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IN THE WAKE OF *GRATZ V. BOLLINGER*: STANDING ON THIN ICE

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Recently, in a display of remarkable inconsistency, the Supreme Court held that a transfer student had standing to challenge the constitutionality of a university's freshman admissions policies. In *Gratz v. Bollinger*,[1] the Supreme Court upheld the standing of a white transfer student to challenge the University of Michigan's affirmative action policies as applied to its freshman admissions program under the Equal Protection Clause[2] of the Constitution.[3] This decision further muddies the already murky waters of the Article III standing requirement when applied to equal protection cases.

This Comment examines the standing doctrine as found in equal protection cases. Part I traces the birth and evolution of the standing doctrine by looking at the Constitution and relevant case law. Part I also explains the development of the constitutional elements of injury-in-fact, causation and redressability as they have emerged in case law. Part II analyzes the Supreme Court's treatment of the Article III standing requirement in equal protection cases. Part II also examines key affirmative action cases leading up to the Court's holding in the *Gratz* opinion. Part II further examines the *Gratz* opinion and concludes that the Court erred in finding that the plaintiff had standing. Part III argues that the less restrictive approach to standing adopted by the federal courts to facilitate equal protection challenges brought by non-minority plaintiffs against affirmative action programs does not truly serve the best interests of those plaintiffs. Part III further suggests a return to the classical interpretation of standing in equal protection cases. It further suggests that if the Court is unwilling to apply the classical standing requirements, it should expressly hold

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1. 539 U.S. 244 (2003).

2. U.S. CONST. amend. XIV, § 1. The relevant portion of the amendment reads: "No State shall make or enforce any law which shall . . . deny to any person . . . the equal protection of the laws." *Id.*

3. *Gratz*, 539 U.S. at 268.

that the relaxed standing requirement will apply to all equal protection challenges.

I. BACKGROUND

A. Article III: "Cases" and "Controversies"

Since Chief Justice John Marshall wrote in 1803 that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[4] various doctrines have arisen to outline the boundaries for such a judicial determination.[5] Article III of the Constitution defines the reach of the federal judiciary by limiting jurisdiction to "cases" and "controversies."[6] From these two words,[7] the concept of justiciability has developed to define and sharpen the bounds of federal jurisdiction.[8]

Justiciability significantly limits the suits that federal courts may hear. A federal court cannot, for example, pronounce void any statute, unless the pronouncement results from the court's judgment of the "legal rights of litigants in actual controversies."[9] The case-and-controversy doctrine, therefore, precludes advisory opinions[10] and decisions on political questions.[11] However, the doc-

4. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

5. LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW 97 (2d ed. 1995). These doctrines include justiciability, standing, mootness, ripeness, political questions and prudential considerations. *Id.*

6. U.S. CONST. art. III, § 2, cl. 1. The "cases" and "controversies" requirement is set forth in the following constitutional language: "The judicial Power shall extend to all Cases, . . . [and] to Controversies . . . ." *Id. See also* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.").

7. Flast v. Cohen, 392 U.S. 83, 94-95 (1968) (portraying cases and controversies as having an "iceberg quality, containing beneath their surface simplicity submerged complexities").

8. *Id.* at 95 (explaining that justiciability is the embodiment of the dual limitation placed upon federal courts by the case-and-controversy doctrine: the requirement of adverseness of questions presented, capable of resolution through the judicial process, and the principle of separation of powers). *See also id.* (describing justiciability as "a concept of uncertain meaning and scope"); Poe v. Ullman, 367 U.S. 497, 508 (1961) (painting the legal concept of justiciability as having no "fixed content" nor "susceptible of scientific verification" with its utilization "the resultant of many subtle pressures").

9. Baker v. Carr, 369 U.S. 186, 204 (1962) (quoting Liverpool Steamship Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885)).

10. *Flast*, 392 U.S. at 96. The edict against advisory opinions arises from events in the early 1790's whereupon authorization by Congress, a suit was brought to determine the constitutionality of a statute. FISHER, *supra* note 5, at 100. The suit did not create a case or controversy between adverse parties. *Id.* In 1793, the Secretary of State asked the Justices of the Supreme Court if "their advice to the executive would be available in the solution of important questions of the construction of treaties, laws of nations and laws of the land".

trine does allow for declaratory judgments.[12] At a minimum, federal judiciary power is limited to questions that are "real and substantial," not hypothetical, abstract, academic or moot.[13]

Justiciability encompasses various other doctrines designed to further delineate the jurisdiction of the federal courts.[14] Among these are standing, ripeness, mootness and political question.[15] Of these four principles, the doctrine of standing determines whether a "real and substantial" controversy exists.[16]

Muskrat v. United States, 219 U.S. 346, 354 (1911). Chief Justice Jay replied to President Washington that the system of checks and balances in the Constitution and the Supreme Court being a last resort were strong arguments against the Justices giving advisory opinions to the President. *Id.* To view a copy of the original letter sent to President Washington by Justice John Jay, *see* Letter from John Jay to George Washington (Aug. 8, 1793), http://www.columbia.edu/cgi-bin/cul/jaypapers/jp?mode=item&key=columbia.jay.08444 (last visited Jan. 30, 2005) (discussing arguments against giving advisory opinions to the President). *See also* FISHER, *supra* note 5, at 100-01 (discussing ways in which the Supreme Court still manages to give advisory opinions to the Executive).

11. *See* Baker, 369 U.S. at 217 (viewing political questions as "essentially a function of the separation of powers"). Baker explained the reasons that political questions are unjusticiable when it said:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id.

12. The Declaratory Judgments Act expressly allows declarations, stating:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree . . . .

Declaratory Judgments Act, 28 U.S.C. § 2201 (2000).

13. *Poe*, 367 U.S. at 510.

14. Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 AM. BANKR. L.J. 109, 116-17 (1997).

15. *Id.*

16. *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 313 (3d ed. 2000) (summarizing the role of standing as "an examination of the sufficiency of the stake of the person making the claim, to ensure the litigant has suffered an actual injury which is fairly traceable to challenged action and likely to be redressed by the judicial relief requested").

B. The Standing Doctrine: A Brief History

1. "Legal Interest" Test

The focus on standing "as a distinct body of constitutional law is an extraordinarily recent phenomenon."[17] In 1992, Professor Sunstein noted that of all the times that the Supreme Court discussed standing in terms of Article III, nearly all occurred after 1965, and almost half occurred after 1985.[18] He further noted that the terms "standing" and "injury-in-fact" did not appear in case law until after 1970.[19]

In the early part of the twentieth century, the right to sue existed only when the plaintiff could show the invasion of a "legal right" conferred by Congress or common law.[20] A plaintiff did not have to demonstrate a personal stake or injury-in-fact.[21] Consistent with these principles, the Supreme Court at that time denied standing in the absence of a law that conferred a right to sue to the plaintiff.[22]

2. Injury-in-Fact

In 1970, *Ass'n of Data Processing Service Organizations v. Camp*[23] greatly narrowed the old Article III jurisprudence requirement of an infringement of a legal right.[24] In *Data Process-*

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17. Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 169 (1992).

18. *Id.* at 169. Professor Sunstein surveyed Supreme Court opinions ending in 1992 and found that the Supreme Court discussed standing in terms of Article III on 117 occasions. *Id.* Fifty-five of those discussion occurred after 1985, during a span of only seven years. *Id.* Seventy-one of those discussions, nearly two-thirds, occurred after 1980, in the span of only a decade. *Id.* Of the 117, 109 of the discussions, or over ninety percent, have occurred since 1965. *Id.*

19. *Id.* at 169, 180.

20. *Id.* at 170. The legal right could be "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Id.* at 181.

21. *Id.* at 170. Professor Sunstein goes on to say that there is no direct evidence that the Framers intended personal stake or injury-in-fact to be constitutional prerequisites under Article III. *Id.* at 173. *See also id.* at 166-67 (arguing that injury-in-fact has no support in the text or history of Article III and is essentially an invention of federal judges, and recent ones at that). "[T]he very notion of 'injury-in-fact' is not merely a misinterpretation of the Administrative Procedure Act and Article III but also a large-scale conceptual mistake." *Id.* at 167. No court referred to "injury-in-fact" until 1970, and the phrase has played no role in administrative or constitutional law since that time. *Id.* at 169-70.

22. *Id.* at 180.

23. 397 U.S. 150 (1970).

24. Tunde I. Ogowewo, *Wrecking the Law: How Article III of the Constitution of the United States Led to the Discovery of a Law of Standing to Sue in Nigeria*, 26 BROOK. J. INT'L L. 527, 553 (2000) (noting *Data Processing*). *See*

ing, the Supreme Court adopted the injury-in-fact test.[25] This concept shifted the focus of standing analysis from the requisite "injury to a legally protected interest" to "objective, concrete harm."[26] This trend towards broadening the injury-in-fact requirement continued until the mid-1970s, culminating in the Supreme Court's decision in *United States v. Students Challenging Regulatory Agency Procedures ("SCRAP")*.[27]

In *SCRAP*, an environmental group brought suit to challenge the Interstate Commerce Commission's surcharge on railroad freight rates, claiming by an attenuated line of reasoning that the surcharge would result in an increased use of non-recyclable goods.[28] This, in turn, would divert natural resources out of the Washington area and into the manufacturing process, which would cause more litter everywhere, including Washington.[29] The Court found that the group had pleaded specific and perceptible harm sufficient to survive a motion to dismiss for lack of standing.[30]

With the decision in *SCRAP* criticized as going to "the very outer limit of the law,"[31] the Supreme Court responded to the new recognition of "intangible, subjective, shared, or legally related injuries" with attempts to contract the now engorged injury-in-fact standard.[32] In 1975, the Supreme Court once again restricted the

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also Eric J. Kuhn, *Standing: Stood up at the Courthouse Door*, 63 GEO. WASH. L. REV. 886, 887 (1996) (stating that prior to 1970, the Supreme Court employed the "legal interest" test, whereby the Court would deny standing to any plaintiff who could not show "an invasion of a common law or statutory right, such as an economic harm or bodily injury").

25. 397 U.S. at 152. In *Data Processing*, petitioners sought to challenge a ruling permitting national banks to make certain services available to other banks and bank customers. *Id.* at 151. The district court dismissed the complaint finding that the petitioners lacked standing. *Id.* The Supreme Court reversed, finding that the petitioners had standing because they could demonstrate economic harm. *Id.* at 152-53. In its decision, the Court introduced the "zone of interests" principle, finding that the petitioners' complaint fell within the zone of interests of the challenged statute. *Id.* at 157. *See also* Sunstein, *supra* note 17, at 186 (stating that Davis first mentioned injury-in-fact in his treatise, misreading the Administrative Procedure Act and inadvertently renovating standing law).

26. Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 74 (1984).

27. 412 U.S. 669 (1973).

28. *Id.* at 688.

29. *Id.*

30. *Id.*

31. Whitmore v. Arkansas, 495 U.S. 149, 159 (1990). *See also* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889 (1992) (characterizing the *SCRAP* decision as an expansive view that "has never since been emulated by [the Supreme] Court"). Indicating that the Court may rule differently upon reconsideration of the case, Professor Tribe believes that *SCRAP* will never be overruled, because "it has largely become a dead letter." TRIBE, *supra* note 16, at 414.

32. Nichol, *supra* note 26, at 75.

requirement to challenge a governmental action by requiring a "distinct and palpable injury."[33] In subsequent cases, the Court looked for a showing of a direct, particular harm,[34] rather than one which is "conjectural" or "hypothetical."[35] Because injury-in-fact has been difficult to define, the Supreme Court often makes case-by-case determinations of whether a plaintiff has made a sufficient showing of injury-in-fact.[36]

3. Redressability

The element of redressability[37] goes hand-in-hand with injury-in-fact to establish standing.[38] Over the years, the Supreme Court has fluctuated widely in its treatment of this standing requirement.[39] In 1976, the Court required that a plaintiff must show

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33. Warth v. Seldin, 422 U.S. 490, 501 (1975). The Supreme Court did not preclude suits which might address grievances of the public at large:

> But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim.

Id. See also Whitmore, 495 U.S. at 155 (stating that the injury "must be concrete in both a qualitative and temporal sense").

34. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 485-86 (1982). In *Valley Forge*, an organization challenged the conveyance of property by the federal government to a religiously affiliated college based on the First Amendment. *Id.* at 467-69. The Supreme Court found that the organization was no more adversely affected by the conveyance than any other citizen and could not show any personal injury, and therefore did not have standing to file the suit. *Id.* at 485-86.

35. City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983). In *Lyons*, the plaintiff was subjected to a chokehold by the police department and suffered physical injury. *Id.* at 97-98. The plaintiff sought an injunction to prevent the police from administering chokeholds in the future. *Id.* at 102-03. The Supreme Court found that the plaintiff had no standing to *seek* an injunction because his allegation of past misconduct by the police did not prove that the misconduct would continue. *Id.* at 106.

36. *See* TRIBE, *supra* note 16, at 400 (acknowledging that "no general definition of the requirement is truly satisfactory"). The Supreme Court has acknowledged that an understanding of the requirement can come about "only through immersion in the various cases raising questions of injury-in-fact." *Id.*

37. Although *Lujan v. Defenders of Wildlife* sets out three elements of the standing doctrine, namely injury-in-fact, causation and redressability, 504 U.S. 555, 560-62 (1992), Professor Spann explains that causation and redressability "are best understood as dual aspects of a single concern." Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1429 (1995). He goes on to state that, "[i]f an injury is proximately caused by the allegedly unlawful action being challenged, then a judicial remedy will redress that injury, thereby ensuring that the courts are not impermissibly interfering with the political process by issuing advisory dicta." *Id.*

38. TRIBE, *supra* note 16, at 424.

39. *See* Nichol, *supra* note 26, at 102 n.27 (exemplifying the inconsistent manner in which the Court has treated redressability in a number of cases).

that redressability would *likely* result,[40] whereas only a year earlier, the Court had ruled that a plaintiff had to show that redressability *would* result.[41] Regardless of the Court's approach, however, the basic requirement has remained that a plaintiff "personally would benefit in a tangible way from the court's intervention."[42]

At its heart, redressability mandates that a plaintiff must show that if the court found in his favor, the result would be the relief that he sought.[43] If a favorable judgment would not redress plaintiff's injury, standing would be lacking.[44] Absent a showing of redressability by a plaintiff, "exercise of its power by a federal court would be gratuitous and thus inconsistent with the Article III limitation."[45] Redressability, therefore, ensures the presence of both personal stake and adverseness in a matter, which in turn keeps the federal judiciary within its constitutional role.[46]

Traditionally, the Court treated causation and redressability as two sides of the same coin.[47] It is telling that the definitive constitutional law treatise treats both causation and redressability in a single section.[48] In some cases, however, the Supreme Court has stated that the distinction between causation and redressability is crucial to a fair analysis of the issues.[49] Therefore, just as failure

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40. *See Simon*, 426 U.S. at 38 (requiring that plaintiff show an injury to himself "likely to be redressed by a favorable decision").

41. *See Warth*, 422 U.S. at 505 (listing as an Article III minimum requirement a showing that "prospective relief will remove the harm").

42. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 104 n.5 (1998) (quoting *Warth*, 422 U.S. at 508).

43. *See* Cynthia L. Fountaine, *Article III and the Adequate and Independent State Grounds Doctrine*, 48 AM. U. L. REV. 1053, 1080 (1999) (emphasizing that redressability requires that a favorable court decision will produce some change or have an impact on the outcome of the case).

44. The Court in *Simon* found that there was not a substantial likelihood that a favorable court decision would redress the plaintiffs' injury, and absent such a showing, standing could not be granted. *Simon*, 426 U.S. at 45-46. In *Allen v. Wright*, the Supreme Court came to a similar finding that the chances of plaintiffs' children being educated in a racially integrated school as a result of the Court's ruling was doubtful. 468 U.S. 737, 740 (1984). The Court added that it was highly speculative whether the school would actually become less segregated as a result of the Court's ruling. *Id.*

45. *Simon*, 426 U.S. at 38.

46. Fountaine, *supra* note 43, at 1064 (noting that the Court will also be protected from issuing advisory opinions as a consequence).

47. *Allen*, 468 U.S. at 753 n.19. The *Allen* decision points out the difference between causation and redressability, in that "the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested." *Id.*

48. *See* TRIBE, *supra* note 16, at 424-33 (discussing the concepts of causation and redressability in the same section).

49. *Allen*, 468 U.S. at 753 n.19. Cases such as *Allen*, in which the relief requested goes well beyond the violation of law alleged, illustrate why it is im-

to show redressability can lead to lack of standing, failure to establish a connection between the plaintiff's injury and an act committed by the defendant can similarly demonstrate a lack of standing.[50]

4. Separation of Powers

Another important facet of any discussion of justiciability is a separation of powers analysis.[51] This analysis was first injected into the standing doctrine in *Allen v. Wright* in 1984.[52] This decision made a significant conceptual impact upon the standing analysis, as Professor Nichols explains:

> Without explanation, and unsupported by two decades of decisions and commentary, the *Allen* Court has ruled that the requirements of standing are to be interpreted primarily by reference to "separation of powers principles." At the very least, *Allen* has introduced a new factor into the already complex standing calculus. At most, *Allen* may portend a major tightening of judicial access by the Supreme Court in the name of deference to other branches of government.[53]

Although prior cases discussed separation of powers principles vis-à-vis the standing requirements, *Allen* was the first case to "explicitly suggest[] that separation of powers principles be used to interpret or give meaning to the injury, causation, and redress-

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portant to keep the inquiries separate if the "redressability" component is to focus on the requested relief. *Id.*

50. *Simon*, 426 U.S. at 41-42. The plaintiffs in *Simon* challenged an IRS ruling that allowed certain hospitals to limit services to indigents. *Id.* at 33. The Court found that the plaintiffs could not show that the IRS ruling alone kept the hospital from serving indigents. *Id.* at 42. It suggested the hospital could very well decide on its own that it would limit services to indigents. *Id.* at 42-43. Consequently, the plaintiffs failed to show a causal connection between the IRS ruling and limited service to indigents. *Id.* at 42-44. In *Allen*, the plaintiffs were black parents who challenged the IRS' decision not to deny tax-exempt status to certain discriminatory private schools and alleged that the denial resulted in their children being unable to attend desegregated schools. *Allen*, 486 U.S. at 739. The Court found that the causal relationship between the IRS' refusal to deny tax-exempt status and the plaintiffs' children being unable to receive education in a racially integrated school was too weak. *Id.* at 740. Consequently, the Court denied standing to the plaintiffs. *Id.*

51. Separation of powers as it pertains to the standing doctrine ensures the judiciary does not unconstitutionally infringe on the duties of the legislative and executive branches. David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37, 47-48 (1984). *See generally* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983) (arguing for the examination of standing issues based on a separation of powers analysis).

52. 468 U.S. 737, 761 n.26 (disagreeing with the suggestions of the dissent "that separation of powers principles merely underlie standing requirements, have no role to play in giving meaning to those requirements, and should be considered only under a distinct justiciability analysis").

53. Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 636 (1985) (defining *Allen* as a watershed decision).

ability requirements of the standing determination . . . [and] bring[] separation of powers analysis out of the prudential realm and squarely into the article III constitutional inquiry."[54]

C. The Standing Doctrine: Today

Despite all the changes that standing law has undergone, the fundamental principle of "personal stake" has remained constant.[55] To use the oft-quoted language of *Baker v. Carr*, the question of standing asks "[h]ave the appellants alleged such a *personal stake* in the outcome of the controversy . . . ."[56] By requiring personal stake as a prerequisite to justiciability, standing has essentially played the role of gatekeeper for federal courts determining the likelihood that a court will hear a certain matter.[57]

Although riddled with confusion,[58] standing persists as a mandatory and threshold condition of the constitutional case-and-controversy requirement.[59] It differs from all other elements of justiciability in that it focuses primarily on the party rather than on the substantive or underlying issues.[60] Although Congress may confer standing upon citizens by statute,[61] the Article III standing requirements must still be satisfied.[62] From a line of decisions,

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54. *See id.* at 659 n.8 (defining *Allen* as a watershed decision).

55. *Baker*, 369 U.S. at 186, 204.

56. *Id.* at 204 (emphasis added).

57. *See Valley Forge*, 454 U.S. at 475-76 (stating that "[t]hose who do not possess Art. III standing may not litigate as suitors in the courts of the United States").

58. *See, e.g., id.* at 475 (stating that the Court "need not mince words when [it] say[s] that the concept of 'Art. III standing' has not been defined with complete consistency"); *Data Processing*, 397 U.S. at 151 (stating that "[g]eneralizations about standing to sue are largely worthless as such"); Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839, 857 (1997) (stating that "the standing doctrine has developed a reputation for ambiguity and complexity that is virtually unrivaled among modern legal concepts"); Nichol, *supra* note 53, at 650 (finding standing law unsatisfactory such that "[a]nnounced principles do not explain even the major cases").

59. *See Lujan*, 504 U.S. at 560-61 (holding standing to be an "irreducible constitutional minimum").

60. *Flast*, 392 U.S. at 99. "[When] standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Id.* at 99-100.

61. *Warth*, 422 U.S. at 501 (recognizing that "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules").

62. *See id.* at 501 (emphasizing that even with a statutory grant of standing, the Article III requirement remains: "the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants"). *See also* Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997) (stating that "[i]t is settled that Congress cannot erase Article III's

three constitutional elements of standing have emerged.[63] First, the plaintiff must allege an "injury-in-fact."[64] Second, the injury must be "fairly traceable" to an act of the defendant.[65] Third, the plaintiff must show that the injury is one that can be "redressed by a favorable decision."[66]

Along with the constitutional requirements of standing, the courts established certain prudential principles that limit a party's ability to seek relief on a matter.[67] These include situations in which plaintiffs: present issues which are "generalized grievances";[68] assert the rights or interests of third parties instead of their own;[69] or do not present a claim which falls within the "zone of interest" to be protected by the statute or constitutional guarantee.[70]

II. STANDING DOCTRINE IN EQUAL PROTECTION CASES: "SEPARATE BUT EQUAL" STANDING REQUIREMENTS

In the past fifty years, starting with *Brown v. Board of Education*,[71] the Fourteenth Amendment[72] has been a powerful tool used to address and remedy discriminatory practices in society.[73]

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standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing"). *See generally* Sunstein, *supra* note 17, at 202-15 (discussing how *Lujan* radically curbed the Congressional power to confer standing). Professor Sunstein remarks that *Lujan* "ranks among the most important [decisions] in history in terms of the sheer number of federal statutes that it apparently has invalidated." *Id.* at 165. *See also Lujan*, 504 U.S. at 561-66 (placing constraints on congressionally conferred as well as judicially conferred standing).

63. *Valley Forge*, 454 U.S. at 472.

64. *Lujan*, 504 U.S. at 560. Specifically, a plaintiff must show "an invasion of a legally protected interest" which is particularized and "actual or imminent, not conjectural or hypothetical." *Id.* (quoting *Lyons*, 461 U.S. at 102) (internal quotations omitted).

65. *Id.* The injury must be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." *Id.* (quoting *Simon*, 426 U.S. at 41-42).

66. *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43).

67. These prudential principles can be used to deny standing even when the constitutional requirements are satisfied. Gladstone, Realtors v. Bellwood, 441 U.S. 91, 99 (1979). The Court explains that these principles are the means "by which the judiciary *seeks* to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim." *Id.* at 99-100.

68. *Valley Forge*, 454 U.S. at 475 (citing *Warth*, 422 U.S. at 499).

69. *Id.* at 474 (citing *Warth*, 422 U.S. at 499-500).

70. *Id.* at 475(quoting *Data Processing*, 397 U.S. at 153).

71. 347 U.S. 483 (1954).

72. U.S. CONST. amend. XIV, § 1.

73. *See* Brian R. Markley, Comment, *Constitutional Provisions in Conflict: Article III Standing and Equal Protection after* Shaw v. Reno, 43 KAN. L. REV. 449, 449 (1995) (noting the development of equal protection doctrine as a re-

Affirmative action programs emerged as one answer to remedy harms against minorities and promote racial diversity.[74] One result of these programs has been an outcrop of "reverse discrimination" suits by non-minorities challenging these programs based on violations of the Equal Protection Clause of the Fourteenth Amendment.[75] In 1989, the Supreme Court mandated that courts apply strict scrutiny to affirmative action programs.[76] As a result, "the issue of standing has become highly important because it is the vehicle through which the courts can expand or limit the number of nonminority plaintiffs who may challenge affirmative action programs."[77]

A. Standing Requirements in Equal Protection Cases

1. Regents of University of California v. Bakke

The first case in which the Court applied the Equal Protection Clause to an affirmative action challenge was *Regents of the University of California v. Bakke*.[78] In this case, the Supreme Court held that an affirmative action program at the University of California Medical School was unlawful.[79]

In *Bakke*, the University of California Davis Medical School rejected the application of the plaintiff, Bakke, a white male.[80] Bakke brought suit against the University, claiming that the school's admissions scheme violated the Equal Protection Clause of the Fourteenth Amendment.[81] The California Supreme Court, finding that Bakke had proved that the University had discriminated against him based on his race, directed the trial court to enter judgment ordering Bakke's admission to the medical school.[82] The Supreme Court affirmed the holding that the special admissions program was unlawful.[83]

The Court limited its discussion of standing in the decision to a footnote, finding that the fact that Bakke was not allowed to compete for all of the seats available for the entering class of medi-

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sponse to discriminatory governmental policies).

74. David J. Antczak, Bras v. California Public Utilities Commission*: Using "Economic Realities" to Establish Standing and Challenge "Goal"-Based Affirmative Action*, 41 VILL. L. REV. 1445, 1446 (1996).

75. *Id.* at 1448.

76. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989).

77. Antczak, *supra* note 74, at 1451.

78. 438 U.S. 265 (1978).

79. *Id.* at 320.

80. *Id.* at 276.

81. *Id.* at 277-78.

82. *Id.* at 280-81.

83. *Id.* at 271-72. The Court affirmed that portion of the ruling that ordered Bakke's admission and held the admissions program invalid, but reversed insofar as the ruling prohibited the University from taking race into consideration in its admission decisions. *Id.*

cal school was sufficient to confer standing upon him.[84] The Court did not look beyond those facts to determine whether Bakke would have been accepted to the medical school but for the affirmative action program in place.[85] In effect, the Court ignored the standing requirements which would require a showing that a favorable ruling would result in Bakke's admission to the medical school because he was a qualified applicant.

2. Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville

The most notable 180-degree turn in standing came in the Court's decision in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*.[86] In this case, the Supreme Court upheld the standing of non-minority construction contractors to challenge a minority set-aside program under the Equal Protection Clause.[87]

In *Northeastern*, the plaintiff was an association comprised of individuals and firms in the Jacksonville, Florida construction industry.[88] Plaintiff challenged the constitutionality of a municipal law that set aside ten percent of the construction funds for minority contractors.[89] The Eleventh Circuit found that the plaintiff lacked an injury-in-fact because it had failed to demonstrate that even one of its members would have received a city contract but for the city ordinance.[90] The Supreme Court overturned the decision finding that the plaintiffs had standing to challenge the ordinance.[91]

In *Northeastern*, the Court reviewed its prior equal protection decisions[92] and held that the injury-in-fact requirement compelled

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84. *Id.* at 280-81 n.14. The Court specifically states that:

> [E]ven if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim. The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. Hence the constitutional requirements of Art. III were met.

Id. (citations omitted).

85. *See* Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 311 (2002) (indicating the Court's failure to find out if Bakke was even qualified to compete).

86. 508 U.S. 656 (1993).

87. *Id.* at 669.

88. *Id.* at 659.

89. *Id.* at 658-59.

90. *Id.* at 660.

91. *Id.* at 658.

92. *See id.* at 663-66 (reviewing equal protection cases addressing injury-in-fact). *See also* Clements v. Fashing, 457 U.S. 957, 962 (1982) (granting plaintiff standing to challenge requirement that directs state officeholders to resign

only a showing of intent on the part of the plaintiff.[93] Despite its previous record of setting a high standard for standing, the Court now relaxed its stance on requirements to establish standing, making it easier for parties to seek relief for violations of the Equal Protection Clause.[94]

3. Gratz v. Bollinger

The most recent Supreme Court decision applying the relaxed standing requirements established in *Bakke* and *Northeastern* is *Gratz v. Bollinger*. In this case, the Supreme Court upheld the standing of a white transfer student to challenge the University of Michigan's affirmative action policies as applied to its freshman admissions program under the Equal Protection Clause.[95]

a. Facts and Prior History

Petitioners Jennifer Gratz and Patrick Hamacher, both Caucasian, applied for undergraduate admission to the University of Michigan ("University").[96] In October 1997, following the denial of

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from current office when candidacy for other offices is announced, even though plaintiff did not allege that plaintiff would have been elected "but for" requirement); *Bakke*, 438 U.S. at 280-81 n.14 (finding standing for white medical school applicant to challenge school policy of reserving seats in class for minority applicants, in absence of allegation that plaintiff would have been admitted to school but for race-conscious policy); *Warth*, 422 U.S. at 516 (denying standing to organization challenging town zoning ordinance that effectively excluded low and moderate income persons because organization did not refer to any specific project of its members that was precluded by ordinance); Turner v. Fouche, 396 U.S. 346, 362 n.23 (1970) (concluding that plaintiff had standing to challenge law that limited school board membership to property owners, even though plaintiff never averred that plaintiff would have been appointed to board in the absence of the limitation).

93. *Northeastern*, 508 U.S. at 666. The Court explained the manner in which the injury-in-fact requirement would be satisfied, stating:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group *seeking* to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury-in-fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Id.

94. Such a relaxed standing policy would expand judicial power. George P. Choundas, *Neither Equal Nor Protected: The Invisible Law of Equal Protection, the Legal Invisibility of Its Gender-Based Victims*, 44 EMORY L.J. 1069, 1154 (1995). *But see* United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring) (cautioning against an expanded judicial power in its statement: "It *seems* to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government").

95. *Gratz*, 539 U.S. at 267-68.

96. *Id.* at 251. In *Gratz*, the petitioners applied to the University's College

their applications by the University, Gratz and Hamacher filed a class-action lawsuit[97] in the United States District Court for the Eastern District of Michigan against the University[98] for violation of the Fourteenth Amendment.[99] Meanwhile, during the pendency of the case, both Gratz and Hamacher enrolled at other schools from which they graduated.[100]

At the outset, the District Court designated Hamacher the class representative for the lawsuit.[101] In the liability phase of the trial,[102] the court granted in part the motions for summary judgment of both the petitioners and the University.[103] Both parties

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of Literature, Science and the Arts ("LSA") as residents of the State of Michigan. *Id.*

97. Plaintiffs sought compensatory and punitive damages for past violations. *Id.* at 252. They further sought injunctive relief prohibiting the University from the continued use of its affirmative action admissions policy. *Id.* Finally, Hamacher sought an order requiring the University to grant him admission as a transfer student. *Id.*

98. Petitioners filed their lawsuit against the University of Michigan, the LSA, James Duderstadt and Lee Bollinger. *Id.* Subsequently, the University and the LSA were replaced by the proper defendant, The University of Michigan Board of Regents. *Id.* at 252 n.2. Duderstadt, sued in his individual capacity, was the president of the University when Gratz's application was pending. *Id.* at 252 n.3. Bollinger, sued in both his individual and official capacities, was the president of the University at the time Hamacher applied for admission. *Id.*

99. Petitioners' complaint was a class-action suit alleging violations of their rights under the Equal Protection Clause of the Constitution as well as racial discrimination in violation of 42 U.S.C. §§ 1981, 1983 and 2000d. *Id.* at 252.

100. *Gratz*, 539 U.S. at 251. A final decision on Gratz's admission was delayed. *Id.* The University stated that Gratz was "well qualified," but "less competitive" than the students who had been admitted. *Id.* Upon learning that her admission had been denied, Gratz enrolled in the University of Michigan at Dearborn from which she graduated in the spring of 1999. *Id.* Hamacher's admission was also delayed and he was given the same reason as the one given to Gratz by the University. *Id.* His application was denied and he subsequently enrolled at Michigan State University. *Id.* He has since graduated from Michigan State University. *Id.* at 251 n.1.

101. *Id.* at 253. The district court found that a class action was appropriate in the case and granted class certification. *Id.* at 252. The certified class consisted of those who were denied admission to the University beginning in 1995 and who were members of racial groups not considered by the University in its admissions policy. *Id.* at 252-53.

102. On petitioner's motion, the district court agreed to bifurcate the trial into a liability and damages phase. *Id.* at 253. The first phase of the trial, the liability phase, was to determine whether the University's admissions policy violated the Equal Protection Clause. *Id.*

103. *Id.* at 259. The parties filed cross-motions for summary judgment with respect to liability. *Id.* at 257. The court granted the petitioners' motion for summary judgment for the years from 1995 to 1998, finding that the policy operated as a quota and was therefore unconstitutional. *Id.* at 257 n.9. The court also granted the University's motion for summary judgment for the years 1999 and 2000, finding that the University's admissions policy was constitutional. *Id.*

appealed to the Sixth Circuit and while the interlocutory appeals were pending, the Sixth Circuit issued an opinion in *Grutter v. Bollinger*, upholding the University's law school admissions policy.[104] Even though the Sixth Circuit had not yet rendered an opinion in *Gratz*, the Supreme Court granted certiorari in both cases.[105] In *Grutter* and *Gratz*, the Court addressed the constitutionality of the University's admissions policies that considered race as one factor in determining admission.[106]

b. The Majority Opinion

Although no party had raised the issue on appeal, the Supreme Court Justices addressed the issue of standing.[107] The majority, led by Chief Justice Rehnquist, held that Hamacher had standing, based on a personal stake in the outcome of the suit.[108] The majority found that Hamacher's intent to apply as a transfer student sufficiently countered Justice Stevens' contention[109] that Hamacher did not in fact establish himself as a transfer student nor did he prove injury-in-fact.[110] The majority also found that the differences between the freshman and transfer admissions policies were sufficiently similar to justify Hamacher as class representative for claims made as to the freshman admissions policy.[111] The Court did admit, however, that its holding in this case was in tension with prior holdings on the issue.[112]

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104. 288 F.3d 732, 735 (6th Cir. 2002).

105. *Gratz*, 539 U.S. at 259-60.

106. *Id.*

107. *Id.* at 260. Pursuant to the Article III case or controversy requirement, when the Supreme Court reviews a decision of a federal district court, it is obligated to examine the standing of the parties even if the issue of standing is not raised by the parties themselves. Juidice v. Vail, 430 U.S. 327, 331 (1977).

108. *Gratz*, 539 U.S. at 268. The Court held that Hamacher had standing due to "[his] personal stake, in view of both his past injury and the potential injury he faced at the time of certification" and that he could "maintain [a] class-action challenge to the University's use of race in undergraduate admissions." *Id.*

109. *See infra* Part II.A.3.c (discussing Justice Stevens' dissent in *Gratz*, 539 U.S. at 282-90).

110. *Gratz*, 539 U.S. at 260-61.

111. *Id.* at 265. The Court found that "the same set of concerns [were] implicated by the University's use of race in evaluating all undergraduate admissions applications under the guidelines." *Id.* at 267.

112. *Id.* at 263 n.15 (noting that "there is tension in our prior cases in this regard"). The Court cites two cases at odds with the current decision: *Blum v. Yaretsky*, 457 U.S. 991 (1982) and *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982). *Gratz*, 539 U.S. at 263 n.15. *See Blum*, 457 U.S. at 1002 (finding that class representatives who had been transferred to lower levels of medical care lacked standing to challenge transfers to higher levels of care); *General Telephone*, 457 U.S. at 149, 158-59 (finding that a Mexican-American plaintiff alleging that he was passed over for a promotion because of race was not an adequate representative to "maintain a class action on behalf of Mexican-American applicants" who were not hired by the same employer).

c. The Dissent

In his dissent, Justice Stevens argued that the Court should dismiss the case for lack of jurisdiction, because Hamacher lacked standing to seek injunctive relief with respect to the University's use of race in undergraduate admissions.[113] He based his holding on the fact that Hamacher had no personal stake in the suit.[114]

Justice Stevens focused on Hamacher's status as a transfer applicant in seeking injunctive relief.[115] According to Justice Stevens, Hamacher's status failed to establish standing for three reasons.[116] First, Hamacher never actually applied as a transfer student, he only intended to do so.[117] Second, the transfer policy was not before the Court,[118] rather the Court was asked to provide injunctive relief regarding the freshman admissions policy.[119] Third, the differences between the freshman and transfer student admissions policies were such that a modification of the freshman policy would not likely have an impact on the transfer policy.[120] Because Hamacher would have no personal stake in the relief he sought, he did not have standing.[121]

B. Relaxation of the Constitutional Elements of Standing in Challenges to Affirmative Action

Northeastern, *Bakke* and *Gratz* show a trend in the Court towards relaxing standing requirements in cases of Equal Protection where affirmative action programs are challenged.

1. Injury-in-Fact Redefined

One way that the Court has overcome the standing hurdle in Equal Protection cases is by redefining injury-in-fact.[122] For example, in *Northeastern*, Justice Thomas rejected the view that the plaintiff must show an inability to obtain a specific benefit to satisfy the injury-in-fact element of standing.[123] Instead of showing an inability to obtain the benefit, the plaintiff needed only to show a denial of equal treatment due to the imposition of a barrier.[124] "To establish standing, therefore," Justice Thomas wrote, "a party challenging a set-aside program . . . need only demonstrate that it

113. *Gratz*, 539 U.S. at 287 (Stevens, J., dissenting).
114. *Id.* at 290 (Stevens, J., dissenting).
115. *Id.* at 285 (Stevens, J., dissenting).
116. *Id.*
117. *Id.* at 286 (Stevens, J., dissenting).
118. *Id.*
119. *Id.*
120. *Id.* at 287 (Stevens, J., dissenting).
121. *Id.* at 289 (Stevens, J., dissenting).
122. *See* Antczak, *supra* note 74, at 1464 (noting Justice Thomas' adoption of an "inability to compete" analysis of injury-in-fact).
123. *Northeastern*, 508 U.S. at 666.
124. *Id.*

is able and ready to [perform] and that a discriminatory policy prevents it from doing so on an equal basis."[125]

This characterization of the injury-in-fact can have a significant impact on whether the elements of causation and redressability have been satisfied.[126] For example, in *Bakke*, by characterizing the injury not as the University's failure to admit Bakke, but as a loss of an opportunity to compete for the spots, the Court can find that all three elements of standing—injury-in-fact, causation and redressability—are satisfied.[127] This simple tweaking by the Court can readily affect the standing of other cases as well:

> In all of these cases of unequal treatment, both causation and redressability are readily satisfied, as an analytic matter, if one simply takes care to specify that the injury complained of is the harm of being *unjustifiably disadvantaged* in comparison to others who are similarly situated; it is *not* the harm of being *denied the particular exemption or other benefit* that others enjoy.[128]

2. *An Increasingly Elusive Redressability Requirement*

In *Northeastern*, Justice Thomas was careful to distinguish *Warth*, because the Equal Protection standing requirements as applied to *Warth* would yield a very different result.[129]

In *Warth*, petitioners challenged the respondents' zoning ordinance which "effectively excluded persons of low and moderate income from living in the town."[130] The Court found that the plaintiffs were unable to show redressability because they could not prove that they would actually obtain housing if the ordinance in question were invalidated.[131] If the plaintiffs in *Warth* had asserted that the unconstitutional zoning ordinance had deprived them of the *opportunity to compete* in the housing market, they would have been able to satisfy standing requirements as they appear in *Northeastern*.[132]

Viewing this dilemma from yet another angle, if the Court

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125. *Id.* The Court goes on to distinguish *Warth*. *Id.* at 667-68.

126. Sunstein, *supra* note 17, at 203-05.

127. *Id.* at 203. *See also Bakke*, 438 U.S. at 318 (discussing how the qualifications of the applicant are weighed so that fair and equal treatment is maintained); TRIBE, *supra* note 16, at 431 (explaining how the recharacterization of injury-in-fact can satisfy standing requirements).

128. TRIBE, *supra* note 16, at 434.

129. *Northeastern*, 508 U.S. at 667-68.

130. 422 U.S. at 493.

131. *Id.* at 504. In *Warth*, the Court held that:

> Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed.

Id.

132. Nichol, *supra* note 26, at 80.

held that plaintiffs in *Warth* could redress their injuries only by showing that they would actually obtain housing, the question arises: Why did the Court not require Bakke to prove that he would have gotten into medical school?[133] Had the Court required such a showing, Bakke might not have ended up in medical school.[134]

3. *Equal Protection Standing as Applied in* Gratz

The decision in *Gratz* applied the Equal Protection standing requirements to conclude that Hamacher had standing to bring the suit.[135] Justice Stevens objected to the majority's failure to dismiss the case for lack of standing because he claimed that Hamacher did not have a personal stake in the matter.[136]

The majority, in turn, used the Equal Protection standing requirements to address this issue. First, the Court found that Hamacher did not need to show that he had applied as a transfer student.[137] Using the *Northeastern* rule, he needed only to show that he was "able and ready" to transfer if the alleged discriminatory admissions practices did not exist.[138] The Court did not require Hamacher to prove that but for the admissions policy at issue, he would have been admitted to the school.[139] In fact, Hamacher did not have to show anything; he only had to allege that he *intended* to transfer to the University.[140]

Using the same Equal Protection standing requirements, the

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133. *Id.* at 81.

134. A number of *Bakke*-type cases exist but with very different results because plaintiffs had to show that they would have been admitted but-for the affirmative action program operating at the school. *See* Doherty v. Rutgers Sch. of Law-Newark, 651 F.2d 893, 902 (3d Cir. 1981) (finding that plaintiff lacked standing to challenge the law school minority student admissions program, where he had failed to qualify for admission even in the absence of the special program due to his academic deficiencies); Donnelly v. Boston Coll., 558 F.2d 634, 635 (1st Cir. 1977) (finding that plaintiff lacked standing to bring an action challenging the law schools' affirmative action program where the evidence clearly showed that the "plaintiff would not have been admitted to any of the law schools even if no minority group members had been admitted"); Henson v. Univ. of Ark., 519 F.2d 576, 576-78 (8th Cir. 1975) (finding that white female plaintiff lacked standing to challenge a law school's minority admission policy, where she did not show by a preponderance of the evidence that her failure to be admitted resulted from the program).

135. *See Gratz*, 539 U.S. at 260 (stating that the petitioners have standing for their requested relief).

136. *Id.* at 290-91 (Stevens, J., dissenting).

137. *Id.* at 260-61.

138. *Id.* at 262.

139. *Id.* The district court rejected the assertion by the University that Hamacher needed a 3.0 GPA in order to attempt to transfer, concluding that "Hamacher's present grades are not a factor to be considered at this time." *Id.* at 283 n.3 (Stevens, J., dissenting).

140. *Id.* at 260-62.

majority seemingly resolved the issue of lack of redressability by finding that the transfer admissions policy and the freshman admissions policy were in fact identical.[141] The Court stated that "the *only* difference" is that minority freshman applicants are given twenty points while minority transfer applicants are not given points.[142] This difference is significant but is ignored by the Court as having no effect on Hamacher's standing.[143]

Under the classical standing requirements, Hamacher would not have found the courtroom doors open to his challenge. Hamacher failed to show an injury-in-fact, or a concrete harm, that would warrant injunctive relief. Further, Hamacher failed to show that a favorable decision by the Court would grant him the relief that he sought. He had already applied to another university and would therefore never apply to the University as a freshman again. The fact that the admissions policy at issue related only to freshman applicants precluded Hamacher from relief as a transfer student.

III. QUALITY, NOT QUANTITY

At the present time, the status of the law on standing is in disarray.[144] In equal protection cases, the Supreme Court has confounded the standing doctrine by significantly relaxing its basic requirements.[145] These rulings fly in the face of long-standing precedents, such as *Warth*.[146] It is critical that the Supreme Court clarify the issue of standing so that plaintiffs are able to look to a consistent judicial policy when seeking relief by the Court.

The Supreme Court can resolve the conflict in the standing

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141. *Id.* at 265. The Court found that "the criteria used to determine whether a transfer applicant will contribute to the University's stated goal of diversity are *identical* to that used to evaluate freshman applicants." *Id.*

142. *Id.* at 266.

143. *Id.*

144. *See supra* note 58 and accompanying text (listing the criticisms against the standing doctrine as it stands today).

145. *See Bakke*, 438 U.S. at 281 n.14 (requiring only that plaintiff is ready and able to perform and not that the plaintiff actually applied to the school); *Northeastern*, 508 U.S. at 666 (requiring only that plaintiff is ready and able to perform and not that the plaintiff actually submitted a bid).

146. *See Warth*, 422 U.S. at 504 (finding that plaintiffs lacked standing where they could not show that they would actually acquire housing if the zoning ordinance prohibiting low-income housing was repealed). *See also* Spann, *supra* note 37, at 1431 (explaining that prior to the *Northeastern* decision "the law of standing had become very strict"). A plaintiff had to satisfy the following elements to establish standing:

> that the injury was proximately caused by the challenged conduct of the defendant; that the injury was imminent; that the plaintiff's challenge was not a programmatic challenge to a general government policy decision; and that the injury would be redressed by a favorable decision on the merits.

Id.

doctrine as found in equal protection cases by simply returning to the classical definition of standing and by applying the *Baker* personal stake requirement in those cases. Although federal courts would hear fewer equal protection challenges, the resulting case law would go a long way towards removing the confusion in the standing doctrine.

If the Court insists, however, in relaxing the classical standing requirements, it should then do expressly what it has done implicitly since *Bakke*: it should bifurcate the standing doctrine so that in equal protection cases, injury-in-fact would require only that the plaintiff is ready and able to perform, while in all other cases, injury-in-fact would require an actual, concrete and imminent injury.

A. A Return to the Classical Standing Doctrine

Starting with *Baker*, the Supreme Court set forth a personal stake requirement to establish standing in a suit.[147] However, decisions by the Court, such as *Northeastern* and *Bakke*, have effectively turned their back on the personal stake requirement. This, in turn, has made it easier for plaintiffs to challenge race-conscious methods employed by the government to ensure greater representation of minorities in various public arenas, such as universities.[148] In these reverse discrimination cases, the Court has dramatically manipulated the elements of the standing doctrine,[149] so that injury-in-fact requires only that a plaintiff show that he is ready and able to perform.[150] The result is a relaxed standing requirement, which allows a greater number of equal protection cases to reach the courts.[151]

The classical standing doctrine requires that the plaintiffs show an actual injury, fairly traceable to the defendant and redressable by a favorable decision.[152] For example, in *Warth*, the Supreme Court held that the plaintiffs did not have standing to challenge a zoning ordinance which precluded lower income persons from residing in the town, because the plaintiffs did not dem-

147. *See Baker*, 369 U.S. at 204 (stating that "the gist of the question of standing" is whether "the appellants [have] alleged such a personal stake in the outcome of the controversy").

148. Nancy J. King, *Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 709 (1993).

149. Spann, *supra* note 37, at 1452 (noting that the Supreme Court now applies "its manipulable law of standing" to cases involving racial discrimination).

150. *See* King, *supra* note 148, at 709 and text accompanying note 148 (citing *Northeastern* and *Bakke* which do not require a showing of actual injury to establish standing).

151. King, *supra* note 148, at 709.

152. *Valley Forge*, 454 U.S. at 472.

onstrate an actual injury.[153] The Court did not consider whether the plaintiffs were ready and able to move into town but required an actual showing of their ability to obtain housing.[154] This view of standing continues to be relevant because the Court has failed to overrule *Warth*, which remains a landmark decision in constitutional law.

In cases such as *Northeastern* and *Bakke*, however, the Court has applied a very different version of the injury-in-fact requirement, requiring only a showing by the plaintiff that he is ready and able to perform.[155] *Northeastern* attempted to distinguish *Warth*,[156] but far from clarifying the discrepancy in the Court's application of the standing doctrine to different cases, the Court, perhaps inadvertently, in fact laid out a formula for the manipulation of the standing doctrine in order to attain standing with greater ease in an equal protection challenge case.[157]

In *Gratz*, the Supreme Court had an opportunity to clarify the discrepancy that has crept into the standing doctrine but failed to do so. The dissent was correct in asserting that the Court should have denied Hamacher standing to bring suit for failure to show personal stake.[158] The Supreme Court, in holding as the dissent did, could have clarified the standing doctrine by returning to the classical standing analysis found in *Warth*.

Returning to the classical standing requirements in equal protection cases will result in fewer affirmative action challenges being heard by the courts.[159] Far from being a detriment, however, the result of this will be the strengthening of case law addressing equal protection challenges. By focusing on the quality as opposed

153. 422 U.S. at 504.

154. *Id.*

155. *See* King, *supra* note 148, at 709 and text accompanying note 148 (citing *Northeastern* and *Bakke* which do not require a showing of actual injury to establish standing). Professor Spann emphasizes that this change in the Supreme Court's application of the standing requirements "not only contributes confusion to the law of standing, but also raises suspicions about the Supreme Court's motivation." Spann, *supra* note 37, at 1427.

156. *See Northeastern*, 508 U.S. at 667-68 (distinguishing *Warth*). Justice Thomas stated that in *Warth*, "there was no claim that the construction association's members could not apply for variances and building permits on the same basis as other firms; what the association objected to were the 'refusals by the town officials to grant variances and permits.'" *Id.* (quoting *Warth*, 422 U.S. at 515). *See also* Spann, *supra* note 37, at 1452 (noting that the Court ignored standing requirements in granting standing in *Northeastern* and "made little effort to distinguish the applicable precedents in doing so").

157. *See* TRIBE, *supra* note 16, at 431-32 (explaining how defining injury as loss of opportunity allows for standing whereas defining injury as a failure to acquire services would result in denial of standing).

158. *Gratz*, 539 U.S. at 290-91 (Stevens, J., dissenting).

159. *But see generally* Choundas, *supra* note 94 (arguing that the standing requirements close the courtroom doors in the faces of plaintiffs bringing equal protection challenges).

to the quantity of the plaintiffs challenging affirmative action programs, the Court will establish clear precedents in its rulings. Such a result can only be favorable.

When it revisits this issue in the future, the Court should affirm that the standing doctrine requires an actual injury and not just a ready and able standard.

B. A Bifurcation of the Standing Doctrine

In the alternative, the Supreme Court could have used the opportunity presented by *Gratz* to expressly establish a bifurcation in the standing doctrine. In this way, the ready and able standard applied in *Northeastern*, *Bakke* and *Gratz* would be the accepted standing doctrine in cases of equal protection cases.[160] Because equal protection means to remedy discrimination,[161] the Court could have stated that a more relaxed standing doctrine is required for public policy reasons so that everyone may access the Court.

The fact that simply recharacterizing an injury as an inability to compete can grant sudden access to the courts is an exercise in game playing.[162] The Court needs to clarify this so that plaintiffs do not have to resort to verbal game playing in order to access the courts. If the Court were to simply state that in affirmative action cases, or in cases of equal protection, the standing standard would simply be ready and able, then those who are denied standing, such as the plaintiffs in *Warth*, could be granted access to the courts. In *Warth*, had the plaintiffs simply stated that their injury was their inability to compete in the housing market due to the zoning ordinance, they would have had standing.

Such an express ruling by the Supreme Court would bring to light allegations of discriminatory practices in rulings in equal protection cases already made against the Court. Professor Spann points out a long history of the Supreme Court's rulings that discriminate against minorities.[163] Even in equal protection chal-

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160. *See Gratz*, 539 U.S. at 262 (applying the ready and able standard to establish standing). *See also* King, *supra* note 148, at 709 and text accompanying note 148 (citing *Northeastern* and *Bakke* which require only that plaintiff is ready and able to perform to establish standing).

161. U.S. CONST. amend. XIV, § 1. *But see* Spann, *supra* note 37, at 1475 (stating that the intent of equal protection "had nothing whatsoever to do with protecting the interests of the white majority"). "[T]he intent of the drafters was to provide federal protection . . . to former black slaves who were being victimized by the Black Codes of the post-Civil War South." *Id.* The drafters did not intend to protect whites. *Id.*

162. *See* TRIBE, *supra* note 16, at 431-32 (showing how defining injury in a different way can make the difference between a grant of standing and a denial of standing to bring suit).

163. Spann, *supra* note 37, at 1454. Professor Spann delivers a scathing analysis of the Court's role in perpetuating discrimination, stating:

As the final constitutional arbiter, the Court is the ideal governmental

lenges, the Court has been quick to grant standing in reverse discrimination challenges such as those found in *Bakke*, *Northeastern* and now *Gratz*.[164] In cases of discrimination challenges by minorities, however, the Supreme Court has kept the standing requirement bar high.[165] If the Supreme Court is engaging in such practices, it should simply make its standard requirements express instead of continuing to rule in such implicitly discriminatory ways.[166]

IV. CONCLUSION

Gratz was an opportunity missed by the Supreme Court to resolve the confusion in the standing doctrine, especially as it applies to equal protection cases. By ruling that a plaintiff need only show that he is ready and able to perform, the Supreme Court allowed the personal stake requirement to become so relaxed that the door is now open for nearly anyone to have standing to bring an equal protection challenge, especially in cases where a nonminority challenges governmental affirmative actions programs designed to protect minorities.

With the next opportunity to rule on this issue, the Supreme Court should clarify this area of the law once and for all. The Court can do this by returning to the classical meaning of personal stake so that a plaintiff must show an actual injury, and not only that he was ready and able to perform, which is too conjectural. Although this will result in fewer equal protection challenges brought in federal courts, the cases which satisfy the standing requirement to find their way into the courts will yield law of a better quality. These precedents will be of more use to future peti-

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> institution to accomplish the majoritarian task of diverting societal resources away from racial minorities in a manner that benefits the majority. The Court can announce legal prohibitions on discrimination and enforce them against the other branches of government in a way that suggests a societal commitment to racial equality, but in the process of so doing, the Court can allocate resources in a way that overrides the very equality that its opinions pronounce.

Id.

164. *See id.* at 1453 (stating that the Court upholds standing when "the plaintiff challenges a systemic practice that adversely affects the interests of the white majority, such as an affirmative action program").

165. *See id.* (stating that the Court denies standing when "the plaintiff challenges a practice that adversely affects the interests of racial minorities, such as a pattern of restrictive zoning, tax subsidization, or police misconduct").

166. *See generally id.* at 1454 (discussing the discriminatory results of the Court's application of standing law in equal protection cases). Professor Spann explains that the Supreme Court is virtually immune to any challenges against its own discriminatory practices. *Id.* He elaborates on this conclusion, stating: "As a practical matter, of course, neither statutory nor constitutional prohibitions on racial discrimination apply to the Supreme Court. Realistically, there is no governmental body that possesses the institutional power to enforce the Constitution against the Court." *Id.*

tioners challenging affirmative action programs, because the precedents set by those cases will be clear.

If the Court refuses to apply the classical standing requirements to equal protection challenges, the Court can, in the alternative, expressly state that the standing requirement in equal protection cases will be the "ready and able" standard, whereas the standing requirement in other cases will adhere to the *Baker* personal stake requirement. Although a less favorable alternative, such a holding by the Court will also serve to guide future plaintiffs when challenging affirmative action programs.

The confusion in the standing doctrine, which has pervaded the legal system for nearly forty years, needs to be clarified. The Court should not pass up another opportunity like *Gratz* to do so.