SANDRA DAY O'CONNOR'S POSITION ON DISCRIMINATION

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This essay examines the underpinnings of Sandra Day O'Connor's treatment of discrimination. This essay will briefly explore her jurisprudence, her doctrinal approach, her understanding of the racial world, and how her position has changed over time.[1] Conclusions in a study like this are necessarily provisional, both because there always remains the possibility that a better explanation will appear, and because conclusions about people can always be falsified by subjects like Justice O'Connor who are still very much alive and active.

I. O'CONNOR'S BASIC POSITION ON DISCRIMINATION

In *Brown v. Board of Education*[2] and the many summary determinations that followed, the Supreme Court overturned a list of explicit distinctions between blacks and whites, directing blacks and whites to different places and services, if indeed any services were provided to blacks.[3] In the language we have subsequently applied to those factual patterns, the discrimination was on the face of the rule; it was *de jure* and explicit. O'Connor has not budged from that basic understanding. The arguments among the justices in almost all of the Supreme Court cases involving gender discrimination are about the basic issue of facial, explicit and *de jure* distinctions, settled in *Brown* with respect to race.[4] For most of the life of the Rehnquist Court

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1. In some respects this essay updates the treatment of Justice O'Connor in STEPHEN E. GOTTLIEB, MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA (2000). At the same time, I have not tried in this essay to duplicate the much fuller treatment of some of the issues that can be found in the book.

2. 347 U.S. 483 (1954).

3. These summary decisions are described in Palmer v. Thompson, 403 U.S. 217, 243–45 (1971) (White, J., dissenting).

4. *See* United States v. Virginia, 518 U.S. 515 (1996); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982). O'Connor has joined opinions which some treat as involving special treatment for women, notably *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (sustaining the Family Medical Leave Act) and *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (sustaining statutory pregnancy leave). The statutes were sustained, however,

before the *Grutter* decision,[5] affirmative action was condemned on the same ground.[6] In addition, many establishment, free exercise and speech cases have been treated as raising essentially the same issue that *Brown* settled in the racial context. In *Washington v. Davis*[7] the Supreme Court decided that where discrimination was not facial, explicit and *de jure,* it would henceforth be defined by the intentions of the governmental actor for the purpose of the Equal Protection Clause. Justice White, who wrote that decision, objected strenuously a few years earlier to the Court's allowance of a municipal decision to close a swimming pool in the face of an order to integrate precisely because the decision to close was motivated by racial animus.[8] Nevertheless, since the beginning of the Rehnquist Court, almost all findings of intentional discrimination have involved determinations that the discrimination targeted whites while favoring blacks.

For twenty years on the Court, Justice O'Connor almost never found instances of racial discrimination against blacks unless the distinction was part of the rule. The single exception was *United States v. Paradise.*[9] She pointed to the *Paradise* decision in *Adarand,* stating that, "every Justice of this Court agreed that the Alabama Department of Public Safety's 'pervasive, systematic, and obstinate

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on the ground that they prevented discrimination and based on a record which justified the conclusion that the statutory requirements were appropriate responses to practices with roots in explicit gender discrimination. Congress clearly concluded in the Pregnancy Disability Act that the Supreme Court had been mistaken in treating denial of pregnancy leave as non-discriminatory. At bottom the issue is the meaning of equality when men and women do not share the same maladies – is it equal treatment to limit coverage to conditions which both share or to specify conditions which are exclusively male or female? Or is a definition equal which more broadly incorporates conditions which afflict men and those which afflict women or both? The language of preferences assumes a baseline – if conditions men get is the baseline, including pregnancy is preferential. But if the baseline is physical afflictions of the body then excluding pregnancy would be unequal. *See* CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 222 (1989).

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

6. *See* Richmond v. J. A. Croson Co., 488 U.S. 469 (1989); *See also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). O'Connor did approve a "plus factor" in *Grutter* and in *Johnson v. Transp. Agency,* 480 U.S. 616, 656 (1987) (O'Connor, J., concurring) where she accepted a voluntary affirmative action plan by a public employer with sufficient disparities in its existing workforce that a prima facie case could likely be made against it. Her carefully crafted opinions in *Croson* and *Adarand* appear to leave room for the rectification of identifiable governmental discrimination that she sanctioned in the gender context in *Johnson,* which in turn led to some of the dissents in *Croson.*

7. 426 U.S. 229 (1976).

8. *Palmer,* 403 U.S. at 240 (White, J., dissenting).

9. 480 U.S. 149, 196 (O'Connor, J., dissenting).

discriminatory conduct'" justified a narrowly tailored race-based remedy," yet she dissented from providing a remedy.[10]

The Court, with O'Connor's participation, defines intentional discrimination as "because of," not merely "in spite of," racial effects.[11] In practice, this mantra aims at conscious malevolence, and excludes selective unconcern or difference in attitudes. As a result, in numerous cases she and her colleagues miss obvious discrimination.[12] Once Congress clarified that the Court's treatment of intentional discrimination was much narrower than the statutory definition,[13] the Court, with Justice O'Connor in the majority, used doctrines of federalism to defang the statutory definition of discrimination that the Court's conservative justices did not like. Justice O'Connor repeatedly writes about the use of strict scrutiny to smoke out discrimination[14] but the intent test lets her avoid doing so for black

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10. *Adarand Constructors, Inc.*, 515 U.S. at 237. *See also* Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002) (arguing that the Court opposes efforts against discrimination). *See also* Stephen E. Gottlieb, *The High Court's Hidden Agenda*, THE NAT'L L.J., Apr. 16, 2001, at A21; GOTTLIEB, *supra* note 2 at 110–12. Rehnquist, Scalia and Thomas have explicitly rejected the very concept of eliminating discrimination as discriminatory, *id.* at 33.

11. *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 353 (1993) (O'Connor, J., dissenting):

> Although we have determined that a successful constitutional challenge to a regulation that disproportionately affects women must show that the legislature "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"

Pers. Administrator of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

Congress recently has made clear its position that showing subjective intent to discriminate is not always necessary to prove statutory discrimination, see Civil Rights Act of 1991, § 105(a), Pub L. No. 102–166, 105 Stat. 1071, 1074. The regulation in *Pers Administrator of Mass.* to which Justice O'Connor referred overruled nine Supreme Court decisions defining discrimination, see Joan Biskupic, *Provisions: The Civil Rights Act of 1991*, CONG. QUARTERLY, Dec. 7, 1991, at 3620.

12. *See, e.g.*, Ward's Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (approving separate segregated recruitment and physical segregation of majority and minority workers in Alaskan cannery); Hernandez v. New York, 500 U.S. 352 (1991) (approving dismissal of bilingual Hispanic jurors on the ground that they would be able to understand the testimony without the benefit of a translator).

13. *See* Joan Biskupic, *Provisions: The Civil Rights Act of 1991*, CONG. QUARTERLY, Dec. 7, 1991, at 3620.

14. Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion):

> 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

plaintiffs. It allows her to deny evidence of bad intentions or to credit lame excuses that could not justify discrimination but allow her to deny that the defendants harbored ill will.[15] She readily finds discrimination against whites from similar circumstantial evidence in districting cases. In addition, O'Connor does not support effective remedies. So-called affirmative action grew out of judicial frustration with evasion of specific remedies. Judges started demanding to see results. But Justice O'Connor rejected affirmative action consistently over her lengthy service on the Court despite the fact that other methods plainly did not work.[16] It is also instructive that the Court's

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> 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.

Id.

15. Lame excuses were credited in *Hernandez v. New York*, 500 U.S. 352 (1991) (Hispanic jurors properly dismissed because they would be able to understand Spanish-speaking witnesses without translation); Goodman v. Lukens Steel Co., 482 U.S. 656, 684–85 (Powell, J., concurring in part and dissenting in part) (accepting union economic explanation for not taking grievances of black members); and generalized assurances accepted in Mu'Min v. Virginia, 500 U.S. 415, 432–33 (1991) (O'Connor, J., concurring) (Court need not go behind jurors' assurances of impartiality by questioning them individually).

Evidence of intentions was denied in: Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (segregated facilities insufficient evidence of discrimination); McCleskey v. Kemp, 481 U.S. 279, 298 (1987) (evidence which showed racial disparities in capital punishment not evidence of intentions); United States v. Armstrong, 517 U.S. 456 (1996) (statistical comparison of 3,500 to zero did not show prima facie case of racially discriminatory intention). Justice Stevens' description of the evidence the Court did not credit in *Armstrong* is revealing:

> Also telling was the Government's response to respondents' evidentiary showing. It submitted a list of more than 3,500 defendants who had been charged with federal narcotics violations over the previous 3 years. It also offered the names of 11 non-black defendants whom it had prosecuted for crack offenses. All 11, however, were members of other racial or ethnic minorities. *See* 48 F.3d 1508, 1511 (CA9 1995). The District Court was authorized to draw adverse inferences from the Government's inability to produce a single example of a white defendant, especially when the very purpose of its exercise was to allay the Court's concerns about the evidence of racially selective prosecutions. As another court has said: "Statistics are not, of course, the whole answer, but nothing is as emphatic as zero . . . ." *See* United States v. Hinds County Sch. Bd., 417 F.2d 852, 858 (CA5 1969) (*per curiam*).

Id. at 476 (Stevens, J., dissenting)

Evidence was credited against but not for minorities in districting cases including Bush v. Vera, 517 U.S. 952, 981 (1996) (districting not done to redress discrimination of black voters, who had fewer representatives than their portion of the population, but to disadvantage white voters, who already had more representation than their proportion of the population).

16. *See, e.g.*, Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) (plurality opinion); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 225 (1995). *But see* Grutter v. Bollinger, 539 U.S. 306 (2003), and Johnson v. Transp. Agency, 480 U.S. 616 (1987) accepting a "plus factor" in narrowly defined circumstances.

federalism cases have been directed largely at the civil rights laws.[17] The convergence of such different lines of decisions in narrowing, curtailing and finding aspects of the civil rights laws unconstitutional suggests an underlying animosity towards the anti-discrimination principle itself.[18]

II. LIMITED CHANGE IN OPINIONS ON DISCRIMINATION

There have been several changes in O'Connor's handling of the discrimination cases in the past few years. Justice O'Connor joined a concurring opinion by Justice Kennedy in *Garrett,* a case involving the Americans with Disabilities Act, which suggested a dent in the restriction of findings of discrimination to cases of conscious malevolence and facial categorization.[19] Kennedy's opinion made the point that insensitivity can be discriminatory.[20] They also made it clear that they believed that discriminatory effects rules were aimed at that kind of discrimination. O'Connor has condemned stereotypes in gender cases like *Mississippi University for Women* but the discrimination at issue in those cases was facial.[21] Nevertheless, in *Garrett,* O'Connor and Kennedy concluded that the statute went beyond the "the purposeful and intentional action required to make out a violation of the Equal Protection Clause" and agreed that it could not apply to states.[22]

In another decision, however, O'Connor did breach the disparate impact barrier. In *Tennessee v. Lane* the steps in front of the courthouse had a discriminatory effect on access to the courts for the disabled, but no ruling or provision in state law explicitly excluded them.[23] Nevertheless, O'Connor decided that states must make courthouses accessible and that Congress had the power to require

17. On the use of federalism to limit the reach of the civil rights laws see Alexander v. Sandoval, 532 U.S. 275 (2001); Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000). United States v. Morrison, 529 U.S. 598 (2000); City of Boerne v. Flores, 521 U.S. 507 (1997).

18. *See supra* note 11.

19. Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 375 (2001). *Garrett* held that the Eleventh Amendment bars state employees from recovering monetary damages if a state violates Title I of the Americans with Disabilities Act.

20. *Id.*

21. United States v. Virginia, 518 U.S. 515 (1996); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982).

22. *Bd. of Trustees of the Univ. of Ala.*, 531 U.S. at 375.

23. Tennessee v. Lane, 541 U.S. 509 (2004).

such action.[24] Unlike *Lawrence*,[25] in which she avoided a due process holding in favor of grounding her opinion on the Equal Protection Clause, in *Lane*[26] she avoided the Equal Protection Clause and grounded her opinion on the Due Process Clause. In her conception of federalism, Congress' power, under Section 5 of the Fourteenth Amendment, to restrict state behavior, is limited to what she and her colleagues were willing to treat as a violation of Section 1 of the Fourteenth Amendment.[27] She was willing to hold that states could not impose barriers to the disabled in access to the courts because that would violate their right to due process under Section 1.[28] But making that holding an aspect of the Equal Protection Clause would have implied a much broader right against the states. Thus, the breach in the wall barring disparate impact analysis in suits against states was limited to those situations in which the Due Process Clause might be implicated.

In another small breakthrough regarding proof of discrimination, O'Connor had finally found on the facts that African Americans may have been the victims of discrimination worthy of some judicial relief.[29] In *Miller-El v. Cockrell*,[30] O'Connor joined the opinion for the Court which held that lower courts did not give sufficient weight to evidence of discrimination by a Texas prosecutor, including an inference from statistical data.[31] After three prior wrenching trips to the Court, O'Connor decided that one North Carolina congressional districting plan does not discriminate against whites.[32] She had also pierced the affirmation action barrier.[33] However, she was not convinced by the notion that minorities are still subject to discrimination in this society. Instead she deferred to employers she respected – large corporations and the military – who told the Court that they needed minorities.[34] As a result, schools can

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24. *Id.*

25. Lawrence v. Texas, 539 U.S. 558 (2003).

26. *Tennessee v. Lane*, 541 U.S. at 509.

27. *Id.*

28. *Id.*

29. She would call it the first time since *United States v. Paradise*, see *supra* notes 11 & 12 and accompanying text.

30. 537 U.S. 322 (2003).

31. *Id.* at 343.

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

33. Unlike *Johnson v. Transp. Agency*, the admission procedure at issue in *Grutter* did not rest on an effort to remedy what might have constituted a prima facie case of discrimination by the University of Michigan Law School.

34. Grutter v. Bollinger, 539 U.S. 306, 330–31 (2003). These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in

now strive (carefully) for diversity, though cities and the United States cannot.[35]

III. O'CONNOR'S JURISPRUDENTIAL TERRAIN

What accounts for her position on discrimination? Justice O'Connor has joined the Court in rejecting the concept of moral autonomy, as evidenced by *Bowers v. Hardwick*.[36] *Bowers* rejected the concept of individual moral autonomy where consenting adults are not affected or harmed by the behavior.[37] Justice Scalia later made the point clear in *Barnes v. Glen Theatre, Inc.*, writing "there is no basis for thinking that our society has ever shared that Thoreauvian 'you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else'[38] beau idea–much less for thinking that it was written into the Constitution."[39] That difference of views has obvious implications in the privacy area. Moreover, rejection of moral autonomy also frees

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today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. Brief for 3M et al. as *Amici Curiae* 5; Brief for General Motors Corp. as *Amicus Curiae* 3–4. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "based on [their] decades of experience," a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security." Brief for Julius W. Becton, Jr. et al. as *Amici Curiae* 27. The primary sources for the Nation's officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. *Id.* at 5. At present, "the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies." *Id.* (emphasis in original). To fulfill its mission, the military "must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting." *Id.* at 29 (emphasis in original). We agree that "it requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective." *Id.*

35. Richmond v. J. A. Croson Co., 488 U.S. 469 (1989); Adarand Constructors Inc. v. Pena, 515 U.S. 200 (1995).

36. 478 U.S. 186 (1986).

37. White's opinion was about deference to the legislature. That position does not do a good job of explaining O'Connor's adherence to *Bowers* because of her consistently negative position on democratic rights. *See* GOTTLIEB, *supra* note 2, at 30–31.

38. Justice Scalia did not make clear the point of his reference to Thoreau. He probably intended a reference to HENRY DAVID THOREAU, ON CIVIL DISOBEDIENCE (1849), or to HENRY DAVID THOREAU, WALDEN; OR, LIFE IN THE WOODS (1854) both of which, in different ways, describe the life of a man free of social conventions but most certainly doing no harm to anyone else. For the philosophy behind the quotation, JOHN STUART MILL, ON LIBERTY (1859) is a good place to start.

39. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 574 (1991).

Court conservatives to fill that gap with their own conceptions of proper behavior, including their views on discrimination.

According to conservative views, the vice of discrimination lies not in what happens to members of the group discriminated against, but in the impure motives of those discriminating.[40] In other words, they use the intent test to make most of the evidence irrelevant – evidence of the distinctive patterns of majority and minority outcomes, from which we would ordinarily infer intent. The question of the purity of motives can be solved without looking at the consequences, no matter how obvious. Their version of the intent test then boils down to whether the defendant can articulate a ground of decision that makes no mention of race.[41] Although more expansive measures of intent have been repeatedly put forward by others, they have been consistently rejected.[42] Court conservatives advance categorical moral views, regardless of who is hurt, and reject tests that take account of consequences that would smack of relativism or situational ethics.

O'Connor has also joined the majority in rejecting the avoidance of harm, a corollary of moral autonomy because harm constrains the autonomy of others. The Court, however, rejected the proposition that harm, not merely antipathy, justifies intervention in the affairs of others and must be avoided. In *Herrera v. Collins*,[43] the Court denied that a convicted man on death row whose attorneys found powerful evidence that he had not committed the crime for which he was condemned to die had a right to any further process or that the federal courts had discretion to provide it. Justice Blackmun, in dissent, suggested that the Court should look at evidence acquired after the conviction when it appears to a court that the defendant is "probably innocent."[44] The majority rejected that position.[45] Leonel Herrera was executed soon after the Court's decision.[46] If it is constitutionally permissible to execute someone who is probably innocent, then avoiding harm has no significant place in the law. In rejecting Blackmun's position, the Court was taking the position that

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40. *See* GOTTLIEB, *supra* note 2.

41. *See supra* note 17.

42. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 254 (1976) (Stevens, J., concurring); Stephen E. Gottlieb, *Reformulating the Motive/Effects Debate in Constitutional Adjudication*, 33 WAYNE L. REV. 97 (1976).

43. 506 U.S. 390 (1993).

44. Herrera v. Collins, 506 U.S. 390, 442 (1993) (Blackmun, J., dissenting).

45. *Id.* at 402–04.

46. *Man in Case on Curbing New Evidence Is Executed*, N.Y. TIMES, May 13, 1993, at A14.

procedure mattered but innocence did not. In effect, the Court rejected consequentialism, making the issue one of form and not substance. In this conservative model, the rejection of consequential evidence is overdetermined – it is irrelevant to intent and does not constitute a moral standard.

In addition to joining the majority opinion, O'Connor wrote a concurring opinion. Clearly troubled, O'Connor began her concurring opinion by stating: "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution. Regardless of the verbal formula employed . . . the execution of a legally and factually innocent person would be a constitutionally intolerable event."[47] In framing the issue, she attempted to leave open the question "whether a fairly convicted and therefore legally guilty person is constitutionally entitled to yet another judicial proceeding in which to adjudicate his guilt anew, 10 years after conviction, notwithstanding his failure to demonstrate that constitutional error infected his trial."[48] Yet, she concluded that:

> Resolving the issue is neither necessary nor advisable in this case. The question is a sensitive and, to say the least, troubling one. It implicates not just the life of a single individual, but also the State's powerful and legitimate interest in punishing the guilty, and the nature of state-federal relations.[49]

On the facts, O'Connor convinced herself that there was no reasonable question about Herrera's guilt. That, in itself, was an interesting conclusion given that Petitioner's brief provides a frightening description of a legal circus in which colleagues of the slain policemen sat on the jury, police were implicated in the drug trade and the specific evidence counsel asked the Court to consider included an eyewitness and a former judge who had once acted as the killer's counsel. Certainly the dissenters' view of the facts was itself well supported. Two years later, in *Schlup v. Delo*,[50] O'Connor joined Stevens' opinion that the federal court did have the discretion to look at the evidence. Chief Justice Rehnquist and Justices Scalia, Kennedy

47. *Herrera*, 506 U.S. at 420.
48. *Id.*
49. *Id.*
50. 513 U.S. 298 (1995).

and Thomas would have held that they did not.[51] Procedure was all that mattered for them, and without O'Connor's vote, they were much more explicit.

Those cases suggest some hypotheses about the philosophical limbo in which Justice O'Connor operates. Her conservative colleagues make decisions without examining the impact on people outside the courtroom. O'Connor is torn, tempted to join them but unable to settle on a categorical resolution. At times she finds it difficult to believe that certain kinds of petitioners accurately allege that something has gone wrong, but also difficult to turn her back once she is convinced.

Herrera was about the harm principle.[52] *Lawrence* is about autonomy.[53] As noted above, one of the most fundamental facts about the conservative block on this Court is that it is not willing to give people the right to make their own moral decisions so long as others are not hurt. They do not treat that idea as a legal principle and their rejection of that idea colors almost every aspect of their work.[54] In *Lawrence v. Texas*,[55] O'Connor voted to find the Texas statute making sodomy a crime unconstitutional, and that also suggested change. Homosexual relationships, along with other sexual practices are among the most contentious moral issues of our time. Justice O'Connor had previously joined the majority in *Bowers v. Hardwick*,[56] which sustained a statute criminalizing sodomy between consenting adults. The phrase "consenting adults" is the standard euphemism but it should be distinguished from situations in which we reluctantly consent to things we dislike and courts are asked to discern whether the consent was really coercion. These adults, or many like them, were no doubt eager, not merely consenting. In joining *Bowers*, O'Connor helped to sustain a statute that denied homosexuals the pleasure they sought.[57]

In *Romer v. Evans*,[58] however, O'Connor voted to overturn an amendment to Colorado's constitution prohibiting any and all statutes that would ban discrimination against homosexuals. One might read the case as meaning that O'Connor had imbibed some libertarian

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51. *Id.*
52. 506 U.S. 390 (1993).
53. Lawrence v. Texas, 539 U.S. 558 (2003).
54. *See* GOTTLIEB, *supra* note 2, esp. ch. 2.
55. 539 U.S. 558 (2003).
56. 478 U.S. 186 (1986).
57. *Id.*
58. 517 U.S. 620 (1996).

principles.[59] Or, one could read the case as meaning that she and Justice Kennedy had decided on the ground that the statute did too much damage to gays and lesbians – a kind of cruel and unusual punishment although in due process garb – or that the statute improperly punished people for their status rather than their behavior.[60] There was sufficient reasoning within the opinion to support everyone's theory.[61]

Nevertheless, O'Connor parted company with Kennedy in *Lawrence*.[62] Kennedy, writing the majority opinion, suggested that the men involved could live their own lives without any interference from the state of Texas.[63] O'Connor also voted to overturn the law, but she differed with Kennedy in a significant way.[64] By taking the equal protection route, O'Connor agreed that Texas could not ban the status, and had to treat everyone the same with respect to their behavior; the behavior was either a crime for all or for none.[65] That principle was also one of the pillars of *Romer v. Evans*.[66] Disagreeing with the majority regarding due process, O'Connor's point was that Texas could ban the acts involved only so long as it did so for everyone.[67] She stood by her decision in *Bowers v. Hardwick*.[68]

In effect, O'Connor has no generalizable libertarian instincts; no generalizable view that people can make their own moral decisions provided they do not hurt others.[69] What people have rights to do are the things that O'Connor believes are the right things to do. Everyone has a right to be like her. In that sense, she is much narrower than Kennedy. She remains in a jurisprudential limbo between portions of the Court with opposite positions on moral liberty and the injunction to avoid harm. That ambivalence continues to be evident in her opinions on racial discrimination which reflect tantalizingly small changes in her position.

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59. *See id.*
60. *Id.*
61. *See* GOTTLIEB, *supra* note 2.
62. 539 U.S. at 567.
63. *Id.*
64. *See id.*
65. *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring).
66. 517 U.S. 620 (1996).
67. *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring).
68. 478 U.S. 186 (1986).
69. *See* GOTTLIEB, *supra* note 2. The argument in that chapter is based on opinions which O'Connor either wrote or joined.

IV. A COGNITIVE EXPLANATION

Despite the fact that she and her conservative colleagues have made common cause on almost all cases involving discrimination against or affirmative action for the black community, her colleagues have frequently distanced themselves from aspects of her opinions that seemed too moderate, too willing to give ground, albeit in some future case not before the Court.[70] O'Connor does not share the visceral racism of a Rehnquist. She does not share the sense of entitlement of a Scalia. She does not share the need to reject every effort to redress mistreatment that Thomas displays. And she is more comfortable with remedial measures than Kennedy. O'Connor's positive relationships with the black community off the Court do not translate to her opinions.[71]

Within her doctrinal approach she could notice intentions to discriminate against minorities the way Justice White often did, but she does not. Her opinions on matters of race make it clear that racism is transparent to her; and she does not see it.[72] She joined Kennedy's comment in a case involving the Americans with Disabilities Act that it is unconscious prejudices rather than conscious malevolence that are part of the problem.[73] Yet, she has not found a way to extend that insight to race. She simply does not notice intentional or unintentional racism when it is practiced against blacks. We could detail her myopia in the minutiae of individual cases but that would be tedious and repetitious. In asking why, we can pose a hypothesis that may affect many as well as Justice O'Connor. Why indeed does so much of white society feel so disconnected from the black experience of discrimination? There are common but false understandings of what has happened in the past that make it easy to distance oneself from the plight of black Americans.

For many people, it seems that blacks get what they ask for. If there are problems, it seems up to blacks to surmount it. These critics of the black community have no sense of multiple barriers that build

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70. *See* Grutter v. Bollinger, 539 U.S. 306 (2003) (*per* O'Connor, J.); *id.* at 378 (Rehnquist, C.J., dissenting); *id.* at 387 (Kennedy, J., dissenting); *id.* at 347 (Scalia, J., dissenting); *id.* at 349 (Thomas, J., dissenting); Richmond v. J. A. Croson Co., 488 U.S. 469, 522 (1989); *id.* at 518 (Kennedy, J., concurring in part and in the judgment); *id.* at 520 (Scalia, J., concurring in the judgment).

71. *See* Charles Lane, *Courting O'Connor*, WASH. POST, July 4, 2004, at W10.

72. *See supra* note 17.

73. Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374–75 (2001) (Kennedy, J., concurring).

on themselves until the resources to surmount them shrivel and disappear. They have no sense of racism as a contemporary problem because they do not see it. They are not around when discrimination happens to black Americans and believe themselves to have had no part in making life difficult for dark skinned Americans.

Yet the northern half of this country segregated itself by official means *after Brown* was finally beginning to desegregate the south. The Federal Highway Administration paved the roads to the suburbs while the Federal Housing Administration redlined those suburbs so that blacks could not buy into them, and redlined the inner city areas they lived in so that black neighborhoods were doomed to deteriorate.[74] Urban renewal, which some of my black friends properly called "Negro clearance,"[75] destroyed living neighborhoods, breaking down the institutional supports of the communities. Black businesses had grown up in virtually every field before *Brown*, paralleling the white economy. But urban renewal separated those black businesses from their patrons, scattered by urban renewal.[76] Black churches were separated from their memberships, and families separated from relatives. Indeed to put it simply, national policies turned poor but functional and perfectly safe communities into the desperate and dangerous ghettos we have come to fear and deplore. So of course whites, who understand none of this, feel no benefits and no obligation to share in the solution.

Would ubiquitous government complicity in the resegregation of America have mattered to O'Connor even if she understood it? None of that tracks O'Connor's doctrinal contributions, separating societal discrimination from specific acts with identifiable causes and identifiable effects that she demanded in *Johnson*,[77] *Croson*,[78] and

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74. Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479, 486 (1995); CHARLES ABRAMS, FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING 229–37 (1955); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 203–15 (1985); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 54–55 (1993); MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 17–18, 51–52, 150, 174 (1995). *See also* NATIONAL COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 101 (1969).

75. *See* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV., 1, 34–5 (2003) (describing the concept of "Negro clearance").

76. *See* Thomas D. Boston, *Trends in Minority-Owned Businesses*, *in* 2 AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES at 190, 196–97 (2001).

77. Johnson v. Transp. Agency, 480 U.S. 616 (1987).

78. Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

Adarand.[79] However, it can affect our sense of the world in larger, more diffuse ways: our confidence that blacks must be responsible for their own misfortunes; our confidence that if the U.S. Attorney in California prosecutes only blacks, that is because only blacks have committed the crimes;[80] our confidence that economic motives are unrelated to race, or can be justified without a look at the racial consequences;[81] our confidence that blacks are now represented[82] and all the problems have been solved except those of their own making, perhaps most important, our sense of our own lack of complicity in and innocence of the contemporary plight of black Americans and our confidence that their problems will not affect us – all that may have been the perverse contribution of northern segregation.

Before *Brown,* blacks had made major strides up from slavery, including the establishment of an extensive set of what are known as Negro colleges, as well as contributions in science, history, literature and the arts and major commercial enterprises. After *Brown*, blacks were thrown into the white world and became more dependent on it for jobs and opportunities as their own segregated institutions struggled to survive in a vastly and suddenly changed world.

Myopia about these events characterizes O'Connor as well as some of her colleagues. Scalia is an obvious example of someone who feels no relationship to black deprivations. His family immigrated early in the twentieth century, but he understood none of the vast official forces that were changing the black communities around him; allowing Italian families to start new lives and shake their participation in the gang warfare and violence that has characterized most large immigrant communities, while not allowing the blacks to do the same. Although it is not clear that a better understanding of the real world and its impact on black fortunes would have opened O'Connor's eyes, she is different from Scalia. O'Connor's ears are somewhat open at least to the leaders of the society at large even if she is hard to convince. She apparently responded to major corporations and military officers telling the Court that they need to take affirmative steps to integrate their institutions although she has failed to notice discriminatory corporate practices. She asks few questions during oral

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

80. United States v. Armstrong, 517 U.S. 456 (1996).

81. Ward's Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

82. *See* Georgia v. Ashcroft, 539 U.S. 461, 480 (2003); Johnson v. De Grandy, 512 U.S. 997, 1011 (1994); Shaw v. Reno, 509 U.S. 630, 656 (1993) on electoral success.

argument while listening intently but when she learns something, the impact on her is often obvious.

One particularly interesting example was the argument in *Ferguson v. City of Charleston*,[83] which included a lengthy exchange between Justice O'Connor and counsel for petitioners.[84] What is dramatic about this exchange involving the treatment of a group of minority women, tested for drugs and arrested at the time of childbirth, some still bleeding from the birth, was that Justice O'Connor was searching for information that clearly mattered to her. She apparently did not know the usual procedures or understand how the treatment of these minority women differed from the treatment of non-minority women, either at this or other hospitals. Provided with the

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83. 532 U.S. 67 (2001).

84. Transcript of Oral Argument, Ferguson v. City of Charleston, 532 U.S. 67 (2001) (No. 99–936), 2000 U.S. Trans. LEXIS 56, October 4, 2000 at 7–9. (Note that the author was present at oral argument and the identification of the exchange as involving O'Connor is based on the author's own observation and is confirmed in the transcript by the Ms. Smith's response to a subsequent question which refers back to the inquiry by Justice O'Connor):

QUESTION [O'Connor, J.]: Didn't they do it to everybody?

MS. SMITH: No, Your Honor. They didn't search everyone. They looked at a targeted list of criteria that included discretionary elements such as inadequate [*8] prenatal care, and there's evidence in the record that some people who had inadequate prenatal care were tested and some people who had inadequate prenatal care weren't tested, precisely because the word inadequate is so –

QUESTION: Is there not a routine urine specimen collected for someone in the hospital and tests employed? I mean, that seems rather routine. Is that not done for pregnant women entering a hospital –

MS. SMITH: Not –

QUESTION: -- in connection with a birth?

MS. SMITH: Not in -- not to be tested for drugs, Your Honor. If you mean just in general are urine samples taken, at some point during the course of prenatal care, I believe they are, but not –

QUESTION: Yes, and wouldn't that routinely show up something like this, or –

MS. SMITH: No.

QUESTION: -- do you have to apply special –

MS. SMITH: You have to look for it.

QUESTION: -- analysis?

MS. SMITH: You have to search for it, Your Honor, which is what they did here.

QUESTION: And is that not routine in today's world, where drug use is more common, and the doctor might need to know what to look for with the child?

MS. SMITH: Absolutely not, Your Honor. It's a special test that would need to be run [*9] on top of what's normally done and, in fact –

QUESTION: Could a doctor today, when he thinks -- he has a pregnant woman, and he thinks the woman's taking drugs. Doctors won't look at the urine to see if she's taking drugs?

MS. SMITH: They might, Your Honor. I understood Justice O'Connor's question to be, just as a routine matter is it always done?

information, she joined Justice Stevens' majority opinion holding that it was an illegal search.[85]

One example does not prove a point. Nevertheless, it seems consistent with her incorporation of what she learned from the amicus briefs by major corporations, deans and military officials in *Grutter*. On crucial issues, she does not know or understand how the world works.

V. CONCLUSION

All of this generates four conclusions. Doctrinally, O'Connor has barely gotten past the questions of explicit, facial, *de jure* discrimination of 1954. Philosophically, O'Connor tends to see moral issues in absolute terms rather than viewing them by the harms they produce. Factually, she does not understand why issues of discrimination are so intractable. But, she changes, slowly.

85. 532 U.S. 67 (2001).