I am writing to you to begin a more effective public discussion on race. I do so in this form\(^1\) as a way to challenge you to think more carefully about racial issues than your colleagues have in their time on the bench. The efforts of the current Justices can, in the main, be characterized as see no evil, hear no evil, and evil. I believe there is a need for the public discussion I hope to provoke; too much of our intellectual discourse about race does not take place in public.\(^2\) More importantly, I am asking you not to take the path blazed by your gender predecessor, Justice Sandra Day O'Connor. Not

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\(^1\) Professor of Law, Duke University School of Law. Thanks to Adrienne Davis and to my research assistant Frank Cooper for his help.

1. For the prior use of this form, see A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas From a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992). I thought that Open Letter from the most senior black judge in the federal system to one of the least senior black judges in the federal system made several extremely useful points. I am not a woman, nor can I claim any particular status that provides me with the right to speak for any group of black people or particular academic community. However, I believe that some of the issues I raise in this Letter are at the heart of much of the discussion I have heard made by both majority scholars and scholars of color. I hope that my Letter raises those concerns in an effective manner.

2. President Clinton's withdrawal of Professor Lani Guinier's nomination to be Assistant Attorney General for Civil Rights is just one example of the insistence that discussions about race be suppressed. Black people who raise the uncomfortable are seen as radical or out of the mainstream. See Jerome McCristal Culp, Jr., *Water Buffalo and Diversity: Naming Names and Reclaiming the Racial Discourse*, 26 CONN. L. REV. 209 (1993). To insist on the continued importance of race in America is to subject oneself, whether black or white, to invective—even from feminists. See Derrick A. Bell and Linda Singer, *Comment, Making A Record*, 26 CONN. L. REV. 265 (1993); Paul D. Carrington, *Comment, Buffaloes and a Straw Man*, 26 CONN. L. REV. 295 (1993). See also T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325, 328-330 (1992) (arguing that courts should not ignore the racism that continues to haunt the experience of Black Americans in housing, education, voting, and other areas of life); Suzanna Sherry, *The Forgotten Victims*, 63 U. COLO. L. REV. 375 (1992). According to Sherry, Aleinikoff ignores the real victims in society—women—and their continued oppression:

Aleinikoff, in his eagerness to empathize with the victims of racism, completely overlooks the victims of sexism. Similarly, his description of the young black man who felt resentful when a woman with a baby crossed the street to avoid him naturally invites a comparison: he fears for his emotional well-being, but she fears for her physical safety. I, at least, would rather be snubbed than raped.

Id. at 375. Sherry's description of this problem shows the difficulty that some important feminists display with respect to issues of racism—she would compare the relatively small risk of being raped with the certainty of snubbing every black male she sees. She does not comprehend racial oppression because for her, the only oppression worth worrying about—whether in her law school or in the marketplace—is against white women.
only is Justice O'Connor deaf and blind to the concerns of Black Americans—she has in significant ways added her voice to form a working majority on the Court in favor of a return to a form of nineteenth century white supremacy\(^3\) in our judicial discourse on race. I hope this Letter will provoke public discussion, elicit responses, and contribute to the creation of a climate where the important issues about race are not ignored by the Court or the Academy. I raise the issue of public discussion in a Letter to you particularly because your nomination sparked discussions about diversity\(^4\)—although I do not mean to imply that your nomination was either required, or limited, by diversity. We in the legal Academy and in the courts have not significantly discussed how much race or other "diversity" concerns ought to matter, or how such concerns are most appropriately addressed. I hope this Letter will help to make such a discussion easier.

Two caveats should be stated at the beginning. First, I do not know how the appropriately race-sensitive Supreme Court Justice would rule in all cases. There is obviously a range of racially sensitive choices that permit room for social change. The issue I raise about the current Court and Justice O'Connor, however, is about adopting a position that leaves the concerns of black people and other racial minorities without any effective outlet. The Court has said, in essence, that black people cannot complain about the racial status quo, and that law and governmental policy will not be part of a response to racial concerns. I do not, of course, require an oppression essentialism—by oppression essentialism I mean a requirement that, because you have suffered gender oppression, you must always reach some particular result in gender or race discrimination cases—of you or of Justice O'Connor. Indeed, the central point I want to make in this letter is that oppression and subordination are both the same and different across culture, race, gender, and sexual orientation.\(^5\) Second, I want to emphasize that I am

3. By white supremacy I mean the view shared by a majority of white people through most of history that their interests ought to dominate the special concerns of Black Americans and other people of color. See, e.g., The Civil Rights Cases, 109 U.S. 3, 25 (1883) ("there must be some stage . . . when [a black man] ceases to be the special favorite of the laws . . . "). The assertion that no group should receive particular attention or assistance in the pursuit of universal fairness ignores the fact that we all act with the weight of both historical privilege and burden behind us. The playing field is not equal and cannot be made so merely by ignoring the reality of history and starting anew. Dominance of the view I term white supremacy means that, whenever issues arise that concern race, the perspectives of white Americans will dominate, and the concerns of Black Americans will be ignored. In that sense Black Americans are never supposed to prevail when their interests are in direct conflict with those of white Americans. Black Americans are a special faction fated to have their interests subordinated to those of whites in constitutional disputes.

4. You raised the issue of diversity yourself in the speech you gave at your swearing-in ceremony for the Supreme Court. See infra text accompanying note 67.

5. Some will criticize my recitation of this litany of social constructions as being "politically correct." I would respond to that criticism in three ways. First, different kinds of social constructions have always determined the issues that legal scholars and legal participants worry about. The nature of slavery and freedom were important social constructions that had legal consequences in the beginning of the nineteenth century. See A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS (1978). Notions of
not commenting on all aspects of Justice O'Connor's jurisprudence or suggesting that race can or should determine every Supreme Court decision. Justice O'Connor, I am sure, has been helpful and perhaps even innovative in other areas of the law, but her jurisprudence of race has been particularly dismissive of the concerns of black people. It is only this aspect of her history that this Letter asks you to reject.

Justice O'Connor could have been the one introduced by President Clinton with these words instead of you:

As a brilliant young law school graduate, she became an early victim of gender discrimination, when as a woman and mother, she sought nothing more than that which every one of us wants—a chance to do her work. She met this challenge with character and determination.6

Like you, Justice O'Connor is married to an influential member of the bar.7 With respect to class and race, both of you come from the privileged end of our society. Privilege does not mean that the holder cannot hear the voices of the oppressed, but it does suggest that one possessing such privilege ought to take care to examine where she is in relation to others and where she and others are going. Racial and gender oppression are both different and the same. This duality means that understanding, or even partial understanding, of one form of oppression does not mean that one will or can understand the other.8 Such understanding is required if racial justice and equality are to be achieved in the near future.

"class" had a legal consequence that led the first post-constitutional Congress to enact as its first bill a law that included a requirement that judges promise to do justice to the rich and to the poor alike. This enactment of an old principle indicated that the implication of wealth was a social construction of great importance in the late eighteenth century. Second, the social constructions I have chosen are important determinates of social and legal position in current society and therefore we ought to pay attention to them. There are no other social constructions that are as important in our current society. Third, by singling these constructions out, including race, I do not mean to create a category outside history or analysis, or to make a claim of race essentialism.


7. I hope it is clear that I reference your husband not to limit you or to make you responsible for his actions but to ask you to examine where you are in the social hierarchy.

8. Consider, for example, the following statement by Suzanna Sherry:

Donald Trump's ill-advised statement (although when has Donald Trump ever behaved advisedly?) that well-educated blacks have an advantage is labelled "incredible," but one need only look at affirmative action at work in academia to recognize the kernel of truth in Trump's conclusion. In both admissions and hiring, blacks have a significant advantage over whites with equal credentials. . . . In hiring, virtually every academic institution has hired minority candidates who lack many of the academic credentials required of white candidates under traditional standards of excellence. Moreover, under the law of supply and demand, minority scholars are often paid more than whites of similar seniority and ability. . . .

I will point out simply that at least blacks have achieved formal equality—a necessary prerequisite to substantive equality, but one which women still lack. There is currently no government activity, no right of citizenship, no employment or educational status that can be denied on the basis of race. All legal barriers to racial equality have been removed by Congress or the courts.

Sherry, supra note 2, at 376-377 (emphasis added).
This letter has three parts. In Section One, I will examine the equality framework that you have advocated for reviewing gender differences. My analysis will demonstrate that your equality model has problems when used to address the racial status quo—I contend that it is likely to reinforce existing modes of racial inequalities. I want to challenge you to think about whether an equality model will work in racial settings, and to contend that it may also not work when applied to the intersection of race and gender. In Section Two, I will look at the history and opinions of Justice Joseph P. Bradley, who I think is the closest historical analogue to you in his appointment to the Court. Justice Bradley came to the Court as an outspoken advocate of racial justice. He, in fact, prodded his colleagues on occasion about their failure to understand and deal with racial inequality. Ultimately, however, he developed a model of racial oppression and justice that left Black Americans outside the protection of the law. I will argue that Justice Bradley’s opinions and votes helped to create the racial jurisprudence that ended the first Reconstruction, and that this jurisprudence is strikingly similar to the jurisprudence of Justice O’Connor. Her jurisprudence is likely to help to effectively end the second Reconstruction. In Section Three, I will discuss the way that Justice O’Connor has used and abused racial difference in her jurisprudence and suggest that her approach of looking for the middle course is not likely to achieve racial justice. Sometimes justice requires an understanding that a fundamental program of change is required. Courts may not always be in the best position to determine the exact nature of that change, but they do have a responsibility to permit some change. Failure to permit change causes courts to become the engines of injustice rather than those of justice. Justice O’Connor’s jurisprudence fails to permit change.

I. RACE, THE COURT, AND THE STATUS QUO

In your confirmation hearings you discussed your view of judging, and in a recent article you suggested that you thought that the concerns of gender inequality, including those of abortion, could best be ameliorated through application of the Equal Protection Clause of the Fourteenth Amendment. In both of these statements you suggest a view of the status quo of change that may be inadequate for looking at issues involving race. For Black Americans the status quo all too often seems inappropriate. The experience of Black Americans, unlike that of white women, too often has not progressed in a uni-dimensional way. Derrick Bell, among others, has documented the tragic situation for Black Americans. Race is still a large marker for success in our society, more so than class or other indicators of social position. When race, class, and gender interact, the synergy produces many of the social problems of America. Blacks still earn less than whites, and when they seek employment or seek to buy an automobile there are still

significant differences in the way that they are treated. Blacks get poorer treatment in the American medical system—even before the Clinton medical plan centralizes and controls the costs associated with being black and poor. The irreconcilable element in the arguments of those who support our current status quo is that there is little evidence that current trends are moving us toward solving these racial differences.

There are several ways of approaching the racial status quo; not all are equally sensitive to the differences and the sameness of race. Historically, the Court has assumed that racial problems will be solved by the evolutionary forces in the world. This view is one of the central tenets of the legal Academy, and it is wrong. Such a view of history and of progress is at the center of liberal versions of legal analysis. The liberal celebration of the law argues that law will lead us inexorably to an “appropriate” society. According to this liberal view of law, the legal system, as represented in our Constitution and the common law, is a careful balancing of justice. Historically, it achieved justice as much as was possible given the constraints of former times. The assertion is that law today does as much as possible to achieve justice given present imperfections; the direction of law in the future is toward a situation where the existing constraints will be removed as we achieve justice.


13. Ian Ayres, Laura G. Dooley, & Robert S. Gaston, Unequal Racial Access to Kidney Transplantation, 46 VAND. L. REV. 805 (1993) (asserting that black people do not have equal access to transplants). See also J. Michael Soucie, John F. Neylan, & William McClellan, Race and Sex Differences in the Identification of Candidates for Renal Transplantation, 19 AM. J. KIDNEY DIS. 414 (1992) (showing that black dialysis patients are less likely than white dialysis patients with similar health risks to be placed on a transplant list).
14. 60 U.S. (19 How.) 393 (1857) (asserting that black men have no rights that white men are bound to respect).
15. 109 U.S. at 25, supra note 3.
16. 163 U.S. 537, 548 (1896) (holding that “the enforced separation of the races” does not violate the Equal Protection Clause of the Fourteenth Amendment).
17. 481 U.S. 279, 314-19 (1987) (finding a claim that racial bias has tainted capital sentencing process insufficient to obviate the death penalty because of the broader social implications such a finding would have in other areas of the law).
18. 501 U.S. 429 (1991) (refusing to examine the racial context of stops of black men on buses in search of drugs and concluding that there was no constitutionally inappropriate coercion and Florida’s per se rule incorrectly interprets the United States Constitution).
19. 113 S.Ct. 2816 (1993) (holding that white plaintiffs challenging the composition of a congressional district make out a prima facie case of discrimination when they claim that a map is so unusual that it could only have been drawn for racial reasons). Justice O’Connor incorrectly compares the plaintiffs’ plight in Shaw v. Reno with that of Gomillion v. Lightfoot, 364 U.S. 339 (1960). The grotesque 28-sided figure drawn in Gomillion was intended to exclude all but four or five black citizens and none of the white citizens of Tuskegee. In Shaw, none of the white citizens were similarly disenfranchised and the power of the white community was not in any way improperly impeded. Indeed, the only injury to the white citizens is having to participate in a district that has a small black majority. Justice O’Connor also argues that somehow there has been an injury to the ability of white (and presumably black)
demonstrate that the Court can move us away from racial justice for long periods of time. More importantly, our legal history does not support the argument that law is always a force for good. This liberal view of law—and of its present, history, and future—is a celebration of a legal process that is incongruent with the real legal history of black people in this country.

It may be necessary for judges to engage in this celebratory rhetoric to perform their constitutional function. I do not believe this to be true, but even if I am wrong, it is still clearly dangerous for Supreme Court Justices to believe the rhetoric. Too strong a belief in this rhetoric is a prescription for total governmental inaction. Nothing in the Constitution—properly understood—requires such a program. Nothing in our history supports a view that such a prescription is fair.

In your Article on judicial voice, you suggest that the role of judges is to facilitate a conversation among legislators. You suggest Roe v. Wade may have been wrong because it truncated a conversation that legislators were having about abortion. You argue that the issue of abortion would be less politically divisive if the Court had based its decision in Roe on more limited grounds—equal rights for women. We will never know whether you are right that such gradualism would have worked. I suspect that there are many radical changes that could have been made by constitutional fiat that would not have produced a large scale reaction. For example, I do not believe that we would be facing a large scale political movement surrounding an interpretation of the Equal Protection Clause to require no-fault divorces. Such a policy is probably unnecessary and may also be bad constitutional analysis, but it is not more or less correct because it is not gradual or because it does not require a conversation with state or federal legislators.

Further, your suggestion that Brown v. Board of Education is the exception that proves the general rule that gradualism is necessary to avoid political divisiveness seems to me to misinterpret the promise and importance of citizens to participate in a more race-neutral system, but she does not explain what that would really look like. See Jerome McCristal Culp, Jr., Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims, N.Y.U. L. REV. (forthcoming Fall 1994).

20. You note:
   The ball, one might say, was tossed by the Justices back into the legislators' court [in Struck v. Secretary of Defense], where the political forces of the day could operate. The Supreme Court wrote modestly, it put forward no grand philosophy; but by requiring legislative reexamination of once customary sex-based classifications, the Court helped to ensure that laws and regulations would "catch up with a changed world."

Roe v. Wade, in contrast, invited no dialogue with legislators. Instead, it seemed entirely to remove the ball from the legislators' court. In 1973, when Roe issued, abortion law was in a state of change across the nation. . . .

No measured motion, the Roe decision left virtually no state with laws fully conforming to the Court's delineation of abortion regulation still permissible.

Ginsburg, supra note 10, at 1204-05 (citations omitted).

23. Id. at 1199-1200.
of Brown. You suggest that the Court’s decision in Brown reversing Plessy v. Ferguson\(^\text{26}\) was the result of a long, well thought-out political campaign to culminate with reversal of the “separate but equal” interpretation of the Constitution.\(^\text{27}\) You assert that this reversal was necessary because “prospects in 1954 for state legislation dismantling racially segregated schools were bleak.”\(^\text{28}\) You point out that a critical difference between the situations addressed by Roe and Brown is that women are, in most instances, the life partners of men, and that women raise daughters and sons, but black people were confined by law to a separate sector where they could not disprove the unreality of biased opinions.\(^\text{29}\) This argument seems to me to prove too much. The court in Brown could have started a simpler and more popular conversation in legislatures about actually providing separate but equal status to schools. A gradualist approach would have been less acrimonious and would have avoided the emergence of political forces in both political parties—forces that have helped to elect every nonincumbent Republican president since that time, and have created a minor political force inside the Democratic party for cutting back the requirement of racial justice.

Your desire for conversations among people will only work in a world where we know what we are to have a conversation about. There is no extrinsic way to decide what those things ought to be. The Congress has engaged in a conversation with the Court that has progressively limited the reproductive opportunities available to poor women.\(^\text{30}\) First, the Court did not require the government to provide abortion services to poor women unable to afford medical care,\(^\text{31}\) then the Court permitted federal administrators to limit access to information to poor women who were the beneficiaries of government largess,\(^\text{32}\) and finally the Court permitted state legislators to limit effective access of poor women to abortion services.\(^\text{33}\) The state legislators and congresspersons involved did not display much appreciation for the hardships these progressive decisions imposed on poor women. The very conversation you wanted has taken place, but without the effective input of the poor women and black women who are the unfortunate victims of this conversation’s results.\(^\text{34}\)

27. Ginsburg, supra note 10, at 1207.
28. Id. at 1206.
29. Id.
The problem with *Roe* is not the lack of a conversation, but the nature of the conversation that was created—the conversation failed to challenge the status quo that disempowered poor and black women. We can create lots of conversations about race that will not challenge the status quo. The very nature of the *Brown* opinion, however, did challenge the fundamental assumption of inferiority that underlay the *Plessy* regime and had supported the racial status quo. *Brown*'s power comes from the conversations it eliminates as well as the ones it creates. Judicial voices that do not understand this important point are bound to help recreate an unsatisfactory status quo.

II. JUSTICE JOSEPH P. BRADLEY: MODEL LIBERAL

We are likely to repeat the racial history of the Supreme Court if we do not understand how that racial history was created. Justice Bradley’s appointment to the Supreme Court in many ways parallels yours. The eldest son of twelve children born on a small farm in upstate New York, Justice Bradley was a prodigy whose teachers, first in a country school and eventually at Rutgers, saw his potential and encouraged his progress—the Rutgers faculty allowed him to complete his degree in less than three years. He, like you, was brilliant. Despite his modest background, he was able to achieve much as a dedicated member of the bar representing largely railroad and other corporate interests. Justice Bradley was appointed to the Supreme Court by President Grant in 1870, along with Justice William Strong. The appointments of Justices Bradley and Strong followed the Senate’s rejection of Ebenezer R. Hoar and the death of Edwin Stanton shortly after he received confirmation.

At the time of his appointment, Justice Bradley clearly represented the best in the liberal tradition with respect to race. He spoke out vigorously against racial oppression in some of his earliest opinions. His dissent in *Blyew v. Kentucky* is illustrative. The majority ruled that the Reconstruction Era civil rights statute which prohibited discrimination against black people in the courts could not be extended to permit the federal courts to take jurisdiction of a case involving the ugly racial murder of a black woman where the only witnesses, black people, were prohibited from testifying by state law because of their race. The majority said that this would make any case that remotely involved black people subject to federal jurisdiction, and that could not have been what Congress meant when they passed the Civil Rights Act. In addition, the majority pointed out that the real injury was to the dead woman, who was not prohibited from testifying by the Kentucky statute. Justice Bradley wrote eloquently in dissent:

36. *See id.* at 724-25.
37. 80 U.S. (13 Wall.) 581 (1871) (Bradley, J., dissenting).
38. *Id.* at 593.
39. *Id.* at 592.
The civil rights bill (passed April 9th, 1866, and under which the indictment in this case was found and prosecuted) was primarily intended to carry out, in all its length and breadth, and to all its legitimate consequences, the then recent constitutional amendment abolishing slavery in the United States, and to place persons of African descent on an equality of rights and privileges with other citizens of the United States. To do this effectually it was not only necessary to declare this equality and impose penalties for its violation, but, as far as practicable, to counteract those unjust and discriminating laws of some of the States by which persons of African descent were subjected to punishments of peculiar harshness and ignominy, and deprived of rights and privileges enjoyed by white citizens.

To deprive a whole class of the community of this right, to refuse their evidence and their sworn complaints, is to brand them with a badge of slavery; is to expose them to wanton insults and fiendish assaults; is to leave their lives, their families, and their property unprotected by law. It gives unrestricted license and impunity to vindictive outlaws and felons to rush upon these helpless people and kill and slay them at will, as was done in this case. To say that actions or prosecutions intended for the redress of such outrages are not "causes affecting the persons" who are the victims of them, is to take, it seems to me, a view of the law too narrow, too technical, and too forgetful of the liberal objects it had in view. If, in such a raid as I have supposed, a colored person is merely wounded or maimed, but is still capable of making complaint, and on appearing to do so, has the doors of justice shut in his face on the ground that he is a colored person, and cannot testify against a white citizen, it seems to me almost a stultification of the law to say that the case is not within its scope.

Justice Bradley understood when he wrote his dissent two years after joining the Court that it was possible to interpret the Constitution to protect black people, and that sometimes it was important to do so. When he dissented in Blyew, Justice Bradley believed the protections of the Constitution should be vigorously enforced. A few years later, however, his view would change.

In The Civil Rights Cases, decided twelve years after Blyew, Justice Bradley wrote for an eight Justice majority that black people should at some point stop being "the special favorite[s] of the laws." His opinion indicated a belief that federal laws designed for the protection of freed slaves could not protect the "social rights of man and races in the community; but instead existed only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery."

One of the cases in The Civil Rights Cases was brought by Robinson and Wife against the Memphis & Charleston Railroad to protest the railroad's refusal to permit the wife to ride in the ladies' car because she was a person of African descent. The plaintiffs appealed a jury verdict for the defendant railroad on the ground that the judge improperly admitted evidence showing

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40. Id. at 595, 596.
41. Id. at 599.
42. 109 U.S. at 25.
43. Id. at 22.
that the wife "was an improper person, because she was in company with a
young man whom [the railroad] supposed to be a white man, and on that
account inferred that there was some improper connection between them." Writing for the majority, Justice Bradley concluded that the Constitution did not permit the federal government to provide protection for purely private wrongs that were not attempts to create badges and incidents of slavery in violation of the Thirteenth Amendment. Free Blacks had suffered similar disabilities before slavery, and the purpose of excluding Blacks from public accommodations had been to ensure that slaves could not run away. The exclusion no longer served its original purpose; therefore, the exclusion at issue was not an attempt to create badges and incidents of slavery and was not constitutionally within the power of the Congress to prohibit.

Justice Bradley, who in Blyew had dissented from the Court's failure to look at the reality created by a statute prohibiting the testimony of black citizens, failed twelve years later to examine the similar reality created in the intersection of race and gender in the case presented by Robinson and his wife. Because Robinson could "pass" for white and his wife could not, the Court concluded that the assumption of disrepute was not a badge and incident of slavery. However, if every black woman not obviously in the role of servant can be presumed to be a prostitute, has not the Court then indirectly condoned a badge of inferiority for black women directly linked to slavery? Justice Bradley does not examine that possibility. In addition, he assumes that whatever rights are available to citizens because of their citizenship will be available and protected by the state courts. Rather than engaging in a meaningful look at reality, Justice Bradley blithely asserts that any discrimination in violation of the Fourteenth Amendment would be reachable by appropriate legislation.

Justice Bradley's jurisprudence left black people with few substantive protections from the vagaries of private racial oppression. Unlike law students today, he had to know the decisions like those in The Civil Rights Cases would leave blacks in most parts of the country subject to severe forms of racial oppression. After all, Justice Bradley had participated in the commission that confirmed the election of President Hayes, and he knew that the compromise that removed protection for blacks in the South would be a significant impediment to change in the racial status quo. The real problem with Justice Bradley's interpretation of the Thirteenth and Fourteenth Amendments was that he permitted the creation of a legal structure that he knew would not allow any alteration in the racial status quo. I do not know whether a more vigilant Court would have been able to prevent the creation of the racial status quo that came about with the creation of the Jim Crow system. It is clear, however, that the Court, in a manner consistent with its limited constitutional function and power, could have required the initiators of a more oppressive racial status quo to abide by the limitations.

44. Id. at 5.
45. See id. at 17-18, 20-21.
imposed in the legal protections for black citizens created in the aftermath of the Civil War by Civil Rights statutes. If Justice Bradley had taken the opportunity to examine the real creation of badges and incidents for black women that at least one of the cases provided, the Court could have made the creation and maintenance of one hundred years of racial oppression a little more difficult. Instead, Justice Bradley helped to cut off the possibility of any legal redress for black citizens for more than three generations.

Justice Bradley was convinced that his narrow reading of the Reconstruction Era civil rights statutes was a necessary realization of the reality of that times. However, the truth is that he came to see his role as judge to require that he act as insurer of the status quo—even a racially unfair and inappropriate status quo. Like you, he had been appointed to the Court by a "racially" sensitive president to provide some necessary careful thinking. He brought his brilliance and concern to the Court, but he allowed himself to use that brilliance to help create a racially restrictive reality for Black Americans. Justice Bradley was moderate and "reasonable", but he was not just to Black Americans.

III. JUSTICE SANDRA DAY O'CONNOR AND RACE

Justice O'Connor was appointed by a racially conservative President as a direct result of a campaign pledge to provide some gender diversity on the Court. She has rejected the notion that it is possible to discover a gender essentialist perspective for women judges. However, she has seemed to want to be sensitive to the concerns of racial minorities. Justice O'Connor has adopted what she has termed a moderate view on what has become an increasingly conservative court. She has approved some forms of affirmative action, and has spoken eloquently about the nature of racial oppression. Justice O'Connor has written powerfully about the discrimination she personally experienced as a very successful graduate of Stanford Law School in an era when being a women was almost an absolute bar to being involved in corporate law. Unfortunately for Black Americans, she has also been a linchpin in the creation of an effective majority on the Court that would limit the ability of any level of governmental or private entity to change the racial status quo.

48. With respect to the concerns of racial difference, Justice O’Connor has commented:

Batson, in my view, depends upon this Nation’s profound commitment to the ideal of racial equality, a commitment that refuses to permit the State to act on the premise that racial differences matter. . . . We ought not delude ourselves that the deep faith that race should never be relevant has completely triumphed over the painful social reality that, sometimes, it may be. That the Court will not tolerate prosecutors’ racially discriminatory use of the peremptory challenge, in effect, is a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact.

Gerry Spann has noted that we ought to have limited expectation about the power of courts to provide change. However, there is a difference between not helping change and being an active barrier to the possibility of change. In our governmental system there are five possible avenues for change. First, we can have federal legislation to provide effective remedies for the existing status quo. The legislative program of the last thirty years has been significantly concerned with attempts to alter the status quo: The Civil Rights Acts of 1964 and 1991, the Fair Housing Act of 1968, and the Voting Rights Act of 1965 and its reenactment in 1982 are examples of efforts in this area. Second, we can have state legislation to remedy within state borders the status quo. Our federalist system means that the possibility of state legislation is an important avenue for change. States have been on the forefront of some changes in the existing racial situation through both state law and local ordinances designed to alter the racial status quo. Third, the President can use his executive power to enforce the principle of anti-discrimination embedded in the Fourteenth Amendment. Presidents Roosevelt, Kennedy, Johnson, and Nixon all used that authority to address elements of racial discrimination. Fourth, the courts can limit forms of racial oppression; your Court has on a limited number of occasions provided such support. Fifth and finally, some issues are left to the private activities of individuals and are outside the purview of governmental action. Some of the change that has occurred in the last fifty years was the direct result of private parties attempting to remedy discrimination.

In four of these areas Justice O'Connor has helped to create a jurisprudence that will not permit change in the racial status quo. Justice O'Connor has been the leader in attempting to interpret Title VII of the Civil Rights

56. Exec. Order No. 8802, 6 F.R. 3109 (1941) (President Roosevelt outlawing racial discrimination in industries that were part of the war effort); Exec. Order No. 10925, 26 F.R. 1977 (1961) (President Kennedy outlawing discrimination among government contractors); Exec. Order No. 11246, 30 F.R. 12319 (1965), as amended by Exec. Order No. 11375, 32 F.R. 14303 (1967) (President Johnson requiring federal contractors to engage in affirmative action); Exec. Order No. 11478, 34 F.R. 12985 (1969) (President Nixon requiring affirmative action programs in federal employment). See James E. Jones, The Rise and Fall of Affirmative Action, RACE IN AMERICA: THE STRUGGLE FOR EQUALITY 351 (Herbert Hill & James E. Jones, Jr. eds., 1993) (noting that every President since Roosevelt, including the current one, has either issued his own executive order attacking racial discrimination or continued the order in effect when he was elected).
57. See A. Leon Higginbotham, Jr., F. Michael Higginbotham, & S. Sandile Ngcobo, De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit For Racial Justice, 1990 U. ILL. L. REV. 763, 767-69. The authors argue persuasively that the Court's willingness to make racial oppressors take a more difficult course can have consequences that could ameliorate the impact of oppression. They show that, in contrast to what happened in South Africa, the U.S. Supreme Court in modest ways slowed down racial oppression.
Act of 1964 so that it cannot address problems regarding the number of black people hired. She was instrumental in pushing the Court to find that a comparison of the percentage of nonwhite workers in jobs classified as skilled or unskilled does not make out a prima facie disparate impact case in *Wards Cove Packing v. Atonio.* She has been an instrumental vote in limiting the ability of government to question the appropriateness of the private sector use of race in decision-making. In *St. Mary's Honor Center v. Hicks,* the Court allowed an employer to escape liability for discrimination on grounds that the defendants had not articulated—and in some ways had denied by asserting the opposite position. In *City of Richmond v. J.A. Croson,* Justice O'Connor refuses to allow the former capital of the Confederacy to attempt to alter a racial status quo where there are essentially no black contractors employed. She suggests that any problems created by a lack of black contractors can be solved by racially neutral proposals, but ignores the extent to which such racial neutrality cannot provide a real alternative for racial change. In *Shaw v. Reno,* however, Justice O'Connor goes further and clearly demonstrates the extent to which she is committed to a restricted and oppressive racial present—she permits white plaintiffs to claim a constitutional harm when no black plaintiff could do so. She is joined by Justice Scalia and Chief Justice Rehnquist, who have argued elsewhere that, when raised by groups other than white Americans, such harms cannot be a violation of equal protection. Justice O'Connor has cre-

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59. 113 S. Ct. 2742 (1993) (holding that a judicial fact-finder could conclude that the black employee's discharge at issue was the result of personal bias despite the fact first, that the supervisor had testified that he had no personal bias, and second, that the employer had never argued that there was personal bias involved).


63. Id.


Of course the relationship of sex to partiality would have been relevant if the Court had demanded in this case what it ordinarily demands: *that the complaining party have suffered some injury,... [T]he defendant would have some excuse to complain about the prosecutor's striking male jurors if male jurors tend to be more favorable towards defendants in paternity suits. But if men and women jurors are (as the Court thinks) fungible, then the only arguable injury from the prosecutor's 'impermissible' use of male sex as the basis for his peremptories is injury to the stricken juror, not to the defendant....*

The core of the Court's reasoning is that peremptory challenges on the basis of any group characteristic subject to heightened scrutiny are inconsistent with the guarantee of the Equal Protection Clause. *That conclusion can be reached only by focusing unrealistically upon individual exercises of peremptory challenge, and ignoring the totality of the practice. Since all groups are subject to the peremptory challenge (and will be made the object of it, depending upon the nature of the particular case) it is hard to see how any group is denied equal protection.*
ated a racially political present in which the interests of black people are outside the possibility of change.

It is difficult to see from where change could come in the racial status quo that Justice O'Connor has attempted to create: state and local governments can only do something if they meet an impossible standard; the federal government is similarly severely limited in its ability to do anything. In addition, Justice O'Connor has been a swing vote saying that, no matter how egregious, the interests of black victims of official police oppression or punishment are not issues that constitutionally trouble the Court. She seems not to understand that such decisions reinforce racial stereotypes and are part of the racial oppression of black people.

Is Justice O'Connor a bad person? No. I think she means well, but she has not understood the extent to which the racial status quo is inappropriate and that, even if she does not want to alter it, if she will not permit others to do so, she becomes an unseen but important enforcer of that racial status quo. To borrow a phrase from the second Justice Harlan, the Court becomes the "fist inside the velvet glove," hiding its endorsement and enforcement of a racially restricted present behind words of sympathy and inaction, but all the time reminding the citizens that some form of the racial status quo is required. My fear is not that you will join all of the positions advocated by Justice O'Connor, or that any one decision taken separately is dangerous, but instead that, in a different way, you will assume that the status quo is appropriate or that what works as a remedy for white middle class women will work for black men and black women. You may be right that, in fact, a middle course is the only effective avenue for change coming from the courts, but your role as a judicial voice requires that you permit other perspectives to be heard. Hear the voices to whom this Court—led significantly by Justice O'Connor—have not given an effective audience.

IV. CONCLUSION

You commented at your swearing in:

This weekend, I attended a celebration of women lawyers in New York. The keynote speaker was our grand Attorney General, Janet Reno. It may have been the best-attended. It was certainly the most remarkable event at the American Bar Association's annual meeting. Awards were made in the name of Margaret Brent, a great lady of the mid-1600s, celebrated as the first woman lawyer in America. Her position as a woman, yet a possessor of

Id. (emphases added). Justice Scalia's argument, if applied to re-districting, should have prevented him from finding harm to five white plaintiffs in Shaw v. Reno.


66. Justice Harlan originally used the phrase in the context of management-union relations during labor disputes:

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

power, so confused her contemporaries that she was sometimes named in court records not as Mistress Margaret Brent, but as Gentleman Margaret Brent. [Laughs] Times are changing. The president made that clear by appointing me, and just last week, naming five other women to Article III courts. Six of his total of fourteen federal bench nominees thus far are women. Justice Sandra Day O'Connor recently quoted Oklahoma Supreme Court Justice Jeanne Coyne who was asked, 'Do women judges decide cases differently by virtue of being women?' Justice Coyne replied that in her experience, 'a wise old man and a wise old woman reached the same conclusion.' [Laughs] I agree, but I also have no doubt that women, like persons of different racial groups and ethnic origins, contribute what a fine jurist, the late Fifth Circuit Judge, Alvin Rubin, described as a 'distinctive medley of views influenced by differences in biology, cultural impact and life experience.' A system of justice will be the richer for diversity of background and experience. It will be the poorer in terms of appreciating what is at stake and the impact of its judgments if all of its members are cast from the same mold. I was impressed by the description of women at the bar by one of the 1993 Margaret Brent Prize recipients, Esther Rothstein, an attorney in private practice in Chicago. Esther said she found women attorneys to be 'tough, yet tender, wanting to win but not vindictive, cautiously optimistic with the sense to settle for victories that do not leave one's opponent bloodied and bowed, willing to be a link in a chain that is strong yet pliable.' In my lifetime, I expect there will be among federal judicial nominees, based on the excellence of their qualifications, as many sisters as 'brothers-in-law.' [Applause] That prospect is, indeed, cause for hope, and its realization will be cause for celebration. Thank you. [Applause]

It had been my hope that when a Democrat was in the White House, I would know and respect the persons appointed to the Supreme Court. In this, your appointment to the Supreme Court, at least, I have not been disappointed by the Clinton Administration. I cannot claim you as a dear friend, but we have friends in common. You were one of the mentors of my friend and former colleague Nadine Taub. Professor Taub has spoken of your help to her in entering teaching and continuing the work in women's rights that you helped to begin at Rutgers Law School in Newark. I, too, began my law school teaching career at Rutgers Law School in Newark with a number of your former colleagues. Ten years ago you participated in a conference that I helped to organize and sponsor on the Twentieth Anniversary of the 1964 Civil Rights Act at Rutgers, and I can still remember the tremendously powerful history you told of gender discrimination in the Academy. I was honored that you would come to our conference, and I can still remember walking you and Judge Nathaniel Jones to the taxicab at the end of the conference, and the real hug of camaraderie you gave to Judge Jones. I saw you then and I still see you as an important participant in

67. Ruth Bader Ginsburg Sworn In as Supreme Court Justice, supra note 6.  
68. You are one of the judges that I send my reprints to, and you have over the years been kind enough to acknowledge receipt of them.  
69. Indeed, though she may not remember it, I showed your daughter around Harvard Law School when she came as a prospective student because we shared common friends. I can still remember the excitement that I got from meeting your daughter, because, even then, more than fifteen years ago, you were a heroine of mine.  
70. Judge Nathaniel Jones, also a participant in the Rutgers conference, was a former
the struggle for civil rights and as a bona fide American heroine. Your selection to the Court was welcomed not for simply making the court look more like America, both in terms of gender and religion, but also for appointing a true participant in the civil rights movement to the Court. This is a Court that truly needs some sense of the history of struggle and change if it is to address the problems the Court will face in the next century. I honor your past, and I welcome you to the Court. I hope that my strong criticism of Justice O'Connor and the other Justices of the Court is not seen as personal character indictments or as outside the permissible range of criticism, but instead as pointed comments on the substance of their opinions and their jurisprudence as a whole.

Of course, if this was all I had to write to you, I could have sent a private letter. You raised the issue of gender and race in your swearing in ceremony. I believe that you would like to bring a significantly different medley, indeed a distinctively different medley to the Court's conversations. I write this to remind you that many perspectives are not now heard by the Court. This is the most conservative Court on race in over one hundred years. Justice Clarence Thomas's votes in *Hicks* and *Shaw v. Reno* prove that he is not truly a judicial conservative—as former Chair of the EEOC he cannot have been confused by the controversy in *Burdine* or have mistaken the Congress's intent to enact the interpretation of the dissenters in *Hicks*—but is instead a supporter of the racial status quo. The point is that racial or gender diversity on the Court does not mean that the distinctive voices and concerns that ought to be heard in the Court will be given a chance. In particular, given the way a number of your colleagues choose their clerks from a limited political perspective, there is a real chance that

general counsel of the NAACP and the NAACP Special Contribution Fund and is now a Circuit Judge on the United States Court of Appeals for the Sixth Circuit. I had the honor of clerking for him in 1979-80. Judge Jones was the third African American to serve on the Sixth Circuit.

71. 113 S.Ct. 2742 (1993).
72. 113 S.Ct. 2816, *supra* note 19.
74. *Burdine* held that the burden of proof is always on the plaintiff in a Title VII suit—all that is required of a defendant employer is the articulation of an explanation for the allegedly discriminatory action. *Hicks* goes further and says that even if the defendant employer does not articulate a persuasive justification, they still may win if the court believes that some other reason "might" have been the cause of the employment action.

Justice Thomas' votes in *Shaw v. Reno*, 113 S.Ct. 2816 (1993) and *Presley v. Etowah County Commission*, 112 S.Ct. 820 (1992), are inconsistent even for a judicial conservative. *Shaw* reaches out to require race neutrality when it does not exist and *Presley* ignores the nonexistence of racial neatlarity when there is statutory and constitutional support to find a real injury. It seems to me that a judicial conservative might rule for plaintiffs in both cases, but to rule for the plaintiff in one and not the other shows not judicial conservatism, but support for the racial status quo that conservatism cannot require.

Conservative Justices in a number of rulings have limited the plaintiff's right to seek recovery in situations where "real" injury occurs. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). *Shaw* is inconsistent with this line of cases and there is no reason for a "conservative" to see differently. At a minimum it might be reasonable to expect Justice Thomas to explain his inconsistency.
important issues involving race and class will not be discussed and unim-
portant issues will dominate. I want to emphasize to you that understanding
the impact of gender oppression does not mean that you will understand
racial oppression. I believe that you will champion those concerns that you
think are important, and I, as one member of the Academy, want to chal-
lenge you to hear the unspoken voices of racial oppression in your delibera-
tions, voices that many of your colleagues cannot and do not desire to hear.
To do that sometimes means not compromising on concerns fundamental to
the poor, to racial minorities, or to women. Sometimes justice requires a
Brown or a Roe to alter and structure our conversations. It is that difficult
task that I ask you to undertake.