Adarand Constructors, Inc. v. Pena and the Continuing Irrelevance of Supreme Court Affirmative Action Decisions

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ESSAY

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

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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

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1. See Local No. 93, Intl 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).

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

These obituaries proved to be premature. Like a phoenix rising from the ashes, calls for a "color-blind society" are again sweeping the nation. 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." 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." 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," 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." 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

10. Id.
nation with "the deadly virus of tribalism" by voting to eliminate affirmative action hiring and admissions.

On June 12, 1995, the Supreme Court added its voice to this clamor. In Adarand Constructors, Inc. v. Pena, the Court, by a five-to-four vote, refused for the first time to uphold a congressionally approved affirmative action plan. The program at issue, the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), 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. 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, a 1990 Supreme Court decision that made use of "a lenient standard, resembling intermediate scrutiny, in assessing the constitutionality of federal race-based action." Adarand, however, did not invalidate the STURAA set-aside. Rather than apply strict scrutiny review to Adarand Constructors' challenge to the STURAA program, the Court sent the dispute back to the district court.
court where it had originated.\textsuperscript{20}

\textit{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, \textit{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. \textit{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."

\textsuperscript{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.\textsuperscript{22} For its part, the Clinton Justice Department embraced \textit{Metro Broadcasting, Inc. v. FCC},\textsuperscript{23} referring to "Congress's broad powers in matters of race" and its status as "a co-equal branch."\textsuperscript{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,"\textsuperscript{25} the Clinton Administration argued that Congress's decisions should be accorded "great weight."

\textit{Adarand} rejected both the Clinton Administration's \textit{laissez-faire} approach to federal affirmative action programs and Mountain States' call for "the most rigid scrutiny."\textsuperscript{26} The Court set-

\begin{itemize}
\item 20. \textit{Id.} at 2118.
\item 22. \textit{See id.} at 18.
\item 23. 497 U.S. 547 (1990).
\item 25. \textit{Id.} at 36.
\item 26. \textit{Id.} at 35 (quoting Fullilove v. Klutznick, 448 U.S. 448, 472 (1980)).
\item 27. \textit{See Adarand}, 115 S. Ct. at 2117. In \textit{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." \textit{Metro Broadcasting, Inc. v. FCC}, 497 U.S. 547, 565 (1990).
\end{itemize}
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. At the same time, Adarand sought to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" 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."

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," "jeopardiz[ing] a broad range of federal affirmative action programs." 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. 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" and heralded as "historic," "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.
tal moral and constitutional principles of nondiscrimination.\textsuperscript{36}

Some of \textit{Adarand}'s early reviews, however, dismissed the decision as inconsequential. For the \textit{New York Times}'s Linda Greenhouse and columnist Charles Krauthammer, \textit{Adarand} was "very nearly beside the point"\textsuperscript{37} and "insignificant"\textsuperscript{38} because it is in the "[world of politics,] not the courtroom, where the fate of affirmative action will ultimately be decided."\textsuperscript{39} George Will also questioned the decision's reach, condemning the Court for "settling nothing" because it was so "tangled in the toils of its hairsplitting reasoning . . . [and] so mesmerized by its classifications that do not helpfully classify."\textsuperscript{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"\textsuperscript{41} and criticize "[exaggerated claims about the end of affirmative action—whether in celebration or dismay."\textsuperscript{42}

No doubt, the reach and limits of \textit{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"\textsuperscript{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 \textit{Adarand}, at least for the time being, will be settled in the political arena. In particular, elected officials will interpret \textit{Adarand} to fit their policy objectives, and, in all likelihood, \textit{Adarand}'s meaning will be defined more by these political forces than by lower court judges' sorting out an ambiguous Supreme

\textsuperscript{38}Charles Krauthammer, \textit{Affirmative Action: Settle It Out of Court . . .}, WASH. POST, June 16, 1995, at A25.
\textsuperscript{39}Greenhouse, \textit{supra} note 37, at A1.
\textsuperscript{40}George Will, \textit{Latest Court Ruling Settles Nothing}, TIMES-PICAYUNE (New Orleans), June 14, 1995, at B7.
\textsuperscript{41}Patrick Downplays Impact of Adarand, Wash. Insider (BNA) (June 16, 1995), available in LEXIS, BNA library, Bnawt file.
\textsuperscript{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. 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.

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

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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*. 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

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

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. 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.” Echoing this sentiment, Reagan’s first and only Civil Rights Division head, William Bradford Reynolds, décried 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).
tistical formula designed to provide to nonvictims of discrimination preferential treatment."

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. At the same time, the Court barred layoffs of senior nonminority employees and state-sponsored nonremedial set-asides.

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, 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. One year later, in Johnson v. Transportation Agency, the Court’s approval of a public employer’s affirmative action plan under Title VII was


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

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56. See id. at 620 n.2. For a more detailed treatment of Johnson’s limits, see Devins, supra note 48, at 365-71.
58. Id. at 581.
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).
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. 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 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 Counsels, 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 1-48 (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.


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, states and municipalities successfully narrowed the potential effect of Croson and Stotts, sometimes by acting and other times by refusing to act. 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. Although some evidence suggests that some of these studies were results-driven, 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. In other words, while Croson was not without effect, states and municipalities could nevertheless side-


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).

76. See Engelberg, supra note 75, at A1; Pasztor, supra note 75, at A8.
77. FRIED, supra note 74, at 109-10.
80. Id. at 283-84.
that affirmative action plans grounded in concrete evidence of prior discrimination will sustain that burden.\textsuperscript{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 to\textsuperscript{82} and "a significant victory for civil rights groups"\textsuperscript{83} because it "left the way clear for employers to adopt affirmative action programs in the workplace."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{87}

\textsuperscript{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)).

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


\textsuperscript{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.


\textsuperscript{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).

\textsuperscript{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 Beitz, supra note 48, at 202-03; U.S. Comm'n on Civil Rights, Federal Enforcement of Equal Employment Requirements (1987).

89. See Beitz, 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-

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

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{102}

In his first month in office, Bush narrowly interpreted \textit{City of Richmond v. J.A. Croson Co.},\textsuperscript{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."\textsuperscript{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.\textsuperscript{105} Before the Supreme Court, these appointees turned their words into deeds by vigorously (and successfully) defending diversity preferences in \textit{Metro Broadcasting, Inc. v. FCC}.\textsuperscript{106}

The \textit{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

\textsuperscript{100} For an overview of President Bush's civil rights policies, see \textit{Steven A. Sholl, A KINDLER, GENTLER RACISM?} (1993); Neal Devins, \textit{Reagan Redux: Civil Rights Under Bush}, \textit{68 Notre Dame L. Rev.} 955 (1993); Chester E. Finn, Jr., \textit{Quotas and the Bush Administration}, COMMENTARY, Nov. 1991, at 17.


\textsuperscript{102} Id.

\textsuperscript{103} 488 U.S. 469 (1989).

\textsuperscript{104} The President's News Conference, \textit{1 PUB. PAPERS} 21, 29 (Jan. 27, 1989).

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

\textsuperscript{106} \textit{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. Solicitor General Kenneth Starr urged the Court to invalidate the FCC program. 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.”

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,” the Court found broadcast diversity “at the very least” an important governmental objective. 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.”

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).


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{112} Neal Devins, *Congress, the FCC, and the Search for the Public Trustee*, LAW & CONTEMP. PROBS., Autumn 1993, at 145, 179.
\textsuperscript{113} *Metro Broadcasting*, 497 U.S. at 565.
\textsuperscript{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.
\textsuperscript{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. 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. 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.

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-


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.\footnote{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].} 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.\footnote{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. 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." Congress struck back both at the Department of Justice and at Reagan's judicial appointments. 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."

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."

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.


ufacturers breathed a sigh of relief because "it c[ould] . . . contin-
ue with affirmative action," and the AFL-CIO applauded the rul-
ings as "a tremendous help to push unions to do more.\textsuperscript{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.\textsuperscript{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 employ-
ment discrimination laws.\textsuperscript{128} Whatever the reason, business's
support of affirmative action held steadfast throughout the Rea-
gan and Bush Administrations.

Beyond interest group politics, social forces played a large role
in making affirmative action seem so entrenched during the
reported that affirmative action is "deeply ingrained in American
corporate culture. . . . The machinery hums along, nearly auto-
matically, at the largest U.S. corporations."\textsuperscript{129} Indeed, "it has
been estimated that over two-thirds of American workers are
covered by affirmative action plans under [Executive Order

\textsuperscript{126} Peter Perl, \textit{Employers, Unions Welcome Decisions}, \textit{WASH. POST}, July 3, 1986,
at A1. Along the same line, the Supreme Court's approval of certain types of volun-
tary affirmative action plans in \textit{Steelworkers v. Weber}, 443 U.S. 193 (1979), rein-
fforced the business community's desire to strengthen affirmative action hiring and
promotion, \textit{see Belz, supra note 48; Note, supra note 125.}

\textsuperscript{127} Gary Lee, \textit{Behind Closed Doors, Civil Rights Compromise}, \textit{WASH. POST}, Apr.
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. \textit{See Joan Biskupic, Job Discrimination Legislation Roils
Business Community}, 49 CONG. Q. WKLY. REP. 989, 989 (1991) (noting conflict be-
tween big and small businesses over the 1991 Act).

\textsuperscript{128} \textit{See Belz, supra note 48, at 197-98; Note, supra note 125. See generally Mi-
chael Selmi, Testing for Equality: Merit, Efficiency, and the Affirmative Action De-
bate}, 42 UCLA L. REV. 1281 (1995) (discussing why employers may benefit from
voluntary affirmative action programs).

\textsuperscript{129} \textit{Race in the Workplace: Is Affirmative Action Working?}, \textit{BUS. WK.}, July 8, 1991,
at 56.
Furthermore, although a 1986 study revealed that eighty percent of whites opposed race preferences in hiring and promotion, 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.'" 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. If anything, during the Reagan and Bush years, widespread support for affirmative action resulted in an expansion of existing affirmative action programs. 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. 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. 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 role in the affirmative action debate.

130. Schwartz, supra note 4, at 546.
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. 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. 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. Adarand Constructors, Inc. v. Pena 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. 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.


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*\textsuperscript{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,"\textsuperscript{143} thereby overturning *Metro Broadcasting's* intermediate review standard for congressionally mandated affirmative action.\textsuperscript{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."\textsuperscript{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"\textsuperscript{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*.\textsuperscript{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."\textsuperscript{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.

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\textsuperscript{142} 497 U.S. 547 (1990).
\textsuperscript{143} *Adarand*, 115 S. Ct. at 2111.
\textsuperscript{144} Id. at 2111-12.
\textsuperscript{145} Id. at 2111.
\textsuperscript{146} Id. at 2109.
\textsuperscript{147} Id. at 2111-13.
\textsuperscript{148} Id. at 2117 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)).
\end{flushleft}
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. 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, which approved a Carter-era set-aside provision in 1980, 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. For this reason,
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-

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154. Id.
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).
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

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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 45.
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").
Administration's specification that "members of minority groups . . . are entitled to a race-based presumption of social and economic disadvantage."

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. Responding to these allegations, Congress held hearings on both set-aside abuse and the ways in which set-asides had helped minority businesses. 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." 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. 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)).
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.\footnote{448 U.S. 448 (1980).}

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"\footnote{Id. at 491.} 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.\footnote{Adarand Constructors, Inc. v. Pena, 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.} 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.\footnote{See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490-91 (1989).} First, Fullilove reflected "appropriate deference to the Congress, a co-equal branch"\footnote{Id. at 487 (quoting Fullilove, 448 U.S. at 472).} and, more fundamentally, the branch that is "expressly charged by the Constitution with competence and authority to enforce equal protection guarantees."\footnote{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).} Second, the Fourteenth Amendment "stemmed from a distrust of state legislative enactments based on race," a factor inapplicable to federal enactments.\footnote{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. 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. 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, Metro Broadcasting rested exclusively on the broadcast diversity objectives of the FCC preference.

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


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).

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

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. 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. 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" and "dispel[ling] the notion that strict scrutiny is 'strict in theory, but fatal in fact'" 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." 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*.

Its stated purpose—to remedy discrimination—is more compelling than the "fair share" arguments made by the sponsor of the *Fullilove* set-aside. 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. 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, *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

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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.\(^\text{192}\) 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.\(^\text{193}\) 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,\(^\text{194}\) it certainly is conceivable that the FCC preference could be upheld as a relatively inobtrusive way of advancing a compelling governmental interest.\(^\text{195}\)

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\(^{192}\) 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 guid-
ance. 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 solu-
tion, 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 mid-
dle-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 risk-
ing severe political repercussions. Moreover, like Casey's substi-
tution of an opaque undue burden standard of review for Roe's
stringent, but easily applied, trimester standard, Adarand re-
jects 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

Raises Stakes on the Issue, BALT. EVENING SUN, June 14, 1995, at 2A.
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 con-
stitutional right to terminate her pregnancy (which is entitled to stare decisis pro-
tection) 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 pro-
tection. 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."\textsuperscript{200}

C. Adarand and the Ongoing Debate over Affirmative Action

Even before its June 1995 release, \textit{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";\textsuperscript{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.\textsuperscript{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."\textsuperscript{203}

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


\textsuperscript{201} The quotation is borrowed from Charles Galvin, \textit{More on Boris Bittker and the Comprehensive Tax Base: The Practicalities of Tax Reform and the ABA's CSTR}, in B. Bittker \textit{et al.}, \textit{A Comprehensive Income Tax Base?} 39 (1968).


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. 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. 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. 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.

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. . . ." 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."

Along these lines, affirmative action supporters have found Adarand to be "helpful in shifting the terms of the debate on affirmative action in Congress." 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." In so doing, Murray made Gramm's bill appear extreme, going well beyond Adarand. 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.

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.
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.\textsuperscript{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,\textsuperscript{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."\textsuperscript{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).\textsuperscript{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,\textsuperscript{217} the White House sought to shore up its minority base and neutralize Jackson through its vigorous public support of affirmative action.\textsuperscript{218} As part of this effort, the executive

\textsuperscript{214} See Merida, \textit{supra} note 212, at A13.
\textsuperscript{215} Id.
\textsuperscript{217} Consider, for example, the American Bar Association's August 9, 1995, decision to endorse affirmative action programs that "eliminate or prevent discrimination." See Saundra Toffy, \textit{ABA Body Backs Endorsement of Affirmative Action}, WASH. POST, Aug. 10, 1995, at A3.

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. Beyond creating the factual predicate to support the constitutionality of existing affirmative action programs, 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.”

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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-asides 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, 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, 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," 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. To muddy the waters even

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 “[a]ffirmative 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.

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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*, 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. When the Court finally spoke, in *Regents of the University of California v. Bakke*, it issued a decision so fractured that no member of the Court joined Justice Lewis Powell's decisive lead opinion. 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.

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. Nonetheless-

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)).
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. 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." 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."

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," 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-

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. 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.