

## Book Review

# From Racial Politics to Political Race: Lani Guinier and Gerald Torres's The Miner's Canary

By Siobhan Stiglitz\*

Although a familiar metaphor, the title The Miner's Canary originates from a specific source. In his treatise on Indian Law, Felix Cohen claimed the status of Native Americans as a marker of the state of American politics and society: "Like the miner's canary the Indian marks the shift from fresh air to poison gas in our political atmosphere, and our treatment of the Indian...marks the rise and fall in our democratic faith."<sup>1</sup>

Authors Lani Guinier<sup>2</sup> and Gerald Torres<sup>3</sup> believe that the same is true for the treatment of African-Americans and other groups labeled by race.<sup>4</sup> Accordingly, as a first step, they map out a project of observing racial dynamics as a means of diagnosing larger problems in American politics and society. From these observations, they suggest ways of changing the atmosphere of the mine—contemporary American culture—as an alternative to simply treating the canary's illness—racial discontent—as an isolated phenomenon. The potential applications of the miner's canary as a metaphor, as described by Guinier and Torres, are far-ranging and involve any area in which race may play a role. Examples of racial profiling, labor disputes, community political organizing, higher education admissions, redistricting, affirmative action, the in-between racial position of Hispanics, the war on drugs, and the increase in the prison population are all woven into suggestions for refocusing debate and activism surrounding racial issues.

The second step of Guinier and Torres' project is to take the systemic problems signaled by the "canary" and use them to mobilize the forces of "political race." The authors use this term to signify a view of race that moves away from identity politics, that is, the belief that to support and understand African-American political advancement one

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1. LANI GUINIER & GERALD TORRES, THE MINER'S CANARY (2001) (quoting Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953)).

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4. GUINIER & TORRES, *supra* note 1, at 11.

must be black.<sup>5</sup> Instead, the authors propose an alternative definition of race:

[T]he concept of political race shocks us out of traditional ways of reading race. Blackness becomes disconnected—within this context—from biology, ancestry, and the prejudice of individuals. It becomes transformed into a political and social signifier, not just one of those who may descriptively be black but of all who are vulnerable under current hierarchies of power. We use blackness as a metaphor for social position vis-à-vis material privileges and resources within society. Political race helps us understand who is functionally black, whether the person identifies with blackness or not.<sup>6</sup>

Accordingly, race may refer to all those who are disenfranchised or denied access to the privileges of American society regardless of race: factory workers who are not allowed to unionize, immigrants who are denied the rights of citizens, rural residents whose schools have traditionally sent few children to the best state universities, or simply voters who are represented by a candidate whom they did not vote for and whose views they do not share. Guinier and Torres' vision is that many such groups will have natural affinities, rooted in the "oppositional consciousness" of race.<sup>7</sup> If encouraged to form cross-racial coalitions at a grassroots level, such alliances can lead to renewed participation in the democratic process. Once such collective voices have political representation, they will stand a far better chance at implementing social justice agendas.<sup>8</sup>

The creation and use of political race entails a third step, one that goes beyond pragmatic political realism to what the authors describe as a "faith in the unseen," a "sense of linked fate"<sup>9</sup> across racial boundaries, towards systemic democratic power-sharing.<sup>10</sup> The authors invoke such faith as a counter to theories of political self-interest that are based on the notion that political power is a zero-sum game. In this zero-sum

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5. See GUINIER & TORRES, *supra* note 1, at 98-99 (describing how an immigrant labor rights group, The Workplace Project, had to encourage participants to reject ethnic and home-country political allegiances in favor of a solidarity based on shared language and experiences with American employers).

6. GUINIER & TORRES, *supra* note 1, at 300.

7. See GUINIER & TORRES, *supra* note 1, at 28 (defining "oppositional consciousness" as the voluntary identification with others seen as similarly oppressed or marginalized. Those with such awareness "are able to see that as a group they are dominated and exploited; they reject the legitimacy of their subordinate position, which they are able to understand as a function of a system created by others; and they come to believe that collective action is their best form of resistance.").

8. GUINIER & TORRES, *supra* note 1, at 152-53, 166-67, 293.

9. GUINIER & TORRES, *supra* note 1, at 289.

10. GUINIER & TORRES, *supra* note 1, at 299.

scenario, those with power do not give it up voluntarily, while those without power, often minority group members, cannot rely on whites or other privileged allies since they will only cooperate as long as it suits their self-interest.<sup>11</sup>

The authors reject such beliefs, not simply out of idealism, but rather from a need to change the basic paradigm of race as a description of individual identity. In doing so, they discard the traditional model of race as a description of skin color and racism as a resulting process of individual discrimination.<sup>12</sup> As long as race remains a question of individual identity, it will signal the zero-sum outcomes that have become so divisive in the context of affirmative action. Under these rules, one more place for African-Americans at prestigious universities means one less spot for whites, a loss of power that most whites refuse to concede.<sup>13</sup> Political race, Guinier and Torres suggest, replaces this scenario with one in which allied groups collectively benefit from challenges to power across racial lines. In the process, activists write new narratives of success and access to power, replacing the “stock stories” of individual merit and accomplishment that are so much a part of American culture.<sup>14</sup>

### I. Political Race in Action

The Miner's Canary is most effective in its recitation of actual examples of how political race can and has worked. This includes tales of enlisting racial/ethnic support in broader-based efforts at union organizing and gaining access to higher education. For example, the detailed description of the Texas Ten Percent Plan and its origins provides valuable publicity for one of the most innovative, large-scale attempts to address educational inequality in recent years.<sup>15</sup>

The plan was a reaction to the *Hopwood* decision, in which the Fifth Circuit eliminated the use of race as a factor in admissions for public universities in Texas (effectively overruling *Bakke*, the Supreme

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11. GUINIER & TORRES, *supra* note 1, at 291; see also Chapter 4, “Rethinking Conventions of Zero-Sum Power.”

12. GUINIER & TORRES, *supra* note 1, at 116-19; see also the Supreme Court's affirmative action line of cases: *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (holding that all racial classification must meet the strict scrutiny test of being narrowly tailored to meet a compelling government interest); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (rejecting societal discrimination as a compelling government interest for purposes of meeting strict scrutiny and suggesting that only a pattern of individual discrimination can support broad race-based remedies such as affirmative action).

13. GUINIER & TORRES, *supra* note 1, at 116-19.

14. See GUINIER & TORRES, *supra* note 1, at 35 (defining “stock stories” as “those ways of explaining and interpreting the world that embody received understandings and meanings.” See also Gerald Lopez, *Lay Lawyering*, 32 UCLA L.REV. 1, 3 (1984), cited in GUINIER & TORRES, *supra* note 1, at 310 n.13.

15. GUINIER & TORRES, *supra* note 1, at 67-74.

Court precedent that left open the question of whether diversity in education was a compelling governmental interest).<sup>16</sup> Instead, legislators proposed a plan to replace traditional race-based affirmative action admissions policies with a simple guarantee of admission to the state's flagship institutions to residents finishing in the top ten percent of their school classes. The Top Ten Percent Plan found its constituency in legislators from rural districts whose high schools had frequently been unrepresented at the flagship universities, the University of Texas at Austin and Texas A&M University; if they applied at all, such rural students had often been rejected in favor of students from suburban high schools with higher test scores. The ability of poor rural and inner city minority representatives to form a coalition aimed at jointly benefiting students from their constituencies stands as a model alternative to simply accepting a colorblind status quo. According to Guinier and Torres, the students admitted since the plan's inception have done well, as has the university's reputation for its willingness to address diversity.<sup>17</sup>

The authors do not address the scattered complaints about the plan, such as the difficulties of its use in combined general/magnet schools, the reluctance to take difficult classes that the need for high grades may encourage,<sup>18</sup> and the complaints of the wealthy suburban students who did not make the cut in spite of high test scores (although these students presumably have high enough SAT scores to have a good chance of admission and even scholarships at many other private schools).<sup>19</sup> The

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16. *Hopwood v. Texas*, 78 F.3d 932 (5<sup>th</sup> Cir. 1996); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

17. See GUINIER & TORRES, *supra* note 1, at 74 (noting even critics have had to concede that the Texas plan has resulted in a return to pre-Hopwood minority enrollments at the University of Texas at Austin of approximately 14% Hispanic and 4% African-American students); see Mary Frances Berry, *How Percentage Plans Keep Minority Students Out of College*, CHRON. OF HIGHER EDUC., Aug. 2000, at A48; Jim Yardley, *The 10 Percent Solution*, N.Y. TIMES, April 14, 2002, at 4A (Education Life). While there have not been comprehensive studies on the plan's overall success, a report by a University of Texas professor, David Montejano, found that the plan had a gradual, but significant impact in increasing geographic diversity. In 2000, students from 74 Texas high schools accounted for about half the incoming freshman class, up from 64 in 1996, the last year of racial preferences. The number of schools that did not send a single student declined from 900 to 700. See Jeffrey Selingo, *Small Number of High Schools Produces Half of Students at U. of Texas at Austin*, CHRON. OF HIGHER EDUC., Apr. 2001, at 37.

18. The Texas legislature has attempted to remedy this problem by proposing that starting in 2004, students ranking in the top 10% of their class would also have to take the state's "recommended" pre-college curriculum. W. Gardner Selby, *Effort to Toughen 10% Rule Advances: Restrictions Sought for Automatic Admission to State's Public Colleges*, SAN ANTONIO EXPRESS-NEWS, Apr. 3, 2001, at 1A. Although the Texas Education Agency (the state department of education) claims that all but one high school offers this curriculum, disparities in course offerings have led to lawsuits in California, which has adopted a similar state university admissions policy. Groups such as the American Civil Liberties Union and the NAACP Legal Defense and Education Fund have charged that in order to have the grade average to qualify for acceptance at the University of California at Berkeley and Los Angeles, students must take advanced placement classes that are not offered at many schools in poorer districts. See Berry, *supra* note 17, at A48.

19. Proponents of affirmative action have also noted that the Texas plan has also relied heavily on increased recruitment, remedial programs and funding for financial aid. Without such a strong state and institutional commitment, similar plans in Florida and California have not fared as well.

U.S. Commission on Civil Rights has even suggested that such plans rely on continued segregation of public schools.<sup>20</sup> Accordingly, racial disparity remains in access to high quality education at K-12 schools, graduate and professional school admission, and representation on faculties.<sup>21</sup> These limitations should not detract from the progressive victory of the emergence of the top ten percent plan, arising as it did on the state legislative level in one of the most conservative—albeit racially diverse—states. This success may signal the real practical potential of the “political race” theory.

The authors construct a similarly in-depth, if more theoretical, exploration of American electoral politics. Here they point out two of the absurdities that are central to the American system but are rarely questioned. First, politicians have the power to pick their own future electors through legislative control of redistricting. Second, the American winner-take-all system creates a fiction that elected representatives suddenly come to represent all of their constituents, both those who voted for them and those who did not.<sup>22</sup> The chapter on redistricting also presents a sole instance of legal analysis and critique. The authors explain the *Shaw v. Reno*<sup>23</sup> line of redistricting cases as an ironic example of the Supreme Court suddenly seeing the limits of the majority-take-all system in the context of majority-minority districts, but then the Court fails to realize the corresponding limitations of the entire American electoral system.<sup>24</sup>

As an alternative to majority-minority districts, Guinier and Torres propose changing the voting system altogether in favor of the proportional representation used in many European countries.<sup>25</sup> Guinier has long been known as an advocate of alternative voting systems.<sup>26</sup> Despite the seemingly foreign nature of these systems to the American

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See Starita Smith, *Much Effort Required to Make Percent Laws Work*, KNIGHT RIDDER/TRIBUNE, Aug. 25, 2000.

20. See BERRY, *supra* note 17, at A48.

21. See *id.*

22. GUINIER & TORRES, *supra* note 1, at 176.

23. 509 U.S. 630 (1993).

24. *Id.* at 173-76. See also *Shaw v. Reno*, 509 U.S. 630 (1993) (rejecting a race-conscious majority-minority congressional district out of fear that it would result in race-based stigma and representational harm. The court explained stigma as race-based stereotyping resulting in judgments that those of the same race think alike, share the same political interests and will prefer the same candidates. Representational harm is the theory that an elected minority group member from such a district may only represent those belonging to the minority group who elected him or her, not all voters in his/her constituency. As Guinier and Torres point out, this latter observation, if true of majority-minority districts, is no less true of all districts, e.g., an elected Republican Congressman is expected to represent both those who voted for him and those Democratic constituents who did not vote for him, even if their views are diametrically opposed.).

25. BERRY, *supra* note 17, at 209-10.

26. See LANI GUINIER, *LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE* 263-69 (1998).

political process,<sup>27</sup> business and law students will recognize one variety of proportional representation in the longstanding use of cumulative voting in the selection of corporate board members, a practice usually justified by its protection of minority shareholders.<sup>28</sup> Still, third-party candidacies in recent years, from Jesse Jackson to Ross Perot to Ralph Nadar, have raised important questions as to the pros and cons of a multiparty system. For example, would more minority candidates lead to “throw away” votes that split party bases, as arguably happened in November 2000? Of course, in European proportional voting systems, divided parties with similar interests often form governing coalitions, and, at the very least, parties with greater than five percent of the vote are granted a proportional number of legislative representatives. Accordingly, minority parties and interests are ensured far more representation and at least a chance at a democratic voice.

Likewise, Guinier and Torres note the potential of another, more realistic, electoral phenomenon known as “virtual representation,” the process by which minority and like-minded voters place their real trust in minority politicians from outside of their home district. Frequently, these are the politicians whose views truly correspond to their constituents’ own beliefs, such as Georgia Congresswoman Cynthia McKinney. The authors describe how loyalty to politicians such as McKinney inspires non-constituent minorities to campaign for them; in doing so, they remain involved in an otherwise unrepresentative political system.<sup>29</sup> Under Guinier and Torres’ view, true representation can only occur in a system where constituents believe that they have an ongoing voice, as opposed to a one-time ability to grant power by voting. Virtual representation, based on race and shared beliefs, provides minority voters with a sense of having such a voice and encourages their ongoing participation in the political process.<sup>30</sup>

## II. Methodological and Stylistic Dilemmas

The breadth of subject matter covered by The Miner’s Canary has the advantage of allowing readers to see the interconnections between the racial issues that emerge in areas such as labor rights, profiling, voting, incarceration, and education. This methodology, however, has the drawback of leaving little room for in-depth, multi-sided analysis of any one of these concerns. Discussion of issues usually begins anecdotally,

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27. See *id.* (mentioning that, in addition to their ongoing use in European countries, proportional systems were once used at local and state-wide levels to elect the New York City Council and the Illinois state legislature.).

28. See, e.g., MODEL BUS. CORP. ACT § 7.28 (1979) (providing for cumulative voting for directors of corporations by shareholders if specified in the articles of incorporation).

29. GUINIER & TORRES, *supra* note 1, at 202-03.

30. GUINIER & TORRES, *supra* note 1, 202-03.

with descriptions of how race has been used in specific instances of political organizing. At its best, this technique lets readers see political theory put into concrete action, as in descriptions of the coalition building behind the Texas Top Ten Percent Plan and the alliance between a local black ministry and largely white unions in the Greensboro, North Carolina Kmart distribution center labor dispute.<sup>31</sup> On other occasions the use of anecdote, taken from a mixture of stories from friends, relatives, and current events, raises various concerns.<sup>32</sup> Mixing often fascinating statistics (although not from the authors' own empirical research) with the stories children bring home from school or their parents read in the paper can undermine the trustworthiness of the authors' conclusions.<sup>33</sup>

At times, as in the story of a high school math teacher whose decision to encourage study groups apparently led to much improved academic performance by his African-American students, the anecdotes are simply too vague.<sup>34</sup> What exactly led these students to work well together at problem solving? How did the teacher ensure that they didn't just waste time talking or explaining incorrect answers? Were there any other variables that could have contributed to an increase in test scores? Did all of the African-American students learn better in group settings? The authors simply conclude that the method worked as a further example of race-based cooperation, with little supporting analysis.

Equally troubling are the far more detailed anecdotes based on the experiences of several African-American teenagers and their private school classmates. The final chapter of the book includes a story of how two of these teenagers take a short cut near train tracks and are arrested by transit police on suspicion of trespassing with intent to paint graffiti.<sup>35</sup> The example of racial profiling recounted in this anecdote introduces a

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31. See GUINIER & TORRES, *supra* note 1, at 131-37 (describing the dispute and the cross-racial protest organizing that led to its successful resolution).

32. See GUINIER & TORRES, *supra* note 1, at 25-29 (exemplifying this sometimes disconcerting mixture of source material. The section, entitled "Political Race in Practice," describes the development of an "oppositional consciousness" in many minority group members through references that include: the personal experience of Ms. Guinier's teenage son, Niko, of watching others react to his race as he walks down the street; an autobiographic account of coming to terms with a mixed race background by Don Terry in *The New York Times*; the liberating possibility of the magical realist re-imagining of racial history presented by Toni Morrison's *Beloved*; and a study containing a comparison of the rising oppositional culture of the Deaf community to that already established in black communities.).

33. See GUINIER & TORRES, *supra* note 1, at 44-49 (exemplifying such statistics, using data the racial disparities in family wealth accumulation, as opposed to the far more common measure of family income, to suggest one systemic rationale for ongoing racial inequality. It should be stressed that it is the combination of such studies with anecdote to form generalizations, and not the studies themselves, that raise issues of credibility.).

34. See GUINIER & TORRES, *supra* note 1, at 144-45, 342 note 23 (citing the study used as a basis for the anecdote, Uri Triesman, *Studying Students Studying Calculus: A Look at the Lives of Minority Mathematics Students in College*, 23(5) C. MATHEMATICS J. 362 (1992)). Regardless of the quality of the original study, Guinier and Torres do not describe enough of its basis to make it appear to be any more than a passing reference.

35. *Id.* at 255-58.

section on the broad associations between race and crime. The authors cite a litany of statistics on racial disparities in incarceration, linking these, in turn, to the war on drugs, the boom in prison construction, and the curtailment of privacy rights by law enforcement.<sup>36</sup> The chapter then returns to another anecdote about the African-American teenagers and their classmates, this time a cautionary tale of an alliance that did not represent “political race.” In it, the mostly white classmates attempt to show their solidarity for a black former teacher, who, after he had joined the faculty of a mixed race urban public school, found himself the victim of repeated racial profiling by police. Joining a march in support of the teacher, the white private school students found themselves “taking over” the march. The white students were positioned at the front of the procession of mostly black local students, presenting a revealing image in the local media.<sup>37</sup>

The chapter presents telling illustrations of the strengths and weaknesses of Guinier and Torres’s methodology. The descriptions provide a valuable sense of the interconnectedness of the many racial issues underlying discussions of crime in America. They also serve to tie abstract statistics to the specific, everyday life experiences of African-American teenagers. Using the stories of the private school teenagers, even those who are African-American, however, risks the same problem the white students encountered in their well-intentioned attempt to show racial solidarity. The descriptive detail and attention to individual voice in these anecdotes makes them stand out against many of the more general stories cited. While *The Miner’s Canary* refers to many inspiring tales of grassroots organization attempts by poor minorities, there is often less of a sense of the individual voices of these communities. One misses excerpts from e-mails, direct quotes from speeches at organizing meetings, named voices telling of daily life experiences of disenfranchisement, impressions of the criminal justice and education systems, and the like, all details that are included in the stories of the teenagers and their classmates.<sup>38</sup>

The graffiti arrest story raises a further issue: is it really possible to compare the experiences and opportunities of private school-educated children of African-American professionals with those of poor rural and

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36. *Id.* at 261-67, 274-80.

37. *Id.* at 283-91.

38. To be fair, there are occasional uses of direct voices, such as that of the Rev. Nelson Johnson, one of the leaders of the Kmart protest, which is perhaps one reason that this story stands out as one of Guinier and Torres’s best examples of political race in action. *See id.* at 133, 136-37. Other descriptions, such as that of Septima Clark’s 1960s era citizenship schools, are more apt to use indirect, anonymous quotes, such as that of “one local sharecropper” who told an organizer that the most important accomplishment of the civil rights movement was not the right to vote, but the right to meet, i.e. the first step in forming a community-based political agenda. *Id.* at 149. A sense of distance from those most affected by race also results from the authors’ quoting of even the best investigative journalism. *See id.* at 75-78 (recounting in detail Charles LeDuff’s article, *At a Slaughterhouse Some Things Never Die: Who Kills, Who Cuts, Who Bosses Can Depend on Race*, N.Y. TIMES, June 16, 2000, at A1, A24).



inner-city minorities? Both may well be subject to racial profiling and develop a stronger “oppositional consciousness” and sense of collective identity, all key elements in the authors’ view of race. The private school children, however, had parents with connections who could bail them out of jail. That, in itself, may represent an essential, class-based difference within racial communities: most of the truly disadvantaged will never have someone to bail them out—or the chance to later tell their stories to a larger public. Most often, they will wait in jail until they are indicted or, if they are lucky, the charges are dropped. If so, they are likely to be rearrested, this time on a drug charge, and end up as one of the prison statistics the authors cite. One doubts that the same future is in store for these well-educated teenagers.

This problem of inter-racial class difference is not meant to discredit Guinier and Torres’s project, but only to show the difficulties of representation they encounter. It is a caution for anyone with sympathies for those affected by race, a reminder of the risks of “taking over” the stories of less privileged minorities, much as the white private school students took over the lead in the protest parade. Such problems may also reflect a possible unintended danger for political coalitions—that the initial inspirational voices, oppositional consciousness, and leadership of poor and even wealthy minorities will be lost within the resulting cross-racial groupings.

Even critical race theorists’ deliberate attempts at inclusiveness will likely face these obstacles. Inclusiveness—“power with” not “power over”—is the true, admirably idealistic, aim of Guinier and Torres’s study.<sup>39</sup> The possibility of inclusion is, after all, central to “political race,” a keyword for the means of bridging racial difference and divisive identity politics, and of transforming the diagnosis given by the miner’s canary into constructive social change.

Guinier and Torres’s use of theory, like their use of anecdote, highlights *The Miner’s Canary’s* methodological and stylistic difficulties. The authors appear caught in a catch-22. On the one hand, they wisely avoid purely academic discussion in favor of concrete tales of political actions; on the other, they need theory to diagram the links between the anecdotes they cite and their vision of transformative social change. As a result, sections outlining the abstract theories of political power and social change of writers such as Michel Foucault and Louis Althusser often follow such anecdotes. Concepts such as “interpellation,” the “weak vs. strong,” and three dimensions of social power provide valuable reference points for those already familiar with the ideas of

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39. Guinier and Torres define “power-with” as “the psychological and social power gained through collective resistance and struggle and through the creation of alternative sets of narratives.” *Id.* at 141.

these theorists.<sup>40</sup> They do little, however, to engage readers seeking a clear language of political action, mobilizing words that can be transferred to political race projects.

### III. Unanswered Questions

One of the attributes of *The Miner's Canary's* broad coverage of racial issues, analysis, and action is its ability to raise important, if unanswered, questions. For an analysis by two established law professors, it is notable how little *The Miner's Canary* discusses law in the conventional sense. Mention of the legal system occurs only in passing, usually as a means of describing political, not legal, strategies. For example, the authors focus on the subversion of legal authority by gospel singing in the courtroom during the Kmart labor dispute litigation,<sup>41</sup> or the usurpation of civil liberties by recent decisions broadening police arrest and search powers.<sup>42</sup> The authors barely allude to the Supreme Court's recent affirmative action cases,<sup>43</sup> and refer only to the political response to the *Hopwood* decision, not to its legal reasoning, or the similar cases now moving their way through the federal courts.<sup>44</sup> Likewise, their critique of "colorblindness" in an early chapter relies on social and political theories connected to ideologies of race, not legal discussion of the issue.<sup>45</sup> In doing so, Guinier and Torres explain one of the central flaws of legal discussions of race, the notion that racism—a social phenomenon—can only be addressed in terms of individual remedies for state-sponsored discrimination or individual harms.<sup>46</sup> The authors also provide a justification for their approach:

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40. See, e.g., *id.* at 86-94, 138-41. The first section alludes to the Marxist political theorist Louis Althusser's theory of "interpellation," the second to philosopher Michel Foucault's theories of the dynamics of power in society. While the main difficulty for readers not familiar with these writers is simply one of stylistic clarity, those with some knowledge of these writers may raise other objections. For example, in describing the pervasiveness of different forms of power in everyday life, along with potential forms of power as resistance, Guinier and Torres leave out the essential role played by language (discourses of power), as developed by both of these theorists, in the construction of reality and power relationships.

41. *Id.* at 136-37.

42. *Id.* at 278-79 (citing *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001)).

43. See *supra*, note 10.

44. See *Hopwood v. Texas*, 78 F.3d 932 (5<sup>th</sup> Cir. 1996); *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D.Mi. 2001) (finding affirmative action admissions program unconstitutional), 247 F.3d 631 (6<sup>th</sup> Cir. 2001), *cert. granted*, 71 U.S.L.W. 3154 (Aug 09, 2002) (NO. 02-241) (stay of injunction against admissions policies granted pending appeal); *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mi. 2001); *Johnson v. Bd. of Regents*, 263 F.3d 1234 (11<sup>th</sup> Cir. 2001).

45. See GUINIER & TORRES, *supra* note 1, Chapter 2: "A Critique of Colorblindness." The authors do mention how the "terrain of public debate," including both right and left wing positions on affirmative action and similar racial issues, has become increasingly defined by the Supreme Court's view of colorblindness. *Id.* at 42.

46. See *id.* at 35-36 (rejecting the "stock story of colorblindness" that "the only motive of the civil rights movement was to free individual black people from state-sponsored discrimination." With such discrimination now removed, any continuing racial inequality must therefore result from the personal failures of individuals or, alternatively, the dysfunction of black culture.) See *id.* at 39-

Given a federal judiciary increasingly dominated by ideological conservatives, we believe that progressives need to focus on politics, not just law, and to engage politics in small laboratories of democracy that exist below the radar of the national media, the federal judiciary, and the traditional theaters of power.<sup>47</sup>

It is difficult to know what other conclusions to draw from this lack of attention to case law: do the authors see no hope in the use of the legal system as a means of social change? Is the judicial system too slow, too elitist, too top-down, too tied to adversarial presentation and authoritative decision-making, at the expense of consensus and inclusion, to work as a space for political race to occur?<sup>48</sup> Or is it that courts are largely powerless to implement social change in the absence of local consent (the conclusion often drawn from *Brown* and the busing cases)?<sup>49</sup> Since political race removes the purely biological categories that now bar most race-based legislation, one wonders if there is now more room for constructive legal change, along the lines of the Texas Ten Percent Plan.<sup>50</sup> Is there a role lawyers might play in political race activism, both in the legislative and judicial spheres, such as by representing potentially allied groups such as unions, immigrants and welfare recipients? These are just some of the questions left unanswered by the authors' silence about the role of the courts.

A second question relates to the uneasy place of affirmative action in the political race project. On one hand, the authors appear suspicious of such individual-based remedies as tending "to reinforce rather than upset the underlying structures of power." Race-based affirmative action leaves unchallenged the stock story equating the triumph of the

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41 for a critique of how even the left has frequently adopted a form of colorblind advocacy in their espousal of "universal" political solutions; alternatively, liberal activists may see race-based remedies as only a temporary utilitarian solution to problems of inequality.

47. *Id.* at 36.

48. The authors suggest that this may be the case in describing how, even though the lawyers litigating on behalf of the workers in the Kmart labor dispute were "accountable to an organized constituency and used the legal strategy to help educate, not just litigate," they nevertheless "played an enhanced role in speaking 'truth to power,'" privileging their viewpoints in a winner-take-all arena. *Id.* at 142.

49. See, e.g., "Note: The Enduring Significance of *Brown*: 'Can Courts Bring About Social Change?'" BREST, *et. al.*, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 765-68 (4th ed. 2000).

50. Texas A&M University recently devised a plan that would test the limits of the percentage system, proposing to offer guaranteed admission to the top 20% of graduates from each of 250 high schools. The schools were selected on the basis of factors such as high drop out rate, limited English proficiency, and low passage rate on statewide tests, but not on race or ethnic composition. University officials decided to delay the plan while it was awaiting a determination by the Texas attorney general as to whether it would violate *Hopwood*. Jeffrey Selingo, *Critics Blast Plan to Expand Class-Rank Policy in Texas as Affirmative-Action Ploy*, CHRON. OF HIGHER EDUC., Jan. 11, 2002, at 29; Sommer Bunce, *Texas A&M Strikes Top 20 Plan for Fall 2002*, THE BATTALION (Texas A&M University), Mar. 20, 2002.

individual with the eventual success of the group, while encouraging a cross-racial divisiveness antithetical to the political race project.<sup>51</sup> Yet, elsewhere in The Miner's Canary, the authors present a powerful response to those who support the admissions "testocracy" over affirmative action, citing a study of three generations of University of Michigan Law School students that found minority status, aside from years since graduation, to be the single most important factor in graduates' likelihood of doing pro bono work, serving on community boards, and providing more general leadership.<sup>52</sup> Although both views of affirmative action are informative, the question remains as to whether political race solutions can coexist with traditional race-based remedies. Or does greater inclusiveness demand a trade-off?

A final query for Guinier and Torres might be how they view the "conservative" race-based coalitions that have arisen in recent years, including the support of many urban African-Americans for school vouchers and faith-based government service initiatives. Here the authors give a clue as to the potential openness of their project:

Despite our belief in the need for a revived progressive agenda, our analysis is not dependent upon the more traditional definitions of social change that are bound up with elections, regulations, and litigation. Indeed, power-with might be employed by those who have a very different vision of social justice than our own.<sup>53</sup>

While leaving such questions unanswered, The Miner's Canary clearly defines political race as an important emerging phenomenon. Notably, Guinier and Torres make little mention of party politics. Moving beyond the ideological associations of Republican and Democrat, as well as the agendas of established racially based organizations, allows far more room for political innovation. Freed from traditional party platforms, issues, and financial constraints, political race coalitions have the potential to be truly responsive to grassroots concerns.

Guinier and Torres describe how, for example, in the 1990s the labor rights group, The Workplace Project, created worker-centered discussion groups, building on the tactics used by the United Farm Workers (UFW) as early as the 1960s. The UFW, in turn, used cultural ties between Mexican-American citizens and immigrant workers to build their support base.<sup>54</sup> It might be added that during the past few years, in

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51. GUINIER & TORRES, *supra* note 1, at 116-19.

52. *Id.* at 270. For a more general description of test-taking and alternative measures of student success, see *id.* at 267-74.

53. *Id.* at 167.

54. *Id.* at 150-52.

a further development not addressed by Guinier and Torres, unions have reversed their longstanding opposition to liberalized immigration laws.<sup>55</sup> The role of a political race coalition—Hispanic and immigrant union membership—and its ability to bring about a transformation in policy, if not yet law, seems clear. The Miner's Canary's greatest achievement lies in the singling out of such visionary alliances, unmasking their potential for renewed democratic participation in American society.

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55. See *Defending the Rights of Immigrant Workers: The AFL-CIO Policy on Immigration*, at <http://www.aflcio.org/immigrantworkers/AFLCIOPO.pdf>. See also the link to immigrant workers rights materials of the AFL-CIO's main page, [http://www.aflcio.org/front/w\\_rights.htm](http://www.aflcio.org/front/w_rights.htm).