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# THE PARADOX OF POLITICAL POWER: POST-RACIALISM, EQUAL PROTECTION, AND DEMOCRACY

William M. Carter, Jr.\*

*[A] reasonable jury could easily find that the City's real reason . . . was . . . a simple desire to please a politically important racial constituency.*

—*Ricci v. DeStefano*<sup>1</sup>

*Democracy is premised on responsiveness.*

—*Citizens United v. FEC*<sup>2</sup>

## INTRODUCTION

Racial minorities have enjoyed increasing electoral success in recent years, while continuing to rank at or near the bottom in terms of health, wealth, income, education, and the effects of the criminal justice system.<sup>3</sup> Some observers, including some members of the Supreme Court, have pointed to evidence of isolated electoral success as proof of “post-racialism,” while ignoring the evidence of substantial continued disparities for the vast majority of people of color.

This Essay will examine the tension between repeated calls for racial minorities to achieve their goals through the political process and the Supreme Court’s increasingly restrictive “colorblind,” or “post-racial,” jurisprudence,

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\* Dean and Professor of Law, University of Pittsburgh School of Law. This Essay benefited greatly from the comments and critiques I received at the Law and Society Association’s 2011 Annual Meeting and at the Constitutional Law Colloquium organized by Mark Tushnet of Harvard Law School during the American Constitution Society’s 2011 National Convention. I would also like to thank Mike Lizerbram for his research assistance. This Essay is dedicated to my nieces and nephew, Alissa, Brianna, and William (“Tre”) Snoddy. Know that your dreams are always within reach and that you can change the world. Do not let it change you.

<sup>1</sup> 129 S. Ct. 2658, 2688 (2009) (Alito, J., concurring).

<sup>2</sup> 130 S. Ct. 876, 910 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part), *overruled by Citizens United*, 130 S. Ct. 876 (internal quotation mark omitted)).

<sup>3</sup> See, e.g., Mario L. Barnes et al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 982–92 (2010) (surveying statistical data indicating continued racial disparities along many measures of economic and social success); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 806–07 (2004) (same). This is not to suggest that racial minorities have not achieved substantial gains relative to earlier times. See, e.g., James Forman, Jr., *The Black Poor, Black Elites, and America's Prisons*, 32 CARDOZO L. REV. 791, 793 n.15 (2011) (citing statistics showing improvements in a variety of material conditions for African-Americans since the Civil Rights Era).

which severely limits the circumstances in which racial minorities can effectively exercise their political power once it has been attained. Examples include *City of Richmond v. J.A. Croson Co.*, where the Court struck down an affirmative action program adopted by a majority-black city council;<sup>4</sup> *Ricci v. DeStefano*, where black and Latino residents of New Haven successfully lobbied the City of New Haven to discard a test for promotions in the fire department because the test resulted in substantial exclusion of racial minorities, only to have the City's action struck down by the Court;<sup>5</sup> and *Northwest Austin Municipal Utility District Number One v. Holder (NAMUDNO)*, where the renewal of section 5 of the Voting Rights Act passed the House and Senate by overwhelming margins, only to have its constitutionality strongly questioned by the Supreme Court.<sup>6</sup>

This Essay argues that the Court's suspicion of the exercise of minority political power will only increase as its post-racial jurisprudence accelerates. For racial minorities, the countermajoritarian difficulty is likely to become much more difficult.

## I. THE COUNTERMAJORITARIAN DIFFICULTY AND POST-RACIALISM

For decades, scholars have attempted to resolve the "countermajoritarian difficulty": the proper role of an unelected federal judiciary in mediating conflicts between majority rule and minority rights.<sup>7</sup> The primary justification for heightened judicial scrutiny of government action disadvantaging certain minority groups has been the "process-defect" rationale.<sup>8</sup> Declaring elected officials' actions unconstitutional is, of course, always antidemocratic in a "thin" sense.<sup>9</sup> Doing so is nonetheless considered justified with regard to laws

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<sup>4</sup> 488 U.S. 469 (1989).

<sup>5</sup> 129 S. Ct. 2658 (2009).

<sup>6</sup> 129 S. Ct. 2504 (2009).

<sup>7</sup> See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (Yale Univ. Press, 2d ed. 1986) (1962) ("The root difficulty is that judicial review is a counter-majoritarian force in our system.")

<sup>8</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (noting that "prejudice against discrete and insular minorities may . . . tend[] seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities," thereby requiring "a correspondingly more searching judicial inquiry" in such cases); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 135–79 (1980) (discussing process-defect theory as a reason for judicial intervention on behalf of minorities).

<sup>9</sup> See, e.g., Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933, 936 (2001) (questioning the premise of the countermajoritarian difficulty)

burdening certain minority groups because they are presumed to be unable to fully protect their interests through the political process, due to their numerical disadvantages, the majority's aversion to them or their interests, and histories of prejudice and subordination.<sup>10</sup> In other words, the judiciary helps those who cannot help themselves.

Critics have long suggested, however, that the Supreme Court has too often engaged in judicial activism, i.e., that it has too often acted in countermajoritarian ways. Many disputes, it is argued, would be better resolved through the political process than in the courts.<sup>11</sup> Even with regard to racial discrimination, conservatives in particular have argued that advocates of racial equality too often rely upon judicial, rather than political, remedies.<sup>12</sup>

Simultaneously, post-racialism has become the dominant cultural narrative regarding racial inequality.<sup>13</sup> Post-racialism posits that racial minorities' societal gains combined with the presumed absence of contemporary discrimination against them render measures explicitly aimed at redressing racial inequality both unnecessary and counterproductive. It is argued that such measures cause, rather than cure, racial divisiveness and resentment.<sup>14</sup> The

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and arguing that judicial review "yields remarkably majoritarian results[] and is a process that is different from majoritarian politics but nonetheless responsive to it").

<sup>10</sup> See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (stating that laws classifying on the basis of race, alienage, and national origin are subject to strict scrutiny because "[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy" and "because such discrimination is unlikely to be soon rectified by legislative means"); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (stating that strict scrutiny should only apply when the class at issue is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process").

<sup>11</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting) (criticizing the majority for striking down a Texas law criminalizing homosexual conduct but stating that he "ha[s] nothing against homosexuals, or any other group, promoting their agenda through normal democratic means").

<sup>12</sup> See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987) ("[The petitioner's] arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are 'constituted to respond to the will and consequently the moral values of the people.'" (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting) (per curiam))).

<sup>13</sup> See Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1594 (2009) (describing post-racialism as reflecting the "belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies, and that civil society should eschew race as a central organizing principle of social action").

<sup>14</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment) (arguing that affirmative action programs "engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race").

post-racialist worldview holds that very little discrimination against minorities occurs today, that any discrimination that does occur is aberrational, and that adopting remedial measures to combat the actions of a few bigots is a cure worse than the disease.<sup>15</sup>

This Essay, while addressing both post-racialism and countermajoritarian criticisms of judicial action protecting racial minorities, does not attempt to resolve those debates. Rather, my primary goal is to illuminate the dangers of what I believe to be a coming convergence between those two ideas in constitutional doctrine and discourse. If post-racialism is assumed to be descriptively accurate, then racial minorities should be able to achieve their goals through the political process, rather than through the courts. And if the countermajoritarian critique has force in this context, then it is preferable that they do so.

The Court's decisions therefore seek to push racial minorities away from vindicating their goals in the courts and toward doing so through the political process. For example, the Court's equal protection doctrine requires proof of subjective discriminatory intent on the part of an identifiable government actor to trigger heightened judicial scrutiny.<sup>16</sup> This requirement means that the Equal Protection Clause will be unavailing as a remedy for any but the most egregious and obvious instances of racial discrimination and inequality. Procedural hurdles compound the litigation-discouraging effect of the Court's substantive equal protection doctrine. For example, the Court's recent decisions requiring greater factual specificity in pleading federal civil claims mean that, in addition to the difficulties in proving subjective discriminatory

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<sup>15</sup> Both of the premises described above are subject to contestation on normative and descriptive grounds. Whether it would be better for remedies for racial inequality to be achieved through the political process than through the courts depends upon what we mean by "better": faster, more effective, more permanent, etc. As for post-racialism, the prescriptive power of its major premise—that we should less often explicitly seek racial justice—is dependent to a large degree on the descriptive force of its minor premises. If more racial discrimination exists than post-racialists would have us believe, or if one believes that individual instances of bigotry are only part of racial injustice, or if post-racialists overestimate the divisiveness that measures addressing racial inequality cause, then the post-racialist worldview loses much of its appeal.

<sup>16</sup> See *McCleskey*, 481 U.S. at 298 (holding, in a case involving an equal protection challenge to racial disparities in capital punishment, that the requirement of discriminatory purpose means proof that the decision maker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group" (quoting *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (internal quotation mark omitted)); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (rejecting an equal protection challenge to a qualifying test administered to applicants to the police academy and holding that, absent proof of discriminatory purpose, even a substantial racially disparate impact "does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations" (citation omitted)).

motive at trial, plaintiffs now have to plead specific facts in the complaint showing that motive.<sup>17</sup> Because plaintiffs will seldom have access to information regarding a defendant's subjective state of mind prior to discovery, presumably fewer equal protection claims will survive motions to dismiss, or fewer such claims will be brought in the first place.<sup>18</sup> Similarly, the Court's increasingly restrictive standing doctrine raises the bar for many would-be equal protection litigants to nearly unattainable heights.<sup>19</sup>

The fact that litigation has become an increasingly ineffective means for advancing substantive equality in any systematic or structural way could be defensible if, in pushing racial minorities out of the courthouse door, one believed they could (and should) instead turn to the political process. Yet the Supreme Court's colorblindness doctrine has made it exceedingly difficult for racial minorities to actually achieve their goals through the political process. As will be discussed in the following Part of this Essay, the Supreme Court has repeatedly and aggressively struck down racial minorities' successful use of the political process to advance their goals. Thus, having explicitly counseled and implicitly required advocates for racial justice to work through the political process and having suggested that no real barriers remain to them doing so, the Court has simultaneously rendered that process unavailing or, at the very least, severely constrained.<sup>20</sup>

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<sup>17</sup> See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (holding, in a case alleging racial and religious discrimination, that the plaintiff failed to provide sufficient factual specificity in his complaint regarding the defendant's subjective state of mind to make his claim sufficiently "plausible" in light of the judge's "common sense" to survive a motion to dismiss).

<sup>18</sup> See Ramzi Kassem, *Implausible Realities: Iqbal's Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN ST. L. REV. 1443, 1446 (2010) ("Under *Iqbal*, [discrimination] claims require a showing of animus or deliberate, invidious intent, which is less likely at the stage where there are the fewest facts available, particularly in cases characterized by stark informational asymmetries between the parties.").

<sup>19</sup> See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984) (holding that parents of African-American public-school students lacked standing to pursue a claim alleging that the IRS improperly failed to terminate the tax-exempt status of racially discriminatory private schools); *Warth v. Seldin*, 422 U.S. 490 (1975) (holding that plaintiffs lacked standing to challenge a suburban ordinance barring the construction of low- and moderate-income housing because they had not adequately proven causation, failing, inter alia, to allege that they would have been able to afford to live in the suburb even absent the ordinance). Importantly, the Court's disdain for equal protection claims by racial minorities has gone hand in hand with its special solicitude for claims of "reverse discrimination" by white plaintiffs. For further discussion of this issue, see William M. Carter, Jr., *Affirmative Action as Government Speech*, 59 UCLA L. REV. 2 (2011).

<sup>20</sup> As discussed below, this is not a new phenomenon. However, the Court's willingness to strike down laws when minorities have achieved their goals through the political process has increased as the Court has grown more conservative.

The post-racialist position on judicial review depends heavily upon false assumptions regarding minority political power. This Essay interrogates those assumptions and argues that they are based largely on sporadic electoral success (of which the election of President Obama is but the most obvious example), rather than systemic minority political empowerment. Such successes are then used as evidence of the descriptive accuracy of post-racialism. The symbolic legitimacy of such successes is further used as a reason for suspicion of the effective exercise of minority political power, i.e., to suggest that racial minorities have reached a place of such political empowerment that democratic action addressing racial inequality should be as constitutionally suspect as laws subordinating racial minorities. I call this model of judicial review “whitened scrutiny.”

As discussed below, the *Carolene Products* justifications for heightened scrutiny<sup>21</sup> all depend to a greater or lesser extent on presumed defects in majoritarian processes that lead to the enactment of laws burdening unprivileged groups. Under whitened scrutiny, the Court assumes the applicability of this same reasoning from evidence of racial minorities’ increasing but still marginal political representation. For the Court—and a substantial number of Americans—majoritarian processes today are considered to be as likely to result in discrimination against whites as against racial minorities. As a recent study has found, many white Americans view racism

as a zero-sum game, such that decreases in perceived bias against Blacks [since the Civil Rights Era] are associated with increases in perceived bias against Whites—a relationship not observed in Blacks’ perceptions. Moreover, these changes in Whites’ conceptions of racism are extreme enough that Whites have now come to view anti-White bias as a bigger societal problem than anti-Black bias.<sup>22</sup>

To the extent that the Court’s doctrine generally reflects the popular consensus on controversial social issues,<sup>23</sup> the Court’s current equal protection jurisprudence seems to be in step with public opinion.

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<sup>21</sup> 304 U.S. 144, 153 n.4 (1938).

<sup>22</sup> Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game that They Are Now Losing*, 6 PERSP. ON PSYCHOL. SCI. 215, 215 (2011); accord Charles M. Blow, Op-Ed., *Let’s Rescue the Race Debate*, N.Y. TIMES, Nov. 20, 2010, at A19 (citing polling data from a survey by the Public Religion Research Institute in which 48% of whites, 32% of Hispanics, and 30% of blacks agreed with the statement that “discrimination against whites has become as big a problem as discrimination against blacks and other minorities”).

<sup>23</sup> See generally PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily et al. eds., 2008) (collecting public opinion data regarding constitutional controversies).

## II. CONSTITUTIONAL COLORBLINDNESS AS A BARRIER TO DEMOCRATIC ACTION

The Supreme Court's current equal protection jurisprudence holds that any governmental consideration of race is presumptively unconstitutional.<sup>24</sup> The Court has held that this is the case regardless of whether the government's action is aimed at aiding or injuring historically subordinated groups.<sup>25</sup> However, the process-defect rationale for strict judicial scrutiny of government action is generally inapplicable with regard to laws aimed at remedying the subordination of historically oppressed groups. For example, the process-defect rationale assumes that the disadvantaged group has been effectively shut out of the political process due to a combination of its small size and prejudice against it.<sup>26</sup> This rationale would not, for example, justify heightened judicial suspicion of affirmative action measures. Such measures are not adopted by a politically empowered majority group to the detriment of politically disempowered racial minority groups. To the contrary, such measures are enacted by and with the support of a political majority that has freely chosen to act in the pursuit of what it sees as the greater good. Should that majority change its mind, it would be able to remedy the situation through the political process.<sup>27</sup>

The Court has nonetheless explicitly and implicitly relied upon process-defect reasoning in many equal protection cases challenging affirmative action programs and other race-conscious measures. The Court's conservative Justices have been highly suspicious of the effective exercise of minority political power. The unstated assumption seems to be that political action that actually achieves a minority group's substantive goals is equally as suspicious from a process-defect perspective as that of a majority group acting to

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<sup>24</sup> See, e.g., *Johnson v. California*, 543 U.S. 499, 505 (2005) (“[A]ll racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.” (second and third alterations in original) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)) (internal quotation marks omitted)).

<sup>25</sup> See *id.* (“We have insisted on strict scrutiny in every context, even for so-called ‘benign’ racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation.” (citations omitted)).

<sup>26</sup> See ELY, *supra* note 8.

<sup>27</sup> Cf. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality opinion) (stating that, “[i]f one aspect of the judiciary’s role under the Equal Protection Clause is to protect ‘discrete and insular minorities’ from majoritarian prejudice or indifference, some maintain that these concerns are not implicated when the ‘white majority’ places burdens upon itself,” but rejecting that argument on the facts of the case (citation omitted) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938))).

disadvantage a minority group. The following sections demonstrate this fear of minority political power in action.

A. *The Beginning of the Court's Suspicion of Minority Political Power: City of Richmond v. J.A. Croson Co.*

*City of Richmond v. J.A. Croson Co.*<sup>28</sup> was the first affirmative action case wherein the Court expressly grounded its equal protection analysis on suspicion of the exercise of minority political power. To understand the problems with the *Croson* Court's reasoning, some background is in order. The British colonial institution of slavery began in Virginia in 1619.<sup>29</sup> Although it was a slaveholding state, Virginia, like other states in the "Upper South," had by the time of the Civil War become less dependent on slavery and therefore less extreme and more amenable to compromise with the Union than some other slaveholding states.<sup>30</sup> During the Reconstruction Era after the Civil War, gains were made in Virginia toward ending state-sponsored racial subjugation.<sup>31</sup> Virginia's pre-war stance as a relatively moderate Southern state did not survive the post-Reconstruction period of racial retrenchment, however. Virginia emerged as one of the leaders of the Jim Crow Era, adopting a variety of laws aimed at maintaining white supremacy.<sup>32</sup> During the civil rights movement of the 1940s–1960s, Virginia veered between the virulent "Massive Resistance" to racial integration emblemized by politicians such as Senator Harry F. Byrd<sup>33</sup> and more moderate (yet still segregationist) responses to demands for equality.<sup>34</sup>

The City of Richmond shared the state's complicated racial history. Richmond was the capital of the Confederacy during most of the Civil War.<sup>35</sup>

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<sup>28</sup> *J.A. Croson Co.*, 488 U.S. 469.

<sup>29</sup> See Tim Hashaw, *The First Black Americans*, U.S. NEWS & WORLD REP., Jan. 29, 2007, at 63, 63.

<sup>30</sup> See Daniel W. Crofts, *Late Antebellum Virginia Reconsidered*, 107 VA. MAG. HIST. & BIOGRAPHY 253 (1999).

<sup>31</sup> See Jeff R. Kerr-Ritchie, *Black Republicans in the Virginia Tobacco Fields, 1867–70*, 86 J. NEGRO HIST. 12 (2001) (discussing the improvements in labor laws, education rights, and political access for African-Americans).

<sup>32</sup> See, e.g., J. DOUGLAS SMITH, *MANAGING WHITE SUPREMACY: RACE, POLITICS, AND CITIZENSHIP IN JIM CROW VIRGINIA* 24–28 (2002) (describing the adoption of literacy tests, poll taxes, and statewide Jim Crow laws from the late 1800s to the early 1900s).

<sup>33</sup> See *Massive Resistance*, VA. HIST. SOC'Y, <http://www.vahistorical.org/civilrights/massiveresistance.htm> (last visited Aug. 6, 2012).

<sup>34</sup> See *Passive Resistance*, VA. HIST. SOC'Y, <http://www.vahistorical.org/civilrights/passiveresistance.htm> (last visited Aug. 6, 2012).

<sup>35</sup> See EMORY M. THOMAS, *THE CONFEDERATE STATE OF RICHMOND: A BIOGRAPHY OF THE CAPITAL* (La. State Univ. Press 1998) (1971).

Black labor was critical to the building (and, after the war, rebuilding) of the City.<sup>36</sup> White business owners, however, colluded with the city government to systematically exclude African-Americans from entrepreneurial opportunities.<sup>37</sup> Moreover, although Richmond always had a substantial African-American population, blacks were effectively locked out of city government until the 1970s, when, due to white flight, they became a majority of Richmond's population.<sup>38</sup> In 1978, newly empowered black voters and their allies elected Richmond's first African-American mayor and a city council in which blacks were a bare majority (five of nine council members).<sup>39</sup> Seeking to redress the history of African-Americans' exclusion from the construction industry, the city council in 1983 adopted a five-year affirmative action plan, under which businesses contracting with the City had to subcontract at least 30% of a contract's value to minority business enterprises.<sup>40</sup> The plaintiff in *Croson* challenged the plan as violating the Equal Protection Clause.<sup>41</sup>

The Supreme Court found the City's actions unconstitutional.<sup>42</sup> Justice O'Connor's plurality opinion in *Croson* reduced the complex history of racial politics in Richmond described above to a simple case of "reverse discrimination" by black government officials against innocent whites.<sup>43</sup> While *Croson*'s reasoning purported to rest on equal protection principles of general applicability, the plurality clearly believed there was something particularly suspicious about the adoption of the plan at issue. The plurality opinion relied heavily on process-defect reasoning by emphasizing the fact that the plan was adopted by a city council having a black majority.<sup>44</sup> To quote from the opinion at some length:

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<sup>36</sup> See 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, 289 (1992) ("Richmond was built, repaired, and rebuilt by minority labor.").

<sup>37</sup> *Id.* at 289–91.

<sup>38</sup> *Id.* at 290.

<sup>39</sup> *Id.* at 290–91.

<sup>40</sup> *Id.* at 289.

<sup>41</sup> 488 U.S. 469, 483 (1989).

<sup>42</sup> See *id.* at 505–06.

<sup>43</sup> *Id.* at 495–96 (plurality opinion).

<sup>44</sup> See Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 50 (2010) ("In *Croson*, the Court relied on the great John Hart Ely to hold that a minority set-aside program was more constitutionally suspect because it had been enacted by a black-majority city council."). It appears that the insinuation of a heavy-handed black majority discriminating against white citizens was first made in appellee *Croson*'s brief. See Brief on Behalf of the Appellee at 8, *J.A. Croson Co.*, 488 U.S. 469 (No. 87-998) ("The vote in favor of adopting the Plan was along racial lines with the five black members and one of the four white members of the Council voting for it.").

Even were we 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 the circumstances of this case. One of the central arguments for applying a less exacting standard to “benign” racial classifications is that such measures essentially involve a choice made by dominant racial groups to disadvantage themselves. . . .

In this case, [however,] blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The 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 in this case.<sup>45</sup>

Notice the plurality’s equation of numbers with political dominance and of political dominance with a process defect. Because blacks were 50% of the City’s population and held 55% of the seats on the city council, they were, in the Court’s view, the “dominant” racial group. And because blacks were dominant, the plurality reasoned, strict scrutiny was appropriate to protect the disenfranchised minority (whites) that was unable to vindicate its goals through the political process.

The *Croson* plurality’s reliance on process-defect reasoning not only discounts the history described above but defies logic and the contemporaneous political reality. Percentage of the City’s population tells us little about political dominance. Given the relatively lower voter-registration and turnout rates in minority communities, it is highly likely that blacks, although 50% of the City’s population, accounted for substantially less than 50% of the registered and actual voters. Thus, even if the black community voted as a bloc (another unstated assumption), at least some of the black city-council members must have enjoyed substantial support from nonblack voters. Moreover, the plurality’s recitation of the facts ignores that one of the white city-council members voted in favor of the affirmative action plan.<sup>46</sup> Finally, the plurality’s reasoning assumes that white voters could not have vindicated their interests through the political process. At most, the actual facts of the case would justify a presumption that black voters in Richmond were in a position to use the political process to remedy the legacy of discrimination against them

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<sup>45</sup> *J.A. Croson Co.*, 488 U.S. at 495–96 (plurality opinion).

<sup>46</sup> See Brief on Behalf of the Appellee, *supra* note 44, at 8.

by the City of Richmond, not that white voters in Richmond were being subordinated by a domineering black majority.

The *Croson* plurality's reasoning reflects a deep concern about the effective exercise of minority political power. *Croson*, however, is less extreme in at least one way than the Court's more recent colorblindness cases, which are discussed below. In *Croson*, a tangible benefit was conferred upon members of certain racial groups. As Heather Gerken has noted, the objection to government action like that in *Croson* seems to be that the political majority has used its power to engage in unseemly racial self-dealing.<sup>47</sup> It is therefore at least understandable that concerns about racial patronage might justify heightened judicial scrutiny of the political process in a case like *Croson*.<sup>48</sup> In the cases discussed in the following sections, however, no such concerns were present. Those cases—*Ricci v. DeStefano* and *NAMUDNO*—therefore represent a qualitative step forward in the Court's post-racialist jurisprudence.

#### B. *Fear of a Black Pastor*<sup>49</sup>: *Ricci v. DeStefano*

*Ricci v. DeStefano*<sup>50</sup> reflects the Court's growing suspicion of the exercise of minority political power in and of itself. *Ricci* involved the City of New Haven's efforts to prevent the near-total exclusion of blacks and Latinos from promotion to supervisory positions in the City's fire department.<sup>51</sup> By way of background, African-Americans and Latinos were approximately 60% of the City's population at the time.<sup>52</sup> While blacks and Latinos held 46% of the City's firefighting positions overall, they held only 18% of the captain and lieutenant positions in the fire department.<sup>53</sup> This lack of representation did not arise in a vacuum. Rather, police and fire departments around the country, and specifically in New Haven, remained bastions of racial homogeneity well into the late twentieth century.<sup>54</sup> This was due in part to the perception of public-

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<sup>47</sup> Gerken, *supra* note 44, at 54.

<sup>48</sup> As Professor Gerken also noted, however, where the political process results in the perpetuation of white privilege, “[t]he Court routinely dismisses pork and patronage as the usual products of pluralist politics under rational basis review. Yet it was markedly alert to the problem of self-dealing in *Croson* when racial minorities ruled.” *Id.* (footnote omitted).

<sup>49</sup> The subsection title is a reference to the hip-hop group Public Enemy's seminal album *Fear of a Black Planet*.

<sup>50</sup> 129 S. Ct. 2658 (2009).

<sup>51</sup> *Id.* at 2664.

<sup>52</sup> *Id.* at 2690 (Ginsburg, J., dissenting).

<sup>53</sup> *Id.* at 2691.

<sup>54</sup> See Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 88–89 (2010) (“[New Haven] had been repeatedly and successfully sued

safety forces as agents of law and order and to the reluctance of many individuals to see persons of color as wielders of such state power, rather than the subjects of it.<sup>55</sup> Municipal police and fire departments also have long histories of perpetuating disproportionate access for white ethnic groups to positions in those departments.<sup>56</sup>

The lawsuit in *Ricci* centered on a qualifying exam the City administered for promotions to the rank of lieutenant or captain in the fire department.<sup>57</sup> The test, in conjunction with civil service rules and union agreements governing promotions, resulted in significant racial disparities in who would be eligible for promotion.<sup>58</sup> Out of the seventy-seven firefighters who took the lieutenant's exam, all of those who would have been eligible for immediate promotion were white.<sup>59</sup> Out of the forty-one firefighters who took the captain's exam, all of those who would have been eligible for immediate promotion were white except for two Latinos.<sup>60</sup> No blacks were eligible for immediate promotion to either captain or lieutenant.<sup>61</sup>

Once this racial disparity became apparent, the City's counsel advised that all promotions be put on hold until the City could explore "whether there [we]re other ways to test for . . . those [promotions] that [we]re equally valid

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by African Americans and Latinos over its hiring and promotional practices—virtually all racially neutral—that operated to shut nonwhites out. . . . Overt and intentional racial exclusion and segregation remained pervasive in many urban fire departments even decades after *Brown*.”).

<sup>55</sup> See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 372 (1987) (“[W]hites are not accustomed to seeing blacks in positions of authority or power. . . . [M]any individuals in our culture continue to resist and resent taking orders from blacks.”).

<sup>56</sup> See *Ricci*, 129 S. Ct. at 2690 (Ginsburg, J., dissenting) (“In making hiring and promotion decisions, public employers often ‘rel[ied] on criteria unrelated to job performance,’ including nepotism or political patronage. Such flawed selection methods served to entrench preexisting racial hierarchies.” (alteration in original) (citation omitted) (quoting 118 CONG. REC. 1817 (1972))); Ann C. McGinley, *Ricci v. DeStefano: A Masculinities Theory Analysis*, 33 HARV. J.L. & GENDER 581, 588–95 (2010) (tracing the history of exclusion of white women and racial minorities from firefighting jobs in New Haven and other urban fire departments, and the resultant desegregation and discrimination lawsuits); *The Ladder*, SLATE (June 25, 2009, 7:17 AM), <http://www.slate.com/id/2221250/entry/2221298/> (“[A]s New Haven’s black population swelled [beginning in the 1960s and 1970s], the city’s Irish, Italian, and Polish residents held tight to power and dug in over hiring in the fire department.”).

<sup>57</sup> 129 S. Ct. at 2664.

<sup>58</sup> *Id.* at 2665–66.

<sup>59</sup> *Id.* at 2666.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

with less adverse [racial] impact.”<sup>62</sup> His legal concern was that proceeding with promotions could give rise to liability under the disparate impact provisions of Title VII of the Civil Rights Act of 1964.<sup>63</sup> City officials also had political concerns. New Haven’s pattern of racial discrimination in the fire department had previously prompted lawsuits and public outrage.<sup>64</sup> As in the past, black and Latino firefighters would have had a reasonable prima facie claim of disparate impact liability had the promotion process at issue in *Ricci* gone forward, given the level of the racial disparity.<sup>65</sup> On this occasion, however, minority firefighters and their allies chose—at least initially—to seek political redress, rather than file a lawsuit.

The City held a series of public hearings at which individuals spoke on both sides of the issue. Firefighters as well as members of the general public urged the Civil Service Commission not to make any promotions because of concerns about unfairness and racial exclusion.<sup>66</sup> A local minister, Reverend Boise Kimber, emerged as one of the most vocal opponents of going forward with the promotions.<sup>67</sup> Reverend Kimber, in addition to being an influential minister and community activist, was also a member of the New Haven Board of Fire Commissioners, which set rules and regulations for the fire department.<sup>68</sup> Reverend Kimber “adamantly opposed certification of the test results” because of their racially disparate impact.<sup>69</sup> At the conclusion of the

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<sup>62</sup> *Id.* at 2669–70 (second alteration in original) (quoting Joint Appendix at 140, *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428, 08-328)) (internal quotation marks omitted).

<sup>63</sup> *Id.* Title VII prohibits both disparate treatment (intentional discrimination) and disparate impact (racial disparities caused by facially neutral employment practices). See 42 U.S.C. § 2000e-2 (2006).

<sup>64</sup> See *Ricci*, 129 S. Ct. at 2691 (Ginsburg, J., dissenting) (describing the prior litigation involving New Haven’s fire department); Harris & West-Faulcon, *supra* note 54, at 89–91 (same).

<sup>65</sup> Indeed, the disparate impact lawsuits that the city counsel feared manifested immediately after the Supreme Court mandated that the City proceed with the racially exclusionary promotions in *Ricci*. Black firefighters filed two disparate impact lawsuits once those promotions were made. See William Kaempffer, *Black Firefighter Files Federal Bias Suit*, NEW HAVEN REG., Oct. 16, 2009, at A1; William Kaempffer, *City Facing More Suits from Firefighters*, NEW HAVEN REG., Nov. 13, 2009, at A3.

<sup>66</sup> Lieutenant Gary Kinney, for example, stated that basing promotions on the results of this test would be “a slap in the face” to the firefighters who did not receive passing scores, because he believed the material tested was not sufficiently pertinent to firefighting in New Haven. Joint Appendix, *supra* note 62, at 44–45. He continued, “this test showing that no minorities passed” is “not going to work. It’s going to cause more [divisiveness].” *Id.* at 46.

<sup>67</sup> See *Ricci*, 129 S. Ct. at 2684–85 (Alito, J., concurring).

<sup>68</sup> *Id.* at 2684. As Justice Ginsburg noted, the Board of Fire Commissioners was a separate and independent body from the Civil Service Board, which made the decision regarding the promotions. *Id.* at 2709 n.19 (Ginsburg, J., dissenting).

<sup>69</sup> *Id.* at 2685–86 (Alito, J., concurring).

hearings, the City ultimately decided not to certify the results, leading to no promotions being made.<sup>70</sup>

The disappointed firefighters sued, alleging that the City's actions violated the disparate treatment provisions of Title VII because they were race conscious.<sup>71</sup> The Supreme Court agreed, holding that of Title VII's two prongs—disparate impact and disparate treatment—the latter generally trumps the former.<sup>72</sup> Borrowing from its affirmative action jurisprudence under the Equal Protection Clause, the Court held that Title VII generally prohibits an employer from voluntarily “tak[ing] adverse employment actions because of an individual's race”<sup>73</sup> to correct for a cognizable disparate impact on persons of a different race.<sup>74</sup> Rather, the employer must prove not only that the business practice at issue causes a substantial racial disparity but also that the employer has a strong basis in evidence to believe it would lose a disparate impact lawsuit if one were brought.<sup>75</sup>

Given that no promotions were made, there was no formal unequal treatment in *Ricci*.<sup>76</sup> Contrary to the popular narrative of the case, the plaintiffs

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<sup>70</sup> *Id.* at 2671 (majority opinion). The City's Civil Service Board was responsible for certifying the list of applicants who passed the test, from which the candidates for promotion would be chosen. *Id.* at 2665. At the end of a series of public hearings, the Board split 2–2 with regard to whether to certify the test results, with the consequence that the list was not certified and no promotions could be made. *Id.* at 2671.

<sup>71</sup> *See id.* at 2664.

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

<sup>73</sup> *Id.* at 2673.

<sup>74</sup> *See id.* at 2675 (“[In the context of the Equal Protection Clause, t]he Court has held that certain government actions to remedy past racial discrimination . . . are constitutional only where there is a ‘strong basis in evidence’ that the remedial actions were necessary. . . . Our cases discussing constitutional principles can provide helpful guidance in this statutory context.” (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989)) (internal quotation marks omitted)). Justice Scalia went further, suggesting in his concurrence that disparate impact statutes may be unconstitutional. *See id.* at 2682–83 (Scalia, J., concurring). He argued that the theory of disparate impact liability requires employers to act in a race-conscious manner because, to avoid or remedy a racially disparate impact, one must first notice the racial disparity and subsequently take action to correct it. *See id.* at 2682. Justice Scalia suggested that, because the Court's equal protection precedents generally prohibit the government itself from acting in a race-conscious manner, it may also be unconstitutional for the government to require others to do so. *See id.* at 2682–83.

<sup>75</sup> *Id.* at 2678 (majority opinion). As the Court explained, a prima facie Title VII disparate impact case is established by the existence of a statistically significant racial disparity. *Id.* Such a disparity does not automatically prove disparate impact liability, however; it is only the first step. As the Court explained, “[T]he City could be liable for disparate-impact discrimination only if the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt.” *Id.*

<sup>76</sup> *See id.* at 2696 (Ginsburg, J., dissenting) (“[City officials] were no doubt conscious of race . . . , but this did not mean they had engaged in racially disparate treatment. . . . [A]ll the test results were discarded, no one was promoted, and firefighters of every race will have to participate in another selection process to be

in *Ricci* were not deprived of a vested right to promotion.<sup>77</sup> At best, they—like all the other firefighters—were deprived of the opportunity to be considered for promotions at that time based on the results of that test.<sup>78</sup> Thus, *Ricci* differs from a case like *Croson*, which involved a traditional affirmative action plan.<sup>79</sup>

The Court's ruling showed deep suspicion of black political power. Most fundamentally, the Court mistakenly "equate[d] political considerations with unlawful discrimination."<sup>80</sup> The Court essentially found that successful black political advocacy that temporarily prevented the perpetuation of racial exclusion amounted to reverse discrimination against whites. It reached this conclusion despite the fact that no promotions were made at all and the fact that making the promotions likely would have violated then-existing law.<sup>81</sup> In essence, *Ricci* treats a racial minority group's success in using ordinary politics to prevent its continued subordination and exclusion as presumptively illegal.

Justice Alito's concurrence made plain his view that whites in New Haven needed judicial protection from black political power. In his view, the City refused to certify the test results not to avoid Title VII liability—or even to

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considered for promotion." (fourth alteration in original) (quoting *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 158 (D. Conn. 2006), *aff'd per curiam*, 530 F.3d 87 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658); see also Helen Norton, *The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 245 (2010) ("Mr. Ricci was not treated differently than any other firefighter based on race, and in fact was not treated differently than any other firefighter at all: the test results were discarded for all, regardless of race, and no one was promoted, regardless of race."). Indeed, the district court rejected the plaintiffs' equal protection claim in *Ricci* in part because no unequal treatment occurred. *Ricci*, 554 F. Supp. 2d at 161.

<sup>77</sup> See *Ricci*, 554 F. Supp. 2d at 161 ("[P]erforming well on the exam does not create an entitlement to promotion . . .").

<sup>78</sup> See *id.* at 160 ("Even [if the Civil Service Board had certified the test results], application of the [civil service rules] would [only] give top scorers an *opportunity* for promotion, depending on the number of vacancies, but no *guarantee* of promotion; it is even conceivable that the applicant with the highest score never would be promoted.").

<sup>79</sup> As Justice Ginsburg noted in dissent, it is for this reason that the "litigation d[id] not involve affirmative action" as traditionally defined. *Ricci*, 129 S. Ct. at 2700 (Ginsburg, J., dissenting). The equal protection cases from which the *Ricci* Court drew the strong-basis-in-evidence standard all involved affirmative action measures by which the government distributed a tangible benefit on the basis of race.

<sup>80</sup> *Id.* at 2709.

<sup>81</sup> *Id.* at 2673 (majority opinion). Prior to *Ricci*'s novel application of the strong-basis-in-evidence standard to Title VII claims, an employer faced with evidence of a statistically significant racial disparity could voluntarily take corrective action to prevent that disparity from occurring without being subject to disparate treatment liability. See *Hayden v. County of Nassau*, 180 F.3d 42, 51 (2d Cir. 1999) ("[W]here an exam that discriminates against a group or groups of persons is reviewed, studied and changed in order to eliminate, or at the very least, alleviate such discrimination, there is a complete absence of intentional discrimination." (internal quotation marks omitted)).

level the playing field—but instead to please the black community.<sup>82</sup> For Justice Alito, the City’s actions were grounded solely in “a simple desire to please a politically important racial constituency.”<sup>83</sup> Even assuming this were true, nowhere does Justice Alito’s opinion explain why this is a forbidden goal in politics.<sup>84</sup> Indeed, as explained in Part I above, the Court’s conservative members’ repeated calls for subordinated groups to use the political process to achieve their goals assumes that doing so is not only permissible but desirable.

Justice Alito’s narrative of the facts, moreover, emphasized what he saw as the sinister role of a single African-American minister whom he believed subverted the political process. Justice Alito, selectively quoting the district court’s opinion, implied that “city officials worked behind the scenes to sabotage the promotional examinations because they knew that, were the exams certified, the Mayor would incur the wrath of [Rev. Boise] Kimber and other influential leaders of New Haven’s African-American community.”<sup>85</sup> It seems unlikely that Justice Alito’s imagery of radical black “wrath” and “sabotage” was merely an unfortunate choice of words. The characterization of the black community’s successful political advocacy as dangerous and subversive reflects a worldview in which the normal tools of politics—vigilance, agitation, and the threat of political repercussions—are ominous when successfully wielded by persons of color.<sup>86</sup> It is supremely ironic that the *Ricci* Court condemned black ethnic politics for successfully interrupting the

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<sup>82</sup> *Ricci*, 129 S. Ct. at 2688 (Alito, J., concurring).

<sup>83</sup> *Id.*

<sup>84</sup> After all, the fact “[t]hat political officials would have politics in mind is hardly extraordinary, and there are many ways in which a politician can attempt to win over a constituency—including a racial constituency—without engaging in unlawful discrimination.” *Id.* at 2709 (Ginsburg, J., dissenting).

<sup>85</sup> *Id.* at 2684 (Alito, J., concurring) (alteration in original) (quoting *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 162 (D. Conn. 2006), *aff’d per curiam*, 530 F.3d 87 (2d Cir. 2008), *rev’d*, 129 S. Ct. 2658) (internal quotation mark omitted). Justice Alito failed to quote the remainder of this portion of the district court’s opinion, which stated that, even if a jury could draw such an inference, “the fact that defendants desired to avoid the wrath of one group (in this case African-American firefighters and other political supporters of Kimber and DeStefano) does not logically lead to the conclusion that defendants intended to discriminate or retaliate against plaintiffs because they were not members of that group.” *Ricci*, 554 F. Supp. 2d at 163.

<sup>86</sup> Whatever can be said about Reverend Kimber as an individual, finding it suspicious or even particularly unusual that a black minister would loudly and even disruptively protest what he saw as discrimination against his community reflects a deep unfamiliarity with the role of the black church in the politics of racial justice. See, e.g., Stephen L. Carter, *The Separation of Church and Self*, 46 SMU L. REV. 585, 588–89 (1992) (“The battle for racial equality . . . was a mass movement . . . . And yet, the movement’s support base for much of its existence was in the church. The leaders of the mass-protest wing were drawn from the black clergy, which continues to supply a disproportionate share of the civil rights leadership.”); see also Emily Bazelon, *Ricci’s Competing Story Lines*, SLATE (June 29, 2009, 2:09 PM), <http://www.slate.com/id/2220927/entry/2221780> (“Boise Kimber has plenty of unsavory bits in his past. Alito runs through many of them. Because in his view, the evil to be protected against in New Haven is black political power.”).

perpetuation of racial exclusion brought about by white ethnic politics, while leaving the latter wholly unexamined.

*C. Fear of a Black Vote: Northwest Austin Municipal Utility District Number One v. Holder*<sup>87</sup>

If *Croson* and *Ricci* are supportable from the perspective of the countermajoritarian difficulty, it cannot be because blacks were so politically dominant in either Richmond or New Haven that whites were effectively a disenfranchised minority. But perhaps judicial suspicion of the political process could be justified in those cases because of the level of government involved. Local governments are thought to be distinctly dangerous sites for government decision making based upon race because local governments are less broadly representative than the national government and therefore more subject to racially distorted politics.<sup>88</sup> Even if that were true in *Ricci* and *Croson*, however, the Court's decision in *NAMUDNO* shows that it considers minority political power equally suspicious at the national level.

*NAMUDNO* involved a challenge to the constitutionality of section 5 of the Voting Rights Act of 1965, as renewed in 2006.<sup>89</sup> Section 5 requires that certain covered jurisdictions obtain preclearance from the federal government prior to the enforcement of any changes to their voting practices or procedures.<sup>90</sup> Congress adopted this provision as a prophylactic measure to supplement the other provisions of the Act, which allow for case-by-case litigation of discrimination in voting.<sup>91</sup> By requiring federal oversight of any changes in voting procedures by those jurisdictions found to have engaged in

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<sup>87</sup> 129 S. Ct. 2504 (2009).

<sup>88</sup> See, e.g., *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 566 (1990) (noting that there is a "heightened danger of oppression from political factions in small, rather than large, political units" and that, "as a matter of 'social reality and governmental theory,' the Federal Government is unlikely to be captured by minority racial or ethnic groups and used as an instrument of discrimination" (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 522–23 (1989) (Scalia, J., concurring in the judgment)) (internal quotation marks omitted)), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

<sup>89</sup> 129 S. Ct. at 2508. The Voting Rights Act contains a sunset provision providing that section 5 shall expire if not renewed by a given date. See *id.* at 2510 ("As enacted, §§ 4 and 5 of the Voting Rights Act were temporary provisions. They were expected to be in effect for only five years. . . . Congress reauthorized the Act in 1970 (for 5 years), 1975 (for 7 years), and 1982 (for 25 years). . . . Most recently, in 2006, Congress extended § 5 for yet another 25 years.").

<sup>90</sup> See 42 U.S.C. § 1973c(a) (2006). The covered jurisdictions are mostly, but not exclusively, located in the South.

<sup>91</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

systematic voting discrimination in the past, Congress “decide[d] to shift the advantage of time and inertia from the perpetrators of the evil to its victims.”<sup>92</sup>

The lawsuit in *NAMUDNO* was brought by a municipal utility district located in Texas, a covered jurisdiction.<sup>93</sup> The District had an elected board and believed that it should not be subject to the preclearance requirement before it could make changes to its election procedures.<sup>94</sup> In the normal course of events, it is unlikely that a small municipal utility district would expend the effort and expense necessary to mount a constitutional challenge and litigate it all the way to the Supreme Court. Indeed, as noted by the district court in *NAMUDNO*:

Throughout its two decades of existence, the District has filed only eight preclearance requests, and the cost of these submissions—\$223 per year—is modest, especially when compared to the District’s average annual budget of \$548,338. . . . [M]oreover, the District has never received an objection letter or been targeted by a section 5 enforcement suit. Nor has the District identified a single voting change that it considered but chose not to pursue because of section 5.<sup>95</sup>

The Utility District in *NAMUDNO*, however, was luckier than most plaintiffs. Although opposed by the county in which it was located,<sup>96</sup> it had the good fortune of being represented by (among others) the Project on Fair Representation, a conservative litigation firm whose mission is ending affirmative action and other governmental measures aimed at increasing diversity or integration.<sup>97</sup> The District’s post-racial argument that the level of black political success today renders section 5 both unnecessary and

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<sup>92</sup> *Id.*

<sup>93</sup> *Nw. Austin Mun. Util. Dist. No. One v. Mukasey (NAMUDNO)*, 573 F. Supp. 2d 221, 223 (D.D.C. 2008), *rev’d sub nom. Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009).

<sup>94</sup> *NAMUDNO*, 129 S. Ct. at 2508.

<sup>95</sup> 573 F. Supp. 2d at 282 (citations omitted).

<sup>96</sup> *See id.* at 278 (“[F]or the County, the modest administrative costs that come with being subject to Section 5’s preclearance requirements are far outweighed by the benefits that come from such coverage.” (quoting Travis County’s Motion for Summary Judgment, with Accompanying Memorandum of Points and Authorities at 7, *NAMUDNO*, 573 F. Supp. 2d 221 (No. 06-1384))).

<sup>97</sup> *See Current Litigation*, PROJECT ON FAIR REPRESENTATION, <http://www.projectonfairrepresentation.org/current-litigation/> (last visited Aug. 6, 2012). Despite the euphemistic language on its website and in its press releases, it is clear from the Project’s actual litigation and briefs filed therein that its goal is to attack race-conscious measures adopted for remedial or diversifying purposes. The Project, for example, was also involved in litigating the successful equal protection challenge to school districts’ voluntary school-integration efforts in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007). *See Current Litigation*, *supra*.

unconstitutional was presented front and center in the first paragraph of its brief:

In the past 44 years, nearly every facet of voting rights has changed in America. Voter registration, voter turnout, and representation in electoral offices have increased dramatically among African Americans, Hispanics, and other minorities. The country has its first African-American president, who received a larger percentage of the white vote than each of the previous two Democratic presidential nominees.<sup>98</sup>

The Court, applying the doctrine of constitutional avoidance, sidestepped the constitutional issues and resolved the case on statutory grounds.<sup>99</sup> But in lengthy dicta clearly intended as a warning to Congress, Chief Justice Roberts's opinion strongly signaled that several members of the Court, if not yet a majority, are prepared to find section 5 unconstitutional. The Court stated that section 5 "raise[s] serious constitutional questions"<sup>100</sup> in an opinion suffused with post-racialist assumptions about minority political power. The opinion reasoned that section 5 may no longer be necessary because "[t]hings have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels."<sup>101</sup> After offering only the briefest of nods to the fact these improvements are due in no small part to section 5,<sup>102</sup> Chief Justice Roberts's opinion then used evidence of minority political success as reason for suspicion of the fruits thereof. In the Chief Justice's view, the "dramatic improvement[]" in minority access to the vote undermined the justification for section 5's continued existence.<sup>103</sup> Indeed, under this view, the overwhelming majorities in Congress by which section 5 was reenacted in 2006 (390–33 in the House and 98–0 in the Senate<sup>104</sup>) serve not as reason for upholding it, but for striking it down. If racial minorities are powerful enough to have such legislation enacted, then why do they need it?

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<sup>98</sup> Appellant's Brief at 1, *NAMUDNO*, 129 S. Ct. 2504 (No. 08-322).

<sup>99</sup> See *NAMUDNO*, 129 S. Ct. at 2513–17. The Court, applying the doctrine of constitutional avoidance, ruled as a matter of statutory interpretation that the District was entitled to seek "bailout" from section 5's preclearance requirement and that it was therefore unnecessary to reach the constitutional issues. *Id.*

<sup>100</sup> *Id.* at 2513.

<sup>101</sup> *Id.* at 2511.

<sup>102</sup> See *id.* ("These improvements are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success. Past success alone, however, is not adequate justification to retain the preclearance requirements.").

<sup>103</sup> *Id.* at 2511–12.

<sup>104</sup> Transcript of Oral Argument at 48, *NAMUDNO*, 129 S. Ct. 2504 (No. 08-322).

Furthermore, for some of the Justices, such successful political advocacy by racial minorities is reason for the same kind of suspicion displayed in *Ricci*: the intuition that racial intimidation, rather than legitimate and ordinary politics, was at work. The following excerpt from the oral argument in *NAMUDNO* is illustrative:

JUSTICE SCALIA: . . . What was the vote on this 2006 extension—98 to nothing in the Senate, and what was it in the House? Was—

[COUNSEL]: It was—it was 33 to 390, I believe.

JUSTICE SCALIA: 33 to 390. You know, the—the Israeli Supreme Court, the Sanhedrin, used to have a rule that if the death penalty was pronounced unanimously, it was invalid, because there must be something wrong there. Do you ever expect—do you ever seriously expect Congress to vote against a reextension of the Voting Rights Act? Do you really think that any incumbent would—would vote to do that?<sup>105</sup>

Justice Thomas would have gone farther than the majority and held section 5 unconstitutional. For Justice Thomas, the time has come for racial minorities to cease to be the “special favorite[s] of the law[.]”<sup>106</sup> with regard to

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<sup>105</sup> *Id.* at 47–48. Justice Scalia was echoing the contemporary conservative movement’s suspicion of the politics behind the reauthorization of section 5. *See, e.g.,* Josh Gerstein, *Voting Rights Act Under Siege*, POLITICO (Feb. 19, 2012, 7:06 AM), <http://www.politico.com/news/stories/0212/73058.html> (“An intensifying conservative legal assault on [section 5 of] the Voting Rights Act [is taking place] . . . [T]he view that states should have free rein to change their election laws even in places with a history of Jim Crow seems to be gaining traction within the Republican Party.”); *see also* Edward Blum, *An Insulting Provision*, NAT’L REV. ONLINE (May 2, 2006, 6:42 AM), <http://www.nationalreview.com/articles/217511/insulting-provision/edward-blum> (“[T]he Republican congressional leadership, cheered on by the Bush Administration, is hell-bent on keeping [section 5] in place. . . . Republicans don’t want to be branded as hostile to minorities, especially just months from an election.”). Like the majority in *Ricci*, Justice Scalia did not explain why enacting legislation to please this particular constituency must be seen as particularly unprincipled or suspicious, as compared to legislative action undertaken to please other important and politically active constituencies, such as gun owners and the elderly.

<sup>106</sup> The Civil Rights Cases, 109 U.S. 3, 25 (1883). In the *Civil Rights Cases*, the Supreme Court held that the Civil Rights Act of 1875, which prohibited racial segregation in places of public accommodation, exceeded Congress’s power to enforce the Thirteenth Amendment. *Id.* In *NAMUDNO*, Justice Thomas argued that section 5 of the Voting Rights Act exceeded Congress’s power to enforce the Fifteenth Amendment. 129 S. Ct. at 2517 (Thomas, J., concurring in the judgment in part and dissenting in part). Nor is Justice Thomas alone in this regard; Chief Justice Roberts clearly also believes that the time for racial remediation has passed. *See* Jeffrey Toobin, *No More Mr. Nice Guy*, NEW YORKER, May 25, 2009, at 42, 42–44 (“[I]n a series of decisions in the past four years, the Chief Justice has expressed the view that the time has now passed when the Court should allow systemic remedies for racial discrimination.”). It is remarkable how similar the reasoning of contemporary post-racialists is to that of the post-Reconstruction Supreme Court, which routinely struck down democratically enacted measures designed to promote racial equality. But perhaps it should not be remarkable. Recent scholarship has shown that the narrative that “we have done enough” arose immediately following the

the right to vote. In his concurring opinion, he argued that “the violence, intimidation, and subterfuge that led Congress to pass § 5 and this Court to uphold it no longer remains.”<sup>107</sup> Because, in his view, section 5 represents federal “[p]unishment for long past sins,”<sup>108</sup> rather than a legitimate response to contemporary discrimination and the political legacy of past discrimination, it is unconstitutional.<sup>109</sup>

### III. THE WAY FORWARD

This Essay has argued that the Supreme Court’s post-racialist jurisprudence treats the effective exercise of minority political power as inherently suspicious. The Court has distorted the traditional justifications for countermajoritarian judicial action in service of a narrative of pervasive white victimization. Its decisions reflect a worldview in which the primary problem of racial injustice today is discrimination against whites by virtue of insidious minority political power. In this final Part, I suggest ways in which the Court’s colorblindness doctrine should be modified to better reflect the realities of minority political power and to allow the political process to function properly.

#### A. *Changing the Narrative*

Recent scholarship has argued that the Court’s colorblindness doctrine is as concerned with the expressive function of race-conscious government action as with its instrumental effects.<sup>110</sup> Richard Primus has called this the “visible-

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Civil War and has been continuous thereafter. *See generally* Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 928–37 (2009) (discussing the recurring historical pattern of resistance to civil rights efforts).

<sup>107</sup> *NAMUDNO*, 129 S. Ct. at 2527 (Thomas, J., concurring in the judgment in part and dissenting in part).

<sup>108</sup> *Id.* at 2525.

<sup>109</sup> Subsequent to the Court’s decision in *NAMUDNO*, several new challenges to the constitutionality of section 5 were filed. Two of the district courts in these new cases have found section 5 to be constitutional. *See LaRoque v. Holder*, No. 10-0561 (JDB), 2011 WL 6413850 (D.D.C. Dec. 22, 2011); *Shelby County v. Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011). In two other cases that remain pending, the courts have not yet reached a decision on the merits. *See Arizona v. Holder*, No. 11-01559 (D.D.C. filed Aug. 25, 2011); *Florida v. United States*, No. 11-01428 (D.D.C. filed Aug. 1, 2011). The Supreme Court has also reiterated in a recent per curiam opinion that at least some Justices continue to believe that section 5 raises “serious constitutional questions.” *Perry v. Perez*, 132 S. Ct. 934, 942 (2012) (per curiam) (quoting *NAMUDNO*, 129 S. Ct. at 2513) (internal quotation marks omitted). In light of these developments, it seems very likely that the Court will soon directly confront the question of section 5’s constitutionality.

<sup>110</sup> *See, e.g., Carter, supra* note 19 (stating that the Court’s colorblindness doctrine is grounded in concerns about the message sent by remedial or diversifying race-conscious government action and arguing that the Court should therefore incorporate First Amendment principles into its analysis in such cases); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010) (arguing that the Court’s concern in

victims” reading of the colorblindness doctrine.<sup>111</sup> The Court condemns government action redressing racial inequality when such action creates visible white victims around whom a narrative consistent with post-racialism can revolve.<sup>112</sup> As Primus has argued, “One predictable way for the race-conscious aspect of a governmental practice to acquire a divisive social meaning is for the practice to create visible victims. Visible victims lend themselves to easily understood narratives of injustice, as every good plaintiffs’ lawyer knows.”<sup>113</sup> The visibility of individual white victims provides a rallying point for resentment; once such resentment manifests, the Court’s conservatives contend that the government’s action (rather than whites’ reaction) threatens social cohesion and is therefore unconstitutional.<sup>114</sup>

I believe that this worldview persists because, when racial minorities exercise their political power to level the playing field, they often do so in ways that create visible, individual white “victims” who are perceived as paying the price for something that is not their fault. Subordination of racial minorities, however, is often accomplished in ways that render individual victims invisible. Accordingly, when racial minorities use the political process to interrupt the perpetuation of white privilege, we falsely see a world in which a politically dominant group (racial minorities) is discriminating against discrete and identifiable victims (individual whites). By contrast, because the continued subordination of racial minorities is often systemic and its causes are often invisible, it is seen as being “just the way things are.”

One possible way to combat the narrative of insidious minority political power would be to present a counternarrative highlighting continued racial inequality. Both in litigation and in the public debate, it should never go

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cases like *Ricci* is with the divisive social meaning that the Court believes is sent by government action explicitly redressing racial inequality); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011) (identifying the antibalkanization principle as an independent doctrinal middle ground between colorblindness theory and antisubordination theory, under which government action violates the Equal Protection Clause when it is seen as causing divisiveness and threatening social cohesion).

<sup>111</sup> See Primus, *supra* note 110, at 1369–74.

<sup>112</sup> See *id.* at 1372.

<sup>113</sup> *Id.*

<sup>114</sup> See Siegel, *supra* note 110, at 1298 (noting that Justices have treated the “resentment of the ‘dispreferred’ [i.e., whites] as a reason to impose restrictions on race-conscious remedies”). This reasoning treats the government’s action, rather than the reaction thereto, as the cause of the problem. As I have written elsewhere, the Court’s colorblindness doctrine “has embraced a kind of heckler’s veto theory, long formally discredited in free speech jurisprudence, whereby the fact that government attention to racial inequality offends some individuals or allegedly creates divisiveness is sufficient to prohibit the message.” Carter, *supra* note 19, at 57.

unremarked that racial minorities (particularly blacks and Latinos) are at or near the bottom of the scale by nearly every material measure<sup>115</sup> and that racial minorities' increasing electoral success falls well short of systemic political empowerment.<sup>116</sup> But the Court's colorblindness doctrine currently has little room for arguments based on racial remediation or for data regarding political empowerment. Indeed, evidence of continued racial disparities was directly presented to the Court in *Croson*, *Ricci*, and *NAMUDNO*, only to be cursorily dismissed because it contradicted the Court's preferred narrative of those cases.

In *Croson*, for example, the City relied on a variety of evidence to defend its decision to adopt the affirmative action plan at issue, including

statistics showing that minority-owned businesses have received virtually no city contracting dollars and rarely if ever belonged to area trade associations; testimony by municipal officials that discrimination has been widespread in the local construction industry; and . . . exhaustive and widely publicized federal studies . . . show[ing] . . . pervasive discrimination in the Nation's tight-knit construction industry.<sup>117</sup>

The Court concluded, however, that such legislative fact finding was "of little probative value in establishing identified discrimination in the Richmond construction industry."<sup>118</sup> In *Ricci*, abundant evidence was presented to the Court regarding pervasive racial discrimination in municipal employment in general and in New Haven in particular.<sup>119</sup> The majority opinion completely disregarded such evidence, reducing the case to the simple proposition that "[t]he City rejected the test results solely because the higher scoring candidates were white."<sup>120</sup> And in *NAMUDNO*, the Court was presented with voluminous evidence—including over 27,000 pages of combined fact finding by the House and Senate—of continued voting discrimination justifying the reenactment of

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<sup>115</sup> See *supra* note 3 and accompanying text.

<sup>116</sup> Indeed, a recent study has found that, in the South, despite the presence of substantial numbers of minority legislators, "[b]lack voters and elected officials have less influence now than at any time since the civil rights era," due to racially polarized voting and race-based redistricting that dilutes black voters' influence. DAVID A. BOSITIS, JOINT CTR. FOR POLITICAL & ECON. STUDIES, RESEGREGATION IN SOUTHERN POLITICS? 1 (2011), available at <http://www.jointcenter.org/sites/default/files/upload/research/files/Resegregation%20in%20Southern%20Politics.pdf>.

<sup>117</sup> 488 U.S. 469, 529 (1989) (Marshall, J., dissenting).

<sup>118</sup> *Id.* at 500 (majority opinion).

<sup>119</sup> See 129 S. Ct. 2658, 2690–92 (2009) (Ginsburg, J., dissenting).

<sup>120</sup> *Id.* at 2674 (majority opinion).

section 5 of the Voting Rights Act.<sup>121</sup> The *NAMUDNO* opinion failed to address this evidence directly, stating only that “[i]t may be that . . . conditions continue to warrant preclearance under the Act. But the Act imposes current burdens and must be justified by current needs.”<sup>122</sup> Thus, efforts to render the subordination of racial minorities visible are unlikely to draw much sympathy from the current Supreme Court.

A second option would be for racial minorities and their allies to continue to use the political process to address racial inequality, but to do so in ways that avoid creating visible white victims. In a case like *Croson*, for example, the city council could have created an affirmative action program based not upon race but upon socioeconomic disadvantage, or the number of previous City contracts a business had received, or some combination of other factors that would correlate closely with the race of previously excluded groups.<sup>123</sup> Similarly, in *Ricci*, the City of New Haven could have used facially neutral measures to avoid the racial disparity in promotions from occurring in the first place.<sup>124</sup> But the Court has proven adept at finding equal protection violations even in situations where no identifiable white individuals have been harmed in any tangible way.<sup>125</sup> Avoiding creating visible white victims therefore will not by itself provide a safe haven for the exercise of minority political power.

Thus, while changing the narrative is important, it will be insufficient without an accompanying doctrinal shift. I suggest that equal protection review incorporate an initial analysis that I call “process scrutiny.” To the extent that the Court’s suspicion of minority political power is grounded in process-defect reasoning, the Court should scrutinize not just the goals and methods of the

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<sup>121</sup> See 573 F. Supp. 2d 221, 228–30, 250–68 (2008), *rev’d sub nom.* Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504 (2009).

<sup>122</sup> 129 S. Ct. at 2511–12.

<sup>123</sup> The disadvantage of such methods is that they would only imperfectly address racial disparities because such proxies would not correspond exactly to the underlying racial disparities. Moreover, focusing on class or other factors, rather than calling attention to the continued racial and structural aspects of inequality, cedes the ground for debate to the post-racialists. See, e.g., Barnes et al., *supra* note 3, at 1001 (“[T]here is something disingenuous and distasteful about not calling racism out for what it is—about buying into the myth that the United States is post-race.”).

<sup>124</sup> Indeed, Justice Kennedy’s opinion in *Ricci* explicitly stated that employers could take such measures notwithstanding *Ricci*’s holding. See 129 S. Ct. at 2677 (“Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race.”).

<sup>125</sup> See, e.g., *Shaw v. Reno*, 509 U.S. 630 (1993) (holding that strict scrutiny applied to a state redistricting plan that created a majority-black voting district, even though white voters made no claim that the district diluted whites’ voting strength or otherwise caused a tangible injury).

challenged governmental action but also the political process that led to the governmental action at issue.

*B. Changing the Doctrine: Process Scrutiny*

Current equal protection jurisprudence holds that any purposeful government consideration of race triggers strict scrutiny.<sup>126</sup> Under strict scrutiny, the courts are to closely examine both the government's ends and means. The reviewing court is to assess the importance of the government's goal to determine whether it is sufficiently compelling to justify the use of race.<sup>127</sup> Even if the goal is compelling, strict scrutiny also requires that the government's means be narrowly tailored or the least restrictive method of achieving the compelling goal.<sup>128</sup> Thus, race-conscious government action is presumptively unconstitutional and will be upheld only in a very few cases.<sup>129</sup>

To the extent that the Court is suspicious of minority political power and therefore believes that process-defect reasoning is applicable in such cases, I suggest the addition of a preliminary step to the equal protection analysis. Prior to the application of strict scrutiny in cases where racial minorities have used the political process to enact legislation directed toward remedying the effects of past discrimination or otherwise leveling the playing field, the courts should scrutinize the political process that led to the decision in question, not merely the end result. To be sure, some Justices believe that strict scrutiny itself accomplishes this purpose. In *Adarand*, for example, Justice O'Connor wrote that strict scrutiny is designed

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 there is little or no possibility

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<sup>126</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

<sup>127</sup> See *id.*

<sup>128</sup> See *id.*

<sup>129</sup> In *Adarand*, the Court noted that it "wish[ed] to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Id.* at 237 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment)). Thus, while strict scrutiny will almost always result in the government's action being declared unconstitutional, there are limited circumstances in which it will be upheld. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding the University of Michigan Law School's consideration of race as a "plus" factor in admissions decisions).

that the motive for the classification was illegitimate racial prejudice or stereotype.<sup>130</sup>

However, this presumes the invalidity of the process from the results and then scrutinizes the results to see if they are both important enough and precise enough to “warrant use of a highly suspect tool.” Treating the results of the political process as “highly suspect” makes sense when reviewing the outcome of majoritarian processes subordinating racial minorities, because rationales other than or in addition to process-defect theory justify such suspicion. For example, we presume that laws burdening racial minorities are likely to reflect “prejudice and antipathy”<sup>131</sup> because of the history of racism and white supremacy.<sup>132</sup> These factors, combined with the group’s numerical disadvantage, serve as a proxy for a process defect.

Such presumptions make no sense, of course, when the political process yields results aimed at redressing racial inequality. Rather, the sole instrumental justification for the “extraordinary protection from the majoritarian political process”<sup>133</sup> embodied by strict scrutiny would be that the political process has malfunctioned in such a way as to effectively exclude a racial group, i.e., whites. This is the point that Justice Alito was attempting to make, however inaccurately, in his concurrence in *Ricci*. But rather than assuming a process defect *ipse dixit*, the courts should actually and directly scrutinize the political process leading to the challenged action to ascertain whether it malfunctioned.

Such process scrutiny<sup>134</sup> would have two elements, one empirical and one interpretive. The first would be an empirical examination of the processes

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<sup>130</sup> 515 U.S. at 226 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)) (internal quotation mark omitted).

<sup>131</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

<sup>132</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (commenting that “a history of purposeful unequal treatment” of the minority group counsels in favor of applying strict scrutiny).

<sup>133</sup> *Id.*

<sup>134</sup> The term “process scrutiny” has previously appeared in the scholarly literature in the context of the Takings Clause. See, e.g., Charles E. Cohen, *The Abstruse Science: Kelo, Lochner, and Representation Reinforcement in the Public Use Debate*, 46 DUQ. L. REV. 375, 411–12 (2008) (advocating that courts scrutinize the process by which a takings decision was reached as a way of determining whether “procedural irregularities” or “improper influence” have distorted the political process). While the goal of such process scrutiny is different in that context—exposing when a putative public purpose for a taking is a pretext for an underlying desire to benefit a private party—the task it performs is somewhat similar here. However, rather than seeking to expose a pretextual explanation for government action, I use “process scrutiny” to indicate a judicial examination of the political process with an eye toward whether a process defect has occurred such

leading to the challenged decision. Some key points of inquiry would include whether the decision was reached by virtue of open and transparent proceedings, whether dissenting views (if any) of both the citizenry and public officials were expressed in a forum that could reasonably be expected to take them into account, and whether socioeconomic or other disparities can be said to have effectively diminished the voice of those who disagreed with the governmental action. In other words, was the political process actually working properly?

The second element would involve interpreting what actually happened with an eye toward the perceived fairness of the processes leading to the challenged decision. Factors for examination would include whether the result would reasonably be perceived as reinforcing the dominance of one group, whether dissenting voices would reasonably be perceived as sufficiently marginalized that they would have exited the political process, and whether the political process would reasonably be perceived as having been illegitimately captured by one racial group. In other words, would the political process have been *perceived* as actually working properly?<sup>135</sup>

To take one example, applying such an analysis to the facts of *Ricci* would yield the result that there was no reason to be particularly suspicious about the effective exercise of minority political power in New Haven. As to the first inquiry, it is clear that the political process actually functioned properly in *Ricci*. The decision not to certify the test results was made by governmental actors responding to the kinds of political pressure from ordinary citizens that are the workings of ordinary politics. New Haven's procedures required that the Civil Service Board (CSB) certify a list of applicants who would be eligible

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that the exercise of minority political power should be subject to strict scrutiny. Future articles will more fully develop the contours of such process scrutiny.

<sup>135</sup> I realize that both elements that I propose involve some degree of subjectivity, as there is no single completely objective set of criteria against which to judge whether the political process has actually malfunctioned or would reasonably be perceived as having malfunctioned. *Cf.* *Holder v. Hall*, 512 U.S. 874, 901–02 (1994) (Thomas, J., concurring in the judgment) (criticizing the Court's vote-dilution jurisprudence under section 2 of the Voting Rights Act by arguing that "there are undoubtedly an infinite number of theories of effective suffrage, representation, and the proper apportionment of political power in a representative democracy that could be drawn upon to answer the questions posed in [vote-dilution cases]" but noting that "such matters of political theory are beyond the ordinary sphere of federal judges" and "are not readily subjected to any judicially manageable standards that can guide courts in attempting to select between competing theories"). Nonetheless, the application of some actual standards for determining when the political process has malfunctioned is preferable to current doctrine, which presupposes the existence of a process defect without the benefit of any rigorous examination of the underlying processes or even of logical presumptions arising from a history of discrimination against the allegedly disadvantaged group.

for civil service positions.<sup>136</sup> Once the controversy over the test results erupted, the CSB, which is an “autonomous body of City of New Haven citizens,”<sup>137</sup> held a series of five open hearings at which members of the public as well as governmental officials spoke for and against certifying the results.<sup>138</sup> The CSB heard testimony “from test takers, the test designer, subject-matter experts, City officials, union leaders, and community members,”<sup>139</sup> including individuals and organized interest groups. In addition to the transparency of the formal process, the matter was very much in public view and part of the public discourse in New Haven at the time.<sup>140</sup> Moreover, the City’s board of aldermen (the elected city council) was also briefed on the situation, providing yet another venue for community input and participation. In short, *Ricci* involved a public matter roundly debated in public fora, providing opportunities for democratic engagement. At the end of the process, democratically accountable officials, acting in a politically responsive fashion, took a position on a political controversy.

The political process in *Ricci* also likely would have been perceived as functioning properly. Although members of the community may have vehemently disagreed as to the proper substantive outcome, it is unlikely that whites in New Haven would have reasonably perceived the political process to be so dominated by minority interests or otherwise closed to them that they were effectively denied procedural justice. Whites were well represented in city government, and the final decision on certification—a 2–2 split by the CSB—belies the impression of minority subversion or capture of the city government. It may have been true that blacks and Latinos were “a politically

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<sup>136</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2665 (2009).

<sup>137</sup> *Civil Service*, CITY OF NEW HAVEN, <http://www.cityofnewhaven.com/HumanResources/CivilService.asp> (last visited Aug. 6, 2012).

<sup>138</sup> See Joint Appendix, *supra* note 62. It is worth noting that these hearings were held over the initial protest of Rev. Kimber, who apparently would have preferred that the Board of Fire Commissioners first have the opportunity to meet privately with the CSB, which does much to dispel the notion that the process operated through secret back-room dealing. See *Ricci*, 129 S. Ct. at 2685 (Alito, J., concurring) (“Reverend Kimber protested the public meeting, arguing that he and the other fire commissioners should first be allowed to meet with the CSB in private.”).

<sup>139</sup> *Ricci*, 129 S. Ct. at 2692 (Ginsburg, J., dissenting).

<sup>140</sup> For example, the issue was thoroughly covered in the local media. See, e.g., William Kaempffer & Angela Carter, *City Fire Tests Have No Easy, Cheap Fix*, NEW HAVEN REG. (Feb. 2, 2004), <http://www.nhregister.com/articles/2004/02/02/import/10901527.txt>; William Kaempffer, *Fire Department Sure to Be Sued over Exams*, NEW HAVEN REG. (Feb. 6, 2004), <http://www.nhregister.com/articles/2004/02/06/import/10927406.txt>; William Kaempffer, *Fire Exams Pose Problems, City Lawyer Says*, NEW HAVEN REG. (Jan. 23, 2004), <http://www.nhregister.com/articles/2004/01/23/import/10855004.txt>; William Kaempffer, *Firefighters Say Tests for Promotions Are Flawed*, NEW HAVEN REG. (Jan. 21, 2004), <http://www.nhregister.com/articles/2004/01/21/import/10840559.txt>.

important racial constituency” in New Haven,<sup>141</sup> that a local black minister apparently had the ear of the mayor,<sup>142</sup> and that city officials and the CSB were persuaded for political reasons not to certify the test results. Nonetheless, in light of the history of racial minorities’ political and social subordination, it remains difficult to see how these facts could reasonably be perceived as amounting to a systemic defect in New Haven’s democratic processes unless successful political advocacy is itself grounds for suspicion. It is inconsistent (to say the least) for the Court’s conservative members to view political influence as especially pernicious in itself when it leads to racially egalitarian political outcomes, while simultaneously believing that, in the context of corporate campaign contributions, it is legitimate for politicians to “respond by producing those political outcomes the supporter favors.”<sup>143</sup>

### CONCLUSION

If current demographic projections are correct, racial minorities will be a numerical majority in America by the middle of this century.<sup>144</sup> As that shift begins, racial minorities in many areas of the country will increasingly hold political power while continuing to face social and economic subordination. Newly empowered minority groups will presumably use the political process to enact laws aimed at ameliorating continued racial inequality.

Although the popular narrative of constitutional history views the federal judiciary—and especially the Supreme Court—as the champions of racial equality, the Court has more often acted in countermajoritarian ways to obstruct racial progress than to advance it.<sup>145</sup> As racial minorities use the

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<sup>141</sup> *Ricci*, 129 S. Ct. at 2688 (Alito, J., concurring).

<sup>142</sup> *Id.* at 2684.

<sup>143</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003), *overruled by Citizens United*, 130 S. Ct. 876).

<sup>144</sup> *See Minorities Expected to Be Majority in 2050*, CNN (Aug. 13, 2008), [http://articles.cnn.com/2008-08-13/us/census.minorities\\_1\\_hispanic-population-census-bureau-white-population?\\_s=PM:US](http://articles.cnn.com/2008-08-13/us/census.minorities_1_hispanic-population-census-bureau-white-population?_s=PM:US).

<sup>145</sup> *See* William M. Carter, Jr., *Judicial Review of Thirteenth Amendment Legislation: “Congruence and Proportionality” or “Necessary and Proper”?*, 38 U. TOL. L. REV. 973, 988 (2007) (“[While] Congress was girding for [the Civil War] . . . , enacting the Reconstruction Amendments after the war’s end, and enforcing them during the brief Reconstruction period via a variety of civil rights measures that were incredibly progressive for their time[, ] the Supreme Court was issuing rulings that were protective of the white supremacist regime Congress was attempting to dismantle.”); Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 154 (1995) (“The claim that the judiciary is the exclusive or even dominant protector of our liberties is a very recent and mistaken idea, one that has arisen principally in the civil liberties community in the last generation. This view of constitutional structure comes from the experience of *Brown v. Board of Education* and the moral authority of that decision.” (footnote omitted)).

political process to vindicate their goals, an activist federal judiciary will more often prove to be an obstacle to racial justice than a vehicle for it, as long as it remains uniquely suspicious of minority political power.