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An Article III Divided Against Itself Cannot Stand: A Critical Race Perspective on the U.S. Supreme Court's Standing Jurisprudence

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ABSTRACT

Article III of the U.S. Constitution requires standing to sue for federal subject matter jurisdiction over a case. Under the modern test for standing, plaintiffs must show that they suffered some concrete and imminent injury-in-fact as a result of the illegal conduct of the defendant. While many scholars and judges have critiqued the U.S. Supreme Court's development and application of the injury-in-fact requirement, relatively little attention has been paid to disturbing racial double standards in the Court's standing jurisprudence. When racial minorities have brought equal protection challenges against programmatic governmental discrimination, the Court has applied standing doctrine strictly. But when white plaintiffs have brought equal protection challenges against racial remediation programs, the Court has continually relaxed standing requirements. This Comment seeks to illustrate and analyze this racial divide by comparing Supreme Court cases raising the issue of standing in the equal protection context. Applying a Critical Race Theory perspective, this Comment ultimately concludes that this racial contradiction in standing doctrine stems from the Court's modern doctrinal push to uproot de jure racial discrimination and to leave de facto racial discrimination alone. Consequently, this Comment suggests either correcting the resulting double standard in standing requirements or eliminating the injury-in-fact requirement altogether.

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INTRODUCTION

Standing is a requirement for federal subject matter jurisdiction, derived from Article III of the U.S. Constitution.[1] Standing raises the question of whether a plaintiff possesses enough interest in the outcome of a case to allow the pursuit of his claims.[2] Scholars[3] and U.S. Supreme Court justices[4] alike have criticized the incoherence of modern standing doctrine. But surprisingly few critiques have focused on racial patterns in the Court's current approach to standing. Indeed, hardly any scholars have noticed that the U.S. Supreme Court has applied standing requirements differently along racial lines in the context of claims brought under the Equal Protection Clause of the Constitution.[5] When racial minorities brought equal protection claims to challenge racially discriminatory policies in the 1970s and 1980s, the Court applied standing requirements strictly. Since the 1990s, however, the Court has relaxed these requirements when white plaintiffs have brought equal protection challenges to governmental racial remediation efforts. This Comment attempts to illustrate, explain, and critique this double standard in procedural requirements.

At the outset, it is important to note that this Comment does not make an outcome-based inquiry. This Comment does not assert that the Court has always granted white plaintiffs standing and has never granted standing to nonwhite plaintiffs in the Equal Protection Clause context. It is a fact that the Court has sometimes denied white plaintiffs standing.[6] Likewise, the Court has also sometimes granted standing to racial minorities and moved on to a decision on the merits.[7] All that is at issue in this Comment is the inconsistent procedural requirements the Court has imposed on both sets of plaintiffs. In short, the issue is not whether whites or racial minorities have won or lost more cases on the issue of

1. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004) (noting that "Article III standing . . . enforces the Constitution's case-or-controversy requirement").
2. Sierra Club v. Morton, 405 U.S. 727, 731–32 (1972).
3. *See, e.g.*, Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417 (2007); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275 (2008); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).
4. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & 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 . . . .").
5. *But see* Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1472 (1995) ("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.").
6. *See, e.g.*, United States v. Hays, 515 U.S. 737 (1995).
7. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

standing—the issue is how the Court has framed the rules of standing differently for the two sets of plaintiffs.

Part I of this Comment briefly summarizes the policy rationales, evolution, and framework of modern standing doctrine. Part II traces the development of standing doctrine in the Equal Protection Clause context over the course of twelve Supreme Court cases. Five of these cases were disparate impact claims brought by racial minorities in the 1970s and 1980s. Seven of these cases were challenges to racial remediation programs brought by whites (mostly beginning in the 1990s). Part III illustrates how the Court has paradoxically relaxed standing requirements in Equal Protection Clause challenges brought by whites and strictly applied standing requirements in challenges brought by racial minorities. Part IV attempts to explain this double standard with Critical Race Theory perspectives on the Court's modern antiracist discourse. This Part illustrates how the Supreme Court's antiracist discourse has in large part caused the double standard because it has prioritized redressing injuries caused by facially discriminatory policies over redressing structural inequalities caused by race-neutral policies and practices. Ironically, the Court's increased priority for ending express racial discrimination has itself had a disparate impact on the standing of racial minorities making disparate impact claims. Part V argues that the Court should reform modern standing doctrine in both the Equal Protection Clause context and elsewhere.

I. BACKGROUND OF STANDING DOCTRINE AND ARTICLE III

A. Constitutional Origin and Rationale of Standing Doctrine

Article III of the Constitution limits the subject matter jurisdiction of the federal courts to certain types of "[c]ases" or "[c]ontroversies."[8] The Supreme Court has interpreted this language to set down numerous justiciability requirements that restrict federal court jurisdiction to cases "of the sort traditionally amenable to, and resolved by, the judicial process."[9] Hence, Article III is the justification for mootness and ripeness requirements and is the basis for federal courts' refusal to consider political questions.[10] As part of these justiciability

8. U.S. CONST. art. III, § 2.

9. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998).

10. *See, e.g.*, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 335 (2006) ("The doctrines of mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language, no less than standing does."); Worth v. Jackson, 451 F.3d 854, 855 (D.C. Cir. 2006) ("Three interrelated judicial doctrines—standing, mootness, and ripeness—ensure that federal courts assert jurisdiction only over 'Cases' and 'Controversies.'" (citing U.S. CONST. art. III, § 2)).

restrictions, the Court has interpreted Article III to also require that a plaintiff bringing a claim have standing: That is, the plaintiff must have a sufficient stake in the outcome of a case.[11]

There have been numerous rationales for standing doctrine. The Court has remarked that Article III requirements generally ensure that the federal judiciary stays within its "province . . . [of deciding] on the rights of individuals," implicating separation of powers concerns.[12] Hence, the role of the courts is not to consider generalized grievances or hypothetical questions but rather to focus only on concrete disputes over rights.[13] Furthermore, the Court has pragmatically justified standing requirements as allowing only sufficiently interested and incentivized parties to bring legal claims, improving the quality of litigation and the presentation of issues.[14]

B. Historical Evolution of Standing Doctrine

Despite its relatively straightforward doctrinal and policy rationales, standing requirements have undergone many twists and turns. Standing first emerged as a jurisdictional doctrine in the early 1900s.[15] Throughout the first half of the twentieth century, standing doctrine essentially involved questions of whether the plaintiff had a private cause of action derived from statutes or from common law, based on having some legal interest at stake.[16] This initial test for standing was known as the "legal interest test."[17] Throughout the New Deal era, the Court used standing requirements to limit judicial review of progressive federal legislation.[18]

With the advent of the Warren Court, however, the Court became much more willing to expand judicial review of governmental action.[19] Hence, the Court became concerned about how the legal interest test excluded plaintiffs' claims derived from public interests rather than from enumerated private rights of action. For example, the legal interest test barred plaintiffs from suing to enjoin

11. Sierra Club v. Morton, 405 U.S. 727, 731–32 (1972).
12. Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)).
13. *Id.*
14. *See* Baker v. Carr, 369 U.S. 186, 204 (1962) (noting that standing requirements assure adverseness between the parties that "sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions").
15. *See, e.g.*, Tyler v. Judges of the Court of Registration, 179 U.S. 405, 406 (1900) (requiring that a plaintiff must show "an interest in the suit personal to himself"); Hessick, *supra* note 3, at 290.
16. *See* Healy, *supra* note 3, at 423–24; Hessick, *supra* note 3, at 291.
17. Healy, *supra* note 3, at 424 (internal quotation marks omitted).
18. *See* Christian B. Sundquist, *The First Principles of Standing: Privilege, System Justification, and the Predictable Incoherence of Article III*, 1 COLUM. J. RACE & L. 119, 124 (2011).
19. *See* Hessick, *supra* note 3, at 292–93.

the government from awarding funds to religious groups based on a broad public interest in how governmental funds were distributed.[20] To expand standing doctrine to encompass both private and public rights, the Court fundamentally altered the central question of the standing inquiry in 1970 in *Ass'n of Data Processing Service Organizations, Inc. v. Camp*.[21] In *Data Processing*, the Court shifted the focus of standing doctrine from a legal inquiry to a factual inquiry.[22] The Court required that, to have standing, a plaintiff must merely allege that a challenged action caused him some material "injury in fact." This approach became known as the "injury-in-fact test" and has remained the dominant inquiry in standing doctrine.

C. Modern Standing Requirements

Case law demonstrates that the question of whether a plaintiff has standing is dependent on three requirements under the injury-in-fact test.[23] To have standing, the plaintiff must have suffered (1) an injury-in-fact that (2) was caused by or is fairly traceable to the defendant's action and (3) that is capable of being redressed by the court.[24] These three requirements are referred to respectively as injury-in-fact, causation, and redressability.

1. Injury-in-Fact

The question of whether there has been an injury-in-fact to the plaintiff itself splits into three separate requirements. First, there must be an "invasion of [the plaintiff's] legally protected interest" or a violation of some legal right.[25] The Court noted in *Data Processing* that this question of legal interest relates to whether substantive law gives the plaintiff a cause of action—in effect, it is a

20. *See id.* at 293 & n.108 (noting that the Court abandoned the legal interest test in *Flast v. Cohen*, 392 U.S. 83 (1968), to allow the plaintiffs to challenge legislation in this scenario based "on the plaintiff's status as a taxpayer").
21. 397 U.S. 150 (1970).
22. *Id.* at 152 (holding that the question of standing concerns whether the "plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise"). *Data Processing* involved a challenge brought under the Administrative Procedure Act (APA). The Court clarified in *Singleton v. Wulff*, 428 U.S. 106, 112–13 (1976), that the injury-in-fact requirement set out in *Data Processing* was a general Article III standing requirement applicable to all cases and not particular to those brought under the APA.
23. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).
24. *Id.* at 560–61.
25. *Id.* at 560; *see also* Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613, 643 (1999).

question relating to whether the plaintiff's claim has any legal basis.[26] In cases like *FEC v. Akins*[27] and *Trafficante v. Metropolitan Life Insurance Co.*,[28] the Court indicated that statutes could create new legal interests and rights when none existed before.[29] The Court could also presumably create legal interests through judicial review, by interpreting the Constitution to grant them to individuals.[30] At the same time, the Court's holdings in *Lujan v. Defenders of Wildlife*[31] and *Akins* indicate that a legal right can grant standing only if other injury-in-fact requirements are also satisfied. In short, prevailing case law has established that a legal right or claim is a necessary, but not sufficient, condition for standing.

Under the modern injury-in-fact test articulated in *Data Processing*, there must also be further material or factual injury to the plaintiff.[32] Hence, there are two additional requirements for determining whether a plaintiff has suffered an injury-in-fact. First, the invasion of the legal interest must be sufficiently "concrete and particularized," which means that the injury must be material (as opposed to abstract) for there to be standing.[33] Second, the existence of the injury cannot be based on excessive speculation: It must be "actual or imminent, not conjectural or hypothetical."[34]

2. Causation and Redressability

Compared to the tripartite injury-in-fact inquiry, the causation and redressability requirements are easily summarized. For there to be sufficient causation, the defendant's challenged conduct must be the but-for cause of the injury-in-fact. In other words, the injury-in-fact must not exist but for the defendant's challenged conduct.[35] For the injury to be redressable, the form of relief requested by the plaintiff must redress or relieve the injury-in-fact alleged.[36]

26. *See Data Processing*, 397 U.S. at 152–53.
27. 524 U.S. 11 (1998).
28. 409 U.S. 205 (1972).
29. *Akins*, 524 U.S. at 20; *Trafficante*, 409 U.S. at 208 (noting that the Civil Rights Act of 1968 created new legal interests, endowing a "broad" base of persons with the power to sue under the Act).
30. *Akins*, 524 U.S. at 20–25.
31. 504 U.S. 555.
32. S*ee id.* at 575–77; Ashutosh Bhagwat, *Injury Without Harm:* Texas v. Lesage *and the Strange World of Article III Injuries*, 28 HASTINGS CONST. L.Q. 445, 447 (2001).
33. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 (1995).
34. *Id.*
35. Allen v. Wright, 468 U.S. 737, 751 (1984).
36. *Id.*

II. TWO LINES OF EQUAL PROTECTION PRECEDENT

This Part reviews the history and development of twelve Supreme Court cases raising the issue of standing in the context of racial discrimination challenges under the Equal Protection Clause of the Fourteenth Amendment of the Constitution.[37] Five of these cases were filed by racial minorities challenging different governmental actions. Seven of these cases were filed by white plaintiffs challenging governmental racial remediation programs.

A. Five Disparate Impact Challenges by Racial Minorities

During the 1970s and 1980s, the Supreme Court considered numerous challenges by racial minorities alleging discriminatory governmental action under the Equal Protection Clause. These cases involved a variety of different governmental policies in very different contexts, including disparate application of criminal laws,[38] IRS support of racially discriminatory private schools,[39] and exclusionary zoning laws.[40] All these cases, however, shared one doctrinally significant characteristic: The plaintiffs sought to enjoin actions, practices, or policies that had a disproportionately negative impact on racial minorities. This Comment examines five such programmatic challenges that raised the issue of standing. Ultimately, the Court denied standing in all five of these cases.[41]

37. U.S. CONST. amend. XIV, § 1.

38. *See, e.g*, McCleskey v. Kemp, 481 U.S. 279 (1987); City of Los Angeles v. Lyons, 461 U.S. 95 (1983); Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974).

39. *See, e.g.*, *Allen*, 468 U.S. 737.

40. *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975).

41. It is important to note that the U.S. Supreme Court *did* grant standing in a sixth disparate impact case brought on behalf of racial minorities during this time period: *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). In *Arlington Heights*, a nonprofit real-estate developer bought a tract of land in order to build racially integrated low- and moderate-income housing. *Id.* at 256–57. When local authorities did not allow the nonprofit developer to build the property under existing zoning regulations, the developer and an African American individual seeking low-cost housing sued. *Id.* at 258. Plaintiffs contended that the authorities' actions were racially discriminatory in violation of the Equal Protection Clause. *Id.* at 254. The Court in *Arlington Heights* concluded that the African American plaintiff had standing to sue because if not for the local authorities' allegedly unlawful action, there was a "substantial probability" that he would gain low-cost housing. *Id.* at 264 (quoting *Warth*, 422 U.S,. at 504) (internal quotation marks omitted).

The fact that the Court granted standing in *Arlington Heights* does not refute this Comment's argument that standing requirements have been heightened for racial minorities making Equal Protection Clause claims. On the contrary, the Court's holding supports this argument: In *Arlington Heights*, the Court required the plaintiff to show that allegedly discriminatory governmental action actually deprived the plaintiff of access to a concrete benefit (in this case, the

1. No Imminent Injury: Three Challenges to Discriminatory Criminal Justice Practices

From 1974 to 1983, the Court found insufficient standing in three cases alleging racial discrimination in the criminal justice system. In all three cases, the Court found that the plaintiffs had not shown that they in particular were likely to suffer any imminent future injury.[42] Rather, the Court found that the injuries alleged were too speculative, and because of this, the plaintiffs did not have standing to request injunctive relief.

In *O'Shea v. Littleton*, the first of these cases, seventeen blacks and two whites filed a class action lawsuit alleging that a magistrate and a state court judge in Alexander County in Illinois disparately set bond, assessed jury fees, and issued sentences based on the race of criminal defendants.[43] Plaintiffs claimed that such discrimination had a disproportionate impact on blacks.[44] Hence, plaintiffs sought injunctive relief to prevent officials from engaging in racially discriminatory conduct in future criminal proceedings.[45] The Court found insufficient standing because there was no evidence that the plaintiffs themselves would be subject to these practices in the future.[46] It was entirely speculative that the plaintiffs in question would be arrested for illegal conduct and would have to appear before the defendants in the future.

The Court similarly denied standing in *Rizzo v. Goode* in 1976.[47] In *Rizzo*, the Court reviewed two class action lawsuits alleging a pattern of unconstitutional

opportunity to live in low-cost housing). As argued *infra* Part III, the Court has not imposed similar standing requirements on white plaintiffs challenging racial remediation programs.

42. *See Lyons*, 461 U.S. 95; *Rizzo*, 423 U.S. 362; *O'Shea*, 414 U.S. 488. The 1987 case of *McCleskey v. Kemp* bears some similarities to these three cases, in which the plaintiff had not shown he, in particular, was likely to suffer any imminent future injury. In *McCleskey*, a black criminal defendant was sentenced to death by a Georgia jury for the murder of a white police officer. 481 U.S. at 283. The defendant alleged an Equal Protection Clause violation. *Id.* at 286. The defendant presented social science evidence showing that Georgia juries were most likely to sentence to death black defendants who killed whites, compared to other combinations of the racial background of the defendant and of the victim. *Id.* at 286–88. The Court rejected this argument because the defendant had not shown that the particular jury that sentenced *him* was racially biased. *Id.* at 292–93. However, this case was decided on the merits, not on standing grounds. Indeed, in the Court's language, the defendant had not met the requirements for an Equal Protection Clause violation: He had shown a racially disparate impact but no discriminatory intent. *Id.* at 298–99. It should also be noted that the defendant was not alleging an imminent future injury and was instead alleging that he had been injured in the past when the jury sentenced him. *See id.* at 292.

43. *O'Shea*, 414 U.S. at 490–92.

44. *Id.*

45. *Id.*

46. *Id.* at 493.

47. *Rizzo*, 423 U.S. at 366.

police mistreatment of racial minorities in Philadelphia.[48] Plaintiffs argued that certain police officers threatened them with future abuses, and sought equitable relief requiring a change in police disciplinary procedures.[49] Citing *O'Shea*, the Court concluded that there was no standing: There was no evidence that the class representatives in particular were likely to suffer police mistreatment in the future.[50] For the Court, it was entirely speculative that a small, unknown minority of policemen would violate the representatives' rights in the future because of lax disciplinary procedures.[51] On this basis, the Court found no standing.[52]

In the last (and the most infamous) of these cases, the Court in *City of Los Angeles v. Lyons* also found insufficient standing for injunctive relief.[53] In *Lyons*, a black plaintiff, Adolph Lyons, sued the City of Los Angeles after Los Angeles police officers subjected him to a chokehold during a traffic stop without any provocation.[54] Lyons claimed that he was justifiably afraid that police would again choke him and strangle him to death without provocation.[55] Thus, Lyons also sought to enjoin the future use of chokeholds in situations in which police officers were not threatened with deadly force, claiming that Los Angeles police officers routinely applied chokeholds in such situations per city policy.[56] Lyons claimed the authorized use of chokeholds violated numerous constitutional rights.[57] In particular, Lyons claimed that the chokeholds were disproportionately used on black males in violation of the Equal Protection Clause.[58] Indeed, Justice Marshall noted in his dissent that in 1975, black males constituted 75 percent of the deaths resulting from the use of such chokeholds, despite making up 9 percent of the Los Angeles population.[59]

The Court held that Lyons lacked standing to sue for forward-looking injunctive relief.[60] Citing both *O'Shea* and *Rizzo*, the Court found that there was no evidence that Lyons was likely to suffer any future imminent injury from the

48. *Id.* at 366–67.
49. *Id.* at 368–69.
50. *Id.* at 371–72.
51. *Id.*
52. *Id.*
53. City of Los Angeles v. Lyons, 461 U.S. 95, 110 (1983).
54. *Id.* at 97–98.
55. *Id.* at 98.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 116 n.3 (Marshall, J., dissenting).
60. *Id.* at 110 (majority opinion).

use of chokeholds by Los Angeles police officers.[61] While Lyons had been choked once, it was purely speculative whether he would again run into police and be choked again without provocation.[62] Hence, the Court ultimately denied Lyons standing to sue for equitable relief.[63]

2. A Challenge to Exclusionary Zoning

Another disparate impact challenge was brought in the context of exclusionary zoning in the 1970s. In 1975, in *Warth v. Seldin*,[64] a diverse group of plaintiffs challenged a zoning ordinance by the town of Penfield in New York that allocated 98 percent of the town's vacant land to single-family housing.[65] Plaintiffs alleged that the ordinance set unreasonable requirements on the use of the land that increased the cost of single-family housing beyond the means of low- and moderate-income people.[66] A group of low- and moderate-income plaintiffs who were members of racial minority groups claimed standing to challenge the zoning ordinance.[67] The plaintiffs claimed that the ordinance sufficiently injured them because they were unable to locate affordable housing in Penfield despite making sufficient efforts and inquiries.[68] Each of these plaintiffs expressed a desire to live in Penfield.[69] The Court found, however, that there was a causation problem: There was no evidence that but for the ordinance's zoning restrictions, the plaintiffs would have been able to find affordable housing in Penfield.[70] Rather, whether the plaintiffs could find affordable housing was a result of the economics of Penfield's housing market and of the prices and the actions of third-party developers and builders.[71] Because of the intervening actions of these

61. *Id.* at 105–06.
62. *Id.* at 106.
63. *Id.* at 110.
64. 422 U.S. 490 (1975).
65. *Id.* at 493–95.
66. *Id.* at 493.
67. *Id.* at 502–03.
68. *Id.* at 503–04.
69. *Id.*
70. *Id.* at 504. The Court distinguished *Warth* in this respect in *Arlington Heights*, in which it held that an African American plaintiff challenging a zoning action as racially discriminatory could actually show that if not for the zoning action, a low-cost housing project would be built and he would be able to live in it. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264 (1977). On this basis, the Court allowed the plaintiff standing in *Arlington Heights*. *Id.* It is important to note that in both *Arlington Heights* and in *Warth*, the Court seemed to consistently require racial minorities to show they would gain access to housing if not for the unlawful actions of a state actor.
71. *Warth*, 422 U.S. at 506.

third parties, the Penfield ordinance could not be the cause of the plaintiffs' injuries.[72] Hence, the Court denied standing.[73]

3. A Challenge to IRS Tax Exemptions for Discriminatory Private Schools

Finally, in *Allen v. Wright*,[74] the parents of black children attending public schools brought a class action lawsuit seeking to enjoin an IRS provision permitting racially discriminatory private schools to obtain tax-exempt status.[75] Arguing that they had suffered an injury-in-fact, plaintiffs contended that the IRS tax exemption allowed racially segregated private schools to thrive, providing opportunities for white children to avoid attending desegregated public schools.[76] The plaintiffs alleged that this diminished the ability of their children to study at desegregated public schools.[77] Citing *Brown v. Board of Education*,[78] the Court agreed that a diminished ability to receive a desegregated education was a cognizable injury-in-fact.[79] But the Court still denied the plaintiffs standing because of a lack of sufficient causation between the challenged policy and the injury alleged.[80] For the Court (much like in *Warth*), there were too many third parties in the chain of causation between the IRS policy and the alleged injury.[81] It was unclear whether the administrators of the discriminatory private schools would have desegregated them if the tax exemption were withdrawn.[82] It was also unclear whether parents of white children attending these schools would transfer them to public schools if the tax exemption were withdrawn.[83] Ultimately, the Court concluded it was unclear to what (if any) extent the IRS policy hindered desegregation efforts because of the independent actions of third-party

72. *Id.* at 506–07.
73. *Id.* at 508.
74. 468 U.S. 737 (1984).
75. *Id.* at 743–45. This Comment treats *Allen* as a disparate impact case because no government policy was alleged on its face to explicitly discriminate based on race. Rather, the IRS's tax-exemption policy itself was race neutral. Admittedly, the case is something of an outlier from typical disparate impact cases because the race-neutral policy supported private actors who did explicitly discriminate based on race. Nonetheless, the point still remains that the IRS policy did have a disproportionate impact on blacks: It furthered explicit discrimination in the private sector.
76. *Id.* at 745.
77. *Id.* at 745–46.
78. 347 U.S. 483 (1954).
79. *Allen*, 468 U.S. at 745–46.
80. *Id.* at 758.
81. *Id.*
82. *Id.*
83. *Id.*

private school officials and of parents of white children in the schools.[84] Hence, the Court denied standing to the plaintiffs.[85]

B. Seven Challenges by White Plaintiffs to Racial Remediation Programs

In the decades following the disparate impact cases, white plaintiffs challenged numerous race-conscious governmental programs designed to aid underrepresented minorities under the Equal Protection Clause. While applying to many different contexts, these cases fall into two broad categories. The vast majority of cases involved the question of whether a public agency had the right to consider the race of applicants when allocating finite resources (such as government contracts, spots at a university, or spaces available in a public school district).[86] A second (much smaller) category of cases involved the question of whether state legislatures may permissibly create legislative districts heavily composed of racial minorities (majority-minority districts).[87] Seven of these cases (six from the first category and one from the second) raised the issue of whether a white plaintiff had standing to enjoin such policies. In contrast to the disparate impact challenges, the Court granted standing in *all but one* of these cases.[88]

1. Six Challenges to Racial Preferences in the Allocation of Resources

As early as the 1970s, white plaintiffs began making Equal Protection Clause challenges to affirmative action programs that gave explicit preference to racial minorities for certain resources such as spots at public universities and governmental contracting opportunities. Beginning mostly in the 1990s, the Court set out an increasingly relaxed approach to standing in six of these cases.[89] The first case to definitively set forth the Court's current approach to standing in this context was *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville* in 1993.[90] In *Northeastern Florida*, the Court

84. *Id.*
85. *Id.* at 759.
86. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (public school spaces); Gratz v. Bollinger, 539 U.S. 244 (2003) (university spots); Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656 (1993) (government contracts).
87. *See, e.g.*, United States v. Hays, 515 U.S. 737 (1995); Shaw v. Reno, 509 U.S. 630 (1993).
88. The one case in which standing was denied was *Hays*. *See Hays*, 515 U.S. at 740.
89. *See Parents Involved*, 551 U.S. 701; *Gratz*, 539 U.S. 244; Texas v. Lesage, 528 U.S. 18 (1999); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); *Ne. Fla. Chapter of the Associated Gen. Contractors of Am.*, 508 U.S. 656; Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
90. *Ne. Fla. Chapter of the Associated Gen. Contractors of Am.*, 508 U.S. 656.

considered a challenge to an ordinance by Jacksonville, Florida that required 10 percent of the amount spent on the city's contracts be set aside for businesses owned by racial minorities.[91] The plaintiffs in *Northeastern Florida* were a group of nonminority white contractors in the construction industry who claimed that they all regularly bid on construction contracts offered by the City and who sought to enjoin the set-aside program under the Equal Protection Clause.[92] An appeals court held that plaintiffs did not have standing to enjoin the ordinance because they could not show that they would have bid successfully for any contracts in the absence of the ordinance's racial preference.[93] Under the strict requirements of cases like *Lyons*, one would think the plaintiffs would have no standing to sue for an injunction as forward-looking relief because the plaintiffs could not show that the preference was likely to injure them in any way in the future.

Surprisingly, the Court reversed the appellate court and found that the plaintiffs had standing, based on a relaxed view of injury-in-fact.[94] The Court framed the imminent injury-in-fact as the "inability to compete on an equal footing in the bidding process" based on race.[95] It was irrelevant whether the plaintiffs could have even obtained the benefit without the racial preference because, for the Court, the relevant injury-in-fact was not an inability to obtain the benefit.[96] Rather, the imminent denial of equal treatment based on race in the bidding process itself was sufficient injury-in-fact for standing.[97] Hence, all that the plaintiffs needed to show in order to establish that they were to suffer an imminent future injury-in-fact was that they were "able and ready" to bid on contracts in the future and would likely run up against the racial preference when they applied.[98]

In *Northeastern Florida*, the Court justified this approach to injury-in-fact in the affirmative action context by citing *Regents of the University of California v. Bakke*[99] as precedent.[100] In *Bakke*, the Court considered a challenge by a white plaintiff, Bakke, whose application for admission to a public medical school had been rejected twice.[101] The school operated a special admissions track insulated from the general admissions process that admitted up to sixteen disadvantaged

91. *Id.* at 658–59.
92. *Id.* at 659.
93. *Id.* at 660.
94. *Id.* at 666.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. 438 U.S. 265 (1978).
100. *Ne. Fla. Chapter of the Associated Gen. Contractors of Am.*, 508 U.S. at 665.
101. *Bakke*, 438 U.S. at 272–76.

students each year (out of a total class of one hundred).[102] Bakke challenged his rejection, claiming the school's special admissions track constituted an unconstitutional quota for racial minorities.[103] Bakke sought an injunction compelling his admission to the school.[104] In a mere footnote, the Court addressed the issue of standing.[105] The Court remarked that, even if Bakke was unable to prove he would have been admitted in the absence of the special track, he had still suffered another injury apart from the failure to be admitted.[106] He had been injured by being unable to compete for all one hundred spots because of his race.[107] Hence, the Court found standing.[108] The Court in *Northeastern Florida* claimed to merely follow *Bakke* as precedent when recognizing an "inability to compete on an equal footing" because of race as a sufficient injury-in-fact for standing purposes.[109]

The Court's reliance on *Bakke* in *Northeastern Florida*, however, seems wholly misplaced. Bakke was not seeking *forward-looking* relief. In *Northeastern Florida*, the Court allowed the plaintiffs standing to sue for injunctive relief because of the imminent future injury of not being able to compete on an equal footing when applying for contracts in the future. In *Bakke*, the alleged injury was not based in the future: Bakke was not claiming an imminent injury from having to apply on an unequal footing to the medical school in the future. Rather, Bakke sought an injunction to make up for the fact that he had been wrongfully rejected from the university in the past[110]—this constituted *backward-looking* relief based on a *past injury*. Even the Court, in framing the injury-in-fact as an inability to compete for all one hundred spots at the medical school, held that this inability to compete occurred in the past when Bakke applied to the school.[111]

Just a few years after *Northeastern Florida*, the Court seemed to find this distinction between forward-looking and backward-looking relief as paramount for standing in the affirmative action context. In *Texas v. Lesage*[112] (a unanimous decision issued merely six years after *Northeastern Florida*) the Court set different standing requirements for forward-looking and for backward-looking relief in

102. *Id.*
103. *Id.* at 277–78.
104. *Id.*
105. *Id.* at 280 n.14.
106. *Id.*
107. *Id.*
108. *Id.*
109. Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993).
110. *Bakke*, 438 U.S. at 277–78.
111. *Id.* at 280 n.14.
112. 528 U.S. 18 (1999).

the affirmative action context.[113] In *Lesage*, like in *Bakke*, a white plaintiff challenged a racial preference program at a public university after his application for admission was rejected.[114] The plaintiff sought both backward-looking monetary damages for being wrongfully rejected and a forward-looking injunction barring the program from using affirmative action in future admissions, as per *Northeastern Florida*.[115] Contradicting *Bakke*, the Court explicitly held that in order to claim backward-looking relief, the plaintiff had to show that he would actually have been admitted if not for the racial preference when he applied for admission in the past.[116] Contrary to *Bakke*, the plaintiff could not claim standing to pursue backward-looking relief based solely on being denied the ability to compete on an equal footing in the past.[117] In line with *Northeastern Florida*, the Court held that this "inability to compete on an equal footing" was sufficient for standing to claim only forward-looking injunctive relief.[118] These differing standing requirements for backward-looking and for forward-looking relief laid out in *Lesage* raise doubts about the Court's claim in *Northeastern Florida* that it was following the holding in *Bakke*. The clash between *Lesage* and *Bakke* also raises the question of whether the decision on standing in *Bakke* can even be considered good law.[119]

113. *Id.* at 21.

114. *Id.* at 19. Notably, the Court in *Lesage* did not expressly mention the word "standing." However, the Court's discussion of sufficient "injuries" indicates that this was what it was doctrinally concerned with. *See* Hessick, *supra* note 3, at 313. Further, lower courts have understood *Lesage* to relate to standing requirements. *See, e.g.*, Donahue v. City of Boston, 304 F.3d 110, 116 (1st Cir. 2002); Aiken v. Hackett, 281 F.3d 516, 519 (6th Cir. 2002); Wooden v. Bd. of Regents of the Univ. Sys. of Ga., 247 F.3d 1262, 1277 (11th Cir. 2001).

115. *Lesage*, 528 U.S at 19.

116. *Id.* at 20–21.

117. *Id.*

118. *Id.* at 20.

119. To add to the confusion, more recently the Court seems to have implicitly overruled (or at the very least ignored) *Lesage* when deciding *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013). In *Fisher*, the Court considered facts identical to those at issue in *Lesage*: A white plaintiff challenged a racial preference program at a public university that had rejected her application for admission. *Id.* at 2417. The federal appeals court below had established that the plaintiff did not have standing to sue for forward-looking injunctive relief because she did not intend to reapply for admission to the university and, thus, was limited to backward-looking money damages for the rejection of her application. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 217 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411. Yet, instead of requiring the plaintiff to prove that her rejection from the university was caused by the racial preference program as per *Lesage*, the Court jumped straight to the merits of the case and never even mentioned the standing issue. *See Fisher*, 133 S. Ct. 2411. Because standing is a threshold jurisdictional question, the Court's ruling on the merits necessarily held—contrary to *Lesage*—that the plaintiff had standing. *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341–42 (2006) (noting that standing is necessary for federal courts to exercise jurisdiction over a case). The Court's approach is especially puzzling given that standing was made an issue in the briefing for *Fisher* and *Lesage* itself was cited (albeit in a

Despite questions as to the legitimacy of the precedential basis for *Northeastern Florida*, the Court has repeatedly affirmed the *Northeastern Florida* approach to injury-in-fact in the affirmative action context. As noted, the Court affirmed *Northeastern Florida* in *Lesage*.[120] In *Adarand Constructors, Inc. v. Pena*, the Court again granted standing to a contractor seeking to enjoin a racial set-aside program.[121] Similarly, in *Gratz v. Bollinger*, the Court granted standing for a white plaintiff, Hamacher, to enjoin a racial preference admissions system at a public university after his application for admission was rejected.[122] *Gratz* went a step beyond both *Bakke* and *Lesage*, however. In *Gratz*, Hamacher had been admitted to and had begun attending other universities at the time of the suit.[123] The Court still granted standing to Hamacher because, at the time of the suit, he manifested an intent to transfer to the defendant university and faced the "imminent" harm of being subjected to the racial preference system in the transfer process.[124] For the Court, it was irrelevant that Hamacher never actually ended up applying to transfer because his intent to do so at one point was sufficient to establish standing.[125] Considering these cases together, the Court affirmed *Northeastern Florida*'s basic doctrine that the inability to compete in a colorblind process for a benefit constitutes an imminent future injury sufficient to grant standing to claim forward-looking relief.

Interestingly, the Court in 2007 began subjecting plans to integrate public schools to the same sort of Equal Protection Clause analysis as to affirmative action programs.[126] As part of this shift, the Court carried over the *Northeastern Florida* approach to injury-in-fact when determining standing in the context of

footnote) in the defendant's briefs to the Court. *See* Brief for Respondents at 16–17 n.6, *Fisher*, 133 S. Ct. 2411 (No. 11-345), 2012 WL 3245488, at *16–17. Furthermore, members of the Court raised the issue of standing and referenced *Lesage* in the oral arguments in *Fisher*. Oral Argument at 1:30, *Fisher*, 133 S. Ct. 2411 (No. 11-345), *available at* http://www.oyez.org/cases/2010-2019/2012/2012_11_345.

120. *Lesage*, 528 U.S at 21.

121. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 212 (1995). The racial set-aside program in *Adarand* was at the federal level and thus, technically, the plaintiff invoked the Equal Protection Clause guarantee of the Fifth Amendment in challenging it rather than the Fourteenth Amendment, which only applies to states. *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (finding that equal protection requirements apply to the federal government through the Due Process Clause of the Fifth Amendment to the U.S. Constitution).

122. Gratz v. Bollinger, 539 U.S. 244, 262 (2003).

123. *Id.* at 261–62.

124. *Id.*

125. *Id.*

126. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007). Historically, desegregation plans had been an area of Equal Protection Clause law subject to an entirely different line of analysis. *See generally* Green v. Cnty. Sch. Bd., 391 U.S. 430 (1968); Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

public school assignments based on race. In *Parents Involved*, parents of children in elementary and middle schools challenged a Seattle school district plan that used race as a factor when assigning students to different public high schools.[127] If too many students applied to attend a particular school, the district used the race of students as a tiebreaker to determine who would fill the limited number of open slots at the oversubscribed school.[128] In taking race into account, school officials aimed to have each school within ten percentage points of the district's total white/nonwhite racial balance.[129] The parents sought to enjoin the plan on behalf of their children so that the district would not one day deny their children assignment to the high school of their choice based on their race.[130]

The school district argued that the plaintiffs' children did not suffer any imminent injury-in-fact because there was no evidence that the children's race would cause them to be denied assignment to the high schools of their choice in the future: That is, the parents had not shown any injury-in-fact necessary for standing.[131] After all, the children might have one day chosen to attend high schools that were not oversubscribed (meaning race did not have to be considered at all as a tiebreaker). Alternatively, the children might have chosen high schools where their race could actually work in their favor, based on the racial makeup of the schools.[132] Like in the affirmative action context, however, the Court rejected this argument and found standing.[133] Even if the students were able to attend the high schools of their choice, the Court reiterated that the imminent injury-in-fact was that the students would be forced to compete for seats at high schools in a system that took race into account.[134]

127. *Parents Involved*, 551 U.S. at 711–13.
128. *Id.* at 711–12.
129. *Id.*
130. *Id.* at 713–14.
131. *Id.* at 718.
132. *Id.*
133. *Id.*
134. *Id.* The Court's exact language framed the relevant injury-in-fact to the students as "being forced to compete in a race-based system that may prejudice" them. *Id.* at 719. Based on the Court's reference to the word "prejudice," one could plausibly infer that the injury-in-fact in *Parents Involved* was not simply that the students were racially classified but rather the possibility that the racial classification would competitively disadvantage students seeking assignment at particular schools. *See* Maureen Carroll, *Racialized Assumptions and Constitutional Harm: Claims of Injury Based on Public School Assignment*, 83 TEMP. L. REV. 903, 926 (2011) ("This emphasis on competitive disadvantage indicates that the plaintiffs' injury resulted from the potential outcome of the process (the school assignment) rather than the process itself (the racial classification)."). The Court's use of the word "prejudice," however, when recounting the pertinent injury-in-fact does not comport with the facts of the case: As noted, the racial tiebreaker that the Court struck down could have just as likely helped the students' chances of being enrolled in the schools of their choice, and the tiebreaker's effects were speculative at best. Given that it was ambiguous

In one respect, the Court's holding in *Parents Involved* was more radical than in cases in the affirmative action context. In the context of affirmative action, the use of racial preferences at least reduced the chances that the white plaintiff would receive a given benefit. In the context of school assignments in which race was merely used as a tiebreaker and could be used differently depending on the racial composition of a given school, it was entirely speculative what effect (if any) race would have on the chances of a given applicant in seeking a spot. For the Court, the fact that race was used as a consideration at all in the assignment process was enough to infer an injury-in-fact to the students.

2. Challenges to Majority-Minority Districts

In a second and much smaller category of cases, the Court has allowed white plaintiffs to make Equal Protection Clause challenges to the creation of districts composed mostly of racial minorities. In *Shaw v. Reno*,[135] the Court held that a white plaintiff could seek to enjoin state redistricting legislation that created two electoral districts in North Carolina that were majority black.[136] To successfully make out such challenges, plaintiffs would have to prove that the districts were so irregularly shaped that only a purpose to separate voters based on race explained their creation.[137] Notably, these majority-minority districts were, like affirmative action programs or desegregation plans, a product of racial remediation policy. The districts in *Shaw*, for instance, were created in response to the U.S. Attorney General's objections to a previous North Carolina redistricting plan as racially discriminatory under the Voting Rights Act of 1965.[138]

In *United States v. Hays*,[139] the Court clarified requirements for standing in the challenges allowed under *Shaw*.[140] In *Hays* (much like in *Parents Involved* a decade later), the Court borrowed the *Northeastern Florida* view of an injury-in-fact sufficient to grant standing. The Court, citing *Northeastern Florida*, framed the injury-in-fact as the personal denial of equal treatment to whites caused by the creation of districts based on race.[141] The Court also listed other harms caused

how the racial tiebreaker would affect the students, it seems that the Court was actually concerned with the fact that the students were being racially classified at all and viewed the injury-in-fact as the racial classification, regardless of its reference to the prejudice that the students would suffer.

135. 509 U.S. 630 (1993).
136. *Id.*
137. *Id.* at 649.
138. *Id.* at 635.
139. 515 U.S. 737 (1995).
140. *Id.*
141. *Id.* at 745.

by such districts, such as social stigma toward those discriminated against and incentives for elected representatives to prioritize the interests of racial minorities over whites.[142] In *Hays*, however, the Court ultimately denied standing to plaintiffs challenging a majority-minority district because they did not reside in the challenged district and were not personally denied equal treatment by its creation.

III. THE STANDING DOUBLE STANDARD

In the two sets of Equal Protection Clause cases discussed in Part II, Supreme Court jurisprudence on standing doctrine has followed a disturbing pattern. Almost invariably, the Court has relaxed standing requirements in white plaintiffs' challenges to racial remediation programs and strictly applied standing requirements in disparate impact challenges brought by racial minorities. Consequently, the Court has divided Article III into two separate and inconsistent standards. In order to demonstrate this, this Part examines each of the three requirements for standing doctrine (injury-in-fact, causation, and redressability) and analyzes how the Court has applied them differently in Equal Protection Clause jurisprudence.

A. Inconsistent Definitions of Injury-In-Fact

Plaintiffs must satisfy three requirements in order to allege a sufficient injury-in-fact to meet Article III standing requirements. As in any lawsuit, there must be an "invasion of [the plaintiff's] legally protected interest."[143] In addition, the invasion of the legal interest must have a factual or material dimension: It must be both (1) "concrete and particularized" and (2) "actual or imminent, not conjectural or hypothetical."[144] Both of these factual requirements have been applied inconsistently in the two lines of Equal Protection Clause precedent discussed.

1. Requirement #1: Concrete Versus Abstract Injuries

The standing requirement that injuries be concrete and based in fact has been almost entirely eliminated in challenges to racial remediation programs. After all, the sheer "denial of equal treatment based on race" or "forced participation in a race-conscious process" recognized as the injury-in-fact in cases like *Northeastern Florida* does not amount to any sort of material harm.[145] Rather, these interests

142. *Id.* at 744.
143. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).
144. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 (1995).
145. Indeed, from the way the Court has abstractly and broadly framed the "inability to compete on an equal footing" as an injury-in-fact, one could even argue that racial minorities themselves might

seem to implicate some abstract legal interest in nondiscrimination. Under modern standing doctrine's shift away from the legal interest test, a court in racial remediation cases like *Northeastern Florida* would normally have to consider whether the plaintiff suffered any sort of material harm or disadvantage from discriminatory treatment. Yet, by defining the injury-in-fact in such cases as the denial of equal treatment *itself* without any further inquiry, the Court has conflated violations of legal rights with showings of concrete, factual injury.[146] In short, in the racial remediation challenges, the Court has established that the denial of equal treatment constitutes an injury-*in-fact* by declaring it so as a *matter of law*.

The Court's relaxed treatment of the concreteness requirement in racial remediation cases is wildly inconsistent with its holdings in disparate impact challenges brought by racial minorities, like *Lyons*. In these disparate impact challenges, plaintiffs actually had to show some sort of imminent material harm or disadvantage that would result from a violation of their legal interests. For standing purposes, it was not enough, for example, for Adolph Lyons to claim an abstract injury by virtue of living in a city where his race was a factor when police officers implemented chokeholds. Rather, the Court required Lyons to show that he would actually be materially affected by these practices and subjected to a chokehold at some future moment. The plaintiffs in *O'Shea*, *Rizzo*, and *Warth* were similarly subject to heightened requirements when trying to allege an injury-in-fact from discriminatory zoning laws and criminal justice practices. Yet, this sort of abstract conception of injury-in-fact was stated by the Court as sufficient for standing in cases like *Parents Involved* and *Hays*. All in all, while the Court has permitted white plaintiffs to allege abstract legal interests as injuries-in-fact, it has not made such an allowance for racial minorities in disparate impact challenges.

Some scholars have posited that the denial of equal treatment identified as the injury-in-fact in the racial remediation context was not abstract at all. These scholars claim that the racial remediation policies enacted in these cases all had some material or concrete impact on the white plaintiffs. This Comment addresses two of these theories and attempts to show that denial of equal treatment truly boils down to an abstract legal injury, rather than a factual one.

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have standing to challenge an affirmative action program. After all, racial minorities are denied equal treatment with whites when competing under an affirmative action program. Unlike whites, however, this works to their material benefit.

146. *See* Hessick, *supra* note 3, at 304–06 (noting that the Court in *Bakke*, *Northeastern Florida*, and *Adarand* contrived an abstract denial of opportunity as a tangible, concrete injury-in-fact).

a. Possible Probabilistic Harms

Some scholars, such as Andrew Hessick, have suggested that the denial of equal treatment was a sufficiently concrete injury in the context of challenges to affirmative action programs.[147] Specifically, Hessick argues that, in cases like *Northeastern Florida*, the white plaintiffs could be viewed as having suffered a material "probabilistic" harm as a result of the denial of equal treatment.[148] The denial of equal treatment was essentially a denial of an opportunity to compete on an equal footing for a given, limited resource. This denial of equal opportunity harmed the white plaintiffs by decreasing the probability that they would ultimately gain the resource at issue.[149] Based on this probabilistic conception of harm, one may argue that the Court's findings of a concrete injury-in-fact in cases like *Northeastern Florida* were well-founded.

Admittedly, this probabilistic conception of injury-in-fact does carry some weight. After all, in *Northeastern Florida*, the Court's reasoning framed the injury-in-fact as a "[governmental] barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group."[150] In addition, the Court briefly mentioned that the use of racial preferences constituted a "barrier" to the white plaintiffs' ability to access resources.[151] This language would suggest that the Court identified a probabilistic harm as the injury-in-fact at stake. The Court also emphasized, however, that the "'injury-in-fact' in an equal protection case of this variety is the denial of equal treatment" based on race.[152] Hence, from the language of *Northeastern Florida* alone, one can actually argue that the Court identified either of two alternative injuries-in-fact: the increased difficulty for the white plaintiff in obtaining the benefit in question *or* the race-based denial of equal treatment. In short, the Court's language in framing the injury-in-fact in *Northeastern Florida* seems ambiguous and permits either of the two interpretations.

Subsequent case history, however, indicates that the Court has interpreted *Northeastern Florida* to mean that the denial of equal treatment *itself* qualifies as an injury-in-fact. This is evidenced by the Court's holdings in *Hays* and *Parents Involved*, in which the Court relied on *Northeastern Florida.* In *Hays*, the Court held, citing *Northeastern Florida,* that white plaintiffs had standing to challenge

147. F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55 (2012).
148. *Id.* at 68 & n.64, 69.
149. *Id.*
150. Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993).
151. *Id.*
152. *Id.* (citing to Turner v. Fouche, 396 U.S. 346, 362 (1970)).

the creation of a majority-minority voting district because they had "been denied equal treatment."[153] In *Hays*, it was unclear how deprivation of the white plaintiffs' abstract legal interest in equal treatment and a race-neutral voting district translated into material harm.[154] After all, as Justice Stevens highlighted in his concurrence in *Hays*, the Court did not require a showing that racial gerrymandering actually diluted the voting strength or the political power of the white plaintiffs.[155] Likewise, in the desegregation context in *Parents Involved*, the Court found an injury-in-fact from the use of race as a tiebreaker in public school assignments, even though it was entirely speculative if and how it would affect a student's probability of being assigned to the high school of his choice. Indeed, as the Seattle School District argued in *Parents Involved*, a racial tiebreaker could have actually helped the plaintiffs' chances of being assigned to their desired schools. In both of these contexts, the idea of probabilistic injury does not explain how the injuries found were concrete. Neither of the racial classifications at issue decreased the probability that the white plaintiffs would gain access to a given benefit or a right. Yet, the Court cited to *Northeastern Florida* in both *Hays* and *Parents Involved* when framing the injury-in-fact. This suggests that the Court has come to interpret *Northeastern Florida* broadly, allowing the fact of a racial classification *itself* to qualify as an injury-in-fact, even when no identifiable probabilistic harm has been caused. Consequently, the probabilistic conception of injury-in-fact does not match the Court's prevailing interpretation of the injury-in-fact at stake in *Northeastern Florida* and does not completely explain why the Court found concrete harms in the racial remediation cases.

b. Possible Stigmatic Harms

While a theory of probabilistic injury does not explain the holdings in the racial remediation cases, the Court itself has identified another possible concrete harm caused by racial classifications: social stigma. In *Allen*, the Court briefly considered whether racial stigma perpetuated by racially discriminatory governmental conduct could be cognizable as an injury-in-fact for standing pur-

153. United States v. Hays, 515 U.S. 737, 745 (1995).

154. Admittedly, the Court in *Hays* also identified certain "representational harms" to the white plaintiffs majority-minority districts caused. *Id.* In other words, the Court noted that a district created solely to serve the common interests of a minority racial group would cause elected officials to serve members of the minority group, rather than their entire constituency. *Id.* at 744. The presence of this other injury, however, does not diminish the point that the Court still expressly recognized that the abstract denial of equal treatment itself was a sufficient injury-in-fact for standing. *Id.* at 744–45.

155. *Id.* at 750 (Stevens, J., concurring).

poses.[156] The Court concluded that this social stigma *could* constitute a cognizable injury-in-fact "in some circumstances."[157] For such social stigma to be sufficient to grant standing, however, the Court bizarrely held that the policy must have denied the challenger himself equal treatment.[158] Otherwise, the Court worriedly remarked, "standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating," regardless of location.[159] The Court reiterated this concern that racial classifications cause social stigma in *Hays*, noting that racial classifications "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility."[160] From this, one may argue that racial classifications like those in the racial remediation context do not merely constitute some abstract legal injury but actually do cause some sort of concrete stigmatic harm to those discriminated against.

But it is difficult to see how racial remediation programs perpetuated any sort of concrete social stigma toward white plaintiffs. Affirmative action programs, majority-minority districts, and desegregation plans cannot be said to have stigmatized any of the white plaintiffs who challenged them in cases like *Gratz*, *Hays*, or *Parents Involved*. While such programs inevitably exclude whites from finite resources in these contexts (such as government contracts or desired spaces at public schools), these programs do not reinforce notions that whites are undesirable or inferior on account of their race because their chief aim is to remediate the consequences of past racial oppression. At worst, the only racial stigma that such programs might have generated were notions that racial minorities are inferior and need governmental paternalism to measure up to whites.[161] And the presence of such racial stigma obviously would not provide *white plaintiffs* with any standing to challenge racial remediation programs.

The notion of social stigma as a concrete, cognizable injury-in-fact makes even less sense in light of the *Allen* Court's rule that a plaintiff suffers an injury-in-fact only when he or she has been personally denied equal treatment. While the Court undoubtedly sought to restrict the scope of standing for policy purposes, it set down a nonsensical rule. The fact that a person was personally denied equal treatment on the basis of race by a governmental policy does not necessarily make

156. *See* Allen v. Wright, 468 U.S. 737, 753–54 (1984).
157. *Id.* at 755.
158. *Id.*
159. *Id.* at 755–56.
160. *Hays*, 515 U.S. at 744 (quoting Shaw v. Reno, 509 U.S. 630, 643 (1993)).
161. *See* Healy, *supra* note 3, at 468.

him more susceptible to racial stigma by the rest of society, given that the policy would also stigmatize all other members of one's racial group.[162]

Ultimately, the way the Court has developed the concept of stigmatic harm does not indicate that the white plaintiffs in the racial remediation cases suffered any sort of concrete injury-in-fact. More generally, the lack of an identifiable, concrete harm in the racial remediation cases underscores the fact that the Court has inconsistently applied the concreteness requirement across the two sets of Equal Protection Clause precedent.

2. Requirement #2: Imminent Versus Conjectural Injuries

The Court has also disparately applied the standing requirement that an identifiable injury be imminent or likely to occur (rather than speculative or conjectural). The imminent injury requirement has had much greater teeth when applied in the disparate impact challenges brought by racial minorities than in challenges brought by whites. The key disparate impact cases that implicate the imminence requirement are *O'Shea*, *Rizzo*, and *Lyons*. In all three of these cases, the Court denied standing to challenge discriminatory practices by judges and police officers in the criminal justice system. The Court refused to conjecture whether the plaintiffs in these cases would commit criminal acts or would be drawn into circumstances that would expose them to the risk of being affected by the discriminatory patterns again. The Court found that the likelihood of such instances was too speculative for there to be an imminent injury.

In contrast, within the racial remediation challenges, the Court has slowly and increasingly stretched the imminence requirement, despite room for speculation regarding whether plaintiffs would ever suffer the injury in question. In early cases like *Northeastern Florida*, the Court was willing to find that the white plaintiffs were likely to suffer an injury in being denied equal treatment by the City of Jacksonville's affirmative action program when applying to complete construction contracts for the city in the future. But it was speculative whether the plaintiffs were ever going to bid on a single contract with the city and be subjected to this injury.[163] For the Court, it was enough that the plaintiffs were contractors who were able and ready to apply for the contracts. This, for the Court, was enough to pose a risk that the contractors would be discriminated against through the set-aside program. Two years later in *Adarand*, the Court's liberality in regard to the imminence requirement briefly receded. The Court in

162. *See id.*
163. *See* Spann, *supra* note 5, at 1440–41.

Adarand actually appealed to evidence that the plaintiff had a record of regularly bidding on construction contracts in the past to conclude that the plaintiff could be expected to continue this practice in the future and would likely be subjected to unequal treatment due to the set-aside program.[164]

The Court swung back toward a more liberal approach to the imminence requirement a decade later in *Gratz*. In *Gratz*, the Court found that plaintiff Hamacher had standing to challenge a university's racial preference in admissions because he expressed an intent, at the time of the suit, to transfer to the university and would have run up against the racial preference had he done so. Yet, the Court ignored the fact that Hamacher did not actually apply to transfer, making any discriminatory treatment he would have suffered hypothetical rather than imminent.

In *Parents Involved* four years later, the Court took an even more liberal approach to the imminence requirement. The Court concluded that the plaintiffs' elementary- and middle-school-aged children were sufficiently likely to be injuriously forced to compete for seats in high school in a school district assignment system that used race as a tiebreaker. Again, even assuming this constituted a concrete injury, concluding that this injury was imminent seems to overreach. After all, the question of whether the district's racial assignment system for high schools would affect the children involved speculation about events years into the future. In the years it would take for the children to progress from elementary or middle school to high school, their families might have decided to move away from the district. Yet, the Court still found that the injury was imminent.

The two lines of precedent reflect contradictions in how far the Court has been willing to engage in speculation when determining the likelihood that a plaintiff will act in certain ways that expose him to a future injury. In cases like *Northeastern Florida* and especially like *Parents Involved*, the Court was perfectly willing to presume it likely that the plaintiffs would engage in certain future behavior that would lead them to exposure to discriminatory treatment (the alleged injury). This behavior ranged from actually applying for a government contract (in *Northeastern Florida*) to staying in a school district for a number of years (in *Parents Involved*). The Court in *Gratz* was even willing to presume that there was a chance that the plaintiff would expose himself to unequal treatment *after* it became clear that the plaintiff did not *actually* do so. The Court in *O'Shea*, *Rizzo*, and *Lyons* was unwilling to engage in the same sort of speculation. In *Lyons*, for example, the likelihood that Lyons would be affected by a pattern of

164. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 212 (1995).

racial discrimination in the application of chokeholds was just as tentative as the likelihood that the children in *Parents Involved* would apply to a high school in their own school district after a period of years. The fact that the two cases resulted in different outcomes is reflective of a broad double standard in the way the Court has applied the imminence requirement across the two sets of cases.

B. Contradictions in Causation and Redressability Requirements

The Court has set down two additional requirements for standing: causation and redressability. The causation requirement deals with whether the defendant's actions are a but-for cause of the plaintiff's alleged injury-in-fact. The redressability requirement involves the question of whether the relief requested by the plaintiff would redress the injury-in-fact. When a plaintiff requests a court to enjoin a particular policy and alleges that it is causing an injury-in-fact, however, the redressability requirement essentially amount to the same inquiry as causation: whether there would remain an injury-in-fact in the absence of the policy.[165] Because the two sets of Equal Protection Clause precedent discussed have primarily revolved around such requests for injunctive relief, redressability is treated the same as causation for the purposes of this discussion.

The Court has relaxed causation requirements, like those for injury-in-fact, in racial remediation challenges while tightening them in disparate impact challenges. In fact, it would be fair to say that, in challenges to racial remediation policies, causation and redressability requirements have been superseded entirely because the Court has framed the injury-in-fact in these cases as the government's very act of race consciousness. In other words, the Court defines the injury-in-fact in these cases as race consciousness *itself*, rather than as some concrete external harm befalling the plaintiff. Consequently, there has usually been no need for further inquiry into the cause of the injury or whether enjoining the policy would redress the injury. This has allowed for the injury-in-fact inquiry to be conflated with both causation and redressability, allowing the Court to conveniently circumvent these two requirements.[166]

In disparate impact challenges like *Allen* and *Warth*, however, the Court kept causation and redressability requirements on the table. Unlike in the racial remediation cases, the Court did not frame the injuries alleged in *Allen* and *Warth* as a governmental denial of equal treatment. Rather, the Court in *Allen* and

165. *See* Allen v. Wright, 468 U.S. 737, 753 n.19 (1984).

166. The Court in *Northeastern Florida* itself recognized that the way it framed injury-in-fact effectively resolved the causation question as well. Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 n.5 (1993).

Warth defined the relevant injury-in-fact in material terms, such as how IRS policies contributed to thwarting desegregation efforts or how zoning laws prevented low-income, racial minorities from finding affordable housing. Thus, in both of these cases, the Court applied strict causation and redressability requirements: To meet the causation requirement, the plaintiffs had to show that, but for the government policies at issue, the injury-in-fact would not exist. Consequently, the Court denied standing to the plaintiffs in *Allen* and *Warth* based on these strict requirements, despite a sufficiently concrete injury-in-fact. The result has been a glaring difference in the causation and the redressability requirements applied in the two lines of Equal Protection Clause cases.

IV. EXPLAINING THE DOUBLE STANDARD

A. Explanations Proposed in the Past

The few scholars who have called attention to the Court's racial double standard in standing doctrine have laid out even fewer wholly satisfying theories to explain it. Some scholars have argued that the double standard reflects the Court's deliberate attempt to reinforce racial privilege. For example, Girardeau Spann argues that the double standard is merely a reaffirmation of the Court's historical tendency to prioritize the majoritarian interests of whites over racial minorities, like in *Dred Scott v. Sanford* and *Plessy v. Ferguson*.[167]

Other scholars have tried to explain the double standard without reference to any sort of deliberate plan or intent on the part of the Court. Gene Nichol—a frequent critic of the Court's doctrine on standing—argues that the inconsistency stems from a perceptual problem.[168] Judges, being privileged and removed from many of the problems that minority low-income plaintiffs face, simply have different conceptions and different values regarding what sorts of injuries the law should seek to redress. Most judges, for example, cannot relate to or fathom being subjected to injuries like racial profiling.[169] Hence, being unaccustomed to viewing injuries like racial profiling as facts of life, judges in cases like *Lyons* might be more inclined to label future threats of racial profiling as speculative and less inclined to see racial profiling as a pervasive social problem. Further, coming

167. *See* Spann, *supra* note 5, at 1487–97. Innovatively, Spann argues that the Court's inconsistent decisions regarding standing doctrine would *themselves* constitute impermissible racial discrimination under both Title VII and Equal Protection Clause standards if those antidiscrimination provisions applied to the Court. *Id.* at 1472.

168. *See generally* Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301 (2002).

169. *See id.* at 326–27.

from positions of privilege threatened by the use of racial preferences, judges are more likely to be predisposed to frown on injuries caused by the use of affirmative action and of racial remediation policy.[170] For Nichol, judges' own personal values, experiences, and perceptions regarding different sorts of injuries actively determine which sorts of harms they are willing to accept as cognizable for standing requirements.

Conversely, Christian Sundquist has argued that the Court's double standard is rooted in system justification theory.[171] According to Sundquist, Supreme Court justices have an unconscious psychological interest in legitimizing existing social structures.[172] System justification theory hypothesizes that those with privilege have a psychological need to justify their status in society and to legitimize existing inequities.[173] For example, a person might rationalize societal inequality with the idea that society operates as a meritocracy and that those with less simply deserve less because of a lack of merit.[174] This justification of existing social structures reduces the anxiety and the uncertainty a person of privilege might feel when confronted with systemic unfairness.[175] Sundquist hypothesizes that suits that expose structural inequalities, like the *Lyons* case exposed racial profiling in Los Angeles, threaten Supreme Court justices' views that the social status quo is structurally fair, meritocratic, and legitimate.[176] As a coping mechanism, the justices (as in *Lyons*) label practices like racial profiling as speculative in an attempt to rationalize them as aberrational rather than as structural.[177] Likewise, justices spring to action to protect the status quo from attempts to undermine social privilege, such as through affirmative action.[178] Under Sundquist's view, this unconscious psychological need to legitimize existing social structures is what ultimately motivates Supreme Court justices to set down contradictory standing requirements.[179]

B. Proposed Explanation

This Comment proposes a simpler explanation for the contradictions in the two lines of Equal Protection Clause cases, not reliant on any conscious secret

170. *Id.*
171. *See* Sundquist, *supra* note 18.
172. *Id.* at 146.
173. *Id.* at 148.
174. *Id.*
175. *Id.*
176. *Id.* at 150–51.
177. *Id.* at 151.
178. *Id.*
179. *Id.* at 146–49.

agenda on the part of the Court or on speculation about the Court's unconscious motives. Rather, this explanation proceeds from what the Court has stated openly in judicial opinions. At the same time, this explanation draws on aspects of the theories of Spann, Nichol, and Sundquist. All three of their explanations agree that the Court's inconsistent standing requirements are based on justices' subjective values, whether those are a drive to impose white dominance, relative views of important injuries, or unconscious desires to legitimize and to preserve existing social structures. This Comment proposes that these contradictions emerge from the Court's modern antiracist values, expressed through its opinions in Equal Protection Clause cases over the past few decades. In other words, the problem emerges from the Court's perceptions and values regarding what is truly harmful about racial discrimination and how to achieve racial justice through law. Because the Court in modern times has come to see the evils of racism largely in individual or in aberrational acts of intentional discrimination, it views them as the only sort of racial discrimination worth redressing. In one respect, this explanation shares similarities with Nichol's and Sundquist's ideas that the injuries judges feel *should* be redressed and judges' own subjective values greatly influence their decisions on standing.[180]

Key to this explanation is the fact that all cases in which standing requirements have been relaxed (such as *Northeastern Florida* and *Hays*) involved facial, express, or de jure racial classifications. In these cases, standing requirements were relaxed in large part because the Court was willing to recognize the imminent injury-in-fact as the explicit denial of equal treatment. This also allowed for the plaintiffs in these cases to circumvent causation and redressability requirements because the injury-in-fact was defined as the governmental action itself. Yet, all the cases in which standing requirements were stringently applied were cases in which the racial discrimination alleged was from the disparate impact on racial minorities of a race-neutral government policy or practice. In these cases, the Court did not envision the injury-in-fact as the denial of equal treatment and, thus, it subjected plaintiffs to enhanced standing requirements.

This dichotomy between challenges based on de jure discrimination and challenges based on disparate impact does not seem to be a coincidence. Rather, the reason that the Court was more willing to recognize differential treatment as an injury-in-fact in challenges to racial remediation programs is because of the importance the Court has given doctrinally (in equal protection antiracist

180. *See also* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 640 (2006) (noting that "judges notoriously uphold standing with greater frequency when they sympathize with claims on the merits than when they do not").

discourse) to the injuries caused by de jure or facial discrimination. Indeed, to the dismay of Critical Race Theory scholars, the Court has repeatedly emphasized in affirmative action and in desegregation cases that de jure discrimination, whether benign or invidious, is fundamentally suspect under the Equal Protection Clause.[181] The Court has repeatedly refused to subject some express racial classifications to lesser scrutiny than others, claiming that "there is simply no way of determining what [racial] classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[182] In short, the Court has expressed a formalistic commitment to eliminate all or nearly all express racial classifications.

A passage from Justice Thomas's concurring opinion in *Missouri v. Jenkins*[183] illustrates the great importance the Court has given to eliminating de jure or overt racial discrimination.[184] In *Jenkins*, Justice Thomas emphasized that the fundamental injury implicated in *Brown v. Board of Education*[185] by racial segregation in public schools was not the social stigma that segregation created.[186] Rather, for Justice Thomas, the chief injury stemmed from the fact of de jure discrimination *itself*, since it violated the "the simple, yet fundamental, truth that the government cannot discriminate among its citizens on the basis of race."[187] In other words, although not within the context of standing, Justice Thomas gave primary importance to the idea that de jure or express discrimination itself constitutes a fundamental injury.

Critical race theorists have argued that the Court's current antiracist approach has been fundamentally misguided.[188] By essentially framing the

181. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 746 (2007); Gratz v. Bollinger, 539 U.S. 244, 270 (2003); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that all federal government classifications based on race are subject to strict scrutiny analysis under the Fifth Amendment's Due Process Clause, and citing to *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), for the holding that all state and local government classifications based on race are subject to strict scrutiny analysis under the Fourteenth Amendment's Equal Protection Clause).

182. *Croson*, 488 U.S. at 493.

183. 515 U.S. 70 (1995).

184. *Id.* at 115 (Thomas, J., concurring). Justice Thomas's view is especially pertinent, given that he was the author of the Court's opinion in *Northeastern Florida*.

185. 347 U.S. 483 (1954). Justice Thomas's interpretation of the injury at stake in *Brown* is particularly important, given that *Brown* is popularly regarded as the origin of modern Equal Protection Clause antiracist doctrine.

186. *Jenkins*, 515 U.S. at 120 (Thomas, J., concurring).

187. *Id.*

188. *See generally* Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 954 (1993) ("[T]he pursuit of colorblindness progressively reveals itself to be an inadequate social policy if the ultimate goal is substantive racial justice."); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection:*

central harm of racial discrimination as the overt discrimination against individuals, the Court has totally ignored the fact that racial inequities tend to be subtle and structural. The disproportionate impact of government actions through racial profiling and through exclusionary zoning exemplifies this structural tendency. Yet, while focusing on eviscerating overt racial discrimination in the public sphere, the Court has emphasized that proof that a governmental policy has a disparate impact on a racial minority by itself is not sufficient for an Equal Protection challenge.[189]

The Court's modern antiracist discourse and values explain why the Court has not expansively framed the denial of equal treatment as the injury-in-fact in challenges based on disparate impact, and thus why standing requirements remained strict in those cases. The Court simply does not see the subtle and the structural impacts of government policy as cognizable injuries under Equal Protection Clause doctrine: The Court's focus is instead limited to rooting out overt discriminatory acts and policies. This also explains why justices have not been willing to recognize this sort of structural impact as an imminent injury-in-fact that is certain to continue into the future. It elucidates why the Court was willing to engage in speculation as to the imminence of injuries-in-fact in cases like *Parents Involved*, in which the racial classification at issue was codified and institutionalized in a desegregation plan. This also makes clear why the Court was so unwilling to speculate that the plaintiffs in *O'Shea*, *Rizzo*, and *Lyons* would be exposed to noninstitutionalized acts of racial profiling. Ultimately, this Comment proposes that the inconsistency in standing doctrine does not arise from either deliberate plan or unconscious motivation, as Spann and Sundquist respectively suggest. Rather, the reason is nearer to Nichol's theory: It stems from how Supreme Court justices perceive different sorts of injuries and, more generally, how they perceive racism itself.

Admittedly, this dichotomy between cases involving facial discrimination and cases involving race-neutral policies does not cleanly explain the Court's standing doctrine in challenges to majority-minority districts like in *Hays* and in *Shaw*. After all, the Court in *Shaw* repeatedly emphasized that it would be difficult to find state legislation creating majority-minority districts facially dis-

Reckoning With Unconscious Racism, 39 STAN. L. REV. 317, 322 (1987) ("[A] large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation."); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1154 (2008) (noting that there is an "insider bias" in the enforcement of antidiscrimination law by courts to view racial discrimination as aberrational rather than subtle and pervasive).

189. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976) (holding that racially disproportionate impact alone does not establish a constitutional violation under the equal protection guarantee of the Fifth Amendment's Due Process Clause).

criminatory.[190] Yet, the Court in *Hays* was still willing to recognize the denial of equal treatment as an injury-in-fact in these cases. Consequently, one may argue that these cases do not fit into the neat dichotomy between cases involving express discrimination (in which standing requirements have been relaxed) and cases involving an alleged disparate impact (in which standing requirements have remained strict).

It would seem that *Shaw* and *Hays*, however, still tilt closer in similarity to a challenge to facial racial discrimination than to a disparate impact challenge. As a matter of form, it is important to note that legislative redistricting statutes themselves can never be facially discriminatory because they mark divisions in land. Indeed, the Court itself explicitly recognized in *Shaw* that "[a] reapportionment statute typically does not classify persons at all; it classifies tracts of land, or addresses."[191] Hence, although the redistricting statutes at issue in *Shaw* and *Hays* do not exactly resemble the express racial preferences in cases like *Northeastern Florida*, this is likely because of the difference in what redistricting statutes do. As a matter of substance, however, the challenges in *Shaw* and *Hays* seem similar to challenges to affirmative action programs. These challenges were ultimately based not on any sort of material disproportionate impact or structural pattern but solely on the presence of overt racial preferences in a policy. For this reason, although *Shaw* and *Hays* do not fit neatly into the dichotomy discussed here, they are still more reminiscent of a de jure discrimination challenge than a disparate impact challenge.

V. ALIGNING STANDING REQUIREMENTS

In light of the double standard in standing requirements in the Equal Protection Clause context identified here, this Comment proposes relatively simple but fundamental changes in standing doctrine. On a smaller scale, the Court should correct the racial double standard built up over Equal Protection Clause precedent and should permit plaintiffs in challenges to disparate impact discrimination and facial discrimination alike to claim denial of equal treatment as an injury-in-fact. Alternatively, the Court could require a showing of more concrete harms from white plaintiffs making challenges to racial remediation programs. Either of these small-scale changes in viewing the injury-in-fact in Equal Protection Clause challenges would dispense with the inconsistency in standing requirements identified here.

190. Shaw v. Reno, 509 U.S. 630, 646 (1993) (discussing majority-minority districts at issue in *Wright v. Rockefeller*, 376 U.S. 52 (1964)).

191. *Id.*

But the double standard also points to larger-scale problems with standing doctrine generally. The role that the Court's own values play in the application of the injury-in-fact requirement hints that the injury-in-fact test simply allows judges too much discretion in choosing who may and who may not sue in federal court. In short, the injury-in-fact test—supposedly a procedural doctrine—has allowed the Court to flexibly dismiss on procedural grounds those cases that it opposes on the merits. Hence, this Comment advocates that the Court simply shift back to the legal interest test when determining questions of standing.[192] Shifting back to the legal interest test would essentially make the question of constitutional standing akin to an inquiry under Federal Rule of Civil Procedure 12(b)(6), regarding whether the plaintiff has stated a legal claim.[193] The chief advantage of returning to the legal interest test is that courts would lose the discretion allowed under the injury-in-fact test to dismiss a given case even when a plaintiff may have a cognizable legal claim. Returning to the legal interest test would also solve the contradictions in standing doctrine identified here. While the legal interest test would certainly allow for courts to apply their own values and preferences when deciding on the merits of cases (a risk facing any case), the legal interest test would at least allow for whites and racial minorities alike to have an equal, full, and fair opportunity to litigate their claims on the merits.

CONCLUSION

Critical Race Theory scholars Lani Guinier and Gerald Torres have argued that racial minorities can function as a sort of miner's canary.[194] In other words, the differential treatment of racial minorities can often reveal greater social problems. This is certainly the case with standing doctrine's racial double standard. The fact that this double standard in the Equal Protection Clause context has been based so heavily on justices' perceptions and values suggests that the doctrine itself faces more fundamental problems generally. If standing doctrine endows judges with the ability to bar access to the federal courts based on their opinions of what injuries truly matter, this could exclude a number of important disputes from the jurisdiction of the federal courts. Hence, this Comment advocates that the Court abandon the injury-in-fact test entirely and simply return to the legal interest test. Absent this, the Court should at least correct the

192. *See* Sunstein, *supra* note 3, at 185–86 (discussing the shift from the "legal interest" test to the "injury in fact" test under *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970)).
193. *See* FED. R. CIV. P. 12(b)(6).
194. *See generally* LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY (2002).

racial double standard built up over precedent and permit plaintiffs in challenges to disparate impact discrimination and facial discrimination alike to claim denial of equal treatment as an injury-in-fact. In short, Article III has become divided against itself. Article III standing requirements in the Equal Protection Clause context have become half-strict and half-lax. This Comment urges that the Court at the very least be consistent in its jurisprudence and make standing doctrine all one thing or all the other.