WRITING OFF RACE

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I

INTRODUCTION

The constitutionality of affirmative action has now become one of the central topics in the politics of race. Ironically, the United States Constitution says absolutely nothing about affirmative action. The text never mentions the term, and the equal protection language in the Fourteenth Amendment simply begs the question of whether equality requires or precludes the use of affirmative action.[1] The intent of the Framers is similarly unhelpful. We know that the drafters of the Fifth Amendment owned slaves,[2] and the drafters of the Fourteenth Amendment envisioned a racially stratified society.[3] But the Fourteenth Amendment was itself an affirmative action measure,[4] and few of us think that the racial prejudices of the Framers should continue to govern contemporary race relations. There are a host of fancier, non-interpretivist constitutional theories, including structural theories, moral theories, civic-republican theories, representation-reinforcement theories, public-choice theories, and postmodern critical-race theories,[5] but none has sufficiently broad support to claim status as the one "authentic" approach to constitutional interpretation. Rather, they are parochial overlays imposed on a Constitution that is best understood as defining the terms of engagement for political bargaining. Given the increasingly transparent dominance of political policy considerations

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1. *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

2. *See* DONALD L. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS 1765-1820, at 209, 210, 244-46 (1971), *quoted in* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 496-97 (3d ed. 1996).

3. *See* Plessy v. Ferguson, 163 U.S. 537, 544-46 (1896) (noting that the object of 14th Amendment was not to abolish distinctions based on color, or to enforce social equality); *see also* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 346-411 (1988) (discussing racial stratification during Reconstruction).

4. Although written in race-neutral terms, the intent of the 14th Amendment was to provide missing legal protections for former black slaves and to authorize Congress to enact protective legislation for blacks. *See* STONE ET AL., *supra* note 2, at 505-08. The Reconstruction legislation enacted contemporaneously with the Reconstruction amendments, which included various Freedmen's Bills, provided special assistance to blacks. *See* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 755-83 (1985).

5. Many of these theories are described in MICHAEL J. GERHARDT ET AL., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES (2d ed. 2000). *See also* JOHN H. GARVEY & T. ALEXANDER ALEINIKOFF, MODERN CONSTITUTIONAL THEORY: A READER (4th ed. 1999); MICHAEL J. GLENNON ET AL., A CONSTITUTIONAL LAW ANTHOLOGY (2d ed. 1997).

in Supreme Court constitutional adjudication, it is not surprising that recent strands of constitutional scholarship have chosen to advocate judicial minimalism,[6] and even the curtailment of judicial review.[7]

Because the Constitution says absolutely nothing about affirmative action, the Supreme Court should have absolutely nothing to say about it either. Rather, the political branches should set the nation's affirmative action policy, and they should do so with political leadership provided by the President. President Clinton has both advocated and actively practiced affirmative action to the extent that he could do so without offending the racial policy preferences of the Supreme Court. But he has failed to perform a presidential function that has even greater constitutional significance. He has failed to contest the Supreme Court's usurpation of racial policymaking power from the political branches of government.

II

CLINTON'S SUPPORT OF AFFIRMATIVE ACTION

Proponents of affirmative action believe that the nature of racial discrimination in the United States is such that only the race-conscious reallocation of resources can promote racial equality. They think that race-neutral, colorblind approaches to civil rights will simply perpetuate the existing inequalities that have been imposed on racial minorities throughout the history of the nation. However, opponents of affirmative action believe that colorblind remedies for past discrimination can eventually provide equal opportunities for oppressed minorities. They think that race-conscious remedies will simply replicate in reverse the racial discrimination of the past. Although the political debate about affirmative action seems largely intractable, President Clinton has chosen to side with the proponents of affirmative action. After a formal review of the nation's affirmative action programs, the President formally adopted a "mend it/don't end it" policy, in the belief that a continued commitment to

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6. *See, e.g.*, CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996) (favoring "incompletely theorized agreements" over comprehensive or definitive judicial resolutions of controversial political issues); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) (favoring narrow Supreme Court decisions that permit democratic reflection by the elected branches); Cass R. Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996); *see also* Robert P. George, *Law, Democracy, and Moral Disagreement*, 110 HARV. L. REV. 1388 (1997) (book review) (favoring political over judicial resolutions of morally charged political conflicts).

7. *See generally* MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (disfavoring judicial review); Mark V. Tushnet, *The Hardest Question in Constitutional Law*, 81 MINN. L. REV. 1, 25-28 (1996) (disfavoring judicial review); *cf.* GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA (1993) (arguing that judicial review harms racial minorities). *But see* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (favoring judicial supremacy in constitutional interpretation that binds other branches of government). Professor Klarman has argued, as a positive matter, that judicial review often ends up entailing mere deference to majoritarian political preferences. *See generally* Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997).

affirmative action remained central to the pursuit of racial justice in the United States.[8] He also attempted to make civil rights a priority on the national agenda by creating a blue ribbon Advisory Panel on Race, headed by historian John Hope Franklin, that gave the President specific policy recommendations on ways to promote racial reconciliation and to enhance equal opportunities for racial minorities.[9] Consistent with those actions, President Clinton has made executive and judicial appointments that have provided an unprecedented level of race and gender diversity in the federal government.[10] Although the President has sometimes sacrificed racial minority interests for what appear to be politically opportunistic reasons,[11] no one seems to question his personal commitment to racial equality.[12] President Clinton has supported affirmative action both in theory and in practice, but he could have done more.

What President Clinton has failed to do is to assert the full scope of his constitutional authority to formulate race relations policy for the nation that elected him to be its political leader. In so doing, he has aligned himself with past Presidents who were passive rather than active in the formulation of constitutional policy. It is often convenient for a President to deflect political controversy to the Supreme Court. A President can appease political allies with rhetoric that endorses more than the Court will allow, and can appease political opponents by acquiescing in Court-ordered results that fall short of presidential rhetoric. That is rational behavior for a politician—particularly in the contemporary environment of designer politics, where rhetorical labels seem to matter at least as much substantive outcomes. It is rational, but it may also be unconstitutional.

III

CLINTON'S CONSTITUTIONAL OBLIGATION

The structure of the Constitution distinguishes between legal issues that are appropriate for judicial resolution, and policy issues that are appropriate for resolution by the democratically elected branches of government. John

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8. *See* CITIZENS COMMISSION ON CIVIL RIGHTS, THE TEST OF OUR PROGRESS: THE CLINTON RECORD ON CIVIL RIGHTS 5-11 (1999); Steven H. Holmes, *Politics; On Civil Rights, Clinton Steers Bumpy Course Between Right and Left*, N.Y. TIMES, Oct. 20, 1996, at 16.

9. *See* CITIZENS COMMISSION ON CIVIL RIGHTS, *supra* note 8, at 7; Holmes, *supra* note 8, at 16.

10. *See* CITIZENS COMMISSION ON CIVIL RIGHTS, *supra* note 8, at 5; Holmes, *supra* note 8, at 16.

11. President Clinton withdrew his nomination of Lani Guinier to head the Civil Rights Division of the Justice Department, and delayed filling other key civil rights posts, because of conservative political opposition. He also signed a controversial Welfare bill that would adversely affect the interests of the minority poor. In an attempt to create the impression that he was tough on crime during his first presidential campaign, Clinton left New Hampshire before that state's primary and returned to Arkansas to preside over the execution of Ricky Ray Rector, a mentally impaired black man who was convicted of killing a white police officer. During the same campaign, Clinton gratuitously criticized black rap artist Sister Souljah at Jesse Jackson's Rainbow Coalition convention. In general, minorities fear that he is likely to behave in a manner that is more politically expedient than principled. *See* Holmes, *supra* note 8, at 16.

12. From his early childhood, President Clinton has been involved in, familiar with, and comfortable with black culture. *See id*.

Marshall recognized the distinction in *Marbury v. Madison*[13] when he disclaimed judicial authority to resolve issues that were political in nature.[14] Over time, however, the distinction between constitutional law and ordinary politics has eroded. The Supreme Court has exercised unconstrained policymaking discretion whenever it thought it could do a better job than the elected branches of defusing political controversy. *Dred Scott*,[15] *Lochner*,[16] *Brown*,[17] *Miranda*,[18] and *Roe v. Wade*[19] are the most obvious examples of Supreme Court policymaking, but the Supreme Court's affirmative action cases also fall into this category. In routinely invalidating affirmative action programs, the Court has chosen to substitute its aversion to affirmative action for the policy preferences of the political bodies that adopted those programs. Such judicial activism offends the most fundamental structural safeguards of the Constitution—just as it did in cases like *Dred Scott* and *Lochner*. But so does presidential acquiescence in such judicial activism.

When a President acquiesces in the Supreme Court's usurpation of policymaking discretion, that President fails to operate in a manner that is consistent with constitutional separation of powers safeguards. The undemocratic, countermajoritarian difficulties inherent in Supreme Court policymaking suggest that the Court should not read its policy preferences into the Constitution, but if it does, the Court's policy preferences should certainly not be deemed dispositive. They should merely be the starting point for further political debate between the Court and the representative branches of government. Thomas Jefferson understood this when he emphasized that the Constitution no more gave the Supreme Court the right to impose its version of constitutional meaning on the President than it gave the President the right to impose his version of constitutional meaning on the Court. Each branch took an oath to uphold the Constitution, and each had the final say over constitutional interpretation within its own sphere of authority.[20] Andrew Jackson adopted a comparable position when he vetoed legislation to recharter the Bank of the United States because he disagreed with the Supreme Court's conclusion about the bank's constitutionality.[21] He added force to this position when his political intimidation apparently dissuaded the Supreme Court from

13. 5 U.S. (1 Cranch.) 137 (1803).

14. *See id.* at 166 (finding that courts do not have power to examine the exercise of executive discretion regarding political issues).

15. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856).

16. Lochner v. New York, 198 U.S. 45 (1905).

17. Brown v. Board of Educ., 347 U.S. 483 (1954).

18. Miranda v. Arizona, 384 U.S. 436 (1966).

19. 410 U.S. 113 (1973); *see also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 867 (1992) ("[T]he Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.").

20. *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 20-27 (13th ed. 1997); STONE ET AL., *supra* note 2, at 53-57.

21. *See* GUNTHER & SULLIVAN, *supra* note 20, at 21-22; STONE ET AL., *supra* note 2, at 53-57.

recognizing Cherokee sovereignty out of fear that the Court's ruling might be politically defied.[22]

Abraham Lincoln conceded that the Supreme Court's interpretation of the Constitution in *Dred Scott* was binding on the parties before the Court, but he argued that the Court's decision could not be deemed binding on the representative branches in other cases without denying the people their constitutional power of representative self-governance. The representative branches had the political right to resist the Supreme Court's constitutional interpretations in the hope that the Court would reverse itself in subsequent cases.[23] In fact, this view seems to follow from the Supreme Court's own *Marbury*-based insistence that the scope of federal judicial power is confined by the case or controversy provision of Article III to the resolution of particular disputes, and does not extend to the issuance of prospective legislative-type policy pronouncements.[24]

A modern incarnation of this view in a statutory context is the nonacquiescence in lower court policymaking that was practiced by some administrative agencies during the Reagan Administration.[25] Franklin D. Roosevelt enlarged upon Lincoln's view in concluding that he would defy an adverse Supreme Court decision in the *Gold Clause Cases*.[26] He then went on to make history by proposing his Court-packing plan, which successfully neutralized Supreme Court political opposition to his New Deal legislation.[27] In *Cooper v. Aaron*,[28] the Supreme Court declared itself to be the final expositor of constitutional meaning,[29] but that judicial declaration does not answer the question of Supreme Court finality; it simply begs it.

Separation of powers requires a President to check and to balance Supreme Court usurpations of political policymaking power. It does not authorize a President to abdicate policymaking responsibility to a politically unaccountable Court. Although President Clinton has forcefully asserted his support for race-conscious affirmative action, he has declined to challenge the Court's political rejection of his views. Instead, he has acquiesced in the Court's conclusion that colorblind, race neutrality is virtually always a constitutional requirement.[30] If

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22. *See* RICHARD H. CHUSED, CASES, MATERIALS AND PROBLEMS IN PROPERTY 20-35 (1999); GUNTHER & SULLIVAN, *supra* note 20, at 24; Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1979-80 n.24 (1990); *see also* Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics and Morality*, 21 STAN. L. REV. 500 (1969).

23. *See* GUNTHER & SULLIVAN, *supra* note 20, at 22; STONE ET AL., *supra* note 2, at 53-57.

24. *See* FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 67-92 (4th ed. 1996).

25. *See* RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 414-16 (3d ed. 1998).

26. *See* GUNTHER & SULLIVAN, *supra* note 20, at 23; STONE ET AL., *supra* note 2, at 53-57.

27. *See* GUNTHER & SULLIVAN, *supra* note 20, at 183-85; STONE ET AL., *supra* note 2, at 215.

28. 358 U.S. 1 (1958).

29. *See id*. at 17-20; *see also* GUNTHER & SULLIVAN, *supra* note 20, at 25-27; STONE ET AL., *supra* note 2, at 53-54.

30. Notwithstanding Supreme Court dicta to the contrary, *see* Adarand Constructors v. Pena, 515 U.S. 200, 237 (1995) (noting that strict scrutiny is not necessarily fatal scrutiny), the strict equal

President Clinton disagrees with that conclusion—as do the four Supreme Court Justices who routinely dissent in the Court's affirmative action cases[31]—he should use the political means at his disposal to challenge the Supreme Court's rulings. Like Presidents Jefferson, Jackson, Lincoln, and Roosevelt, he should actively resist the Court's claim to finality in constitutional exposition, and he should dispute the Court's right to impose its own political preferences on the rest of the nation.

IV

CLINTON'S CONSTITUTIONAL DEFAULT

There are at least three recent cases in which the President could have done more than he did to reclaim political leadership from the Court. In *Adarand Constructors v. Pena*,[32] the Supreme Court first applied strict scrutiny to a benign federal affirmative action program. The program granted favorable treatment to socially and economically disadvantaged construction contractors, but it also adopted a rebuttable presumption that women and racial minorities were socially and economically disadvantaged. The Court held that the racial presumption was subject to strict scrutiny.[33] On remand, the district court invalidated the presumption on the ground that it was not narrowly tailored enough to survive strict scrutiny.[34] The President appealed, but argued that the case had become moot when the white male plaintiff was ultimately granted the status of a disadvantaged contractor. Although the plaintiff argued that it had been granted this status only because of the district court order invalidating the race and gender presumption on remand, the Tenth Circuit held that the case had become moot and vacated the district court order.[35] It is not clear whether the federal government was implicated in the actions that assertedly made the case moot.[36] However, the President could have taken a more forceful political position by defending the affirmative action plan on its merits rather than seeking a dismissal on the ground of mootness.[37] The *Adarand* program

protection scrutiny now applied to racial affirmative action has always proven to be fatal since the Court's now-discredited decision in Korematsu v. United States, 323 U.S. 214 (1944). *See* STONE ET AL., *supra* note 2, at 601.

31. Justices Stevens, Souter, Ginsburg, and Breyer typically dissent in Supreme Court decisions that invalidate affirmative action programs. *See* GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES 156-63 (2000) (discussing Supreme Court affirmative action voting blocs); Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1, 18-21 (1995) (discussing Supreme Court affirmative action voting blocs).

32. 515 U.S. 200 (1995).

33. *See id.* at 205-10.

34. *See* Adarand Constructors v. Pena, 965 F. Supp. 1556, 1558-59, 1577-84 (D. Colo. 1997).

35. *See* Adarand Constructors v. Slater, 169 F.3d 1292, 1296-99 (10th Cir. 1999).

36. A state agency conferred a favorable status on the plaintiff, but the plaintiff argued that the federal government's involvement made the case analogous to cases in which the party seeking a mootness declaration was itself the one who had caused the case to become moot. *See id*. at 1298-99.

37. To the extent mootness is jurisdictional, the President could have argued that the voluntary cessation exception to the mootness doctrine was triggered by the state-agency decision certifying the

presented perhaps the strongest affirmative action case imaginable. The affirmative action program at issue consisted of only a rebuttable presumption that women and racial minorities had been socially and economically disadvantaged. If such an obviously accurate presumption offends the Constitution, the President should have forced the Supreme Court to say so, and to retract its *Adarand* dicta promising that strict scrutiny is not necessarily fatal scrutiny.[38] The political process could then respond to such a *Plessy*-type judicial pronouncement as it deemed appropriate.[39]

The second case in which the President could have done more to advance his affirmative action agenda is *Coalition for Economic Equity v. Wilson*,[40] a case in which the lower courts split over the constitutionality of Proposition 209, the 1996 California voter initiative that prohibited state agencies from engaging in race or gender affirmative action. The Clinton Administration challenged the constitutionality of Proposition 209 as an *amicus curiae* in the Court of Appeals,[41] but declined to urge the Supreme Court to grant review of a Ninth Circuit decision upholding the initiative against the claim that its purported neutrality actually constituted racial discrimination.[42] The Supreme Court denied review and permitted Proposition 209 to take effect.[43] This time President Clinton passed up the opportunity to press the Court to decide whether the Constitution allows facial neutrality to be used as a device to freeze existing inequalities into law. Again, if the Supreme Court thinks this to be the case, the President should force the Court to say so, thereby permitting the political process to fashion an appropriate response.

The third case in which the President could have taken more forceful political action to advance his stated affirmative action goals is *Taxman v. Piscataway Township Board of Education*.[44] A Title VII case with equal protection overtones, *Taxman* squarely presented the issue of whether a public school affirmative action plan could take racial diversity into account when deciding which of two teachers with equal qualifications and equal seniority had to be laid off for budgetary reasons.[45] The *Taxman* challenge to the Piscataway

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plaintiff as disadvantaged. *See id*; *see also* FALLON ET AL., *supra* note 24, at 219-20 (discussing the voluntary cessation exception). The Supreme Court ultimately adopted this reasoning in reversing the Tenth Circuit decision and remanding the case for further proceedings on the merits. *See* Adarand Constructors v. Slater, 120 S. Ct. 722 (2000).

38. *See Adarand*, 515 U.S. at 237 (stating that strict scrutiny is not necessarily fatal scrutiny).

39. In Plessy v. Ferguson, 163 U.S. 537, 544-46 (1896), the Supreme Court adopted the obviously fictitious position that racial segregation in 1896 Louisiana did not imply the inferiority of blacks.

40. 122 F.3d 692 (9th Cir.), *cert. denied*, 522 U.S. 963 (1997).

41. *See* Coalition for Econ. Equity, 122 F.3d at 703 (stating the position of United States as *amicus curiae*).

42. *See* Coalition for Econ. Equity, 522 U.S. 963 (1997) (granting leave to file amicus briefs to petitioners not including the United States).

43. *See id*. (denying certiorari).

44. 91 F.3d 1547 (3d. Cir. 1996) (en banc), *cert. granted*, 521 U.S. 1117, *cert. dismissed*, 522 U.S. 1010 (1997).

45. *See Taxman*, 91 F.3d. at 1551-52 (describing the facts of case). Where public employers are involved, as in the *Taxman* case, the impermissible consideration of race could raise equal protection issues independent of the Title VII issues that were before the *Taxman* court.

affirmative action plan was originally filed by the Justice Department during the Bush Administration. However, while an appeal from a district court decision invalidating the plan was pending in the Third Circuit, the Clinton Justice Department withdrew from the case after the Third Circuit denied its request to switch sides and support the affirmative action plan. When the Third Circuit affirmed the district court invalidation of the Piscataway plan, President Clinton directed the Justice Department to switch sides again and ask the Supreme Court not to grant review. The Supreme Court granted review nevertheless, and the Justice Department argued that the Piscataway affirmative action plan should be invalidated because it did not fall within the narrow range of circumstances in which race could be considered for non-remedial purposes. Deprived of the Administration's support, the school board settled the case at the urging of civil rights groups who feared an adverse Supreme Court precedent, and the Supreme Court dismissed the case as moot.[46] President Clinton was presumably trying to preserve some modicum of affirmative action from invalidation by a blunderbuss Supreme Court affirmance, but his action is most noteworthy for its willingness to let the Supreme Court dictate the terms of the political debate about affirmative action. Once again, the President passed up an opportunity to litigate a very strong affirmative action case, this time raising the issue of whether racial diversity can ever be considered in an educational context. If the Supreme Court thinks that the goal of racial diversity is unconstitutional, then the President should force the Court to say so, thereby permitting the political process to respond accordingly.

One might wonder—as the President and some civil rights organizations apparently do—whether it is preferable to evade adverse Supreme Court precedents in the hope of fighting another day before a more hospitable Court. That, however, seems to concede the very separation of powers question at issue. My point is that the President and the political branches of the federal, state, and local governments should be the ones making political policy—not the Supreme Court. If the Court is successfully able to chill the political branches into self-censoring their own political preferences, the Court will succeed in dominating the political policymaking process just as surely as when it directly overrides majoritarian political preferences. Indeed, the thrust of my argument is that such presidential self-censorship in order to avoid a political confrontation with the Supreme Court is a passive abdication of presidential power.

I have argued that President Clinton could have challenged the Supreme Court's usurpation of affirmative action policymaking power by adopting a more aggressive Supreme Court appeal policy, but there are even more forceful political actions the President can take to reclaim political power from the Court. Once one ceases to view the Supreme Court as the final expositor of constitutional meaning, Supreme Court decisions can be recognized as mere

46. The procedural history of *Taxman* is described in SPANN, THE LAW OF AFFIRMATIVE ACTION, *supra* note 31, at 69-78.

opening gambits in an ongoing political negotiation between the Court and the representative branches. As a result, forceful political action that might seem inappropriate in response to an apolitical Supreme Court adjudication emanating from constitutional principle re-emerges as an appropriate political check on Supreme Court political policymaking excesses.

For example, if the Supreme Court declares that the Constitution prohibits a legislature from presuming that women and minorities are disadvantaged, or that the Constitution prevents a school board from pursuing diversity in an educational context, a President who favors affirmative action could denounce those decisions in a manner designed to be politically efficacious. The President could object to the Court's decisions not only as bad policy, but also as illegitimate exercises of democratic policymaking power that the Supreme Court does not possess under our constitutional scheme of governance. He could also announce that, consistent with the case or controversy requirement of Article III, adverse Supreme Court affirmative action decisions will be narrowly construed in situations where even slight variations in facts are arguably material. The fact that *Adarand* might invalidate an affirmative action presumption for Latinos in Colorado does not therefore mean that *Adarand* invalidates a similar presumption for blacks in Alabama or Asians in New York. Different groups in different states might have different levels of disadvantage or different histories of discrimination. This policy of non-acquiescence would give the Court many opportunities to reconsider the constitutional soundness of its rulings in the varying factual contexts of the many subsequent cases with which the Court will be presented.

The President could propose legislation to strip the Court of appellate jurisdiction to invalidate affirmative action programs adopted by the political branches, and could stress the need for such legislation to restore the proper balance of power between the Court and the political branches of government. The President could also initiate a national discussion of whether impeachment is an appropriate remedy for Supreme Court Justices who persist in their efforts to usurp policymaking power in defiance of the separation of powers safeguards envisioned by the Framers. If impeachment is an appropriate remedy for presidential transgressions that are minor and personal in nature, it is an even more appropriate remedy for judicial transgressions that are constitutional and antidemocratic in nature. In addition, the President could propose an affirmative action amendment to the Constitution that would preclude future Courts from invalidating affirmative action programs adopted by the democratically accountable branches of government. By taking such forceful actions to exert political pressure on the Court, the President would be adding to the legacy of those dynamic past Presidents who refused to permit their political agendas to be undermined by the policy preferences of Supreme Court Justices who happened to have different political tastes. Presumably, the Supreme Court would eventually conclude that its aversion to affirmative action was out of step

with majoritarian views on affirmative action, and the Court would have the wisdom to bring its current *Lochner* era to an end.[47]

V

CONCLUSION

At this point one might well wonder whether President Clinton—or indeed the American public—is sufficiently committed to the concept of racial affirmative action to warrant the political confrontation with the Supreme Court that I have advocated. The American public does seem to be intensely confused and profoundly ambivalent about affirmative action. Polls indicate that public support for affirmative action varies most strongly with how the polling questions happen to be phrased.[48] That is precisely why political leadership is so important with respect to the affirmative action issue. President Clinton has stated that he favors affirmative action, and that racial reconciliation is a high priority in his Administration. Perhaps this is political posturing, and perhaps his idea of racial reconciliation is the continued sacrifice of minority rights for majoritarian gain. But if we are to take the President at his word when he states that mending affirmative action is an important item on his political agenda, then we can justifiably expect him to take the lead in the formulation of affirmative action policy. We can justifiably urge the President not to abdicate this leadership role to an unelected and unrepresentative Supreme Court. Throughout history, the Supreme Court has invoked the Constitution to nullify gains that racial minorities have obtained through the political process.[49] The Court is doing the same thing today when it invalidates

47. In Lochner v. New York, 198 U.S. 45 (1905), the Supreme Court began a 32-year period during which it invalidated numerous health and safety statutes on the ground that they offended the notion of *laissez-faire* capitalism—a doctrine that the *Lochner* Court "found" to be embodied in the Constitution. The *Lochner* era came to an end when the Court eventually concluded that it was imprudent to continue resisting popular political sentiment for health and safety legislation. *See generally* STONE ET AL., *supra* note 2, at 813-42.

48. *See* DeNeen L. Brown, *Gray in the Debate on Color: Many See Both Sides of Affirmative Action*, WASH. POST, June 5, 1995, at A1 (surveying attitudes on affirmative action); Linda Greenhouse, *Justices, 5 to 4, Cast Doubts on U.S. Programs that Give Preferences Based Upon Race,* N.Y. TIMES, June 13, 1995, at A1 (reporting that affirmative action is the subject of vigorous debate in Congress and states); John F. Harris, *For Clinton, A Challenge of Balance*, WASH. POST, June 14, 1995, at A1 (describing popular ambivalence about affirmative action); Louis Harris, *Affirmative Action and the Voter*, N.Y. TIMES, July 31, 1995, at A13 (stating that Republicans are exploiting confusion among voters between affirmative action, which voters favor, and preferences, which voters do not favor); Nicholas Lemann, *Taking Affirmative Action Apart*, N.Y. TIMES, June 11, 1995, at 36, 39-43, 52-54 (MAGAZINE) (stating that Republicans are exploiting confusion among voters between affirmative action, which voters favor, and preferences, which voters do not favor).

49. For example, in Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), the Supreme Court invalidated a Pennsylvania statute prohibiting the forcible removal without judicial process of blacks from the state for the purpose of detaining them as slaves, finding the statute to interfere with the property rights of slave owners. In Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), the Supreme Court invalidated the Missouri Compromise prohibition on slavery in certain federal territories, also on the ground that the Constitution protected the property rights of slave owners. In the Civil Rights Cases, 109 U.S. 3 (1883), the Supreme Court invalidated the public accommodations provisions of the Civil Rights Act of 1875, and imposed a state-action requirement on the 14th Amendment that made southern states, rather than the federal government, the primary guarantors of civil rights. *See*

affirmative action programs that were adopted by the political branches of government. The Constitution does not authorize the Court to supplant popular politics with Supreme Court politics. Rather, it authorizes the President to ensure that the Court remains within the adjudicatory realm by giving the President the political power to check judicial incursions into the policymaking realm. When the President declines to exercise this political power to protect affirmative action, one not only wonders whether the President is writing off race, but one also begins to wonder whether he is writing off our constitutional form of government as well.

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generally STONE ET AL., *supra* note 2, at 501-12.