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THE EVOLUTION OF RACE IN THE LAW: THE SUPREME COURT MOVES FROM APPROVING INTERNMENT OF JAPANESE AMERICANS TO DISAPPROVING AFFIRMATIVE ACTION FOR AFRICAN AMERICANS

Reggie Oh*
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INTRODUCTION

Over the past fifty years, the United States Supreme Court has articulated the constitutional standards for the governmental use of racial classifications by referring repeatedly to its wartime decisions on the Japanese American internment. Those decisions were understood then as being emphatically not about race, but have been understood since as being equally emphatically based upon acquiescence to racism. In the past year, with the most recent race cases that have been handed down by the Court, especially its affirmative action decision, the doctrines that have given substance to the constitutional guarantee of equal protection have become increasingly problematic. The awkward development of the doctrines can be traced to their origins.

During World War II, the Supreme Court decided the historic case of Korematsu v. United States.\(^1\) There, the Court approved the internment of Japanese Americans as a racial group without individual determinations of political loyalty. The case is one of the "justly infamous episode[s]" in the history of the American judiciary, according to Professor Laurence Tribe.\(^2\) It remains the best known constitutional challenge brought by Asian Americans as well as the most important source of the standard known as "strict...
scrutiny," which marks the constitutional limits of the public use of racial classifications and private use of racial generalizations.

In its 1994-1995 Term, the Supreme Court decided the similarly significant case of Adarand Constructors, Inc. v. Pena. There, the Court effectively disapproved of affirmative action for African Americans and other racial minorities as strongly as it would of racism against these groups. The Adarand opinion affects not only so-called "reverse discrimination" but also conventional discrimination. It applies "strict scrutiny" to all racial references in the law, regardless of the underlying intent, impact, or context.

As the Court suggests, the Korematsu precedent is crucial to the Adarand decision. In Adarand, the Court analyzes Korematsu in depth, acknowledging that its own judgment had been mistaken in the internment cases, instead of simply citing the decisions as it formally had done until the very recent past. The Court nevertheless fails to appreciate the differences between Korematsu and Adarand, and in particular the consequences of using "strict scrutiny" for all racial classifications. This essay explores the complex relationship between Korematsu and Adarand, and offers a critique of the reasoning used in both cases. The essay argues that Adarand may permit invidious racial classifications to survive constitutional challenge and that its analysis of the standing issues associated with collateral litigation over affirmative action are inconsistent with its resolution of substantive issues of racial discrimination.

KOREMATSU v. UNITED STATES

The litigation brought by Fred Korematsu, a native-born American citizen, was one in a trilogy of cases decided by the Supreme Court concerning the Japanese American internment.

4. The popular perception of affirmative action presents African Americans as the exclusive or primary beneficiaries. In Adarand, the affirmative action program at issue, unlike many other plans, included Asian Americans among its beneficiaries. Id. at 2103.
5. See infra notes 60-105 and accompanying text.
6. 115 S. Ct. at 2106, 2117.
7. The two others were Hirabayashi v. United States, 320 U.S. 81 (1943), and Yasui v. United States, 320 U.S. 115 (1943). There was a fourth case near the end of the war, Ex parte Endo, 323 U.S. 283 (1944).
Writing for six of the nine members of the high court, Justice Hugo Black held that it was constitutional to imprison all persons—including United States citizens—of Japanese ancestry because they could be considered enemy aliens. The many ironies of the Korematsu case have been recognized by the Asian American and legal communities, but they have not necessarily been respected by the Court.

To this day, the significance of the case shows its contradictions. For Asian Americans, Korematsu still stands as a reminder that they are viewed as outsiders and foreigners and a potential threat to their own community. For Asian Americans, consequently, Korematsu evokes memories of prejudice, shame, and hardship. Simultaneously, Korematsu remains controlling case law, establishing the related rules that racial classifications are suspect and subject to “strict scrutiny” by the judicial system, although they are not necessarily unconstitutional as a result. Thus, for civil rights lawyers and litigants, Korematsu has been invoked to prevent the invidious use of race.

The contradictions of the case were created by the divergence between its reasoning and its result. On the one hand, the Court affixes its imprimatur to the mistreatment of a racial group while, on the other hand, warns against the use of race as the basis for any official action. In addition to approving the internment as necessary, the majority opinion sets forth three principles: (1) “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect,” (2) “courts must subject them to the most
rigid scrutiny," and (3) "]t]at is not to say that all such restrictions are unconstitutional."

These statements may have been dicta, but they have assumed greater legal significance than any other aspect of the case. Taken together, they have become embedded in the law as the "strict scrutiny" standard of review for racial classifications.

The first two propositions establish that any legislation or other government action which uses a racial classification is to be viewed as presumptively illegitimate if challenged in litigation. In contrast, almost all legislation and other government action without a racial classification are understood as presumptively legitimate, even if they distinguish among classes of citizens to the disadvantage of some. In practical terms, the government bears the burden of proof in justifying an explicit racial classification, but the individual who wishes to challenge the statute does so in every other context. The Court has since varied slightly in its phrasing of the "strict scrutiny" test, but the basic elements of the test remain the same: the government must show that the law serves a "compelling interest" and, moreover, that it is "narrowly tailored" to further that interest.

The third proposition is a caveat. It emphasizes that despite the difficulty of justifying racial preferences in the law, the government may prevail in some special cases. Over time, this difficulty has proved absolutely impossible to overcome. Korematsu remains the only case of a racial classification, concededly not "benign," that has been subjected to and has survived "strict scrutiny." As Professor Gerald Gunther famously observed, the standard has been "'strict' in theory and fatal in fact."

In Korematsu, the majority rested its decision on a pair of distinct rationales. Whatever the persuasiveness of these rationales at the time, they have been seriously challenged since. Neither the Court nor commentators have been heard defending these rationales for the decision in at least a generation.

11. 323 U.S. at 216.
12. For example, discrimination as between ophthalmologists and optometrists on the one hand, and opticians on the other hand, is subject to a deferential standard of rationality review. Under this standard, the Court must conclude that the discrimination is irrational in order to strike it down. Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955).
13. See, e.g., Adarand, 115 S. Ct. at 2117.
15. However, Justice Douglas, who had voted with the majority in Korematsu at the beginning of his career, believed the decision was correct through the end of his tenure on the bench. See infra note 72.
First, the Court reasoned that as an institution it was required to defer to the judgment of the military, especially due to the exigencies of war. The Court wrote:

[W]e cannot reject as unfounded the judgment of the military authorities and of Congress . . . [and w]e cannot say that the war-making branches of the Government did not have ground[s] for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety . . . .  

Second, the Court responded to the constitutional challenge by stating that the case had nothing to do with race, much less racism. The Court wrote, “Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire . . . .” The Court blended the justification of military necessity with its denial of racial prejudice: “To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue.”

Both of these lines of reasoning have been weakened over time. The factual basis of the former has been undermined while the internal inconsistencies of the latter have proven too difficult to dismiss. The justification of national security has often been raised in many contexts, but has rarely been relied upon by the Court. As documented by a scholar associated with the later successful petition for vacatur of Korematsu’s conviction, the Department of Justice knowingly misrepresented the risk of disloyalty on the part of Japanese Americans. Professor Peter Irons has shown in his exhaustive study that the Department of Justice, along with the military, had concluded internally that there was no significant risk of disloyal acts being committed by Japanese Americans.

Given the Court’s extensive references to racial classifications, the majority’s assertion that Korematsu was not about race seems

16. 323 U.S. at 218 (quoting Hirabayashi v. United States, 320 U.S. 81, 99 (1943)).
17. Id. at 223.
18. Id.
19. The Court has continued to accept the military necessity justification in contexts other than race. See, e.g., Goldman v. Weinberger, 475 U.S. 503 (1986) (finding that a military ban on the wearing of yarmulkes does not violate the First Amendment guarantee of freedom to exercise one’s religious beliefs).
incredible on its face. The lead counsel in the vacatur of the Korematsu conviction, Professor Lorraine Bannai and attorney Dale Minami, argue that the majority opinion is incoherent. The Court accepted the military explanation that the internment was necessary because of some sort of racial affinity on the part of Japanese Americans to Japan—even as it denied that race was a factor in the military decision making.21 Thus, the Court insisted that its decision was not motivated by overt hostility toward Korematsu or his Japanese American background. Still, it is difficult to deny that Korematsu in particular and Japanese Americans as a group are linked to the Japanese Empire by race. Absent race, Korematsu was simply another United States citizen.

In marked contrast to the judicial disregard of the problems in the Korematsu decision, the executive and legislative branches slowly came to accept that the internment was guided by prejudice. Those branches apologized symbolically and monetarily by providing reparations in the 1970s and 1980s.22

Notwithstanding the consensus that condemned the Korematsu decision almost as soon as it had been issued, the principles enunciated in the majority opinion became established as fixtures of constitutional law. The Korematsu case was transformed into an obligatory citation, strangely warranting no more than cursory discussion.

A survey of Supreme Court cases from 1945 to 1995 reveals that Korematsu was cited as authority more than fifty times, but it was discussed in depth only rarely. Typically, the reference was literally a single sentence, so that it stood as legal authority barren of substantive analysis.23

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21. Lorraine K. Bannai & Dale Minami, Internment During World War II and Litigations, in ASIAN AMERICANS AND THE SUPREME COURT 755, 774 (Hyung-chan Kim ed., 1992) (discussing how the Korematsu Court "initially deny[d] any connection between the exclusion [from a military area] and race, then state[d] the connection between Korematsu and Japan but refuse[d] to discuss this as an issue").

22. See Proclamation No. 4417, 41 Fed. Reg. 7741 (1976) (quoting President Ford as stating, "we now know what we should have known then—not only was that evacuation wrong, but Japanese-Americans were and are loyal Americans"); Civil Liberties Act of 1988, 50 U.S.C. app. § 1989 (1988). One may well ask why it remained necessary to clarify that "Japanese-Americans were and are loyal Americans."

23. Among the cases citing Korematsu are: Harisiades v. Shaughnessy, 342 U.S. 580, 589 n.16 (1952) (upholding immigration statutes and using Korematsu as an example of presidential and congressional authority to which the Court would defer because of the "war power over even citizens"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 661 n.3 (1952) (Clark, J., concurring) (citing Korematsu as an example of exercise of presidential power with express congressional approval); Loving v. Virginia, 388 U.S. 1, 11 (1967) (citing Korematsu in striking down antimiscegenation law); Frontiero v. Richardson, 411 U.S. 677, 682 n.9 (1973) (plurality opinion) (applying heightened scrutiny to gender discrimination and analogizing gender...
Strikingly, Korematsu was discussed in neutral terms as late as 1987, without any hint that the Court believed it to be wrongly decided. Indeed, in the 1987 case concerning the internment, which was resolved on jurisdictional grounds, the Court offered no comment on the internment itself.  

Surprisingly, Korematsu was not discussed at all in 1954, when the Court decided Brown v. Board of Education, unanimously declaring racial segregation in public education to be unconstitutional. As a historical matter, under the prevailing doctrine at that time, the limitation of Korematsu on the federal government should indicate that Korematsu is less, not more, of an equal protection case. That surface distinction between applicability of equal protection to the federal and state governments is at odds with the analysis of congruence between federal and state levels offered in Adarand. Some commentators have argued that Korematsu and Brown present different analytical approaches for evaluating laws based on race: Korematsu focuses on racial classifications being used by the government, but Brown focuses on the fundamental rights being infringed upon by the government. The Court has not

discrimination to race discrimination).

Two earlier race cases involving Japanese Americans cited Korematsu in neutral terms with implicit approval of its holding: Oyama v. California, 332 U.S. 633, 671 (1948) (Murphy, J., concurring) (invalidating California Alien Land Laws); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 413, 418, 423 (1948) (striking down California law on issuance of fishing licenses, which had prevented aliens "ineligible to citizenship" from obtaining them).

Korematsu, like many cases, has had a successful career in dissenting opinions. Justice Thurgood Marshall, for example, cited it in a case where the majority refused to apply heightened scrutiny to age discrimination and where the majority opinion omitted any cite to Korematsu. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting).

24. See United States v. Hohri, 482 U.S. 64 (1987) (holding that a claim for compensation arising from the internment was not within the jurisdiction of the regional court of appeals, but fell within the exclusive jurisdiction of the Federal Circuit).

25. 347 U.S. 483, 494 (1954). Korematsu is cited in the companion case to Brown at the federal level, Bolling v. Sharpe, 347 U.S. 497, 499 n.3 (1954), which is accepted as being the case that brought the convergence of state and federal standards on race-based laws; see also Adarand, 115 S. Ct. at 2107 (citing McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964) (citing Korematsu, 323 U.S. at 216), to demonstrate that the Supreme Court had understood the standards for federal and state racial classifications to be the same)

26. 115 S. Ct. at 2112-13, 2117.

27. See, e.g., Michael Klarman, An Interpretive History of Modern Equal Protection, 90 MICH. L. REV. 213, 238-40 (1991). But see Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 YALE L.J. 1063, 1067-72 (1980) (criticizing proponents of separating “process” (e.g., racial classifications) from substantive principles (e.g., fundamental rights), and suggesting that a meaningful discussion of the former necessarily entails treatment of the latter).

It is possible that Korematsu will be reinterpreted in the future for positive uses
elaborated on the possible distinction, but the contraction of the scope of Korematsu may lead to an expansion of Brown in offering protection to racial minorities.

The only discussions of Korematsu prior to Adarand that merit attention appeared in a challenge to the death penalty based on racial disparities in its imposition and in an immigration case. The former challenge presents a clear contrast to Adarand, while the latter challenge suggests that the Court may overlook the general relevance of Korematsu beyond cases involving racial classifications.

In McCleskey v. Kemp, the Court rejected a challenge to the death penalty that was based on strong statistical evidence that Black defendants accused of murdering White victims were subjected to capital punishment at much higher rates than Black defendants accused of the same crime against Black victims. In making his equal protection claim, McCleskey presented the Court with a multiple regression analysis—the "Baldus study"—that controlled for over 230 nonracial, possibly relevant factors; race was still the best predictor of death sentencing, other factors being equal. The Court stated that instead of empirical evidence of systemic discrimination, it would require individualized showings that there had been bias in specific cases.

In reaching this conclusion, the Court depended in part on Korematsu. The Court expressed concern that the history of the country and its changing demographics would make it too easy for other non-Black minority groups and even Whites to claim racism. The Court cited a lengthy list of its own decisions, among them Korematsu, as examples of racism.

In contrast, in Reno v. Flores, which upheld the Immigration and Naturalization Service's detention procedures for juveniles suspected of being deportable, Justice John Paul Stevens implicitly condemned Korematsu in his dissent. He wrote, "[t]he Court today does not cite [Korematsu], but the Court's holding in Korematsu obviously supports the majority's analysis in [Flores], for the Court approved a serious infringement of individual liberty without re-

as a due process decision, rather than an equal protection decision, at both federal and state levels, thanks to the consistency valued in Adarand, 115 S. Ct. at 2112-13, 2117.


29. See McCleskey, 481 U.S. at 287-88; Carter, supra note 28, at 441; Kennedy, supra note 28, at 1397.

30. See McCleskey, 481 U.S. at 292-93.

31. Id. at 316-17.

32. Id. at 319 n.39.

quiring a case-by-case determination as to whether such an infringement was in fact necessary...  

Justice Stevens would cast Korematsu as a due process decision rather than an equal protection decision. By his view, repudiating Korematsu would seem to compel individual analysis rather than group treatment in a much broader range of government actions, at least insofar as administrative and individual determinations are being made. Meanwhile, the orthodox reading of Korematsu has been as a case concerned with "fit." By this view, racial classifications are not per se invalid. Whether a racial classification is valid turns on whether the classification of race "fits" well enough the characteristic for which it serves as a proxy. The legislative lines should be drawn to avoid egregious overinclusion or underinclusion. The Court recognizes, realistically, that some over- and underinclusion is inevitable in the absence of individual determinations, which may not be feasible.  

With respect to the World War II internment, race supposedly served as a proxy for disloyalty, i.e., to be Japanese American was to be disloyal. The inquiry was whether race was an accurate measure of loyalty. The risks were overinclusion in the form of imprisoning too many Japanese Americans who were loyal, and underinclusion in the form of imposing the same restraints on too few other Americans who were disloyal. To the extent that later citations of Korematsu were meaningful uses of legal precedent, they carried on...
the tradition of analyzing "fit" as a matter of overinclusion and underinclusion. In this abstract form, the Korematsu case has become an integral anomaly in constitutional law. Beneath the surface for half a century, the case has appeared once again, this time in the affirmative action context.

ADARAND CONSTRUCTORS, INC. v. PENA

Last year, the Supreme Court addressed affirmative action in a decision that appears more definitive than any of its predecessors. The plaintiff in the suit, Adarand Constructors, Inc., sought to bid on federal government contracts, the regulations for which included set-asides for socially and economically disadvantaged businesses. Racial minority status, which was defined for the purposes of this program as including African Americans, Asian Americans, Latinos, Native Americans, and others, but excluding Whites, created a presumption of disadvantaged status for purposes of benefiting from the set-aside.

Justice Sandra Day O'Connor, writing for five of the nine members of the Court, ruled in favor of Adarand. The Court held that affirmative action would be treated like other racial classifications and thus subjected to "strict scrutiny" analysis. The case was remanded for a determination of whether the set-aside could meet the "strict scrutiny" standard. Adarand likely will result in far fewer, but still some, affirmative action programs being approved by the lower courts. Regardless of the result in Adarand itself in the lower courts, the approach adopted returns the Court to the course set in Korematsu.

In order to understand Adarand, it is necessary to consider the background created by three earlier decisions on affirmative action during a generation of litigation: Regents of the University of California v. Bakke, City of Richmond v. J. A. Croson Co., and Metro Broadcasting v. FCC. In Bakke, the first affirmative action case decided on the merits by the Supreme Court, the compromise position proposed by Justice Lewis Powell turned into the constitutional norm. At issue in Bakke was the admissions policy of the University of California at

37. Adarand, 115 S. Ct. at 2101.
38. Id. at 2103.
39. Id. at 2111.
40. Id. at 2118.
42. 488 U.S. 469 (1989).
Davis Medical School. Four Justices voted with Justice Powell to sustain affirmative action in principle. Four different Justices voted with Justice Powell to strike down the particular affirmative action plan as it was being implemented. The Powell opinion, as a result of the deep division among the Justices, became the law that governed affirmative action. According to Justice Powell, affirmative action is not exempt from “strict scrutiny,” but neither is affirmative action subject to “strict scrutiny” in the manner that Korematsu would prescribe. Without clarifying the exact method of judicial review, Justice Powell concluded, after a lengthy consideration of different justifications for affirmative action, that race could be considered as a factor in university admissions policies if it did not result in numerical quotas.

A decade of further political activity, legislative change, and accompanying litigation returned affirmative action to the Court’s docket again and again. The turning point was marked by a conservative Court shifting away from the Powell balancing approach in the Croson decision. The relevant aspect of the Croson decision, which otherwise foreshadowed the Adarand decision, was its adoption of a dual standard. At issue in Croson was the set-aside program enacted by the City of Richmond, Virginia, modeled after similar federal programs. The Croson Court held that whatever the constitutional status of affirmative action programs enacted by Congress, even identical programs adopted at the state and local levels would be subject to “strict scrutiny.” Much of the reasoning of Croson addressed federalism and the differing roles of federal, state and local governments, so that the result could not be explained solely by race.

The distinction between the different acting governmental entities permitted the Court to distinguish Croson from Metro Broadcasting v. FCC, the next case it accepted concerning affirmative action. Metro Broadcasting concerned the federal program of granting radio station broadcasting licenses, and awarding “plus” points based on race in order to encourage “diversity” in programming.

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44. Bakke, 438 U.S. at 269.
45. The four were Justices Brennan, White, Marshall, and Blackmun. Id. at 272.
46. The four were Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens. Id. at 271.
47. Id. at 290-91.
48. Id. at 315-20.
50. Id. at 528.
51. Id. at 493-94.
52. See, e.g., id. at 504.
Unexpectedly, the Court upheld the program. It reasoned that the federal government had shown a “nexus” between race and viewpoint; that is, a “nexus” between promoting diversity and increasing the number of underrepresented minority groups owning broadcast licenses. That “nexus” served the goal of “diversity” in media programming. Thus, the Court found compelling the “nexus” (the means) coupled with “diversity” (the ends).

After Metro Broadcasting, Adarand was accepted on the Court’s docket. In resolving the affirmative action controversy at its constitutional limits, the Court made affirmative action much more difficult, although not impossible.

Korematsu echoes throughout Adarand in the formalist “fit” analysis of racial classifications. Justice O’Connor asserted that equal protection standards have always embraced three principles: (1) “skepticism” toward “any preference” based on racial classifications, (2) “consistency,” meaning that the same skepticism applied regardless of the context of the classification, and (3) “congruence” in equal protection analysis under the Fifth and Fourteenth Amendments. Justice O’Connor applied these principles in deriving three results that bear on earlier cases: (1) “despite the surface appeal of holding ‘benign’ racial classifications to a lower standard [than ‘strict scrutiny’] . . . it may not always be clear that a so-called preference is . . . benign”, (2) “all racial classifications . . . must be strictly scrutinized”, and (3) the pronouncement that “we wish to dispel the notion that strict scrutiny automatically leads to invalidation of the official use of racial classifications.”

With each of these statements, Adarand altered Bakke, Croson and Metro Broadcasting. By equating benign racial classifications with invidious ones, Adarand effectively overrules Bakke—i.e., the Powell opinion as well as any part of the other opinions more favorable to affirmative action. In stating that “strict scrutiny” applies to all racial classifications, Adarand extended Croson from the

54. Id. at 569, 582-83.
55. Id. at 567-68.
57. Id. at 2112.
58. Id. at 2111.
59. Id. at 2117. The interesting issue that remains, and may be addressed in the current Term, is whether gender classifications will be treated in a formalist manner in which they are all the same, or in a contextual manner in which discrimination against women and discrimination in their favor (and paternalistically in their favor) are distinguished from one another. For an especially interesting view, see Michael M. v. Superior Court, 450 U.S. 464, 476 (1981) (plurality opinion) (arguing that men have not faced historical discrimination and are not “in need of the special solicitude of the courts”).
The evolution of race in the law state and local level to the federal level, achieving a consistency with respect to racial classifications, but not necessarily with conservative notions of federalism. By explaining that some statutes could conceivably pass “strict scrutiny,” Adarand renders the Metro Broadcasting analysis superfluous because government entities no longer need to support affirmative action by making the distinction that it is helpful rather than harmful; rather they need to support it by empirical data. Under Adarand, however, the government can continue to consider race. The judicial branch also participates in the process as it evaluates whether an affirmative action plan is supported by sufficient evidence of discrimination and need.

In reaching its holding, the Adarand majority relied heavily on the Korematsu case. The Court treated Korematsu as analytic support for its holding as well as a rhetorical example of the dangers of relying on race to prove other characteristics. In two relatively lengthy passages, the Court discussed the Korematsu statements setting up the “strict scrutiny” test.60

In the first section, the contemporary Court observed of its wartime counterpart that “in spite of the ‘most rigid scrutiny’ standard it had just set forth, the Court then inexplicably . . . conclude[d] that . . . the racially discriminatory [internment] order was nonetheless within the Federal Government’s power.”61 The Court reiterated that the internment was “‘motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership.’”62 In Adarand, at last, the dissenting Justices in Korematsu were vindicated. The Adarand majority recognized that the Korematsu minority had challenged a law that “falls into the ugly abyss of racism.”63

In the second section, beyond disapproving the earlier decision, the Adarand Court continued with its powerful dicta on Korematsu. After all, Korematsu served a purpose, as a warning against judicial laxity in reviewing racial classifications. The Court states, “Korematsu demonstrates vividly that even ‘the most rigid scrutiny’ can sometimes fail to detect an illegitimate racial classification.”64 And, “[a]ny retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future.”65

What is remarkable is the type of judicial inquiry which is required

60. Adarand, 115 S. Ct. at 2106, 2117.
61. Id. at 2106.
63. Id. at 2106 n.* (quoting Korematsu, 323 U.S. at 233).
64. Id. at 2117.
65. Id.
THE RELATIONSHIP OF KOREMATSU AND ADARAND: 
STANDING AND SUBSTANCE

The use of the Korematsu decision in the Adarand opinion is troubling. By simultaneously repudiating discrimination against Asian Americans and rejecting a remedy for discrimination against African Americans, it establishes a zero-sum game of sorts, representing an advance for Asian Americans and a retreat for African Americans. Overall, it is a setback for society at large because the treatment of racial classifications will serve no stated public policy.

Most obviously, Justice O'Connor's opinion for the Adarand majority represents the first occasion on which the Supreme Court has disapproved at any length of its own earlier decisions upholding the constitutionality of the internment. In that respect, the lateness of the admission is a sign that the judicial branch, as an institution, is more conservative than the executive and legislative branches; it confirms that the "least dangerous branch" earns that title by being the most conservative branch.67 More importantly, Justice O'Connor's opinion also marks the first occasion on which the high court has affirmed with substantial discussion its "strict scrutiny" reasoning for racial classifications. In that respect as well, it shows that the judiciary is conservative in the sense of limiting itself and other governmental institutions inremedying racial discrimination.

As much as Asian Americans have emerged politically, the Korematsu case has made its reappearance doctrinally, in the debate over affirmative action.68 The Court asserts that the internment and

66. Justice Stevens offers an alternative reading of Korematsu. Instead of standing for the proposition that "federal remedial programs are subject to strict scrutiny," he interprets it as specifying that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect." Adarand, 115 S. Ct. at 2125 n.7 (Stevens, J., dissenting) (alteration in original) (quoting Korematsu, 323 U.S. at 216). In contrast, an affirmative action program "benefit[s] certain racial groups and impose[s] an indirect burden on the majority." Id.; cf. id. at 2121 (illustrating the significant differences between a decision by the majority to impose a special burden on the minority and a decision to provide benefits to the minority).

In the interest of thoroughness in collating references to Asian Americans, rather than to read too much into a single reference to them, Justice Stevens also mentions that a "millionaire" who was "an Asian American or an African American," would not benefit from the affirmative action program at issue. Id. at 2129.


68. For information on Asian Americans and affirmative action, the following sources are useful: Viet D. Dinh, Multiracial Affirmative Action, in DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION 280, 281 (Nicolaus Mills ed., 1994) (arguing against affirmative action programs which conceive of race as merit, instead of race as remedy); LEAP ASIAN PACIFIC AMERICAN
affirmative action are the same for constitutional purposes. But the assertion is nothing more than that, an assertion with no analysis whatsoever.

It may be unintentional, but it should be curious, if not controversial, that the Court depends on an argument effectively stating that racial classifications harmful to Asian Americans weaken racial classifications helpful to African Americans. This legal rationale is provocative because it parallels the political argument that affirmative action itself has a disproportionate impact...
on Asian Americans if they are not beneficiaries. Yet for the most part in affirmative action cases, Asian Americans have had a minor presence.

The earliest case on affirmative action to reach the Supreme Court, *DeFunis v. Odegaard*, went unresolved because of mootness problems but nevertheless mentioned Asian Americans by name. In a dissenting opinion, Justice William O. Douglas—an iconoclastic liberal who had voted with the majority in *Korematsu* and defended his decision in a footnote in *DeFunis*—argued that "there is no Western State which can claim that it has always treated Japanese and Chinese in a fair and evenhanded manner." Justice Douglas concluded, though, that these facts weighed against affirmative action because too many groups might argue that they should be included.

Later, Asian Americans and other non-Black racial minorities were relegated to the literal margins. In *Bakke*, Justice Powell stated in a footnote that the inclusion of "Asians" in the affirmative action program was "especially curious in light of the substantial numbers of Asians admitted through the regular admissions process." Justice Powell cited *Korematsu* for the traditional recitation of "strict scrutiny," also noting that arguments of necessity should be balanced, but the standard of review should remain "constant."

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69. For recent examples of the argument, see Wu, *supra* note 68, at 225 ("House Speaker Newt Gingrich . . . has asserted that 'Asian Americans are facing a very real danger of being discriminated against' because they are becoming too numerous at prestigious universities which have affirmative action. . . . Again and again, claims are made that Asian Americans, like whites, suffer because of affirmative action for African Americans."). Cf. Carol Innerst, *College Admissions Study Finds Asian-Americans Have a Gripe*, WASH. TIMES, Dec. 16, 1995, at A5 (quoting Congressman Dana Rohrabacher who argued that Asian Americans are victims of affirmative action because they "aren't a politically correct minority group"); Benjamin Pimentel, *Asian Americans' Awkward Status: Some Feel Whites Use Them as 'Racial Wedge' with Others*, S.F. CHRON., Aug. 22, 1995, at A1 (quoting campaign manager of anti-affirmative action initiative in California as stating, "the quota kings and quota queens seem to be uncomfortable with the tendency of Asian Americans to emphasize excellence").

70. *See Wu, supra* note 68, at 259-61. The next few paragraphs are adapted from my earlier article. Note that Justice Powell was slightly misquoted due to an editing error. *Id.* at 257.


73. *Id.* at 339 n.20.

74. *Id.* at 339.

75. *Id.* at 340.

76. *Bakke*, 438 U.S. at 309 n.45 (emphasis added). While the Court explicitly uses the term "Asians," it seems reasonably likely that the Court also intended to include Asian Americans. *Id.*

77. *Id.* at 287, 299.
Justices who voted to uphold affirmative action cited Korematsu with an awareness that it "paradoxically" supported their position.78

Finally, Asian Americans made a cameo appearance of sorts in the cases that immediately preceded Adarand. In Croson, Justice O’Connor, writing for the majority, stated with emphasis that in the Richmond construction industry, "[t]here [was] absolutely no evidence of past discrimination" against any of the non-Black racial minority groups, including "Oriental[s]."79 Justice O’Connor understood this lack of proof as another indication that the affirmative action plan "perhaps . . . was not in fact to remedy past discrimination" but only represented self-serving racial spoils.80 In Metro Broadcasting, Justice O’Connor, writing in dissent, apparently alluded to non-Black racial minority groups by implying that they may be disfavored by affirmative action in the future: "[m]embers of any racial or ethnic group, whether now preferred [by the affirmative action program] or not, may find themselves politically out of fashion and subject to disadvantageous but ‘benign’ discrimination."81 She failed to elaborate on her prediction. The Croson Court cited Korematsu to note that necessity was not an especially compelling argument in favor of racial classifications.82 The Metro Broadcasting Court cited Korematsu for its usual perfunctory purpose.83

Arguably, with respect to the actual holding of Metro Broadcasting, there is an equivalence between the conclusion that the racial characteristic of being Japanese American correlates to the political viewpoint of loyalty to Japan and the conclusion that being a racial minority radio station owner correlates to a certain cultural viewpoint in programming content.84 The difference between the two, however, is that the former imposed imprisonment on a racial minority group, but the latter confers a benefit on racial minorities. Standing alone, that difference does not seem enough for either a principled understanding of racial classifications or a persuasive political position. In any event, that Metro Broadcasting may have

78. Id. at 359 n.34 (joint opinion by Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).
79. Croson, 488 U.S. at 506.
80. Id.
81. Id. at 510-11.
82. 497 U.S. at 615 (O'Connor, J., dissenting).
83. Croson, 488 U.S. at 501.
84. Metro Broadcasting, 497 U.S. at 564 n.12.
85. This conclusion is implied by Justice O'Connor's dissenting opinion. See id. at 603-04 (citing Korematsu when arguing that the dangers of racial classifications like the FCC's affirmative action policy include the endorsement of "race-based reasoning and the conception of a Nation divided into racial blocs").
been wrongly decided, or poorly reasoned, does not mean that *Adarand* was rightly decided, or richly reasoned.

The Court thus arrived at the *Adarand* decision having consigned Asian Americans to the periphery of racial politics, even as *Korematsu* stood as the hollow center of its racial doctrine. The tragedies of the *Korematsu* case are likely to be replayed by the *Adarand* case.

The irony of the *Korematsu* case, virtually cliche, is that the Supreme Court sanctioned, in the positive as well as negative sense, the use of race by the government in official decision making. *Korematsu* and its companion cases on the internment are the only instances in which invidious racial classifications have triggered "strict scrutiny" and survived. The irony of the *Adarand* case, in contrast, appears because the Supreme Court, in an effort to state that some so-called "reverse discrimination" might survive "strict scrutiny," must be understood to have said that some conventional discrimination could also survive "strict scrutiny."

The reasoning will be apparent to any lawyer attempting to defend a racial classification that disadvantages people of color. The reasoning is simplistic, but the potential results are complex and difficult to predict.

Initially, Justice O'Connor's opinion in *Adarand* takes a formalistic view of racial classifications. It rejects the suggestion in Powell's *Bakke* opinion that affirmative action can be subjected to anything less than "strict scrutiny," and any vestigial implications that there are principles for distinguishing between benign and invidious racial classifications. In the new regime, all racial classifications are equal. None is more or less benign or invidious than the next.

The *Adarand* Court then affirms the *Korematsu* "strict scrutiny" standard. As *Korematsu* itself was a case where the racial classification passed this demanding level of judicial review, so too *Adarand* states plainly that other racial classifications may also meet the test. This dicta overturns generations of unquestioning acceptance of the fatality of "strict scrutiny." It presumably means that some affirmative action programs are permissible by the constitutional norms. However, thanks to the *Adarand* approach, affirmative action has become indistinguishable from any reference to race in the law.

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86. *Adarand*, 115 S. Ct. at 2117 ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'").
87. *Adarand*, 115 S. Ct. at 2117.
88. *Id*.
89. See, e.g., Gunther, *supra* note 14, at 8 (characterizing strict scrutiny as "'strict' in theory and fatal in fact").
Therefore, if affirmative action can be sustained, it follows that invidious (as they were formerly characterized) classifications can be sustained.

In other words, the Adarand opinion provides the foundation for a subsequent case which could follow Korematsu not only in its reasoning, but also in its result.90 The Adarand approach may well be worse than a color-blind Constitution, which at least has the virtues of being clear and seemingly neutral, as well as of prohibiting race-based laws detrimental to racial minorities.91 The Adarand approach is even weaker than Professor Gunther’s approach of rationality review with “bite.”92 The Adarand approach is not necessary to a holding that affirmative action is unconstitutional, but its effect extends well beyond affirmative action programs.

It may well be true that Justice O’Connor and a majority of the sitting Supreme Court Justices would recognize a reincarnation of Korematsu. Indeed, they offer reassurances that they would decide another Korematsu differently if presented with the opportunity.93 How they should do so remains somewhat a mystery, for if Justice O’Connor and her colleagues are to be believed, the next Korematsu will be the same as the next Adarand (and the next Brown v. Board of Education)—there being no distinction to be drawn between racism and its remedy.

At the very least, to take an example that is quite apt, for the same reason that the Korematsu case was wrongly decided, internment reparations likewise should be subject to “strict scrutiny”—again because racial classifications are the same.94 But after

90. In her dissent, Justice Ginsburg, anticipating the risk, appears to be providing reassurance that a majority of the Justices would strike down a latter-day Korematsu, however, she provided no further explanation 115 S. Ct. at 2136.


93. This is not to say that the current Court would be blind to another Korematsu, but only to question whether it has stated a principle for doing so, other than an “I know it when I see it” approach. See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (containing an acknowledgment by Justice Stewart of his inability to formulate a coherent test for identifying obscenity). The latter ad hoc approach is suggested by Justice Ginsburg who, writing for herself and Justice Breyer, indicated that “[t]he divisions in this difficult case should not obscure the Court’s recognition of the persistence of racial inequality and a majority’s acknowledgment of Congress’ authority to act affirmatively . . . .” Adarand, 115 S. Ct. at 2135 (Ginsburg, J., dissenting).

94. Justice Stevens used a similar example: “Now suppose Congress decided to reward [military] service [by Japanese Americans during World War II] with a federal program that gave all Japanese-American veterans an extraordinary preference in
Korematsu was decided in the manner that it was, it became necessary to decide what could be served as a remedy. To say that Korematsu will be decided differently if it arises again is counterfactual and begs the question of what to do if Korematsu is a given. Needless to say, internment reparations for Japanese Americans can be easily analogized to affirmative action for African Americans. The difference between them is the larger scale of the injustice of slavery, which weighs in favor of providing the latter, but is the very reason it cannot be compensated—as Justice Brennan stated in McCleskey, the Court “fear[s] . . . too much justice.”

The similarities between Korematsu and Adarand are prospective as well as historical. The Korematsu case established an empirical standard as much as a normative standard for evaluating race. The Court in Korematsu accepted that the federal government might legitimately rely on race as a proxy for political viewpoint, thus applying different treatment to groups of people rather than individual persons. The Court in Korematsu ostensibly required that the federal government provide an empirical basis for doing so. The question is one of “fit.” There are many possible alternative approaches that can be adopted for a court facing a modern version of Korematsu, among them, a color-blind Constitution, a prohibition on subjugation, or a contextual interpretation of racial discrimination.

Instead of considering any of the alternative approaches, the Adarand case gives further support to an empirical tradition over a normative tradition. The Court in Adarand, like the Court in the

Government employment.” Id. at 2121 (Stevens, J., dissenting).
95. See Wu, supra note 68, at 262 n.171.
96. McCleskey, 481 U.S. at 339 (Brennan, J., dissenting) (criticizing the majority for rejecting claim of racially discriminatory sentencing); see also Kennedy, supra note 28, at 1414 (identifying “[a]pprehensions over perceived remedial costs” as “prompt[ing] the Court increasingly to narrow the definition of violations”).
97. See Ruth Colker, Anti-Subordination Above All: Sex, Race, and Equal Protection, 61 N.Y.U. L. REV. 1003 (1986) (advancing equal protection analysis from an antisubordination perspective, which seeks to eliminate power disparities between the have and the have-nots, as opposed to the antidifferentiation perspective, which contends that treating individuals differently because of their race or sex is inappropriate).
98. See Charles R. Lawrence, III, The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987) (arguing that the intent requirement in Fourteenth Amendment equal protection jurisprudence results in the failure to take into account the effects of unconscious racism).

earlier *Croson* case concerning state and local government versions of affirmative action, accepted the use of race as a proxy for social and economic disadvantage, thus allowing preferential treatment for some members of racial minority groups. The Court in *Adarand*, however, would require that the federal government provide an overwhelming empirical basis in historical fact and contemporary data, before allowing it to proceed with the challenged program. The question again is one of “fit.” The logical risk is that other racial classifications will be justified by the same form of statistical stereotyping.

A few examples of “rational racism” show how *Adarand* can be abused. The proportion of Black males with criminal records within the population of Black males as a whole is higher than the proportion of White males with criminal records out of White males as a whole (even if the absolute number of White males with criminal records is greater than the absolute number of Black males similarly situated, or if less than a majority of Black males have criminal records). The proportion of Latinos and Asians who are foreign-born or undocumented immigrants is higher than the proportion of Caucasian Anglos who are foreign-born or undocumented immigrants.

Based on either of these sets of “facts”—which, it would be an understatement to say, conceal larger issues—federal and state legislatures might enact discriminatory laws incorporating racial classifications. A conservative Congress or an electorate voting on a ballot proposition might believe the arguments and accept the public policy proposals advanced in *The Bell Curve* and *Alien Nation*, which argue, respectively, that race determines intelligence which in turn, determines socioeconomic success, and that the nation has been and should remain racially White and culturally homoge-


With enough social science and empirical data, courts could sustain those laws. Moreover, the courts may be compelled to sustain those laws because they would lack authority to take an approach that was more critical or that deviated from legal ratification of statistical data. The courts are limited by the data. They cannot serve as vehicles of social change.

If the rationale of Korematsu, as it has evolved in Adarand, sets the prevailing constitutional standard—and because constitutional standards influence and ultimately limit the political discourse—it becomes acceptable to argue that racism is rational. More than acceptable, as the “strict scrutiny” standard is weakened and approaches rationality review, it may well be legally persuasive to assert that racial classifications are reasonable. The burden may remain on the defendant to justify the racial classification—that burden being the difference between “strict scrutiny” and rationality review—but it is a burden that can be carried. Thus, the Court seems prepared to accept blithe and uncritical assertions along the lines of “it can’t be racism if it’s true.”

The Adarand Court offers a reminder that “strict scrutiny” is nothing more than a standard of review: “It says nothing about the ultimate validity of any particular law.” By taking an approach that asks for empirical evidence rather than legal reasoning, the courts and society avoid the difficult moral judgments about the use of race that should be addressed at the threshold. The law loses its mediating moral function if courts cannot decide whether a racial classification is benign or invidious (though those terms may not be the best). The discussion of classifications rather than rights elevates form over substance, an accusation made often, but accurately in this case.

The Adarand Court confuses the metaphor of “strict scrutiny” with scientific inquiry, as if the lower courts should actually search for something physical that will reveal whether discrimination exists. The popular perception of Adarand exacerbates the problem, because it is understood as a case condemning only affirmative action rather than as a case condemning all racial classifications. What is to be found in Adarand that tempers the disapproval of affirmative action works little benefit to affirmative action but considerable gain to other racial classifications.

It would be easier to be sanguine about Adarand if the Court were willing to consider social science statistics presented by plaintiffs alleging racial discrimination, rather than only in collateral lit-

106. Adarand, 115 S. Ct. at 2114.
igation attacking affirmative action. The Court has refused to do so. The Court, without reservation about what is at best an inconsistency lacking justification and at worst outright hypocrisy, gave little weight to empirical data in the *McCleskey* death penalty case. Thus, the Court argued in favor of “consistency” in evaluating race while practicing the contrary. Worse, it used *Korematsu* in *Adarand* and *McCleskey* to reach results that were diametrically opposed to one another.

If the Court were to apply *McCleskey* to *Adarand*, rigorously requiring the same evidence to prove discrimination and reverse discrimination, it would require much more of the allegedly aggrieved White males. They would need to show that, but for affirmative action, they would have gained admission to the university, been awarded the contract, or been given the promotion—that is, not just that any White male would have benefited, but that the complainants specifically as individuals would have been chosen—if they wished to obtain broad-based injunctive relief striking down the program, rather than narrow compensatory relief in the form of damages. That would separate the angry White men from the unsuccessful White men. It also would emphasize that affirmative action is relatively modest and cannot be blamed for systemic economic problems. Adding a simple requirement that the

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107. It also would be easier to be optimistic if courts were willing to consider evidence that was not strictly statistical, but critical and interpretative—if the testimony of the historian or psychologist could supplement the record.

108. In *Adarand*, there is no indication that the Supreme Court would require the plaintiff to make this type of showing. Rather, the Court requires the plaintiff to make the minimal showing that “some time in the relatively near future it will bid on another government contract.” *Adarand*, 115 S. Ct. at 2105 (citing Northeastern Fla. Contractors v. Jacksonville, 113 S. Ct. 2297, 2303-04 (1993)). See generally id. at 2103-05 (describing the affirmative action program at issue and discussing whether plaintiff has standing to seek declarative and injunctive relief). Cf. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280 n.14 (1978) (discussing the White plaintiff’s burden of proof to show standing in challenge to school’s admission policy).

There are arguments that may distinguish the situations. In particular, there is a constitutional difference (whether the law is susceptible to a facial challenge) between covert racism and overt affirmative action. The difference, unfortunately, is taken to favor the former and disfavor the latter. Therefore, under prevailing doctrine, an explicit racial reference in the law is distinguished from a law with a racial impact or with a racial motivation. See *Adarand*, 115 S. Ct. at 2105 (distinguishing the present case, which concerns explicitly race-based classifications, from facially neutral laws that result in racially disparate impact or are motivated by a racially discriminatory policy). But only a fool today would openly admit that they were acting to discriminate against racial minorities. Perhaps the Court will revisit its intent requirement as government actors with racial motivations become more sophisticated.

109. See Stanley Fish, *Reverse Racism or How the Pot Got to Call the Kettle Black*, ATLANTIC MONTHLY, Nov. 1993, at 128 (confronting and rebutting the objections to affirmative action).
would-be plaintiff show that he was qualified and would have received the benefit but for affirmative action, might appear to be inoffensively neutral—for it should foreclose nothing substantively. The Court, however, has not followed that course.

In a decision that may have greater significance than Adarand, the Court two Terms earlier in Northeastern Florida Contractors v. Jacksonville considered "whether, in order to have standing to challenge the [affirmative action program], an association of contractors is required to show that one of its members would have received a contract absent the [program]." Justice Clarence Thomas, commanding the votes of six of his colleagues, wrote in the lead opinion, "we hold that it is not." Justice Thomas reasoned that the required injury in fact was suffered when the contractor faced a procedural obstacle in bidding for government contracts, regardless of whether he was able to demonstrate that without that procedural obstacle the substantive outcome would have been in his favor.

The substantive asymmetry between the internment and affirmative action (or any negative treatment of racial minorities compared to remedial programs with a racial component) is reproduced in standing analysis. If the internment and affirmative action were equivalent for constitutional purposes, it should be possible for a White plaintiff to sue for the former as well as against the latter. That is, a White plaintiff could be imagined suing initially to institute an internment program, or in a collateral challenge to ensure enforcement in a more stringent manner, much as a racial minority could challenge racial discrimination, seeking a remedy in the form of a consent decree or injunction. For that matter, a White plaintiff also should be able to contest an internment program directed at racial minorities. These possibilities seem not only mildly implausible as actual scenarios, but also unclear with respect to standing. The fact that they are not quite the same for standing

110. Any litigant wishing to challenge an affirmative action program would be able to satisfy what is a rather minimal standard anyway. Cf. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (describing plaintiff's burden of establishing a prima facie case of disparate treatment employment discrimination as "not onerous").

111. 113 S. Ct. at 2299. The other issue raised by the case was mootness. Id. at 2301. The dissenting Justices would have held that the case was moot without reaching the standing problem. Id. at 2305 (O'Connor, J., dissenting). The mootness issue arose because the affirmative action program was abolished and a new affirmative action program was instituted after litigation commenced; the difference between the two was the exclusion of racial minorities other than African Americans. Id. at 2300. The foundation for Northeastern Florida Contractors was the collateral challenge to affirmative action permitted by Martin v. Wilks, 490 U.S. 755 (1989).

112. 113 S. Ct. at 2299.

113. Id. at 2303.
purposes suggests that they are substantively dissimilar.

The difference is that the racial minority facing an invidious racial classification suffers an injury in fact under the more restrictive test, while the White plaintiff challenging affirmative action suffers a theoretical harm not intended to be directed toward him or his race.\textsuperscript{114} This difference is emphasized by the standing analysis followed in \textit{Northeastern Florida Contractors} and \textit{Adarand}.

The standing analysis in affirmative action, like the substantive analysis, regards racial classifications in the abstract. But rather than condemning racial classifications in the abstract, the Court implicitly accepts the possibility that there will be enough evidence to support the stereotype. Furthermore, the Court's unwillingness to consider the reality of racial discrimination that is unconscious or covert, rather than plainly visible in the explicit intentions of a state actor or the plain language of a statute, ensures that at the constitutional level plaintiffs alleging regular discrimination must meet a more difficult test than plaintiffs alleging reverse discrimination. The only hope for improvement is that some defendants will prevail in challenges to affirmative action by demonstrating to the highest degree that discrimination occurs and that there are no better means to remedy it. The defendants in those cases, coincidentally, will often be the very institutions whose conduct gave rise to the need for a remedy.

A real test of the standing analysis offered by the Court with respect to affirmative action would be a case brought by a racial minority whose claim centered around structural obstacles to participating in competition for some type of benefit, that is, whose claim was based on statistically demonstrated racial discrimination traceable to official policies. The injury would be concrete, and the cause would be demonstrable, but the relationship could be more convoluted than an overt form of substantive racial discrimination.

In other words, the real test of the standing analysis would be another \textit{McCleskey}.\textsuperscript{115} Such a case would present a claim that could be understood as: Whites jurors intentionally discriminate, or White

\textsuperscript{114} Cf. David Chang, \textit{Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?}, 91 COLUM. L. REV. 790 (1991) (considering whether one can reconcile a case involving government policy designed to redress effects of past discrimination with a case involving a facially neutral policy with disparate impact, on the ground that the two cases involved different kinds of harm).

\textsuperscript{115} \textit{McCleskey v. Kemp}, 481 U.S. 279 (1987); cf. Kennedy, \textit{supra} note 28, at 1422-23 (addressing the question of standing and arguing that African Americans are the victims of racial disparities in death penalty sentencing because their lives are devalued by the criminal justice system and they are afforded less protection from crime).
jurors unconsciously discriminate, or there is a form of systemic bias in the criminal justice system. 116 Whichever it is, one of these explanations must be true, unless the evidence is regarded as an artifact or as falsified, contentions that have never been made. The claim by McCleskey-type plaintiffs should be understood as a claim of racial discrimination within the official processes, identical to that raised in Adarand, except in this case the criminal justice system is implicated rather than the contract bidding system. Of course, the Court has resolved cases like McCleskey by taking what was merely a standing issue in affirmative action—and one that turned out to be nonproblematic at that—and turning it into a dispositive substantive issue. Under McCleskey, proof of discrimination that is severe and widespread is not enough without proof of individual wrongdoing which identifies a perpetrator and an intent. 117

Professor Cass Sunstein has argued that Northeastern Florida Contractors was correctly decided and portends a positive trend in standing doctrine. 118 For Professor Sunstein, the standing analysis should be much more directly linked to the substantive analysis; indeed, they would merge with one another. He writes, "[t]he question of standing is the same as the question [of] whether the plaintiff has a cause of action." 119

The approach espoused by Professor Sunstein has its advantages if it is applied in all instances, and it focuses attention on the deficiencies of the underlying substantive law. Under this view, the problem with McCleskey lies with the unwillingness of the Court to consider statistical evidence, not with anything arising from standing. Professor Sunstein, however, has identified the opposite side of the problem. Another interpretation, equally consistent and plausible, is that Northeastern Florida Contractors is problematic because it has taken what elsewhere has been an issue of substantive law and

116. Cf. Kennedy, supra note 28, at 1405-06 (comparing McCleskey with cases involving statistical disparities based on racial criteria).

117. See McCleskey, 481 U.S. at 292, 297 (holding that petitioner "must prove that the decisionmakers in his case acted with discriminatory purpose," and finding insufficient a study that shows racial disparity in the imposition of the death penalty). A challenge to different sentencing standards for crack and powder cocaine, for example, would be evaluated under rationality review and almost certainly sustained. Cf. David A. Sklansky, Cocaine, Race, and Equal Protection, 47 STAN. L. REV. 1283 (1995) (criticizing the Supreme Court's assumption that equal protection doctrine should remain uniform regardless of factual context). The problem in popular perception with the cocaine issue—that the complaining individuals are all "criminals" in some sense—overlooks the fact that the light sentences in one instance effectively define away the criminality of the conduct. The conduct might be criminal, but it becomes more so depending on the race of the perpetrator.


119. Id. at 51.
rendered it a standing issue. The Court indicated that its opinion did not reach the merits, but by characterizing its concern as one over standing, it effectively resolved what had been in McCleskey a significant part of the merits (the other part consisting of the facial discrimination/intentional discrimination threshold requirement). The Court shifts back and forth between procedure and substance; in some instances, a particular problem is purely procedural, in others purely substantive, and in others it is mixed. The movement obscures the issues and the inconsistencies—this is to suggest only that the Court has used procedure inconsistently, not to suggest that it has done so instrumentally. Forcing McCleskey and Northeastern Florida Contractors into an Adarand form of congruence leaves the problem of whether discrimination must be facial or intentional, but it would be an accomplishment to even expose that problem and thus address it. The McCleskey claim is exactly the type specified by Northeastern Florida Contractors: plaintiffs allege "denial of equal treatment . . . not the ultimate inability to obtain the benefit." It should make no difference whether in the former case the plaintiffs seek the benefit of a different sentence, or if they seek to avoid the sanction of the death penalty; the use of "ultimate" in the latter case renders the situation all the more poignant.

However, there is more to the law than naive empiricism. Korematsu, and Adarand after it, depend on procedural means to accomplish substantive ends. Both cases set the burden of proof against the government seeking to create a racial classification. In  


122. 113 S. Ct. at 2303.

123. These tensions have begun to present themselves already. See Reno v. Catholic Social Services, 113 S. Ct. 2485, 2496 n.19 (1993) (holding that immigrants seeking to adjust their legal status under IRCA lacked standing or ripe claims, the Court applied the Northeastern Florida Contractors analysis and defined "injury in fact" as "the inability to compete on equal footing in the bidding process, not the loss of a contract") (quoting Northeastern Fla. Contractors, 113 S. Ct. at 2303).

124. The Court has been ambivalent about the use of expert witness testimony presenting scientific theories. It rejected the requirement that the theory be "generally accepted" but also provided trial courts with great discretion to exclude evidence. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 U.S. 2786 (1993). For an excellent discussion of the problems arising from legal applications of social science, see Fagman, supra note 99.
this respect, Korematsu is less sophisticated than Adarand. The Korematsu case focused on the legal analysis rather than the factual analysis of whether Japanese Americans were likely to be loyal, and what scant evidence there was has since been revealed to be false. Following Korematsu, and more directly Croson, the Adarand test focuses on the factual analysis as much as the legal analysis of whether race in the particular industry, locality and time captures the concept of disadvantage.

The Court’s analysis of the “fit” of a racial classification contains a normative vision of racial justice. Justice Antonin Scalia’s concurring opinion in Adarand, for example, expounds on this normative vision, which merely is implied in the majority opinion’s discussion of “skepticism,” “consistency,” and “congruence.”

Justice Scalia wrote forcefully, “[t]o pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred.” The alternative view is to become colorblind, at least insofar as official action is concerned: “In the eyes of government, we are just one race here. It is American.”

Whatever the other problems with this normative view, it has been applied only inconsistently across cases. In Korematsu, the Court upheld the racial classification disadvantaging Japanese Americans. In McCleskey, the Court denied the equal protection claim brought by African Americans. In Adarand, the Court was “skeptical” about the racial classification that was intended as a remedy for past and present racial discrimination. In Northeastern Florida Contractors, the Court resolved what had been a dispositive substantive issue for a minority plaintiff as a quasi-procedural standing issue for a White plaintiff. Indeed, if the Court and Justice Scalia were as insistent about their underlying normative vision of race in cases brought by racial minority plaintiffs, they should be much more willing to find racial discrimination rather than attempting to determine if a racial classification “fits” the compelling governmental interest.

Although in a logical (perfect?) world the outcome of the inquiry should be independent of the party that bears the burden of proof or the precision of the proof, in a legal (imperfect?) world the outcome of the litigation may be resolved by declaring which party bears the burden of proof and at what level. Strangely, the emphasis on empiricism places data in a vacuum. The “strict scrutiny” stan-

125. See supra note 56.
126. Adarand, 115 S. Ct. at 2119 (Scalia, J., concurring).
127. Id.
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The standard relies on an abstract and formal conception of race, leaving open the possibility that racial prejudice can be reasonable, but foreclosing the potential to develop a response. According to the Supreme Court interpretation of race, *Korematsu* and *Adarand* are the same: negative racial classifications are prohibited only because positive racial classifications are prohibited. By a more realistic understanding of race, *Korematsu* and *Adarand* are not identical; they are mirror images with antithetical features. It may well be moot as a political matter, but it is important to affirm again as a constitutional matter that there can be a principled basis for distinguishing between racial discrimination and affirmative action.

While there may be legitimate criticisms of affirmative action, among them characterizations of some of the programs in practice as being little more than racial preferences, and constitutional tensions along with moral unease over the principles, the Court invites cynicism and loss of respect by simply equating conventional racism with efforts to remedy it. Only if *Adarand* proves to be as helpful for racial minorities, and especially African Americans, to prove claims of racism, as it does for Whites to assert claims of reverse racism, will it live up to its task. Whatever one might believe about race and racism, the history of slavery, official segregation, Jim Crow, antimiscegenation laws, restrictionist immigration policies, the Japanese American internment, and their contemporary effects, all should not be reduced to the debate over the validity of affirmative action.

CONCLUSION

For Asian Americans as a political group, the *Korematsu* and *Adarand* cases taken together should serve as a reminder that any racial classification should be seen with ambivalence. It could be helpful as well as hurtful to Asian Americans, and possibly both simultaneously. For Americans as a whole, the cases should show that racial classifications are not simple nor should they be simply condemned. Race is a complex social phenomenon. Racial classifications are a complicated legal phenomenon. The realities of race should be recognized and considered, regardless of whether as a constitutional matter government color blindness is required universally or government color consciousness is tolerated in certain cases. Race deserves deeper consideration than it has been given by the Supreme Court.