South Carolina Law Review

Volume 54 | Issue 2 Article 3

Winter 2002

Reply to Professor Tarpley's Comment Regarding Justice Sandra Day O'Connor

Jean H. Toal
Supreme Court of South Carolina

ESSAY
REPLY TO PROFESSOR TARPLEY'S COMMENT REGARDING JUSTICE SANDRA DAY O'CONNOR

JEAN HOEFER TOAL*

I. INTRODUCTION

The Fall 2001 book of the *South Carolina Law Review* contains an essay by Joan Tarpley, J.D., Professor of Law at the Walter F. George School of Law, Mercer University entitled, *A Comment on Justice O'Connor's Quest for Power and Its Impact on African American Wealth.*[1] The essay is an overheated, sensational personal attack masquerading under the guise of legal scholarship. Its thesis is that Justice O'Connor is a white supremacist who, through her opinion in *City of Richmond v. J.A. Croson Co.*,[2] seeks to dismantle affirmative action jurisprudence and strengthen her position as the swing vote on the United States Supreme Court in order to exercise the power of Chief Justice, in fact, if not in name.

Selection to the editorial staff of the *South Carolina Law Review* in the spring of my first year of law school remains one of the proudest events of my

*Chief Justice, Supreme Court of South Carolina.

1. Joan Tarpley, *A Comment on Justice O'Connor's Quest for Power and Its Impact on African American Wealth*, 53 S.C. L. REV. 117 (2001).

2. 488 U.S. 469 (1989).

legal career. For over 35 years, I have followed with pride and contributed to the progress of our law journal. I was keenly disappointed to read such a racist article in our Law Review, but if simple disagreement were the only motivation, my own opinions would have remained completely private.

Respect for the Law Review's obligation to present a variety of opinions, made me hesitate over this past year to publicly discuss this article. The First Amendment is considered by many, including myself, to occupy the status of *primus inter pares* among the constitutional amendments which comprise the Bill of Rights.[3] In our country, freedom to express the most unpopular point of view is the handmaiden of liberty, the foundation of all the other protections contained in the original constitutional framework. However, I have concluded that Professor Tarpley's article does necessitate a response, not only to discuss the merits of her analysis, but also to address what I consider to be the real evil of her article: the implication her attack on Justice O'Connor, as a judge, has for the independence of the judiciary of the United States.

At the outset, it may be rightly observed that members of the United States Supreme Court, with a lifetime appointment, have very little to fear from even the most savage and unwarranted criticisms. However, I would suggest that the unchallenged use of *ad hominem* attacks as a vehicle for discussing the opinions or rulings of a judge creates a climate of disrespect for the rule of law which undermines the very foundation of freedom in America. Thus, I am determined to use this Essay both to reply to Professor Tarpley and to discuss judicial independence.

II. BACKGROUND

The founders of this nation recognized that judicial independence is essential to the administration of justice and sought to establish a judiciary free from political and personal agendas.[4] As noted in the Preamble to the Code of Judicial Conduct,[5] "Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that

3. U.S. CONST. amend. I.

4. DAVID MCCULLOUGH, JOHN ADAMS 103 (2001). In trying to convince his colleagues that a Bill of Rights should be inserted into the Constitution, James Madison stated that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive. . . ." Maeva Marcus, *The Adoption of the Bill of Rights*, 1 WM. & MARY BILL RTS. J. 115, 119 (1992) (quoting James Madison's speech to the House of Representatives (June 8, 1789)). Similarly, Alexander Hamilton displayed his belief in the independent judiciary when he quoted Baron de Montesquieu: "'[T]here is no liberty, if the power of judging be not separated from legislative and executive powers'. . . . The complete independence of the courts of justice is peculiarly essential in a limited Constitution." THE FEDERALIST NO. 78, at 491 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

5. Rule 501, SCACR.

govern us." Judges "must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system."[6]

Since the Court's early days, the press has subjected the Justices of the United States Supreme Court to criticism. In the landmark decision *Marbury v. Madison*[7] the Supreme Court announced the doctrine of judicial review, thereby avoiding a showdown between the executive and judiciary. Republican newspapers denounced Federalist Chief Justice John Marshall's opinion as "a political act unworthy of a court of law."[8] In contrast, Federalist papers heralded Marshall's opinion as a "stroke of genius, which saved the concept of an independent judiciary from certain destruction."[9] Although the Court ultimately held it lacked jurisdiction to rule on the question presented because the statute conferring jurisdiction was unconstitutional, the Chief Justice first made it clear that President Jefferson's actions in permitting Madison to withhold delivery of the commissions authorized by President Adam's administration were "not warranted by law, but violative of a vested legal right."[10] Significantly, while Jefferson's party's newspapers openly criticized Marshall's Court as politically motivated, President Jefferson himself kept his disagreement with the Court's decision private.[11] President Jefferson's restraint is particularly remarkable in light of the public perception of Chief Justice Marshall's opinion "as an attack upon [Jefferson's] integrity and the policies of his administration."[12]

A more recent and egregious judicial attack occurred in the wake of the Supreme Court's *Brown v. Board of Education* decisions.[13] On the heels of *Brown* and other controversial decisions, the John Birch Society initiated a nationwide campaign to impeach Chief Justice Earl Warren and Justice William Douglas.[14] The group mounted their campaign by scattering "Impeach Earl Warren" billboards around the country and even sponsored a nation-wide

---

6. *Id.* at pmbl.

7. 5 U.S. 137 (1803). This case arose out of the attempt of President Jefferson's Secretary of State, James Madison, to prevent delivery of commissions for the office of Justice of the Peace for the District of Columbia. The commissions had been authorized by the preceding Adams administration, but were never delivered. See Johnny C. Burris, *Some Preliminary Thoughts on a Contextual Historical Theory for the Legitimacy of Judicial Review*, 12 OKLA. CITY U. L. REV. 585, 608-26 (1987), for an overview of the highly charged election of 1800 and ensuing power struggle between the Federalist and Republican parties leading up to Justice Marshall's opinion.

8. Burris, *supra* note 7, at 639.

9. *Id.* at 634-35 (footnote omitted).

10. *Marbury*, 5 U.S. 137 at 162; *see also* Paul E. McGreal, *Ambition's Playground*, 68 FORDHAM L. REV. 1107 (2000) (discussing *Marbury v. Madison* and its relationship to the Constitutional doctrines of judicial review and checks and balances).

11. Burris, *supra* note 7, at 641-42.

12. *Id.* at 641 (citations omitted).

13. 347 U.S. 483 (1954); 349 U.S. 294 (1955).

14. Charles J. Ogletree, Jr., *Judicial Activism or Judicial Necessity: The D.C. District Court's Criminal Justice Legacy*, 90 GEO. L.J. 685, 693 (2002).

essay competition on the subject of why Earl Warren should be impeached.[15] Two extremists, Fulton Lewis, Jr. and retired Marine Colonel Mitchell Paige, spoke at forums around the country advocating that Chief Justice Warren be hanged.[16]

III. PROFESSOR TARPLEY'S ATTACK ON JUSTICE O'CONNOR

Professor Tarpley launched a similarly outrageous attack in her article, *A Comment on Justice O'Connor's Quest for Power and Its Impact on African American Wealth*.[17] Admittedly, Professor Tarpley was exercising her constitutional right of free speech in criticizing the affirmative action decisions of Justice O'Connor. Since the United States Supreme Court's rulings are not subject to appellate review, it is essential that academic criticism be leveled against its decisions. However, in her attempt to uncover an improper agenda underlying Justice O'Connor's decisions in affirmative action cases, Professor Tarpley resorts to a sensationalistic and very personal attack on Justice O'Connor. Professor Tarpley's chosen form of criticism—attribution of extrajudicial motives to Justice O'Connor—is devoid of arguments that might further the cause of affirmative action and is also damaging to the overall independence of our judiciary.

Although Professor Tarpley is free to disagree with Justice O'Connor's affirmative action decisions, as did the members of the United States Supreme Court who dissented in those cases, it is completely unwarranted to allege, with no basis whatsoever, that Justice O'Connor is a "Machiavellian"[18] power seeker who will manipulate the law to achieve her goals. The Professor's article bristles with footnotes and citations and yet her central thesis is pure fantasy, unsupported by any evidence. Professor Tarpley's essay is replete with unfounded statements, such as the allegation that Justice O'Connor's appointment to the Court prevented "some well-deserving white male" from being appointed "because of the discriminatory gender preference in favor of [Justice] O'Connor."[19] The inflammatory assertions that Justice O'Connor has a "primal intent to preserve white status quo elitism each time she confronts an affirmative action plan,"[20] wishes to "protect white entitlement,"[21] has "a resolute fidelity to 'white supremacy,'"[22] and is "an elitist"[23] lack any foundation and verge on libel. Professor Tarpley's analogies of Justice

15. *Id.*
16. *Id.*
17. Tarpley, *supra* note 1.
18. *Id.* at 139.
19. *Id.* at 119.
20. *Id.* at 120.
21. *Id.* at 122.
22. *Id.* at 120.
23. Tarpley, *supra* note 1, at 135.

O'Connor's affirmative action decisions to "street gang warfare"[24] and "Bull Connor's Alabama helmet police and savage dogs"[25] are ironically reminiscent of the reverse sensationalism employed by the John Birch Society against Chief Justice Earl Warren in the 1950s.[26] Such irresponsible characterizations are normally confined to the realm of the pulp press and fortunately find no foothold in academia. The use of such unjustified, inflammatory language by a member of the Bar who is entrusted with the education of future attorneys is particularly disturbing to me.

Interestingly, Professor Tarpley indicated in a 1999 law review article on the Supreme Court's decisions on sexual harassment that Justices O'Connor and Ginsberg were "holding down their branch of government well."[27] Apparently, when Professor Tarpley agrees with Justice O'Connor's decisions, she believes the Justice is an able jurist. However, when she disagrees, the professor lashes out with vicious castigation.

Professor Tarpley offers no support for her attacks on Justice O'Connor's application of the law in affirmative action cases. Instead, her essay is merely a hostile attack on Justice O'Connor and the judiciary as a whole. Professor Tarpley's assertion that Justice O'Connor portrays herself as moderate so that other members of the Court will join in her opinions[28] implies that the other members of the Court are unable to comprehend the true effect of Justice O'Connor's opinions.

Although I may join Professor Tarpley in disagreement with Justice O'Connor's affirmative action analysis on an academic level, I am still able to recognize that Justice O'Connor's affirmative action opinions represent the struggle of all members of the United States Supreme Court to develop a coherent, effective, and constitutional approach to remedy past and to prevent future discrimination based on race and gender. The complicated and contradictory history of recent affirmative action decisions warrants at least a sketch as background to my comments.

IV. THE EVOLUTION OF THE STRICT SCRUTINY STANDARD FOR EQUAL PROTECTION CHALLENGES TO RACE-BASED CLASSIFICATIONS

In *City of Richmond v. J.A. Croson Co.*[29] the Supreme Court reviewed the City of Richmond's ("City") affirmative action plan for city construction contracts. The City's plan required that prime contractors subcontract at least thirty percent of the dollar amount of their contracts to minority business

---

24. *Id.* at 119.

25. *Id.*

26. *See supra* notes 14-16 and accompanying text.

27. Joan R. Tarpley, *American Jurisprudence and Myth Viewed Through the Lens of the Supreme Court and Sexual Harassment*, 23 AM. J. TRIAL ADVOC. 291, 321 (1999).

28. Tarpley, *supra* note 1, at 140.

29. 488 U.S. 469 (1989).

enterprises (MBE) owned or controlled by citizens who are "Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts."[30] The City provided for a waiver of this thirty percent set-aside upon proof that sufficient minority businesses were unavailable or unwilling to participate.[31] J.A. Croson Co., the sole bidder on a city contract to supply and install plumbing fixtures, attempted without success to obtain a subcontract bid from a minority business.[32] The one MBE that expressed interest could not give J.A. Croson Co. a quote within the time required for two reasons: (1) the supplier that the MBE contacted had already quoted Croson directly and, therefore, would not quote the MBE, and (2) the MBE had problems in obtaining the required credit approval.[33] With no feasible MBE subcontractor as a part of its bid, J.A. Croson Co. requested a waiver. J.A. Croson Co.'s waiver request was denied, and it lost the contract.[34] Consequently, J.A. Croson Co. challenged the constitutionality of the City's affirmative action plan on equal protection grounds.[35]

The U.S. Supreme Court had previously approved a ten percent minority set-aside on federal contracts in their 1980 decision in *Fullilove v. Klutznick*,[36] holding "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees."[37] Relying on *Fullilove* U.S. District Judge Robert Mehrige denied J.A. Croson Co.'s challenge and upheld the constitutionality of the plan, and the Fourth Circuit Court of Appeals affirmed.[38]

While Croson's petition for certiorari to the U.S. Supreme Court was pending, the Court decided *Wygant v. Jackson Board of Education*.[39] At issue in *Wygant* was a provision of the Jackson County, Michigan Board of Education's collective bargaining agreement, which gave preferential protection from layoffs to some employees because of race or national origin.[40] Applying a strict scrutiny standard, the Court held the provision violated Equal Protection.[41] The opinion of the Court begins by observing that governmental classifications based on race have long been subject to the most searching examination by the Court. Citing *Fullilove* the Court then enunciated the constitutional standard as follows:

---

30. *Id.* at 478.
31. *Id.* at 478-79.
32. *Id.* at 482.
33. *Id.*
34. *Id.* at 483.
35. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 483 (1989).
36. 448 U.S. 448 (1980).
37. *Id.* at 491.
38. *Croson*, 488 U.S. at 483-84.
39. 476 U.S. 267 (1986).
40. *Id.* at 269-70.
41. *Id.* at 283-84.

> There are two prongs to this examination. First, any racial classification "must be justified by a compelling governmental interest." Second, the means chosen by the State to effectuate its purpose must be "narrowly tailored to the achievement of that goal." We must decide whether the layoff provision is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored.[42]

Without deciding whether the School Board's plan was justified by a compelling state interest, the Court found that the School Board's layoff plan placed too large a burden on particular individuals and, therefore, was not sufficiently narrowly tailored.[43] The Court noted that other "less intrusive means of accomplishing similar purposes" were available.[44] The opinion of the Court was authored by Justice Powell for a plurality including Chief Justice Burger, Justice O'Connor, and Justice Rehnquist. Justice White concurred in the judgment. Justices Marshall, Brennan, Blackmon, and Stevens dissented.[45]

The vigorous debate within the Supreme Court preceding *Wygant* about how to remedy the effects of historic governmental discrimination had surfaced in cases brought by the victims of historic discrimination as well as in challenges to legislative preferences in favor of minorities. As the case law preceding *Croson* demonstrates, the Supreme Court had been struggling with the question of whether any distinction in the law based on race, ethnicity, or gender,[46] even when based on benign motives, could survive the scrutiny of the Equal Protection Clause of the Fourteenth Amendment.[47] In 1978, some ten years before the *Croson* decision and three years before Justice O'Connor's Supreme Court appointment, the Court upheld a white student's challenge to University of California's minority preference medical school policy in *Regents of the University of California v. Bakke*[48] by applying a strict scrutiny standard. The entire Court concurred in the judgment; Justices Powell, Brennan, White, Marshall, and Blackmun agreed that racial classifications called for strict scrutiny.[49] Therefore, the debate over race-based classifications and the Court's

42. *Id.* at 274 (citations omitted).
43. *Id.* at 278, 283.
44. *Id.* at 283-84.
45. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 294-95 (1986).
46. For an illustration of the Court's struggle to scrutinize gender-based classifications, see *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982), in which Justice O'Connor, writing for the Court, applied an intermediate scrutiny standard.
47. U.S. CONST. amend. XIV, § 1.
48. 438 U.S. 265 (1978).
49. *Id.* at 305-06.

eventual move toward a strict scrutiny standard well preceded Justice O'Connor's addition to the Court.[50]

In light of the Supreme Court's decision in *Wygant*, in which a plurality of the Court applied a strict scrutiny standard in the affirmative action context, the Court remanded *Croson* to the Fourth Circuit for further consideration.[51] On remand, using the two-prong strict scrutiny test from *Wygant*, the Fourth Circuit held that the City of Richmond's plan was unconstitutional because (1) the City had not shown a compelling state interest, in that the record did not contain any evidence of prior discrimination by the City in awarding construction contracts,[52] and (2) the thirty percent set-aside was not narrowly tailored to remediate the discrimination.[53] The table was set for the Supreme Court to address the question of whether to adopt a strict scrutiny test for all affirmative action cases. When the *Croson* case came back up before the Supreme Court, the Court affirmed the Fourth Circuit.[54] The test enunciated by Justice O'Connor in the *Croson* opinion was not groundbreaking; it was the same as that used in *Wygant* and has its roots in the racial classification cases decided by the Court prior to *Wygant*.

Instead, what divided the Court in *Croson* the most was the evidence question. The City failed to offer detailed evidence of past discrimination in awarding construction contracts. Justice O'Connor, Chief Justice Rehnquist, Justice White, and Justice Kennedy considered this lack of specific evidence fatal to the claim that a compelling state interest existed.[55] Justice Scalia, concurring in the judgment, would not uphold any governmental racial classifications adopted to remedy past discrimination.[56] Justices Marshall, Blackmon, and Brennan dissented, contending that the City of Richmond need not show specific evidence of past racial discrimination in awarding construction contracts, but rather could justify its plan as a remedy for the City's overall history of racial discrimination.[57] Justice Stevens concurred in the judgment of the plurality that the City had not justified its ordinance as a remedy for past discrimination; however, he would approve governmental racial classifications when adopted as an assistance in the future to "disadvantaged classes."[58]

---

50. See *Wygant*, 476 U.S. at 273-74, for Justice Powell's discussion of the evolution of the strict scrutiny standard.

51. City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 485 (1989).

52. J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1357-59 (4th Cir. 1987).

53. *Id.* at 1360-61.

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

55. *Id.* at 498-506.

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

57. *Id.* at 528-29 (Marshall, J., dissenting).

58. *Id.* at 514 (Stevens, J., concurring).

V. POST-*CROSON: METRO BROADCASTING* AND *ADARAND*

The very next year, the Supreme Court seemed to withdraw from the strict scrutiny test enunciated in *Croson* in the opinion Justice Brennan wrote for the Court in *Metro Broadcasting, Inc. v. FCC*.[59] In *Metro Broadcasting* the *Croson* dissenters formed the majority, joined by Justice Stevens, and upheld the Federal Communications Commission's minority preference policies which allowed a limited category of existing radio and television licenses to be transferred only to minority controlled firms.[60] Metro Broadcasting contended that this policy violated the Equal Protection Clause of the Fourteenth Amendment. The majority in this case rejected the use of a strict scrutiny test when reviewing congressionally mandated, benign racial classifications,[61] holding that "the FCC minority ownership policies pass muster under the test we announce today. First, we find that they serve the important governmental objective of broadcast diversity. Second, we conclude that they are substantially related to the achievement of that objective."[62] Rather than overruling *Croson*, Justice Brennan distinguished the *Croson* case on the ground that it involved a local government ordinance which should be subject to a higher level of scrutiny than an act of congress. Justice Brennan wrote for the Court: "race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments."[63] Justice Stevens joined in the opinion and judgment, but observed, "Today the Court squarely rejects the proposition that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong. I endorse this focus on the future benefit, rather than the remedial justification, of such decisions."[64]

Predictably, the *Croson* plurality of Justices O'Connor, Rehnquist, Scalia, and Kennedy vigorously dissented in *Metro Broadcasting*. Justice O'Connor wrote, "The Constitution's guarantee of equal protection binds the Federal Government as it does the States, and no lower level of scrutiny applies to the Federal Government's use of race classifications."[65] She was particularly troubled by the majority's use of the designation "benign racial classification" and pointed out that the right to equal protection of the laws is a personal right.[66] Justice O'Connor opined that the majority's use of the term "benign racial classification" depends entirely on its "ability to distinguish good from

59. 497 U.S. 547 (1990).
60. *Id.* at 552.
61. *Id.* at 564-65.
62. *Id.* at 566.
63. *Id.* at 565.
64. *Id.* at 601 (Stevens, J., concurring) (citing his concurring opinion in *Croson*, 488 U.S. at 511-13).
65. *Metro Broad.*, 497 U.S. at 604 (O'Connor, J., dissenting).
66. *Id.* at 609 (citing Shelley v. Kraemer, 334 U.S. 1 (1948)).

harmful governmental" use of race-based classifications. "History," she noted, "should teach greater humility."[67] Justice O'Connor argued that by using the less rigorous standard of "substantially related to an important governmental objective," the majority was leaving the door open to upholding racial distinctions based on the "preference of the moment."[68]

Echoing Justice O'Connor's fears, Justice Kennedy, in dissent, expressed the fear that the test enunciated in *Metro Broadcasting* would revive the "relaxed" standard used by the Court to uphold Louisiana's mandatory segregation laws.[69] Citing to the Court's now widely discredited decisions upholding the internment of Japanese-American citizens during World War II, Justice Kennedy said:

> I cannot agree with the Court that the Constitution permits the Government to discriminate among its citizens on the basis of race in order to serve interests so trivial as "broadcast diversity." In abandoning strict scrutiny to endorse this interest the Court turns back the clock on the level of scrutiny applicable to federal race-conscious measures. Even strict scrutiny may not have sufficed to invalidate early race-based laws of most doubtful validity, as we learned in *Korematsu v. United States*. But the relaxed standard of review embraced today would validate that case, and any number of future racial classifications the Government may find useful. Strict scrutiny is the surest test the Court has yet devised for holding true to the constitutional command of racial equality.[70]

Thus, the Court was still deeply divided following *Croson* regarding its equal protection analysis in the affirmative action context.

Five years later, the Court was again faced with a congressionally adopted racial classification in an affirmative action setting. Under review in *Adarand Constructors, Inc. v. Pena*[71] were regulations of the U.S. Department of Transportation (DOT) developed to implement congressional adoption of a minimum ten percent government contract set-aside for "socially and economically disadvantaged individuals."[72] The DOT presumed that certain racial groups[73] met this test and gave DOT contractors financial incentives to

---

67. *Id.* at 609.

68. *Id.* at 610.

69. *Id.* at 631-32 (Kennedy, J., dissenting) (citing Plessy v. Ferguson, 163 U.S. 537 (1896)).

70. *Id.* at 633-34 (citation omitted).

71. 515 U.S. 200 (1995).

72. *Id.* at 205.

73. The "socially and economically disadvantaged individuals" included "Black Americans, Hispanic Americans, Asian Pacific Americans, and other minorities." *Id.*

hire subcontractors controlled by socially and economically disadvantaged individuals. Justice O'Connor wrote for a majority consisting of herself, Chief Justice Rehnquist, and Justices Kennedy, Scalia, and Thomas. Through her opinion, the Court returned to the strict scrutiny standard and the two-pronged test of *Croson* in the equal protection analysis of any federal, state, or local government racial classification, whether or not such classification was remedial or benign.[74] To the extent *Fullilove* or *Metro Broadcasting* adopted a more relaxed test for analyzing congressional enactments or federal agency regulations and practices, the cases were overruled by *Adarand.* Also rejected was the notion that a different level of analysis of equal protection is permitted under the Fifth Amendment than that employed under the Fourteenth Amendment.[75] Vigorous dissents were filed by Justices Stevens, Souter, Ginsberg, and Breyer.[76]

Even though she would employ a deferential test when analyzing Congressional enactments aimed at remedying past racial discrimination, Justice Ginsberg, in dissent, acknowledged the sincere motivations of the majority. She observed:

> The divisions in this difficult case should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgment of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects.
>
> . . . .
>
> While I would not disturb the programs challenged in this case, and would leave their improvement to the political branches, I see today's decision as one that allows our precedent to evolve, still to be informed by and responsive to changing conditions.[77]

Justice Ginsberg's depiction of the Court's continuing struggle to develop a cohesive approach for equal protection challenges to race-based classifications stands in direct contradiction to Professor Tarpley's wild assertions regarding Justice O'Connor's extrajudicial motivations.

Professor Tarpley does not really take issue with Justice O'Connor's enunciation of the two- prong strict scrutiny test, nor does she contend that the City of Richmond offered specific evidence of the past discrimination to justify adopting the ordinance. Rather, Professor Tarpley contends that, in the specific facts of the *Croson* bid, J.A. Croson Co. discriminated against a potential minority business supplier, and that this was evidence of systematic exclusion

74. *Id.* at 227, 235-36.
75. *Id.* at 227.
76. *Id.* at 242, 265.
77. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 273, 276 (1995).

of minority suppliers.[78] Neither the City nor the dissent by Justice Marshall makes this claim.

In her opinion in *Croson*, Justice O'Connor did note that a potential supplier refused to quote a price to an African-American subcontractor. Justice O'Connor cited the fact that the supplier had already given a direct quote to the prime contractor, J.A. Croson Co., as the reason for the supplier's refusal to quote to the African-American subcontractor.[79] According to Professor Tarpley, Justice O'Connor refused to recognize the discrimination in the case, insisting the refusal of the white supplier to give the quote to an African-American was "surely"[80] race-related. Unfortunately, the Professor failed to support this assertion with any facts other than the race of the business owners. Although I may have joined Professor Tarpley in a well-reasoned critique of Justice O'Connor's holding on the merits of *Croson*, Professor Tarpley's overly conclusive assertions leave no room for that possibility, as they are utterly devoid of any meaningful support.[81]

Professor Tarpley further states that Justice O'Connor abandons judicial precedent to reach the results she seeks.[82] Although, as discussed, *Adarand* did overrule the decision in *Metro Broadcasting*, Justice O'Connor contended that *Metro Broadcasting* was a departure from a strict scrutiny doctrine established over a fifty-year period.[83] By overruling *Metro Broadcasting*, Justice O'Connor reasoned that the Court was actually restoring "the fabric of the law" instead of refusing to follow precedent.[84]

In the years following *Adarand*, two-pronged strict scrutiny has become the accepted standard for an equal protection analysis of a governmentally adopted affirmative action plan.[85] But there is still great debate as to the type of evidence required to demonstrate both the compelling state interest and the narrow tailoring prongs of strict scrutiny.[86] The Fifth Circuit has, in effect, rule

78. Tarpley, *supra* note 1, at 124.

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

80. Tarpley, *supra* note 1, at 124.

81. Like Justice Marshall, I would have allowed the evidence of Richmond's past history of governmentally enforced segregation to suffice as evidence of past discrimination. Thus, I would have found the first prong of the *Wygant-Croson* strict scrutiny test to be met.

82. *Id.* at 118.

83. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 231 (1995).

84. *Id.* at 233-34.

85. M.R. Killenbeck, *Pushing Things Up to Their First Principles: Reflections on the Values of Affirmative Action*, 87 CAL. L. REV. 1299, 1313-16 (Dec. 1999) (analyzing competing views among the federal circuits and the members of the Supreme Court itself post-*Adarand* regarding the application of the strict scrutiny test in school admissions cases).

86. Smith v. University of Washington Law School, 233 F.3d 1188 (9th Cir. 2000) (holding that until the Supreme Court rules otherwise, a university can operate a race-conscious admissions process because promoting future diversity is a compelling state interest); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (holding that neither a state university law school's interest in achieving a diverse student body nor remediation of a state's general historical discrimination are compelling state interests).

that race can never be a factor in achieving a benign governmental objective.[87] To the contrary, the Ninth Cirucuit has held that promotion of future diversity is a legitimate compelling state interest.[88]

Justice O'Connor and her fellow Justices on the Supreme Court will attempt to resolve this question when they hear *Grutter v. Bollinger*[89] this term. In *Grutter* a Michigan U.S. District Court, reviewing the University of Michigan's use of race and ethnicity in its admissions policy, found that achieving a diverse student body was not a compelling state interest. The district court believed that the Supreme Court had limited the use of racial and ethnic considerations to remedying past discrimination.[90] The Sixth Circuit disagreed and reversed, finding that non-remedial consideration of race and ethnicity to promote a diverse student body can be a compelling state interest.[91]

VI. THE IMPACT OF PERSONAL ATTACKS ON JUDICIAL INDEPENDENCE

I am certain that numerous commentators might disagree with Justice O'Connor's decisions in affirmative action cases. Fortunately, in the spirit of the robust debate that is so critical to our democratic system, some individuals have produced informed, reasoned criticism of the decisions without resorting to unfounded, vitriolic personal attacks on the author of the decision. In the words of past ABA President, Jerome Shestack:

> To be sure, reasoned criticism of judicial decisions is perfectly acceptable. But misleading demagoguery, threats and political intimidation distort the public's view of the judicial process, and undermine public confidence in the justice system, and have a chilling effect on judges. The result is an undermining of our independent judiciary.[92]

Professor Tarpley's attempt to convince others of the merits of affirmative action through blatant falsities, such as the allegation that Justice O'Connor is

---

87. *Hopwood*, 78 F.3d at 944-48.

88. *Smith*, 233 F.3d at 1200-01; *see also*Kenneth L. Karst & Harold W. Horowitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 HARV. C.R. - C.L. L. REV. 7 (1979) (stating that Powell's opinion in *Regents of University of California v. Bakke*, 438 U.S. 265, created a benchmark for how professional schools can constitutionally factor an applicant's race into the admissions process).

89. 288 F.3d 732 (6th Cir. 2000), *cert. granted*, ____ S. Ct. ____, 2002 WL 1968753, 71 USLW 3154 (U.S. Dec. 2, 2002) (No. 02-241).

90. 137 F. Supp. 2d 821 (E.D. Mich. 2001).

91. Ironically, in several heated concurring and dissenting opinions, members of the Sixth Circuit accuse their colleagues of forwarding personal, extrajudicial motives to affect their decisions in *Grutter*, 288 F.3d 732 (In dissent, Judge Boggs personally attacks his colleagues, attributing less than proper motives to their decision to hear the case en banc. In her concurring opinion, Judge Moore admonishes Judge Boggs for this attack.).

92. Jerome J. Shestack, *The Risks to Judicial Independence*, A.B.A. J., June 1998, at 8, 8.

a racist striving to keep African-Americans in economic bondage, all in her effort to become Chief Justice,[93] fails to further the cause of affirmative action, and more significantly, erodes the ability of all judges to accomplish their constitutional mandate to "interpret and apply the laws that govern us."[94]

Judges, particularly those who are elected, are vulnerable to politically motivated attack, which drastically constricts their ability to remain independent. Those who disagree with a judge's decision can easily distort that judge's record in an attempt to oust the popularly elected judge from office. A successful campaign to remove Tennessee Supreme Court Justice Penny White occurred in the wake of the Tennessee Supreme Court's decision to reverse and remand the sentencing phase of a death penalty case.[95] In this case the Tennessee court held that the trial court committed reversible errors by refusing to allow the defendant's clinical psychologist to testify at the penalty phase and by refusing to instruct the jury on the mitigating circumstances raised by the evidence in the sentencing phase, as required by Tennessee statute.[96] Justice White did not author the majority or a concurring opinion, but was nonetheless singled out of the five justices who signed the opinion for a pointed attack simply because she was up for re-election.[97]

A pro-death penalty faction used the decision as fodder to remove Justice White from the bench. A political party mailed out anti-Penny White brochures that stated, "Just Say NO! Vote for Capital Punishment by Voting NO on August 1 for Supreme Court Justice Penny White."[98] Disregarding the reality that the Tennessee Supreme Court's decision was practically mandated by statute,[99] the opinion was used as a platform to label Justice White as a pro-criminal jurist.[100] Consequently, Justice White was soundly defeated and removed from the bench.

In states where judges are popularly elected, a judge's attempt to remain independent from the partisan, issue-specific world may be easily thwarted by anyone capable of twisting judicial opinions to be utilized for political capital. The rhetorical question posed by Tennessee Governor Don Sundquist shortly after Justice White was removed from the bench illustrates this point well: "Should a judge look over his shoulder [when making decisions] about whether they're [sic] going to be thrown out of office? I hope so."[101]

---

93. Tarpley, *supra* note 1, at 118, 119, 120, 122, 135, 145.

94. Rule 501, SCACR.

95. State v. Odom, 928 S.W.2d 18, 33, 36 (Tenn. 1996).

96. *Id.* at 28, 30; TENN. CODE ANN. § 39-13-204(e)(1) (1989); Stephen B. Bright, *Political Attacks on the Judiciary*, 80 JUDICATURE 165, 169 (1997).

97. Bright, *supra* note 96, at 169.

98. *Id.* at 168-69.

99. § 39-13-204(e)(1).

100. Bright, *supra* note 96, at 169.

101. Paula Wade, *White's Defeat Poses Legal Dilemma: How is a Replacement Justice Picked?*, COMMERCIAL APPEAL (Memphis), Aug. 3. 1996, at A1.

Well I, for one, hope not. While we, as judges, should be criticized by those who in good faith disagree with our rulings, we should not be attacked by political pundits and issue mongers who try to benefit themselves personally at our expense. Those who launch *personal* attacks against judges for their *professional* decisions would be wise to follow President Jefferson's model of political restraint.[102]

Fortunately, our system of selecting judges in South Carolina insulates us, as judges, just enough to enable us to maintain our judicial independence. One of the most awesome of the South Carolina General Assembly's institutional responsibilities is its duty to select judges. Tennessee and nineteen other states select judges by popular election; twenty-six of the fifty states select judges by appointment of the Governor.[103] Three states use some form of legislative election in combination with gubernatorial interim appointment.[104] South Carolina, since colonial times, has followed the ruggedly independent course of election of judges solely by its General Assembly.[105]

South Carolina's legislative selection system is rooted in a healthy distrust of putting too much authority in the executive and in a strong desire to assure judicial independence by protecting the selection process from the temporary passions of popular election. Judicial independence is the cornerstone of any system of judgment or dispute resolution. Independence is the handmaiden of fairness and consistency, the hallmarks of a successful judicial system. The perceived absence of judicial independence wrought by the royal appointment system was, from early colonial times, one of the catalysts for the creation of our system of legislative election.[106]

South Carolina's constitutional design has proved a wise one—even more so in this age of instant sound-bite politics and staggeringly costly election campaigns. Our governmental structure encourages us as judges to faithfully uphold the laws of this state without having to constantly look over our shoulders to see which interest group is using the sound-bite to try to remove us from office.

In expressing my belief that judges should be able to decide cases free from the personal whims of self-interested partisans, I am not suggesting that judges should not be accountable for their actions. I fervently agree with Penny White's distinction between independence and accountability:

> The common denominator in all accurate descriptions of judicial independence is that judicial independence does not serve to remove a judge from accountability. Rather, it serves to *remove a judge from accountability to the wrong sources.*

---

102. Burris, *supra* note 7, at 652-53.
103. COUNCIL OF STATE GOV'TS, 33 THE BOOK OF THE STATES 137-39 (2000).
104. *Id.*
105. *Id.*
106. 1 JAMES LOWELL UNDERWOOD, THE CONSTITUTION OF SOUTH CAROLINA 7-22 (1986).

> Judicial independence is not the freedom of a judge to decide cases based on personal whim or caprice, nor is it the freedom of a judge to decide cases based on personal viewpoints of what the law ought to require. A judge remains accountable to the fair application of the law regardless of the judge's endorsement of or belief in the law.[107]

Judges must remain accountable to the laws that govern their jurisdictions, but their good faith efforts to uphold the law must not be held captive to the demagogic whims of the John Birch Society, partisan political distortions, and outlandish attacks of the Joan Tarpleys of the world.[108] I am hopeful that we can discourage this type of self-serving criticism, at the very least among those in our profession, in favor of the robust, academic, and critical debate that will both reinforce the independence of our judiciary and contribute to the constant dialogue necessary to a healthy democracy.

VII. CONCLUSION

The United States Supreme Court's struggle to enunciate a strict scrutiny test for analyzing the equal protection issues presented by governmental affirmative action plans reflects the tension in American society between the moral and constitutional imperative of a color-blind approach to the law and the necessity of remediating our shameful past of legally enforced slavery and segregation. Neither *Croson* nor *Adarand* constitutes an aberrant manipulation of constitutional doctrine for base personal motives as Professor Tarpley suggests. Rather, these cases represent and reflect America's continuing struggle to create a just society.

As a state Chief Justice, I am deeply concerned about the vulnerability of state court judges to personal attack. Over ninety-seven percent of cases in the United States are filed in state courts.[109] In recent years, we have witnessed with increasing frequency the use of violent, deeply personal attacks to voice disagreement with a judge's ruling. The First Amendment, which permits such attacks, is rarely any protection for the judge whose rulings become the

---

107. Penny J. White, *Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 FORDHAM URB. L.J. 1053, 1060 (2002) (emphasis added).

108. The increasing frequency of attacks on judicial independence have prompted legal organizations, including the American Bar Association, the American Trial Lawyers Association, and the South Carolina Bar, and several states to appoint committees to address threats to judicial independence and to educate the public on the importance of an independent judiciary.

109. EXAMINING THE WORK OF STATE COURTS, 2001: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 10 (Brian J. Ostrom et al. eds., 2001).

platform for a public campaign by a particular interest group, since the canons of ethics often prohibit a judge from publicly defending her decision.[110]

This nation's courts are regularly called upon to resolve intensely divisive constitutional issues. Recent decisions of the United States Supreme Court concerning controversial issues such as affirmative action, abortion, the death penalty, and regulatory takings excite heated public discussion. Robust debate on such issues strengthens the constitutional underpinning of our system of justice by forcing us to re-examine our society's aspirations and values using the Constitution as our guide. The right to criticize judicial decisions is indispensable in our democratic system of government. However, I would suggest that it is unwarranted and inappropriate to use personal attacks on judges to express disagreement with our decisions. Professor Tarpley's deeply personal criticism does nothing more than erode public confidence in the judicial system. I believe that as members of the legal profession, Professor Tarpley and I have a special duty to temper even the fiercest criticism with respect for the courts as an institution.

Finally, I disagree in the most fundamental way with the conclusions Professor Tarpley has drawn about Justice O'Connor's personal values from the Professor's utterly inaccurate reading of Justice O'Connor's written opinions. These opinions, when fairly examined, reveal a thoughtful and compassionate judge. But perhaps a writing even more revealing of the Justice's character is the memoir Sandra Day O'Connor and her brother Alan Day wrote about growing up on a cattle ranch in the American Southwest. The spare yet evocative prose of *Lazy B*[111] sketches the life of the intensely loyal Day family for whom straight dealing, hard work, and personal honesty were core values. The Sandra Day O'Connor of this writing is shaped by the love and high expectations of a mother and father who raised their daughter to prize a job well done and the dignity of all people. In my view, a hidden personal agenda is totally foreign to the decent and self-reliant woman who authored the opinions Professor Tarpley attacks.

110. *See, e.g.*, Canon 3(B)(9), Rule 501, SCACR ("A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing.").

111. SANDRA DAY O'CONNOR & H. ALAN DAY, LAZY B (2002).