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Re-Mapping Equal Protection Jurisprudence: A Legal Geography of Race and Affirmative Action

Reginald Oh

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Re-Mapping Equal Protection Jurisprudence: A Legal Geography of Race and Affirmative Action

Keywords

Equal Protection, Richmond v. Croson, race relations, affirmative action, Political Process Theory

RE-MAPPING EQUAL PROTECTION JURISPRUDENCE: A LEGAL GEOGRAPHY OF RACE AND AFFIRMATIVE ACTION*

REGINALD OH**

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INTRODUCTION

When the United States Supreme Court decided *Richmond v. Croson*¹ in 1989 and imposed strict scrutiny on state and local government affirmative action programs, it marked a critical moment and turning point in the evolution and development of public and legal discourse on race, racism, and race relations in America. Although many scholars have critically examined the *Croson* opinion, curiously, scholars have yet to recognize its full ramifications and implications. Aside from the technical doctrinal changes made to equal protection law, the *Croson* decision is also important because of the way the Court produced and mapped a new social reality of race relations in America. In the decision, the Court asserted that African Americans had achieved racial parity with Whites, and as such, that African Americans could no longer rely on a history of racial discrimination to justify the enactment of affirmative action programs.²

In *Croson*, a white general contractor challenged the constitutionality of a Richmond set-aside requiring general contractors to sub-contract thirty percent of the contract award to a minority business enterprise.³ The Court emphasized that the set-aside was enacted by a Richmond City Council controlled by African Americans.⁴ Thus, instead of being the traditionally disempowered political minority, African Americans were seemingly a powerful political majority who enacted a law that advantaged their African American constituents while disadvantaging the interests of the white Richmond minority. In striking down the city of Richmond's set-aside program, the Court effectively concluded that the African American-controlled Richmond City Council abused its political powers to exact a form of racial retribution on the white Richmond minority.⁵

In equal protection terminology, the Court in *Croson* implicitly held that African Americans were no longer a disadvantaged, discrete, and insular minority in the political process. In fact, the opposite was true: for the Court, African Americans were now a politically powerful racial faction in the American political pluralist arena. Moreover, the Court seemed to imply that African Americans were now politically powerful *because of* and not in spite of having historically suffered from invidious racial discrimination.

1. 488 U.S. 469 (1989).

2. See *Croson*, 488 U.S. at 499 (stating that, "an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota").

3. *Id.* at 477-78. The Richmond set-aside defined a minority business enterprise as a business owned by "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.* at 487.

4. *Id.* at 495.

5. *Id.* at 510.

Thus, the Court in *Croson* radically re-mapped American race relations and concluded that because African Americans now had become a political majority in cities like Richmond, the Equal Protection Clause was now needed to protect the white racial minority from oppressive measures enacted by powerful black political majorities.

This Article, however, will argue that the Court's mapping of race relations in America is profoundly inaccurate and obscures the continuing racial, socioeconomic, and political subordination of African Americans. It will critically examine the *Croson* decision and the remarkable facts of the case as openings to evaluate issues of narrative legal theory, the importance of examining space and geography in critiquing and constructing legal doctrine, the continuing socioeconomic racial segregation of African Americans in metropolitan areas throughout the United States, the relationship between political power and space/geography, and the future of equal protection doctrine.

Part I of this Article will examine the narrative structure of judicial opinions and contend that, in constructing a particular narrative, the legal narrator makes certain unconscious and implicit choices regarding the spaces and places within which her narrative or story unfolds. Those choices, rather than being neutral, inconsequential choices, deeply shape the meaning, message, and rhetorical power of a narrative representation of history or reality. Thus, this Part will contend that an effective method of deconstructing dominant legal narratives on race is to uncover and deconstruct the spatial assumptions embedded within those narratives.

Part II of this Article will discuss the facts, holding, and reasoning in *Croson*. Specifically, it will focus on the majority opinion of Justice O'Connor, the concurring opinion of Justice Scalia, and the dissenting opinion by Justice Marshall, and will examine their legal narratives. This Article will then argue that the *Croson* majority, and Justice Scalia in particular, constructed a compelling, coherent legal narrative to justify imposing strict scrutiny review on affirmative action programs.

Part III of this Article will argue that the *Croson* majority constructed legal narratives about racial power relations inside the city of Richmond that obscure and obfuscate the reality of the continuing political and socioeconomic subordination experienced by African Americans. Their narratives obscure the reality of African American subordination through the manipulation of geographic setting and scale. Thus, this Article will analyze the Court's legal narrative by critically examining a key geographic assumption in the narrative,⁶ specifically, the assumption that

6. In this Article, I sometimes refer to the *Croson* narratives in the plural and other times I refer to the *Croson* narrative in the singular. In some instances, I refer to Justice Scalia's narrative specifically, and sometimes I treat Justice Scalia's narrative and Justice

the geographic scale of the narrative had to be limited to the jurisdictional boundaries of the city of Richmond.

Part III contends that a different social reality of race and racial subordination emerges once the *Croson* narrative is set within broader geographic settings. This Part will examine the situation in *Croson* from four different geographic perspectives. The first section of Part III will examine the *Croson* situation from the national and regional geographic scale and contend that the Court's argument that the case was about protecting the white Richmond minority was misplaced, because the corporation that sued the city of Richmond was neither based in Richmond nor incorporated in Virginia.⁷ Rather, Croson Co. is a general contractor incorporated in Ohio and based in the city of Columbus.⁸ Thus, the Madisonian rationale and political process theory rationale was not even relevant to the supposed "victim" of local government racial tyranny, as Croson Co. is neither a "citizen" of the city of Richmond nor a natural person. The fact that Croson Co. is a corporation operating within the Ohio mid-atlantic region further complicates the analysis of the Court, especially because corporations do not easily fit within the Madisonian or political process theory framework, by virtue of the fact that corporations can be in multiple places simultaneously, and thus have multiple bases for "citizenship."

The second section of Part III will re-examine *Croson* from the state geographic scale. Specifically, this section will examine Justice O'Connor's political process argument and contend that her application of Professor Ely's political process theory is flawed and does not necessarily support her conclusion that heightened federal court scrutiny was appropriate under Professor Ely's jurisprudential justification for heightened equal protection scrutiny. This Part will argue that in order to portray the set-aside as a result of black majoritarian local tyranny, the Court had to ignore and obfuscate the status of the city of Richmond as a subordinate arm of the Commonwealth of Virginia. If Justice O'Connor had correctly treated the city of Richmond as an agent of the state, she would have had to have concluded that the set-aside was technically enacted to advance the state's white majority's interests in promoting the racial integration of the Virginia construction industry.

The third section of Part III will re-examine the *Croson* situation from the Richmond metropolitan area geographic scale. Once the narrative is situated within the Richmond metropolitan area, it becomes clear that while African Americans may be a political majority within the City of

O'Connor's narrative as essentially telling a slightly different version of the same story.

7. J.A. *Croson Co. v. Richmond*, 779 F.2d 181, 182 (4th Cir. 1985).

8. *Id.*

Richmond, they are still a subordinate political minority within the greater Richmond metropolitan area. Moreover, examining *Croson* as a narrative regarding suburban-urban relations will expose a troubling paradox: African American attainment of formal political control of local governments actually is a reflection of their continuing political and socio-economic subordination and not a reflection of racial progress.

In short, the fact that Blacks became a political majority in the City of Richmond in 1977 is not evidence of improving socioeconomic conditions for Blacks; instead, it is evidence of precisely the opposite: Black political power, especially at the local level, has been gained while socioeconomic conditions worsened for a substantial number of African Americans living in the central cities of America.⁹ An inverse relationship between socioeconomic power and formal political power exists for African Americans because throughout the 1980s and 1990s, African Americans have experienced greater segregation in public schools and in residential areas on both a racial and socioeconomic basis.¹⁰ Moreover, because of the threat of jurisdictional exit, the white Richmond suburban majority and even the white Richmond city minority are able to exert enormous influence and control over the City's policymaking, further undermining the substantive political power of African Americans.

Finally, the fourth section of Part III will re-map political process theory in light of the geographical analysis conducted in this Article. This section will contend that African Americans are disadvantaged in the Virginia political process because they are systemic political losers in the state political process regarding the regulation of local governments. Specifically, it will examine Virginia's ban on the City of Richmond's powers of annexation as an example of a malfunction in the state political process. The power to annex new territory is one tool the City could use to deal with its socioeconomic problems. However, the Virginia state legislature has specifically targeted and prohibited large Virginia cities like Richmond from being able to use its annexation powers until 2010, in large part to protect the interests of the predominantly white suburbs. The structure of local government relations in Virginia systemically

9. See David B. Wilkins, *Doing Well by Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers*, 41 HOUS. L. REV. 1, 33 (2004) (emphasizing that, since *Brown v. Bd. of Educ.*, the rise in black political power has been mostly local); John Charles Boger, *The Urban Crisis: The Kerner Commission Report Revisited*, 71 N.C. L. REV. 1289, 1347 (1993) (conceding that the living conditions for Blacks in "inner-cities" have become demonstrably worse in the past thirty years).

10. See Gary Orfield, Harvard Univ. Civil Rights Project, *Schools More Separate: Consequences of a Decade of Resegregation*, at 2-3, 23-25 (July 2001) (asserting that segregation increased throughout the 1990s because of an attitude that "nothing can be done" and because of an increase in residential segregation), available at http://www.civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf.

disadvantages African Americans living in Richmond, and thus, under political process theory, the state ban on annexation should be declared in violation of the Equal Protection Clause. Finally, in Part IV, this Article will conclude by discussing some of the implications that flow from a geographical analysis of law and legal narratives.

I. LAW AS NARRATIVE: JUDICIAL OPINIONS AND THE NARRATIVE CONSTRUCTION OF SOCIAL REALITY

The law is constituted as narrative.¹¹ When courts construct legal doctrine and write judicial opinions, they do so by organizing and interpreting events according to a narrative in which the events and characters are interwoven with each other and into an “overarching structure” where conflicts are created.¹² For example, when a court declares that a government is engaged in invidious racial discrimination and subsequently strikes down a statute, it must first construct a narrative in which a character (the plaintiff) is faced with an obstacle or problem (racial discrimination) posed by an antagonist (a racially discriminatory government entity). In framing a racial discrimination lawsuit in this way, a court assembles a set of circumstances into an “intelligible whole,”¹³ and then into a coherent narrative in which the actions and events are endowed with intentionality, meaning, and purpose.¹⁴

To explain the meaning-making effects of narrative, it is useful to compare an un-narrated account of facts and situations to a narrated account. Historian Hayden White contrasts an annal with a narrative.¹⁵ An annal “consists only of a list of events ordered in chronological

11. See ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 112 (2000) (arguing that law is no different from narrative as it carries with it the rules that our society valued at the time the law was written); GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW 261 (2000) (recognizing that judges and juries are required to interpret facts and that thus, a legal dispute is naturally transformed into a narrative through this interpretation); RONALD DWORKIN, LAW'S EMPIRE 228-29 (1986) (arguing that law operates as a “chain novel”); L.H. LARUE, CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY 2 (1995) (arguing that the judicial opinions are persuasive because judges include fictitious rhetoric throughout opinions). See generally Patrick Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward Sociology of Narrative*, 29 LAW & SOC'Y REV. 197 (1995) (discussing the sociology of narrative as used by legal scholars).

12. See Ewick & Silbey, *supra* note 11, at 200 (conceptualizing the reasons narratives allow time and space to be placed in order to create a full picture of events).

13. See Paul Ricoeur, *Narrative Time*, in ON NARRATIVE 165, 167 (W.J.T. Mitchell ed., 1981) (describing how a story is created by stringing together events to create a “plot”).

14. See Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 592 (1981) (charging that rational legal arguments are derived from an interpretive construction of the situation that suits the requirements of the attorney).

15. HAYDEN WHITE, THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION 4-5 (1987).

sequence.”¹⁶ A narrative, on the other hand, organizes separate events according to a plot, connecting and locating them according to an overarching structure or theme.¹⁷ As a literary theorist notes, “‘The king died, and then the queen died’ is [an annal]. ‘The king died and then the queen died of grief’ is a [narrative] plot. Considering the death of the queen, if it is in an [annal] we say: ‘And then?’ However, if it is in a [narrative] plot we ask: ‘Why?’”¹⁸ An annal does not create meaning because the chronicler does not supply a causal relationship between separate events.¹⁹ A narrative, on the other hand, shows how one event (death of the king) relates to another (caused the queen to die of grief), and in so doing, endows the events with purpose and meaning.

The meaning-making function of narrative, therefore, is what makes narrative such a powerful determinant of legal decision-making. As Mark Kelman contends, prior to the evolution of a legal sounding-argument, a situation must be characterized through a narrative construct.²⁰ Thus, when a court has constructed a narrative, it means that it has already determined the meaning, moral, and purpose inherent to a set of facts and circumstances; it has created a narrative that not only recounts what transpired but also instructs society about its meaning and the correct way to feel about the events.²¹ Consequently, once the meaning of events is made clear, the legal result that flows from a narrative rendering of a set of events seems necessary and inevitable.²²

In organizing and interpreting events according to a narrative structure, courts actively construct and produce their versions of social reality, versions which then become codified in legal doctrine.²³ Contrary to the conventional view of judicial lawmaking, instead of taking established facts and mechanically applying the law to them, courts actually create narrative accounts of social reality and then make legal judgments and decisions based on their narrative accounts.²⁴

16. *Id.* at 5

17. Kelman, *supra* note 14, at 593.

18. WILLIAM LOWELL RANDALL, *THE STORIES WE ARE: AN ESSAY IN SELF-CREATION* 121 (1995) (quoting E. M. FORSTER, *ASPECTS OF THE NOVEL* 87 (1962)).

19. *See id.* (arguing that a story’s meaning is created when the author connects its events through a series of cause and effect scenarios); *see also* WHITE, *supra* note 15, at 5 (asserting that an annal does not possess a “structure” capable of creating meaning out of separate chronologically ordered events).

20. Kelman, *supra* note 14, at 593.

21. *See* RANDALL, *supra* note 18, at 161 (arguing that historians create history by compiling facts to create narratives).

22. *Id.*

23. *See id.* at 36 (contending that law is created when competing lawyers repeat the version of their client’s story over and over again until a judge creates the final narrative that becomes law).

24. *Id.*

A. *Legal Narratives Reinforce and Reproduce Dominant Cultural, Political, and Social Beliefs*

When we understand that courts engage in the invisible process of constructing narratives as a precondition to making legal decisions, we can better understand how law actively constructs hegemonic visions of social reality.²⁵ Social reality can be defined as “the bundle of presuppositions, received wisdom, and shared understandings against a background of which legal and political discourse takes place.”²⁶ A narrative construction of social reality explains and makes sense of human behavior and the structures of everyday life.²⁷ Hegemonic narratives are those that rationalize and justify existing institutions and structures of inequality and subordination.²⁸ For example, hegemonic narratives about the relationship between unregulated markets and the accumulation of societal wealth help to rationalize socioeconomic inequality as a natural and necessary by-product of economic efficiency.²⁹

Legal narratives, in particular, are especially powerful in reinforcing dominant constructions of social reality because they have the weight and imprimatur of state authority behind them.³⁰ In a legal dispute, a judge has to choose between competing narrative constructions of what happened in the past, declare one story over another as the definitively true version, and create rights or impose liability on a party based on the story that he or she has chosen as the truth.³¹ When a court chooses a particular narrative over another, the chosen narrative becomes the official government truth, and therefore becomes even more powerful as rhetoric in public discourse precisely because that particular narrative now has the sanction and force of the law. In short, law consists of stories given authority and truth by virtue of being told and validated by a judge.

25. See PETER KOLLOCK & JODI O'BRIEN, *THE PRODUCTION OF REALITY: ESSAYS AND READINGS ON SOCIAL INTERACTION* 541-42 (2d ed. 1997) (realizing that judges and juries are limited in their search for the truth and thus are merely able to reconstruct the truth within the confines of the law); see also Ewick & Silbey, *supra* note 11, at 213 (explaining that our culture is defined by narratives).

26. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989).

27. See *id.* at 2412-15 (interpreting stories told by different groups within the population to demonstrate how each version of the same story presents a different reality).

28. *Id.* at 212.

29. See *id.* at 213 (finding that in society, narratives further the “existing structures of meaning and power”).

30. Cf. *id.* at 208-09 (noting that judges exercise control over the law by the use of limited narrative as a means to convey a certain side of a story that only advances certain goals, while ignoring other facts or characterizations that change the story).

31. See, e.g., *id.* at 209 (noting also that lawyers only allow witnesses to tell facts that enhance the lawyer's version of the story, and that the lawyer intervenes when a witness continues to speak beyond what the lawyer requires).

B. Critiquing Dominant Legal Narrative Constructions of Social Reality

As argued above, although dominant legal narratives of social reality appear as objective descriptions of society, they are actually constructed in much the same way as a novelist or historian constructs a story.³² The process of narrative construction in law requires courts to select the relevant facts and categories which will then provide the framework for formal legal argumentation. In making these selective choices, courts are actively engaging in narrative construction, instead of merely reporting and describing objective social reality.

Thus, an effective way of deconstructing dominant legal narratives is to expose the narrative techniques used to construct a seemingly unmediated objective account of an event. Exposing the use of literary techniques reveals that the legal narrator had to make choices about what facts to include in the narrative and what facts to exclude. As Hayden White notes, "Every narrative, however, seemingly 'full,' is constructed on the basis of a set of events that might have been included but were left out."³³ Thus, exposing the legal narrator's representational choices reveal that the narrator did not "find" reality, but that he built it according to his subjective values and his belief system.³⁴

C. Space, Not Time, Hides Consequences From Us: Examining Spatial Constructs in Dominant Legal Narratives

One effective way of unpacking a hegemonic narrative is to uncover all the conscious and unconscious spatial or geographic constructs embedded within the narrative. A narrative that organizes itself around a coherent plot often achieves its coherence by ignoring and obscuring the spatial or geographic dimensions of social reality.³⁵ John Berger argues it is no longer possible to tell a coherent story unfolding sequentially over time, both because in today's postmodern world, we are too self-aware of events that continually disrupt the linear, temporal flow of a story-line, and because we are too self-aware of the geographic "simultaneity and extension of events and possibilities."³⁶ Berger points to the increasing interconnectedness of the postmodern world as a main cause for our

32. See L.H. LARUE, *supra* note 11, at 10 (finding that judicial opinions, although perceived as facts declaring the law, are in fact fictional stories built on a compilation of facts that are ordered according to how judges intend to tell stories).

33. WHITE, *supra* note 15, at 10.

34. See *id.* (finding that a narrator adds choice adjectives to describe the mood present at an event or time).

35. *Id.* at 110-11.

36. EDWARD W. SOJA, *THIRDSPACE: JOURNEYS TO LOS ANGELES AND OTHER REAL-AND-IMAGINED PLACES* 165-66 (1996) (quoting JOHN BERGER, *THE LOOK OF THINGS* 40 (1974)).

constantly having to take into account the “simultaneity and extension of events and possibilities”:³⁷

There are many reasons why this should be so: the range of modern means of communications: the scale of modern power: the degree of personal political responsibility that must be accepted for events all over the world: the fact that the world has become indivisible; the unevenness of economic development within that world; the scale of exploitation. All these play a part. *Prophecy now involves a geographical rather than historical projection; it is space not time that hides consequences from us . . . Any contemporary narrative which ignores the urgency of this dimension is incomplete and acquires the oversimplified character of a fable.*³⁸

In this remarkable passage, Berger contends that any narrative, legal or historical, that ignores the geographic “simultaneity and extension of events and possibilities,” is a narrative that is likely more a construct of a storyteller’s imagination rather than a representation of reality.³⁹ Such a narrative actually hides from the audience the consequences and realities of the material world.⁴⁰

Moreover, in terms of the role that narratives play in the law, these narrative choices about which spaces and places to include or exclude are choices that can help to mask and obscure power relations and power dynamics. As geographer Doreen Massey explains, “Social space can helpfully be understood as a social product, as constituted out of social relations, and social interactions.”⁴¹ Moreover, precisely because it is constituted out of social relations, spatiality is always and everywhere an expression and medium of power.⁴²

Thus, critical legal theorists should explicitly theorize about space, because the organization and production of space is ultimately about social and political control and power, and therefore we cannot fully understand the phenomenon of power without understanding how power operates

37. *Id.*

38. *Id.* (emphasis added).

39. *Id.* at 166 (arguing that any narrative which disregards the spatial dimension is insufficient in conveying meaning and is similar to the oversimplified narrative of a fable).

40. *See id.* at 165 (asserting that the use of spatial narrative rather than the chronological narrative is necessary to reveal the critical perspective needed to practically and theoretically evaluate the present world).

41. *See* DOREEN MASSEY, *Space/Power, Identity/Difference: Tensions in the City*, in *THE URBANIZATION OF INJUSTICE* 100, 104 (Andy Merrifield & Erik Swyngedouw eds., 1997) (using the influence that major trade policies, such as NAFTA and GATT, have over the reorganization of the population of major world cities to illustrate that social space in the modern world is defined by constant changing social forces and interactions).

42. *See id.* (arguing that the size of a city’s population is a reflection on powerful social forces, such as global trade agreements and national agricultural policies, which have influenced change in the city’s social structure).

through and in spaces and places.⁴³ For example, not only must a theory on race relations ask how society has relied on historical and cultural norms to construct racial categories, but it must also ask how a particular society has used space to construct racial categories and ask how the legal production and representation of space works to create and perpetuate racial oppression.⁴⁴

How does one go about uncovering and critically examining the embedded spatial constructs in a legal narrative? To examine and deconstruct the “spaces and places” of a narrative means at least two things: First, a critical analysis could examine the geographic scale or setting of a narrative. This inquiry asks: where does the story take place? It also asks where else could it have taken place? Second, a critical analysis could examine the movement of people within the spaces and places in which the narrative unfolds. The latter line of geographic inquiry assumes that where people are located has great significance, and that questioning, in a particular story, people’s location at any given time and place can help to disrupt and deconstruct the plot of a legal narrative. This inquiry asks: where are the “characters” from? Where are they *now*? How did they get from there to here?

In the following parts, this Article will examine a Supreme Court decision dealing with race and affirmative action. Then, it will engage in a geographical analysis of the legal narratives in that case.

II. *RICHMOND V. CROSON* AND THE NEW MAPPING OF RACE RELATIONS IN AMERICA

In *Richmond v. J.A. Croson*,⁴⁵ the Supreme Court reviewed the affirmative action set-aside program enacted by the city of Richmond and struck it down for violating the Equal Protection Clause under the Fourteenth Amendment.⁴⁶ *Croson* is a landmark equal protection case because it was the first time the majority of the Court agreed to subject race-conscious affirmative action programs to the highest level of scrutiny, essentially equating race-conscious measures attempting to racially integrate the labor market with white racial discrimination against racial

43. See SOJA, *supra* note 36, at 86-87 (emphasizing that power is contextualized and made concrete through the production of social space).

44. See *id.* at 84-86 (employing the works of Bell Hooks, who characterized the space of everyday life as a place where all forms of oppression can be found, to illustrate the significant role that space and geography play in the study of race relations).

45. 488 U.S. 469 (1989).

46. *Id.* at 510-11 (concluding that Richmond’s plan of awarding city construction contracts to minority businesses violated the Equal Protection Clause of the Fourteenth Amendment because the city failed to demonstrate a compelling government interest justifying the plan and because the plan was not a narrowly tailored means to remedy the effects of past discrimination).

minorities.⁴⁷ Prior to *Croson*, the Court had been sharply divided over what standard of review to use to examine the constitutionality of affirmative action programs.⁴⁸ Justice O'Connor, writing the plurality opinion, held that the race-based set-aside must be subject to strict scrutiny, and that under strict scrutiny, the set-aside violated the Equal Protection Clause.⁴⁹

The facts in *Croson* presented a perfect opportunity for the Court to severely restrict the power of state and local governments to enact race conscious affirmative action programs. Specifically, in *Croson*, the Court dealt with an affirmative action program enacted by a black majority controlled legislative body.⁵⁰ Proponents of affirmative action typically justify it as a necessary tool to remedy the effects of past racial discrimination against African Americans.⁵¹ The background social reality underlying the arguments for affirmative action is the belief that African Americans are a disadvantaged, politically powerless racial minority group who have been oppressed and discriminated against because of their race.⁵²

In *Croson*, however, that old social reality came into sharp conflict with the particular facts of the case. In *Croson*, Blacks were now in control of the governing legislative body in Richmond.⁵³ The Blacks on the city council then enacted legislation benefiting their constituency—the black population in Richmond.⁵⁴ In *Croson*, therefore, Blacks seemed neither

47. *See id.* at 472 (finding that, because the Richmond plan denied a certain class of citizens a right to compete for public contract works based exclusively on race, a strict scrutiny standard should be applied, and further explaining that the application of this standard does not depend upon the race of those who are burdened or benefited by such a classification).

48. *See, e.g.,* Fullilove v. Klutnick, 448 U.S. 448, 490-92 (1980) (affirming the constitutionality of a congressional statute, which required ten percent of federal public work project grants be awarded to minority-owned businesses, because the program was limited in extent and duration and was a narrowly tailored means to remedy past discriminatory treatment of minorities from public work projects).

49. *See Croson*, 488 U.S. at 493, 505 (asserting that, because Richmond's set-aside program denied certain citizens the opportunity to compete for a fixed public contract solely on the basis of race, such classifications must be evaluated under the strict scrutiny standard and finding that the city failed to demonstrate a compelling government interest to justify the plan).

50. *See id.* (indicating that Blacks constituted approximately fifty percent of the population in Richmond at the time of *Croson* and that the majority of the seats on the city council were held by Blacks).

51. *See id.* at 496 (citing *Univ. of California Bd. of Regents v. Bakke*, 438 U.S. 265, 288-89 (1978), which indicated that reducing the historic deficit of traditionally disfavored minorities in medical school and the medical profession was one of the major justifications offered in support of a plan that reserved a certain number of admission seats for minority applicants at the University of California at Davis).

52. *See id.* at 494 (explaining that one of the problems with racial classifications is that they may promote notions of racial inferiority by enforcing the belief that certain groups of minorities are unable to achieve success without special protections).

53. *See id.* at 495.

54. *See id.* (indicating that Blacks constituted over fifty percent of the population in Richmond at that time).

politically powerless nor disadvantaged.⁵⁵ In this situation, because the prevailing social reality no longer seemed to fit the circumstances, the Court constructed a new social reality of race to explain what had occurred in *Croson*. That social reality inverted the status of African Americans as a systemically disadvantaged racial minority and reconstructed African Americans as a politically powerful racial majority.⁵⁶ Within this new social reality, African Americans are not only “equal” with Whites but also are now in a position to engage in the racial oppression of Whites.⁵⁷

Thus, *Croson* is a significant case, not only because the Court made significant changes in affirmative action equal protection jurisprudence, but also because the Court constructed a new social reality of race relations in America, a reality which has dramatically changed the dynamics of the affirmative action and race debate in legal and public discourse.

This part of the Article will discuss and examine the Court’s narrative constructions of race relations in Richmond. Part III will then deconstruct the narratives through a critical analysis of their geographic assumptions.

A. *The Social Reality in Justice O’Connor’s Legal Narrative: Blacks are no Longer a Historically Disadvantaged Racial Minority in the Political Process*

In justifying the Court’s decision to impose strict scrutiny on benign racial classifications, Justice O’Connor took note of the racial composition of the Richmond city council in order to address Professor John Hart Ely’s representation reinforcement theory for treating benign racial classifications with greater deference than invidious racial classifications.⁵⁸ Throughout her opinion, Justice O’Connor expressed her strong concern that Richmond’s set-aside program was a result of “simple racial politics.”⁵⁹ In an ingenious move, Justice O’Connor used Professor Ely’s political process theory to justify the Court’s decision to subject local

55. *Id.*

56. See Darren Lenard Hutchinson, “Unexplainable on Grounds Other Than Race”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. of Ill. L. Rev. 615, 637 (arguing contemporary equal protection analysis inverts concepts of privilege and subordination, reserving the most exacting level of scrutiny for laws burdening historically privileged groups).

57. See *id.* at 495-96 (noting that heightened judicial scrutiny is required in this case because the city’s black political majority could disadvantage the city’s white minority based on unwarranted facts and assumptions).

58. See *id.* at 495 (referencing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 170 (1980) [hereinafter ELY, *DEMOCRACY AND DISTRUST*], which argues that it is not appropriate for benign racial classification to undergo a heightened scrutiny analysis when a dominant racial group chooses to disadvantage itself for the sake of minority racial groups).

59. See *id.* at 493 (arguing that, in the absence of judicial inquiry into the justification of race-based measures, it is difficult to distinguish between classifications that are designed to be benign or remedial from those that are based on simple racial politics).

affirmative action programs to strict scrutiny.⁶⁰ Further, Justice O'Connor used the *Croson* fact pattern not merely to rebut Professor Ely's political process theory argument, but also to conclude, in effect, that African Americans were no longer a historically disadvantaged discrete and insular minority. Also, Justice O'Connor used the fact pattern to argue that they had become a well-organized, powerful interest group in the American pluralist political system.⁶¹

1. *Facts of the case*

In 1983, a black-majority-controlled Richmond City Council enacted the five-year Minority Business Utilization ("MBE") Plan.⁶² The MBE plan was based on evidence which showed that between 1977 and 1982, while the city of Richmond consisted of a fifty percent black population, only .67% of the general construction contract dollars went to black owned businesses.⁶³ Under the set-aside, any contractor submitting a bid for a city contract was required to sub-contract thirty percent of the contract dollar value to one or more Minority Business Enterprises, or MBEs.⁶⁴ The set-aside defined an MBE as a business owned and controlled by a "black, Hispanic, Oriental, Indian, Eskimo, or Aleut."⁶⁵ The set-aside did not place any geographic limitations on MBE eligibility; in other words, an MBE did not have to be located within the city of Richmond in order to participate in the program.⁶⁶

J.A. Croson Company, a white-owned general contracting firm incorporated in Ohio, challenged the legality of the set-aside, after the City refused to accept Croson's low bid on a construction contract because it did not propose to subcontract thirty percent of the contract award to an MBE.⁶⁷ The Croson company sued in Virginia state court, challenging the

60. See *id.* at 496 (citing John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 739 n.58 (1974) [hereinafter Ely, *Reverse Racial Discrimination*], which argued that, even though benign racial classification is not as suspect as that of invidious classification, a law that favors Blacks over Whites would be suspect if it were enacted by a legislature that was predominantly black).

61. See *id.* (implying that heightened scrutiny was an appropriate standard in the case because Blacks are no longer considered the political minority in Richmond and because the black majority could have enacted the plan to disadvantage the white minority).

62. See *id.* at 477 (observing that the MBE plan required prime contractors to whom the city awarded construction contracts and that these contractors were required to subcontract at least thirty percent of the contract to one or more minority owned businesses).

63. *Id.* at 479-80.

64. *Id.* at 478.

65. *Id.*

66. See *id.* (noting that any qualified MBE from any U.S. state could take advantage of Richmond's thirty percent set-aside program).

67. See *id.* at 481-83 (indicating that the city council rejected Croson's bid despite the fact that only one MBE in Richmond expressed interest to Croson in supplying fixtures for the contract work, that the MBE's ability to supply the fixtures was contingent upon approval of a credit report and that the acceptance of the MBE's bid would have increased

set-aside on state law and equal protection grounds.⁶⁸ The lawsuit was subsequently removed by the city of Richmond to federal district court.⁶⁹ The district court ruled that the city had legal authority to enact the set-aside, and that the set-aside did not violate equal protection.⁷⁰ On appeal, the Fourth Circuit Court reversed the district court's ruling, holding that the set-aside violated the equal protection clause.⁷¹ The Supreme Court, in a plurality opinion written by Justice O'Connor, upheld the Fourth Circuit ruling and struck down the set-aside.⁷² Moreover, a majority of the Court agreed that state and local government race-based affirmative action programs must be subject to the strict scrutiny standard of review.⁷³

2. *Justice O'Connor's rationale for subjecting affirmative action programs to strict scrutiny*

In holding that state and local government affirmative action plans must be subject to strict scrutiny, the *Croson* Court concluded that both "benign" racial classifications and invidious racial classifications should be scrutinized under the same standard of review.⁷⁴ Under the strict scrutiny test, the courts first determine whether the state has a compelling interest in relying on a racial classification.⁷⁵ Once a compelling state interest is identified, the courts must determine if the racial classification is narrowly tailored to advance the compelling state interest.⁷⁶

the cost of the project by seven percent).

68. *See id.* at 483 (arguing that the Richmond set-aside program was unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment).

69. *See id.* (noting that the action was eventually brought to the Federal District Court for the Eastern District of Virginia).

70. *See id.* at 484-85 (discussing the district court's upholding of Richmond's set-aside plan based on the conclusion by Richmond's city council that low minority participation in the contract industry was the result of past discrimination and that the plan was a reasonable means of remedying such past actions).

71. *See J.A. Croson Co. v. Richmond*, 822 F.2d 1355, 1357-61 (4th Cir. 1987) (concluding that the set-aside plan did not satisfy the strict scrutiny standard because using a race-based quota as a means to remedy past discrimination based on a "broad-brush assumption of historic discrimination" cannot be considered a compelling governmental interest). The court also found that the thirty percent set-aside was not narrowly tailored enough to accomplish the remedial goal.

72. *Croson*, 488 U.S. at 511.

73. *See id.* at 493 (noting the usefulness of strict scrutiny in the context of race-based legislation).

74. *See id.* at 493 (emphasizing that the purpose of the strict scrutiny analysis is to "smoke out" the illegitimate use of race by assuring that the legislative body is pursuing a significant goal to warrant the use of a highly suspect tool like racial classification, but also noting that, in the case of benign classification, it is difficult to determine whether or not the use of race is motivated by illegitimate goals).

75. *Id.*

76. *See id.* (stating that the strict scrutiny test ensures that the means chosen to achieve the compelling goal fit closely with the goal to assure that there is little possibility that the motive for the racial classification is not based on illegitimate racial prejudice or stereotype).

Justice O'Connor reasoned that the entire purpose of heightened scrutiny was to determine whether a racial classification was invidious or benign, and that determination cannot be made before the Court applies the strict scrutiny test to the racial classification:

Absent searching judicial inquiry into the justification for such 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. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that the motive for the classification was illegitimate racial prejudice or stereotype.⁷⁷

Justice O'Connor's detailed reference to the "smoking out" purpose of strict scrutiny has its basis in the political process theory of heightened equal protection judicial review.⁷⁸ Under this theory, heightened judicial scrutiny ensures that discrete and insular minorities are able to fully participate in the legislative process.⁷⁹ The political process theory of judicial review has its genesis in the famous footnote four of *United States v. Carolene Products Co.*⁸⁰

Professor Ely has developed the most elaborate and sophisticated version of political process theory. Under his theory, judicial intervention into the political process is justified when the process malfunctions and fails to protect the rights of discrete and insular minorities. Ely describes two types of political malfunctions. First, a malfunction exists when "the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out."⁸¹ Second, a malfunction exists when "representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalties of interest, and thereby denying that minority the protection afforded other groups by a representative system."⁸²

77. *Croson*, 488 U.S. at 493.

78. *See id.* (arguing that the strict scrutiny standard must be applied to race-based classification to ensure that such measure is not based on illegitimate prejudice or stereotype of the minority members of society whether they are white or black).

79. *See* ELY, DEMOCRACY AND DISTRUST, *supra* note 58, at 76 (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) which noted that heightened judicial scrutiny of legislation that burdens certain groups based on race may be justified because such prejudice limits the ability of those groups to participate fully in the political process).

80. 304 U.S. 144, 153 n.4 (1937) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

81. ELY, DEMOCRACY AND DISTRUST, *supra* note 58, at 103.

82. *Id.*

Thus, for example, when a racial majority in the legislature consistently enacts legislation that disadvantages and burdens racial minorities, Ely contends that such results may flow from a distortion in the normal workings of the political process.⁸³ Accordingly, in such a situation, Ely contends that courts should closely examine any racial classifications enacted by a racial majority against a racial minority to “smoke out” racist or invidious motives that may have created a political process in which a racial minority group consistently ends up as a “loser” in the process.⁸⁴

Ely argues, however, that political process theory does not justify strict scrutiny of “benign racial classifications.”⁸⁵ In determining when it is appropriate for the judiciary to override a legislative decision, Ely contends that courts should be more vigorous in their scrutiny of legislative enactments when, in any given case, a danger exists that a majority in the legislature may have enacted legislation as a way to “tyrannize” discrete and insular minorities.⁸⁶ When white-controlled legislatures enact affirmative action programs to benefit Blacks and other disadvantaged racial minorities, Ely argues, little danger exists that the racial classification is a result of a defect in the political process: “When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking.”⁸⁷ In this situation:

There is no danger that the coalition that makes up the white majority in our society is going to deny to Whites generally their right to equal concern and respect. Whites are not going to discriminate against all Whites for reasons of racial prejudice, and neither will they be tempted generally to underestimate the needs and deserts of whites relative to those, say, of blacks⁸⁸

The *Croson* fact pattern, however, presented a perfect scenario in which to undermine the political process justification for treating affirmative action programs with greater judicial deference. Simply put, when Blacks gain political power and enact an affirmative action plan to benefit their black constituents, it is easy to argue that it is no longer possible to distinguish, without subjecting the racial classification to strict scrutiny,

83. *Id.*

84. *See id.* at 146 (reasoning that the function of heightened scrutiny, which demands that suspect classifications closely fit the purpose of the legislation, is to identify unconstitutional motives).

85. Ely, *Reverse Racial Discrimination*, *supra* note 60, at 727 (arguing that “special scrutiny” is not appropriate in cases of “reverse racial discrimination” because it is not constitutionally suspect for a majority to discriminate against itself).

86. *Id.* at 732.

87. *Id.* at 735.

88. ELY, *DEMOCRACY AND DISTRUST*, *supra* note 58, at 170.

whether a classification is truly remedial or a form of racial politics. Thus, Justice O'Connor reasoned, "[e]ven if we were to accept a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate . . . in this case."⁸⁹ She then noted that Richmond's population was fifty percent black, and that five of nine city council members were black.⁹⁰

Based on these facts, Justice O'Connor flipped Ely's theory on its head. In this case, Justice O'Connor reasoned that "[t]he concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny . . ."⁹¹ In other words, under the facts of this case, where a black majority City Council enacted an ordinance that harmed the interests of Whites to seemingly provide an economic boon to its black constituents, Justice O'Connor used Ely's political process theory to imply that the white minority in Richmond were a suspect class who needed the courts to protect its rights and interests from the "racial tyranny" of the new black political majority.⁹²

3. *The dangers of racial factionalism at the state and local government level*

Having adopted the strict scrutiny standard of review for race conscious affirmative action set-asides, Justice O'Connor then applied the standard to Richmond's set-aside and struck it down as violative of equal protection.⁹³ In doing so, Justice O'Connor portrayed the enactment of the set-aside as essentially a power move made by the black majority in Richmond to provide government largess to its constituency under the guise of seeking to remedy the effects of past discrimination. Justice O'Connor's application of strict scrutiny to the set-aside in *Croson*, then, was another means of reinforcing the essential plotline of her legal narrative: that African Americans are now a politically powerful interest group, who, instead of needing judicial protection, must now have their actions carefully scrutinized to ensure that they do not engage in racial politics and undermine the rights and interests of white minorities under their power.

Under the compelling state interest analysis, Justice O'Connor held that the Richmond city council failed to "provide the city of Richmond with a

89. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989).

90. *Id.*

91. *Id.* at 495-96.

92. *See id.* at 496 (citing Ely, *Reverse Racial Discrimination*, *supra* note 60, at 739 n.58, who asserts, "[o]f course, it works both ways: a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature.").

93. *Id.* at 511.

'strong basis in evidence for its conclusion that remedial action was necessary'"⁹⁴ to rectify the present effects of past racial discrimination in the Richmond construction industry. Specifically, Justice O'Connor criticized the city council for relying on the disparity between the minority population of the city and the number of prime contracts awarded to minority firms as evidence of the present effects of past racial discrimination.⁹⁵ For Justice O'Connor, the reliance on such a disparity was problematic because such "generalized" evidence could be the basis for extending the set-aside "until the percentage of public contracts awarded to MBE's in Richmond mirrored the percentage of minorities in the population as a whole."⁹⁶

In other words, if evidence showing that less than one percent of prime contracts went to African American bidders even though African Americans constitute fifty percent of the population in the city of Richmond could be used to justify a set-aside to African American contractors of thirty percent, Justice O'Connor's fear was that such evidence could be used to justify a set-aside percentage to mirror the population of African Americans within Richmond's jurisdiction.⁹⁷ Moreover, if the population of African Americans and racial minorities continued to grow in Richmond, logically, evidence of such a disparity could be used to increase the set-aside percentage to mirror the increase in the population growth of racial minorities.

Thus, to prevent a local government from using its population of racial minorities as a primary basis for justifying a set-aside targeted for the benefit of that racial minority population, Justice O'Connor required that a state or local government provide evidence of "identified discrimination within its jurisdiction" to justify and prove that it is enacting a set-aside for a remedial purpose.⁹⁸ For Justice O'Connor, if the Court permitted the city

94. *Id.* at 500 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986), which held that the policy of laying off non-minority teachers before the minority teachers violated the Equal Protection Clause because the lay-off policy, whose stated purpose was to provide role models for minority students, was not narrowly tailored to achieve the purpose of remedying social discrimination).

95. *Id.* at 501.

96. *Id.* at 498. Furthermore, Justice O'Connor contends that accepting general discrimination as a compelling governmental interest would allow local governments to favor a minority group in a particular industry with a mere showing of the lack of opportunities for the minority group. *Id.* at 499.

97. *See id.* at 498 ("[A] generalized assertion on that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It 'has no logical stopping point.'" (quoting *Wygant*, 476 U.S. at 275)).

98. *Id.* at 509. Justice O'Connor indicated that the city of Richmond would have had a sufficiently compelling interest if it produced evidence that minority businesses were being systematically excluded from subcontracting opportunities by non-minority contractors. *Id.* Moreover, the city would have been justified in providing relief to victims of discrimination in individual instances where a "racially motivated" contractor refused to hire a minority

of Richmond to enact a set-aside based on the evidence it mustered, her fear was that the Court would be giving localities the license to engage in raw racial group factionalism:

Proper findings in this regard are necessary to define both the scope of injury and the extent of the remedy necessary to cure its effects. Absent such findings, there is a danger that a racial classification is merely . . . a form of racial politics. “[I]f there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate ‘a piece of the action’ for its members.”⁹⁹

In quoting Justice Stevens’ dissent in *Fullilove v. Klutznick*, Justice O’Connor used the history of racial oppression against racial minorities as a reason to look upon affirmative action programs such as the Richmond set-aside with suspicion and skepticism.¹⁰⁰ The critical part of the quotation is the notion that, in the post civil rights era, a racial group “with political strength to negotiate ‘a piece of the action’ for its members” could use the history of racial discrimination and exclusion in the United States for self-serving purposes.¹⁰¹

For Justice O’Connor, this use of historical racial discrimination for self-serving purposes is precisely what happened in *Croson*. In her view, the Black-controlled Richmond city council used its political strength to negotiate “a piece of the action” for the fifty percent Black population of Richmond using generalized assertions of past racial discrimination as the basis for its raw assertion of interest group racial politics.¹⁰² Moreover, the possibility that other cities with a substantial racial minority population could engage in the same sort of racial politics would seriously undermine racial progress towards a colorblind society, because the “dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently immeasurable claims of past wrongs.”¹⁰³ Hence, for Justice O’Connor and the other Justices who joined her opinion, it was necessary for the Court to impose strict scrutiny on state and local

subcontractor. *Id.*

99. *Id.* at 510-11 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 539 (1980) (Stevens, J., dissenting)).

100. *See id.* at 500 (arguing that, because racial classifications are suspect, legislative assurances of good intention do not suffice).

101. *Id.* at 511.

102. *See id.* at 506 (implying that because the city lacked evidence of past discrimination against other minorities, the city of Richmond’s purpose in enacting the set-aside program was not to remedy societal discrimination against all minorities in the construction industry but to benefit Blacks).

103. *Id.* at 505-06.

government race conscious affirmative action programs to send a clear message to local governments like Richmond that they cannot use historical evidence of racial discrimination to justify naked racial politics in the present.

B. Social Reality in Justice Scalia's Legal Narrative: Blacks as the Dominant Racial and Political Group and Whites as the Disadvantaged Racial and Political Group in Richmond

Justice Scalia wrote a concurrence in *Croson* forcefully reiterating the same themes in Justice O'Connor's plurality opinion.¹⁰⁴ Moreover, his concurrence helped to shore up a flaw in Justice O'Connor's political process theory analysis. Political process theory has been used to justify special judicial protection only of historically disadvantaged discrete and insular minorities in the political process.¹⁰⁵ In *Croson*, however, Justice O'Connor gave Whites in Richmond the status of disadvantaged political minority, even though, as Justice Marshall pointed out in his dissent, Whites have not historically been disadvantaged.¹⁰⁶ Justice Scalia's concurrence, however, provided a novel rationale for justifying "suspect class" status for white minorities in territorial jurisdictions like the city of Richmond: a white minority should be considered a "suspect class" where the black political majority has an incentive to "even the score" with Whites for the way that Whites had discriminated and oppressed them in the past.¹⁰⁷ To put it another way, under Justice Scalia's reasoning, that Blacks have been historically discriminated against by Whites in the past is a reason to view with suspicion legislation enacted by a black majority burdening the rights of a white minority.

In his concurrence, Justice Scalia agreed with Justice O'Connor's reliance on the historical purpose of the Fourteenth Amendment to distinguish between federal uses of race and state and local race-based action.¹⁰⁸ He went on to state that another "sound distinction between federal and state (or local) action based on race rests . . . upon social reality and governmental theory."¹⁰⁹ He viewed the Richmond set-aside as an illegitimate means to benefit "the dominant political group, which happens also to be the dominant racial group."¹¹⁰ In his view, the social reality is

104. *Id.* at 520 (Scalia, J., concurring).

105. See ELY, DEMOCRACY AND DISTRUST, *supra* note 58, at 170.

106. *Croson*, 488 U.S. at 533 (Marshall, J., dissenting).

107. See *id.* at 527-28 (acknowledging that Blacks had suffered more discrimination than any other racial group but rejecting the notion that societal discrimination justifies favoring one race over another because it would nurture the views that sourced past discrimination).

108. See *id.* at 490-91 (reasoning that the Fourteenth Amendment expanded federal power while limiting state power).

109. *Id.* at 522.

110. *Id.* at 524.

that racial discrimination against a particular group may be carried out with greater ease at the state and local level, rather than at the federal level.¹¹¹ Justice Scalia cited to the school desegregation cases as evidence of his view of social reality.¹¹²

Justice Scalia further supported his view of social reality by relying on James Madison's political theory as explicated in Federalist 10 of the Federalist Papers.¹¹³ He reasoned that "[a]n acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history."¹¹⁴ Justice Scalia then cited at length from a passage in Federalist 10:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the numbers of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.¹¹⁵

Thus, according to Madisonian political theory, within an extended republic, a greater variety of interests will exist, and the chance is less likely that a dominant, permanent majority faction will form. Within a smaller, more homogeneous republic, Madison contends, it is easier for a single interest or faction to dominate a legislative body and be able to engage in majoritarian tyranny against a minority faction. In *Croson*, Justice Scalia contended that the prophesy of Madison's words "came to fruition in Richmond in the enactment of a set-aside clearly and directly beneficial to the dominant political group, which happens also to be the dominant racial group."¹¹⁶

Under Justice Scalia's view, a racial classification enacted at the local level requires the closest and most careful level of judicial scrutiny, because at the local level, the danger of racial majoritarian tyranny is the greatest.¹¹⁷ Within the smaller geographic sphere of Richmond, Blacks, although a minority within the state and in the nation, are large enough to

111. *Id.* at 523.

112. *Id.*

113. James Madison, *No. 10*, in THE FEDERALIST 82, 84 (Clinton Rossiter ed., 1961).

114. *Croson*, 488 U.S. at 523.

115. *Id.* (quoting Madison, *supra* note 113, at 82-84).

116. *Id.* at 524.

117. *Id.* at 523.

constitute a majority. This majority, moreover, has been subject to a long history of racial discrimination by Whites in Richmond and in Virginia. Thus, the black majority has a “common motive to invade the rights”: its belief that “an injustice rendered in the past to a black man should be compensated for by discriminating against a white.”¹¹⁸ For Justice Scalia, the black majority enacted a set-aside plan that discriminated against the new white minority in Richmond, a “plan of oppression” facilitated by the structure of local government which, according to Madison and Justice Scalia, makes it easier for a political majority to oppress a political minority.¹¹⁹ Therefore, when the black dominated city council enacted a set-aside seemingly benefiting the black majority while burdening the rights of the white minority, Justice Scalia concluded that the enactment of the set-aside was a clear and obvious example of a dominant racial and political majority oppressing and tyrannizing the weaker racial and political minority.¹²⁰

C. Justice Marshall’s Dissent and the Historical Response to the Majority’s Legal Narrative in Croson

Justice Marshall wrote the main dissent in the opinion, a dissent in which Justices Blackmun and Brennan joined.¹²¹ The basic thrust of Justice Marshall’s dissent was to criticize the majority for ignoring the city of Richmond’s “disgraceful history of public and private racial discrimination” in striking down an affirmative action set-aside meant to redress the effects of that long history of racial discrimination against African Americans.¹²² While Justice Scalia vigorously contended that the black majority Richmond city council enacted the set-aside to “even the score”¹²³ against its former white oppressors, Justice Marshall, on the other hand, viewed it as “a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst.”¹²⁴

Similarly, liberal and critical commentators were quick to criticize the Court for concluding that the long history of racial oppression in this nation and in Richmond was irrelevant to a showing of identified past racial discrimination.¹²⁵ Professor Neil Gotanda argued, “[i]f judicial review is to

118. *Id.* at 528.

119. *Id.* at 523.

120. *Id.* at 524.

121. *Id.* at 528 (Marshall, J., dissenting).

122. *Id.* at 529 (refuting the majority’s position that Richmond’s findings were inadequate to prove that societal discrimination prevented minorities from “joining or participating fully” in the Richmond construction industry).

123. *Id.* at 528.

124. *Id.*

125. *See, e.g.,* Kimberlé Williams Crenshaw, *Color Blindness, History, and the Law*, in

consider the past and continuing character of racial subordination, then . . . [j]udicial review using historical-race should be asymmetric because of the fundamentally different histories of Whites and Blacks.”¹²⁶ Professor Patricia Williams sums up eloquently the essential core of the historical argument against the *Croson* decision:

I cannot but marvel at how, against a backdrop of richly textured facts and proof on both local and national scales, in a city where more than half the population is black and in which fewer than 1 percent of contracts are awarded to minorities or minority-owned businesses, interpretative artifice alone allowed this narrow vision that not just that 30 percent was too great a set-aside, but that there was no proof of discrimination.¹²⁷

However, the emphasis on past historical discrimination against African Americans actually supported and gave even more credence to the majority’s concerns about the dangers of racial factionalism and local racial politics in Richmond. In fact, the standard liberal response actually supports and feeds into the Court’s concerns about racial factionalism. If *Croson* is viewed as a case about political process and the dangers of racial factionalism at the local level, then it becomes clearer why the historical argument used to criticize the *Croson* Court simply fails to address the Court’s policy concerns. The *Croson* majority, and in particular Justice Scalia, agreed with the dissent that Blacks have historically been subject to invidious racial discrimination and oppression.¹²⁸ The majority and dissent, however, drew very different conclusions from that history. For the *Croson* majority, the long and horrific history of racial oppression of Blacks was an even further compelling reason to view with suspicion the actions of a black controlled local government.¹²⁹ For the majority, at the local level, Blacks not only have the motive to tyrannize Whites but also the means and power to do so. In essence, the core of both Justice

THE HOUSE THAT RACE BUILT: BLACK AMERICANS, U.S. TERRAIN 280, 284-85 (Wahneema Lubiano ed., 1997) (contending that the *Croson* Court’s color-blind approach, without regard to historical discrimination, resulted in formal equality, which furthers the domination of minorities by majorities in situations of social inequality); Neil Gotanda, *A Critique of “Our Constitution is Color-Blind”*, 44 STAN. L. REV. 1, 49-50 (1991) (denouncing formal-race strict scrutiny, as applied by the *Croson* Court, due to its limiting effects on the scope of constitutional governmental remedies available to correct racial equality, “thereby perpetuating social advantages for Whites”); Peter Charles Hoffer, “*Blind to History*” *The Use of History in Affirmative Action Suits: Another Look at City of Richmond v. J.A. Croson Co.*, 23 RUTGERS L.J. 271, 279 (1992) (suggesting that the Court’s use of a humanistic approach to historical reasoning, which considers a broader context, examines proximate causes, and finds deep associations, may have changed the outcome of *Croson*).

126. Gotanda, *supra* note 125, at 49.

127. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 106 (1991).

128. *Croson*, 488 U.S. at 527.

129. *Id.* at 500.

O'Connor's and Justice Scalia's narrative comes down to this "truth": the Equal Protection Clause does not permit a historically oppressed racial group to use its history of racial oppression to discriminate against its former oppressor. As Justice Scalia asserts, "[w]here injustice is the game . . . turnabout is not fair play."¹³⁰

Thus, in emphasizing the long history of racial discrimination by white Richmond citizens against black Richmond citizens, Justice Marshall's dissent never directly addressed the majority's concerns regarding reverse majoritarian tyranny, and perhaps his dissent ended up only providing further fodder for the majority's conclusion that Whites were now a suspect class precisely because Whites in Richmond had historically engaged in discriminatory practices against Blacks. Thus, because of that history, the *Croson* majority believes Whites are now likely to be subject to racial retribution by the new black political majority in the guise of ostensibly benign legislative enactments purporting to remedy the effects of past discrimination.

The *Croson* decision, in subjecting state and local government affirmative action programs to strict scrutiny, is significant because it reflects the ascendance of the colorblindness principle in equal protection doctrine. Thus, liberal constitutional scholars and justices constructed arguments against the *Croson* decision that actually end up supporting, rather than undermining, the "plot" of the *Croson* majority's legal narrative. Why? The critiques have been ineffective because they have failed to critically examine the spatial assumptions in the *Croson* majority's legal narrative. In fact, they, like the *Croson* majority, all implicitly assume that the proper geographic scale for the story is the city of Richmond, since the case is about a set-aside enacted by the city of Richmond. Accordingly, for both the majority and dissent, the implicit assumption was that places and spaces outside the political boundaries of the city of Richmond were simply irrelevant to the competing stories being told in the opinion.

III. CRITIQUING THE SPATIAL ASSUMPTIONS IN THE *CROSON* NARRATIVE

In order to effectively critique the *Croson* majority's narrative, it is necessary to first uncover the spatial assumptions present in the Court's decision. One key spatial assumption in the *Croson* majority's narrative is that the relevant geographic scale or setting was the city or local scale. The Court assumed that the narrative was about a local government, the city of Richmond, and consequently, the Court restricted the geographic scale of

130. *Id.* at 524.

its narrative to the city limits of Richmond.¹³¹ In making this geographic assumption, the Court effectively made the spaces and places outside the city lines of Richmond disappear from the minds of the reader, making the reader forget that the city of Richmond is located within a greater geographic context.

However, as argued earlier, the decision to choose a particular geographic scale/setting of a story is not a neutral, inconsequential decision. Rather, the geographic setting is integral to the construction of a plot, and the plot is the key determinant of a narrative's meaning. In fact, the spatial construction in the *Croson* legal narratives was a critical move necessary to make the narratives coherent, self-evident, and therefore convincing. Accordingly, the next sections of this Article will examine alternative geographic settings for the *Croson* narratives to reveal the consequences of racial inequality and the workings of power that had been obscured by the *Croson* majority's legal narratives.

A. *Croson as a Narrative About the National Construction Industry*

As mentioned above, one effective way to uncover the embedded spatial constructs in a legal narrative is to start by asking the *where* question: Where are the "characters" in the narrative located? Where are they from? Where are they now? This section will examine where the plaintiff in *Croson* was from, and in doing so, this section will argue that the local geographic scale in the *Croson* narratives was entirely inappropriate given the interstate nature of the construction industry.

Justice Scalia contended that the set-aside reflected an attempt by the dominant black racial and political group in Richmond to "even the score" with the white racial and political minority.¹³² Justice Scalia concluded that it was necessary for the Court to strike down the set-aside and impose strict scrutiny on state and local government race conscious programs to protect minority members like Croson Co. from future acts of injustice.¹³³

A crucial geographic assumption in Justice Scalia's story is that this case involved a racial majority faction oppressing a racial minority faction within the territorial jurisdiction of Richmond. For Justice Scalia, affirmative action "is the means by which Whites might be oppressed in those places where Whites are racially outnumbered."¹³⁴ For Justice Scalia's narrative to make sense, therefore, the assumption must have been

131. *See id.* at 492 (holding that Richmond may take steps to remedy private discrimination within its own city boundaries).

132. *See id.* at 524, 528 (Scalia, J., concurring) (stating that the Richmond set-aside program was enacted by the dominant political group in favor of the same dominant racial group to remedy past discrimination).

133. *Id.* at 520, 524.

134. Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 402 (1989).

that Croson was a company operated by a member of the “outnumbered” white racial group in Richmond.

However, for all the concerns raised by Justice Scalia regarding the vulnerability of the white Richmond minority, the irony is that in *Croson*, the plaintiff Croson Co. was not a “citizen” of the city of Richmond.¹³⁵ Croson was, and still is, a corporation incorporated in Ohio with its principal place of business in Ohio.¹³⁶ Thus, the Madisonian and process theory concerns raised by the Court, in particular by Justice Scalia, simply did not apply in *Croson*. Croson Co. was not even an individual but a multi-locational corporation with bases of operation in multiple states.

The geographic location of the general contractor was never mentioned by any of the justices in *Croson*, nor did the Court mention this in the statement of facts.¹³⁷ However, once it is understood that the plaintiff, Croson Co., was an Ohio corporation, that understanding undermines Justice Scalia’s reliance on Madisonian theory to understand the social reality of race relations in Richmond. The political process and Madisonian theory relied on by the majority was premised on protecting minority individual personal rights, not the rights of corporations. *Croson*, however, involved a foreign corporation challenging Richmond’s set-aside program. In other words, contrary to the narrative told by Justice Scalia, this case did not involve a political majority enacting a policy burdening a political minority. Rather, this case involved a city government regulating how it deals with commercial enterprises located throughout the nation. Madisonian theory, however, is silent about interstate relations, and is silent about the role of corporations in its theory of factions.

Moreover, the fact that Croson Co. is an out-of-state corporation raises serious questions regarding the applicability of Madisonian factional theory to corporations. Corporations defy traditional Madisonian territorial jurisdictional factional analysis for two reasons. One reason why it is difficult to apply Madisonian factional theory to corporations is because a corporation is a legal fiction and does not have a corporeal existence, and so the question of “where is a corporation” is a difficult if not impossible question to answer. In *Croson*, the plaintiff had a regional manager in the Richmond area, and presumably, that regional manager had conducted numerous transactions on behalf of Croson Co. with the city of Richmond over a period of time.¹³⁸ Does that fact, therefore, mean that Croson Co. is

135. J.A. *Croson Co. v. Richmond*, 779 F.2d 181, 182 (4th Cir. 1985).

136. *Id.*

137. See generally *Croson*, 488 U.S. at 477-86 (noting only that Croson Co. received the bid forms but not stating that Croson Co. was an Ohio corporation).

138. See *Croson*, 779 F.2d at 183 (assuming that because Croson Co. received bid documents, Croson Co. was regularly involved in Richmond public bids).

“in” the city of Richmond and therefore a “citizen” of Richmond?¹³⁹ Whatever answer one provides to this question, the main point is that the question is not an easy one to answer. As such, it is difficult to incorporate the rights of “corporations” within Madison’s theory of local factions. Moreover, to the extent that most general contractors are corporations, it is not legally possible to determine whether a corporation “resides” in a city such as Richmond because corporations are incorporated at the state level and do not technically have a “local” place of incorporation.¹⁴⁰

Additionally, the nature of a city’s procurement practices also makes it difficult to apply Madisonian theory to determine if a city engages in “tyrannical” procurement practices that burden and invade the rights of the city’s minority factions. The reality is that, as a general practice, a city like Richmond does not restrict itself to dealing solely or mostly with general contractors located within its jurisdiction.¹⁴¹ In fact, studies of various city procurement practices show that the geographic scope of a city’s procurement practice extends far beyond its political jurisdictional boundaries. In New York City, for example, a disparity study showed that the relevant geographic scope for construction procurement practices was a “twelve county, two state area, and a nineteen county, three state area for personal and professional services.”¹⁴²

Finally, even if we accept Justice Scalia’s logic that this set-aside was truly about “evening the score” with Whites in general, and not just white Richmond residents, then, because white general contractors located outside of Richmond were the ones “oppressed” by the city’s set-aside program, it would mean that the black members of the Richmond city council enacted this set-aside as a way to “even the score” with white people and white-owned businesses throughout the entire United States.

However, there is very little factual evidence to support the inference that the city was truly motivated by a desire to “even the score” with white people of the United States. It is a speculative proposition, and moreover, it speaks to a theory of racial factionalism that Madison never envisioned. Thus, put in proper geographic perspective, Justice Scalia’s conclusion is not supported by social theory and history. Rather, the social theory and history invoked by Justice Scalia was simply irrelevant to the circumstances in the case.

139. The question of a corporation’s location is one that the Court has grappled with in the context of personal jurisdiction law. *See, e.g., Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

140. *See id.* at 317 (holding that only corporate presence may exist at a state level through “continuous and systematic” activities).

141. *See* George R. La Noue, *Standards for the Second Generation of Croson Inspired Disparity Studies*, 26 URB. LAW. 485, 495 (1994) (detailing that different areas may be considered and that agencies may utilize different geographic regions in their search).

142. *Id.* at 495-96.

Yet, even though the *Croson* decision did not represent a paradigmatic, unambiguous example of a majority oppressing a minority within a territorial jurisdiction, curiously, even legal scholars supportive of affirmative action have not really challenged the narrative constructed by Justice Scalia.¹⁴³ Perhaps the lack of critical analysis of Justice Scalia's Madisonian reasoning stems from the power of his narrative, a narrative so compelling and so resonant with dominant beliefs regarding the dangers of majoritarian tyranny, that the "truth" of Justice Scalia's story seemed unassailable and self-evident, making it easy to forget to ask simple questions such as where was the plaintiff really from, which, as I argue, opens up an avenue for critiquing and revealing the ways in which a legal narrative does not correspond with and accurately represent the reality of a situation.

B. Croson as a Narrative About the Commonwealth of Virginia

Even though the rights of the white minority in Richmond were not directly implicated in *Croson*, the general question still needs to be addressed: Does the white Richmond minority have reasons to fear that the black political majority has the incentive and means to invade its rights? Does the general theoretical possibility of black majoritarian tyranny at the local level justify the Court's decision to impose strict scrutiny on state and local government's race conscious measures? This section will examine the *Croson* situation by locating it within the state political scale instead of focusing solely on the local scale. In other words, instead of examining *Croson* as a case involving a pure "local" matter, it will examine it as case involving the relationship between a state and one of its local governments.

1. Local governments as creatures of state law

Under well-settled Virginia state law, local governments such as the city of Richmond are subordinate political subdivisions of the state.¹⁴⁴ As political subdivisions, local governments exist as a creature, a delegate, and an agent of the state.¹⁴⁵ As a creature of the state, a local government derives its existence and power solely from the state and is completely

143. See Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 466 (1997) (accepting implicitly Justice Scalia's incorrect assumption that the case involved an aggrieved member of the white Richmond minority).

144. See *id.* at 7 (noting that states possess total control over local governments).

145. See, e.g., *id.* at 6-8 (asserting that local governments have no rights against their states); Carol F. Lee, *The Federal Courts and the Status of Municipalities: A Conceptual Challenge*, 62 B.U. L. REV. 1, 5-7 (1982) (tracing the development of the relationship between state and local governments); Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 83-84 (investigating Dillon's framework of city powerlessness).

subject to plenary state power and control.¹⁴⁶ As a delegate of the state, a local government possesses only those powers conferred on it by the state.¹⁴⁷ As an agent of the state, a local government exercises its delegated powers at the local level to further state interests.¹⁴⁸ Thus, under this formal view, “a local government is like a state administrative agency, serving the state in its narrow area of expertise.”¹⁴⁹

The federal constitutional status of local government is predicated on its status as a subordinate political subdivision of the state.¹⁵⁰ Local governments have no independent constitutional status or rights. Therefore, because all local exercises of power are performed to further the state’s interests, local government action is considered “state” action.¹⁵¹

2. *The inconsistent treatment of local governments in constitutional law*

Even though black-letter law exists on the legal and constitutional status of local government, Professor Richard Ford asserts that “local government exists in a netherworld of shifting and indeterminate legal status.”¹⁵² Ford argues that “local government law oscillates between two competing conceptions of local government.”¹⁵³ The first conception is the traditional notion of local government as a subordinate political subdivision of the state.¹⁵⁴ The second conception reflects a view of local government as an autonomous political community formed by people of the same values and interests.¹⁵⁵ Within this view, local governments are decentralized sites for democratic participation. Local government as autonomous political community invokes visions of New England town meetings.¹⁵⁶ This conception “belies the conception of local government as a delegate of the state and instead conjures up the notion of a state within a state.”¹⁵⁷

146. Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 8 (1990) [hereinafter Briffault, *Our Localism: Part I*]; Lee, *supra* note 145, at 6.

147. Briffault, *Our Localism: Part I*, *supra* note 146, at 8.

148. *See id.* at 7-8; Lee, *supra* note 145, at 6-7.

149. Briffault, *Our Localism: Part I*, *supra* note 146, at 7-8.

150. Williams, *supra* note 145, at 83; *see also* Briffault, *Our Localism: Part I*, *supra* note 146, at 7 (asserting that state governments have total control over local governments).

151. Briffault, *Our Localism: Part I*, *supra* note 146, at 7-8.

152. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1864 (1994) [hereinafter Ford, *Boundaries*].

153. Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 STAN. L. REV. 1173, 1175 (1996) [hereinafter Ford, *Beyond Borders*].

154. *Id.* at 1176.

155. *Id.* at 1175.

156. *See id.* (implying that local government provides a community that can be shaped and controlled by its members).

157. Ford, *Boundaries*, *supra* note 152, at 1867. As I will argue below, the *Croson* majority viewed Richmond as an autonomous political community. However, the Court took this autonomy as a threat to the liberty of the white Richmond minority. The Court’s fear of local power in *Croson* is in stark contrast to the Court’s positive, romantic view of such political communities as the white, suburban school district in *Milliken v. Bradley*, 433

While Ford argues that local government doctrine “oscillates” between the “subordinate political subdivisions of the state” view and the “autonomous political community” view,¹⁵⁸ the case law provides no discernible pattern or principle from which to predict when a court, in a particular case, will rely on one conception of local government over another.

While any case, taken in isolation, may appear to be governed by a singular and coherent set of principles or a holistic logic, the cases as a whole reflect a deep ambivalence towards the proper role of local government in a society ostensibly committed to popular sovereignty, individual rights, and the rule of law.¹⁵⁹

The doctrinal “oscillation” between two competing visions of local government serves as a way to manipulate the spatial or geographic scale of the legal story a court tells in order to justify a particular decision. Specifically, in *Croson*, in order to construct its narrative about local government tyranny, the Court ignored the legal conception of a city as a subordinate arm of the state. More specifically, the Court had to ignore the holding of the Fourth Circuit Court of Appeals, which held that, in enacting the set-aside, the city of Richmond acted to further the state’s interests in promoting diversity in the construction industry.¹⁶⁰

In imposing strict scrutiny, the Court focused solely on the perceived localized racial interests of the black city council in Richmond.¹⁶¹ Had the Court been consistent in treating the city of Richmond as a state entity, it would have focused its equal protection analysis not on the black majority city council of Richmond, but on the white majority-controlled Commonwealth of Virginia. Once the city of Richmond is properly located as a subordinate agent of the Commonwealth of Virginia, it is harder to argue that the federal courts needed to intervene into state-local government affairs in order to protect vulnerable whites from local racial majoritarian tyranny.

3. *The Fourth Circuit’s state law holding—the city of Richmond as an agent of the state of Virginia*

The Fourth Circuit held that the Commonwealth of Virginia enacted the set-aside to further the public interest in promoting inclusion of minority

U.S. 267 (1977), and the affluent, predominantly white school district in *San Antonio v. Rodriguez*, 411 U.S. 1 (1973).

158. Ford, *Beyond Borders*, *supra* note 153, at 1175.

159. *Id.*

160. See *J.A. Croson Co. v. Richmond*, 779 F.2d 181, 190 (4th Cir. 1985) (holding that the information presented by Richmond showed that the “[p]lan was adopted to remedy the effect of past discrimination”).

161. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495-96 (1989) (stating that the black political majority’s exercise of power called for the use of heightened scrutiny).

and women owned businesses in government procurement transactions.¹⁶² In other words, the city of Richmond was acting as an administrative arm of the Commonwealth of Virginia to effectuate the interests of the Commonwealth of Virginia in advancing racial equality through affirmative action.

The Fourth Circuit Court, in deciding the constitutionality of the set-aside, first dealt with the threshold state law question: whether Richmond had authority under state law to enact the set-aside.¹⁶³ In holding that Richmond had the requisite authority to enact the set-aside, the court concluded that the set-aside advanced the state's interest in promoting minority participation in government construction contracts.¹⁶⁴ In conducting its analysis, the court applied Virginia state and local government law. Virginia limits the power of its local governments to express grants of statutory authority.¹⁶⁵ The scope of a local government's authority is determined according to the judicial doctrine of Dillon's Rule.¹⁶⁶ Dillon's Rule states, "[L]ocal governing bodies have only those powers that are expressly granted, those that are fairly implied from expressly granted powers, and those that are essential and indispensable."¹⁶⁷

Plaintiff, Croson Co., contended that Richmond's authority to enact the set-aside could not be "fairly implied" from powers expressly granted to localities by Virginia.¹⁶⁸ It made two arguments to support this claim. First, Croson argued that the power was not "fairly implied," since the "Plan is not 'based on competitive principles,'" as required by the Virginia Procurement Statute.¹⁶⁹ The Fourth Circuit rejected this argument, reasoning that past discrimination produced anti-competitive effects for minority businesses.¹⁷⁰ Therefore, by encouraging minority-owned businesses to enter a market where they had previously been absent, the set-aside actually promoted competition.¹⁷¹

162. See *Croson*, 779 F.2d at 190 (asserting that Richmond's plan effectively remedied past discrimination to promote current diversity).

163. See *id.* at 184-85 (stating that Croson Co. contended that Richmond's plan was *ultra vires* and therefore, invalid).

164. See *id.* (indicating that, because the plan remedied past discrimination, it was constitutionally valid).

165. See *id.* at 185 (contending that the ordinance was valid only if authorized under the Dillon Rule); see also Note, *Dillon's Rule: The Case for Reform*, 68 VA. L. REV. 693, 693 (1982) [hereinafter *Dillon's Rule*] (indicating that Dillon's Rule presents a narrow scope of local power).

166. *Dillon's Rule*, *supra* note 165, at 693.

167. *Croson*, 779 F.2d at 185.

168. See *id.* (presenting Croson Co.'s argument that Richmond had no power to enact the plan under the Dillon Rule).

169. *Id.*

170. *Id.*

171. *Id.*

Second, Croson argued that Richmond's authority to enact the set-aside cannot be fairly implied from expressly granted powers because the set-aside was contrary to the public policy of Virginia.¹⁷² The Court rejected this argument, noting that under the section 11-48 of the Virginia Procurement Statute, all public bodies in Virginia were required to "facilitate the participation of small businesses and businesses owned by women and minorities in procurement transactions."¹⁷³

If the set-aside comported with the state's mandate that government contracts be awarded on a competitive basis, and, if the set-aside advanced the state's interest in promoting minority participation in government procurement practice, then the Court seemed to have focused its strict scrutiny analysis on the wrong government entity. Once we view Richmond as a state law entity advancing the state's interest, the analysis would not focus on the Richmond City Council and its black majority, but rather, would focus on the state legislature and its dominant white majority.

Under political process analysis, if there is a process defect, the process defect is in the state legislative process for authorizing one of its subdivisions to engage in unlawful racial politics. And, applying Ely's theory to the facts, there is little danger of a process defect because the white majority in the Virginia state legislature is not likely to allow a black controlled subdivision to invidiously discriminate against Whites in Richmond. This situation is the classic affirmative action scenario that Ely poses: a white political majority disadvantaging itself to benefit a racial minority. In this light, the Madisonian political process theory's fear of local government racial tyranny becomes more apparent than real. State law mechanisms exist to control local government action. Dillon's Rule, for example, developed as an attempt to curb perceived local government corruption.¹⁷⁴

4. *Justice O'Connor's inconsistent treatment of the city of Richmond in Croson*

In the Supreme Court's decision in *Croson*, however, the Court ignored both the Fourth Circuit's and its own treatment of the city of Richmond as a state entity in deciding to impose strict scrutiny on the local government set-aside. In fact, the Court oscillated, without any reasoning or justification, between the two competing conceptions of local government

172. *See id.* at 185-86 (presenting Croson Co.'s argument that the plan violated public policy because a "public body" discriminates on the basis of race).

173. *Id.* at 186.

174. *See* Williams, *supra* note 145, at 84 (noting that Dillon wanted to "limit city power" by arguing "cities had no inherent sovereignty").

within the same opinion by inconsistently treating the city of Richmond simultaneously as a state agency and as an autonomous city-state.

In distinguishing the congressional set-aside upheld in *Fullilove v. Klutznick*¹⁷⁵ from the Richmond city council set-aside at issue in *Croson*, Justice O'Connor repeatedly emphasized that the Equal Protection Clause acts as a limit on state power.¹⁷⁶ The City of Richmond argued that *Fullilove* authorizes state and local governments to enact race-conscious remedial programs.¹⁷⁷ Justice O'Connor rejected the city's argument.¹⁷⁸ Justice O'Connor reasoned that Congress has greater latitude in fashioning a remedy for past discrimination against racial minorities because Section Five of the Fourteenth Amendment grants Congress broad enforcement powers.¹⁷⁹ Section Five of the Fourteenth Amendment empowers the federal government with broad remedial powers to enforce the Equal Protection Clause but Section One acts as a limit on state action regarding matters of race.¹⁸⁰ Here, Justice O'Connor sought to distinguish the Richmond set-aside from the Congressional set-aside upheld as constitutional in *Fullilove*.¹⁸¹

Thus, in treating the city of Richmond as a "state" for constitutional purposes, Justice O'Connor relied on a conception of local governments as administrative arms of the state. This move is necessary because the Equal Protection Clause explicitly limits state power. Local governments are also subject to the Equal Protection Clause because, for constitutional purposes, the local government is a part of the state, and its actions are considered an exercise of state power.¹⁸² Accordingly, Justice O'Connor emphasized that the city of Richmond is "a state entity which has state-law authority to address discriminatory practices within local commerce under its jurisdiction."¹⁸³

175. 448 U.S. 448 (1980).

176. *Croson*, 488 U.S. at 490-92.

177. *Id.* at 486.

178. *Id.*

179. *Id.* at 490.

180. *Id.* at 486-93.

181. *Id.* at 490-91. In 1977, Congress enacted the MBE provision of the Local Public Works Act. The Act required that ten percent of the federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned and controlled by MBE's (defined to include Blacks, Hispanics, Asians, Indians, Eskimos, and Aleuts). *Fullilove v. Klutznick*, 448 U.S. 448, 454 (1980).

182. See *Avery v. Midland*, 390 U.S. 474, 479-80 (1968) ("The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State."); see also Briffault, *Our Localism: Part I*, *supra* note 146, at 87 (noting that, although the Equal Protection Clause reaches only exercises of state power, a local government's status as a political subdivision of the state allows for the application of equal protection to local government action).

183. *Croson*, 488 U.S. at 492.

The Court also relied on the city of Richmond's status as a state entity, acting on behalf of state interests, in distinguishing the Richmond set-aside from the race-based layoff plan struck down in *Wygant v. Jackson Board of Education*.¹⁸⁴ In *Wygant*, a plurality on the Court applied strict scrutiny to a local school board's race-based lay-off program.¹⁸⁵ The Court held that, under strict scrutiny, the local school board had to show that it engaged in prior racial discrimination in its hiring practices in order to implement a race-conscious plan.¹⁸⁶ Justice O'Connor, in *Croson*, distinguished the local school board from the Richmond City Council, holding that the City of Richmond did not need to show that it had engaged in prior discrimination in its procurement practices.¹⁸⁷ The difference between the city of Richmond in *Croson*, and the local school board in *Wygant*, is that Richmond was considered a state entity and therefore had the power to address discriminatory practices within its jurisdiction.¹⁸⁸

Thus, in distinguishing *Wygant* from *Croson*, Justice O'Connor recognized the well-settled legal principle that local governments act as delegates or entities of the state, and specifically that Richmond's local interests are essentially state interests.¹⁸⁹ Yet, in Part III of Justice O'Connor's opinion, where she begins her equal protection analysis of the set-aside, there is no mention of any possible state interest in authorizing Richmond to enact the set-aside. She ignores her characterization of Richmond as a state entity and treats Richmond as a sovereign city-state that engages in legislative action solely for its own local purposes.

If Richmond is viewed as an autonomous, state-like entity, the dangers of racial politics are enhanced because there do not seem to be any structural "checks" on potential local abuses of power. Accordingly, the need to subject local government set-asides to strict scrutiny seems compelling and necessary. However, once we foreground the legal conception of local government in the equal protection analysis, political process and Madisonian theory do not support the Court's reasoning. Justice O'Connor's oscillation between the two competing conceptions of local government diverts our attention away from Richmond's constitutional status as a subordinate political subdivision of the state and the existence of state law checks on local government power.

If Justice O'Connor had consistently treated the city of Richmond as an entity of the state, she would have acknowledged that, because the

184. *Id.* at 492 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986)).

185. 476 U.S. at 280.

186. *Id.* at 277-78.

187. *Croson*, 488 U.S. at 492.

188. *Id.*

189. See Ford, *Boundaries*, *supra* note 152, at 1862 (arguing that the view of local governments as delegates of the states does not provide them with any autonomy).

Richmond set-aside was legally authorized by state law, according to Dillon's Rule, she would have had to treat the set-aside as a program enacted pursuant to and consistent with the state of Virginia's policies and interests. Once seen from that perspective, arguably, from a political process standpoint, the black majority on the Richmond City Council should have been viewed as "an agent" of the white majority in terms of population and in terms of the racial composition of the Virginia state legislature.

Of course, the mere existence of installed institutional checks does not automatically protect members of a jurisdiction from majoritarian tyranny. As critical race and legal scholars have vigorously and convincingly argued, formal legal protection against racial discrimination does not necessarily translate into substantive protections against racial discrimination.¹⁹⁰ Similarly, one could argue that the state-law checks on local government tyranny may themselves be "malfunctioning," and that the interests of white minorities in localities like Richmond may not be fully taken into account by the state-wide white majority.

However, the critical point for purposes of this Article is that whether local white numerical minorities need federal judicial protection from black local majorities is not a question that can be summarily answered, from a political process standpoint, by merely looking at which racial group is the numerical majority in city government. Justice O'Connor's misapplication of Professor Ely's political process theory still begs the question: Are Blacks now in actuality the dominant racial and political group in cities like Richmond, and do, therefore, white minorities need federal judicial protection in order to be protected from potential acts of black majoritarian tyranny?

C. *Croson as a Narrative About the Richmond Metropolitan Area*

This section will examine the nature of a city's substantive political power by analyzing a critical theme in the *Croson* legal narrative: That regardless of the city's formal status as a state entity, because Blacks now are a numerical majority on the Richmond City Council, Blacks are now the dominant racial and political group in Richmond.¹⁹¹ This Section contends, however, that once black political power in the city of Richmond is analyzed in the context of urban-suburban relations, black control of

190. See, e.g., *id.* at 1843-1921 (arguing that despite civil rights reform, local government policy and private actors work together to create an ongoing practice of actual physical segregation that continues to disempower historically powerless minority communities).

191. 488 U.S. at 524.

formal political power in Richmond is actually evidence of the continuing political and socioeconomic powerlessness of African Americans.

The Court recognized the demographic change in the city of Richmond from majority white to majority black.¹⁹² The continuing, actual political powerlessness experienced by African Americans in Richmond becomes clear only when a simple question about geography/demography is asked. Neither the majority nor the dissent raised this question: How did Blacks end up becoming a majority in the city of Richmond? In asking this question, the presumption is that where people are is of great social significance. Thus, when critically examining a legal narrative, it is always useful to ask how the people who are part of the legal narrative ended up where they did. This simple question opens up the *Croson* analysis from its restricted geographic setting, the city of Richmond, and directs it to an analysis of race relations between Whites and Blacks in the Richmond metropolitan area.

1. *How did Blacks become a racial majority in the city of Richmond?*

The rise of the black majority in Richmond occurred for primarily one reason—the outward-migration of Whites from the city to the Richmond suburbs.¹⁹³ Specifically, the election of black mayors and city council members throughout cities in the United States reflect the historical trend of Whites moving from the city to the suburbs.¹⁹⁴ In Richmond, beginning in the 1960s, white residents exercised their exit option. A similar pattern occurred throughout the country, contributing to the problems of central cities such as Richmond.¹⁹⁵ In Richmond, white residents used their exit option not to escape local racial politics, but to escape from the court ordered racial integration of public schools.¹⁹⁶ The rise of black majorities

192. *See id.* at 479.

193. *See* CHRISTOPHER SILVER & JOHN V. MOESER, *THE SEPARATE CITY: BLACK COMMUNITIES IN THE URBAN SOUTH, 1940-1968* 42 (1995) (explaining that Whites began moving West from the city in the 1940s, establishing homogenous suburban neighborhoods, while Blacks began to predominate census tracts in most areas of central Richmond).

194. *See* WILLIAM E. NELSON, JR. & PHILIP J. MERANTO, *ELECTING BLACK MAYORS: POLITICAL ACTION IN THE BLACK COMMUNITY* 337 (1977) (concluding that black leaders inherit their cities' problems when white leaders and residents move away from the central city, yet black leaders lack the economic resources to deal with these problems effectively as a result of the flight of a large number of the cities' middle-class citizens).

195. *See* SILVER & MOESER, *supra* note 193, at 167 (observing that post-1960s, a population loss resulted in a weakening economy, drastic drops in home ownership and a substantial decline in the supply of habitable housing in Richmond).

196. *See* Robert Pratt, *Simple Justice Denied: The Supreme Court's Retreat from School Desegregation in Richmond, Virginia*, 24 *RUTGERS L.J.* 709, 710 (1993) (stating that Whites were able to prevent *de facto* integration through passive resistance techniques, but by the time of court-ordered busing in 1970, Whites had already begun to exit Richmond in large numbers). *See generally* *Bradley v. Richmond Sch. Bd.*, 325 F. Supp. 828 (E.D. Va. 1971) (holding that attendance figures may be used to determine if a Richmond school integration plan is working in practice and not simply on paper).

in central cities, which serve as the basis of political power for black political officials, therefore, does not reflect black electoral influence and socioeconomic gain, but more accurately reflects the trend of “white flight” from the central cities to the suburbs and the resulting predominance of poor black citizens within these central cities.¹⁹⁷

The consequences of “white flight” from the central city of Richmond have been dramatic. The city of Richmond has shrunk in population by nineteen percent since 1970, and in 1996, Richmond’s population dipped below 200,000.¹⁹⁸ In stark contrast, the three adjacent, predominantly white Richmond area counties have doubled in population, showing a growth in 220,000 new residents.¹⁹⁹ By the mid-1990s, the attrition of Whites from the city had led to a black majority that had grown from fifty percent in the mid-70s to nearly sixty percent in the new millennium.²⁰⁰ Thus, the rise to political power by Blacks in Richmond was primarily through attrition of Whites rather than gains in black population.²⁰¹ Because the socioeconomic health of a city is reflected by population gain and economic growth,²⁰² such a population trend was a major signal that the city of Richmond was in distress.

While the metropolitan area’s population growth mirrors its economic growth, the city of Richmond’s population decline mirrors its economic decline. From 1979 to 1994, total employment opportunities in the Richmond metropolitan area increased by 34%.²⁰³ During that same period, total employment opportunities in the city of Richmond declined by 6%, representing a loss of 11,000 jobs.²⁰⁴ In 1979, 53% of all jobs in the Richmond metropolitan area were located in the city of Richmond.²⁰⁵ By 1994, only 37% of the jobs were located in Richmond.²⁰⁶ And between 1980 and 1993, the time period when the set-aside was enacted, 90% of business investment in the metropolitan area was in the suburbs.²⁰⁷ In 1980, white median household income in the city was 42% higher than

197. Pratt, *supra* note 196, at 710, 723.

198. DAVID RUSK, CITIES WITHOUT SUBURBS 27 (1995).

199. *Id.*

200. ANTHONY DOWNS, NEW VISIONS FOR A METROPOLITAN AREA (1994).

201. *See id.* at 27 (identifying a cycle where a rise to black political dominance traps poor Blacks in cities of declining economic opportunity while simultaneously accelerating the flight of middle-class residents).

202. *See id.* at 47 (explaining that cities that have experienced a flight of middle-class families to the suburbs, and thus encountered a steady population drop, typically stagnate economically and a reliance on federal and state aid).

203. John W. Moeser, *Spirit of Community Can Rescue Richmond*, RICHMOND TIMES DISPATCH, July 14, 1996, at F1.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

black median household income.²⁰⁸ Ten years later, in 1990, white median household income in the city was 65% higher than black median household income.²⁰⁹ Moreover, by 1990, over 63% of all the poor in the Richmond metropolitan area resided within the city of Richmond.²¹⁰

With regard to the state of Richmond public schools, in 1954, white children constituted 57% of the Richmond city public school population.²¹¹ By 1989, Blacks constituted more than 87% of the public school population and Whites only 13%.²¹² Presently, black children constitute 95% of the public school population in the Richmond city schools.²¹³ These statistics show that school segregation has increased over the past several decades. Moreover, the segregation is occurring on both a race and a class level, as the children in the Richmond public schools tend to also be low-income students.²¹⁴

Once the geographic context of Richmond's population is understood, the way in which Blacks became a majority in Richmond raises questions about whether the black rise to power in Richmond, and other central cities in the nation, is consistent with the belief that racial progress has advanced in a steady, linear fashion.²¹⁵ Since the late 1960s, while the Richmond metropolitan area has been flourishing, the city of Richmond has been dying. Instead of moving into a position of power, Richmond's black community has obtained political control of a depreciating asset.²¹⁶

Richard Hatcher, the first African American mayor of Gary, Indiana, recognizes the "paradox" of black political gain in America.²¹⁷ Specifically, the number of black elected officials grew from two to three hundred in 1972 to over 6,000 by 1989.²¹⁸ Despite such gains in black political power, however, the economic status of black communities during

208. *Id.*

209. *Id.*

210. *Id.*

211. Pratt, *supra* note 196, at 710.

212. *Id.*; Jennifer E. Spreng, *Scenes from the Southside: A Desegregation Drama in Five Acts*, 19 U. ARK. LITTLE ROCK L. REV. 327, 390 (1997).

213. Pratt, *supra* note 196, at 710.

214. *Id.*

215. See NELSON, JR. & MERANTO, *supra* note 194, at 337 (countering a theory of black political dominance and alternatively maintaining that the demographic conditions that result in an increase of black political power may also restrict black leaders' abilities to govern effectively).

216. RUSK, *supra* note 198, at 27; see SILVER & MOESER, *supra* note 193, at 166-69 (asserting that Richmond in the 1990s "lacked the means to attract and to sustain population densities necessary to support vital urban institutions").

217. See Richard Hatcher, *Conclusion* to RACE, POLITICS, AND ECONOMIC DEVELOPMENT: COMMUNITY PERSPECTIVES 175 (James Jennings ed., 1992) (noting that political power in the hands of American ethnic groups does not always translate into the achievement of economic power for these groups).

218. *Id.*

this period has continued to decline.²¹⁹ Moreover, the economic status of African Americans residing within territorial jurisdictions politically controlled by African American political leaders has worsened.²²⁰

The worsening socioeconomic conditions of African Americans residing in localities ruled by black political leaders are not due to a failure of political will but are the result of structural conditions affecting the vast majority of localities under African American control. The phenomenon of “white flight” not only has contributed to the socioeconomic distress of African Americans residing in a central city like Richmond, but also has represented a form of geopolitical power—a form of political power that challenges formal, liberal territorial conceptions of political power. The power of “geographic exit” helps to explain the structural factors that make it very difficult for African American political leaders of cities like Richmond to engage in measures to remedy the socioeconomic conditions of their African American constituents.

Once urban-suburban race relations in Richmond and other American metropolitan areas are understood as structured by the workings of the power of geographic exit, a seeming “paradox” emerges regarding the nature of political power in the United States. For African Americans in particular, the attainment of political power is no longer a means of achieving socioeconomic power. In other words, there no longer is a positive, mutually reinforcing relationship between formal political gain and socioeconomic gain. In fact, the inverse is true: At the local level, African Americans’ hold on formal political power now depends on their continual socioeconomic distress and intense socioeconomic racial segregation. Moreover, at the local level, the threat of geographic exit gives both the white Richmond suburban majority and the white Richmond city minority the ability to influence and control the city’s policymaking. This further undermines black substantive political power.

2. *The threat of jurisdictional exit/entry as power*

In order to fully understand how the workings of geographic exit help to structure urban-suburban geopolitical relations, it is necessary to discuss the political and economic theory that explains how exit operates as political power.²²¹ How does the threat of jurisdictional exit operate as

219. *Id.* at 175-76.

220. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* 153-60 (4th ed. 1994) (illustrating that despite the existence of black leadership in central cities, the resulting political and residential isolation of these communities undermines black politicians’ ability to promote their citizens’ welfare); PAUL E. PETERSON, *CITY LIMITS* 88 (1981) (“Unfortunately, improved access to local politics did not thereby radically alter the socioeconomic well-being of racial minorities and low-income groups.”).

221. See, e.g., ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES* (1968) [hereinafter HIRSCHMAN, *EXIT*]

political power? A person or a group has power in the political process of territorial jurisdiction X by virtue of that person's ability to exit territorial jurisdiction X and enter another territorial jurisdiction. In the local government context, a person in Richmond, for example, has power to influence Richmond politics if city officials believe that she may leave Richmond if the city government fails to adequately consider her interests.

There are several key aspects to the power of exit. First, a person or group of persons are politically powerful by virtue of their ability to exit, if and only if that person is someone a territorial jurisdiction wants to keep as a member.²²² Such members typically are valuable to the city for economic, social, and political reasons.²²³ Thus, jurisdictional exit empowers only those persons or groups who already possess a strong degree of political and socioeconomic power.

In contrast, the ability to exit a jurisdiction offers little political power to those who are politically, economically, and socially weak.²²⁴ Not everyone is equally empowered by the ability to exit a jurisdiction. For example, a homeless person cannot use the threat of jurisdictional exit as leverage in the political process. The reason is obvious—a territorial jurisdiction typically wants the homeless person to leave, and thus a homeless person cannot rely on threats of leaving as a political bargaining tool.

Second, the exit option turns into a form of political power for a valuable member of a jurisdiction only when it is feasible and practical for that member to enter another jurisdiction.²²⁵ If one withdraws from membership in an organization, and if membership serves a vital, necessary function, then exit is possible “only if the same relationship can be reestablished with another [jurisdiction].”²²⁶ Exit, therefore, is a viable

(detailing how exit is a powerful tool to express displeasure within a societal or organizational relationship); see also ALBERT O. HIRSCHMAN, *RIVAL VIEWS OF MARKET SOCIETY AND OTHER ESSAYS* 77-101 (1986) [hereinafter HIRSCHMAN, *RIVAL VIEWS*] (stating that exit is an important function predicated on the availability of choice within a community); Elaine B. Sharp, *Exit, Voice, and Loyalty in the Context of Local Government Problems*, 37 W. POL. Q. 67, 68-73 (1984) (explaining that race and education are two factors that impact a person's ability to exit his or her community).

222. See generally HIRSCHMAN, *EXIT*, *supra* note 221, at 23 (explaining, in the market context, how customer desertion leads management to improve its quality to retain its customers); HIRSCHMAN, *RIVAL VIEWS*, *supra* note 221, at 80 (noting that if an important member threatens to exit a group, the group may pay more attention to that member).

223. Edith M. Hofmeister, *Women Need Not Apply: Discrimination and the Supreme Court's Intimate Association Test*, 28 U.S.F.L. REV. 1009, 1068 (1994).

224. DOREEN MASSEY, *SPACE, PLACE, AND GENDER* 150 (1994) [hereinafter MASSEY, *SPACE, PLACE, AND GENDER*] (commenting that the ability to exit reinforces and concentrates power).

225. HIRSCHMAN, *RIVAL VIEWS*, *supra* note 221, at 78 (stating that exercising the power of withdrawal from one organization is only possible when that person is wanted by another organization).

226. *Id.*

option only “on the availability of choice, competition, and well-functioning markets.”²²⁷

Third, when an already powerful person or group actually exits from a jurisdiction, that person not only empowers herself but also simultaneously disempowers others.²²⁸ When the exit option is viable, those most able to use their voice and prevent a decline in an organization are the first to leave. The result is a deterioration in the conditions of the firm that has lost its “connoisseur members.” It is those members, for whom exit is not a feasible option, that suffer.²²⁹ They suffer because the loss of the most valuable members of the organization correspond to a loss of power, leverage, and influence.

Thus, as geographer Doreen Massey argues, a person who exercises the power of exit actually disempowers those people that she left behind.²³⁰

For it does seem that mobility, and control over mobility, both reflects and reinforces power. It is not simply a question of unequal distribution, that some people move more than others, and that some have more control than others. It is that the mobility and control of some groups can actively weaken other people. Differential mobility can weaken the leverage of the already weak.²³¹

Fourth, the power of exit is a very powerful form of political power at the local geographic level.²³² Because local governments are geographically smaller than state or national governmental units, it is much more feasible and practical for a person to exit or move from one local jurisdiction to another.²³³ Moreover, in the United States, the vast number of local governmental units provide individuals with numerous exit options.²³⁴

227. *Id.*

228. See HIRSCHMAN, EXIT, *supra* note 221, at 99-100 (explaining that the exit of a member leads to the deterioration in the quality of an organization).

229. *Id.* at 109 (reasoning that the depressed groups in society will be unable to achieve exit and will therefore not be able to attain upward social mobility).

230. MASSEY, SPACE, PLACE, AND GENDER, *supra* note 224, at 150; see Gerald Frug, *City Services*, 73 N.Y.U. L. REV. 23, 27 (1998) [hereinafter Frug, *City Services*] (“[M]obility itself, if unequally allocated, imposes negative consequences on one’s neighbors”). See generally James Liebman, *Voice, Not Choice*, 101 YALE L.J. 259, 262 (1991) (using Hirschman’s theory to critique school choice plans).

231. MASSEY, SPACE, PLACE, AND GENDER, *supra* note 224, at 150.

232. See Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 839, 886 (1983) (emphasizing the threat of exit behind voice at the local level).

233. *Id.*

234. See generally Frug, *City Services*, *supra* note 230, at 23 (establishing that many of America’s metropolitan regions provide a high quality of services to residents, enabling people to freely choose a city that conforms to their preferences).

3. *The power of exit and Madisonian theory revisited—the phenomenon of the white minority tyrannizing the weak black political majority*

Once we view the threat of exit as a form of political power within the context of the city of Richmond, the traditional Madisonian view of majority-minority relations gets flipped on its head, as will be shown below. The power of exit gives both outsiders and political minorities the ability to “tyrannize” a weak political majority.²³⁵

In Richmond and other American cities, the historically and geographically specific conditions that led to the election of black mayors and city council members simultaneously created economic and social constraints that restricted black political leaders’ ability to govern effectively.²³⁶ Specifically, the geographic movement of Whites from city to suburb and the continuing threat of future “white flight” has had a devastating socioeconomic effect on the poor African Americans remaining in Richmond. When white middle-class residents leave the cities for the suburbs, they take with them the cities’ most valuable taxable assets. Thus, black mayors are faced with an increased demand for government services yet lack the basic fiscal resources to effect change within their communities.²³⁷ As political scientists, William Nelson and Philip Meranto, observed in 1977:

It is undoubtedly true that in the foreseeable future most black mayors will be elected in dead or dying cities These cities will bear only a modest resemblance to the financially secure governmental structures captured by white ethnics. The election of black mayors signals instead the onset of black takeover of bankrupt cities consumed by social conflict, physical decay, and enormous financial problems.²³⁸

The white minority in Richmond, rather than being oppressed by its numerical minority, actually wields tremendous leverage and influence over city policies because the white minority in Richmond is comprised predominantly of middle class residents. In fact, because Whites within the city of Richmond and within the suburbs have political power flowing from their ability to exit or to threaten to exit, the Richmond City Council policies have a bias in favor of the interests of Whites in Richmond and Whites in the Richmond suburbs, and a bias against the interests of low-income African Americans living in the city.²³⁹ The city has a strong

235. HIRSCHMAN, EXIT, *supra* note 221, at 80.

236. NELSON, JR. & MERANTO, *supra* note 194, at 337.

237. *Id.*

238. *Id.*; see also Briffault, *Our Localism: Part II—Localism & Legal Theory*, 90 COLUM. L. REV. 346, 408-09 (1990) [hereinafter Briffault, *Our Localism: Part II*] (arguing that, although the rise of minority mayors has increased the role of minority and neighborhood interests, urban politics continues to focus on the protection of the local tax base and the maintenance of access to capital markets).

239. CHRISTOPHER SILVER, TWENTIETH-CENTURY RICHMOND: PLANNING, POLITICS, AND

economic incentive to keep middle class citizens within its borders because such residents help to preserve the city's property tax base. Moreover, white neighborhoods have higher property value than black neighborhoods and thus, a black controlled city council has an economic incentive to keep white middle class residents residing within the city.²⁴⁰ Thus, the Richmond government actually has an economic incentive to enact policies favorable to the interests of the white middle class to ensure that it does not use its exit option and move out to the suburbs.

Why? At the local level, especially for poor central cities like Richmond, the highest priority for the city government is to protect and expand the tax base.²⁴¹ That tax base is most threatened by the possibility of geographic exit by businesses and middle class residents from the city of Richmond to the suburbs. White Richmond area business and political leaders exercised and continue to exercise enormous de-facto political power and influence because the city council operates under the constant threat that businesses and middle class residents would exit the city if the city engaged in any sort of policy that would hurt the interests of businesses and the middle class. Moreover, if the white middle class exit from Richmond, it would exist along with its assets and capital, and the result would be a dramatic decrease in the city's tax base.

The threat and power of exit at the local level provides strong incentives to make sure that a city like Richmond enacts favorable policies to prevent its more economically valuable residents from leaving the city. As Richard Briffault observes, "[c]ontemporary cities, as a rule, do not engage in innovative re-distributive programs, not because they lack the legal authority, but rather because they fear that initiating such programs would cause residential and commercial taxpayers to depart."²⁴²

During the 1980s, the black city council, rather than acting against the interests of Whites on several policy issues, actually aligned itself with the interests of white suburban business interests at the expense of the interests of poor Blacks in Richmond.²⁴³ As one historian contends, under black leadership, the focus of city policies remained on pursuing white middle class, business, and suburban interests rather than the interests of low-

RACE 318-19 (1984).

240. *Id.*

241. Frug, *City Services*, *supra* note 230, at 25-27.

242. Briffault, *Our Localism: Part I*, *supra* note 146, at 408; *see also* Frug, *City Services*, *supra* note 230, at 25-26 (summarizing public goods theory that central cities have economic incentives to keep middle class residents from exiting); Clayton P. Gillette, *Equality and Variety in the Delivery of Municipal Services*, 100 HARV. L. REV. 946, 961 (1987) (reviewing CHARLES H. HAAR & DANIEL W. FESSLER, *THE WRONG SIDE OF THE TRACKS: A REVOLUTIONARY REDISCOVERY OF THE COMMON LAW TRADITION OF FAIRNESS IN THE STRUGGLE AGAINST INEQUALITY* (1986) and asserting that poor central cities have incentive to offer "bribes" to keep middle class residents from leaving).

243. *Id.* at 316-19.

income African Americans.²⁴⁴ The focus of the city council was on restoring “economic superiority to the central city and to encourage the return of the [mostly white] middle class [to Richmond], if only as visitors.”²⁴⁵ Downtown redevelopment continued to be the central focus of city council policies, even under black leadership.

Thus, despite the fears of the *Croson* majority, the city of Richmond was acting in concert with and on behalf of the interests of white middle class business and political elites, and not engaging in local racial tyranny. Moreover, the focus of city policy has been on the redevelopment of downtown to attract business and white suburbanites, at the expense of policies that would directly help its own African American citizens.²⁴⁶ For example, in 1982, the city council diverted \$1.25 million in federal funds intended for community development to provide seed funding for the Richmond Renaissance downtown revitalization project.²⁴⁷ Seen in this light, the enactment of the set-aside seems like a rather modest effort by the city council to enact a policy that focused on the economic interests of African Americans.²⁴⁸ Therefore, when the politics of Richmond are analyzed within the geographic context of Richmond metropolitan politics and in the context of the threat that geographic exit poses to the central city of Richmond, the set-aside in *Croson* looks less like a “power grab” by Blacks, and more like a modest attempt by the black city council to address the problems of socioeconomic inequality among Blacks.

The de-linking between political power and economic power is made stark by a 1986 study examining the socioeconomic characteristics of forty-three medium-sized cities in the United States.²⁴⁹ That study revealed that Richmond was both the richest and poorest city among the cities examined.²⁵⁰ The richest, most affluent neighborhood of all forty-three cities was Richmond’s predominantly white, West End neighborhood, while the second poorest neighborhoods among all forty-three cities were Richmond’s predominantly African American inhabited neighborhoods.²⁵¹

Once the set-aside is put in context of urban-suburban relations in the Greater Richmond Metropolitan Area, regardless of the “motives” for the set-aside, the operational purpose is clear—to stem the flow of jobs and industry out of the city, and to foster economic development within Richmond. Moreover, in that geographic context, the *Croson* Court’s

244. *Id.*

245. *Id.* at 316.

246. SILVER, *supra* note 239, at 319.

247. *Id.*

248. *Id.*

249. SILVER & MOESER, *supra* note 193, at 183-84.

250. *Id.*

251. *See id.* at 184 (noting that Atlanta, Georgia had the poorest neighborhoods among the forty-three cities surveyed).

assertions regarding the “dominant political and racial group in Richmond” are exposed as assertions without any basis in reality.

The *Croson* legal narratives, however, by circumscribing the geographic scale to the city limits of Richmond, hid and obscured the workings of power that flow across jurisdictional lines, and essentially rendered invisible the phenomenon of suburban-city political-economic conflict. Political power typically is defined as the “capacity to coerce others legitimately into doing your will.”²⁵² When this definition of power is placed within the context of territorial jurisdiction, power can be further defined as a “monopoly of control exercised equally over all places within a given territory by a dominant social group”²⁵³ John Agnew believes that the traditional relationship between space and power is underpinned by three geographical assumptions:

- (1) that states have an exclusive power within their territories as represented by the concept of sovereignty;
- (2) that domestic and foreign affairs are essentially separate realms in which different rules obtain; and
- (3) that the boundaries of a state define the boundaries of society, so that the latter is ‘contained’ by the former.

These assumptions reinforce one another to produce “a state-centered view of power in which the space occupied by states is seen as fixed, as if for all time.”²⁵⁴

The conventional liberal view of power, therefore, “sees power as flowing from a single (sovereign) source, such as the state.”²⁵⁵ Moreover, the conventional liberal view presumes that a sovereign state has a monopoly on power, and that such power is restricted to and defined by the “block of space” under its jurisdictional or territorial control.²⁵⁶ Under this view, jurisdictional boundaries act as a “geographic container” of sovereign governmental power.²⁵⁷ In addition, under this view, “Jurisdictional boundaries also act as a container of all social and political organization.”²⁵⁸ In other words, when we examine politics and race relations in the city of Richmond from a conventional understanding of power, we assume that “the boundaries of the state are also the boundaries of whatever social or political process we might be interested in. Other

252. John Agnew, *The New Geopolitics of Power*, in HUMAN GEOGRAPHY TODAY 173, 176 (Doreen Massey et al. eds., 1999).

253. *Id.*

254. *Id.* at 173.

255. *Id.* at 178.

256. *Id.* at 174-75.

257. *Id.* at 176.

258. *Id.*; see also PETERSON, *supra* note 220, at 4 (arguing that prevailing theories of urban politics assume that “political forces within the city are treated as the most fundamental elements explaining what cities do”).

geographic scales of thinking or analysis are thereby precluded.”²⁵⁹ Instead, the conventional conception of power views the world as comprised of territorial actors achieving their goals through the formal political control of space.²⁶⁰

Under such a conventional view of political power, the way to control a “block of space” requires obtaining control of the formal governing apparatus of a particular territorial jurisdiction.²⁶¹ Once in control of the formal political apparatus, the dominant group then is presumed to have exclusive control and power over the people and spaces within the territorial jurisdiction.²⁶² Moreover, the unstated assumption is that persons and entities outside of the jurisdiction are powerless to control events and people within a particular jurisdiction given the formal definition of power as something within the exclusive control of a sovereign not subject to such power.²⁶³

As the analysis in this Section has shown, however, a more realistic approach to power would recognize that power is exercised in all relationships between people, rather than being exclusively exercised by and flowing from a single sovereign source within a particular jurisdiction.²⁶⁴ A theory of political power that treats power as a “thing” hermetically contained and sealed within the territorial jurisdictional boundaries of a particular state or locality obscures power dynamics that constantly flow across such boundaries. Moreover, such a legal narrative obscures the fact that jurisdictional boundaries operate to empower certain outsiders, as an examination of the power of exit has shown in the context of the Richmond urban-suburban race relations.

D. Revisiting Political Process Theory: The Politics of Annexation and the City of Richmond as a Discrete and Insular Jurisdictional Minority in the Virginia Political Process

Having examined *Croson* from several different geographic scales, this Section will re-examine political process theory from a more informed geographic perspective by examining race relations in Virginia as a conflict between the state and its local government. Doing so will ultimately lead to a conclusion consistent with the material reality of race relations in America: that African Americans residing in central cities like Richmond

259. Agnew, *supra* note 252, at 176.

260. *Id.*

261. *See id.* at 178 (noting that the territorial state draws its power from social groups and institutions).

262. *Id.* at 176.

263. *See Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (holding that a judgment by a court without jurisdiction is null and void).

264. Agnew, *supra* note 252, at 178.

continue to experience both political and socioeconomic subordination within the state political process.

Although a full elaboration of a political process theory that incorporates the insights of this Article is beyond the scope of this Article, this section will set forth a preliminary re-mapping of Equal Protection political process theory. If political process theory is to have any viability as a jurisprudential theory for protecting disadvantaged groups, it must recognize and incorporate the structural changes in race relations that have occurred in recent decades. In short, a viable political process theory must consider now that African Americans experience political disadvantage in the way that the state regulates and governs political and economic relations between its local governments. Specifically, such a theory must recognize that many states, such as Virginia, have laws that regulate and structure their local governments in such a way to make African Americans who are segregated in central cities like Richmond systemic losers in the state political process.

1. *Re-mapping political process theory—breaking down racial segregation to break down we-they thinking*

Under political process theory, the courts should intervene into the legislative process when a malfunction exists to systematically disadvantage a discrete and insular minority.²⁶⁵ Judicial intervention in such instances serves several purposes. First, as Ely contends, when legislators rely on “we-they” thinking to make classifications, such thinking is a primary cause of malfunctions in the political process.²⁶⁶ A malfunction in the political process means that groups that actually have common interests are systematically pushed towards acting in ways against their common interests and in ways that reveal their ignorance of their common interests.²⁶⁷ And we-they thinking is a crucial factor in contributing to such malfunctions.²⁶⁸

We-they thinking is not merely a construction of thoughts and beliefs. In other words, we-they thinking along racial lines does not result merely because people “think” and believe certain things about other races. Further, we-they thinking is not developed in the abstract without the influence of historical and geographical context. In the context of white-black race relations in America, we-they thinking has a concrete, material cause. We-they thinking is constructed by, and in turn constructs, racial

265. See Ely, *Reverse Racial Discrimination*, *supra* note 60, at 729 (noting that prejudice against discrete and insular minorities raises the Supreme Court’s level of scrutiny).

266. See *id.* at 733 (noting that racial classifications that disadvantage minorities have their roots in “we-they” thinking).

267. See ELY, *DEMOCRACY AND DISTRUST*, *supra* note 58, at 153.

268. See *id.* at 732-33 (examining the dangers inherent in “we-they” thinking).

segregation in residency and in education.²⁶⁹ If that is true, we-they thinking can be broken down not just by exhorting people to stop thinking about race but by breaking down the actual barriers of racial segregation. Thus, under a political process theory of equal protection focused on breaking down we-they thinking, the courts should intervene where the political process systematically reinforces racial segregation patterns in education, the workplace, and/or in housing.

Based on the tentative re-mapping above of a political process theory that explicitly takes into account the role of space and geography in constructing we-they thinking and in contributing to malfunctions in the political process, a strong argument can be made that many states are in violation of equal protection because they have arranged their local governments in such a way as to reinforce and perpetuate racial socioeconomic segregation in metropolitan areas.

To understand a political process theory that takes into account the geography of power is to understand Michel Foucault's insight that "space is fundamental in any exercise of power."²⁷⁰ A conception of power that acknowledges that space is fundamental to any exercise of power will ask: Who is actually empowered by a particular arrangement of political places and spaces?²⁷¹ In asking this question, it is crucial to understand that a group may be empowered by a particular arrangement of space, spaces, and places. Furthermore, an empowered group may wield leverage and influence within a territorial jurisdiction, even if that group or person is not a formal member of that territorial jurisdiction, or even if that group is part of a minority faction within that territorial jurisdiction. To put it another way, a more realistic conception of power would understand that formal political power is not the same as substantive political power. A group may control the formal governing apparatus of a territorial jurisdiction yet lack any real substantive political power to successfully enact policies in that group's interest.

2. *The Commonwealth of Virginia's arrangement of its local governments as a political process defect*

This Section contends that the way the Commonwealth of Virginia has arranged and structured its local governments amounts to a malfunction in its political process. Specifically, when examining state and local relations through the political fight over annexation, the city of Richmond and its predominantly black population can be viewed as a "discrete and insular

269. See, e.g., MASSEY & DENTON, *supra* note 220, at 6-19 (exploring the political, economic, and social effects of racial discrimination on Blacks in the United States).

270. MICHEL FOUCAULT, *THE FOUCAULT READER* 252 (Paul Rabinow ed., 1984).

271. See *id.* at 239-56 (discussing historical examples of space/power relationships).

jurisdictional minority” in the Virginia political process.²⁷² The city of Richmond is a city in socioeconomic distress, along with many other central cities throughout the United States. In *Croson*, the Court struck down a modest economic development policy that could have helped mitigate the disastrous movement of jobs and industry from the city to the suburbs, in Richmond and in other central cities. A central city like Richmond, however, has a more far-reaching tool to rectify its socioeconomic distress: the power of annexation. According to general state annexation laws, a local government such as Richmond may, if it meets the legal requirements, annex county property as a way to increase its land and tax base.²⁷³

As political scientists contend, annexation is an extremely powerful tool for a city to economically revitalize itself.²⁷⁴ For cities such as Richmond to effectively deal with its socioeconomic problems, it must become what David Rusk calls an “elastic city.”²⁷⁵ The socioeconomic viability of high-density cities depends heavily on their ability to expand their municipal boundaries to capture suburban population growth.²⁷⁶ Typically, cities are able to expand their municipal boundaries by annexing new territory. Rusk categorizes central cities into two categories: elastic cities and inelastic cities. Elastic cities are cities that have experienced population growth primarily by aggressively annexing new territory and expanding their municipal boundaries. Inelastic cities, on the other hand, are cities that have been, for various reasons, “unable or unwilling to expand their city limits.”²⁷⁷ Rusk contends that “being an elastic city is essential to [the] economic, social, and fiscal health”²⁷⁸ of a central city. Studies show that elastic cities are healthier economically because they have less racial segregation in their housing and schools and are therefore better able to attract investment.²⁷⁹

In Richmond’s case, based on census data from 1950 to 1990, Rusk categorizes the city of Richmond as a city with “medium elasticity.”²⁸⁰ The reason why the city of Richmond is “inelastic” is because of a state ban on its annexation powers. In 1979, the Commonwealth of Virginia amended the state annexation laws to prohibit central cities like Richmond from

272. See RUSK, *supra* note 198, at 26-27 (explaining that, although Richmond’s black community has political control of the city, they lack political power in the state necessary to conduct an annexation program that would increase Richmond’s tax revenues).

273. *Id.* at 9-11.

274. *Id.*

275. *Id.*

276. *Id.* at 9 (contending that cities can only grow if they have vacant land to develop or the political and legal tools to annex more land).

277. *Id.* at 10.

278. *Id.*

279. ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* 169 (1994).

280. RUSK, *supra* note 198, at 55.

annexing county territory.²⁸¹ The Commonwealth of Virginia renewed the ban in 1998, and the ban is effective until the year 2010.²⁸² Therefore, the city of Richmond cannot expand its municipal boundaries and is severely restricted in terms of dealing with the socioeconomic conditions within the city of Richmond because the Commonwealth of Virginia, with its majority white legislative body, has specifically targeted central cities like Richmond from being able to use its annexation powers.

The annexation political conflict in Virginia is an example of a defect in the political process that is systematically disadvantaging African Americans via the State's regulation of its local governments. This point brings us back to political process theory and the question raised in *Croson*: Are Blacks no longer a disadvantaged minority in the political process because they dominate the city of Richmond politics? Richmond's policies are ultimately regulated by the Commonwealth of Virginia, and therefore the city cannot utilize its annexation powers by virtue of a decision made by the state legislative majority. Thus, by virtue of a state ban on annexation powers, a ban targeting central cities like Richmond, Richmond is doomed to be an "inelastic city." As an inelastic city, it is severely hampered in its ability to address its socioeconomic distress. Moreover, the suburban officials and residents of the Richmond metropolitan area population vigorously oppose annexation by the city of Richmond because annexation would mean "loss of control over land use, schools, and use of tax revenues."²⁸³

Remapping the political process in Virginia and viewing race relations through the geographic lens of urban-suburban relations helps to show that Blacks continue to be a disadvantaged group in the Virginia political process, except now they are systematically disadvantaged via state regulation of its local government units. Furthermore, territorial jurisdiction has become fused with race. As Professor Moeser contends, "With the city [of Richmond] no longer able to expand its boundaries, you've had a very, very solid black majority, to the point where whole jurisdictions can be defined largely by race..."²⁸⁴ Within the Commonwealth of Virginia is a political process where identifiably discrete and insular black central cities like Richmond are systemic political losers, and predominantly white suburban and county interests vigorously oppose any regional solutions to the socioeconomic problems of Richmond.

281. VA. CODE ANN. § 15.2-3201 (Michie 2003) (prohibiting cities from initiating annexation proceedings against counties or parts of counties in Virginia).

282. *Id.*

283. DOWNS, *supra* note 279, at 170.

284. Wes Allison, *Annexations Helped Richmond Grow; Now Landlocked City Must Find Other Solutions*, RICHMOND TIMES DISPATCH, Mar. 14, 1999, at C8.

Racial politics are taking place in the guise of supposedly “race neutral” urban-suburban conflict, yet, the Court is sanctioning such racial politics while striking down affirmative action programs that could help to ease the socioeconomic distress of urban centers like Richmond.²⁸⁵ If the Court is so concerned about racial politics, why are they not concerned about racial politics where Whites enact policies that continue to preserve and maintain the racial segregation of the races, contributing to racial balkanization, just because they are conducted in the guise of facially neutral politics?

The situation is further complicated by the fact that African Americans in Richmond and in other central cities are ambivalent about annexation.²⁸⁶ Professor Gerald Frug contends that efforts by inner city African Americans to enact anti-condominium conversion legislation demonstrate that “[m]any Blacks would see the weakening of the city boundary line [via annexation] as an attack on the political power they have gained in central cities”²⁸⁷ Thus, African Americans are wary of annexation because annexation would mean an increase in the population of Whites in the city, and a large enough increase may result in a return to white majority population in the city. Consequently, a strong possibility exists that if the city engaged in an aggressive annexation campaign, political control over the city council would return to the hands of a white majority.

African American political leaders in Richmond, therefore, are presented with a catch-22—vigorously lobby the state legislature to permit them to annex suburban areas as a way to revitalize the city for its constituents and risk losing political power, or eschew annexation plans (especially since they will not be able to do so at least until 2010) and continue to maintain political power in Richmond without the ability to make any meaningful changes for their poorest African American constituents.

This dilemma facing African Americans political leaders illustrates the fragile nature of the African American hold on formal political power. In this post-civil rights era, it is ironic and tragic that African Americans believe that their tenuous hold on formal political power depends on the continuing existence of local government structures that reinforce their racial/socioeconomic segregation. A similar dilemma exists in national politics, where the creation of majority-minority voting districts may result in a greater number of African American representatives in Congress, but

285. See PETERSON, *supra* note 220, at 158-62 (discussing the scope, strengths, and weaknesses of black integration into local and national politics).

286. See DOWNS, *supra* note 279, at 170 (commenting that there is little support by anyone for expanding the borders of central cities, because Blacks fear losing political control and suburbanites fear higher taxes and loss of control over the services provided by their local governments).

287. GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 82 (1999) [hereinafter FRUG, CITY MAKING].

which will also result in a voting phenomenon called “packing,” diluting African American political influence in the end.²⁸⁸

IV. IMPLICATIONS FOR A GEOGRAPHICAL ANALYSIS OF LAW AND LEGAL NARRATIVES

A. *Critiquing the Racial Progress Teleology in the Master Colorblind Legal Narrative*

A spatial critique of the *Croson* narratives reveals the strong grip of the racial progress teleology in the American racial consciousness. The teleology of racial progress can be defined as the belief that American society is on a steady, progressive, linear path towards the creation of a just, equal colorblind society. In the racial progress narrative, *Croson* played a major role in reaffirming the “truth” of this narrative because black gains in political power signaled the eventual attainment of socioeconomic equality between the races. The premise is that that Blacks have political control over many local jurisdictions throughout the nation, and now that they are well represented in state and national government, they will be able to use their political power to make continuing socioeconomic progress. Under the liberal colorblind narrative, then, gaining political power is a sign of both racial political *and* socioeconomic progress.²⁸⁹

The geographical analysis in this Article exposes a paradox in the colorblind narrative of racial progress, as the socioeconomic plight of cities like Richmond strongly suggests that this society is not traveling on a straight, linear path towards a just, colorblind society. As argued above, African American hold on political power is less a sign of racial progress than another manifestation of the continuing socioeconomic and political disempowerment experienced by millions of African Americans residing in central cities throughout the United States.

288. See generally Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1136 (1991) (advocating for an electoral system based on proportionate, rather than majoritarian electoral representation).

289. See Mack Jones, *The Black Underclass as Systemic Phenomenon*, in RACE, POLITICS, AND ECONOMIC DEVELOPMENT: COMMUNITY PERSPECTIVES 63 (James Jennings ed., 1992) (suggesting that, contrary to traditional assumptions, political power gained by Blacks rests in the hands of a few black elites who are neither representative nor capable of addressing the issues of the black underclass).

B. Hiding Power Relations by Circumscribing the Spatial Setting in Legal Narratives

The analysis above could not have been conducted if we restricted the geographic scale or setting in the *Croson* legal narrative to the city lines of Richmond. A legal narrator must make choices about the geographic setting in which the story takes place, and those choices are not neutral, inconsequential choices, but choices which have a dramatic effect on the representation of “reality” in that narrative.²⁹⁰ In effect, the *Croson* Court, by restricting the geographic scale of its narrative to the city lines of Richmond not only obscured power dynamics and relations between the Richmond suburbs and the Richmond central city, but also essentially made the phenomenon of white suburban political and socioeconomic dominance over the predominantly black central city disappear.

The power of legal narratives to shape and distort our grasp of concrete, material reality is even more remarkable considering that there is a wealth of social science literature examining the phenomena of political, economic, and race relations between suburbs and inner cities in metropolitan areas across the United States.²⁹¹ Legal scholars and social scientists clearly understand that formal legal notions of jurisdictionally bounded political power does not comport with the reality that power flows across jurisdictional lines. Yet, legal narratives like the ones told in *Croson* are so powerful that they make us forget about what is actually happening at the concrete level, and they pull us into a self-contained, nonexistent world where power is neatly contained within jurisdictional borders of a local government and where power neatly corresponds with numerical superiority.

As the geographical analysis of *Croson* has hopefully shown, one effective means of critiquing dominant legal narratives is to critically examine all of its embedded geographic and spatial assumptions.

290. Although a full analysis of the decision is beyond the scope of this Article, it may be useful to briefly discuss the Court’s most recent affirmative action decision, *Grutter v. Bollinger*, 539 U.S. 306 (2003). Although the *Grutter* Court held that narrowly tailored affirmative action programs in the higher public education context may continue to survive equal protection strict scrutiny, Justice O’Connor curiously sidestepped the explicit recognition of the continuing unequal socioeconomic conditions experienced by many African Americans, while reiterating many of the key “plotlines” in her *Croson* opinion.

A critical component of her majority opinion in *Grutter* is that affirmative action in higher education can be justified on grounds of furthering racial diversity and promoting First Amendment educational values rather than as a policy tool to explicitly address the systematic socioeconomic inequality presently being experienced by African Americans and other racial groups. In short, the *Grutter* decision, while upholding affirmative action programs in higher education, is consistent with the mapping of race relations that the Court produced in *Croson*. It is consistent with the teleology of “racial progress” theme in the master colorblind plot of Equal Protection jurisprudence, and therefore a way to avoid dealing with the material reality of race relations that contradict and undermine that theme.

291. See, e.g., RUSK, *supra* note 198; DOWNS, *supra* note 279, at 269.

Accordingly, the hope is that this Article is but the first step in the construction of a systematic legal geographical approach to the critical analysis of law.