RICHMOND AND REPUBLICANISM

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Professor Michelman's Dunwody lecture1 continues his study of the conceptions of democracy underlying public law.2 As early as 1977, he wrote about the relevance of republicanism to American public law3 — something that did not become clear to most of us until far later. In a series of works, he has examined how deliberative and strategic conceptions of politics have played themselves out in judicial opinions.4 The Dunwody lecture elaborates his analysis in two respects. He further refines the analysis by distinguishing between two deliberative conceptions of politics, liberal and republican.5 He also applies the analysis to a new set of cases, those dealing with voting rights.6

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5. See Michelman, Voting Rights, supra note 1, at 445-52. For the benefit of readers unfamiliar with the area, political philosophers attach special meanings to the terms "liberal" and "republican," which are quite unrelated to ordinary usage. See infra text accompanying notes 54-58.
6.  See Michelman, Voting Rights, supra note 1, at 460-85. Although Professor Michelman attempts to trace the influence of the deliberative model of politics on past Supreme Court decisions, he does not address how its explicit acceptance could affect the resolution of current voting controversies. For an excellent recent effort along those lines, see Abrams, Raising Politics Up: Minority Political Participation and Section 2 of the Voting Rights Act, 63 N.Y.U. L. REV. 449, 475-81, 594-31 (1988).
Rather than attempting to add to Professor Michelman's evocative reading of the voting rights cases, this essay investigates the utility of a similar reading of an important recent case, City of Richmond v. J.A. Croson Co.\textsuperscript{7} Richmond sharply limited certain forms of affirmative action.\textsuperscript{8} I contend that Justice O'Connor's opinion in Richmond is best read as a deeply republican opinion centering on concerns about political deliberation and civic community. Although the Richmond opinion focuses on how republicanism limits affirmative action, I argue that republicanism also provides intriguing arguments on behalf of affirmative action.

Before turning to Richmond, two preliminary points must be addressed. First, definitions of liberalism and republicanism tend to be hazy, and their relationship with any particular thinker is often unclear.\textsuperscript{9} The difference between the two philosophies is to some extent one of emphasis, with republicans emphasizing notions of political community and liberals tending to emphasize individualism.\textsuperscript{10} Both elements, however, may color the views of any particular political thinker. Thus, the republican/liberal distinction should not be overdrawn.

Second, attempting connections between political theory and judicial opinions is a particularly hazardous venture. Judges are not political philosophers (nor, in my view, should they be). There is no reason to think that Justice O'Connor has read the republicanism literature. My thesis is not that she has developed a theory of republicanism, but rather, that her Richmond opinion expresses a view of political life much akin to that held by republicans. While I do not claim that she had republican theory in mind when she wrote Richmond, I hope to do more than torture a particular text until it yields a republican interpretation. Rather, I believe that Justice O'Connor would find the republicanism literature congenial and that a republican reading of Richmond would strike her as sympathetic rather than perverse.

\textsuperscript{7} 109 S. Ct. 706 (1989).

\textsuperscript{8} Richmond was seen as a major blow to affirmative action programs. See Jacoby, \textit{Now We're on Our Own: The Supreme Court Cuts Back on Affirmative Action}, \textit{Newsweek}, Feb. 6, 1989, at 64; Greenhouse, \textit{Court Bars a Plan Set Up to Provide Jobs to Minorities — Wide Effects Seen}, \textit{N.Y. Times}, Jan. 24, 1989, at 1, col. 6.


Richmond is a difficult case to parse, partly because the Court was badly fractured, with three dissents, three concurring opinions, and only a partial majority opinion. Before I attempt to explore its relationship to republicanism, a brief review of the decision may be helpful.

The City of Richmond adopted a contracting plan under which city contractors were required to subcontract at least thirty percent of their work to minority business enterprises. By a six-to-three margin, the Court struck down the plan as a violation of the equal protection clause. Justice O'Connor wrote the lead opinion. Fewer than five Justices joined her opinion explicitly on some points, but a head count reveals that all of her conclusions have majority support.

Richmond establishes three constitutional principles. First, the states have less power to establish affirmative action programs than the federal government, because section five of the fourteenth amendment gives Congress a unique role in enforcing civil rights. The federal government set-aside program for minority contractors, which had been upheld in Fullilove v. Klutznick, therefore was distinguish-

11. See Richmond, 109 S. Ct. at 712.
12. Id. at 712-13.
13. Id. at 730 (O'Connor, J., plurality opinion in which Rehnquist, C.J., and White and Kennedy, JJ., joined); see also id. at 734 (Stevens, J., concurring in part and concurring in the judgment); id. at 739 (Scalia, J., concurring in the judgment).
14. The Chief Justice and Justice White joined all of the O'Connor opinion; Justice Stevens joined three sections of the opinion (I, III-B, and IV); and Justice Kennedy joined everything except Part II of the opinion.
15. For this reason, like the Richmond dissenters, see Richmond, 109 S. Ct. at 740 n.1 (Marshall, J., dissenting), I will not distinguish between those portions of the opinion joined by a majority and those that were joined by only a plurality. Regarding those issues in which Justice O'Connor lost her majority because Justices Scalia and Kennedy thought she was too permissive toward affirmative action, see id. at 734-35 (Kennedy, J., concurring in part and concurring in the judgment); id. at 735 (Scalia, J., concurring in the judgment); the plurality plus the Richmond dissenters would constitute a majority for upholding any plan that met Justice O'Connor’s standards. The plurality plus Justices Scalia and Kennedy would be a majority for rejecting any plan that failed her standards. Thus, Justice O'Connor's standards command the support of shifting majorities, but majorities nonetheless.
16. Id. at 718-20 (distinguishing between federal and state power). Because the Richmond dissenters would uphold a broad affirmative action plan by any level of government, id. at 764-57 (Marshall, J., dissenting), and the O'Connor plurality would uphold such broad plans only at the federal level, the practical result is that the federal government’s power in this area is greater than that of the states.
able. Second, state affirmative action programs are subject to strict judicial scrutiny like other racial classifications. The government must show that the program is necessary to serve a compelling state interest. Third, a local government has compelling interests in remedying its own past discrimination and in ensuring that its funds are not used to support or entrench private discrimination. Local government does not, however, have a compelling interest in remedying general societal discrimination. The Court feared that recognizing such a broad interest as compelling would open the door to unrestricted racial preferences.

Specifically, the Court found the Richmond program deficient in several respects. First, the City of Richmond did not show that minority contractors in Richmond had suffered discrimination from the city or local businesses. The fact that a city with a fifty percent black population had few minority contractors was not probative because societal discrimination could be the cause. Moreover, the city failed to explain why it chose the thirty percent figure or why it defined minorities to include Hispanics, Indians, and Eskimos. "The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond, suggests that perhaps the city's purpose was not in fact to remedy past discrimination." Finally, the city did not demonstrate the inadequacy of less intrusive methods of assisting minority businesses. Because the city considered all bids individually, it could consider discrimination on a case-by-case basis when it reviewed specific bids. If general contractors discriminated against minority subcontractors, the city should show that less intrusive remedies would not work; only in the "extreme case" would a narrowly tailored racial preference like the one Richmond adopted be necessary as a remedy. Richmond's plan was clearly not a narrowly tailored remedy: "Under Richmond's

18. See Richmond, 109 S. Ct. at 720-23 (plurality opinion); id. at 735 (Scalia, J., concurring in the judgment).
19. Id. at 727 (plurality opinion).
20. Id. at 720.
21. Id. at 722-23.
22. Id. at 727.
23. Id.
24. Id. at 724-25.
25. Id. at 728.
26. Id. at 728-29.
27. Id. at 728.
28. Id. at 729.
scheme, a successful Black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination.”

The three concurring Justices all quarreled with some aspect of the O’Connor opinion. Justice Scalia felt that O’Connor went too far in authorizing affirmative action. He believed that the Constitution mandates a general rule of color-blindness by state governments and apparently was prepared to allow exceptions only for emergencies (such as prison riots), school busing, and similar situations. Justice Kennedy also voiced misgivings and confessed that he was attracted to Scalia’s more draconian approach. Justice Stevens thought that Justice O’Connor gave short shrift to nonremedial justifications for affirmative action, such as fostering diversity, though he admitted that those justifications were not raised by the facts of Richmond.

Justice Marshall filed a vigorous dissent, joined by Justices Brennan and Blackmun. He took issue with the majority at virtually every point. He saw no reason to apply a stricter test to state governments than to the federal government; instead, he advocated the use of “middle-tier scrutiny” for both. In his view, “[a] profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral government activity from perpetuating the effects of such racism.” Because of this difference, he argued against strict scrutiny in affirmative action cases. He found ample evidence to support a remedial program, based on statements made before the Richmond City Council, the dearth of minority contractors in Richmond, and the existence of widespread discrimination in the American contracting industry.

The Court’s ruling obviously disturbed the dissenters. Justice Marshall accused the majority of sounding “a full-scale retreat” from the

29. Id.
30. Id. at 736 (Scalia, J., concurring in the judgment).
31. Id. at 735 (Scalia, J., concurring in the judgment).
32. Id. at 735-38 (Scalia, J., concurring in the judgment).
33. Id. at 734 (Kennedy, J., concurring in part and concurring in the judgment).
34. Id. at 730-31 & n.1 (Stevens, J., concurring in part and concurring in the judgment).
35. Id. at 739 (Marshall, J., dissenting).
36. Id. at 743, 752 (Marshall, J., dissenting).
37. Id. at 762 (Marshall, J., dissenting).
38. Id. (Marshall, J., dissenting).
39. Id. at 740-43, 747-50 (Marshall, J., dissenting).
Court's long-standing commitment to equal opportunity.\textsuperscript{40} He profoundly disagreed "with the cramped version of the Equal Protection Clause which the majority offers today and with its applications of that vision to Richmond, Virginia's, laudable set-aside plan."\textsuperscript{41} In a brief dissent, Justice Blackmun noted the historic irony that Richmond, the capitol of the Confederacy, now stood accused of unduly favoring racial minorities.\textsuperscript{42}

For purposes of this essay, \textit{Richmond} is notable not so much for its holding regarding affirmative action, but for the conception of democratic politics underlying the holding. It takes no great acuity to perceive the \textit{Richmond} Court's views on legislative deliberation. Indeed, \textit{Richmond} is the clearest judicial application in the last ten years of "due process of law making."\textsuperscript{43} Justice O'Connor heavily emphasized the weak evidence presented in the City Council hearings on the set-aside plan, dedicating several pages of her opinion to this point.\textsuperscript{44} After carefully reviewing the evidence, she noted that its weakness was a fatal flaw in the city's case: "While the States and their subdivisions may take remedial evidence that their own spending patterns are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief."\textsuperscript{45} Moreover, the inclusion of groups such as Aleuts in the set-aside program "suggested that perhaps the city's purpose was not in fact to remedy past discrimination."\textsuperscript{46}

In the closing paragraph of the opinion, Justice O'Connor drives home the importance of deliberation:

\begin{quote}
Proper findings in this regard [by the city] are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of
\end{quote}

\begin{itemize}
\item \textsuperscript{40} \textit{Id.} at 757 (Marshall, J., dissenting).
\item \textsuperscript{41} \textit{Id.} (Marshall, J., dissenting).
\item \textsuperscript{42} \textit{Id.} (Blackmun, J., dissenting).
\item \textsuperscript{43} For a discussion of the Supreme Court's previous brushes with this concept, see L. TRIBE, \textit{AMERICAN CONSTITUTIONAL LAW} ch. 17 (2d ed. 1988).
\item \textsuperscript{44} \textit{Richmond}, 109 S. Ct. at 723-28.
\item \textsuperscript{45} \textit{Id.} at 727.
\item \textsuperscript{46} \textit{Id.} at 728. The Court continued:
\begin{quote}
If a 30\% set-aside was "narrowly tailored" to compensate black contractors for past discrimination, one may legitimately ask why they are forced to share this "remedial relief" with an Aleut citizen who moves to Richmond tomorrow? The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation.
\end{quote}
\textit{Id.} (citations omitted).
\end{itemize}
equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics.\textsuperscript{47}

This paragraph could not fit Professor Michelman's deliberative model better if he had written it himself.\textsuperscript{48}

The Court is nearly as explicit in rejecting what Michelman calls the strategic model of politics (at least in the setting of affirmative action). The strategic model views politics as an arena in which groups strive only to further the interests of their members, rather than the public interest. As part of its assault on the Richmond plan, the Court carefully marshals evidence tending to establish strategic motivation. The statement of facts makes it clear that the particular minority subcontractor involved in the case performed no useful services, was probably unqualified, and was charging a seven percent markup just for the use of his name.\textsuperscript{49} Nevertheless, the city refused to give the general contractor a waiver, even though no other minority subcontractors were available.\textsuperscript{50} The Court also stressed that the City Council that passed the ordinance had a black majority, which could increase the likelihood that the city acted without proper deliberation.\textsuperscript{51} Some evidence suggested "more of a political than a remedial basis for the racial preference."\textsuperscript{52} The obvious implication is that the desire of black representatives to further the interests of their black supporters is not in itself a proper basis for a set-aside program. The final paragraph of the opinion quotes approvingly from Justice Stevens' dissent in \textit{Fullilove}, which speaks openly of pork-barrel politics:

\begin{quote}
[If there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any
\end{quote}

\textsuperscript{47} Id. at 730.

\textsuperscript{48} Sunstein discusses the link between deliberative models of politics and judicial review under the equal protection clause. \textit{See} Sunstein, \textit{supra} note 4, at 69-72, 78 (noting that this "Madisonian" approach to judicial review would support a more stringent rationality standard, and thus legislatures would have to somehow justify disparate treatment beyond factional pressure).

\textsuperscript{49} \textit{Richmond}, 109 S. Ct. at 715-16.

\textsuperscript{50} Id. at 715.

\textsuperscript{51} Id. at 722.

\textsuperscript{52} Id. at 717 (quoting J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1359 (4th Cir. 1987)).
ethnic, religious, or racial group with the political strength to negotiate "a piece of the action" for its members.\footnote{Id. at 730 (quoting Fullilove v. Klutznik, 448 U.S. 448, 539 (1980) (Stevens, J., dissenting)); see also Richmond, 109 S. Ct. at 733 n.9 (Stevens, J., concurring) (suggesting that the Richmond ordinance "might be nothing more than a form of patronage").}

Because the Richmond Court stressed the importance of deliberation and a negative attitude toward strategic politics, the opinion closely fits Professor Michelman's deliberative model. But Professor Michelman introduces an additional level of complexity in his analysis by distinguishing between liberal and republican deliberation. In a break from the conventional view, he suggests that liberals also can adopt the deliberative model.\footnote{Michelman, Voting Rights, supra note 1, at 445.} Liberalism may be based either on a desire to maximize the total social welfare (defined as the sum of individual interests)\footnote{Id.} or on a desire to protect prepolitical rights.\footnote{Id.} By deliberating about how to maximize total welfare or about how to protect individual rights, legislators could help achieve these liberal goals more effectively.\footnote{See id.} Republicans, on the other hand, give credence to rights only as the outcome of political deliberation and believe that "an autonomous public interest independent of the sum of individual interests" exists.\footnote{Michelman, Voting Rights, supra note 1, at 485.} Consequently, republicans place an intrinsic value on deliberation. While the distinction is admittedly hazy, the essential point is that republicans focus on the political community while liberals focus on individuals.

Does Justice O'Connor's opinion in Richmond\footnote{Michelman, Voting Rights, supra note 1, at 485.} adopt a liberal or republican conception of deliberation? Perhaps, as Michelman suggests, the answer depends on whether "we imagine the justice assigning constitutive value directly to the individuals's experience of involvement in the dialogue, as opposed to regarding that involvement as strictly instrumental to the individuals ulterior ends."

Several features of Richmond suggest its republican orientation. The Court views the city as properly concerned with discrimination within its own city limits: it cannot rely on evidence of discrimination elsewhere. The Court portrays the city as officious in attempting to remedy discrimination in other localities.\footnote{Richmond, 109 S. Ct. at 723-24.} Only discrimination by the
city or by local construction firms could justify Richmond's ordinance. On the other hand, the federal government is properly concerned with discrimination on a nationwide scale. The Court portrays combating discrimination as a peculiarly national enterprise. This focus on geographic boundaries seems unrelated to the strength of the remedial interest in assisting victims of discrimination. But tied to the notion of community, it makes considerably more sense.

The federal government represents the nation collectively. The city represents the local community. The city's proper concern is with the harms suffered by the members of that community. As Professor Michelman says of another judicial opinion, the conception here seems to be that of a city "defined by subjective membership rather than objective interest in which the community's internal bonds are something more like civic friendship than procedural accountability. . . ." This republican conception of urban government underlies Justice O'Connor's emphasis on the need to demonstrate a local basis for remedial action.

The Court's preoccupation with the health of the political process also indicates republicanism. Although the opinion does not lack references to individual rights, the Court's greater concern is with the risk of "racial politics." Allowing the city to rely on broad concerns about societal discrimination in drafting rules would provide no limit to affirmative action, making it — and political disputes about its scope — a permanent feature of American life. The availability of affirmative action encourages minority group members to organize to obtain benefits. Whites then organize to keep their own share of government benefits, thereby strengthening racial divisions in politics. Unrestricted affirmative action, then, could "lead to a politics of racial hostility." As Professor Hazard has said:

62. Id. at 729.
63. See id. at 717-20.
64. Professor Michelman ties the idea of community self-determination to republicanism in his earlier work. See Michelman, Political Markets, supra note 3, at 196-99.
65. Michelman, Voting Rights, supra note 1, at 477-79 (referring to Justice Rehnquist's majority opinion in Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 61-75 (1978) (Rehnquist, J., majority opinion)).
66. See Richmond, 109 S. Ct. at 721.
67. Id. at 727.
68. Unfortunately, racial polarization is not a hypothetical concern, but is already a widespread condition in American political life. See Abrams, supra note 6, at 494-504.
69. Richmond, 109 S. Ct. at 721 (citations omitted).
Preferential treatment for blacks therefore has to be predicated on grounds that are cognitively intelligible and normatively acceptable to the white majority. Some predicates for such preferments are simply unacceptable. For example, a community would find it unacceptable for blacks, having established control of a local government where they are the dominant majority, simply to vote themselves preferments the way emergent ethnic groups often did in the past. If such crude redress were condoned, the whites could do the same thing where they had control, and we would soon regress to a legally segregated society. The same criticism would apply to explicit "benign quotas" imposed by local "rainbow coalitions" or narrowly based white elites having control of strategic educational and employment resources.  

Racial politics is undesirable because racial animosity destroys civic community. The *Richmond* Court recognized that strict scrutiny is called for because "classifications based on race are potentially so harmful to the entire body politic . . . ."  

The most direct sign of a republican focus, as defined by Professor Michelman, is the *Richmond* Court's emphasis on the process values of affirmative action. The Court portrays members of the white majority as having something beyond an interest in enjoying the economic benefits that affirmative action programs divert to minority groups. The white majority also has a noninstrumental interest in the process (as opposed to the substance) of affirmative action. Courts scrutinize affirmative action programs because, "[t]o whatever racial group these citizens belong, their 'personal rights' to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking." Moreover, the *Richmond* Court chastised the city for failing to consider racial factors on a case-by-case basis through its ordinary bidding process. Such individualized affirmative action programs are "less problematic from an equal protection standpoint because they treat all candidates individually . . . ." The legislature also reassures its citizens about the benign purpose of the program by making proper findings. Thus,

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71. *Richmond*, 109 S. Ct. at 727 (quoting Fullilove v. Klutznik, 448 U.S. 448, 533-35 (1980) (Stevens, J., dissenting)); see also id. at 735 (Kennedy, J., concurring in part and concurring in the judgment) (Richmond's ordinance may "cause the same corrosive animosities" as other racial preferences).

72. *Id.* at 721 (plurality opinion).

73. *Id.* at 728-29.

74. *Id.* at 730.
apart from ensuring socially desirable outcomes, the process of enacting and administering the affirmative action program has independent value because it reflects the political community's respect for its members.

The major sign of liberalism in Richmond is the Court's emphasis on the remedial purpose of the affirmative action program. The Court's emphasis on remedying violations of rights may sound like rights-centered liberalism, but this resemblance may be misleading. At the federal level, the Court seems willing to be lax about the connection between the alleged discrimination and the remedy. The Court also apparently is willing to accept evidence falling short of full proof of a violation when it evaluates state affirmative action programs. Moreover, the Court uses republican language when it justifies remedial measures. The Court portrays minorities as suffering from a "system of racial exclusion" or a "closed business system." "Business as usual,' should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards." This focus on exclusion comports with republicanism: from a republican perspective, excluding individuals from the civic bonds of the community is a grave injury.

Applying Professor Michelman's classification scheme is not, at least in hands less deft than his own, a very straightforward exercise. Professor Michelman draws a subtle distinction between republican and liberal deliberative models. His orientation toward the scholarship of political philosophers is as foreign to the Court as is his vocabulary. In some sense, this essay attempts to translate Justice O'Connor's opinion into a language she does not speak. Such a translation can never be exact. For these reasons, Justice O'Connor's views in Richmond may not fit precisely within the republican tradition portrayed by Professor Michelman. Nevertheless, the most plausible reading of the opinion seems to follow Professor Michelman's republican tradition. Apart from the republican elements in the Richmond opinion, the strongly republican cast of some of Justice O'Connor's earlier opinions also supports the republican reading. Justice O'Connor expresses concern about the harm done to outsiders by exclusion from the community in several of her opinions.  

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75. Id. at 720.
76. Id. at 729.
77. Id. at 730.
78. For a discussion of these republican elements in Justice O'Connor's opinions, see Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 VA. L. REV. 543, 592-613 (1986).
As Richmond shows, republicanism can support politically conservative results distressing to left-of-center academics who have embraced republicanism. The discrepancy between the politics of academic republicans and the results of this highly republican judicial opinion is ironic, but it conveys no deep meaning about republicanism. Justice O'Connor's republican leanings may have made her more favorable to affirmative action than she otherwise would have been, using the concurring opinions by Scalia and Kennedy as a guide to the nonrepublican conservative view.

Although republicanism raises concern about local affirmative action programs, it also suggests some distinctive rationales for affirmative action. My purpose in this essay is not to take a stand on affirmative action, but to understand the implications of republicanism for affirmative action. I will sketch a republican perspective on affirmative action, reserving the question of whether courts ultimately should adopt this perspective. With this reservation in mind, I will explore whether it might be helpful to characterize affirmative action, not as a matter of rights (individual or group), but as a matter bearing on the political health of the community.

The basis of the republican argument for affirmative action is the importance of civic community. Because republicans perceive participation in the community as a basic element of human thriving, individuals suffer grave injury by being exiled or marginalized. Lack of participation by some citizens also weakens the community by undermining the civic bonds that unify it. Lack of citizen participation additionally erodes the political process by converting a dialogue between fellow citizens into an adversary confrontation. For this reason, the law should avoid communicating messages of exclusion to any of the community's members.

Justice O'Connor has propounded a similar theory to explain why the state should not endorse religious symbols in establishment clause cases. State endorsement of some religious symbols communicates the message that the political community accepts some religious group but simultaneously rejects other groups as outsiders with deviant religious views.79 Justice O'Connor's establishment clause ar-

79. See Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment); Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring). In Lynch, she explained the impermissibility of government endorsement or opposition of religion as follows: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." Id. at 688.
A similar argument supports affirmative action. Members of racial minorities have reason to feel like outsiders to American society. Compared to majority group members, they generally have lower incomes, shorter life expectancies, less education, fewer jobs, and less political power. Minorities also have reason to believe that prejudice and discrimination ultimately caused much of this situation. For liberals, the accuracy of this perception is crucial because liberals believe society is obligated to correct only the results of its own misdeeds. From the republican perspective, however, causation is less important.

Whatever the actual causes of minority disadvantage may be, minority group members strongly believe the cause is racism. As a result, minorities are deeply alienated from American social institutions. Majority group members may believe no invidious discrimination exists and that remaining disparities are the result of other factors. Minority group members are unpersuaded and will feel victimized and excluded so long as they see whites in nearly exclusive possession of desirable positions. Words alone are unlikely to persuade minorities that they are welcome members of the community. The majority community can persuade minorities that they are welcome in society only by going out of its way to include them in key institutions.

Affirmative action has some subsidiary republican justifications as well. A basic element of republicanism is that only economically independent individuals truly can participate in the political dialogue; to be economically dependent is to be politically handicapped. Affirmative action programs help minority group members attain positions of economic security, thereby promoting their political participation.

80. For an attack on affirmative action on the causation issue, see T. Sowell, Civil Rights: Rhetoric or Reality? 42-48 (1984). See also Richmond, 109 S. Ct. at 726 (suggesting that "[b]lacks may be disproportionately attracted to industries other than construction"); id. at 728 ("completely unrealistic . . . that minorities will choose a particular trade in lockstep proportion to their representation in the local population") (quoting Local 28 of Sheet Metal Workers v. EEOC, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part)).

81. For a fuller discussion of the marginalized position of racial minorities, see Karst, Citizenship, Race, and Marginality, 30 WM. & MARY L. REV. 1 (1988).

82. This rationale for affirmative action has some similarity to Michelman's reading of Harper, in which the right to vote is said to be valued as a "badge of inclusion in the political dialogue." Michelman, Voting Rights, supra note 1, at 484.

83. See Michelman, Possession v. Distribution, supra note 2, at 1332-22; Michelman, Traces, supra note 2, at 20.

84. The egalitarian aspects of republicanism are emphasized in M. Tushnet, supra note 4, at 166-67, 228.
Moreover, certain occupations, such as the legal profession, provide special access to political institutions: If more black lawyers exist in society, someday more black judges and legislators will also exist. The government more readily will hear black voices as a result. Similarly, black doctors will be able to participate in public health decisions, bringing a minority voice into that setting. Professional prestige also may give minority views a stronger effect in other settings.

Special republican arguments for affirmative action arise in the context of education. Republicans place special emphasis on education as a way of building community and inculcating civic virtue. Assuring that minority groups participate fully in educational programs has particular importance to republicans. Moreover, including minority group members as teachers and students also sends a strong message to the majority about the nature of the community. White students who have black teachers learn in a vivid way that blacks are equal citizens. Thus, affirmative action in educational institutions sends a powerful message of inclusion.

The republican argument has some significant advantages over the conventional argument for affirmative action, which asserts that whites have harmed minority group members and therefore have a duty to provide compensating advantages. This conventional argument is subject to two possible attacks. First, the causal link between past white misconduct and present minority disability is debatable. Factual disputes exist as to whether the absence of minority group members from certain occupations is due to past discrimination or some other factor. (Disputes even exist as to what past actions should be labeled discriminatory.) Second, the perpetrators of past injustices may not be the


In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all white, or nearly all white, faculty... It is one thing for a white child to be taught by a white teacher that color, like beauty, is only "skin deep"; it is far more convincing to experience that truth on a day to day basis during the routine, ongoing learning process.

Id.

87. This argument is ably presented in Days, Fullilove, 96 Yale L.J. 453 (1987) (defending minority set-aside programs such as the ones upheld in Fullilove v. Klutznik, 448 U.S. 448 (1980)). The literature on the constitutionality of affirmative action is voluminous. For summaries of the major arguments, see J. Nowak, R. Rotunda & J. Young, supra note 15, at § 14.10; L. Tribe, supra note 43, at § 16-22.
individuals who bear the burden of affirmative action programs, and the beneficiaries of today's programs may not have been the victims of yesterday's injustices. At this point, the argument becomes tangled in disputes about factual matters (Do all blacks suffer today as a result of past discrimination? Have all whites benefited from discrimination?) and in philosophical disagreements about group versus individual rights. Objections to the conventional argument may not be decisive but are at least troublesome.88

The republican argument avoids these disputes. From the republican perspective, the cause of present disadvantage of a minority group is irrelevant, as is whether any particular white is responsible for invading the rights of any particular minority person. What does matter is that minority group members have been excluded from full participation in the community and feel sufficiently alienated to require tangible assurances of acceptance. In other words, the republican argument focuses more on the present than the past. The conventional argument is historically based. The republican argument thus avoids potentially intractable disputes about historic causation and present responsibility.

As Richmond makes clear, republicanism is not blind to the risks associated with affirmative action programs. Such programs can represent political plums rather than principled republicanism. Affirmative action programs also can send a message of exclusion to majority group members, who may feel victimized at the expense of both minority members (who benefit from the programs) and more privileged whites (who are less likely to be affected by affirmative action). Ultimately, affirmative action may cement racial divisions within the community, rather than erode those divisions. The Richmond opinion responds to these concerns with careful scrutiny of local affirmative action programs. The opinion leaves localities some power to engage in affirmative action and gives the federal government broader power.89

Richmond is relevant to Professor Michelman's thesis in several respects. First, the opinion explicitly reveals a deliberative conception of democracy. After Richmond, few can argue that American constitutional discourse is based solely on a strategic conception of political


89. A republican critique of Richmond might well argue that the Court overestimated these risks or gave too little weight to countervailing benefits.
interaction. Second, though not as indisputable, *Richmond* appears to be based on a republican rather than liberal conception of political deliberation, as Professor Michelman defines these categories. The *Richmond* opinion therefore adds considerable weight to his thesis regarding the existence of a republican strain in American public law. Third, *Richmond* shows that republicanism is not guaranteed to lead to its advocates' most congenial results. To that extent, the *Richmond* decision may test advocates' commitment to republicanism. Finally, *Richmond* suggests that republicanism may have something new and interesting to tell us about the virtues and risks of affirmative action.

Professor Michelman has pioneered the revival of interest in republicanism in the law school world. Without his work, our reading of the *Richmond* case would lose the dimension of richness provided by the republicanism literature. He deserves credit for giving us a new way to read *Richmond* and other major cases.