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A Comment on Justice O'Connor's Quest for Power and Its Impact on African American Wealth

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A COMMENT ON JUSTICE O'CONNOR'S QUEST FOR POWER AND ITS IMPACT ON AFRICAN AMERICAN WEALTH

JOAN TARPLEY*

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I. INTRODUCTION

The distribution of wealth depends, not wholly, indeed, but largely, on a [society's] institutions; and the character of [a society's] institutions is determined, not by immutable economic laws, but by the values, preferences, interests and ideals which rule at any moment in a given society.¹

In general, African Americans did not experience the "wealth effect" connected with the booming American economy of the 1990s.² This Essay addresses the asset poverty of blacks in America and how the Supreme Court's affirmative action decisions play a role in continuing that poverty. In particular, this Essay addresses how Justice Sandra Day O'Connor's affirmative action opinions further institutionalize the "whiteness as property"³ character of America's institutions. O'Connor is the subject of this Essay rather than one of the other conservatives on the Court because, as this Essay will demonstrate, she writes as a moderate voice so that she can be the Court's point person on some of the "hot button" issues.

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1. MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH* 127 (1995) (quoting R. H. TAWNEY, *EQUALITY* (1952)) (alteration in original).

2. Yochi J. Dreazen, *U.S. Racial Wealth Gap Remains Huge—Despite Booming Economy, Disparities Didn't Alter in the Course of the 1990s*, *WALL ST. J.*, Mar. 14, 2000, at A2.

3. Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1707 (1993).

Nevertheless, O'Connor is not moderate on questions of race. She is deeply hostile to affirmative action. Her opinions are only facially moderate. Without exception, she takes the conservative position that affirmative action plans are unconstitutional. In fact, she has authored the conservative party line opinions on affirmative action, thereby creating blockades to use where none previously existed. O'Connor seeks power, stakes out her position, and proceeds to use whatever rule of law she needs in order to reach her desired result. She will use a rule although it is one she has previously disavowed, and if the rule does not exist, she creates it.

Justice Sandra Day O'Connor is an affirmative action, feminist movement appointee. Her position on the bench is the product of President Ronald Reagan's campaign promise to appoint a woman to the United States Supreme Court upon his election.⁴ Ironically, although O'Connor has arguably benefited from affirmative action, she has studiously worked at writing opinions that find affirmative action plans unconstitutional.

O'Connor writes about the "stigma" of being unqualified, one that minorities face because of affirmative action.⁵ She has also written about potential stigma as an outgrowth of affirmative action.⁶ Nevertheless, O'Connor did not refuse her appointment, nor has she relinquished her seat on the Court because of the potential stigma attached to her appointment as President Reagan's token female appointee.

Despite graduating third in her law school class from Stanford in 1952, O'Connor received no offers to work as a lawyer in the private sector.⁷ However, O'Connor found work as a law clerk and deputy county attorney in the San Mateo County attorney's office.⁸ Subsequent to this work, O'Connor worked in Frankfurt, West Germany as a civilian lawyer for the United States Army, while her husband served in the Judge Advocate General's Corps.⁹ Next, O'Connor returned to

4. See DAVID M. O'BRIEN, *JUDICIAL ROULETTE* 48 (1988).

5. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting) (stating that racial classifications may stigmatize those groups singled out for different treatment), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (O'Connor, J.) ("Classifications based on race carry a danger of stigmatic harm.").

6. See *Metro Broad., Inc.*, 497 U.S. at 603-04; *J.A. Croson Co.*, 488 U.S. at 493-94; see also Stephen E. Gottlieb, *Three Justices in Search of a Character: The Moral Agendas of Justices O'Connor, Scalia and Kennedy*, 49 RUTGERS L. REV. 219, 220 (1996) ("The current conservative Justices feel as free to adopt specific moral agendas and incorporate them in their interpretation of constitutional law as the liberal Justices they have attacked."). Gottlieb, while pointing out that race distinction should not be tolerated, says:

[R]ace also reflected for many a confirmation of their own social superiority. . . . Modern conservatism has struggled with the relation between race, character and socio-economic position. Conservatives can treat socio-economic position as a reflection of underlying character, and, harking back to the apologists of slavery, treat the relatively poor socio-economic position of blacks as a reflection of racial character.

Id. at 240. "The hypothesis that the conservatives on the Court prefer to treat discrimination as a parable of character is embodied in the pattern of their opinions." *Id.* at 243.

7. THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 339 (Melvin I. Urofsky ed., 1994) [hereinafter THE SUPREME COURT JUSTICES].

8. *Id.*

9. *Id.*

Phoenix where she opened her own law firm with another lawyer.¹⁰ In 1965, O'Connor became an assistant attorney general for Arizona.¹¹ She was appointed to fill a vacancy in the Arizona state senate in 1969 and was subsequently elected to two full terms.¹² O'Connor began her career on the bench in 1974 when she was elected to sit on the Maricopa County Superior Court.¹³ In 1979, she was appointed to the Arizona Court of Appeals.¹⁴ In 1981, O'Connor received her Supreme Court appointment.¹⁵ Despite O'Connor's experience, one can be certain that some well-deserving white male on President Reagan's short list of appointees did not get the job because of the discriminatory gender preference in favor of O'Connor.

Justice O'Connor is not a swing vote on the Court in matters of racial affirmative action plans as some believe. To the contrary, she is the chief architect in dismantling these plans. No less deleterious than Bull Connor's Alabama helmet police and savage dogs were to the 1960s Civil Rights Movement,¹⁶ O'Connor's opinions have dismantled affirmative action programs intended to provide equal economic opportunity to African Americans. Justice O'Connor invests heavily in economic turf protection on behalf of wealthy white Americans by engaging in a highly sophisticated form of war that, stripped of its black robes, suited attire, and United States Supreme Court chambers, is analogous to street gang warfare.

As a member of the United States Supreme Court, Justice O'Connor has engaged, and continues to engage, in an opportunistic enterprise. She takes every opportunity to add to existing institutionalized white preferences in wealth distribution. In the real world of the ongoing Confederacy, white skin carries entitlement to economic opportunity at the exclusion of African Americans.¹⁷ As chief architect for the disassembly of affirmative action plans, O'Connor has also carefully crafted obstacles to overcome in shepherding an affirmative action plan through her labyrinth. For example, her opinions craftily leave room for affirmative action optimists to believe that some plan might succeed.¹⁸ However, O'Connor always construes the law to disfavor the affirmative action plan because of unconstitutional racial preference.

Justice O'Connor's opinion in *City of Richmond v. J.A. Croson Co.*¹⁹ is the lead bulldozer in her dismantling of affirmative action jurisprudence. When *Croson* is read alongside her other opinions on affirmative action, she emerges as an elitist, a consummate politician, and a protector of the institutionalized "rights of whites."²⁰

10. *Id.*

11. *Id.*

12. *Id.*

13. THE SUPREME COURT JUSTICES, *supra* note 7, at 339.

14. *Id.*

15. *Id.*

16. See SARA BULLARD, FREE AT LAST 26-27 (1993).

17. See Harris, *supra* note 3, at 1789 ("The fundamental precept of whiteness—the core of its value—is exclusivity.").

18. See *infra* Part II.

19. 488 U.S. 469 (1989) (voiding as unconstitutional a construction industry set-aside benefiting minority-owned subcontractors).

20. Linda S. Greene, *Race In the 21st Century: Equality Through Law?*, 64 TUL. L. REV. 1515, 1517 (1990). Greene uses "rights of whites" to denote the "tendency to give legal legitimacy to the efforts of whites, who historically have benefited from racism, to maintain the racial status quo." *Id.*

Other scholars have not been kind to O'Connor.²¹ This piece adds to the discussion concerning O'Connor's affirmative action decisions by supplying the perspective that these opinions were written to strengthen her position as the power vote on the Court—to become the Chief Justice in fact, if not in name.

Part II analyzes the affirmative action opinions that Justice O'Connor has authored, including majority, plurality, concurring, and dissenting opinions, and what I believe to be their impact on African American wealth. Part III discusses O'Connor's disagreements with Justice Antonin Scalia. These disagreements are important because Scalia's attacks call attention to O'Connor's political nature and note that O'Connor says whatever she needs to say in order to reach her desired result. Part III also places O'Connor's affirmative action opinions within the context of the Court and argues that O'Connor seeks to dominate²² the Court and grass-roots-level politics. Part IV concludes with some comments on the impact of O'Connor's opinions on African American wealth and the global economy.

II. THE AFFIRMATIVE ACTION DECISIONS

This Part provides insight into Justice O'Connor's primal intent to preserve white status quo elitism each time she confronts an affirmative action plan. Her opinions guarantee the demise of these plans. To borrow one of O'Connor's frequently used terms, the "troubling" issue is whether the Justices whose votes helped to dismantle affirmative action plans actually believed their own opinions. One would almost prefer that the Justices have a personal stake in preserving the white elitist status quo and serving their own self-interests, rather than having an aloof perspective on the reality of racism in this country. Worse yet, it could be that the Justices are so limited in their world view that their comprehension of institutional racism is at best a formalistic embrace of the status quo, and at worst a resolute fidelity to "white supremacy."²³

The continued maintenance of the status quo in America by regarding "whiteness as property"²⁴ will slaughter us all, black and white alike, in the global

21. See generally EDWARD P. LAZARUS, *CLOSED CHAMBERS* (1998) (providing an inside look at what transpires behind the closed doors of the U.S. Supreme Court); Jerome McCristal Culp, Jr., *An Open Letter from One Black Scholar to Justice Ruth Bader Ginsburg: Or, How Not to Become Justice Sandra Day O'Connor*, 1 DUKE J. GENDER L. & POL'Y 21 (1994) (arguing that Justice O'Connor's jurisprudence of race has been dismissive of black people's concerns); Judith Olans Brown et al., *The Rugged Feminism of Sandra Day O'Connor*, 32 IND. L. REV. 1219 (1999) (finding that Justice O'Connor's conclusions are often at odds with the feminist agenda).

22. See FRIEDREICH NIETZSCHE, *BEYOND GOOD AND EVIL* 18 (Helen Zimmern trans., Henry Regnery Co. 1949) ("A living thing seeks above all to *discharge* its strength—life itself is *Will to Power*.").

23. Francis L. Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n.129 (1989). White supremacy refers to a "political, economic, and cultural system in which whites overwhelmingly control power and material resources, [and] conscious and unconscious ideas of white superiority and entitlement are widespread. . . ." *Id.*; see also Harris, *supra* note 3, at 1714 n.10 (adopting Ansley's definition of white supremacy). See generally ALVIN TOFFLER, *THE THIRD WAVE* (1981) (discussing industrial-age persons holding on to the status quo and refusing to move, without applied pressure, into the information age).

24. Harris, *supra* note 3, at 1707.

economy.²⁵ International economies are too inextricably bound together to afford the luxury of protective entitlements for whites institutionalized under a reign of white supremacy—a reign that simultaneously suppresses the assertive entrepreneurial spirit of African Americans.

The Supreme Court is a political entity that bases its decisions along the lines of the Justices' ideological propensities. In the political war over wealth distribution, Justice O'Connor's opinions eradicate affirmative action plans and opportunities for African Americans that would arise under those plans. O'Connor writes as if she does not know that this country has a history of white supremacy and racism. Although she writes of equal protection as a guarantee for individuals and not groups,²⁶ her appointment itself came out of a movement to advance the opportunities of a group—women.

O'Connor's elitism is emphasized in her failure to acknowledge the “withering-on-the-vine” effect of group racial outcasting in *City of Richmond v. J.A. Croson Co.*²⁷ She wrote the *Croson* opinion for the Court as if the public construction bidding process in Richmond, Virginia might, *on the odd occasion*, have individual occurrences of racism. She exemplifies the notion that “[o]ne can only find what the search allows in the sense that the search fails to recognize anything else.”²⁸ In *Closed Chambers*, Edward Lazarus criticizes O'Connor's *Croson* opinion:

[T]here was something deeply unsettling about O'Connor's approach. Her presentation of both the facts and the law was skewed by a seemingly calculated omission. . . . Few cities had a stronger symbolic link to the slave economy of the old South, and, perhaps more pertinently, few communities had resisted more persistently the modern legal command of black equality.²⁹

In what school of thought has Justice O'Connor situated herself? “Over the last few years, a substantial and growing number of Supreme Court Justices, federal judges, and some theorists, including Raoul Berger, Robert Bork, Frank Easterbrook, Michael McConnell, Sandra Day O'Connor, Richard Posner, and Antonin Scalia, have begun to articulate a profoundly conservative interpretation

25. See Bob Deans, *White House Faces Worldwide Resentment of Policies*, THE ATLANTA J. CONST., May 6, 2001, at A7, for a discussion of the international ballot that voted the United States off the United Nations Human Rights Commission. In this article, speaking about a secret ballot vote among fifty-four nations, Robert Pastor, an Emory University professor of political science, stated as follows: “They’re a little fed up with the United States. . . . Our unilateral attitude was one of many factors in causing us to lose that vote.” *Id.* Of the fifty-four nations, at least forty-three had indicated they would support U.S. membership, but only twenty-nine in fact did so. *Id.* The article concludes with the professor's analysis that unless President George W. Bush articulates a more inclusive policy in laying out a strategy for international issues, “we will not only have problems with our allies and with Russia and China, but our allies, Russia and China might find reason to coordinate their approach to us. This would make it difficult for us to do almost anything in the world.” *Id.*

26. *City of Richmond v. J.A. Croson Co.*, 488 U. S. 469, 493 (1989).

27. *Id.*

28. PIERRE SCHLAG, THE ENCHANTMENT OF REASON 4 (1998).

29. LAZARUS, *supra* note 21, at 298.

of the constitutional tradition.”³⁰ In *Progressive and Conservative Constitutionalism*, Robin West compares a progressive interpretation of the Constitution with a conservative interpretation of the Constitution.³¹ West points out that the Supreme Court is dominated by conservative constitutionalism.³² Indeed, West notes that “conservative constitutionalism . . . may soon dominate the federal judiciary, and has already profoundly shaped the constitutional law of the foreseeable future.”³³ As one of many who wish to protect white entitlement, O’Connor makes it virtually impossible for African Americans to rise socially if the route is via an affirmative action plan. The political consequence of O’Connor’s writing has been the nullification of the political will at a grass roots level.

A. Cases

O’Connor’s linchpin decision on affirmative action is *City of Richmond v. J.A. Croson Co.*³⁴ While it is unlikely that anyone is unfamiliar with the term “affirmative action,” in this Essay “affirmative action” means an intentional effort of inclusion through a “policy or program for correcting the effects of discrimination in the employment or education of members of certain groups”³⁵ such as African Americans, Hispanic Americans, Asian Americans, and women.

The following is a recitation of facts selectively excerpted from Justice O’Connor’s *Croson* opinion for the Court:

On April 11, 1983, the Richmond City Council adopted the Minority Business Utilization Plan (the Plan). The Plan required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBE[s]). . . .

The plan defined an MBE as “[a] business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members.”

On September 6, 1983, the city of Richmond issued an invitation to bid on a project for the provision and installation of certain plumbing fixtures at the city jail. On September 30, 1983, Eugene Bonn, the regional manager of J.A. Croson Company (Croson), a mechanical plumbing and heating contractor, received the bid forms. The project involved the installation of stainless steel urinals and water closets in the city jail. *Products of either of two manufacturers were specified, Acorn Engineering Company*

30. Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 641 (1990).

31. *Id.*

32. *Id.* at 642.

33. *Id.*

34. 488 U. S. 469 (1989).

35. WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 33 (2d ed. 1983).

(*Acorn*) or *Bradley Manufacturing Company (Bradley)*. Bonn determined that to meet the 30% set-aside requirement, a minority contractor would have to supply the fixtures.

. . . On October 12, 1983, the day the bids were due, Bonn again telephoned a group of MBE[s]. This time, Melvin Brown, president of Continental Metal Hose (Continental), a local MBE, indicated that he wished to participate in the project. Brown subsequently contacted two sources of the specified fixtures in order to obtain a price quotation. *One supplier, Ferguson Plumbing Supply, which is not an MBE, had already made a quotation directly to Croson, and refused to quote the same fixtures to Continental. Brown also contacted an agent of Bradley, one of the two manufacturers of the specified fixtures. The agent was not familiar with Brown or Continental, and indicated that a credit check was required which would take at least 30 days to complete.*³⁶

Croson finally received a bid from Continental after Croson requested a waiver from the city of the thirty percent set-aside.³⁷ Continental's bid would have raised the cost of the project by \$7,663.16, an increase not reflected in Croson's bid on the project.³⁸ "The city denied both Croson's request for a waiver [from complying with the plan] and [Croson's] suggestion that the contract price be raised. The city informed Croson that it had decided to rebid the project."³⁹ Croson sued pursuant to 42 U.S.C. § 1983, alleging that the plan was unconstitutional under the Fourteenth Amendment's Equal Protection Clause.⁴⁰ The Federal District Court for the Eastern District of Virginia upheld the city's plan in all respects.⁴¹ A divided panel of the Fourth Circuit Court of Appeals affirmed the district court's ruling.⁴²

The United States Supreme Court found the city's affirmative action plan unconstitutional. Justice O'Connor wrote the lead opinion.⁴³ The Court held that the city failed to demonstrate a compelling governmental interest justifying the plan and that the plan was not narrowly tailored to remedy effects of prior discrimination.⁴⁴

A crucial fact undermining the MBE's effort to meet the bid criteria was the limiting supplier specification.⁴⁵ Only two suppliers could be used.⁴⁶ One supplier refused to even quote a price to the MBE.⁴⁷ The other supplier would have taken thirty days to run a credit check on the MBE.⁴⁸ Therefore, the suppliers

36. *Croson*, 488 U.S. at 477-78, 481-82 (emphasis added).

37. *Id.* at 482.

38. *Id.* at 483.

39. *Id.*

40. *Id.* at 483.

41. *Id.*

42. *Croson*, 488 U.S. at 483-84.

43. *Id.* at 476.

44. *Id.* at 505, 508.

45. *Id.* at 481.

46. *Id.*

47. *Id.* at 482.

48. *Croson*, 488 U.S. at 482.

discriminated against the MBE in the bidding process. O'Connor was aware of these facts because she recited them. However, she chose not to address the refusal to quote a price to the MBE as a race-related refusal.

O'Connor states:

Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion.⁴⁹

According to this sentence, O'Connor requires a showing of systematic exclusion in order to uphold an affirmative action plan. Yet, the refusal to quote prices to an MBE surely was an exclusion. Although the case presented only one incident, the incident lends support to the belief that such an exclusion was not an isolated occurrence.

For situations of systematic exclusion, O'Connor's remedy is that "the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria."⁵⁰ Thus, she is looking for specific villains to be individually punished. She seeks punishment of the single wrongdoer rather than economic advancement of the wounded. Perhaps only when discrimination is openly widespread and entrenched would O'Connor consider an affirmative action plan necessary.

In 1995, O'Connor wrote the opinion for the Court in *Adarand Constructors, Inc. v. Peña*.⁵¹ *Adarand* held that federal affirmative action plans implemented by a federal, state, or local government actor would be reviewed for constitutionality under the same criteria as those set forth in *Croson*.⁵² In *Adarand* the United States Department of Transportation awarded the prime contract for a highway construction project in Colorado to Mountain Gravel and Construction Company.⁵³ The contract's terms provided that Mountain Gravel would receive additional compensation if it hired subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals," a financial incentive legislated to induce the hiring of minority subcontractors.⁵⁴ Mountain Gravel awarded the bid to Gonzales Construction Company, a minority subcontractor, even though Gonzales had not submitted the lowest bid.⁵⁵ *Adarand Constructors*, the low bidder on the project, "filed suit against various federal officials in the United States District Court for the District of Colorado, claiming that the race-based presumptions involved in the use of subcontracting compensation clauses violate[d]

49. *Id.* at 509.

50. *Id.* at 509. "In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion." *Id.*

51. 515 U.S. 200 (1995).

52. *Id.* at 227-28.

53. *Id.* at 205.

54. *Id.* at 205-06.

55. *Id.* at 205.

Adarand's right to equal protection."⁵⁶ In addition to its request for relief, Adarand sought "injunctive relief against any *future* use of subcontractor compensation clauses."⁵⁷ The district court granted summary judgment in favor of the government.⁵⁸ The Court of Appeals for the Tenth Circuit affirmed the district court.⁵⁹

In her opinion for the Court, O'Connor stated that "[w]e think it necessary to revisit the issue here."⁶⁰ Justice O'Connor proceeded to lay out a scheme to protect the status quo into the foreseeable future:

"[A] free people whose institutions are founded upon the doctrine of equality," should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. *To the extent that Metro Broadcasting is inconsistent with that holding, it is overruled.*⁶¹

O'Connor's hostility towards affirmative action plans is also evident in her dissenting opinion in *Metro Broadcasting, Inc. v. FCC*.⁶² In *Metro Broadcasting* Justice Brennan delivered the opinion of the Court, and Justice O'Connor filed a dissenting opinion in which Chief Justice Rehnquist and Justices Scalia and Kennedy joined.⁶³ *Metro Broadcasting* involved the review of two minority preference programs adopted by the Federal Communications Commission (FCC).⁶⁴ Under the minority preference policy, the FCC considered minority ownership as "a 'plus' to be weighed together with all other relevant factors."⁶⁵ Furthermore, the FCC planned to increase minority opportunities through a "distress sale" policy.⁶⁶

56. *Id.* at 210.

57. *Adarand*, 515 U.S. at 210.

58. *Id.*

59. *Id.*

60. *Id.* at 213.

61. *Id.* at 227 (alteration in original) (citation omitted) (emphasis added).

62. 497 U.S. 547 (1990) (5-4 decision), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

63. *Id.* at 552, 602.

64. *Id.* at 556.

65. *Id.* at 557. When evaluating applications for new radio or television stations, the FCC evaluates the following six factors: "diversification of control of mass media communications, full-time participation in station operation by owners . . . , proposed program service, past broadcast record, efficient use of the frequency, and the character of applicants." *Id.* at 556-57.

66. *Id.* at 557. "As a general rule, a licensee whose qualifications to hold a broadcast license come into question may not assign or transfer that license until the FCC has resolved its doubts The distress sale policy is an exception to that practice, allowing a broadcaster to assign the license to [a] minority enterprise." *Id.*

Metro Broadcasting challenged the FCC's minority preference policies after the FCC chose to grant a minority-owned business a license to construct and operate a new UHF television station in Orlando, Florida.⁶⁷ The FCC awarded the minority-owned business the license because the business's "minority credit outweighed Metro's local residence and civic participation advantage."⁶⁸ On review, the FCC affirmed its grant of the license to the minority-owned business.⁶⁹ A divided United States Court of Appeals for the District of Columbia Circuit affirmed.⁷⁰

The United States Supreme Court held that the FCC's affirmative action plan did not violate equal protection principles.⁷¹ Specifically, the Court stated the following:

We hold that benign race-conscious measures mandated by Congress—even if those measures are not “remedial” in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.

Our decision last Term in *Richmond v. J.A. Croson Co.*, concerning a minority set-aside program adopted by a municipality, does not prescribe the level of scrutiny to be applied to a benign racial classification employed by Congress.⁷²

In her dissent, Justice O'Connor stated that “[r]acial classifications, whether providing benefits to or burdening particular racial or ethnic groups, may stigmatize those groups singled out for different treatment and may create considerable tension with the *Nation's widely shared commitment* to evaluating individuals upon their individual merit.”⁷³

O'Connor's statement regarding the “Nation's widely shared commitment”⁷⁴ is intolerable in the face of the present-day continuance of racial prejudice throughout the country. One only has to observe the battles that are currently being fought to remove the Confederate symbol from state flags to know that this “widely shared commitment” is a farce.⁷⁵

At another point in her dissent, O'Connor laid down the foundation for what would later become the Court's opinion in *Adarand Constructors, Inc. v. Peña*:

67. *Id.* at 558.

68. *Metro Broad., Inc.*, 497 U.S. at 559.

69. *Id.* at 560.

70. *Id.*

71. *Id.* at 566.

72. *Id.* at 564-65 (citation omitted).

73. *Metro Broad., Inc.*, 497 U.S. at 604 (O'Connor, J., dissenting) (emphasis added).

74. *Id.* at 604.

75. See Marlon Manuel, *Mississippians Sticking With Flag*, THE ATLANTA J. CONST., Apr. 18, 2001, at A1 (describing the failed attempt in Mississippi to have the Confederate battle emblem removed from the state flag).

Under the appropriate standard, strict scrutiny, only a compelling interest may support the Government's use of racial classifications. Modern [*i.e.*, Rehnquist Court] equal protection doctrine has recognized only one such interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest.⁷⁶

Writing for the dissent in *Metro Broadcasting, Inc.*, Justice O'Connor took more liberty with her rhetoric than she did later when writing the Court's opinion in *Adarand*. In *Metro Broadcasting, Inc.* O'Connor stated that "[f]inally, the Government cannot employ race classifications that unduly burden individuals who are not members of the favored racial and ethnic groups."⁷⁷ With this statement, O'Connor raised the "unduly burdening" language to an independent requirement by stating that "[t]he challenged policies fail this independent requirement, as well as the other constitutional requirements."⁷⁸

B. Causes

Writing for the Court in *City of Richmond v. J.A. Croson Co.*,⁷⁹ O'Connor, assured that the City is innocent, ignores in her analysis a fact that she outlines—that a white parts supplier would not quote a price to a minority contractor.⁸⁰ Is this the Court's idea of race-neutral policies? O'Connor's language raises questions of "How much discrimination is needed to be extreme?" and "How narrowly must an affirmative action plan be tailored?" At a minimum, O'Connor could have noted that the supplier, by refusing to quote prices to a black contractor, should be stricken from the city's list of approved contractors. Perhaps the opinions of the author and joiners alike, having an uneven playing field tilted in their favor, will not vote to level it through affirmative action.⁸¹ Perhaps the jurisprudence of O'Connor's opinion is simply politics as usual, and her attempts to analyze it differently are acts of futility.

Generations of families—including the King family—have been fighting segregationist culture since the 1960s. Nonetheless, economic segregation continues to be protected in America under the aegis of Justice O'Connor's race-neutral,

76. *Metro Broad., Inc.*, 497 U.S. at 612 (O'Connor, J., dissenting).

77. *Id.* at 630.

78. *Id.*

79. 488 U.S. 469 (1989).

80. *Id.* at 482.

81. See Harris, *supra* note 3, at 1767. Harris states:

The Supreme Court's rejection of affirmative action programs on the grounds that race-conscious remedial measures are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment—the very constitutional measure designed to guarantee equality for Blacks—is based on the Court's chronic refusal to dismantle the institutional protection of benefits for whites that have been based on white supremacy and maintained at the expense of Blacks.

Id.

color-blind, and politically-motivated, affirmative action opinions. She consistently writes conservative opinions, rhetorically styled to be viewed as moderate.

From a more global perspective, rather than hampering competition, affirmative action plans could actually sharpen competition and force some born within the "good ol' boy network" to compete on an equal playing field. The thorn for Justice O'Connor is the money, or the opportunity to make money, thereby creating and building upon wealth. A wealthy black America could create an oppositional stronghold of power in a political arena historically favoring whites.

Showcasing her intent to strike at the heart of financial equal opportunity, Justice O'Connor states in *Metro Broadcasting, Inc.* that "[t]he comparative licensing and distress sale programs provide the eventual licensee with an exceptionally valuable property and with a rare and unique opportunity to serve the local community."⁸² However, O'Connor dissents from the opinion that upheld the FCC's minority ownership plan. The "exceptional" value of an air wave license apparently gave O'Connor license to impose her undue burden test as an "independent requirement" in addition to "other constitutional requirements."⁸³ She writes that the FCC program "imposes a particularly significant burden."⁸⁴ Is one to conclude that the burden of those not preferred is to be measured by the value of the property delivered into the outstretched hands of the minority licensee? Is a white potential licensee significantly burdened when an African American receives a license for a radio or television station from a set-aside program? Probably not. However, to O'Connor the answer is yes, and her opinion in *Metro Broadcasting, Inc.* makes clear that her line in the sand occurs when money, and certainly when "exceptionally valuable property" is at issue.

In her article on progressive constitutionalism, Robin West addresses a free-market, conservative perspective on economic power.⁸⁵ "[T]he adoration, celebration, or, more simply, love of economic power characteristic of modern free-market conservatives implies an archly conservative version of legal pragmatism or instrumentalism."⁸⁶ Pointing out that law by any name "can be put to either radical, liberal, or conservative political ends,"⁸⁷ West advises that "law is a tool with which to achieve other independently defined purposes."⁸⁸

In a synthesis analysis, West says:

When legal pragmatism is combined with the politics of free-market conservatism, . . . the result is again a profoundly conservative jurisprudential doctrine: what might be called "conservative instrumentalism." For the conservative instrumentalist, law should be organized in such a way as to

82. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting).

83. *See id.* ("[T]he Government cannot employ race classifications that unduly burden individuals who are not members of the favored racial and ethnic groups. . . . The challenged policies fail this independent requirement, as well as other constitutional requirements.").

84. *Id.*

85. West, *supra* note 30, at 661-62.

86. *Id.* at 661.

87. *Id.*

88. *Id.*

promote free economic competition. Economic competition—the process by which the wishes, instincts, and desires of the strongest appropriately become the will of the community, and by which their perceptions of the world become the truth about reality—is not just a fact or practice, but a normative principle of modern life. Law, then, both adjudicative and otherwise, should be used and interpreted in such a way as to promote best the substantive values and norms of competitive life. The consequence for decision-making is that when law must be informed or guided by a conception of the good, it should embrace whatever decision will liberate competition.⁸⁹

This last sentence on embracing “whatever decision will liberate competition,”⁹⁰ raises the question of what in fact liberates competition. In this author's mind, the same members of the “good ol’ boy network” competing with each other in the same old way is not liberated competition. There is also a question to be raised about what West terms “the integrity of the competitive process.”⁹¹ West writes:

In this decade, what this conservative interpretation of equality means, most importantly, is that other than in truly extraordinary circumstances, no individual's or corporation's competitive chances in the marketplace will be compromised by societal efforts to put an end to the substantive, subordinating effects of private, social, or institutional racism through anticompetitive affirmative action programs. The [Equal Protection Clause] thus construed protects not equality so much as the integrity of the competitive process, and targets not *racism* (to say nothing of classism, misogyny, or heterosexism), but race-conscious governmental decisionmaking. The conservative's conception of the guarantee of equality thus has nothing to do with putting an end to racism if “racism” is understood as the white majority's hatred, contempt, and subordination of nonwhites, and little if anything to do with achieving equality. Rather, it has everything to do with protecting competitive values against progressive political attempts by the state to do so.⁹²

The “integrity” of the competitive process is fundamentally flawed in America. By what method is competition in the economic marketplace judged to have integrity when potential competitors come to the foot races with tons of cotton sacks on their backs? To the contrary, affirmative action programs remove the cotton sacks, and such programs would be transitory if carried out as

89. *Id.* at 661 (footnote omitted).

90. *Id.*

91. West, *supra* note 30, at 672.

92. *Id.* (emphasis in original).

conceptualized. Affirmative action plans would eventually eradicate the very reason for implementing such plans. As discriminatory practices subside, the need for affirmative action plans would no longer exist. At that point in time, one could truly speak to the reality of a competitive process and its integrity.

Justice O'Connor cites the plurality opinion of *Wygant v. Jackson Board of Education*⁹³ for her proposition that the "standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification."⁹⁴ In the *Wygant* plurality opinion, a collective bargaining agreement providing preferential treatment for some minority employees in the event of teacher layoffs was held unconstitutional by the Court.⁹⁵ O'Connor's concurring opinion states:

In the final analysis, the diverse formulations and the number of separate writings put forth by various Members of the Court in these difficult cases do not necessarily reflect an intractable fragmentation in opinion with respect to certain core principles. Ultimately, the Court is at least in accord in believing that a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preference.⁹⁶

O'Connor shifted her emphasis from "disproportionate harm" in *Wygant* to "narrowly tailored," in *Croson*⁹⁷ and *Adarand*.⁹⁸ However, in *Metro Broadcasting* "disproportionate harm" changed to "significant burden," and "unduly burden."⁹⁹ Apparently, the potential value of a license to the air waves moved Justice O'Connor to extend her *singularly personal* reading of the *Wygant* plurality's consensus to that of a requirement, independent of the constitutional requirements.

African Americans have reached economic opportunity by way of the civil rights agenda, arriving sooner than some might have expected. Mercifully, the entire black national economy is not dependent on Justice O'Connor, Scalia, Kennedy, Rehnquist, and Thomas. Many African Americans are rising economically, not only black athletes and Hollywood celebrities. The black middle class of physicians, lawyers, and entrepreneurs is also increasing.¹⁰⁰ O'Connor's

93. 476 U.S. 267 (1986).

94. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989).

95. *Wygant*, 476 U.S. at 284.

96. *Id.* at 287.

97. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989).

98. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

99. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting).

100. See Earl Ofari Hutchinson, *Show King the Money*, THE BLACK COLLEGIAN ONLINE, available at <http://www.black-collegian.com/african/kingmoney100.shtml> (last visited Oct. 31, 2001). But see OLIVER & SHAPIRO, *supra* note 1, at 92-97 for a discussion on what is meant by the black

opinions achieve the delay—but hopefully not the permanent prevention—of a more widely-based black wealth. A base that carries wealth forward from generation to generation.

C. *African American Wealth*

In order to understand the impact of Justice O'Connor's affirmative action opinions on African Americans, one must analyze the large economic disparity between blacks and whites. According to Oliver and Shapiro in *Black Wealth/White Wealth*, "[i]nherited wealth is a very special kind of money imbued with the shadows of race."¹⁰¹ Oliver and Shapiro argue that the absence of inherited wealth accounts for the great wealth disparity between blacks and whites.¹⁰² The authors claim that "[f]or the most part, the economic foundation of the black middle class lacks one of the pillars that provide stability and security to middle-class whites—assets."¹⁰³ Furthermore, "[t]he black middle class position is precarious and fragile with insubstantial wealth resources."¹⁰⁴ According to Oliver and Shapiro, this analysis means that "it is entirely premature to celebrate the rise of the black middle class. The glass is both half empty and half full, because the wealth data reveal the

middle class:

The economic status of the black middle class is a vital factor in ongoing debates in the field of racial equity. A frequent question that arises concerns what one means by "the black middle class." Some demark the limits simply in terms of income; others include education or occupation in the definition. Most scholars embrace a class conception based on the work of Karl Marx or Max Weber and make occupation their central focus. The evidence cited earlier showing an enlarged middle class touches all these bases—educational achievement, earnings, and occupation. As previously noted, middle class means working in a white-collar occupation or being self-employed. In using several different indicators of class status, we confirm that the economic foundation of the black middle class is not dependent upon any one way of thinking about class. The point of this exercise is to show that an accurate and realistic appraisal of the economic footing of the black middle class reveals its precariousness, marginality, and fragility. The case for this characterization rests not only on an inspection of the resources available to the black middle class but on the relative position of the latter with respect to the white middle class.

Id. at 92-93.

101. OLIVER & SHAPIRO, *supra* note 1, at 6.

102. *Id.* at 5-7. "For the most part, blacks will not partake in divvying up the baby boom bounty. America's racist legacy is shutting them out. The grandparents and parents of blacks under the age of forty toiled under segregation, where education and access to decent jobs and wages were severely restricted. Racialized state policy and the economic detour constrained their ability to enter the post-World War II housing market. Segregation created an extreme situation in which earlier generations were unable to build up much, if any, wealth. . . . [T]he average black family headed by a person over the age of sixty-five has no net financial assets to pass down to its children. Until the late 1960s there were few older African Americans with the ability to save much at all, much less invest. And no savings and no inheritance meant no wealth." *Id.* at 6-7.

103. *Id.* at 7.

104. *Id.*

paradoxical situation in which blacks' wealth has grown while at the same time falling further behind that of whites."¹⁰⁵

O'Connor's opinions undermine generational wealth for African Americans. As black contractors, plumbers, and electricians have attempted, and presently attempt, to grow wealth in small businesses, O'Connor's opinions propose that racial inequality in the bidding process is simply a tough and punishing reality without a remedy. O'Connor's opinions disregard a history that created limited opportunities for African Americans.

Oliver and Shapiro come to a conclusion that others seem to agree with,¹⁰⁶ but which the O'Connor opinions disavow:

Disparities in wealth between blacks and whites are not the product of haphazard events, inborn traits, isolated incidents or solely contemporary *individual* accomplishments. Rather, wealth inequality has been structured over many generations through the same systemic barriers that have hampered blacks throughout their history in American society: slavery, Jim Crow, so-called de jure discrimination, and institutionalized racism.¹⁰⁷

Oliver and Shapiro maintain that blacks are subject to asset deprivation, "both absolutely and in relation to whites. . . ."¹⁰⁸ They claim that this deprivation reverberates throughout the economic circumstances of African Americans.¹⁰⁹ In studying wealth as a social phenomenon, Oliver and Shapiro confirm our already known anecdotal information: "When the wealth pies are placed on the table, very few black households are served."¹¹⁰

An "*intergenerational transmission of inequality*" rather than the wealth sustaining inheritance of assets, shows how "an oppressive racial legacy continues to shape American society through the reproduction of inequality generation after generation."¹¹¹ A middle-class white child can look forward to inherited wealth, occupational upward mobility, and institutional racism skewed in his favor.¹¹² Not

105. *Id.* at 7-8.

106. *See generally* Harris, *supra* note 3 (discussing the evolution of "whiteness" into a form of property which continues to influence the Court's decisions and serve as a barrier to change); Greene, *supra* note 20 (asserting that the new legal order, while no longer overtly racist, legitimates the maintenance of racial subordination and domination).

107. OLIVER & SHAPIRO, *supra* note 1, at 12-13 (emphasis added).

108. *Id.* at 97-98.

109. *Id.* at 98.

110. *Id.* at 103.

111. *Id.* at 128.

112. *Id.* at 156-60.

so for the middle-class black child.¹¹³ The Oliver and Shapiro analysis sets forth three ways in which wealth is transmitted from one generation to another:

First, inequality is generated by the contemporary American social structure through severe distinctions in human capital, sociological, and labor market factors. We have seen that racially stratified experiences in schooling, jobs and family life result in resource circumstances unmitigatedly marked by race. . . .

The second layer of inequality . . . concerns institutional and policy factors, both public and private. In examining the practices surrounding home ownership . . . differential access to mortgage and housing markets and the racial valuation of neighborhoods result in enormous asset discrepancies. . . . Home ownership is without question the single most important institutionally sanctioned means by which assets are accumulated. At the same time, however, it is worth remembering that housing represents only one arena, albeit the most important one, of institutional discrimination.

The third layer of racial inequality in America is transmitted from generation to generation. We saw who inherited money both during the lifetime and after the death of a parent. Disparities

113. OLIVER & SHAPIRO, *supra* note 1, at 156-60. Oliver and Shapiro explain:

[D]ata confirm and partially document that wealth is transmitted from one generation to another in two additional ways. First, they reveal the existence of distinctions between white and black patterns of occupational mobility. This part of the story is important, because it speaks to the comparative ability of white and black parents to pass along status to them and to help their children move up the social and occupational ladders. Second, and more directly bearing on wealth, [data in conjunction with our interviews highlight the vastly different wealth rewards that social mobility confers on whites and blacks. . . .

....

Our results indicate a strikingly high degree of occupational inheritance for those at the top of the status hierarchy. For respondents with upper-white-collar parents, occupational status is maintained nearly 60 percent of the time. By the same token, only one in eight of those with upper-white-collar backgrounds find themselves in the lowest ranking group. At the other end of the occupational range nearly one-third, like their parents, are in low-skilled occupations. Thus two-thirds of those from lower-blue-collar backgrounds achieved mobility. Those from lower-white-collar backgrounds experience a noteworthy amount of upward mobility; over half secure upper-white-collar professional and technical positions.

Things look very different, however, when we break down our findings by race. Results reveal a tale of "two mobilities." For whites the mobility figures for the general population are reproduced with a sharper emphasis on achievement and upward mobility. For blacks the achievement pattern changes significantly. . . .

Id. at 156-57.

emerged at three levels of inheritance: cultural capital, milestone events, and traditional bequests.¹¹⁴

Arguing “that the racialization of the welfare state and institutional discrimination are fundamental reasons for the persistent wealth disparities” between blacks and whites, Oliver and Shapiro identify government policies as the culprit.¹¹⁵ Government policies have discriminated against blacks in their “quest for economic security” while simultaneously aiding and abetting whites in their expansion of wealth.¹¹⁶

The following language from *Black Wealth/White Wealth* challenges the “free market theory of constitutional conservatism” discussed by West¹¹⁷ and written about in O’Connor’s affirmative action decisions:¹¹⁸

These [governmental] policies are not the result of the workings of the free market or the demands of modern industrial society; they are, rather, a function of the political power of elites. The powerful protect and extend their interests by way of discriminatory laws and social policies, while minorities unite to contest them. Black political mobilization has removed barriers to black economic security, but the process is uneven. As blacks take one step forward, new and more intransigent legislative or judicial decisions push them back two steps. . . .

....
The inheritance of accumulated disadvantages over generations has, in many ways, shortchanged African Americans of the rather dramatic mobility gains they have achieved. While blacks have made stunning educational strides, entered middle-class occupations at an impressive rate, and moved into political positions in numbers unheard of a quarter of a century ago, they have been unable to surmount the historical obstacles that inhibit their accumulation of wealth. Still today, they bear the brunt of the sedimentation of racial inequality.

....
Of course, this may simply be another way of saying that wealth is not only a function of achievement; rather, it can rise or fall in accordance with racially differential state policies¹¹⁹

Justice O’Connor’s opinions perpetuate a jurisprudence that continues to deprive blacks of a foundation upon which to build their wealth. There is no generational wealth among blacks because there is no societal or governmental

114. *Id.* at 169.

115. *Id.* at 174.

116. *Id.* Some of the government policies which were discriminatory included the Fair Housing Act, Social Security, and the United States Tax Code. *Id.*

117. See West, *supra* note 30, at 661-62.

118. See *supra* Part II.A.

119. OLIVER & SHAPIRO, *supra* note 1, at 174-75, 178.

foundation upon which blacks can build and transfer their wealth. Self-employed small business owners, such as the Minority Business Enterprise in *Croson*¹²⁰ and the subcontractor in *Adarand*,¹²¹ are examples of blacks who could, with the opportunity to participate in the capitalist system, generate sufficient income to ultimately amass wealth.

The real tragedy perpetuated by institutional white supremacy and the O'Connor opinions does not stop at the boundary lines of the black ghetto. The dearth of a sufficiently educated, high-tech labor pool¹²² is a direct result of an expansive spectrum of the population, namely blacks and other poor Americans, receiving minimal education.¹²³ If competition makes the product better, greater opportunity to compete as the contractor, rather than as only the laborer, would be beneficial to the entire country, not just blacks. There is an economic disservice done to the United States economy when only a few sit down at the competitive table. Wake up conservative constitutionalists, the wealthier the population is overall, the more likely our country is to have a vast, better educated, high-tech labor pool. America can hire its own. Furthermore, hiring through an affirmative action plan is far more liberating than depending on immigrant labor.

As we move away from the industrial age and into the information age, "whiteness as property"¹²⁴ is too expensive to maintain. More efficient countries that direct human energy to the highest possible level of capability will surpass the United States because some in this country have a collective belief in, and insistence on, white preference. At best, O'Connor's jurisprudence is too short-sighted, too "narrowly tailored,"¹²⁵ and too "unduly burden[some]"¹²⁶ for a country struggling to maintain global economic dominance. Opinions that are hostile to affirmative action, and thus legitimize the hostility in the continuing Confederacy, delay some of America's best and brightest in getting to the tables of negotiation and harvest. These same opinions retard this country's productivity potential.

Justice O'Connor's opinions showcase her as an elitist as well as a politician. Elitism requires scarcity. When too many African Americans are included in the capitalist market place, the scarcity that effectuates elitism disappears. Most elitists do not want to become commoners. In *Adarand*, Justice O'Connor devotes

120. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 482 (1989).

121. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 205 (1995).

122. See, e.g., Carolyn Lockhead, *Plan to Boost Tech-Worker Visas is Victim of Election-Year Politics*, S.F. CHRON., Aug. 25, 2000, at A1 (discussing claim by high-tech companies that unless the cap on high-tech visas increases, hundreds of thousands of jobs will be vacant and operations will move overseas); Tom McGhie, *Silicon Valley Logs on High-Tech Immigrants*, MAIL ON SUNDAY (London), Feb. 20, 2001, at 4 (describing how California's Silicon Valley has partly solved the problem of high-tech labor shortages by persuading the government to allow more skilled immigrant visas).

123. Eric Alterman, *The Class of the Internet*, WORTH, Winter 2000/2001, available at http://www.worth.com/content_articles/ZZZUE18IFGC.html (last visited Oct. 31, 2001).

124. Harris, *supra* note 3, at 1721.

125. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

126. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting).

significant space to addressing the dissenting opinion of Justice Stevens.¹²⁷ She also addresses the overruling of *Metro Broadcasting* in her discussion of *stare decisis*.¹²⁸ Having taken her stance and written the scrutiny test¹²⁹ to be applied to future affirmative action plans, O'Connor promotes the status quo elitism. Ironically O'Connor, the first woman appointed to the United States Supreme Court, took her seat and began eviscerating the concept of affirmative action that got her there. By handling discriminatory exclusion on an individual, case-by-case basis, O'Connor can continue to delay the economic rise of African Americans through the beginning of the twenty-first century.

III. THE POLITICIAN AT WORK

A. *The Battles*

she walked into forbidden worlds
impaled on the weapon of her own pale skin
she was a sentinel
at impromptu planning sessions
of her own destruction . . .¹³⁰

Justice Antonin Scalia has been one of Justice O'Connor's strongest critics, perhaps the strongest. Interestingly, Scalia's attacks on O'Connor highlight O'Connor's political nature, as exhibited in her opinions. Although Scalia is sometimes O'Connor's ally on other issues, he discredits O'Connor's affirmative action opinions and emphasizes that O'Connor's adherence to policy and precedent is elastic. She stretches policy and precedent as far as she needs to in order to carry out her agenda, or she simply decides to "revisit the issue." Justice O'Connor leaves herself that politician's wiggle room.

In *Croson*, Justice Scalia, in a concurring opinion, writes that although he agrees with much of O'Connor's opinion, he does not agree "with Justice O'Connor's dictum . . ."¹³¹ Furthermore, when the Court decided *Webster v. Reproductive Health Services*,¹³² in which the court reconsiders *Roe v. Wade*,¹³³ Scalia strongly criticizes O'Connor's concurring opinion: "[Justice O'Connor's] assertion, . . . that a 'fundamental rule of judicial restraint' requires us to avoid reconsidering *Roe*, cannot be taken seriously."¹³⁴ Scalia relentlessly points out that it "is not the rule of avoiding constitutional issues where possible, but the quite

127. See *Adarand Constructors, Inc.*, 515 U.S. at 227-31 ("[W]e believe [Justice Stevens'] criticisms reflect a serious misunderstanding of our opinion.").

128. *Id.* at 225-27.

129. *Id.* at 278 ("[T]he point of strict scrutiny is to 'differentiate between' permissible and impermissible governmental use of race.").

130. Harris, *supra* note 3, at 1709 (quoting Cheryl I. Harris, *poem for alma* (1990) (unpublished poem, on file at the Harvard Law School Library)).

131. *J.A. Croson Co.*, 488 U.S. at 520.

132. 492 U.S. 490 (1989).

133. 410 U.S. 113 (1973).

134. *Webster*, 492 U.S. at 532 (Scalia, J., concurring) (emphasis added).

separate principle that we will not 'formulate a rule of constitutional law broader than is required by the precise facts. . . .'¹³⁵ Scalia describes the Court's *Webster* decision as a contrivance "to avoid almost any decision of national import. . . ."¹³⁶ Scalia cites O'Connor's decision in *Croson* as an example of her willingness to write more than the case requires for the decision when it suits her purposes.¹³⁷ Scalia's concurrence in *Webster* reveals his frustration with O'Connor's use of judicial restraint to avoid overturning *Roe*.¹³⁸ When Scalia states, "[g]iven the Court's newly contracted abstemiousness"¹³⁹ and "under our newly discovered 'no-broader-than-necessary' requirement,"¹⁴⁰ he is clearly referencing O'Connor's tendency to use judicial restraint when she chooses. Scalia professed dismay regarding O'Connor's hesitation about Rehnquist's restructuring¹⁴¹ of *Roe*.¹⁴² "After all, [as] Scalia points out, Rehnquist's disposal of the trimester framework was based in large part on O'Connor's own prior critique."¹⁴³

In *Battles on the Bench*, Phillip J. Cooper chronicles the battles between O'Connor and Scalia growing out O'Connor's opinion in *Croson* and her concurrence in *Webster*.¹⁴⁴ Cooper writes:

A quite extraordinary event occurred on the last day of the Supreme Court's October 1988 term. Justice Antonin Scalia issued a stinging, pointed, and seemingly quite personal attack on a colleague in the form of a concurring opinion. The case was a suit against a Missouri statute that was adopted as a deliberate challenge to the Court's 1973 *Roe v. Wade* decision that recognized a right to abortion. What made Scalia's opinion so unusual was that it was not a criticism of the Court, or even a response to a dissenter. It was, rather, a public upbraiding of another concurring justice, Sandra Day O'Connor.

What made it worse was the public perception that Scalia was attempting to intimidate O'Connor into providing the crucial fifth vote that would reverse *Roe v. Wade*. That impression was reinforced because the *Webster* clash came just six months after a ruling in which Scalia had issued another stinging concurrence, this one aimed at the majority opinion prepared by O'Connor. Just to make certain that the point of his criticism was not lost, Scalia's

135. *Id.* at 533 (quoting O'Connor's concurring opinion which quoted *Ashwander v. TVA*, 297 U.S. 288, 347 (1936)).

136. *Id.* at 532.

137. *Id.* at 533.

138. *See id.* at 532-34.

139. *Webster*, 492 U.S. at 537 (Scalia, J., concurring).

140. *Id.*

141. *Webster*, 492 U.S. at 517-20. "The key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution [or in constitutional principles]. . . . [T]he result has been a web of legal rules . . . resembling a code of regulations rather than a body of constitutional doctrine." *Id.* at 517.

142. *Id.* at 532-35, 536 n.* (Scalia, J., concurring).

143. LAZARUS, *supra* note 21, at 408.

144. PHILLIP J. COOPER, *BATTLES ON THE BENCH* 49-52 (1995).

Webster concurrence took O'Connor to task and cited her own opinion in the earlier case, *Richmond v. Croson*, back to her.¹⁴⁵

Cooper continues by saying:

Scalia rejected the idea that O'Connor's refusal to cast the fateful vote to reject *Roe* could have been based on an attempt to avoid deciding constitutional questions unnecessarily. He also dismissed the notion that O'Connor's approach could be explained by "the quite separate principle that we will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,'" the argument advanced by O'Connor in her separate concurrence in *Webster*. If that principle was so important, he asked, why was it that Justice O'Connor had done exactly that in two previous cases that term and two other cases in recent years?¹⁴⁶

In *Closed Chambers*, Edward Lazarus assesses Justice Scalia's reaction to Justice O'Connor's decision to write a concurring opinion in *Webster* rather than join the Rehnquist opinion.¹⁴⁷ Lazarus uses the term "apostasy"¹⁴⁸ to describe Scalia's view of O'Connor's decision to write her own opinion: "Scalia circulated a brutal attack on O'Connor's professed devotion to 'judicial restraint.' For page after page, citing case after case, Scalia demolished the idea that O'Connor, as she claimed in *Webster*, was a principled advocate for addressing only those constitutional questions necessarily raised in a case."¹⁴⁹

Lazarus labels O'Connor's opinion in *Webster* as a pretense.¹⁵⁰ Lazarus, also accuses O'Connor of deciding on the result she wants and then writing whatever becomes necessary to reach that result.¹⁵¹

Mangling a statute virtually beyond recognition in order to manufacture a jurisprudential tie may have been a clever way for O'Connor to postpone giving a definitive verdict on *Roe*; it may even have been a courageous break from her accustomed allies; but it was an act of restraint only in the narrowest sense of its outcome.¹⁵²

145. *Id.* at 49 (footnotes omitted).

146. *Id.* at 50 (footnotes omitted).

147. LAZARUS, *supra* note 21, at 414-15.

148. *Id.* at 414.

149. *Id.* at 415.

150. *Id.* at 422 ("In *Webster*, what passed for judging was mostly pretense. Justice O'Connor wrapped her decisive opinion in the Brandeisian vestments of judicial self-restraint. The fit, however, was poor.").

151. *Id.* "She had predetermined that she wanted to uphold Missouri's statute under the Court's current precedents without revisiting *Roe*, and she did whatever was necessary to reach that goal." *Id.*

152. *Id.*

"For O'Connor, the recourse to judicial restraint was mere contrivance."¹⁵³ As Scalia elaborated in his dissent in *Webster*, O'Connor's jurisprudential forbearance was hardly consistent.¹⁵⁴ "When it suited her, especially in her favored field of states' rights, she rivaled Brennan in her zeal to write broad and unnecessary pronouncements on constitutional questions."¹⁵⁵ Lazarus further argues that "[o]ver and over, O'Connor had either written or joined opinions that had reached more broadly than required . . ."¹⁵⁶

In an assessment of the *Webster* opinion's impact on the stature of the Court, Lazarus concludes that the accusation of legal interpretation being driven by personality and politics, an accusation once almost unheard of from the Justices themselves, is one that is routinely leveled.¹⁵⁷ Justice O'Connor's dichotomous affirmative action opinions demonstrate the dual facets of her personality:

Some who encounter O'Connor describe her as stiff and terse. Others say she is courteous and charming. Both are accurate. Visitors to the court are more likely to see the business-minded justice at work, while those who see her on the Washington social circuit are more likely to speak of the gracious and amiable justice.¹⁵⁸

One ventures to say that controlling precedent in the affirmative action arena of the law is Justice O'Connor's personality and politics—her Machiavellian will to power.

B. Power Politics at Grass Roots Extremity

If Lazarus' description of what happens behind the scene of the courtroom and in chambers is to be believed, somewhere Justice O'Connor learned to be coy, and she has brought the energy of the word into her political arena with all of the negativity that the term implies.¹⁵⁹ In *Richmond v. J.A. Croson Co.*, O'Connor's flirtatious opinion led legal scholars and lawyers to believe that affirmative action plans could continue to prevail if they simply met a standard of scrutiny that included evidence of prior state discrimination.¹⁶⁰ Flirts always leave the other party hoping that there might be some chance of success. However, O'Connor proved with her opinion in *Adarand Constructors, Inc. v. Peña*¹⁶¹ that the hopes of affirmative action supporters would never come to fruition.

Through flirtation and politics, O'Connor exercises her will on the Court. O'Connor's opinions are the flagship opinions for affirmative action. Interestingly,

153. LAZARUS, *supra* note 21, at 422.

154. *Webster*, 492 U.S. at 532-36.

155. LAZARUS, *supra* note 21, at 422.

156. *Id.* at 415.

157. *Id.* at 415-23.

158. David G. Savage, *Sandra Day O'Connor*, in 8 MEN AND A LADY 209 (1990).

159. See LAZARUS, *supra* note 21, at 414-15.

160. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-506 (1989).

161. *Harris v. Forklift Sys., Inc.*, 515 U.S. 200 (1995).

her opinion for the Court in *Harris v. Forklift Systems, Inc.* validated and established parameters for “hostile-work-environment” claims.¹⁶² O’Connor understands what it is like to be a woman with a career in a male-dominated profession. However, she does not understand being black or poor.

Other scholars have also questioned Justice O’Connor:

Her respect, even admiration, for the ruggedly self-reliant individual is strikingly evident in O’Connor’s famous concurrence in *Price Waterhouse v. Hopkins*. [Ann Hopkins] was denied partnership because she was not conventionally feminine in her dress and demeanor. To O’Connor, this was the essence of gender discrimination.

O’Connor’s majority opinion in *Ford Motor Company v. EEOC* is in stark contrast. That case was brought by a group of women with blue collar, factory jobs who had previously prevailed in a Title VII sex discrimination claim against Ford. . . .

In considering the nature and extent of the damages owed by Ford, O’Connor displayed an almost *Lochnerian* disregard for the plaintiffs’ job security concerns. According to O’Connor, requiring Ford to offer retroactive seniority would hurt those “innocent” male employees who had accrued seniority during the pendency of plaintiffs’ litigation. . . .

. . . O’Connor, the successful career woman, can understand and empathize with Ann Hopkins and the humiliation she suffered. But O’Connor has little appreciation of the economic vicissitudes faced by the women working at Ford and their concerns for job security are foreign to her. Once again, her experiential reasoning is bounded by the scope of her own life experiences.

A similar myopia is evident in Justice O’Connor’s decisions on affirmative action.¹⁶³

As an elitist seeking power, O’Connor must continue to make herself appear moderate. By portraying herself as moderate, her opinions can carry a plurality, if not the majority. In some cases, she does not carry the majority because the more progressive Justices will not join in her opinion. In the area of affirmative action, O’Connor is openly hostile to attempts to change the status quo. The status quo understands whiteness and preference to be one and the same. Relying on her personal life experiences, Justice O’Connor simply cannot understand people different from herself. She understands only the privileged white establishment and

162. 510 U.S. 17, 18-23 (1993).

163. Brown et al., *supra* note 21, at 1241-43 (footnotes omitted).

its progeny, institutionalized racism.¹⁶⁴ However, even here Edward Lazarus accuses her of being disingenuous.¹⁶⁵

In *Closed Chambers*, Lazarus makes clear that he believes O'Connor's opinion in *Croson* lacked intellectual integrity.¹⁶⁶ He makes two quite telling points: (1) O'Connor's opinion "fairly reeked of hypocrisy,"¹⁶⁷ and (2) O'Connor's opinion was a "deeply cynical use of law."¹⁶⁸

Lazarus makes his point on the hypocrisy issue by noting O'Connor's failure to consider the relevance of Richmond's racist history in writing the *Croson* opinion for the Court.¹⁶⁹

This history, much of it recent, was relevant as more than just atmospherics. On behalf of a majority of the Court, Justice O'Connor was ruling that, for the purposes of judicial review, a preference in favor of a black contractor was the legal equivalent of a law discriminating against a black contractor. In the context of Richmond, this bland equivalence rankled. As even one opponent of affirmative action said of such arguments, "To pretend . . . that the issue [of affirmative action] was the same as the issue in *Brown* is to pretend that history never happened and that the present doesn't exist."

....

164. Gottlieb, *supra* note 6, at 232.

[O'Connor's] opinions stress that individuals must earn what they have and use it in what she regards as the public interest. O'Connor's view of the public interest, however, is confined by a narrow perspective which leads her to understand and trust voices of the establishment far more than those outside of it.

Id. (footnotes omitted).

165. See LAZARUS, *supra* note 21, at 300.

166. *Id.* at 299.

167. *Id.*

168. *Id.* at 300.

169. *Id.* at 298.

In education, rather than comply with *Brown v. Board of Education*, this former capital of the Confederacy had pursued a policy marked by what a panel of the Fourth Circuit Court of Appeals once called "sordid" efforts to "circumvent, defeat, and nullify" the constitutional right of black children to attend desegregated schools. In social relations, until 1967 Richmond was the capital of a state that prohibited interracial marriage for fear of creating a "mongrel race." In politics, as Richmond's black population neared 50 percent, the city's white elite, determined to thwart growing black political power, decided to dilute black voting strength by annexing part of an all-white neighboring county. Only federal court intervention scotched the plan. And in housing, Richmond's neighborhood development was so rife with bigotry—racially restrictive covenants, race-based reclining, and the like—that one court accused city officials of "tending to perpetuate apartheid of the races in ghetto patterns throughout the city."

Id. (footnotes omitted).

That O'Connor chose to slight this history suggested to those who held opposing points of view that her stand was grounded not in a high-minded opposition to race discrimination of every kind but in an indifference to the larger issue of racism that formed the legal, moral, and political backdrop to the case. And this suspicion was emphatically confirmed and compounded by the fact that a crucial aspect of her legal analysis fairly reeked of hypocrisy.¹⁷⁰

Lazarus also argues in *Closed Chambers* that O'Connor uses the law cynically to advance her political agenda:

But whether or not others accepted the interpretation O'Connor advanced, it was practically unimaginable that the Justice subscribed to *her own reasoning*. In the annals of the modern Court, no Justice, with the possible exception of Rehnquist, has been more steadfastly devoted to states' rights—to their autonomy, to the breadth of their powers, to the extreme deference owed the judgments of their officials—than the former Arizona legislator and state court judge Sandra Day O'Connor. She had been weaned on her rancher-father's vehement opposition to the big government social welfare policies of Roosevelt's New Deal, and every station in her professional career—from her first job as a deputy county attorney in San Mateo, California, through her work as a precinct captain for Barry Goldwater in 1964, until her appointment to the Arizona bench—had served only to confirm her inherited bias toward lean government and local autonomy. In every other field of law, from habeas corpus to economic regulation, and in those opinions in which O'Connor herself took the greatest pride, she championed state authority in the face of federal interference and exalted the centrality of state sovereignty in the overall constitutional scheme.

170. *Id.* at 298-99 (alteration in original) (footnotes omitted).

In this respect, the problem with Justice O'Connor's opinion was not that it concluded that all racial distinctions, both benign and invidious, must be subjected to the same level of exacting scrutiny. The problem was it reached this conclusion in a manner that ignored and seemed almost to trivialize the suffering of the millions of blacks who had experienced by far the heaviest burden of this country's racism—many of them in the very place from which the *Croson* case arose. If, as O'Connor alleged, the Constitution protected Richmond's whites and blacks equally from the effects of racial preferences, it was not because the races were somehow equal in their victimhood; nor was it (as the tone of O'Connor's opinion sometimes seemed to suggest) because racism against Richmond's blacks was a relic of the past. It was because the oppression of Richmond's blacks and their ancestors throughout the nation had brought into being a principle of constitutional equality won not only for themselves but for everyone, of every color, who came after.

Id. at 299.

For O'Connor newly to discover that, in the single circumstance of affirmative action, states were suddenly and peculiarly disempowered in comparison to the federal government, was a deeply cynical use of law. . . . In 1995, in [*Adarand Constructors, Inc. v. Peña*,] an opinion striking down a new *federal* construction set-aside[,] . . . O'Connor repudiated her *Croson* interpretation of the Fourteenth Amendment and miraculously rediscovered that the provision's constitutional mandate of equality applied "congruently" to the states and the federal government.¹⁷¹

It is this cynical aspect of O'Connor's *Croson* opinion that frustrated Scalia in *Webster v. Reproductive Health Services*.¹⁷² Clearly, this cynicism draws the disrespect of Lazarus in *Closed Chambers*:¹⁷³

Employing whichever legal arguments are necessary and effective to defend a position is part of the craft of being a lawyer. It is not, however, a legitimate part of judging. Judges serve as the law's referees. They cannot declare illegitimate a particular type of reasoning in one case and then use it themselves in another. To do so invites colleagues and the community to suspect their motives, especially when the subject matter is as sensitive as race. In *Croson*, Justice O'Connor brought such charges to her door.¹⁷⁴

Such charges find a home at O'Connor's door because of her consistency in writing for convenience rather than conviction and her consistency of self-reference as her single source of authority.

The hypocrisy in O'Connor's opinions indicates that she is, above all else, a politician determined to prevail. In her determination to prevail, she is aware of the power she exerts by shifting her position to cast powerful and decisive votes on the Court.¹⁷⁵ As Lazarus notes:

Occupying the pivot is often a deliberate strategy. Indeed, Kennedy has been known to brag about expressing views at conference designed to make him a necessary but distinctive fifth vote for a majority. O'Connor pursues the same policy more

171. LAZARUS, *supra* note 21, at 300-01 (emphasis in original) (footnotes omitted).

172. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 532-33 (1989) (Scalia, J., concurring).

173. LAZARUS, *supra* note 21, at 300-01.

174. *Id.* at 301.

175. See Peggy Edersheim Kalb, *The 30 Most Powerful Women in America*, LADIES' HOME J., Nov. 2001, at 110, 112. Kalb ranks O'Connor as the second most powerful woman in America and notes that "her extraordinary power comes largely from her role on a divided [C]ourt—with O'Connor often casting the deciding vote." *Id.* Kalb notes that O'Connor's vote is considered critical in upcoming issues such as "school vouchers and voter redistricting" and that "O'Connor's decision on these issues will affect how billions of dollars will be spent." *Id.*

quietly. Both, in effect, hold constitutional interpretation hostage to their personal and often idiosyncratic views.¹⁷⁶

It is evident that Justice O'Connor often finds ways to fit a square peg in a round hole, but she takes every opportunity to dislodge a round peg from a round hole. Though she tries to argue the Court's position under the veil of conservatism, the argument is better labeled individualism. Unfortunately, this individualism has been detrimental to African Americans.¹⁷⁷

C. *A Theoretical Analysis of O'Connor's Quest for Power*

In this Essay, power is defined as "the ability to favorably change the bargaining set."¹⁷⁸ In the 1880s, Friedrich Nietzsche, in a discussion of power, noted that "[p]sychologists should bethink themselves before putting down the instinct of self-preservation as the cardinal instinct of an organic being. A living thing seeks above all to *discharge* its strength—life itself is *Will to Power*; self-preservation is only one of the indirect and most frequent *results* thereof."¹⁷⁹ Justice O'Connor is well beyond the self-preservation stage of her career. She is at the zenith of her career in terms of years, and, during those years, she has been building her power blocks—one case at a time.¹⁸⁰ As has been noted, O'Connor uses her power to sway the Court when it favors her beliefs.¹⁸¹

Though Justices O'Connor and Scalia each subscribe to the Court's conservative equality jurisprudence, their battles are well noted.¹⁸² Robin West argues that the origin of equal protection rendered by the Court "can readily and easily be traced to conservatism's political and jurisprudential premises."¹⁸³ For this proposition, West cites *City of Richmond v. J.A. Croson Co.*¹⁸⁴ as the conservative Court's paradigm Equal Protection Clause case, destined to become central to the conservatives' developing understanding of equality doctrine.¹⁸⁵

To say that O'Connor and Scalia subscribe to the conservative Court's jurisprudence on equality doctrine is an understatement. Of course they subscribe to

176. LAZARUS, *supra* note 21, at 515.

177. See *supra* Parts II.A & B.

178. DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR* 250 (1986).

179. NIETZSCHE, *supra* note 22, at 18.

180. See Kalb, *supra* note 175, at 110. Kalb ranks O'Connor as the most powerful American woman in the "Financial Impact" category:

Money may not be everything, but controlling it confers great power. While our list includes many very wealthy women, Supreme Court Justice Sandra Day O'Connor took the top score in this category. O'Connor plays an important, and sometimes unpredictable, role in final decisions with huge *financial impact*—potential rulings as diverse as whether school vouchers are constitutional, and what should happen in the ongoing Microsoft case.

Id.

181. LAZARUS, *supra* note 21, at 413-16.

182. See *supra* Part III.A.

183. West, *supra* note 30, at 669.

184. 488 U.S. 469 (1989).

185. West, *supra* note 30, at 669.

it—they wrote it. Tracing her theory of the Court's conservatism regarding competition, West writes the following:

[In the politics of a] free-market conservative, race ought not to be a determinant of legislative decisionmaking that affects the success of individuals in competitive economic markets—*regardless of whether the motive of such legislation is benign or malignant*. . . . For the conservative instrumentalist, the purpose of law should be to free economic competition, so that economic power can prevail unimpeded by extrinsic considerations. The [E]qual [P]rotection [C]lause should therefore be read in such a way as to further this purposive mandate. Discriminatory, race-conscious legislation generally inhibits rather than furthers competition, and hence trenches on competitive values. If competitive rationality is the purpose—and therefore the meaning—of equality and of equal protection, it obviously makes no difference whether the discriminatory legislation is malignant or benign—either way it inhibits competition. The result in *Croson* is substantially in accord. Thus, Justice O'Connor's summary of the Court's holding emphasizes both the value of competition and conservative instrumental themes¹⁸⁶

In *Croson*, O'Connor's opinion protects economic advantage. The opinion delivers ongoing institutionalization of "whiteness as property,"¹⁸⁷ and portrays precisely what Michel Foucault says needs to be understood about power:

We need to see how these mechanisms of power, at a given moment, in a precise conjuncture and by means of a certain number of transformations, have begun to become economically advantageous and politically useful It is only if we grasp these techniques of power and demonstrate the economic advantages or political utility that derive[d] from them in a given context for specific reasons, that we can understand how these mechanisms come to be effectively incorporated into the social whole.¹⁸⁸

The very real impact of O'Connor's affirmative action opinions is that they cater to conservative theorists and reward the conservative, grassroots following with continued advantage. This advantage jeopardizes the integrity of competition. As with the game of golf, only when the handicap is accounted for is there integrity in competition. Competition without integrity fails to utilize all available and able

186. *Id.*

187. Harris, *supra* note 3, at 1707.

188. MICHEL FOUCAULT, *POWER/KNOWLEDGE* 101 (Colin Gordon ed., Colin Gordon et al. trans., 1980).

energy. O'Connor's power on the Supreme Court flows into the capillaries of the American economy and stifles international competition with institutional racial prejudice.

In an analysis of power, Foucault urges that we go beyond the central location of power and apply it "at its extremities, in its ultimate destinations, with those points where it becomes capillary, that is, in its more regional and local forms and institutions."¹⁸⁹ Following this analysis, one should look beyond the courts and the legal system to see the impact of O'Connor's opinions. The institutions held in place by the power of "the law" would be the focus of this analysis. A good example of a capillary of Supreme Court power is the bidding process for state-sponsored projects in this country. Because of *Richmond v. J.A. Croson Co.*,¹⁹⁰ those already empowered can expect ongoing entitlements. Foucault explains how central power flows through capillaries at the "point where power surmounts the rules of right which [organize] and delimit it and extends itself beyond them, invests itself in institutions, becomes embodied in techniques, and equips itself with instruments and eventually even violent means of material intervention."¹⁹¹ This fulcrum point that Foucault describes is institutional racism, and its impact is evident when a parts supplier such as the one in *Croson* refuses to quote a price for parts to an African American businessman attempting to bid on a job.¹⁹²

The Foucault description of power flowing into the extremities of a system describes how O'Connor's affirmative action politics have impacted African Americans. One author has said that "Justice O'Connor used the phrase 'strict scrutiny' despite its long history of use by opponents of affirmative action who advocate a color-blind approach to block color-conscious remedy. If she did not mean to gut affirmative action, she should change her phrase or explain it better."¹⁹³ Perhaps O'Connor did mean to gut affirmative action as she indicated in *Adarand*.¹⁹⁴ The writer continues: "Failure to correct the course set by the underlying messages of *Croson* will make Justice O'Connor, more than any other Justice, responsible for a retrenchment by federal and state courts in the response to race discrimination."¹⁹⁵ O'Connor toes the party line on the race question, insisting on a "color-blind" interpretation of the Equal Protection Clause and on a "formal" understanding of the equality that Clause protects. Therefore, city, state, and federally initiated affirmative action plans that are meant to eradicate the effects of societal discrimination are unconstitutional.¹⁹⁶ Unless O'Connor overrules herself, she will continue to toe the party line—a party line she created through her opinions.

189. *Id.* at 96.

190. 488 U.S. 469 (1989).

191. FOUCAULT, *supra* note 188, at 96.

192. *See Croson*, 488 U.S. at 482.

193. Douglas D. Scherer, *Affirmative Action Doctrine and the Conflicting Messages of Croson*, 38 U. KAN. L. REV. 281, 340 (1990).

194. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

195. Scherer, *supra* note 193, at 340.

196. West, *supra* note 30, at 670, 672.

IV. CONCLUSION

*"Thus, to summarize, equality means 'formal equality' and no more in the conservative paradigm"*¹⁹⁷

In response to an invocation of the principle of color blindness as the basis for opposing remedial programs, Burke Marshall stated:

I think that we would have no debate over whether or not a policy of nondiscrimination or [color blindness] is an ideal for an ideal society. The problem is that ours is not an ideal society. Ours is a society that is still permeated by racial discrimination and even more so by the traces of racial oppression that was permitted legally as well as socially and economically up until a little less than thirty years ago. And in that context it does not seem to me that it is possible to take the position . . . that the remedy for discrimination can be on a basis that does not take race into account.¹⁹⁸

Oliver and Shapiro would argue that nothing has changed over the past thirty years. Certainly, the two would argue that African Americans continue to experience racial oppression that deprives the black population of wealth in the form of assets. Housing segregation and neighborhood redlining are not legal. Even so, the practices seemingly continue and their impact continues to be felt.¹⁹⁹

From an economic impact perspective, "[i]n American society, a stable economic foundation must include a command over assets as well as an adequate income flow. Nowhere is this observation better illustrated than by the case of black Americans."²⁰⁰ Oliver and Shapiro insist that:

Too much of the current celebration of black success is related to the emergence of a professional and middle-class black population that has access to a steady income. Even the most visibly successful numbers of the black community—movie and TV stars, athletes, and other performers—are on salary. But, income streams do not necessarily translate into wealth pools. Furthermore, when one is black, one's current status is not easily passed on to the next generation. The presence of assets can pave the way for an extension and consolidation of status for a family over several generations.²⁰¹

197. *Id.* at 672.

198. Burke Marshall, *A Comment on the Nondiscrimination Principle in a "Nation Of Minorities,"* 93 YALE L.J. 1006, 1006 (1984).

199. See Haya El Nasser & Paul Overberg, *Index Charts Growth in Diversity*, USA TODAY, Mar. 15, 2001, at 3A (arguing that even though the nation's diversity index increased by twenty-three percent from 1990 to 2000, segregation continues).

200. OLIVER & SHAPIRO, *supra* note 1, at 175.

201. *Id.* at 175-76.

Oliver and Shapiro clarify the importance of generational wealth. The authors are unequivocal in their position that the economic cleavages between the races are deep and historically rooted.²⁰² Lest one stutter in the iteration about the nexus between race and class, the authors repeat:

The interaction of race and class in the wealth accumulation process is clear. Historical practices racist in their essence have produced class hierarchies that, on the contemporary scene, reproduce wealth inequality. As important, contemporary racial disadvantages deprive those in the black middle class from building on their wealth assets at the same pace as similarly situated white Americans.²⁰³

The affirmative action plan in *Croson*,²⁰⁴ the monetary incentive in *Adarand*,²⁰⁵ and the minority ownership policies in *Metro Broadcasting, Inc.*²⁰⁶ had a common intent. Each was designed to offer a helping hand to black, small-business owners who were self-employed. Many small businesses fail “within the first five years.”²⁰⁷ Furthermore, “[s]evere economic restrictions have historically prevented many African Americans from establishing successful businesses. These include segregation, legal prohibition, acts of violence, discrimination, and general access only to so-called black markets.”²⁰⁸ The challenged affirmative action plans that were held unconstitutional would have helped many families see their small businesses succeed, and struggles to lessen a deeply rooted poverty could have produced the beginnings of generational asset building.

Personal position in society—personal status—plays a significant role in creating a feeling of security about the future. Assets give us a feeling that there is always a safety net underneath as we seek our own self-actualization. “‘The secret point of money and power in America is neither the things that money can buy nor power for power’s sake . . . but absolute personal freedom, mobility, privacy,’ according to Joan Didion. Money allows one ‘to be a free agent, [and] live by one’s own rules.’”²⁰⁹ The “free agent” lifestyle for blacks is precisely what the “rights of whites”²¹⁰ intend to prevent. An increase in black free agents would cause the labor pool to shrink at the expense of the white workforce.

Justice O’Connor’s will to power drives her politics on affirmative action. She understands very well the value of assets. She undoubtedly knows that color-blind theory effectuates a divided America. She also must know that white entitlement is anchored in the deprivation of minorities.

202. *Id.* at 176.

203. *Id.*

204. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477 (1989).

205. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 205 (1995).

206. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 555 (1990).

207. OLIVER & SHAPIRO, *supra* note 1, at 182.

208. *Id.*

209. *Id.* at 172.

210. Greene, *supra* note 20, at 1517.

Affirmative action is about more than individual income generation. When one views depriving a minority of an opportunity to win a bid or obtain a radio license as a block to gaining generational wealth and as asset deprivation, the severe deleterious impact of O'Connor's opinions becomes evident. The opinions support the deprivation of black intergenerational transmission of wealth. What an impoverished legacy Justice O'Connor has handed to African Americans and ultimately to the American economy.²¹¹

211. In *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), the Court remanded the case for a determination of whether the factual circumstances, including congressional findings relied on for passage of the legislation that fostered the *Adarand* litigation, could withstand a narrowly tailored remedy test. *Id.* at 237-39. In its decision, the Tenth Circuit Court of Appeals, on yet another appeal from the trial court, held that the most recent congressional action *meets* the test and that the remedy provided for is sufficiently narrowly tailored. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1176-88 (10th Cir. 2000). This decision held *constitutional* the incentive so hotly contested in the seemingly neverending *Adarand* litigation. *Id.* Both the trial court and court of appeals noted that it is time the litigation ended. *Id.* at 1161; *Adarand Constructors, Inc. v. Peña*, 965 F. Supp. 1556, 1558 (D. Colo. 1997).

Like Scherer, *supra* note 193, the author is willing to engage in wishful thinking. This author is more than willing to have the thesis of this Essay proven wrong and read a Supreme Court decision in which Justice O'Connor votes to find any affirmative action plan constitutional. It would be better still if she wrote the opinion upholding the plan. Only then will one really know if the O'Connor opinion in the Court's existing *Adarand* case actually intends that strict scrutiny not be fatal in theory and also not be fatal in fact. The Supreme Court's acceptance of the latest round of *Adarand* litigation for decision is located at 121 S. Ct. 1401 (2001).

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