

3-1-2006

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### Recommended Citation

Chapin Cimino Cody, *Considering Standing, Sincerity, and Antidiscrimination*, 2006 BYU L. Rev. 71 (2006).  
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2006/iss1/2>

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## Considering Standing, Sincerity, and Antidiscrimination

*Chapin Cimino Cody*\*

Though it was not always so, the phrase “antidiscrimination” today refers equally to cases challenging affirmative action as to cases challenging “traditional” discrimination. We refer to cases challenging affirmative action as “reverse discrimination” cases, but they are antidiscrimination cases just the same.<sup>1</sup> As such, the body of law that we call “antidiscrimination law” is developing and growing rapidly. One of these developments is that 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 invoke federal jurisdiction. Further, in this Article, I assert that because the norm of sincerity helps courts evaluate injury in fact, courts should recognize the norm of sincerity and give it 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

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1. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 234 (1995) (discrediting the notion of a “benign” racial classification and holding that all government racial classification “must serve a compelling governmental interest and must be narrowly tailored to further that interest”).

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 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 that she was “able and ready” to compete for the benefit.<sup>2</sup> 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, in this Article, I 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, I 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 limited resources at stake.

In this Article, I will also show that the norm of sincerity is highly relevant today. Both politically and legally, we have grappled for years with the question of what is an appropriate use of racial and/or ethnic

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2. As shown *infra* Part I, the phrase “able and ready” comes from the Supreme Court’s decision in *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 657 (1993).

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preferences in government programs. 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 abounds.

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 preferences across their campuses to support the institution's "expressed commitment to the educational benefits of diversity."<sup>3</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-resources discrimination claim. Through these preferences, universities award certain benefits to some students on the basis of race or national origin, but not to others. And when making these awards, universities are ultimately drawing from a finite pool of resources: the university budget.

No plaintiff has yet tested the validity of any one of these preference programs through litigation on the merits,<sup>4</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>5</sup> Justice Scalia predicted that one result of the Court's holding would be a flood of litigation.<sup>6</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-

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

4. 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. HIGHER EDUC., Mar. 11, 2005, at A26.

5. *Grutter*, 539 U.S. at 325 ("[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.").

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

only student organizations, separate minority student centers, even separate minority-only graduation ceremonies.)<sup>7</sup>

One looking for such targets need not look far: currently these programs are operating across campuses nationwide.<sup>8</sup>

When these cases arrive at the courthouse, one important question that the universities are likely to raise is whether the particular student bringing the case has standing to assert the claim. Because these will be what I will refer to as limited-resources discrimination cases, the norm of sincerity will apply in this context. No commentator has recognized this developing trend.

In Part I of this Article, I provide a brief overview of standing generally, and of standing in antidiscrimination cases specifically. In Part II, I contend that the injury-in-fact analysis in this class of cases contains an implicit norm: the norm of sincerity.<sup>9</sup> In Part III, I establish that there is a trend developing here. Specifically, I will show that several federal courts have implicitly invoked sincerity to help answer the question of whether a particular antidiscrimination plaintiff demonstrated a sufficiently personal stake in the litigation to state injury in fact. In this Part, I will also show that a court's sincerity judgment is most observable when a transparent process governs the competition for those benefits because a transparent process sets analytical markers by which courts can measure the plaintiff's preparation to compete. Part IV considers how the norm would function in antidiscrimination cases in the higher education context, particularly in the context presaged by Justice Scalia. I conclude that the norm will be relevant in this context but could be difficult to

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7. *Id.*

8. See generally Peter B. Schmidt, *Not Just for Minority Students Anymore*, CHRON. 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).

9. 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, *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"); Meir Dan-Cohen, *Listeners and Eavesdroppers: Substantive Legal Theory and Its Audience*, 63 U. COLO. L. REV. 569, 579–80, 581 n.27 (1992).

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apply explicitly. Therefore, I conclude the Article by identifying and proposing a workable 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 my purpose is not to try to duplicate any of those efforts.<sup>10</sup> Rather, my thesis 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 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>11</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>12</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>13</sup>

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10. For the briefest sampling of some of these writings, one could consult Ashutosh Bhagwat, *Injury Without Harm: Texas v. Lesage and the Strange World of Article III Injuries*, 28 HASTINGS CONST. L.Q. 445 (2001); David Dow, *The Equal Protection Clause and the Legislative Redistricting Cases – Some Notes Concerning the Standing of White Plaintiffs*, 81 MINN. L. REV. 1123 (1997); or *The Supreme Court, 1992 Term—Leading Cases*, 107 HARV. L. REV. 144, 303 (1993).

11. See generally ERWIN CHEREMINSKY, FEDERAL JURISDICTION 56–60 (4th ed. 2003).

12. See, e.g., David Flickinger, *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 & State, Inc.*, 454 U.S. 464, 472 (1982))). The “case or controversy” requirement of Article III has been interpreted to require a showing of three distinct elements: injury, causation, and redressability. See *id.* (citing *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 663 (1993); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

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

Resolving standing questions is rarely easy,<sup>14</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>15</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>16</sup> and courts should not decide constitutional questions without an adequate factual background to ensure that the principle enunciated in the decision will not be improperly extended.<sup>17</sup>

The three constitutionally grounded requirements of standing are familiar.<sup>18</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>19</sup> second, the plaintiff must show “a causal relationship between the injury and the challenged conduct”;<sup>20</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>21</sup> The burden of proving standing is on the party asserting jurisdiction.<sup>22</sup>

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14. See, e.g., Flickinger, *supra* note 12, 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; CHEMERINSKY, *supra* note 11, 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.”).

15. See, e.g., Spann, *supra* note 14, at 1423 (“[C]lose examination suggests that the Supreme Court’s standing decisions embody the very sort of racial discrimination that we rely on the Court to prevent.”).

16. See *Schlesinger v. Reservists Comm. 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)).

17. See Eskridge, *supra* note 16, at 1310–11 & n.133 (citing Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996)).

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

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

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

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

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

71] *Considering Standing, Sincerity, and Antidiscrimination**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. City of Jacksonville*.<sup>23</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>24</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 have obtained the contract but for discrimination on the basis of race.<sup>25</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>26</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>27</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>28</sup> The district court found for the plaintiff and entered a temporary restraining order.<sup>29</sup> On appeal, the

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23. 508 U.S. 656.

24. *Id.* at 657.

25. *Id.* at 666.

26. *Id.*

27. *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).

28. *Id.* at 658.

29. *Id.* at 659.



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>30</sup> The Supreme Court reversed the Eleventh Circuit.<sup>31</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>32</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 barrier to) a person’s ability “to compete on an equal footing” for that benefit.<sup>33</sup>

Commentators offer mixed reviews on the result in *Northeastern Florida*<sup>34</sup> and disagree over whether the decision represented a change in the law.<sup>35</sup> Whether it does is irrelevant here; what is relevant is whether

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30. *Id.* at 660 (quoting *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 951 F.2d 1217, 1218 (11th Cir. 1992)).

31. 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). In *Lesage*, 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.

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

33. *Id.* at 666.

34. 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.

35. Despite the Court’s reliance on precedent in *Northeastern Florida*, some have observed that the holding represented a new development in equal protection standing doctrine. *See, e.g.*, Nichol, *supra* note 34, at 326; *see also* Spann, *supra* note 15 *passim*. 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

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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, help 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.

## 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>36</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 that, due to allegedly unlawful racial or ethnic discrimination, she was prevented from doing so. When the plaintiff makes this averment, and if either the

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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*.

36. *See supra* Part I.

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>37</sup> to back up the plaintiff's professed, but inherently subjective, intent. Implicitly, the court is asking the plaintiff to demonstrate the sincerity of her stated intent to compete.

Consider a single paradigm case, *Carroll v. Nakatani*.<sup>38</sup> In *Nakatani*, the plaintiff, a non-native Hawaiian, claimed that Article XII of the Hawaii State Constitution, which created the Office of Hawaiian 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>39</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>40</sup> The plaintiff did not complete and resubmit the application because he alleged that it would be "futile."<sup>41</sup>

Because the plaintiff never filed a "completed" application, the defendant argued that the plaintiff lacked standing to challenge the program.<sup>42</sup> The district court ultimately found that the plaintiff did lack standing, but not for this reason.<sup>43</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.

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

38. *Id.*

39. *Id.* at 1221–22.

40. *Id.* at 1224–25.

41. *Id.* at 1225–26.

42. *Id.* at 1226–29.

43. *Id.* at 1225–26.

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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>44</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>45</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, including rent, equipment, and paper; that he had not pursued any alternative financing programs; and that he had no business plan.<sup>46</sup>

Doctrinally, the court considered these facts in the context of the able-and-ready analysis.<sup>47</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>48</sup> Absent such a “real present and immediate intention,”<sup>49</sup> the court concluded that the plaintiff's asserted injury was nothing more than “philosophical,”<sup>50</sup> that the plaintiff lacked the required personal stake in the case,<sup>51</sup> and that his complaint presented a nonjusticiable “generalized grievance.”<sup>52</sup>

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44. *Id.* at 1227.

45. *Id.*

46. *Id.* at 1227 n.10.

47. *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).

48. *Id.*

49. *Id.*

50. *Id.* at 1226.

51. *Id.* at 1228–29.

52. *Id.* at 1228.

On appeal, the Ninth Circuit upheld both the district court's finding and analysis.<sup>53</sup> The Ninth Circuit considered and rejected the plaintiff's proffered evidence of injury in fact.<sup>54</sup> The Ninth Circuit noted that the plaintiff's intent is relevant in an equal protection case and reviewed the plaintiff's evidence.<sup>55</sup> It found that the plaintiff could not show that the government had treated him unequally because of the OHA preference.<sup>56</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>57</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>58</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 the OHA program.<sup>59</sup>

Thus, the *Nakatani* opinions illustrate what is a developing trend<sup>60</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

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

54. *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.

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

56. *Id.*

57. *Id.*

58. *Id.*

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

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

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line of cases: a finding of sincerity does not necessarily mean that the plaintiff has established the required personal stake in the litigation.

*B. The Limits of Sincerity: Some Counter-Examples*

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.

Courts, including the U.S. Supreme Court, have for years recognized that a plaintiff may be unquestionably sincere yet lack standing. For example, in the well-known case of *Schlesinger v. Reservists Committee to Stop the War*, the Supreme Court found that the plaintiffs lacked standing to bring an action to compel the Secretary of Defense to enforce the Incompatibility Clause of the Constitution.<sup>61</sup> Specifically, the plaintiffs had sought an order requiring the Secretary of Defense to refuse to allow any then-current member of the U.S. Congress to also serve as a member of the Federal Reserves, and requiring the Secretary to recover the pay that anyone who had served as a member of both groups at the same time had earned as a Reservist.<sup>62</sup> Both the district court and the circuit court found that plaintiffs did have standing to seek this order, but the Supreme Court disagreed, finding that the complaint did not assert a sufficiently concrete injury because the injury alleged was too abstract.<sup>63</sup>

Notably, the district court had considered the fact that the parties “sharply conflicted in their interests and views” as partial support for its conclusion that the complaint presented a sufficiently concrete and adversarial dispute.<sup>64</sup> In other words, the district court seemed to infer that the dispute was sufficiently concrete in part because the parties sincerely disagreed on the merits of the points pressed in the case. A majority of the Supreme Court rejected both the district court’s finding and its reasoning, and stated,

We have no doubt about the sincerity of the respondents’ stated

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61. 418 U.S. 208, 209–11 (1974).

62. *Id.* at 211.

63. *Id.* at 209, 220–21 (“Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution.”).

64. *Id.* at 225.

objectives and the depth of their commitment to them. But the essence of standing “is not a question of motivation but of possession of the requisite . . . interest that is, or is threatened to be, injured by the unconstitutional conduct.”<sup>65</sup>

Thus, the Court concluded that the plaintiffs’ sincerity alone was insufficient to show the required personal stake in the case, and as such, insufficient by itself to invoke federal jurisdiction over the dispute.

A more recent and particularly candid example of the limits of sincerity is the opinion in *In re Marriage License of McKinley*.<sup>66</sup> The opinion in *In re Marriage License* illustrates quite nicely 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.

*In re Marriage License* is a recent decision of the Judicial Appeals Tribunal of the Cherokee Nation.<sup>67</sup> There, a third-party, Todd Hembree, challenged the validity of another couple’s marriage, which was a same-sex marriage.<sup>68</sup> In his complaint, Mr. Hembree 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>69</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: “[W]hile Mr. Hembree may have a strong political or philosophical interest in

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65. *Id.* at 225–26 (quoting *Doremus v. Bd. of Educ.*, 342 U.S. 429, 435 (1952)).

66. 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).

67. *Id.* The decision is relevant to this analysis because Cherokee law looks to federal law to resolve standing questions, though the parties disagreed as to the precise extent that it does so. Compare Reynolds/McKinley Motion to Dismiss at 8–9, *In re Marriage License*, No. JAT-04-15 (July 8, 2005), available at <http://www.nclrights.org/cases/pdf/reynoldsmotion.pdf>, with Hembree’s Response to Motion to Dismiss at \*2–3, *In re Marriage License*, No. JAT-04-15 (July 27, 2005) (on file with author) (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).

68. See Response to Motion to Dismiss, *supra* note 67.

69. *Id.* at \*3–4.

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obtaining a ruling that same-sex couples are excluded from marriage under Cherokee law, that interest is not sufficient to confer standing.”<sup>70</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>71</sup> His challenge was dismissed for a lack of standing because Mr. Hembree “failed to show that he will suffer individualized harm.”<sup>72</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 a 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 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 a personal, particularized legal dispute.<sup>73</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.

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70. Motion to Dismiss, *supra* note 67, at 13.

71. *In re Marriage License*, *supra* note 66.

72. *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 (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.”)

73. See *infra* Part II.C.



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 to 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 the Able-and-Ready Standard and Its Inherent 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>74</sup> If the plaintiff were able and ready to compete for the benefit, then being excluded from that competition would have injured her in the relevant way for standing purposes. By contrast, if she were not able and ready to compete, then being excluded from the competition would not have caused her injury in fact, and she would lack standing.<sup>75</sup>

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>76</sup> This is so because discrimination litigation can be employed to press a political or social, as opposed to an exclusively legal,

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74. 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).

75. *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 to compete for the business loan he was denied and 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 *supra* text accompanying notes 37–59.

76. *See, e.g., Dow, supra* note 10, at 1134 ("Constitutional 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.").

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agenda.<sup>77</sup> Examples include equal protection litigation campaigns proposing law reform in the areas of school desegregation,<sup>78</sup> affirmative action,<sup>79</sup> anti-affirmative action,<sup>80</sup> and gender and sexuality rights.<sup>81</sup> Given the broad political and social ramifications of these cases, it is not 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>82</sup> Judges

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77. 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 COLUM. 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").

78. *See, e.g.*, *Brown v. Bd. of Educ.*, 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 nonsouthern 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.)

*Id.*

79. *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").

80. *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").

81. *See* Eskridge, *supra* note 16, 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").

82. *See* *Valley Forge Christian Coll. v. Ams. United for Separation of Church & 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"); *see also* *Gettman v. Drug Enforcement Admin.*, 290 F.3d 430, 432–34 (D.C. Cir. 2002) (finding that plaintiffs lacked standing to seek federal court review of agency's dismissal of their petition to initiate rulemaking proceedings and noting that "[w]hile it is perfectly proper, and indeed appropriate and even necessary, for the

must ensure that courts remain a forum of last resort for adjudicating concrete, actual, particularized disputes between adversarial parties.<sup>83</sup> As noted *supra*, a dispute is particularized if the plaintiff bringing the suit has been injured in a personal and direct way.<sup>84</sup> Personal and direct injury is tested by the requirement of injury in fact,<sup>85</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>86</sup>

Now we have come full circle because, as *Nakatani* and other similar opinions<sup>87</sup> show, the appearance of preparation can be illusive or deceiving, especially if 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>88</sup> Especially when there is no such personal right to be vindicated, a judge may not let litigation substitute for the political process.<sup>89</sup>

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political branches to respond to the abstract, ideological, philosophical or even idiosyncratic wishes and needs of citizens . . . the courts are granted authority only for the purpose delineated in Article III, section 2, clause 1 of the Constitution and 'may exercise power only in the last resort and as a necessity'" (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)).

83. See *Allen v. Wright*, 468 U.S. 737, 752 (1984); see also *Valley Forge Christian Coll.*, 454 U.S. at 472; *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976) ("[W]hen 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.").

84. See *supra* note 13 and accompanying text; see also *Lee v. State*, 107 F.3d 1382, 1387 (9th Cir. 1997) ("[S]tanding is primarily concerned with *who* is a proper party to litigate a particular matter.") (citing *CHEMERINSKY*, *supra* note 11, § 2.4 at 98–99).

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

86. *Id.* at 666; see *supra* notes 37–59 and accompanying text.

87. See *infra* notes 128–148 and accompanying text (discussing the *Lac View* and *Pedersen* cases).

88. 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)) (quotation marks 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 putatively illegal conduct of the defendant.'" (quoting *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979))).

89. See Eskridge, *supra* note 16, at 1310 (noting that courts have the power both to 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

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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>90</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>91</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>92</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 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

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avoid decisions that might settle controversial issues prematurely; a ‘minimalist’ approach to constitutional law . . .”).

90. *See, e.g.*, *Carroll v. Nakatani*, 188 F. Supp. 2d 1219, 1227 (D. Haw. 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).

91. *See infra* Part IV.A.

92. *See infra* Part IV.B.

access to an otherwise generally available resource, such as access to a child support order modification process,<sup>93</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>94</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>95</sup> The mother of a child born out of wedlock argued that these burdens violated her equal protection rights.<sup>96</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>97</sup>

While not using the terms "able and ready," the Second Circuit applied the injury-in-fact analysis set forth in *Northeastern Florida*.<sup>98</sup> The court noted that the reasoning of *Northeastern Florida* "applies with the same force to Williams's equal protection claim."<sup>99</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 wedlock. Williams is injured by the denial of equal access to the modification process.<sup>100</sup>

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93. See *infra* notes 94–104 and accompanying text.

94. 46 F.3d 1275 (2d Cir. 1995).

95. *Id.* at 1277–78 (describing dichotomous statutory processes).

96. *Id.*

97. *Id.* at 1278.

98. *Id.* at 1279 (noting that "[d]etermining injury in fact is not always easy" and applying *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993)).

99. *Id.* at 1280.

100. *Id.*

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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>101</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>102</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>103</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>104</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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101. *Id.* at 1278 (noting defendant's position at oral argument).

102. *Id.* at 1280.

103. *See infra* notes 105–154 and accompanying text.

104. 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 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*

As set forth above, 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. As will be shown below, 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 when the relevant analytical markers are transparent should not be surprising. That reason is that when the rules of a game—any game—are transparent, any spectator watching that game should be able to observe whether a competitor “broke” the rules. Similarly, when there are clear prerequisites that must be met before a competitor is prepared to compete, a spectator should be able to observe for himself whether the competitor met those prerequisites.

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 the government awards or distributes a benefit is a transparent one, then a judge should have the analytical tools available to her by which she could evaluate whether a plaintiff challenging that award was adequately prepared to participate in the competitive 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 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>105</sup> is one example of this analysis, *Northeastern Florida*<sup>106</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>107</sup> The standing issue had been suggested in a concurring opinion<sup>108</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>109</sup> On remand, the district court entered a permanent injunction.<sup>110</sup> When the case again returned to the Eleventh Circuit, the court specifically analyzed the standing issue previously

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105. For a discussion of *Nakatani*, see *supra* notes 37–59 and accompanying text.

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

107. *Id.* at 658.

108. 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.

109. *Id.* at 1286.

110. 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>111</sup> and vacated the district court's permanent injunction.<sup>112</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>113</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>114</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>115</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>116</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 of this effect is *Comer v. Cisneros*,<sup>117</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>118</sup> There were two distinct groups of plaintiffs in the case, the

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111. *Id.* at 1218–19.

112. *Id.* at 1220.

113. *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).

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

115. *Id.* at 659 (quoting AGC's complaint, ¶¶ 9, 46).

116. *Id.* at 666, 668–69; *see also supra* note 47 and accompanying text.

117. 37 F.3d 775 (2d Cir. 1994).

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

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“RAC plaintiffs” and the “Belmont plaintiffs.”<sup>119</sup> The defense challenged both groups’ standing on both statutory and constitutional grounds.<sup>120</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>121</sup> thereby violating the Fourteenth Amendment by denying them on the basis of race the opportunity to benefit from the program.<sup>122</sup> In this case, set procedures determined how a resident applied for a voucher.<sup>123</sup> Additionally, set criteria determined the priority of applicants to receive vouchers.<sup>124</sup> The district court found that the plaintiffs lacked standing,<sup>125</sup> but upon appellate review, the Second Circuit reversed.<sup>126</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>127</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>128</sup> The court also pointed to evidence offered by the lead Belmont plaintiff that she had also filed applications for the vouchers.<sup>129</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

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119. 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.*

120. *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.

121. *Id.* at 790–91.

122. *Id.* at 785–86.

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

124. *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).

125. *Id.* at 779.

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

127. *Id.* at 791.

128. *Id.*

129. *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.”).

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 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>130</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>131</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>132</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>133</sup> Of course, Justice Stevens, in dissent, did implicitly question Mr. Hamacher's sincerity.<sup>134</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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130. 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).

131. See *id.*

132. 247 F.3d 1262, 1284–85 (11th Cir. 2001) ("[T]here is no evidence that [plaintiff] intends to re-apply for admission to [defendant institution] under any version of the [challenged] admissions policy.").

133. 539 U.S. at 262 (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").

134. 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>135</sup> the defendant challenged the plaintiff’s standing in part because the plaintiff had not actually applied for the contract.<sup>136</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>137</sup> However, the Sixth Circuit found that the plaintiff did have standing.<sup>138</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>139</sup> Explicitly, the Sixth Circuit found that the able-and-ready standard did

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135. 172 F.3d 397 (6th Cir. 1999).

136. *Id.* at 403 (noting that the district court found plaintiff lacked standing for equal protection claim).

137. *Id.* at 403–04.

138. *Id.* at 404 (“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.”).

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

not require the plaintiff to have submitted a viable proposal; rather, the court found that the evidence offered by the plaintiff—suggesting a track record as a developer and the ability to meet the City’s requirements—showed that the plaintiff was “able and ready.”<sup>140</sup>

Thus, although the plaintiff “missed” an objective marker of preparation by failing to actually apply for the contract at stake, which failure 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>141</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>142</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>143</sup> Notably, these plaintiffs were all club soccer athletes.<sup>144</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>145</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

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140. *Id.* at 406.

141. *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).

142. *Id.* at 858.

143. *Id.* at 870.

144. *Id.* at 871.

145. *Id.* (noting error in the district court’s legal analysis).

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them by failing to field a varsity women's soccer team.<sup>146</sup> The Fifth Circuit reasoned that the plaintiffs' status as club soccer players meant that they stood able and ready to compete for a varsity women's soccer team—the ultimate benefit at stake in the case.<sup>147</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

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146. *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”).

147. *Id.*

allocation of scholarships and other benefits to varsity athletes.”<sup>148</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>149</sup>

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>150</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>151</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>152</sup> To cure this defect, the court in the footnote noted that this specific issue would be left for “another day.”<sup>153</sup> The text of the note states, however, that what was not before the court in this particular case was the allegation that the plaintiffs were “deterred from competing for a spot on an existing varsity team because of perceived unequal treatment.”<sup>154</sup> In other words, the court suggested that it might have resolved the standing question differently if the plaintiffs had simply but explicitly averred that they were “deterred from competing

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

149. This distinction is important because it shows the implicit norm of sincerity at work. *See infra* notes 172–175 and accompanying text.

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

151. *Id.* at 872 n.13.

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

153. *Id.* at 872 n.13.

154. *Id.*

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for a spot on an existing varsity team because of perceived unequal treatment.”<sup>155</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 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 that in this class of cases, courts can find sincerity to be a highly important factor in the injury-in-fact analysis. Similarly, this section showed that judging sincerity is something that courts in fact do, whether or not they explicitly recognize that judgment for what it is. The next section will show that the sincerity judgment is an important one and, given the rapid developments underway in antidiscrimination law, is poised to become even more important.

#### IV. 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>156</sup> Indeed, as Justice Scalia predicted these claims in his dissenting opinion in *Grutter v. Bollinger*,<sup>157</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>158</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

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155. *Id.*

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

157. 539 U.S. 306, 349 (Scalia, J., dissenting).

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



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>159</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>160</sup> Some of the programs identified in that memo included: minority-only or minority-preferred leadership workshops, scholarships, fellowships, mentoring programs, summer research internships, and recruiting and outreach programs.<sup>161</sup> In addition to the complaint pending at OCR regarding Virginia Tech, multiple complaints and investigations are pending involving other schools.<sup>162</sup>

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>163</sup> For example, since 2003, at least seventy schools have voluntarily opened minority-based programs to nonminority students.<sup>164</sup> Some college administrators are concerned about these programs on a number of levels. First, these programs are one way that universities meet their minority students' needs to fit in on campus.<sup>165</sup> Some administrators find

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159. See Memorandum from CEO to OCR (June 10, 2003), available at <http://www.ceousa.org/pdfs/VATechOCRMemo.pdf> (discussing OCR's complaint against Virginia Tech).

160. *Id.*

161. *Id.*

162. See Schmidt, *supra* note 8, at A17 (noting that at that time, "[o]nly two colleges, Pepperdine University and Washington University in St. Louis, have refused to alter scholarship 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").

163. 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).

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

165. See, e.g., Sarah Brummett, *Law Students Petition for a Minority Lounge*, WASH. SQUARE NEWS, February 17, 2006, at 1, available at [http://www.nyunews.com/vnews/display.v/ART/2006/02/17/43f57a3433506?in\\_archive=1](http://www.nyunews.com/vnews/display.v/ART/2006/02/17/43f57a3433506?in_archive=1) (reporting that, in support of a petition asking for a "minority law lounge" at the school, minority students anonymously stated feeling "isolated and estranged from the classroom environment" and stated that the "voices" of the "few people of color" were "lost in the melee"); see also Katherine S. Mangan, *Does Affirmative Action Hurt Black Law Students?*, CHRON. HIGHER EDUC., Nov. 12, 2004, at A35 (interviewing a minority

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that meeting this need is important to retain and ultimately graduate all students.<sup>166</sup> However, other administrators are concerned that identity-conscious programs, including admissions, could be divisive among students on campus<sup>167</sup> and/or that they are unlawful.<sup>168</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 use of race in certain circumstances in admissions,<sup>169</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>170</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, universities may consider race as one of many factors in an admissions program, it is not at all clear to what extent universities may consider race in programs outside of admissions to promote that same goal.

For three 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 these cases. First, the benefits of these programs are distributed from scarce resources, which

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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.’”).

166. See, e.g., Schmidt, *supra* note 8, 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”).

167. See, e.g., Peter B. Schmidt, *A New Route to Racial Diversity*, CHRON. HIGHER EDUC., 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’”).

168. See Schmidt, *supra* note 4, at A26 (“Colleges 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 8, at A17 (“Colleges throughout the nation are quietly opening a wide range of minority programs to students of any race, mainly to avoid being accused of discrimination.”).

169. *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.”).

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

means that sincerity should be an important factor in the injury-in-fact analysis.<sup>171</sup> Second, only in some of these programs will there be a transparent competitive process by which the university distributes the benefits (and so by which intent and sincerity can be measured). Third, because these cases will be somewhat inherently political, courts may, as in *Nakatani*, be presented with some plaintiffs who present at least some ideological, as opposed to a legal, stake in the case. For these reasons, the sincerity norm should be an important factor in this context.

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

#### *A. A Hypothetical Complaint: Student v. University*

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>172</sup> have been violated because the university operates multiple

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171. See *supra* text accompanying notes 117–155.

172. 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

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programs on campus in which they would like to participate but cannot participate because the programs are reserved for minorities only.<sup>173</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” (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>174</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 offer academic programming, including a two-hour session entitled “Study Skills for Success,” and a two-hour “Introduction to the Library” 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-

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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).

173. 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.

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

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>175</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 and attended the pre-orientation session. Specifically, the record shows that at the general orientation, all students are invited to a similar but not identical two hour session on academic preparation/study skills, and all students are offered the 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 missed a relevant marker of preparation here: she has admitted that even if given the chance, she would not attend the study skills session twice.<sup>176</sup> From this you conclude that Plaintiff A has shown no concrete stake in the litigation over these two programs. She is

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

176. *See supra* notes 106–130 and accompanying text.

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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 as 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 has met the relevant markers here: he was 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 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 has 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>177</sup> Like the plaintiff in *Nakatani*, she has failed to offer any "bona fides" that she intended to use the benefits if she were to "win" them.<sup>178</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>179</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>180</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 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.

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177. *See supra* text accompanying note 55.

178. *See supra* text accompanying note 45.

179. *See supra* text accompanying notes 57–63.

180. *See supra* text accompanying notes 34–54.

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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 open to him.<sup>181</sup> 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 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>182</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 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

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181. *See supra* text accompanying notes 106–135 (discussing past behavior as a relevant marker).

182. *See supra* text accompanying notes 149–159.



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>183</sup> In effect, Article III requirements would be waived; only prudential standing concerns might set bounds on the universe of potential plaintiffs here.<sup>184</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>185</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>186</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>187</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 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 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

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

184. 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”).

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

186. *See supra* Part III.

187. *See supra* Part III.B.2.

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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 this 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.

## V. CONCLUSION

In sum, because antidiscrimination law is developing rapidly—for example, in the higher education context—the time has come to take another look at why courts find that some plaintiffs have been injured in fact by the alleged discrimination, and some have not. As shown in Part I, it is not enough for a limited-resources discrimination plaintiff to aver that discrimination prevented her from winning a government benefit. Rather, a plaintiff in a limited-resources discrimination case must be able to show that, at the time she was discriminated against, she stood able and ready to compete for the benefit at stake. As shown in Part II, the able-and-ready test has an inherent norm, the norm of sincerity, which some courts have implicitly drawn on to help evaluate a plaintiff's stated injury in fact. Part III demonstrated how courts judge sincerity: what triggers the norm and how it operates to root out falsity and identify a plaintiff's personal stake in the litigation.

Part IV showed that the norm is likely to be particularly relevant and necessary in an upcoming area of equal protection litigation—an area vulnerable to being co-opted to press a political agenda. That litigation has been presaged by Justice Scalia, who told us to expect students to file lawsuits alleging discrimination in university affirmative action preferences outside of the admissions context. One challenge for a court

hearing this type of claim will be to ensure that the plaintiff pressing the claim brings a legal dispute to the courthouse, rather than (or at least in addition to) a political one.

Because the norm of sincerity helps courts ensure that a complaint asserts a legally cognizable injury and helps root out claims based on ideological or political injury, recognizing the norm of sincerity will help courts better serve the gatekeeping function with which they've been charged by Article III. And, while the complaint in Part IV illustrating the norm at work in this context was only hypothetical, as predicted by Justice Scalia, its real world counterpart probably is not far off.