Chapter Four

O'Connor in Command

Justice O'Connor stepped front and center as the leading judicial voice on affirmative action cases with her majority opinion in *City of Richmond v. J.A. Croson Company*. Jokingly described by one political observer as a city of "great social rest," the outwardly sleepy Virginia capital had also been capital of the Confederate States of America and a nerve center for the South's massive resistance to school desegregation in the 1950s. By the early 1980s, however, 50 percent of the population and five of the nine city council members were black. In 1983, the council passed an ordinance requiring that nonminority contractors subcontract at least 30 percent of municipal construction contracts to firms at least 51 percent owned and controlled by blacks, Hispanics, Asians, Native American Indians, Eskimos, or Aleuts. At the council meeting devoted solely to this matter, some of those present talked in general about discrimination in the construction industry and the difficulty that minority contractors had breaking into the business. Participants noted that only 0.67 percent of the city's prime construction contracts during the previous five years had been

awarded to minority firms. Although Richmond prevailed against a challenge by a white contractor in the district court, the Fourth Circuit Court of Appeals reversed,[1] noting the Supreme Court's decision in *Wygant*, which had prevented Jackson, Michigan, from laying off a white teacher while maintaining a black with less seniority.

Justice O'Connor rejected the Richmond quota, with a total of six justices coming down on the same side of that issue. She dismissed the notion that the black share of Richmond's population—50 percent—was much of a starting point for a finding of discrimination, insisting that the number of MBEs in the city would have better conveyed the universe from which contractors and subcontractors were selected. Relying on "completely unrealistic" raw population figures betrays "an assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population."[2] She also pointed out that the record did not contain any direct evidence of discrimination on the part of the city or its prime contractors, nor any evidence that the city knew the number of MBEs in town or the percentage of work obtained by minority subcontractors. Without a showing of discrimination and with the strict scrutiny the case required, Richmond could show neither a compelling need for its quota nor a narrowly tailored remedy for addressing any need: "[A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota."[3] Further, the seemingly random inclusion of other ethnic groups—"It may well be that Richmond has never had an Eskimo or Aleut

1. *J.A. Croson Company v. City of Richmond*, 779 F.2d 181 (4th Cir. 1985).
2. *Croson*, 488 U.S. at 507.
3. *Id.* at 499.

citizen"—undermined rather than supported the city's claim that its quota responds to a pattern of discrimination.[4]

Lawyers for the city argued that with the Court having approved a 10 percent federal set-aside in *Fullilove*, "It would be a perversion of federalism to hold that the federal government has a compelling interest in remedying the effects of racial discrimination in its own public works program, but a city government does not."[5] O'Connor addressed this point unconvincingly, falling back on the special responsibility Congress has to implement the Fourteenth Amendment, which, along with the other Civil War amendments, "are limitations of the powers of the States and enlargements of the power of Congress."[6]

This clear constitutional mandate reinforced the need for strict scrutiny to "smoke out" illegitimate uses of race, a practice Justice O'Connor condemned in language stronger than any she had previously employed in affirmative action cases: "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."[7]

Justice O'Connor's tone was strong and confident, and her recognition of the potential harm of race-conscious action was welcome. However, the decision did not convincingly distinguish itself from recent Court holdings to the contrary, and, in yielding to her developed tendency to narrowly apply her own edicts, the decision did away with far less state and

4. *Id.* at 506.
5. *Id.* at 489.
6. *Id.* at 490.
7. *Id.* at 493.

municipal race-conscious activity than was initially assumed.

For one thing, the federal-state explanation for approving a 10 percent set-aside in *Fullilove* while rejecting the 30 percent quota in *Croson* was inconsistent. True, Congress has a special responsibility to implement the Fourteenth Amendment, but it must do so in a constitutional manner affording due process to all races. The *Fullilove* evidence supporting congressional concern about difficulties faced by minority contractors was no more specific and, thus, in a constitutional sense, no more impressive than the evidence for *Croson*—testimony about difficulties minority contractors have with raising funds, posting construction bonds, and working up responsible bids. These obstacles purportedly explain the low number of minority bid winners. In *Fullilove*, the Court told the federal government to continue with its preferences, whereas in *Croson*, Justice O'Connor offered a handful of race-neutral steps that would make it easier for MBEs to compete at least for the smaller contracts. Clearly, as the Court balance shifted, Justice O'Connor and her brethren would seek opportunities to revisit this issue.

Justice O'Connor offered no explanation distinguishing her treatment of statistical information in *Croson* from that in *Johnson*. In both cases, the lower courts found no link between low minority or female participation in the activity in question and any official discrimination. Yet the miniscule percentage of successful minority bidders in *Croson* raised no problem for her, while the failure of females to seek heavy-duty road building work in *Johnson* established, in O'Connor's view, a prima facie case of discrimination by Santa Clara County. Why? The Court has often applied a lesser standard of scrutiny for gender-based distinctions, but

that was not at issue here. Justice O'Connor offered no explanation for her contrary conclusions, and the passage of time has shed no new light on them.

Yet strikingly in *Croson*, Justice O'Connor remained open to the development of convincing evidence of discrimination, even providing a formula for its accomplishment: "There is no doubt that '[W]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.' . . . But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task."[8] With this succinct bit of guidance, Justice O'Connor transformed the denouement she appeared to have wanted—a lessening of reliance on race-conscious state contracting procedures to favor minority applicants—into a mad scramble on the part of hundreds of jurisdictions to find disparities sufficient to justify race-conscious relief. "Disparity studies" appeared in jurisdiction after jurisdiction, vouched for by a parade of expert witnesses translating low numbers of minority contracts into an inference of discrimination. Their claims were in turn disputed by other expert witnesses who saw in the same low numbers only a paucity of qualified minority bidders. Justice O'Connor had spoken forcefully about the evils of race-conscious decision making, but in terms of facts on the ground, her decision served mainly to educate jurisdictions on how best to insulate their race-conscious programs from successful challenge.

8. *Id.* at 501, 502.

A Lurch to the Left

The liberals on the Court were able to reassemble their affirmative action majority for the only time in the 1990s, in the case of *Metro Broadcasting, Inc. v. FCC*.[9] They used their fleeting power to rewrite judicial standards for considering race-conscious government action, only to have the new standards disowned after Justice Marshall surrendered his place on the bench to the conservative Justice Thomas. In view of the brevity with which it served as precedent, *Metro Broadcasting* is most noteworthy for the opportunity it presented Justice O'Connor to spell out in dissent a more complete version of the views she had articulated in *Croson*.

Metro Broadcasting involved a challenge to two rules promulgated by the Federal Communications Commission and designed to increase minority ownership of broadcast outlets. In 1986, minorities owned only 2.1 percent of the more than 1,100 radio and television stations in the United States.[10] The FCC suggested that increasing minority ownership would provide all citizens with a more diverse menu of viewpoints, present minorities depicted on radio and television in less stereotypical ways, and increase the employment of minorities by the broadcast industry. To help effectuate such change, the commission decided to treat minority ownership as one positive factor among several considerations in deciding among competing applicants for broadcasting rights. In addition, the commission made it easier for a licensee whose qualifications for holding a broadcast license had been placed under FCC review to unload the property through a "distress sale" to an FCC-designated

9. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).
10. *Id.* at 553.

minority. In fiscal year 1988, Congress endorsed this policy by including in its appropriation for the FCC a condition that no appropriated money be spent examining or changing its minority policies.[11]

In a dramatic departure from at least a half century of precedent, the Court, led by Justice Brennan, offered a relaxed standard by which the Court would judge benign race-conscious legislation: "We hold that benign race-conscious measures mandated by Congress—even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives."[12] No special scrutiny. No compelling governmental need. No narrow tailoring. No need for any past discrimination to be alleged. No limitation of relief to victims of alleged discrimination. No need to address the lingering effects of past discrimination. As long as a court considered the race-conscious behavior "benign"—presumably meaning it favored minorities at the expense of whites—and as long as it didn't take a court full of clerks to discern the relationship between some important governmental interest and the act in question, the Court would provide its blessing.

All the dissenters, Justices Rehnquist, Kennedy, and Scalia, joined Justice O'Connor's long, comprehensive dissent: "At the heart of the Constitution's guarantees of equal protection lies the simple command that the Government must treat citizens 'as individuals,' not simply as components of a

11. *Id.* at 560.
12. *Id.* at 564–565.

racial, religious, sexual or national class."[13] With *Metro Broadcasting*, the Court abandoned the safeguards of strict scrutiny, compelling need, narrow tailoring—long established to protect this concept. The reason for such scrutiny was to eliminate the division of the nation into racial blocs, thus escalating racial hostility and perhaps stigmatizing the minority. Congressional approval of preferences unlinked to specific past discrimination, though earning respectful consideration, should not alter the Court's responsibility or the standards of close scrutiny. The *Fullilove* decision, which approved the 10 percent set-aside for MBEs, was distinguishable because it was exercised by Congress under its special authority to implement the Fourteenth Amendment—it was part of congressional efforts to remedy past discrimination and never embraced the relaxed standard approved by the Court in *Metro Broadcasting*.

Particularly troubling, Justice O'Connor continued, was the majority's reliance on benign racial classifications: "'Benign racial classification' is a contradiction in terms. Governmental distinctions among citizens based on race or ethnicity, even in the rare circumstances permitted by our cases, exact costs and carry with them substantial dangers. To the person denied an opportunity or right based on race, the classification is hardly benign."[14] Further, the term "benign" conveys a sense of transient fashion rather than immutable principle: "Untethered to narrowly confined remedial notions, 'benign' . . . reflects only acceptance of the current generation's conclusion that a politically acceptable

13. *Id.* at 602.
14. *Id.* at 609.

burden, imposed on particular citizens on the basis of race, is reasonable."[15]

Then came a paragraph that would later haunt Justice O'Connor as she sought to explain her acceptance of the diversity-inspired race preference admissions procedures at the University of Michigan School of Law: "Under the appropriate standard, strict scrutiny, only a compelling interest may support the Government's use of racial classifications. Modern equal protection doctrine has recognized only one such interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications."[16]

O'Connor elaborated that such classifications should be reserved for remedial settings; they should not be invoked for "insubstantial" interests like program diversity: "This endorsement trivializes the constitutional command to guard against such discrimination and has loosed a potentially far-reaching principle disturbingly at odds with our traditional equal protection doctrine. . . . Like the vague assertion of societal discrimination, a claim of insufficiently diverse broadcasting viewpoints might be used to justify equally unconstrained racial preferences, linked to nothing other than proportional representation of various races."[17] Moreover, the concept of equating race with point of view rests on stereotyping and cannot be defended as narrowly tailored. That premise, according to the dissent, "is utterly irrational

15. *Id.* at 610.
16. *Id.* at 612.
17. *Id.* at 614.

and repugnant to the principles of a free and democratic society."[18]

Still, Justice O'Connor could not evade some reference to *Bakke*, in which Justice Powell had accepted some race consciousness in the interest of a diverse student body. This concept is true enough, acknowledged Justice O'Connor, but "only if race were one of many aspects of background sought and considered relevant to achieving a diverse student body."[19]

Finally, Justice O'Connor complained that the FCC had explored no race-neutral ways to achieve diverse viewpoints, including simply requiring more balanced and targeted material.[20]

With *Metro Broadcasting*, two well-defined visions of the standard by which affirmative action cases should be judged were grappling for supremacy on the Court. In the Brennan-Marshall view, benign government classifications were entitled to only enough court review to determine whether they reflected an important governmental interest and were substantially related to the achievement of that interest.

In the other view, race-conscious policies required strict scrutiny—judicial oversight—to ensure they served a compelling government interest, most often (if not exclusively) to redress specific past wrongs. Justice O'Connor had become the most articulate judicial advocate for this latter point of view, and, owing to her opinion in *Croson*, her view was the law with respect to state actions. *Metro Broadcasting*, however, bestowed only an intermediate standard of scrutiny upon federal actions. This decision could perhaps be justified

18. *Id.* at 618.
19. *Id.* at 621.
20. *Id.* at 622.

by distinguishing between the strict standard established for the states under the Fourteenth Amendment's equal protection clause, coupled with Congress' historic mandate to enforce the amendment against the states, and the standard established for the federal government under the due process clause of the Fifth Amendment.

In terms of stare decisis, *Metro Broadcasting* would enjoy the short adventurous life of a jackrabbit testing greyhounds. By the time the next federal program reached the Court, the liberal Justice Marshall had retired, replaced by the conservative Clarence Thomas, and Justices White and Brennan—who had both voted with the majority in *Metro Broadcasting*—had also left the bench, replaced by liberal Clinton Justices Ginsburg and Breyer, both considered likely to back intermediate review. The net conservative gain of one was enough to tip the balance on the Court.

All of that, however, did not occur until 1995, five years after *Metro Broadcasting*. During the interim, Justice O'Connor had the opportunity to discuss race-conscious decision making in the related field of redistricting. Following the 1990 census, North Carolina became entitled to a twelfth congressional seat. The legislature created one majority black district, but the U.S. attorney general refused to "preclear" the plan, claiming under the Voting Rights Act[21] that the state, with a black population of 20 percent, could have created a second majority black district. To gain clearance, the legislature engaged in a bit of gerrymandering, fabricating a district that was 160 miles long and that darted out from the farm country, through business and manufacturing centers along I-85 to gobble up every black enclave to the point where critics joked that a car driving along the interstate

21. *Voting Rights Act*, 42 U.S.C. 1971, 1973-1973p (2000).

with its doors open could kill most of the voters in the district.[22] The gerrymander did not disenfranchise whites or lessen their political influence. In fact, some voting analysts concluded at the time that concentrating black voters—who tend to vote overwhelmingly Democratic—in a handful of districts actually diluted Democratic voting strength in other competitive districts, costing the party congressional seats. Those initiating the suit, however, claimed they were being denied their Fourteenth Amendment right to participate in a color-blind election. The majority opinion in *Shaw v. Reno*, written by Justice O'Connor, and her actions in later related cases are noteworthy. First was the vehemence with which she expressed her abhorrence at the very notion of classifications of citizens on basis of race, borrowing from an earlier Supreme Court decision that said such classifications "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[23] Regarding racial gerrymandering, she had this to say: "A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid."[24] The case was remanded for consideration of the evidence as to what, if anything, had been considered apart from race.

When read carefully, however, particularly in light of her subsequent decisions, it is clear that Justice O'Connor had no

22. *Shaw v. Reno*, 509 U.S. 630 (1993) (citing WASHINGTON POST, Apr. 20, 1993, at A4).

23. *Id.* at 643.

24. *Id.* at 647.

problem with race being one factor in redistricting, as long as more traditional considerations—geographic compactness, continuity, and respect for political subdivisions—were not given short shrift. According to O'Connor, race-conscious redistricting is not always impermissible. What is objectionable "is redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification."[25]

Concurring in the 1995 Georgia redistricting case, *Miller v. Johnson*,[26] which also involved the extreme application of race consciousness, Justice O'Connor found it necessary to assuage the concern of districts all across the nation, many of which reflected at least some race consciousness. "Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts, where presumably the States have drawn the boundaries in accordance with their customary districting principles. That is so even though race may well have been considered in the redistricting process."[27]

This statement is vintage O'Connor. First, state your argument in the most powerful fashion, and then narrow the applicability of your decision to the specific facts at hand, providing yourself with the maximum flexibility to decide the next case in a seemingly different way. This is a good formula for maintaining strategic influence on the Court, even if it does carry a price among those who feel important shared principles have been abandoned.

25. *Id.* at 642.
26. *Miller v. Johnson*, 515 U.S. 900 (1995).
27. *Id.* at 928.

The case that proved the vehicle for reversing *Metro Broadcasting—Adarand Constructors, Inc. v. Pena*[28]—involved a fairly typical provision in a federal contract entitling the prime contractor to a bonus should he hire subcontractors owned and controlled by socially and economically disadvantaged individuals, normally a euphemism for preferred minorities. Adarand, the low bidder on a federal highway guardrail subcontract, brought suit after losing the bid to a firm owned by a preferred minority. Adarand lost at the district and appellate court levels when both courts applied the *Metro Broadcasting* "substantially related" standard to the transaction.[29] However, Justice O'Connor, backed by Chief Justice Rehnquist and Justices Kennedy, Thomas, and Scalia, dismembered *Metro Broadcasting* and left even *Fullilove*, which had approved an earlier government-mandated set-aside program, quaking.

O'Connor said that prior to *Metro Broadcasting*, the Court had been evolving to embrace three clear principles: skepticism (strict scrutiny) toward any preference based on racial or ethnic criteria; consistency in applying the law to anyone burdened or benefited by the racial or ethnic classification; and congruence, a coming together of the equal protection and due process clauses of the Fourteenth and Fifth Amendments.[30] According to Justice O'Connor, the three principles undermined by *Metro Broadcasting* "all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups."[31] Government actions based on race employ a group classification recog-

28. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).
29. *Id.* at 210.
30. *Id.* at 223–224.
31. *Id.* at 227.

nized in most situations as "irrelevant and therefore prohibited. . . . Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."[32]

Typically, O'Connor also sought to assure civil rights advocates that there was still room for the government to operate, disclaiming any notion that strict scrutiny is "strict in theory, but fatal in fact." Instead, a successful effort had to focus on amelioration of wrongs: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."[33]

Concurring, Justice Thomas found a succinct way to describe his thinking: "Government cannot make us equal; it can only recognize, respect and protect us as equal before the law."[34]

32. *Id.*
33. *Id.* at 237.
34. *Id.* at 240.