

January 1998

Beyond Black and White: Chinese Americans Challenge San Francisco's Desegregation Plan

Caitlin M. Liu

Follow this and additional works at: <https://scholarship.law.berkeley.edu/aalj>

Recommended Citation

Caitlin M. Liu, *Beyond Black and White: Chinese Americans Challenge San Francisco's Desegregation Plan*, 5 *ASIAN AM. L.J.* 341 (1998).

Link to publisher version (DOI)

<https://doi.org/10.15779/Z38CZ8R>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Asian American Law Journal by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

Beyond Black and White: Chinese Americans Challenge San Francisco's Desegregation Plan

Caitlin M. Liu†

I.

INTRODUCTION

For the past 15 years, San Francisco has taken aggressive measures to desegregate its public schools. Originally conceived to enhance equal education opportunities for racial and ethnic minority children, the desegregation plan has come under increasing attack in recent years for its discriminatory effects on students of Chinese descent, especially with regard to admissions into Lowell, the city's elite magnet high school. Four years ago, three Chinese-American students filed a lawsuit against the school district in the United States District Court for the Northern District of California, claiming violation of their constitutional right to equal protection. Last May, U.S. District Court Judge William Orrick denied the plaintiff's motion for summary judgment.¹ The case is currently before the U.S. Court of Appeals of the Ninth Circuit.²

The lawsuit, *Ho v. San Francisco Unified School District*, is significant both for the impact it may have on San Francisco's public school system and the broader, spillover effects it may have on desegregation and affirmative action jurisprudence. Though its legal outcome is not yet certain, the case has already attracted national media attention as one of the first lawsuits filed by Asian Americans challenging school desegregation. It has galvanized factions between and within minority communities and given more tailwind to the political maelstrom against affirmative action. The case has also complicated the laws, policies and debates involving school desegregation, formerly an issue concerning only blacks and whites that must now take the interests of other racial minorities into account.³ In

© 1998 Asian Law Journal, Inc.

† J.D., University of California at Berkeley School of Law (Boalt Hall), 1998; M.P.P., John F. Kennedy School of Government, Harvard University, 1997; B.A., Stanford University, 1991.

1. See *Ho v. San Francisco Unified Sch. Dist.*, 965 F. Supp. 1316, 1318 (N.D. Cal. 1997).

2. See Brief for Plaintiffs-Appellants, *Ho v. San Francisco Unified Sch. Dist.*, 965 F. Supp. 1316 (9th Cir. 1997) (No. 97-15926).

3. See, e.g., RICHARD D. KAHLBERG, *THE REMEDY: CLASS, RACE AND AFFIRMATIVE*

the end, the lawsuit will surely underscore the difficulties of balancing the goal of integration in public education with the protection of individual rights, especially in an increasingly multicultural American society.

II.

CASE BACKGROUND

Ho v. San Francisco Unified School District arose as a direct challenge to a 1983 consent decree that mandated a wide range of measures aimed at ending de facto segregation in the San Francisco public school system. The court-ordered plan classified all school-age children into the following nine racial and ethnic categories: Spanish-surnamed, Other White, Black, Chinese, Japanese, Korean, Filipino, American Indian, and Other Nonwhite.⁴ It also spelled out recipe-like rules for determining the proper racial/ethnic balance of students within the district: each school must have students from at least four categories, no school may enroll more than 45% of their students from any one racial or ethnic group, and designated "alternative" schools may not enroll more than 40% of their students from any single group.⁵ The decree additionally required that the racial/ethnic composition of teachers, staff and administrators reflect that of the student population and that they be equitably assigned throughout the district.⁶ The consent decree was itself the culmination and resolution of litigation between the San Francisco Unified School District (S.F.U.S.D.) and the local chapter of National Association for the Advancement of Colored People (N.A.A.C.P.), which claimed that the district had promoted and maintained a segregated school system.⁷ The decree was ordered by Judge Orrick, the same district court judge who later ruled on the summary judgment motion in the *Ho* case.

Though intended to improve the educational opportunities of disadvantaged minority children, the consent decree produced some unintended effects. The eye of a brewing storm was Lowell, one of the "alternative" schools and the district's magnet high school. One of the most famous and prestigious public high schools in the United States and the oldest high school west of the Mississippi,⁸ Lowell counts a governor, two Nobel laureates, and a Supreme Court justice among its distinguished alumni.⁹ Per-

ACTION 4, 8, 72-73 (1995) (documenting how desegregation and affirmative action policies were rooted in government concerns in the 1960's about the plight of black Americans and describing the continuing hostilities among whites toward affirmative action and desegregation policies aimed at helping blacks).

4. See *San Francisco N.A.A.C.P. v. San Francisco Unified Sch. Dist.*, 576 F. Supp. 34, 53 (N.D. Cal. 1983).

5. See *id.* at 53-54.

6. See *id.* at 57.

7. See *id.* at 44-45.

8. See Jane Meredith Adams, *Education Tables Are Turned; Whites With Lower Scores Can Enter San Francisco School*, CHI. TRIB, Jan. 1, 1996, at 3.

9. Those alumni are former California Governor Edmund G. Brown, Sr., physicist Albert

haps 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.

Problems with the desegregation plan began to surface with San Francisco's shifting demographics. When the consent decree was entered in 1983, children of Chinese descent comprised only 19.5% of San Francisco's school-age student population,¹⁰ but their numbers have increased rapidly over the years. By 1993 children of Chinese descent comprised nearly a third of the school-age population, and they began bumping up against the fixed 40% ceiling for any single racial or ethnic group at Lowell. To comply with the consent decree and keep a lid on its Chinese American enrollment, Lowell made it more difficult for children of Chinese descent to gain admissions than any other racial or ethnic group, including whites.¹¹

By 1993, students of Chinese descent had the lowest acceptance rate of any racial or ethnic group at Lowell. The magnet school accepted 35% of its Chinese American applicants but 65% of white applicants, though half of the white students who were accepted had lower entrance scores than all of the students of Chinese descent who were accepted. Ironically, white students—a group that had decreased in numbers in the district over the years—enjoyed the highest acceptance rate of all the racial/ethnic groups.¹² Originally intended to help disadvantaged, minority children, the consent decree had turned into what some derisively called “affirmative action for whites.”¹³

Angry over the treatment of their children, Chinese American parents complained to school officials and petitioned local political leaders to no avail. In 1992, the Chinese American Democratic Club (C.A.D.C.) in San Francisco began organizing parents and a year later formed the Asian American Legal Foundation to lay the groundwork for a lawsuit.¹⁴ With the backing from C.A.D.C. and the Asian American Legal Foundation, *Ho v. San Francisco Unified School District* was filed in July 1994 in the

Michelson, physiologist Joseph Erlanger, and Justice Stephen G. Breyer. Other prominent Lowell alumni include naturalist Dian Fossey and artist Alexander Calder. See Elaine Woo, *Caught on the Wrong Side of the Line? Chinese Americans Must Outscore All Other Groups to Enter Elite Lowell High in San Francisco*, L.A. TIMES, July 13, 1995, at A1.

10. See *San Francisco N.A.A.C.P. v. San Francisco Unified Sch. Dist.*, 576 F. Supp. 34, 37 (N.D. Cal. 1983).

11. See Adams, *supra* note 8, at 3.

12. See Laura J. Foo and Laura Ho, *The Lowell Case: Don't Litigate, Cooperate*, S.F. EXAMINER, July 5, 1995, at A13.

13. Adams, *supra* note 8, at 3. See also Selena Dong, *Too Many Asians: The Challenge of Fighting Discrimination Against Asian Americans and Preserving Affirmative Action*, 47 STAN. L. REV. 1027, 1033 (1995).

14. See Michael W. Lynch, *San Francisco's Chinese Wall*, J. AM. CITIZENSHIP POL'Y REV., May-June 1997, at 6.

United States District Court for the Northern District of California.¹⁵

Plaintiffs Brian Ho, Hilary Chen and Patrick Wong were school-aged children of Chinese descent who claimed to be victims of discriminatory treatment under the San Francisco consent decree. Brian Ho, five years old at the time the lawsuit was filed, was rejected from two kindergarten classes, including one in his neighborhood, because the two schools already had the maximum percentage of students of Chinese descent allowed under the consent decree.¹⁶ Eight-year-old Hilary Chen was rejected from three elementary schools, also because the schools had "capped out" on the number of students of Chinese descent.¹⁷ The third plaintiff, Patrick Wong, was 14 at the time the suit was filed. Patrick had applied to and was rejected from Lowell.

Lowell rejected Patrick Wong because his application score—an index that combines junior high grades with the results from an entrance exam—was not high enough. He had scored 58 out of a perfect score of 69, which was lower than the minimum score of 62 required for students of Chinese descent for acceptance into Lowell.¹⁸ But it was a score that would have gained him entry into the school had he been white, black, Latino, or even Japanese or Korean.¹⁹ In addition to his rejection from Lowell, Patrick was turned away from four other public high schools to which he had applied because those schools had "capped out" for students of Chinese descent.²⁰

Backed by the C.A.D.C., Patrick's mother, along with the parents of Brian Ho and Hilary Chen, took their case to court. Named as defendants were S.F.U.S.D., the local and state boards of education, the California Department of Education, the Superintendent of the District and the Acting Superintendent of Public Education of the State of California. Also named as a defendant was the San Francisco chapter of the N.A.A.C.P., which had brought the lawsuit two decades ago that culminated in the consent decree and launched S.F.U.S.D.'s desegregation policies. In 1996, the District Court granted a motion filed by the *Ho* plaintiffs to certify the class on whose behalf the lawsuit would be pursued: "all children of Chinese descent of school age" in the San Francisco Unified School District.²¹

In response to the lawsuit, Lowell changed its admission policy so that all students regardless of race were subject to the same cutoff score for

15. *See id.*

16. *Ho v. San Francisco Unified Sch. Dist.*, 965 F. Supp. 1316, 1318 (N.D. Cal. 1997).

17. *Id.* at 1319.

18. *Id.*

19. At the time, the minimum score for whites and other Asian Americans was 58. *See Quotas in San Francisco: Hearings on Affirmative Action Before the Senate Comm. on the Judiciary*, 105th Cong., 1st Sess. (1997) [hereinafter *Hearings*] (testimony of Charlene F. Loen, mother of Patrick Wong).

20. *Id.*

21. *Id.*

80% of the available seats. Currently the school reserves 20% of its seats for special admissions based on considerations such as socioeconomic factors, extracurricular activities, and race.²² S.F.U.S.D. continues to enforce the consent decree's other mandated measures to ensure racial balancing at other schools.

The *Ho* plaintiffs-appellants received some unexpected support last year from the California Board of Education, one of the named defendants. The state board decided to switch alliances and oppose the other defendants—including the local school district and the local chapter of the N.A.A.C.P.—even though they are all technically on the same side in the litigation. This highly unusual turn of events occurred after California Governor Pete Wilson criticized the desegregation plan as a “perversity of the affirmative action mind-set” in a letter to the state board.²³ In response the members, all Wilson appointees, voted to support the governor.²⁴

III.

LEGAL IMPLICATIONS

A. *Current Status of the Case*

As a court order, the consent decree is not covered by Proposition 209, the California initiative passed by voters in 1996 that bans local or state government affirmative action programs.²⁵ The District Court's denial of the plaintiff's motion for summary judgment has also effectively upheld the consent decree for the time being.²⁶ In his ruling issued on May 7, 1997, Judge Orrick stated that the racial classifications mandated by the consent decree would be subject to review under a standard of “strict scrutiny,” but a decision on the merits of the case was not possible at that time because there were outstanding factual issues that required a trial to resolve.²⁷

1. *Arguments of Plaintiffs-Appellants Before the Ninth Circuit*

Procedural issues aside, the crux of the *Ho* plaintiffs' substantive legal case is that the provisions of the consent decree do not pass constitutional muster under “strict scrutiny,” the standard of review set forth by the Supreme Court for examining racial classifications imposed by federal, state, or local government. To survive strict scrutiny, remedial measures

22. See *Ho v. San Francisco Unified Sch. Dist.*, 965 F. Supp. 1316, 1319 (N.D. Cal. 1997).

23. Nanette Asimov, *Wilson Sides With S.F. Chinese Americans on Schools Lawsuit to End Court-Supervised Desegregation*, S.F. CHRON., Aug. 21, 1997, at A20 [hereinafter Asimov, *Wilson Sides With S.F. Chinese Americans*].

24. See *id.*

25. See CAL. CONST. art. I, § 31.

26. See *Ho v. San Francisco Unified Sch. Dist.*, 965 F. Supp. at 1316.

27. See *id.*, at 1324-25.

that require racial classifications must be "narrowly tailored" to serve a "compelling government interest."²⁸ There must also be a "strong basis in evidence" that the remedial measures are necessary.²⁹

The plaintiffs-appellants argue that the defendants had failed to present sufficient evidence of a compelling state interest to justify the consent decree because there is no longer any de jure discrimination in the school district, no constitutional right or mandate to a particular degree of racial balancing, and no constitutional right to equal education results.³⁰ They also contend that the defendants failed to present evidence that the consent decree is narrowly tailored; rather than specifically limiting the remedial program to just the victims of S.F.U.S.D.'s past discrimination, the consent decree purports to confer benefits indiscriminately to all children in the district.³¹ For example, the consent decree mandates an "academic excellence" program that serves all students, including whites who have never suffered from discrimination,³² and contains provisions concerning housing development.³³

Another argument the plaintiffs advance is that the consent decree should have only lasted for the time necessary to carry out the decree's goals, not in perpetuity.³⁴ Since the S.F.U.S.D. has already accomplished the consent decree's intended goal of eliminating de jure segregation, the plaintiffs argue, the decree ought to be dissolved.³⁵

The plaintiffs' appeal is supported by the California Board of Education, which has filed its own brief to the Ninth Circuit arguing that the District Court had failed to properly apply a strict scrutiny standard to this case and urging that the court reverse the decision of the district court.³⁶

2. *Arguments of Defendants-Appellees Before the Ninth Circuit*

Focusing mainly on upholding the District Court's denial of summary judgment, the defendants-appellees contend that there are many factual disputes that can be resolved only by a trial.³⁷ Whether the consent decree

28. *Adarand Constructors Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that federal practice of offering financial advantages to prime contractors who employ minority subcontractors is a race-based remedy that warrants "strict scrutiny").

29. *Shaw v. Hunt*, 517 U.S. 899, 902 (1996) (holding that race-based redistricting that is not narrowly tailored to serve a compelling government interest constitutes a violation of the equal protection clause).

30. See Brief for Plaintiffs-Appellants at 21-26, *Ho* (No. 97-15926).

31. See *id.* at 27-30.

32. See *id.* at 28.

33. See *id.* at 31.

34. See *id.* at 41-42.

35. See *id.* at 43.

36. See Brief for Defendant-Appellee Board of Education of the State of California at 11-12, *Ho v. San Francisco Unified Sch. Dist.* (9th Cir. 1997) (No. 97-15926).

37. See Joint Opposition Brief of Defendants-Appellees at 26, *Ho v. San Francisco Unified Sch. Dist.* (9th Cir. 1997) (No. 97-15926).

passes strict scrutiny, i.e., the measures are narrowly tailored and serve a compelling government interest, depends on specific facts. Arguing that it is the plaintiffs who carry this burden, the defendants claim that the plaintiffs have failed to demonstrate that only legal issues remain in this case.³⁸ Defendants also contend that plaintiffs have failed to establish any right as a matter of law to dissolve the consent decree.³⁹

B. Effects on the Future of School Desegregation and Affirmative Action

Though its legal outcome is not yet clear, the *Ho* case, no matter how it is ultimately resolved, will likely play a significant and lasting role in shaping the contours of future laws affecting school desegregation and affirmative action. In some ways, the lawsuit may be regarded as a battleground between two divergent streams of constitutional jurisprudence that have progressed through federal courts in the last few decades involving race-conscious policies, the extent of judicial powers and the right to equal protection.

The first judicial revolution started with *Brown v. Board of Education I* in 1954,⁴⁰ when the Supreme Court rejected the "separate but equal" doctrine of *Plessy v. Ferguson*⁴¹ and held that maintaining segregated schools constituted a violation of the right of black children to equal protection under the Fourteenth Amendment. To ensure compliance with *Brown I*, the Supreme Court in *Brown v. Board of Education II* gave the District Court the mandate to monitor the school district's desegregation.⁴² Out of *Brown I and II* came several legal movements: the use of racial classifications in government actions, active promotion of minority interests under the equal protection clause,⁴³ and an expanded role of the federal judiciary in overseeing school desegregation efforts nationwide,⁴⁴ such

38. *See id.* at 39.

39. *See id.* at 40.

40. 347 U.S. 483 (1954).

41. 163 U.S. 537 (1896) (holding that the maintenance of "colored" train compartments separate from "white" compartments is constitutionally permissible), *overruled by* *Brown v. Board of Education*, 347 U.S. 483 (1954).

42. 349 U.S. 294 (1955) (empowering the lower court to appraise school authorities to ensure compliance with the constitutional principles of *Brown I*).

43. *See generally* *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971) (upholding involuntary busing to accomplish desegregation goals); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (holding that federal program requiring that 10% of certain construction grants be awarded to minority contractors did not violate equal protection); and *Local Number 93 v. City of Cleveland*, 478 U.S. 501(1986) (upholding consent decree requiring local government to promote minority employees, even if the race-conscious measures benefit individuals who are not actual victims of discrimination).

44. *See* John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1130-31 (1996) (arguing that since *Brown*, federal courts have expanded their power to impose obligations on state institutions). *See also* W. Brevard Hand, *Affirmative Action: La Mort de la Republique? A Second Cry From the Wilderness*, ALA. L. REV. 799, 809 (1997) (arguing that after *Brown*, "there is virtually no area of education policy into which a fed-

as San Francisco's consent decree.

In recent years, however, a separate strain of constitutional jurisprudence has emerged. Differing from the explicitly race-conscious policies supported by many post-*Brown* courts⁴⁵ were other rulings, such as *City of Richmond v. Croson*⁴⁶ and *Adarand Constructors v. Peña*,⁴⁷ that regarded any use of racial classifications with skepticism and circumscribed governmental authority to enact race-based remedies.⁴⁸ Contrasting the color-consciousness of many post-*Brown* court rulings, this new jurisprudence purports to strive toward a colorblind ideal in government decisionmaking.⁴⁹ The two lines of judicial rulings also diverge in their use of the Fourteenth Amendment. While the *Brown*-influenced jurisprudence sought to advance minority interests on the grounds of equal protection, the new jurisprudence has been invoking the same constitutional principles to advance the interest of whites who have been disadvantaged by minority-favoring policies and programs.⁵⁰ The new jurisprudence also reduced the scope of district courts' powers in implementing desegregation decrees under *Missouri v. Jenkins*.⁵¹

These different judicial approaches have come head-to-head in the *Ho* case. The ultimate judicial ruling will likely affect not only the future of desegregation efforts but also the authority of federal courts to order and monitor their implementation. In equal protection jurisprudence, the *Ho* litigation provides an important testing ground for the likely success of third-party challenges to government remedial actions. Previously almost the exclusive domain of white versus black interests,⁵² the struggles over

eral district court cannot insert itself, including budgeting, staffing, administrative oversight, judgments about the locations of schools, and the aesthetic quality of schools").

45. See, e.g., *Swann*, 402 U.S. 1; *Fullilove*, 448 U.S. 448; and *Local Number 93*, 478 U.S. 501.

46. 488 U.S. 469 (1989) (holding that a city's plan to award at least 30% of its contracts to minority contractors, absent a showing of prior discrimination by the city, constituted a violation of the right to equal protection).

47. 515 U.S. 200 (1995).

48. See, e.g., *Croson*, 488 U.S. at 493 (in which Justice O'Connor refers to race-based measures as a "highly suspect tool"). *Croson* and *Adarand* also illustrate the Supreme Court's use of the heightened standard of "strict scrutiny" for evaluating race-based classifications used by local, state or federal government.

49. See, e.g., *Croson*, 488 U.S. at 495 (in which a plurality of the Court states that the "ultimate goal" ought to be the elimination of race from government decisionmaking).

50. See Alexandra Natapoff, *Trouble in Paradise: Equal Protection and the Dilemma of Inter-minority Group Conflict*, 47 STAN. L. REV. 1059, 1066 (1995) (arguing that the Supreme Court has been shifting toward a interpretation of the Equal Protection Clause that treats whites as a racial minority group).

51. 515 U.S. 70 (1995) (rejecting a district court's order of salary increases for school employees as part of a desegregation plan on the grounds that it exceeded the court's permissible scope of authority).

52. While almost all cases challenging affirmative action programs have been filed by whites, at least one other case was brought by a member of a racial minority challenging a government program intended to benefit another racial minority. In *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), cert. denied, 514 U.S. 1128 (1995), a Hispanic student prevailed in a lawsuit filed against a state university for maintaining a scholarship program that targeted only black students.

affirmative action and the use of racial classifications have now been complicated by the emergence of Asian Americans as a political and legal force. A minority group that has historically suffered from legally sanctioned discrimination, Asian Americans are claiming that they are again being harmed by government policies—this time, through race-based remedial actions.

The resolution of the *Ho* case will likely have a significant impact on the future of affirmative action policies in education and elsewhere. If the *Ho* plaintiffs prevail and the consent decree is struck down, it would undoubtedly further circumscribe the ability of government to enact race-based remedial measures. Dissolving the long-standing court order could also be a signal that the era of court-managed school desegregation is coming to an end. If, however, the consent decree is upheld, it could indicate a re-affirmation of the active judicial role in the tradition of *Brown II*. Upholding the desegregation plan and its use of racial classifications would be a noted retreat from the current judicial stance of suspicion and hostility toward color-conscious government actions.

IV.

POLITICAL CONSIDERATIONS

Until Brian Ho, Hilary Chen and Patrick Wong took their grievances to court, lawsuits challenging desegregation programs were largely the domain of white plaintiffs claiming reverse discrimination.⁵³ Not only is this case providing fresh momentum to the forces against affirmative action, it is also transforming the conventional view of desegregation in public education as purely a black and white issue. Long after the litigation has ended, the *Ho* case will likely be remembered as a critical turning point for the legal and political debate involving affirmative action and in particular, public education policies.

A more immediate effect of this lawsuit is its mobilization of Chinese American participation in the political and judicial process. Many Chinese Americans are outraged by the consent decree precisely because it sanctions the same kind of discrimination that harks back to the blatantly racist laws against Chinese in America more than 100 years ago. In 1866, when California was experiencing a growing Chinese immigrant community, the state enacted a law to withhold funding from schools that enrolled children of Chinese heritage to encourage schools to keep them out.⁵⁴ Testifying before Congress last year, the mother of one of the plaintiffs recounted a chillingly familiar tale: not only was her son rejected from Lowell because

53. Other lawsuits seeking to end desegregation programs in public schools have been filed, all by parents of white students, in Boston, Mass., Arlington, Va., Houston, Tex., and Akron, Ohio. See Louis Freedberg, *Oldest School Faces Modern Controversy: Affirmative Action Under Attack*, S.F. CHRON., Dec. 11, 1997, at A1.

54. See Lynch, *supra* note 14, at 6.

he was held to higher admissions standards as a Chinese American, he was also rejected from four other schools to which he had applied because of his ethnicity.⁵⁵ At school after school, when questioning why her son's application had been turned down, the mother heard the same refrain: "Too many Chinese."⁵⁶ To many Chinese Americans and other Asian Americans only too well aware of this nation's history of discrimination against people of Asian descent, the time had come to fight back.⁵⁷

But the *Ho* case has also carved deep divisions within the Asian American community and strained relations with other minority groups. Legally and symbolically, this lawsuit pits Chinese Americans directly against the N.A.A.C.P. and other minority groups – including Latinos, Native Americans and Southeast Asians – who currently gain from San Francisco's desegregation plan. Interminority conflicts notwithstanding, the case also has vocal critics within the Asian American and even Chinese American community.⁵⁸ Some have noted that if the *Ho* plaintiffs prevail in this case, their success will likely undermine affirmative action efforts in other areas, such as employment, where discrimination against Chinese- and Asian-Americans still exists.⁵⁹ One commentator has urged that *Ho* plaintiffs accept Lowell's revised admissions standards without challenging the other measures prescribed by the consent decree, since Chinese Americans are now receiving equal treatment as whites and other Asian Americans in gaining admissions into the magnet school, so that some affirmative action could be preserved for other disadvantaged students.⁶⁰

Not surprisingly, this case has found widespread support among people and groups against affirmative action. It has drawn praise from the leaders and organizers of the California Civil Rights Initiative, or Proposition 209, which has outlawed the use of racial preferences in the public

55. See *Hearings*, *supra* note 19 (testimony of Charlene Loen).

56. See *id.*

57. See Lynch, *supra* note 14, at 6 (describing laws excluding children of Chinese descent from public education in California over 100 years ago). See also Annie Nakao, *Asians Deeply Divided Over Affirmative Action: It's Not Just Whites Feeling Ill Effects of Race Preference*, S.F. EXAMINER, Sept. 22, 1996, at C1 (quoting University of California Regent Stephen Nakashima, a Japanese American who compared race-conscious programs that disfavor Asian Americans to the internment of his family during World War II); Stephen Schwartz, *Anti-Desegregation Bid Rejected*, S.F. CHRON., May 7, 1997, at A24 (quoting Amy Chang, president of the Asian American Legal Foundation, comparing Judge Orrick's summary judgment ruling as a continuation of the legal discrimination suffered by Asian immigrants over 100 years ago).

58. See Nakao, *supra* note 57, at C3 (quoting Henry Der, former director of Chinese for Affirmative Action). See also Maria Puente, *Asians, Whites Join Forces in School Integration Debate*, U.S.A. TODAY, Sept. 11, 1995, at A8 (quoting Ling-chi Wang, chairman of Asian-American studies at University of California at Berkeley).

59. See Eric K. Yamamoto, *Representing Race: Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 824 (1997).

60. See Haeryung Shin, Note, *Safety in Numbers? Equal Protection, Desegregation, and Discrimination: School Desegregation in a Multi-Cultural Society*, 82 CORNELL L. REV. 182, 223 (1996).

sector in California.⁶¹ Another prominent ally is Governor Wilson, a vocal opponent of affirmative action.⁶² Ironically, the original backers of the *Ho* case have tried to disassociate the lawsuit from these endorsements. “[M]any groups have tried to piggyback on our case and interpret it to fit their agendas,” said Roland Quan, who heads C.A.D.C. and also serves as president of the board of the Asian American Legal Foundation. “[T]his case is about ending discrimination and not at all about ending affirmative action.”⁶³

Politics and ideology aside, the lawsuit in some ways has become a tug-of-war over money between state and local education interests. The desegregation measures mandated by the consent decree include busing, after-school programs, development of new curricula, staff training and improvement of facilities,⁶⁴ and the court order further stipulates that these mandates be financed by the state of California.⁶⁵ The consent decree is bringing S.F.U.S.D. about \$30 million a year,⁶⁶ or about six percent of the district’s annual budget, an amount that some local educators have admitted they now depend on.⁶⁷ Since 1983, S.F.U.S.D. has reportedly received over \$400 million from the state because of the consent decree.⁶⁸ Whether this pipeline of funds will continue flowing hangs on the outcome of this case.

V.

CONCLUSION

For all Asian Americans, regardless of whether they support, oppose, or feel ambivalent about *Ho v. San Francisco Unified School District*, the lawsuit is most significant for what it symbolizes: a public struggle for justice. *Ho* also illustrates the need for courts to examine the validity and effects of race-based policies beyond the traditional black-white paradigm, particularly in the light of the growing interminority conflicts involving affirmative action and desegregation efforts. In an increasingly multicultural nation, the *Ho* case is surely a harbinger of greater difficulties to come in formulating any future race-conscious public policies.

61. See K.L. Billingsley, *Quota Foes Attack Judge's Decision on Racial Admissions*, WASH. TIMES, May 15, 1997, at A10.

62. See Asimov, *Wilson Sides With S.F. Chinese Americans*, *supra* note 23, at A20.

63. Alethea Yip, *New Support in School Desegregation Case*, ASIANWEEK, Sept. 5-11, 1997 <<http://www.asianweek.com/090597/schoolnews.html>>.

64. See *1983 Consent Decree With Modifications Required by Court Approved Stipulations and Orders through Nov. 5, 1993*, *San Francisco N.A.A.C.P. v. San Francisco Unified Sch. Dist.* (N.D. Cal. 1993) (No. C-78-1445 WHO).

65. See *San Francisco N.A.A.C.P. v. San Francisco Unified Sch. Dist.*, 576 F. Supp. 34, 58 (N.D. Cal. 1983).

66. See Asimov, *Wilson Sides With S.F. Chinese Americans*, *supra* note 23, at A20.

67. See Nanette Asimov, *S.F. Schools Diversity Plan Under Attack*, S.F. CHRON., Nov. 15, 1996, at A21.

68. See *id.*

