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## Affirmative Action: Justice O'Connor's Opinions

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### Summary

An examination of Justice O'Connor's opinions reveals a gradual shift in perspective regarding the legal and constitutional standards to be applied in evaluating governmental affirmative action efforts, and the manner of their application in various legal and factual settings. This report briefly surveys decisions of retiring Justice Sandra Day O'Connor in affirmative action cases, an area where her opinions have frequently determined the outcome.

An examination of Justice O'Connor's opinions reveals a gradual shift in perspective regarding the legal and constitutional standards to be applied in evaluating governmental affirmative action efforts, and the manner of their application in various legal and factual settings. Early on, Justice O'Connor was notably in dissent from a series of rulings in 1986 and 1987 which narrowly approved of remedial hiring preferences for minorities and women in statutory Title VII employment discrimination cases. These measures were deemed by a majority of the Justices to be a proper remedy for "manifest racial imbalance" in "traditionally segregated" job categories, if voluntarily adopted by private employers,<sup>1</sup> or for entrenched patterns of "egregious and longstanding" discrimination by the employer, if imposed by judicial decree.<sup>2</sup> In either circumstance, however, the Court required proof of remedial justification rooted in the employer's own past discrimination and its persistent workplace effects. Of equal importance, all racial preferences in employment were to be judged in terms of their adverse impact on "identifiable" non-minority group members. But affirmative action preferences had to be sufficiently flexible, temporary in duration, and "narrowly tailored" to avoid becoming rigid "quotas."<sup>3</sup>

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<sup>1</sup> United Steelworkers v. Weber, 443 U.S. 193 (1979).

<sup>2</sup> Local 28 Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986).

<sup>3</sup> United States v. Paradise, 480 U.S. 149 (1987); Johnson v. Transportation Agency, 480 U.S. (continued...)

The five Justice majority in those cases — Justices Brennan, Marshall, Blackmun, Powell, and Stevens — were opposed by a minority consisting of Chief Justice Rehnquist and Justices White and Scalia. Justice O'Connor occupied a middle ground arguably less tolerant of affirmative action than the Brennan-Powell majority and closer to the Rehnquist minority.<sup>4</sup> Thus, she was part of a five-Justice majority, concurring in the judgment in *Wygant v. Jackson Board of Education*,<sup>5</sup> which struck down as an equal protection violation a term in the contract between a local school board and its teachers that provided protection from layoff in reverse order of seniority for minority staff newly hired under a board-inspired affirmative action policy. Initially, Justice O'Connor's concurrence searched for common ground among the conflicting views of her brethren. "In the final analysis," she concluded, "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."<sup>6</sup> Ultimately, however, Justice O'Connor aligned herself with the plurality view that "societal discrimination" will not justify voluntary affirmative action remedies and that the layoff plan was infirm because it was overbroad and not "narrowly tailored" to the school board's past discrimination.

Not until 1989 did a majority of the Justices resolve the proper constitutional standard for review of governmental classifications by race enacted for a remedial or other "benign" legislative purpose. Disputes prior to *City of Richmond v. J.A. Croson*<sup>7</sup> yielded divergent views as to whether state affirmative action measures for the benefit of racial minorities were subject to the same "strict scrutiny" as applied to "invidious" racial discrimination under the Equal Protection Clause, an "intermediate" standard resembling the test for gender-based classifications, or simple rationality. In *Croson*, an O'Connor-led 5 to 4 majority settled on strict scrutiny to invalidate a 30% set-aside of city contracts for minority-owned businesses (MBEs) because the program was not "narrowly tailored" to a "compelling" governmental interest. While "race-conscious" remedies could be legislated in response to proven past discrimination by the affected governmental entities, "racial balancing" untailored to "specific" and "identified" evidence of minority exclusion was impermissible.

Justice O'Connor's opinion stressed several factors that collectively condemned the Richmond MBE set-aside program. First, there was no specific evidence of past discrimination, "public or private," as it relates to the exclusion of qualified MBEs willing to perform city contracts, and the 30% benchmark reflected a "completely unrealistic" assumption that MBE participation in a particular trade will mirror minority representation in the community. Second, the Richmond ordinance was flawed by "gross overinclusiveness" in that it applied not only to blacks but also to various other groups,

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<sup>3</sup> (...continued)  
616 (1987).

<sup>4</sup> See Selig, Joel L., Affirmative Action in Employment: The Legacy of a Supreme Court Majority, 63 Ind. L.J. 301, 305 n. 15 (1987) (table of voting patterns of justices).

<sup>5</sup> 476 U.S. 267 (1986).

<sup>6</sup> Id. at 292.

<sup>7</sup> 488 U.S. 469 (1989).

Eskimos and Aleuts for example, as to whom “there was *absolutely no evidence* of past discrimination.”<sup>8</sup> Third, the Richmond City Council failed to “consider any alternatives to a race-based quota” to eliminate barriers to minority participation in public contracts. Finally, the focus on MBE availability with regard to whether a minority applicant had actually suffered from past discrimination rendered the plan’s “waiver” provision deficient.

*Croson* suggested, however, that because of its unique equal protection enforcement authority, a constitutional standard more tolerant of racial line-drawing may apply to Congress. This conclusion was reinforced a year later when, in *Metro Broadcasting, Inc. v. FCC*,<sup>9</sup> the Court upheld certain preferences for minorities in broadcast licensing proceedings, approved by Congress not as a remedy for past discrimination but to promote the “important” governmental interest in “broadcast diversity.” Prophetically, however, Justice O’Connor dissented from Justice Brennan’s adoption of this more lenient “intermediate” standard for federal affirmative action. She argued that strict scrutiny should be applied to any race-conscious program, including those promulgated under federal law, and that diversity as an end in itself was not a compelling governmental interest.<sup>10</sup>

At least in formal terms, the two-tiered approach to equal protection analysis of affirmative action did indeed prove to be short-lived. In *Adarand Constructors, Inc. v. Peña*,<sup>11</sup> the Court applied “strict scrutiny” to a federal transportation program of financial incentives for prime contractors who subcontracted to firms owned by “socially and economically disadvantaged individuals,” defined so as to prefer members of designated racial minorities. Although the Court refrained from deciding the constitutional merits of the particular program before it, and remanded for further proceedings below, it determined that all “racial classifications” by government at any level must be justified by a “compelling governmental interest” and “narrowly tailored” to that end. But the majority opinion, by Justice O’Connor, sought to “dispel the notion” that “strict scrutiny is ‘strict in theory, but fatal in fact,’” by acknowledging a role for Congress as architect of remedies for discrimination nationwide. “The unhappy persistence of both the practices and lingering effects of racial discrimination against minorities in this country is an unfortunate reality, and the government is not disqualified from acting in response to it.” No further guidance is provided, however, as to the scope of remedial power remaining in congressional hands, or of the conditions required for its exercise. The lower federal courts continue to grapple with these unresolved issues. Bottom line, *Adarand* suggests that racial preferences in federal law or policy are a remedy of last resort, which must be adequately justified and narrowly drawn to pass constitutional muster.

The latest chapter in the High Court’s affirmative action jurisprudence was written at the conclusion of the 2002-03 term with rulings in the Michigan higher education

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<sup>8</sup> Emphasis in original.

<sup>9</sup> 497 U.S. 547 (1990).

<sup>10</sup> *Id.* at 607-08 (O’Connor, J., dissenting).

<sup>11</sup> 515 U.S. 200 (1995).

cases. In *Grutter v. Bollinger*,<sup>12</sup> a 5 to 4 majority of the Justices, led by Justice O'Connor, held that the University's Law School had a "compelling" interest in the "educational benefits that flow from a diverse student body," which justified its consideration of race in admissions to assemble a "critical mass" of "underrepresented" minority students. But in a companion decision, *Gratz v. Bollinger*,<sup>13</sup> six Justices decided that the University's undergraduate policy of awarding "racial bonus points" to minority applicants was not "narrowly tailored" enough to pass constitutional muster.

The discrepant outcomes turned on Justice O'Connor's application of the narrow tailoring standard, which differed from the dissenters. In *Grutter*, Justice O'Connor determined that the law school program was not a quota system because its was based on an individualized, "holistic" review of each applicant's file, which considered race as one of many — but not the "sole" or "exclusive" — factor in the admissions process. This was so despite the fact that the goal was to admit a "critical mass" of minority students — with at least one eye on the numbers — and race may be a determinative factor in some admission decisions. In this regard, Justice O'Connor found the Law School Program quite different from the undergraduate admissions program in *Gratz*, which "[did] not provide for a meaningful individualized review of applicants" but instead "assign[ed] every underrepresented minority applicant the same, automatic 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant."<sup>14</sup> Accordingly, Justice O'Connor joined Chief Justice Rehnquist's opinion for the Court in *Gratz*, which held, for the same reasons as that stated in Justice O'Connor's concurrence, that the undergraduate program "[was] not narrowly tailored to achieve the [asserted] interest in educational diversity."<sup>15</sup>

The *Grutter* opinion in the law school case was key, however, because it enshrined in law a much debated principle first articulated by the late Justice Lewis Powell (but joined by no other Justice) in the 1978 *Bakke* case<sup>16</sup> that state institutions of higher learning have a "compelling" interest in enrolling a "diverse" student body that justified nonexclusive consideration of race in admissions. Justice O'Connor had earlier hinted at the same proposition when, in *Wygant*,<sup>17</sup> she noted that "although its precise contours are uncertain, a state interest in the promotion of racial diversity [in a student body] has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest."<sup>18</sup> Access to education and cross-cultural understanding among the races is critical, Justice O'Connor argued, as is the judicial "tradition of giving a degree of deference to a university's academic decisions." Moreover, Justice O'Connor stressed the role of higher education in providing diverse, well-trained graduates for business, the military, and other governmental institutions. "Effective participation by members of all racial and ethnic

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<sup>12</sup> 539 U.S. 506 (2003).

<sup>13</sup> 539 U.S. 244 (2003).

<sup>14</sup> *Id.* at 276-77 (O'Connor, J., concurring).

<sup>15</sup> *Id.* at 278.

<sup>16</sup> *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)

<sup>17</sup> *Supra* n. 5.

<sup>18</sup> *Citing Bakke*, 438 U.S. at 311 - 15 (opinion of Powell, J.).

groups in the civic life of our nation is essential if the dream of one nation, indivisible, is to be realized.”<sup>19</sup> Nonetheless, the benefits of race-based affirmative action were not without limit:

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that in 25 years from now, the use of racial preferences will no longer be necessary to further the principle approved today.<sup>20</sup>

Justice O’Connor’s opinion was joined by Justices Stevens, Souter, Ginsburg, and Breyer.

The O’Connor legacy for the law of affirmative action thus appears noteworthy in two major particulars. First, with respect to constitutional norms to be applied in judging differential classifications by race in governmental policy, Justice O’Connor was in the vanguard of Justices — indeed, led the charge — that ultimately held that all governmental consideration of race be subjected to the most unforgiving of judicial tests — the strict scrutiny standard. Perhaps as important, however, as the legal concept itself were her views as to how strict scrutiny is to be applied in various social and economic contexts. As her jurisprudence has developed, Justice O’Connor has repeatedly recognized since her 1995 *Adarand* opinion:

Strict scrutiny is not ‘strict in theory, but fatal in fact.’ . . . When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow tailoring requirement is also satisfied.<sup>21</sup>

But any possibly implied leniency has not necessarily led to a similar degree of tolerance for all forms of racial line-drawing by governmental action, even for “benign” or remedial purposes. Rather than general principle, each case appears to rest heavily on judicial inquiry into the fact-specific setting from which the legal dispute arises. Contextual differences, including the particular kind of governmental activity being challenged, can be significant in evaluating the constitutionality of race-conscious affirmative action among, for example, the areas of public employment, government contracting, admission to public institutions of higher education, and election redistricting.<sup>22</sup>

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<sup>19</sup> Grutter, 539 U.S. at 332.

<sup>20</sup> Id. at 343.

<sup>21</sup> Id. at 326-27 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)).

<sup>22</sup> See, e.g., *Shaw v. Reno*, 509 U.S. 630, 642 (5-4 decision) (O’Connor, J.) (held racial gerrymandering to create majority-African-American district may violate the equal protection clause); *Bush v. Vera*, 517 U.S. 952, 957 (1996) (5-4 decision) (plurality opinion) (O’Connor, J.) (stating that racially gerrymandered redistricting creating majority-African-American and majority-Hispanic districts violated the equal protection clause); *Shaw v. Hunt*, 517 U.S. 899, 901-02 (1996) (5-4 decision) (O’Connor, J., voted with majority) (holding racially gerrymandered redistricting creating majority-African-American district violated the equal protection clause); and *Miller v. Johnson*, 515 U.S. 900, 920-21 (1995) (5-4 decision) (O’Connor, J., voted with majority) (holding racially gerrymandered redistricting creating majority-African-American district violated the equal protection clause).

Arguably, one standout area where Justice O'Connor has perhaps most influenced the development of affirmative action law is in higher education. Justice Powell in *Bakke*, and Justice O'Connor concurring in *Wygant*, had earlier noted the possibility of recognizing diversity as a compelling interest in higher education. But it was Justice O'Connor, writing for the five Justice majority in *Grutter*, who first held that (even in the absence of past discrimination) institutions of higher learning have a compelling interest in the educational benefits that flow from assembling a racially diverse student body. But, here too, it appears that "means" may frequently trump "ends" so that, as noted by Justice Scalia, the Court's "split double-header" in the Michigan cases leaves many dispositive issues open for future consideration on a case-by-case basis. Not until the seminal decisions in the Michigan case have had sufficient time to spawn caselaw progeny — presumably well beyond the tenure of Justice O'Connor — will the full import of these rulings become more predictable.

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