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The Croson Effect & Its Remedies: Overcoming Racial Incompetence in Policy and People

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ABSTRACT

When the Supreme Court case City of Richmond v J.A. Croson Company (1989) *made it so that any use of race in any legislative policy would have to pass the strictest of scrutiny in order to be deemed constitutional, the Court effectively doomed affirmative action policies and institutionalized color-blind rhetoric (which is largely comfortable for racial majorities) while rendering color-conscious rhetoric (which is largely comfortable for racial minorities) to the dustbin. In doing so, the Court made dialogue about race between diverse people (but especially amongst policy-makers) strained, tense, and largely unworkable.* Croson *institutionalized the practice of racial groups speaking past one another, and racial majorities bulldozing over racial minorities. By condemning race-conscious language,* Croson *made it difficult for different races to communicate about, and combat, racism. We simply are not all on the same page. This is the Croson Effect.*

In this Blog, drawing from my own experiences in working with coalitions of policy-makers on state equity policy, I assess the Croson Effect on policy and people in the United States. I argue that to combat the Croson Effect in policy, legislatures should support and create spaces for localized dialogue, and empower community stakeholders to work together on solutions that come from themselves (for example, California's Assembly Bill 617). To combat the Croson Effect in people (meaning, to combat Croson*'s dialogue-chilling effect on our interpersonal, cross-racial relationships), I outline an exercise for legal practitioners to facilitate racial dialogue by using techniques from Augusto Boal's Theatre of the Oppressed, which is an all-empowering, theatrical means for people to actively (and often, absurdly) reenact conflict and brainstorm solutions from varying perspectives. Having used this "Croson exercise" before to great success, I write this Blog to share it more widely.*

Keywords: *Croson*, Croson Effect, affirmative action, equity policy, color-blindness, cross-racial dialogue, diversity, interpersonal relationships, racism, critical race theory

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INTRODUCTION

In the late 1980s, the Supreme Court handed down a decision which may have doomed the possibility of a shared racial consciousness amongst the People of the United States. *City of Richmond v. J.A. Croson Company* effectively censored *any* mention of *any* race in *any* policy, as such political use of race would be viewed with deep suspicion by the Supreme Court, and would have to pass the strictest of scrutiny in order to be deemed constitutional.[1] Although most legislative actions receive a presumption of constitutionality, strict scrutiny reverses this presumption, placing the burden of proof upon the government to prove that its race-conscious policy is constitutional. *Croson* made race-conscious language "taboo," which frustrated cross-racial dialogue and in turn, made it difficult for diverse policy-makers to even communicate about, let alone *combat*, racism.

In the first section, I briefly summarize how *Croson* empowered plaintiffs to use the 14th Amendment to abuse and override valid equity concerns of racial minorities.

In the second section, I analyze *Croson* and its case law's chilling effect on policy and policy-makers. I share my own experience dealing with the Croson Effect in policy and in people, and I identify remedies to both. For a remedy to the Croson Effect on policy, I recommend strategies employed in California Assembly Bill 617. For a remedy to the Croson Effect on people, I recommend utilizing Professor Patricia Williams's critical scholarship on cross-racial dialogue amongst everyday people.

In the third section, I outline a "Theatre of the Oppressed" training exercise for legal practitioners to use in their work with policy and people. This "Croson workshop" rests upon Professor Williams's scholarship, and is a Diversity & Inclusion workshop I developed and employed to groundbreaking success.

I. PROBLEM: THE MISUSE OF THE FOURTEENTH AMENDMENT

In January of 2021, Oregon earmarked sixty-two million dollars in COVID-19 relief to explicitly benefit "Black people, Black-owned businesses, and Black community based organizations."[2] In the words of Lew Frederick, a Black state senator from Oregon: "[The relief fund] was finally being honest: this is who needs this support right now."[3] Studies support Frederick's assertion; Black people have suffered the most from the COVID-19 epidemic in America,[4] and yet Black people are amongst the least likely to have received

[1] City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
[2] John Eligon, *A Covid-19 Relief Fund Was Only for Black Residents. Then Came the Lawsuits*, N.Y. TIMES (Jan. 3, 2021), https://www.nytimes.com/2021/01/03/us/oregon-cares-fund-lawsuit.html.
[3] *Id.*
[4] Richard A. Oppel Jr, Robert Gebeloff, K.K. Rebecca Lai, Will Wright & Mitch Smith, *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (Jul. 5, 2020),

a COVID-19 vaccination.[5] Despite this disparity, Oregon's sixty-two million dollar targeted investment is now on hold after one Mexican-American and two white business owners sued the state.[6] The plaintiffs argue that the fund (dubbed "The Oregon Cares Fund") racially discriminates against them, in violation of the 14th Amendment.[7] The lawsuits—alleging violations of 14th Amendment Due Process and Equal Protection rights—caused the Oregon legislature to backpedal on the targeted COVID-19 relief to Black residents, putting the Fund on hold.[8] Kelly Gonzales, a member of the Cherokee Nation of Oklahoma and a health disparity expert on the Oregon Governor's COVID-19 advisory committee, stated, "[o]ur system is not yet prepared to center on and reveal the truth of structural racism and how it plays out."[9]

Unfortunately, the Oregon legislature is not alone in struggling with enacting equity policies. While the 14th Amendment protects minorities from state-sponsored majority oppression, a slew of Supreme Court cases (culminating in *Croson*) have effectively reversed this consideration, compelling policy-makers to abandon race-conscious social policy (I will discuss this case law in the following section). These decisions have crippled policy-makers, and have resulted in ineffective equity policy.

Take, for example, Illinois's rollout of recreational cannabis. Much talk went into how the equity provisions for the Cannabis Regulation and Tax Act (CRTA) were the "gold standard" in the nation.[10] The Illinois Cannabis Social Equity Program, created by the CRTA, instituted a lottery system for distributing licenses for retail cannabis dispensaries, and provided certain procedural assistance for diverse and disadvantaged applicants.[11] The CRTA did not have affirmative action policies, which would have compelled the state to grant licenses to a quota of minority-owned dispensaries (why even try if it will be challenged and struck down by *Croson*'s strict scrutiny?). Without a race-conscious affirmative action program, the CRTA readily passed *Croson*'s strict scrutiny standard. Instead of using racial quotas, or otherwise addressing racial inequity directly, the CRTA made creative use of a point system in its licensing applications.[12] The CRTA point system granted applicants points based on the strength of their application, and granted extra points to "Illinois residents who could prove they were from designated communities disproportionately affected by the War on Drugs, or they or a family member had been

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https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html.

[5] Centers for Disease Control and Prevention, *COVID-19 Vaccine Equity for Racial and Ethnic Minority Groups* (Nov. 2, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/vaccine-equity.html.

[6] Oregon Cares Fund for Black Relief + Resiliency, https://www.theoregoncaresfund.org/ (last visited Dec. 3, 2021).

[7] Eligon, *supra* note 2.

[8] Gillian Flaccus, *Role of Race in US Vaccine Rollout Gets Put to the Test*, AP NEWS (Jan. 28, 2021), https://apnews.com/article/oregon-coronavirus-vaccine-rollout-418205f28faed79f9a569ea3c6002dc3.

[9] *Id.*

[10] David S. Ruskin, *The New Illinois Cannabis Regulation and Tax Act and a Preview of Upcoming Litigation*, HMB LEGAL COUNSEL: BETTER INSIGHTS BLOG (Feb. 26, 2020), https://hmblaw.com/blog/litigation/the-new-illinois-cannabis-regulation-and-tax-act-and-a-preview-of-upcoming-litigation/.

[11] The Civic Federation, *What is the State of Illinois' Cannabis Social Equity Program and How Will New Legislation Reform It?*, THE CIVIC FED'N (June 18, 2021), https://www.civicfed.org/blog/what-state-illinois-cannabis-social-equity-program-and-how-will-new-legislation-reform-it.

[12] *Id.*

arrested on cannabis charges."[13] *The point system will give us diverse dispensaries without any need for an affirmative action program*, was the prevailing theory.

But when recreation cannabis finally became legal in Illinois, the Program failed to provide a license to even a single minority. In its headline, the Chicago Sun-Times dubbed the bill "An Epic Failure," noting that as of today, there is not a single minority-owned cannabis dispensary in Illinois.[14] In other words, white people have an absolute monarchy over recreational cannabis in Illinois. And despite Governor J.B. Pritzker's desire to have the Illinois cannabis market be owned by locals, multinational corporations have managed to take over, causing the Governor to make reform of the CRTA among his "key priorities."[15]

What caused this "Epic Failure"? How did effective racial justice *yet again* slip through the fingers of well-intentioned and hard-working policy makers, in the 21st century no less? I argue the culprit is what I have come to call the Croson Effect.

II. ANALYSIS: THE CROSON EFFECT

In this section, I review the relevant case law, by tracking the two predecessors of *City of Richmond v. J.A. Croson Company*: *United States v. Carolene Products Company* and *Wygnant v. Jackson Board of Education*.[16] I then assess *Croson*'s effect on policy and people, and suggest remedies to the Croson Effect on both fronts.

Croson grew out of a 1938 case called *United States v. Carolene Products Company*.[17] Ironically, *Carolene* did not have anything to do with racial justice; it was about whether Congress could regulate the sale of milk, of all things. However, hidden in the bottom of the opinion is what has been called the most important footnote in Constitutional Law: Footnote Four.[18] Footnote Four of *Carolene* describes categories of legislative acts that might give rise to a higher level of judicial scrutiny (dubbed "strict scrutiny"). One such category is race: *Carolene* demands strict scrutiny for any law that discriminates against "discrete and insular" minorities, especially racial, religious, and national minorities—particularly those who lack sufficient numbers or power to seek redress through the political process.[19]

Fifty years later, in contradiction with the *Carolene* decision but building off of

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[13] Glenn Redus, *Black and Latinx Owners are Barely a Blip on the Cannabis Revenue Radar*, CHI. REP. (Jan. 13, 2021), https://www.chicagoreporter.com/black-and-latinx-owners-are-barely-a-blip-on-the-cannabis-revenue-radar/.

[14] Tom Schuba, *'Epic Failure' of Illinois Legal Weed Backers in Springfield to Keep Promises on Diversity*, CHI. SUN-TIMES (Dec. 11, 2020, 3:40 PM), https://chicago.suntimes.com/2020/12/11/22166603/marijuana-legalization-recreational-illinois-diversity-innovative-industrial-properties-legal-weed.

[15] Tom Schuba, *Addressing Troubled Cannabis Licensing Rollout Among State's 'Key Priorities,' Pritzker Says*, CHI. SUN-TIMES (Feb. 17, 2021, 4:13 PM), https://chicago.suntimes.com/cannabis/2021/2/17/22287939/j-b-pritzker-cannabis-marijuana-legalization-social-equity-lottery.

[16] U.S. v. Carolene Products Co., 304 U.S. 144 (1938); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

[17] *Croson*, 488 U.S. 469; *Carolene*, 304 U.S. 144.

[18] David Schultz, *Carolene Products Footnote Four*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/5/carolene-products-footnote-four.

[19] *Carolene*, 304 U.S. at 152 n.4.

Footnote Four, the Court held in *Wygnant v. Jackson Board of Education (1986)* that *all* race-based policy preferences must undergo a strict scrutiny standard of equal protection review.[20] In *Wygnant*, white teachers had challenged their layoffs by the Jackson School Board, arguing that the teacher union's protection of minority teachers with less seniority constituted unconstitutional racial discrimination against them.[21] The District and Appellate Court found for the Board, but on appeal the Supreme Court reversed, holding, in a 5–4 decision, that because the School Board had not based their racial preferencing on prior evidence of discrimination, Wygant's layoff was unconstitutional.[22] The Court held that to "do" affirmative action, the government has to (1) show that its policy is necessary to achieve a compelling state interest, and (2) demonstrate that the legislation is narrowly tailored to achieve the intended result.[23]

Three years later the Supreme Court handed down the mother of all equity cases: *City of Richmond v. J.A. Croson Co. (1989)*.[24] This case arose when the city of Richmond came under suit for reserving contracts for Minority Business Enterprises ("MBEs"), which are businesses the City certifies as being minority-owned.[25] The Supreme Court struck down the City's affirmative action program on the grounds that the City failed the *Carolene* strict scrutiny test because (1) the City failed to demonstrate compelling governmental interest for the plan; (2) the plan was not narrowly tailored to remedy effects of prior discrimination; and (3) that the City had not exhausted, or shown the insufficiency of, race-neutral ("non-discriminatory") alternatives.[26]

Importantly, in *Wygnant* and *Croson*, the Court took *Carolene* further than its stated purpose. Footnote Four in *Carolene* specifies that strict scrutiny consideration should be relied upon to protect "discrete and insular minorities" from prejudice, especially racial, religious, and national minorities.[27] But in *Wygnant* and *Croson*, the Court effectively trampled *Carolene*'s more nuanced reasoning, turning strict scrutiny *against* racial, discrete, insular, and powerless minorities by adopting strict scrutiny for any and all race-based legislation, giving rise to much litigation on the part of racial majorities against affirmative action policies for racial minorities.[28] *Wygnant* and *Croson* empowered racial majorities to counter affirmative action policy, and institutionalize color-blind rhetoric (which is largely comfortable for racial majorities) while rendering renders color-conscious

[20] Wygnant v. Jackson Bd. of Educ., 476 U.S. 267, 285 (1986).
[21] *Id.* at 272.
[22] *Id.* at 274–76.
[23] *Id.* at 276–78.
[24] City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
[25] *Id.* at 477–79, 482–84.
[26] *Id.* at 506–10.
[27] U.S. v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
[28] *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (in which a white male successfully challenged the affirmative action policy of a state medical school); Grutter v. Bollinger, 539 U.S. 306 (2003) (in which law students denied admission unsuccessfully challenged the state law school's race-conscious admissions policy); Fisher v. Univ. of Tex. Austin, 570 U.S. 297 (2013) (in which a white woman denied admission to a state university challenged the university's use of race in the application process—the Court overturned the lower court's granting of the university's motion for summary judgment, holding that the lower courts improperly applied the strict scrutiny standard); Students for Fair Admissions, Inc. v. President & Fellows Harvard Coll., 397 F. Supp. 3d 126 (2019) (in which a group of Asian students unsuccessfully filed suit against Harvard's affirmative action policy. The federal court found that Harvard's criteria passed *Croson*'s strict scrutiny test; however, the case has been taken up on appeal by the Supreme Court).

rhetoric (which is largely empowering for racial minorities) to the dustbin.

For those of us who recognize, experience, and seek political remedies for racial discrimination in our systems of governance, the question is: what should we do? The effect of *Croson* upon the United States' policy and people has been tremendous. With *Croson*, the Court unnecessarily expanded *Carolene* to throw a painful wrench into the potential for racial unity in the country, not only at the policy level but amongst lay people. *Croson* has effectively neutered affirmative action policy, and twisted our tongues when it comes to cross-racial communication about racism. *Croson* institutionalized the practice of racial groups speaking past one another and racial majorities bulldozing over racial minorities. We are not all on the same page, neither in policy, nor amongst our people.

The following sections illustrate the problems arising in policy and people from the Croson Effect, and provides remedies on both fronts.

A. The Croson Effect on Policy

I studied the Croson Effect on policy when I worked on the Diversity and Equity provisions of the Illinois Clean Energy and Jobs Act (CEJA). CEJA seeks to promote jobs, equity, and economic opportunity especially in communities of color and communities abandoned by coal-burning companies, while achieving a carbon-free power sector by 2030, and ensuring Illinois reaches 100% renewable energy by 2050.[29] My role was to address and remedy the expected racial disparities in state workforce contracting without explicitly mentioning race, or utilizing affirmative action, in the bill (due to *Croson*).

I attempted to "avoid" politicizing race by searching for racial proxies (demographic characteristics to use in lieu of race). I also researched the use of disparity studies[30] to meet and overcome *Croson*'s strict scrutiny standard. Disparity studies gather empirical evidence of racial disparity, and are often used to pass *Croson*'s strict scrutiny standard to enact retroactive affirmative remedies, such as racial quotas for contracting, when evidence of disparity arises. However, my work suggested that affirmative action policies *after* evidence of disparity has arisen is not enough to cure racial disparities in the marketplace. Especially in pioneering industries such as green technology and cannabis, a few years of a head start is enough for non-discriminated businesses to monopolize the market. The power of self-reinforcing monopolies, path dependence,[31] and increasing returns suggests that disparity studies are at most a flimsy remedy, rather than a solution, for establishing equal opportunity in the marketplace. No amount of disparity studies can cure the white monopoly of Illinois's recreational cannabis market. A *proactive* affirmative action could have prevented such a monopoly, but *Croson* made it largely impossible to enact proactive affirmative action to rectify such racism. Any retroactive affirmative action program now would just be throwing stones at an already-monopolized market.

But perhaps, affirmative action (retroactive or proactive) is not the solution to racial discrimination after all. Affirmative action has its flaws, and *Croson* has forced policy-

[29] *Clean Energy Jobs Act*, ILL. CLEAN JOBS COAL., https://ilcleanjobs.org/who-we-are/clean-energy-jobs-act/ (last visited Dec. 3, 2021).
[30] Colette Holt & Assoc., *City of Chicago Disparity Study for Construction Contracts*, CHI. DISPARITY STUDY (2020), http://chicago.disparity-study.com/.
[31] Dillon Tatum, *The Paradox of Path Dependence: The Problem of Teleology in International Theory*, E-INT'L REL. (July 16, 2012), https://www.e-ir.info/2012/07/16/the-paradox-of-path-dependence-the-problem-of-teleology-in-international-theory/.

makers to get more creative in drafting equity policy. Necessity is the mother of invention, and lo and behold, some legislators in California may have gotten this whole equity thing right, without relying on affirmative action at all.

B. Remedies to the Croson Effect on Policy

In her piece *The End of Affirmative Action*, Professor Meera E. Deo notes that affirmative action policies are on their way out, writing that "[t]he Supreme Court has signaled the end of affirmative action. In 2003, Justice O'Connor asserted that affirmative action should sunset within twenty-five years—leaving institutions committed to actively enrolling students of color with less than a decade to find a better solution."[32] She notes *Grutter v. Bollinger* and discusses other cases where white applicants have rather successfully challenged affirmative action policies at universities based on a strict scrutiny argument.[33] Professor Deo deems current policies in affirmative action as "relics of the past."[34] Which begs the question: what's next for equity policy?

Professor Deo's take on the "end of affirmative action" is nuanced and surprising. She welcomes its end, characterizing the standard affirmative action model as "outdated."[35] She notes that "the optimal benefits of diversity are not being satisfied through current affirmative action efforts focused exclusively on diversity and ignoring current realities of race and racism."[36] She calls for more data: for programs and schools to look more closely at the data of applicants and adopt equity-focused, means-tested models and policies. These models and policies should not be based on blanket numbers of diversity, which tend to obscure actual discrepancies in opportunity. In "The End of Affirmative Action" Professor Deo sees the potential for a legislative shift to data-driven, individually-oriented policies that address and foster equal opportunity for those who actually need it most.

I propose three such policy strategies below, in turn.

One legislative strategy is to ensure due process and transparency in the granting of contracts (as recommended by the National Cannabis Industry Association in response to CRTA's epic failure).[37]

A second legislative strategy is to leave a door open for retroactive affirmative action remedies (such as diversity quotas) through legislative mandates of yearly disparity studies on state contracts. Contracting which shows substantial disparity (evidenced through said disparity studies) can be put under injunction, to be lifted when a competent affirmative action program is deployed.

However, the third and most promising legislative strategy when it comes to equity policy comes from California, namely, from the drafters of Assembly Bill No. 617 (AB 617).[38] Policy makers wrote AB 617 to solve equity deficiencies in California's 2006

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[32] Meera E. Deo, *The End of Affirmative Action*, 100 N.C. L. REV. 237, 239 (2021).
[33] *Id.* (citing Grutter v. Bollinger, 539 U.S. 306, 343 (2003)).
[34] *Id.* at 240.
[35] *Id.*
[36] *Id.* at 252.
[37] The National Cannabis Industry Association – Diversity, Equity, and Inclusion Committee, *Letter to Governor J.B. Pritzker* (Oct. 30, 2020), https://cdn.thecannabisindustry.org/wp-content/uploads/2020/11/DEIC-Illinois-Social-Equity-Licensing-Letter-November-2020.pdf?_ga=2.41928802.1960254934.1614293068-1673386409.1614293068.
[38] Assemb. Bill 617, 2017–2018 Reg. Sess. (Cal. 2017).

Global Warming Solutions Act (AB 32).[39]

AB 32 was meant to be overarching "green" bill for California; however, it failed Californian communities most burdened by pollution (such as through factories and/or landfills placed in or around their neighborhoods). AB 32 left such communities without practical remedies for their disproportionate burden. These communities are commonly referred to as Environmental Justice (EJ) communities, and are disproportionately Black, Latinx, and poor.[40] A 2020 study explains AB 32's flaws.

> Overall, the language of AB 32 was unprecedented in its emphasis on EJ concerns and objectives. However, the practical implementation of this landmark legislation encountered some formidable challenges. In a candid assessment of the first implementation phase (i.e. 2006-2012), London et al. (2013) describe a "seemingly intractable conflict" between state agencies and the EJ communities.[41]

The study identifies two causes for said conflict. First, AB 32 relied on overarching policies from the federal and state Environmental Protection Agency (EPA), policies which focused on reducing state and country-wide emissions; however, EJ communities more commonly sought to reduce local emissions.[42] The second cause for conflict was frustrated conversations between state agencies and the EJ communities. The state officials failed to comply with procedural requirements and the community's input "was not being taken seriously" by the state officials, who often only nominally notified the community about town halls around important environmental decision.[43] The result of the conflict was that AB 32 left behind the communities most burdened by pollution.

This conflict led seven of the eleven members of California's EJ Action Committee to file a lawsuit against the California Air Resources Board (CARB) in 2009.[44] (The CARB, created in the late 1960s by then-governor Ronald Reagan, oversees and implements community programs to reduce air pollution.) The lawsuit alleged that the implementation of AB 32 was misaligned with the legislative intent to protect EJ communities.

Since the case, the CARB has worked directly with local communities to address air pollution and to provide streamlined solutions to reducing emissions.[45] State legislators also made an amendment to AB 32 by passing AB 617 in 2017, which especially focused on the treatment of California EJ Communities ("communities most impacted by air pollution").[46] AB 617 provides two significant innovations to AB 32: mandatory

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[39] Assemb. Bill 32, 2005–2006 Reg. Sess. (Cal. 2006).
[40] Cal. Env't Prot. Agency, Environmental Justice Program CALEPA (Oct. 2021), https://calepa.ca.gov/envjustice/.
[41] Meredith Fowlie, Reed Walke & David Wooley, *Climate Policy, Environmental Justice, and Local Air Pollution*, BROOKINGS INST. 1, 10 (Oct. 2020), https://www.brookings.edu/wp-content/uploads/2020/10/ES-10.14.20-Fowlie-Walker-Wooley.pdf.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] Bay Area Air Quality Management District, *Community Health Protection Program* (Nov. 24, 2021), https://www.baaqmd.gov/community-health/community-health-protection-program.

monitoring and, most importantly, mandatory direct engagement with local community members in planning reduction policies.[47] The Act provides:

> The bill would require the state board to select locations around the state for the preparation of community emissions reduction programs, and to provide grants to community-based organizations for technical assistance and to support community participation in the programs. The bill would require an air district containing a selected location, within one year of the state board's selection, to adopt a community emissions reduction program. By increasing the duties of air districts, this bill would impose a state-mandated local program.[48]

AB 617's deference to—and institutional support of—local problem-solvers effectively supported Californian EJ communities. The October 2020 study on California's "climate policy experiment" with AB 617 concludes that "a legislative mandate to engage community members in the planning process directly is helping to mitigate some of the barriers that have historically stood in the way of community involvement."[49] The authors state:

> Prior to the AB 617 planning process, interactions between the community and local, regional and state air quality agencies was episodic, often involving a shifting set of agency personnel, from multiple jurisdictional entities (state, city, port, health and transportation agencies). Addressing local air quality problems requires a more sustained commitment and collaboration between disparate agencies. This is an important benefit of an AB 617 process which forces greater interagency cooperation and reduces frustration and transaction costs for community groups and residents.[50]

AB 617's policy solution—to create and sustain, by state-mandate, engagement with community action groups—is a solution legislatures can adopt to address equity in all state policy. Policies that empower and support community problem-solvers efficiently kill many birds with one stone. These programs rely on, build up—or if nonexistent, create—community working groups to solve their problems. AB 617 mandates the construction of dialogic infrastructure (i.e., boards, community meetings, councils, etc.) to meet values of equity and opportunity. Thus empowered, community-led dialogue has the potential to efficiently address equity considerations without state or federal policy prescriptions, which tend to fumble the bag anyway. Policymakers make bad cultural machinists. Instead, legislators should create multicultural platforms for dialogue, so their constituents can work through their toughest problems together; all the state needs to do is support and create spaces for cross-cultural dialogue, and empower the community stakeholders to craft and implement solutions that come out of said dialogue. AB 617 seeks to do just that, and hopefully it will succeed—because through it, no state bureaucrat can play cultural

[47] Assemb. Bill 617, 2017–2018 Reg. Sess. (Cal. 2017).
[48] *Id.*
[49] Meredith Fowlie, Reed Walker & David Wooley, *supra* note 41, at 16.
[50] *Id.*

machinist. Instead, talking out our political problems with our community members becomes mandatory. We will all learn how to be better people and neighbors.

The only problem is: do we even *know* how to talk with one another about our diverse equity concerns? I do not think that we do, and again, I identify the culprit as the Croson Effect.

C. The Croson Effect on People

I observed the Croson Effect on people (specifically, policy-makers) when I helped draft Equity Provisions for Illinois's Clean Energy and Jobs Act (CEJA). A diverse array of coalition members sought to make the Equity Provisions of CEJA more effective than the Cannabis Regulation and Tax Act (CRTA), but we also needed to survive *Croson*'s strict scrutiny standard. In coalition, the lawyer side would sometimes disconnect with the desires and wishes of other coalition members, who wanted strong affirmative action policies in the Equity Provisions. Burdened by the Croson Effect, we sometimes were at a loss at how to proceed in equity policy while trying to avoid mentioning race fear of being struck down in court. Our avoidance of race-consciousness gave birth to some frustrated discussions, in which the desire for some form of race-consciousness policy provision surrendered to legality. This was the Croson Effect in action: by making racial-consciousness taboo, the Supreme Court frustrated dialogue, understanding, and collaboration between diverse policy-makers and people.

Witnessing this, I remembered Professor Patricia J. Williams's wise words from 1987:

> For blacks, describing needs has been a dismal failure as political activity. It has succeeded only as a literary achievement. The history of our need is certainly moving enough to have been called poetry, oratory, epic entertainment—but it has never been treated by white institutions as the statement of a political priority.[51]

One of the founders of the much-maligned Critical Race Theory, Professor Patricia Williams has inspired a following of scholars (myself included) to embrace her analysis of the root causes and remedies of racial conflict. In *The Pain of Word Bondage (A Tale with Two Stories)*, Professor Williams tells the now-classic story of how she (a Black woman) and Professor Peter Gabel (a white man) went apartment hunting in New York. I quote her story of how they acquired their sublets below [emphasis added]:

> It turned out that Peter had handed over a $900 deposit in cash, with no lease, no exchange of keys, and no receipt, to strangers with whom he had no ties other than a few moments of pleasant conversation. He said he did not need to sign a lease because it imposed too much formality. The handshake and the good vibes were for him indicators of trust more binding

[51] Patricia J. Williams, "The Pain of Word Bondage (a tale with two stories)," AN ALCHEMY OF RACE AND RIGHTS 146, 151 (1991), http://www.dariaroithmayr.com/pdfs/assignments/Williams,%20%20The%20Pain%20of%20Word%20Bondage.pdf.

than a form contract. At the time I told Peter he was mad, but his faith paid off. His sublessors showed up at the appointed time, keys in hand, to welcome him in. There was absolutely nothing in my experience to prepare me for such a happy ending. (In fact I remain convinced that, even if I were of a mind to trust a lessor with this degree of informality, things would not have worked out so successfully for me: many Manhattan lessors would not have trusted a black person enough to let me in the door in the first place, paperwork, references, and credit check notwithstanding.) I, meanwhile, had friends who found me an apartment in a building they owned. In my rush to show good faith and trustworthiness, I signed a detailed, lengthily negotiated, finely printed lease firmly establishing me as the ideal arm's-length transactor. **As Peter and I discussed our experiences, I was struck by the similarity of what each of us was seeking, yet with such polar approaches. We both wanted to establish enduring relationships with the people in whose houses we would be living; we both wanted to enhance trust of ourselves and to allow whatever closeness was possible. This similarity of desire, however, could not reconcile our very different relations to the tonalities of law.** Peter, for example, appeared to be extremely self-conscious of his power potential (either real or imagistic) as white or male or lawyer authority figure. He therefore seemed to go to some lengths to overcome the wall that image might impose. The logical ways of establishing some measure of trust between strangers were an avoidance of power and a preference for informal processes generally….

On the other hand, I was raised to be acutely conscious of the likelihood that no matter what degree of professional I am, people will greet and dismiss my black femaleness as unreliable, untrustworthy, hostile, angry, powerless, irrational, and probably destitute. Futility and despair are very real parts of my response....I grew up in a neighborhood where landlords would not sign leases with their poor black tenants, and demanded that rent be paid in cash; although superficially resembling Peter's transaction, such informality in most white-on-black situations signals distrust, not trust. Unlike Peter, I am still engaged in a struggle to set up transactions at arm's length, as legitimately commercial, and to portray myself as a bargainer of separate worth, distinct power, sufficient rights to manipulate commerce.

Peter, I speculate, would say that a lease or any other formal mechanism would introduce distrust into his relationships and he would suffer alienation, leading to the commodification of his being and the degradation of his person to property. For me, in contrast, the lack of formal relation to the other would leave me estranged. It would risk a figurative isolation from that creative commerce by which I may be recognized as whole, by which I may feed and clothe and shelter myself, by which I may be seen as equal-even if I am stranger. **For me, stranger-stranger relations are better than stranger-chattel**.

> The unifying theme of Peter's and my discussions is that **one's sense of empowerment defines one's relation to the law**, in terms of trust/distrust, formality/informality, or rights/no-rights ("needs")…. On a semantic level, Peter's language of circumstantially defined need, of informality, solidarity, overcoming distance, **sounded dangerously like the language of oppression to someone like me who was looking for freedom through the establishment of identity, the formulation of an autonomous social self.** To Peter, I am sure, my insistence on the protective distance that rights provide seemed abstract and alienated. [52]

The staying power of Professor Williams's story rests in how she reveals root causes of racial conflict. By narrating how she actively utilizes the formalities of her rights to form relationships in a society which too often treats her with bad faith, she contrasts her mental machinery with that of Professor Gable, who actively *under*utilizes the formalities of his rights to form relationships in a world which often affords him good faith due to his skin color. This antithesis—between colleagues who overutilize rights and those who underutilize them—not only provides an insight into the world and mind of state-oppressed peoples, it also provides a way for diverse teams to understand how histories of state oppression affect different colleagues' use of rights language. When people speak the language of color-consciousness, they are often called "divisive." However, Professor Williams shows that color-conscious language is anything but divisive; in fact, color-consciousness is usually employed by racial minorities to construct a legal personhood by which we can *form* relationships with racial majorities, not destroy them.

With Professor Williams's insight, we can internalize two truths: first, that minorities mean to *unify* by emphasizing our rights, and second, that majorities also mean to *unify* by deemphasizing their own rights. Our intentions thus revealed, we may finally be able to meet on the same page, and move forward together, in uncharted territory, without bulldozing over minorities who speak in ways we know best.

To be sure, the practice of minorities emphasizing our rights has been driven by need. It is not a practice which should be overly-criticized, as many Critical Legal Theorists have done (claiming that such reliance on rights only further exposes minorities to state-oppression, and that minorities are better casting away the idea of *rights* all together, focusing instead on fighting for our *needs*).[53] Professor Williams explains:

> Such statements . . . about the relative utility of needs over rights discourse overlook that blacks have been describing their needs for generations. They overlook a long history of legislation *against* the self-described needs of black people . . . .
>
> For blacks, then, the battle is not deconstructing rights, in a world of no rights; nor of constructing statements of need, in a world of abundantly apparent need. Rather the goal is to find a political mechanism that can confront the *denial* of need. The argument that rights are disutile, even

[52] *Id.* at 146–51.
[53] *See* Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23 (2016); *Critical Perspectives on Rights*, THE BRIDGE, https://cyber.harvard.edu/bridge/CriticalTheory/rights.htm (last visited Apr. 14, 2022).

> harmful, trivializes this aspect of black experience specifically, as well as that of any person or group whose vulnerability has been truly protected by rights.[54]

To create a nation where all races can join in harmony, we all must understand how harmful deemphasizing minorities' statements of rights (including our penchant for affirmative action) can be. Productive cross-cultural coalition requires legislators to understand the deep socioeconomic value—and *necessity*—of directly addressing race, both in law and out, and thereby *affirmatively* build good faith with their diverse teams. However, with *Croson*, the Supreme Court did just the opposite; when it adopted color-blindness (which is a form of deemphasizing rights) as its policy standard, the Supreme Court essentially handed a "Get Out of Race Talk for Free" card to legislators, leaving race-conscious minorities to languish in resignation, misunderstanding, and further repression. The Supreme Court made it unduly cumbersome for minorities to converse with majorities about rights. This is the Croson Effect on American people. It keeps us from being on the same page, and it does this by tearing out the words of minorities.

D. Remedy to the Croson Effect on People

If the problem with today's equity conversations is that diverse people are on different pages of power, then the solution is straight-forward: combine the pages, quilt-like. In doing so, we can learn not only each other's perspectives, but also how to embrace them, especially perspectives which have been long vilified. This embracing of multiple perspectives is possible. In parable, Professor Patricia Williams reflects that when her sister sees a highway as purple, which she sees as black, that:

> [T]he lesson I learned from listening to her wild perceptions is that it really is possible to see things—even the most concrete things—simultaneously yet differently; and that seeing simultaneously yet differently is more easily done by two people than one, but that one person can get the hang of it with time and effort.[55]

Professor Williams concludes that "[w]hat is needed, therefore, is not the abandonment of rights language for all purposes, but an attempt to become multilingual in the semantics of evaluating rights."[56]

In the following section, I present such an attempt: a training exercise for people to overcome the Croson Effect by building good faith with others through directly addressing race and practicing multilingual, cross-cultural dialogue.

III. SOLUTION: TRAINING EXERCISE TO OVERCOME THE CROSON EFFECT

> "*Reason is a faculty far larger than mere objective thought. When either the political or the scientific discourse announces itself as the voice of reason,*

[54] Williams, *supra* note 51, at 151–52.
[55] *Id.* at 149–50.
[56] *Id.* at 149.

> *it is playing God, and should be spanked and stood in the corner.*"[57]—
> Ursula K. Le Guin, Bryn Mawr Commencement Address (1986)

Those who seek to overcome the Croson Effect need not manufacture discussions about race glibly, or—worst of all—in an uninspired, unprincipled fashion. What is required is training in racial distress and transformative mediation. Thankfully, the critical pedagogy movement long ago established a teaching strategy to do just that. Specifically: the *Theatre of the Oppressed*.

Born in 1960s Brazil, the Theatre of the Oppressed is a teaching method inspired by Paulo Freire (author of *Pedagogy of the Oppressed*) and developed by Augusto Boal, Freire's greatest student.[58] Both believed in the principles of a democratized education, education for liberation, and the potential of engaged dialogue and theater to transform society and politics. Boal traveled globally and extensively in South America teaching workshops on various Theatre of the Oppressed techniques.[59]

Martha Katsoridou and Kolodobika Vio described the essence of the Theatre of the Oppressed at the 2015 International Conference on Critical Education: Critical Education in the Era of Crisis.

> *Theatre of the Oppressed [(T.O.)],* an aesthetic method structured on a set of exercises and dramatic techniques, is a collective "freedom" tool based on autonomous awareness of people who struggle for collective research of solutions in order to change the world. The whole procedure of T.O. can be systematized in four stages: The first stage is "Knowing the body", the second is "Making the body expressive," the third is "Theatre as language," and the fourth is "Theatre as discourse".[60]

Boal spent decades developing various techniques, activities, and exercises under each of these four stages. One workshop, a twelve-day intensive at New York University's Tisch School of Arts in January 1989, sparked a still-present pedagogical transformation not only of the department but the entire school—and even the city—itself.[61] Most of Boal's techniques can be grouped in three broad categories: Simultaneous Dramaturgy, Image Theatre, and Forum Theatre.[62] Unpacking all of them would require a much longer Blog; so for now, I focus on Simultaneous Dramaturgy.

In Simultaneous Dramaturgy, audience members ("spect-actors") take to the stage and act out some sort of real-world conflict that they personally experienced. For example,

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[57] Ursula K. Le Guin, *Bryn Mawr Commencement Address*, SERENDIP STUDIO (1986), https://serendipstudio.org/sci_cult/leguin/.
[58] Augusto Boal, THEATRE OF THE OPPRESSED (Charles A. McBride trans., 1993).
[59] *Id.*
[60] Martha Katsoridou & Kolodobika Vio, *Theatre of the Oppressed as a Tool of Educational and Social Intervention: The Case of Forum Theatre*, 2 PROC. 4TH INT'L CONF. ON CRITICAL EDUC. 334, 336 (2015).
[61] *See* Jan Cohen-Cruz, *Boal at NYU: A Workshop and Its Aftermath*, 34 TDR (1988–) 43, 43–49 (1990) (400 people of all walks of life attended Boal's NYU lecture-demonstrations, including: Cora Roelofs who brought Boal's techniques to Oberlin College; Judy Siegman who arranged for a workshop with Boal for the Consortium of Union Educators; Eve Silver who applied Boal's techniques to a school drop-out prevention program in New York City; Jan Cohen-Cruz who uplifted and crafted the techniques at the Tisch School of the Arts; and more).
[62] Boal, *supra* note 58, at 132–39.

one such scenario can be an environmental justice activist talking about race with a fancy white lawyer. While the scenario is being enacted, the other spect-actors offer oral solutions from the side-lines, correcting the actors' actions and shouting out instructions on how to engage in the conflict; spect-actors can even switch places with the central actors and even the facilitator (more on this role in the next paragraph), if they want a shot at resolving the conflict.[63] This ability to "switch" roles is crucial; it allows racial majorities to act as minorities, and vice versa, so that we all may learn how to be multilingual in one another's use of rights language, as Professor Williams so desired. Through the "switch," the conflict can be recreated and reevaluated from multiple perspectives. Even more importantly, by acting in different (often conflicting) roles, the spect-actors can witness how they *view* one another and the conflict itself. Such a theater brings buried sentiments to the surface, so that they can be properly resolved.

Obviously, such theatrical reenactments of conflict can heighten tensions in a group, especially if the reenacted conflict targets members of the group. That is why the central facilitator of Simultaneous Dramaturgy workshops is called the Joker. The Joker (presumably, the legal practitioner, coalition-leader, or "mother" of the group) assigns roles, controls the timing of the discussion, and is, in general, the jovial and subversive spirit that plays upon and draws out the spect-actors' deepest desires and most liberating solutions.[64] The Joker should utilize absurd theatrical techniques to cut through the Croson Effect, coyly and good-heartedly pushing the spect-actors into different roles and considerations, so as to spark deeper critical thinking and innovation. The Joker should push the conflict into uncharted (but deeply-intriguing, and often harmonious) territories.

Below, I outline a workshop based in Simultaneous Dramaturgy. All people can facilitate this workshop to help their teams overcome the Croson Effect.

Training Exercise: Overcoming the Croson Effect

1) **Stage 1: Knowing the Body.**
    a. The Joker holds a series of exercises by which spect-actors begin to know their bodies, "its limitations and possibilities, its social distortions and possibilities of rehabilitation,"[65] which can look like:
        i. Ask spect-actors to journal about how they express their race at their work place, and submit it before training.
        ii. Lead a guided meditation.
        iii. Ask spect-actors to reenact their everyday movements and habits at work, and ask others to comment on their reenactment.
2) **Stage 2: Making the Body Expressive.**
    a. The Joker facilitates a series of games "by which one begins to express one's self through the body, abandoning other, more common and habitual forms of expression."[66]

[63] Katsoridou & Vio, *supra* note 60, at 344–45.
[64] Paul Heritage, *The Courage to Be Happy: Augusto Boal, Legislative Theatre, and the 7th International Festival of the Theatre of the Oppressed*, 38 TDR 25, 26 (1994).
[65] Boal, *supra* note 58, at 126.
[66] *Id.*

i. Playing music before training, encouraging people to dance along. Animatedly move around the room.
ii. Ask spect-actors to act how they would act during a party with family and/or intimate friends.
iii. Otherwise "shake" spect-actors out of their normal way of engaging with one another.

3) **Stage 3: Theatre as Language.**
   a. The Joker and a few spect-actors reenact a conflict of choice, allowing peripheral spect-actors to intervene in the scenario and practice "theatre as a language that is living and present,"[67] which can look like the following:
      i. Have a spect-actor defend or contest a race-conscious policy to the Joker. The Joker will then try everything possible to counteract the volunteer's desires.
      ii. Have spect-actors shout out suggestions to the central actors to overcome the Croson Effect.
      iii. Have spect-actors yell "Switch!" to switch places with the lead actors and/or the Joker, and continue the reenactment from where it left off.
4) **Stage 4: Theatre as Discourse.**
   a. The Joker should theatrically debrief the exercise following three principles: 1) no violence, rather pleasure; 2) no competition; and 3) talk about and work on your own oppression, not someone else's. Using these principles, spect-actors act out scenarios according to their needs and desires "to discuss certain themes or rehearse certain actions."[68] Most importantly: in the debrief, the Joker should identify and help express the spect-actors' *authentic* desires, which can look like the following:
      i. Ask the spect-actors to over-dramatically express how it felt to reenact the scenario, what they learned, and what else they felt they could have tried.
      ii. Ask spect-actors to reenact or tell stories about times when they overcame the Croson Effect.

Call it crazy, but this training exercise *works*. I've used it in a Diversity, Equity, and Inclusion (DEI) training for Northwestern Law's clinical faculty. One administrator who attended the workshop compared her experience to a similar diversity workshop she had just attended immediately prior and said "this one hour workshop was more engaging and helpful than that three hour workshop where we just focused on definitions and terms. That was absolutely exhausting and this was actually productive!"[69]

This role-switching exercise is easy (albeit nerve-wracking) to set up, and basic enough to take in any creative direction you can imagine. It can be about anything and include anyone, regardless of identity or *position of power.* Because as Boal explained in

[67] *Id.*
[68] *Id.*
[69] Northwestern Pritzker School of Law Center on Negotiations and Mediation, *Moving Forward with Reflection & Intention: Cross-Racial Dialogue: Overcoming the Croson Effect*, NEWSLETTER (2021), https://mailchi.mp/law.northwestern.edu/cnmfall2021newsletter.

an interview post-NYU workshop, in an answer to a question as to whether he works differently concerning women or women issues: "I never, never propose solutions to problems. I always question people. I question black people like I question women. We make a dialectical debate. I pose questions instead of giving answers."[70] And as Boal explained, the theatre of the oppressed can be used effectively even amongst non-oppressed people (aka: people in power): "Why use theatre of the oppressed only with the poorest, the most miserable people?" said Boal. "And won't there always be people more miserable than we are? Whoever I work with I say, "Let's fight against what is oppressing us here and now." Sometimes by doing this we discover that we are also oppressors-and we find ways of changing."[71]

And lo and behold, at the end of it all, I am willing to bet that through our collective theatrics, we might finally uncover the jewel-like truth of racial reconciliation, a unity which is desirable, pursuable, and indeed, truly possible. Boal certainly believed so.

CONCLUSION

So. With *Croson,* did the Supreme Court kill the potential for racial unity in America? Probably. By effectively censoring any mention of race in policy and subjecting racial consciousness to the strictest of scrutiny, the Supreme Court dealt death blows to the possibility of a shared racial consciousness in America. Racism looms in the peripheries; that is its evil power – that it so easily evades strict scrutiny. So if legal professionals refuse to *casually* engage in race-conscious dialogue, and insist upon strict scrutiny, racism will further oppress minorities, create divisions in our citizenry, and cause the downfall of our united nation. However, there are still remedial paths to overcoming the Croson Effect, in policy and people.

Promising policy remedies include the dual-use of disparity studies to pass the strict scrutiny standard and the utilization of injunctions to prevent the granting of privileges or contracts in the likely event that substantial racial disparity is found. The most promising policy remedy is the mandated creation of localized community action groups in charge of overseeing the equitable rollout of any relevant policy, similar to California's AB 617.

In overcoming the Croson Effect in people, the remedy is to practice racial distress training, cross-racial literacy, and affirmative good faith acts towards *Croson* workarounds. On this front, the most useful exercise is Augusto Boal's arsenal of theatrical techniques under the umbrella of the *Theatre of the Oppressed*. I outlined one such exercise which communities can use to empower themselves and each other.

My parting hope is that we can all speak about race, casually and freely, without the paranoia of strict scrutiny. We can train ourselves out of this paranoia. It is a practice, and one we must do. Let us make talking about race a casual affair, instead of a strict one. The American people need it now more than ever.

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[70] Augusto Boal, Jan Cohen-Cruz & Mady Schutzman, *Theatre of the Oppressed Workshops with Women: An Interview with Augusto Boal*, 34 TDR 66, 72 (1990).
[71] Cohen-Cruz, *supra* note 61, at 46.