

## AFFIRMATIVE ACTION DEFENDED\*

By  
W. B. Allen  
Chairman, United States Commission on Civil Rights

Justice Sandra O'Connor's opinion for the Court in *Richmond v. Croson* is remarkably consistent with her concurring opinion in *Johnson v. Santa Clara County Transportation Agency* (1987). Yet, in this year's case she overturned a minority set-aside program in the city of Richmond, while in the former case she helped to uphold an affirmative action program, which awarded a preference in employment for women over men.

It was not difficult for O'Connor to come up with such apparently different results, for she has largely avoided arguments over the merits of affirmative action policies and focused on the procedural requirements for imposing them. Accordingly, not only does her Richmond opinion fail to declare affirmative action unconstitutional, but it actually lays out the standards whereby federal, state, and local governments may qualify such programs in the eyes of a majority on the Court.

True, for the Congress O'Connor offers virtual *carte blanche*, while for states and municipalities she constructs an elaborate hedge work designed to prevent facile recourse to race-based public policies. On her grounds, a program such as the Atlanta set-aside system, based on elaborate findings of racial discrimination, will likely receive Court approval, while the City of Pasadena's affirmative action program for Armenians will likely fall. The fact that neither contemporary nor historical evidence of systematic discrimination against Armenians can be produced means that such programs as Pasadena's are regarded more as old-fashioned local government abuses of power than as legitimate attempts to eliminate racism.

In light of these reflections, we are well entitled to wonder why so much hullabaloo has greeted O'Connor's opinion, with liberals decrying it as an "attack" on equal protection and some witless conservatives exuberating in it as a mortal blow against racial preferences. It seems to me that neither side waited to read the decision before pronouncing on it. Further, their pronouncements were rather informed by the tone and language of Justice Marshall's dissent than the actual content of O'Connor's opinion.

Marshall was shrill: it is a step backwards! Based on the above analysis, it is clear that O'Connor's opinion rather strengthens than weakens affirmative action, at least from the perspective of traditional civil rights groups. The only way to account for Marshall's view is to conceive that he has in sight something beyond the literal implications of the decision. In order to force state and local jurisdictions to toe the line, O'Connor introduced the language of "strict scrutiny," which in modern day jurisprudence bears all the threatening importance that the language of "strict construction" once bore for disputes over state-federal relations and the powers of the federal government.

Marshall knows that “strict scrutiny” has always been the first announcement of the impending death of pet programs in public policy at any level. Thus, he fears more the future application of O’Connor’s precedent than the actual results of the *Richmond* case. In short, Marshall’s shrill language was intended rather for the ears of his brothers and sister on the Court, than as an accurate representation to the public of the import of this case. That is the reason he teased O’Connor by quoting her *Johnson* opinion against her *Richmond* opinion and pretending a contradiction. He knows that for some new Justice (perhaps replacing himself) , what is no contradiction in O’Connor will be in fact a contradiction, which “strict scrutiny” cannot endure.

One reason Marshall cannot fear the actual results of the *Richmond* case is that he knows that O’Connor’s argument, including the resort to “strict scrutiny” to rein in localities, is derived from an essay by the very scholar who, working as Carter’s Assistant Attorney General for Civil Rights, successfully defended Congressionally ordered minority set-asides ten years ago. Drew Days III, now a Yale professor, reviewed his work in the *Fullilove* decision in an essay in 1987. In that essay he concluded that the Court had been too gullible in accepting his argument on behalf of the government and thereby had opened the door to classical racial abuses by refusing to lay down strict rules for the adoption of race-conscious remedies. Days argued, therefore, that affirmative action itself would be endangered (as in the Armenian example), unless we restored a healthy suspicion of state and local governments in this arena. Thus, using the language of conservatism, Days succeeded to strengthen the liberal agenda.

The idea in restricting localities is to safeguard against a resurgence of malign race-consciousness—no matter who local office-holders are. That, in turn, strengthens the hand of Congress in ordering race-conscious remedies seeking to alleviate historical discriminations. Conservatives who have thought this decision meant otherwise have over-reacted, and in doing so lost an opportunity. One wonders sometimes whether conservatives are not constitutionally incapable of mastering the nuances of democratic politics. For nothing can be more certain than that, if *Richmond v. Croson* had been such a decision as conservatives imagined, their task would have been to decry it as the opposite, as a renewed defense of affirmative action.

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