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ESSAY

ADARAND CONSTRUCTORS, INC. v. PENA AND THE CONTINUING IRRELEVANCE OF SUPREME COURT AFFIRMATIVE ACTION DECISIONS

NEAL DEVINS*

I. INTRODUCTION

Ten years ago, the Reagan Administration's campaign against affirmative action was on the verge of collapse. The Administration's efforts to convince the Supreme Court to reject preferences and allow only make-whole relief to the actual victims of discrimination were turned away in 1986.¹ Smarting from that defeat, the White House abandoned a Department of Justice proposal to rescind an executive order requiring federal contractors to set numerical hiring goals.² By the spring of 1987, after the Supreme Court ruled that a female could be

* Thanks to Jason Kelley and Krista Weber for research assistance. Thanks also to Mechelle Dickerson, Dave Douglas, Alan Meese, John McGinnis, Jeremy Rabkin, David Strauss, and Mark Tushnet for their comments on a draft of this Essay. This Essay is dedicated to the *William and Mary Law Review*. Over the past three years, I have had the good fortune to serve as the *Review's* faculty advisor. Thanks to the good nature and hard work of the *Review's* staff and editors, I have cherished this assignment.

1. See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) (holding that a Title VII consent decree may benefit individuals who were not the actual victims of the defendant's discriminatory practices); Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986) (holding that Title VII allows a court to order affirmative race-conscious relief as a remedy for past discrimination); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (plurality opinion) (holding that racial classifications must be justified by a compelling State purpose, which is not met by societal discrimination alone, and that the means chosen to effectuate that purpose must be narrowly tailored).

2. See Gerald M. Boyd, *Goals for Hiring To Stay in Place*, N.Y. TIMES, Aug. 25, 1986, at A1.

hired over a marginally better-qualified male to alleviate sex imbalance,³ journalists and academics concluded that the "affirmative action wars [were] over,"⁴ with the Administration having suffered another "near-deathblow" defeat.⁵

These obituaries proved to be premature. Like a phoenix rising from the ashes, calls for a "color-blind society" are again sweeping the nation.⁶ Starting with a 1993 grass roots effort to amend the California Constitution to prohibit the state from granting race and gender preferences and with no end in sight (at least not until the 1996 elections), affirmative action is once again an incendiary topic. On March 15, 1995, Senate Majority leader and presidential candidate Robert Dole (R-Kan.) called for a comprehensive review of federal affirmative action programs, proclaiming that "fighting discrimination should never become an excuse for abandoning the color-blind ideal."⁷ Two months later, Charles Canady (R-Fla.), Chair of the House Judiciary Subcommittee on the Constitution, concluded that, "[i]f there ever was a time for affirmative action, we are moving beyond it."⁸ For his part, after launching a government-wide review of affirmative action by saying "[w]e shouldn't be defending things we can't defend,"⁹ President Bill Clinton, on July 19, 1995, reaffirmed the principle of affirmative action by declaring that "[t]he job of ending discrimination is not done."¹⁰ The very next day, however, the University of California Regents heeded Republican Governor and then-1996 presidential candidate Pete Wilson's claim that racial preferences "threaten to infect the

3. See *Johnson v. Transportation Agency*, 480 U.S. 616, 641-42 (1987) (holding that Title VII allows gender to be considered a factor in promotion decisions).

4. Herman Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over but the Shouting*, 86 MICH. L. REV. 524, 524 (1987).

5. Marcia Coyle, *Administration Loses Major Round on Reverse Bias*, NAT'L L.J., Apr. 6, 1987, at 5.

6. For a provocative explanation of why a call to end affirmative action is not really a call for color blindness, see David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99.

7. 141 CONG. REC. S3929 (daily ed. Mar. 15, 1995) (statement of Sen. Dole).

8. Dan Freedman, *Government Re-examining Affirmative Action*, TIMES-UNION (Albany), May 14, 1995, at A20.

9. John F. Harris, *Clinton Avows Support for Affirmative Action*, WASH. POST, July 20, 1995, at A1.

10. *Id.*

nation with 'the deadly virus of tribalism'"¹¹ by voting to eliminate affirmative action hiring and admissions.¹²

On June 12, 1995, the Supreme Court added its voice to this clamor. In *Adarand Constructors, Inc. v. Pena*,¹³ the Court, by a five-to-four vote, refused for the first time to uphold a congressionally approved affirmative action plan.¹⁴ The program at issue, the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA),¹⁵ set aside "not less than 10 percent" of appropriated funds for socially and economically disadvantaged firms and made use of race-based presumptions to help determine disadvantaged status.¹⁶ Ruling that the STURAA set-aside and other federal affirmative action programs were subject to the same standard of strict scrutiny review as state and local government programs, *Adarand* both tightened the standards governing affirmative action and overturned *Metro Broadcasting, Inc. v. FCC*,¹⁷ a 1990 Supreme Court decision that made use of "a lenient standard, resembling intermediate scrutiny, in assessing' the constitutionality of federal race-based action."¹⁸ *Adarand*, however, did not invalidate the STURAA set-aside. Rather than apply strict scrutiny review to *Adarand Constructors'* challenge to the STURAA program,¹⁹ the Court sent the dispute back to the district

11. Bill Stall, *Wilson Steps Up Affirmative Action Attack*, L.A. TIMES, July 19, 1995, at A3.

12. See Amy Wallace & Dave Leshner, *UC Regents, in Historic Vote, Wipe Out Affirmative Action*, L.A. TIMES, July 21, 1995, at A1.

13. 115 S. Ct. 2097 (1995).

14. *Id.* at 2118.

15. Pub. L. No. 100-17, 101 Stat. 132 (codified in scattered sections of 23 U.S.C.).

16. *Id.* § 106, 101 Stat. at 145-46 (codified in scattered sections of 23 U.S.C.). Under the statute, nonminorities can establish eligibility by demonstrating that they are socially and economically disadvantaged. See *id.* The presumptive eligibility of minority group members, however, can be rebutted "if a third party comes forward with evidence suggesting that the participant is not, in fact, . . . disadvantaged." *Adarand*, 115 S. Ct. at 2103.

17. 497 U.S. 547 (1990).

18. *Adarand*, 115 S. Ct. at 2104 (quoting *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1544 (10th Cir. 1994)).

19. *Adarand Constructors*, a "nondisadvantaged" highway construction company, challenged the STURAA set-aside after its low bid for a guardrail subcontracting project was turned away in favor of a somewhat higher bid by a "disadvantaged" minority subcontractor. *Id.* at 2102-04. In particular, *Adarand Constructors* chal-

court where it had originated.²⁰

Adarand promised to be a landmark, presenting the Court with an opportunity to resolve a longstanding controversy about whether *all* race preferences are inherently suspect. Along these lines, *Adarand Constructors* and the Clinton Justice Department, which defended the STURAA set-aside, advanced strikingly different approaches to judicial review of federal affirmative action programs. *Adarand Constructors*, represented by the conservative Mountain States Legal Foundation, argued that both federal and state affirmative action programs should be subject to "the most rigid scrutiny" and "must be designed to remedy clearly identifiable discrimination."²¹ Echoing the Reagan Justice Department's calls for victim-specific relief, Mountain States called upon the Court to strike down most federal affirmative action programs.²² For its part, the Clinton Justice Department embraced *Metro Broadcasting, Inc. v. FCC*,²³ referring to "Congress's broad powers in matters of race" and its status as "a co-equal branch."²⁴ Furthermore, noting that, "in the event that Congress should err in its choice of [an affirmative action program], its broadly representative character provides a check,"²⁵ the Clinton Administration argued that Congress's decisions should be accorded "great weight."²⁶

Adarand rejected both the Clinton Administration's *laissez-faire* approach to federal affirmative action programs and Mountain States' call for "the most rigid scrutiny."²⁷ The Court set-

lenged a cash incentive program that the Department of Transportation used in implementing the STURAA set-aside. Under this provision, prime contractors could receive up to two percent of the original contract amount by awarding subcontracts to two or more disadvantaged businesses.

20. *Id.* at 2118.

21. Brief for the Petitioner at 18, 40, *Adarand*, 115 S. Ct. 2097 (No. 93-1841).

22. *See id.* at 18.

23. 497 U.S. 547 (1990).

24. Brief for the Respondents at 35, *Adarand*, 115 S. Ct. 2097 (No. 93-1841).

25. *Id.* at 36.

26. *Id.* at 35 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980)).

27. *See Adarand*, 115 S. Ct. at 2117. In *Metro Broadcasting*, the Court concluded that federal affirmative action programs are "constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 565 (1990).

tled, instead, on a middle-ground position. Specifically, by insisting that federal, as well as state, affirmative action programs be "narrowly tailored" to serve a "compelling governmental interest," *Adarand* substituted strict scrutiny review for *Metro Broadcasting's* approval of a less demanding intermediate review standard.²⁸ At the same time, *Adarand* sought to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"²⁹ Referring to the "unhappy persistence of both the practice and the lingering effects of racial discrimination," *Adarand* emphasized that "government is not disqualified from acting in response to it."³⁰

Adarand's mixed message makes it a rather slippery precedent. Moreover, because the Court remanded the case rather than resolving the dispute, *Adarand* offers little guidance about the application of strict scrutiny review. Nevertheless, most journalists and legislators viewed the decision as monumental. The *Los Angeles Times* and the *Washington Post* described *Adarand* as "a potentially fatal blow,"³¹ "jeopardiz[ing] a broad range of federal affirmative action programs."³² Likewise, the *Wall Street Journal* saw the Supreme Court as "join[ing] the assault on affirmative action, attacking the foundations of the vast federal network" of preferential treatment programs.³³ In Congress, *Adarand* was alternatively vilified as the "re-subordination of African Americans" or "laying the legal foundation to pave the way back toward slavery"³⁴ and heralded as "historic,"³⁵ "str[iking] an important blow in defense of the fundamen-

28. See *Adarand*, 115 S. Ct. at 2117.

29. *Id.* (quoting *Fullilove*, 448 U.S. at 519).

30. *Id.*

31. David G. Savage, *High Court Deals Severe Blow to Federal Affirmative Action*, L.A. TIMES, June 13, 1995, at A1.

32. Joan Biskupic, *Court Toughens Standard for Federal Affirmative Action*, WASH. POST, June 13, 1995, at A1.

33. Paul M. Barrett, *Not Affirmed: Supreme Court Ruling Imperils U.S. Programs of Racial Preference*, WALL ST. J., June 13, 1995, at A1.

34. Kevin Merida & Kenneth J. Cooper, *Alarmed by High Court Rulings, Black Leaders Prepare for Action*, WASH. POST, July 3, 1995, at A1 (quoting black political leaders and civil rights activists).

35. 141 CONG. REC. S8530 (daily ed. June 16, 1995) (statement of Sen. McConnell).

tal moral and constitutional principles of nondiscrimination."³⁶

Some of *Adarand*'s early reviews, however, dismissed the decision as inconsequential. For the *New York Times*'s Linda Greenhouse and columnist Charles Krauthammer, *Adarand* was "very nearly beside the point"³⁷ and "insignifican[t]"³⁸ because it is in the "[world of politics,] not the courtroom, where the fate of affirmative action will ultimately be decided."³⁹ George Will also questioned the decision's reach, condemning the Court for "sett[ing] nothing" because it was so "tangled in the toils of its hairsplitting reasoning . . . [and] so mesmerized by its classifications that do not helpfully classify."⁴⁰ For example, much to Will's chagrin, President Clinton and his Assistant Attorney General for Civil Rights, Deval Patrick, could speak of the Court's ruling as "a setback, but not a disaster"⁴¹ and criticize "[e]xaggerated claims about the end of affirmative action—whether in celebration or dismay."⁴²

No doubt, the reach and limits of *Adarand* are hard to predict. Rather than stake out a hard-line position, the Court—following the "judicial practice of dealing with the largest questions in the most narrow way"⁴³—has positioned itself to ratchet up, ratchet down, or maintain its ambiguous application of strict scrutiny review to federal affirmative action programs. As such, the meaning of *Adarand*, at least for the time being, will be settled in the political arena. In particular, elected officials will interpret *Adarand* to fit their policy objectives, and, in all likelihood, *Adarand*'s meaning will be defined more by these political forces than by lower court judges' sorting out an ambiguous Supreme

36. 141 CONG. REC. H5761 (daily ed. June 13, 1995) (statement of Rep. Canady).

37. Linda Greenhouse, *In Step on Racial Policy*, N.Y. TIMES, June 14, 1995, at A1.

38. Charles Krauthammer, *Affirmative Action: Settle It Out of Court . . .*, WASH. POST, June 16, 1995, at A25.

39. Greenhouse, *supra* note 37, at A1.

40. George Will, *Latest Court Ruling Settles Nothing*, TIMES-PICAYUNE (New Orleans), June 14, 1995, at B7.

41. *Patrick Downplays Impact of Adarand*, Wash. Insider (BNA) (June 16, 1995), available in LEXIS, BNA library, Bnawt file.

42. Susan R. Kneller, *Clinton, Civil Rights Supporters, Find Hope in Adarand Decision*, Daily Lab. Rep. (BNA) No. 114, at D-2 (June 14, 1995).

43. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

Court decision.

This phenomenon of narrow judicial holdings whose meanings are defined by social and political forces is hardly unique.⁴⁴ Without question, it permeates the Supreme Court's affirmative action jurisprudence. Specifically, these decisions are so indeterminate that they essentially are nonbinding. As a result, while political actors may claim allegiance to them, these decisions can be recalibrated at will—trumpeted or ignored to match the desired outcome. For example, Reagan-era affirmative action decisions strikingly similar to *Adarand* were spun to facilitate broad-based elected government support of race and gender preferences.⁴⁵

This Essay will highlight the Court's de minimis role in settling the affirmative action wars. Part II will examine the Reagan and Bush Justice Departments' failed campaign against race and gender preferences. This discussion will call attention to three interrelated phenomena, each of which has played a decisive role in shaping the terms of affirmative action decisionmaking. First, by refusing to articulate (let alone stick to) a comprehensible position on preferences, the Court has played next to no role in affecting either public discourse or elected government behavior in this area. Second, with the Court saying so little, elected officials have freely interpreted Court decisions to suit their political needs. Third, social and political forces, which strongly support preferences, have dominated elected government affirmative action decisionmaking. While many forces point in the other direction, during the Reagan and Bush years, the forces favoring affirmative action dominated. Outside of the Department of Justice, as Part II will show, there was strong support for affirmative action in both

44. See generally NEAL DEVINS, *SHAPING CONSTITUTIONAL VALUES: THE SUPREME COURT, ELECTED GOVERNMENT AND THE ABORTION DISPUTE* (forthcoming 1996); LOUIS FISHER, *CONSTITUTIONAL DIALOGUES* 44 (1988) ("Although the holding of the Supreme Court is of utmost importance, it often serves as but one stage of an ongoing constitutional process shared with lower courts, the executive branch, and legislators."); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 581 (1993) (stating that courts "facilitate and mold the national dialogue concerning the meaning of the Constitution").

45. See *infra* part II.A.

Congress and nearly all executive departments and agencies. In particular, these forces undermined Reagan and Bush Justice Department efforts to convince the White House, executive agencies, and state and local governments to join the Justice Department in opposing affirmative action. Indeed, Reagan and Bush Administration officials often undercut Justice Department efforts through narrow readings of Supreme Court restrictions on affirmative actions and expansive readings of Court decisions upholding race and gender preferences.

By considering *Adarand* and its immediate aftermath, Part III will extend Part II's examination of the forces that shape affirmative action decisionmaking. Specifically, Part III will demonstrate the continuing vitality of the three phenomena identified in Part II. For example, a close look at *Adarand's* middle-ground approach to federal affirmative action programs will demonstrate clearly that the Court went out of its way to say very little about affirmative action, preferring instead to leave this divisive issue to elected government. Along these lines, Part III will compare *Adarand* to Supreme Court efforts to find a middle-ground solution to the abortion issue in *Planned Parenthood v. Casey*.⁴⁶ Part III, moreover, will consider the ways in which elected government defines a Court decision through political action. This discussion will focus on how affirmative action supporters and opponents have twisted *Adarand* to suit their political objectives. The Clinton Administration, for example, has proven adept at defending affirmative action as being consistent with both the spirit and letter of *Adarand*. This discussion will reveal the continuing vitality of those social and political forces that strongly favor affirmative action programs.

Finally, Part IV will extend Parts I and II's assessments of the constitutional dialogue that takes place among the Supreme Court, elected officials, and social and political forces. This discussion will focus on identifying the appropriate judicial role in establishing constitutional norms. Specifically, by placing hardly any constitutional limits on government-sponsored race and gender preferences, the Court has done more than limit its role in affirmative action decisionmaking; it has undermined its

46. 114 S. Ct. 909 (1994).

institutional legitimacy by allowing elected officials to treat Court decisions as little more than "waste paper."⁴⁷

II. THE PAST IS PROLOGUE: WHY THE REAGAN-BUSH CAMPAIGN AGAINST AFFIRMATIVE ACTION FAILED

Beginning with the 1980 election of Ronald Reagan and ending with George Bush's 1992 electoral defeat, the Department of Justice fought and lost a holy war over affirmative action. Throughout this struggle, the Department's principal foe was not the Supreme Court. In fact, though its judicial defeats may have outnumbered its victories, the Department unquestionably made some inroads.⁴⁸ The Department, however, was no match for affirmative action supporters inside and outside of government—Congress, the states, business, civil rights interest groups, and other parts of the executive branch.

A. *The Reagan Administration*

The opening salvo in the Reagan-Bush campaign against affirmative action was fired in the 1980 election. Challenging Carter Administration affirmative action initiatives, Reagan campaigned on a platform that argued that "equal opportunity should not be jeopardized by bureaucratic regulations and decisions which rely on quotas, ratios, and numerical requirements to exclude some individuals in favor of others."⁴⁹ Echoing this sentiment, Reagan's first and only Civil Rights Division head, William Bradford Reynolds, decried racial preferences as "[just as] offensive to standards of human decency today as [they were] some 84 years ago when countenanced under *Plessy v. Ferguson*" and, accordingly, told Congress that the Justice Department would oppose "the use of quotas or any other numerical or sta-

47. Cf. LEARNED HAND, THE BILL OF RIGHTS 14 (1958) (describing the futility of Supreme Court judgments if not supported and enforced by the President and Congress).

48. For overview treatments of Reagan-era affirmative action decisions, see HERMAN BELZ, EQUALITY TRANSFORMED 209-32 (1991); Neal Devins, *Affirmative Action After Reagan*, 68 TEX. L. REV. 353 (1989); Schwartz, *supra* note 4.

49. *Republican Platform 1980*, in NATIONAL PARTY PLATFORMS OF 1980, at 176, 182 (Donald B. Johnson ed., 1982).

tistical formula designed to provide to nonvictims of discrimination preferential treatment."⁵⁰

Department of Justice efforts to dismantle affirmative action received, at best, a mixed reception by the Supreme Court. The Court flatly rejected the Department's absolutist claims that *all* race and sex preferences are immoral and illegal, approving a range of hiring and promotion schemes that benefitted nonvictims.⁵¹ At the same time, the Court barred layoffs of senior nonminority employees and state-sponsored nonremedial set-asides.⁵²

Beyond these mixed outcomes, Reagan-era affirmative action decisions proved too idiosyncratic to reveal a coherent judicial approach to the issue of preferences. For starters, some decisions say very little about the legality of the preference plan under attack. In *Local No. 93, International Association of Firefighters v. City of Cleveland*,⁵³ a 1986 decision, the Court approved the use of affirmative action plans to settle employment discrimination lawsuits governed by Title VII but did not decide whether the affirmative action plan at issue was outside the bounds of permissible court-ordered Title VII relief.⁵⁴ One year later, in *Johnson v. Transportation Agency*,⁵⁵ the Court's approval of a public employer's affirmative action plan under Title VII was

50. *Oversight Hearings on Equal Employment Opportunity and Affirmative Action. Part 1: Hearings Before the Subcomm. on Employment Opportunities of the Comm. on Education and Labor*, 97th Cong., 1st Sess. 137 (1981) (statement of William Bradford Reynolds, Assistant Attorney General for Civil Rights).

51. *See, e.g., Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (permitting the sex of a candidate to be a factor for promotion); *United States v. Paradise*, 480 U.S. 149 (1987) (ruling that a 50% promotion requirement between blacks and whites is a constitutionally permissible remedy); *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986) (acknowledging that some nonvictims may benefit from affirmative action programs); *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986) (upholding race-conscious affirmative relief).

52. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (finding unconstitutional set-asides that were not narrowly tailored); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (refusing to allow teachers to be laid off based on race rather than seniority); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (holding that Title VII forbids out-of-turn layoffs based on race).

53. 478 U.S. 501.

54. *See id.* at 515. For a more detailed treatment of *Local No. 93's* limits, see Devins, *supra* note 48, at 360-65.

55. 480 U.S. 616.

tempered by the Court's refusal to consider whether the plan was constitutional.⁵⁶

Other Reagan-era decisions that appeared at first to be pathbreaking later fizzled when read alongside subsequent decisions. *Firefighters Local Union No. 1784 v. Stotts*,⁵⁷ a 1984 decision that struck down an affirmative action plan that undercut the seniority rights of nonminority employees, was such a decision. *Stotts* promised to be the first nail in the affirmative action coffin, noting in dicta that Title VII's legislative history "made clear that a court was not authorized to give preferential treatment to non-victims."⁵⁸ Yet, two years later, in *Local 28, Sheet Metal Workers v. EEOC*,⁵⁹ a plurality of the Court formally limited *Stott's* dicta, holding that a Title VII remedy could establish hiring goals that benefit nonvictims.⁶⁰ *Sheet Metal Workers'* approval of such remedial orders, however, was limited to cases of "long continued and egregious racial discrimination" and "foot-dragging resistance" to judicial efforts to enjoin blatant intentional discrimination.⁶¹

Another decision that did not live up to its landmark billing was 1989's *City of Richmond v. J.A. Croson Co.*,⁶² which held that a municipal set-aside plan is unconstitutional unless it benefits only members of racial groups arguably discriminated against by the city itself.⁶³ Although the Court subjected such plans to strict review, its primary objection to the Richmond set-aside plan was its arbitrariness,⁶⁴ a fact that lower courts have seized upon in approving post-*Croson* set-aside programs.⁶⁵

56. See *id.* at 620 n.2. For a more detailed treatment of *Johnson's* limits, see Devins, *supra* note 48, at 365-71.

57. 467 U.S. 561 (1984).

58. *Id.* at 581.

59. 478 U.S. 421 (1986).

60. *Id.* at 473-74.

61. *Id.* at 477; see also *United States v. Paradise*, 480 U.S. 149, 166 (1987) (citing *Sheet Metal Workers* to support race-conscious constitutional remedies).

62. 488 U.S. 469 (1989).

63. *Id.* at 503-06.

64. See *id.* at 506-07. Because Richmond's 30% set-aside failed to set geographic criteria for minority participants and included minorities such as Eskimos and Aleuts, who were never victimized in Richmond, the Court found that the set-aside was "not linked to identified discrimination in any way" and that the city's purpose was "outright racial balancing." *Id.* at 507.

65. For discussions of lower court interpretations of *Croson*, see Memorandum

In the end, Reagan-era affirmative action decisions were incremental in nature, and, consequently, generalizations about them make little sense. During this period, the Court studiously avoided grand pronouncements by deciding the cases before it on the narrowest available grounds. As such, although the Court was an active player in the affirmative action wars, it provided little meaningful leadership during the Reagan era.

Even if the Court had spoken more decisively (or at least less ambiguously), the meaning and reach of its affirmative action decisions likely would have been controlled by social and political forces.⁶⁶ The Reagan era, therefore, underscores the inherent limitations on the Court's ability to define public discourse on issues as emotionally divisive as affirmative action. *Croson*, *Stotts*, and *Wygant v. Jackson Board of Education*⁶⁷ illustrate the transformative role of social and political influences. By striking down affirmative action plans under some form of heightened review, all three cases were, in important respects, victories for the Reagan Justice Department. In the end, however, these decisions were severely limited by strong state and federal government support for affirmative action programs.

from Assistant Attorney General Walter Dellinger to General Counsel, Re: *Adarand* (June 28, 1995), reprinted in 1995 Daily Lab. Rep. (BNA) No. 125, at D-33 (June 29, 1995) (discussing *Croson* in light of the *Adarand* decision) [hereinafter *Adarand Memorandum*]; Walter H. Ryland, *A Survey and Analysis of Post-Croson Case Law*, in RACIAL PREFERENCES IN GOVERNMENT CONTRACTING 1, 1-48 (Roger Clegg ed., 1993) (analyzing post-*Croson* case law and the implications of the cases). For an argument that lower courts should not read too much into *Croson*, see *Constitutional Scholars' Statement on Affirmative Action After City of Richmond v. J.A. Croson Co.*, 98 YALE L.J. 1711 (1989) [hereinafter *Constitutional Scholars' Statement*] (arguing that, despite *Croson*, affirmative action programs are still viable). This statement is especially instructive in understanding the Clinton Administration's views towards *Croson* in particular and the constitutionality of affirmative action in general, for three of the *Statement's* signers—Drew Days, Walter Dellinger, and Christopher Edley—have, as Clinton appointees, played pivotal roles in defining Clinton's affirmative action agenda. See *infra* notes 157, 219, 222.

66. See *infra* part II.C (discussing social and political influences on affirmative action decisions). For a related explanation of why *Lochner*-era Justices could not overcome New Deal social and political forces, see BRUCE ACKERMAN, *WE THE PEOPLE* 40-43 (1991); ROBERT MCCLOSKEY, *THE AMERICAN SUPREME COURT* 102-08 (2d ed. 1994); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 421-23 (1995).

67. 476 U.S. 267 (1986). For further discussion, see *infra* notes 79-87 and accompanying text.

Croson and *Stotts* highlight the critical role that states and municipalities play as consumers of Supreme Court decisions. Just as southern resistance to *Brown* effectively killed off pre-1964 Civil Rights Act desegregation efforts,⁶⁸ states and municipalities successfully narrowed the potential effect of *Croson* and *Stotts*, sometimes by acting and other times by refusing to act.⁶⁹ *Croson*, for example, prompted a slew of "disparity studies" to prove the likelihood of continuing discrimination in public contracting and thereby justify the [affirmative action] programs.⁷⁰ Although some evidence suggests that some of these studies were results-driven,⁷¹ most disparity studies have not, and probably will not, be challenged in court. This fact is partly a result of the costs of litigation and partly a result of modifications in affirmative action programs that make them less vulnerable to constitutional attack. Specifically, as the Clinton Department of Justice noted in its assessment of *Adarand*, post-*Croson* initiatives "tend to employ flexible numerical goals and/or bidding preferences in which race or ethnicity is a 'plus' factor . . . , rather than [a] hard set-aside of the sort at issue in *Croson*."⁷² In other words, while *Croson* was not without effect,⁷³ states and municipalities could nevertheless side-

68. See GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION* 15-32 (1968); GERALD N. ROSENBERG, *THE HOLLOW HOPE* 42-71 (1991); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 85-97 (1994).

69. A handful of states, through Attorney General opinions, did conclude that existing set-aside programs were unconstitutional. See Ryland, *supra* note 65, at 42 n.172.

70. *Adarand* Memorandum, *supra* note 65, at 29; see George R. LaNoue, *The Disparity Study Shield: Baltimore and San Francisco*, in RACIAL PREFERENCES IN GOVERNMENT CONTRACTING, *supra* note 65, at 69, 73 (reporting that, as of 1993, more than 60 jurisdictions spent \$30 million dollars on these studies); George R. LaNoue, *Social Science and Minority "Set-Asides"*, PUB. INTEREST, Winter 1993, at 49; Dorothy J. Gaiter, *Court Ruling Makes Discrimination Studies a Hot New Industry*, WALL ST. J., Aug. 13, 1993, at A1.

71. Some studies were reformulated after a preliminary finding of no discrimination, and at least one firm—Peat Marwick—was turned away by some municipalities, in part because it did not find evidence of discrimination in its study of affirmative action programs in Miami. See Gaiter, *supra* note 70.

72. *Adarand* Memorandum, *supra* note 65, at 29. See generally Ryland, *supra* note 65 (analyzing post-*Croson* decisions).

73. By forcing states and municipalities to restructure their affirmative action

step the decision.

The saga of *Stotts* is an even more vivid illustration of state and local support of affirmative action. Here, the Reagan Justice Department turned its Court victory into a devastating defeat. Declaring *Stotts* a "slam-dunk" for color blindness, the Civil Rights Division wasted no time in seeking to eliminate preferences in fifty-one consent decrees.⁷⁴ Towards this end, the Justice Department asked states and localities subject to affirmative action obligations under these decrees to join its effort to reopen cases.⁷⁵ This effort backfired. Not only was the Department's offer rejected almost uniformly, but several mayors and governors roundly criticized the Department.⁷⁶ Worse yet, lower federal courts uniformly rejected the Department's motions to modify existing consent decrees, limiting *Stotts* to its facts.⁷⁷ By the summer of 1986, with the Senate having just turned down Brad Reynolds's nomination to be Associate Attorney General,⁷⁸ the post-*Stotts* campaign proved to be a kamikaze mission that yielded no kills.

Another example of the perils of confrontational strategies is *Wygant v. Jackson Board of Education*.⁷⁹ Although it invalidated a school board's practice of laying off nonminority employees ahead of less senior minority employees, *Wygant* rejected the Department's absolutist stance that all governmental preferences based on race are unconstitutional.⁸⁰ Instead, while a plurality of the Court concluded that "any racial classification 'must be justified by a compelling governmental interest'" and that the means chosen must be "narrowly tailored," *Wygant* recognized

programs, *Croson* was consequential. Moreover, *Croson* raised the financial and political costs of affirmative action (the latter because the modified preference program would have to be reenacted).

74. See CHARLES FRIED, ORDER AND LAW 109 (1991) (quoting Rex Lee).

75. See Stephen Engelberg, *Attack on Quotas Opposed by Cities*, N.Y. TIMES, May 4, 1985, at A1; Andy Pasztor, *Opposition Is Growing to U.S. Attempt To End Hiring Quotas of Municipalities*, WALL ST. J., May 24, 1985, at A8.

76. See Engelberg, *supra* note 75, at A1; Pasztor, *supra* note 75, at A8.

77. FRIED, *supra* note 74, at 109-10.

78. Howard Kurtz, *Reynolds' Nomination Voted Down*, WASH. POST, June 28, 1985, at A1.

79. 476 U.S. 267 (1986).

80. *Id.* at 283-84.

that affirmative action plans grounded in concrete evidence of prior discrimination will sustain that burden.⁸¹ For this reason, *Wygant* generally is depicted as a significant Department of Justice defeat. The *Washington Post*, the *New York Times*, and the *Los Angeles Times* spoke of *Wygant* as encouraging to⁸² and "a significant victory for civil rights groups"⁸³ because it "left the way clear for employers to adopt affirmative action programs in the workplace."⁸⁴

Wygant shows clearly that the Reagan Justice Department needed only to look in the mirror to face its worst enemy. Not content to move incrementally by challenging race and gender preferences, which were especially vulnerable to judicial attack, the Department unconditionally pursued its moral crusade against any and all affirmative action programs.⁸⁵ In other words, by staking out a hard-line position and pursuing it with reckless abandon, any judicial approval of affirmative action could be depicted as a setback to the Department.⁸⁶ When combined with the Department's failed efforts to restore the tax-exempt status of racially discriminatory private schools, as well as its opposition to bipartisan congressional efforts to make disparate racial impact an important evidentiary tool in voting rights cases, the Civil Rights Division weakened the Department's position with Congress and within the Reagan Administration.⁸⁷

81. *Id.* at 274 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980) (plurality opinion)).

82. Stuart Taylor Jr., *High Court Bars a Layoff Method Favoring Blacks*, N.Y. TIMES, May 20, 1986, at A1, A20.

83. Al Kamen, *High Court Ruling Signals Support for Affirmative Action*, WASH. POST, May 20, 1986, at A1.

84. Philip Hager & Michael Wines, *Layoff Plan Favoring Blacks Voided by the Court*, L.A. TIMES, May 20, 1986, at A1. Ironically, these same newspapers characterized *Croson* as a civil rights disaster, even though *Croson* did little more than reaffirm *Wygant*. For an examination of this press treatment as well as the similarities between the *Wygant* and *Croson* decisions, see Devins, *supra* note 48, at 372-78.

85. See Neal Devins, *The Civil Rights Hydra*, 89 MICH. L. REV. 1723, 1749-63 (1991).

86. For an analogous argument that President Franklin Delano Roosevelt's Court-packing plan undercut the legal policymaking objectives of the New Deal Justice Department, see Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 601 (1996).

87. See Devins, *supra* note 85, at 1749-63.

Congress communicated its displeasure with the Justice Department's arguments through oversight hearings, committee reports, confirmation votes, and legislation.⁸⁸ Many of these efforts focused on the Department itself, particularly the rejection of Brad Reynolds as Associate Attorney General, and resulted in numerous oversight hearings.⁸⁹ Congress also took aim at federal agencies that questioned race and gender preferences, especially the Civil Rights Commission (CRC), the Equal Employment Opportunity Commission (EEOC), and the Federal Communications Commission (FCC).⁹⁰ That Congress, particularly the Democratic majority in the House of Representatives, would oppose the Justice Department's call for color blindness comes as no surprise. What is surprising is the Department's limited influence within the executive branch.

The most telling example of the Department's lack of political clout within the Reagan Administration was its failed attempt to persuade the White House to modify Executive Order 11,246,

88. For an overview of Congress-Department of Justice relations during this period, see BELZ, *supra* note 48, at 202-03; U.S. COMM'N ON CIVIL RIGHTS, *FEDERAL ENFORCEMENT OF EQUAL EMPLOYMENT REQUIREMENTS* (1987); .

89. See BELZ, *supra* note 48, at 202-03. For example, the Justice Department was taken to task for interfering with Equal Employment Opportunity Commission (EEOC) efforts to defend affirmative action before both the lower federal courts and the Supreme Court. See Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273, 285-98 (1993).

90. The CRC, in addition to being subjected to an extensive GAO audit, had its appropriations severely reduced and was directed by Congress to pursue specified research priorities and to allocate its appropriations internally, according to a restrictive legislative formula. See David Brock, *Politicizing the Government's Watchdog*, WALL ST. J., July 16, 1986, at A23; Howard Kurtz, *Hill Slashes Funding for Rights Panel*, WASH. POST, Oct. 19, 1986, at A12. For the EEOC, its anti-affirmative action chief of staff, Jeffrey Zuckerman, was turned down for the agency's general counsel post. Mary Thornton, *Senate Rejects EEOC Nomination: Comments on Discrimination Were Issue*, WASH. POST, May 21, 1986, at A23. FCC efforts to rescind the granting of preferences to minority broadcasters were greeted by the enactment of single-year funding restrictions forbidding such reconsideration. For a review of this and other congressional efforts to preserve and expand FCC diversity preferences, see Neal Devins, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 136-41 (1990). Furthermore, this direct challenge to existing rulemaking, combined with the FCC's repeal of the fairness doctrine, so poisoned relations between the FCC and Congress that "it stimulated congressional oversight of a magnitude Washington insiders [said was] unprecedented." *Micromanagement of the FCC: Here To Stay?*, BROADCASTING, Dec. 26, 1988, at 56.

which required 325,000 government contractors to adopt affirmative action plans.⁹¹ Although Brad Reynolds claimed that the "[11,246] program is broken and . . . needs to be fixed in a way that brings it back in line with the principle of non-discrimination,"⁹² pragmatists within the Administration, like Labor Secretary Bill Brock, thought it "politically crazy" for the White House to expend further political capital in this area.⁹³ Brock ultimately prevailed; in August 1986, the White House killed the proposal "because of recent Supreme Court decisions upholding some affirmative action plans."⁹⁴ That these decisions did not consider Civil Rights Division objections to the executive order program did not matter. Rather than view these indeterminate, fact-specific rulings as being of limited reach, the White House saw these decisions as a significant political rebuke to the Department's campaign to put down affirmative action.

The Reagan Administration's willingness to interpret these Supreme Court decisions broadly, using them as cover to avoid addressing the merits of the executive order program, demonstrates that the White House thought affirmative action was too entrenched to oppose. Although the Administration did not pull the plug on the Justice Department, neither the White House nor government agencies assisted the Department. Under Reagan, affirmative action proved to be so pervasive "that the very government agencies of an administration that opposes quotas and goals report to the Equal Employment Opportunity Commission on their progress toward meeting affirmative action numerical goals!"⁹⁵ The Administration, moreover, did not alter either the Small Business Administration's or other executive-initiated set-aside programs or EEOC guidelines providing for an inference of adverse impact whenever the utilization of women and minorities is less than eighty percent of their availability.⁹⁶ In-

91. See Gary L. McDowell, *Affirmative Inaction*, POL'Y REV., Spring 1989, at 32, 33.

92. *MacNeil/Lehrer News Hour* (PBS television broadcast, Mar. 31, 1986).

93. For an insightful account of this episode, see McDowell, *supra* note 91, at 32.

94. Boyd, *supra* note 2, at A1.

95. Nathan Glazer, *The Affirmative Action Stalemate*, PUB. INTEREST, Winter 1988, at 99, 107.

96. For examinations of the Reagan Administration's mixed record on affirmative

deed, contrary to Brad Reynolds's claim that "there is no real justification for tolerating" federal programs that set aside contracts for minority businesses,⁹⁷ Ronald Reagan told the National Association of Minority Contractors that "this administration has strongly supported programs to provide special assistance to minority businesses."⁹⁸

Reagan's not-so-secret support of affirmative action helped limit Justice Department victories before the Supreme Court and helped exacerbate Department defeats. Combined with strong state and congressional support for preferences, Reagan-era affirmative action decisions accordingly were narrowed or expanded to fit into the government's strong support of these programs. Although social and political forces inevitably will shape the impact of Supreme Court decisions, the Court's ambiguous, narrow approach towards affirmative action made its decisions especially susceptible to being overtaken by these forces. Correspondingly, the Court not only limited its own influence but also undercut the relevance of constitutional interpretation. Specifically, by failing to play a leadership role in affirmative action, the Court enabled elected officials to engage in purely political decisionmaking while claiming to follow Supreme Court constitutional decisionmaking.

B. The Bush Administration

George Bush campaigned on a platform that promised to follow "in the tradition of Ronald Reagan," including a commitment to "resist efforts to replace equal rights with discriminatory quota systems and preferential treatment."⁹⁹ Like President

action, see BELZ, *supra* note 48, at 181-207; Jeremy Rabkin, *How the White House Got Hooked, Reagan's Secret Quotas*, NEW REPUBLIC, Aug. 5, 1985, at 15.

97. Howard Kurtz, *Justice Official Blasts U.S. Set-Aside Contracts: No Real Justification for Programs Seen*, WASH. POST, Sept. 20, 1985, at A25 (quoting Brad Reynolds).

98. 20 WEEKLY COMP. PRES. DOC. 946, 949 (June 27, 1984). The Reagan White House also opposed a CRC study critical of set-asides. See Howard Kurtz, *Civil Rights Commission Withdraws Its Report on Minority Contracts*, WASH. POST, Apr. 12, 1986, at A7.

99. 1988 Republican Party Platform, reprinted in 46 CONG. Q. WKLY. REP. 2369, 2399, 2378 (1988).

Reagan, President Bush granted broad discretion to the Department of Justice to oppose affirmative action while other parts of his administration vigorously supported race and gender preferences.¹⁰⁰ Bush, however, disapproved of the confrontational strategies of the Reagan-era Civil Rights Division and had, as Reagan's vice president, often advocated positions at odds with the ideologically driven Justice Department.¹⁰¹ Indeed, rather than seek to reshape the civil rights landscape, the Bush Administration engaged in damage control to distance itself from Reagan-era aftershocks.¹⁰²

In his first month in office, Bush narrowly interpreted *City of Richmond v. J.A. Croson Co.*,¹⁰³ claiming that the "decision spoke to one set of facts," and emphasized his "commit[ment] to affirmative action" and, with it, his desire "to see a reinvigorated Office of Minority Business in Commerce."¹⁰⁴ Bush also sought to cool the fires of the Reagan FCC's opposition to affirmative action. In the summer of 1989, he appointed three FCC Commissioners who expressly supported the granting of race preferences to minority broadcasters.¹⁰⁵ Before the Supreme Court, these appointees turned their words into deeds by vigorously (and successfully) defending diversity preferences in *Metro Broadcasting, Inc. v. FCC*.¹⁰⁶

The *Metro Broadcasting* litigation was telling for another reason. Before the Supreme Court, Bush appointees in the Justice Department took issue with the FCC position. Characterizing these preferences as "racial stereotyping that is anathema to

100. For an overview of President Bush's civil rights policies, see STEVEN A. SHOLL, A KINDLER, GENTLER RACISM? (1993); Neal Devins, *Reagan Redux: Civil Rights Under Bush*, 68 NOTRE DAME L. REV. 955 (1993); Chester E. Finn, Jr., *Quotas and the Bush Administration*, COMMENTARY, Nov. 1991, at 17.

101. See Ruth Marcus, *What Does Bush Really Believe?: Civil Rights Record Illustrates Shifts*, WASH. POST, Aug. 18, 1992, at A1.

102. *Id.*

103. 488 U.S. 469 (1989).

104. The President's News Conference, 1 PUB. PAPERS 21, 29 (Jan. 27, 1989).

105. For a discussion of these and other Bush civil rights appointments, see Neal Devins, *The Civil Rights Commission Backslide*, WALL ST. J., Oct. 19, 1990, at A14.

106. See Brief for Federal Communications Commission at 27, *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (No. 89-453) (arguing that diversity preferences serve the "compelling governmental interests of promoting diversity in broadcasting programming and remedying discrimination").

basic constitutional principles," Solicitor General Kenneth Starr urged the Court to invalidate the FCC program.¹⁰⁷ Congress, whose support for affirmative action was in full tilt during the Bush Administration, also participated in the *Metro Broadcasting* litigation. Through a brief prepared by the Senate's Office of Legal Counsel, Congress countered Department of Justice claims by defending the FCC preferences as "a measured and constitutional effort to overcome past inequities and to advance the legitimate public interest in diversity of programming."¹⁰⁸

By a five-to-four vote, the Supreme Court sided with Congress and the FCC. In approving these programs, the Court did not demand a finding that the preferences were responsive to either FCC or societal discrimination. Instead, referring to a slew of cases upholding FCC regulation of broadcasting to ensure the "widest possible dissemination of information from diverse and antagonistic sources,"¹⁰⁹ the Court found broadcast diversity "at the very least" an important governmental objective.¹¹⁰ Moreover, although neither Congress nor the FCC ever sought to prove the nexus between minority ownership and broadcast diversity, the Court claimed to be "required to give great weight to the decisions of Congress and the experience of the Commission."¹¹¹

107. Brief of the United States as Amicus Curiae Supporting Petitioner at 8, *Metro Broadcasting*, 497 U.S. 547 (No. 89-453). The spectacle of Bush appointees squaring off before the Supreme Court on a matter as explosive as race preferences appears bizarre. It is not. FCC appointees needed to satisfy constituencies within Congress. Justice Department officials were not beholden to that constituency; instead, the Bush Justice Department maintained its allegiance to the individuals and arguments of its predecessor. In many respects, the Department of Justice was Bush's calling card to movement conservatives who figured so prominently in the Reagan revolution. To turn his back on that constituency by ordering the Solicitor General to back away from the *Metro Broadcasting* case was unthinkable. For a discussion of the politics behind the *Metro Broadcasting* litigation, see Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 295-96 (1994).

108. Brief of the United States Senate as Amicus Curiae in Support of Respondents at 2, *Metro Broadcasting*, 497 U.S. 547 (No. 89-453).

109. *Metro Broadcasting*, 497 U.S. at 567 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

110. *Id.*

111. *Id.* at 570 (quoting *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973)).

Following in the wake of the Court's formal invocation of strict scrutiny review in *Croson*, *Metro Broadcasting* shocked Congress, the FCC, and the Solicitor General's office.¹¹² It shouldn't have, for *Metro Broadcasting* once again demonstrated that Supreme Court affirmative action decisions are not subject to generalizations. Most obviously, *Metro Broadcasting's* bifurcation of state and federal affirmative action programs revealed that *Croson* was limited to state and local programs.¹¹³ Furthermore, *Metro Broadcasting* cannot be extricated from its political context. Justice Byron White, who consistently had sided with the Reagan Justice Department in calling for strict judicial review of affirmative action, provided the critical fifth vote in *Metro Broadcasting*. White, however, also was the author of decisions that the Reagan FCC publicly repudiated as contrary to the First Amendment's marketplace of ideas, and he held strong beliefs about what he considered the continued correctness of Court decisions upholding FCC authority to regulate the airwaves in the name of broadcast diversity.¹¹⁴ White remained committed to broadcast diversity and, according to Justice William Brennan's personal records, refused to join a Brennan draft opinion upholding the preferences on remedial grounds until the majority based its opinion on the continued vitality of diversity-based broadcast regulation.¹¹⁵ In other words, rather than serving as some grand statement about Congress's authority to enact race and gender preferences, *Metro Broadcasting* ultimately is moored to a questionable application of First Amendment principles.

The political forces that resulted in the filing of competing briefs by Congress, the Department of Justice, and the FCC in *Metro Broadcasting* were again at play in deliberations between Congress and the White House over the 1991 Civil Rights Act. Specifically, after the Supreme Court agreed with arguments

112. Neal Devins, *Congress, the FCC, and the Search for the Public Trustee*, LAW & CONTEMP. PROBS., Autumn 1993, at 145, 179.

113. *Metro Broadcasting*, 497 U.S. at 565.

114. On Justice White's motivations in *Metro Broadcasting*, as well as the Reagan FCC's campaign to discredit broadcast diversity regulations, see Devins, *supra* note 112, at 145.

115. See *id.* at 179.

made by the Reagan Administration in 1988 and issued five decisions in 1989 that made it more difficult to prove discrimination under Title VII and other statutes, Congress and civil rights interest groups went to work on legislation that would both nullify these decisions and make it easier for civil rights plaintiffs to bring lawsuits.¹¹⁶ For his part, George Bush very much wanted to strike a deal with civil rights groups. Although an imbroglio over whether disparate impact proofs of discrimination would unduly pressure employers to hire by the numbers to stave off costly litigation prompted a presidential veto and several rounds of marathon negotiations, Bush pressured his negotiators both to meet with civil rights leaders and to find a way for him to sign a civil rights bill.¹¹⁷ Ironically, while dissatisfaction with the Supreme Court prompted this legislation, the key to the compromise was to delegate to the courts the task of specifying standards of proof governing disparate impact cases.¹¹⁸

C. The Triumph of Social and Political Forces

The willingness of Congress and the White House to simultaneously repudiate Court interpretations and delegate decisionmaking authority to the courts makes clear that social and political forces may well define the judicial role. Whereas this outcome is to be expected on statutory matters, such as the 1991 Civil Rights Act, the limits of the Court's constitutional affirmative action decisionmaking power also have hinged on elected government action. For example, state and local government support for set-asides has limited *Croson's* reach. More-

116. See generally Symposium, *The Civil Rights Act of 1991: Theory and Practice*, 68 NOTRE DAME L. REV. 911 (1993) (discussing the need for and implementation of the 1991 Civil Rights Act); Symposium, *Civil Rights Legislation in the 1990s*, 79 CAL. L. REV. 591 (1991) (examining the nature and scope of recent civil rights legislation).

117. See Ann Devroy, *Bush Saw Gains in Deal, Officials Say*, WASH. POST, Oct. 26, 1991, at A1; Andrew Rosenthal, *Civil Rights Bill Gives Look at White House Split*, N.Y. TIMES, Oct. 22, 1990, at A15. At the same time, Bush and his negotiators were successful in moderating several key provisions of the 1991 Act, including limits on damage awards and a requirement that plaintiffs must nearly always demonstrate the specific practices that caused the disparate impact. See Devins, *supra* note 100, at 990-99.

118. See Devins, *supra* note 100, at 997-98.

over, *Wygant's* recognition that nonvictims may benefit from affirmative action plans helped kill Department of Justice efforts to rescind Executive Order 11,246.

The bottom line, quite simply, is that Court decisions must operate within a political culture. Although Court decisions may affect this culture, social and political forces nonetheless play a large role in shaping the ultimate meaning of Court action. During the Reagan and Bush Administrations, affirmative action programs appeared very much entrenched. Despite President Reagan's rhetoric and his occasional willingness to stand up to civil rights interests, "group preference policies had spread widely and were deeply entrenched in the political and administrative system" during his presidency.¹¹⁹ Under President Bush, affirmative action flourished. No meaningful counteroffensive was launched, and the President repeatedly bent over backwards to win favor with civil rights groups.¹²⁰

119. *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 17 (1995) (statement of Hugh Davis Graham, Professor of American History, Vanderbilt University) [hereinafter Testimony of Hugh Davis Graham].

120. For example, when black college presidents formally complained to President Bush about a Solicitor General brief opposing increased financial support to black colleges, he directed a reversal of that position before the Supreme Court. See Linda Greenhouse, *Bush Reverses U.S. Stance Against Black College Aid*, N.Y. TIMES, Oct. 22, 1991, at B6. Similarly, to quell an avalanche of protests from higher education and civil rights groups, Bush reversed a Department of Education ruling that race-exclusive scholarships were illegal. Karen De Witt, *U.S. Eases College Aid Stand But Not All the Way*, N.Y. TIMES, Dec. 19, 1990, at A1. While recognizing that race-specific scholarships may run contrary to the statutory prohibition against recipients of federal financial assistance discriminating in any program or activity, the President trivialized this concern as a matter for courts to rule on, stating that "for now . . . we can continue to have these kinds of scholarships." See *id.* But see *Podbersky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994) (holding that a race-specific scholarship program was not narrowly tailored to remedy past discrimination and was therefore unconstitutional).

The Bush Administration, however, did not *always* give in to civil rights interests. As discussed, George Bush used his veto authority to strike a compromise over the 1991 Civil Rights Act and authorized his Justice Department to fight affirmative action in court. See *supra* notes 116-18 and accompanying text. Moreover, notwithstanding his appointment of the surprisingly liberal David Souter, President Bush's nomination of Clarence Thomas placed an outspoken opponent of affirmative action on the Court. See *infra* note 183. For the most part, however, the Bush Administration worked hard at ducking the civil rights forces that consumed so much of the Reagan Administration. See generally Devins, *supra* note 100 (arguing that the Bush

Bush's attentiveness to civil rights concerns also reveals another obvious lesson: interest groups play a large role in defining the social and political environment. The Reagan Administration suffered setbacks for not taking into account the potency of these interests.¹²¹ With the backing of Congress and the press, for example, civil rights interests helped bring down Reagan Administration efforts to transform the Supreme Court's affirmative action decisionmaking. Of twenty-one "top papers" that commented on the Supreme Court's partial rejection of Department of Justice arguments in 1986, "only one opposed the use of affirmative action to remedy discrimination, and seventeen praised the decisions without any qualifications."¹²² Congress struck back both at the Department of Justice and at Reagan's judicial appointments.¹²³ When President Reagan nominated Robert Bork to the Supreme Court, Senate Judiciary Chair and presidential candidate Joseph Biden (D-Del.) met with the Leadership Conference on Civil Rights, the NAACP Legal Defense Fund, and other civil rights groups to "plot[] strategy."¹²⁴

The power of civil rights groups, though critically important, tells only part of the story. For the most part, big business and labor interests also support affirmative action. In September 1985, *Fortune* proclaimed that "[b]usinessmen like to hire by the numbers."¹²⁵ One year later, after the Supreme Court approved some affirmative action orders, the National Association of Man-

Administration's guiding principle on civil rights was the avoidance of confrontation).

121. The NAACP, National Urban League, American Civil Liberties Union, and Women's Political Caucus accused the Reagan Administration of "strain[ing]" the relationship "between the national government and black America" through its "absolutely deplorable" record and "hostility to individual rights." Chester E. Finn, Jr., *Affirmative Action Under Reagan*, COMMENTARY, Apr. 1991, at 17. For an argument that, although civil rights groups have substantial political power, "it would be a serious mistake to conclude that racial minorities have achieved full political equality," see Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 686, 688 (1991).

122. Schwartz, *supra* note 4, at 525 n.11.

123. See *supra* notes 88-90.

124. TERRY EASTLAND, *ENERGY IN THE EXECUTIVE* 246 (1992).

125. Anne B. Fisher, *Businessmen Like To Hire by the Numbers*, FORTUNE, Sept. 16, 1985, at 26. See generally Note, *Rethinking Weber: The Business Response to Affirmative Action*, 102 HARV. L. REV. 658, 659-63 (1989) (arguing that businesses have become enthusiastic supporters of affirmative action).

ufacturers breathed a sigh of relief because "it c[ould] . . . continue with affirmative action," and the AFL-CIO applauded the rulings as "a tremendous help to push unions to do more."¹²⁶ In 1991, representatives of several "Fortune 100" companies worked with civil rights groups in forging a compromise on civil rights legislation independent of the White House.¹²⁷ Business has many incentives for supporting affirmative action, ranging from increasing productivity to improving a company's public image to reducing the risk of litigation for violation of employment discrimination laws.¹²⁸ Whatever the reason, business's support of affirmative action held steadfast throughout the Reagan and Bush Administrations.

Beyond interest group politics, social forces played a large role in making affirmative action seem so entrenched during the Reagan and Bush Administrations. In 1991, *Business Week* reported that affirmative action is "deeply ingrained in American corporate culture. . . . The machinery hums along, nearly automatically, at the largest U.S. corporations."¹²⁹ Indeed, "it has been estimated that over two-thirds of American workers are covered by affirmative action plans under [Executive Order

126. Peter Perl, *Employers, Unions Welcome Decisions*, WASH. POST, July 3, 1986, at A1. Along the same line, the Supreme Court's approval of certain types of voluntary affirmative action plans in *Steelworkers v. Weber*, 443 U.S. 193 (1979), reinforced the business community's desire to strengthen affirmative action hiring and promotion, see BELZ, *supra* note 48; Note, *supra* note 125.

127. Gary Lee, *Behind Closed Doors, Civil Rights Compromise*, WASH. POST, Apr. 10, 1991, at A16. "As a matter of public choice theory," as my colleague Alan Meese notes, "there is a critical distinction between large, capital intensive businesses and small, labor intensive businesses. The former will support actions that increase the price of labor or lower its productivity as a means of disadvantaging their small rivals, who depend more upon labor." Memorandum from Alan Meese to Neal Devins (Aug. 25, 1995) (on file with Author). For this reason, small business interests did not support the 1991 Act. See Joan Biskupic, *Job Discrimination Legislation Roils Business Community*, 49 CONG. Q. WKLY. REP. 989, 989 (1991) (noting conflict between big and small businesses over the 1991 Act).

128. See BELZ, *supra* note 48, at 197-98; Note, *supra* note 125. See generally Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251 (1995) (discussing why employers may benefit from voluntary affirmative action programs).

129. *Race in the Workplace: Is Affirmative Action Working?*, BUS. WK., July 8, 1991, at 56.

11,246]."¹³⁰ Furthermore, although a 1986 study revealed that eighty percent of whites opposed race preferences in hiring and promotion,¹³¹ it was not until 1994 "that a majority of whites agreed with the idea that 'We have gone too far in pushing equal rights in this country.'"¹³²

With supporters of affirmative action needing only to block challenges to existing programs, social and political forces were far too strong for opponents of affirmative action to overcome this inertia.¹³³ If anything, during the Reagan and Bush years, widespread support for affirmative action resulted in an expansion of existing affirmative action programs.¹³⁴ These forces, moreover, helped shape the meaning of Supreme Court affirmative action cases, narrowing *Stotts* and *Croson* to their facts and expanding decisions such as *Wygant* and *Sheet Metal Workers* into far-reaching endorsements of nonvictim relief.

All of this is not to say that the Supreme Court does not matter. *Croson*, for example, has prompted modest reforms of state and local set-aside programs.¹³⁵ Furthermore, the Supreme Court's approval of some affirmative action programs has strengthened business community support for race- and gender-based hiring and promotion plans.¹³⁶ Nevertheless, because Court affirmative action decisions tend to be indecisive, saying little that can be generalized beyond the facts of a particular dispute, social and political forces have played a more dominant

130. Schwartz, *supra* note 4, at 546.

131. THOMAS B. EDSALL & MARY D. EDSALL, CHAIN REACTION 186 (1991).

132. Richard Lacayo, *A New Push for Blind Justice*, TIME, Feb. 20, 1995, at 39, 39 (quoting a 1994 Times Mirror poll). A 1995 poll of 248,000 teenagers revealed growing opposition to affirmative action. "[N]ine out of ten of . . . [those] surveyed say they oppose affirmative action in hiring and college admission to make up for past discrimination." William Raspberry, *What Actions Are Affirmative?*, WASH. POST, Aug. 21, 1995, at A21.

133. For a discussion of this point as well as the application of public choice theory to the affirmative action debate, see Daniel A. Farber, *The Outmoded Debate over Affirmative Action*, 82 CAL. L. REV. 893, 917 (1994); Farber & Frickey, *supra* note 121, at 713-16.

134. See Testimony of Hugh Davis Graham, *supra* note 119; cf. BELZ, *supra* note 48, at 207 (describing how the Reagan Administration sought to reform affirmative action to accommodate employer interests).

135. See *supra* notes 70-72.

136. See BELZ, *supra* note 48, at 182; *supra* notes 125-28.

role in affirmative action than in other areas.¹³⁷ Put simply, for the Court to play a leadership role on a highly charged issue, it must write decisions that make it a force to be reckoned with. Otherwise, the Court risks undercutting its own legitimacy and, with it, the relevance of constitutional interpretation.¹³⁸ Indeed, the willingness of Reagan and Bush officials to treat affirmative action as a purely political issue demonstrates that when the Court refuses to utter principled and clear pronouncements, the executive branch and Congress follow the path of least resistance, shirking their responsibility to follow the Constitution and, instead, give in to potent (if not overwhelming) social and political forces. This is the lesson of the Reagan and Bush Administrations, and, as Part III will reveal, it is also the lesson of *Adarand*.

III. ADARAND CONSTRUCTORS, INC. V. PENA

Reagan and Bush Administration acquiescence to affirmative action, especially to programs that supported minority business enterprises, contributed to an explosion of legislative and administrative initiatives. By 1994, roughly 160 of these programs had spread throughout the federal government.¹³⁹ *Adarand Constructors, Inc. v. Pena*¹⁴⁰ addressed a challenge to the constitutionality of one of these programs, the STURAA, and its requirement that "not less than 10 percent" of appropriated funds be set aside for women, members of certain racial groups, and individuals who could prove both social and economic disadvantage.¹⁴¹ Beyond the STURAA set-aside, the Court saw *Adarand*

137. For a discussion of the Court's ability to shape public discourse, see generally ROSENBERG, *supra* note 68 (analyzing competing visions of the Court's role in social reform); Neal Devins, *Judicial Matters*, 80 CAL. L. REV. 1027 (1992) (concluding that *The Hollow Hope* underestimates the Court's contribution to social reform); Peter Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763 (1993) (criticizing Rosenberg's theory).

138. See *infra* part IV.

139. See Memorandum from the American Law Division to Sen. Robert Dole (Feb. 17, 1995), reprinted in 141 CONG. REC. S3930-38 (daily ed. Mar. 15, 1995).

140. 115 S. Ct. 2097 (1995).

141. Surface Transportation and Uniform Relocation Act of 1987, Pub. L. No. 100-17, 101 Stat. 132, 145 (1987); *Adarand*, 115 S. Ct. at 2103. Minority group members are presumed to be disadvantaged, a presumption that can be rebutted "if a third

as an opportunity to clarify its position on affirmative action. Claiming that *Metro Broadcasting, Inc. v. FCC*¹⁴² was a departure from the Court's consistent practice of subjecting affirmative action programs to scrutinizing judicial review, the Court demanded that *all* race preferences be subjected to "the strictest judicial scrutiny,"¹⁴³ thereby overturning *Metro Broadcasting's* intermediate review standard for congressionally mandated affirmative action.¹⁴⁴

Adarand's suggestion that, with the exception of *Metro Broadcasting*, Court affirmative action decisions are cut from the same cloth is nonsense. Indeed, the Court in *Adarand* discredited this claim simply by describing its previous ventures in the affirmative action wars. The Court admitted, for example, that its prior decisions left "lingering uncertainty in the details."¹⁴⁵ Furthermore, the Court stated that its "failure to produce a majority opinion" before *Croson* "left unresolved the proper analysis for remedial race-based governmental action"¹⁴⁶ and that the first time that it returned to the constitutionality of affirmative action after *Croson*, it issued a decision—*Metro Broadcasting*—that was inconsistent with *Croson*.¹⁴⁷ Compounding this image problem, *Adarand* refused to rule on the constitutionality of the STURAA set-aside, noting only that the application of strict scrutiny review should not be "strict in theory, but fatal in fact."¹⁴⁸ As such, *Adarand* is more than the Supreme Court's most recent entry in the affirmative action chronicles. It is the culmination of two decades of issue avoidance and failed leadership. Rather than speaking the last word (or even a useful word) on the constitutionality of affirmative action, the Court still appears to be making up its mind about the propriety of race and gender preferences.

party comes forward with evidence suggesting that the participant is not, in fact, either economically or socially disadvantaged." *Adarand*, 115 S. Ct. at 2103. For further discussion of the STURAA program, see *supra* note 16.

142. 497 U.S. 547 (1990).

143. *Adarand*, 115 S. Ct. at 2111.

144. *Id.* at 2111-12.

145. *Id.* at 2111.

146. *Id.* at 2109.

147. *Id.* at 2111-13.

148. *Id.* at 2117 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)).

This section will expose *Adarand* as a limited and disingenuous precedent. Its assertions about *Metro Broadcasting* and other decisions do not hold up under scrutiny. Although it may be true that *Metro Broadcasting* should have been overruled, the reason is not, as *Adarand* suggests, that *Metro Broadcasting's* differential treatment of state and federal affirmative action is a substantial departure from earlier case law.¹⁴⁹ More fundamentally, the Court's refusal to provide any guidance about the application of strict review gives Congress, the White House, and lower courts a free hand to apply *Adarand* as they see fit. For this reason, rather than have Court-imposed constitutional limitations shape public discourse on affirmative action, social and political forces will continue to dominate affirmative action decisionmaking. Consequently, although *Adarand* may have been politically expedient, it further reveals the Court's limited role in defining the affirmative action debate. By placing so few restraints on elected government action, *Adarand* frees the way for elected government to treat affirmative action as a purely political issue and thereby undermines the Court's institutional legitimacy.

A. *The Road to Adarand*

In *Adarand*, the Court went to great lengths to distinguish *Metro Broadcasting* from the corpus of Supreme Court affirmative action decisions. This effort was misleading, for *Adarand* is as much a departure from *Fullilove v. Klutznick*,¹⁵⁰ which approved a Carter-era set-aside provision in 1980,¹⁵¹ as it is from *Metro Broadcasting*. Furthermore, the STURAA set-aside at issue in *Adarand* can be traced directly to *Fullilove's* approval of a nearly identical set-aside provision.¹⁵² For this reason,

149. *Adarand* cites several scholars, including myself, who are critical of *Metro Broadcasting's* application of different standards of review to federal and state racial classifications. *Id.* at 2115. None of these scholars, however, has claimed that *Metro Broadcasting* is a departure from the Court's typical application of strict review to federal affirmative action.

150. 448 U.S. 448 (1980).

151. *Id.* at 492.

152. Compare *id.* at 456-63 (discussing the "minority business enterprise" provision requiring that 10% of materials used in the projects come from minority businesses)

Fullilove is the critical starting point for an understanding of both *Adarand*'s factual context and the Court's reasoning in *Adarand*.

At issue in *Fullilove* was Congress's first explicit authorization of contract set-asides for minority businesses—the Public Works Employment Act of 1977.¹⁵³ By requiring that “at least ten per centum” of public works grants go to businesses “at least 50 per centum of which” are owned by “citizens . . . who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts,”¹⁵⁴ the amendment, in the words of its sponsor, Representative Parren Mitchell (D-Md.), sought to ensure that “minority businesses [would] get a fair share of the action from this . . . legislation.”¹⁵⁵ Introduced in the House, the *Fullilove* set-aside generated little debate.¹⁵⁶ Indeed, as Clinton Solicitor General Drew Days, who argued for the Carter Justice Department in *Fullilove*, put it: “One can only marvel at the fact that the minority set-aside provision was enacted into law without hearings or committee reports, and with only token opposition.”¹⁵⁷

The paucity of Congress's fact-finding did not trouble the Supreme Court. A plurality of the Court relied, instead, on legislative reports, hearings, and the like that, although unrelated to the *Fullilove* set-aside, addressed the condition of minority business.¹⁵⁸ In an opinion that Reagan Solicitor General Charles Fried described as “so narrow and qualified as to be virtually incomprehensible,”¹⁵⁹ the *Fullilove* plurality, applying for the first and only time a “most searching examination” standard, concluded that Congress could remedy racial discrimina-

with *Adarand*, 115 S. Ct. at 2103 (requiring that 10% of funds be directed toward disadvantaged small businesses).

153. 42 U.S.C. § 6705(f)(2) (1988).

154. *Id.*

155. 123 CONG. REC. 5327 (1977) (statement of Rep. Mitchell).

156. “Discussion of the provision in the House filled approximately six pages of the Congressional Record; in the Senate, approximately two pages.” Daniel R. Levinson, *A Study of Preferential Treatment: The Evolution of Minority Business Enterprise Assistance Programs*, 49 GEO. WASH. L. REV. 61, 75 (1980).

157. Drew S. Days, *Fullilove*, 96 YALE L.J. 453, 465 (1987).

158. See *Fullilove v. Klutznick*, 448 U.S. 448, 478 (1980) (noting that “Congress had before it . . . evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises”).

159. FRIED, *supra* note 74, at 120.

tion through affirmative action.¹⁶⁰

Fullilove begot hundreds of state and federal set-aside programs. Although the plurality in *Fullilove* clearly limited itself to congressional authority, state and local officials extended *Fullilove* to suit their needs. By 1989, when the Supreme Court struck down Richmond's set-aside in *Croson*, at least 234 jurisdictions had established set-aside programs.¹⁶¹ Most of these mimicked the *Fullilove* set-aside, providing relief to Eskimos and Aleuts as well as to Hispanics and African Americans. Congress, too, viewed *Fullilove* as a boon to its affirmative action efforts. Through floor amendments and often without legislative hearings or debate,¹⁶² Congress frequently failed even to pay lip service to *Fullilove*'s "most searching examination" standard, perceiving that these set-asides were immunized from constitutional attack.

The STURAA set-aside followed this pattern. Through a floor amendment to the 1982 Surface Transportation Assistance Act, Congress specified that ten percent of highway and urban mass transportation funds would be designated for socially and economically disadvantaged business enterprises.¹⁶³ In the *only* statement during debate on the set-aside provision, Representative Mitchell obliquely referred to the "Supreme Court in 1980 [upholding] the constitutionality" of set-asides and noted that "[t]hat is all we are dealing with."¹⁶⁴ Five years later, when Congress renewed this program, it again approved a "not less than 10 percent" set-aside.¹⁶⁵ This time around, Congress explicitly incorporated the Small Business

160. *Fullilove*, 448 U.S. at 491-92.

161. See Testimony of Hugh Davis Graham, *supra* note 119, at 17; Days, *supra* note 157, at 454.

162. See Days, *supra* note 157, at 457-77; Terry Eastland, *The Set-Aside Set*, AM. SPECTATOR, Mar. 1993, at 48 (noting the lack of debate); Thomas W. Lippman, *Energizing Minorities' Objectives: Legislation Offers Opportunity for the Incoming Administration*, WASH. POST, Dec. 1, 1992, at A17 (noting that the affirmative action provision in the energy bill "was hardly mentioned in all the months of hearings and floor debates").

163. 128 CONG. REC. 28927 (1982) (amendment offered by Rep. Mitchell).

164. *Id.* (statement of Rep. Mitchell).

165. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2103 (1995) (quoting the STURAA).

Administration's specification that "members of minority groups . . . are entitled to a race-based presumption of social and economic disadvantage."¹⁶⁶

Congress's 1987 enactment differed from its 1982 effort in one significant respect. Stories of false front companies—those supposedly owned by minorities but actually owned by whites—and of minority-owned firms that sold contracts won through set-aside programs to white-owned firms began to surface in the early and mid-1980s.¹⁶⁷ Responding to these allegations, Congress held hearings on both set-aside abuse and the ways in which set-asides had helped minority businesses.¹⁶⁸ When the Senate Environment and Public Works Committee issued its STURAA report, it pointed to these hearings in concluding that the STURAA set-aside "is necessary to remedy the discrimination faced by socially and economically disadvantaged persons."¹⁶⁹ Although the STURAA set-aside was not the subject of floor debates and the Senate Report barely alluded to (let alone evaluated) allegations of abuse and complaints of reverse discrimination, Congress did moderate the original 1982 set-aside to protect against abuse and reverse discrimination. The 1987 Act, for example, increased the amount of subcontracting business that nondisadvantaged firms can bid for and placed limits on disadvantaged businesses' selling their contracts to nondisadvantaged firms.¹⁷⁰ In other words, while Congress's

166. *Id.* (citing Small Business and Small Disadvantaged Business Concerns, 48 C.F.R. §§ 19.001, 19.073(a)(2) (1994)).

167. See Kenneth B. Noble, *Business and the Law: Setbacks for Minority Aid*, N.Y. TIMES, May 18, 1987, at D2; Michael Oreskes, *The Set-Aside Scam: Corruption and Quotas in the Construction Industry*, NEW REPUBLIC, Dec. 24, 1984, at 17, 17; Walter Shapiro, *\$4 Billion Worth of Temptation: Corruption Dogs the Set-Aside Programs for Minority Firms*, TIME, June 15, 1987, at 20, 20.

168. See *The Disadvantaged Business Enterprise Program of the Federal-Aid Highway Act*, Hearing Before the Senate Subcomm. on Transportation of the Senate Comm. on Environment and Public Works, 99th Cong., 1st Sess. (1985); *Review of the 10-Percent Set-Aside Program, Section 105(f) of the Surface Transportation Assistance Act of 1982: Hearing Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the House Comm. on Small Business*, 98th Cong., 2d Sess. (1984).

169. S. REP. NO. 4, 11, 100th Cong., 1st Sess. (1987), reprinted in 1987 U.S.C.C.A.N. 66, 76.

170. See *id.* at 12-13, reprinted in 1987 U.S.C.C.A.N. at 77.

fact-finding was limited, the STURAA set-aside was a better crafted and far more thoroughly deliberated invocation of race preferences than the set-aside upheld in *Fullilove v. Klutznick*.¹⁷¹

B. *The Adarand Decision*

Adarand paid little attention to the *Fullilove* plurality, focusing, instead, on Justice Lewis Powell's concurring opinion. Pointing to Powell's claim that *Fullilove*'s "most searching examination"¹⁷² standard was no different from strict scrutiny review, the Court in *Adarand* concluded that "[o]ur action today makes explicit what Justice Powell thought implicit," namely, that "federal racial classifications, like those of a State" are subject to strict review.¹⁷³ By recasting *Fullilove*, *Adarand* was able to isolate *Metro Broadcasting* and its embrace of intermediate scrutiny review of federal affirmative action programs.

Adarand also gave short shrift to *Croson*'s assiduous efforts to distinguish state from federal affirmative action. In explaining why the Richmond set-aside, which was modeled after *Fullilove*, should be subject to strict scrutiny review, *Croson* concluded that the *Fullilove* model was inapplicable to state and local set-asides.¹⁷⁴ First, *Fullilove* reflected "appropriate deference to the Congress, a co-equal branch"¹⁷⁵ and, more fundamentally, the branch that is "expressly charged by the Constitution with competence and authority to enforce equal protection guarantees."¹⁷⁶ Second, the Fourteenth Amendment "stemmed from a distrust of state legislative enactments based on race," a factor inapplicable to federal enactments.¹⁷⁷

171. 448 U.S. 448 (1980).

172. *Id.* at 491.

173. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2117 (1995). As an aside, *Adarand* also noted that "to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling." *Id.*

174. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490-91 (1989).

175. *Id.* at 487 (quoting *Fullilove*, 448 U.S. at 472).

176. *Id.* at 488 (quoting *Fullilove*, 448 U.S. at 483). For a discussion of this point, see *Adarand*, 115 S. Ct. at 2132-33 (Souter, J., dissenting).

177. *Croson*, 488 U.S. at 491.

Metro Broadcasting, unlike *Adarand*, paid great attention to *Croson's* federal-state distinction and to the ambiguity of the *Fullilove* plurality's "most searching" scrutiny standard.¹⁷⁸ At the same time, *Metro Broadcasting* deviated from prior precedents. The *Fullilove* plurality, for example, neither endorsed nor rejected strict review as a possible measure of federal affirmative action and did not contemplate the intermediate review standard utilized in *Metro Broadcasting*.¹⁷⁹ Furthermore, whereas the *Fullilove* plurality, as well as the Department of Justice, which submitted a brief defending the program, took great pains to defend the set-aside as a "strictly remedial measure" and hence within Congress's Fourteenth Amendment powers,¹⁸⁰ *Metro Broadcasting* rested exclusively on the broadcast diversity objectives of the FCC preference.¹⁸¹

Metro Broadcasting's deviation from prior precedent, no doubt, made it a prime candidate for reversal. *Adarand*, however, incorrectly transformed pre-*Metro Broadcasting* case law from a doctrinal muddle into a consistent call for strict review of both state and federal affirmative action. At the same time, although *Adarand* could have conceded the patchwork quality of Supreme Court affirmative action decisionmaking and still overturned *Metro Broadcasting*, *Adarand's* characterization of *Metro Broadcasting* as aberrational, though dishonest, is nonetheless sensible. By treating its embrace of strict review as anything but pathbreaking, *Adarand* was able to overturn *Metro Broadcasting* without raising knotty stare decisis problems. According to the Court in *Adarand*, "[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of

178. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 563-64 (1990) (citing *Fullilove*, 448 U.S. at 491). Justice Stevens's dissent in *Adarand* attacked the majority for misinterpreting the state-federal distinction made in earlier cases. See *Adarand*, 115 S. Ct. at 2123-28 (Stevens, J., dissenting).

179. A majority of Justices in *Fullilove* pointed to strict review as a possible measure of federal affirmative action. *Fullilove*, 448 U.S. at 492; *id.* at 518-19 (Marshall, J., concurring). Only three members of the Court in *Fullilove* embraced intermediate review. See *id.* at 517-19 (Marshall, J., concurring).

180. *Id.* at 481; see also Brief for the Secretary of Commerce, *Fullilove*, 448 U.S. 448 (No. 78-1007) (noting at least 23 times the remedial nature of the *Fullilove* set-aside).

181. *Metro Broadcasting*, 497 U.S. at 579.

stare decisis than would following a more recently decided case inconsistent with the decisions that came before it."¹⁸²

What is most remarkable is that, with all its doctrinal gyrations, *Adarand* has such limited practical consequences. To begin with, the retirement of four of *Metro Broadcasting's* five-member majority and the corresponding appointment of at least one staunch affirmative action critic, Clarence Thomas, ensured some tightening of the *Metro Broadcasting* standard.¹⁸³ The only question was how much. In a sense, by remanding the case rather than subjecting the STURAA preference to strict scrutiny review, *Adarand* does not answer that question. By treating *Metro Broadcasting* as an aberration from an otherwise unitary body of decisionmaking, however, *Adarand* signals its support of the status quo ante.¹⁸⁴ Along these lines, *Adarand*, if anything, places another nail in the coffin of the Reagan-Bush Department of Justice campaign for victim-specific relief. By taking the result of *Fullilove* as a given, recognizing that "government is not disqualified from acting in response" "[to] both the practice and the lingering effects of racial discrimination"¹⁸⁵ and "dispel[ling] the notion that strict scrutiny is 'strict in theory, but fatal in fact,'"¹⁸⁶ *Adarand* distanced itself from absolutist arguments that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."¹⁸⁷ Indeed,

182. *Adarand*, 115 S. Ct. at 2115.

183. Thomas, when chair of the EEOC under Reagan, told Congress that numerically based remedies "have the potential to undermine the ultimate goals of nondiscrimination" and "can lead to a perception that women and minorities need preferential treatment to compete even after the discrimination has ended." *Equal Employment Opportunity Commission Policies Regarding Goals and Timetables in Litigation Remedies 1986: Hearings Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 99th Cong., 2d Sess. 25-26 (1986); see also Juan Williams, *A Question of Fairness*, ATLANTIC MONTHLY, Feb. 1987, at 70 (discussing Thomas's position on affirmative action as chairman of the EEOC).

184. This claim is the centerpiece of Justice Ginsburg's dissent. *Adarand*, 115 S. Ct. at 2134 (Ginsburg, J., dissenting) ("I write separately to underscore . . . the considerable field of agreement—the common understanding and concerns—revealed in opinions that together speak for a majority of the Court.").

185. *Id.* at 2117.

186. *Id.* (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)).

187. *Id.* at 2118 (Scalia, J., concurring in part and concurring in the judgment).

no evidence suggests that either the STURAA set-aside remanded in *Adarand* or the diversity preference upheld in *Metro* are doomed as a result of *Adarand*.

The STURAA set-aside, without question, is on stronger constitutional footing than the set-aside approved in *Fullilove*.¹⁸⁸ Its stated purpose—to remedy discrimination—is more compelling than the “fair share” arguments made by the sponsor of the *Fullilove* set-aside.¹⁸⁹ The STURAA set-aside also includes limited safeguards to protect against abuse and to protect the interests of both disadvantaged nonminorities and the nondisadvantaged: eligibility is limited to the disadvantaged, including nonminorities who can demonstrate both social and economic disadvantage; nondisadvantaged minorities are ineligible; contracts awarded to disadvantaged businesses cannot be brokered to nondisadvantaged firms; and bidding requirements are designed to protect nondisadvantaged firms from bearing a disproportionate burden.¹⁹⁰ While this fine tuning of *Fullilove*’s blanket grant of eligibility to any and all members of designated minority groups does not ensure that the STURAA set-aside will survive strict review,¹⁹¹ *Adarand* does not come close to sealing the fate of this program.

The FCC diversity preference, although a tougher sell, may also survive the *Adarand* decision. For starters, *Adarand* does not comment on whether broadcast diversity and other

Justice Thomas also advanced this victim-specific model in a separate concurrence. See *id.* at 2119 (Thomas, J., concurring in part and concurring in the judgment) (“There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution.”).

188. *Adarand*, while not disturbing *Fullilove*, does not comment on “whether the program upheld in *Fullilove* would survive strict scrutiny as our more recent cases have defined it.” *Id.* at 2117. This comment is truly remarkable, for it further demonstrates the disingenuity of *Adarand*’s claim that *Metro Broadcasting* is the only deviation from the Court’s otherwise consistent approach to affirmative action.

189. See 123 CONG. REC. 5327 (1977). The *Fullilove* plurality, however, assumed that the set-aside served remedial objectives. See *Fullilove*, 448 U.S. at 483-84.

190. See *supra* notes 16, 169-70. For a detailed treatment of why the STURAA set-aside is constitutional, see Brief for the Respondents, *supra* note 24, at 43; Brief of the Congressional Black Caucus as Amicus Curiae, *Adarand*, 115 S. Ct. 2907 (No. 93-1841).

191. See generally Brief for the Petitioner, *supra* note 21, at 33 (arguing that the STURAA set-aside cannot survive strict review).

nonremedial objectives remain a legitimate basis for affirmative action.¹⁹² Furthermore, the FCC preference is not merely an attempt to increase broadcast diversity caused by the underrepresentation of minority broadcast license holders. Congressional and related FCC action in the late 1970s and early 1980s revealed that the preference is a remedial link to FCC diversity objectives; specifically, because underrepresentation of minority owners stems from societal discrimination, the FCC must remedy that discrimination as a means to the end of program diversity.¹⁹³ To the extent that the diversity preference operates as no more than a "plus" in comparing the relative merits of competing applications for a broadcast license,¹⁹⁴ it certainly is conceivable that the FCC preference could be upheld as a relatively inobtrusive way of advancing a compelling governmental interest.¹⁹⁵

192. While finding the Court's silence on this matter highly probative, the Clinton Department of Justice's review of *Adarand* reached no conclusions about "whether and in what settings nonremedial objectives can constitute a compelling interest." *Adarand* Memorandum, *supra* note 65, at 14. Nonremedial preferences may be permissible, therefore, because *Adarand* does not overrule Justice Powell's conclusion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), that diversity preferences in university admissions are constitutionally permissible, *see Bakke*, 438 U.S. at 311-19; *Adarand* Memorandum, *supra* note 65, at 14-16. Furthermore, *Adarand's* author, Justice Sandra Day O'Connor, previously has signaled her possible support of nonremedial affirmative action. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 288 (1986) (O'Connor, J., concurring in part and concurring in the judgment).

193. For a detailed examination of the remedial justification for the FCC preference, *see Devins, supra* note 112, at 150-55.

194. One of the two programs upheld in *Metro Broadcasting* operated this way. Under this program, a broadcaster's past broadcast record, the proposed program service, and owner participation in station operations also were factors. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 557 (1990). Race was dispositive in the second program, a "distress sale" policy that allowed FCC-approved minority broadcasters to purchase stations at a distress price from broadcasters whose qualifications were called into question. *See id.* at 552.

195. Some chance remains that the FCC may moderate the diversity preference programs that it successfully defended in *Metro Broadcasting*. In response to *Adarand*, the Commission no longer utilizes race and gender preferences when awarding licenses to provide personal communications services such as wireless telephone and wireless facsimile. *Entrepreneur's Block Auction May Proceed, Appeals Court Says*, 1995 Daily Rep. Execs. (BNA) No. 190, at A-18 (Oct. 2, 1995). Instead, the Commission now provides preferences to all small businesses, regardless of the owner's race or gender. *See id.* Whether this change in policy signals more far-reach-

That the FCC and STURAA programs may withstand post-*Adarand* review makes clear that the Court in *Adarand* went to great lengths to craft a decision that, at best, offers limited guidance. The Court's sidestepping in *Adarand* also suggests that social and political forces play a large role in shaping Court decisionmaking. In particular, *Adarand's* middle-ground solution, by simultaneously embracing strict review and making clear that federal affirmative action may be constitutional under this standard, matches public opinion and gives the government a free hand to debate the issue of preferences.¹⁹⁶ Like its middle-ground solution to the abortion issue in *Planned Parenthood v. Casey*,¹⁹⁷ *Adarand* allows the Court to appear to take a stand on a divisive and emotionally charged issue without risking severe political repercussions. Moreover, like *Casey's* substitution of an opaque undue burden standard of review for *Roe's* stringent, but easily applied, trimester standard, *Adarand* rejects *Metro Broadcasting's* straightforward, albeit deferential, standard of review in favor of an ill-defined version of strict review.¹⁹⁸ Accordingly, just as *Casey* returned much of the abortion issue to elected government, *Adarand* likewise leaves it to elected government to sort out acceptable race and gender preferences from unacceptable ones.¹⁹⁹ In so doing, the Court

ing reforms is unclear. Unlike in personal communications services, a supposed nexus exists between broadcast diversity and the preferences upheld in *Metro Broadcasting*. See *supra* note 193 and accompanying text.

196. See Jack Germond & Jules Witcover, *On Politics: Affirmative Action Ruling Raises Stakes on the Issue*, BALT. EVENING SUN, June 14, 1995, at 2A.

197. 112 S. Ct. 2791 (1992) (reaffirming *Roe v. Wade*, 410 U.S. 113 (1973), but rejecting its stringent trimester standard in favor of a less demanding undue burden standard).

198. *Adarand* and *Casey* also make use of highly suspect stare decisis analysis. *Adarand* misstates precedent in order to isolate *Metro Broadcasting*. See *supra* note 182 and accompanying text. *Casey* separates *Roe's* holding that a woman has a constitutional right to terminate her pregnancy (which is entitled to stare decisis protection) from *Roe's* trimester standard of review, which the Court claimed was not an essential part of the *Roe* holding and therefore not entitled to stare decisis protection. *Casey*, 112 S. Ct. at 2818. At the same time, unlike in its abortion cases, the Court never has embraced an absolutist approach towards affirmative action. For this reason, stare decisis concerns of institutional legitimacy (which loomed so large in *Casey's* reaffirmation of *Roe*) played no role in *Adarand's* overturning of *Metro Broadcasting*.

199. In the case of abortion, nearly all state legislatures have declined to use their

has returned home to its ambiguous fact-specific approach to affirmative action, eschewing the clarity of absolutist approaches in favor of the resulting murkiness—the “dank, miasmic, myxomycetous sump.”²⁰⁰

C. *Adarand and the Ongoing Debate over Affirmative Action*

Even before its June 1995 release, *Adarand* had been largely overtaken by social and political forces. For example, in the spring of 1995, Congress was considering a bill introduced by Senator Jesse Helms (R-N.C.) entitled the “Act to End Unfair Preferential Treatment”;²⁰¹ the White House was in the midst of an extensive review of federal affirmative action programs; announced and prospective presidential candidates—including Bob Dole, Phil Gramm, Jesse Jackson, Arlen Specter, and Pete Wilson—had made affirmative action one of the centerpieces of their presidential bids; and a citizen-sponsored ballot initiative in California threatened to do away with most state affirmative action programs, including public employment and contracting programs.²⁰² By May 1995, “[t]he question of the hour” was not whether the Supreme Court would settle the affirmative action controversy “but simply whether it [would] stand aside and let the nation sort through these problems on its own.”²⁰³

By saying so little, *Adarand* ensured that elected officials will continue to dominate this ongoing debate over preferences. Fur-

enhanced authority to enact abortion restrictions. For a summary and tentative assessment of state practices after *Casey*, see Neal Devins, *The Countermajoritarian Paradox*, 93 MICH. L. REV. 1433, 1453-55 (1995) (exploring states' reluctance to enact antiabortion measures).

200. The quotation is borrowed from Charles Galvin, *More on Boris Bittker and the Comprehensive Tax Base: The Practicalities of Tax Reform and the ABA's CSTR*, in B. BITTKER ET AL., A COMPREHENSIVE INCOME TAX BASE? 89 (1968).

201. S. 497, 104th Cong., 1st Sess. (1995).

202. William Claiborne, *Chipping at a Democratic Cornerstone: California Party Leaders Consider Compromise on Affirmative Action*, WASH. POST, Feb. 4, 1995, at A1. Considerable doubt remains whether the California initiative will qualify for the 1996 ballot. On December 1, 1995, the *Los Angeles Times* suggested that the initiative campaign “was not adequately focused on the immediate need to gather at least 690,000 signatures to qualify for next November's ballot.” Dave Leshner, *UC Regent To Take Over Initiative Campaign Against Affirmative Action*, L.A. TIMES, Dec. 1, 1995, at A42.

203. Jeremy A. Rabkin, *The Color of California*, AM. SPECTATOR, May 1995, at 24.

thermore, because it could take at least two years for the Supreme Court "to find a case it can use to fill in the outlines of" *Adarand*, the Court will not likely reenter this fray until after the 1996 elections.²⁰⁴ Indeed, *Adarand* effectively makes the 1996 presidential elections a referendum on affirmative action. With President Clinton strongly supporting preferences and the leading Republican candidates lined up against affirmative action, one or two Supreme Court appointments could either tighten or eviscerate the strict scrutiny standard adopted by *Adarand*'s five-member majority.²⁰⁵ As such, *Adarand* reinforces the purely political nature of affirmative action decisionmaking, thereby undermining the Court's authority and the Constitution's relevance.

This is not to say that *Adarand* is irrelevant to public discourse on affirmative action. Having arrived on the crest of a tidal wave of attention being given to affirmative action, *Adarand* has been discussed ad nauseum by the President and his legal advisors, hordes of congressmen and senators, and nearly every policy wonk and syndicated columnist. *Adarand*, however, is so malleable as to be almost beside the point. Proponents of affirmative action spin it to mean one thing; opponents spin it to mean something entirely different.

A vivid illustration of this phenomenon occurred in July 1995, when Senator Phil Gramm (R-Tex.) proposed eliminating set-asides for minorities and women in federal contracting.²⁰⁶ In defending this measure, Gramm claimed that *Adarand* supported the Reagan-Bush view that race-conscious relief should be

204. Greenhouse, *supra* note 37, at A1, A17. The Court's silence may well be intentional. By reserving a decision on its application of strict review, *Adarand* enables the Court to fine tune its decisions at a later date—once the ongoing conflagration over affirmative action has quieted, if not settled.

205. For this reason, I am unwilling to read very much into Supreme Court decisions, issued within a month of *Adarand*, limiting race-conscious electoral districts. See, e.g., *Miller v. Johnson*, 115 S. Ct. 2475 (1995) (holding that Georgia lacked a compelling interest to use racial gerrymandering to create a black majority congressional district); *United States v. Hays*, 115 S. Ct. 2431 (1995) (holding that a plaintiff who does not reside in a gerrymandered district lacks standing to sue the state). While the Court may be signaling an increasing discomfort with race-conscious decisionmaking, *Adarand* is simply too indeterminate and too vulnerable to support any larger claims about the future of judicial scrutiny of affirmative action.

206. 141 CONG. REC. S10,401 (daily ed. July 20, 1995) (statement of Sen. Gramm).

limited to the victims of discrimination. Gramm explained that "[m]y amendment is written in total conformity with *Adarand*. . . . That is, if the court finds that a contractor was [personally] subject to discrimination, the court may provide a remedy with a set-aside. . . ." ²⁰⁷ In sharp contrast, Senator Arlen Specter (R-Pa.) called attention to *Adarand's* recognition that the government may act in response to "both the practice and the lingering effects of racial discrimination." ²⁰⁸ Along these lines, affirmative action supporters have found *Adarand* to be "helpful in shifting the terms of the debate on affirmative action in Congress." ²⁰⁹ Specifically, with *Adarand's* demand that federal affirmative action programs satisfy strict review, elected officials can express skepticism about the propriety of preferences while passing the affirmative action buck back to the courts. For example, Senator Patty Murray (D-Wash.), confident that the Clinton Administration would narrowly interpret *Adarand*, countered Gramm's efforts by proposing that federal funds can only be used for "programs . . . completely consistent with the Supreme Court's recent decision in . . . *Adarand*." ²¹⁰ In so doing, Murray made Gramm's bill appear extreme, going well beyond *Adarand*. ²¹¹ When all was said and done, the Murray amendment was approved by a lopsided eighty-four to thirteen vote and the Gramm amendment was soundly defeated by a bipartisan sixty-one to thirty-six vote. ²¹²

207. *Id.* at S10,408 (statement of Sen. Gramm).

208. *Id.* at S10,409 (statement of Sen. Specter) (quoting *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2117 (1995)). In response to Specter, Gramm made clear that his "objective [was] not to ratify the *Adarand* ruling" but to "end set-asides." *Id.* at S10,410 (statement of Sen. Gramm). Gramm also has said that, if elected president, he would repeal the executive order that Reagan left in place. See James Srodes, *The Maverick*, FIN. WORLD, Aug. 29, 1995, at 66.

209. Steven A. Holmes, *Affirmative Reaction: For the Civil Rights Movement, a New Reason for Living*, N.Y. TIMES, July 9, 1995, § 4, at 1.

210. 141 CONG. REC. S10,405 (daily ed. July 20, 1995) (statement of Sen. Murray).

211. Bob Dole's recent proposal to eliminate most federal affirmative action programs also goes well beyond *Adarand's* demands. As one of Senator Dole's staff members stated: "The fact that an [affirmative action program may be] constitutional does not make it wise public policy." Kevin Merida, *Dole Aims at Affirmative Action*, WASH. POST, July 28, 1995, at A10.

212. See Kevin Merida, *Senate Rejects Gramm Bid To Bar Affirmative Action Set-Asides*, WASH. POST, July 21, 1995, at A13. This margin of defeat may have been exacerbated by Dole supporters who voted against the amendment, in part, to em-

The defeat of the Gramm amendment reveals that reports of the death of affirmative action, like earlier reports of the demise of the Reagan Justice Department's challenge to preferences, are greatly exaggerated. Several key Republican legislators, including House Republican Conference Chair John Boehner (R-Ohio), Republican Policy Committee Chair Don Nickles (R-Okla.), and House Speaker Newt Gingrich (R-Ga.), have launched a concerted effort to push affirmative action to the back burner.²¹³ Motivated both by a desire "to craft a positive message for minorities before trying to dismantle affirmative action" and a corresponding fear that a catfight over affirmative action may undermine the pursuit of the Contract with America,²¹⁴ the Republican Party may not be ready to do battle over affirmative action. Along the same lines, "more than a dozen" Republican governors have said that "they hoped the GOP nominee [for President] would not make affirmative action a major issue in the 1996 election."²¹⁵ In other words, although the 1994 elections promised a sea of reforms, affirmative action may prove too entrenched to be overcome (at least until the 1996 elections, if at all).²¹⁶

Interest group politics also has played a role in the Clinton Administration's defense of affirmative action. Concerned that Jesse Jackson would harm President Clinton's reelection efforts,²¹⁷ the White House sought to shore up its minority base and neutralize Jackson through its vigorous public support of affirmative action.²¹⁸ As part of this effort, the executive

barrass Gramm. See Steven A. Holmes, *Senate Rejects Effort To End Preference Programs*, N.Y. TIMES, July 22, 1995, at A7.

213. See Merida, *supra* note 212, at A13.

214. *Id.*

215. David S. Broder & Robert A. Barnes, *Few Governors Join Attack on Racial Politics*, WASH. POST, Aug. 2, 1995, at A1.

216. Consider, for example, the American Bar Association's August 9, 1995, decision to endorse affirmative action programs that "eliminate or prevent discrimination." See Sandra Torrey, *ABA Body Backs Endorsement of Affirmative Action*, WASH. POST, Aug. 10, 1995, at A3.

217. See Paul Richter, *Democrats Listen for Tick of Jesse Jackson Time Bomb*, L.A. TIMES, July 18, 1995, at A1.

218. President Clinton's support for affirmative action is not without qualification. For example, in response to claims that his first choice to head the Justice Department's Civil Rights Division, Lani Guinier, was a "quota queen," Clinton with-

branch has spun *Adarand* to fit its needs, limiting *Adarand*'s reach through White House and Justice Department assessments of the decision. Through a White House-conducted "Affirmative Action Review," the Clinton Administration concluded that nearly all affirmative action programs are responsive to discrimination, do not unduly burden nonminorities, and accomplish their objectives of increasing opportunities for minorities and women.²¹⁹ Beyond creating the factual predicate to support the constitutionality of existing affirmative action programs,²²⁰ the Clinton White House also made clear its views on the meaning of *Adarand*. In a July 19, 1995, speech on affirmative action, Clinton "emphasize[d] that the *Adarand* decision did not dismantle affirmative action and did not dismantle set-asides. In fact, . . . it actually reaffirmed the need for affirmative action and reaffirmed the continuing existence of systematic discrimination in the United States."²²¹

drew the nomination, claiming that Guinier's writings "lend themselves to interpretations that do not represent the views that I expressed on civil rights during my campaign." Michael Isikoff, *Readings in Controversy: Guinier's Pivotal Articles*, WASH. POST, June 4, 1993, at A10.

219. Although noting that its conclusions "must be considered tentative and provisional" because of the intervening *Adarand* decision, the "Affirmative Action Review" found that federal affirmative action programs are both responsive "to the lingering biases and the poisons of prejudice" and "fair—i.e., no unqualified person can be preferred over another qualified person in the name of affirmative action . . . [and that preferential] measures will be transitional." *Text of "Affirmative Action Review" Report to President Clinton Released July 19, 1995*, reprinted in 1995 Daily Lab. Rep. (BNA) No. 139, at D-30 (July 20, 1995) [hereinafter *Affirmative Action Review Report*]. This review was conducted by Christopher Edley, Jr., who was a committed supporter of affirmative action before joining the Clinton Administration. See *Constitutional Scholars' Statement*, *supra* note 65, at 1715 (listing Edley as one of its signers).

220. I do not mean to suggest that no executive department or agency will modify existing affirmative action programs as part of this review process. At the least, the Department of Defense has rescinded its so-called "rule of two" set-aside policy for disadvantaged business enterprises. *DOD Suspends Use of "Rule of Two" Set-Asides for SDBs in Light of Adarand-Mandated Review*, 64 Fed. Cont. Rep. (BNA) 368 (Oct. 30, 1995). Under this rule, prime contracts were set aside for disadvantaged businesses whenever two or more disadvantaged firms were available and qualified to bid. See *id.* Although it has repealed the "rule of two," the Department of Defense still makes use of race-conscious affirmative action to meet congressionally mandated goals. See *id.* As of December 12, 1995, six months after *Adarand*, no other executive agency or department had announced significant revisions to existing affirmative action programs.

221. Statement by President Clinton at the National Archives and Records Admin-

Through a June 28, 1995, Office of Legal Counsel opinion,²²² the Department of Justice also limited *Adarand*'s reach. Emphasizing the Court's rejection of "strict in theory, but fatal in fact" review and its related determination that "the lingering effects of racial discrimination" may justify race-based remedial measures,²²³ the Office of Legal Counsel opinion, especially when read in conjunction with the White House's narrow interpretation of *Adarand*, provides a legal justification for supporters of race and gender preferences to preserve existing affirmative action programs. In particular, the opinion notes that *Adarand* "leaves many questions open,"²²⁴ including: whether there must be evidence of discrimination to establish a compelling governmental interest; whether the federal government will be held accountable to *Croson* or some other version of strict review; whether congressionally prescribed affirmative action will be treated any differently from agency-initiated programs; whether affirmative action programs can be grounded in nonremedial objectives; and whether the government must consider race-neutral alternatives.²²⁵ To muddy the waters even

istration, 31 WEEKLY COMP. PRES. DOC. 1255, 1262 (July 19, 1995).

222. See *Adarand* Memorandum, *supra* note 65. The Office of Legal Counsel typically is engaged in the business of resolving legal disputes within the executive branch. For the most part, this task involves a determination of which one of two competing legal interpretations is correct. See generally Symposium, *Executive Branch Interpretation of the Law*, 15 CARDOZO L. REV. 21 (1993) (collecting articles and commentary on the Attorney General's opinion function and the Office of Legal Counsel). To issue a descriptive memorandum about the uncertain application of a Supreme Court affirmative action decision, particularly when the Civil Rights Division has subject matter jurisdiction over affirmative action, is quite unusual. At the same time, it is sensible that an opinion be written to stave off agency general counsel interpretations inconsistent with administration objectives. See *infra* note 225. Given the Office of Legal Counsel's role in resolving agency legal disputes and the partisan reputation of the Civil Rights Division, it is also sensible that the Clinton Administration would seek an Office of Legal Counsel memorandum on *Adarand*, especially because the head of that office, Walter Dellinger, is a committed supporter of affirmative action. See *Constitutional Scholars' Statement*, *supra* note 65, at 1715 (listing Dellinger as signer of statement).

223. *Adarand* Memorandum, *supra* note 65, at 1.

224. *Id.*

225. See *id.* By creating, rather than answering, questions about *Adarand*, the Office of Legal Counsel Memorandum preserved political flexibility for the President, allowing him to fill in the gaps identified by the Memorandum. In other words, had President Clinton elected to cut back federal affirmative action programs, the Office

further, the opinion suggests that lower court interpretations of *Croson* are too indeterminate to resolve the proper application of the *Croson* standard, assuming, that is, that *Croson* is even applicable.²²⁶ Finally, the opinion contains a four-page appendix of questions that, depending on how lower courts sort out the issues that the Supreme Court did not address in *Adarand*, may or may not be relevant to assessing the validity of federal affirmative action programs.²²⁷ By identifying *Adarand*'s uncertain status, the Office of Legal Counsel opinion sounds a cautionary message to agency general counsels that "[n]o affirmative action program should be suspended prior to" an evaluation of the program's constitutionality.²²⁸

Nothing about the Office of Legal Counsel's opinion is unreasonable or unseemly.²²⁹ The fact that affirmative action supporters and opponents have announced competing visions of *Adarand* also is neither surprising nor problematic. Indeed, it is inevitable that affirmative action decisions will, if possible, be interpreted to advance partisan objectives. In the case of *Adarand*, the Court's utter failure to communicate how strict review works simply creates a broader range of interpretive

of Legal Counsel Memorandum would not have proven a barrier to such an expansive reading of *Adarand*. My thanks to John McGinnis, former Deputy Assistant Attorney General at the Office of Legal Counsel, for this insight.

226. *See id.* at 28-34. The Office of Legal Counsel usually does not rely on lower court rulings in its interpretation of a Supreme Court decision. In this instance, attention to lower court rulings was consistent with the Clinton Administration's objective of protecting against expansive interpretations of *Adarand*.

227. *See id.* at 35-38.

228. *Id.* at 34. Given the President's embrace of affirmative action and the Office of Legal Counsel's failure to set forth a standard by which the administration believes affirmative action should be judged, it is highly doubtful that any agency general counsel will propose the dismantling of existing affirmative action programs. Inflexible race-based quotas, however, appear to be taboo to the administration. *See Affirmative Action Review Report*, *supra* note 219. Hardly any of these programs exist, however. For example, set-aside programs such as STURAA almost always include mechanisms allowing for nonminority participation, challenges to minority participation, and adjustments to the set-aside target. *See id.* At the same time, consistent with the administration's "mend it, don't end it" rhetoric, some affirmative action programs may be adjusted at the margins.

229. While the Office of Legal Counsel may be obligated to issue opinions that are faithful to Supreme Court decisions, the *Adarand* Memorandum highlights rather than misstates the indeterminate nature of the Court's decision.

possibilities. As such, *Adarand* places very few constraints on its interpreters. Depending on the outcome they desire, *Adarand* interpreters can treat the case as decisive or irrelevant, as a reaffirmation or repudiation of affirmative action.

IV. CONCLUSION: TOWARDS AN UNDERSTANDING OF THE JUDICIAL ROLE IN AFFIRMATIVE ACTION DECISIONMAKING

Two decades ago, in *DeFunis v. Odegaard*,²³⁰ the Supreme Court issued its first nondecision in an affirmative action case. Rather than play a leadership role and define the parameters of government authority over race preferences, the Court ducked the issue altogether by ruling the *DeFunis* lawsuit moot.²³¹ When the Court finally spoke, in *Regents of the University of California v. Bakke*,²³² it issued a decision so fractured that no member of the Court joined Justice Lewis Powell's decisive lead opinion.²³³ Symposia were held to sort out what all this meant, whose opinion controlled, how the case should be applied, whether it was a principled decision, et cetera.²³⁴

As this Essay has demonstrated, this pattern continues. The Supreme Court has not used its bully pulpit to speak about the rightness or wrongness of preferences. Unlike abortion, school desegregation, the death penalty, school prayer, and a host of other emotionally charged issues, the Court has not played a leadership role in affirmative action. Its decisions are fact-specific, plurality decisions far outnumber majority decisions, and the values that underlie the Court's rulings are, at best, hard to decipher. Admittedly, this division reflects the public's division and lack of consensus on the affirmative action issue. Nonethe-

230. 416 U.S. 312 (1974).

231. *Id.* at 315-16. DeFunis, who challenged a law school affirmative action admissions program, had attended and graduated from another law school during the course of litigation. *See id.* As it had done one year earlier in *Roe v. Wade*, 410 U.S. 113 (1973), the Court could have resolved the dispute by finding DeFunis's challenge "capable of repetition yet evading review." *Id.* at 125 (quoting *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)).

232. 438 U.S. 265 (1978).

233. For an exceptional accounting of the *Bakke* litigation, see JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. A BIOGRAPHY 455-501 (1994).

234. *See, e.g., De Funis Symposium*, 75 COLUM. L. REV. 483 (1975); Symposium, *Regents of the University of California v. Bakke*, 67 CAL. L. REV. 1 (1979).

less, by not staking out a position, the Court has played next to no role in shaping public discourse on affirmative action. In contrast, on issues like abortion and school desegregation, the Court has proved itself a player, shaping policy through decisions that have had a nationwide impact.²³⁵

Adarand exemplifies the Court's limited influence in settling (or even defining) the affirmative action debates.²³⁶ Without guidance on how the Court's strict review standard should be applied, Congress and the White House are free to do with the decision as they see fit. The competing approaches of affirmative action supporters, opponents, and moderates who have yet to (and may never) stake out a position makes clear that *Adarand* is an extraordinarily malleable opinion. While social and political forces typically play a part in defining the reaches of Supreme Court decisionmaking, Court decisions often play a large role in shaping constitutional and other dialogues that take place among the branches.²³⁷ *Adarand*, in contrast, places few meaningful checks on elected government action. Affirmative action supporters claim that the decision "reaffirmed the need for affirmative action";²³⁸ opponents claim that, after *Adarand*, only the actual victims of discrimination can obtain race-conscious relief.²³⁹

What is truly amazing is that the Court keeps telling us that

235. See generally ROSENBERG, *supra* note 68 (discussing the role of federal courts in producing political and social changes in civil and women's rights); Devins, *supra* note 137 (arguing that federal courts play a significant role in shaping public values); Schuck, *supra* note 137 (reviewing books that explore the role of federal courts in legal reform).

236. While *Bakke*, *Croson*, and *Adarand* express judicial skepticism about quotas and set-asides, overwhelming social and political forces also oppose these rigid affirmative action programs. For example, civil rights leaders, Democrats sponsoring the 1991 Civil Rights Act, and the Clinton White House all have joined the chorus in opposition to inflexible preferences. Indeed, President Clinton's withdrawal of Lani Guinier's nomination to head the Department of Justice's Civil Rights Division was largely rooted in anti-quota sentiment. See *supra* note 218.

237. See FISHER, *supra* note 44; LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* (2d ed. 1996); Neal Devins, *Foreward to Symposium, Elected Branch Influences in Constitutional Decisionmaking*, LAW & CONTEMP. PROBS., Autumn 1993, at 1.

238. Statement by President Clinton at the National Archives and Records Administration, 31 WEEKLY COMP. PRES. DOC. 1255, 1262 (July 19, 1995).

239. See *supra* note 202.

it matters and that, for the most part, lawyers, law professors, and journalists agree. In *Adarand*, for example, the Court spoke of establishing "general propositions with respect to governmental racial classifications," and, to develop this declaration, overruled *Metro Broadcasting* because it deviated from these propositions.²⁴⁰ As this Essay has shown, however, saying that "you matter" and actually shaping public discourse and elected government action are quite different things.

The Supreme Court should matter. In our three-branch scheme, the Supreme Court is expected to shape constitutional values and, in so doing, preserve the judiciary's integrity as a coequal branch of government. Along these lines, the *Federalist Papers*, in supporting the Court's authority to strike down governmental conduct, spoke of the judicial branch as serving as "an intermediate body between the People and the Legislature, in order, among other things, to keep the latter within the limits assigned to their authority."²⁴¹ When it comes to affirmative action, however, the Court has failed to speak in a way that alters the political forces. It has neither defined the terms of the affirmative action debate particularly well nor used its bully pulpit to explain what values are at stake. Narrow holdings, refusals to consider constitutional issues, and deployment of mootness, remand, and other doctrines of judicial restraint are the hallmark of the Court's affirmative action jurisprudence. As a result, although it is often true that "speaking no more broadly than is absolutely required avoids throwing settled law into confusion; doing so [on affirmative action] preserves a chaos that is evident to anyone who can read and count."²⁴²

There is no reason to think this practice will change. After twenty years of ducking the issue, the Court, rather than "establish[ing] . . . general propositions,"²⁴³ has issued a decision that is at once indeterminate and disingenuous. These actions engender in the political branches a belief that the Constitution is infinitely malleable. Consequently, rather than debate the mer-

240. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2111 (1995).

241. THE FEDERALIST No. 78, at 542 (Alexander Hamilton) (H.B. Dawson ed., 1863).

242. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 535 (1989) (Scalia, J., concurring).

243. *Adarand*, 115 S. Ct. at 2111.

its of affirmative action as a matter of public policy, *Adarand* enables elected officials to cloak their support or opposition of preferences around high-sounding constitutional rhetoric. This is unfortunate—it reduces the level of respect for the Court among the other branches and weighs down public discourse on affirmative action with meaningless legalisms.

Adarand, then, does not simply return affirmative action to elected government.²⁴⁴ Instead, the Court's mealy-mouthed approach demonstrates that affirmative action always has been the province of elected government. Whether the California affirmative action initiative and other political events will fully overtake *Adarand* is unclear. What is clear, however, is that elected government and not the Court will decide the fate of affirmative action.

244. While the Court must stake out meaningful positions on controversial issues to protect its institutional legitimacy, I do not mean to suggest that the Court's institutional legitimacy hinges on its taking a stand on *every* controversial issue. See CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT* 53 (1960) (arguing that the Court's principal function is to *validate* elected government decisionmaking). In other words, although decisions like *Adarand* diminish the Court's status as a coequal branch, the Court can (and has) offset the costs of its tentative approach to affirmative action by playing a leadership role on abortion, school desegregation, and other issues.