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Vikram David Amar
University of California, Berkeley

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I. INTRODUCTION

Justice Sandra Day O'Connor is, I'm sure, tired of being identified as the jurist who holds the fate of constitutional law in her hands. At a recent judicial conference, she responded to a seemingly innocuous observation by United States District Court Judge Terry Hatter that she is the pivotal high court vote in so many disputed areas by chiding him with the line: "You've been reading too many newspapers. I get a little impatient with that description."[1]

But the newspapers and Judge Hatter are right: Justice O'Connor's vote and voice are, at this point in time, constitutionally crucial. And I'm not sure that recognition of this reality is really what bothers her. Instead, I think what must get tiresome for her is not the observation that her stance determines outcomes, but the separate (though often accompanying) comment that her voice is idiosyncratic, ad hoc and not terribly consistent.[2] Being reminded you have the power is one thing; being accused of exercising the power in an erratic and unprincipled way is quite another.

In this short essay, I'd like to unpack a few of the supposed idiosyncracies and inconsistencies in Justice O'Connor's jurisprudence of equality. Equal protection law is, of course, a huge topic, so I am going to narrow my focus to the most contentious area of equal protection, and the one where Justice O'Connor has made her most visible mark on legal doctrine—the area of race-based decisions undertaken by government.

II. THE IMPORTANCE OF THE O'CONNOR VOTE

There is no genuine dispute about whether Justice O'Connor dictates the constitutional law of racial equality. Beginning with her concurring opinion in *Wygant*[3] in 1986, Justice O'Connor has never shied away from staking out her own distinct view in this vexing line of cases. By the late 1980s, Justice O'Connor had

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† Ralph Waldo Emerson is often credited for observing that "foolish consistency is the hobgoblin of little minds." *See* JOHN BARTLETT, FAMILIAR QUOTATIONS 497 (Little, Brown and Co.) (1980).

* Professor of Law, University of California, Hastings College of the Law; Visiting Professor of Law, University of California at Berkeley. A.B. University of California at Berkeley, 1985; J.D. Yale Law School, 1988.

1. Tony Mauro, *Predicting the Supreme Court's Case Agenda*, THE RECORDER 3, Sept. 22, 2000.

2. *See, e.g.*, Edward P. Lazarus, *Swing Voter O'Connor Provides Judicial Barometer*, L.A. TIMES, July 9, 2000, at 1, Op-Ed Section; Melissa Saunders, *Reconsidering Shaw: The Miranda of Race-Conscious Districting*, 109 YALE L.J. 1603, 1613-14 (2000).

3. Wygant v. Jackson Bd. of Ed., 476 U.S. 267 (1986) (O'Connor, J., concurring).

emerged as the Justice whose vote was most likely to correlate with, and indeed create, a majority result in race cases. No wonder, then, that by 1988 she began to write not just for herself, but for other wings of the Court that were trying to "get to 5."[4] Justice O'Connor wrote the majority opinion in *Croson*[5]—the Court's most elaborate discussion to date of how facially racial remedial programs fare under Equal Protection Clause analysis—and the dissent for four Justices the next year in *Metro Broadcasting*.[6] Since 1991, the year of Justice Thurgood Marshall's retirement, the four dissenters in *Metro Broadcasting* have, with the addition of Justice Clarence Thomas (Marshall's replacement), become a five-person majority that has dictated the result in almost every major race case since.[7] That Justice O'Connor has become the chief spokesperson for this new majority was made clear by her authorship of the famous *Adarand* opinion for the Court in 1995.[8] Perhaps equally or more importantly, Justice O'Connor is "the principal architect of the *Shaw* doctrine,"[9] the series of recent cases (beginning with and named after *Shaw v. Reno*[10]) in which the Court has held that race-conscious districting is, at least in some circumstances, forbidden by the Constitution.[11] In addition to writing the opinion for the Court in the seminal case of *Shaw v. Reno* (*Shaw I*), Justice O'Connor has in this line of decisions authored the plurality opinion in *Vera*,[12] and an important limiting concurrence to Justice Kennedy's majority opinion in *Miller*.[13] As Sam Issacharoff has succinctly observed, in the entire area of race, "there is no escaping the fact that the Supreme Court's equal protection law jurisprudence is being driven by Justice O'Connor."[14]

III. THE COHERENCE OF O'CONNOR'S OPINIONS

Perhaps more interesting than the centrality of Justice O'Connor's vote is the question whether O'Connor's expressed views and writings knit together. To be sure, in this area Justice O'Connor has her share of critics who argue, among other things, that there is no internal coherence to her positions. In certain ways Justice O'Connor seems to go out of her way to invite this kind of criticism—writing

4. Former Justice William Brennan is reputed, at various seminars he taught, to have raised his hand and asked, "What is the first rule of the Supreme Court?" He would then answer his own query with the snappy line, "You have to get to 5." *See* Abner Mikva, *What Justice Brennan Gave Us to Keep*, 32 LOY. L.A. L. REV. 655, 656 (1999).

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

6. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (O'Connor, J., dissenting).

7. This is true at least outside of the area of criminal procedure.

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

9. Saunders, *supra* note 2, at 1614-15.

10. 509 U.S. 630 (1993).

11. *Id.* at 657-58.

12. Bush v. Vera, 517 U.S. 952 (1996) (plurality opinion).

13. Miller v. Johnson, 515 U.S. 900, 928 (1995) (O'Connor, J., concurring).

14. Samuel Issacharoff, *The Constitutional Contours of Race and Politics*, 1995 SUP. CT. REV. 45, 63.

concurrences to her own opinions, for example,[15]—but in other ways I think the charges that she is ad hoc and quirky are not entirely fair. This is not to say that her views are always well explained and defended; instead it is to say that here, as elsewhere, some of Justice O'Connor's intuitions have significant constitutional traditions behind them, and that her gut instinct is often an important one to understand and examine, not just to predict the direction of doctrine, but because her instincts are sufficiently interesting and sophisticated that they should not be casually disregarded.

A. *The Invocation of the Strict Scrutiny Standard of Review*

Let us begin with perhaps the most forceful criticism of her views, that she applies different standards in essentially similar cases, in particular that her decisions of when to invoke "strict scrutiny" are inconsistent. It is true that in the voting districting cases—the so-called *Shaw* doctrine—Justice O'Connor's opinions have characterized race-conscious districting laws as "laws that classify citizens by race" and "racial classifications," but have refrained from invariably applying strict scrutiny in every instance. Instead, as Melissa Saunders has observed in what she calls a "quirk" in the O'Connor race jurisprudence:

> [T]he strict scrutiny of *Shaw* does not apply whenever the state intentionally takes race into account in districting, but only when it makes race the 'predominant factor' in districting. . . . [Put another way,] Justice O'Connor has insisted that the strict scrutiny of *Shaw* does not apply whenever the state intentionally designs a district to give a certain racial group a majority, so long as it does not substantially disregard 'traditional' districting principles to do so.[16]

This seems like a "quirk" to Professor Saunders and others because it seems in tension with the broad principle that Justice O'Connor herself pronounced for the Court when a race-based federal contracting set-aside was challenged in *Adarand*: "[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[17] This broad statement—and the skepticism of ALL government race-consciousness it reflects—has led other members of the majority for which O'Connor is writing to distance themselves from Justice O'Connor's "quirky" failure to apply strict scrutiny to each and every instance of race-consciousness in the *Shaw* line of cases. Indeed, other members of the Court's conservative majority have expressed considerable

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15. *See* Bush v. Vera, 517 U.S. at 990-95 (O'Connor J., concurring); *id.* at 952 (O'Connor J., writing lead plurality opinion).

16. Saunders, *supra* note 2, at 1613.

17. *Adarand*, 515 U.S. at 227.

discomfort with the idea of "racial classifications" (which is how O'Connor herself has described racial redistricting) that are reviewed under anything less than strict scrutiny.

B. *Justice O'Connor's Commitment to the "Whole-Person" Principle*

Let me put to one side for the moment the possibility (to which I will return) that the districting cases *ought* to be treated differently from the contracting "affirmative action" cases like *Adarand*, from which the famously broad language comes. Let me also put aside temporarily the doctrinal jargon of "strict scrutiny" and when it should apply. Instead let me ask the more basic question whether Justice O'Connor's fundamental constitutional attitude is different in *Adarand* and *Croson*, on the one hand, and in *Shaw* and its progeny on the other. I maintain that it is not—that in both lines of cases Justice O'Connor's basic constitutional admonition is that race ought not to crowd out other aspects of a person's humanity.

To appreciate this, let us begin by considering Justice O'Connor's dissenting opinion in the *Metro Broadcasting*[18] case. Most people view Justice O'Connor's approach in *Metro Broadcasting* to have become, with the replacement of Justice Thomas for Justice Marshall, the majority position in *Adarand*. Indeed, Justice O'Connor's opinion in *Metro Broadcasting* has a more absolutist color-blind feel to it than does even her majority writing in *Adarand*. For this reason, to the extent that Justice O'Connor in the *Shaw* line of cases was inconsistent with her own colorblind impulse, *Metro Broadcasting* is the place to examine her earlier views. But when those views are examined, we see much more consistency between her position there and her position in *Shaw* than might first appear. Writing for four Justices who would have struck down Federal Communication Commission (FCC) policies that gave preferences to minority-owned firms in order to promote diversity in programming, Justice O'Connor observed:

> [T]he Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think. . . . [Such classifications] endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.[19]

As other commentators have observed, these are "strong words" that might seem to doom all racial generalizations, and thus words not to be taken lightly.[20] But read carefully, Justice O'Connor's indictment of the FCC policies may not have been an

18. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (O'Connor, J., dissenting).
19. *Id.* at 602-03 (O'Connor, J., dissenting) (quotations and citations omitted).
20. *See, e.g.*, Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1761 (1996).

indictment against the use of race, *per se*, but rather a scathing criticism of the *way* the FCC was using race. In the block quote above, for example, what Justice O'Connor said was wrong with the federal policies was not that they were based on the assumption that race "matters" in how someone acts or thinks; what was problematic was the government's apparent belief that race "*determines*" how people behave.[21] When one believes and proclaims that X *determines* Y, surely one is making a larger claim (and one with which Justice O'Connor sees a problem) than the proposition that X influences or affects Y. We might read Justice O'Connor as saying only that government cannot ground policy on the former—rather than the latter—reasoning.

Is it fair to base so much on Justice O'Connor's use of the single word "determine?" Perhaps not. But my argument here is based on much more. Justice O'Connor's use of the word "determine" is a central part of—rather than an inconsistent element within—her jurisprudence in the affirmative action cases. Take, for example, other language she uses in her *Metro Broadcasting* dissent. At one point she writes that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the government must treat citizens as individuals, not as *simply* components of a racial, religious, sexual or national class."[22] Later on, she observes that the problem with the FCC policies is that they "directly *equate* race with belief and behavior, for they establish race as a necessary and *sufficient* condition [for] securing the preference."[23] Like the word "determine," the words "simply" and "equate" and "sufficient" are telling ones. As two commentators have put the point:

> [Justice O'Connor] was taking issue with the crude view that race is by itself—without ever looking at the whole person—enough to presume that one has a certain set of beliefs. Government may not presume that race determines how a person thinks or acts; but perhaps this is different from saying that government may not conclude that race may influence how a person thinks and that government must be utterly blind to race when looking at [an individual] as a whole person.[24]

Viewed in this way, Justice O'Connor's views in *Metro Broadcasting* are very similar to those expressed by Justice Lewis Powell in his famous opinion in the *Bakke* case,[25] where he concluded that equal protection is violated when a university admits a student *solely* on the basis of race without looking at other aspects of the

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21. *See generally id.*
22. *Metro Broadcasting*, 497 U.S. at 602 (O'Connor, J., dissenting) (emphasis added).
23. *Id.* at 618 (O'Connor, J., dissenting) (emphasis added).
24. Amar & Katyal, *supra* note 20, at 1763-64.
25. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

person.[26] It is not surprising that Justice O'Connor's affirmative action writings—while a bit harsher in tone than Lewis Powell's—echo Powell's bottom line in *Bakke*. Justice O'Connor, herself, has cited approvingly to Powell's nuanced *Bakke* approach. In her separate concurrence in *Wygant*, for example, Justice O'Connor went out of her way not to call into question the permissibility of government race-consciousness to accomplish the kind of diversity of which Powell spoke.[27] Justice O'Connor has never explicitly disavowed her opinion in *Wygant*, or the Powellesque foundation on which it rests. Indeed, even in *Metro Broadcasting* Justice O'Connor cites *Bakke* for the following observation—and one consistent with my reading here: "race-conscious measures might be employed to further diversity only if race were one of many aspects of background sought and considered relevant to achieving a diverse student body."[28]

When we fast forward from Justice O'Connor's opinions in the *Wygant* and *Croson* affirmative action cases to her opinions in the voting districting cases, much of the supposed inconsistency disappears. In the districting setting, she seems to be concerned about the same thing she is concerned with in *Metro Broadcasting*—government race consciousness that assumes race is the be-all end-all component of personhood. When she says in *Vera*,[29] for example, that government cannot make race the "predominant" factor to the exclusion of all other "traditional districting criteria," she is saying essentially what Powell said in *Bakke*—that even as government acknowledges that race matters, it should not assume that other attributes do not. In the education setting, those other attributes might be test scores, grades, musical or athletic talent, geographic and socioeconomic background, etc.—what we might call "traditional admissions criteria."[30] In the voting setting, the "traditional districting criteria" that cannot be entirely displaced by race would include political party, socioeconomic background, education level, religion, etc. Whether or not Justice Powell's vision—which we might call a commitment to look at the "whole person"—is a sound constitutional one or not, it is one that, like Justice Blackmun's opinion in *Roe*,[31] has occupied a prominent place in our jurisprudence for a quarter century and has become a meaningful part of our constitutional tradition. And Justice O'Connor has tapped into it on a consistent basis; it animates her views of race equality across the board.

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26. *Id.* at 312-21 (opinion of Powell, J.).
27. *See Wygant*, 476 U.S. at 286 (O'Connor J., concurring).
28. *Metro Broadcasting*, 497 U.S. at 621 (O'Connor J., dissenting).
29. Bush v. Vera, 517 U.S. 952 (1996) (plurality opinion).
30. *Id.* at 964.
31. Roe v. Wade, 410 U.S. 113 (1973).

C. *The Treatment of Overt v. Covert Racial Classifications*

Someone might raise the following technical objection to the foregoing analysis: perhaps it is true that the "whole person" principle explains Justice O'Connor's constitutional *bottom lines* across the whole range of race-conscious government action cases (spanning *Croson*, *Adarand* and *Shaw*). But it is just as surely true that, as a formal doctrinal matter, she is not treating the districting cases consistently with the affirmative action cases, in that she *applies* strict scrutiny to all racial classifications in the latter category, but not to all racial classifications in the former. To put the objection another way, in the affirmative action setting, she will apply strict scrutiny to see whether her whole-person principle has been respected; in the voting cases, she looks to the whole-person principle *before* deciding whether to apply strict scrutiny in the first place, and that is not consistent.

I think there is some surface plausibility to this criticism, but in the end I don't think it goes very far toward demonstrating inconsistency on Justice O'Connor's part. Inconsistency in this context means treating similar things dissimilarly. Justice O'Connor's failure to apply strict scrutiny to all race-conscious voting districting is not inconsistent—even as a formal doctrinal matter—with the affirmative action cases, for the simple reason that the two kinds of cases, again as a formal doctrinal matter, are not similar. In the affirmative action cases, we confront what we might term old-fashioned racial classifications—government laws or policies *that on their face* make the race of an individual relevant to receipt of a public benefit or imposition of a public burden. Race-conscious districting, by contrast, does not involve a racial classification in this traditional, and overt, sense. Instead, it falls into a different doctrinal box—facially- neutral governmental decisions that are allegedly motivated by racial considerations—cases like *Washington v. Davis*[32] and *Arlington Heights*.[33]

This distinction—between overt racial classifications and race-neutral laws that are premised on race—has been drawn over and over by the Court but is obscured in the *Shaw* line of cases because the Court has used, somewhat misleadingly, the shorthand "racial classification" repeatedly in its description and analysis of racial redistricting.[34] But in its more careful passages in the *Shaw* cases, even the Court has acknowledged that, strictly speaking, racial redistricting is not a racial classification in the classic old-fashioned sense. In *Cromartie*,[35] for example, the Court conceded that "districting legislation ordinarily is race-neutral on its face."[36] Nonetheless,

32. 426 U.S. 229 (1976).
33. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).
34. *See, e.g.*, *Shaw*, 509 U.S. at 657; *Miller*, 515 U.S. at 910.
35. Hunt v. Cromartie, 119 S. Ct. 1545 (1999).
36. *Id.* at 1549.

citing to cases in the *Washington v. Davis* line, the Court characterizes racial redistricting as "racial classifications" of the "covert" variety.[37]

All of this raises the question as to what standard of review the Court has traditionally used when it has dealt with "covert" racial classifications. If these laws, like overt racial classifications, are ordinarily subject to strict scrutiny, then Justice O'Connor's "lenience" in the racial redistricting setting may look inconsistent after all. In fact, though, the Court has never (outside the districting cases) applied strict scrutiny to "covert" racial classifications; instead, it has simply invalidated them, provided that the racial considerations were a but-for cause of enactment of the facially race-neutral policy.[38] Once racial motivations are determined to have led to the enactment, the judicial inquiry is at an end.

In a sense, then, the whole Court is acting inconsistently when, after it concludes that race is a but-for cause of the shape of a district, the Court does anything other than invalidate the district-drawing effort *en toto*. This seems to be what Justices Thomas and Scalia (the true colorblind proponents) advocate, but not Chief Justice Rehnquist and Justice Kennedy—the other members (besides Justice O'Connor) of the new majority. But Justice O'Connor is certainly no more inconsistent here than the Chief Justice or Justice Kennedy.

And all three of them may not be so inconsistent, anyway. Here, as elsewhere, the inconsistency might be more apparent than real. The reason for this is simple: the significant (nondistricting) cases in which the Court has struck down racially-motivated facially-neutral laws involved racial motivations designed to suppress, not empower, racial minorities.[39] That is, the older cases—the only ones from which we have doctrine—involve discrimination against racial minorities, not discrimination against white majorities.

It is true, of course, that the Court has made it clear in the context of overt racial classifications that affirmative action is just as subject to strict scrutiny as was old-fashioned discrimination. Thus, the programs in *Croson* and *Adarand* are subjected to the same test as were the laws in *Brown*[40] and *Strauder*.[41] We live in an equal protection world that seems to embrace symmetry. But we don't yet know if symmetry applies to the *Washington v. Davis* line of cases, of which the racial redistricting cases are a part. For example, if someone could prove that the University of California's so-called 4% plan (by which the University admits people graduating in the top 4% of their high school class, regardless of test scores) was intended to increase the number of African Americans on UC campuses, and would not have been adopted absent that racial effect, would we strike it down

37. *Id.*

38. *See Village of Arlington Heights*, 429 U.S. at 265.

39. There are not many cases in which the Supreme Court has held that the high burden to prove racial intent placed on a plaintiff by the *Washington v. Davis* test has been met. But the ones that have tend to involve intent to suppress minorities. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222 (1985).

40. Brown v. Board of Educ., 347 U.S. 483 (1954).

41. Strauder v. West Virginia, 100 U.S. 303 (1879).

automatically in the same way we would if the UC chose to lean heavily on SATs *because* they have the effect of reducing the number of minority students? The Court in general, and Justice O'Connor in particular, has not come close to answering this question.[42] Because they have not, there is no clear baseline against which to measure the consistency of the *Shaw* doctrine. Put another way, because the Court has yet to rule on cases that are analytically similar to *Shaw* (that is, facially-neutral laws motivated by a desire to empower a minority race) but which involve the provision of civil benefits rather than the drawing of district lines, charging Justice O'Connor with real inconsistency is difficult.

D. The Distinction Between Political Rights Cases and Civil Rights Cases

Having considered all that, though, some people might be left with a feeling that Justice O'Connor still really does treat the districting cases differently than the non-districting affirmative action analogues, and that she is more permissive of race consciousness in the districting context than elsewhere. Perhaps this is true. Even if it is, however, I would not characterize her nuanced approach as inconsistent or ad hoc. The simple fact is that the Court itself, over time and in spite of personnel changes, has treated voting cases differently than school admissions or government contracting cases. In fact, although the Court rarely acknowledges it, the vision of equality implemented in cases involving political participation has been distinct from equality decisions in other realms. A few examples will illustrate this deep constitutional trend.

Take, for instance, the way the intent requirement of *Washington v. Davis* has played out in the context of discrimination against minorities. In the employment and housing setting, the Supreme Court made it very difficult for a person to challenge a facially-neutral government decision that adversely affects minority interests; the bar for proving illicit intent has been set extremely high. But as Dan Ortiz pointed out, in the voting context in cases like *Rogers v. Lodge*[43] (involving exclusion of blacks), the intent requirement has been satisfied by a "showing of disparate impact plus a showing that the jurisdiction [involved] has engaged in other types of discrimination in the past . . . . In voting [unlike school or employment

42. Indeed, in her opinion in *Adarand*, Justice O'Connor suggested that even in the context of facial racial affirmative action, strict scrutiny need not be fatal as it was when applied to facial discrimination against minorities. *Adarand*, 515 U.S. at 228. Moreover, and more important, the language in *Croson* that the City of Richmond should have used "race-neutral" means of increasing minority contractor representation, see *Croson*, 488 U.S. at 507, suggests that formally race-neutral devices chosen with the goal of helping minorities are not only constitutionally permissible, but indeed are under some circumstances the preferred course.

43. 458 U.S. 613 (1982).

cases], the intent requirement does not demand any showing of actual discriminatory motivation in the decision to adopt or retain the [voting system] at issue."[44]

In the jury venire setting, which I have elsewhere argued is historically and analytically similar to the voting setting,[45] the Court has also lowered the intent bar, allowing a minority group to challenge a method of selecting jurors that has the effect of excluding minority group members from the venire, even when there is no clear showing of invidious motivation. Effects, more than intent, seem to drive the jury exclusion cases, as they do another political equality line of cases—the so-called *Hunter v. Erickson* line of decisions,[46] in which the Court manifests a deep concern not just with the formal neutrality of procedural provisions of state legislative processes, but also with their real world consequences on the policy agendas of racial minorities.

Finally, consider how political equality has been treated in the alienage setting. The Supreme Court has repeatedly held that the Equal Protection Clause forbids states from discriminating against noncitizens in the provision of education and other public benefits.[47] But when it comes to government jobs that have any political dimension to them at all, states are free to exclude aliens.[48] Once again, constitutional equality means something different where political participation is involved than where it is not.

This unarticulated but clear distinction in the Court's doctrine is not made up of whole cloth. Like Justice Powell's *Bakke* decision is today, the distinction between political equality and other equality is part of our constitutional tradition. Indeed, it runs much much deeper than any single opinion by a Justice, no matter how famous. As I and others have recounted elsewhere, the framers of the Reconstruction Amendments drew a sharp distinction between so-called civil rights (e.g., the right to own property, ply a trade, inherit, make contracts, etc.) and political rights (for example, the right to vote, hold office, serve on juries). In fact, the Fourteenth Amendment was intended to cover only the former, leaving the latter to be taken care of by the Fifteenth Amendment.[49]

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44. Daniel Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1127-28 (1989); *see also* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 255-58 (1995) (discussing intent versus effect in political rights cases).

45. *See* Amar, *supra* note 44.

46. *See, e.g.*, Hunter v. Erickson, 393 U.S. 385 (1969); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982). For a discussion of this interesting and vexing line of cases, see Vikram David Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 969 (1996), and Vikram David Amar & Evan H. Caminker, *The Hunter Doctrine and Proposition 209: A Reply to Thomas Wood*, 24 HASTINGS CONST. L.Q. 1001 (1997).

47. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973); Nyquist v. Mauclet, 432 U.S. 1 (1977); *In re* Griffith, 413 U.S. 717 (1973).

48. *See, e.g.*, Foley v. Connelie, 435 U.S. 291 (1978); Ambach v. Norwich, 441 U.S. 68 (1979); Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

49. *See* Amar, *supra* note 44, at 222-41.

Given that political rights are protected by different provisions of the Constitution than are civil rights, it is not necessarily surprising that the concept of equality embodied in the political rights provisions may be different as well. Thus, the seeming inconsistencies we see in the cases between political equality and civil rights equality may simply reflect different kinds of equality for different kinds of cases. In this vein, legislative attempts to accomplish racial or gender balance in political processes—affirmative action in the political rights realm, if you will—might be a constitutionally different matter than affirmative action in the civil rights context. Real world access—rather than formal governmental barriers to it—on the part of minorities to democratic institutions has often been the touchstone of political rights doctrine by the Court. And if Justice O'Connor's opinions in the *Shaw* line of cases continue this trend by allowing for some real-world legislative success by racial minorities, I would argue that this simply means that here, as perhaps elsewhere, Justice O'Connor's instinct is interesting and plausible. And the fact that it is underexplained and underdeveloped does not render it inconsistent or ad hoc.

E. Coherence Within the Area of Political Rights

But, someone might object finally, if we are going to understand tension between Justice O'Connor's redistricting cases and her earlier affirmative action opinions in terms of the distinction between political and civil rights, shouldn't her opinions at least be consistent *within* the political rights realm? And aren't there blatant inconsistencies and idiosyncracies within that realm?

Perhaps, but again I am not yet entirely convinced—although I do see some areas in need of clarification by Justice O'Connor. The most vexing of these is Justice O'Connor's separate opinions in the jury peremptory challenge cases. As I noted earlier, the vision of political rights held by the framers of the Reconstruction Amendments defined political rights not just as the right to vote in elections, but also the right to serve, and vote, in the jury box. Happily, the Supreme Court has begun to embrace the voter/juror connection, and has focused on the rights of the excluded jurors in constitutionally halting race and gender-based peremptory challenges.[50] Justice O'Connor has joined in the decisions to prevent government lawyers from using race or gender in their peremptory strikes, but has—oddly to some—refused to extend her constitutional skepticism to peremptory strikes (especially gender-based strikes) by private lawyers in both criminal and civil cases. Other members of the Court seem willing to extend the ban on race and gender peremptories to private lawyers (correctly, I think) and have gotten around the state action problem by pointing out that the judge (a state officer) is the one who actually excuses jurors, and (much more importantly to my mind) the fact that the whole task

50. *See* Amar, *supra* note 44, at 204-10 (collecting and discussing cases).

of picking jurors seems inherently public, just as the task of picking voters and holding primary elections is quintessentially public.

Justice O'Connor has not followed along, and shows reluctance to stretch state action doctrine to cover race and/or gender-based peremptories by lawyers other than government lawyers.[51] Many commentators have thought that her stance here is more than a bit unusual, and difficult to coherently explain.

In a way, though, I see Justice O'Connor's views here as fully in keeping with her writings in other race and gender settings. State action doctrine is inherently flexible; whether the Court wants to admit it or not, state action extends farther when there is more confidence in the correctness and centrality of our substantive constitutional holdings.[52] In the race discrimination context, for example, we extend state action farther than we do in, say, the procedural due process setting.[53] Given this reality, I would expect Justice O'Connor to extend state action less far here (in the peremptory challenge setting) if she is not entirely sure that the substantive rule we are announcing—no race or gender based strikes—is correct or central. And, in fact, I would expect Justice O'Connor to be somewhat uncertain of the correctness of the absolute ban on race or gender strikes. Why? Because in the peremptory challenge context, the lawyer making the strikes may not be ignoring the whole-person principle—Justice O'Connor's guiding tenet of constitutional equality. It is not clear that when someone is stricken because of race that other aspects of his or her person are ignored. Even the most lazy of prosecutors would not strike persons of color who happen to be prosecutors themselves, or for that matter recent victims of crime. Lawyers who over-rely on racial and gender stereotypes lose cases; there is a market correction device that requires respect for the whole person principle. This is much less true in the district-drawing context, where district drawers (unlike lawyers in a courtroom) are not faced with the "whole person" of each voter. For this reason, racial shortcuts and overgeneralizations can, to use Justice O'Connor's phrase, more easily "predominate."

But because race or gender in the peremptory context is not being used as a sledgehammer, Justice O'Connor may be more torn (and constitutionally permissive) about it. Her writings express that tension and uncertainty—she acknowledges that race and gender do count as a matter of fact, but concludes without significant explanation that they cannot count as a matter of law.[54] Justice O'Connor's concurrences may not explain themselves because she may not be sure

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51. *See, e.g.*, J.E.B. v. Alabama ex. Rel. T. B., 511 U.S. 127, 150 (1994) (O'Connor, J., concurring).

52. *See generally*, Alan Brownstein, *Constitutional Wish Granting and the Property Rights Genie*, 13 CONST. COMM. 7 (1996).

53. For example, no one thinks there would have been state action in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), if the claim had been by a fired employee against the private restaurant under procedural due process instead of, as was the case, a claim by a refused patron alleging race discrimination under equal protection.

54. *See J.E.B.*, 511 U.S. at 149 (O'Connor, J., concurring).

of the explanation. Whether or not there are good explanations, her uncertainty understandably leads her to apply the state action doctrine somewhat conservatively.

IV. CONCLUSION

In the end, I see a lot more consistency and deep constitutional instinct in Justice O'Connor's race cases than do some of her critics. None of this is to say, of course, that she has gotten all things right or that she has defended her positions perfectly. Instead, it is to say that there are far worse hands in which to place our immediate constitutional future.

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