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# Considering Standing, Sincerity, and Antidiscrimination

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## Considering Standing, Sincerity, and Antidiscrimination

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Though it was not always so, the phrase “antidiscrimination” today refers equally to cases challenging some form of affirmative action preference as it does to cases challenging “traditional” discrimination. Recently, some federal courts have implicitly recognized that in a certain class of antidiscrimination cases, the “sincerity” with which the plaintiff brings the claim can affect the court’s determination of standing to sue.

In this Article, I dub this developing principle “the norm of sincerity” and assert that the norm helps courts evaluate whether a plaintiff’s claimed constitutional injury is sufficiently concrete and personal to establish federal jurisdiction over her claim. Further, in this Article I assert that a plaintiff’s sincerity in this context *should* matter: if a person has not, in fact, been injured by alleged discrimination, then that person should not be the one to bring the claim. As the norm of sincerity helps courts evaluate injury in fact, then the norm of sincerity should be recognized for what it is and given a rightful place in the developing antidiscrimination jurisprudence.

At the outset, let me define terms. In all discrimination cases, a plaintiff complains that the government unconstitutionally denied her the ability to access a process, or to compete for a benefit, on the basis of race or national origin. In some of these cases, the alleged discrimination cuts off the plaintiff’s access to benefits that are finite, or limited, in number. For instance, two common examples of limited resources cases include cases challenging racial or ethnic preferences in municipal contracting, and cases challenging racial or ethnic preferences in university admissions. In the municipal contracting context, there are typically a finite number of contracts to be awarded; in university admissions, there are a finite number of seats in a class. Because there

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are only a finite number of benefits to be awarded in these cases, I think of them as “limited resources” cases, and will refer to them that way.

Another definition: by “sincerity” I mean that *why* a particular plaintiff is the one to bring an antidiscrimination claim matters to the injury-in-fact piece of the standing analysis. As will be shown *infra*, to state injury in fact in this class of discrimination cases, a plaintiff must show that she was, essentially, prepared to compete for the benefit at stake. A plaintiff meets this standard by offering objective evidence of her preparation. If the court suspects that the plaintiff has not met this showing, some courts have required that the plaintiff offer additional evidence. In my observation, what these courts are looking for in this more searching review is evidence that the plaintiff *subjectively intended* either to compete for, or to use, the benefits at stake. In other words, if and when a court suspects that the plaintiff was not, in fact, prepared to compete, the court then questions whether the plaintiff sincerely intended to compete at all. If she cannot demonstrate that she sincerely intended to compete, then she lacks injury in fact. If she lacks injury in fact, then she lacks standing to sue for the alleged discrimination.

Thus, this Article will show that the norm of sincerity is an implicit norm that helps courts evaluate injury in fact in limited resources discrimination cases. In other words, this Article will show that, for standing in this class of cases, a plaintiff may not merely aver that she has been discriminated against by a certain preference in a competitive process. Rather, she must be able to show the court, in some relevant and meaningful way, that she was in fact *prepared* to compete, which is in some cases an objective proxy for her subjective *intent* to compete. As I will demonstrate *infra*, the norm of sincerity is most observable when a transparent process governs the competition for the resources.

This Article will also show that the norm of sincerity is highly relevant today. It is unquestionable that the appropriate use of racial and/or ethnic preferences in government programs has been both a legal and political question for our society for years. There is no reason to expect that litigation over this issue will end anytime soon. In fact, in my view, one important context where we should expect an increase in such litigation in the near future is in the realm of higher education, where the potential for “reverse discrimination” cases is abundant.

Specifically, affirmative action preferences are currently at work on college and university campuses across the country. The most obvious place is in the admissions office, but outside of that context, colleges and universities are also operating a plethora of affirmative action

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preferences across their campuses to support the institution's "expressed commitment to the educational benefits of diversity."<sup>1</sup> These programs include minority-only or minority-preferred summer orientation and academic preparation programs, scholarships, fellowships, internships, and mentoring programs. Any one of these programs is theoretically a basis for a "limited resource" discrimination claim. These preferences can result in the award of certain benefits to some students on the basis of race or national origin, but not to others. And these benefits ultimately are drawn from a finite pool of resources, the university budget.

The validity of any one of these preference programs has yet to be resolved by litigation on the merits in court,<sup>2</sup> but those tests are surely coming. Writing in dissent in the 2003 Supreme Court decision in *Grutter v. Bollinger*, which confirmed that diversity in education is a compelling state interest,<sup>3</sup> Justice Scalia predicted that one result of the Court's holding would be a flood of litigation.<sup>4</sup> He observed:

Still other suits may challenge the bona fides of the institution's expressed commitments to the educational benefits of diversity that immunize the discriminatory scheme in *Grutter*. (Tempting targets, one would suppose, will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority student centers, even separate minority-only graduation ceremonies.)<sup>5</sup>

One looking for such targets need not look far: currently these programs are operating across campuses nationwide.<sup>6</sup>

When these cases arrive at the courthouse, one important question the litigation will surely raise is whether the particular plaintiff bringing the case has standing to assert the claim. As these claims, which I will refer to as "tempting targets" claims, will be limited resources claims, the

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1. *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Scalia, J., dissenting).

2. A Clemson University student filed one such suit against the National Science Foundation challenging "an NSF research fellowship for minority graduate students," but the parties settled the suit out of court based on the NSF's conclusion that the program was unlawful. Peter B. Schmidt, *NIH Opening Minority Programs to Other Groups*, CHRON. OF HIGHER EDUC., Mar. 11, 2005, at A26.

3. *Grutter* 539 U.S. at 325 (2003) ("[T]oday we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.").

4. *Id.* at 348–49 (Scalia, J., dissenting).

5. *Id.* (emphasis added).

6. See generally Peter B. Schmidt, *Not Just for Minority Students Anymore*, CHRON. OF HIGHER EDUC., Mar. 19, 2004, at A17 (including a table of changes made to programs previously reserved for minorities and including a list of programs that have been officially challenged by OCR and which are still in dispute).

norm of sincerity should apply. No commentator has recognized this developing trend.

In Part I, this Article will provide a brief overview of standing generally and standing in antidiscrimination cases specifically. Part II contends that the injury-in-fact analysis in this class of cases contains an implicit norm: the norm of sincerity.<sup>7</sup> Part III establishes the existence of an emerging trend in the cases showing that courts call upon this norm to help identify when an equal protection plaintiff challenging access to limited government benefits lacks the required personal stake in the litigation. In this Part, I will also show that the sincerity judgment is most observable when a transparent process governs the competition for those benefits because such a process sets analytical markers by which preparation to enter the competition can be measured. Part IV demonstrates that the norm will be particularly necessary in the tempting targets context, a coming focus of equal protection litigation but that the norm will be difficult to apply. The Article concludes by identifying a proposed model for applying the “able and ready” standard and its inherent norm of sincerity to these and similar challenges.

## I. THE “ABLE AND READY” TEST FOR INJURY IN FACT IN ANTIDISCRIMINATION CASES

### A. *Standing Generally*

Volumes have been written on standing in equal protection cases, and the purpose of this Article is not to try to duplicate any of those efforts. Rather, the thesis of this Article is that something new is happening in a certain class of equal protection challenges: in limited resources discrimination cases, some courts have implicitly recognized that sincerity matters to standing. To give context to this thesis, I ask the

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7. At least two other commentators have used the phrase norm of sincerity. One is Seanna Valentine Shiffrin, who posits a theory against compelled speech that relies in part on the “moral norm[] of sincerity” as a norm that is incompatible with the notion that persons may be “force[d] . . . to attest to things they do not believe.” Seanna Valentine Shiffrin, *What is Really Wrong With Compelled Association?*, 99 NW. U. L. REV. 839, 860–64 (2005). The other is Meir Dan-Cohen, who argues that sincerity is directly correlated to one’s connection to or detachment from the role he or she is playing; i.e., that sincerity is a function of “role proximity”. Meir Dan-Cohen, *Between Selves and Collectivities: Toward a Jurisprudence of Identity*, 61 U. CHI. L. REV. 1213, 1220–25 (1994); see also Meir Dan-Cohen, *Listeners and Eavesdroppers: Substantive Legal Theory and Its Audience*, 63 U. COLO. L. REV. 569, 579–80, 581 n.27 (1992); Meir Dan-Cohen, *Law, Community and Communication*, 1989 DUKE L.J. 1654, 1668 & n.15 (arguing an attorney litigating on behalf of his client is “exempt from the norm of sincerity altogether.”).

reader to retrace only a few of the steps of hornbook standing principles—steps necessary to understand the trend I see developing here.

The doctrine of standing draws on principles from two sources: first, Article III of the Constitution, and second, “prudential” principles articulated in the decisional law.<sup>8</sup> The focus of this Article is on the requirement of “injury in fact,” a constitutional necessity traced to Article III’s “case or controversy” requirement.<sup>9</sup> The focus here is on injury in fact because when the plaintiff claims that she was directly affected by the challenged program, rather than by the government’s regulation (or lack thereof) of the institution, causation and redressability should flow from the fact of the injury.<sup>10</sup>

Resolving standing questions is rarely easy,<sup>11</sup> and standing in equal protection cases is no exception. Commentators have noted that holdings on standing in equal protection cases are erratic at best, and at worst, discriminatory against powerless plaintiffs.<sup>12</sup> Yet standing is especially important in constitutional cases because courts should refrain from deciding constitutional questions unless absolutely necessary to resolve the specific dispute at issue,<sup>13</sup> and courts should not decide constitutional

8. See generally ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 56–60 (4th ed. 2003).

9. See, e.g., David Flicklinger, *Standing in Racial Gerrymandering Cases*, 49 STAN. L. REV. 381, 384 (1997) (“The ‘irreducible minimum’ of Article III requires a showing that the plaintiff ‘personally has suffered some actual or threatened injury.’” (quoting *Valley Forge Christian Coll. v. Ams. United For Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979))). The “case or controversy” requirement of Article III has been interpreted to require a showing of three distinct elements: injury, causation and redressability. See Flicklinger at 384 (citing *Ne. Fla. Chapter of Associated. Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 663 (1993) and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

10. See *Lujan*, 504 U.S. at 561–62. The Court in *Northeastern Florida* also made this point. 508 U.S. at 666 n.5.

11. See, e.g., Flicklinger, *supra* note 9, at 383 & n.14 (“Members of the Supreme Court and its observers have complained that standing doctrine is one of the most confusing areas of the law.” (citing *Valley Forge*, 454 U.S. at 475 and CHEMERINSKY, *supra* note 8, at 54)); see also Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1426 (1995) (“The law of standing is in a state of notorious disarray.”).

12. See, e.g., Spann, *supra* note 11 at 1423 (arguing that “close examination suggests that the Supreme Court’s standing decisions embody the very sort of racial discrimination that we rely on the Court to prevent”).

13. See *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 221 (1974) (noting the importance of the injury requirement in constitutional litigation to avoid unnecessary adjudication and observing that “concrete injury removes from the realm of speculation whether there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party”); see also William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy By Lowering the Stakes of Politics*, 114 YALE L. J. 1279, 1310 & n.132 (2005) (citing ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962)).

questions without an adequate factual background to ensure that the principle enunciated in the decision will not be improperly extended.<sup>14</sup>

The three constitutionally grounded requirements of standing are familiar.<sup>15</sup> First, a plaintiff must show that she has been “injured in fact,” meaning that she has experienced “an invasion of a legally protected interest that is a) concrete and particularized, and b) actual and imminent, not conjectural or hypothetical;”<sup>16</sup> second, the plaintiff must show “a causal relationship between the injury and the challenged conduct;”<sup>17</sup> and third, the plaintiff must show “a likelihood that the injury will be redressed by a favorable decision,” meaning “that the ‘prospect of obtaining relief from the injury as a result of a favorable ruling’ is not ‘too speculative.’”<sup>18</sup> The burden of proving standing is on the party asserting jurisdiction.<sup>19</sup>

#### B. Northeastern Florida and the “Able and Ready to Compete” Test

Though the trilogy of injury in fact, causation, and redressability are by now hornbook requirements of standing law, the precise meaning of each of these requirements remains somewhat elusive. Most relevant to this Article is the precise meaning of the injury-in-fact requirement. Specifically, the meaning of the injury-in-fact requirement was the subject of the 1993 Supreme Court decision in *Northeastern Florida Chapter of the Associated General Contractors of America v. the City of Jacksonville, Florida*<sup>20</sup>. There the Court held that in discrimination cases, a plaintiff states injury in fact when she pleads or offers evidence that she was “able and ready” to compete for the benefits she claims she was impermissibly denied and would have competed but for the alleged unlawful discrimination.<sup>21</sup>

In *Northeastern Florida*, the Supreme Court held that to argue injury in fact in an equal protection challenge to a city construction ordinance preferring minority contractors, a plaintiff need not allege that he would

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14. See Eskridge, *supra* note 13 at 1310 –11 & n.133 (citing Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996)).

15. *Northeastern Florida*, 508 U.S. at 663–64

16. *Id.* at 663 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

17. *Id.* (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)).

18. *Id.* at 663–64 (citing *Allen v. Wright*, 468 U.S. 737, 752 (1984)).

19. *Lujan*, 504 U.S. at 561.

20. 508 U.S. 656.

21. *Id.* at 657.

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have obtained the contract but for discrimination on the basis of race.<sup>22</sup> Rather, the Court held that the plaintiff must aver only that he *would have competed* for the contract in the absence of the challenged racial discrimination.<sup>23</sup> In short, the decision in *Northeastern Florida* means that to show injury in fact in an equal protection discrimination suit, a plaintiff must state that he was, at the time the suit was filed, “able and ready” to compete for that benefit.<sup>24</sup>

Specifically, in *Northeastern Florida*, the plaintiff, the Association of General Contractors (“AGC”), sued the City of Jacksonville seeking to enjoin the city from setting aside ten percent of its city construction contracts for minority business enterprises.<sup>25</sup> The district court found for the plaintiff and entered a temporary restraining order.<sup>26</sup> On appeal, the Eleventh Circuit reversed, finding that the plaintiff lacked standing because “it ‘has not demonstrated that, but for the program, any AGC member would have bid successfully for any of these contracts. . . .’”<sup>27</sup> The Supreme Court reversed the Eleventh Circuit.<sup>28</sup> Writing for the Court, Justice Thomas reasoned that past equal protection cases illustrated that a plaintiff need not show he would have been awarded a contract but for the challenged ordinance.<sup>29</sup> This was true because the Court found that the constitutional injury in an equal protection case is not the ultimate loss of the benefit at stake, but rather is the denial of (or

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22. *Id.* at 666.

23. *Id.*

24. *Id.* Note that the standard works both for claims for compensatory damages, in which case the question is whether the plaintiff was, at the time he was excluded from the competition, able and ready to compete, and also for claims for prospective relief, in which case the question is whether the plaintiff will, in the very near future, be unable to compete for a benefit. *See id.* at 668 (noting allegations that AGC members “regularly bid” in the past on contracts, and allegations that they “would have bid” in the future on other contracts, but for the challenged ordinance).

25. *Id.* at 658.

26. *Id.* at 659.

27. *Id.* at 660 (quoting *Ne. Fla. Chapter of Associated. Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 951 F.2d 1217, 1218 (1992)).

28. The precise issue for the Supreme Court in *Northeastern Florida* was, on a claim for prospective relief, “whether, in order to have standing to challenge the ordinance, an association of contractors is required to show that one of its members would have received a contract absent the ordinance.” *Id.* at 658. The Court held that the contractors were not required to make that showing. *Id. Cf. Texas v. Lesage*, 528 U.S. 18 (1999), where the plaintiff, a white applicant rejected from a university Ph.D. program, did not allege an ongoing violation and did not seek injunction. The university consequently defended at the jurisdictional stage by stating that it would have made the same decision in absence of any discriminatory preference. Rather, when only damages are sought, the government can avoid liability by showing that they would have made the same decision but for the impermissible factor. *Id.* at 20–21.

29. *Northeastern Florida*, 508 U.S. at 664.



barrier to) a person's ability "to compete on an equal footing" for that benefit.<sup>30</sup>

Commentators offer mixed reviews on the result in *Northeastern Florida*<sup>31</sup> and disagree over whether the decision represented a change in the law.<sup>32</sup> Whether it does is irrelevant here. What is relevant is whether the "able and ready" standard fits the purposes to which it is put: does the standard, which explicitly tests a plaintiff's preparation to compete, succeed in helping courts identify injury in fact in antidiscrimination cases? In the next part of this Article, I conclude that it does, but a key reason it does is that there is more to the "able and ready" test than meets the eye. Specifically, the test contains an inherent norm, which is the norm of sincerity.

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30. *Id.* at 666.

31. For example, one commentator has dubbed this the "affirmative action exception to the injury requirement" of standing doctrine. See Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 326 (2002). But see Cass R. Sunstein, *Standing Injuries*, 1993 SUP. CT. REV. 37, 43-44 (1993) (finding the result in *Northeastern Florida* correct, and asking "what sense would it make to require the plaintiffs to prove that they would actually have been awarded the relevant contracts? How would constitutional goals be served by such an odd requirement?"). Notably, while Professor Sunstein thinks that the Court got the result right in *Northeastern Florida*, he asserts that the case "exposes . . . a fundamental problem in the modern law of standing—the assumption . . . that 'injuries' can be identified without reference to positive law." *Id.* at 63.

32. Despite the Court's reliance on precedent in *Northeastern Florida*, many have observed that the holding represented a new development in equal protection standing doctrine. See, e.g., Nichol, *supra* note 31 at 32-6. Moreover, a review of opinions in cases in the affirmative action/reverse discrimination context prior to *Northeastern Florida* show that it was not obvious that a plaintiff could demonstrate injury in fact merely by demonstrating that he was prepared to compete for the benefit. By contrast, prior to the decision in *Northeastern Florida* at least some federal appellate courts had presumed that the plaintiff needed to show that he at least had a chance of winning the ultimate competition. For example, in the context of challenge to racial preference in university admissions, a plaintiff had to show that he had some chance of ultimately winning the competition but for the exclusion—i.e., the plaintiff must have been at least admissible under the school's objective admissions criteria. If he did not meet the school's objective admissions criteria, then he could not have been injured in fact by any preference, discriminatory or not, that resulted in his being excluded from the competition for the benefit. See *Dougherty v. Rutgers Sch. of Law-Newark*, 651 F.2d 893, 902 (3d Cir. 1981) (disagreeing with plaintiff's claim that he was injured in fact simply by the defendant's preferential admissions program, notwithstanding the evidence that he did not meet the school's objective admissions requirements, and finding no injury in fact where the plaintiff failed to show that "there was a chance of successful admission had s/he not been prohibited from competing for all the seats." (emphasis added) (interpreting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 n.14 (1978))). That thinking changed with the decision in *Northeastern Florida*.

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## II. THE “ABLE AND READY” STANDARD’S INHERENT “NORM OF SINCERITY.”

I have already said that the “able and ready” test is intended to help courts evaluate whether, at the time a plaintiff was excluded from a competition for government benefits due to race or national origin, that plaintiff was prepared to compete for that benefit.<sup>33</sup> In this part, I will show that while courts explicitly use the “able and ready” standard to analyze a plaintiff’s preparation to compete, some courts, under the “able and ready” rubric, also seem to implicitly evaluate whether the plaintiff sincerely intended to compete. In other words, I will show here that a plaintiff’s subjective sincerity with respect to her intent to compete can be as important to the standing analysis as is her objective preparation for the competition. To do this, I will show how the “able and ready” test and its inherent norm of sincerity operate through a paradigm fact pattern, that of a recent and notable equal protection case.

### A. *The “Norm of Sincerity”: A Paradigm Case*

In an equal protection case where injury in fact is an issue, a pattern emerges in recent opinions. First, a plaintiff avers that at the time the suit was filed, she intended or wanted to compete for a benefit but, due to allegedly unlawful racial or ethnic discrimination, she was prevented from doing so. When the plaintiff makes this averment, and if either the defendant or the court raises the issue of standing, the court will look to the record to determine whether the plaintiff has shown that she is adequately prepared for the competition. Doctrinally, this examination is the “able and ready” analysis. A plaintiff can show preparation if she can demonstrate that she took some necessary step toward the competition. In the trend of developing cases, if she has taken such a step, that step is regarded explicitly as sufficient evidence of preparation. Yet if she cannot show that she has taken such a step, in this class of cases the court will require additional evidence of the plaintiff’s intent. Explicitly, the court is seeking objective “bona fides”<sup>34</sup> to back up the plaintiff’s professed, but inherently subjective, intent. Implicitly, the court is asking the plaintiff demonstrate the sincerity of her stated intent to compete.

Consider a single paradigm case, *Carroll v. Nakatani*.<sup>35</sup> In *Nakatani*, the plaintiff, a non-native Hawaiian, claimed that Article XII of the Hawaii State Constitution, which created the “Office of Hawaiian

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33. *See supra* Part I.

34. *Carroll v. Nakatani*, 188 F. Supp. 2d 1219, 1227 (D. Haw. 2001), *aff’d*, 342 F.3d 934 (9th Cir. 2003).

35. *Id.*

Affairs” (“OHA”), violated the Equal Protection Clause of the Fourteenth Amendment as it restricted the provision of certain benefits to native Hawaiians, including preferential terms for small business start-up loans.<sup>36</sup> The plaintiff had initially filed an application with OHA for such a loan, but the state returned the application to him. Because the state required the applicant to note native Hawaiian ancestry, which the applicant here could not and did not do, the state considered the application incomplete.<sup>37</sup> The plaintiff did not complete and resubmit the application because he alleged that it would be “futile.”<sup>38</sup>

Because the plaintiff never filed a “completed” application, the defendant argued that the plaintiff lacked standing to challenge the program.<sup>39</sup> The district court ultimately found that the plaintiff did lack standing, but not for this reason.<sup>40</sup> Notably, the reason that the defense offered as evidence that the plaintiff failed to state injury in fact—that the plaintiff failed to complete the application—in effect raised the court’s suspicions: to the court the incomplete application was an analytical marker that suggested insincerity.

Specifically, the district court closely examined the plaintiff’s averment that he would use the loan to open a copy shop, and the court concluded that the plaintiff really had no interest in doing so.<sup>41</sup> The district court found that the plaintiff’s lack of relevant background or experience was fatal to his claim of injury in fact:

[The plaintiff] has shown no real initiative in starting a new business—he has not sought alternate sources of financing (as is required by OHA, even for Hawaiians), he has not formulated even the most basic of business plans, and could offer no real details about his proposed business, among other things. In short, he has offered no bona fides (other than his cursory statement that he wants to start up a business) that he actually intends to start a copy shop.<sup>42</sup>

The district court noted further that the plaintiff had failed to research the market for copy shops beyond “casually speak[ing] to a sales clerk at Office Depot”; that he lacked any information as to the cost of business,

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36. *Id.* at 1221–22.

37. *Id.* at 1224–25.

38. *Id.* at 1225–26.

39. *Id.* at 1226–29.

40. *Id.* at 1225–26.

41. *Id.* at 1227.

42. *Id.*

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including rent, equipment, and paper; that he had not pursued any alternative financing programs; and that he had no business plan.<sup>43</sup>

Doctrinally, the court considered these facts in the context of the “able and ready” analysis.<sup>44</sup> Underpinning this explicit analysis is an implicit evaluation of whether the plaintiff sincerely intended, in fact, to use the benefits at stake. The court concluded, based on the evidence of what the plaintiff had not done, that the plaintiff lacked “real present and immediate intention of opening a business.”<sup>45</sup> Absent such a “real present and immediate intention,”<sup>46</sup> the court concluded that the plaintiff’s asserted injury was nothing more than “philosophical;”<sup>47</sup> that the plaintiff lacked the required personal stake in the case;<sup>48</sup> and that his complaint presented a nonjusticiable “generalized grievance.”<sup>49</sup>

On appeal, the Ninth Circuit upheld both the district court’s finding and analysis.<sup>50</sup> The Ninth Circuit considered and rejected the plaintiff’s proffered evidence of injury in fact.<sup>51</sup> The Ninth Circuit noted that the plaintiff’s intent is relevant in an equal protection case and reviewed the plaintiff’s evidence.<sup>52</sup> It found that the plaintiff could not show that the government had treated him unequally because of the OHA preference.<sup>53</sup> Instead, the court reasoned that he failed to show that he was “able and ready” to compete for or benefit from an OHA loan.<sup>54</sup> The court wrote that even assuming proper intent, the plaintiff’s failure to complete an application showed that he was not in a position to “compete equally” with other applicants for a loan should he be permitted to do so.<sup>55</sup> The court concluded that instead of an injury in fact, the plaintiff had averred merely a generalized grievance, and, accordingly, the plaintiff lacked standing to challenge to OHA program.<sup>56</sup>

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43. *Id.* at 1227 n.10.

44. *Id.* at 1228–29 (analyzing whether the plaintiff was “able and ready” to compete for a small business loan in the preferential program administered by OHA).

45. *Id.*

46. *Id.*

47. *Id.* at 1226.

48. *Id.* at 1228–29.

49. *Id.* at 1228.

50. *Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003) (affirming district court’s opinion that plaintiffs lacked standing).

51. *Id.* at 941–43. On appeal the plaintiff offered three theories of injury in fact: first, that the fact of the racial classification itself was sufficient injury; second, that preferred classes were afforded “greater sovereignty” in the state; and third, that he suffered “representational harm” similar to the harm alleged in redistricting cases. *Id.* at 941.

52. *Id.* at 942 (citing *Gratz v. Bollinger*, 539 U.S. 244, 261 (2003)).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 943 (citing *United States v. Hays*, 515 U.S. 737, 743–44 (1995)).

Thus, the *Nakatani* opinions illustrate what is a developing trend<sup>57</sup> in opinions of this class of cases: when an equal protection discrimination plaintiff avers he is “able and ready” to compete for the benefit at stake, but has not taken concrete steps to prepare to compete, that omission should cause the court to doubt the plaintiff’s sincerity. The court’s doubt is shown by the court’s searching examination for some other pleading (if on a motion to dismiss) or evidence (if on a motion for summary judgment) of intent: something that shows that the plaintiff actually and sincerely intended (or intends in the future) to use the benefits at stake. If the court finds nothing, standing is denied because the plaintiff lacks an injury in fact. In sum, this pattern reveals the norm of sincerity at work in this class of cases.

Before moving on to analyze more of those cases, however, it is worthwhile to note a counterexample to my thesis. The counter-example shows that sincerity is only one factor of the injury in fact analysis in this line of cases: a finding of sincerity does not necessary mean that the plaintiff has established the required personal stake in the litigation.

#### *B. Assuming Sincerity: A Counter-Example*

Note that while the *Nakatani* opinions illustrate this emerging pattern, sincerity is not the only factor relevant to personal stake or to injury in fact. Sincerity is only one factor. It is true that a plaintiff can be “sincere” yet lack the required personal stake in the outcome of the litigation that is necessary to demonstrate injury in fact.

For example, consider the recent case of *In re the Marriage License of Dawn L. McKinley and Kathy E. Reynolds*.<sup>58</sup> *In re Marriage License* shows that a plaintiff’s philosophical objection to a state’s act is not the equivalent of a “personal stake” in the outcome of the litigation over the act, even when that plaintiff is undoubtedly sincere in his stated interest in the effect of the litigation’s outcome. Because *In re Marriage License* demonstrates that a plaintiff can be ideologically “sincere” about the perceived effect that the case will have on his interests yet still lack the required personal stake in the litigation, it follows that sincerity is only a single factor of the personal stake requirement.

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57. More of these cases are considered *infra* in Part III.

58. *In the Matter of the Appeal of the Adverse Order of the District Court Against Kathy Reynolds and Dawn L. McKinley, Pro Se*, No. JAT-04-15 (August 2, 2005) [hereinafter *In re Marriage License*] (order opinion of Chief Justice Darell R. Matlock, Justice Stacy L. Leeds, and Justice Darrell Dowty, and order granting the Reynolds/Smith Motion to Dismiss the Hembree complaint of standing grounds) (on file with author).

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*In re Marriage License* is a recent decision of the Judicial Appeals Tribunal of the Cherokee Nation.<sup>59</sup> There, a third-party, Todd Hembree, challenged the validity of a same-sex marriage.<sup>60</sup> In his complaint, the plaintiff argued that the marriage was “in total disregard to the Cherokee laws,” and that any citizen of the Cherokee nation suffered “direct harm” when “such a law is violated under the authority of the Cherokee Constitution.”<sup>61</sup> The women whose marriage he challenged argued that Mr. Hembree lacked the requisite direct stake in the outcome of the resolution of the suit: “while Mr. Hembree may have a strong political or philosophical interest in obtaining a ruling that same-sex couples are excluded from marriage under Cherokee law, that interest is not sufficient to confer standing.”<sup>62</sup>

The parties disagreed as to the extent to which Cherokee law looks to federal law to resolve matters of standing.<sup>63</sup> In a one-page order, the Judicial Appeals Tribunal of the Cherokee Nation agreed with the respondents that Todd Hembree lacked any personal stake in the matter because he did not show the marriage would harm him individually.<sup>64</sup> His challenge was dismissed for a lack of standing because Mr. Hembree “failed to show that he will suffer individualized harm.”<sup>65</sup> Notably for this purpose, no one doubted Mr. Hembree’s sincerity as to his beliefs, either expressly or implicitly, yet the sincerity of his beliefs regarding the outcome of the litigation was not sufficient to make up for the absence of legally relevant personal stake in the litigation.

Thus, it should be clear that I am not claiming that “sincerity” is the end of injury-in-fact analysis in this line of cases. I posit only that sincerity is a factor that implicitly informs the injury-in-fact analysis because it speaks to whether a particular plaintiff is subjectively, as well as objectively, “prepared” to compete for the benefits at stake. Even with

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59. *Id.*

60. Hembree’s Response to Motion to Dismiss, *In re Marriage License*, No. JAT-04-15 (July 27, 2005) (on file with author).

61. *Id.* at \*3–4.

62. Reynolds/McKinley Motion to Dismiss, *In re Marriage License*, No. JAT-04-15 at 13 (July 8, 2005), available at <http://www.ncrlights.org/cases/pdf>.

63. Compare Motion to Dismiss at 8–9 with Response at \*2–3 (acknowledging that as a matter of broad principle, Cherokee law looks to federal law to determine standing, but asserting that where federal procedural law would be unjust or cause delay, those principles may be disregarded) (citing Cherokee decisional law).

64. *In re Marriage License*, *supra* note 58.

65. *Id.* Mr. Hembree has tried again, this time by adding the legislators who apparently wrote the marriage law to his action. See Teddye Snell, *Councilors Join Cherokee Gay Marriage Controversy*, TAHLEQUAH DAILY PRESS, Nov. 9, 2005, at XX (reporting council member Linda Hughes O’Leary’s statement that “[it] was ruled that Todd [Hembree] had no standing in the case . . . We are the legislators for the Cherokee Nation. We make the laws, and we do have standing.”)

this qualification, two questions could be raised regarding my thesis so far. First, how is the norm of sincerity different than the preexisting requirement that the plaintiff not lie in her pleadings? Second, is it not possible that a plaintiff could simply fake sincerity?

There is a single answer to these related concerns, namely, that rather than creating another opportunity to press false points, the norm of sincerity instead helps courts identify falsity. As will be shown *infra*, an equal protection claim is not supposed to mask what is nothing other than a social or political dispute in the clothing of personal, particularized, legal dispute.<sup>66</sup> The sincerity norm is called upon precisely to (and does) root out such falsity. While it is true that one who is prone to lie in a pleading can profess a false interest in a benefit that is not sincerely held, the function of the norm of sincerity is precisely to detect such lies. The norm is “triggered,” so to speak, when a plaintiff’s objective actions are inconsistent with her professed intent.

Thus, the “able and ready” test possesses an inherent “norm of sincerity.” Under the “able and ready” rubric, courts explicitly analyze the plaintiff’s objective preparation to compete for the benefit at stake. Under that same rubric, some courts also implicitly test the plaintiff’s subjective sincerity with respect with her stated intent to compete. As such, subjective sincerity can be as important as objective preparation to the injury-in-fact analysis in this class of cases.

*C. A Doctrinal and Normative Analysis of “Able and Ready” and the Norm of Sincerity*

I have already established that the “able and ready” test asks whether the particular plaintiff was, at the time she was excluded from competing for a government benefit due to her race or national origin, in fact prepared to compete for that benefit.<sup>67</sup> If the plaintiff was “able and ready” to compete for the benefit, then being excluded from that competition injured her in the relevant way for standing purposes. By contrast, if she was not “able and ready” to compete, then being excluded from the competition did not cause her injury in fact and standing does not exist.<sup>68</sup>

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66. See *infra* Part II.C.

67. The injury-in-fact piece of the standing analysis is based on the plaintiff herself and not on the issues: “In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

68. See *Carroll v. Nakatani*, 188 F. Supp. 2d 1219, 1228–29 (D. Haw. 2001) (noting that the plaintiff did not suffer “injury in fact” because he did not adequately show he was “able and ready”

The idea of the “able and ready” test is that a court will find injury where the plaintiff can show some relevant preparation for the competition. However, as the *Nakatani* opinions show, sometimes determining whether a plaintiff has prepared for the competition is, in fact, quite complicated—evaluating injury in the fact can be an especially tricky analysis in any antidiscrimination case. The reason is that equal protection litigation by its nature can be somewhat inherently political.<sup>69</sup> This is so because discrimination litigation can be employed to press a political or social, as opposed to an exclusively legal, agenda.<sup>70</sup> Examples include equal protection litigation campaigns proposing law reform in the areas of school desegregation,<sup>71</sup> affirmative action,<sup>72</sup> anti-affirmative action,<sup>73</sup> and gender and sexuality rights.<sup>74</sup> Given the broad political and social ramifications of these cases, it is not

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to compete for the business loan he was denied; that the plaintiff was without a “real present and immediate intention of opening a business.”), *aff’d*, 342 F.3d 934 (9th Cir. 2003) For a complete discussion of this case see discussion *supra* accompanying notes 34–56

69. See, e.g., David R. Dow, *The Equal Protection Clause and the Legislative Redistricting Cases—Some Notes Concerning the Standing of White Plaintiffs*, 81 MINN. L. REV. 1123, 1134 (1997) (noting that “[c]onstitutional rights, including the equal protection right, are constraints on the political majority’s political power. They are thus, by definition, available only against the political majority.”).

70. Whether the law should assume this function is debated. See, e.g., Tomiko Brown-Nagin, *Elites, Social Movements and the Law: The Case of Affirmative Action*, 105 COLUMBIA L. REV. 1436, 1436 (2005) (observing in the article’s first sentence that “Supreme Court opinions are forms of public discourse that both shape and reflect national debates about controversial subjects, including race.”).

71. See, e.g., *Brown v. Bd of Ed.*, 347 U.S. 483 (1954); see also RICHARD A. POSNER, *OVERCOMING LAW* 63 (1995).

Whatever its motive or juridical content, *Brown* was politically highly consequential—it thrust the Supreme Court into the midst of a power struggle between the southern and the northern states and in that respect could be thought a reprise of the *Dred Scott* decision. The Court’s reluctance to come to grips with what might have seemed the central issue—the intentions of southern legislators in imposing segregation—and its delay in ordering compliance with its ruling are other political aspects of the decision. (The determination to avoid seeming political may itself be politically motivated.)

72. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003); see also Jack M. Balkin, *Plessy, Brown, and Grutter: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1691 (2005) (arguing that “constitutional principles are political compromises,” and observing that “adopting certain constitutional principles, and not others, is sometimes a method of compromise; it is a way of explaining and justifying political compromise in what appears to be a principled fashion.”).

73. See Girardeau A. Spann, *Neutralizing Grutter*, 7 U. PA. J. CONST. L. 633, 634–36 (2005) (questioning the institutional competence of the Court “to formulate racial policy for the nation” and observing that “it is hard to find in the phrase ‘equal protection’ any justification for Supreme Court invalidation of affirmative action burdens that the political majority has chosen to impose upon itself to ‘equalize’ the status of those racial minorities whom American culture has historically treated as inferior.”).

74. See Eskridge, *supra* note 13 at 1315 (asserting that the decisions in both *Roe v. Wade* (gender rights) and *Bowers v. Hardwick* (sexuality rights) were “avoidable exercises in stakes-raising politics.”).



hard to imagine that the plaintiffs who brought these suits were motivated at least in part by the desire to vindicate political preferences, as well as to compensate for the denial of personal rights.

Judges, however, are jurisdictional gatekeepers and as such, must ensure that a courtroom does not become a forum for academic debate on the merits of the political ideas underlying any particular case.<sup>75</sup> Judges must ensure that courts remain a forum of last resort for adjudicating concrete, actual, particularized disputes between adversarial parties.<sup>76</sup> As noted *supra*, a dispute is particularized if the plaintiff bringing the suit has been injured in a personal and direct way.<sup>77</sup> Personal and direct injury is tested by the requirement of injury in fact,<sup>78</sup> and, as explained above, injury in fact in the equal protection discrimination context is shown when a plaintiff is “able and ready” to compete.<sup>79</sup>

Now we have come full circle because as *Nakatani* and other similar opinions<sup>80</sup> show, the appearance of preparation can be deceiving, especially when the court suspects that a plaintiff’s motivation for bringing a discrimination case is on balance more political than personal. Judges have the responsibility to ensure that the plaintiff bringing the case has a personal right at stake.<sup>81</sup> Especially when there is no such

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75. See *Valley Forge Christian Coll. v. Ams. United For Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982) (noting that the “actual injury” requirement implicitly embodied in Article III helps ensure that “the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action”).

76. See *Allen v. Wright*, 468 U.S. 737, 752 (1984); see also *Valley Forge Christian Coll. v. Ams. United For Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976) (noting “when a plaintiff’s standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation.”).

77. See *supra* note 10 and accompanying text; see also *Lee v. Oregon*, 107 F.3d 1382, 1387 (1997) (“[S]tanding is primarily concerned with *who* is a proper party to litigate a particular matter . . .”) (citing *CHEMERINSKY*, *supra* note 8, § 2.4 at 98–99).

78. See *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 663 (1993) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

79. *Id.* at 666; see *supra* notes 34–56 and accompanying text.

80. See *supra* notes 20–32 and accompanying text.

81. See *Allen*, 468 U.S. at 766 (1984) (“The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement.” (quoting *Simon* 426 U.S. at 39 (1976)) (quotations omitted); see also *Valley Forge Christian Coll.*, 454 U.S. at 472 (1982) (“[A]t an irreducible minimum, Art. III requires the party who invokes the court’s authority to ‘show that he personally has suffered some actual or threatened injury as a result of the

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personal right to be vindicated, a judge may not let litigation substitute for the political process.<sup>82</sup>

To be sure, I do not mean to suggest that a discrimination case is somehow improper simply because the case, in addition to presenting a specific and concrete legal dispute between adversaries, also carries broader social or political ramifications; far from it. Rather, the point here is that a discrimination case only implicates the jurisdiction of the federal courts if the plaintiff can show that she has standing to bring the claim. Specifically, as the norm of sincerity helps courts evaluate whether a plaintiff in an otherwise “political” equal protection case has in fact been injured in a legally relevant way, the norm of sincerity serves a valuable function.

### III. JUDGING SINCERITY

I have suggested so far that sincerity is an implicit factor in the able and ready analysis.<sup>83</sup> I have also suggested that while it is implicit, the norm is especially important in a certain class of equal protection cases: cases in which a limited pool of resources is at stake. This part of the Article will address how the norm of sincerity works in these cases.

Specifically, in this Part, I will first explain more fully a premise of my thesis that up to now, I have asked the reader to presume: why there is a difference in the patterns of limited versus unlimited resource cases.<sup>84</sup> Then, I will show that the norm is most readily observable in a subclass of limited resources cases: cases in which a transparent competitive process governs how the benefits at stake are distributed.<sup>85</sup>

#### A. *Limited v. Unlimited Resources*

Sincerity is especially important when the ultimate benefit at stake in an equal protection-based discrimination case is access to a pool of

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putatively illegal conduct of the defendant.” (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)).

82. See Eskridge, *supra* note 13 at 1310 (noting that courts have the power to both promote, and to “undermine democracy . . . . Judicial review can raise the stakes of politics by taking issues away from the political system prematurely . . .” and noting that “[t]he Supreme Court has plenty of doctrinal tools that can keep it from fanning the flames of high-stakes identity politics issues. These include the ‘passive virtues,’ where the Court deploys procedural doctrines [such as standing] to avoid decisions that might settle controversial issues prematurely; a ‘minimalist’ approach to constitutional law . . .”).

83. See, e.g., *Carroll v. Nakatani*, 188 F. Supp.2d 1219, 1227 (D. Hawaii 2001) (“Plaintiff Barrett cannot establish that he is ‘ready and able’ to benefit from an OHA business start-up loan. . . . In short, he has offered no bona fides (other than his cursory statement that he wants to start up a business) that he actually intends to start a copy shop.”), *aff’d*, 342 F.3d 934 (9th Cir. 2003).

84. See *infra* Part IV.A.

85. See *infra* Part IV.B.

limited resources. The reason is that when resources are limited, someone will win and someone will lose the competition for the resources. When courts referee such a zero-sum game, they generally are more likely to be suspicious of intent than when the contest by its nature does not require losers. In other words, when the benefit at stake is access to an otherwise generally available resource, such as access to a child support order modification process,<sup>86</sup> courts are more likely to accept a plaintiff's pleading of "able and ready" at face value.

One example of the less-exacting sincerity analysis applied in cases of generally available resources is the decision in *Williams v. Lambert*.<sup>87</sup> There the Second Circuit evaluated a state statutory scheme by which parents of legitimate children who wished to modify child support orders had access to one process, and parents of illegitimate children who wished to modify child support orders were subject to a more burdensome process.<sup>88</sup> The mother of a child born out of wedlock argued that these burdens violated her equal protection rights.<sup>89</sup> The father opposed her complaint and argued that she was not injured in fact, and so lacked standing to sue because the state provided a way for parents of children born out of wedlock to seek modification of support orders.<sup>90</sup>

While not using the terms "able and ready," the Second Circuit applied the injury-in-fact analysis set forth in *Northeastern Florida*.<sup>91</sup> The court noted that the reasoning of *Northeastern Florida* "applies with the same force to Williams's equal protection claim."<sup>92</sup> But rather than following the pattern of retracing the plaintiff's steps to determine whether she had met certain markers of preparation to pursue the less burdensome modification process, the court simply noted that

[t]he New York legislature has created a barrier which makes it more difficult for a parent of an illegitimate child to have a support agreement modified than it is for a parent of a child born in

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86. See *infra* notes 87-97 and accompanying text.

87. 46 F.3d 1275 (2d Cir. 1995).

88. *Id.* at 1277-78 (describing dichotomous statutory processes).

89. *Id.*

90. *Id.* at 1278.

91. *Id.* at 1279 (noting that "[d]etermining injury in fact is not always easy" and applying *Ne. Fla. Chapter of the Assoc. Gen. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993)).

92. *Id.* at 1280.

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wedlock. Williams is injured by the denial of equal access to the modification process.<sup>93</sup>

The court reached this result even though it acknowledged that there was in fact a procedure open to Williams by which she could seek modification of the child support order, yet she had not pursued it.<sup>94</sup>

The plaintiff's sincerity was never in question. The Second Circuit did not require that the plaintiff offer evidence, for example, that she tried to utilize but was denied access to the less burdensome rubric applicable to parents of children born in wedlock. Nor did the court require that she show entitlement to a modification of the support order. In fact, the court expressly stated that “[j]ust as the contractors [in *Northeastern Florida*] did not have to show that they would have obtained the contracts had they bid, Williams need not show that she could successfully modify the support agreement if she were given access to the modification procedure.”<sup>95</sup>

Notably, the court did not ask for validation of her intent to avail herself of that process as courts tend to do when the benefits at stake are limited resources.<sup>96</sup> In contrast, the court seemed to presume sincerity, which is quite different than the more exacting analysis seen in the limited resources cases.<sup>97</sup> A reasonable explanation for this distinction could be that in *Williams*, the benefit at stake was limited qualitatively but not quantitatively. There was no cap on the number of parents who could seek to modify child support orders through the preferred statutory rubric; there was only a limit as to the type of parent who could use that rubric. In effect, the challenged rubric was not a zero-sum contest. These circumstances are quite different from those where there is a quantifiable limit on the available benefits. In this latter type of case, the norm of sincerity is most important. These cases are considered next.

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93. *Id.*

94. *Id.* at 1278 (noting defendant's position at oral argument).

95. *Id.* at 1280.

96. *See infra* notes 98–147 and accompanying text.

97. All of the equal protection cases discussed *infra* that apply the *Northeastern Florida* injury-in-fact analysis where the sincerity norm is observable are “limited resources cases.” As shown below, for example, in contracting cases, the pool of ultimate benefits at stake—the number of contracts for municipal construction work that will be awarded—is limited. There are only so many contracts to be set aside under any given preference program. Similarly, in admissions cases, the pool of ultimate benefits at stake—spots for admission in a university class—are limited. Additionally, in the Title IX context, parties are fighting over how to spend limited resources: a university's budget.

*B. Subset of Limited Resources Cases: Transparent Competitive Processes*

So far I have said that the norm of sincerity is most important when the benefits distributed or denied are finite in number, or in other words, when the ability to compete for limited resources is at issue. I will now show that the norm of sincerity is most observable in cases in which a transparent competitive process governs the competition. In these cases, the steps in the competitive process serve as explicit markers of preparation. When a plaintiff misses one such marker, courts require further evidence of intent—evidence that implicitly measures sincerity. As will be seen, the “able and ready” standard works best when such analytical markers are transparent.

One reason that the standard works best in this context is not surprising: there exists a general principle that when the rules of a game are transparent, a spectator should be able to more easily observe whether a competitor “broke” the rules than when the rules of the game are not transparent. Similarly, when there are clear prerequisites that must be met before a competitor is prepared to compete, a spectator should be able to observe whether those prerequisites were met.

In a nonlegal sense, consider a competitor who says she intends to run a race. She comes to the track but does not line up. Further, she puts on track shoes, but with only moments to go before the race begins, she has yet to tie them. By not lining up and by not tying her shoes, she seems unprepared to compete, despite her stated intent.

Applying that principle here suggests that if the process by which a government benefit is distributed or awarded is transparent, a judge should have the analytical tools available to her by which she could evaluate whether an equal protection plaintiff is adequately prepared to participate in that process. That is, she should have markers by which she could assess preparation and thereby determine sincerity: if those markers are met, the sincerity norm is met; if not, the sincerity norm requires additional evidence to prove the plaintiff’s subjective intent.

For example, in an admissions case, a marker of preparation is the intent to apply or the actual application; in a contracting case, a marker of preparation can be the ability to pay a required fee, a submitted proposal, or a history of similar work; and in a Title IX case, a marker of preparation is the student’s status as an athlete. In any of these contexts, when a plaintiff misses an important marker, courts tend to seek

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additional evidence of preparation as evidence of sincerity. At that level, the court is implicitly testing the plaintiff's intent and sincerity.

The following discussion shows the analytical effect of meeting, or missing, a relevant marker in a limited resources discrimination case. The discussion is organized by type of "marker" as follows: (1) evidence of relevant background or experience (i.e., a history of playing a particular a sport or performing a certain type of work in the past); and (2) evidence of minimal qualification (i.e., the ability to pay an application fee or the ability to play a sport that a university does not offer to students).

### *1. Past behavior, experience, or background*

When a competitive process requires a competitor to take some action to be eligible to compete, past behavior, experience, or background can be relevant to the "able and ready" analysis. When a plaintiff fails to take a required action, suspicions arise, and, as courts look further for additional evidence, courts implicitly test the plaintiff's sincerity. While the paradigm case of *Carroll v. Nakatani*<sup>98</sup> is one example of this analysis, *Northeastern Florida*<sup>99</sup> set the groundwork for the analysis. It is worth returning to a more detailed discussion of *Northeastern Florida* here to illustrate how a missed "marker" can trigger the sincerity norm.

Recall that in *Northeastern Florida*, the issue for the Supreme Court was whether AGC, the plaintiff association of contractors, lacked standing because it had not shown that any of its members would have won the contract at stake if they had been permitted to compete for it.<sup>100</sup> The standing issue had been suggested in a concurring opinion<sup>101</sup> in an Eleventh Circuit ruling that reversed the district court's issuance of a preliminary injunction prohibiting Jacksonville from operating the challenged ordinance.<sup>102</sup> On remand, the district court entered a permanent injunction.<sup>103</sup> When the case again returned to the Eleventh Circuit, the court specifically analyzed the standing issue previously

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98. For a discussion of *Nakatani*, see *supra* notes 34–56 and accompanying text.

99. Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656 (1993).

100. *Id.* at 658.

101. Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 896 F.2d 1283, 1287 (11th Cir. 1990) (Tjoflat, J., concurring), *rev'd*, 508 U.S. 656.

102. *Id.* at 1286.

103. Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 951 F.2d 1217, 1218 (11th Cir. 1992) (noting procedural history).

raised by Judge Tjoflat<sup>104</sup> and vacated the district court's permanent injunction.<sup>105</sup>

In that opinion, the Eleventh Circuit found that AGC lacked standing because it had not averred that any one of its members would have "bid successfully" on any contract if the ordinance had not been in place.<sup>106</sup> The Supreme Court disagreed with the Eleventh's Circuit's reasoning and conclusion and instead found that the plaintiff had adequately averred the required personal stake in the outcome of the litigation.<sup>107</sup> The Supreme Court credited AGC's pleading that "many of its members 'regularly bid on and perform construction work for the City of Jacksonville'" and "that they 'would have . . . bid on . . . designated set aside contracts but for the restrictions imposed' by the ordinance."<sup>108</sup> As set forth above, the Court found that this pleading demonstrated that AGC was "able and ready" to compete, and that AGC was not required to establish that it would have successfully bid if permitted to compete.<sup>109</sup> This opinion set in motion the pattern of looking to whether a plaintiff has "met" the relevant analytical markers to shed light on whether the plaintiff was "able and ready" to compete.

A counterexample occurs when the plaintiff meets all relevant intent markers of the particular competitive process at issue, and, accordingly, the court finds that the plaintiff was "able and ready" to compete. In this situation the norm of sincerity is met when the plaintiff meets the relevant markers, and the court does not need to engage in a more thorough examination of the record for supporting evidence.

An example to this effect is *Comer v. Cisneros*,<sup>110</sup> a consolidated equal protection, statutory fair housing, and civil rights class action, in which both individual and group plaintiffs challenged as racially discriminatory the manner in which three federal public housing programs were being administered locally in and around the city of Buffalo.<sup>111</sup> There were two distinct groups of plaintiffs in the case, the

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104. *Id.* at 1218–19.

105. *Id.* at 1220.

106. *Id.* at 1219 (finding that AGC failed to state injury in fact as it did not demonstrate that, but for the ordinance, "any AGC member would have bid successfully" for any contract).

107. *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 656 (1993).

108. *Id.* at 659 (quoting AGC's complaint at ¶¶ 9 and 46).

109. *Id.* at 666, 668–69; *see also supra* note 44 and accompanying text.

110. 37 F.3d 775 (2d Cir. 1994).

111. *Id.* at 784–86 (noting procedural history of cases).

“RAC plaintiffs” and the “Belmont plaintiffs.”<sup>112</sup> The defense challenged both groups’ standing on both statutory and constitutional grounds.<sup>113</sup>

The plaintiffs alleged that while the programs offered opportunities for suburban housing vouchers, city administrators routinely and intentionally did not inform black applicants of this option,<sup>114</sup> thereby violating the Fourteenth Amendment by denying them the opportunity to benefit from the program on the basis of race.<sup>115</sup> In this case, set procedures determined how a resident applied for a voucher.<sup>116</sup> Additionally, set criteria determined the priority of applicants to receive vouchers.<sup>117</sup> The district court found that the plaintiffs lacked standing,<sup>118</sup> but upon appellate review, the Second Circuit reversed.<sup>119</sup>

Specifically, the court pointed to testimony offered by the lead RAC plaintiff that (1) she wished to move outside of city public housing<sup>120</sup> and that (2) she had applied for public housing but had not been informed of the possibility of using a voucher to move outside the city.<sup>121</sup> The court also pointed to evidence offered by the lead Belmont plaintiff that she had also filed applications for the vouchers.<sup>122</sup> With respect to both sets of lead plaintiffs, past application history “marked” their preparation to compete. Because these plaintiffs met these relevant markers, the court implicitly found that the plaintiffs’ sincerely intended to use the benefits of the voucher programs; there was no reason to suspect otherwise or to look for further evidence of intent.

Similarly, to show injury in fact under *Northeastern Florida* in the context of challenges to preferential treatment on the basis of race or

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112. RAC is the nonprofit organization that, by contract with the City of Buffalo, operates its Section 8 housing program. *Id.* at 783. Belmont is the nonprofit organization that, by contract with the City of Amherst, operates its suburban Section 8 program. *Id.*

113. *Id.* at 786 (noting that the trial court granted the defendants’ motion to dismiss based on standing). Only the analysis of standing requirements to press the equal protection claim is considered here.

114. *Id.* at 790–91.

115. *Id.* at 785–86

116. *See id.* at 781–83 (discussing the statutory and regulatory background of a Section 8 housing program).

117. *Id.* at 781 (noting that applicants were prioritized by family situation, including the condition of their housing, the fact of involuntary displacement, and the percentage of family income paid to rent).

118. *Id.* at 779.

119. *Id.* at 795 (reversing the district court’s opinion on standing).

120. *Id.* at 791.

121. *Id.*

122. *Id.* at 794–95 (reviewing evidence of standing produced by plaintiff Jessie Comer, who “believed that an applicant had to live outside the city limits to obtain a Belmont subsidy. When she learned otherwise, she applied for a Belmont subsidy. . . . At this time, Comer is homeless, although living with a relative, and waiting for affordable housing to become available.”).



ethnicity in higher education admissions, an applicant (or prospective applicant) need not demonstrate conclusively that she would have been admitted but for the discriminatory admissions preference.<sup>123</sup> Instead she must demonstrate only that she was “able and ready” to compete for admission but that she was prevented from competing equally due to an allegedly discriminatory preference.<sup>124</sup> Courts looking at injury in fact in admissions cases therefore have generally required a plaintiff to make that demonstration by either applying to the school or credibly pleading that she intended or intends to apply. For example, in *Wooden v. Board of Regents of the University of Georgia*, the Eleventh Circuit found that a student who could not show evidence of his averred intent to transfer to the defendant institution lacked standing to seek prospective relief against that school.<sup>125</sup> As a counterexample, the majority of the Court in *Gratz v. Bollinger* did not question the sincerity of plaintiff Patrick Hamacher’s professed intent to, one day, file for admission as a transfer student to the University of Michigan.<sup>126</sup> Of course, Justice Stevens, in dissent, did implicitly question Mr. Hamacher’s sincerity.<sup>127</sup>

The *Wooden* and *Gratz* examples illustrate what the reader has undoubtedly suspected by now: the concept of sincerity certainly has its limits. Not all “missed markers” will strike all judges in the same way; not every missed marker of preparation will seem equally suspicious among all judges. That sincerity has its limits, however, does not disprove that the concept is, under the “able and ready” test for injury in fact, relevant.

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123. See *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (applying *Northeastern Florida* to university admissions, concluding an applicant need not show she would have ultimately been admitted but for the challenged barrier, rather she was “ready and able” to compete).

124. See *id.*

125. *Wooden v. Bd. of Regents*, 247 F.3d 1262, 1284–85 (11th Cir. 2001) (noting that “there is no evidence that [plaintiff] intends to re-apply for admission to [defendant institution] under any version of the [challenged] admissions policy.”).

126. See *Gratz*, 539 U.S. at 262 (2003) (finding that Plaintiff Hamacher averred in the complaint in the case that he “intended” to apply as a transfer student, which “demonstrated that he was ‘able and ready’ to apply as a transfer student should the University cease to use race in undergraduate admissions”).

127. See *id.* at 282–90 (Stevens, J. dissenting) (arguing that Hamacher’s alleged intent to reapply to the University was merely “hypothetical” and did not demonstrate the required personal stake in the resolution of the dispute over the ongoing freshman admissions policies).

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## 2. *Minimal qualification*

Another marker of preparation is evidence of objective minimal qualification to compete. Cases in both the contracting and Title IX contexts offer examples.

*a. The contracting context.* In the contracting context, the benefits at stake are the contracts themselves, and the markers of preparation are derived from the procedures, which are usually statutory, by which government awards those contracts. One type of marker evidence in this context is whether the contractor is minimally qualified to compete for the contract. “Minimally qualified to compete” does not mean whether the contractor would have ultimately won the contract; instead it refers only to whether the contractor could have competed in the first place. Relevant markers therefore could include whether the contractor filed the required application or whether the contractor otherwise demonstrated an ability to begin the bidding process. If a relevant objective marker is missed, the pattern is that courts in this context can become suspicious that the plaintiff intended to compete for, or to ultimately use, the benefits at stake. Thus, if a missed objective marker causes the court to doubt the plaintiff’s subjective intent, the court can then require further evidence of the plaintiff’s sincerity.

For example, in *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*,<sup>128</sup> the defendant challenged the plaintiff’s standing in part because the plaintiff had not actually applied for the contract.<sup>129</sup> The defense had argued that this failure showed a lack of injury in fact, and the district court agreed, finding no evidence that met its requirements of “ready and able.”<sup>130</sup> However, the Sixth Circuit found that the plaintiff did have standing.<sup>131</sup>

The evidence that satisfied the Sixth Circuit included allegations in the amended complaint setting forth the plaintiff’s history as a developer and an affidavit stating that the plaintiff was aware of and able to comply with all of the city’s requirements, including payment of fees.<sup>132</sup> Explicitly, the Sixth Circuit found that the “able and ready” standard did not require the plaintiff to have submitted a viable proposal; rather the court found that the evidence offered by plaintiff—suggesting a track

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128. 172 F.3d 397 (6th Cir. 1999).

129. *Id.* at 403 (appeals court noting district court found plaintiff lacked standing for equal protection claim).

130. *Id.* at 403–04.

131. *Id.* at 404 (noting that “Lac Vieux argues that the district court erred in determining that it was not ready and able misapplied [*Northeastern Florida*], and ignored crucial evidence. We agree.”).

132. *Id.* at 404–05 (reviewing and crediting allegations in amended complaint and in affidavit).

record as a developer and the ability to meet the City's requirements—showed that the plaintiff was “able and ready.”<sup>133</sup>

Thus, although the plaintiff “missed” an objective marker of preparation by failing to actually apply for the contract at stake, which raised the district court's suspicions, the appellate court was satisfied that the plaintiff showed minimal qualification to compete. Explicitly, the plaintiff's qualification evidence demonstrated that the plaintiff was “able and ready” to compete; implicitly, the evidence confirmed that the plaintiff sincerely intended to compete for the contract.

*b. The Title IX context.* In the Title IX context, the benefits at stake are limited university resources for athletic programs. Generally, Title IX challenges can be based on either of two theories: (1) “ineffective accommodation,” which is a specific complaint as to a university's treatment of a single women's team or sport; or (2) “unequal treatment,” which is a broader complaint that the university generally treated female athletes unequally relative to male athletes.<sup>134</sup> The relevant marker of standing in both types of claims is the plaintiff's status as an athlete.

In *Pederson v. Louisiana State University*, the plaintiffs brought both types of claims.<sup>135</sup> On the ineffective accommodation claim, the “Pedersen plaintiffs,” charged that the university unlawfully failed to accommodate their request for a varsity women's soccer team.<sup>136</sup> Notably, these plaintiffs were all club soccer athletes.<sup>137</sup> This fact was insufficient to the district court because the district court apparently required the plaintiffs to claim “being denied the opportunity to compete on a specific varsity team,” which they did not do.<sup>138</sup>

On appeal, the Fifth Circuit found that the students' status as club soccer players was determinative of the plaintiffs' ability to show injury in fact with respect to the claim that the university discriminated against them by failing to field a varsity women's soccer team.<sup>139</sup> The Fifth Circuit reasoned that the plaintiffs' status as club soccer players meant

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133. *Id.* at 406.

134. *See Pederson v. La. State Univ.*, 213 F.3d 858, 865 n.4 (5th Cir. 2000) (noting frequent distinction of types of claims brought under Title IX and noting that the distinction derives from federal regulations implementing Title IX).

135. *Id.* at 858.

136. *Id.* at 870.

137. *Id.* at 871.

138. *Id.* (noting error in the district court's legal analysis).

139. *Id.* (analyzing *Northeastern Florida* and holding that “to establish standing under a Title IX effective accommodation claim, a party need only demonstrate that she is ‘able and ready’ to compete for a position on the unfielded team”).

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that they stood “able and ready” to compete for a varsity women’s soccer team—the ultimate benefit at stake in the case.<sup>140</sup> Implicitly, the status of “club soccer athletes” served as a relevant marker of preparation, as that status suggested that the students would in fact try out and could compete for a varsity soccer team if one were fielded. In other words, the Fifth Circuit found this status important because it confirmed the plaintiffs’ preparation to compete. Implicitly, however, the status was important because it showed the sincerity of the plaintiffs’ claimed personal stake in the outcome of the litigation. That is to say, these women sincerely intended to play varsity soccer if given the chance. As such, the case was not abstract or political to them; rather, it was personal. Thus, in this case, the “able and ready” analysis helped the court to explicitly evaluate the plaintiffs’ preparation, and the norm of sincerity helped the court to implicitly evaluate the plaintiffs’ personal stake in the case.

Consider how the case might have come out if the plaintiffs had been club swimmers who claimed that the university failed to accommodate their request for a women’s varsity soccer team. If the plaintiffs had been swimmers, even varsity swimmers, the court might have questioned their personal stake in the case: do they really want to play varsity soccer, or is the case about equalizing opportunities in higher education generally? The court could have inferred that the litigation was intended not primarily to resolve a concrete dispute between adversaries but to advance a social or political cause (i.e., increase funding for all women’s sports because it is the right thing to do or offer more sports to women because it is the right thing to do). In *Pederson*, by contrast, the court apparently drew the opposite inference, at least as to the ineffective accommodation claim: the plaintiffs’ status as club soccer players objectively demonstrated the sincerity of their stated intent to play varsity soccer if a varsity team were fielded.

In fact, the court in *Pederson* did suspect an ideological stake in the outcome of the litigation with respect to the plaintiffs’ second claim—the broad equal treatment claim. In that claim, the plaintiffs “challenge[d] LSU’s *entire varsity athletic program* as it then existed, including the allocation of scholarships and other benefits to varsity athletes.”<sup>141</sup> Because under the unequal treatment claim the plaintiffs were challenging the university’s treatment of all, but only, varsity athletes, the relevant marker was the status of being, or preparing to be, a varsity athlete.<sup>142</sup>

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140. *Id.*

141. *Id.* at 872 (emphasis added).

142. This distinction is important because it shows the implicit norm of sincerity at work. See *infra* notes 164–166 and accompanying text.

Specifically, the Fifth Circuit upheld the district court's finding that the plaintiffs, none of whom was a varsity athlete and who apparently did not plead that they wished to become a varsity athlete, lacked standing to press the unequal treatment claim.<sup>143</sup>

Notably, in a footnote, the Fifth Circuit came quite close to explicitly recognizing that sincerity was a factor with respect to the equal treatment claim:

We do not mean to imply that an equal treatment claim can only be brought by an existing varsity athlete. Whether, for example, a female student who was deterred from competing for a spot on an existing varsity team because of perceived unequal treatment of female varsity athletes would have standing to challenge the existing varsity program is a question we leave for another day.<sup>144</sup>

Textually, the point here is fairly basic: without first being varsity athletes or wanting to be varsity athletes, the plaintiffs did not have the required personal stake in the case because any change in treatment of varsity athletes resulting from the outcome of the case would not "impact" these women.<sup>145</sup> To cure this defect, the court in the footnote noted that this specific issue would be left for "another day."<sup>146</sup> The text of the note states, however, that what was not before the court in this particular case was the allegation that the plaintiff "was deterred from competing for a spot on an existing varsity team because of perceived unequal treatment . . . ."<sup>147</sup> In other words, the court suggested that it might have resolved the standing question differently if the plaintiff had simply but explicitly averred that she was "deterred from competing for a spot on an existing varsity team because of perceived unequal treatment[TS35]."<sup>148</sup>

This suggestion should sound odd: such a simple pleading trick cannot possibly account for the difference between finding a personal stake and not finding a personal stake in the outcome of the litigation. Rather, surely the court would, and should, require that a plaintiff making this averment actually mean it. The unacceptability of an insincere averment of intent is obvious. That unacceptability

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143. *Pederson*, 213 F.3d at 872.

144. *Id.* at 872 n.13.

145. *Id.* at 872 & n.14 (quoting the District Court Memorandum Ruling).

146. *Id.* at 872 n.13.

147. *Id.*

<sup>148</sup> *Id.*

demonstrates the implicit but nonetheless crucial role that is played here by the norm of sincerity. The point is this: implicit in the footnote's analysis is the assumption that if and only if such a plaintiff were sincere about her stated intent to compete might she be able to demonstrate personal stake required for injury in fact in the equal treatment claim. Accordingly, this footnote shows how important of a factor sincerity can be to finding injury in fact in this class of cases.

#### V. RELEVANCE: WHY DOES THE NORM OF SINCERITY MATTER?

I noted early on that a likely coming focus of equal protection litigation is challenges to nonadmission preference programs in higher education.<sup>149</sup> Indeed, as Justice Scalia predicted these claims in his dissenting opinion in *Grutter v. Bollinger*,<sup>150</sup> litigation against the “tempting targets” is all but imminent.

As a result, administrators at colleges and universities across the country are now finding themselves threatened with either private litigation or a federal investigation<sup>151</sup> if their school does not immediately “open” or eliminate any and all such programs on its campus (which programs can be in the tens, if not hundreds, at any small university). For example, consider the administrators at Virginia Tech. In April 2003, they received notice of a complaint that was filed with the Office of Civil Rights of the U.S. Department of Education (“OCR”) by the Center for Equal Opportunity (“CEO”).<sup>152</sup> In a June 2003 memo to OCR, CEO summarized the allegations in the complaint, and identified over sixty preference programs at Virginia Tech that CEO summarily claimed constituted unlawful discrimination.<sup>153</sup> Some of the programs identified in that memo included: minority-only or minority-preferred leadership workshops, scholarships, fellowships, mentoring programs, summer research internships, recruiting and outreach programs.<sup>154</sup> In addition to the complaint pending at OCR regarding Virginia Tech, multiple complaints and investigations are pending involving other schools.<sup>155</sup>

149. See *supra* notes 2–3 and accompanying text.

150. 539 U.S. 306, 349 (Scalia, J., dissenting).

151. See CEO Press Release, CEO Uncovers More Discrimination at Virginia Tech, Request from Office for Civil Rights Results in Identification of Dozens More Programs (Wednesday, June 11, 2003), available at <http://www.ceousa.org/updates.html>.

152. See CEO Memorandum to OCR, RE: OCR Complaint No. 11-03-2045 (Virginia Tech), (June 10, 2003), available at <http://www.ceousa.org/pdfs/VATechOCRMemo.pdf>.

153. *Id.*

154. *Id.*

155. See Schmidt, *supra* note 14 at A17 (noting that at that time, “[o]nly two colleges, Pepperdine University and Washington University in St. Louis, have refused to alter scholarship

Although administrators at Virginia Tech are defending against this complaint, administrators at many other schools have decided to make changes to these programs upon only a threat of a similar complaint.<sup>156</sup> For example, since 2003, at least seventy schools have voluntarily opened minority-based programs to nonminority students.<sup>157</sup> Some college administrators are concerned about these programs on a number of levels. First, the programs in place because the programs are one way to meet a need that students recognize: the need to fit in on campus,<sup>158</sup> which is crucial to retaining and ultimately graduating all students.<sup>159</sup> However, other administrators are concerned that identity-conscious programs, including admissions, could be divisive among students on campus<sup>160</sup> and/or that they are unlawful.<sup>161</sup>

The idea behind these challenges (and the threat of such challenges) seems to be that while the Supreme Court held in *Grutter* that student body diversity is a compelling government interest that may justify the

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programs that have been challenged by [CEO and the American Civil Rights Institute (“ACRI”)] and brought to the attention of the Office for Civil Rights.”).

156. *See id.* (interviewing general counsel of Carnegie Mellon University who “responded defiantly early last year when its academic summer camp for minority students was challenged by” CEO and ACRI, and who originally “planned . . . to wait for the federal courts to offer guidance,” but following the Michigan decisions, decided to open its campus “summer camp” and full scholarship program to any student who demonstrated an ability to contribute to diversity on campus, and ended a policy of preferring certain minority students when awarding need-based aid).

157. *Id.*; *see also* Editorial, *Color-Blind Progress*, WALL ST. J., Dec. 13, 2004, at A16.

158. *See, e.g.*, Katherine S. Mangan, *Does Affirmative Action Hurt Black Law Students?*, CHRONICLE OF HIGHER EDUC., Nov. 12, 2004, at A35 (interviewing a minority lawyer who graduated in 2003 from Harvard Law School, who “sa[id that] racial preferences are not the issue. ‘The problem is not so much the entry; it’s what happens while you’re there . . . .’ As a minority law student, ‘you’re more likely to feel isolated and marginalized, and feel like ‘nobody gets my experience.’”).

159. *See, e.g.*, Schmidt, *supra* note 14, at A17 (interviewing president of Haverford College regarding the school’s summer minority preorientation program, who noted that “the students who participate tend to fare better in college than those who don’t.”).

160. *See, e.g.*, Peter B. Schmidt, *A New Route to Racial Diversity*, CHRONICLE OF HIGHER EDUCATION, Jan. 28, 2005, at A22 (interviewing Robert M. Gates, President of Texas A&M, and noting that “one of [Gates’s] goals in retaining race-blind admissions was ensuring ‘that every student here knew that every other student was here on the same basis’”).

161. *See* Schmidt, *supra* note 3, at A26 (stating that “[c]olleges throughout the nation interpreted the Supreme Court’s Michigan rulings as leaving their race-exclusive programs vulnerable to legal challenge. They responded by opening the programs to other groups, like students who were economically disadvantaged or had demonstrated a commitment to promoting diversity.”); *see also* Schmidt, *supra* note 14, at A17 (stating that “[c]olleges throughout the nation are quietly opening a wide range of minority programs to students of any race, mainly to avoid being accused of discrimination.”).

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use of race in certain circumstances in admissions,<sup>162</sup> the use of race in any other context is uncertain and therefore suspect. While an analysis of the merits of this position is outside the scope of this Article, it seems fair to say that neither *Grutter*, nor its companion decision,<sup>163</sup> nor any decision since then has conclusively determined the fate of such programs on the merits. While it is clear that to promote educational diversity race may be considered as one of many factors in an admissions program, it is not at all clear to what extent race may or may not be considered outside of admissions to promote that same goal.

For two reasons, the “able and ready” standard of determining injury in fact in equal protection cases is going to raise novel, important, and difficult questions for plaintiffs and courts in the “tempting targets” cases alluded to by Justice Scalia in *Grutter*. First, the benefits of these programs are distributed from scarce resources, which means that sincerity should be an important factor in the injury-in-fact analysis.<sup>164</sup> Second, only in some of these programs will there be a transparent competitive process by which the benefits are distributed (and by which intent and sincerity can be measured). This means that, in this limited resources context, when a plaintiff challenges a program that lacks a transparent process setting analytical markers of preparation, the “able and ready” standard should not be expected to work as seamlessly as it does when there is such a process. Nonetheless, because the tempting targets cases are limited resource cases, the sincerity norm should be an important factor.

Because it is only a matter of time before these cases reach the docket of a federal courthouse, and because these cases are likely to contribute important principles to the developing law of antidiscrimination, it is worth considering a bit in depth how the standing analysis in one such case might unfold. Further, it is worth considering in depth what role we might expect the norm of sincerity to play in this context.

To do that, first consider a hypothetical complaint that raises the issue of whether a state-supported university’s racial or ethnic preference programs in two different nonadmissions contexts violate two different students’ federal constitutional equal protection rights. Following the conclusion of the resolution of the hypothetical complaint, this Article

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162. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (“[T]oday we endorse Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.”).

163. *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (striking down racial preference in undergraduate admissions program as insufficiently narrowly tailored to achieve compelling state interest, educational diversity).

164. See *supra* text accompanying notes 121–66.



proposes a model for reconceptualizing the norm of sincerity in this class of cases.

*A. A Hypothetical Complaint: Student v. "Tempting Target"*

Imagine that you are a district court judge and a new equal protection case has just been assigned to you. It is May. There are two plaintiffs in the case. Plaintiff A is an incoming freshman; she has been accepted for freshman admission at defendant State University and has committed to attending the school in the fall. Plaintiff B has just completed his freshman year at State U; he is now a rising sophomore.

Plaintiff A is a white woman; Plaintiff B is white man. Both plaintiffs claim that their rights under the Fourteenth Amendment and Title VI<sup>165</sup> have been violated because the university operates multiple programs on campus in which they would like to participate but cannot participate because the programs are reserved for minorities only.<sup>166</sup>

The complaint challenges two programs in particular: first, a two-day minority-only "pre-orientation" session held just before the school's general freshman orientation session; and second, the "multicultural leadership development initiative" (or "MuLDI"). Plaintiff A avers she has not been invited to the pre-orientation session and anticipates being excluded from MuLDI. Plaintiff A seeks both compensatory damages and prospective relief as to all programs.<sup>167</sup> Plaintiff B complains that he was not invited to participate in the pre-orientation session or MuLDI last year, and is still being excluded from MuLDI as it is open to minority students only, regardless of class year. Plaintiff B seeks damages with respect to the orientation programming and both damages and prospective relief as to MuLDI.

Specifically, the complaint avers that the pre-orientation sessions offers academic programming, including a two-hour session entitled "Study Skills for Success," and a two-hour "Introduction to the Library"

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165. Title VI, Civil Rights Act of 1964, 42 U.S.C. 2000d to d-6 (2000). While Title VI regulations "prohibit practices with racially discriminatory effect," there is no private right of action to enforce them. *See* Erwin Chemerinsky, *Closing the Courthouse Doors to Civil Rights Litigants*, 5 U. PA. J. CONST. L. 537, 541 (2003) (discussing the Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001)). Further, if a tempting targets plaintiff styled his claim as an action under 29 U.S.C. § 1981, such a claim would be "governed by the substantive standards applicable to race-based challenges brought pursuant to Title VII of the Civil Rights Act of 1964." *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 416 F.3d 1025, 1038–39 (9th Cir. 2005).

166. Assume that the defendant university defines "minorities" as any person who identifies herself as a member of a racial or ethnic group that is non-caucasian.

167. For the sake of argument, assume there is no ripeness problem with these claims.

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tour. The complaint declares that these programs advantage participants by providing them with additional resources needed to succeed in higher education that are not available to students who have been excluded on the basis of race or ethnicity. Plaintiffs claim this program is a barrier to their ability to properly transition from high school to college academics.

Plaintiffs also indicate that MuLDI is a leadership skills program in which minority students of all class years are invited to participate in a series of monthly leadership development workshops throughout the academic year. The complaint states that the plaintiffs have been disadvantaged by not being able to participate in MuLDI because they do not have the same access to the college's resources for building leadership skills as do the invited students, who are all minorities.

The complaint avers generally that Plaintiff A would like to participate in this year's pre-orientation academic programming because she does not want any of her classmates to get a "leg up" on her, and both claim jointly that they would like the chance to participate in MuLDI because "it is a good opportunity." The complaint states that Plaintiff A is "able and ready" to come to campus early for the pre-orientation session and that both plaintiffs are "able and ready" to participate in MuLDI if invited. Finally, the complaint avers generally in support of the allegations that because the Constitution is "color-blind" and because the school receives some federal funding, the school is required to permit all students to participate in any program operated by the institution without discriminating on the basis of race or national origin.

You are not surprised to see this complaint, though after some initial research, you confirm that other than the Michigan decisions,<sup>168</sup> there are no decided cases that you can consult for guidance on these specific issues. In this hypothetical complaint has either plaintiff stated injury in fact?

### *1. Pre-orientation session*

FACTS: From limited discovery you granted on standing, you now know that there is a general student orientation session that immediately followed the pre-orientation program about which the plaintiff complains. At that general orientation session, the plaintiffs, along with every other student, were offered the same or similar opportunities for social introduction and academic preparation as were offered to the minorities who were invited to attend and attended the pre-orientation session. Specifically, the record shows that at the general orientation, all

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168. The "Michigan decisions" are, of course, *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003).

students are invited to a similar but not identical two hour session on academic preparation/study skills, and all students are offered the identical same two-hour library tour.

PLAINTIFF A: In her deposition testimony, Plaintiff A admitted that she was interested generally in attending academic preparation sessions but that she had no particular interest in attending the same library tour twice, and, if given the opportunity, would not choose to attend the same session on study skills twice.

RESULT A: Plaintiff A fails to meet the norm of sincerity with respect to the academic programming offered at the pre-orientation session. Plaintiff A has shown no concrete stake in the litigation over these two programs. She is interested in improving her study skills, but she does not believe that these programs will help her do that. The court should not announce a new constitutional rule on whether colleges can use race to distribute benefits such these upon Plaintiff A's claim. The courts should wait for a plaintiff who has a stake in the outcome of the litigation.

PLAINTIFF B: In contrast to Plaintiff A, Plaintiff B maintains that if given the opportunity, he would have attended both of the academic preparation sessions offered at the pre-orientation, even though substantially similar programs were offered to all students at the school's general freshman orientation the following week. Plaintiff B testified that he was not confident in his academic skills as an entering freshman and that he would have benefited from the extra attention earlier on. Plaintiff B's admissions file shows that his SAT scores were slightly below the average for admitted students in his class.

RESULT B: Plaintiff B meets the norm of sincerity as to the pre-orientation academic programming. Plaintiff B was sincerely interested in each of the two specific sessions offered at the summer orientation, and he testified that he would have attended both. As further evidence, he offered his SAT scores, which, while not terrible, were not outstanding. It is reasonable to conclude that a person in his circumstances is sincere when he states that he would have attended and used the benefits of the study skills session and the library tour. The court should find that Plaintiff has sufficiently stated injury in fact to pursue this claim for damages.

## 2. *MuLDI*

FACTS: Discovery shows that, shortly after classes begin in the fall of each year, State University offers all students the chance to attend a

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full day diversity awareness workshop. This workshop teaches leadership skills similar to those taught in the MuLDI program, and it addresses other issues related to diversity on campus. This workshop lasts only one day; it is not continued throughout the year as is the MuLDI program. The MuLDI program is the only program on campus that focuses on discussing, sharing, and promoting strategies for minorities to excel in leadership roles on a predominately white campus.

PLAINTIFF A: In her deposition testimony, Plaintiff A maintains that she wants to participate in MuLDI but has admitted that she had not planned on attending the workshop in September that is open to her. Further, she been unable to articulate a reason why MuLDI causes her injury, other than she does not want to miss out on opportunities provided to other students. She maintains, however, that the school is not permitted to exclude her from any opportunity on the basis of race or ethnicity.

RESULT A: Though she expresses a facial interest in the MuLDI programming, Plaintiff A has not offered any evidence that shows she is prepared to participate in a key aspect of that program, which is the program's focus on increasing the diversity on campus through increasing the leadership roles of students of color. When asked for evidence to support her stated intent to participate, she could not articulate how she was prepared to participate in that discussion or why that showed a personal stake in the resolution of the MuLDI-based claim. Like the plaintiff in *Carroll v. Nakatani*, if Plaintiff A is not prepared to "participate equally" in those discussions, then she is not denied equal treatment by being excluded from them.<sup>169</sup> Similarly, like Todd Hembree, who challenged the validity of a Cherokee same-sex marriage, Plaintiff A's ideological objection to MuLDI is not the equivalent of a legal interest in the outcome of a dispute over the program.<sup>170</sup> She has not stated an injury in fact with respect to the MuLDI program. If a court is going to adjudicate the issues raised by the MuLDI complaint, it should wait for a plaintiff who shows a personal stake in the outcome of the litigation.<sup>171</sup>

PLAINTIFF B: Plaintiff B also maintains that he has been injured by not being invited to MuLDI in his freshman year and wants to participate in the full MuLDI program as a sophomore. However, Plaintiff B admitted in his deposition testimony that he did not attend the one day diversity workshop that the school held in the fall of his freshman year, but he claims that he does intend to attend this year's workshop. Plaintiff

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169. *See supra* text accompanying note 55

170. *See supra* text accompanying notes 57-63.

171. *See supra* text accompanying notes 34-54

B further testified that while he is a member of the majority population on campus, he feels he has experiences that would contribute to the discussion of diversity and leadership on campus. In support, he points to a record of volunteer work with small nonprofit agencies in an urban community neighborhood, including three years of service as a literacy tutor to at-risk junior high school students.

RESULT B: Plaintiff B meets the norm of sincerity. Whether Plaintiff B states injury in fact with respect to the MuLDI claim is more difficult, however, than the same question as to the academic programming. Plaintiff B avers that he wants to participate in MuLDI but he has missed a relevant marker: in the past he failed to attend a similar program that was opened to him. He says he did not know about it at the time, which his lawyer has not been able to confirm. You are suspicious, so you look for other evidence of sincerity. You find it: Plaintiff B has a record of past relevant behavior, which is three years of community service tutoring at risk youth, and the intent to attend this year's workshop. This evidence confirms that Plaintiff B is sincerely interested in the MuLDI program.

Plaintiff's B's sincerity is akin to that demonstrated by the club soccer players in the *Pedersen* Title IX case: by offering evidence of relevant background, experience, or "minimal qualification" as to diversity and leadership, Plaintiff B has shown a sincere interest in participating in those discussions.<sup>172</sup> You consider this sincerity as a factor in your determination of whether Plaintiff B was able and ready to participate in MuLDI.

### *B. A Proposed Model for Cases without Markers*

The hypothetical complaint illustrates the role that sincerity can play in this context. A problem can arise when there is no transparent competitive process that governs the distribution of benefits because then it is more difficult to "judge" sincerity. And not all preferences bring a transparent competitive process with them. To ensure that the doctrinal and normative principles of the "able and ready" test are consistently applied—even when the challenged programs lack transparent competitive processes by which preparation can be most easily judged—I offer the following models.

One model for assessing preparation in the absence of obvious markers is to relax the standard back to the least common denominator of

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172. See *supra* text accompanying notes 149–60

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markers. In the nonadmission higher education context, the least common denominator could likely mean a simple statement that the plaintiff is “able and ready” or “wants and intends” to come to campus and participate in the challenged programming. If this relaxed model were the standard, almost anyone (subject to sanctions for misrepresentations in a pleading) could meet it. But such a permissive standard of injury in fact would mean that virtually anyone would have standing.<sup>173</sup> In effect, Article III requirements would be waived; only prudential standing concerns might set bounds on the universe of potential plaintiffs here.<sup>174</sup>

However, courts applying the “able and ready” standard in limited resources cases do not adopt such a permissive view of injury in fact.<sup>175</sup> Rather, there is a pattern showing that, as part of the “able and ready” analysis to determine injury in fact, courts apply the norm of sincerity to test whether a plaintiff sincerely intended to use the benefits at stake.<sup>176</sup> As noted *supra*, the standard, and its implicit norm, serve important doctrinal and normative functions: functions that will be equally important in the tempting targets context.<sup>177</sup>

Another model for assessing preparation which is more loyal to the principles underlying the “able and ready” standard is to require an affirmative statement by the plaintiff of her *intent to use* the particular benefits of each challenged program. By requiring an affirmative statement of intent, the norm of sincerity becomes a rule. By calling it a rule, sincerity becomes an explicit factor in the injury-in-fact analysis in these cases. Making sincerity an explicit factor, or rule, ensures that the principles of the able and ready standard are not lost in what will surely be complicated cases in this highly important developing area of law.

If sincerity were the rule, a tempting targets plaintiff would have to include, as part of her averment of being able and ready, some other fact showing a sincere intent to actually use the benefits at stake. For example, if a plaintiff complained that she was excluded from the a minority student union, under a rule of sincerity, the required pleading of injury in fact would include: 1) that the plaintiff was able and ready to

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173. Recall in these cases that causation and redressability flow from injury in fact. *See supra* text accompanying notes 29–30.

174. Some might argue that such a permissive standard would be, normatively, a good result. *See* Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection For Intergroup Solidarity*, 77 IND. L.J. 63, 83–86 (2002) (comparing broad and narrow conceptualizations of stating injury to third-parties seeking to enforce provisions of Title VII prohibits against workplace discrimination, and noting that “standing cases are shaped by a tension between lowering the standing threshold and tying the injury to the discriminatory harms made actionable by Congress”).

175. *See supra* note 87 and accompanying text.

176. *See supra* Part III.

177. *See supra* Part III.C, V.

participate in that group, and 2) why or how she would benefit from participating in the group. Further, under a rule of sincerity, the required pleading of injury in fact due to exclusion from a minority-only academic session would include: 1) that the plaintiff was able and ready to attend the session, and 2) how the plaintiff intended to use the benefits of that session. Finally, under a rule of sincerity, the required pleading of injury in fact due to exclusion from a leadership skills program would include: 1) that the plaintiff was able and ready to attend the session, and 2) why or how she would benefit from it.

The point is that there are questions—similar to questions that have been raised in the “able and ready” analysis in decided cases—that could shed light on whether a plaintiff is in fact “able and ready” to benefit from these programs. Similar determinations are already being made, though implicitly, in relevant cases. By making the questions explicit, courts can better ensure that plaintiffs have the constitutionally required personal stake in the litigation. As the Article has shown, this is an adjustment that should be made soon: the lawyers who may bring the cases that will decide the next set of important constitutional principles regarding diversity and discrimination are probably waiting on the courthouse steps.