

The Minority in the Middle: Thurgood Marshall, Clarence Thomas, and Sandra Day O'Connor's Race Jurisprudence

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Introduction

As chief counsel for the NAACP in the 1940's and 1950's, Thurgood Marshall changed the course of the Supreme Court's race jurisprudence, most prominently in *Brown v. Board of Education*, where Marshall convinced a unanimous Court to desegregate schools across the country.¹ When Lyndon Johnson appointed the first African-American to the Supreme Court, "it had to be Marshall, a great hero to African-Americans and liberal lawyers."² The *New York Times* described the nomination as "rich in symbolism,"³ and upon Marshall's confirmation, the *Washington Post* heralded "an occasion for self-congratulation."⁴ However, in more than two decades on the Court, Justice Marshall could not reproduce the dramatic impact on race relations that he made in *Brown*. As the Court's composition changed over the years, Marshall found himself increasingly in the minority, and upon his retirement, the *New York Times* described him as "the Great Dissenter."⁵ Unfortunately, his time on the Supreme Court bench coincided with a time when the country was becoming increasingly skeptical of the government's ability to intervene in issues of race. The Court's direction on these issues would have to be determined by another Justice.

Clarence Thomas, Justice Marshall's successor and the second African-American on the Supreme Court, would have been a natural choice. Coming to prominence in the Reagan administration's EEOC, his conservative views on affirmative action and discrimination were much more in line with the prevailing political opinion of the time. In Justice Thomas's first meeting with his predecessor at the Supreme Court, Justice Marshall told him: "I did what I had to do in my time; you do what you have to do in yours."⁶ Justice Thomas took these words to heart and forged his own path on issues of race. Thomas's approach was distinctly different from Marshall's, but the result was the same: Justice Thomas has rarely taken the lead on racial issues. Like Justice Marshall, Justice Thomas has increasingly found himself in dissent over the course of his career. The Rehnquist Court's most important opinions on race were written by another Justice.

Sandra Day O'Connor filled the void left by Justices Marshall and Thomas. The author of majority opinions in *Croson*, *Shaw v. Reno*, *Adarand Constructors*, and *Grutter*, Justice O'Connor has defined the Supreme Court's race jurisprudence over the

¹ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

² Mark Tushnet, *MAKING CONSTITUTIONAL LAW* 25 (1997) (paraphrasing advice that Nicholas Katzenbach gave to Johnson).

³ *Id.* at 25 quoting *New York Times*, p.1, col.7 (June 14, 1967).

⁴ *Id.* at 27 quoting *Washington Post*, p. A20, editorial (Sept. 1, 1967).

⁵ Kathleen Sullivan, "Marshall, the Great Dissenter," *New York Times* A23 (June 29, 1991).

⁶ Meeting with Justice Clarence Thomas in Washington, DC (October 27, 2005).

past two decades. Although not a racial minority, O'Connor is a minority in her own right – the first woman on the Court. This unique experience may have given her a perspective on minority rights that her male colleagues could not appreciate. In 1991, Justice O'Connor wrote in the *Stanford Law Review* that “I have not encountered prejudice on a sustained basis. But I have experienced gender discrimination enough, such as when law firms would only hire me, a ‘lady lawyer,’ as a legal secretary.”⁷ Those remarks came in a tribute to Justice Marshall, whom she acknowledged “as colleague and friend” and a “profound[] influence.”⁸ Working with Thurgood Marshall for ten years and with Clarence Thomas for nearly fifteen has had an undeniable effect on her views. She admits that “[l]ike most of my counterparts who grew up in the Southwest in the 1930’s and 1940’s, I had not been personally exposed to racial tensions.”⁹ She came to the bench with few preconceived notions regarding race, and her two colleagues in the “African-American seat” on the Court were in a unique position to influence her views.

This paper will consider the influence of Justice Marshall and Justice Thomas on Justice O'Connor’s race jurisprudence primarily through the opinions each Justice wrote in Supreme Court cases. The first part of the paper will survey Justice O'Connor’s decisions on racial issues throughout her career. The second part of the paper will consider her race jurisprudence in detail, focusing on the specific legal doctrines she has developed to decide these cases.

I. JUSTICE O’CONNOR’S DECISIONS ON RACIAL ISSUES

Justice O'Connor has defined the Court’s dialogue on race over the course of her career. This has been partly due to her ability to broker compromise among her colleagues, but it also reflects the nature of the cases that came before the Court. By the 1980’s, the race cases before the Supreme Court were no longer simple discrimination or segregation claims. The racial classifications the Court was asked to evaluate were complex and ambiguous in purpose. Some were intended to benefit minorities, some merely had disparate racial impacts, and some could not be clearly attributed to a state actor. This section will explore four major categories of these cases: desegregation, peremptory challenges, vote districting, and affirmative action.

A. Desegregation

The desegregation of schools was Justice Marshall’s greatest enduring legacy. However, his contributions came almost entirely during his career as a litigator; he rarely addressed the issue from the bench because he generally recused himself in cases where the NAACP was involved. One of these cases was *Allen v. Wright*, where Justice O'Connor wrote for the majority rejecting a claim against discriminatory private schools.¹⁰ The NAACP had challenged the tax-exempt status of all-white private schools under a theory that such schools prevented black children from enjoying the benefits of integrated public schools. Justice O'Connor found that the plaintiffs could not have standing without attempting to enroll in the schools.¹¹ *Allen v. Wright* was typical of desegregation cases

⁷ Sandra Day O'Connor, 44 STAN. L. REV. 1217, 1219 (1991).

⁸ *Id.* at 1217.

⁹ *Id.*

¹⁰ *Allen v. Wright*, 468 U.S. 737 (1984).

¹¹ *Id.* at 746.

during O'Connor's tenure; if they reached the Supreme Court it was because the discrimination was not easily defined, and Justice O'Connor did not generally expand the definition of discrimination to recognize these claims.

Not every desegregation case was so obfuscated though, and soon after Justice Thomas joined the Court, a unanimous judgment was handed down in *United States v. Fordice* striking down the disparate admissions policies and duplicate programs at Mississippi's historically black and historically white universities.¹² Justice O'Connor wrote a separate concurrence enforcing a "constitutional obligation to dismantle the discriminatory system that should, by now, be only a distant memory."¹³ Justice Thomas also concurred, agreeing with the that "[i]t is safe to assume that a policy adopted during the *de jure* era, if it produces segregative effects, reflects a discriminatory intent."¹⁴ However, he used his concurrence to narrow the holding, assuring Mississippi's schools that "we do not foreclose the possibility that there exists 'sound educational justification' for maintaining historically black colleges *as such*."¹⁵ He thought "[i]t would be ironic, to say the least, if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges."¹⁶

Three years later, O'Connor and Thomas both concurred again but on the opposite side of this issue. In *Missouri v. Jenkins*, a federal district court had ordered an urban school district to dramatically improve its facilities to attract white students back from the suburbs.¹⁷ The Supreme Court overturned the order, and Justice O'Connor wrote that the problems of "white flight" are "not readily corrected by judicial intervention, but are best addressed by the representative branches."¹⁸ She also praised her colleague, pointing out that "Justice Thomas congenitly (sic) observes that what the federal courts cannot do at the federal level they cannot do against the states."¹⁹

Justice Thomas's concurrence in *Jenkins* expanded his defense of historically black colleges in *Fordice*:

[I]t may very well be that what has been true for historically black colleges is true for black middle and high schools. Despite their origins in "the shameful history of state-enforced segregation," these institutions can be "both a source of pride to blacks who have attended them and a source of hope to black families who want the benefits of ... learning for their children."²⁰

He refused to accept that "integration [] is the only way that blacks can receive a proper education" because "[u]nder this theory, segregation injures blacks because blacks, when left on their own, cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based upon a theory of black inferiority."²¹ These ideas would guide Justice Thomas's opinions on affirmative action and discrimination over the

¹² *United States v. Fordice*, 505 U.S. 717 (1992).

¹³ *Id.* at 745 (O'Connor, J., concurring).

¹⁴ *Id.* at 746 (Thomas, J., concurring).

¹⁵ *Id.* at 748.

¹⁶ *Id.* at 749.

¹⁷ *Missouri v. Jenkins*, 515 U.S. 70 (1995).

¹⁸ *Id.* at 112 (O'Connor, J., concurring).

¹⁹ *Id.* at 113.

²⁰ *Id.* at 122 *quoting* *Fordice*, 505 U.S. at 748 (Thomas, J., concurring).

²¹ *Id.* at 122.

next decade, and although Justice O'Connor was sensitive to this type of stereotyping, she never his pessimistic view of integration.

In the most recent Supreme Court case considering segregation, Justice O'Connor wrote the majority opinion striking down California's policy of segregating prisoners based on race.²² Somewhat surprisingly, Justice Thomas dissented from the holding, approving of the segregation because "[t]he Constitution has always demanded less within the prison walls."²³ This tolerance for segregation is not an indication of racism on the part of Justice Thomas but his skepticism of integration, apparent in his *Fordice* and *Jenkins* opinions. Thomas's stance is inapposite to that of Justice Marshall, who had dedicated his career as a litigator to the pursuit of integration. Justice O'Connor took a middle position, critical of segregation but unwilling to subordinate other legal principles in blind pursuit of integration.

B. Peremptory Challenges

One of the more difficult questions of racial discrimination to face the Court during Justice O'Connor's tenure was the issue of race-based peremptory challenges. In 1965, the Supreme Court had refused to overturn a conviction based on the discriminatory use of peremptory challenges.²⁴ Twenty years later, the Court had an opportunity to reconsider that decision, and in *Batson v. Kentucky*, a majority of the Court overruled *Swain v. Alabama*, banning the use of race-based peremptory challenges by a criminal prosecutor.²⁵ Although she concurred in the judgment, Justice O'Connor did not appear to do so with great enthusiasm, using her concurrence to emphasize that the new rule should not apply retroactively.²⁶ Justice Marshall also concurred in the holding, but he advocated for a far more aggressive measure: "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely."²⁷ No other Justice was willing to go that far.

Justice O'Connor's unease in *Batson* became dissent in *Edmonson v. Leesville Concrete Co.*, where the Court struck down race-based peremptories by private litigants.²⁸ She could not join the majority "[b]ecause I believe that a peremptory strike by a private litigant is fundamentally a matter of private choice and not state action."²⁹ That same year, she agreed with a majority in *Hernandez v. New York*, which held that a prosecutor's peremptory challenges were permissible when based on Spanish-speaking ability rather than race.³⁰ She wrote in concurrence that "[n]o matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race."³¹ In both those cases, she was on the opposite side of Justice Marshall, who consistently voted against race-based peremptories in any form.

²² *Johnson v. California*, 125 S.Ct. 1141 (2005).

²³ *Id.* at 1157.

²⁴ *Swain v. Alabama*, 380 U.S. 202 (1965).

²⁵ *Batson v. Kentucky*, 476 U.S. 79 (1986)

²⁶ *Id.* at 111 (O'Connor, J., concurring).

²⁷ *Id.* at 102 (Marshall, J., concurring).

²⁸ *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991)

²⁹ *Id.* at 632 (O'Connor, J., dissenting).

³⁰ *Hernandez v. New York*, 500 U.S. 352 (1991).

³¹ *Id.* at 375 (O'Connor, J., concurring).

Justice O'Connor retreated further from *Batson* the next year when she dissented in *Georgia v. McCollum*, disagreeing with the Court's holding that criminal defendants were also barred from making race-based peremptory challenges.³² As with private litigants in *Edmonson*, she believed that a defendant's challenge was not state action: "the antagonistic relationship between government and the accused is clear for all to see."³³ Her dissent evoked the language of Justice Marshall's *Batson* concurrence, expressing concern that "conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials," so peremptory challenges were necessary to counteract this bias.³⁴

By the time the Court heard *McCollum*, Justice Thomas had replaced Justice Marshall on the Court, and he concurred in the judgment because he believed it was mandated by *stare decisis*.³⁵ Despite concurring in the result, Thomas supported Justice O'Connor's argument in dissent that "securing representation of the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial."³⁶ Where Justice Marshall wanted to abolish all peremptory challenges to nullify the unconscious racism of prosecutors, Thomas and O'Connor sought to preserve peremptories to compensate for the racism of jurors.

After *McCollum*, O'Connor and Thomas would not find themselves on the same side of this question for the rest of their careers. In *Campbell v. Louisiana*, O'Connor joined a majority extending *Batson* to the selection of a grand jury foreperson,³⁷ while Thomas dissented, arguing that the "verdict of guilt beyond a reasonable doubt was in no way affected by the composition of the grand jury."³⁸ In *Johnson v. California*, Justice O'Connor joined a majority strictly enforcing *Batson*'s prima facie standard, but Thomas dissented, believing that questions of implementation should be left to the states.³⁹

Unlike other areas of race jurisprudence, Justice O'Connor did not write any majority opinions on peremptory challenges. Her jurisprudential values, so consistent in other areas of race jurisprudence, pulled in opposite directions in the area of peremptory challenges. While she was generally hostile to race-based decisionmaking, she was sympathetic to defendant's rights, sensitive to the effects of unconscious racism, and conservative in finding state action.

C. Vote Districting

During most of the Burger Court era, the most difficult Voting Rights Act claims were facially neutral regulations that diluted minority voting power. Justice Marshall made his views clear in *Mobile v. Bolden*, where he dissented from the Court's decision upholding Mobile's at-large electoral system.⁴⁰ He believed that voting regulations "having obvious discriminatory effects represent, at the very least, selective racial sympathy and indifference resulting in the frustration of minority desires, the stigmatization of the minority as second-class citizens, and the perpetuation of

³² *Georgia v. McCollum*, 505 U.S. 42 (1992).

³³ *Id.* at 67 (O'Connor, J., dissenting).

³⁴ *Id.* at 69.

³⁵ *Id.* at 60 (Thomas, J., concurring).

³⁶ *Id.* at 61 *citing* *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880).

³⁷ *Campbell v. Louisiana*, 523 U.S. 392 (1998).

³⁸ *Id.* at 407 (Thomas, J., dissenting).

³⁹ *Johnson v. California*, 125 S.Ct. 2410 (2005).

⁴⁰ *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

inhumanity.”⁴¹ Fifteen years later, Justice Thomas took the opposite view, arguing that a focus on vote dilution “encourages federal courts to segregate voters into racially designated districts to ensure minority electoral success.”⁴² While Justice Marshall believed that the Court had to protect the interests of minority voters, Justice Thomas believed that the courts did more harm than good, becoming “a device for regulating, rationing, and apportioning political power among racial and ethnic groups.”⁴³

In the time between Justice Marshall’s statements and those of Justice Thomas, Justice O’Connor developed a more pragmatic approach. In *Holder v. Hall*, she “reject[ed] Justice Thomas’ suggestion that we overhaul our established reading of § 2” of the Voting Rights Act but concurred in the judgment rejecting the challenge.⁴⁴ She recognized a cause of action for vote dilution but only in cases where there was an obvious race-neutral alternative to use as a benchmark.⁴⁵ Her view on vote districting were more clearly articulated in cases involving majority-minority districts, where the government made race-conscious decisions to increase minority voting power.

In *Shaw v. Reno*, North Carolina had drawn a majority-black Congressional district at the request of the Department of Justice.⁴⁶ Justice O’Connor began her majority opinion by writing that the case implicated “two of the most complex and sensitive issues this Court has faced in recent years: the meaning of the constitutional ‘right’ to vote, and the propriety of racebased state legislation designed to benefit members of historically disadvantaged racial minority groups.”⁴⁷ Her primary concern was not individual discrimination against voters but the political ramifications of race-based districting. She saw an “uncomfortable resemblance to political apartheid.”⁴⁸ She worried that such districting “threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole.”⁴⁹ Ultimately, she struck down the majority-minority districting because it “reinforce[d] the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin.”⁵⁰

Justice Thomas joined the *Shaw v. Reno* majority, and he did the same two years later in *Miller v. Johnson*, where Justice O’Connor, in a concurring opinion, clarified her standard, requiring that “a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices.”⁵¹ She further refined this rule in *Bush v. Vera*, requiring a finding that “legitimate districting principles were subordinated to race . . . that race must be *the predominant* factor motivating the legislature’s redistricting decision.”⁵² In addition to her majority opinion, O’Connor wrote a concurrence in *Vera* signaling to other legislatures that “compliance with the

⁴¹ *Id.* at 139.

⁴² *Holder v. Hall*, 512 U.S. 874, 892 (Thomas, J., concurring) (1994)

⁴³ *Id.* at 893.

⁴⁴ *Id.* at 885-86 (O’Connor, J., concurring).

⁴⁵ *Id.* at 890.

⁴⁶ *Shaw v. Reno*, 509 U.S. 630.

⁴⁷ *Id.* at 633.

⁴⁸ *Id.* at 647.

⁴⁹ *Id.* at 650.

⁵⁰ *Id.* at 657.

⁵¹ *Id.*

⁵² *Bush v. Vera*, 517 U.S. 952, 958 (1996) (quotations removed, emphasis in original).

results test of § 2 of the Voting Rights Act (VRA) is a compelling state interest,”⁵³ suggesting that some race-conscious districting would be permissible. Justice Thomas disagreed with this concession, writing in concurrence that “I cannot agree with Justice O’Connor’s assertion that strict scrutiny is not invoked by the intentional creation of majority-minority districts.”⁵⁴

Five years later, North Carolina had followed Justice O’Connor’s instructions, and she joined a majority in *Easley v. Cromartie* reversing a District Court’s finding that a majority-minority district was unconstitutional.⁵⁵ Justice Thomas dissented, but this was the last such case to come before the Court because a Republican administration would soon take over the Justice Department. Just when legislatures had begun to grasp Justice O’Connor’s standards, the political will for majority-minority districts evaporated.

By 2003, the Courts were back to considering vote dilution cases. In *Georgia v. Ashcroft*, Justice O’Connor wrote for a majority upholding a redistricting plan that did not maximize the number of majority-minority districts.⁵⁶ She held that “the increase in black voting age population in the other districts likely offsets any marginal decrease in the black voting age population in the three districts that the District Court found retrogressive.”⁵⁷ In her view, approving the district served “to foster our transformation to a society that is no longer fixated on race.”⁵⁸ Justice Thomas concurred in the case simply to say that he did not believe the plaintiffs had a cause of action for dilution, as he had previously articulated in *Holder v. Hall*.⁵⁹

Although Justice O’Connor’s most significant opinion on the vote districting issue was the striking of a district in *Shaw v. Reno*, Justice O’Connor’s legacy in this area is a rule of deference. Since North Carolina was able to comply with her standard in *Cromartie* and Georgia was able to avoid her scrutiny, race is not explicitly banned from vote districting decisions. Justice O’Connor’s rule, and the Court’s rule, allows consideration of race as long as it is not the “predominant factor.”

⁵³ *Id.* at 990 (O’Connor, J., concurring).

⁵⁴ *Id.* at 999 (Thomas, J., concurring).

⁵⁵ *Easley v. Cromartie*, 532 U.S. 234 (2001).

⁵⁶ *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

⁵⁷ *Id.* at 487.

⁵⁸ *Id.* at 490.

⁵⁹ *Id.* at 492 (Thomas, J., concurring) *citing* *Holder v. Hall*, 512 U.S. 874, 891 (1994).

D. Affirmative Action

The law of affirmative action was fractured and indeterminate when Justice O'Connor joined the Supreme Court. In *Regents of the University of California v. Bakke*,⁶⁰ decided three years before her confirmation, four Justices sought to uphold a university affirmative action admissions program as a "benign" racial classification,⁶¹ four Justices sought to strike down all affirmative action programs,⁶² and Justice Powell cast the deciding vote striking down the admissions policy but leaving the door open for future affirmative action programs.⁶³ Justice Marshall was a strong defender of affirmative action, writing in dissent that "[i]f we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors."⁶⁴

Just two years later, six Justices voted to uphold a Congressional set-aside for minority businesses in *Fullilove v. Klutznick*.⁶⁵ Justice Marshall argued in concurrence that "the consideration of race is relevant to remedying the continuing effects of past racial discrimination."⁶⁶ He also wrote that "any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program."⁶⁷ The first time Justice O'Connor had to consider affirmative action issues, she shared many of Justice Marshall's concerns with stigmatization. The case was *Mississippi University for Women v. Hogan*, which involved affirmative action for women, with an all-female nursing school justifying its admissions policies by claiming that they were necessary to help women succeed.⁶⁸ Justice O'Connor wrote for a majority forcing the school to admit a male applicant, insisting that "the validity of gender-based classification ... must be applied free of fixed notions concerning the roles and abilities of males and females."⁶⁹ She was troubled by the fact that the female-only admissions policy "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."⁷⁰ The fact that her first case in this area related to gender rather than race may have made this issue more personal to her, and it certainly helped her to develop a coherent doctrine.

In her first racial affirmative action case, Justice O'Connor attempted to bridge the ideological divide on the Court.⁷¹ In *Wygant v. Jackson*, she observed that "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."⁷² However, the divisions persisted and she was relegated to dissenting in several cases, gradually developing a doctrine that could appeal to more of her colleagues. In *Sheet Metal Workers*, decided later in 1986,

⁶⁰ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

⁶¹ *Id.* at 327 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part)

⁶² *Id.* at 408 (Stevens, Stewart, Rehnquist, JJ., with Burger, C.J., concurring in part and dissenting in part).

⁶³ *Id.* at 311-12.

⁶⁴ *Id.* at 402 (Marshall, J., dissenting).

⁶⁵ *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

⁶⁶ *Id.* at 518 (Marshall, J., concurring).

⁶⁷ *Id.* at 519 *quoting* *Bakke*, 438 U.S. at 361.

⁶⁸ *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

⁶⁹ *Id.* at 724-25.

⁷⁰ *Id.* at 729.

⁷¹ *Wygant*, 476 U.S. 276.

⁷² *Id.* at 287.

Justice O'Connor wrote that "it is completely unrealistic to assume that individuals of each race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination."⁷³ In her *United States v. Paradise* dissent a year later,⁷⁴ she committed to the doctrine of strict scrutiny.⁷⁵ By 1989, Justice O'Connor was ready lead the Court on affirmative action.

In *Richmond v. J.A. Croson*, Justice O'Connor wrote for a five-Justice majority striking down a 30% set-aside for minority contractors.⁷⁶ This policy was modeled on the 10% set-aside the Court upheld in *Fullilove*, but O'Connor believed that there were more stringent requirements on state and local governments, since "the Fourteenth Amendment stemmed from a distrust of state legislative enactments based on race."⁷⁷ She established a strict scrutiny test requiring that "the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool" and that "the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."⁷⁸ As developed in her earlier dissents, stereotypes and stigmas were central to her holding: "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."⁷⁹

Justice Marshall dissented forcefully, repeating his view that "[a] profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism."⁸⁰ He sharply criticized Justice O'Connor's opinion, which he believed "signals that ... racial discrimination [is] largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice."⁸¹ However, Justice O'Connor is careful to note that "[n]othing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction," and "[i]n the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."⁸²

A year later, the pendulum swung back to Marshall's side, and he joined Justice Brennan's majority opinion in *Metro Broadcasting, Inc. v. Federal Communications Commission*, upholding an FCC regulation setting aside radio stations for minority owners.⁸³ The majority distinguished the case from *Croson* because the policy in question was federal, but Justice O'Connor was not convinced. She wrote a strong dissent that set the course for the next decade of affirmative action jurisprudence. She

⁷³ *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 494-95 (O'Connor, J., concurring in part and dissenting in part) (1986).

⁷⁴ *United States v. Paradise*, 480 U.S. 149, 197 (1987) (O'Connor, J., dissenting).

⁷⁵ *Id.* at 196.

⁷⁶ *Croson*, 488 U.S. 469 (1989).

⁷⁷ *Id.* at 491.

⁷⁸ *Id.* at 493.

⁷⁹ *Id.*

⁸⁰ *Id.* at 551-52 (Marshall, J., dissenting).

⁸¹ *Id.* at 552.

⁸² *Id.* at 509.

⁸³ *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990).

was deeply concerned that the “policies may embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts – their very worth as citizens – according to a criterion barred to the Government by history and the Constitution.”⁸⁴ It is this stereotyping that troubled Justice O’Connor, because “[t]he racial generalization inevitably does not apply to certain individuals, and those persons may legitimately claim that they have been judged according to their race rather than upon a relevant criterion.”⁸⁵ After Justices Brennan and Marshall left the Court, this would become the dominant view of the Court.

In 1995, Justice O’Connor’s majority opinion in *Adarand Constructors, Inc. v. Pena* made her views the law.⁸⁶ Although overruling prior precedent, Justice O’Connor argued that “[b]y refusing to follow *Metro Broadcasting* ... we do not depart from the fabric of the law; we restore it.”⁸⁷ By this time, Justice Thomas had taken Justice Marshall’s seat on the bench, and he concurred, showing how far apart he and Marshall were on this subject: “In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice.”⁸⁸ However, like Marshall and O’Connor, Thomas shared a concern with racial stigmatization: “These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences.”⁸⁹

Justice O’Connor and Justice Thomas remained in agreement for eight years, until the Court considered *Grutter v. Bollinger* in 2003.⁹⁰ Justice O’Connor wrote for the majority upholding the University of Michigan’s law school admissions policy.⁹¹ She recognized diversity as a compelling interest, noting that “the Law School’s admissions policy promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of difference races.”⁹² All four Justices that joined her opinion in *Adarand* dissented in *Grutter*. Justice Thomas did so sharply, writing that “[t]he majority upholds the Law School’s racial discrimination not by interpreting the people’s constitution, but by responding to a faddish slogan of the cognoscenti.”⁹³ However, in many ways *Grutter* was consistent with O’Connor’s earlier affirmative action jurisprudence. The University of Michigan emphasized that “diminishing the force of such stereotypes is ... a crucial part of the Law School’s mission.”⁹⁴ Justice O’Connor had “never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.”⁹⁵ As was the case in vote districting, the litigants in *Grutter* had paid attention to Justice O’Connor’s jurisprudence and crafted a policy to meet her requirements.

⁸⁴ *Id.* at 604 (O’Connor, J., dissenting).

⁸⁵ *Id.* at 620.

⁸⁶ *Adarand Constructors v. Pena*, 515 U.S. 200 (1995).

⁸⁷ *Id.* at 233-34.

⁸⁸ *Id.* at 241 (Thomas, J., concurring).

⁸⁹ *Id.*

⁹⁰ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁹¹ *Id.* at 328.

⁹² *Id.* at 330 (quotations removed).

⁹³ *Id.* at 350 (Thomas, J., dissenting).

⁹⁴ *Id.* at 333 (majority opinion).

⁹⁵ *Id.* at 328.

Justice O'Connor's Supreme Court decisions on race are not easily categorized as "conservative" or "liberal," and that is one reason her views came to define the Court's standards. She came to the Court with relatively few preconceived notions regarding race, and she was much more interested in developing consistent standards than she was in reinforcing ideology. This pragmatic approach allowed litigants to read and react to her rulings, and her standards had been employed in legislatures across the country by the end of her career. Inherent in these standards were many concepts borrowed from Justice Marshall and Justice Thomas, whom could offer practical experience that O'Connor never had. The next section of this paper will explore the ways that these influences became part of Justice O'Connor's language and doctrine in issues of race.

II. JUSTICE O'CONNOR'S RACE JURISPRUDENCE

The outcome of a case is often much less important than the doctrine used to decide it. Especially in race jurisprudence, where every case affects an entire class of individuals, court rulings must establish standards that can be applied to a wide variety of situations. Justice O'Connor was always very conscious of this fact, and she preferred to set broad standards that would not foreclose some unforeseen future circumstance. This allowed legislators to draw district lines that did not imply prejudice, and it allowed university administrators design admissions policies that did not stigmatize. This section will investigate the ways in which Justice O'Connor developed doctrines to allow flexibility on racial issues, and it will consider the influence of her African-American colleagues on these doctrines.

A. Recognizing Discrimination

One of the most critical issues in Supreme Court race jurisprudence is the standard required to recognize racial discrimination. Although intentional and explicit racial discrimination is recognized by all courts, many forms of discrimination are less visible. Even obvious discrimination may not be attributable to the government. In this area of the law, judicial discretion plays a particularly important role. Justice Marshall, who put the Supreme Court at the forefront of the civil rights movement, believed in expanding the Court's recognition of discrimination. Justice O'Connor and Justice Thomas, however, shared a conservative philosophy that generally sought to keep the courts out of areas where individuals or other branches might be better suited to act.

In the year before Justice O'Connor came to the Court, Justice Marshall warned against "manipulating doctrines and drawing improper distinctions under the Fourteenth and Fifteenth Amendments" that make the "Court an accessory to the perpetuation of racial discrimination."⁹⁶ This was a condemnation of his more conservative colleagues, with whom Justice O'Connor often concurred in her early race cases. In *Firefighters Local Union No. 1784 v. Stotts*, the Court rejected a challenge to seniority-based layoffs that had a disproportionate racial impact.⁹⁷ Justice O'Connor wrote in concurrence that the plaintiffs had not presented "a plausible case of discriminatory animus in the adoption or application of the seniority system."⁹⁸ In *Allen v. Wright*, Justice O'Connor wrote for a majority refusing to find standing for the plaintiffs because they had not been

⁹⁶ *City of Mobile v. Bolden*, 446 U.S. 55, 141 (1980) (Marshall, J., dissenting).

⁹⁷ *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

⁹⁸ *Id.* at 587 (O'Connor, J., concurring).

“personally denied equal treatment by the challenged discriminatory conduct.”⁹⁹ In these early cases, O’Connor showed her conservative tendencies, adhering to the principle first established in *Washington v. Davis* that the Court would not recognize a claim without some showing of discriminatory intent.¹⁰⁰ In 2003, she still enforced the same standard, writing for the Court in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*: “We have made it clear that ‘proof of racially discriminatory intent or purpose is required’ to show a violation of the Equal Protection Clause.”¹⁰¹ Requiring specific intent was a method of adjudication that Justice O’Connor was likely familiar with as a state court judge, and she did not hesitate to throw out discrimination cases on these grounds.

In the peremptory challenge cases, discriminatory intent worked with the state action doctrine to limit claims. Concurring in *Hernandez*, she wrote that “a violation of the Equal Protection Clause requires state action motivated by discriminatory intent; the disproportionate effects of state action are not sufficient to establish such a violation.”¹⁰² In *Edmonson*, she dissented because “a peremptory strike by a private litigant is fundamentally a matter of private choice and not state action.”¹⁰³ In *McCullum*, she wrote that “a private party’s exercise of choice allowed by state law does not amount to state action.”¹⁰⁴ This judicial philosophy was generally consistent with that of Justice Thomas, whom she wrote in *Missouri v. Jenkins* that “[p]sychological injury or benefit is irrelevant to the question whether state actors have engaged in intentional discrimination.”¹⁰⁵ In that case, Justice O’Connor also wrote that “[t]hose myriad factors are not readily corrected by judicial intervention, but are best addressed by the representative branches.”¹⁰⁶ When asked to recognize discrimination, Justice O’Connor was reliably conservative throughout her career, generally agreeing with Justice Thomas but not allowing other Justices to significantly change her views.

B. Strict Scrutiny

Justice O’Connor’s views on “strict scrutiny” were far more complex. She came to the Court with few preconceived notions regarding the proper judicial scrutiny for racial classifications, and there were no reliable precedents on the issue. She eventually developed an approach that was between the Rehnquist Court’s two ideological extremes that divided the Court, and her opinions defined the law on all racial classifications.

i) Applying Strict Scrutiny

When Justice O’Connor came to the Supreme Court in 1981, her colleagues were bitterly divided on the issue of strict scrutiny. In *Bakke*,¹⁰⁷ four Justices sought to uphold an affirmative action admissions program under an intermediate level of scrutiny,¹⁰⁸ four

⁹⁹ *Allen v. Wright*, 468 U.S. at 755.

¹⁰⁰ *Washington v. Davis*, 426 U.S. 229 (1976).

¹⁰¹ *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 194 (2003) quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977).

¹⁰² *Hernandez*, 500 U.S. at 372-73 (O’Connor, J., concurring).

¹⁰³ *Edmonson*, 500 U.S. at 632 (O’Connor, J., dissenting).

¹⁰⁴ *McCullum*, 505 U.S. at 66 (O’Connor, J., dissenting).

¹⁰⁵ *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) (Thomas, J., concurring).

¹⁰⁶ *Id.* at 112 (O’Connor, J., concurring).

¹⁰⁷ *Bakke*, 438 U.S. 265 (1978).

¹⁰⁸ *Id.* at 327 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part)

Justices sought to strike down all affirmative action programs under strict scrutiny,¹⁰⁹ and Justice Powell cast the deciding vote applying strict scrutiny and striking down the admissions policy but recognizing a compelling interest in diversity.¹¹⁰ This five-four decision in favor of strict scrutiny was only a temporary truce, because two years later a six-three decision rejected strict scrutiny in *Fullilove v. Klutznick*.¹¹¹ In a concurring opinion in that case, Justice Marshall argued that “strict scrutiny” was merely a pretense for opposition to affirmative action; he believed that the advocates of strict scrutiny were hiding behind a “scrutiny that is strict in theory, but fatal in fact.”¹¹² A year later, Justice O’Connor joined the Court, and over the course of the next two decades, she brought coherence to this fractured doctrine.

Justice O’Connor first elaborated on this issue in *Wygant v. Jackson*, where the majority sought to impose strict scrutiny while other members of the Court advocated for a more relaxed standard.¹¹³ In a sharp dissent, Justice Marshall noted that “[a]greement upon a means for applying the Equal Protection Clause to an affirmative-action program has eluded this Court every time the issue has come before us.”¹¹⁴ Justice O’Connor did not believe the situation to be so dire, observing that the majority’s “standard reflects the belief, apparently held by all Members of this Court, that racial classifications of any sort must be subjected to ‘strict scrutiny,’ however defined.”¹¹⁵ In *Wygant*, it was far from clear where Justice O’Connor stood, but she was clearly searching for compromise. This open-minded approach gave her a unique opportunity to bridge this divide.

A year after *Wygant*, the Court did not apply strict scrutiny in *Paradise*, with Justice Powell switching his vote.¹¹⁶ The lack of a consistent standard troubled Justice O’Connor, and in dissent, she cited *Wygant* for the principle “that the level of Fourteenth Amendment ‘scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination.’”¹¹⁷ She concluded that a single standard of scrutiny would be necessary for all race cases.

This view crystallized in *Croson*, where she emphasized the purpose of strict scrutiny in all race cases:

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are “benign” or “remedial” and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to “smoke out” illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen “fit” this compelling goal so closely

¹⁰⁹ *Id.* at 408 (Stevens, Stewart, Rehnquist, JJ., with Burger, C.J., concurring in part and dissenting in part).

¹¹⁰ *Id.* at 311-12.

¹¹¹ *Fullilove*, 448 U.S. 448.

¹¹² *Id.* at 518 (Marshall, J., concurring).

¹¹³ *Wygant*, 476 U.S. 276.

¹¹⁴ *Id.* at 301 (Marshall, J., dissenting).

¹¹⁵ *Id.* at 285 (O’Connor, J., concurring).

¹¹⁶ *United States v. Paradise*, 480 U.S. 149 (1987).

¹¹⁷ *Id.* at 196 (O’Connor, J., dissenting) quoting *Wygant*, 476 U.S. at 273.

that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.¹¹⁸

This strong endorsement of strict scrutiny was a far cry from her tentative first steps in *Wygant*, and it stood in stark contrast to the views of Justice Marshall and the other liberal Justices on the Court. Sensing an impending shift in the Court's race jurisprudence, Justice Marshall sharply criticized Justice O'Connor's opinion, warning that:

In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brutal and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice.¹¹⁹

The alliance brokered in *Croson* fell apart just a year later, when Justice Stevens voted for intermediate scrutiny in *Metro Broadcasting*.¹²⁰ However, Justice O'Connor refused to yield any ground, writing in dissent that "[t]he Court's application of a lessened equal protection standard ... finds no support in our cases or in the Constitution."¹²¹

With David Souter and Clarence Thomas replacing Justice Brennan and Justice Marshall, Justice O'Connor wrote for a majority in *Shaw v. Reno* advocating strict scrutiny.¹²² She reiterated her *Croson* and *Metro Broadcasting* opinions, writing that "the very reason that the Equal Protection Clause demands strict scrutiny of all racial classifications is because without it, a court cannot determine whether or not the discrimination is truly 'benign.'"¹²³ She wrote the final word on strict scrutiny in *Adarand*, where the majority explicitly overruled *Metro Broadcasting*,¹²⁴ firmly establishing that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."¹²⁵

Although Justice O'Connor enforced strict scrutiny upon all racial classifications, her stance was borne of compromise rather than ideology, which was readily apparent in the vote districting cases. In *Vera*, she wrote that "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race."¹²⁶ In the case of vote districting, "[e]lectorate district lines are 'facially race neutral,' so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of 'classifications based explicitly on race.'"¹²⁷ The flexibility in her standard stood in contrast to Justice Thomas's assertion that "application of strict scrutiny

¹¹⁸ *Croson*, 488 U.S. at 493.

¹¹⁹ *Id.* at 552 (Marshall, J., dissenting).

¹²⁰ *Metro Broadcasting*, 497 U.S. 547.

¹²¹ *Id.* at 603 (O'Connor, J., dissenting).

¹²² *Shaw v. Reno*, 509 U.S. 630.

¹²³ *Id.* at 653.

¹²⁴ *Adarand*, 515 U.S. at 233-34.

¹²⁵ *Id.* at 227.

¹²⁶ *Vera*, 517 U.S. at 958.

¹²⁷ *Id.*

in this suit was never a close question.”¹²⁸ He believed that *Adarand* mandated “that all racial classifications by government must be strictly scrutinized and, even in the sensitive area of state legislative redistricting, I would make no exceptions.”¹²⁹

Justice O’Connor applied strict scrutiny to give every racial classification fair consideration, not as a pretext to strike down policies with which she disagreed. This was demonstrated in 2005, when it was conservative Justices arguing for a lower level of scrutiny. In *Johnson v. California*, where she wrote for a majority striking down racial segregation in California prisons, Justice Thomas advocated for intermediate scrutiny – a “reasonably related” standard.¹³⁰ While Justice O’Connor quoted her opinion in *Shaw v. Reno*, emphasizing that “racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally,”¹³¹ Justice Thomas argued that “*Adarand* has nothing to do with this case.” Although he had claimed “no exceptions” in the area of redistricting, he believed that “constitutional demands are diminished in the unique context of prisons.”¹³² Justice O’Connor was unpersuaded, and she held steadfast to her view, consistent through nearly two decades of jurisprudence, of “insist[ing] on strict scrutiny in every context.”¹³³

The doctrine of strict scrutiny for all racial classifications was vehemently opposed by Justice Marshall during his time on the Court, but although Justice O’Connor sided with his opponents, her strict scrutiny was both stricter and more flexible than that of her more conservative colleagues. When Justice Thomas sought to enforce strict scrutiny in all redistricting cases, O’Connor insisted on first establishing that race was the predominant factor.¹³⁴ When Justice Thomas sought to apply intermediate scrutiny in prisons, Justice O’Connor insisted on a consistent scrutiny, just as she had rejected Justice Marshall’s pleas for intermediate scrutiny in affirmative action fifteen years earlier. Strict scrutiny became O’Connor’s doctrine, and since few other Justices had an opportunity to write majority opinions on the issue, the standard remained remarkably consistent over two decades.

ii) Defining Strict Scrutiny

In addition to requiring strict scrutiny for all racial classifications, Justice O’Connor had to define the contours of the scrutiny. By the time Justice O’Connor came to the Court, strict scrutiny had already been defined in terms of a two part test: First, the action must be justified by a compelling interest.¹³⁵ Second, the implementation must be narrowly tailored to accomplish that interest.¹³⁶ The meaning of these two tests in the context of race had not yet been clearly established.

a) Compelling Interests

In her *Wygant* concurrence, Justice O’Connor was not very strict in her definition of a compelling interest, writing that “in formulating affirmative action programs, the

¹²⁸ *Id.* at 999 (Thomas, J., concurring).

¹²⁹ *Id.* at 1002-03.

¹³⁰ *Johnson v. California*, 125 S.Ct. 1141 (2005)

¹³¹ *Id.* at 1147 quoting *Shaw v. Reno*, 509 U.S. at 651.

¹³² *Id.* at 1167 (Thomas, J., dissenting).

¹³³ *Id.* at 1146.

¹³⁴ *See Vera*, 517 U.S. at 958.

¹³⁵ *See, e.g. Bakke*, 438 U.S. at 357; *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16-17 (1973).

¹³⁶ *See, e.g. Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (collecting cases).

distinction between a ‘compelling’ and an ‘important’ governmental purpose may be a negligible one.”¹³⁷ She identified both the “remedying past or present racial discrimination” and “diversity,” and left the door wide open:

[N]othing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently ‘important’ or ‘compelling’ to sustain the use of affirmative action policies.¹³⁸

However, as she sought precision in the application of strict scrutiny in *Croson*, she cast doubt on non-remedial interests by writing that “[u]nless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”¹³⁹ She also rejected “a generalized assertion that there has been past discrimination” as a compelling interest because it “provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.”¹⁴⁰ In her *Metro Broadcasting* dissent, she rejected yet another interest: “The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications.”¹⁴¹

In *Vera*, Justice O’Connor placed explicit limits on the remedial interest: A State’s interest in remedying discrimination is compelling when two conditions are satisfied. First, the discrimination that the State seeks to remedy must be specific, “identified discrimination”; second, the State “must have had a strong basis in evidence to conclude that remedial action was necessary, *before* it embarks on an affirmative action program.”¹⁴²

Although her majority opinion in *Vera* limited compelling interests, her concurring opinion explicitly named an additional one: “compliance with the results test of § 2 of the Voting Rights Act (VRA) is a compelling state interest.”¹⁴³ Even as she eliminated specific interests, Justice O’Connor never foreclosed the possibility of others, emphasizing in *Grutter* that “we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.”¹⁴⁴ Justice Thomas did not share this view, writing in dissent to limit compelling interests to “only those measures the State must take to provide a bulwark against anarchy, or to prevent violence.”¹⁴⁵ However, Justice O’Connor only expanded the list, remarking that “the Law School’s admissions policy promotes ‘cross-racial understanding,’ helps to break

¹³⁷ *Wygant*, 476 U.S. at 286 (O’Connor, J., concurring)

¹³⁸ *Id.*

¹³⁹ *Croson*, 488 U.S. at 493.

¹⁴⁰ *Id.* at 497.

¹⁴¹ *Metro Broadcasting*, 497 U.S. at 612 (O’Connor, J., dissenting).

¹⁴² *Bush v. Vera*, 517 U.S. at 982 *quoting* *Shaw v. Hunt*, 517 US 899, 910 (1996).

¹⁴³ *Id.* at 990 (O’Connor, J., concurring).

¹⁴⁴ *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

¹⁴⁵ *Id.* at 353 (Thomas, J., dissenting).

down racial stereotypes, and ‘enables [students] to better understand persons of difference races.’”¹⁴⁶

Justice O’Connor’s refusal to explicitly limit the spectrum of compelling interests reflects her strong desire for consistent and flexible standards. Her insistence on strict scrutiny was never meant to end all racial considerations. Rather, she took the words at face value, allowing any interest that might be sufficiently compelling.

b) Narrow Tailoring

The second part of the strict scrutiny test is narrow tailoring, and this was the an underdeveloped part of the doctrine when Justice O’Connor came to the Court. The first time she addressed the issue, she advocated a harsh standard in her *Paradise* dissent, requiring that “to survive strict scrutiny, the District Court order must fit with greater precision than any alternative remedy.”¹⁴⁷ She did not leave much more room in *Croson*, where she conceded only that “[i]n the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.”¹⁴⁸

These types of unassailable procedural barriers were precisely what Justice Marshall condemned, but as with other areas of her strict scrutiny doctrine, Justice O’Connor retained a great deal of flexibility. The last argument in her *Adarand* opinion sought “to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact,’” quoting Justice Marshall’s own words from *Fullilove*.¹⁴⁹ She did not foreclose future affirmative action policies, because “racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.”¹⁵⁰ There was a similar caveat in *Shaw v. Reno*, where she wrote that “[t]his Court never has held that race-conscious state decision-making is impermissible in all circumstances.”¹⁵¹

Although the door was open, it was not clear which policies might be let through until the Court upheld the University of Michigan Law School’s race-conscious admissions policy in 2003.¹⁵² The four Justices that joined her majority opinion in *Adarand* all dissented in *Grutter*, forcing Justice O’Connor to defend her doctrine: “we do not abandon strict scrutiny ... we adhere to *Adarand*’s teaching that the very purpose of strict scrutiny is to take such ‘relevant differences into account.’”¹⁵³ She found that that “the Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”¹⁵⁴ This was in contrast to *Gratz*, where she found that the undergraduate procedures “do not provide for a meaningful individualized review of applicants.”¹⁵⁵ The final rule on strict scrutiny is much less stringent than her original proclamation in *Paradise* that requires the best possible option; she explicitly holds in

¹⁴⁶ *Id.* at 330 (majority opinion).

¹⁴⁷ *Paradise*, 480 U.S. at 199 (O’Connor, J., dissenting).

¹⁴⁸ *Croson*, 488 U.S. at 509.

¹⁴⁹ *Id.* at 237 quoting *Fullilove* 448 U.S. at 519 (Marshall, J., concurring).

¹⁵⁰ *Id.*

¹⁵¹ *Shaw v. Reno*, 509 U.S. at 642 (emphasis in original).

¹⁵² *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹⁵³ *Id.* at 334 quoting *Adarand*, 515 U.S. at 228 (internal quotation marks and citations omitted).

¹⁵⁴ *Id.* at 337 (majority opinion).

¹⁵⁵ *Gratz v. Bollinger*, 539 U.S. 244, 276 (O’Connor, J., concurring) (2003).

Grutter that “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative.”¹⁵⁶

There is an apparent disconnect between the Justice O’Connor that wrote in *Paradise, Croson, Metro Broadcasting, Shaw v. Reno, and Adarand*, and the Justice O’Connor that wrote the majority opinion in *Grutter*. After spending her first two decades on the Court unable to find a policy that satisfied strict scrutiny, she became the savior of affirmative action in 2003. However, a careful reading of her strict scrutiny jurisprudence reveals remarkable consistency over her career. Justice Marshall was the one that sought to draw an amorphous distinction between discriminatory and benign racial classifications. Justice Thomas sought to use strict scrutiny to overturn any legislature’s consideration of race. Justice O’Connor charted a middle course, which was guided by a consistent and flexible doctrine. For Justice Marshall and Justice Thomas, the issues were too personal and their views too ideological. For Justice O’Connor, it was apparent that she had to “consistently give racial classifications . . . detailed examination” and “searching judicial inquiry,”¹⁵⁷ and that is the legacy she leaves, forcing the courts to look at every racial classification with a suspicious eye but a fair hand.

C. Stereotypes and Stigmas

One of the most interesting areas where Justice Marshall and Justice Thomas have influenced Justice O’Connor’s race jurisprudence is in the explicit discussion of racial stereotypes and stigmas. This manifested as a willingness to recognize unconscious racism, which was a major factor in the peremptory challenge cases. In *Batson*, Justice Marshall worried that cited the unavoidable effects of unconscious racism.¹⁵⁸ Justice Thomas expanded on this idea in his *McCullum* dissent:

Major newspapers regularly note that the number of whites and blacks that sit on juries in important cases. Their editors and readers apparently recognize that conscious and unconscious prejudice persists in our society and that it may influence some juries. Common experience and common sense confirm this understanding.¹⁵⁹

This seemed to have an effect on Justice O’Connor, whom joined the majority in *Batson*, striking down peremptories for prosecutors, but dissented in *McCullum*, reluctant to do the same for defendants because of concern with “the misconceptions or biases of white jurors.”¹⁶⁰

Justice Marshall and Justice Thomas also considered racial stigma explicitly, particularly in affirmative action cases. Justice Marshall developed these ideas when considering racial discrimination, writing that “any statute must be stricken that stigmatizes any group.”¹⁶¹ He believed that the damage posed by discrimination was psychological as well as physical, as he stated in a case considering the erection of a

¹⁵⁶ *Grutter*, 539 U.S. at 339.

¹⁵⁷ *Adarand*, 515 U.S. at 236.

¹⁵⁸ *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

¹⁵⁹ *McCullum*, 505 U.S. at 61 (Thomas, J., concurring).

¹⁶⁰ *Id.* at 69 (O’Connor, J., dissenting).

¹⁶¹ *Fullilove v. Klutznick*, 448 U.S. at 519 (Marshall, J., concurring) quoting *Bakke*, 438 U.S. at 361 (joint separate opinion).

traffic barrier between black and white neighborhoods.¹⁶² In the area of affirmative action, Justice Marshall used this concept to separate discriminatory racial classifications from benign classifications. In *Fullilove*, he would have upheld the program because “under the set-aside provision a contract may be awarded to a minority enterprise only if it is qualified to do the work, [so] the provision stigmatizes as inferior neither a minority firm that benefits from it nor a nonminority firm that is burdened by it.”¹⁶³

Justice O’Connor was sympathetic to the concept of stereotypes, which she herself articulated in cases regarding gender discrimination, striking down a “policy of excluding males from admission to the School of Nursing” because it “tends to perpetuate the stereotyped view of nursing as an exclusively woman’s job.”¹⁶⁴ Her dissent in *Metro Broadcasting* expounded on this topic with regard to race:

Such policies may embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts – their very worth as citizens – according to a criterion barred to the Government by history and the Constitution ... Racial 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.¹⁶⁵

In the context of vote districting, these concerns took on a new dimension. Not only do racial classifications “threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility,”¹⁶⁶ but race-based voter districting “reinforces the perception that members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls.”¹⁶⁷

Justice Thomas shared these views, writing that “[t]he assumptions upon which our vote dilution decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution.”¹⁶⁸ Regarding affirmative action, Justice Thomas believed “[t]hese programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences.”¹⁶⁹ In his *Grutter* dissent, he expounded on the harm of stigmas:

When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a party in their advancement. The question itself is the stigma – because either racial discrimination did play a role, in which case the person may be deemed ‘otherwise unqualified,’ or it did not, in which case asking the

¹⁶² *City of Memphis v. Greene*, 451 U.S. 100, 139-40 (1981) (Marshall, J., dissenting).

¹⁶³ *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring).

¹⁶⁴ *Mississippi University for Women v. Hogan*, 458 U.S. 718, 729 (1982).

¹⁶⁵ *Metro Broadcasting*, 497 U.S. at 604 (O’Connor, J., dissenting).

¹⁶⁶ *Shaw v. Reno*, 509 U.S. 630 at 644.

¹⁶⁷ *Id.* at 647.

¹⁶⁸ *Holder v. Hall*, 512 U.S. at 905-06 (Thomas, J., concurring).

¹⁶⁹ *Adarand Constructors*, 515 U.S. at 241 (Thomas, J., concurring).

question itself unfairly marks those blacks who would succeed without discrimination.¹⁷⁰

Justice O'Connor disagreed with Justice Thomas in *Grutter*, but among the benefits of affirmative action she cited was that it “helps to break down racial stereotypes.”¹⁷¹

Many Supreme Court Justices have condemned the consideration of these psychological factors in race jurisprudence. In *Bakke*, Justice Powell wrote that “[t]he Equal Protection Clause is not framed in terms of ‘stigma.’ Certainly the word has no clearly defined constitutional meaning.”¹⁷² In *Shaw v. Reno*, Justice Souter dismisses Justice O'Connor’s “stigmatic harm” as “utterly implausible.”¹⁷³ There are other Justices that are amenable to these concepts, such as Justice Stevens,¹⁷⁴ but racial stigmas have rarely been featured in majority opinions except when written by Justice O'Connor. Her comfort with this concept likely stems from her own experience as a woman facing stereotypes in the practice of law, but her use of this language has also served to elevate the views of Justice Marshall and Justice Thomas, not necessarily in the outcomes of cases but in the doctrine that is developed. Indeed, without consideration of these psychological factors, Justice O'Connor may not have been able to develop a coherent race jurisprudence at all.

Conclusion

When Justice O'Connor came to the Supreme Court in 1981, it was bitterly divided on issues of race. The momentum for desegregation had slowed, the status of facially neutral regulations was indeterminate, and the Court’s seminal affirmative action case generated six separate opinions. Where the Warren Court established strong protections against racial discrimination and a commitment to equality, the Burger Court struggled to define the limits of those protections and the strength of that commitment. With preemptory challenges, affirmative action, and majority-minority districting on the docket, the issues were no easier for the Rehnquist Court. The two Justices with the most personal experience with these issues, Thurgood Marshall and Clarence Thomas, found themselves on the sidelines in most of these cases. However, the Court’s first woman, Sandra Day O'Connor, was at the forefront of almost every major decision.

On routine discrimination and desegregation issues, Justice O'Connor generally remained true to conservative judicial principles. However, on the novel race issues that challenged the Rehnquist Court, Justice O'Connor was able to develop consistent and flexible standards while forging narrow majorities. In both majority-minority districting and affirmative action, her legal standards were clear enough for litigants to allow litigants to adjust within a decade.¹⁷⁵ Her doctrine of strict scrutiny is the legal standard that will apply to all race classifications for the foreseeable future.

¹⁷⁰ *Grutter*, 539 U.S. at 373 (Thomas, J., dissenting).

¹⁷¹ *Id.* at 330 (majority opinion).

¹⁷² *Bakke*, 438 U.S. 265, 295 (1978).

¹⁷³ *Shaw v. Reno*, 509 U.S. at 687 (Souter, J., dissenting).

¹⁷⁴ *See, e.g.* *Croson*, 488 U.S. at 516 (Stevens, J., concurring); *Adarand*, 515 U.S. at 249 (Stevens, J., dissenting).

¹⁷⁵ *See, e.g.* *Easley v. Cromartie*, 532 U.S. 234; *Grutter v. Bollinger*, 539 U.S. 306.

Justice O'Connor was the swing vote on many issues, but her effect on race jurisprudence was especially profound. There were two primary factors that allowed her to take such an important role: First, her status as the first woman on the Court helped her relate to the plight of racial minorities and particularly the psychological factors attendant to discrimination. Second, her desire for compromise and her relative unfamiliarity with racial issues made her willing to listen to her colleagues, especially those with life experience to share. Justice Marshall was her raconteur,¹⁷⁶ and Justice Thomas has played a similar role in addition to being a conservative ally in many cases.

After Justice O'Connor leaves the Court, her race jurisprudence will remain. The standards she adopted in affirmative action and redistricting cases may be subject to manipulation by other Justices, but with cases both upholding and striking down policies on the record, both her consistency and flexibility should be preserved by *stare decisis*. Regardless of the future fate of racial classifications, Justice O'Connor's legacy will survive in the doctrines that will be used to decide these cases: strict scrutiny, compelling interest, narrow tailoring, and racial stigma. Long after Justice O'Connor has left the Court, her jurisprudence will endure, preserving not only her views on race, but those of her colleagues as well, especially Justice Marshall and Justice Thomas, the minorities to her left and right that guided her towards the center.

¹⁷⁶ See 44 Stan. L. Rev. 1217.

Bibliographical Note

The primary sources for this paper were the cases and opinions of the Supreme Court. Here are a few additional sources:

Tushnet, Mark, *MAKING CONSTITUTIONAL LAW* (Oxford University Press 1997) (This book was my primary source regarding Thurgood Marshall; although since I focused on Justice O'Connor I only used a minimal amount of information from it).

Foskett, Ken, *JUDGING THOMAS : THE LIFE AND TIMES OF CLARENCE THOMAS* (Harper Collins 2004) (This was my primary source regarding Clarence Thomas, although I used very little information from the book in my paper).

O'Connor, Sandra Day, *Thurgood Marshall: The Influence of a Raconteur*, 44 *STAN. L. REV.* 1217 (1992) (This article written by Sandra Day O'Connor was the inspiration for this paper and it provided some brief insight into the interactions between Justices that could provided the basis for influence in cases).

The Sway of the Swing Vote: Justice Sandra Day O'Connor and Her Influence on Issues of Race, Religion, Gender and Class, 44 *MD. J. RACE RELIG. GEND. CLASS* 207 (2004) (This collection of essays about Justice O'Connor were often a little too politically biased or too analytical to be useful, but they provided some good background reading).