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# Taking Account of Another Race: Reframing Asian-American Challenges to Race-Conscious Admissions in Public Schools

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## NOTE

### TAKING ACCOUNT OF ANOTHER RACE: REFRAMING ASIAN-AMERICAN CHALLENGES TO RACE-CONSCIOUS ADMISSIONS IN PUBLIC SCHOOLS

*Gitanjali S. Gutierrez*†

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*Using the context of race-conscious admissions programs in public schools, this Note confronts the dilemmas for progressive attorneys created when minority plaintiffs bring equal protection challenges to race-conscious programs. This Note first reviews the rationales for colorblind equal protection doctrine. It then illustrates that in interracial equal protection conflicts, the doctrine ignores the difference between various minority groups' experiences of racial discrimination and positions their interests against one another. As a result, one minority group achieves its gains at the cost of other minority groups. In this Note, the author argues that Asian-American plaintiffs should avoid the consequences of colorblind doctrine. This Note discusses Professor Eric Yamamoto's "critical race praxis" as a means for minority plaintiffs and their lawyers to craft a more nuanced approach to interracial conflict, despite the limitations of colorblind doctrine. This Note concludes by suggesting three practical strategies for implementing critical race praxis in interracial conflicts: discussing a series of formative questions for attorneys and clients; using antisubordination principles when selecting the specific practices to challenge; and employing the educative function of briefs and other legal memoranda.*

INTRODUCTION

*Racial justice is an intensely practical as well as theoretical concern. Without some connection to a core sense of justice, law cannot have legitimacy. So we should strive to identify and ameliorate the sources of the disconnect between law and racial justice, between civil rights practice and critical race theory.<sup>1</sup>*

In the fall of 2000, twenty public schools in the San Francisco Unified School District (SFUSD) began the academic year with student populations dominated by a single ethnic group as a result of a court-ordered race-neutral admissions policy.<sup>2</sup> For the previous fif-

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<sup>1</sup> Keith Aoki & Margaret Chon, *Critical Race Praxis and Legal Scholarship*, 5 MICH. J. RACE & L. 35, 52 (1999).

<sup>2</sup> Nanette Asimov, *20 S.F. Schools Resegregate, Report Says*, S.F. CHRON., Aug. 1, 2000, at A13; Ryan Kim, *Racial Clusters in S.F. School Admissions*, S.F. EXAMINER, Aug. 1, 2000, at A7.

In its 1999-2000 *Annual Report* discussing its progress towards desegregation, the SFUSD described the impact of the race-neutral student assignment plan for the 2000-2001 school year:

The use of this [race-neutral assignment] plan has caused the level of racial imbalance in the District at the school level to increase. In addition, the

teen years, the SFUSD had been operating under a highly-touted desegregation consent decree that maintained a racial balance in each school.<sup>3</sup> The District implemented its new race-neutral plan following a lawsuit by Chinese-American students, which alleged that the Decree's strict racial quotas denied them admission to selective magnet schools on the basis of race.<sup>4</sup> During settlement negotiations, the Chinese-American plaintiffs refused to accept race as an admission factor under any circumstance.<sup>5</sup> As a consequence of the race-neutral plan the District's Lowell High School, one of the country's most prestigious public schools,<sup>6</sup> offered admission to only 13 black and 40 Latino

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incoming classes at several schools are marked by the highest levels of racial isolation in many years, suggesting a likelihood of accelerated resegregation if this student assignment plan were continued without modification.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT, 1999-2000 CONSENT DECREE ANNUAL REPORT, EXECUTIVE SUMMARY 2 (2000), available at <http://www.sfusd.k12.ca.us/index1.html> (Aug. 1, 2000). In April 2001 the SFUSD reported a decade-long trend of increasing racial imbalance in its schools:

From Fall 1993 to the present, the number of schools with high concentrations of one racial or ethnic group (45% or higher) increased *each year*—from 9 schools in Fall 1993, to 19 schools in 1995, to 28 schools in 1997, to 34 schools in 1998, and to 48 schools this past fall.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT, EXCELLENCE FOR ALL: A FIVE-YEAR COMPREHENSIVE PLAN TO ACHIEVE EDUCATIONAL EQUITY IN THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT, EXECUTIVE SUMMARY 5 (2001) [hereinafter EXCELLENCE FOR ALL].

<sup>3</sup> See *S.F. NAACP v. S.F. Unified Sch. Dist.*, 576 F. Supp. 34, 36 (N.D. Cal. 1983), *rev'd*, 896 F.2d 412 (9th Cir. 1990) ("To understand . . . the Decree one must have some insight into the enormous effort exerted not only by the parties themselves, . . . but also by the best experts on desegregation in the country . . ."); see also Haeryung Shin, Note, *Safety in Numbers? Equal Protection, Desegregation, and Discrimination: School Desegregation in a Multi-Cultural Society*, 82 CORNELL L. REV. 182, 185 (1996) ("San Francisco's Consent Decree stood as a shining example of cooperation, dedication, and sensitivity . . . [T]he Decree has been hailed as 'one of the nation's most far-reaching school desegregation plans' and 'has been held up as a national model for achieving integration . . .'" (footnote omitted)). The court-appointed committee that drafted the Decree included Harold Howe II and Gary A. Orfield, both nationally respected education policy experts with extensive government, administrative, and academic experience. See *S.F. NAACP*, 576 F. Supp. at 52, 64-65.

<sup>4</sup> *Ho ex rel. Ho v. S.F. Unified Sch. Dist.*, 965 F. Supp. 1316 (N.D. Cal. 1997), *appeal dismissed*, 147 F.3d 854 (9th Cir. 1998).

<sup>5</sup> See David I. Levine, *The Chinese American Challenge to Court-Mandated Quotas in San Francisco's Public Schools: Notes from a (Partisan) Participant-Observer*, 16 HARV. BLACK LETTER L.J. 39, 96 (2000) (noting that "the *Ho* plaintiffs were adamant in their desire to eliminate the racial classification scheme"); see also Ryan Kim, *Foe Blasts Schools' New Admission Plan*, S.F. EXAMINER, Nov. 25, 1999, at A1 ("[Attorney David Levine, who represented the *Ho* plaintiffs,] blasted a new enrollment plan submitted Wednesday by San Francisco public schools officials, saying it still includes race as a criterion and is, therefore, illegal."). The court-approved settlement forced the District to adopt a race-neutral plan in compliance with the Supreme Court's recent colorblind equal protection jurisprudence. See *infra* note 11 (discussing the Court's "colorblind analysis" of race-conscious programs); cf. Nanette Asimov, *S.F. District OKs Race-Neutral School Plan*, S.F. CHRON., Jan. 7, 2000, at A19 (stating that courts across the country were mandating race-neutral plans).

<sup>6</sup> See, e.g., Caitlin M. Liu, Recent Development, *Beyond Black and White: Chinese Americans Challenge San Francisco's Desegregation Plan*, 5 ASIAN L.J. 341, 342 (1993) (describing Lowell as "[o]ne of the most famous and prestigious public high schools in the United

students out of a total of 861 offers for fall 2000.<sup>7</sup> At Lowell, offers to black and Latino students declined dramatically under the race-neutral plan: dropping over 50% in 1999, the first year the plan applied, and an additional 15% in 2000.<sup>8</sup> These figures are particularly troubling because SFUSD is one of the most ethnically and racially diverse districts in the United States.<sup>9</sup>

Commentators disagree about whether the Lowell litigation represents the success of the Supreme Court's race-neutral equal protection jurisprudence<sup>10</sup> or the failure of constitutional colorblindness in a multiracial society.<sup>11</sup> The Supreme Court asserts that a race-neutral standard successfully avoids the difficulty of legally defining "benign" remedies and "minority" races,<sup>12</sup> prohibits government reliance upon racial stereotypes,<sup>13</sup> and prevents racial classifications from increasing racial hostilities.<sup>14</sup> Although the Supreme Court has not squarely addressed the question of minority challenges to race-conscious pro-

States"); Elaine Woo, *Caught on the Wrong Side of the Line?*, L.A. TIMES, July 13, 1995, at A1 (discussing Lowell's reputation and achievements).

Lowell High School is an "academic 'alternative' high school," or magnet school, that "admits students based on a combination of grades and test scores." *Ho*, 965 F. Supp. at 1319 n.2.

<sup>7</sup> Julian Guthrie, *Race Gap to Widen Further at Lowell Next Year: Fewer Blacks and Latinos, More Asians and Whites*, S.F. EXAMINER, Mar. 10, 2000, at A1.

<sup>8</sup> *Id.*

<sup>9</sup> See Asimov, *supra* note 2.

<sup>10</sup> See, e.g., Levine, *supra* note 5, at 132 (stating that the Lowell litigation was an effort to ensure that the school district took a neutral approach to race and ethnicity).

<sup>11</sup> E.g., Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 826 (1997); Alexandra Natapoff, Note, *Trouble in Paradise: Equal Protection and the Dilemma of Interminority Group Conflict*, 47 STAN. L. REV. 1059, 1059-62 (1995).

In the context of equal protection jurisprudence, a "colorblind analysis" refers to the Supreme Court's application of strict scrutiny review to race-conscious programs intended to benefit racial minorities. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (plurality opinion) (subjecting university's race-conscious special admissions program to strict judicial scrutiny); see also *infra* Part I.A-B (reviewing the development of colorblind jurisprudence and outlining its primary rationales). Some Justices characterize this analysis as "colorblind" because it interprets the Equal Protection Clause as embodying a neutral nondiscrimination principle applicable to every person regardless of their race or ethnicity. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521-22 (1989) (Scalia, J., concurring in the judgment); see also Laurence H. Tribe, "In What Vision of the Constitution Must the Law Be Color-Blind?", 20 J. MARSHALL L. REV. 201, 203 (1986) (offering a critical analysis of the argument that the Equal Protection Clause is race neutral).

An alternative approach, proposed by numerous critical race theorists, involves a "race-conscious" analysis that takes into account the historical and present-day status of various racial groups when determining the constitutionality of racial classifications. See Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1, 6-7 (1991) (asserting that colorblindness fails to take into account the "complex historical and social implications" underlying race status); *infra* Part I.C (discussing critical race theorists' critiques of constitutional colorblindness).

<sup>12</sup> See *infra* Part I.B.1.

<sup>13</sup> See *infra* Part I.B.2.

<sup>14</sup> See *infra* Part I.B.3.

grams,<sup>15</sup> advocates of racial neutrality frequently invoke the Asian-American model-minority myth, or the Lowell situation itself, to illustrate the costs race-conscious programs impose upon Asian Americans.<sup>16</sup>

This Note rejects these rationales for race neutrality and instead agrees with the analysis of critical race theory scholars that the doctrine of colorblindness fails to achieve interracial justice because it adopts an ahistorical, formal definition of race.<sup>17</sup> As a result, colorblind analysis has repeatedly failed to distinguish between minority

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<sup>15</sup> This Note refrains from using the phrase "affirmative action." This phrase first appeared in President Lyndon B. Johnson's 1965 executive order requiring government contractors to "take affirmative action to ensure" nondiscrimination based upon race, creed, color, sex, or national origin. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), *reprinted as amended in* 42 U.S.C. § 2000e note (1994). President Johnson's encouraging phrase attached a name to the concept of implementing change. Yet, in subsequent years the phrase acquired a negative connotation due to the fact that debates about "affirmative action" remain quite entrenched in longstanding racial fear and distrust. See Corinne E. Anderson, Comment, *A Current Perspective: The Erosion of Affirmative Action in University Admissions*, 32 AKRON L. REV. 181, 181-82 (1999) (discussing various negative connotations of "affirmative action"); see also CRITICAL RACE THEORY, at xxix (Kimberlé Crenshaw et al. eds., 1995) (arguing that "Critical Race Theory . . . provides a basis for understanding affirmative action as something other than 'racial preference' (a notion whose implicit premise is that affirmative action represents a deviation from an otherwise non-racial neutrality)"). The alternative phrase "race-conscious program" refers both to the reality that our society is race conscious as well as to the program's remedial objective to correct historic and institutionalized racism.

Race-conscious admissions programs have a variety of structures. For an explanation of these programs, see David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 926-33 (1996). Professor Oppenheimer describes "five methods of race- and gender-conscious practices which are covered under the umbrella of affirmative action: (1) quotas, (2) preferences, (3) self-studies, (4) outreach and counseling, and (5) anti-discrimination." *Id.* at 926.

The use of race as a selection criterion in university admissions programs is currently subject to much academic debate. Compare WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998) (compiling a comprehensive, long-range study of the use of race as a selection criterion in higher education and concluding that race-conscious admissions programs foster a beneficial learning environment for all students and lead to higher levels of success among African-American students), and Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1 (1997) (supporting the use of race as a selection factor in law school admissions), with STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE* 391-422 (1997) (asserting that race-based preferential admissions policies harm African-American students by encouraging universities to accept students who are academically underprepared).

<sup>16</sup> See, e.g., THERNSTROM & THERNSTROM, *supra* note 15, at 535-37 (highlighting Asian Americans' "spectacular economic and social mobility" and "striking success" long "before government began to pursue color-conscious policies to benefit racial minorities"); Michael Omi & Dana Y. Takagi, *Situating Asian Americans in the Political Discourse on Affirmative Action*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 271, 272-74 (Robert Post & Michael Rogin eds., 1998) (describing the "social construction" in which "[p]referential policies" victimized Asian American as much as, perhaps more than, whites").

<sup>17</sup> See *infra* Part I.C.1.

groups' competing discrimination claims<sup>18</sup> and has exacerbated interracial animosity.<sup>19</sup> No other situation crystallizes the failure of constitutional colorblindness and the dilemma it creates for minority plaintiffs more than the Lowell litigation.

Scholars have not responded effectively to the failure of constitutional colorblindness to resolve interracial conflicts.<sup>20</sup> Specifically, they have not offered a legal argument in response to the assertion that race-conscious admissions programs are unconstitutional because the programs benefit some minorities, namely blacks and Latinos, while harming another racial minority, Asian Americans, along with whites.<sup>21</sup> On the one hand, prominent defenders of race-conscious admissions programs have constructed a legally viable diversity rationale to support these programs for African Americans and Latinos.<sup>22</sup>

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<sup>18</sup> See, e.g., *De Grandy v. Wetherell*, 815 F. Supp. 1550, 1578-80 (N.D. Fla. 1992) (rejecting Voting Rights Act challenge to Florida Senate redistricting plan brought by black and Hispanic voters where remedies sought by each group would be mutually exclusive), *aff'd in part and rev'd in part on other grounds sub nom. Johnson v. De Grandy*, 512 U.S. 997 (1994); *S.F. NAACP v. S.F. Unified Sch. Dist.*, 576 F. Supp. 34, 49-50 (N.D. Cal. 1983) (approving desegregation decree though it did not "address separately the specific needs of every racial/ethnic group comprising the plaintiff class"), *rev'd on other grounds*, 896 F.2d 412 (9th Cir. 1990).

<sup>19</sup> See *infra* Part I.D.4 (discussing the racial tensions among San Francisco's minority communities in the wake of the Lowell litigation and the implementation of the race-neutral admissions plan).

<sup>20</sup> This Note adopts the language used by Professor Eric Yamamoto to describe race relations:

I use the word *interracial* narrowly . . . to denote relations among nonwhite racial groups, and by *nonwhite racial groups* I mean groups or communities of color. Those commonly recognized racial groups include African Americans, Asian Americans, and Native Americans (including Native Hawaiians). I also treat Latinas/os as a racial group, even though Hispanic/Latina/o has been defined by the U.S. Census and other legal directives as an ethnic group (racially either white or nonwhite). By doing so, I am acknowledging the social and political construction of racial and ethnic categories. For this reason, I also recognize the significance of white as a racial category and use the term *multiracial* to denote interactions among racial groups, including white Americans.

ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 281 n.1 (1999) (citations omitted).

<sup>21</sup> See *infra* notes 24-25 and accompanying text.

Proponents of colorblindness further assert that even if a court distinguishes white Americans from nonwhite racial minorities, the court has no principled means of weighing different racial minority groups' competing discrimination claims. See, e.g., *De Grandy*, 815 F. Supp. at 1578-80 (denying a remedy when both African-American and Latino communities presented mutually exclusive and colorable claims under the Voting Rights Act); see also Stephan Thernstrom & Abigail Thernstrom, *Reflections on The Shape of the River*, 46 UCLA L. REV. 1583, 1629 (1999) (book review) ("Furthermore, it is not only whites who are excluded when blacks and Hispanics are admitted to schools by racial double standards. . . . The cost of racial double standards in admissions is currently being paid by many Asian students. When preferences are eliminated, they derive the greatest benefit.").

<sup>22</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-20 (1978) (plurality opinion) (Powell, J.); *BOWEN & BOK*, *supra* note 15, at 279-80 (concluding that an empirical foundation exists for the diversity rationale justifying race-conscious programs); see also *De-*

Although this rationale may survive strict scrutiny,<sup>23</sup> critics note that the decision not to address these programs' impact upon Asian Americans leaves race-conscious admissions supporters' legal argument vulnerable to the criticism that the Court must still weigh the harm to one minority group against the benefit to another minority group in order to justify the race-conscious program,<sup>24</sup> a course courts have been reluctant to take even in the remedial context.<sup>25</sup>

On the other hand, those critical race theorists whose work directly addresses questions of interracial conflict and race consciousness frequently discuss only the academic, political, or social impact of these issues.<sup>26</sup> Critical race theory has been "challenging racial orthodoxy, shaking up the legal academy, questioning comfortable liberal premises, and leading the search for new ways of thinking about our nation's most intractable, and insoluble, problem—race."<sup>27</sup> Yet some commentators have noted that this scholarship's outright rejection of our system of civil rights law has resulted in a gap between the aspira-

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defendants' Memorandum of Law in Support of Renewed Motion for Summary Judgment at 36-43, *Grutter v. Bollinger*, No. 97CV75928-DT, 2001 WL 293196 (E.D. Mich. Mar. 27, 2001) (stating that the University of Michigan Law School's admissions policy fully complies with the standards set forth in *Bakke*).

<sup>23</sup> See *Bakke*, 438 U.S. at 311-12 (plurality opinion) (Powell, J.) (stating that "the attainment of a diverse student body" is "clearly . . . a constitutionally permissible goal for an institution of higher learning"); *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000) (noting, in agreement with the district court's ruling in *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000), that "Supreme Court precedent does not bar courts from considering diversity as a compelling state interest"); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1200-01 (9th Cir. 2000) ("For now, therefore, it ineluctably follows that the Fourteenth Amendment permits University admissions programs which consider race for other than remedial purposes, and educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures."), *cert. denied*, 69 U.S.L.W. 3593 (U.S. May 29, 2001) (No. 00-1341); *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 827-31 (distinguishing university's race-conscious admissions program from program invalidated in *Bakke*).

<sup>24</sup> See, e.g., *Thernstrom & Thernstrom*, *supra* note 15, at 400 (describing the tension between "engineering racial balance" to increase diversity and prohibiting discrimination against Asian Americans because "Asian Americans are so overrepresented at many elite schools that their presence actually reduces diversity"); Selena Dong, Note, "Too Many Asians": *The Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*, 47 *STAN. L. REV.* 1027, 1045 (1995) (noting that Asian-American plaintiffs challenging race-conscious admissions programs may argue that "the goal of diversity can never supercede the Constitutional imperative against disadvantaging individuals on the basis of race"); see also Omi & Takagi, *supra* note 16, at 275-76 (discussing the detrimental consequences of progressive analyses of affirmative action that ignore Asian Americans).

<sup>25</sup> See, e.g., *De Grandy v. Wetherell*, 815 F. Supp. at 1578-80.

<sup>26</sup> The emerging critical Asian legal scholarship is illustrative. See, e.g., ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* 59 (1999) ("[T]raditional civil rights work, while providing some important benefits, will ultimately be unable to meet the needs of Asian Americans because of its unequal coverage and theoretical problems.").

<sup>27</sup> Richard Delgado, *Introduction to CRITICAL RACE THEORY: THE CUTTING EDGE*, at xiii, xiii (Richard Delgado ed., 1995).



tional, oppositional wisdom of critical race theory and the struggles of practitioners in the trenches of civil rights litigation.<sup>28</sup> As a result, the wisdom of critical race theory is just beginning to meaningfully inform contemporary civil rights litigation strategies.

This Note joins the voices of critical race scholars calling for academics to transform their wisdom into guidance for practitioners.<sup>29</sup> Drawing upon the insights of critical race theory, this Note suggests litigation strategies for practitioners seeking to achieve interracial justice within the current framework of constitutional colorblindness.<sup>30</sup> These strategies urge attorneys who view the outcome of the SFUSD litigation as a success to reconsider the wisdom of encouraging Asian-American plaintiffs to challenge the constitutionality of race-conscious programs. Simultaneously, this Note encourages progressive lawyers to represent these Asian-American plaintiffs and to grapple with the difficult challenges these plaintiffs raise.

This Note is divided into two main parts. Part I first discusses the principal rationales behind constitutional colorblindness and critical race theory's critiques of the doctrine. Part I then examines how the Lowell litigation demonstrates the failure of constitutional colorblindness to resolve interracial conflicts.

In Part II, this Note applies the insights of critical race theory to the difficulties facing civil rights attorneys involved in minority challenges to race-conscious programs. Part II concludes by offering three practical strategies for framing and conducting challenges to race-conscious admissions programs in public schools. These strategies strive to prohibit discrimination against Asian Americans while preserving race-conscious admissions programs for other minority groups as well as Asian Americans in other contexts. The first strategy involves a series of formative questions for attorneys to explore with minority clients to appropriately identify which specific practices the plaintiffs

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<sup>28</sup> *E.g.*, Yamamoto, *supra* note 11, at 873-75, 882-89 (discussing the need to develop practical ways in which lawyers can use the courts to resolve interracial conflict and achieve interracial justice).

<sup>29</sup> *E.g.*, YAMAMOTO, *supra* note 20, at 129; Yamamoto, *supra* note 11, at 875; *cf.* Bill Ong Hing, *In the Interest of Racial Harmony: Revisiting the Lawyer's Duty to Work for the Common Good*, 47 STAN. L. REV. 901, 916-17 (1995) (outlining positive litigation strategies for lawyers working on cases involving racial conflict); Levine, *supra* note 5, at 138 (noting that Professor Yamamoto does not explain how ideas from critical race theory "could have been realistically employed to solve the problem in San Francisco" arising from the Lowell litigation).

<sup>30</sup> Professor Richard Delgado acknowledges that we must decide "whether our system of civil rights law needs a complete overhaul, as the [critical race theory] writers argue, or just a minor tune-up—and if the former, whether the [critical race theorists'] suggestions are good places to start." Delgado, *supra* note 27, at xv; *see also* Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2337 (2000) (discussing the need to "develop arguments for upholding race-neutral affirmative action" programs that "take existing doctrine seriously" and "have a realistic chance of success in the courts").

wish to challenge and to educate the clients regarding the consequences of their choices. The second strategy challenges systemic racism using a litigation model that shifts the focus of the suit from an effort to secure public educational opportunities only for the individual plaintiffs to an effort to challenge the limited availability of resources for all students. The third strategy involves the use of briefs and other court filings by minority clients and their attorneys to emphasize the present-day impact of historical legal disenfranchisement of Asian Americans, Latinos, and blacks, which could justify race-conscious remedies consistent with a colorblind framework. This Note concludes that although "the potential for social change through litigation is limited,"<sup>31</sup> critical race theorists cannot abandon the courtroom in their efforts to transform the inspiring visions of critical race praxis into daily tools for achieving social justice.<sup>32</sup>

## I

### EQUAL PROTECTION ANALYSIS AND RACE-NEUTRAL DOCTRINE

#### A. The Evolution of Race-Neutral Equal Protection Doctrine

The Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>33</sup> In some of the earliest cases considering the constitutionality of racial classifications, the Supreme Court declared that these classifications are inherently suspect under the Equal Protection Clause.<sup>34</sup> As a result, the Court reviews these classifications under strict scrutiny, which "serves to insure against the risk that a racial classification was motivated by an impermissible racial purpose."<sup>35</sup> Under a strict-

<sup>31</sup> Kevin R. Johnson, *Lawyering for Social Change: What's a Lawyer to Do?*, 5 MICH. J. RACE & L. 201, 206 (1999).

<sup>32</sup> Although the custom of student note writing places great emphasis upon the student author's anonymity, I am persuaded by the tradition in critical race theory that acknowledges the importance and influence of how a person is situated in society. My desire to see critical race praxis assist lawyers in achieving social justice is very much grounded in my experience as a race-conscious, nonblack, woman of color.

In many traditions, a person's name tells her story: in Hindi "Gitanjali" means a collection of poems or songs, and is an appropriate description of my background. I am South Asian and was born and adopted in the United States by an Anglo family. My curious name is a result of taking my Latina partner's last name as my family name. From my perspective, the world is far more complicated than a black-and-white paradigm. And, most importantly, the dynamics of racial prejudice are far more complex in a multiracial world still desperate for racial justice.

<sup>33</sup> U.S. CONST. amend. XIV, § 1. The Fifth Amendment provides similar protections against racial classifications by the federal government: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V; *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954) (concluding that the due process obligations of the federal government under the Fifth Amendment not to discriminate on the basis of race carry the same force as the states' obligations under the Fourteenth Amendment).

<sup>34</sup> *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Bolling*, 347 U.S. at 499.

<sup>35</sup> Forde-Mazrui, *supra* note 30, at 2359.

scrutiny analysis, the Court first considers whether a compelling government interest exists for establishing the racial classification,<sup>36</sup> and second, whether the racial classification is narrowly tailored to meet that interest.<sup>37</sup>

Historically, the Supreme Court applied strict-scrutiny analysis to identify state laws that disenfranchised racial minorities.<sup>38</sup> Through a series of decisions beginning with *Regents of the University of California v. Bakke*<sup>39</sup> and culminating in *Adarand Constructors, Inc. v. Peña*,<sup>40</sup> the Court has concluded that the protections of the Fifth and Fourteenth Amendments provide that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify" under the strictest judicial scrutiny "any racial classification subjecting that person to unequal treatment."<sup>41</sup> The Court has made clear that any racial classification implicates the Equal Protection Clause, regardless of whether that classification harms minorities through invidious racial discrimination or benefits minorities through race-conscious programs.<sup>42</sup> The application of strict scrutiny to any race-conscious remedy, or to "benign" racial classifications, has come to embody the modern understanding of constitutional colorblindness.

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<sup>36</sup> See *id.* at 2338 n.23. The Court has declared that states have a compelling governmental interest in correcting the present-day effects of past or present racial discrimination. *E.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504 (1989) (plurality opinion) ("[T]he States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination . . ."). However, the Court has been reluctant to recognize other compelling government interests that justify racial classifications. In particular, the Court has rejected the assertion that remedying societal discrimination is sufficient to justify a race-conscious remedial program. *Id.* at 505 (plurality opinion); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307-10 (1978); see also Lino A. Graglia, *The "Remedy" Rationale for Requiring or Permitting Otherwise Prohibited Discrimination: How the Court Overcame the Constitution and the 1964 Civil Rights Act*, 22 SUFFOLK U. L. REV. 569, 615 (1988) (discussing Justice Scalia's rejection of remedying societal discrimination as a permissible equal protection goal); Kent D. Lollis, *Strict or Benign Scrutiny Under the Equal Protection Clause: Troublesome Areas Remain*, 35 Sr. LOUIS U. L.J. 93, 100 (1990) (discussing Justice Powell's reasoning that remedying societal discrimination is impermissible).

Although the lower federal courts are divided over the question of whether an educational institution's interest in providing a diverse learning environment constitutes a compelling governmental interest, many commentators anticipate that recent litigation over the University of Michigan undergraduate and law school race-conscious admission programs could compel the Court to answer this question. See Jodi Wilgoren, *U.S. Court Bars Race as Factor in School Entry*, N.Y. TIMES, Mar. 28, 2001, at A1.

<sup>37</sup> See Forde-Mazrui, *supra* note 30, at 2338 n.23.

<sup>38</sup> *E.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 490-91 (1954); *Korematsu*, 323 U.S. at 216.

<sup>39</sup> 438 U.S. 265 (1978).

<sup>40</sup> 515 U.S. 200 (1995).

<sup>41</sup> *Adarand*, 515 U.S. at 224.

<sup>42</sup> See, *e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (plurality opinion); *Wygant*, 476 U.S. at 273 (plurality opinion).

## B. Principal Rationales for Constitutional Colorblindness

The Court has offered three principal rationales for applying a strict-scrutiny analysis to benign racial classifications. In addition, the Court has asserted that underlying each of its rationales is a fundamental concern with justice and fairness for protecting the personal rights of individual citizens.

### 1. *Definitional Problems Beyond Judicial Competence: "Benign" and "Invidious" Classifications, "Minority" and "Majority" Racial Groups*

First, without strict-scrutiny analysis, the difficulty of defining the purpose of a racial classification<sup>43</sup> or of identifying the "minority" race<sup>44</sup> would run the risk of allowing a government to use an illegitimate racial classification.<sup>45</sup> In *Croson*, the Court found that "[a]bsent searching judicial inquiry into the justification for . . . race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."<sup>46</sup>

### 2. *Race Neutrality Protects Against Government Use of Racial Stereotypes*

Second, the Court's colorblind approach prevents the use of racial stereotypes to justify government action.<sup>47</sup> In the plurality opinion in *Bakke*, Justice Powell expressed concern that "preferential programs may only reinforce common stereotypes holding that cer-

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<sup>43</sup> See *Croson*, 488 U.S. at 493 (plurality opinion); see also *Adarand*, 515 U.S. at 241 n.\* (Thomas, J., concurring in part and concurring in the judgment) ("It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others. . . . Accordingly, whether a law relying upon racial taxonomy is 'benign' or 'malign' either turns on 'whose ox is gored' or on distinctions found only in the eye of the beholder." (citations omitted)).

<sup>44</sup> See *Bakke*, 438 U.S. at 295-300 (plurality opinion) (Powell, J.). The plurality opinion in *Bakke* expressly discussed the difficulties of applying constitutional protections based upon membership in "majority" or "minority" racial groups rather than upon an individual's right to be free from any racial classification. *Id.* (plurality opinion) (Powell, J.). The plurality stated that the "concepts of 'majority' and 'minority' necessarily reflect temporary arrangements and political judgments" and thus provide "no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not." *Id.* at 295-96 (plurality opinion) (Powell, J.). The plurality opinion further explained that the "kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable." *Id.* at 297 (plurality opinion) (Powell, J.); see also *DeFunis v. Odegaard*, 416 U.S. 312, 337-40 (1974) (Douglas, J., dissenting) (discussing the problems in a multiracial society of basing racial classification upon membership in a minority group), quoted in *Bakke*, 438 U.S. at 297 n.37 (plurality opinion) (Powell, J.).

<sup>45</sup> *Croson*, 488 U.S. at 493 (plurality opinion).

<sup>46</sup> *Id.*

<sup>47</sup> *Bakke*, 438 U.S. at 298 (plurality opinion) (Powell, J.).

tain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."<sup>48</sup> The plurality opinion in *Croson* similarly explained that without "[p]roper findings . . . to define both the scope of the injury and the extent of the remedy necessary to cure its effects," a risk exists "that a racial classification is merely the product of unthinking stereotypes or a form of racial politics."<sup>49</sup> Such stereotyping "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, [and] share the same . . . interests."<sup>50</sup>

### 3. *Preventing Exacerbation of Racial Hostilities and Increase of Racial Tensions*

Finally, the Court has justified the use of a colorblind analysis to prevent racial classifications from exacerbating racial hostilities or increasing racial balkanization.<sup>51</sup> Justice Scalia has warned that the problem with a racial quota "lies not in its name, but in its effects: a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant."<sup>52</sup> One scholar has described the Court's concern in terms of white citizens' resentment for bearing the burdens of race-conscious programs: "Much of what causes resentment along racial lines is the way in which race-operative affirmative action appears to give preferential treatment to those who do not deserve it, relatively privileged racial minorities, and denies opportunities to materially disadvantaged persons, such as poor whites."<sup>53</sup>

The Court has not completely adopted a colorblind principle and has left open the possibility that, under some circumstances, it will

<sup>48</sup> *Id.* (plurality opinion) (Powell, J.).

<sup>49</sup> *Croson*, 488 U.S. at 510 (plurality opinion); see also *id.* at 516-17 (Stevens, J., concurring in part and concurring in the judgment) ("There is a special irony in the stereotypical thinking that prompts legislation of this kind. Although it stigmatizes the disadvantaged class with the unproven change of past racial discrimination, it actually imposes a greater stigma on its supposed beneficiaries.").

<sup>50</sup> *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (holding that North Carolina voters alleging racial gerrymandering by the legislature stated a claim under the Equal Protection Clause).

<sup>51</sup> *Id.* at 647-49; *Croson*, 488 U.S. at 493 (plurality opinion); *id.* at 528 (Scalia, J., concurring in the judgment); *Bakke*, 438 U.S. at 298-99 (plurality opinion) (Powell, J.). Several commentators have discussed the Court's focus on this concern. *E.g.*, Forde-Mazrui, *supra* note 30, at 2358; Kathleen M. Sullivan, *City of Richmond v. J.A. Croson Co.: The Backlash Against Affirmative Action*, 64 TUL. L. REV. 1609, 1622-23 (1990).

<sup>52</sup> *Croson*, 488 U.S. at 527 (Scalia, J., concurring in the judgment) (quoting ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975)).

<sup>53</sup> Forde-Mazrui, *supra* note 30, at 2358. For a responsive argument debunking the myth that race-conscious programs deny lower-income whites opportunities for the benefit of affluent minorities, see BOWEN & BOK, *supra* note 15, at 46-51.

consider racial distinctions. Yet its equal protection doctrine has embraced a race-neutral, strict-scrutiny analysis that Justice Marshall criticized as "strict in theory, but fatal in fact."<sup>54</sup>

#### 4. *Underlying Concern for Protecting Individual Rights*

In addition to strategizing within the confines of the Court's colorblind doctrine, scholars and attorneys must address the Court's emphasis upon protecting individual rights when adjudicating challenges to race-conscious programs.<sup>55</sup> The tension between a group rights-based approach and an individual rights-based approach is most pronounced in the context of race-conscious remedies. The Court has integrated an individual-rights approach into its colorblind analysis, asserting that racial classifications risk imposing burdens "upon individual members of a particular group in order to advance the group's general interest."<sup>56</sup> Under a colorblind analysis, the standard of review is "not dependent on the race of those burdened or benefited by a particular classification,"<sup>57</sup> but depends upon every citizen's "'personal rights' to be treated with equal dignity and respect."<sup>58</sup> Although numerous advocates are creatively using reparations arguments to address group-based wrongs,<sup>59</sup> attorneys defending race-conscious pro-

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<sup>54</sup> Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment), *overruled by* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995). In *Adarand*, the Court responded to Justice Marshall's criticism:

[W]e wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.

*Id.* (citation omitted). Yet, a review of current case law shows that courts rarely find a race-conscious program that passes strict scrutiny.

<sup>55</sup> See *Croson*, 488 U.S. at 493.

<sup>56</sup> *Bakke*, 438 U.S. at 298 (plurality opinion) (Powell, J.); see also THERNSTROM & THERNSTROM, *supra* note 15, at 315 (recounting the childhood experiences of Sam Fulwood, an African-American correspondent for the *Los Angeles Times*, who did not welcome the news that "he had been picked by the principal to integrate the town's white junior high school").

<sup>57</sup> *Croson*, 488 U.S. at 494 (plurality opinion); see *id.* at 520 (Scalia, J., concurring in the judgment).

<sup>58</sup> *Id.* at 493 (plurality opinion); see also *Adarand*, 515 U.S. at 227 ("[A]ll governmental action based on race—a group classification long recognized as 'in most circumstances irrelevant and therefore prohibited'—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." (citation omitted) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), *error coram nobis granted by* 828 F.2d 591 (9th Cir. 1987))).

<sup>59</sup> See, e.g., *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987); *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); Jack Hitt, *Making the Case for Racial Reparations*, HARPER'S MAG., Nov. 2000, at 37.

grams against challenges by minority plaintiffs cannot avoid working within the limitations of an individual-rights approach.<sup>60</sup>

### C. Critical Race Theory Critiques of Constitutional Colorblindness

By embracing constitutional colorblindness, both the Supreme Court and lower federal courts have sidestepped the complicated questions raised by interracial conflict.<sup>61</sup> Under constitutional colorblindness, courts avoid both the difficulty of weighing competing claims of discrimination and the challenge of constructing a particularized remedy that corrects the specific harm faced by a distinct minority group.<sup>62</sup> According to critical race scholars, race-neutral doctrine fails to resolve racial inequality in the context of interracial conflicts for two primary reasons.<sup>63</sup> First, when courts use a race-neutral standard to resolve interracial conflict, it results in the maintenance of a legal system that systematically benefits whites over racial minorities under the guise of neutrality.<sup>64</sup> Second, critical race theo-

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<sup>60</sup> One significant issue this situation raises is the need for the attorney and client to explore the balance between the individual benefit the plaintiff seeks and the cost of that benefit to the larger group. Part II.B discusses strategies that attempt to lessen this tension by prompting the client either to reconsider whether the individual benefit is so great that he or she is willing to compromise the group's right (which an individual litigant is often willing to do) or, alternatively, to discover the overlapping interests of the client and the group as a means of appealing to the client's self-interest.

<sup>61</sup> See Natapoff, *supra* note 11, at 1060-62. Numerous scholars have examined the Supreme Court's current shift towards a doctrine of constitutional colorblindness in equal protection cases. See, e.g., Frank R. Parker, *The Damaging Consequences of the Rehnquist Court's Commitment to Color Blindness Versus Racial Justice*, 45 AM. U. L. REV. 763, 773 (1996) ("Color blindness is a pathology, a disease of the eye. In striving for a color-blind society, the Supreme Court is turning a blind eye to the gross racial inequities that pervade American society and which, unless alleviated, deprive this country of any claim to racial justice.").

Ironically, it was an Asian American, Toyosaburo Korematsu, whose case expanded this principle to include all races, not just African Americans. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

<sup>62</sup> See, e.g., *S.F. NAACP v. S.F. Unified Sch. Dist.*, 576 F. Supp. 34, 50 (N.D. Cal. 1983) (refusing to define specific remedies for particular minority groups), *rev'd*, 896 F.2d 412 (9th Cir. 1990).

For a historical example of the origins of the perception that all minorities are the same, see *Gong Lum v. Rice*, 275 U.S. 78, 82 (1927), *cited in* *Brown v. Bd. of Educ.*, 347 U.S. 483, 491 (1954), which described the "brown, yellow, and black races" as "colored" and the opposite of the white race in a case involving a Chinese-American student suing for the right to attend white segregated schools.

<sup>63</sup> This Note focuses specifically on critical race theory's criticisms of race neutrality in the context of interracial conflict. Numerous articles have discussed critical race theory's more general criticisms of the impact of constitutional colorblindness upon conflicts between minorities and whites. See, e.g., Gotanda, *supra* note 11.

<sup>64</sup> Many, if not all, critical race theorists take the position that the U.S. legal institution systematically benefits whites. These theorists assert that early American legislators and courts structured a legal system that resulted in the preservation of racial, gender, class, and sexual-orientation subordination. For example, in the 1600s, property laws allowed white men to exercise property rights over blacks and the value of their production.

rists have described how the use of constitutional colorblindness to resolve interracial conflicts creates a somewhat illusory success for a victorious minority plaintiff. A minority group that successfully challenges the use of race-conscious programs in one context may eventually find itself unsuccessfully defending such a program in another context.<sup>65</sup>

### 1. *The Not-So-Neutral Bias of Race Neutrality*

According to critical race theorists, when plaintiffs of any race invoke race-neutral equal protection doctrine to invalidate race-conscious programs—which schools, employers, and other institutions implement to correct the historical exclusion of generations of minorities—it results in minorities facing purportedly race-neutral laws which render invisible systemic benefits to whites.<sup>66</sup>

For example, in *Podberesky v. Kirwan*,<sup>67</sup> the Fourth Circuit struck down the University of Maryland's Banneker scholarship program, a merit-based program for African-American students.<sup>68</sup> Daniel Podberesky challenged the program under the Fourteenth Amendment because he met the academic and nonacademic requirements for the Banneker scholarship but was unable to compete for it because he is Latino.<sup>69</sup> The Fourth Circuit Court of Appeals held the scholarship program unconstitutional because no compelling state interest justified it,<sup>70</sup> and even if such an interest existed, the university did not narrowly tailor the program to meet it.<sup>71</sup> As a result of Podberesky's suit, the court enjoined the university from using race as a selection criterion for its scholarships,<sup>72</sup> despite the existing racial hostility to-

See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1715-21 (1993). Later inheritance laws permitted this ill-begotten wealth to be transferred from generation to generation without ever addressing the original appropriation. *Id.* at 1729-31. Finally, modern equal protection precedent forbids redistributing resources through affirmative action to correct societal inequities. *Id.* at 1766-67. In this manner, the law makes systemic inequality appear as a natural, or social, event that the law cannot redress. *Id.* at 1768. For additional critical race theorists who expressly assert that the law systematically benefits people who are white, see Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 VILL. L. REV. 767, 774 (1988); Gotanda, *supra* note 11, at 36-37; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 350 (1987).

<sup>65</sup> See *infra* Part I.C.2.

<sup>66</sup> See Gotanda, *supra* note 11, at 16-17; *infra* text accompanying note 79.

<sup>67</sup> 38 F.3d 147 (4th Cir. 1994).

<sup>68</sup> *Id.* at 152, 161.

<sup>69</sup> See *id.* at 152.

<sup>70</sup> See *id.* at 155. The court found that present-day effects of past discrimination against black students "do not necessarily implicate past discrimination on the part of the university." *Id.* at 154.

<sup>71</sup> See *id.* at 158-61.

<sup>72</sup> See *id.* at 162.



wards black students on campus<sup>73</sup> and black students' underrepresentation and higher attrition rates.<sup>74</sup>

The court also noted that Podberesky failed to qualify for the University's unrestricted scholarship program, the Francis Scott Key program, because his academic credentials were just below the Key program's requirements.<sup>75</sup> However, unlike the Banneker program's race-conscious criteria, Podberesky would not have been able to challenge the Key program's facially race-neutral requirements. Under constitutional colorblindness, strict-scrutiny analysis prohibits remedies for "societal," or systemic, discrimination.<sup>76</sup> Thus, strict-scrutiny analysis would prohibit Podberesky from challenging on equal protection grounds the cultural bias in standardized tests and public education that is at least partially responsible for the disproportionate number of white students academically outperforming minority students, including Latino students.<sup>77</sup> As a result, the Francis Scott Key

<sup>73</sup> See *id.* at 154.

<sup>74</sup> See *id.* at 157-58. According to the district court, the Banneker program "help[ed] to build a base of strong, supportive alumni, combat racial stereotypes and provide mentors and role models for other African-American students." The program also "serve[d] to enhance [the university's] reputation in the African-American community, increase the number of African-Americans students who might apply . . . , improve the retention rate of those African-American students who are admitted and help ease racial tensions that exist on the campus." *Podberesky v. Kirwan*, 838 F. Supp. 1075, 1094-95 (D. Md. 1993), *vacated*, 38 F.3d 147 (4th Cir. 1994).

<sup>75</sup> See *Podberesky*, 38 F.3d at 152.

<sup>76</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion).

<sup>77</sup> See, e.g., *Larry P. v. Riles*, 495 F. Supp. 926, 956-57 (N.D. Cal. 1979) (finding that standardized I.Q. tests administered to Californian students "were never designed to eliminate cultural biases against black children; it was assumed in effect that black children were less 'intelligent' than whites" and that the "tests were standardized and developed on an all-white population, and naturally their scientific validity is questionable for culturally different groups"), *aff'd in part and rev'd in part sub nom. Larry P. ex rel. Lucille P. v. Riles*, 793 F.2d 969 (9th Cir. 1984). See generally THERNSTROM & THERNSTROM, *supra* note 15, at 348-422 (proposing that lower expectations of African-American students contribute to their lower performance on certain standardized tests); Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER SOC. POL'Y & L. 121 (1993) (discussing examples of cultural and gender bias in testing questions on the Law School Admissions Test and its impact upon law school admissions); Christopher Jencks, *Racial Bias in Testing*, in THE BLACK-WHITE TEST SCORE GAP 55 (Christopher Jencks & Meredith Phillips eds., 1998) (describing various types of bias inherent in cognitive tests); William C. Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and Its Relationship to Racial Diversity in Legal Education*, 12 YALE J.L. & FEMINISM 1, 24 (2000) ("Possible forms of LSAT test bias linked to gender and race/ethnicity include stereotype threat, speededness, differential guessing, subject matter selection and item bias."); Michael T. Nettles et al., *Race and Testing in College Admissions*, in CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES 97, 106 (Gary Orfield & Edward Miller eds., 1998) (arguing that the test-score gap between students of color and white students taking the SAT is due to "persisting inequalities in precollege education" and "unequal access to test-specific preparation"); Roberto Rodriguez, *Test-Driven Admissions: ETS Responds to Criticism of SATs*, BLACK ISSUES IN HIGHER EDUC., Sept. 5, 1996, at 7 (summarizing standardized-testing administrators' responses to concerns that the tests are biased against racial minorities); Susan Sturm & Lani Guinier,

scholarship, a program that likely tends to benefit white students, remained intact with an invisible bias, while the court struck down the Banneker Program, a race-conscious program that altered the balance of power between white and black students to address the legacy of discrimination against black students.<sup>78</sup>

A similar phenomenon occurs with college admission programs that employ race-conscious standards. Applying a race-neutral analysis, courts strike down programs that attempt to redress the historical discrimination against minorities through affirmative action strategies.<sup>79</sup> Yet other permissible “‘plus’ categories” that admissions offices use include “legacies, . . . musicians, and the geographically diverse”—all categories which are disproportionately white.<sup>80</sup> Described by some as “‘the oldest form of affirmative action,’”<sup>81</sup> the practice of legacy admissions—favoring an applicant whose family members are alumni—is perhaps the most objectionable category due to its racial bias.<sup>82</sup> Nevertheless, this practice remains in place at numerous universities.<sup>83</sup> A legacy admissions program favors white applicants because historical racial segregation and discriminatory policies “ensured that elite institutions would be populated by whites whose descendants are now benefitting.”<sup>84</sup>

Even such seemingly innocuous university admissions criteria as geographic diversity can contain racial bias.<sup>85</sup> Many people of color are concentrated in urban regions of the country from which colleges receive greater numbers of applicants.<sup>86</sup> As a result, a geographic diversity factor will rarely benefit minority applicants<sup>87</sup> but instead will tend to help applicants living in less populated states or regions, who

*The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 982 (1996) (arguing that standardized tests cannot accurately assess an applicant's future performance because of the racial, gender, and class bias of the tests).

William Bowen and Derek Bok point out that standardized-test scores may also “be affected by the quality of teaching that applicants have received or even by knowing the best strategies for taking standardized tests, as coaching schools regularly remind students and their parents.” BOWEN & BOK, *supra* note 15, at 277.

<sup>78</sup> See *supra* notes 73-74 and accompanying text (referring to the present effects of past discrimination at the university and the remedial benefits of the Banneker program).

<sup>79</sup> See, e.g., *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

<sup>80</sup> CHANG, *supra* note 26, at 115.

<sup>81</sup> *Id.* (quoting JOHN K. WILSON, *THE MYTH OF POLITICAL CORRECTNESS: THE CONSERVATIVE ATTACK ON HIGHER EDUCATION* 149 (1995)).

<sup>82</sup> See *id.* at 114-16.

<sup>83</sup> *Id.* at 116 (discussing Harvard University and Stanford University).

<sup>84</sup> *Id.* at 115.

<sup>85</sup> *Id.*

<sup>86</sup> See Expert Report Submitted on Behalf of the University of Michigan, *The Compelling Need for Diversity in Higher Education*, *Gratz v. Bollinger*, 135 F. Supp. 2d 790 (E.D. Mich. 2001) (No. 97-CV-75231-CT), reprinted as Thomas J. Sugrue, *Expert Report*, 5 MICH. J. RACE & L. 261, 266-68 (1999).

<sup>87</sup> See CHANG, *supra* note 26, at 155.

in turn tend to be white. In the near future, the same "diversity" rationale that successfully justifies the use of geographic, musical, athletic, or other facially nonracial criteria may also provide a legal justification for the consideration of race as a "diversity" factor rather than as a means to remedy the effects of present or historical racial discrimination.<sup>88</sup>

Critical race theorists assert that the tendency of legal institutions to systematically benefit whites is due in part to the ahistorical conception of race contained in race-neutral equal protection doctrine. Within this framework, race is simply the color of an individual's skin, disconnected from the historical, political, social, or cultural meaning attached to race.<sup>89</sup> Several conceptualizations of "race" exist but most critical race theorists argue that when analyzing interracial conflict, it is essential to view the position of minority groups relative to one another, and to whites, with an understanding of history<sup>90</sup> or, at a minimum, with an understanding of race that takes into account the existence of institutionalized racism.<sup>91</sup> Although critical race theorists argue that a historical conception of race could potentially allow racial minorities to see the connections among their individual experiences of oppression,<sup>92</sup> these theorists rarely articulate a way for courts or

<sup>88</sup> See *supra* note 23 and accompanying text.

<sup>89</sup> See, e.g., CHANG, *supra* note 26, at 137-38; Gotanda, *supra* note 11, at 35-36. Conceiving race in its social context, numerous critical race theorists also reject the Supreme Court's recent recognition of whites as an ethnic group that experiences racial discrimination in the same manner as racial minority groups. Professor Chang eloquently articulates the shortcomings of applying an ahistorical racial analysis to conflicts between minorities and whites:

Much is made today of the idea of color blindness, with the ghost of Martin Luther King, Jr., invoked to provide legitimacy. But the idea that law is to be neutral to race is over two hundred years too late. To institute color blindness now is to render law incapable of redressing the sedimentation of legalized racial injustice. To institute color blindness now without reparations is to legitimize hundreds of years of violence wreaked on bodies of color. It would leave intact accumulated white racial privilege and would attempt to cover up, without healing, the racial sores that have been produced by the racist history of this nation.

CHANG, *supra* note 26, at 137-38.

<sup>90</sup> See CHANG, *supra* note 26, at 137-38; Lawrence, *supra* note 64, at 324.

<sup>91</sup> See Gotanda, *supra* note 11, at 44; Lawrence, *supra* note 64, at 324-26. For example, critical race theorists point to the existence of institutionalized racism as a historically based justification for affirmative-action plans. See Gotanda, *supra* note 11, at 63 (calling for a "revised approach to race [that] recognize[s] the systemic nature of subordination in American society"); Harris, *supra* note 64, at 1715-16 (discussing the historical development of "whiteness" and its accompanying entitlements); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 388-92 (1987) (justifying affirmative action on the basis of remedying the appropriation of blacks' labor which has gone uncorrected for generations).

<sup>92</sup> See, e.g., CHANG, *supra* note 26, at 131-32 ("[W]e must develop a greater appreciation of the interconnectedness of different forms of oppression."). Professor Chang argues that a connective link does not appear to exist between Asian Americans and blacks because we do not fully understand the history of or manner in which our society has

practitioners to translate this sociopolitical argument into legal doctrine.

In *Podberesky*, the failure of a race-neutral analysis to recognize the distinct needs of various minority groups based upon their history of subordination resulted in the maintenance of systemic privileges for whites at the expense of minority groups.<sup>93</sup> An alternative analysis could have taken into account the fact that both Latino and black students are underrepresented at the university due to a variety of historical and modern factors. Rather than the complete elimination of the Banneker scholarship program, the court or Podberesky could have sought implementation of a similar program for Latino students.<sup>94</sup>

## 2. *The Illusory Success of Plaintiffs' Victories Under a Race-Neutral Doctrine*

Critical race theorists who have examined interracial conflict assert that race-neutral analysis leads to illusory success for minority plaintiffs challenging race-conscious programs because all minority groups could benefit from race-conscious programs in some context.<sup>95</sup> Numerous studies have shown that no minority group has achieved equality of outcome in every aspect of society compared with whites,<sup>96</sup> implying that every minority group would eventually benefit from a race-conscious program if it were available. An *individual* minority plaintiff who successfully challenges a race-conscious program receives an immediate benefit in one context, but may later find her-

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drawn the color line. *Id.* at 126-27. Consequently, he calls for a more expansive temporal framework that not only accounts for present-day conditions, but also incorporates historical discrimination and subordination. *Id.* at 47.

<sup>93</sup> See *supra* text accompanying notes 77-78.

<sup>94</sup> Courts have consistently refused, however, to recognize that a race-conscious remedy may need to "address separately the specific . . . needs of every racial/ethnic group" by providing different race-conscious programs appropriate for various racial groups or, in some cases, providing a race-conscious program only for those groups that will prospectively benefit from the program. *S.F. NAACP v. S.F. Unified Sch. Dist.*, 576 F. Supp. 34, 50 (N.D. Cal. 1983), *rev'd*, 896 F.2d 412 (9th Cir. 1990).

<sup>95</sup> See *infra* note 96. Recent cases indicate that although minority plaintiffs are just beginning to challenge race-conscious programs, these plaintiffs are very likely to succeed. See *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994); *S.F. NAACP v. S.F. Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1029-30 (N.D. Cal. 1999). No case has yet arisen in which a minority plaintiff has challenged a permissible use of race, but one can speculate that in today's judicial climate, if a race-conscious program has a negative effect upon another racial minority, a court may be more likely to find the program invalid.

<sup>96</sup> See James Jennings, *The International Convention on the Elimination of All Forms of Racial Discrimination: Implications for Challenging Racial Hierarchy*, 40 *How. L.J.* 597, 600 (1997) ("[A] comprehensive assessment of race relations shows that racial divisions provide systemic advantages to whites, at the expense of people of color, but especially blacks. The distribution of economic, social, and cultural benefits in this nation reflects a well-ingrained hierarchy based on race."). Jennings summarizes research concerning racial harassment and violence, as well as residential and employment segregation. *Id.* at 600-03.

self regretting the lack of race-conscious programs in another context.<sup>97</sup>

For example, in the Lowell High School litigation discussed below in Part I.D, the plaintiffs opposed the use of race-conscious admissions programs in public magnet schools because they viewed these programs as denying opportunities to Chinese-American applicants in favor of less-deserving black or Latino applicants.<sup>98</sup> Yet supporters of the program warned that these same Chinese-American students may find themselves facing significant racial discrimination and barriers when they leave an academic setting and move into the workplace—an environment in which Asian Americans face express and implicit racial or cultural discrimination preventing their advancement and limiting their opportunities.<sup>99</sup> Under these circumstances, an individual who once challenged the use of race-conscious programs may subsequently appreciate the role these programs play in overcoming racial subordination.

As in the Lowell litigation and *Podberesky*, when a minority plaintiff embraces a race-neutral standard, she is likely to view a race-conscious program benefitting another minority group as the source of her racial subordination. Constitutional colorblindness does not offer this plaintiff a means for challenging the subtle (or not-so-subtle) racial bias in facially neutral programs.<sup>100</sup> When a plaintiff successfully challenges the program, all minority groups then suffer the loss of race-conscious strategies for addressing systemic discrimination.<sup>101</sup> These effects illustrate the difficulty of addressing competing claims of discrimination under current jurisprudence without deepening inter-racial tensions and concealing systemic benefits for whites.<sup>102</sup>

<sup>97</sup> See *infra* Part I.D.4.

<sup>98</sup> See *infra* Part I.D.3.

<sup>99</sup> See *infra* Part I.D.4.

<sup>100</sup> See *supra* Part I.C.1.

<sup>101</sup> See *supra* notes 95-97 and accompanying text.

<sup>102</sup> See, e.g., Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles"*, 66 S. CAL. L. REV. 1581, 1584-85 (1993) (describing how the "master narrative of white supremacy" limited the narrative of the conflict between Korean Americans and African Americans in Los Angeles). Ikemoto states that:

The notion of a Korean American/African American conflict [during the 1992 Los Angeles riots] locates the causes of the uprisings in problems originating within and bounded by communities of color. At the same time, the rubric of race and racism used to describe the conflict is legalistic; it focuses on intent and attributes racism to wrong-minded individuals. This denies the possibility of embedded, culture-wide racism. It makes race fungible and independent of the history of racial subordination in the United States. And it distances the problem of intergroup conflict from the dominant society; the problem is defined as one of race. This distinguishes race from whiteness.

*Id.* at 1593 (footnote omitted).

#### D. The San Francisco Unified School District

From one perspective, a minority plaintiff's constitutional challenge to a race-conscious program fits neatly within the Court's traditional strict-scrutiny analysis. From another perspective, one can ask if such a claim should fit so neatly. Perhaps, as some scholars have argued, minorities' competing claims of discrimination reveal the inadequacies of constitutional colorblindness and provide an opportunity to challenge the legitimacy of the doctrine itself.<sup>103</sup>

However, this second perspective raises a number of questions. Are the claims of minority plaintiffs such as Daniel Podberekys substantially different from similar challenges brought by white plaintiffs such as Allan Bakke? Does a minority plaintiff's challenge have a different constitutional, legal, political, or social impact? Do unique concerns arise under these circumstances that civil rights lawyers should consider? These questions dominate legal scholars' and practitioners' reactions to the Lowell litigation.

The litigation over admissions policies in the San Francisco Unified School District discussed in this subpart raises questions about the consequences of the Chinese-American plaintiffs' decision to embrace a race-neutral approach. The aftermath of the Lowell litigation demonstrates the need for minority plaintiffs and their attorneys to develop new litigation approaches to interracial conflict over race-conscious programs.

##### 1. "*The Oldest Public High School in the West*"<sup>104</sup>

Lowell High School, in the troubled SFUSD,<sup>105</sup> is one of the oldest and most preeminent public high schools in the country.<sup>106</sup> It offers students of all races from middle- and working-class families the opportunity for an exceptional education and an increased likelihood of admission to a prestigious college.<sup>107</sup> Most recently, Lowell has garnered attention for being at the center of the controversy over the

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<sup>103</sup> See *supra* Part I.C (discussing critical race theorists' criticisms of race-neutral equal protection doctrine).

<sup>104</sup> LOWELL ALUMNI OFFICE, LOWELL ALUMNI ASSOCIATION, at <http://www.lowellalumni.org> (last modified June 2000).

<sup>105</sup> See Shin, *supra* note 3, at 184 (quoting a newspaper article describing Lowell as "a desirable intellectual oasis in a state whose academic performance routinely ranks among the worst in the nation").

<sup>106</sup> See Woo, *supra* note 6. Lowell's distinguished alumni include former California Governor Edmund G. Brown, Sr., naturalist Dian Fossey, sculptor Alexander Calder, Nobel laureate physicist Albert Michelson, and United States Supreme Court Justice Stephen G. Breyer. Liu, *supra* note 6, at 342 n.9; Woo, *supra* note 6.

<sup>107</sup> See Liu, *supra* note 6, at 342-43 ("Perhaps more important than its hallowed history is its top-notch academic environment viewed by many families, especially middle- and working-class ones that cannot afford to send their children to private schools, as a gateway to four-year colleges and future success.").

SFUSD's 1983 desegregation Consent Decree<sup>108</sup> involving a debate about merit,<sup>109</sup> access,<sup>110</sup> race-conscious remedies,<sup>111</sup> desegregation,<sup>112</sup> and interracial conflict.<sup>113</sup>

## 2. "Negative Action" Against Chinese-American Students

In 1983, the SFUSD implemented a desegregation Consent Decree in response to the San Francisco NAACP's suit to desegregate the

<sup>108</sup> See *infra* Part I.D.2 (describing the Decree's origins and provisions).

<sup>109</sup> Compare Statement by Amy Chang and Harrison Chow Before the San Francisco Board of Education Meeting (May 11, 1993), in Editorial, *A Lesson on Cheating at Lowell High School*, ASIANWEEK, May 21, 1993, at 22 (describing the desegregation Consent Decree as a "system of racial cheating" that admits students with lower test scores and excludes Chinese Americans with higher test scores), and Julian Guthrie, *50% Drop in Blacks, Latinos at Lowell*, S.F. EXAMINER, Mar. 16, 1999, at A1 (quoting the mother of Patrick Wong, one of the *Ho* plaintiffs denied admission to Lowell, "Yes, there's now a drop in offers made to blacks and Latinos. But offers should be made on merit. In the long range, when you apply for a job, don't you think you should get it on merit?"), and Sen. Quentin L. Kopp, Editorial, *The War on Merit at Lowell High School*, ASIANWEEK, Feb. 25, 1994, at 19 (describing the Decree's implementation at Lowell as attacking the "values of individual effort, hard work, and merit"), and Julie D. Soo, *Racial-Cap Suit Delayed Once Again*, ASIANWEEK, Sept. 10, 1998, at 17 (quoting a Chinese-American parent as saying, "I also heard . . . that Chinese students needed to score higher to get in [to Lowell], higher than say African American or European students. I don't think that is fair . . . kids should be judged on their score and performance, not on color of their skin" (second omission in original)), with BOWEN & BOK, *supra* note 15, at 277 (suggesting an alternative definition of merit that includes a student's potential for contributing to civic society rather than one limited to numerical grades), and Note, *The Constitutionality of Race-Conscious Admissions Programs in Public Elementary and Secondary Schools*, 112 HARV. L. REV. 940, 955-56 (1999) (arguing that "students denied admission to elementary and secondary schools often have a lesser claim to be entitled to admission based on 'merit' than a student applying to college or graduate school who has "invested years of work in attaining grades and a record of extracurricular and other achievement"), and Viji Sundaram, *EEOC Official: Affirmative Action Can End Stereotyping*, INDIA-WEST, Mar. 5, 1999, at A32 (quoting EEOC Vice Chairman Paul Igisaki as saying it is difficult to "assess merit" because "standardized tests do not fairly treat Latino Americans and African Americans"), and Bill Wong, *Merit Myth*, ASIANWEEK, May 10, 1996, at 6 (arguing for affirmative action because high scores alone should not determine merit and the United States is not actually a meritocracy).

<sup>110</sup> See, e.g., Bert Eljera, *Equal Access or Discrimination?*, ASIANWEEK, Oct. 18, 1996, at 12 (discussing whether race-conscious programs increase or decrease Asian Americans' access to educational and employment opportunities).

<sup>111</sup> See *supra* note 15 for a description of various methods used in race-conscious programs.

<sup>112</sup> See, e.g., Editorial, *How to Improve the Consent Decree*, ASIANWEEK, Mar. 26, 1993, at 4 (offering suggestions for effective integration programs in the SFUSD).

Chinese Americans also have a long history of challenging segregated school systems. See, e.g., *Gong Lum v. Rice*, 275 U.S. 78, 87 (1927) (affirming judgment of the Supreme Court of Mississippi that because the establishment of separate schools for white and black students was permissible, the question is no different "where the issue is as between white pupils and the pupils of the yellow races").

<sup>113</sup> See *infra* Part I.D.4.

school district.<sup>114</sup> The Decree was a comprehensive<sup>115</sup> plan to “eliminate racial/ethnic segregation or identifiability in any S.F.U.S.D. school, program, or classroom and to achieve the broadest practicable distribution throughout the system of students from the racial and ethnic groups which compromise the student enrollment of the S.F.U.S.D.”<sup>116</sup> At the time of the Decree, the District had “historically

<sup>114</sup> See *S.F. NAACP v. S.F. Unified Sch. Dist.*, 576 F. Supp. 34, 36-37 (N.D. Cal. 1983), *rev'd*, 896 F.2d 412 (9th Cir. 1990). The plaintiffs listed the following practices or policies that perpetuated a dual school system for white and minority students:

constructing new schools and annexes, leasing private property for school use, and utilizing portable classrooms in order to incorporate extant residential segregation into the District; establishing feeder patterns, transfer and reassignment policies, optional and mandatory attendance zones to situate children in racially isolated schools; implementing racially discriminatory testing procedures, disciplinary policies, and tracking systems within schools and classrooms; hiring and assigning faculty and administrative personnel, and allocating financial resources in a discriminatory manner.

*Id.* at 37.

For early examples of black schoolchildren challenging racially segregated public school systems, see *People ex rel. King v. Gallagher*, 93 N.Y. 438, 456 (1883), which held that a black child's challenge to separate schools for black and white students failed because such segregation was constitutional, and *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 209 (1850), which upheld a school committee's authority to create separate schools for black and white children. Over one hundred years later in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Supreme Court finally held that segregated schools are unconstitutional.

<sup>115</sup> The plan addressed educational goals for all students, not just minority students. See *S.F. NAACP*, 576 F. Supp. at 49, 52. It involved every school in the district. See *id.* at 53-54. The plan also covered all aspects of educational and administrative programming. See *id.* at 53-54, 57. Finally, the Decree went beyond the school setting to address external factors affecting the schools' racial composition. See *id.* at 57-59. It included provisions for the parties to request that the Defense Department discontinue transporting students from military bases to private schools. See *id.* at 57. It also required parties to recommend policies to local, state, and federal agencies that would help reduce residential segregation affecting the school's racial composition. See *id.* at 58-59.

<sup>116</sup> *Id.* at 53. This opinion contains a copy of the entire Consent Decree. *Id.* at 51-66.

In order to remedy widespread segregation, the Decree identified nine racial and ethnic groups in the district, “Spanish-surname, Other White, Black, Chinese, Japanese, Korean, Filipino, American Indian, and Other Non-White,” and required that “[n]o racial/ethnic group shall constitute more than 45% of the student enrollment at any regular school, nor more than 40% at the . . . alternative schools.” *Id.* at 53.

Other school districts around the country have used race-conscious admissions as part of their desegregation plans. See *United States v. Bd. of Educ.*, 554 F. Supp. 912, 918-19 (N.D. Ill. 1983) (discussing the use of racial percentages as “a measure of desegregation”); *Keyes v. Sch. Dist. No. 1*, 540 F. Supp. 399, 402 (D. Colo. 1982) (permitting the use of racial quotas for some schools within the district); *Morgan v. Kerrigan*, 401 F. Supp. 216, 240-43 (D. Mass. 1975) (describing race-conscious school assignment policies for Boston's regular and magnet public schools); see also Michael Heise, *An Empirical and Constitutional Analysis of Racial Ceilings and Public Schools*, 24 SETON HALL L. REV. 921, 924-28 (1993) (discussing the impact of racial ceilings upon black students in the Chicago public school system); Note, *supra* note 109, at 944-46 (discussing challenges to race-conscious admissions programs in public schools in Boston, Los Angeles, and Maryland); John E. Lee, Note, *The Rise (and Fall?) of Race-Conscious Remedies and “Benign” Racial Discrimination in Public Education*, 30 SUFFOLK U. L. REV. 153, 164-84 (1996) (discussing the use of race-conscious remedies in the context of school assignment programs and mandatory busing).



segregated schools . . . including nine 'Hispanic' schools, five 'Chinese' schools, and five 'Black' schools."<sup>117</sup>

Despite objections to the Decree from nonblack racial minority groups,<sup>118</sup> the district court approved its implementation<sup>119</sup> by ignoring the differences among the District's nonwhite students.<sup>120</sup> The court reasoned that a plan benefitting all students in general would also benefit all minority students, despite their divergent needs and histories.<sup>121</sup> Unfortunately, the Decree's effect on Chinese-American students proved this assumption false.

### 3. *The Evolution of a Race-Neutral Admission Plan*

Over time, the Decree's effect caused tensions to rise within the Chinese-American community. Following national trends,<sup>122</sup> the

Race-conscious programs in public primary and secondary schools are coming under increasing attack with mixed results. See Amy Docker Marcus, *The New Battleground over Race and Schools: Younger Students*, WALL ST. J., Dec. 29, 1999, at B1. Docker's article reviewed pending litigation over these public school programs. See *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123 (4th Cir. 1999) (ruling school district's race-conscious transfer policy is unconstitutional); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999) (finding kindergarten's weighted lottery plan to promote racial and ethnic diversity unconstitutional); *Hunter v. Regents of the Univ. of Cal.*, 190 F.3d 1061 (9th Cir. 1999) (finding race-conscious admissions program of an elementary school operated as a research laboratory to be narrowly tailored and thus permissible); *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998) (finding admissions policy to be unconstitutional); *Capacchione v. Charlotte-Mecklenburg Sch.*, 80 F. Supp. 2d 557 (W.D.N.C. 1999) (awarding plaintiffs attorney fees and expenses arising from school desegregation case holding school's race-conscious admissions policy unconstitutional); see also *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 748 (2d Cir. 2000) (holding that white student plaintiff failed to demonstrate clear likelihood of success in her constitutional challenge of school district's race-conscious transfer program, citing unclear case law regarding whether nonremedial state interest of diversity may justify race-based programs in the constitutional context); *Comfort ex rel. Neunyer v. Lynn Sch. Comm.*, 100 F. Supp. 2d 57, 65 (D. Mass. 2000) (finding that *Wessmann* did not hold that "avoiding racial isolation and promoting diversity are never permissible"). The court in *Brewer* noted that recent opinions from the courts of appeals have not resolved whether "a non-remedial state interest, such as diversity," could "justify race-based programs in the educational context." *Brewer*, 212 F.3d at 748 (citing *Tuttle*, 195 F.3d at 704; *Wessmann*, 160 F.3d at 795).

<sup>117</sup> *S.F. NAACP*, 576 F. Supp. at 49-50.

<sup>118</sup> *Id.* (noting that a Latino advocacy group opposed the Decree because it "addressed only the specific needs of black students in San Francisco, and . . . fail[ed] to address the need for equal educational opportunities for Hispanic students as well").

<sup>119</sup> *Id.* at 51.

<sup>120</sup> *Id.* at 50.

<sup>121</sup> *Id.* at 49.

<sup>122</sup> When the Census Bureau released its annual estimates in 1999, Director Kenneth Prewitt stated that the "estimates show that the number of Hispanics, and the number of Asians and other racial groups living in the United States has increased substantially during the 1990s." Press Release, U.S. Census Bureau, Census Bureau Releases State and County Population Changes for the Nation's Racial and Hispanic Groups—Substantial Increases Estimated from 1990 (Sept. 15, 1999), <http://www.census.gov/Press-Release/www/1999/cb99-170.html>. Nationwide, the Hispanic population increased by 35.2% and the Asian population increased by 40.8% between 1990 and 1998. *Id.*

SFUSD had experienced a significant increase in its percentage of Asian-American students since the 1980s.<sup>123</sup> Consequently, the Decree had a perverse impact upon Chinese-American students' access to neighborhood and magnet schools. In order to keep the numbers of Chinese-American students below the forty percent maximum at Lowell High School,<sup>124</sup> for example, Chinese-American applicants needed a higher test score to be offered admission to Lowell than the score required for all other students, including white students.<sup>125</sup> The required admissions scores for students applying to Lowell for the 1993-94 school year were the following: Chinese American (62), white (58), other nonwhite (58), Spanish surname (53), and black (53).<sup>126</sup>

Nationally, college campuses also faced increasing numbers of Asian-American students and experienced an anti-Asian-American backlash.<sup>127</sup> This phenomenon was especially notable in California, where Asian and other minority populations are rapidly growing.<sup>128</sup> Universities instituted programs to reduce the number of Asian-American students and reestablish the number of white students.<sup>129</sup> Although the purpose of these programs was distinct from the purpose of the SFUSD's desegregation program, their effect upon Chinese-American students was similar.<sup>130</sup> Some commentators dubbed this

<sup>123</sup> See Patrick Anderson, *Asians Approach Majority at San Francisco Schools*, ASIANWEEK, Apr. 3, 1992, at 16.

<sup>124</sup> Gerard Lim, *Lawsuit over Chinese American HS Enrollment: Class Warfare by the Bay?*, ASIANWEEK, Aug. 19, 1994, at 1 (describing the percentage requirements of the Decree).

<sup>125</sup> *Id.* Lowell used an admissions index based partly upon a sixty-nine point standardized test. *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> See Arthur Hu, Editorial, *Hu's on First . . .*, ASIANWEEK, Sept. 3, 1993, at 17 (describing universities' adjustment of admissions quotas in response to increasing numbers of Asian-American students).

<sup>128</sup> Press Release, *supra* note 122. Not surprisingly, California is one of the states in which Latino and Asian populations have had the highest numerical gains. *Id.* In fact, several states, including California, Hawaii, and New Mexico, as well as the District of Columbia, already have a "majority-minority"; Florida and Texas will soon join this trend. Jon Meacham, *The New Face of Race*, NEWSWEEK, Sept. 18, 2000, at 38, 40. For a state-by-state analysis of racial and immigration population statistics, see *America 2000: A Map of the Mix*, NEWSWEEK, Sept. 18, 2000, at 48.

<sup>129</sup> See, e.g., L. Ling-chi Wang, *Trends in Admissions for Asian Americans in Colleges and Universities: Higher Education Policy*, in THE STATE OF ASIAN PACIFIC AMERICA: POLICY ISSUES TO THE YEAR 2020, at 49, 52-53 (Don T. Nakanishi & J.D. Hokoyama eds., 1993) (discussing university programs that reduced the numbers of Asian-American students); see also Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, a Policy Analysis of Affirmative Action*, 4 ASIAN PAC. AM. L.J. 129, 159-160 (1996) (describing the policy implications of "negative action," or racial caps, against Asian Americans).

<sup>130</sup> See, e.g., Lee Cheng, Editorial, *Smoke Screen for Inequity*, ASIANWEEK, Apr. 19, 1996, at 7 (discussing similarities between the Lowell High School policy and a policy at the University of California, Berkeley which reduced its number of Asian-American students); S.W. Chow, Editorial, *Consent Decree Fails Chinese Americans*, ASIANWEEK, Apr. 9, 1993, at 6 ("Having followed [the Lowell High School controversy], I am reminded of my own experience

national phenomenon "negative action"<sup>131</sup> against Chinese Americans or "affirmative action . . . for whites."<sup>132</sup>

The challenge to the SFUSD decree began when the Chinese American Democratic Club (CADC) in San Francisco<sup>133</sup> established the Asian American Legal Foundation to "lay the groundwork for a lawsuit."<sup>134</sup> A year later they discovered their plaintiffs. In 1994, five-year-old Brian Ho was rejected from the 1994-95 entering kindergarten classes in two of San Francisco's elementary schools because these schools had already accepted their limits of Chinese-American students according to the Decree.<sup>135</sup> Two other Chinese-American students, eight-year-old Hilary Chen and fourteen-year-old Patrick Wong, had been similarly rejected from their preferred schools.<sup>136</sup>

Despite what appeared to be the patent unfairness of the Decree, it was difficult for the families and the CADC to find an attorney willing to accept their case.<sup>137</sup> The numerous civil-rights and public-interest organizations throughout the San Francisco Bay Area declined to represent the plaintiffs due to the controversial nature of the case.<sup>138</sup> Eventually the CADC found two attorneys from a San Francisco law firm specializing in plaintiff representation in financial and personal-injury class actions who agreed to represent the plaintiffs and challenge the Decree.<sup>139</sup> In 1994, the plaintiffs filed a suit alleging that the Decree constituted a system of racial classification and quotas in

of having been discriminated by an educational system because of my race. . . . I still remember the day . . . with great pain and anger.").

<sup>131</sup> Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworin's Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 3 (1996).

<sup>132</sup> Lisa J. Hong, *Debate Running Deep over Integration Consent Decree*, ASIANWEEK, Mar. 19, 1993, at 28; Joan Walsh, Editorial, *A White Mother: Are Asians Smarter than My Kid?*, PUEBLA TRIB., Nov. 15, 1994, at 7-A.

<sup>133</sup> See Liu, *supra* note 6, at 343. California Democratic organizations chartered the CADC in 1957. See CHINESE AMERICAN DEMOCRATIC CLUB, HISTORY AND MISSION, at <http://www.sfcadc.org/history.html> (last updated July 1999). The CADC's mission is:

to continue its fight against racial and economic injustice and to increase the political participation of the Chinese American community. CADC's vision on improving the quality of life for Chinese Americans may differ from others in San Francisco. The challenge will be to reinvigorate our relationships with diverse groups in San Francisco, to be able to disagree with each other, and still be able to work with each other on matters which we agree on.

*Id.*

<sup>134</sup> Liu, *supra* note 6, at 343.

<sup>135</sup> Ho *ex rel.* Ho v. S.F. Unified Sch. Dist., 965 F. Supp. 1316, 1318-19 (N.D. Cal. 1997). One of these schools was also Brian's neighborhood school. See *id.* at 1318.

<sup>136</sup> *Id.* at 1319. Patrick had scored a 58 out of a possible 69 on the SFUSD entrance exam, which would have gained him admission to Lowell if he had been any race other than Chinese American. See Liu, *supra* note 6, at 344; *supra* notes 125-26 and accompanying text.

<sup>137</sup> Levine, *supra* note 5, at 58-59.

<sup>138</sup> See *id.* at 58.

<sup>139</sup> *Id.* at 59.

violation of the Fourteenth Amendment.<sup>140</sup> In 1995, the plaintiffs filed an amended complaint adding the San Francisco chapter of the NAACP as a defendant.<sup>141</sup>

In 1999, on the verge of what would surely have been a divisive trial, the *Ho* plaintiffs, the San Francisco NAACP, the SFUSD, and state officials reached a settlement.<sup>142</sup> The settlement order eliminated the mandatory racial composition requirements and entered a preliminary injunction prohibiting the SFUSD from assigning students on the basis of race for the 1999-2000 school year.<sup>143</sup> Although the district also had to develop a new permanent student-assignment plan that did not consider race or ethnicity as the "primary or predominant consideration in determining" admissions, the school could consider race or ethnicity as it related to a student's language needs or "otherwise to assure compliance with controlling federal or state law."<sup>144</sup> In the fall of 1999, the SFUSD district revealed a plan to use a diversity index for twenty percent of its admissions openings, and to consider the race of black and Latino students as one of several selection criteria.<sup>145</sup> After the school district's announcement, the Lowell plaintiffs insisted that the SFUSD eliminate any consideration of race.<sup>146</sup> The final settlement forced the District to adopt a race-neutral plan giving priority to children with enrolled siblings and children who live near a school or in certain zip codes.<sup>147</sup> After Lowell High School implemented this race-neutral approach, its entering classes

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<sup>140</sup> See *Ho*, 965 F. Supp. at 1318-19. Amy Chang, who chaired the CADC's Consent Decree Task Force, described the purpose of the suit: "Given that Chinese American students don't sue every day, this monumental step is a long time coming. . . . We are fighting for the right of parents and children of all races to choose. . . . [I]n our eyes, it's a very simple civil rights issue." Gerard Lim, *SF's Chinese Students File Class Action Suit*, ASIANWEEK, July 15, 1994, at 1 (second omission in original). One black observer of a CADC protest against the Decree stated, "That's the first time I ever saw angry Chinese." Don Lau, *CADC Protests Consent Decree at School Board Meeting*, ASIANWEEK, Mar. 12, 1993, at 7.

Other commentators provide a more comprehensive discussion of the litigation's legal proceedings and the substantive law involved in the decision. See, e.g., Levine, *supra* note 5; Dong, *supra* note 24, at 1034-56 (reviewing school-desegregation, affirmative-action, employment-rights, and voting-rights case law and analyzing possible constitutional challenges to the Lowell admissions plan); Liu, *supra* note 6, at 345-49 (discussing the legal implications of the case prior to the 1999 settlement); Shin, *supra* note 3, at 190-222 (analyzing trends in school-desegregation law and the potential impact of the Lowell case).

<sup>141</sup> See *S.F. NAACP v. S.F. Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1024 (N.D. Cal. 1999).

<sup>142</sup> *Id.* at 1025.

<sup>143</sup> *Id.* at 1026-27.

<sup>144</sup> *Id.* at 1025.

<sup>145</sup> See Kim, *supra* note 5; Jason Ma & Joyce Nishioka, *SFUSD Overseer Sends Mixed Signals on Race*, ASIANWEEK, Nov. 11, 1999, at 12 (noting that the diversity index considered "four criteria—family income level, reading and math scores, language proficiency and race").

<sup>146</sup> See Kim, *supra* note 5.

<sup>147</sup> See Asimov, *supra* note 5.

were almost exclusively white and Chinese-American students.<sup>148</sup> The resulting resegregation of the SFUSD's schools mirrors the experience of other institutions when litigation forces them to abandon race-conscious remedies.<sup>149</sup>

The District adopted its final assignment plan in April 2001 as a result of the Lowell litigation, the mandate of the original consent decree, and community concern about education quality.<sup>150</sup> Under the new plan, the District assigns students "without consideration of their race or ethnicity except in extreme and rare circumstances in which race-neutral mechanisms [have failed] and compelling governmental interests warrant[ ] a very limited use of race/ethnicity as one of multiple factors."<sup>151</sup> After preference is given to siblings of current enrollees and students with special educational needs, the school employs a "diversity index lottery procedure" to select the remaining student body at each school.<sup>152</sup> Using this procedure, the district:

assigns the seat to the student whose race-neutral diversity profile (which the District presently defines as including seven characteristics—socioeconomic status, academic achievement, English Language Learner status of the students, mother's educational background, academic performance at the student's prior school, home-language, and geographic area of San Francisco) will most enhance diversity at the school.<sup>153</sup>

This plan, however, does not apply to Lowell.<sup>154</sup> The District is still developing its approach to admissions at Lowell, taking into account parents' objections to "the current use of academic criteria for admission" and their "belief that the atmosphere at Lowell is hostile to African American and Latino students, and therefore discourages qualified African American and Latino students from applying" to Lowell.<sup>155</sup>

#### 4. *The Rationales for Race Neutrality Fail Lowell High School*

To address the needs of a highly racially diverse community, the district court required the SFUSD to evaluate students on an individ-

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<sup>148</sup> See Guthrie, *supra* note 7.

<sup>149</sup> See, e.g., Barbara Ortutay, *Coalition Calls for Repeal of SP-1, 2 at Regents' Meeting*, DAILY BRUIN (UCLA), Mar. 2, 2001, at 1 (noting that the enrollment of black students at UCLA declined 54.5% following the end of the school's race-conscious admissions program), available at 2001 WL 15554453.

<sup>150</sup> See Press Release, San Francisco Unified School District, SFUSD Board Approves Revised Plan (Apr. 5, 2001), available at <http://sfusd.edu/index1.html> (updated Apr. 19, 2001).

<sup>151</sup> EXCELLENCE FOR ALL, *supra* note 2, at 14.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> See *id.* at 15.

<sup>155</sup> *Id.* at 21.

ual basis without any state-imposed racial classification. This approach should have satisfied the Supreme Court's rationales for race neutrality.<sup>156</sup> Yet the court-ordered assignment plan did not avoid difficult definitional issues,<sup>157</sup> the litigation reinforced governmental use of racial stereotypes,<sup>158</sup> and racial tensions increased dramatically as a result of the assignment plan. This section focuses on the increase in racial tensions in the SFUSD and questions whether the failure to fulfill the rationales for race neutrality raises concerns about the appropriateness of a race-neutral approach for resolving interracial conflict.

The use of a race-neutral approach in the Lowell litigation led to increasing racial animosity among San Francisco's minority communities. Although the original Decree took into account the racial diversity within the SFUSD,<sup>159</sup> the Decree's failure to give legal cognizance to the divergent, and sometimes conflicting, interests of these groups triggered deep tensions within the Chinese-American community as well as between it and other minority communities.

Within the Chinese-American community, supporters and opponents of the litigation sharply disagreed about whether the interests of Chinese-American students were consistent with the interests of other minority groups. Supporters of the litigation viewed the benefit to other minority groups as the cause of the discrimination against Chinese Americans.<sup>160</sup> For the CADC, the suit involved rewarding merit and preventing Chinese-American students from "being forced to shoulder a disproportionate amount of the educational burden."<sup>161</sup> Supporters touted the academic superiority of Chinese Americans

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<sup>156</sup> See *supra* Part I.B.

<sup>157</sup> For many, the SFUSD litigation did not present difficulties with defining the majority and minority races or with clarifying the nature of the remedy as benign or invidious. The desegregation plan for the SFUSD was a model plan that clearly delineated various racial groups. Unlike the Supreme Court's fear in *Bakke* that no sociological and political data would be available to evaluate the status of racial groups, see *supra* note 44, the Lowell litigation presented a clear picture of the specific racial groups involved and the effect of the admissions plan upon each group. See *S.F. NAACP v. S.F. Unified Sch. Dist.*, 59 F. Supp. 2d 1021 (N.D. Cal. 1999).

<sup>158</sup> The court-ordered plan tended to perpetuate the stereotype of Asian Americans, and Chinese Americans in particular, as a "model minority." See *infra* note 167 and accompanying text; Levine, *supra* note 5, at 130.

<sup>159</sup> See *supra* note 116 and accompanying text.

<sup>160</sup> See, e.g., Amy Chang, Editorial, *10-Year-Old Decree Hurting Chinese Americans*, *ASIANWEEK*, Feb. 26, 1993, at 2 (arguing that the Decree has "resulted in discrimination against Chinese American students" and urging the Chinese-American community to join the CADC "and others in demanding that [t]he San Francisco Board of Education end discrimination against Chinese American children and limited English-speaking students").

<sup>161</sup> Lim, *supra* note 124.

over blacks and Latinos as a justification for ending the Consent Decree and opposing race-conscious programs.<sup>162</sup>

In contrast, opponents of the litigation, including the San Francisco-based Chinese for Affirmative Action (CAA) and its executive director Henry Der, attempted to realign, or alternatively to balance, the interests of Chinese Americans with those of blacks and Latinos.<sup>163</sup> They criticized the use of litigation as a means of dealing with Chinese-American students' problems.<sup>164</sup> These critics of the litigation pointed out that race-conscious remedies also benefit Asian Americans and Chinese Americans in education and other contexts<sup>165</sup> and urged Chinese Americans to resist occupying a "buffer" position

<sup>162</sup> See, e.g., Eljera, *supra* note 110 (discussing an example of "the Chinese American student who was denied admission to Lowell High School in San Francisco in favor of a black or Latino who had lower grades"); Arthur Hu, Editorial, *A Chinaman's Chance at Lowell*, *ASIANWEEK*, Sept. 24, 1993, at 23 ("After a decade of desegregation, half of blacks in the school district still get grades worse than a C. . . African Americans get half of [the] suspensions for assault, are nearly half of [the] special education students, and have an even higher drop-out rate than the Hispanics."); Lucia Hwang, *A House Divided: Asian Americans and Affirmative Action*, *THIRD FORCE*, Dec. 31, 1996, at 10 (quoting one Asian-American community advocate as saying, "You work hard, you get more. You work less, you get less. . . . Why should you feel bad for those people? . . . How can I be responsible for someone who doesn't work hard and is lazy? . . . Aren't you the one who didn't study, going out there every night and dancing?").

<sup>163</sup> See Lim, *supra* note 124. Other opponents of the litigation also pointed out that the real tension was between Chinese-American and white students. See, e.g., Nanette Asimov, *A Hard Lesson in Diversity: Chinese Americans Fight Lowell's Admissions Policy*, *S.F. CHRON.*, June 19, 1995, at A1 (discussing the admission of white students over Chinese-American students with higher scores at Lowell); Adair Lara, Editorial, *Affirmative Action at Lowell High*, *S.F. CHRON.*, Apr. 11, 1995, at E6 (acknowledging that white students are experiencing affirmative action at the expense of Chinese Americans, but supporting diversity as an admissions goal); Frank H. Wu, Editorial, *At Lowell High, Who Is Equal to Whom?*, *S.F. CHRON.*, Sept. 21, 1994, at A23 ("If Asian Americans are hurt by affirmative action at Lowell, it primarily is by affirmative action not for African Americans but for whites. By requiring higher scores for Asian Americans than for whites, the school district in effect takes away from Asian Americans to give to whites.").

<sup>164</sup> See, e.g., Gerard Lim, *Enrollment at Elite High Schools Continues to Stir Controversy*, *ASIANWEEK*, Feb. 4, 1994, at 1 (citing Henry Der for the argument that "Chinese students [under the Consent Decree] experience a greater choice in prospective schools, comparable to that of white students and far greater than African American or Latino students"); Lim, *supra* note 124 (quoting Henry Der as saying that the plaintiffs "have yet to provide any evidence of a disproportionate impact [by the Consent Decree] on Chinese students").

<sup>165</sup> See, e.g., Diane T. Chin, Editorial, *End of Decree Hurts Chinese American Children*, *S.F. CHRON.*, Mar. 17, 1999, at A17 (arguing that the end of the Decree will reduce educational resources and opportunities for limited-English proficiency and low-income Chinese-American students); see also Harvey Gee, Comment, *Changing Landscapes: The Need for Asian Americans to Be Included in the Affirmative Action Debate*, 32 *GONZ. L. REV.* 621, 638-641 (1996-97) (describing modern discrimination against Asian Americans in immigration, business, education, social life, and political participation). *But cf.* Lance T. Izumi, *Confounding the Paradigm: Asian Americans and Race Preferences*, 11 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 121, 123, 133 (1997) (arguing that Asian Americans "should welcome the opportunity to be treated simply as individuals protected by the rights and guarantees of the Constitution" rather than become "unintentionally created" victims of affirmative action).

between whites and other minorities.<sup>166</sup> Finally, the critics dispelled the model-minority myth perpetuated by the Lowell litigation.<sup>167</sup>

Other Asian-American groups, including Filipino, Japanese, Vietnamese, and Indian Americans, presented their own claims of discriminatory treatment and underrepresentation.<sup>168</sup> These groups criticized the Lowell plaintiffs and asserted that the litigation weakened the notion of the Asian-American community as a group with common interests.<sup>169</sup> In addition, advocates for recent Chinese immigrants expressed concerns that the litigation's success could lead to the loss of up to \$37 million in federal desegregation funds and threaten the availability of resources and educational access for limited-English proficiency students.<sup>170</sup>

Black and Latino advocates raised claims of present-day and historical discrimination that directly opposed the Lowell plaintiffs' efforts to dissolve the Decree.<sup>171</sup> The deep divisions between the black and Latino community and the Chinese-American community, re-

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<sup>166</sup> See, e.g., Jeff Chang, *Teetering on the Fence*, A. MAG., Oct./Nov. 1999, at 36, 36 (discussing how conservatives "began recasting [Asian Americans] as the wedge group" separating whites from blacks, Latinos, and Native Americans); Wu, *supra* note 163 ("Asian Americans . . . are wrong to think that their goals can be achieved by abolishing affirmative action for African Americans. . . . Asian Americans should recall that they have been caught in the middle before and used to advance others' ideological causes."); see also Allen O., *One Step Forward, Three Steps Back*, INT'L EXAMINER, Aug. 18-31, 1999, at 15 (discussing the *Ho* litigation's negative impact upon relations between Asian Americans and other racial minority groups).

<sup>167</sup> See Emil Guillermo, Editorial, *On Model Minorities and Immigrant Makeovers*, FILIPINO EXPRESS, Oct. 13, 1996, at 11 (discussing a study finding that Asian Americans "are among the poorest residents in San Francisco, often at risk [in] both health and education").

<sup>168</sup> See, e.g., Venise Wagner, *Students Oppose Lowell Suit Deal: Black, Latino and Filipino Youths Say They're Ignored in White-Asian Dispute*, S.F. EXAMINER, Dec. 15, 1999, at D1 (discussing opposition to the SFUSD settlement by black, Latino, and Filipino students).

<sup>169</sup> See, e.g., Emil Guillermo, Editorial, *The Best Victims*, FILIPINO EXPRESS, Mar. 14, 1999, at 11 (describing how the *Ho* litigation not only drove a wedge between Asian Americans and other racial minorities, but also polarized between various Asian-American groups).

<sup>170</sup> See Chin, *supra* note 165 ("The end of the desegregation agreement may make it easier for middle-class Chinese children to attend Lowell but it takes away resources used to address the educational needs of low-income children."); Joyce Nishioka, *Judge Gives Final OK to Ending Race Caps*, ASIANWEEK, Apr. 22, 1999, at 12 (quoting Diane Chin of the CAA as saying that "People think that all Chinese American children are doing well. . . . But data from the school district shows that limited-English proficient Chinese American children are near the bottom in terms of grades and test scores."); O., *supra* note 166 ("The outlook is particularly grim for Asian American students. Among the 61,954 students in the district, over 20,000 are children of Asian immigrants who have limited English language skills. The programs for these children are probably going to be the first to be cut.")

<sup>171</sup> See *S.F. NAACP v. S.F. Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1029-30 (N.D. Cal. 1999) (noting that the defendants' attempts to prove that past governmental discrimination caused any current problems in the District had largely failed, and recognizing that the parties sought conflicting remedies).



flected a long-standing history of distrust and misunderstanding.<sup>172</sup> Some blacks and Latinos, as well as some Asian Americans, viewed the lawsuit as a selfish effort benefitting Chinese Americans over other minorities.<sup>173</sup> Although blacks and Latinos did not necessarily view the Decree as an unequivocal success,<sup>174</sup> the *Ho* plaintiffs' success resulted in a virtual elimination of black and Latino students from the Lowell campus,<sup>175</sup> while other SFUSD schools reverted back to being racially identified as black schools or Latino schools.<sup>176</sup> As a result of the Lowell litigation, the distrust between San Francisco's minority communities continues to deepen.<sup>177</sup> In the wake of the Lowell litigation, many practitioners and scholars are asking whether they can resolve future conflicts with an alternative approach within the context of existing equal protection jurisprudence, or instead whether minor-

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<sup>172</sup> The tensions between Asian Americans and other minority communities are well documented. See, e.g., ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE 155-58 (1998) (describing conflict between Asian Americans, blacks, and Latinos over redistricting and protection under the Voting Rights Act); Ikemoto, *supra* note 102, at 1581-83 (arguing that portrayals of the "Korean American/African American conflict" during the 1992 Los Angeles riots pitted minority against minority rather than discussing the interrelationship between their experiences of white oppression); Yamamoto, *supra* note 11, at 824-25 (arguing that a victory by the *Ho* plaintiffs "may well exacerbate African American and Asian American tensions already heightened by negative stereotypes held by some members of each group about the other, by intergroup economic competition, and by intergroup justice grievances" (footnotes omitted)).

<sup>173</sup> See Yamamoto, *supra* note 11, at 823-25.

<sup>174</sup> See, e.g., Hong, *supra* note 132 (noting that a local black Democratic club "has called for the end to the 'policy of unequal schools under the guise of integration'"); Lau, *supra* note 140 (quoting a black civil-rights leader as saying that "[b]lack children are losing more than what they're getting through the consent decree's integration").

Some legal scholars question whether court-ordered integration is the most effective solution for African-American students. See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-19, at 1495 n.15 (1988) (discussing the view in the black community that "predominantly black-populated and black-controlled local schools may better serve black community interests than will the lengthy and troublesome process of desegregation"); Derrick Bell, *Learning from Our Losses: Is School Desegregation Still Feasible in the 1980s?*, 64 PHU DELTA KAPPAN 572, 575 (1983) (questioning whether desegregation addresses black children's stigmatic and psychological injuries from segregated schools); Erica J. Rinas, Note, *A Constitutional Analysis of Race-Based Limitations on Open Enrollment in Public Schools*, 82 IOWA L. REV. 1501, 1523 (1997) (summarizing the views of critics of integration who dispute the presumption that "black children need white children to receive an adequate education"); see also GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 338 (1991) (arguing that courts are not an effective source of social change).

<sup>175</sup> See *supra* notes 7-8 and accompanying text.

<sup>176</sup> See Asimov, *supra* note 2; see also Mary Curtius, *S.F. Drops Bid to Use Race as Student Placement Factor*, L.A. TIMES, Jan. 8, 2000, at A13 (quoting San Francisco NAACP attorney Michael Harris as predicting that "there will be a number of schools that will have incoming classes that will have extreme racial concentrations").

<sup>177</sup> See Yamamoto, *supra* note 11, at 837-38 ("Amid this morass [of cases like Lowell], communities of color undermine one another with often thinly veiled insults and proposed settlements that at best paper over unresolved tensions and satisfy no one. Group wounds, lying just beneath the surface of daily interactions, and larger intergroup power dynamics go unaddressed." (footnotes omitted)).

ity communities will inevitably position their interests against one another under constitutional colorblindness.

## II

### TRANSFORMING INSIGHTS FROM CRITICAL RACE PRAXIS INTO PRACTICAL STRATEGIES FOR LITIGATION

Recognizing the inadequacy of constitutional colorblindness to reconcile minorities' competing discrimination claims, critical race scholars have begun developing a new approach to achieving interracial justice—"critical race praxis."<sup>178</sup> Critical race praxis is an approach that

combines critical, pragmatic, socio-legal analysis with political lawyering and community organizing to practice justice by and for racialized communities. Its central idea is that racial justice requires antistatutory practice. In addition to ideas and ideals, justice is something experienced through practice. . . . It requires, in appropriate instances, using, critiquing, and moving beyond notions of legal justice pragmatically to heal disabling intergroup wounds and forge intergroup alliances. It also requires, for race theorists, enhanced attention to theory translation and deeper engagement with frondine practice; and for political lawyers and community activists, increased attention to a critical rethinking of what race is, how civil

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<sup>178</sup> Critical race praxis was recently developed by critical race theorists, Asian legal scholars, and LatCrit scholars to address interracial justice and racial equality. See Johnson, *supra* note 31, at 202-04. Professor Yamamoto first introduced the notion of critical race praxis in a 1995 article and further developed this praxis in subsequent articles and a recently published book. See Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 ASIAN PAC. AM. L.J. 33, 69 (1995) [hereinafter Yamamoto, *Rethinking Alliances*] ("[L]aw and notions of legal justice provide a potentially powerful base for constructing merged theoretical and practical, or praxis, approaches to inter-group healing as well as interracial justice."); see also YAMAMOTO, *supra* note 20 (exploring critical race praxis as a means to interracial justice); Yamamoto, *supra* note 11 (describing a framework for and the implications of critical race praxis).

Since its formation, critical race praxis has been the subject of numerous journal articles and at least one symposium. See, e.g., Tanya Lovell Banks, *Both Edges of the Margin: Blacks and Asians in Mississippi Masala, Barriers to Coalition Building*, 5 ASIAN L.J. 7 (1998); Paulette M. Caldwell, *The Content of Our Characterizations*, 5 MICH. J. RACE & L. 53 (1999); Robert S. Chang, *Facing History, Facing Ourselves: Eric Yamamoto and the Quest for Justice*, 5 MICH. J. RACE & L. 111 (1999); Sumi K. Cho, *Essential Politics*, 2 HARV. LATINO L. REV. 433 (1997); Sumi K. Cho, *Multiple Consciousness and the Diversity Dilemma*, 68 U. COLO. L. REV. 1035 (1997); Tayna Kateri Hernández, *"Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97 (1998); Chris K. Iijima, *The Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 COLUM. HUM. RTS. L. REV. 47 (1997); Peter Kwan, *Complicity and Complexity: Cosynthesis and Praxis*, 49 DEPAUL L. REV. 673 (2000); Symposium, *Nanook of the Nomos: A Symposium on Critical Race Praxis*, 5 MICH. J. RACE & L. 31 (1999); Eric K. Yamamoto, *Conflict and Complicity: Justice Among Communities of Color*, 2 HARV. LATINO L. REV. 495 (1997); Eric K. Yamamoto, *Healing Our Own*, 20 B.C. THIRD WORLD L.J. 101 (2000); Harvey Gee, *Perspective, Beyond Black and White: Selected Writings by Asian Americans Within the Critical Race Theory Movement*, 30 ST. MARY'S L.J. 759 (1999);

rights are conceived, and why law sometimes operates as a discursive power strategy.<sup>179</sup>

Critical race praxis literature crosses the boundaries between the law and other disciplines, including history, public policy, political science, religion, sociology, and psychology.<sup>180</sup> It involves bringing racial communities together to learn one another's histories and present circumstances, offer apology and reconciliation, and discover connective relationships.<sup>181</sup> In pursuing this emerging interdisciplinary approach, scholars sometimes neglect the relationship between critical theory and *legal* practice,<sup>182</sup> perhaps due in part to critical theorists' disillusionment or frustration with the limited capacity to further social justice through legal efforts.<sup>183</sup>

This Note asserts that critical race praxis must consistently emphasize the necessity of bridging the gap between critical race theory and legal practice. Although the law is not the exclusive tool with which to achieve interracial justice, nor perhaps even the most effective one, it is too pervasive an institution impacting too many lives for critical race theory to neglect. Critical race praxis offers civil-rights attorneys and their plaintiffs practical, concrete strategies for implementing critical race theory in actual litigation. This Part first identifies some key ideals of critical race praxis. It then suggests three practical strategies for implementing these ideals when minority plain-

<sup>179</sup> Yamamoto, *supra* note 11, at 829-30.

<sup>180</sup> *E.g.*, YAMAMOTO, *supra* note 20, at 153-71.

<sup>181</sup> *E.g.*, CHANG, *supra* note 26, at 127-32; YAMAMOTO, *supra* note 20, at 50-59, 172-209.

<sup>182</sup> Significantly, Professor Yamamoto has not neglected the practical application of critical race praxis. Professor Chang notes that Professor Yamamoto's recent book, *Interracial Justice*, "is the culmination of several years of activist lawyering and academic writing," and that Professor Yamamoto, perhaps more than most law professors, has "been able to blend theory and practice in his activism and in his writings. He is the embodiment of the race praxis for which he advocates. In his book, Professor Yamamoto shares the lessons he has learned. The challenge for us and this nation is to listen." Chang, *supra* note 178, at 114 (footnote omitted); *see* YAMAMOTO, *supra* note 20.

As part of his thinking and practice concerning racial reparations and apology, Professor Yamamoto "participated on the legal team that pursued coram nobis petitions to overturn the convictions of Gordon Hirabayashi, Fred Korematsu, and Minoru Yasui, who were convicted of violating various measures enforcing the exclusion and internment of Japanese Americans during World War II." Chang, *supra* note 178, at 114 n.17; *see also* *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding conviction of American citizen of Japanese descent under discriminatory wartime laws), *error coram nobis granted by* 584 F. Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding conviction of American citizen of Japanese descent for violation of discriminatory wartime curfew), *error coram nobis granted by* 828 F.2d 591 (9th Cir. 1987); *Yasui v. United States*, 320 U.S. 115 (1943) (same). *See generally* Eric K. Yamamoto, *Korematsu Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1986) (discussing the petition process and the larger concern of government accountability to civil liberties).

<sup>183</sup> *See* ROSENBERG, *supra* note 174; Johnson, *supra* note 31, at 228.

tiffs present equal protection challenges to race-conscious programs. As the Lowell litigation demonstrates, interracial conflict is one of the most divisive experiences for minority communities and among the most formidable obstacles to the achievement of interracial justice.

### A. Critical Race Praxis

Critical race praxis seeks to heal interracial tensions between minority groups while simultaneously challenging structures of systemic racism. Despite the “all-over-the-map feel” of much of the literature on critical race praxis,<sup>184</sup> this Note identifies the key aims of an emerging jurisprudence for interracial justice. These aims include an emphasis on antistatutory practices, the necessity for political lawyering, and a focus upon the educative function of litigation.

#### 1. Antistatutory Practice

Critical race praxis unites racial groups around the central notion “that racial justice requires antistatutory practice” rather than the achievement of gains for a particular individual or racial group through the application of race-neutral doctrine.<sup>185</sup> Antistatutory practice seeks “to disrupt the use of law as an instrument for perpetuating hierarchical power relations.”<sup>186</sup> Critical race praxis

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<sup>184</sup> YAMAMOTO, *supra* note 20, at 47 (“Perhaps this all-over-the-map feel to the few articles on interracial jurisprudence simply means that interminority jurisprudence is in its early stages, but perhaps it indicates scholarly ambivalence. Still another explanation . . . may be political. Discussion of interracial conflict is considered taboo.”). Professor Yamamoto provides a bibliography of literature on interracial jurisprudence in his book, *Interracial Justice*. See *id.* at 289 n.59 (citing Sumi K. Cho, *Korean Americans vs. African Americans: Conflict and Construction*, in *READING RODNEY KING/READING URBAN UPRISING* (Robert Gooding-Williams ed., 1993); Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 *STAN. L. REV.* 855 (1995); 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); Hing, *supra* note 29; Ikemoto, *supra* note 102; Charles R. Lawrence III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 *STAN. L. REV.* 819 (1995); Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 *STAN. L. REV.* 957 (1995); Reginald Leamon Robinson, *“The Other Against Itself”: Deconstructing the Violent Discourse Between Korean and African Americans*, 67 *S. CAL. L. REV.* 15 (1993); Yamamoto, *Rethinking Alliances*, *supra* note 178; Dong, *supra* note 24; Natapoff, *supra* note 11.

<sup>185</sup> Yamamoto, *supra* note 11, at 829; see CHANG, *supra* note 26, at 130; Julie A. Nice, *Equal Protection's Antinomies and the Promise of a Co-Constitutive Approach*, 85 *CORNELL L. REV.* 1392, 1394 (2000). Professor Nice describes the choice between pursuing antistatutory goals and assimilation goals as “[t]he fundamental question underlying the equal protection mandate.” Nice, *supra*, at 1394. An assimilation approach urged by more conservative scholars “leads to ignoring the distinguishing trait—taking a so-called color-blind or gender-neutral position—and endorses a standard of sameness for all classes within a classification.” *Id.* at 1394-95.

<sup>186</sup> Nice, *supra* note 185, at 1395.

continues to advance the critical race theory position that race-neutral equal protection doctrine maintains systemic racial inequality.<sup>187</sup>

## 2. *Political Lawyering*

Critical race praxis calls for lawyers to play a more active role in working with their minority clients to shape and guide antidiscrimination litigation.<sup>188</sup> It also encourages lawyers to situate individual lawsuits within a broader political strategy to achieve interracial justice.<sup>189</sup> Political lawyering could involve “bringing lawsuits as part of a comprehensive impact strategy,”<sup>190</sup> “politicization of a trial to obtain publicity for a case or cause,”<sup>191</sup> or community organizing and lobbying the legislature.<sup>192</sup> Although “the role of the attorney seeking social change through the law is an extremely difficult one,”<sup>193</sup> the strategies discussed below demonstrate how political lawyering can advance critical race praxis as part of a comprehensive approach for achieving interracial justice.

## 3. *Educative Function of Litigation*

Implicit in the notions of interracial justice advanced by critical race praxis is the educative function of litigation. Under this theory, litigation may increase awareness of the court and parties alike about the interdependence of the legal rights of opposing minority litigants as well as the distinctions between their historical and current experiences of racial subordination. Professor Yamamoto, for example, emphasizes that minority groups experience shifting relationships to one another: “[A]n actor may be oppressed within one context, [and] may therefore make justice claims against those with power over that actor in that context,” yet “may also be oppressive in another context, and may therefore be responsible for the justice claims of those over whom it exerts power.”<sup>194</sup>

Courts have repeatedly allowed Asian Americans to serve as a buffer between whites and blacks or Latinos during conflicts over race-conscious remedies due to misperceptions about the status of Asian Americans as a “model minority.” Litigation may allow parties to challenge the model-minority myth and encourage Asian Ameri-

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187 See *supra* Part I.C.1.

188 E.g., Yamamoto, *supra* note 11, at 830.

189 See Johnson, *supra* note 31, at 214-15.

190 *Id.* at 214.

191 *Id.*

192 *Id.*

193 *Id.* at 228.

194 Yamamoto, *supra* note 11, at 892.

cans to support affirmative action programs.<sup>195</sup> Professor Frank Wu has written extensively on the model-minority myth and the attempts to use Asian Americans as a “wedge group” against other minorities in the context of affirmative action.<sup>196</sup> He notes that “liberals . . . treat affirmative action as if it benefits all racial minorities . . . , but such a tactic brings only a temporary respite. . . . [T]hey fail to address the tensions among racial minority groups—which should not be exaggerated or exacerbated by external forces, but which do exist.”<sup>197</sup> By emphasizing the educative function of litigation, critical race praxis helps to challenge the use of the model-minority myth to align Asian Americans’ interests in opposition to those of blacks or Latinos.

### B. Practical Litigation Strategies for Implementing Critical Race Praxis

This subpart introduces three practical strategies for political lawyers<sup>198</sup> seeking to achieve interracial justice through critical race praxis. Although not all lawyers support an antisubordination ideal of equal protection doctrine,<sup>199</sup> political and progressive lawyers striving to implement critical race praxis need the tools to negotiate a case such as *Lowell*. This subpart suggests strategies to assist a political lawyer facing a potential client who is a minority and seeks to challenge a race-conscious remedy. This Note presumes that a political lawyer using these strategies could responsibly persuade some, but not all, of these potential clients to refrain from seeking to invalidate an entire race-conscious program.

Before discussing the specific strategies, a caveat is necessary. A number of commentators point out the ethical concerns raised by the notion of “political” or “critical” lawyering.<sup>200</sup> The primary concern

<sup>195</sup> See Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 227 (1995) (“[A]lthough there are many real issues that result from the dramatically changing demographics of the country, the dilemma of Asian Americans and affirmative action should be understood as an issue which has been manufactured for political gains [by opponents of affirmative action].”). However, in the *Ho* litigation, the Chinese-American plaintiffs initiated the conflict, which affirmative action opponents later coopted. See *infra* note 216. Professor Wu does not address a solution for the very real interracial conflicts at the heart of the *Lowell* case.

<sup>196</sup> Theodore Hsien Wang & Frank H. Wu, *Beyond the Model Minority Myth*, in THE AFFIRMATIVE ACTION DEBATE 191 (George E. Curry ed., 1996) (discussing the benefits Asian Americans receive from race-conscious programs and criticizing the model-minority myth).

<sup>197</sup> Wu, *supra* note 195, at 280-81.

<sup>198</sup> See Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3, 3-7 (Austin Sarat & Stuart Scheingold eds., 1998) (contrasting political and conventional lawyering).

<sup>199</sup> See, e.g., Levine, *supra* note 5 (stressing the need for race-neutral methods of achieving equity and fairness).

<sup>200</sup> See, e.g., GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 74 (1992); Anthony V. Alfieri, *(Er)Race-ing an Ethic of Justice*, 51

revolves around a lawyer's duty to zealously represent her client rather than to seek to conform her client's wishes to her own political agenda.<sup>201</sup> Many question whether the traditional zealous advocate model is appropriate for public interest law.<sup>202</sup> As an alternative approach, advocates of political lawyering argue that current ethical rules "lend support to the lawyer who encourages a client to pursue a strategy that is less likely to damage race relations—even if that strategy will not yield the greatest pecuniary result or swiftest relief for the client."<sup>203</sup>

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STAN. L. REV. 935 (1999); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2145-46 (1991); Naomi R. Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 MICH. L. REV. 965, 994-1000 (1997); John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 FORDHAM L. REV. 1927, 1956 (1999); Hing, *supra* note 29, at 904 (proposing new ethical guidelines that "would impose a duty on lawyers involved in racially charged disputes to inform their clients of options for resolution that would be less likely to fuel racial tensions"); Johnson, *supra* note 31, at 217-27; Nancy D. Polikoff, *Am I My Client?: The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C.L. L. REV. 443 (1996); Sarat & Scheingold, *supra* note 198, at 7-8; Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 544-45 (1987-88); David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502 (1998).

<sup>201</sup> The *Model Rules of Professional Conduct* state that "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." MODEL RULES OF PROF'L CONDUCT pmbl. (1999); see also MODEL CODE OF PROF'L RESPONSIBILITY EC 7-19 (1983) ("The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.").

<sup>202</sup> E.g., Hing, *supra* note 29, at 927-30 (discussing criticism of the zealous advocate model by scholars and courts, including Louis D. Brandeis, Talcott Parsons, Duncan Kennedy, and Robert Gordon).

<sup>203</sup> *Id.* at 920. Professor Hing discusses a number of rules which place a duty upon a lawyer to provide her client with advice concerning moral, political, or social factors relevant to the client's circumstances. *Id.* at 920-22. For example, Rule 2.1 of the *Model Rules of Professional Conduct* states that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." MODEL RULES OF PROF'L CONDUCT R. 2.1 (1999) (emphasis added), quoted in Hing, *supra* note 29, at 921. The comment to Rule 2.1 notes that

[l]egal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront . . .

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

Although a more complete analysis of these ethical considerations is beyond the scope of this Note, the following discussion proceeds from the presumption that current ethical rules permit a critical lawyer to educate her client about the political and social considerations in cases involving minority challenges to race-conscious programs with the hope that this information will persuade her client to choose a less detrimental course of action. This Note acknowledges, however, that a client possesses the final decision regarding what approach to pursue, and a lawyer must continue to zealously advocate on behalf of her client once representation has begun regardless of her client's decision.

### 1. *Formative Questions for Attorneys and Their Clients*

This Note proposes a series of formative questions for attorneys to explore with minority clients wishing to challenge race-conscious remedies. These questions should assist attorneys in helping these clients to identify the specific practices they wish to challenge and in educating the clients about the consequences of their choices. After stating each formative question, this Note explores the purpose of the question and its role in forming the theory of the case and selecting litigation strategies.

Professor Hing has suggested a similar approach that would function within his proposed ethical guidelines.<sup>204</sup> He would require lawyers involved in cases with potential racial tension to "complete a form and questionnaire indicating whether less antagonistic options exist and describing these options."<sup>205</sup> The purpose of Professor Hing's proposals "is to require the lawyer to sit down and discuss with the client the possible negative effects on race relations that the immediate pursuit of certain options may have."<sup>206</sup> As a result, lawyers may persuade their clients to exhaust nonadversarial options before engaging in an adversarial approach or, if the client pursues an adversarial approach, to at least postpone or reduce the racial tensions in the case.<sup>207</sup> The formative questions proposed below focus on specific issues a lawyer may explore during client counseling to educate a client about the potential personal and social impact of various courses of action.<sup>208</sup>

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*Id.* cmt. (emphasis added), *quoted in* Hing, *supra* note 29, at 921 n.101.

<sup>204</sup> See Hing, *supra* note 29, at 917-22 ("We need [ethical] rules that obligate lawyers and clients to attempt to settle disagreements through nonadversarial procedures first.").

<sup>205</sup> *Id.* at 918.

<sup>206</sup> *Id.* at 919.

<sup>207</sup> *Id.*

<sup>208</sup> See LÓPEZ, *supra* note 200, at 74 ("When the aim to educate itself becomes a core of any acceptable notion of providing sound help, familiar practices like interviewing, counseling, planning, negotiating, and litigating take on a different look and feel.").



In many respects, these questions focus less upon litigation strategy and more upon raising the client's awareness of systemic racial inequality with the ultimate goal of encouraging the client to pursue antistatutory litigation rather than personal redress under colorblind equal protection doctrine. This Note envisions attorneys relying on these questions when preparing to meet with clients who intend to challenge a race-conscious remedy using colorblind equal protection doctrine. By reviewing the substance of these questions with their clients, attorneys might successfully diminish the negative impact of cases such as the Lowell litigation. It is essential to note, however, that many attorneys will require assistance in implementing the strategies contained in these questions. Many cities have professional diversity trainers or facilitators skilled in training multicultural groups.<sup>209</sup> Just as an attorney might engage the assistance of other professionals when a client presents issues outside the attorney's medical or scientific skill level, for example, this Note encourages attorneys to seek the assistance of skilled professionals when engaging in an effort to provide their clients with accurate historical or sociological information or when professional multicultural mediation skills are necessary.

- *What is the overall position of the minority group in society? What is the relationship between the plaintiff's minority group and other minority groups that might oppose the litigation?*

By exploring with clients the position of their minority group within society, an attorney may be able to dispel race-based stereotypes, such as an Asian-American family's belief in the model-minority myth, or to identify an area in which the potential plaintiffs might benefit from race-conscious remedies. This question might provide an opportunity for a minority plaintiff to understand how she as an individual—and her racial or ethnic group as a whole—is simultaneously in a position of subordination relative to whites as well as a position of domination over other racial or ethnic groups.<sup>210</sup> An attorney may need to rely upon newspaper reports, history, and statistics to overcome entrenched myths of Asian Americans' success and the perception that blacks and Latinos are the source of barriers to opportunity for Asian Americans. Here, the lawyer's role is to raise her client's consciousness of the historical, political, and social terrain upon which the suit will play out.

- *Have the plaintiffs communicated with members of racial groups likely to oppose the litigation?*

In today's racially segregated society, it is not uncommon for people to form their racial perceptions without ever speaking to one an-

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<sup>209</sup> See Peralte C. Paul, *Diversity Training: From Churches to Classrooms, Industry Groups*, ATLANTA J. & CONST., Oct. 5, 2000, at 1F.

<sup>210</sup> See Yamamoto, *supra* note 11, at 891.

other about race, racial identity, racism, and equality.<sup>211</sup> In many respects, this question seeks to explore the client's own prejudice prior to the formation of a lawsuit. If a community attorney can facilitate an introductory conversation or workshop among parents, children, or community members, it could ease the desire of the minority plaintiff to completely eliminate a race-conscious program. Personal accounts of the program's beneficial impact for others or the barriers faced by others could motivate the plaintiffs to present a more narrow challenge to the program.

- *Is the client aware that a successful challenge to a race-conscious program in one context may lead to the elimination of a similar program in another context? Does the client universally oppose race-conscious remedies or is the client upset about a specific loss of opportunity? Does a race-neutral approach offer the client a "quick fix"?*

Many minority plaintiffs may not be aware of the broader legal impact of a successful attack upon a race-conscious program.<sup>212</sup> Some may believe that their challenge to a specific program will not have an effect upon other race-conscious programs that benefit the plaintiffs in other settings. Explaining in accessible terms the idea of equal protection and the role of precedent may help a client understand that a successful challenge to a program in one context, for example a school's admission program, will provide support for a similar challenge in another context, such as hiring or promotion policies in a workplace.<sup>213</sup> A progressive lawyer may find that the time spent discussing the potential impact of the case in other contexts will lead the client to reconsider a broad attack on a race-conscious program.

This phenomenon may partly explain the CADC's position concerning the Lowell litigation and race-conscious programs in general. Although the CADC provided organizational support and was the impetus for the challenge to the SFUSD assignment program,<sup>214</sup> the organization simultaneously supported the use of race-conscious programs for the allocation of government contracts because these

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<sup>211</sup> See, e.g., Beverly Daniel Tatum, *Talking About Race, Learning About Racism: The Application of Racial Identity Development Theory in the Classroom*, 62 HARV. EDUC. REV. 1, 5 (1992) (noting that racism is a taboo topic in racially mixed settings).

<sup>212</sup> Any first-year law student who has been exposed to concepts of collateral estoppel, stare decisis, and res judicata realizes the complexity behind understanding the binding effect and influential impact of a holding that may not be apparent to the average layperson.

<sup>213</sup> See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (plurality opinion) (relying in part upon *Bakke*, a case considering race-conscious admissions in higher education, to invalidate a race-conscious program for awarding government contracts).

<sup>214</sup> See *supra* notes 133-41 and accompanying text.

programs benefitted Chinese Americans.<sup>215</sup> The CADC was taken aback when state and national leaders opposed to all race-conscious programs embraced the Lowell litigation as part of a universal fight.<sup>216</sup> In response, the CADC took the untenable position of selectively opposing only the SFUSD's use of race-conscious admissions programs.<sup>217</sup> In future situations, progressive lawyers may be able to use a client's willingness to support other race-conscious programs as a window of opportunity for explaining the importance of narrowing the challenge to a program with a disparate effect on some minority groups.

Finally, for those who question the wisdom of lawyers spending their time educating clients on race relations and history, the Lowell litigation provides a compelling reason for investing this time prior to litigation. It took communities of color, state courts, and federal and national education experts nearly twenty years to achieve the model desegregation consent decree for the SFUSD. In only five years, three individual plaintiffs returned the district to nearly identical racial

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<sup>215</sup> See Norman Matloff, Editorial, *Lowell High Plaintiffs Want It Both Ways*, S.F. CHRON., Dec. 8, 1994, at A29 (stating that the CADC cannot "have it both ways" with affirmative action); O., *supra* note 166 (criticizing the CADC for "send[ing] the wrong message that Asian Americans will fight for equality and equal access only when it benefits them").

<sup>216</sup> Even supporters of the litigation, however, began to express discomfort when California Governor Pete Wilson, an opponent of race-conscious programs, embraced the suit as an attack on "the 'perversity of the affirmative-action mind-set.'" Alethea Yip, *New Support in School Desegregation Case*, ASIANWEEK, Sept. 11, 1997, at 10. The president of the CADC, Roland Quan, responded, "Our group has never been for dismantling affirmative action and in fact we are supportive of affirmative action. . . . But many groups have tried to piggyback on our case and interpret it to fit their agendas. . . . [T]his case is about ending discrimination and not at all about ending affirmative action." *Id.*; see also Hwang, *supra* note 162 (describing how anti-affirmative action politicians coopted the Lowell controversy for their own political agendas). Ward Connerly, a prominent African-American opponent of race-conscious programs, also supported the litigation as a means to end affirmative action. See Ward Connerly, Editorial, *Race Has No Place in School Admissions Policy*, S.F. CHRON., Oct. 26, 1999, at A21.

<sup>217</sup> One Asian-American magazine editorial chastised the CADC for maintaining a contradictory policy regarding race-conscious programs:

[H]ow can it be fair for the city to give breaks to Asian American businessmen because they for years were shut out of networks and capital, then refuse such considerations to African American youngsters . . . ?

. . . While it is discomfoting to think about a Chinese American applicant rejected in favor of a Latino or black applicant with slightly lower test scores, it should be no less a perceived injustice to see than a well-funded white construction company getting rejected for an Asian American firm whose bid was counted as 10 percent less than it actually was under the minority business ordinance.

Fair is fair. If one is the solution, the other must be, too. To maintain otherwise is to advocate only for ourselves—a dangerous position that, if taken by all minorities, will weaken our hard-won gains.

Editorial, *The Parity Problem*, ASIANWEEK, Feb. 18, 1999, at 4.

demographics that the schools experienced in the 1960s.<sup>218</sup> Communities of color cannot afford this “progress.”

## 2. *Selecting the Challenged Practice Using Antisubordination Principles*

Political lawyers or progressive clients may also implement critical race praxis by shifting the focus of the suit from an effort by the plaintiffs to secure for themselves public educational opportunities that are not available for many students into an effort to challenge the limited availability of these resources. One example of this antisubordination litigation model is a recent suit that the ACLU of Southern California filed on behalf of four African-American and Latino students, *Daniel v. California*.<sup>219</sup>

Although the suit does not challenge a race-conscious program, it alleges that the students “are being denied equal and adequate access to Advanced Placement (“AP”) courses by the State of California and by the State’s local school districts.”<sup>220</sup> According to the complaint filed by the plaintiffs’ high-profile attorneys,<sup>221</sup> Beverly Hills High School and Arcadia High School, two predominantly white and Asian-American schools,<sup>222</sup> offer fourteen and eighteen AP courses, respectively.<sup>223</sup> At Arcadia, the eighteen AP academic subjects provide “45 AP classes to hundreds of students.”<sup>224</sup> In contrast, according to the complaint, predominantly black and Latino high schools offer significantly fewer AP courses.<sup>225</sup> For instance, Inglewood High School (97.4% black and Latino) and Arvin High School (92.8% black and Latino) offer only three and two AP courses, respectively.<sup>226</sup>

The suit was brought in response to the University of California Board of Regents’ decision to abandon their race-conscious admissions program after the passage of Proposition 209.<sup>227</sup> While abandoning their race-conscious program, the Board maintained their

<sup>218</sup> See *supra* notes 6-9 and accompanying text.

<sup>219</sup> Complaint, *Daniel v. California*, No. BC214156 (Cal. Super. Ct. filed July 27, 1999), available at <http://www.aclu-sc.org/docs/ap-comp.pdf> [hereinafter *Daniel Complaint*].

<sup>220</sup> *Id.* ¶ 1.

<sup>221</sup> The plaintiffs are represented by the ACLU of Southern California, Johnnie L. Cochran, Jr., and Eric G. Ferrer. See *id.*

<sup>222</sup> Beverly Hills High School and Arcadia High School have 8.8% and 8.4% black and Latino students, respectively. *Id.* ¶ 12.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* ¶ 15.

<sup>225</sup> *Id.* ¶ 11.

<sup>226</sup> *Id.* ¶ 12 chart 1.

<sup>227</sup> See *Inglewood High School Minority Students File Suit Against State*, L.A. SENTINEL, Aug. 4, 1999, at A1 (quoting ACLU plaintiffs’ attorney Mark Rosenbaum stating that “[t]he lawsuit, which is ‘the first of its kind in the nation,’ is a case ‘about the underbelly of Proposition 209,’” the California referendum that “ended affirmative action programs in state and local government, hiring, education, contracting and housing”).

system of preferences for students who have completed AP courses in their high schools.<sup>228</sup> As a result of these decisions and differences in the availability of AP classes in California high schools, a facially race-neutral admissions policy systematically disadvantages black and Latino students by reducing their access to more intellectually challenging courses and thus their ability to gain acceptance to the University of California's public universities.<sup>229</sup> For example, the 1998 applicants to UCLA "had an average high school GPA of 4.19 (on a 4.0 scale), which is achievable only as a result of having taken many AP classes."<sup>230</sup> In addition, students admitted to UCLA "took an average of 16.8 AP and honors-level courses in high school."<sup>231</sup> The *Daniel* plaintiffs allege that this favorable admissions policy towards high-school students completing AP courses, combined with the relative unavailability of AP courses in predominantly nonwhite secondary schools, placed black and Latino students at a disadvantage in gaining access to the California public university system.<sup>232</sup>

The plaintiffs seek on behalf of themselves, and for their proposed plaintiff class,<sup>233</sup> that all qualified students have reasonable access to AP courses.<sup>234</sup> The court entered a stay in the case while the parties attempted to reach a settlement.<sup>235</sup> During the stay and settlement negotiations, the ACLU's team of educational experts lobbied the California legislature for changes in the distribution of AP courses.<sup>236</sup> The combination of litigation and political action created sufficient pressure and attention to compel the enactment of legislation creating the Advanced Placement Challenge Grant Program.<sup>237</sup> The program provides for four-year grants of up to \$30,000 to 550

<sup>228</sup> In 1984, the University of California began "rewarding extra grade points" for students who completed AP classes. Louis Sahagun & Kenneth R. Weiss, *Bias Suit Targets Schools Without Advanced Classes*, L.A. TIMES, July 28, 1999, at A1; see also Daniel Complaint, *supra* note 219, at 23 ("The University of California automatically raises by one point the GPA of its prospective students for every AP class that they took. For example, if a student receives a A-, or a 3.5, in an AP class, the grade in that class is recorded as a 4.5.").

<sup>229</sup> AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, SAMPLE OF CASES ON OUR DOCKET: Daniels v. State of California, at <http://www.aclu-sc.org/litigation/cases.shtml> (last visited Apr. 27, 2001) [hereinafter ACLU, CASES ON OUR DOCKET]; see also Daniel Complaint, *supra* note 212, ¶¶ 4-10 (discussing the University of California admissions policy regarding AP courses).

<sup>230</sup> Daniel Complaint, *supra* note 212, ¶ 20.

<sup>231</sup> *Id.*

<sup>232</sup> See *id.* ¶¶ 16, 20.

<sup>233</sup> In their complaint, the plaintiffs seek certification for a class "consist[ing] of all current and future California public high school students who are being denied by virtue of defendants' policy and practice, equal and adequate access to AP classes." *Id.* ¶ 35.

<sup>234</sup> See ACLU, CASES ON OUR DOCKET, *supra* note 229.

<sup>235</sup> See *id.*

<sup>236</sup> *Id.*

<sup>237</sup> See CAL. EDUC. CODE §§ 48980(m), 52247 (West Supp. 2001); Valerie Small Navarro, *Crucial Votes on AP Classes, DNA and Police*, ACLU NEWS, July/Aug. 2000, at <http://www.aclunc.org/aclunews/news42000/sacto-report.html>.

high schools to use for AP course development.<sup>238</sup> Although both the Northern and Southern California ACLU organizations had sought much broader changes,<sup>239</sup> the Challenge Grant Program is a structural change that improves educational access for black and Latino students as well as low-income students of all races.

Similarly, in *Rios v. Regents of the University of California*, an interracial coalition is addressing the same problem with the University of California's admissions preference from a different angle.<sup>240</sup> In *Rios*, a group of African-American, Latino, and Filipino-American students filed a class-action lawsuit in federal district court alleging that "U.C. Berkeley's undergraduate admissions process violates federal civil rights laws."<sup>241</sup> In addition to the named plaintiffs, a number of minority and civil rights organizations joined this litigation, including the Mexican American Legal Defense and Educational Fund, the NAACP Legal Defense and Educational Fund, the Asian Pacific American Legal Center of Southern California, the Lawyers' Committee for Civil Rights of the San Francisco Bay Area, the ACLU Foundation of Northern California, the NAACP Oakland Imani Youth Council, the California League of United Latin American Citizens, and the Kababayan Alliance, an organization of Filipino high school students.<sup>242</sup>

The plaintiffs challenge a number of UC Berkeley's admissions policies that disproportionately disadvantage minority students.<sup>243</sup> The plaintiffs address the same issues present in *Daniel*, but at the university, rather than the high-school, level. The plaintiffs argue that

<sup>238</sup> CAL. EDUC. CODE § 52247.

<sup>239</sup> See Navarro, *supra* note 237; ACLU, CASES ON OUR DOCKET, *supra* note 229.

<sup>240</sup> Complaint for Declaratory and Injunctive Relief, *Rios v. Regents of the Univ. of Cal.*, No. CV 99-0525 SI (N.D. Cal. filed Feb. 2, 1999) [hereinafter *Rios* Complaint], available at <http://www.aclunc.org/discrimination/ucb-brief.html>.

<sup>241</sup> *Minority Students Sue U.C. Berkeley for Discrimination: Admissions Process Violates Federal Civil Rights Laws*, ACLU NEWS, Mar./Apr. 1999 [hereinafter *Minority Students Sue U.C. Berkeley*], at <http://www.aclunc.org/acluncnews/news299/admissions.html>.

<sup>242</sup> See *Rios* Complaint, *supra* note 240.

<sup>243</sup> The *Rios* Complaint states:

Defendants' current admissions process discriminates against Latino, African American, and Filipino American applicants in several respects, including, but not limited to, the following: it grants unjustified preferential consideration to applicants who have taken certain courses that are less accessible in high schools attended largely by African American, Latino, and Filipino American students. It also encourages and allows admissions officers to place undue and unjustified reliance upon standardized test scores. . . . Even the policy's provision for the admission of students who fail to meet academic eligibility requirements, called "admissions by exception," has been implemented by Defendants to disproportionately favor white applicants.

U.C. Berkeley's current process . . . gives enormous preferences to students who take Advanced Placement, or AP, courses. . . . [M]any schools with high concentrations of African Americans, Latinos and Pilipino Americans have no AP courses at all. Rewarding applicants with slightly higher SAT scores who had access to AP courses simply because of where they attended high school doesn't reward merit, it rewards privilege.<sup>244</sup>

The suit seeks to enjoin the university's existing admissions process.<sup>245</sup> As in *Daniel*, the ACLU of Northern California combined these litigation efforts with political lobbying for passage of the Advanced Placement Challenge Grant Program.<sup>246</sup>

The *Daniel* and *Rios* suits evince a distinct move towards critical race praxis, unlike the Lowell litigation. These suits seek to interrupt the systemic inequality that developed out of a history of residential segregation, and that was reinforced through historical employment segregation and racial discrimination that limited upward mobility.<sup>247</sup> By providing additional points for affluent schools, the university system's facially race-neutral admissions standard reinforces the continuing legacy of segregated housing that has resulted in a lack of equal opportunity and resources for many minorities.<sup>248</sup> These suits interrupted this systemic discrimination by denying rewards for the privilege of attending an affluent school.

The suits have also facilitated interracial healing by bringing together diverse organizations with mutual interests.<sup>249</sup> Rather than becoming trapped by competing claims of racial discrimination, the *Daniel* and *Rios* plaintiffs seek structural change of an unequal system. They want to alter facially race-neutral policies—the additional admissions points for AP classes and the distribution of AP classes throughout the state's schools—that preserve privilege derived from historical discrimination. In addition, although both suits acknowledge the present racial inequality between white and Asian-American students on the one hand, and black and Latino students on the other, neither group of plaintiffs has positioned its claims in direct opposition to the Asian-American students' access to AP courses or their admission to the UC colleges. This tactic avoids the difficulties of competing claims

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<sup>244</sup> *Minority Students Sue U.C. Berkeley*, *supra* note 241 (quoting NAACP attorney Kimberly West-Faulcon).

<sup>245</sup> See *Rios Complaint*, *supra* note 240.

<sup>246</sup> See ACLU, CASES ON OUR DOCKET, *supra* note 229.

<sup>247</sup> See *supra* Part II.A.1 (discussing antisubordination practice's goal of interrupting systemic inequality).

<sup>248</sup> See *Harris*, *supra* note 64, at 1746; see also *S.F. NAACP v. S.F. Unified Sch. Dist.*, 576 F. Supp. 34, 58-59 (N.D. Cal. 1983) (including provisions in desegregation consent decree to address the continuing impact of residential segregation affecting public schools' racial composition), *rev'd*, 896 F.2d 412 (9th Cir. 1990).

<sup>249</sup> See *supra* note 234 and accompanying text.

of discrimination or unequal access present in the Lowell litigation. The *Daniel* and *Rios* plaintiffs defined the contours of the litigation as a means to create equality for all California students, not to benefit one particular group.<sup>250</sup>

The plaintiffs in the Lowell litigation also could have framed their litigation in a manner that promoted educational equality for all students in the school district. Throughout the political and legal struggle in the SFUSD, CAA's Henry Der articulated a vision of the conflict that was similar to the *Daniel* and *Rios* plaintiffs' framing of their own litigation. Rather than seeking more opportunities solely for Chinese-American students within the existing admission system,<sup>251</sup> CAA, like the *Rios* plaintiffs, challenged the exclusionary structure of the admission system itself.<sup>252</sup> In the midst of the Lowell litigation, CAA proposed a "combined achievement/lottery system" for Lowell that would place students who scored above a cutoff score between 50 and 55 out of a possible 69 on the standardized basic skills test in a pool from which the school district would select students for Lowell at random.<sup>253</sup> By randomly selecting students from a broader eligible pool, students from a variety of backgrounds would have more opportunity to attend Lowell.

It would have been difficult for the plaintiffs in Lowell to adopt a stance similar to the *Rios* plaintiffs without completely reversing the premise of their suit. Unlike the litigants in *Rios* who were disproportionately excluded from admission to the UC schools, the Lowell plaintiffs experienced discrimination based on their success under the current admissions system. Thus, the Lowell plaintiffs were not only invested in the current means of evaluating merit, they sought to have restrictions upon that system—the use of race-conscious admissions criteria—removed to allow more Chinese-American students to gain admission.

The Lowell plaintiffs, however, could have adopted a position similar to that of the *Daniel* plaintiffs by seeking an increase of educational opportunities. The CAA addressed the "outcry for quality

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<sup>250</sup> See *supra* notes 233-34 and accompanying text (describing the plaintiffs' proposed class).

<sup>251</sup> See Lim, *supra* note 124.

<sup>252</sup> See *id.*; see also CHINESE FOR AFFIRMATIVE ACTION, EDUCATION PROGRAM (2001), at <http://www.caasf.org> (last visited May 2, 2001) [hereinafter EDUCATION PROGRAM] ("CAA has consistently advocated for policies that both promote integrated educational environments and provide high quality education for public school students of all racial, linguistic and economic backgrounds.")

<sup>253</sup> Lim, *supra* note 124. A similar lottery system was already in place for every SFUSD alternative school other than Lowell. *Id.* CAA's Henry Der argued that the "test does not even measure analysis, so that the difference between a student who scores a 59 and another who scores a 64 is practically negligible. There's nothing magical about these point scores." *Id.*



schools and more educational choices in the district" by advocating for the District to create additional academic high schools.<sup>254</sup> CAA began working with SFUSD in 1994 to transform the troubled Galileo High School into the Galileo Academy of Science and Technology.<sup>255</sup> Galileo, unlike Lowell High School, is not designated as an alternative school with exclusionary admissions criteria, but instead gives preference to the largely "high-risk and limited-English-speaking students" living in the school's surrounding Tenderloin and Chinatown neighborhoods.<sup>256</sup> The Lowell plaintiffs could have similarly challenged the systemic discrepancies between the educational resources available at different schools within the District.<sup>257</sup> Rather than attempting to give even more Chinese-American students access to Lowell, the plaintiffs could demand that SFUSD create additional schools that provide students with similar high-quality education.

The final admissions plan SFUSD adopted in April 2001 had a policy approach very similar to that of CAA.<sup>258</sup> The school district articulated the objectives of its new plan as "first, to eradicate existing segregation and all traces of past segregation in SFUSD's schools, programs, and classrooms, and second, to improve academic excellence for all students, but particularly students whose performance has lagged behind others."<sup>259</sup> In the end, CAA's vision of unifying efforts to desegregate with efforts to improve educational opportunities for all students prevailed over the Lowell plaintiffs' narrow effort to achieve individual gains.<sup>260</sup>

Although the Lowell litigation forced SFUSD to reevaluate its assignment plan, the 2001 plan contained its dual objectives in spite of, rather than because of, the approach the Lowell plaintiffs adopted.

<sup>254</sup> EDUCATION PROGRAM, *supra* note 252.

<sup>255</sup> *See id.*

<sup>256</sup> Mamie Huey, *Galileo High School to Become Premier Academic Institution*, *ASIANWEEK*, Feb. 10, 1995, at 5.

<sup>257</sup> Consistent with the *Daniel* plaintiffs' concerns, *supra* notes 220-26 and accompanying text, black and Latino students in the SFUSD had less access to advanced placement and honors classes than other students:

High schools with *low* African American and Latino enrollment (where the *combined* enrollment of these two groups was just 12-13%) offer their students an average of 29 AP or honors courses. High schools with high African American and Latino enrollment, however, offered just 5 AP and honors courses on average.

EXCELLENCE FOR ALL, *supra* note 2, at 4; *see also id.* at 9-15 (discussing strategies for addressing the lack of equity in the allocation of resources throughout the district).

<sup>258</sup> *See id.* at 2, 14-15.

<sup>259</sup> Press Release, *supra* note 150.

<sup>260</sup> Lee Cheng, vice chairperson of the CADC's Educational Reform Task Force, stated at one point that if Lowell were to become 80% to 90% Chinese American, "it would not necessarily be a bad thing. Chinese Americans have been so oppressed in the past that for us to achieve that sort of level, one that would be temporary because of changing demographics, would be quite an accomplishment." Lim, *supra* note 124.

One can only speculate that had the Lowell plaintiffs adopted an approach similar to the *Daniel* plaintiffs, a great deal of additional resources, time, and effort would have been directed earlier toward securing greater opportunities for all the students in the district. The plaintiffs' actual approach, however, caused SFUSD to lose ground in several significant areas.<sup>261</sup>

3. *Benefitting from the Educative Functions of Briefs and Legal Memoranda*

Professor Yamamoto and others have suggested one practical strategy for implementing critical race praxis in litigation: incorporating a "critical inquiry into the interminority dynamics at the heart of the case" in the "legal filings, oral arguments, and court rulings."<sup>262</sup> Yet, David Levine, who served as an attorney for the Lowell plaintiffs, later wrote that it is unlikely that the federal district and appellate courts considering the Lowell case "would have been particularly moved by" such briefs and motions in light of the Supreme Court's colorblind doctrine.<sup>263</sup> Although the proposed educative approach might not challenge the premise of colorblindness, it could offer judges an account of minorities' present-day experience of the vestiges of discrimination, which, in turn, could justify the use of race-conscious remedies for particular minorities consistent with a colorblind framework.

An enormous knowledge gap exists between the daily impact of racial prejudice upon the lives of minorities and the judicial or social perception of the degree to which vestiges of historical racial discrimination still permeate the lives of minorities today. Increasingly, challenges to race-conscious programs succeed because the institutions defending these programs cannot satisfy the evidentiary burden necessary to establish the present-day effect of historical or present racial discrimination.<sup>264</sup> The challenges brought by minority plaintiffs such as the Lowell plaintiffs serve to reinforce the perception that racial discrimination no longer harms "good" minorities. Because many legal professionals are unaware of the differences in the history and dynamics of racial subordination of particular minority groups, it is easier for courts to treat all minorities as a uniform group. Courts thus conclude that if a program harms one minority group—for instance, Chinese Americans—then it must be harmful to all minority groups.

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<sup>261</sup> See *supra* notes 5-9 and accompanying text (discussing the impact of the litigation upon admissions offers from Lowell given to black and Latino students).

<sup>262</sup> YAMAMOTO, *supra* note 20, at 32.

<sup>263</sup> Levine, *supra* note 5, at 137-38.

<sup>264</sup> See, e.g., *supra* note 54 and accompanying text.

An alternative approach using critical race praxis would use legal filings as an educational opportunity to provide judges with historical, social, political, and cultural information about various minority groups in the United States and their diverse histories of racial subordination. In a sense, this strategy seeks to transform the literary narrative in much of the critical race scholarship into a legal presentation of information beyond the knowledge and experience of many nonminority legal professionals.<sup>265</sup>

Over time, these efforts could succeed in creating a broader knowledge among legal professionals about the various historical and present-day impacts of racial discrimination upon different minority groups. Ultimately, this could provide a court with the ability to perceive the necessary evidence to mandate a remedial program for some minority groups and abandon the remedy for others, an approach courts have yet to adopt.<sup>266</sup> The Lowell litigation presented an ideal opportunity to employ this strategy. The school district had well-documented information regarding the lingering effect of vestiges of historical discrimination upon the present-day status of black and Latino students, as well as how this effect was distinct from the experiences of upper- and middle-class Chinese Americans who had overcome the effect of historical discrimination in the educational context. Had the SFUSD presented its case in a manner that supported the continuing use of race-conscious admissions for black and Latino students, the court may have been willing to stretch beyond a binary paradigm and permit remedial race-conscious programs appropriate for particular racial groups.

### CONCLUSION

*We've got the rights. But we've got no justice.*<sup>267</sup>

Racial minorities in the United States have the right to formal equality, but racial justice has remained elusive. Critical race theory scholarship and the plethora of critical literature following in its wake emerged from the social and political movements both within and outside of law schools as formal equality cracked open the doors to

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<sup>265</sup> See CHANG, *supra* note 26, at 64.

<sup>266</sup> This assertion rests upon the assumption that the evidentiary basis for a remedial justification would exist if a court uses a broader understanding of racial discrimination that incorporates a historical understanding of race. Often, courts will hold that racially segregated schools are the result of irremediable "societal discrimination" in the absence of explicit and deliberate discriminatory acts by the government. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22 (1971). Through litigants' repeated use of an educative approach, courts may someday recognize that the status of black and Latino students is due to more than vague "societal discrimination," but is, in fact, due to the present-day impact of discriminatory state and local policies that have gone unremedied.

<sup>267</sup> YAMAMOTO, *supra* note 20, at 70 (quoting Alice Aiwohi).

what was once an exclusively white (and male) legal profession.<sup>268</sup> Yet much of this literature remains embedded in the language and context of academia, far removed from the challenges of today's civil-rights litigation. This Note urges critical scholars to pass back through those doors and transform the visions of critical race praxis into practical tools for political lawyers struggling to realize racial justice.

Emerging controversies over school desegregation and educational reform provide an opportunity for critical race praxis to expand the availability of race-conscious programs permissible under current equal protection jurisprudence. Arguably, primary and secondary school admissions provide a more fertile ground for successful race-conscious programs because opponents' merit-based arguments are less compelling when students are young and have had less opportunity to accomplish achievements or skills that distinguish one student from another.<sup>269</sup> With the issue of merit less predominant, courts will face the question of whether the historical use of state racial classifications—for example, discriminatory lending practices that created entrenched residential segregation<sup>270</sup>—still contributes to the present-day status of disadvantaged minority children in our public schools. This creates an opportunity for courts to revisit a historical definition of race that incorporates the varied histories of racial minority groups and the vestiges of discrimination that still remain.

Most importantly, this impending litigation will involve the multi-racial demographics that define our country's future. As racially diverse generations of children move through secondary school, seek college admissions, and enter the workforce, courts will increasingly face equal protection challenges with complex interracial dynamics. Rather than ignoring the legacy of racial subordination that shadows these conflicts by embracing colorblind doctrine, critical race praxis offers litigants and attorneys a strategy for achieving racial justice in a multiracial society.

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<sup>268</sup> See Sumi Cho & Robert Westley, *Critical Race Coalitions: Key Movements that Performed the Theory*, 33 U.C. DAVIS L. REV. 1377 (2000) (discussing the history of critical race theory's emergence in legal academia).

<sup>269</sup> See Note, *supra* note 109, at 955-56. *But cf. supra* notes 122-36 and accompanying text (describing the merit-based arguments some parents used to justify their desire to end race-conscious admissions programs in the SFUSD).

<sup>270</sup> See, e.g., Sugrue, *supra* note 86, at 280-81.