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COLOR-CODED STANDING

INTRODUCTION

Remarkably, the Supreme Court has held that whites who wish to challenge the constitutionality of affirmative action plans have standing to do so. In Northeastern Florida Chapter of the Associated General Contractors v. City of Jacksonville, [1] the Supreme Court upheld the standing ***1423** of non-minority construction contractors to challenge a minority set-aside program under the Equal Protection Clause of the United States Constitution. What is remarkable is not that the result reached in the case was wrong, but that the Court was able to reach that result given its most recent standing precedents. In previous Terms, the Supreme Court had taken great pains to infuse prohibitively high standing requirements into the law of justiciability so that it could defer to the political process for the resolution of contentious social issues. In Northeastern Florida, however, the Court seemed to sidestep those precedents precisely so that it could supplant political resolution of the contentious social issue of affirmative action.

It is often difficult to explain why a court decides a case the way that it does. Legal realism has left us with a legacy of skepticism concerning the relevance of doctrine in accounting for case outcomes, and postmodern extensions of legal realism to social science theories have generated similar disaffection with most nondoctrinal, social science accounts. But the assertion that

Supreme Court cases are political or result-oriented offers little satisfaction because it does not explain how judges determine what their political or result-oriented preferences require of them in particular cases.

In such an analytical environment, one can only offer observations about decisions and hope that they will resonate with the readers who evaluate them. The observation that I wish to offer is that the Supreme Court's decision in Northeastern Florida is racially suspicious. It is one of a series of racially suspicious decisions that the Supreme Court has issued concerning the issue of standing. In fact, close examination suggests that the Supreme Court's standing decisions embody the very sort of racial discrimination that we rely on the Court to prevent.

I have argued in the past that, contrary to popular understanding, the institutional function of the Supreme Court in American culture has consistently been to facilitate the subordination of racial ***1424** minority interests to white majority interests. [2] The array of standing decisions issued by the Court since the New Deal illustrates this veiled majoritarian phenomenon. In fact, the racially correlated outcomes of the cases suggest that if the Supreme Court's racial discrimination standards were applicable to the Court's treatment of standing, the Supreme Court's standing decisions would violate its own nondiscrimination norms.

When minority plaintiffs file programmatic challenges to widespread patterns of racial discrimination, the Court typically denies standing because the plaintiffs cannot demonstrate a sufficient likelihood of particularized gain resulting from a favorable judgment. Such a showing is required to establish a justiciable "case" or "controversy." [3] However, when nonminority plaintiffs file similar programmatic challenges to affirmative action programs, the Court typically grants standing, even though the plaintiffs are equally unable to demonstrate a high likelihood of particularized gain.

The distinctions that the Court offers to justify this racially disparate treatment are too tenuous to survive the level of scrutiny that the Court applies to nongovernmental actors under Title VII of the Civil Rights Act of 1964. [4] Moreover, when the racially correlated character of the Court's standing decisions is combined with evidence about the Supreme Court's racial attitudes, which can be gleaned from other civil rights decisions, the Supreme Court seems to be engaged in "intentional" discrimination sufficient to violate the Equal Protection Clause. [5] Statutory and constitutional antidiscrimination laws are, however, effectively inapplicable to the Supreme Court. [6] This immunity ***1425** makes the Court a particularly expedient institution for preserving majority control over minority interests.

The Supreme Court is putatively charged with protecting the rights of minorities from invasion by tyrannical majorities. [7] Constitutional history, however, reveals that the actual role played by the Supreme Court has been considerably different. From Dred Scott [8] to Plessy [9] to Brown, [10] the primary concern of the Court in race cases has been the protection of favored majority interests. The Court has even invalidated majoritarian efforts to protect minority rights when those efforts have failed to comport with the Court's conception of majority self-interest. [11] The standing decision in Northeastern Florida is, therefore, best understood as a recent addition to a long line of Supreme Court decisions that subordinate the welfare of racial minorities to the overriding interests of the majority.

Part I of this Article describes the contemporary law of standing, highlighting its antagonism toward programmatic challenges to governmental action, and describes the Court's decision in Northeastern Florida. Part II then demonstrates how difficult it is to square the outcome in Northeastern Florida with the Court's other recent standing decisions. Part III suggests that Northeastern Florida is symptomatic of a more general trend in Supreme Court standing jurisprudence, pursuant to which case outcomes tend to correlate with the plaintiffs' racial interests in a way that would violate both Title VII and the Equal Protection Clause if these provisions applied to Supreme Court decisions. The Article concludes that no matter how strong a showing can be made of Supreme Court racial discrimination, such discrimination is, curiously, inconsequential.

***1426 I**

THE LAW OF STANDING

The law of standing is in a state of notorious disarray. [12] The doctrine was designed to implement the Article III case-or-controversy restriction on federal jurisdiction by limiting the authority of the judiciary to that which was necessary for the redress of justiciable injuries. This limitation, in turn, permitted the politically-unaccountable judiciary to minimize its interference with

the actions of the politically-sensitive, coordinate branches of government. However, a coherent concept of injury has proved to be elusive. As a result, standing rules have not effectively distinguished between proper and improper exercises of judicial authority. Indeed, they have given the Court little guidance and nearly unlimited discretion in making judicial intervention determinations. [13]

One of the Supreme Court's most recent statements of the law of standing was articulated in Northeastern Florida Chapter of the Associated General Contractors v. City of Jacksonville. [14] In Northeastern Florida, a construction trade association challenged the constitutionality of a municipal law that set aside ten percent of the municipality's construction funds for minority contractors. [15] The case presented the Court with what has become a paradigmatic standing problem: an institutional ***1427** plaintiff, with a political or ideological interest in the resolution of a controversial social issue, sought the Court's assistance in the advancement of that interest.

The Northeastern Florida Court first recited a series of stringent requirements for pleading, causation, and redressability that seem designed to minimize private challenges to government programs by ideological plaintiffs who do not suffer traditional injuries. But the Court then applied these requirements to the facts in a way that strained to permit the very type of programmatic challenge that the stringent requirements seem to preclude. As a result, the decision not only contributes confusion to the law of standing, but also raises suspicions about the Supreme Court's motivation.

A. The Law of Northeastern Florida

The standing portion of Justice Thomas's majority opinion in Northeastern Florida begins with the assertion that "[t]he doctrine of standing is 'an essential and unchanging part of the case-or-controversy requirement of Article III,' which itself 'defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded.'" [16] This opening reflects the customary manner in which federal judges begin their discussions of standing; [17] it emphasizes that it would be undemocratic and unconstitutional for politically unaccountable judges to substitute their policy preferences for those of politically accountable legislative and executive officials. [18] The distinction between a justiciable "case" or "controversy" and a nonjusticiable request for judicial intervention turns on the presence of an Article III injury that will be redressed by a favorable decision on the merits. Accordingly, in Northeastern Florida, Justice Thomas summarized the law of standing in the following manner:

> It has been established by a long line of cases that a party seeking to invoke a federal court's jurisdiction must demonstrate three things: (1) "injury in fact," by which we mean an invasion of a legally protected ***1428** interest that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical" [citing Lujan]; (2) a causal relationship between the injury and the challenged conduct, by which we mean that the injury "fairly can be traced to the challenged action of the defendant," and has not resulted "from the independent action of some third party not before the court" [citing Simon]; and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the "prospect of obtaining relief from the injury as a result of a favorable ruling" is not "too speculative" [citing Allen]. These elements are the "irreducible minimum" required by the Constitution. [19]

Justice Thomas thus enumerated three requirements for standing: injury, causation, and redressability.

Since the 1970 companion cases of Association of Data Processing Service Organizations v. Camp [20] and Barlow v. Collins, [21] the injury requirement for standing has meant "injury in fact." "Injury in fact" encompasses real-world injuries, as opposed to the invasion of a formal legal interest, which had previously been required for standing. [22] In Data Processing the Court held that the increased competition confronting data processing firms from expanding national banks was an economic injury sufficient for standing. [23] Likewise in Barlow v. Collins, [24] the Court held that the increased vulnerability of tenant farmers to economic pressure exerted by their landlords constituted an adequate injury for standing. [25]

***1429** Noneconomic harms such as the harm to aesthetic, conservational, recreational, and even spiritual values also satisfy the Court's contemporary conceptions of an Article III injury. [26] In United States v. SCRAP, [27] the Supreme Court found that law students working on a school project suffered a sufficient injury to challenge an Interstate Commerce Commission rate increase by virtue of their exposure to the environmental harms that could result from the rate increase's disincentive effect on recycling. [28] Flast v. Cohen [29] similarly recognized the interest of an individual federal taxpayer in preventing the expenditure of federal funds in violation of the Free Exercise and Establishment Clauses of the First Amendment to be sufficient for standing. [30] Other cases, however, have denied standing for lack of an adequate injury under seemingly similar facts, [31] exacerbating the substantial uncertainty in the law of standing. [32]

The causation and redressability requirements that Justice Thomas enumerated for standing are best understood as dual aspects of a single concern. If an injury is proximately caused by the allegedly unlawful action being challenged, then a judicial remedy will redress that injury, thereby ensuring that the courts are not impermissibly interfering with the political process by issuing advisory dicta. [33] Since 1990, the Court has applied the causation and redressability requirements with extreme stringency. This trend is exemplified by two recent standing opinions written by Justice Scalia.

First, in Lujan v. National Wildlife Federation, [34] the Court denied standing to an environmental plaintiff challenging a decision of the Reagan and Bush Administrations to open federal lands to increased mining, oil, and natural gas exploitation. The plaintiff had submitted affidavits averring recreational use of the lands in question, which would have seemingly been sufficient for standing under SCRAP. Yet Justice Scalia found the affidavits insufficient because they did not identify with particularity which tracts were used by which affiants and ***1430** did not correlate those tracts with particular contemplated leases. [35] As a result, the injury about which the plaintiff complained was deemed speculative, not proximately connected to particular projects, and therefore not sufficiently imminent for judicial redress. [36] The demanding pleading and proof requirements that the Court thus imposed made it difficult for nontraditional plaintiffs to use a single test case to challenge a broad-based governmental program, such as the Republican program to open federal lands to increased exploitation. Only if a particular aspect of a program inflicted a traditionally recognized injury would that aspect of the program be subject to review. [37] Justice Scalia viewed programmatic challenges as inherently political, rather than judicial, in nature. [38]

Second, in Lujan v. Defenders of Wildlife, [39] Justice Scalia fortified the Court's new pleading and proof requirements by giving them constitutional grounding. His opinion denied standing to an environmental group that sought foreign enforcement of the Endangered Species Act because the plaintiff's members had not specified their future plans to view endangered species in foreign countries with sufficient particularity, as required under National Wildlife Federation. [40] Moreover, the plaintiff's desired enforcement of the Act might not result in any enhanced protection of endangered species because the financial incentive scheme of the Endangered Species Act ultimately ***1431** depended upon the actions of third party foreign governments that were not before the Court. Accordingly, the alleged failure to enforce the Endangered Species Act did not produce an injury that was sufficiently redressable to establish standing. [41]

Unlike the statutes involved in National Wildlife Federation, the Endangered Species Act at issue in Lujan had a “citizen suit” provision that granted standing to any citizen to enforce its provisions. [42] Although Justice Scalia recognized that the Court had in the past held that Congress possessed the power to create statutory injuries sufficient for Article III standing, [43] in Lujan, he stated that Congress could not confer standing on a plaintiff who did not suffer a traditional Article III injury independent of the statutorily created right. [44] Again, Justice Scalia appears to have been trying to keep the courts out of political disputes, even when Congress had by statute invited them to participate in the resolution of such disputes. [45]

At the time the Court decided Northeastern Florida, the law of standing had become very strict. A plaintiff could no longer establish standing simply by demonstrating an “injury in fact.” Rather, the plaintiff had to establish, with a high degree of particularity in both pleading and proof, that the injury was proximately caused by the challenged conduct of the defendant; that the injury was imminent; that the plaintiff's challenge was not a programmatic challenge to a general government policy decision; and that the injury would be redressed by a favorable decision on the merits.

B. The Facts of Northeastern Florida

Northeastern Florida presented the Supreme Court with what has become a standard-form challenge to the concept of affirmative action. A trade association representing members of the white majority challenged the constitutionality, under the Equal Protection Clause, of an affirmative action program adopted through the political process ***1432** to benefit racial minorities. [46] Since the Court confronted its first modern affirmative action case in 1974, [47] it has had considerable difficulty with the affirmative action issue. From 1974 until 1989, the Supreme Court was unable to issue a majority opinion resolving the merits of a constitutional affirmative action case. It disposed of the seven equal protection race cases that it considered during this period with one per curiam [48] and six plurality opinions. [49]

Since 1989, however, the Court has issued five majority opinions in affirmative action cases that it has resolved on constitutional ***1433** grounds, [50] ultimately holding that all affirmative action programs -- whether federal, state, or local -- are subject to strict judicial scrutiny. [51] Strict scrutiny has traditionally been fatal scrutiny, suggesting that all affirmative action may now be unconstitutional. [52] However, the Court has also stated that it will cease to treat strict scrutiny as fatal scrutiny, [53] thereby raising the possibility that some affirmative action programs will continue to be upheld in the future, even under the stringent strict scrutiny standards. [54] At the hornbook level of analysis, therefore, it would appear that the Jacksonville set-aside plan at issue in Northeastern Florida now may well be unconstitutional -- if the plaintiffs have standing to challenge its constitutionality. [55]

A municipal ordinance established the Jacksonville plan in 1984, requiring the city to set aside ten percent of the funds expended on municipal contracts during each fiscal year for "Minority Business Enterprises." ***1434** [56] The ordinance required these "MBEs," as they have come to be known, to have at least fifty percent minority or female ownership if privately held and fifty-one percent minority or female ownership if publicly held. [57] The term "minority" was defined to include anyone who considered himself or herself to be "black, Spanish-speaking, Oriental, Indian, Eskimo, Aleut, or handicapped." [58] The plan appears to have been modeled upon the federal set-aside program whose constitutionality the Supreme Court had previously upheld in Fullilove v. Klutznick. [59] To implement the program, the city's chief purchasing officer was to designate certain contracts for MBE bidding, and the designated contracts could be bid upon only by contractors who had been prequalified as MBEs under the procedures specified in the ordinance. [60]

The plaintiff trade association represented the interests of its members, who were individuals and firms engaged in the construction industry in Jacksonville. Because most of the members of the plaintiff organization did not qualify as minorities within the terms of the ordinance, they were not eligible to bid on municipal contracts designated for the minority set-aside. From 1984 to 1989, the first five years during which the program was in operation, $14.6 million in contracts were awarded to racial minorities under the program, comprising approximately two percent of the city's total expenditures. [61]

In 1989 the plaintiff filed suit in the United States District Court for the Middle District of Florida, arguing that the Jacksonville set-aside plan violated the Equal Protection Clause of the Fourteenth ***1435** Amendment both on its face and as applied. [62] Although the program had been in effect for five years, the district court nevertheless issued a temporary restraining order two days after the plaintiff filed the complaint. [63] Fourteen days later, the court issued a preliminary injunction prohibiting the city from giving further effect to the set-aside plan. [64] In March 1990 the United States Court of Appeals for the Eleventh Circuit reversed the district court order on the grounds that the plaintiff had failed to demonstrate irreparable injury and remanded the case for a trial on the merits. [65]

In May 1990, on remand, the district court entered summary judgment for the plaintiff, denied the city's cross-motion for summary judgment, and permanently enjoined the city from further implementing the set-aside program. The court held that the set-aside program was unconstitutional under the Supreme Court's then-recent decision in City of Richmond v. J.A. Croson Co. [66] In January 1992 the Court of Appeals again reversed the district court, this time holding that the plaintiff lacked standing to sue. [67] The Court of Appeals reasoned that the plaintiff lacked standing because it had not established injury of an economic nature in that it had not demonstrated that "but for the program, any [trade association] member would have bid successfully for any of these contracts." [68] On October 5, 1992, the Supreme Court granted certiorari to resolve a conflict among the circuits. [69]

On October 27, 1992, just twenty-two days after the Supreme Court had granted certiorari, the Jacksonville City Council repealed the set-aside ordinance that had been the subject of the litigation and replaced it with a new ordinance that took effect the following day. [70]

***1436** The new ordinance appears to have been designed to accommodate the changes that the Supreme Court had made to its Fullilove holding in City of Richmond v. J.A. Croson Co. [71] In Croson, the Court emphasized the need for findings of past discrimination and for flexibility in fashioning a plan that was narrowly tailored to remedy the continuing consequences of that past discrimination. [72] Accordingly, the new Jacksonville plan defined the term "minority" to include only women and blacks, rather than the seven categories enumerated in the original ordinance. [73] In addition, the new ordinance replaced the ten percent "set-aside" of the original ordinance with "participation goals" that ranged from five to sixteen percent depending upon the type of contract involved, the ownership of the contractor, and the fiscal year in which the contract was awarded. Finally, the new ordinance provided five methods for the city to use in pursuing the participation goals, with the determination of the most appropriate method to be made on a project-by-project basis. One of these methods, the "Sheltered Market Plan," reserved certain contracts for bidding by companies that were owned by blacks or women. [74]

After the city repealed the original ordinance, the city moved to dismiss the appeal pending before the Supreme Court as moot. On December 14, 1992, the Court denied this motion without explanation, [75] although it did include a discussion of mootness in its subsequent opinion resolving the appeal. [76] In the Court's final opinion, issued on June 14, 1993, Justice Thomas, writing for a seven justice majority, held that the case was not moot because the city's repeal of the original set-aside ordinance was merely a voluntary cessation of a challenged activity and thus did not serve as a basis for mootness. [77] The opinion asserted that the voluntary cessation rule was particularly applicable to the Jacksonville ordinance, in which the challenged provision was immediately reenacted as the "Sheltered Market Plan." [78] Justice Thomas went on to hold that the plaintiff trade association did not lack standing, even though it had failed to demonstrate that even one of its members would have been awarded one of the contracts at issue but for the set-aside plan. He reasoned that, with respect to an equal protection challenge, the denial of an opportunity to bid on a contract constituted an injury sufficient to confer standing, regardless ***1437** of whether the putative bid would have ultimately been accepted. [79] Only Justices O'Connor and Blackmun declined to join Justice Thomas's majority opinion, dissenting on the grounds that the case had been rendered moot by the enactment of the new Jacksonville ordinance. [80]

II

DOCTRINAL PROBLEMS

The principal problem with Northeastern Florida is that it cannot be squared with the existing law of standing. As a doctrinal matter, Justice Thomas's opinion in Northeastern Florida ignores the invigorated standing requirements that the Supreme Court adopted during its preceding Terms. National Wildlife Federation holds that a plaintiff must suffer an injury that is proximate, imminent, and nonprogrammatic to establish standing. Moreover, satisfaction of these requirements at the summary judgment stage of litigation demands a pleading and evidentiary showing that is highly specific. [81] In addition, Lujan superimposes on an otherwise qualifying injury a rigid redressability requirement that is very difficult to satisfy when the injury is ultimately traceable to the actions of third parties. [82] This redressability requirement has been deemed so essential that the Court found it to be compelled by Article III. [83]

The plaintiff in Northeastern Florida satisfied none of these doctrinal requirements. Moreover, the fact that the Court issued an opinion upholding the plaintiff's standing despite the rather obvious mootness of the case makes Justice Thomas's opinion seem gratuitous. Although the law of standing is quite confused, it is not so confused that one can fail to spot Northeastern Florida as a suspicious aberration in the Court's justiciability jurisprudence.

A. The Injury Is Not Proximate

The lost contractual opportunities that the plaintiff claimed were suffered by its members in Northeastern Florida were not proximate in the sense that National Wildlife Federation now requires. In National Wildlife Federation, the plaintiff was denied standing to challenge the withdrawal of certain federal lands from federal protection because the plaintiff's allegations and

proof were not sufficiently specific. [84] The ***1438** plaintiff had alleged that its members "are suffering and will continue to suffer injury . . . [because they] use and enjoy the environmental resources that will be adversely affected by the challenged actions . . . regularly . . . for fishing, hunting, bird and wildlife watching, canoeing and boating, hiking, camping, and other similar activities." [85] In addition, the plaintiff appended to its complaint a list of 788 land status actions under the challenged program that illustrated the alleged adverse effects. [86]

The Supreme Court held that the plaintiff did not identify specific tracts of land used by its members that would be opened for mining operations. Rather, the plaintiff's affidavits averred that the plaintiff's members used land in the "vicinity" of certain identified tracts. The Supreme Court found these averments to be insufficiently specific. [87] Justice Scalia stated that the affidavits were insufficient because, in the context of a motion for summary judgment, the injury requirement

> is assuredly not satisfied by averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action. It will not do to "presume" the missing facts because without them the affidavits would not establish the injury that they generally allege. [88]

In Northeastern Florida, the plaintiff trade association "alleged that its members regularly bid on construction contracts in Jacksonville, and that they would have bid on contracts set aside pursuant to the city's ordinance were they so able." [89] This allegation is less specific than the allegation found inadequate in National Wildlife Federation in that it does not refer to particular construction contracts the way the National Wildlife Federation complaint referred to particular tracts of federal land. [90] Moreover, despite Justice Scalia's insistence in National Wildlife Federation that highly specific affidavits were required at the summary judgment stage -- not simply conclusory allegations that would suffice at the motion-to-dismiss stage, as illustrated by cases such as SCRAP [91] -- Justice Thomas's opinion in Northeastern Florida makes no reference whatsoever to any affidavits identifying specific ***1439** contracts on which the plaintiff's members were prepared to bid. Rather, Justice Thomas upheld the plaintiff's standing solely on the basis of a single allegation made in the complaint. [92]

Not only did the Northeastern Florida plaintiff fail to provide affidavits, but the allegation on which it relied was not even as specific as the National Wildlife Federation affidavits. In National Wildlife Federation, the plaintiff's members averred that they used land that was at least in the "vicinity" of particular tracts that the government had opened to exploitation. The conceptual equivalent of the "vicinity" allegation under the facts of Northeastern Florida would have been an allegation that contractors who bid on particular types of contracts in particular geographic areas of the city were prepared to bid on those types of contracts, and that those types of contracts were going to be removed from general bidding because of their inclusion in the set-aside program. The plaintiff in Northeastern Florida made no such allegations.

The clearest way to illustrate the conflict between National Wildlife Federation and Northeastern Florida is to apply Justice Scalia's language in National Wildlife Federation to the facts of the Northeastern Florida case. If Justice Scalia's words were adapted to the facts of Northeastern Florida, they would assert that the injury requirement

> is assuredly not satisfied by [allegations] which state only that one of [[[plaintiff's] members [bids on] unspecified portions of an immense [public contracting program], on some portions of which [minority set-aside] activity has occurred or probably will occur by virtue of the governmental action. It will not do to "presume" the missing facts because without them the [[[allegations] would not establish the injury that they generally allege. [93]

As this transposition of Justice Scalia's language demonstrates, the plaintiff in Northeastern Florida lacked standing for precisely the same reason that the plaintiff in National Wildlife Federation lacked ***1440** standing. In both cases, the plaintiff's injury was not sufficiently proximate to the defendant's action to give rise to a justiciable injury.

B. The Injury Is Not Imminent

The alleged injury in Northeastern Florida was also insufficiently imminent to serve as a basis for standing under National Wildlife Federation. Although the National Wildlife Federation Court stressed the specificity defects of the two member affidavits that the district court had accepted, there were four additional member affidavits that the district court refused to consider. Those additional affidavits appear to have presented no specificity problems, but the district court nevertheless rejected them as untimely. [94] Although Justice Scalia was willing to affirm the district court's discretionary decision to reject the affidavits as untimely, [95] his primary holding with respect to the four supplemental affidavits was that the injuries they averred were not sufficiently imminent to establish standing. For Justice Scalia, the problem with the four supplemental affidavits was not that they were insufficiently specific in identifying tracts of affected federal property, but rather that the exploitation of the identified tracts had not yet progressed far enough to establish the plaintiff's standing. [96] Although such concerns are typically viewed as relating to the doctrine of ripeness rather than standing, [97] Justice Scalia chose to infuse an imminence requirement into the law of standing as well. [98]

Once again, comparing the facts of National Wildlife Federation to the facts of Northeastern Florida reveals that the Northeastern Florida plaintiff did not satisfy the Court's new imminence requirement for standing. In National Wildlife Federation, Justice Scalia discussed one of the four supplemental affidavits, noting that the affiant averred that a particular company had filed an application for a permit to mine a portion of the tract of land her affidavit identified as public land that she used for recreational and aesthetic purposes. The Bureau of Land Management, however, had not yet acted on that application. Although the affiant's injury would have been sufficient for standing had the permit been granted, it was, according to Justice Scalia, "impossible to tell [prior to issuance of the permit] where or whether mining activities will occur. Indeed, it is often impossible to tell from ***1441** a classification order alone, whether mining activities will even be permissible." [99]

In Northeastern Florida, there were no affidavits or allegations of comparable specificity. [100] Moreover, the plaintiff's general allegation that some of its members would have bid on set-aside contracts were it not for the challenged minority set-aside program was less imminent than the supplemental affidavits found wanting in National Wildlife Federation.

In National Wildlife Federation, a permit had at least been applied for, and the only contingency at the time of the litigation related to whether the government would grant or deny the permit application. In Northeastern Florida, by contrast, no member of the plaintiff trade association had ever applied for a contract. [101] As a result, the imminence problem was greater in Northeastern Florida than in National Wildlife Federation in three ways: First, in Northeastern Florida it was uncertain whether any of the plaintiff's members would have the time, inclination, or capacity to bid on any particular contract that the city put out for competitive bidding. Second, it was uncertain whether the city would grant any particular contract to any of the plaintiff's members who were prepared to bid on them. Third, it was uncertain whether any contract that one of the plaintiff's members was prepared to bid on, and that the city was prepared to award to that member, would be set aside by the city for exclusive minority bidding.

These three contingencies indicate that the plaintiff in Northeastern Florida did not satisfy the imminence requirement that precluded standing in National Wildlife Federation, in which only one contingency was present. Justice Scalia's language in National Wildlife Federation is again instructive: Given such contingencies, it is "impossible to tell where or whether [contracting] activities will occur. Indeed, it is often impossible to tell from a [set-aside program] alone whether [particular contracts] will even be [granted]." [102]

There is yet another reason why it is unreasonable to claim that the plaintiff in Northeastern Florida satisfied the National Wildlife Federation imminence requirement. Far from being imminent, the plaintiff's challenge appears to have been moot. After the Supreme Court decided City of Richmond v. J.A. Croson Co., [103] the continued constitutional validity of Fullilove-type minority set-aside programs, such as the ***1442** program originally adopted by the Jacksonville City Council, was called into serious question. [104] Accordingly, when the Supreme Court granted certiorari in Northeastern Florida, the Jacksonville City Council immediately replaced its set-aside program with a new minority preference program that relied upon more flexible "participation goals" that could be achieved through one of five alternative strategies, selected on a case-by-case basis. [105] The new program's substitution of "participation goals" for set-aside "quotas," as well as its reliance on a case-by-case selection among remedial strategies, appears to have been a direct effort to comply with the dictates of the Supreme Court's opinion in Croson, in which the Court disapproved of the use of quotas and stressed the need for flexible discrimination remedies that

were narrowly tailored to the scope of the past discrimination. [106] In sum, the set-aside plan whose constitutionality the plaintiff challenged no longer existed at the time the Supreme Court held that the plaintiff had standing to challenge it.

Although one of the alternatives available under the new program, the "Sheltered Market Plan," was in effect a minority set-aside with variable percentage goals, the Court had no evidence about how Jacksonville would implement the new program. [107] Because the Sheltered Market Plan was only one of five alternatives, it was not clear whether the city would ever use that alternative. Moreover, if it did use the alternative, it was unknown what percentage goals would be selected, and what contextual factors would go into the selection of those percentage goals -- issues that would be very relevant to any adjudication of the constitutionality of the new program under Croson. These issues raise the very sort of contingencies that the National Wildlife Federation Court found fatal to standing under the imminence requirement. Yet the Northeastern Florida Court did not find them troubling, even though they seem central to any imminence inquiry.

The only justification that Justice Thomas offered in Northeastern Florida for ignoring the salient mootness of the plaintiff's claim was the exception to the doctrine of mootness for defendants who voluntarily cease their challenged conduct. [108] This voluntary cessation exception is intended to ensure that a defendant cannot escape the possibility of an adjudication on the merits by ceasing to engage in a ***1443** disputed action each time the action is challenged in court. [109] Accordingly, the exception does not apply to situations in which the defendant modifies the challenged action in order to honor a recent change in Supreme Court law. [110]

The voluntary cessation exception seems inapplicable to Northeastern Florida. Application of the exception might have made sense if there were some danger that the city of Jacksonville would re-institute the old set-aside program once the litigation was dismissed on mootness grounds. But there was no such danger. The City of Jacksonville had modified its program in order to comply with, rather than evade, new Supreme Court requirements for affirmative action plans. Notwithstanding this change, only the old set-aside program was before the Supreme Court. As far as the record revealed, the new program had never been used, and it had certainly never been challenged by the plaintiff. Because the only program before the Court was a program that was no longer in effect, it is difficult to imagine a case that could be less imminent than Northeastern Florida was at the time that the Supreme Court granted the plaintiff standing to maintain it.

Even if Jacksonville's abandonment of its old set-aside plan did not technically deprive the Supreme Court of jurisdiction on mootness grounds, it would still fail to satisfy the imminence requirement that is now essential to standing. In City of Mesquite v. Aladdin's Castle, [111] the case that Justice Thomas purported to follow in Northeastern Florida, [112] the Supreme Court stated: "Such abandonment is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter relating to the exercise rather than the existence of judicial power." [113] After having gone to such great lengths to erect the imminence requirement in National Wildlife Federation, the absence of imminence in Northeastern Florida would certainly constitute sufficient reason for declining to exercise any residue of jurisdiction that the Court might have retained under Justice Thomas's reading of the mootness doctrine. [114]

***1444 C. The Injury Is Not Nonprogrammatic**

The stringent specificity requirements that Justice Scalia imposed in National Wildlife Federation seem on their face to be artificial. It is not apparent why an organizational plaintiff should have standing if its members make recreational or aesthetic use of a tract of land that the government has chosen to open up to commercial exploitation, but not if the members make use of land that is merely in the "vicinity" of the tract opened to exploitation. [115] After all, recreational and aesthetic interests can be harmed whether a company is mining the tract of land on which one is camping or is mining an adjoining tract. If Justice Scalia's specificity requirement is to have any meaningful content, it must be viewed as an incident to his more general view that the plaintiff in National Wildlife Federation had not challenged a "final agency action." [116]

The "agency action" that the plaintiff challenged in National Wildlife Federation consisted of two subsidiary actions. First, there was an initial, general decision made by the Department of the Interior during the Reagan Administration to withdraw federal lands from federal protection so that they could be opened up for commercial exploitation. Second, this general decision was followed by a series of specific actions taken during the Reagan and Bush Administrations to open up particular tracts of land to commercial exploitation. The plaintiff alleged that both the initial decision to adopt a program withdrawing public lands from

federal protection and the discrete subsidiary actions taken to implement that withdrawal program constituted "final agency actions" that were taken in violation of various environmental laws. [117]

Justice Scalia's opinion held that no such "program" was subject to judicial review. Assuming that the alleged program existed, he reasoned that it was an initial agency action. The action did not become "final" until it had been implemented with respect to particular tracts of land. [118] Therefore, Justice Scalia's insistence on highly specific references to particular tracts of land in the plaintiff's affidavits and on a high level of imminence with respect to the likely development of each particular tract was meant to ensure that judicial review would be delayed until the implementation phase of the land withdrawal "program." In sum, Justice Scalia was willing to permit judicial review of particular applications of the land withdrawal "program," but not of the "program" itself.

***1445** One could certainly disagree with Justice Scalia's preference for implementation-level, rather than programmatic, challenges to newly-adopted executive policies. Although implementation challenges are likely to be accompanied by the enhanced contextual benefits that the doctrine of ripeness is intended to secure, they are also likely to be accompanied by high levels of inertia, entrenchment, and sunk costs that will make it more difficult for a reviewing court to invalidate an agency's implementation actions. Moreover, the heightened practical impediments to maintaining implementation challenges -- such as preparing specific affidavits for each of the thousands of implementation actions that an agency might take in connection with one programmatic decision -- will mean that many implementation actions will simply have to go unchallenged.

Justice Scalia was aware of this difficulty in National Wildlife Federation. His majority opinion stated:

> The case-by-case approach that this requires is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of our Nation's wildlife and the streams and forests that support it. But this is the traditional, and remains the normal, mode of operation of the courts. Except where Congress explicitly provides for our correction of the administrative process at a higher level of generality, we intervene in the administration of the laws only when, and to the extent that, a specific "final agency action" has an actual or immediately threatened effect. [119]

It appears that Justice Scalia preferred the risk of under-enforcement to the dangers that he perceived to accompany programmatic challenges.

Justice Scalia never specified what dangers might be associated with a programmatic challenge. He merely refers to the customary dangers associated with claims that are not yet ripe for review. These ripeness dangers, however, are often outweighed by the dangers of delaying review. [120] Accordingly, it is possible that Justice Scalia feared stringent private enforcement itself -- which would be facilitated if programmatic challenges were permitted -- and preferred instead the diluted level of private enforcement that would result from allowing implementation-only challenges. Regardless of how one views the prudence of the Supreme Court's preclusion of programmatic challenges ***1446** to government programs, however, it is clear that the Court failed to apply its own programmatic preclusion in Northeastern Florida.

As the proximity [121] and imminence [122] discussions above illustrate, the plaintiff's challenge in Northeastern Florida was a programmatic challenge, not a challenge to any particular implementation of the Jacksonville set-aside plan. None of the plaintiff's members had bid on or been denied a contract on the grounds that the contract had been set aside for a minority contractor. [123] Rather, the plaintiff's challenge was to the abstract idea of a minority set-aside "program." Like the plaintiff in National Wildlife Federation, the plaintiff in Northeastern Florida attempted an "across-the-board" challenge at the adoption, rather than the implementation, stage of the government program. And like the plaintiff in National Wildlife Federation, the plaintiff in Northeastern Florida made a challenge that occurred at too high a "level of generality" to constitute "final agency action" for judicial review. As a result, the plaintiff in Northeastern Florida lacked standing to maintain its programmatic challenge every bit as much as did the plaintiff in National Wildlife Federation.

D. The Injury Is Not Redressable

In Lujan the Supreme Court reaffirmed the strict standing demands it had adopted in National Wildlife Federation, and then gave those demands constitutional status by linking them to an enhanced redressability requirement. [124] Justice Scalia's majority opinion specifies a three-part test that the plaintiff must meet in order to establish the existence of an injury sufficient to satisfy the Article III case-or-controversy requirement. First, the plaintiff has to suffer an "injury in fact" that is "concrete and particularized," as well as "actual or imminent," rather than "conjectural or hypothetical." Second, there must be a "fairly traceable" causal connection between the injury and the challenged conduct, establishing that the injury is not the result of the "independent actions of some third party not before the court." Third, it must be "likely" and not merely "speculative" that the plaintiff's injury will be "redressed by a favorable decision" on the merits. [125]

In Northeastern Florida, Justice Thomas quoted Justice Scalia's Lujan opinion in identifying the "irreducible minimum" that is required ***1447** for standing, [126] but ultimately disregarded the redressability element of Justice Scalia's three-part test in holding that the plaintiff trade association had standing. In terms of redressability, Lujan and Northeastern Florida are indistinguishable. The Court characterized the injury asserted by the plaintiff in Lujan as too attenuated and too dependent upon the actions of third parties to be redressable within the meaning of the Article III case-or-controversy requirement. The plaintiff had challenged the legality of a new regulation promulgated by the Secretary of the Interior that exempted United States funded foreign construction projects from the Endangered Species Act requirement for interagency consultation. This requirement ensured that federally-funded actions were not likely to jeopardize any endangered or threatened species. In support of its standing, the plaintiff had submitted affidavits from two of its members who averred that they had traveled to particular foreign countries in order to observe specified endangered species that were jeopardized by specified funded projects, and that they intended to do so again in the future. [127]

After ruling that the absence of particular dates and particularized plans for these future trips failed to satisfy the proximate-imminent-nonprogrammatic requirement of National Wildlife Federation, [128] Justice Scalia's opinion went on to hold that even if the injury asserted by the plaintiff were otherwise sufficient, the injury was not redressable in the sense required by the case-or-controversy requirement of Article III. Redressability was lacking because, even if the plaintiff received the relief that it requested -- that is, if the Secretary of the Interior adopted a regulation requiring consultation between all agencies involved in funding foreign projects in order to minimize jeopardy to endangered and threatened species -- the other agencies that funded foreign projects might refuse to comply with the Secretary's regulation.

Even if the other agencies complied with the Secretary's regulation, and foreign funding was consequently withheld, foreign governments might nevertheless decide to continue their construction projects without United States funding. This would perpetuate the danger to endangered and threatened species that the plaintiff sought to eliminate, even though the plaintiff had been granted precisely the remedy that it desired on the merits. Redress of the injury about which the plaintiff complained was ultimately dependent upon the actions ***1448** of third parties -- other funding agencies and foreign governments -- who were not before the Court. [129]

The very same third-party redressability problem was present in Northeastern Florida. The members of the plaintiff trade association in Northeastern Florida had not alleged or averred with particularity what construction contracts they would have bid on in the absence of the Jacksonville set-aside program. [130] Even if the plaintiff's members had made particularized allegations and averments, however, the injury that they alleged still might not have been redressed by a favorable decision on the merits. If the Jacksonville set-aside program were invalidated, the city might still fail to award the plaintiff's members the contracts on which they bid. Not only did their ability to secure the award of particular contracts depend upon the actions of the Jacksonville municipal officials who participated in the contract-awarding process, but the award of particular contracts ultimately depended upon the contract bids submitted by competing contractors. Because these competitors were third parties who were not before the Court, and because their actions could affect whether the plaintiff's members would be awarded a contract, their actions precluded a finding of redressability under the terms of Lujan. [131]

One might sensibly argue that it is unrealistic to require absolute redressability to satisfy the demands of Article III; the mere elimination of a substantial impediment to redress of the plaintiff's injury ought to be sufficient to establish standing. Because the universe is a complicated place, in which meaningful causal relationships are very difficult to ascertain, the problem of determining causation has long perplexed the legal system. [132] Accordingly, when the law of standing requires that an injury " fairly can be traced to the challenged action of the defendant," [133] the qualifier "fairly" indicates that something less than absolute redressability will satisfy the demands of Article III. However, this is the precise argument that the Court seems to

have rejected in Lujan, in which the denial of United States funding was deemed insufficient for standing. [134] Standing was denied even though it could "fairly" be said that the presence or absence of such funding is likely to be a substantial factor in a foreign government's ***1449** decision to proceed with a construction project in disregard of the harm to endangered or threatened species. [135]

This argument has even more appeal than is initially apparent. The meaning of a "fairly" traceable causal connection is largely indeterminate. As a result, supplying meaning to that term is more an act of legislative policymaking than of judicial interpretation. Because the causation-redressability requirement directly affects the degree to which private enforcement actions will be used to supplement governmental enforcement of a legal provision, this policy determination should be made by a politically accountable legislature. Indeed, that is precisely what is embodied in the zone-of-interest or "nexus" test that the Court sometimes requires for standing in addition to the injury requirement. [136] Congress arguably makes such a determination when it speaks to the issue of who should have standing to enforce particular statutes, striking the desired balance between the pros and cons of private enforcement.

In Lujan, Congress explicitly granted standing to "any person" to enforce the consultation provisions of the Endangered Species Act, [137] thereby indicating that Congress intended high levels of supplemental private enforcement for the statute. Ironically, Justice Scalia's majority opinion in Lujan viewed the Article III redressability requirement as so important that it declared the statute's "citizen suit" standing provision to be unconstitutional. [138] However, it is actually the Court's invalidation of the "citizen suit" provision that appears to be unconstitutional because it substitutes judicial for legislative policy preferences concerning the appropriate level of supplemental private enforcement for a congressional enactment. In ignoring the Article III dimensions of the zone-of-interest or nexus inquiry -- which the Court mistakenly views as prudential rather than constitutional [139] -- the Court itself violated separation-of-powers restrictions on its exercise of legislative power. [140]

***1450** Although one could easily disagree with the Supreme Court's decision to read a stringent redressability requirement into the language of Article III, one would still expect the Court to apply this requirement consistently. However, the effort that Justice Thomas made in Northeastern Florida to distinguish the Court's prior redressability decisions was both minimal and unconvincing. Justice Thomas stated simply that Northeastern Florida was distinguishable from the Court's prior redressability decisions because it was an equal protection case. [141] As such, the plaintiff was not required to show that the injury it asserted would actually be redressed through the award of the contract on which it wished to bid, but merely that it was denied the opportunity to have its bid considered. [142] This diluted redressability requirement resulted from the fact that the essence of an equal protection claim is the denial of the right to equal consideration. [143]

Prior to Northeastern Florida, the Supreme Court had never suggested that the redressability requirement applied differently to equal protection cases. In fact, the Court had denied standing in equal protection race cases, such as Warth v. Seldin, [144] on grounds that explicitly included insufficient causation and lack of redressability. [145] Moreover, all of the equal protection cases that Justice Thomas discussed in Northeastern Florida were decided before the Supreme Court strengthened the stringency of the redressability requirement in Lujan. [146]

Justice Thomas's handling of the redressability precedents in Northeastern Florida was noticeably disingenuous. However, the real reason that his purported distinction of those precedents fails is that there is no analytically sound reason why equal protection cases should be treated differently from other standing cases. Justice Thomas reasoned that the essence of an equal protection claim was the procedural right to equal consideration, not equal outcome. [147] In a rather remarkable sentence offered as part of his effort to distinguish ***1451** Warth, Justice Thomas asserted, "In Warth, by contrast, there was no claim that the construction association's members could not apply for variances and building permits on the same basis as other firms; what the association objected to were the 'refusals by the town officials to grant variances and permits.'" [148] There is little to commend the suggestion that an equal protection plaintiff has standing to challenge a rule that prohibits the plaintiff from applying for a benefit, but not to challenge a rule that requires the plaintiff's application to be rejected on the merits. Prohibitions on discrimination apply with equal force whether the discrimination occurs at the application or the award-of-benefit stage.

Even if there were something special about abstract consideration of an application that made denial of such consideration enough to warrant an exception to the ordinary redressability requirement, Lujan was itself a consideration case. Nothing

in the Endangered Species Act provision that the plaintiff wished to enforce required the outcome of protecting endangered and threatened species. Rather, the Act required interagency consultation designed to reduce the likelihood of harm to such species. [149] Accordingly, the Lujan plaintiff was asking for consideration of its claim for the protection of endangered and threatened species every bit as much as the plaintiff in Northeastern Florida was asking for consideration of its claim for the award of a contract. In terms of redressability, the two cases appear to be completely indistinguishable. It seems irrelevant that one case involved the Equal Protection Clause and that the other involved the Endangered Species Act.

On a doctrinal level, the Supreme Court has recently taken great pains to impose stringent pleading and proof requirements on plaintiffs who wish to establish standing. The Court has required particularized pleading and proof that the plaintiff's asserted injury is proximate and imminent. [150] In addition, the Court has imposed a stringent redressability requirement on plaintiffs who wish to establish standing, and it has read this requirement into the case-or-controversy provision of Article III. [151] These recent requirements seem designed to eliminate programmatic challenges to governmental actions -- challenges that could alter the level of overall law enforcement that executive officials deem appropriate. Although the newly invigorated law of standing arguably constitutes a violation of separation-of-powers principles, entailing the judicial usurpation of legislative policymaking ***1452** functions, the Supreme Court has not given any explicit attention to this problem. It has, however, chosen to ignore all of these new requirements in granting standing to the plaintiff in Northeastern Florida, and it has made little effort to distinguish the applicable precedents in doing so.

III

DISCRIMINATION PROBLEMS

Doctrinal inconsistencies in the Supreme Court's law of standing are now so commonplace that they have become relatively uninteresting. [152] And the insight that the Court manipulates the law of standing to advance judicial policy preferences has become more fatuous than scandalous. [153] It is noteworthy, however, that among the policy preferences that the current Supreme Court has chosen to pursue with its manipulable law of standing is the policy of racial discrimination. Although Jim Crow laws are no longer tolerated, the white majority still secures for itself a disproportionately high percentage of societal resources at the expense of racial minorities. Whether one focuses on tangible assets -- such as employment, income, property ownership, and the like -- or more intangible prerogatives -- such as health, safety, country club memberships, or chances of becoming a United States Senator -- the majority is statistically better off than racial minorities. [154]

Although individual victims are still likely to be granted standing to challenge discrete acts of discrimination, discrete acts no longer constitute the major type of racial discrimination that exists in the United States. [155] Rather than relying on atomistic acts of overt discrimination to secure a disproportionate share of societal resources, the contemporary majority now relies on systemic, structural, and programmatic techniques of differentiation that correlate with race. Even in the absence of overt discrimination, reliance on seemingly neutral devices, such as standardized test scores, educational attainment, and residency requirements, can divert the flow of resources toward the majority. [156] As a result, the contemporary problem of racial discrimination has become statistical in nature.

***1453** The Supreme Court recognized the power of statistical discrimination in its decision in Griggs v. Duke Power Co., [157] when it adopted a disparate impact standard for establishing unlawful racial discrimination in employment under Title VII of the Civil Rights Act of 1964. [158] In Washington v. Davis, [159] however, the Court declined to adopt a similar disparate impact standard for racial discrimination alleged to violate the Equal Protection Clause of the United States Constitution, preferring instead a constitutional standard that requires a showing of discriminatory intent, rather than mere discriminatory effect. [160] Nevertheless, statistically disparate impact remains relevant even to the constitutional standard of discriminatory intent because an unexplained racially disparate impact provides strong evidence of a discriminatory motive on the part of the person or entity responsible for the disparate impact. [161]

When one looks at the cases in which a legal challenge is lodged against a systemic, structural, or programmatic practice, the Supreme Court's standing decisions display a racially disparate impact. When the plaintiff challenges a systemic practice that adversely affects the interests of the white majority, such as an affirmative action program, the Court tends to uphold the

plaintiff's standing. But when the plaintiff challenges a practice that adversely affects the interests of racial minorities, such as a pattern of restrictive zoning, tax subsidization, or police misconduct, the Court tends to deny the plaintiff's standing.

The degree of disparate impact that emerges from the Court's racial decisions is sufficient to prove racial discrimination under the statutory standard the Court adopted in Griggs for Title VII purposes. [162] Moreover, there is also sufficient evidence of the Court's discriminatory intent to establish a constitutional violation under the equal protection standard of Washington v. Davis; the Court's civil rights decisions fortify the inference of discriminatory intent that flows from the racially disparate impact of the Court's standing decisions. ***1454** [163] In sum, the Supreme Court's law of standing fails both the statutory and constitutional standards prohibiting racial discrimination.

As a practical matter, of course, neither statutory nor constitutional prohibitions on racial discrimination apply to the Supreme Court. Realistically, there is no governmental body that possesses the institutional power to enforce the Constitution against the Court. [164] Moreover, the Court has held that the Court itself possesses the power to render final and dispositive interpretations of the Constitution. [165] As the final constitutional arbiter, the Court is the ideal governmental institution to accomplish the majoritarian task of diverting societal resources away from racial minorities in a manner that benefits the majority. The Court can announce legal prohibitions on discrimination and enforce them against the other branches of government in a way that suggests a societal commitment to racial equality, but in the process of so doing, the Court can allocate resources in a way that overrides the very equality that its opinions pronounce. Not only is that what the Supreme Court has done with its racially discriminatory law of standing, but that is the function that the Supreme Court has historically served in American government. [166]

A. Standing and Disparate Impact

In Griggs v. Duke Power Co., [167] the Supreme Court held that employment practices governing hiring, discharge, promotion, and conditions of employment violate the Title VII prohibitions on employment discrimination if such practices have a racially disparate impact. [168] The Court chose to adopt a discriminatory effects test rather than a discriminatory intent test in order to prevent the white majority from perpetuating its past advantage through prospective racial neutrality. [169] Accordingly, employment practices constitute prohibited ***1455** racial discrimination under Title VII if they have a racially disparate impact, regardless of the employer's intent. [170]

Interestingly, the Supreme Court's standing decisions have such a disparate impact. In cases in which the plaintiff claims to have been harmed by a systemic practice that has a racially discriminatory impact, rather than by an isolated act of racial discrimination, the Supreme Court has typically denied standing if the plaintiff was a member of a racial minority group, but has granted standing if the plaintiff was white.

1. Minority Programmatic Challenges

When minority plaintiffs challenge contemporary racial discrimination, their challenges tend to take the form of a programmatic attack on a "pattern and practice" of official conduct in the administration of a governmental program. Although the governmental program is often facially neutral, the minority plaintiffs typically allege that the program has had a disparate impact that is disproportionately adverse to racial minorities. Frequently, the minority plaintiffs assert that the program at issue is discriminatory by design as well as in effect. [171]

Warth v. Seldin provides an example of a programmatic challenge to official conduct filed by minority plaintiffs. There, an array of black and latino plaintiffs filed a class action challenging a municipal zoning policy that was alleged to have been racially discriminatory both in intent and effect. [172] The plaintiffs in Warth were denied standing because they failed to satisfy the third-party redressability test [173] that the ***1456** Court introduced in Linda R.S. v. Richard D. [174] and later developed with redoubled stringency in National Wildlife Federation and Lujan. [175] Warth also contained dicta linking redressability to the Article III case-or-controversy requirement, [176] which the Court subsequently turned into holding in Lujan. [177] Although the Court did not find the equally serious third-party redressability problem to be a basis for denying standing in Northeastern

Florida, [178] it did find the problem sufficient to deny standing in Warth. In a very real sense, therefore, the plaintiffs in Warth were denied standing because of the programmatic nature of their challenge to a systemic zoning practice.

Allen v. Wright [179] is another example of the denial of standing to maintain a programmatic challenge to systemic discrimination. In Allen, the parents of minority school children filed a national class action challenging a pattern and practice of decisions made by the Internal Revenue Service (IRS) that, in effect, granted tax subsidies to segregated private schools. [180] These "subsidies" allegedly violated the Internal Revenue Code and frustrated the plaintiffs' efforts to secure integrated educational opportunities for their children. [181] The plaintiffs asserted that the IRS had acquiesced in misrepresentations concerning the nondiscrimination policies of many private schools by refusing to take any action to detect false certifications of nondiscrimination, in spite of the fact that the Internal Revenue Code and IRS regulations clearly prohibited segregated schools from acquiring tax-exempt status.

The plaintiffs argued that by granting tax-exempt status -- and the concomitant ability to receive tax-deductible contributions -- to segregated schools, the IRS was both fostering support for segregated schools and interfering with applicable school desegregation plans. [182] After again referring to the Article III case-or-controversy requirement, the Court held that the plaintiffs lacked standing because they had not satisfied the causation and redressability requirements established in cases such as Warth, and that their "injury" was a mere "generalized ***1457** grievance" whose judicial resolution would implicate the Court in separation-of-powers problems. [183] The Court rejected both the argument that the plaintiffs were injured by the federal government's identification with and financing of segregated education, [184] and the argument that the plaintiffs were injured in their efforts to secure integrated educational facilities for their children. The Court found these alleged injuries to be too abstract and speculative. [185] Once again, the problem with the claim asserted in Allen v. Wright appears to have been its programmatic nature. And once again the Court's denial of standing seems to be directly at odds with the Northeastern Florida decision, which flatly disregarded similar problems of an abstract and speculative injury.

In a series of four police and prosecutorial misconduct cases decided between 1974 and 1983, various groups of inner-city minority residents sought injunctive relief to prevent the recurrence of alleged patterns and practices of official misconduct that were claimed to have violated the civil rights of the minority residents. In the 1974 case, O'Shea v. Littleton, [186] seventeen minority and two white residents of Cairo, Illinois filed a class action alleging that local police officers, prosecutors, and magistrates intentionally discriminated against minorities and others who were engaged in civil rights activities, and that they failed to enforce the laws adequately against whites who victimized racial minorities.

The plaintiffs offered evidence of specific instances in which individual named plaintiffs had been subjected to abusive bond-setting, sentencing, and jury-fee practices. [187] Although the Court did not expressly use the term "standing," [188] it dismissed the suit for failure to demonstrate an Article III injury. [189] The Court held that the alleged past abuses did not establish a justiciable claim because there was no evidence that those abuses would be repeated against the same plaintiffs in the future. This is a curious response to a class-action complaint that alleges a pattern and practice of ongoing misconduct. It does, however, seem to rest on a blend of stringent standing and ripeness ***1458** concerns that is reminiscent of the Court's decisions in National Wildlife Federation and Lujan. [190]

In Spomer v. Littleton, [191] a companion case to O'Shea, the Court remanded the action, which the same plaintiffs had filed against the State's Attorney, suggesting that the action was moot with respect to the original State's Attorney, who had been replaced in a recent election, and unripe with respect to the new State's Attorney, who had not done anything to harm the plaintiffs. [192] Obviously, the Court's determination that the injury alleged in a pattern-and-practice case can be both moot and unripe makes it difficult to maintain such suits; the window through which an injury that qualifies for standing purposes is permitted to pass is very narrow. [193] In 1976 the O'Shea holding was reaffirmed in Rizzo v. Goode, [194] a case in which a class of Philadelphia residents filed two suits against the Mayor and the Police Commissioner of Philadelphia, alleging a pattern and practice of racially discriminatory and abusive police misconduct. [195] Once again, the Court found that the plaintiffs had not sustained an Article III injury, for the reasons stated in O'Shea. [196]

In 1981 the Court decided City of Los Angeles v. Lyons, [197] where a minority victim of a "chokehold" applied by a Los Angeles police officer sued to enjoin continued implementation of a police department policy that allegedly authorized the use

of chokeholds in an unlawful and racially discriminatory manner. [198] Citing O'Shea and Rizzo, the Court held that the plaintiff suffered no Article III injury. [199] Once again, the Court's unmistakable hostility to programmatic police misconduct challenges stands in marked contrast to the Court's receptivity to the equally programmatic affirmative action challenge that it permitted in Northeastern Florida.

***1459 2. Majority Programmatic Challenges**

When racial discrimination claims are asserted by members of the white majority, they tend to take the form of programmatic challenges to affirmative action plans that have been voluntarily adopted, agreed to as part of a consent decree, or imposed as part of a remedial judicial order. Northeastern Florida exemplifies this type of challenge, which has become ubiquitous with the increased political conservatism of the Supreme Court.

A challenge to an affirmative action program is programmatic in the same way that a minority challenge to a pattern and practice of official conduct is programmatic. Although a plaintiff challenging an affirmative action plan is at least nominally interested in personal relief, it is the systemic nature of the challenge that gives the case its societal importance. To suggest that affirmative action challenges are important because of the particularized impact that they will have on the plaintiff is like suggesting that Brown v. Board of Education was important because it said that Linda Brown could attend a desegregated elementary school in Topeka, Kansas. [200]

The frequency with which the Supreme Court considers affirmative action challenges is testimony to the systemic significance with which those challenges are vested. It appears that the Supreme Court grants certiorari in those cases so that it can formulate and announce its evolving policy concerning the appropriate nature and scope of affirmative action programs. Therefore, it is unsurprising that the Court has entertained challenges to affirmative action programs even when they have become moot as to the plaintiff filing the challenge, [201] and even when the affirmative action conflict that the Court wished to address has had no effect on the plaintiff whatsoever. [202]

***1460** Since 1974, when the Court began considering affirmative action cases outside of the school desegregation context, it has decided eighteen racial affirmative action cases. [203] Fourteen of these cases raised constitutional challenges to an affirmative action program under the Equal Protection Clause. [204] Four of the cases concerned statutory challenges under Title VII. [205] Eleven of the challenges arose in the employment context, disputing the allocation of contracts, promotions, or layoffs. [206] Other challenges have been made to educational affirmative action programs, [207] remedial voting rights plans, [208] and broadcast license preference programs. [209]

The Court's resolution of the merits of these affirmative action challenges has not been uniform. Sometimes the Court has declined to reach the merits; [210] sometimes the Court has upheld the challenged ***1461** plans; [211] and sometimes the Court has invalidated the challenged plans. [212] However, the Court's resolution of the plaintiffs' standing has been strikingly consistent. In virtually every affirmative action case, the white plaintiff has been accorded standing to challenge the affirmative action program at issue. [213]

3. Racially Disparate Impact

In cases in which the plaintiff claims to have been harmed by a systemic practice that has had a racially discriminatory impact, rather than by an isolated act of racial discrimination, the Supreme Court's tendency has been to grant standing if the plaintiff was white or was challenging a practice alleged to have adversely affected the interests of the white majority. On the other hand, it has tended to deny standing if the plaintiff was a member of a racial minority group or was challenging a practice that was alleged to have adversely affected the ***1462** interests of a racial minority group. In all six of the cases referred to above, in which a minority plaintiff asserted a programmatic challenge to a pattern and practice of discriminatory conduct that adversely affected a racial minority, the minority plaintiff was denied standing on grounds relating to the generalized nature of the asserted injury or problems relating to the proximity, imminence, or redressability of the injury. [214] However, in seventeen of the eighteen affirmative action cases referred to above, in which a white plaintiff asserted a programmatic challenge to a pattern

and practice of conduct that adversely affected the white majority, the plaintiff was granted standing despite the generalized nature of the asserted injury and despite problems relating to proximity, imminence, or redressability. [215]

The correlation between race and standing may not be perfect. For example, in the affirmative action cases -- other than Northeastern Florida -- in which the plaintiff was granted standing to maintain a challenge to an affirmative action plan, standing was rarely focused upon as an issue in the case. [216] As a result, it may be unfair to compare cases in which standing was tacitly assumed and cases in which standing was expressly denied; the Court may simply not have focused on the issue in the tacit standing cases.

Even assuming, however, that the Court's focus on the standing issue was sporadic, the Court's inconsistent emphasis on standing may fortify the proposition that the Court is making discriminatory use of the doctrine. The Court's selective attention to standing may establish that, despite their doctrinal similarities, white plaintiff pattern-and-practice cases are not even considered to be cases in which standing could realistically pose a significant problem, whereas minority plaintiff pattern-and-practice cases are cases in which standing can be fatal. [217]

Most of the Court's affirmative action cases were decided before 1990, when the Court began to increase standing requirements in programmatic challenge cases, thereby rendering the earlier affirmative action challenge cases arguably inapposite. [218] However, once the Court did begin to increase the stringency of its standing requirements, Northeastern Florida indicates that standing was recognized to be ***1463** an issue in cases challenging affirmative action programs, but that standing for white plaintiffs would nevertheless be upheld. [219]

Another factor that may dilute the correlation between race and standing stems from the cases that I have not discussed. I have focused upon the pattern-and-practice race cases in which minority plaintiffs were denied standing, but I have not mentioned the cases in which standing was granted -- such as the many school desegregation cases in which the Court routinely assumed standing for minority school children. [220] Although those cases are technically ones in which individual plaintiffs challenged discrete acts of discrimination committed through the denial of particular educational benefits, realistically the cases are institutional, systemic, programmatic, pattern-and-practice cases because segregated school systems must be integrated in order to provide the plaintiffs any meaningful relief. This makes the school desegregation cases seem as relevant as the affirmative action cases in which standing was also tacitly granted.

Although standing for black plaintiffs was traditionally assumed in the early school desegregation cases, if one focuses more precisely on cases that have been decided since the Court began to use standing as a restrictive rather than an expansive doctrine, a racially disparate impact once again emerges. Most of the school desegregation cases in which the Court has tacitly granted standing were decided before the Supreme Court began its vigorous reformulation of restrictive ***1464** standing rules in 1990. [221] Now that standing has become a more frequent tool for Supreme Court policymaking, restrictive standing cases such as Allen v. Wright are more representative of the Court's present posture toward minority plaintiff, programmatic, school desegregation challenges, [222] whereas permissive standing cases such as Northeastern Florida are more representative of the Court's present posture toward white plaintiff, programmatic, affirmative action challenges.

The Supreme Court sometimes grants standing to a minority plaintiff after having denied standing to a similar plaintiff in a prior case. For example, although the Court denied standing to minority plaintiffs in Warth v. Seldin [223] when they challenged racially restrictive zoning practices, two years later it granted standing to similarly-situated minority plaintiffs in Village of Arlington Heights v. Metropolitan Housing Development Corp., [224] despite the apparent lack of distinction between the two cases. [225] In addition, there is undoubtedly a host of other race discrimination cases that can be fairly characterized as ***1465** programmatic and in which the Court proceeded to decide the merits, without ever considering standing to be an issue. For example, in Swain v. Alabama [226] and Batson v. Kentucky, [227] the Court considered the constitutionality of racially motivated uses of peremptory challenges in criminal cases without discussing standing, and in McClesky v. Kemp, [228] the Court likewise considered the merits of the plaintiff's claim that the death penalty was being implemented in a racially discriminatory manner without treating standing as an issue.

One could attempt to dispute the relevance of many of the programmatic cases in which the Court reached the merits without addressing the issue of standing. In McClesky, for example, the reason the Court offered for rejecting the plaintiff's

discrimination claim on the merits was that the claim was a systemic claim rather than a claim of particularized discrimination, thereby making the case more consistent than inconsistent with my present thesis. [229] Moreover, as has been discussed, it is unclear how much weight should be given to a case in which the Court upholds standing without recognizing standing to be an issue, precisely because the Court failed to focus on the programmatic nature of the challenge that was before it. [230] Rather than dispute the relevance of the tacit standing cases, however, it seems preferable to concede that the Court has sometimes decided programmatic discrimination cases on the merits even when the plaintiffs were minority plaintiffs.

Even if the correlation between race and standing is not perfect, it does exist. In light of the uniform success that white plaintiffs have had in establishing standing to challenge affirmative action programs, compared to the frequent lack of success that minority plaintiffs have had in pursuing their programmatic challenges, it is difficult to imagine anyone seriously disputing the fact that the Court is much more likely to reject a programmatic racial discrimination challenge on standing grounds when the plaintiff is a minority plaintiff than when the plaintiff is white. And that correlation is certainly sufficient to create a suspicion of discriminatory treatment that the Supreme Court would be expected to explain away if it wished to refute charges of discrimination.

***1466 4. Exacerbating Rationales**

In Northeastern Florida, Justice Thomas demonstrated an awareness of the decisions that have created a racially correlated disparate impact in the law of standing to maintain programmatic challenges to official actions. He twice cited Allen v. Wright, [231] relied heavily on Regents of the University of California v. Bakke, [232] and attempted to distinguish Warth v. Seldin. [233] Nevertheless, Justice Thomas's overall effort to explain the Court's departure from its recent standing precedents was minimal. His reading of Bakke as the controlling precedent simply disregarded the Court's post-1990 standing jurisprudence -- which his opinion purported to follow [234] -- and relied on a simplistic and untenable interpretation of the case. [235] Moreover, Justice Thomas's proffered distinction of Warth seems more silly than serious, [236] and borders on dishonesty. [237] In the final analysis, the cavalier treatment that he accorded the issue of standing in Northeastern Florida seems to exacerbate rather than ameliorate the racially disparate impact of the Court's standing decisions.

Justice Thomas began the standing portion of Northeastern Florida with a lack of care that conveys an absence of concern about the racially charged dimension of his undertaking. In his statement of the controlling law, Justice Thomas conflated the "injury in fact" and the "legal interest" tests for standing as if they were identical, rather than dramatically different. [238] This reveals an incomplete understanding of the shift induced by the Administrative Procedure Act from the pre-New Deal "legal interest" regime to the post-New Deal "injury-in-fact" approach to standing. [239]

***1467** In stating the applicable standing test, Justice Thomas quoted the language of Justice Scalia's opinion in Lujan that precludes programmatic challenges to governmental actions by insisting on particularized showings of imminence, proximity, causation, and redressability to establish an Article III injury. [240] However, after quoting Justice Scalia's restrictive approach to standing, Justice Thomas proceeded to discuss the issue of standing for the white plaintiff in Northeastern Florida as if he were applying the expansive law of standing to which the Court adhered during the injury-in-fact era of the early 1970s, [241] rather than the restrictive law of the post-1990 Scalia era. [242] He accomplished this by according liberal interpretations to the pleadings and minimal significance to the redressability difficulties that arise under the facts of the case -- things that the Supreme Court has not done in minority plaintiff cases or in its post-1990 cases other than Northeastern Florida.

The reason that Justice Thomas gave for dispensing with the stringent redressability requirement was that Northeastern Florida was an equal protection case, and that in equal protection cases the plaintiff need only demonstrate a failure to compete or a failure to be considered for a benefit on equal terms in order to establish standing. [243] In support of this proposition, Justice Thomas relied heavily on Bakke, which permitted a disappointed white medical school applicant to challenge the affirmative action program adopted by the University of California at Davis Medical School without requiring the applicant to demonstrate that he would have been admitted to the school had the affirmative action plan not been in effect. [244]

There are several problems with this assertion. One problem is that it is merely an assertion; Justice Thomas did not attempt to explain why equal protection cases should be different from other cases in which standing has been denied for redressability

reasons. He merely cited Bakke as establishing this proposition. [245] A bare citation to authority might be an adequate basis for decision in some circumstances, but it is insufficient for the resolution of a controversial issue in the constantly shifting context of standing, especially when the ***1468** Court's resolution goes against the grain of the Court's most recent precedents.

Another problem with Justice Thomas's bare citation to Bakke is that standing was hardly a central issue in that case. The primary parties did not raise the issue. Although the Court considered standing in response to an amicus argument, the Bakke discussion of the issue was relegated to a mere three paragraph footnote, of which only one paragraph addressed the issue of redressability. [246] Moreover, in that discussion of redressability, the Court appeared more to be deferring to a trial court finding of fact that the plaintiff suffered an injury independent of his inability to be admitted to medical school, than to be announcing a principle of standing jurisprudence. [247]

Viewing the Northeastern Florida opinion most favorably to Justice Thomas, the reason that the Supreme Court found standing in Bakke is that Bakke was decided in 1978, prior to the Supreme Court's Scalia-inspired hardening of the doctrine in the post-1990 cases. [248] However, even if this interpretation saves Bakke from characterization as a racially motivated decision, it still establishes nothing more than that Bakke arose in the twilight of the Court's permissive era of standing. [249] It does not provide reliable authority for granting standing in the Court's post-1990 restrictive era.

The conclusory nature of Justice Thomas's assertion that equal protection cases are different from other standing cases is troubling not only because he appeared to give the proposition little attention, but because the proposition also appears to be wrong. If there is something special about equal protection cases, it must be that the denial of fair or nondiscriminatory consideration of an application for a ***1469** benefit is important in a way that is independent from receipt of the benefit itself. However, neither fairness nor nondiscrimination is ultimately able to sustain a claim that the Equal Protection Clause is special for standing purposes.

If the independent importance of considering an application for a benefit stems from the need for fair consideration, it is difficult to see how the Equal Protection Clause is relevant. Although one might well favor standing to protect the process-based goal of ensuring procedural regularity, that goal will be present in equal protection and non-equal protection cases alike. The members of the plaintiff trade association in Northeastern Florida may have been denied their procedural right to adequate consideration if their bids were improperly rejected, [250] but the plaintiffs in Lujan were also denied their procedural right to adequate consideration if their claims for interagency consultation were improperly rejected. [251] The procedural defect exists regardless of whether the provision being violated is the Equal Protection Clause or the Endangered Species Act. Accordingly, there is nothing special about the Equal Protection Clause that merits special treatment for standing purposes if the goal being pursued is the goal of procedural fairness or adequate consideration. This goal, therefore, cannot be what caused Justice Thomas to view equal protection cases as special for standing purposes.

If the goal that merits special treatment of standing under the Equal Protection Clause is the goal of nondiscrimination, Justice Thomas's claim has more facial plausibility, but it is still seriously vulnerable. Justice Thomas might have argued that, in addition to serving the procedural goal of adequate consideration, the Equal Protection Clause serves the substantive goal of prohibiting impermissible discrimination. This goal is frustrated when adequate consideration is denied on racially discriminatory grounds, as it was in Northeastern Florida, but it is not frustrated when adequate consideration is denied on nondiscriminatory, political, or economic grounds, as it was in Lujan. Therefore, equal protection cases should be treated differently for standing purposes because the denial of adequate consideration constitutes a substantive injury that is not present when a legal provision other than the Equal Protection Clause is alleged to have been violated.

This argument is vulnerable to the response that other legal provisions -- even purely procedural ones such as the Endangered Species Act -- also vest substantive rights in the beneficiaries of their procedural guarantees. Under the Endangered Species Act, for example, environmentalists ***1470** who wish to view endangered species have a substantive interest in whatever increased level of endangered species protection will result from the procedural guarantees of the statute. After all, the whole point of congressional enactment of the Endangered Species Act was presumably to increase extant levels of protection for endangered species. To the extent that Justice Thomas's equal-protection-is-special argument depends on a distinction between substance and procedure, the argument can never be more satisfying than the distinction on which it rests. [252]

But the primary problem with the argument is that, even if valid, it is ultimately unhelpful. At best, the argument that special standing rules should apply in equal protection cases enables Justice Thomas to distinguish Northeastern Florida from cases such as Lujan, where race was not an issue. In cases where race is an issue, however -- the cases that are relevant to the present disparate impact analysis -- the Equal Protection Clause is a constant, not a variable that serves as a basis for distinction. By hypothesis, any case in which the plaintiff initiates a programmatic challenge to official governmental conduct on the grounds that the conduct is racially discriminatory can be formulated as an equal protection challenge. [253] This reformulation would make standing liberally available in all such cases without recourse to draconian redressability requirements, and analysis of the pertinent standing cases would then reveal no racially disparate impact. But that is not what has happened; programmatic challenge cases do show a racially disparate impact, and they show this disparate impact despite Justice Thomas's purported special treatment of equal protection claims. [254]

***1471** The imposing presence of the Supreme Court's earlier decision in Warth v. Seldin forced Justice Thomas to confront this flaw in his equal protection argument. [255] Warth was an explicit equal protection challenge to a pattern and practice of restrictive zoning actions. [256] As a result, the special standing rules for equal protection cases, on which Justice Thomas relied in order to distinguish Northeastern Florida from the redressability demands of the post-1990 cases such as Lujan, should have been available to permit standing for the plaintiffs in Warth.

Because the Warth plaintiffs were denied standing, Justice Thomas had to find a way to distinguish the two cases. After conceding that there was "undoubtedly some tension" between Warth and the other equal protection standing cases on which he had relied to find standing in Northeastern Florida, [257] Justice Thomas offered two bases for distinguishing Warth. First, he argued that in Warth the plaintiffs were not complaining about the inability to have their applications for zoning variances considered the way that the plaintiffs in other equal protection cases like Bakke were. Rather, the plaintiffs in Warth were complaining about the failure to have their applications granted. Because there is no difference between consideration when the outcome is preordained and no consideration at all, this argument is fatuous.

Recognizing the tenuous nature of his distinction between applications that are never considered and applications that are automatically denied, Justice Thomas immediately retreated to his fallback argument. Even if the Warth plaintiffs had alleged a discriminatory refusal to consider their applications, they still lacked standing because they had not alleged the existence of any particular construction project that was being prevented by the alleged discriminatory acts. [258] This second argument is simply untrue, and Justice Thomas's assertion of it seems dishonest. As has been discussed, [259] there was a particular construction project at issue in Warth -- the Court simply chose to disregard it as too stale. [260] Whether one believes the sincerity ***1472** of the Court's assertion or not, the Warth plaintiffs' identification of even a "stale" project did more to establish redressability than did the total absence of any identified contract in Northeastern Florida. [261]

The outcomes of the Supreme Court's standing inquiries in programmatic challenges to allegedly racially discriminatory government conduct vary according to the race of the plaintiff. When the plaintiff is white or advocates the interests of the white majority, the Court grants standing despite the programmatic nature of the challenge, which the current Supreme Court has generally taken pains to exclude from judicial cognizance. When the plaintiff is a member of a racial minority, however, or advocates the interests of a racial minority, the Court will deny standing on the ground that nonredressable generalized grievances and programmatic challenges are not judicially cognizable, but are better left to the political branches for resolution.

Justice Thomas's attempt in Northeastern Florida to account for this racially disparate impact is so minimal and so disingenuous that it exacerbates rather than reduces the damage done by the Court's decisions. This disparate impact would alone be sufficient to establish a prima facie violation of the Title VII statutory prohibitions on racial discrimination -- if such antidiscrimination provisions applied to the Supreme Court. But of course these antidiscrimination provisions do not apply to the Supreme Court, and thus, the Court is free to engage in conduct that has a racially disparate impact.

B. Standing and Intentional Discrimination

In Washington v. Davis, [262] the Supreme Court adopted a discriminatory intent test for equal protection purposes, refusing to apply the disparate impact standard that it had previously adopted under Title VII. [263] The Court did not offer much explanation as to why the disparate impact standard used in Title VII cases was inappropriate for constitutional cases asserting an equal

protection violation. It merely stated that the use of an effects test for equal protection purposes would jeopardize the legality of a wide range of governmental actions, and that the decision to impose an effects test rather than an intent test was legislative rather than judicial in nature. [264]

Nevertheless, the decision did establish that, for constitutional purposes, official action having a racially discriminatory effect does not violate the Equal Protection Clause unless it is also motivated by a ***1473** racially discriminatory intent. However, an unexplained racially disparate impact can itself be compelling evidence of discriminatory intent. [265] If the Washington v. Davis intentional discrimination standard were applied to the Supreme Court's standing decisions, the Court would be found to have engaged in unconstitutional discrimination in violation of the Equal Protection Clause. Such a finding is justified because the racially disparate impact that exists in the Supreme Court's programmatic standing decisions between actions filed by white plaintiffs and actions filed by minority plaintiffs supports an inference of discriminatory intent. Moreover, when this evidence is supplemented by the evidence of discriminatory intent that is provided by the contemporary Court's civil rights decisions and the tradition of racial oppression that the Court has historically fostered, the inference of unconstitutional discriminatory intent becomes too powerful to resist.

1. Contemporary Civil Rights Decisions

In the past decade, the Supreme Court has issued a series of rulings in civil rights cases that have been gratuitously adverse to the interests of racial minorities. The decisions can be characterized as gratuitous either because they were noticeably insupportable under the accepted legal rules existing at the time, or because their political motivation was so obvious that it is difficult to view the decisions as distinct from ordinary politics.

Included among these decisions are the five affirmative action cases that the Court has been able to resolve with majority opinions, the cases in which the Court sought to nullify the Title VII disparate impact standard by reallocating burden of proof requirements under the statute, and the cases concerning constitutional protection of racially abusive hate speech. In addition, the Court issued a number of more esoteric decisions that helped to comprise the now infamous 1988 Term assault on minorities. The racial attitudes of the contemporary Supreme Court that emanate from these decisions, combined with the racially disparate impact of the Court's standing decisions, provides strong evidence of intentional discrimination -- evidence sufficient to establish an equal protection violation, if the Equal Protection Clause could meaningfully be applied to the Supreme Court.

a. Affirmative Action

Since 1974, the Supreme Court has granted certiorari in a number of constitutional affirmative action cases, [266] but has been able ***1474** to issue majority opinions resolving the merits in only its five most recent decisions. In 1989 the Court decided City of Richmond v. J.A. Croson Co., [267] in which it applied strict scrutiny under the Equal Protection Clause to invalidate a minority set-aside program adopted by the City Council of Richmond, Virginia for the award of municipal construction contracts. [268] In 1990 the Court decided Metro Broadcasting, Inc. v. FCC, [269] in which it applied intermediate scrutiny and upheld two minority preference programs used by the FCC in awarding radio and television broadcast licenses. [270] In 1993 the Court decided Shaw v. Reno, [271] in which it applied strict scrutiny to a voter reapportionment plan adopted by the State of North Carolina to increase minority voting strength to comply with the Voting Rights Act. [272] In 1995 the Court decided Adarand Constructors, Inc. v. Pena, [273] which overruled Metro Broadcasting, and applied strict scrutiny to a federal statute containing a presumption that minority construction contractors were socially and economically disadvantaged, and therefore entitled to a preference in the award of construction contracts. In 1995 the Court also decided Miller v. Johnson, [274] in which it extended Shaw v. Reno by invalidating a voter reapportionment plan because the location of the district lines had been "predominantly" motivated by race.

The Adarand decision has established that all affirmative action -- whether federal, state, or local -- is now subject to strict scrutiny. [275] However, Adarand also stated that strict scrutiny is no longer to be considered fatal scrutiny. [276] Although the Supreme Court recognizes the potential legitimacy of using race-conscious affirmative action programs for limited purposes, such as providing a remedy for the lingering effects of past discrimination, [277] the fact that such remedies are harmful to whites makes affirmative action a remedy of last resort, permissible only in limited circumstances. [278]

Despite their different outcomes, these five affirmative action cases all provide evidence of the Supreme Court's preference for the ***1475** interests of whites over the interests of racial minorities. The reason is that these five cases share a common analytical peculiarity: each proceeds from the premise that the Equal Protection Clause protects whites as well as racial minorities. This premise is stated explicitly in the majority opinions written by Justice O'Connor in Adarand, [279] Shaw, [280] and Croson, [281] and is tacitly reaffirmed in the Miller majority opinion written by Justice Kennedy, [282] and the Metro Broadcasting majority opinion written by Justice Brennan. [283] The premise is, however, insupportable as either an originalist or a functional matter.

As an originalist matter, the intent of the drafters of the Fourteenth Amendment had nothing whatsoever to do with protecting the interests of the white majority. Stated most flatteringly, the intent of the drafters was to provide federal protection -- primarily congressional, as opposed to judicial, protection -- to former black slaves who were being victimized by the Black Codes of the post-Civil War South. Stated less flatteringly, the intent of the victorious northern drafters was to punish the rebellious southern states after the Civil War by depriving them of the federalism-based power to control their internal affairs. [284] The intent of the drafters may have been to punish whites, but it was certainly not to protect them.

As a functional matter, the Fourteenth Amendment is perhaps most commonly understood as implementing a representation-reinforcement theory of constitutional law, under which the courts are empowered to reverse the policy preferences of politically accountable legislatures only if there is evidence that the legislature discounted or disregarded the interests of discrete and insular minorities who are underrepresented in the political process. [285] Although many other theories of constitutional law exist, representation-reinforcement is probably the most popular contemporary process theory, as evidenced ***1476** by Justice O'Connor's focus on the theory in her Croson opinion. [286] Although contemporary racial minorities arguably constitute discrete and insular minorities who are underrepresented in the political process, it is difficult to view the white majority as a politically underrepresented minority needing judicial protection from majoritarian legislative enactments such as the affirmative action programs at issue in Croson, Metro Broadcasting, Shaw, Adarand, and Miller. [287]

The lack of an analytically sound basis for the contemporary Supreme Court's assertion of the principle that the Equal Protection Clause protects the white majority renders the Court's motives suspect. Because there is no obvious reason why the Court should invalidate majoritarian enactments to protect the white majority, the Court's indulgence in such invalidations seems racially protectionist. Even when the majority elects to allocate a resource to a racial minority, the Court reserves the right to invalidate that allocation if it disapproves of the majority's judgment. The Court appears to view itself as the guardian of majority interests, whose job it is to prevent the tyranny of the minority and to ensure that the majority is not disadvantaged by its own shortsightedness. [288]

It is possible to construct theories of judicial review, such as public choice theory, [289] under which the task of protecting majoritarian ***1477** preferences is a defensible function of the Supreme Court. Such theories, however, do not lend themselves to characterization of the Supreme Court as a guardian of minority interests. Rather, they recognize the Court to be the guardian of majority interests at the expense of minority interests. Accordingly, such theories suggest that the Supreme Court will on occasion be engaged in intentional discrimination within the meaning of Washington v. Davis.

b. Title VII Burden of Proof

As has been noted, the Supreme Court held in Griggs v. Duke Power Co. that the existence of unlawful discrimination for Title VII purposes was to be determined through a discriminatory effects test rather than a discriminatory intent test. [290] In issuing the Griggs decision, the Court purported not to be relying on its own policy preferences, but to be implementing congressional intent. [291] In subsequent decisions, however, the Court reinterpreted the Griggs discriminatory effects test to be very demanding -- so demanding, in fact, that it became arguably more difficult to satisfy than the nominally more demanding intentional discrimination standard of Washington v. Davis.

When the Griggs disparate impact decision was issued in 1971, it was intended to apply most directly to objective employment criteria such as high school diploma requirements and standardized test scores. [292] Although Griggs did not preclude the use of objective hiring and promotion criteria when those criteria merely produced a racially disparate result, the decision shifted to

the employer the burden of proving that the criteria were sufficiently job-related that they neutralized or outweighed the racially disparate impact that resulted from their use. [293]

In 1988 the Court confronted the issue of whether the discriminatory effects test should also be applied to subjective employment criteria, such as impressions created by personal interviews, or whether a discriminatory intent standard was more appropriate for subjective criteria. In Watson v. Fort Worth Bank & Trust, [294] the Court held that a discriminatory effects test should be applied despite the ***1478** subjective nature of the criteria because use of a discriminatory intent standard would permit employers to evade Griggs simply by combining subjective criteria with whatever objective criteria they wished to utilize. [295] However, Justice O'Connor wrote a plurality opinion that contained dicta reallocating the burden of proof. A majority of the Court adopted this dicta the following Term in Wards Cove Packing Co. v. Atonio. [296]

Justice White wrote the majority opinion in Wards Cove, which first reaffirmed the applicability of a discriminatory effects test to subjective employment criteria, [297] and then went on to adopt Justice O'Connor's reallocation of the burden of proof. [298] Prior to Watson and Wards Cove, the employee's demonstration of a racially disparate impact would establish a prima facie case of discrimination and shift to the employer the burden of explaining why the practice producing the disparate impact was nevertheless a justifiable employment practice. [299] Under the new allocation, however, an employee claiming to be the victim of racial discrimination was given the burden not only of proving that the challenged employment practice produced a racially disparate impact, but of anticipating and negating explanations of the disparate impact that might dispel the suspicion of discriminatory intent. [300] Justice White not only shifted the burden of proof, but also made the burden unmanageable for many plaintiffs by requiring them to focus on particular employment practices rather than on the collective effect of all the employer's practices. [301]

Under Watson and Wards Cove, an employee could no longer establish a prima facie case by demonstrating that an employer had used a combination of seven objective and subjective selection criteria to produce a racially disparate impact. Rather, the employee was required to isolate each of the seven criteria, prove which ones were responsible for the disparate impact, and negate any potential justifications for the use of those criteria in order to establish a prima facie case. Because this is difficult to do in the large number of cases in which no one knows precisely what is responsible for a demonstrated disparate impact, a Title VII plaintiff could lose the very same case that he or she would have won before Watson and Wards Cove.

***1479** In effect, Watson and Wards Cove required a Title VII plaintiff to prove not only that the challenged employment practice had a discriminatory effect, but also that the employer had a discriminatory intent in adopting it, by negating all possible explanations for the disparate impact that did not entail discriminatory intent. Stated more succinctly, Watson and Wards Cove replaced the Griggs discriminatory effects test with a discriminatory effects plus discriminatory intent test. Although the operative legal standard for Title VII cases changed as a result of Watson and Wards Cove, the statutory language of Title VII did not. The only thing that changed was the political orientation of the Supreme Court.

In 1971, when Griggs was decided, the Court was in a very real sense still the Warren Court. Chief Justice Warren had retired only two years earlier. [302] By 1989, however, when Wards Cove was decided, Justices Black, Douglas, Harlan, and Stewart had been replaced by Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Kennedy. [303] The 1989 Court was much more conservative on racial issues than the immediate post-Warren Court had been. A measure of the 1989 Court's racial conservatism is provided by the fact that none of the four replacement Justices has ever voted in favor of the minority position in an affirmative action case that the Court has decided on constitutional grounds. [304] Now that Justices Brennan and Marshall ***1480** have been replaced by Justices Souter and Thomas, [305] the present Supreme Court is even more conservative on racial issues. [306]

Congress overruled the Watson and Wards Cove decisions in the Civil Rights Act of 1991 and restored the Griggs disparate impact burden and standard of proof to Title VII. [307] This suggests not only that the Supreme Court was politically motivated in its reinterpretation of Title VII, but that its reinterpretation of the statute was outside the mainstream of contemporary thought on the issue of racial discrimination in employment. In addition, the Court's pretense in Watson and Wards Cove that it was preserving the Griggs disparate impact standard for subjective criteria cases -- when it was in fact imposing a new standard that would often be harder to satisfy than the Washington v. Davis intent standard -- evinces disrespect for racial minorities by suggesting that minorities are unworthy of candid disclosures. The Court's conservative deviation from the norm on the burden

of proof issue in Title VII cases, combined with its condescension, provide additional reasons to suspect that the Court has engaged in intentional discrimination in issuing its racially correlated pattern of standing decisions.

c. Hate Speech

The regulation of hate speech -- speech consisting of racially derogatory language, epithets, or symbols -- is one of the most controversial topics in contemporary constitutional law. Racial minorities often argue that hate speech is a unique form of tortious injury that silences minority speech, inflicts severe emotional harm on its victims, provides no corresponding societal benefit, and increases inter-group frictions in a way that frustrates ultimate realization of generally accepted goals of racial tolerance, harmony, and uninhibited free expression. [308] Opponents of hate speech regulation often argue that First Amendment values favoring free expression are seriously undermined by the censorship of hate speech because it has traditionally been understood that the government should not regulate expression ***1481** on the grounds that it disapproves of the content of that expression. [309]

In recent Terms, the Supreme Court has twice considered the constitutionality of hate speech regulations. In 1992 the Court decided R.A.V. v. City of St. Paul, [310] invalidating a "Bias-Motivated Crime Ordinance" that prohibited the display of symbols such as burning crosses or swastikas that were likely to "arouse[ ] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." [311] Justice Scalia, writing for the majority, accepted for the sake of argument the Minnesota Supreme Court's construction of the ordinance as encompassing only those forms of expression that are "fighting words" unprotected by the First Amendment. [312] Nevertheless, Justice Scalia concluded that the St. Paul ordinance violated the First Amendment because it constituted a content-based regulation which punished speech that offended on the basis of race and the other categories enumerated in the ordinance, but did not punish speech that offended on the basis of other characteristics. [313] He noted that derogatory speech about one's mother or derogatory speech directed at "anti-Catholic bigots" might be very offensive but would not be proscribed by the ordinance, thereby demonstrating that the ordinance encompassed impermissible viewpoint discrimination. [314]

In 1993 the Court issued a decision in Wisconsin v. Mitchell, [315] upholding the constitutionality of a Wisconsin hate crimes penalty enhancement statute, which had been used to increase the maximum sentence given to a criminal defendant convicted of aggravated battery because the defendant intentionally selected his victim on the basis of race. [316] Chief Justice Rehnquist's majority opinion rejected the argument that the penalty enhancement statute violated the First Amendment by penalizing the defendant's abstract racial beliefs, and held that the enhancement statute punished conduct rather than speech. [317] Chief Justice Rehnquist distinguished R.A.V. as a case in which the underlying crime consisted of expression, whereas in Mitchell, the underlying crime had nothing to do with expression. Expression ***1482** -- in the form of the defendant's motivating beliefs -- was relevant only to determine the defendant's sentence, not his culpability. [318] The Mitchell opinion relied in passing on Dawson v. Delaware [319] and Barclay v. Florida [320] to support the distinction between speech and conduct. Dawson held that the defendant's abstract status as a racial bigot could not be used to justify imposition of the death penalty, but Barclay held that racial bigotry relevant to the defendant's crime could be used to justify imposition of the death penalty. [321]

Despite the assurances of Chief Justice Rehnquist, it is difficult to distinguish Mitchell from R.A.V. The distinction offered in Mitchell rests upon the belief that a meaningful difference between speech and conduct exists. However, because speech is conduct and because much conduct is expressive, it is not surprising that the distinction between the two has proved to be elusive.

Under the Mitchell fact situation, there are two relevant crimes: battery, which carries a normal penalty, and bigoted battery, which carries the normal penalty for battery plus an enhanced penalty for bigotry. When the two crimes are compared, the battery components and their associated penalties cancel each other out, and all that is left is bigotry and the enhanced penalty. There is no conduct left, only speech -- bigotry -- and R.A.V. holds that bigotry alone cannot be criminally punished because that would implicate the government in the impermissible content-based regulation of speech that it disfavors.

The Dawson and Barclay decisions -- on which Chief Justice Rehnquist relied to support his proffered distinction between speech and conduct -- do nothing to avoid the problem. Everyone agrees that a defendant's "good" characteristics can be considered in the abstract as mitigating factors by a sentencing judge or jury. [322] This establishes that "speech," as well as conduct, is relevant

to the state's imposition of criminal punishment. Although one might try to distinguish Dawson and Barclay by focusing on the degree of relevance that a defendant's abstract beliefs have to the defendant's crime [323] or on whether the defendant's beliefs are used to mitigate or enhance the defendant's sentence, [324] these are simply matters of judicial discretion and ***1483** have nothing whatsoever to do with a qualitative distinction between conduct and speech.

Justice Scalia might respond that because bigotry was assumed to be unprotected speech in R.A.V., it can be suppressed by the government as long as the government chooses to suppress all bigotry and does not selectively engage in viewpoint discrimination with respect to the various brands of bigotry that compete for recognition in the marketplace of ideas. [325] But the Wisconsin statute that was upheld in Mitchell enumerates roughly the same categories of proscribed bigotry as did the St. Paul ordinance that was invalidated in R.A.V. Race, color, and religion are common to both; the Wisconsin statute adds disability, sexual orientation, and national origin or ancestry; and the St. Paul ordinance adds creed and gender. [326] Both omit from their coverage bigotry directed at a person's mother and bigotry directed against "anti-Catholic bigots" -- the two categories of bigotry on which Justice Scalia focused to illustrate the deficiency in the St. Paul ordinance. [327]

Some have suggested that despite the difficulty of finding neutral or principled differences between the "speech" protected in R.A.V. and the "conduct" punished in Mitchell, there is certainly a difference between pure expression on the one hand and expression that is intimately connected to conduct on the other. [328] Along the spectrum of speech-connected-to-conduct, for example, an arbitrary discharge from employment is qualitatively distinct from a racially motivated discharge. Accordingly, the legislature should be free to punish the two forms of speech-connected-to-conduct differently, as Congress chose to do in Title VII. [329] Similarly, no one argues that the distinction drawn between child molestation and adult molestation for sentencing purposes is unconstitutional on First Amendment grounds. These distinctions, however, are every bit as infirm as the purported distinction ***1484** between R.A.V. and Mitchell. The fact that we routinely tolerate differential punishment of discharges and molestations, despite the expressive components of their motivations, only means that the Supreme Court honors the tenuous distinction between speech and conduct when it is convenient to do so. It does not mean that the distinction has content.

R.A.V. and Mitchell are indistinguishable along the spectrum of First Amendment doctrine, but they are distinguishable along another spectrum. The defendant who escaped a criminal sentence in R.A.V. was white, [330] but the defendant who was subjected to an enhanced criminal sentence in Mitchell was black. [331] The victim whose racially motivated injury was found to be redressable under the Constitution in Mitchell was white, [332] but the victim whose racially motivated injury was found not to be redressable under the Constitution in R.A.V. was black. [333] In the two cases on which Chief Justice Rehnquist relied in Mitchell to illustrate when bigotry could be considered by a sentencing judge or jury in death penalty cases, the outcome also varied with the race of the defendant. In Dawson v. Delaware, the bigot whose bigotry was held to be inadmissible was a white supremacist. [334] In Barclay v. Florida, the bigot whose bigotry was held to be admissible was a member of the Black Liberation Army. [335]

When doctrine gets murky, it loses its ability to justify outcomes. One is then forced to look for alternate ways to account for those outcomes. In racially charged cases such as R.A.V., Mitchell, Dawson, and Barclay, racial correlations between those whom the Supreme Court elects to protect and those whom the Court elects to abandon become conspicuous. Realistically, Supreme Court adjudications are at least as interesting for the messages that they send as for the doctrinal rules that they articulate. The hate speech cases provide yet another basis for suspecting that the Court was engaged in intentional discrimination when it issued its racially correlated pattern of standing decisions.

d. The 1988 Term

The Supreme Court's 1988 Term symbolizes the racial attitude of the present Supreme Court. During that Term, the Rehnquist Court issued a series of rulings that were either directly or indirectly harmful ***1485** to the political and economic interests of racial minorities. In case after case, the Court was unrelenting in its dissemination of the message that the Supreme Court was no longer the place to which minorities should turn for improvement of their social condition.

Many of these decisions were subsequently overruled by Congress in the Civil Rights Act of 1991. [336] Although congressional reversal helped to nullify the substantive damage that the Court had inflicted, it did nothing to reverse the impression created by

the Term's decisions that the Court is an institution unreceptive to minority claims for protection from the race-related dangers inherent in ordinary politics.

As U.S. Law Week observed, "A series of civil rights decisions by a conservative majority of the U.S. Supreme Court making it easier to challenge affirmative action programs and more difficult to establish claims of employment discrimination highlighted the 1988-89 term's labor and employment cases." [337] Law Week described seven decisions that had been handed down that Term to illustrate its point. The two best known decisions were City of Richmond v. J.A. Croson Co., [338] which invalidated the minority set-aside plan adopted by the Richmond City Council, [339] and Wards Cove Packing Co. v. Atonio, [340] which reallocated and heightened the burden of proof in Title VII cases. [341]

The other decisions referenced in Law Week were less celebrated but still harmful to minority interests in both substantive and symbolic ways. In Patterson v. McLean Credit Union, [342] the Supreme Court adopted a narrow construction of 42 U.S.C. s 1981 -- a Reconstruction civil rights statute that, among other things, prohibits discrimination in the making or enforcement of contracts. The Court held that the statute did not prohibit racial harassment of minority employees by their employers despite the contractual basis of the employment. The Court then held in Jett v. Dallas Independent School District [343] that s 1981 actions could not be used to file discrimination claims against municipalities under a theory of respondeat superior.

In Martin v. Wilks, [344] the Court permitted white workers to maintain a collateral attack on a Title VII consent decree that contained ***1486** affirmative action provisions, even though the workers had chosen not to intervene in the litigation out of which the consent decree had emerged. [345] In Lorance v. AT&T Technologies, Inc., [346] the Court held that the statute of limitations for Title VII challenges to discriminatory seniority systems began to run when the seniority systems were first adopted, rather than when the discriminatory aspects of the system emerged in the form of seniority-based demotions. [347] In Independent Federation of Flight Attendants v. Zipes, [348] the Court held that attorney's fees for prevailing plaintiffs could not be assessed against unsuccessful union intervenors in the Title VII case. [349]

Two 1988 Term cases that were not included in the Law Week account also adversely affected the interests of racial minorities. In Price Waterhouse v. Hopkins, [350] the Court held that discriminatory employment decisions did not violate Title VII if the employer could show that the plaintiff would not have received the benefit sought even in the absence of the alleged discrimination. In Will v. Michigan Department of State Police, [351] the Court held that 42 U.S.C. s 1983 -- another Reconstruction statute, which prohibits official discrimination under "color" of state law -- did not permit discrimination suits to be filed against states as employers because states did not constitute "persons" within the meaning of s 1983.

Congress responded to the 1988 Term by enacting the Civil Rights Act of 1991, [352] which overruled many of that Term's decisions. In Landgraf v. USI Film Products, [353] the Supreme Court listed the 1988 Term cases, as well as other recent decisions, that Congress modified by its enactment of the Civil Rights Act of 1991. [354] The Court noted that the purpose of the Act was "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." [355] Section 3(4) of the Act, as well as sections 2(2) and 3(2), changed the Court's new burden of proof requirements by restoring the burden of proof rules that had existed prior to Wards Cove. [356] In addition, section 101 changed the result in Patterson, by extending the ***1487** 42 U.S.C. s 1981 prohibition on discrimination in the making or enforcement of contracts to encompass on-the-job racial harassment of employees. [357] Section 107 changed the result in Price Waterhouse by prescribing new discrimination standards to be used in mixed-motive discrimination cases. [358] Section 108 changed the result in Martin v. Wilks by prohibiting certain collateral challenges to employment consent decrees. [359] Section 112 changed the result in Lorance by enlarging the rights of minority employees to challenge discriminatory seniority systems. [360]

The fact that the Supreme Court, in a single Term, issued a string of nine cases that were uniformly adverse to racial minority interests does not alone prove anything. Nevertheless, the nine cases are suggestive of a racially insensitive attitude. When the 1988 Term is considered in conjunction with the congressional reversal of many of the cases decided that Term, the Supreme Court begins to look like an institution that is at the periphery, rather than the core, of contemporary attitudes on race. When the 1988 Term is considered in conjunction with the current Court's doctrinally tenuous hostility toward the merits of affirmative

action cases, the suggestion of racial insensitivity grows stronger still. When all of this is then combined with the Court's willingness to adopt a dramatic shift in the traditional burden of proof for Title VII cases, the suggestion becomes a strong suspicion. The suspicion is reinforced by the Court's racially correlated decisions in the hate speech cases. This suspicion, combined with the strikingly disparate impact of the Court's standing decisions, is sufficient to support a compelling inference of intentional discrimination that violates the Equal Protection Clause under the Court's own standard in Washington v. Davis. Characterization of the Supreme Court as intentionally discriminatory is not unique to the Rehnquist Court. As an institutional matter, the Supreme Court has always been intentionally discriminatory.

2. Traditional Discrimination

Whether or not the discriminatory pattern of the Supreme Court's standing decisions is ultimately deemed to amount to intentional ***1488** discrimination within the meaning of Washington v. Davis, it does constitute traditional discrimination. Supreme Court decisions such as Northeastern Florida are merely the latest offerings in a long tradition of Supreme Court decisions that have preserved majority control over minority interests. Whether or not Supreme Court justices consciously intend to do so, they serve as agents of the majority in implementing majoritarian preferences concerning minority rights.

The Supreme Court is ideally suited to serve in a majoritarian institutional role because its task is to make rhetorical pronouncements that give meaning to the goals and objectives to which our society aspires. In practice, however, the Court has not lived up to those aspirational goals and objectives itself. Because it is the Supreme Court that determines the meaning of the Constitution,[361] there is no institution of government that has the formal or practical ability to enforce constitutional norms against the Court.

As a result, it is not surprising that, throughout the history of the United States, the Supreme Court has presided over the sacrifice of minority interests for majority gain.[362] Perhaps the three most famous race relations cases decided by the Supreme Court are Dred Scott,[363] Plessy,[364] and Brown.[365] All three of these cases illustrate the manner in which the Supreme Court has sacrificed racial minority interests for majority gain.

a. Dred Scott

In the Court's 1857 Dred Scott decision, the Supreme Court's sacrifice of minority rights for majority gain was obvious. Dred Scott was a slave who sought a judicial declaration that he had become free when his owner had taken him first to a free state, then to a federal territory in which slavery had been prohibited, and finally back to the owner's original slave state.[366] At stake was the issue of whether Dred Scott existed for the benefit of Dred Scott himself, or for the benefit of Dred Scott's owner. In ruling against the slave and in favor of the ***1489** owner, the Supreme Court sacrificed the liberty interest of a black person in order to protect the property interest of a white person.[367]

The precise legal issue that was before the Supreme Court in Dred Scott was whether a black person was a "citizen" entitled to invoke diversity jurisdiction to file suit in federal court.[368] In ruling that Dred Scott was not a citizen, the Court based its decision on the subhuman character of blacks. The language of Justice Taney's famous opinion is as colorful as it is telling:

> The words "people of the United States" and "citizens" are synonymous. . . . The question before us is, whether [blacks are] a portion of this people. . . . We think they are not . . . and can therefore claim none of the rights and privileges which [the Constitution] provides . . . . On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.
>
> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights

> which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. [369]

After holding that the Court lacked jurisdiction because blacks could not be considered citizens, Justice Taney went on to offer pronouncements about the importance of protecting the property rights of slave holders. [370] These pronouncements were gratuitous because the Court had just held that it lacked jurisdiction to issue them; but they are noteworthy because the Supreme Court was willing to invalidate an Act of Congress -- for only the second time in its history [371] -- in order to implement them. The Court held that the Missouri Compromise, [372] which prohibited slavery in certain portions of the Louisiana ***1490** Purchase, [373] was unconstitutional because it interfered with the rights of slave owners. [374]

Ultimately, the Court's pronouncements were reversed by the Civil War, and Dred Scott is now generally considered to be an embarrassment. Justice Taney's opinion is now the emanation of a meddlesome Supreme Court justice who wrongly thought he could do a better job than Congress of managing a political controversy. If indeed Dred Scott is the icon of a bygone era, it is no longer cause for continuing concern. But if, as the meddlesome Supreme Court actions that led to the Civil Rights Act of 1991 suggest, [375] Dred Scott was merely the first in a tradition of racially abusive Supreme Court decisions, Dred Scott remains ominous.

b. Plessy

After the Civil War, ratification of the Thirteenth and Fourteenth Amendments overruled Dred Scott and granted citizenship to former black slaves. [376] In its 1896 decision in Plessy, the Supreme Court considered the meaning of the Equal Protection Clause of the Fourteenth Amendment and held that the equal protection guarantee could be satisfied by according separate-but-equal treatment to whites and racial minorities. [377] In upholding a Louisiana statute that required racial segregation in railroad cars, [378] the Court engaged in a practice that it has carried through to its modern race cases: It chose to conduct constitutional analysis at the level of fictitious formalism rather than at the level of common knowledge realism.

In Plessy, the Court was willing to adopt the fiction that Louisiana's racial segregation could be equal, even though that segregation had evolved from the same culture of slavery that the Taney Court had sought to protect in Dred Scott. Justice Harlan emphasized in his dissenting opinion that the invidiousness of the railroad segregation statute was well known, and he prophetically predicted that Plessy would come to be regarded as a decision whose perniciousness would equal that of Dred Scott itself. [379] Nevertheless, the majority chose to overlook the common knowledge aspects of the Louisiana statute in favor of the statute's formal declaration of equality and race neutrality. [380]

***1491** Despite the political context out of which Plessy emerged -- Dred Scott, followed by the Civil War, followed by the enactment of the Fourteenth Amendment -- the holding of Plessy was not surprising. Plessy had been presaged by the Slaughter-House Cases [381] and the Civil Rights Cases. [382] In a move that may reflect an enduring characteristic of the Court as an institution, the Supreme Court responded to the political reversal of its earlier Dred Scott decision by adopting a narrow reading of the Fourteenth Amendment.

The Fourteenth Amendment is best understood as an effort to secure the constitutionality of congressional Reconstruction statutes that were designed to shift primary responsibility for the protection of minority interests from the states to the federal government after the Civil War. [383] Prior to enactment of the Reconstruction amendments, there was a danger that the courts would find protective federal legislation to be an unconstitutional violation of the then robust doctrine of federalism. Ratification of the Fourteenth Amendment was intended to eliminate any potential federalism problems. [384]

Despite this history, the Supreme Court adopted a narrow construction of the Fourteenth Amendment. In the Slaughter-House Cases, which concerned a business monopoly and did not directly involve race, the Court held that the Fourteenth Amendment did not shift general responsibility for the protection of civil rights from the states to the federal government. The Fourteenth

Amendment merely expanded federal regulatory authority in matters that were closely related to the protection of newly freed slaves. [385]

In the Civil Rights Cases, the Supreme Court invalidated the public accommodations provisions of the Civil Rights Act of 1875 on the grounds that the statute was limited to state action and could not reach private discrimination. [386] By imposing a state action requirement, the Court nullified the primary purpose of the Fourteenth Amendment. Because state action could be established only after a showing that state legal protections were unavailable for claims of racial discrimination, the Supreme Court effectively shifted primary responsibility ***1492** for the protection of minority interests back to the states, thereby undoing the fundamental purpose of the Fourteenth Amendment. [387]

Although Plessy has come to stand for the proposition that separate treatment of the races must also be equal treatment, the language of Plessy nowhere imposes an equality requirement. [388] In a sense, this is a mere technical deficiency because the statute that the Court was reviewing in Plessy explicitly required equal treatment in addition to separate treatment. [389] In another sense, however, the Court's omission of an equality requirement in Plessy was prescient, because the Court would subsequently choose to tolerate segregation requirements without insisting on equality. [390]

Sometimes the Court did invalidate state segregation statutes because of their failure to provide for equal treatment. In McCabe v. Atchison, Topeka & Sante Fe Railway Co., [391] for example, the Court invalidated a railroad segregation statute that accorded lower quality accommodations to minorities than to whites because of minimal minority demand. [392] On other occasions, however, the Court refused to recognize inequality of segregated facilities as a basis for invalidating segregation laws under the Equal Protection Clause. In Cumming v. County Board of Education, [393] the Court rejected an equal protection challenge by minority taxpayers to a tax assessment that was used to support a segregated white high school after the school district had closed the only black high school in the area. As a result, both blacks and whites were required to pay to support the white high school, but only whites were permitted to attend it. [394]

Interestingly, the Cumming opinion was written by Justice Harlan, the mild dissenter in Plessy. [395] Although the post- Plessy cases were inconsistent with respect to whether constitutionally permissible separate treatment also had to be equal treatment, Brown ultimately resolved this inconsistency . . . establishing unequivocally that equality would not be required.

***1493 c. Brown**

Brown v. Board of Education is commonly offered as the case that proves the institutional ability of the Supreme Court to resist majoritarian pressures and to protect minority rights. [396] Brown overruled the separate-but-equal reading of the Fourteenth Amendment that was adopted in Plessy [397] and required the desegregation of public schools "with all deliberate speed." [398] Accordingly, Brown is generally interpreted as having negated the obvious racial prejudice of the Taney Court in Dred Scott, and as having corrected the misguided conception of equality to which the Court succumbed in Plessy. However, Brown did none of these things. It did not desegregate the public schools, and it certainly did not overrule Plessy.

Brown was decided over forty years ago, yet many public schools are still segregated. One-third of black public school students in the United States still attend all-black schools, and sixty-three percent attend schools that are at least half black. [399] The reason that the public schools have not been desegregated is that the Supreme Court lost its resolve as popular support for desegregation dissipated.

Professor Bell has argued that when Brown was decided, it was not the countermajoritarian decision that it is publicly heralded to have been. [400] Rather, he argues, the Brown decision reflected a national coalition of majoritarian interests that converged on the desirability of imposing school desegregation on the South. The interests of blacks who desired integrated education, whites who saw southern segregation ***1494** as a threat to national economic growth, and foreign policy advocates who viewed southern segregation as a liability in the competition with communism for control over the third world, all converged to favor the desegregation of southern schools.

The South, of course, objected to desegregation, but -- reminiscent of Reconstruction -- the national majority cared little about parochial southern interests. Once the desegregation effort began to move north, however, the national coalition supporting school desegregation crumbled, and the Supreme Court halted the desegregation process. [401] Because de facto northern school segregation tended to be a product of residential segregation rather than de jure state laws, the Court was able to curtail unpopular northern desegregation by declining to remedy de facto segregation, [402] by refusing to order interdistrict desegregation remedies, [403] and by tolerating unequal funding between inner-city and suburban schools. [404] Far from demonstrating that the Supreme Court can withstand majoritarian pressures and protect minority rights, Brown's failure to desegregate northern schools indicates the coextensiveness of Supreme Court protection and majority support. [405]

Brown is commonly cited as the case that overruled Plessy, but that characterization is also inaccurate. Although Brown did preclude formal separate-but-equal government conduct, it also reaffirmed Plessy in two important respects. First, Brown reaffirmed Plessy's application of constitutional analysis at the level of fictitious formalism rather than at the level of common knowledge realism. Because Brown required the replacement of dual school systems with unitary systems, [406] it is now formally correct that most public schools in the United States have finally been desegregated. The common knowledge reality that many urban schools are still severely segregated is simply irrelevant as a formal matter, just as the invidious nature of the Louisiana railroad segregation law was formally irrelevant in Plessy. [407]

Second, Brown reaffirmed Plessy's omission of an equality requirement. Professor Seidman has argued that the Brown decision was necessary to save the nation from the implications of a separate-but-equal doctrine that had a real equality component. [408] If public schools, for example, were to be accorded equal funding regardless of the race of ***1495** the students who attended them, the majority would be confronted with a threat to its "liberal individualism" that would be politically unacceptable. [409] In contemporary American culture, the concept of equal educational funding for white and minority students is unfathomable, and Supreme Court imposition of such a requirement is unimaginable. Brown, however, relieved the Supreme Court of any obligation to require actual equality. By defining equality for equal protection purposes to consist of formal integration, Brown enabled the Supreme Court to avoid the abandonment of majoritarian concerns simply to aid racial minorities.

Both Dred Scott and Plessy offer strong support for the proposition that the Supreme Court is willing to sacrifice the interests of racial minorities in order to benefit the majority. Although it is easy to consign those two cases to the dark side of American history and to argue that they are not relevant to the contemporary racial attitudes of the Supreme Court, a proper understanding of Brown indicates that this is simply untrue. The present Court is just as committed to the protection of majority interests at the expense of minority interests as were the Dred Scott and Plessy Courts. The details may have changed as the social acceptability of overt discrimination has changed, but within the range of whatever discrimination is culturally tolerable at any given point in time, the Supreme Court can be counted on to perform ritualistic sacrifices of minority interests as those sacrifices become necessary for the well being of the majority.

The racially disparate impact of the current Court's standing decisions merely serves as a recent example of the Court's majoritarian role. Combined with the other evidence concerning Supreme Court racial predispositions that is available, cases like Northeastern Florida demonstrate that the Supreme Court not only engages in intentional discrimination that is theoretically unconstitutional, but that the Court's intentional discrimination is as traditional as it is unconstitutional.

CONCLUSION

The present Supreme Court is very stingy on the issue of standing. If a plaintiff wishes to use federal litigation to force programmatic changes on government, the court -- led by Justice Scalia -- is likely to view that litigation as an illegitimate request for judicial intervention into the political process, and is likely to deny the plaintiff standing on redressability-related grounds. That is not an insupportable view of the Supreme Court's governmental role. The problem is ***1496** that the Court is stingier on standing for racial minorities than for the white majority.

When minority plaintiffs file programmatic challenges to government actions alleged to be racially discriminatory, they typically take the form of a challenge to a pattern and practice of official discrimination. The Supreme Court regularly dismisses such actions because of their programmatic nature. However, when white plaintiffs file programmatic challenges to government actions alleged to be racially discriminatory, they typically take the form of a challenge to the legality of an affirmative action

program that benefits minorities at the expense of the majority. And the Court almost always permits such actions to be maintained.

This discriminatory approach to standing was most pronounced in Northeastern Florida, in which the Supreme Court strained to allow a white plaintiff affirmative action challenge despite serious standing defects. Although the Court explicitly addressed the minority plaintiff discrimination cases that it had dismissed for lack of standing in the past, it nevertheless chose to grant standing to the white plaintiff in Northeastern Florida. In so doing, the Court not only recognized, but ratified and perpetuated the racially disparate impact of its standing decisions.

The racially disparate impact of the Court's standing decisions is so striking that it would almost certainly violate Title VII of the Civil Rights Act of 1964 if that statute applied to Supreme Court decisionmaking. Moreover, the Court's decisions also seem to violate the Supreme Court's own interpretation of the Equal Protection Clause because other evidence of Supreme Court racial attitudes indicates that the Court is engaged in intentional racial discrimination.

Although the Supreme Court may be violating the spirit of its own antidiscrimination laws, the Court is effectively immune from the commands of both statutes and constitutional provisions. Because the Court decides what the law is, the Court can always expound the law in a way that permits the Court to do whatever the Court is doing. This unique position makes the Supreme Court the ideal social institution to trade off minority interests for majority gain. In pronouncing the need for nondiscriminatory societal behavior, the Court can engage in the very discrimination that the Court denounces, thereby permitting the majority to have its cake and eat it too.

The Supreme Court has served this veiled majoritarian function since the Republic began. Dred Scott illustrates the minority exploitation phenomenon explicitly; Plessy demonstrates that the Court will camouflage its exploitation when blatant exploitation becomes unpalatable; and Brown demonstrates that, when necessary, the camouflage ***1497** can become so subtle and elaborate that even minorities may fail to detect the depths of their own exploitation.

Notwithstanding these observations, the thing that is most striking about the tradition of Supreme Court racial discrimination is its utter irrelevance. Whether one focuses on the technicalities of standing or the merits of civil rights decisions, everyone undoubtedly recognizes that the Court's racial attitudes have had a significant impact on the Court's race-related decisions. But no one seems to care. Northeastern Florida is written as if the case were about injury, redressability, and causation, rather than about the Supreme Court's perpetuation of racial subordination, and we are eager to accept the charade. This is like arguing that Dred Scott was about property rights, or that Plessy was about deference to the legislature. However, the condemnation that has come to characterize those earlier decision has yet to taint Northeastern Florida. We continue to discuss and even conceptualize issues of contemporary racial justice as if the reality of their operational existence corresponded to the doctrinal formality that those issues are accorded by courts.

This transposition of race, from operational reality to doctrinal formality, is a necessary incident of Supreme Court adjudication. Courts cannot confront real life. They can only confront cold records that have been filtered through evidentiary rules and legal presumptions. However, the slippage that occurs between operational existence and doctrinal formality is sufficient to permit a culture that subsists on racial subordination to conceive of itself as racially just. Supreme Court adjudication is instrumental in this process because it institutionalizes the distractions that are necessary to make a benign account of our racial difficulties plausible.

When the Supreme Court, therefore, holds that whites have standing to challenge racial equality, but that minorities lack standing to challenge racial discrimination, the Court is merely playing out the social role that we have prescribed for it. The Supreme Court is continuing to perform the function that it has performed so admirably throughout its history.

Footnotes

d Professor of Law, Georgetown University Law Center. I would like to thank David Cole, Lisa Heinzerling, Patricia King, Tom Krattenmaker, Elizabeth Patterson, and Mike Seidman for their help in developing the ideas expressed in this Article. Research for this Article was supported by a grant from the Georgetown University Law Center.

1 113 S. Ct. 2297 (1993). Cf. Shaw v. Reno, 113 S. Ct. 2816 (1993) (permitting white challenge to affirmative action voter apportionment scheme without ever discussing issue of standing). In order to facilitate the process of finding references, the secondary sources that are cited most frequently in this Article are collected alphabetically in this footnote: Derrick Bell, Brown and the Interest-Convergence Dilemma, in Shades of Brown: New Perspectives on School Desegregation 91 (Derrick Bell ed., 1980); Stephen G. Breyer & Richard B. Stewart , Administrative Law and Regulatory Policy (3d ed. 1992); David Cole, Neutral Standards and Racist Speech, 2 Reconstruction 65 (1992); John H. Ely , Democracy and Distrust: A Theory of Judicial Review (1980); William N. Eskridge, Jr. & Philip P. Frickey , Cases and Materials on Legislation: Statutes and the Creation of Public Policy (1988) ; Louis M. Seidman, Brown and Miranda, 80 Cal. L. Rev. 673 (1992); Girardeau A. Spann, Expository Justice, 131 U. Pa. L. Rev. 585 (1983) [hereinafter Spann, Expository Justice]; Girardeau A. Spann , Race Against the Court: The Supreme Court and Minorities in Contemporary America (1993) [hereinafter Spann , Race Against the Court]; Geoffrey Stone et al. , Constitutional Law (2d ed. 1991 & Supp. 1994).

2 See Spann , Race Against the Court , supra note 1, at 19-26, 94-99, 104-60; Girardeau A. Spann, Pure Politics, 88 Mich. L. Rev. 1971, 1982-90, 2000-08, 2012-18 (1990).

3 See U.S. Const. art. III, s 2 (imposing "case" or "controversy" restriction on federal court jurisdiction).

4 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 243 (1964) (codified as amended at 42 U.S.C. ss 2000e to 2000e-17 (1988 & Supp. IV 1992)).

5 U.S. Const. amend. XIV, s 1.

6 Title VII is inapplicable by its terms. See 42 U.S.C. s 2000e(b) (1988) (excluding United States from definition of "employer" covered by the Act). Although the Equal Protection Clause technically applies to all government actions, there is no governmental body that possesses the formal authority to enforce constitutional guarantees against the Court. Even if there were, the Court has proclaimed itself to be the final expositor of constitutional meaning. See Cooper v. Aaron, 358 U.S. 1, 18 (1958) (recognizing "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution," and quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), for proposition that "[i]t is emphatically the province and duty of the judicial department to say what the law is"); cf. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 337-52 (1816) (rejecting argument that state courts are final expositors of constitutional meaning within spheres of state sovereignty). The Court has, thereby, effectively insulated itself from constitutional accountability. Ironically, this insulation enables the Court to implement the very types of discriminatory preferences that the Court would be obliged to invalidate if expressed by another branch of government.

7 See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162-68 (1803) (function of judiciary is to protect legal rights); see also The Federalist No. 78 (Alexander Hamilton) (federal judiciary obligated to invalidate acts of political branches that violate constitutional rights).

8 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) (holding blacks not citizens within meaning of United States Constitution).

9 Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding separate-but-equal interpretation of Equal Protection Clause).

10 Brown v. Board of Educ. (Brown I), 347 U.S. 483 (1954) (rejecting Plessy's separate-but-equal interpretation of Equal Protection Clause of United States Constitution); see also Brown v. Board of Educ. (Brown II), 349 U.S. 294, 301 (1955) (ordering desegregation of public schools "with all deliberate speed").

11 See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (applying strict scrutiny to affirmative action plan adopted by city council of Richmond, Virginia).

12 See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 475 (1982) ("We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it."); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970) ("Generalizations about standing to sue are largely worthless as such."); 3 Kenneth C. Davis , Administrative Law Treatise s 22.18 (Supp. 1965) ("[T]he Supreme Court's law of standing remains cluttered, confused, and contradictory."); Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1291 (1976) ("[T]he Supreme Court is struggling manfully, but with questionable success, to establish a formula for delimiting who may sue that stops short of 'anybody who might be significantly affected by the situation he seeks to litigate.'"); Mark V. Tushnet, The New Law of Standing: A Plea for Abandonment, 62 Cornell L. Rev. 663 (1977) ("[T]he law of standing lacks a rational conceptual framework. It is little more than a set of disjointed rules dealing with a common subject."); Mark V. Tushnet, The Sociology of Article III: A Response to Professor Brilmayer, 93 Harv. L. Rev. 1698, 1705 (1980) ("The ease of manipulation [of standing criteria] is especially enhanced because the doctrine is so amorphous and confused."); Michael A. Wolff, Standing to Sue: Capricious Application of Direct Injury Standard, 20 St. Louis U. L.J. 663 (1976) ("The confusing and inconsistent nature of these decisions has been the subject of judicial and scholarly comment."); see generally Erwin Chemerinsky , Federal Jurisdiction s 2.3 (2d ed. 1994) (discussing standing).

13 Some commentators have argued that the existence of such Supreme Court discretion is a good thing because it permits the Court to avoid improper involvement in political decisionmaking. See, e.g., Alexander M. Bickel , The Least Dangerous Branch: The Supreme Court at the Bar of Politics 111-98 (1962) (terming doctrines such as standing "passive virtues").

14 113 S. Ct. 2297 (1993).

15 Id. at 2299-2301.

16 Id. at 2301 (quoting respectively Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992), and Allen v. Wright, 468 U.S. 737, 750 (1984)).

17 See, e.g., Valley Forge Christian College v. Americans United for the Separation of Church and State, 454 U.S. 464, 471-76 (1982); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 72 (1978); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40-45 (1976); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215-16 (1974); United States v. Richardson, 418 U.S. 166, 171-72 (1974); Sierra Club v. Morton, 405 U.S. 727, 731-34 (1972); Flast v. Cohen, 392 U.S. 83, 94-101 (1968).

18 See Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-62 (1992); Massachusetts v. Mellon, 262 U.S. 447, 488-89 (1923). This account of the constitutional dimension of standing is developed more fully in Spann, Expository Justice, supra note 1 (arguing that justiciability rules are best understood as facilitating expository, rather than dispute-resolution, function of federal courts).

19 Northeastern Florida, 113 S. Ct. at 2301-02 (citations omitted).

20 397 U.S. 150, 151 (1970).

21 397 U.S. 159, 163 (1970).

22 The first three lines of the quoted portion of Justice Thomas's opinion in Northeastern Florida seem to equate the injury-in-fact and legal-interest tests even though they are analytically very different. See Spann, Expository Justice, supra note 1, at 620-21. Compare Northeastern Florida, 113 S. Ct. at 2301-02 (equating the two tests) with Data Processing, 397 U.S. at 152-53 (emphasizing the difference between the two tests). This confusion replicates an earlier confusion introduced by Justice Scalia in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), which Justice Thomas quoted. See Northeastern Florida, 113 S. Ct. at 2301-02. (In order to comply with citation conventions, Lujan v. National Wildlife Federation has been referred to as " National Wildlife Federation" and Lujan v. Defenders of Wildlife has been referred to as " Lujan.") The point is esoteric enough that Justice Thomas, who possesses no particular expertise in administrative law or the law of standing, could understandably have failed to appreciate it. What is more surprising is that in conflating the "injury in fact" test with the "legal interest" test, Justice Thomas was quoting the Lujan opinion of Justice Scalia. See id. Justice Scalia, as a former law professor and expert in administrative law, is generally regarded as having considerable competence in such matters. For a suggestion that this equation is not an error but an effort to supplant the injury-in-fact test with a restored legal-interest test, see Ronald Cass et al., Administrative Law: Cases and Materials 316 (2d ed. 1994).

23 See Data Processing, 397 U.S. at 152-53.

24 397 U.S. 159 (1970).

25 See id. at 160-63.

26 See Data Processing, 397 U.S. at 154.

27 412 U.S. 669 (1973).

28 See id. at 672-76.

29 392 U.S. 83 (1968).

30 See id. at 85-88.

31 See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (environmentalists lack standing to enforce Endangered Species Act); Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990) (environmentalists lack standing to challenge government decision to permit increased mining of federal lands); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) (taxpayers lack standing to challenge gift of government property to religious school as violation of Establishment Clause of First Amendment).

32 See supra note 12 and accompanying text (documenting confusion in law of standing).

33 See Spann, Expository Justice, supra note 1, at 589-92, 636-44.

34 497 U.S. 871 (1990).

35 Id. at 875-89. The plaintiff submitted two affidavits in support of its opposition to the government's motion to dismiss for lack of standing. The district court denied this motion, and the court of appeals upheld the denial. On remand, the district court held a hearing on the government's motion for summary judgment based upon the plaintiff's lack of standing. After this hearing, the plaintiff submitted four more specific supplemental affidavits, but the district court rejected them as untimely. See id. at 879-82; cf. id. at 904 n.6 (Blackmun, J., dissenting) (stating that five additional affidavits were

submitted). The court of appeals then reversed the district court, finding that the additional affidavits were admissible and that the plaintiff had established a genuine issue of material fact concerning whether its members used affected tracts of land and thus survived the government's motion for summary judgment. See id. at 879-82. Ultimately, the Supreme Court ruled that the district court's refusal to accept the additional affidavits was proper and that the affidavits were nevertheless insufficient to survive the government's motion for summary judgment. See id. at 890-98.

36 See id. at 882-89.

37 See id. at 890-94. Justice Scalia asserted that a general policy decision was not "final agency action" ripe for review under the Administrative Procedure Act until that general policy decision was reduced to operative implementation decisions. Id.

38 Id. at 891 (arguing that requests for programmatic changes should be addressed to Congress rather than to the courts).

39 504 U.S. 555 (1992).

40 See id. at 563-64. One affiant had traveled to Egypt in 1986 to observe the traditional habitat of the Nile crocodile, which she averred would suffer harm by American oversight of the rehabilitation of the Aswan High Dam on the Nile. The other affiant had traveled to Sri Lanka in 1981 to observe the Asian elephant and the leopard, which she averred were threatened by the Mahaweli Project that was being funded by the United States Agency for International Development. Both affiants had general, but not specific, plans to take similar trips in the future. See id. at 564-65 n.2.

41 See id. at 568-71. This portion of the opinion was signed by only four justices -- Justice Scalia, Chief Justice Rehnquist, Justice White, and Justice Thomas. See id. at 557. In addition to the uncertainty about how foreign governments would respond to the financial incentives in the Endangered Species Act, Justice Scalia was unwilling to assume that the other government agencies needed for effective enforcement would be bound to follow a regulation promulgated by the defendant Secretary of the Interior. This was especially so at the commencement of litigation in the district court -- the time at which standing was to be determined -- when the Supreme Court had not yet ruled on the binding effect of such a regulation on other agencies. See id. at 569-71 nn.4 & 5.

42 See 16 U.S.C. s 1540(g)(1) (1988) ("[A]ny person may commence a civil suit on his own behalf to enjoin any person, including the United States ... who is alleged to be in violation of any provision of this chapter.").

43 See Lujan, 504 U.S. at 572-73.

44 See id. at 571-78.

45 See id. at 572-78.

46 See Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 113 S. Ct. 2297, 2299 (1993). The Jacksonville ordinance creating the affirmative action plan also extended the set-aside to women. Although the plaintiff trade association may have had some minority and female members, most of its members did not qualify for the minority set-aside under the terms of the plan, thereby prompting the trade association to challenge its constitutionality. Id.

47 See DeFunis v. Odegaard, 416 U.S. 312 (1974) (dismissing challenge by white applicant to University of Washington Law School affirmative action program on grounds of mootness due to impending graduation of applicant, who had been admitted as result of state Supreme Court order invalidating challenged program). Characterizing DeFunis as the first modern affirmative action case treats the race-conscious school desegregation cases as sui generis, although they

too are technically affirmative action cases to the extent that they authorize race-conscious remedies in order to benefit minority students. See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 27-28 (1971) (authorizing race-conscious pupil assignment as remedy for prior maintenance of unconstitutional dual school system). The post-Civil War, Reconstruction cases can also be considered affirmative action cases to the extent that they concerned the validity and interpretation of laws and constitutional provisions enacted to benefit former black slaves. Cf. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) (holding that special federal judicial protection of privileges and immunities of U.S. citizenship was intended primarily to benefit former black slaves).

48 See DeFunis v. Odegaard, 416 U.S. 312 (1974) (per curiam) (dismissing challenge by white applicant to University of Washington Law School affirmative action program on grounds of mootness, with four justices dissenting from mootness holding).

49 See United States v. Paradise, 480 U.S. 149 (1987) (Brennan, J.) (four-justice plurality opinion upholding constitutionality of district court order requiring Alabama to promote one black state trooper for every white state trooper promoted, in order to remedy effects of past discrimination); Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) (Brennan, J.) (four-justice plurality opinion upholding constitutionality of hiring goals, training fund, and contempt citation issued against recalcitrant union to remedy past discrimination); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (Powell, J.) (four-justice plurality opinion invalidating consent decree protecting minority school teachers in Jackson, Michigan from layoffs despite having lower seniority than white teachers who were laid off); Fullilove v. Klutznick, 448 U.S. 448 (1980) (Burger, C.J.) (three-justice plurality opinion upholding 10% set-aside for minority contractors on federally funded public works projects); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (Powell, J.) (opinion joined by four other justices, invalidating University of California at Davis set-aside of 16% of medical school seats for minority students, and joined by four different justices upholding constitutionality of remedial use of race in appropriate circumstances); United Jewish Orgs. v. Carey, 430 U.S. 144 (1977) (White, J.) (plurality opinion joined on various points by other justices, upholding constitutionality of race-conscious New York legislative apportionment scheme designed to increase black voting strength).

50 See Miller v. Johnson, 115 S. Ct. 2475 (1995) (invalidating after strict scrutiny under the equal protection clause a state redistricting plan adopted to comply with the federal Voting Rights Act because race was a "predominant" factor in drawing district lines); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) (subjecting to strict scrutiny under the equal protection clause a congressional presumption that minority construction contractors are socially and economically disadvantaged); Shaw v. Reno, 113 S. Ct. 2816 (1993) (subjecting to strict scrutiny under the equal protection clause a state redistricting plan adopted to comply with the federal Voting Rights Act by increasing minority voting strength); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (upholding after intermediate scrutiny under the equal protection clause two FCC broadcast affirmative action plans authorized by Congress in the exercise of its power under s 5 of the Fourteenth Amendment), overruled by Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (subjecting to strict scrutiny under the equal protection clause a minority construction set-aside plan not authorized by Congress in the exercise of its power under s 5 of the Fourteenth Amendment); cf. United States v. Hays, 115 S. Ct. 2431 (1995) (denying standing to white voters wishing to challenge the validity under the equal protection clause of a state redistricting plan for a district in which the white voters did not reside). But see Miller, 115 S. Ct. at 2485 (granting standing to white voters wishing to make the same challenge for a district in which they did reside).

51 See Adarand, 115 S. Ct. at 2117 (extending strict scrutiny from state and local to federal affirmative action plans).

52 No racial classification has withstood strict scrutiny under the equal protection clause since the Supreme Court's 1944 decision in Korematsu v. United States, 323 U.S. 214 (1994). See Stone et al. , supra note 1, at 572; see also Fullilove v. Klutznic, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment) (Strict scrutiny is "strict in theory, but fatal in fact."). Korematsu's tolerance of the race-based internment of Japanese-American citizens is now generally regarded as the product of wartime hysteria, and the result is widely discredited. See Stone et al. , supra note 1, at 572, and authorities cited therein.

53 See Adarand, 115 S. Ct. at 2117 ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory but fatal in fact.' ") (citations omitted).

54 The test traditionally required under the strict scrutiny standard is that, in order to be valid, the classification under review must advance a compelling state interest and must be necessary to the advancement of that interest. See Loving v. Virginia, 388 U.S. 1, 11 (1967); cf. Korematsu, 323 U.S. at 216.

55 See infra part III.B.1.a (discussing affirmative action). The history of the Supreme Court's law of affirmative action is discussed extensively in Spann , Race Against the Court , supra note 1, at 119-49.

56 Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 113 S. Ct. 2297, 2299 (1993).

57 Id.

58 Id.

59 448 U.S. 448 (1980) (Burger, C.J.) (three-justice plurality opinion upholding 10% set-aside for minority contractors on federally funded public works projects). Not only the 10% minority set-aside concept, but the specification of particular racial minority groups (including Aleuts, who are unlikely to be prevalent in Jacksonville) and the definition of minority corporate control utilized in the Jacksonville ordinance (including different percentages for publicly and privately owned businesses) were identical to those specified in the federal Public Works Employment Act of 1977, which the Supreme Court upheld in Fullilove. See id. at 456-59. Because the law of affirmative action was very uncertain when the Jacksonville ordinance was enacted in 1984, municipalities often copied the provisions of the federal statute upheld in Fullilove in order to maximize the likelihood that their ordinances would also be found constitutional. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 477-80, 505-06 (1989) (discussing similarities between Richmond, Virginia minority set-aside plan and the statute upheld in Fullilove, as well as the belief of the city's legal counsel that plan would be declared constitutional under the Fullilove decision); id. at 528-29 (Marshall, J., dissenting) (asserting that Richmond set-aside plan was patterned upon plan upheld in Fullilove).

60 See Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 951 F.2d 1217, 1219 (11th Cir. 1992).

61 See id.

62 See id. at 1217.

63 See id.

64 Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, No. 89-278 (M.D. Fla. Apr. 20, 1989).

65 Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 896 F.2d 1283, 1286 (11th Cir. 1990). The Chief Judge argued that the suit should be dismissed for lack of standing. See id. at 1287-88 (Tjoflat, C.J., specially concurring).

66 Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, No. 89-278 (M.D. Fla. May 31, 1990) (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)).

67 Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 951 F.2d 1217, 1220 (11th Cir. 1992).

68 Id. at 1219.

69 Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 113 S. Ct. 50 (1992). The Court found the decision of the Eleventh Circuit to conflict with the decision of the District of Columbia Circuit in O'Donnell Construction co. v. District of Columbia, 963 F.2d 420, 423 (D.C. Cir. 1992), and the decision of the Ninth Circuit in Coral Construction Co. v. King County, 941 F.2d 910, 930 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992). See Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 113 S. Ct. 2297, 2300 (1993).

70 Northeastern Florida, 113 S. Ct. at 2300.

71 488 U.S. 469 (1989).

72 See id. at 486-511.

73 Northeastern Florida, 113 S. Ct. at 2300.

74 Id.

75 Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 113 S. Ct. 808 (1992).

76 See Northeastern Florida, 113 S. Ct. at 2301.

77 Id.

78 Id.

79 See id. at 2301-04.

80 Id. at 2305 (O'Connor, J., dissenting with Blackmun, J.).

81 See supra notes 34-38 and accompanying text (discussing National Wildlife Federation).

82 See Lujan, 504 U.S. at 560-62.

83 See supra notes 39-45 and accompanying text (discussing Lujan).

84 See Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990).

85 See National Wildlife Fed'n v. Burford, 835 F.2d 305, 312 (D.C. Cir. 1987) (quoting from complaint).

86 See id. at 312.

87 See National Wildlife Fed'n, 497 U.S. at 885-89.

88 See id. at 889.

89 See Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 113 S. Ct. 2297, 2304 (1993); see also id. at 2299.

90 See supra text accompanying note 86 (discussing list of 788 land status actions appended to plaintiff's complaint in National Wildlife Federation).

91 See National Wildlife Fed'n, 497 U.S. at 883-85, 889.

92 See Northeastern Florida, 113 S. Ct. at 2301-05. The only justification Justice Thomas offers for not requiring affidavits or some other evidence at the summary judgment stage is that the City of Jacksonville had moved for summary judgment on the merits and had not challenged the plaintiff's standing. See id. at 2300 n.1. This assertion is puzzling in light of the Court's insistence in Lujan -- the standing decision that immediately preceded Northeastern Florida -- that the invigorated injury requirements adopted by the Court in National Wildlife Federation were Article III, constitutional requirements, not mere prudential ones. See Lujan, 504 U.S. at 559-62, 571-78. As a result, the issue of the plaintiff's standing in Northeastern Florida was a jurisdictional issue that the Court had the constitutional obligation to resolve for itself regardless of whether the city chose to object. See United States v. Hays, 115 S. Ct. 2431, 2435 (1995) (court required to address the issue of standing even if the parties fail to raise the issue). Because National Wildlife Federation established that affidavits, rather than mere allegations, were required to resolve this jurisdictional issue at the summary judgment stage, it is unclear why Justice Thomas thought that he could dispense with the affidavit requirement and rely solely on the conclusory pleadings contained in the complaint.

93 Cf. National Wildlife Fed'n, 497 U.S. at 889.

94 See id. at 881, 890-98.

95 See id. at 894-98.

96 See id. at 891-94; id. at 892 n.3 (discussing contingencies that would have to occur before exploitation of federal lands actually commenced).

97 See Abbott Lab. v. Gardner, 387 U.S. 136, 148-56 (1967) (discussing ripeness requirement for judicial review of administrative agency actions); see also Gardner v. Toilet Goods Ass'n, 387 U.S. 167, 171-73 (1967); Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164-66 (1967) (same); see generally Breyer & Stewart , supra note 1, at 1092-1115 (same).

98 See National Wildlife Fed'n, 497 U.S. at 891-94.

99 See id. at 892 n.3 (discussing affidavit of Peggy Peterson, one of the original affiants who also filed one of the four supplemental affidavits after the standing issue was drawn into focus in the district court).

100 See supra part II.A.

101 See Northeastern Florida, 113 S. Ct. at 2299, 2304 (complaint alleged only that unnamed members of plaintiff trade association would have bid on set-aside contracts).

102 Cf. National Wildlife Fed'n, 497 U.S. at 892 n.3.

103 488 U.S. 469 (1989).

104 See id. at 486-93 (applying more stringent standard of equal protection scrutiny to state and local affirmative action programs than to congressional affirmative action programs); id. at 493-509 (invalidating, on equal protection grounds, municipal set-aside program very similar to Jacksonville program).

105 See Northeastern Florida, 113 S. Ct. at 2300.

106 See Croson, 488 U.S. at 498-511.

107 See Northeastern Florida, 113 S. Ct. at 2300.

108 See id. at 2301.

109 See id.; City of Mesquite v. Aladdin's Castle, 455 U.S. 283, 288-89 (1982); United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203-04 (1968); United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

110 Cf. Northeastern Florida, 113 S. Ct. at 2301 n.3 (degree of difference between old and new ordinance controls mootness issue).

111 455 U.S. 283 (1982).

112 See Northeastern Florida, 113 S. Ct. at 2301.

113 City of Mesquite, 455 U.S. at 289.

114 But see United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203-04 (1968) (asserting without elaboration or explanation that Court had “no choice” but to decide case that was not moot).

115 See Lujan v. National Wildlife Fed'n, 497 U.S. 871, 885-89 (1990) (holding “vicinity” affidavit insufficiently specific for standing).

116 See id. at 890-94.

117 See id.

118 See id.

119 Id. at 894. This assertion is somewhat disingenuous in that Justice Scalia is giving new meaning to the statutory term "final agency action" in the Administrative Procedure Act, not simply following a settled interpretation of the statutory language adopted by Congress.

120 See id. at 893 (quoting Abbott Lab. v. Gardner, 387 U.S. 136, 152-54 (1967) (permitting preenforcement challenge to drug advertising regulations where dangers of delaying review outweighed danger of permitting preenforcement review)).

121 See supra part II.A.

122 See supra part II.B.

123 See Northeastern Florida, 113 S. Ct. at 2299, 2304 (complaint alleged only that unnamed members of plaintiff trade association would have bid on set-aside contracts).

124 See supra notes 39-45 (discussing Lujan opinion).

125 See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

126 See Northeastern Florida, 113 S. Ct. at 2302 (quoting Lujan, 112 S. Ct. at 2136); see also supra text accompanying note 19 (quoting Northeastern Florida statement of constitutional test for standing).

127 See Lujan, 504 U.S. at 563-64.

128 See id. at 562-67.

129 See id. at 568-71.

130 See supra part II.A.

131 See Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 113 S. Ct. 2297, 2302-03 (1993); cf. Lujan, 540 U.S. at 568-71.

132 See generally Symposium on Causation in the Law of Torts, 63 Chi.-Kent. L. Rev . 397 (1987); Symposium, Causation and Financial Compensation, 73 Geo. L.J. 1357 (1985).

133 See Northeastern Florida, 113 S. Ct. at 2302 (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976)) (emphasis added).

134 See Lujan, 504 U.S. at 568-71.

135 See id. at 599-601 (Blackmun, J., dissenting).

136 A plaintiff is within the zone of interest of the statute or constitutional provision that the plaintiff seeks to enforce if the drafters of that provision intended to benefit the plaintiff. See Barlow v. Collins, 397 U.S. 159, 164 (1970); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152-56 (1970); see also Spann, Expository Justice, supra note 1, at 638-39. Although the zone-of-interest or nexus test was initially easy to satisfy, the Supreme Court has recently applied it with considerable stringency. See Air Courier Conference v. American Postal Workers Union, 498 U.S. 517, 523-25 (1991) (declining to continue assuming that Congress intended to benefit all incidental beneficiaries of its legislation and instead demanding stronger showing of congressional intent to benefit plaintiff whose standing was at issue).

137 See Lujan, 504 U.S. at 571-78.

138 See id.

139 See Barlow, 397 U.S. at 164-65; Data Processing, 397 U.S. at 154-56 (1970).

140 See Spann, Expository Justice, supra note 1, at 632-47 (arguing that zone-of-interest rather than injury test should be viewed as constitutionally compelled).

141 Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 113 S. Ct. 2297, 2303 (1993).

142 Id.

143 See id. at 2302-03.

144 422 U.S. 490 (1975).

145 See id. at 502-08 (denying standing because of causation and redressability problems). Justice Thomas purported to distinguish Warth on grounds of particularity, but the plaintiffs in Warth had focused on at least one particular construction project that had been frustrated by the defendant's challenged actions, whereas the plaintiff in Northeastern Florida had not focused on any particular construction contracts that had been denied by the defendant's challenged actions. See Northeastern Florida, 113 S. Ct. at 2303-04. Warth and other standing cases involving race are discussed more fully in part III, infra.

146 Compare Northeastern Florida, 113 S. Ct. at 2302-03 (discussing cases decided between 1970 and 1989) with Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). But cf. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40-46 (1976) (non-equal protection case imposing earlier version of redressability requirement in 1976).

147 See Northeastern Florida, 113 S. Ct. at 2303-04.

148 Id. at 2304 (quoting Warth, 422 U.S. at 515) (emphasis added in Justice Thomas's quotation).

149 See Lujan v. Defenders of Wildlife, 504 U.S. 555, 558 (1992) (quoting pertinent provision of Endangered Species Act).

150 See supra parts II.A & II.B.

151 See supra text accompanying notes 124-25.

152 See generally authorities cited supra note 12 (discussing inconsistencies in law of standing).

153 See generally supra note 12.

154 See Spann , Race Against the Court , supra note 1, at 120-24 (documenting disproportionate statistical advantage that members of the majority have over members of racial minorities in the allocation of societal resources).

155 See id.

156 See id. at 120-24, 140-43 (discussing systemic nature of contemporary racial discrimination).

157 401 U.S. 424 (1971).

158 See id. at 429-30.

159 426 U.S. 229 (1976).

160 See id. at 238-48.

161 See id. at 242 (stating that disparate impact can evidence discriminatory intent); see also Batson v. Kentucky, 476 U.S. 79 (1986) (permitting inference of discriminatory intent from racially correlated use of peremptory challenges by prosecutor); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (permitting inference of discriminatory intent from racially correlated election districts); Yick Wo v. Hopkins, 118 U.S. 351 (1886) (permitting inference of discriminatory intent from racially correlated administration of laundry licensing statute). But cf. Spann , Race Against the Court , supra note 1, at 60-66 (deconstructing distinction between intent and effects).

162 See infra part III.A.

163 See infra part III.B.

164 In theory, the President and Congress -- both of whom take an oath to uphold the Constitution -- could use political methods to enforce the Constitution against the Supreme Court. Arguably, the Civil War and the subsequent enactment of the Fourteenth Amendment granting citizenship to former black slaves constituted political correction of a constitutional error made by the Court in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (holding that blacks are not citizens within the meaning of United States Constitution). However, even accepting that such corrections are motivated by constitutional rather than political concerns, political corrections are likely to be few and far between. Cf. Spann , Race Against the Court , supra note 1, at 14-17 (discussing the political leverage that the representative branches have over the Supreme Court).

165 See supra note 6.

166 This is the thesis that is developed in Spann , Race Against the Court , supra note 1.

167 401 U.S. 424 (1971).

168 See Griggs, 401 U.S. at 429-31.

169 See id. at 429-30.

170 The Supreme Court subsequently reformulated its disparate impact test in a way that made disparate impact considerably more difficult to establish. See, e.g., Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (imposing stringent new proof requirements on plaintiffs seeking to establish disparate impact of subjective standards used in employment); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (plurality decision containing dicta favoring increase in plaintiff's burden of proof). These decisions, as well as other restrictive Supreme Court decisions interpreting Title VII, were subsequently overruled by Congress in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C. ss 2000e to 2000e-16 (Supp. V 1993)). See generally Symposium, The Civil Rights Act of 1991: Theory and Practice, 68 Notre Dame L. Rev. 911 (1993); Note, The Civil Rights Act of 1991 and Less Discriminatory Alternatives in Disparate Impact Litigation, 106 Harv. L. Rev. 1621 (1993); Note, The Civil Rights Act of 1991: The Business Necessity Standard, 106 Harv. L. Rev. 896 (1993).

171 Although the allegation of discriminatory intent is superfluous for present purposes, it does support the inference of discriminatory intent that can be drawn from disparate impact, as is discussed infra in part III.B.

172 See Warth v. Seldin, 422 U.S. 490, 493-98 (1975). Note that the array of Warth plaintiffs also included some presumably non-minority plaintiffs who wished to construct low income housing, live in an integrated community, and avoid the tax increases that they alleged would result from the challenged restrictive zoning practices. See id. Nevertheless, the nature of the case is such that it can safely be classified as a minority plaintiff case.

173 See id. at 504-08.

174 410 U.S. 614, 614-19 (1973) (mother lacks standing to seek criminal prosecution of father for nonpayment of child support because prosecution would punish father but might not result in payment of child support).

175 See supra notes 34-45 and accompanying text (discussing National Wildlife Federation and Lujan).

176 See Warth, 422 U.S. at 498-501 (containing Article III redressability dicta).

177 See Lujan v. Defenders of Wildlife, 504 U.S. 555, 571-78 (1992) (holding "citizen suit" provision of Endangered Species Act unconstitutional due to Article III redressability problems). Lujan is discussed more fully supra, notes 39-45 and accompanying text.

178 See supra part II.D (discussing redressability problems in Northeastern Florida).

179 468 U.S. 737 (1984).

180 Id. at 739-43.

181 See id.

182 See id. at 739-47.

183 See id. at 750-53. Although the Court devoted significant attention to the generalized nature of the plaintiffs' alleged injury, it treated the generalized nature of the injury as a prudential rather than a constitutional problem. See id. at 750-51. I have argued elsewhere that the Court's alignment of prudential and constitutional tests is backwards. See Spann, Expository Justice, supra note 1, at 632-47 (arguing that zone-of-interest rather than injury test should be viewed as constitutionally compelled).

184 See Allen, 468 U.S. at 752-56.

185 Id. at 756-62.

186 414 U.S. 488 (1974).

187 Id. at 490-93.

188 The majority opinion referred to “standing” only twice, both times in footnotes. See id. at 493 n.2, 494 n.3.

189 See id. at 493.

190 See supra notes 34-45 and accompanying text (discussing National Wildlife Federation and Lujan).

191 414 U.S. 514 (1974).

192 Id. at 519-23.

193 It is also interesting to note that the basis of the Court's determination of mootness in Spomer -- that is, the election of a new prosecutor who might not continue the alleged abuses -- was very similar to the reason that Northeastern Florida appears to have been moot -- that is, the “election” of a new affirmative action program that might not continue the alleged abuses. Nevertheless, in Spomer the minority plaintiff was denied relief on mootness grounds, but in Northeastern Florida, the white plaintiff was not. Compare Spomer, 414 U.S. at 519-23 with Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 113 S. Ct. 2297, 2300-01 (1993).

194 423 U.S. 362 (1976).

195 See id. at 366-70.

196 See id. at 371-73.

197 461 U.S. 95 (1983).

198 See id. at 97-100; cf. id. at 115-19 (Marshall, J., dissenting) (emphasizing racially discriminatory nature of alleged chokehold policy).

199 Id. at 101-04.

200 See Brown v. Board of Educ., 347 U.S. 483, 486 n.1 (1954).

201 See Northeastern Florida, 113 S. Ct. at 2301 (rejecting claim of mootness despite repeal and replacement of challenged program). The mootness issue in Northeastern Florida is discussed more fully above. See supra part I.B. But see DeFunis v. Odegaard, 416 U.S. 312, 315-20 (1974) (rejecting affirmative action challenge on grounds of mootness).

202 See Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (resolving conflict between affirmative action and seniority where no such conflict existed, because all affected workers had same seniority and pertinent decisions were made alphabetically -- a fact that the Court did not disclose in its opinion); see also Girardeau A. Spann, Simple Justice, 73 Geo. L.J. 1041, 1046, 1068 (1985) (discussing alphabetical rather than seniority basis of Stotts). New York Times Supreme Court reporter Linda Greenhouse has suggested that the present Supreme Court has been so anxious to overrule liberal precedents in cases having both direct and indirect racial overtones that the Court has repeatedly granted review in cases having procedural or technical problems that will make it difficult for the Court to issue useful rulings on the merits of those cases. See Linda Greenhouse, Detours on the Road to Legal Precedents, N.Y. Times , Feb. 12, 1995, s 4, at 3 (discussing questionable grants of review in Missouri v. Jenkins, a school desegregation case, Adarand Constructors v. Pena, an affirmative action case, and Anderson v. Green, a welfare restriction case).

203 The 18 affirmative action cases are Miller v. Johnson, 115 S. Ct. 2475 (1995); United States v. Hays, 115 S. Ct. 2431 (1995); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); Shaw v. Reno, 113 S. Ct. 2816 (1993); Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 113 S. Ct. 2297 (1993); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), overruled by Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Johnson v. Transportation Agency, 480 U.S. 616 (1987); United States v. Paradise, 480 U.S. 149 (1987); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986); Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); Fullilove v. Klutznick, 448 U.S. 448 (1980); United Steel Workers v. Weber, 443 U.S. 193 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); United Jewish Orgs. v. Carey, 430 U.S. 144 (1977); DeFunis v. Odegaard, 416 U.S. 312 (1974).

The Court has also decided a series of cases under the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. ss 1971, 1973 to 1973bb-1 (1988)). See, e.g., Johnson v. De Grandy, 114 S. Ct. 2647 (1994); Holder v. Hall, 114 S. Ct. 2581 (1994); Voinovich v. Quilter, 113 S. Ct. 1149 (1993); Growe v. Emison, 113 S. Ct. 1075 (1993). Although these cases technically constitute affirmative action cases, because they decrease white voting strength in order to enhance minority voting strength, the voting rights cases that have been decided on statutory rather than constitutional grounds are numerous, complex, and beyond the scope of the present discussion.

204 The 14 cases raising constitutional challenges to affirmative action plans are Miller; Hays; Adarand; Shaw; Northeastern Florida; Metro Broadcasting; Croson; Paradise; Sheet Metal Workers; Wygant; Fullilove; Bakke; United Jewish Organizations; and DeFunis.

205 The four Title VII cases are Johnson; International Ass'n of Firefighters; Firefighters Local Union No. 1784; and United Steel Workers.

206 The 11 cases that arose in an employment context are Adarand; Northeastern Florida; Croson; Johnson; Paradise; International Ass'n of Firefighters; Sheet Metal Workers; Wygant; Firefighters Local Union No. 1784; Fullilove; and United Steel Workers.

207 The two cases that arose in an educational context are Bakke and DeFunis.

208 The four cases that arose in a remedial voting rights context are Miller; Hays; Shaw; and United Jewish Organizations.

209 The case that arose in the context of a preferential broadcast license program is Metro Broadcasting.

210 The Court dismissed one constitutional challenge to a law school affirmative action program on mootness grounds rather than ruling on the merits. See DeFunis v. Odegaard, 416 U.S. 312 (1974). The Court dismissed one challenge to a voter reapportionment plan for lack of standing. See United States v. Hays, 115 S. Ct. 2431 (1995). In addition, the Court addressed only the issue of standing in Northeastern Florida, remanding the case for resolution of the merits. See Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 113 S. Ct. 2297, 2305 (1993).

211 The Court upheld the challenged affirmative action programs in five of the constitutional cases: Metro Broadcasting; Paradise; Sheet Metal Workers; Fullilove; and United Jewish Organizations. In addition, the Court upheld affirmative action plans in two Title VII cases: International Ass'n of Firefighters and United Steel Workers.

212 The Court invalidated the affirmative action programs presented in six of the constitutional cases: Miller; Adarand; Shaw; Croson; Wygant; and Bakke. In addition, in Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984), the Court rejected an expansive interpretation of a Title VII consent decree in order to protect seniority rights, which the Court found to be entitled to greater protection under Title VII than race. See id. at 572-73.

213 The only case challenging the constitutionality of an affirmative action plan in which the Court dismissed the white plaintiffs' case for lack of standing was United States v. Hays, 115 S. Ct. 2431 (1995), where the Court found that the plaintiffs lacked standing because they did not live in the voting district whose reapportionment they had challenged. However, in the companion case of Miller v. Johnson, 115 S. Ct. 2475 (1995), the Court upheld the standing of white plaintiffs to make the same challenge to the reapportionment of the district in which they did reside. This renders the standing restriction in Hays a technicality rather than a meaningful impediment to the ability of white plaintiffs to challenge affirmative action reapportionment plans. The Supreme Court mentioned standing in only four of the remaining affirmative action challenges. In Northeastern Florida, standing was the central issue before the Court. However, in the factually similar Fullilove decision, the Court mentioned standing only once, in a footnote. See Fullilove, 448 U.S. at 480-81 n.71. Ironically, the Fullilove footnote stressed that the plaintiffs had identified three specific examples of contracts that the plaintiff's members would have been awarded but for the affirmative action program. See id. No such allegation was made in Northeastern Florida. See supra text accompanying notes 90-92 (discussing plaintiff's failure to identify particular contracts that would have been awarded to plaintiff's members absent minority set-aside). In United Jewish Organizations v. Carey, a concurring opinion made a general reference to standing in one sentence of one footnote. See United Jewish Orgs., 430 U.S. at 180 n.* (Stewart, J., concurring in the judgment). The most extensive standing discussion is contained in Bakke, in which the Court devoted a three paragraph footnote to the issue. See Bakke, 438 U.S. at 280-81 n.14. Justice Thomas relies heavily on this footnote in his Northeastern Florida opinion. See Northeastern Florida, 113 S. Ct. at 2302-03. Although the Supreme Court did not discuss the issue of standing in DeFunis, it did dismiss the case on mootness grounds. See DeFunis, 416 U.S. at 315-20.

214 See supra part III.A.1.

215 See supra part III.A.2.

216 See supra note 213 (discussing limited consideration of standing issue in affirmative action challenge cases).

217 The cursory nature of the consideration accorded the issue of standing, even when the issue is addressed in the affirmative action challenge cases, lends some support to this view. See supra note 213 (discussing limited consideration of standing issue in affirmative action challenge cases).

218 See supra notes 34-45 and accompanying text (discussing post-1990 standing decisions in National Wildlife Federation and Lujan).

219 Cf. United States v. Hays, 115 S. Ct. 2431 (1995) (denying standing to white plaintiffs in Voting Rights Act case who did not live in challenged district). But see Miller v. Johnson, 115 S. Ct. 2475 (1995) (upholding standing of white plaintiff in Voting Rights Act case who did live in challenged district).

220 Brown v. Board of Educ. (Brown I), 347 U.S. 483 (1954), and Brown v. Board of Educ. (Brown II), 349 U.S. 294, 301 (1955), required race-conscious remedies in order to achieve the desegregation of previously segregated school systems "with all deliberate speed." Subsequent cases emphasized that contemplated desegregation strategies had to be effective in order to be acceptable. See, e.g., United States v. Montgomery County Bd. of Educ., 395 U.S. 225, 235-36 (1969); Green v. County Sch. Bd., 391 U.S. 430, 439 (1968); Griffin v. County Sch. Bd., 377 U.S. 218, 233-34 (1964). In Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), the Court explicitly authorized the use of race-based pupil assignments as a permissible remedy for prior constitutional violations. See id. at 27-28. Chief Justice Burger, writing for a unanimous Court, also endorsed -- albeit reluctantly -- the use of mathematical ratios reflecting racial proportionality in the school district population as targets in formulating desegregation plans to remedy constitutional violations, and did so in the face of a congressional statute that arguably prohibited making pupil assignments for the purpose of achieving racial balance. See id. at 16-18, 22-25.

In a companion case, North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971), the Court held that a prohibition on race-based pupil assignments in favor of colorblind pupil assignments was also unconstitutional because it interfered with the school board's ability to fashion an effective remedy for past segregation. See id. at 45-46. In each of these cases, the Supreme Court assumed without discussion that the plaintiffs had standing to maintain the desegregation suits.

221 See supra text accompanying notes 34-45 (discussing post-1990 standing decisions in National Wildlife Federation and Lujan).

222 See supra text accompanying notes 179-85 (discussing Allen v. Wright, 468 U.S. 737 (1984)). But see United States v. Fordice, 112 S. Ct. 2727 (1992) (holding that Mississippi college system with racially identifiable schools remained dual rather than unitary despite racially unrestricted choice given to students in selecting schools). It is worth noting that, in Fordice, Justice Thomas interpreted the majority opinion as permitting the intentional perpetuation of historically black colleges. See id. at 2744 (Thomas, J., concurring).

223 422 U.S. 490, 502-18 (1975).

224 429 U.S. 252, 260-64 (1977).

225 The only difference between Arlington Heights and Warth seems to be that Arlington Heights concerned a suburb of Chicago, see Arlington Heights, 429 U.S. at 254-60, whereas Warth concerned a suburb of Rochester, see Warth, 422 U.S. at 493-98. The Arlington Heights opinion attempted a half-hearted distinction of Warth by focusing on a particular housing project contemplated by one of the plaintiffs in Arlington Heights. See Arlington Heights, 429 U.S. at 260-64. Warth too involved a particular housing project, but the Warth Court simply disregarded that project, speculating, without any basis in the record, that it might have become stale during the course of the litigation. See Warth, 422 U.S. at 514-17.

The Arlington Heights Court's treatment of the Article III case-or-controversy issue was even more remarkable. With respect to the newly articulated nonspeculativeness, causation, and redressability requirements, Justice Powell's opinion stated:

An injunction [the requested relief] would not, of course, guarantee that Lincoln Green [the contemplated project] will be built. MHDC [the plaintiff] would still have to secure financing, qualify for federal subsidies, and carry through with construction. But all housing developments are subject to some extent to similar uncertainties. When a project is as detailed and specific as Lincoln Green, a court is not required to engage in undue speculation as a predicate for finding that the plaintiff has the requisite personal stake in the controversy. MHDC has shown an injury to itself that is "likely to be redressed by a favorable decision."

Arlington Heights, 429 U.S. at 261-62 (footnote omitted) (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976)). The whole point of Warth was, of course, that the Court was required to engage in precisely such speculation in order to uphold a plaintiff's standing. See Warth, 422 U.S. at 498-517.

226 380 U.S. 202, 221-24 (1965) (rejecting on merits claim that discriminatory use of peremptory challenges violates Equal Protection Clause).

227 476 U.S. 79, 93-98 (1986) (upholding on merits claim that discriminatory use of peremptory challenges violates Equal Protection Clause).

228 481 U.S. 279, 291-99 (1987) (rejecting on merits claim that Georgia death penalty statute was discriminatorily applied more frequently to those convicted of killing white victims than to those convicted of killing black victims).

229 See McClesky, 481 U.S. at 292-97.

230 See supra notes 216-17 and accompanying text.

231 See Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 113 S. Ct. 2297, 2301-02 (1993) (citing Allen v. Wright, 469 U.S. 737, 750, 752 (1984)).

232 See id. at 2302-03.

233 See id. at 2303-04.

234 See id. at 2301-02 (citing Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992), as stating applicable law of standing).

235 See id. at 2302-03 (discussing Bakke without reference to redressability requirement).

236 See id. at 2303-04. Justice Thomas attempted to distinguish Warth by suggesting that the Warth plaintiffs lacked standing because they alleged merely that their applications for zoning variances were denied on racial grounds. If they had instead alleged that their applications were rejected on racial grounds, as did the plaintiffs in Northeastern Florida, then they would have had standing. See id. at 2304.

237 See supra notes 145 (discussing attempted distinction of Warth on grounds of particularity), 225 (discussing problems with attempted distinction of Warth on grounds of particularity).

238 See Northeastern Florida, 113 S. Ct. at 2302 (defining "injury in fact" to mean "an invasion of a legally protected interest").

239 See supra notes 20-22 and accompanying text (discussing difference between "legal interest" and "injury in fact" tests).

240 See id. at 2301-02 (quoting Lujan test). This statement of the law is quoted above. See supra text accompanying note 19.

241 See supra text accompanying notes 20-32 (discussing injury-in-fact cases).

242 See supra text accompanying notes 34-45 (discussing post-1990 cases).

243 See Northeastern Florida, 113 S. Ct. at 2302-03; see also supra notes 141-48 and accompanying text.

244 See Northeastern Florida, 113 S. Ct. at 2302-03 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280-81 n.14 (1978) (Powell, J.)). Although Bakke was a plurality decision, this portion of Justice Powell's opinion was joined by five justices. See Bakke, 438 U.S. at 272.

245 See Northeastern Florida, 113 S. Ct. at 2302-03.

246 See Bakke, 438 U.S. at 280-81 n.14. Justice Thomas did cite three additional decisions concerning the right to hold public office in support of his holding: Quinn v. Millsap, 491 U.S. 95 (1989); Clements v. Fashing, 457 U.S. 957 (1982); and Turner v. Fouche, 396 U.S. 346 (1970). See Northeastern Florida, 113 S. Ct. at 2302-03. However, these three citations are just as cursory as the Bakke citation. In Turner v. Fouche, where the plaintiff challenged a "freeholder" requirement for school board membership, the Court asserted in one sentence of one footnote that the "contention that no appellant has standing to raise this claim is without merit." Turner, 396 U.S. at 362 n.23. In Quinn v. Millsap, the Court devoted one textual paragraph and one footnote paragraph to the issue of standing, although it ultimately did nothing more than cite Turner for the proposition that plaintiffs who do not own property have standing to challenge freeholder requirements for public office. See Quinn, 491 U.S. at 103. Finally, Clements v. Fashing was a ripeness case in which the Court held that public officials could challenge a requirement that they resign from one office before running for another, even though they had not yet announced their candidacy for the second office. In the course of its one-page discussion, the Court included a reference to Turner in a string cite. See Clements, 457 U.S. at 961-62.

247 See Bakke, 438 U.S. at 280-81 n.14 (second paragraph).

248 See supra notes 34-45 and accompanying text (discussing post-1990 standing decisions).

249 See supra notes 34-45 and accompanying text (discussing emergence of the Court's speculativeness, causation, and redressability requirements).

250 The facts of Northeastern Florida are discussed above. See supra text accompanying notes 46, 56-61.

251 The facts of Lujan are discussed above. See supra text accompanying notes 39-45.

252 The distinction between substance and procedure has been recognized as tenuous. See, e.g., Gary Peller, Neutral Principles in the 1950's, 21 U. Mich. J.L. Ref. 561, 566-72 (1988); see also Stephen B. Burbank, Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act, 1989 Duke L.J. 1012, 1012-13; Laura Cooper, Statutes of Limitations in Minnesota Choice of Law: The Problematic Return of the Substance-Procedure Distinction, 71 Minn. L. Rev. 363, 371-77 (1986).

253 Some minority plaintiff programmatic challenge cases, such as Warth v. Seldin, 422 U.S. 490 (1975), and the police misconduct cases, are naturally structured as equal protection cases. Other cases, such as Allen v. Wright, 468 U.S. 737 (1984), are naturally structured as statutory violation cases, but they could easily be reformulated as equal protection cases by emphasizing constitutional rather than statutory constraints on the challenged official conduct. See supra part III.A.1 (discussing minority plaintiff programmatic challenge cases).

254 Justice Thomas also suggested that the reason the redressability requirement was more potent in Warth than in Northeastern Florida was because the allegations of redressable injury were not challenged by the defendant in

Northeastern Florida the way they were in Warth. See Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 113 S. Ct. 2297, 2304 (1993). As has been noted, this argument ignores the jurisdictional nature of the redressability requirement, which makes acquiescence of the parties irrelevant. See supra note 92. However, even if the argument were more tenable, it would still amount to a mere technicality, rather than a justification for a pattern of racially disparate standing results.

255 See Northeastern Florida, 113 S. Ct. at 2303-04 (attempting to distinguish Warth).

256 See Warth, 422 U.S. at 493.

257 See Northeastern Florida, 113 S. Ct. at 2304.

258 See id.

259 See supra notes 145 & 225 (discussing particular housing construction project that -- despite Court's contrary assertion -- was at issue in Warth).

260 To compound this apparent disingenuity, Justice Thomas went on to assert that "[a]n allegation that a 'specific project' was 'precluded' by the existence or administration of the zoning ordinance would certainly have been sufficient to establish standing, but there is no suggestion in Warth that it was necessary." Northeastern Florida, 113 S. Ct. at 2304 (citation omitted). The whole point of Warth was, of course, that identification of a specific project was precisely what was necessary. See supra note 225 (discussing presence of particular housing construction project as distinguishing factor between Warth and Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)).

261 See supra part II.D (discussing redressability problem in Northeastern Florida).

262 426 U.S. 229 (1976).

263 See id. at 238-48.

264 See id. at 248.

265 See supra note 161 (inference of intent can be based upon disparate impact).

266 See supra part III.A.2 (discussing Supreme Court affirmative action decisions).

267 488 U.S. 469 (1989).

268 See id. at 477-86.

269 497 U.S. 547 (1990), overruled by Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

270 See id. at 563-66.

271 113 S. Ct. 2816 (1993).

272 See id. at 2824-30.

273 115 S. Ct. 2097 (1995).

274 115 S. Ct. 2475 (1995).

275 See Adarand, 115 S. Ct. at 2117 (extending strict scrutiny from state and local to federal affirmative action plans).

276 See id. ("[w]e wish to dispel the notion that strict scrutiny is 'strict in theory but fatal in fact.' ").

277 See Adarand, 115 S. Ct. at 2117; Croson, 488 U.S. at 493-506.

278 See Spann , Race Against the Court , supra note 1, at 124-30 (discussing history of Supreme Court law of affirmative action).

279 See Adarand, 115 S. Ct. at 2108.

280 See Shaw v. Reno, 113 S. Ct. 2816, 2829 (1993).

281 See Croson, 488 U.S. at 493-98.

282 See Miller v. Johnson, 115 S. Ct. 2475, 2486 (1995) (prohibiting assignment of whites to voting districts on the basis of race).

283 See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 563-66 (1990), overruled by Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995). The Metro Broadcasting Court applied intermediate scrutiny to FCC minority preference programs. If it had viewed whites as unprotected by the Equal Protection Clause, it would presumably have applied the rational basis standard of review that is typically applied in equal protection cases that do not involve suspect classifications such as race. See, e.g., New York City Transit Auth. v. Beazer, 440 U.S. 568, 590-94 (1979); City of New Orleans v. Dukes, 427 U.S. 297, 303-06 (1976); McGowan v. Maryland, 366 U.S. 420, 425-28 (1961).

284 See Stone et al. , supra note 1, at 481-83 (discussing political environment from which Reconstruction Amendments emerged).

285 See generally Ely , supra note 1 (describing representation-reinforcement theory).

286 See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495-96 (1989) (citing Ely , supra note 1, at 170).

287 In Croson, Justice O'Connor emphasized that five of the nine seats on the Richmond City Council were occupied by blacks. See id. This does not, however, establish whites as an underrepresented minority in Richmond. Whites in Richmond appear to have constituted roughly 50% of the population, see id., and they plainly constituted a majority of the electorate in the State of Virginia and the United States, both of which are political entities possessing the legal authority to nullify the Richmond set-aside program. The FCC preferences at issue in Metro Broadcasting, Inc. v. FCC,

497 U.S. 547 (1990), were held to be congressionally authorized affirmative action plans, see id. at 563-66, and whites obviously constitute substantial majorities in both the United States Congress and on the FCC, which designed and implemented the preference programs. The reapportionment plan at issue in Shaw v. Reno, 113 S. Ct. 2816 (1993), was adopted by a state whose legislature was so overwhelmingly white that the case centered around the first black representative that the state had sent to Congress since Reconstruction. See id. at 2843 (Blackmun, J., dissenting). Like the FCC programs in Metro Broadcasting, the presumption of minority disadvantage in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995), was adopted by the overwhelmingly white United States Congress. See id. at 2102-04. And like the North Carolina reapportionment plan in Shaw, the Georgia reapportionment plan in Miller v. Johnson, 115 S. Ct. 2475 (1995), was adopted by a majority white legislature in a southern state with a history of voting discrimination. See id. at 2483-84.

288 For a fuller elaboration of this thesis, see Spann , Race Against the Court , supra note 1, at 119-49.

289 Stated briefly, public choice theory is a political economics theory positing that, because of "free rider" problems, governmental decisionmaking will tend to favor special interest groups rather than the more diffuse majority interest. Under this construct, an affirmative action program that benefitted racial minority special interests would stand a better chance of enactment than a majoritarian effort to prevent the enactment of the special interest program. Accordingly, the job of a reviewing court would be to set aside the special interest enactment because it distorted the outcome that would have been produced by a properly functioning majoritarian political process. In a sense, public choice theory is the politically conservative flip side of the typically liberal representation-reinforcement theory of judicial review. For a general discussion of public choice theory, see Eskridge & Frickey , supra note 1, at 367-98.

290 See supra part III.A (discussing disparate impact test for discrimination).

291 See Griggs v. Duke Power Co., 401 U.S. 424, 429-36 (1971); cf. Washington v. Davis, 426 U.S. 229, 248 (1976) (declining to adopt discriminatory effects test for equal protection purposes because adoption of such a test was a legislative function).

292 See Griggs, 401 U.S. at 430-33.

293 See id. at 431-36.

294 487 U.S. 977 (1988).

295 See id. at 989-91.

296 490 U.S. 642 (1989).

297 See id. at 649-50.

298 See id. at 650-55.

299 See Griggs v. Duke Power Co., 404 U.S. 424, 431 (1971) ("The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.").

300 See Wards Cove, 490 U.S. at 650-55.

301 See id. at 655-58.

302 See Stone et al. , supra note 1, at lxxxi-lxxxiii (chart showing tenure of Supreme Court justices).

303 See id.

304 See supra note 204 (citing the 14 constitutional affirmative action cases that the Court has considered to date). In each of those cases Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy either voted against the racial minority position or were not on the Court when the case was decided. The only arguable exception is the vote cast by then-Justice Rehnquist in United Jewish Organizations v. Carey, 430 U.S. 144 (1977), to uphold a New York legislative apportionment scheme. The scheme had been adopted in order to comply with the Voting Rights Act, and it increased black voting strength by diluting the voting strength of a Hasidic Jewish community. See id. at 147-55 (White, J.) (stating facts); id. at 165-68 (Stewart, J., joined by Stevens & Rehnquist, JJ.). It is not clear what inference should be drawn from Justice Rehnquist's vote in this case. Even though Justice Rehnquist voted against the Hasidic plaintiffs, he may well have conceived of the case as involving a dispute between two minority groups rather than as a dispute between a racial minority and the majority.

It should also be noted that Justice O'Connor voted to dismiss Northeastern Florida as moot. See Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 113 S. Ct. 2297, 2305-09 (1993) (O'Connor, J., dissenting). However, Justice O'Connor's majority opinion in the factually similar City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), leaves little doubt that she would vote to invalidate the Northeastern Florida affirmative action plan on the merits if she viewed the issue as properly presented. Although all four replacement Justices voted to dismiss for lack of standing the voter reapportionment challenge in United States v. Hays, 115 S. Ct. 2431 (1995), all four voted on the same day to uphold the merits of the same type of reapportionment challenge in Miller v. Johnson, 115 S. Ct. 2475 (1995).

305 See Stone et al. , supra note 1, at lxx, lxxxiii & 1994 Supp. at 1-2 (chart showing tenure of Supreme Court justices and biographical data concerning Justices Souter and Thomas).

306 It is too soon to tell how the replacement of Justices White and Blackmun by Justices Ginsburg and Breyer will affect the political leaning of the Court in race cases. Both Justices, however, dissented from the majority opinions in Miller and Adarand. See Miller, 115 S. Ct. at 2497 (Ginsburg, J., dissenting, joined by Breyer, J.); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2134 (1995) (Ginsburg, J., dissenting, joined by Breyer, J.).

307 See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C. ss 2000e to 2000e-16 (Supp. V 1993)).

308 See, e.g., Mari J. Matsuda et al. , Words That Wound : Critical Race Theory, Assaultive Speech, and the First Amendment (1993) (offering arguments to justify regulation of hate speech).

309 See, e.g., Cole, supra note 1, at 65 (1993) (arguing that minority interests are ultimately better protected through guarantee of free speech than through suppression of hate speech); Charles Fried, The New First Amendment Jurisprudence: A Threat to Liberty, 59 U. Chi. L. Rev. 225, 245-55 (1992) (arguing that regulation of hate speech is inconsistent with traditional First Amendment liberty).

310 112 S. Ct. 2538 (1992).

311 See id. at 2541.

312 See id. at 2542 (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).

313 See id. at 2542-50.

314 See id. at 2548.

315 113 S. Ct. 2194 (1993).

316 See id. at 2197.

317 See id. at 2199-2202.

318 See id.

319 503 U.S. 159 (1992).

320 463 U.S. 939 (1983).

321 See Mitchell, 113 S. Ct. at 2200.

322 See Dawson, 503 U.S. at 169-80 (Thomas, J., dissenting) (emphasizing instances in which mitigating character traits have been held to be admissible and listing the mitigating character traits that were admitted in the Dawson case itself).

323 Cf. id. at 178-80 (Thomas, J., dissenting) (noting that Due Process Clause -- not First Amendment -- regulates degree to which evidence can be admitted in light of its probative value and prejudicial nature).

324 Intuitively, it may seem different to admit evidence that the defendant was a Girl Scout or an altar boy for the purpose of mitigating the defendant's sentence, than to admit evidence that the defendant belonged to a racist organization for the purpose of enhancing the defendant's sentence. However, it is difficult to find a principled difference between these two -- especially a difference that does anything to support a distinction between speech and conduct.

325 Note that Chief Justice Rehnquist does not make this argument in Mitchell, but rather rests on the speech-conduct distinction. See Mitchell, 113 S. Ct. at 2200-01. This is particularly surprising because Chief Justice Rehnquist devotes much of his energy in a previous portion of the opinion to undermining the speech-conduct distinction by citing the numerous instances in which we focus on the defendant's motives and beliefs -- the defendant's speech -- in order to determine how much to punish the defendant's conduct. See id. at 2199-200.

326 Compare Mitchell, 113 S. Ct. at 2197 with R.A.V., 112 S. Ct. at 2541 (setting out pertinent legal provisions).

327 See R.A.V., 112 S. Ct. at 2547-48.

328 See Cole, supra note 1, at 65-68.

329 See id. at 66 (emphasizing noncommunicative aspect of conduct state wishes to punish).

330 See Brief for Respondent at 1-2, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (No. 90-7675) (stating that defendant was white).

331 See Wisconsin v. Mitchell, 113 S. Ct. 2194, 2196 (1993) (stating that defendant was black).

332 See id. (stating that victim was white).

333 See R.A.V., 112 S. Ct. at 2541 (stating that victim was black).

334 See Mitchell, 113 S. Ct. at 2200 (discussing Dawson).

335 See id. (discussing Barclay).

336 See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C. ss 2000e to 2000e-16 (Supp. V 1993)).

337 Review of Supreme Court's Term: Labor and Employment Law, 58 U.S.L.W. 3065 (Aug. 8, 1989).

338 488 U.S. 469 (1989).

339 See supra notes 267, 286-87 and accompanying text (discussing Croson).

340 490 U.S. 642 (1989).

341 See supra notes 296-301 and accompanying text (discussing Wards Cove).

342 491 U.S. 164 (1989).

343 491 U.S. 701 (1989) (race discrimination claim filed by white employee against black employer).

344 490 U.S. 755 (1989).

345 See id. at 763-68.

346 490 U.S. 900, 909-11 (1989) (gender discrimination case that also applies to race).

347 See id. at 909-11.

348 491 U.S. 754, 761-66 (1989).

349 See id. at 761-66.

350 490 U.S. 228 (1989) (gender discrimination case that also applies to race).

351 491 U.S. 58 (1989).

352 See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C. ss 2000e to 2000e-16 (Supp. V 1993)).

353 114 S. Ct. 1483 (1994).

354 See id. at 1489-90.

355 Id. at 1489 quoting s 3(4) of the Act.

356 See id.

357 See id.

358 See Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1489-90 (1994).

359 See id.

360 See id. at 1490. In addition to modifying these 1988 Term decisions, s 109 of the Act overruled EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991), by redefining the term "employee" in Title VII to include certain United States citizens working for United States employers in foreign countries; s 113 overruled West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991), by providing that attorneys' fees recoverable under Title VII could include expert fees; and s 114 overruled Library of Congress v. Shaw, 478 U.S. 310 (1986), by authorizing the recovery of interest on judgments against the United States. See Landgraf, 114 S. Ct. at 1490.

361 See Cooper v. Aaron, 358 U.S. 1, 18 (1958) (recognizing "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution," and quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), for proposition that "[i]t is emphatically the province and duty of the judicial department to say what the law is").

362 For an extended argument in support of this proposition see Spann , Race Against the Court , supra note 1, at 94-99, 104-18.

363 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

364 Plessy v. Ferguson, 163 U.S. 537 (1896).

365 Brown v. Board of Educ. (Brown I), 347 U.S. 483 (1954) (rejecting separate-but-equal interpretation of Equal Protection Clause of United States Constitution); see also Brown v. Board of Educ. (Brown II), 349 U.S. 294, 301 (1955) (ordering desegregation of public schools "with all deliberate speed").

366 See Dred Scott, 60 U.S. (19 How.) at 396-99.

367 See id. at 451-52.

368 See id. at 400-02.

369 Id. at 404-05, 407.

370 See id. at 451-52.

371 The first time that the Supreme Court invalidated an act of Congress was in Marbury v. Madison, where it declared s 13 of the Judiciary Act of 1789 to be unconstitutional. See Marbury v. Madison, 5 U.S (1 Cranch.) 137, 176-80 (1803).

372 Act of Mar. 6, 1820, 3 Stat. 545 (popularly known as Missouri Compromise).

373 See Don E. Fehrenbacher , The Dred Scott Case: Its Significance in American Law and Politics 107-13 (1978) (discussing Missouri Compromise and political context out of which it arose).

374 See Dred Scott, 60 U.S. (19 How.) at 451-52.

375 See supra part III.B.1.d (discussing 1988 Term decisions that led to Civil Rights Act of 1991).

376 See U.S. Const. amend. XIII, XIV.

377 See Plessy v. Ferguson, 163 U.S. 537, 544-52 (1896).

378 See id. at 540-42.

379 See id. at 556-57, 559-60 (Harlan, J., dissenting).

380 See id. at 540, 548.

381 83 U.S. (16 Wall.) 36 (1872).

382 109 U.S. 3 (1883).

383 See Stone et al., supra note 1, at 481-88 (discussing history and purpose of Reconstruction statutes and constitutional amendments).

384 See id.

385 See The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70-83 (1872). Note the tension between this narrow interpretation of the Fourteenth Amendment and its current, more expansive interpretation as protecting the individual interests of the white majority. See supra part III.B.1.a (discussing applications of Equal Protection Clause to white majority in Miller v. Johnson, 115 S. Ct. 2475 (1995); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); Shaw v. Reno, 113

S. Ct. 2816 (1993); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990); and City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

386 See The Civil Rights Cases, 109 U.S. 3, 8-19 (1883).

387 See Stone et al. , supra note 1, at 485-88 (discussing fundamental change in Fourteenth Amendment caused by the Civil Rights Cases).

388 See id. at 490-92 (discussing absence of "equality" requirement in Plessy).

389 See Plessy, 163 U.S. at 540 (quoting statutory requirement for "equal but separate accommodations").

390 See generally Stone et al. , supra note 1, at 490-92 (discussing cases implementing Plessy without insisting on equality of treatment).

391 235 U.S. 151 (1914).

392 See id. at 160-62.

393 175 U.S. 528 (1899).

394 See id. at 541-45.

395 See id. at 541 (majority opinion by Harlan, J.); Plessy, 163 U.S. at 552 (Harlan, J., dissenting).

396 See, e.g., Akhil R. Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1133 (1991) ("Living in the shadow of Brown," we have come to view state officials as a threat to individual and minority rights, and federal courts as "the special guardians" of those rights.); James O. Freedman, The Law as Educator, 70 Iowa L. Rev. 487, 494 (1985) ("law reinforced and validated the movement toward greater civil rights for minority citizens by expressing the values of equality in the landmark legislation and court decisions of the 1950's and 1960's, particularly Brown v. Board of Education and the Civil Rights Act of 1964"); Stephen Girard, 66 Yale L.J. 979, 981 (1957) ("In Brown v. Board of Education, the Court, speaking the conscience of a majority of the nation, took a giant step in the evolution of full equality for the Negroes."); Harold A. McDougall, Social Movements, Law, and Implementation: A Clinical Dimension for the New Legal Process, 75 Cornell L. Rev. 83, 113 n.202 (1989) ("According to Professor Sherry, the Warren Court was the mirror opposite of the Burger Court, intervening as in Brown I to prevent minority rights from being subordinated to the will of the majority") (citing Suzanna Sherry, Issue Manipulation by the Burger Court: Saving the Community from Itself, 70 Minn. L. Rev. 611, 652 (1986)); Sharon K. Mollman, The Gender Gap: Separating the Sexes in Public Education, 68 Ind. L.J. 149, 156 n.51 (1992) ("Forced exclusion was a motivating factor in Brown v. Board of Education [citation omitted] where the Court, reacting to a history of segregation forced upon the black minority by the white majority, denounced 'separate but equal' education.").

397 See Brown v. Board of Educ. (Brown I), 347 U.S. 483 (1954).

398 See Brown v. Board of Educ. (Brown II), 349 U.S. 294 (1955).

399 See Stone et al. , supra note 1, at 530.

400 See Bell, supra note 1, at 91-106; see also Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 Stan. L. Rev. 61 (1988).

401 See Spann , Race Against the Court , supra note 1, at 78-80, 108-09 (charting Supreme Court's reluctance to extend desegregation effort to northern schools).

402 Cf. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

403 See Milliken v. Bradley, 418 U.S. 717 (1974).

404 See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

405 See Bell, supra note 1, at 98-102.

406 See Brown v. Board of Educ. (Brown II), 349 U.S. 294, 301 (1955).

407 See supra part III.B.2.b (discussing Plessy).

408 See Seidman, supra note 1, at 686-717.

409 See id. at 709-15.

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