



1996

## Bras v. California Public Utilities Commission: Using Economic Realities to Establish Standing and Challenge Goal-Based Affirmative Action

David J. Antczak

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

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 (1996).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol41/iss5/3>

This Note is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

1996]

## Notes

### BRAS v. CALIFORNIA PUBLIC UTILITIES COMMISSION: USING "ECONOMIC REALITIES" TO ESTABLISH STANDING AND CHALLENGE "GOAL"-BASED AFFIRMATIVE ACTION

#### I. INTRODUCTION

Since the adoption of the first federal government affirmative action program in 1969,<sup>1</sup> much debate has surrounded the government's use of

1. See Christopher Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1240 (1994) (discussing origins of affirmative action). In 1969, the Department of Labor under the Nixon Administration issued a regulation, known as the "Philadelphia Plan," that required contractors involved in federal construction projects in the City of Philadelphia to meet certain hiring goals for minorities. *Id.* The United States Court of Appeals for the Third Circuit upheld the validity of this plan in *Contractors Association v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971). For further discussion of the Philadelphia Plan, see Daniel A. Farber, *The Outmoded Debate over Affirmative Action*, 82 CAL. L. REV. 893, 896-98 (1994) (describing Philadelphia Plan as major part of Republican political strategy to use affirmative action to divide Democratic Party along racial lines); James E. Jones, Jr., *The Origins of Affirmative Action*, 21 U.C. DAVIS L. REV. 383, 394-402 (detailing development of Philadelphia Plan); Robert P. Schuwerk, Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723, 742 nn.104-06 (1972) (listing hiring goals of Philadelphia Plan).

The phrase "affirmative action" first appeared in 1962 in an executive order issued by the Kennedy administration that directed contractors to act affirmatively to prevent discrimination in hiring and employment. Jones, *supra*, at 395-96; Don Munro, Note, *The Continuing Evolution of Affirmative Action Under Title VII: New Directions After the Civil Rights Act of 1991*, 81 VA. L. REV. 565, 565 n.1 (1995) (citing Exec. Order No. 10,925, 3 C.F.R. 448, 450 (1959-63)). Yet, attempts to define the phrase precisely have been and continue to be problematic. See STEVEN YATES, *CIVIL WRONGS: WHAT WENT WRONG WITH AFFIRMATIVE ACTION 2* (1994) (noting that definition of "affirmative action" involves "a semantic wonderland" and that phrase means "whatever politicians, federal judges, compliance officers, and other bureaucrats want [it] to mean"). One proponent of affirmative action defined it as "policies that provide preferences based explicitly on membership in a designated group." Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1327 n.1 (1986). An opponent of racial affirmative action described it as "policy that recognizes proportional entitlements for racial and ethnic groups." ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* at vii (1992). For the purposes of this Note, "affirmative action" refers to a race-conscious system developed to promote greater minority participation.

The two main forms of affirmative action are quotas, or "set-asides," and "preferential treatment" measures. Samuel L. Starks, *Understanding Government Affirmative Action and Metro Broadcasting, Inc. v. FCC*, 1991 DUKE L.J. 933, 940-41. Quotas are practices that exclusively reserve certain opportunities or benefits for members of an identified minority group. *Id.* "Preferential treatment" is a less rigid measure that considers a person's minority status as one positive factor among others when opportunities or benefits are allocated. *Id.*

(1445)

race-conscious programs to promote greater minority participation in the workforce.<sup>2</sup> Proponents of affirmative action contend that it is both necessary to remedy past and present harms against minorities and useful to encourage racial diversity.<sup>3</sup> On the other hand, critics of affirmative ac-

---

2. See Farber, *supra* note 1, at 893 (stating that “[t]he academic debate over affirmative action has become a bitter stalemate”); Munro, *supra* note 1, at 565 (comparing affirmative action to other “inherently divisive” issues such as abortion and homosexual rights); *Anger and Elation at Ruling on Affirmative Action*, N.Y. TIMES, Mar. 29, 1987, at 1 (summarizing various disputed views on affirmative action). One commentator has suggested that the controversy over affirmative action is linked to its inherent ambiguity. HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-72*, at 28 (1990). Graham states that from its inception, affirmative action has been problematic because it exists to guarantee that persons are treated without regard to race, yet it also creates a “command to act affirmatively” with race as a factor in the process. *Id.*; see also Steven V. Roberts, *Affirmative Action on the Edge*, U.S. NEWS & WORLD REP., Feb. 13, 1995, at 32 (noting intense debate over affirmative action and arguing that it is linked to conflict between principles of equal opportunity and merit). For an extensive discussion of the social and legal issues in the affirmative action debate, see RACIAL PREFERENCE AND RACIAL JUSTICE: THE NEW AFFIRMATIVE ACTION CONTROVERSY (Russell Nieli ed., 1991) (collecting articles, written by legal scholars and 10 former and current U.S. Supreme Court Justices, addressing most important features of affirmative action debate) and *infra* notes 3-4 and accompanying text.

3. See GERTRUDE EZORSKY, *RACISM AND JUSTICE: THE CASE FOR AFFIRMATIVE ACTION 1* (1991) (arguing that affirmative action programs are proper because blacks, as descendants of slaves and subjects of institutionalized racism, are particularly entitled to “special efforts to ensure their fair share of employment benefits”); JOE R. FEAGIN & CLAIRECE BOOHER FEAGIN, *DISCRIMINATION AMERICAN STYLE: INSTITUTIONAL RACISM AND SEXISM* at xi (2d ed. 1986) (contending that recent notions of “merit” and “individual opportunity” and concerns over treatment of white males represent “neglect . . . of the serious patterns of discrimination still afflicting minorities”); MICHEL ROSENFELD, *AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY 2-3* (1991) (stating that supporters of affirmative action programs believe that equal treatment, standing alone, can be used to maintain status quo of inequality); MELVIN I. UROFSKY, *A CONFLICT OF RIGHTS: THE SUPREME COURT AND AFFIRMATIVE ACTION 29* (1991) (stating that many advocates of affirmative action believe that “[i]f, in the past, the majority used a person’s race or gender or national origin against him or her in a discriminatory manner, it is now fair to take those same considerations into account, and use them to the person’s benefit”); Benjamin L. Hooks, *Affirmative Action: A Needed Remedy*, 21 GA. L. REV. 1043, 1052-53 (1987) (arguing that affirmative action is necessary because race-neutral, remedial measures “ignore the lingering effects of past discrimination” and thus become discriminatory themselves); Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1043 (proposing that affirmative action is required to end “the manipulation of the concept of ‘merit’ in our society to maintain the favored position of the dominant group (white males) in our society”); McGeorge Bundy, *The Issue Before the Court: Who Gets Ahead in America*, THE ATLANTIC, Nov. 1977, at 44-45 (suggesting that “because it is not yet ‘racially neutral’ to be black in America, a racially neutral standard will not lead to equal opportunity for blacks”); Charles Krauthammer, *In Defense of Quotas*, NEW REPUBLIC, Sept. 16, 1985, at 10-11 (making argument that “[w]hile color blindness may be a value, remedying centuries of discrimination through (temporary) race consciousness is a higher value”); R. Roosevelt Thomas, Jr., *From Affirmative Action to Affirming Diversity*, HARV. BUS. REV., Mar.-Apr., 1990, at 107, 117 (arguing that affirmative action, despite its limitations, has helped to make goal of workforce diversity attainable).

tion argue that a policy of race-consciousness, albeit benign, defeats the principle of equality and only promotes further discrimination.<sup>4</sup> Inceas-

---

Likewise, certain members of the United States Supreme Court have endorsed or encouraged the position that affirmative action is necessary. *See, e.g.*, *Johnson v. Transp. Agency*, 480 U.S. 616, 628 & n.6 (1987) (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979)) (reaffirming position that race may be taken into account in order to “break down old patterns of racial segregation and hierarchy”); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12 (1978) (recognizing that “the attainment of a diverse student body . . . clearly is a constitutionally permissible goal”); *Bakke*, 438 U.S. at 407 (Blackmun, J., concurring in part and dissenting in part) (“In order to get beyond racism, we must first take account of race . . . [a]nd in order to treat some persons equally, we must treat them differently.”).

4. *See* ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 133 (1975) (claiming that affirmative action in form of racial quotas “is a divider of society, a creator of castes, and [ ] is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant”); KULL, *supra* note 1, at 182-90 (stating that once political coalition that had succeeded in passing Civil Rights Act of 1964 and Voting Rights Act of 1965 rejected color-blindness and accepted race-conscious policies, it lost “unifying power and moral claim” of “antidiscrimination principle”); ROSENFELD, *supra* note 3, at 2-3 (indicating that some opponents of affirmative action view preferences for women and minorities as equally improper as preferences for white men); THOMAS SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY?* 52-53 (1984) (arguing that affirmative action has become counterproductive); William Bradford Reynolds, *An Equal Opportunity Scorecard*, 21 GA. L. REV. 1007, 1007 (1987) (stating that affirmative action is “sugar-coated phrase” allowing courts to justify discrimination, just as courts were able to stray from principle of equality under law with Jim Crow laws and World War II internment of Japanese Americans); Antonin Scalia, *The Disease as Cure: “In Order to Get Beyond Racism, We Must Take into Account of Race,”* 1979 WASH. U. L.Q. 147, 152 (taking position that affirmative action and notions of restorative justice that led to its adoption are highly unfair to “many white ethnic groups that came to this country in great numbers relatively late in its history . . . who took no part in, and derived no profit from, the . . . suppression of the currently acknowledged minority groups, but were . . . themselves the object of discrimination”); Sidney Hook, *Foreward* to BARRY R. GROSS, *DISCRIMINATION IN REVERSE: IS TURNABOUT FAIR PLAY?* at ix (1978) (insisting that “[o]nce we strive to undo the consequences of past privileges by enstating new privileges in the present, we establish the precedent for . . . a permanently polarized society”); William Beer, *Resolute Ignorance: Social Science and Affirmative Action*, SOCIETY, May-June 1987, at 63 (stating that “affirmative action has been translated into a series of quotas . . . that benefit certain groups at the cost of others”).

As with the contrary position, the argument that affirmative action promotes further discrimination has garnered the support of various Justices of the United States Supreme Court. *See, e.g.*, *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2119 (1995) (Thomas, J., concurring in part and concurring in judgment) (rejecting argument that benign racial classifications should be subject to less demanding judicial review because such classifications reflect “paternalism” and “undermine the moral basis of the equal protection principle”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989) (Scalia, J., concurring) (“The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency . . . to classify and judge men and women on the basis of . . . the color of their skin.”); *Fullilove v. Klutznick*, 448 U.S. 448, 526 (1980) (Stewart, J., dissenting) (indicating that nothing in language of Fourteenth Amendment “singles out some ‘persons’ for more ‘equal’ treatment than others”).

ingly, whites have challenged such race-conscious governmental programs as a form of "reverse discrimination" in violation of the Equal Protection Clause of the United States Constitution.<sup>5</sup>

In 1989, in *City of Richmond v. J.A. Croson Co.*,<sup>6</sup> the United States Supreme Court levied a substantial blow to the viability of race-conscious

---

5. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1767 & n.262 (1993) (discussing cases in which whites have challenged affirmative action programs); see also Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996) (alleging "reverse discrimination" when white correctional officers failed to receive promotion because Corrections Department determined that black officers were needed to create authority among black inmates); Aiken v. City of Memphis, 37 F.3d 1155, 1160 (6th Cir. 1994) (alleging "reverse discrimination" against city when white police officers and fire department employees were denied promotions because of city's race-conscious promotion program); *In re Birmingham Reverse Discrimination Emp. Lit.*, 20 F.3d 1525, 1530 (11th Cir. 1994) (charging that City of Birmingham violated Equal Protection Clause when it made racially-based decisions in promoting city firefighters), *cert. denied*, 115 S. Ct. 1695 (1995); Billish v. City of Chicago, 962 F.2d 1269, 1272-73 (7th Cir. 1992) (challenging promotion decisions of Chicago Fire Department, pursuant to affirmative action plan, as violative of Equal Protection and Due Process Clauses of Fourteenth Amendment); Baker v. Elmwood Distrib., Inc., 940 F.2d 1013, 1015 (7th Cir. 1991) (alleging that minority employer fired plaintiffs solely because of their race, in violation of 42 U.S.C. § 1981); *United States v. City of Chicago*, 870 F.2d 1256, 1257-58 (7th Cir. 1989) (claiming unlawful discrimination when Chicago police department conducted promotions based upon test results that were adjusted to favor African-Americans and Hispanics). The challengers of affirmative action generally acknowledge that minorities suffered oppression and discrimination in the past. Harris, *supra*, at 1767 & n.263. They argue, however, that the government violates the Equal Protection Clause of the United States Constitution when it burdens whites who did not participate in the past discriminatory acts. *Id.* The Equal Protection Clause of the United States Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. For a general overview of equal protection doctrine, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-1, at 1436-39 (2d ed. 1988) (stating that one aspect of equal protection entails "the right to treatment as an equal" by government).

One commentator has suggested that so-called "reverse discrimination" should not be addressed in the same manner as discrimination against minorities. See John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727 (1974). Rather, Professor Ely contends that it is simply not "suspect" for white males, the majority, to decide to discriminate against themselves in the form of affirmative action. *Id.* (claiming that "special scrutiny" is unnecessary "when White people have decided to favor Black people at the expense of White people"). Yet, Professor Ely's conclusion may be based upon the uncertain premise that "there is a cohesive white majority having common interests different from a cohesive coalition of racial minorities." JEROME A. BARRON ET AL., *CONSTITUTIONAL LAW: PRINCIPLES AND POLICY* 642 (4th ed. Michie 1992).

One Ninth Circuit decision revealed the difficulty in comparing affirmative action with reverse discrimination. See *Legal Aid Soc'y v. Brennan*, 608 F.2d 1319 (9th Cir. 1979). In *Legal Aid*, the court stated that affirmative action does not theoretically require preferences or discrimination on the basis of race. *Id.* at 1343. The court did acknowledge, however, that employers may engage in racially preferential or discriminatory behavior as a matter of expediency in order to satisfy affirmative action goals. *Id.* at 1344.

6. 488 U.S. 469 (1989).

programs by mandating that courts apply strict scrutiny to state and local affirmative action programs.<sup>7</sup> The *Croson* decision led to renewed efforts

---

7. *Id.* at 493-94. For a description of strict scrutiny, see *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984) (stating that first prong of strict scrutiny analysis is that law classifying persons according to race must "be justified by a compelling governmental interest"); *Fullilove*, 448 U.S. at 480 (providing that second prong of strict scrutiny examination is whether means employed by government to effectuate its interest are "narrowly tailored to the achievement of that goal"). Prior to *Croson*, the Court had never definitively subjected affirmative action programs to strict scrutiny review under the Equal Protection Clause. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (plurality opinion) (applying strict scrutiny to school board's policy of laying off nonminority teachers while retaining minority teachers with less seniority).

In *Croson*, a nonminority contractor challenged the Richmond's minority business enterprise program after he was denied a waiver of the program's set-aside requirement. *Croson*, 488 U.S. at 483. Writing for the Court, Justice O'Connor reasoned that a strict standard of equal protection review applies regardless of whether the race that is burdened by the race-conscious classification is a nonminority race. *Id.* at 493-94 (citing *Wygant*, 476 U.S. at 279-80 (O'Connor, J., concurring in part and concurring in judgment)) (holding that absent strict scrutiny, Court cannot discern which racial classifications are "benign" or "remedial" and which "are in fact motivated by illegitimate notions of racial inferiority or simple racial politics"). Applying strict scrutiny to the city's affirmative action set-aside program, the Court required that the city provide a "factual predicate" to support its adoption of a race-conscious program. *Id.* at 498. Because the Court found that Richmond's evidence of past discrimination against minorities in the city's construction industry was insufficient, it declared the set-aside program invalid. *Id.* at 498-506. In doing so, the Court held that Richmond's conclusory statements of past discrimination in the construction industry were inadequate. *Id.* at 499 ("[A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota."). In particular, absent statistical evidence of disparity between available minority contractors and minority participation in contracting associations, Justice O'Connor refused to make an inference of discrimination solely upon the low percentage of public contracts awarded to minority businesses. *Id.* at 501, 503. On this basis, the Court concluded that the city had not identified a compelling interest for its racial classifications and struck down the city's set-aside program. *Id.* at 511 ("Because the city of Richmond has failed to identify the need for remedial action in the awarding of its public construction contracts, its treatment of its citizens on a racial basis violates the dictates of the Equal Protection Clause.").

The dissent in *Croson*, authored by Justice Marshall, criticized the majority's decision to apply strict scrutiny to the municipal program as inconsistent with prior cases and damaging to state and local attempts to eradicate discrimination through affirmative action measures. *Croson*, 488 U.S. at 528-61 (Marshall, J., dissenting). The dissent based this conclusion upon the proposition that remedial racial classifications such as affirmative action should be subject to a lower level of judicial review than strict scrutiny. *Id.* at 535 (Marshall, J., dissenting) (citing *Wygant*, 476 U.S. at 301-02 (Marshall, J., dissenting); *Fullilove*, 448 U.S. at 517-22 (Marshall, J., concurring); *Bakke*, 438 U.S. at 359 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.)) (contending that remedial race-conscious classifications need only "serve important governmental objectives and must be substantially related to achievement of those objectives"). Under this standard, the dissent would have upheld Richmond's program. *Id.* at 536 (Marshall, J., dissenting). The dissent added that the Court's decision imposed a "daunting standard" upon state and local governments that seek to adopt affirmative action programs. *Id.* at 555 (Marshall, J., dissenting). For a further discussion of the facts of *Croson* and the

on the part of nonminority individuals to challenge affirmative action.<sup>8</sup> As

---

Justices' opinions, see Janice R. Franke, *Richmond v. Croson: The Setting Aside of Set-Asides?*, 34 ST. LOUIS U. L.J. 603 (1990); Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729 (1989); Kathleen M. Sullivan, *City of Richmond v. J.A. Croson Co.: The Backlash Against Affirmative Action*, 64 TUL. L. REV. 1609 (1990); Nina Farber, Comment, *Justifying Affirmative Action After City of Richmond v. J.A. Croson: The Court Needs a Standard for Proving Past Discrimination*, 56 BROOK. L. REV. 975 (1990).

In 1995, the Court determined that federal affirmative action programs, like the state and local programs affected by *Croson*, would also be subject to strict scrutiny. *Adarand*, 115 S. Ct. at 2113 (stating that racial classifications in local, state and federal affirmative action programs will be subject to strict scrutiny and overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (holding that "benign" federal racial classifications need only satisfy intermediate scrutiny)).

8. Kenneth Jost, *After Adarand*, A.B.A. J., Sept. 1995, at 70, 74; Robert Pear, *Courts Are Undoing Efforts to Aid Minority Contractors*, N.Y. TIMES, July 16, 1990, at A1. At the time of the decision, 36 states and approximately 200 local governments utilized minority affirmative action programs. Jere W. Morehead & Peter J. Shedd, *Civil Rights and Affirmative Action: Revolution or Fine-Tuning?*, BUS. HORIZONS, Sept. 1, 1990, at 53. Following *Croson*, the Minority Business Enterprise Legal Defense and Education Fund reported that 31 jurisdictions dismantled their respective affirmative action programs. Jost, *supra*, at 74. In addition, over 50 court challenges to municipal affirmative action programs ensued. *Id.* Indeed, the high threshold for constitutional validity under *Croson* suddenly jeopardized many public sector affirmative action programs. Mary C. Daly, *Rebuilding the City of Richmond: Congress's Power to Authorize the States to Implement Race-Conscious Affirmative Action Plans*, 33 B.C. L. REV. 903, 905-06 & n.6 (1992) (citing Stephen Wermiel, *Justices Limit State Contracts Based on Race*, WALL ST. J., Jan. 24, 1989, at A3); Rosenfeld, *supra* note 7, at 1732; Morehead & Shedd, *supra*, at 53; Eleanor Holmes Norton & Edward Norton, *A Setback for Minority Businesses*, LEGAL TIMES, May 1, 1989, at 31.

The *Croson* Court indicated that the state or local government must make a substantial showing of prior discrimination in order to satisfy the strict scrutiny standard of review. *Croson*, 488 U.S. at 504 (requiring governments to "identify . . . [past] discrimination . . . with some specificity before they may use race-conscious relief"); see also Daly, *supra*, at 905 (contending that *Croson* directs state and local governments to offer proof of past discrimination). Thus, the state or local government effectively faces the burden of proving a prima facie case of prior discrimination in order to uphold its affirmative action program. Kay A. Hoogland & Condon McGlothlen, *City of Richmond v. Croson: A Setback for Minority Set-Aside Programs*, EMPLOYEE REL. L.J., June 22, 1989, at 519. Commentators have questioned the ability of governments to meet this heavy burden. See *id.* (describing adoption of strict scrutiny as "lethal . . . blow to state and municipal set-aside programs"); Lori J. Hoffman, Note, *Fatal in Fact: An Analysis of the Application of the Compelling Governmental Interest Leg of Strict Scrutiny in City of Richmond v. J.A. Croson Co.*, 70 B.U. L. REV. 889, 892 (1990) (contending that *Croson* "renders the implementation of voluntary affirmative action plans virtually impossible"); cf. *Fulilove*, 448 U.S. at 519 (Marshall, J., concurring) (characterizing strict scrutiny test as "strict in theory, but fatal in fact"); David G. Savage, *Rebuilding Affirmative Action*, A.B.A. J., Aug., 1995, at 42, 46 (concluding that strict scrutiny review is typically "fatal" for race-conscious programs). For a discussion of attempts by state and local governments to justify affirmative action programs so as to satisfy the mandate of *Croson*, see Dorothy J. Gaiter, *Racial Reviews, Court Ruling Makes Discrimination Studies a Hot New Industry*, WALL ST. J., Aug. 13, 1993, at A1. For a discussion of the application of the *Croson* decision in the lower courts, see Nicole Duncan, *Croson Revisited: A Legacy of Uncertainty in the Application of Strict Scrutiny*, 26 COLUM. HUM. RTS. L. REV. 679 (1995).

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.<sup>9</sup> In other words, if standing requirements are relaxed, more nonminority plaintiffs can bring equal protection claims.<sup>10</sup> Once this occurs, a court

9. Adrian Daunarummo, Recent Case, 25 SETON HALL L. REV. 720, 723 & n.8 (1994) (citing George R. LaNoue, *Court's Jacksonville Decision Opens Affirmative Action Plans to Increased Litigation*, NATION'S CITIES WKLY., July 12, 1993, at 9 (asserting that standing issue provided limitation to equal protection challenges of affirmative action)); *Leading Cases*, 107 HARV. L. REV. 144, 303 (1993) (stating that standing is "one of the issues that has emerged in the ensuing litigation" after *Croson*); see also Jost, *supra* note 8, at 70 (commenting that courts dismissed most equal protection challenges to minority set-aside programs for lack of standing).

10. In several cases after *Croson*, standing was a contested issue in equal protection claims brought by nonminority plaintiffs. See *Adarand*, 115 S. Ct. at 2097 (granting standing to nonminority subcontractor to challenge federal highway contracting program that offered prime contractors additional compensation for meeting minority subcontractor hiring goals); *Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993) (determining that nonminority plaintiffs had standing to challenge city ordinance implementing minority preference program); *Bras v. California Pub. Utils. Comm'n*, 59 F.3d 869 (9th Cir. 1995) (holding that nonminority plaintiff had standing to challenge minority participation goals of California enactment and agency order), *cert denied*, 116 S. Ct. 800 (1996); *Aiken v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994) (denying standing to white police officers and employees of Memphis fire department who sued city for reverse discrimination); *Concrete Works of Colo., Inc. v. City of Denver*, 36 F.3d 1513 (10th Cir. 1994) (granting nonminority prime contractor standing to challenge Denver minority contractor preference ordinance), *cert. denied*, 115 S. Ct. 1315 (1995); *Contractors Ass'n of E. Pa., Inc. v. City of Phila.*, 6 F.3d 990 (3d Cir. 1993) (granting construction contractors standing to challenge Philadelphia ordinance that established set-aside program for business enterprises owned by minorities, women and handicapped persons), *aff'd*, 91 F.3d 586 (3d Cir. 1996); *Cone Corp. v. Hillsborough County*, 5 F.3d 1397 (11th Cir. 1993) (remanding issue of whether contractors challenging county program that treats minority and nonminority contractors differently had standing); *Davis v. City & County of S.F.*, No. 91-16579, 1993 WL 26842, at \*3 (9th Cir. July 15, 1993) (denying standing to nonminority teachers challenging city affirmative action plan pursuant to consent decree); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50 (2d Cir. 1992) (finding that nonminority contractors had standing to bring challenge against state statute that mandated compliance with race-conscious goals); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992) (determining that nonminority plaintiff had standing to challenge District of Columbia's Minority Contracting Act), *Billish v. City of Chicago*, 962 F.2d 1269 (7th Cir. 1992) (denying standing to 13 of 20 fighters who challenged Chicago's nonrank-order promotion of minority fire fighters); *Associated Gen. Contractors of Cal., Inc. v. Coalition for Econ. Equity*, 950 F.2d 1401 (9th Cir. 1991) (granting organization of construction contractors standing to challenge San Francisco ordinance that provided bid preference to minority businesses); *Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991) (finding standing for construction company to challenge validity of minority set-aside measures); *Cone Corp. v. Florida Dep't of Transp.*, 921 F.2d 1190 (11th Cir. 1991) (denying standing to challenge state affirmative action program to nonminority contractor because contractor did not demonstrate loss of any specific contract due to program); *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752 (11th Cir. 1991) (holding that nonminority business lacked standing to challenge municipal minority business enterprise resolution, despite loss of business opportunities); *Carpen-*



will likely strike down the challenged affirmative action program under the strict standard of review mandated by *Croson*.<sup>11</sup>

This Note examines *Bras v. California Public Utilities Commission*<sup>12</sup> and the expansion of the doctrine of standing in the specific context of a non-minority plaintiff's equal protection challenge to the California Women and Minority Business Enterprises Law<sup>13</sup> and an order of the California Public Utilities Commission.<sup>14</sup> Part II of this Note defines the doctrine of Article III standing under the United States Constitution and discusses the role of standing analysis in lawsuits involving government affirmative action programs.<sup>15</sup> Part III of this Note describes the events that led to the plaintiff's equal protection challenge in *Bras*.<sup>16</sup> Parts IV and V then analyze the *Bras* opinion and conclude that the court correctly reasoned that

---

ter v. Barnhart, No. 88-3578, 1990 WL 2314, at \*3 (4th Cir. Jan. 16, 1990) (concluding that nonminority business lacked standing to bring suit against North Carolina set-aside program that served as prerequisite for receipt of federal highway funds); *Converse Constr. Co. v. Massachusetts Bay Transp. Auth.*, 899 F. Supp. 753 (D. Mass. 1995) (determining that business that lost its minority status for purpose of state and federal set-aside programs had standing to bring equal protection claim); *Capeletti Bros., Inc. v. Metropolitan Dade County*, 776 F. Supp. 1561 (S.D. Fla. 1991) (denying standing to prime contractors who brought equal protection suit against county for its use of race-conscious programs when granting county and federally-funded projects); *Michigan Road Builders Ass'n, Inc. v. Blanchard*, 761 F. Supp. 1303 (W.D. Mich. 1991) (holding that association lacked standing to challenge state set-aside program favoring women and minority owned business enterprises), *aff'd*, 979 F.2d 851 (6th Cir. 1992); *Underground Contractors Ass'n v. Metropolitan Water Reclamation Dist.*, No. 90-C-3586, 1991 WL 127616 (N.D. Ill. July, 10, 1991) (denying standing to several nonminority plaintiffs to enjoin set-aside program); *Miami Tele-Communications, Inc. v. City of Miami*, 743 F. Supp. 1573 (S.D. Fla. 1990) (holding that cable television licensees penalized for noncompliance with set-aside program had sufficient injury to confer standing); *Associated Gen. Contractors, Inc. v. City of New Haven*, 130 F.R.D. 4 (D. Conn. 1990) (acknowledging that association had standing to challenge municipal ordinance that set-aside contracts for women and minority-owned firms).

For further discussion of affirmative action challenges after *Croson* in which standing was an issue, see Daunarummo, *supra* note 9, at 724-25 nn.10-11 (listing cases) and *infra* note 79 (discussing affirmative action cases that address standing issue after Supreme Court's standing decision in *Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993)).

11. For a discussion of the *Croson* Court's decision to subject state and local affirmative action programs to strict scrutiny review, see *supra* note 7 and accompanying text.

12. 59 F.3d 869 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 800 (1996).

13. CAL. PUB. UTIL. CODE §§ 8281-8286 (West 1993). For a discussion of the California Women and Minority Business Enterprises Law, see *infra* notes 82-83 and accompanying text.

14. General Order 156 of the Public Utilities Commission of the State of California (1988). For a discussion of this provision, see *infra* notes 84-86 and accompanying text.

15. For a discussion of general Article III standing doctrine and its particular significance in recent equal protection challenges against affirmative action programs, see *infra* notes 19-79 and accompanying text.

16. For a discussion of the facts of *Bras*, see *infra* notes 80-105 and accompanying text.

the plaintiff had standing.<sup>17</sup> Finally, Part VI argues that the Ninth Circuit's decision follows the less restrictive approach to standing that federal courts have recently adopted and that the decision will facilitate equal protection challenges brought by nonminority plaintiffs against affirmative action programs in the future.<sup>18</sup>

## II. BACKGROUND

Standing is a preliminary inquiry in which the federal courts determine "whether the litigant is entitled to have the court decide the merits of the dispute."<sup>19</sup> Standing also relates to the limitation in Article III of the United States Constitution that allows federal courts to decide only "cases" or "controversies."<sup>20</sup> Namely, the Supreme Court has determined that the standing inquiry exists as "an essential and unchanging part" of

---

17. For a discussion of the majority and dissenting opinions in *Bras* and an analysis of the judges' reasoning, see *infra* notes 106-63 and accompanying text.

18. For a discussion of the likely implications of the *Bras* opinion upon Article III standing doctrine and future challenges to affirmative action programs by nonminority plaintiffs, see *infra* notes 164-71 and accompanying text.

19. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). A plaintiff with standing has "a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972). Justice Scalia colorfully simplified the concept of a standing inquiry as a court asking a plaintiff, "What's it to you?" Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983) (arguing that standing is essential to principle of separation of powers). For a discussion of the required elements of Article III standing, see *infra* notes 23-26 and accompanying text.

20. U.S. CONST. art. III, § 2, cl. 2 ("The judicial Power shall extend to all Cases . . . arising under this Constitution, [and] the Laws of the United States, and . . . to Controversies to which the United States shall be a Party; to Controversies . . . between Citizens of different States; [and] between Citizens of the same State . . ."); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992) ("To be sure, [the Constitution] limits the jurisdiction of the federal courts to 'Cases' and 'Controversies.'"); *Allen v. Wright*, 468 U.S. 737, 750 (1984) ("Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies'"); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976) (explaining that "cases" or "controversies" requirement is constitutional limit on federal courts' jurisdiction) (citing *Flast v. Cohen*, 392 U.S. 83, 95 (1968)); *Flast*, 392 U.S. at 94 (stating that power of federal courts "is defined and limited" by "cases" or "controversies" restriction in Article III).

In *Flast*, the Court provided a rationale for the "cases" or "controversies" requirement. *Id.* at 94-95. First, it insures that the issues before the court are within an adversarial context. *Id.* at 95. Second, the requirement keeps the issues "in a form capable of resolution through the judicial process." *Id.* Finally, the Court added that the requirement helps to reinforce the separation of powers principle of our government. *Id.* (stating that limiting federal courts only to "cases" or "controversies" insures that the judiciary will not "intrude into areas committed to the other branches of government").

The *Flast* Court described a judicial question that satisfies the "case" or "controversy" requirement as "justiciable." *Id.* at 95-97. Therefore, "justiciability" measures whether the litigants have presented a question for which they are entitled to invoke the power of the federal court. C. Douglas Floyd, *The Justiciability Decisions of the Burger Court*, 60 NOTRE DAME L. REV. 862, 862-63 (1985).

confining the federal courts to this constitutional restriction on the exercise of their judicial power.<sup>21</sup> Accordingly, the Court has determined that the standing doctrine protects the principles of separation of powers and federalism inherent in Article III.<sup>22</sup>

21. *Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 656 (1993); *Allen*, 468 U.S. at 750; see *Lujan*, 504 U.S. at 560 (citing THE FEDERALIST NO. 48, at 256 (James Madison) (Carey & McClellan eds., 1990)) (describing standing as one of few "landmarks" that identifies "cases" or "controversies" that are justiciable under Article III); *Warth*, 422 U.S. at 498 (stating that standing allows court to answer "the threshold question in every federal case" of whether claimant has "case or controversy" within meaning of Article III); *TRIBE*, *supra* note 5, § 3-14, at 107 (introducing standing as "[t]he doctrine most central to defining article III's requirement of a 'case' or 'controversy'"). For a definition of standing, see *supra* note 19 and accompanying text. For a discussion of the elements of standing analysis, see *infra* notes 23-26 and accompanying text.

Despite general agreement as to the doctrine's importance in giving effect to Article III of the Constitution, an explicit standing analysis emerged in federal courts only in this century. See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224-25 (1988) (claiming that federal courts did not employ general doctrine of standing to determine whether plaintiff had right to sue until 20th century); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1374 (1988) (asserting that, for first 150 years of American history, Congress and courts were "oblivious" to concept of standing as component of "cases" or "controversies" requirement); Craig R. Gottlieb, Comment, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063, 1064-65 (1994) (indicating that Court created standing in response to significant expansion of private rights in this century). Indeed, the Supreme Court issued its first notable standing decision in 1923 in *Frothingham v. Mellon*, 262 U.S. 447 (1923). Eric B. Schnurer, Note, "More Than an Intuition, Less Than a Theory": *Toward a Coherent Doctrine of Standing*, 86 COLUM. L. REV. 564, 565 & n.6 (1986) ("The party who invokes the [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury . . ." (quoting *Frothingham*, 262 U.S. at 447)). Despite its relatively recent appearance, some judges and constitutional scholars insist that standing doctrine is essential to the separation of powers and to federalism. For a discussion of the role of standing in protecting separation of powers and federalism, see *infra* note 22 and accompanying text.

22. *Northeastern*, 508 U.S. at 662 (citing *Allen*, 468 U.S. at 750) (indicating that standing upholds "cases" or "controversies" requirement of Article III, which "itself defines . . . the idea of separation of powers on which the Federal Government is founded"); *Allen*, 468 U.S. at 752 (stating that "the law of Article III standing is built upon a single basic idea—the idea of separation of powers"); *City of L.A. v. Lyons*, 461 U.S. 95, 112 (1983) (noting that plaintiff's claim is limited by federalism concerns); see also *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473-74, 476 (1982) (stating that Article III analysis ensures that courts remain true to separation of powers principles and federalism); *Simon*, 426 U.S. at 39 (indicating that courts must not exceed their "assigned role in our system"); *Rizzo v. Goode*, 423 U.S. 362, 378-79 (1976) (refusing to grant plaintiff's equitable relief because "important considerations of federalism" weigh against intrusion of federal judiciary into state administration of its own law (citing *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951))); *Warth*, 422 U.S. at 498 (declaring that standing inquiry considers "constitutional limitations on federal court jurisdiction"); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974) (cautioning against expansion of standing so as to "distort the role of the Judiciary in its relationship to the Executive and the Legislature"); *O'Shea v.*

A. *Current Standing Analysis*

A plaintiff seeking relief from a federal court must demonstrate the existence of three elements to establish Article III standing.<sup>23</sup> First, the plaintiff must demonstrate that an *injury in fact* occurred.<sup>24</sup> Second, the plaintiff must show that a *causal relationship* exists between the injury and the conduct of which the plaintiff complains.<sup>25</sup> Third, the plaintiff is re-

---

Littleton, 414 U.S. 488, 499-502 (holding that federalism concerns prevent courts from intruding upon state court proceedings), *vacated sub nom.*, *Spomer v. Littleton*, 414 U.S. 514 (1974); *Freedom Republicans, Inc. v. Federal Election Comm'n*, 13 F.3d 412, 417 (D.C. Cir.) (recognizing "the express separation-of-powers concerns" of *Lujan* Court's standing analysis (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1991))), *cert. denied*, 115 S. Ct. 84 (1994). *But see Allen*, 468 U.S. at 791 n.9 (Stevens, J., dissenting) (contending that "whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems" (quoting *Flast*, 392 U.S. at 100)); *Flast*, 392 U.S. at 100 (stating that whether plaintiff is proper party to bring suit does not, standing alone, raise separation of power concerns); *TRIBE*, *supra* note 5, § 3-14, at 108 (observing that Burger Court changed standing inquiry to incorporate separation of powers concerns); *Floyd*, *supra* note 20, at 863 (asserting that Burger Court's reliance upon separation of powers and federalism concerns conflicts with prior standing decisions of Warren Court); *Gottlieb*, *supra* note 21, at 1072 n.48 (noting authorities that criticize use of standing to link Article III with separation of powers). For a discussion of the linkage of standing with principles of the separation of powers, see generally *Scalia*, *supra* note 19, at 881 (arguing that standing is essential to principle of separation of powers).

The Supreme Court has also identified "prudential," as opposed to constitutional, reasons for a court's conclusion that standing is absent. *Valley Forge*, 454 U.S. at 474-75; *Warth*, 422 U.S. at 498-500; David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 Wis. L. Rev. 37, 46-48. The plaintiff cannot raise a "generalized grievance" that is shared with "a large class of citizens." *Valley Forge*, 454 U.S. at 475; *Warth*, 422 U.S. at 499. Moreover, the plaintiff's claim cannot rely solely upon "the legal rights or interests of third parties." *Valley Forge*, 454 U.S. at 474; *Warth*, 422 U.S. at 499. These prudential standing barriers are related to constitutional concerns, yet they primarily serve as a form of "judicial self-governance." *Id.* at 500; *see also Valley Forge*, 454 U.S. at 475 (stating that close relationship exists between prudential limitations and Article III). Accordingly, the Court has held that a plaintiff who has satisfied the elements of constitutional standing analysis may still be denied standing due to these prudential limitations. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979) (indicating that prudential concerns are employed "to avoid deciding questions . . . 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"). *But see Scalia*, *supra* note 19, at 886 (contending that prudential standing barriers have fallen into disfavor with federal courts). For a further discussion of the prudential limitations on standing, see Logan, *supra*, at 46-48.

23. *Northeastern*, 508 U.S. at 663. The Supreme Court has stated that these three elements are the "irreducible minimum" for standing, as required by the Constitution. *Valley Forge*, 454 U.S. at 472.

24. *Northeastern*, 508 U.S. at 663; *Lujan*, 504 U.S. at 560; *Lyons*, 461 U.S. at 101-02; *Gladstone*, 441 U.S. at 100; *Warth*, 422 U.S. at 501; *O'Shea*, 414 U.S. at 494. For a discussion of the "injury in fact" element of Article III standing analysis, see *infra* notes 27-35 and accompanying text.

25. *Northeastern*, 508 U.S. at 663 (citing *Simon*, 426 U.S. at 41-42); *Allen*, 468 U.S. at 751; *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429

quired to establish that the injury may be *redressable by a favorable decision* of the court.<sup>26</sup>

### 1. *Injury in Fact*

The modern "injury in fact" element of Article III standing originated in the United States Supreme Court as an expansion of standing doctrine in *Association of Data Processing Service Organizations, Inc. v. Camp*.<sup>27</sup> In *Warth v. Seldin*,<sup>28</sup> however, the Court established the more restrictive re-

U.S. 252, 261 (1977); *Simon*, 426 U.S. at 41-42. For a discussion of the causation element of standing analysis, see *infra* notes 36-42, 47-50 and accompanying text.

26. *Northeastern*, 508 U.S. at 663-64; *Allen*, 468 U.S. at 752; *Simon*, 426 U.S. at 38, 41; *Warth*, 422 U.S. at 508. For a discussion of the redressability element of standing, see *infra* notes 36-39, 43-46, 48-49, 51 and accompanying text.

27. 397 U.S. 150 (1970). In *Data Processing*, an association of data processors attempted to challenge a ruling by the Comptroller of Currency that allowed competing national banks to make data processing services available to both other banks and their customers. *Id.* at 151. The plaintiff association alleged that the Comptroller's ruling authorized illegal competition. *Id.* at 152.

In performing its standing analysis, the Court focused its inquiry upon whether the plaintiff had alleged that the challenged action caused it "injury in fact, economic or otherwise." *Id.* The Court found that the plaintiff had sufficiently alleged an "injury in fact" through its assertion that the Comptroller's ruling authorized illegal competition. *Id.* Thus, the Court held that the association had standing to sue the Comptroller. *Id.* at 158.

The *Data Processing* decision is significant because it represented a liberalization of the standing doctrine, thus allowing more individuals to invoke federal jurisdiction. See Linda R.S. v. Richard D., 410 U.S. 614, 616-17 (1973) (citing *Data Processing* as one of "[r]ecent decisions by this Court" that "have greatly expanded the types of 'personal stake(s)' which are capable of conferring standing"); *Data Processing*, 397 U.S. at 153 (rejecting accepted "legal interest" test of *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118 (1939) and replacing it with requirement that plaintiff only suffer injury in fact "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question"); see also Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 645-46 & n.2 (1973) (citing *Data Processing*, 397 U.S. 150 (1970)) (criticizing general approval of "trend toward easing standing requirements"); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1445 & n.56 (1988) (arguing that *Data Processing* was response to Court's desire to expand judicial review of administrative action by creating "quite lenient" requirement and indicating that Supreme Court has never denied standing under *Data Processing* test). Indeed, the language of the decision is indicative of the liberal approach to standing that the Court wished to achieve. See *Data Processing*, 397 U.S. at 154 (noting that "the trend is toward enlargement of the class of people who may protest administrative action"). Furthermore, the Court found that the "injury in fact" analysis of standing could be used to challenge governmental actions that harm not only economic interests, but also less conventional aesthetic, conservation or recreational ones. *Id.*; see Gene R. Nichol, Jr., *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 KY. L. REV. 185, 187 & nn.11-15 (1980-81) (citing various cases subsequent to *Data Processing* in which "injury in fact" test "was quickly interpreted to encompass a wide variety of grievances"). For a discussion of cases in which the Burger Court later used the "injury in fact" element, together with the causation and redressability elements, to restrict judicial grants of standing, see *supra* notes 28-51 and accompanying text.

28. 422 U.S. 490 (1975).

quirement where a plaintiff who seeks to challenge governmental action must demonstrate a "distinct and palpable injury to himself."<sup>29</sup> In *Warth*, several litigants sued a town in New York, claiming that its zoning ordinance effectively excluded individuals of low or moderate income from residing in the town.<sup>30</sup> The Court denied standing because the plaintiffs never demonstrated that the ordinance prevented them from obtaining a specific building permit or performing a construction project.<sup>31</sup> Therefore, the Court found that the plaintiffs "failed to show the existence of any injury . . . of sufficient immediacy . . . to warrant judicial intervention."<sup>32</sup>

Following *Warth*, the Court further defined "injury in fact" and continued to employ a restrictive standing analysis.<sup>33</sup> The Court found that an allegedly unconstitutional statute will not suffice for injury unless the government's enforcement of that statute actually harms the plaintiff in a direct or particular manner.<sup>34</sup> Moreover, the Court determined that a

29. *Id.* at 501 (citing *United States v. SCRAP*, 412 U.S. 669 (1973)); see George P. Choudas, Comment, *Neither Equal Nor Protected: The Invisible Law of Equal Protection, the Legal Invisibility of Its Gender-Based Victims*, 44 EMORY L.J. 1069, 1132 (1995) (citing *Warth* as prime example of Court's "rigid application of the standing requirements").

30. *Warth*, 422 U.S. at 493. The plaintiffs alleged that the zoning ordinance prevented the building of low and moderate-cost housing in the town so as to exclude minorities who typically live in such housing. *Id.* at 496.

31. *Id.* at 516. The Court stressed that the plaintiffs failed to aver that any one of them had even applied to the town for a building permit. *Id.* Because this had not transpired, the Court found it impossible to infer that the ordinance hindered any current building project of the plaintiffs. *Id.*

32. *Id.* The Court's requirement in *Warth* that the plaintiffs identify the actual denial of a permit or building project so as to show that they suffered an injury has been criticized as unsupported by precedent. See TRIBE, *supra* note 5, § 3-18, at 134 (criticizing stringent injury requirement employed in *Warth*); Daunarummo, *supra* note 9, at 734-35 n.52 (supporting proposition that prior to *Warth*, Supreme Court never required plaintiffs to demonstrate actual loss of project or property for standing (citing *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208, 211 (1972); *James v. Valtierra*, 402 U.S. 137, 139 (1971); *Hunter v. Erickson*, 393 U.S. 385, 387, 393 (1969); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384-85 (1926))).

33. See Schnurer, *supra* note 21, at 567 (contending that Court initially relied upon "injury in fact" element of standing "as a tool for excluding cases from court").

34. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485-86 (1982). In *Valley Forge*, an organization supporting the separation of church and state used the Establishment Clause of the First Amendment to challenge the federal government's conveyance of 77 acres of "surplus" military property to a religiously affiliated college. *Id.* at 467-69. In its discussion of the standing issue, the Court stated that the "injury in fact" requirement keeps federal courts from becoming "publicly funded forums for the ventilation of public grievances." *Id.* at 473. Accordingly, the Court emphasized that standing cannot be predicated upon a citizen's general assertion that the government has acted unconstitutionally. *Id.* at 482-83 (citing *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922)). Therefore, when the Court found that the organization, despite its fervent desire to maintain the separation of church and state, was

plaintiff seeking to enjoin allegedly illegal governmental conduct must show that an injury is imminently pending rather than “conjectural” or “hypothetical.”<sup>35</sup>

## 2. Causation and Redressability

Soon after its creation of the modern “injury in fact” test, the Court jointly introduced the two elements of causation and redressability to standing analysis.<sup>36</sup> The Court relied upon these elements to deny stand-

---

not adversely affected by the property conveyance any more than other citizens, it concluded that an “injury in fact” for standing was absent. *Id.* at 485-86 (“Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error . . .”); *see also* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 223 n.13 (1974) (stating that governmental nonobservance of Constitution will not suffice as injury for standing purposes).

35. *City of L.A. v. Lyons*, 461 U.S. 95, 101-02 (1983). In *Lyons*, the plaintiff suffered physical injury when members of the Los Angeles police department administered a chokehold upon him. *Id.* at 97-98. As a result, the plaintiff sought damages and an injunction to prevent the police from using such chokeholds in the future. *Id.* at 98. Although the Court acknowledged that the plaintiff had standing to seek damages, it found that his assertion of past illegal police conduct did not establish an imminent injury for standing to enjoin the police. *Id.* at 102-03 (citing *O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)). The Court added that if the plaintiff had demonstrated that the city authorized the illegal conduct and would continue to do so, he would have standing to seek the injunction. *Id.* at 106; *see also* *Rizzo v. Goode*, 423 U.S. 362, 372-73 (1976) (holding that plaintiffs who alleged widespread unconstitutional police conduct lacked injury for standing to gain injunction because claim rested upon what police might do in future).

36. *See* Kevin A. Coyle, *Standing of Third Parties to Challenge Administrative Agency Decisions*, 76 CAL. L. REV. 1061, 1078-81 (1988) (citing *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973)) (indicating that Supreme Court established “traceability” and “redressability” requirements of standing by following decisions of 1970s); Nichol, *supra* note 27, at 188 (suggesting that Court’s causation and redressability decisions of 1970s were “an attempt to curb the expansion of standing under the injury-in-fact test”). The two requirements were first applied in standing analysis in *Linda R.S.* Coyle, *supra*, at 1079-80; Nichol, *supra* note 27, at 188. In *Linda R.S.*, a single mother of an illegitimate child brought an equal protection challenge to a Texas statute. 410 U.S. at 615-16. The statute subjected only fathers of legitimate children to prosecution for failure to provide child support. *Id.* In denying standing to the mother, the Court stated that “in the unique context of a challenge to a criminal statute,” the existence of an “injury in fact” alone is not sufficient to confer standing. *Id.* at 617-18. The Court then found two substantial deficiencies with the mother’s claim. *Id.* at 618. Specifically, the Court found that the mother could not demonstrate that her injury, a lack of child support, directly resulted from the statute’s failure to criminalize the father’s behavior. *Id.* Similarly, the Court added that it was “only speculative” that prosecution of the father would result in the payment of child support. *Id.*

Later, the Court adopted the *Linda R.S.* approach and applied causation and redressability as necessary elements of standing analysis in *Warth v. Seldin*. *See* Nichol, *supra* note 27, at 189 (arguing that *Warth* used narrow holding in *Linda R.S.* to create general causation and redressability elements for standing). In *Warth*, several plaintiffs sued a town, claiming that its zoning ordinance prevented persons of low or moderate income from living there. *Warth*, 422 U.S. at 495. In

ing in *Simon v. Eastern Kentucky Welfare Rights Organization*<sup>37</sup> and *Allen v. Wright*.<sup>38</sup> In *Simon*, indigent plaintiffs claimed that an Internal Revenue Service (IRS) ruling was illegal because it provided favorable tax treatment to certain hospitals that refused to fully serve indigents.<sup>39</sup> Writing for the Court, Justice Powell noted that the plaintiffs' injury might have resulted from decisions made by the hospitals that were independent from the effect of the IRS ruling.<sup>40</sup> From this observation, Justice Powell stated that it is only "speculative" to decide that the ruling was the cause of the hospitals' denial of full services to the plaintiffs.<sup>41</sup> Therefore, Justice Powell determined that the plaintiffs lacked the requisite element of causation because the injury could not be "fairly traced" to the challenged governmental action and may have resulted from "the independent action of some third party not before the Court."<sup>42</sup>

The *Simon* Court also used redressability analysis to find an absence of standing.<sup>43</sup> The Court stated that the plaintiffs had the burden of showing that a court ruling in their favor would result in the relief that they de-

---

denying standing, the Court relied upon the causation and redressability elements of *Linda R.S. Id.* at 504 (citing *Linda R.S.*, 410 U.S. at 614). In particular, the Court required that the plaintiffs show that the zoning ordinance caused their alleged inability to obtain housing in the town. *Id.* at 504-05. Furthermore, the Court said that it was also necessary that the plaintiffs demonstrate that if a court issued a favorable ruling, the plaintiffs' inability to obtain housing would end. *Id.* at 504. When the Court found that the plaintiffs' complaint lacked such allegations, it denied standing to the plaintiffs. *Id.* at 508-09. In the process, the Court dismissed the plaintiffs' specific contention that the zoning ordinance precluded third parties from constructing housing for them. *Id.* at 504-05. For a discussion of *Warth* and the "injury in fact" element of standing analysis, see *supra* notes 28-33 and accompanying text.

37. 426 U.S. 26 (1976). For a discussion of the Court's standing analysis in *Simon*, see *infra* notes 39-46 and accompanying text.

38. 468 U.S. 737 (1984). For a discussion of the Court's standing analysis in *Allen*, see *infra* notes 47-51 and accompanying text.

39. *Simon*, 426 U.S. at 33. Specifically, the plaintiffs challenged IRS Revenue Ruling 69-545. *Simon*, 426 U.S. at 32. The Ruling modified previous IRS policy by allowing certain hospitals to limit nonemergency services for indigents while still maintaining their charitable status for advantageous tax treatment. *Id.* at 31 (citing IRS Rev. Rul. 69-545, 1969-2 C.B. 117). Prior IRS policy mandated that, in order to be considered "charitable" by the IRS, an organization must be "operated to the extent of its financial ability" for the benefit of indigents. *Id.* at 30 (citing Rev. Rul. 56-185, 1956-1 C.B. 202).

40. *Simon*, 426 U.S. at 43-44 (reasoning that denial of hospital services to plaintiffs could equally "result from decisions made by the hospitals without regard to the tax implications").

41. *Id.* at 42-43. Justice Powell stated that the only allegation the plaintiffs made in their complaint that linked the IRS ruling with their injury was that the ruling "encouraged" the hospitals to deny the plaintiffs services. *Id.* at 42.

42. *Id.* at 41-42. The Court implied that this third party was one of the hospitals that denied full services to the indigent plaintiffs. *Id.* at 43.

43. *Id.* at 43-44.



sired—full services at the hospitals.<sup>44</sup> The Court found that it was very possible that the hospitals would continue to make their services unavailable to indigents, regardless of a court ruling that the hospitals must receive unfavorable tax treatment.<sup>45</sup> As a result, the Court held that the redressability element of standing was lacking because there was not a “substantial likelihood” that a favorable court decision would redress the plaintiffs’ injury.<sup>46</sup>

*Allen v. Wright*<sup>47</sup> reflects another situation in which the Court relied upon both causation and redressability inquiries to deny standing.<sup>48</sup> The plaintiffs in *Allen* were black parents who alleged that the failure of the IRS to deny tax-exempt status to certain racially discriminatory, private schools interfered with their children’s right to receive an education in a desegregated school.<sup>49</sup> In refusing to grant standing to the plaintiffs, the Court held that “links in the chain of causation” between IRS grants of tax exemption and the children’s inability to receive an education in a racially integrated school were “far too weak.”<sup>50</sup> Likewise, the Court determined

44. *Id.* at 42. The Court adopted this requirement from the strict mandate in *Warth* that the plaintiff must actually show that “prospective relief will effectively remove the harm.” *Id.* at 45 (quoting *Warth v. Seldin*, 422 U.S. 490, 505 (1975)).

45. *Id.* at 43. The Court stressed that dependency upon advantageous tax treatment could vary substantially among the hospitals in question. *Id.* Therefore, the Court concluded that even if it rendered a favorable decision for the plaintiffs, it was equally likely that the hospitals would decide to avoid the “financial drain” of providing full services for indigents and would choose to forego the tax benefits. *Id.*

46. *Id.* at 45-46. The Court determined that granting the plaintiffs relief would merely “discourage” the hospitals from denying services to the plaintiffs. *Id.* at 42. Such a result was not sufficient enough to conclude that the plaintiffs’ injury was, in fact, redressable. *Id.*

47. 468 U.S. 737 (1984).

48. *Id.* at 756-61.

49. *Id.* at 739-40. The plaintiffs challenged particular guidelines and procedures that the IRS had established for determining whether a private school is racially nondiscriminatory. *Id.* at 740-43. Among other things, the guidelines required that private schools adopt of a written, public, nondiscriminatory policy; give a racial breakdown of the student body, faculty and staff; and identify any school founders or supporters who wish to maintain segregated private education. *Id.* at 741-42 (citing Rev. Proc. 75-50, 1975-2 C.B. 587). If a certain private school refused to comply with these guidelines, the IRS would deny tax exempt status to the school. *Id.* at 740 (citing Rev. Proc. 75-50, 1975-2 C.B. 587). The plaintiffs, however, asserted that many racially segregated private schools continued to maintain their tax exempt status despite these guidelines. *Id.* at 744-45 (indicating that plaintiffs insisted that segregated schools remained tax exempt under these guidelines simply by “adopting,” rather than “implementing,” nondiscriminatory policy). Based upon this allegation, the plaintiffs claimed that the IRS’s continued grant of tax exemption to the segregated schools was illegal and unconstitutional. *Id.* at 745 & n.12.

50. *Id.* at 759. The Court stated that this case presented an “even weaker” chain of causation than that presented in *Simon*. *Id.* In its causation analysis, the Court particularly focused upon the many possible third parties not before the Court who were likely to have more of a causal connection to the plaintiffs’ children’s injury. *Id.* (naming “officials of racially discriminatory schools receiving tax

under a redressability analysis that it was “entirely speculative” whether the requested relief, elimination of the schools’ tax-exempt status, would cause the schools to discontinue their discriminatory policies.<sup>51</sup>

B. *Relaxation of the “Injury in Fact” Element in Constitutional Challenges to Affirmative Action*

1. *Ninth Circuit Precedent*

Despite the mandate of *Warth*, in *Coral Construction Co. v. King County*,<sup>52</sup> the Ninth Circuit granted standing to a nonminority-owned construction company who brought an equal protection challenge against an affirmative action program without requiring that the company identify a specific project or contract that was lost due to the program.<sup>53</sup> In *Coral Construction*, a municipal ordinance in a Washington county provided “set-aside” contracts and bidding preferences to women and minority owned businesses.<sup>54</sup> When a nonminority-owned construction company was denied a particular county contract despite being the lowest bidder, the company brought an equal protection challenge against the application of the county ordinance.<sup>55</sup> Holding that the company had standing, the Ninth Circuit stated that the company had suffered an “injury in fact” every time it placed a bid and was denied the ability to compete equally.<sup>56</sup>

---

exemptions and the parents of children attending such schools”). Furthermore, the Court justified its causation decision by reasoning that granting standing in this suit would encourage other individuals to challenge agency decisions in federal court, rather than specific governmental violations of the law. *Id.* The Court indicated that such challenges “are rarely if ever appropriate for federal-court adjudication.” *Id.* at 760.

51. *Id.* at 758. The Court added that it was also speculative whether the schools would actually become more integrated once they were threatened with a loss of their tax exemption. *Id.*

52. 941 F.2d 910 (9th Cir. 1991).

53. *Id.* at 930. For a discussion of the *Warth* Court’s holding, see *supra* note 31 and accompanying text.

54. *Coral Constr.*, 941 F.2d at 914 (citing King County, Wash., Ordinance 8937 (May 1, 1989)). The affirmative action program employed two primary methods. *Id.* One method, used with bids for county contracts of \$10,000 or less, gave women and minority-owned businesses a preference if their bid was within five percent of the lowest bid. *Id.* (citing KING COUNTY, WASH., CODE § 4.18.060(A)(1) (1989)). Before the Ninth Circuit heard the case, the five percent preference method was eliminated and replaced with a “flexible-percent preference” method that was determined on a “case-by-case” basis. *Id.* at 915. The second method, applicable to county contracts exceeding \$10,000, required contractors who succeeded in obtaining the county project to use women and minority-owned businesses for a specified percentage of the work performed. *Id.* at 914 (citing KING COUNTY, WASH., CODE § 4.18.060(A)(2) (1989)).

55. *Id.* at 914-15. The contract was awarded to a minority-owned business instead. *Id.* at 914. The district court upheld the ordinance under strict scrutiny review. *Id.* at 915 (citing *Coral Constr. Co. v. King County*, 729 F. Supp. 734 (W.D. Wash. 1989)).

56. *Id.* at 930 (“[A]n injury results . . . every time the company simply places a bid.”). The court was clear that the company *could* identify a lost bid for the pur-

The Ninth Circuit reaffirmed this approach to “injury in fact” analysis in *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*.<sup>57</sup> In *Associated General*, the plaintiff, an organization of construction contractors, challenged a San Francisco city ordinance that gave bid preferences for city contracts to minority businesses.<sup>58</sup> The court concluded that the organization had suffered an “injury in fact” sufficient for standing because of the “mere fact” that the organization’s members could not “play on an even field” with minority businesses.<sup>59</sup>

2. *Adoption of the Ninth Circuit’s Approach to “Injury in Fact” by the United States Supreme Court*

In *Northeastern Florida Chapter of the Associated General Contractors v. City of Jacksonville*,<sup>60</sup> the Supreme Court confronted the issue of the extent of injury that a plaintiff challenging an affirmative action program must demonstrate in order to satisfy the “injury in fact” element for standing.<sup>61</sup>

---

poses of an “injury in fact.” *Id.* (emphasis added). Yet, the court indicated that because the county program forced the company to participate in an “objectively unequal bidding process[,]” it was not necessary for the company to actually show a lost contract in order to have standing. *Id.* Rather, the court found that an “injury in fact” arose from the unequal competition that the ordinance created. *Id.* (suggesting that company would suffer injury sufficient for standing “even when it [was] the successful bidder” for contract because company must still undergo “unequal competition” authorized by ordinance).

57. 950 F.2d 1401 (9th Cir. 1991).

58. *Id.* at 1403-04 (citing *Minority/Women/Local Business Utilization Ordinance*, No. 139-84 (1984)). The ordinance directed the city to grant up to a 10% preference to minority-owned businesses during bidding for contracts valued less than \$10,000,000. *Id.* at 1404-05 (citing S.F. ADMIN. CODE, Ch. 12D (1989)). *Associated General Contractors of California*, a business organization that was not designated as minority-owned under the ordinance, sued to enjoin the application of the program, alleging that the preferences violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 1405, 1412.

59. *Id.* at 1407 (citing *Coral Constr.*, 941 F.2d at 930); *see also* *Harrison & Burrows Bridge Constructors v. Cuomo*, 981 F.2d 50, 55-56 (2d Cir. 1992) (recognizing inability to compete equally for work due to minority set-aside as cognizable injury for standing); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 423 (D.C. Cir. 1992) (citing *O'Donnell Constr. Co. v. District of Columbia*, 762 F. Supp. 354, 362 (D.D.C. 1991)) (affirming grant of standing because minority set-aside program deprived plaintiffs of “the opportunity to compete on an equal footing” for contracts).

60. 508 U.S. 656 (1993).

61. *Id.* at 658. The Court granted certiorari specifically to resolve the dispute among the circuits as to what constitutes an “injury in fact” for a viable challenge to an affirmative action program. *Id.* at 659-60 (citing *O'Donnell*, 963 F.2d at 423; *Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 951 F.2d 1217, 1219 (11th Cir. 1992); *Coral Constr.*, 941 F.2d at 930). For a discussion of the lenient approach to “injury in fact” taken by the Ninth Circuit, *see supra* notes 52-59 and accompanying text.

The second, more restrictive approach, supported primarily by the Eleventh Circuit, demanded that the plaintiff actually identify a lost contract as a result of the challenged affirmative action program. *Northeastern*, 951 F.2d at 1219; *Cone Corp. v. Florida Dep't of Transp.*, 921 F.2d 1190, 1205-06 (11th Cir. 1991) (requir-

The plaintiff in *Northeastern* was an association of individuals and firms in the Jacksonville, Florida construction industry.<sup>62</sup> The plaintiff brought an equal protection challenge to enjoin a Jacksonville ordinance that gave preferential treatment to minority-owned businesses in the award of city contracts.<sup>63</sup> The Supreme Court heard the case after the Eleventh Circuit concluded that the association lacked an "injury in fact" for standing.<sup>64</sup> In particular, the Eleventh Circuit reached this conclusion after the court found that the association did not demonstrate that one of its members would have obtained a city contract but for the challenged ordinance.<sup>65</sup>

In its review of the Eleventh Circuit's ruling, the Court assessed some of its previous equal protection standing decisions.<sup>66</sup> Writing for the

---

ing that contractor seeking to challenge affirmative action program must allege loss of specific contract to have injury for standing); *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 758 (11th Cir. 1991) (holding that loss of opportunity to compete on equal basis without proving loss of contract is insufficient injury for purposes of standing to challenge set-aside program); *see also* *Contractors Ass'n v. City of Phila.*, 945 F.2d 1260, 1264 (3d Cir. 1991) (affirming district court's decision that plaintiffs who identified loss of specific contracts due to city set-aside program had standing); *Carpenter v. Barnhart*, No. 88-3578, 1990 WL 2314, at \*3 (4th Cir. Jan. 16, 1990) (holding that plaintiff lacked standing because he did not bid regularly on contracts and never identified any specific contracts lost due to set-aside program).

62. *Northeastern*, 508 U.S. at 659.

63. *Id.* The ordinance created a set-aside of 10% of the money spent on city contracts for "minority business enterprises." *Id.* at 658 (citing JACKSONVILLE PURCHASING CODE §§ 126.604(a), 126.605(a) (1988)). The ordinance defined such an "enterprise" as a business whose ownership was at least 51% female, black, Spanish-speaking, Asian, Native American, Eskimo, Aleut or handicapped. *Id.* (citing JACKSONVILLE PURCHASING CODE § 126.603(a),(b)). Most of the plaintiff's members did not qualify as "minority business enterprises" under the Jacksonville ordinance. *Id.* at 659.

64. *Id.* at 660 (citing *Northeastern*, 951 F.2d at 1218). The Eleventh Circuit vacated the district court's ruling that the ordinance did not pass strict constitutional scrutiny. *Id.* The Eleventh Circuit, however, did not address the merits of the association's equal protection argument because it determined that the plaintiff lacked standing. *Id.*

65. *Id.* (citing *Northeastern*, 951 F.2d at 1219); *Northeastern*, 951 F.2d at 1219 (citing *Cone Corp.*, 921 F.2d at 1205-06) (refusing to grant standing because plaintiff did not allege "that its members would have bid successfully on any one or more of these contracts if not for the ordinance").

66. *Northeastern*, 508 U.S. at 663-66 (citing *Clements v. Fashing*, 457 U.S. 957 (1982); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Warth v. Seldin*, 422 U.S. 490 (1975); *Turner v. Fouche*, 396 U.S. 346 (1970)); *see* *Clements*, 457 U.S. at 962 (granting plaintiff standing to challenge requirement that directs state officeholders to resign 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*, 396

Court, Justice Thomas stated that in an equal protection claim, a plaintiff suffers an "injury in fact" when the challenged government program denies the plaintiff equal treatment.<sup>67</sup> Justice Thomas rejected the Eleventh Circuit's view that an injury in fact exists only when the plaintiff can demonstrate that he or she was unable to obtain the specific benefit that was sought.<sup>68</sup> Instead, Justice Thomas adopted the Ninth Circuit's approach and declared that the "injury in fact" from a minority preference program is "the inability to compete on an equal footing in the bidding process, not the loss of a contract."<sup>69</sup> Applying this rule, Justice Thomas concluded that because the association had alleged that it was "able and ready" to bid on public contracts and that the ordinance prevented it from competing equally with minority-owned businesses for those contracts, the association had suffered an "injury in fact."<sup>70</sup> In reaching the decision that the plaintiff had standing, Justice Thomas noted that this definition of "injury in fact" also incorporated the elements of causation and redressability.<sup>71</sup>

---

U.S. at 362 n.23 (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 absence of limitation).

67. *Northeastern*, 508 U.S. at 666.

68. *Id.* Justice Thomas determined that the Eleventh Circuit's "injury in fact" approach was unfounded because Supreme Court precedent indicated that:

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.* (citing *Turner*, 396 U.S. at 362). In reaching this conclusion, Justice Thomas relied mainly upon *Bakke*. *Id.* at 665-66. Justice Thomas noted that, in *Bakke*, a white male medical school applicant who was denied admission challenged the school's admissions program that set-aside positions in the upcoming class for minority applicants only. *Id.* at 665. Justice Thomas observed that in *Bakke*, Justice Powell concluded that the applicant had standing because his "injury" was the inability to compete for all of the positions in the class due to his race. *Id.* (citing *Bakke*, 438 U.S. at 281 n.14) (opinion of Powell, J.). Furthermore, Justice Thomas concluded from Justice Powell's opinion that the applicant did not have to show that he would have been admitted "but for" the race-conscious admissions program in order to have standing. *Id.* (citing *Bakke*, 438 U.S. at 280-81 (opinion of Powell, J.)).

69. *Id.* at 666 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)) ("The [set-aside program] denies certain citizens the *opportunity to compete* for a fixed percentage of public contracts based solely upon their race."). For a discussion of the Ninth Circuit's approach to "injury in fact" analysis, see *supra* notes 52-59 and accompanying text.

70. *Northeastern*, 508 U.S. at 666.

71. *Id.* at 666 n.5. (holding that "[i]t follows from our definition of 'injury in fact' that [the plaintiff] has sufficiently alleged both that the city's ordinance is the

Notably, the *Northeastern* Court distinguished its prior standing decision in *Warth v. Seldin*.<sup>72</sup> In doing so, the Court characterized the “injury in fact” inquiry in much broader terms than it had done in the past.<sup>73</sup>

---

‘cause’ of its injury and that a judicial decree directing the city to discontinue its program would ‘redress’ the injury”).

72. *Id.* at 666-67 (citing *Warth v. Seldin*, 422 U.S. 490 (1975)). The *Warth* Court determined that an association of construction firms lacked an “injury in fact” because the association did not identify a specific permit or project that the challenged zoning law prevented them from obtaining. *Warth*, 422 U.S. at 516. In *Northeastern*, the Court held that *Warth* was not applicable to the case for two reasons. *Northeastern*, 508 U.S. at 667. First, unlike the plaintiff in *Northeastern*, the association in *Warth* did not complain that a discriminatory classification precluded their ability to compete for a project on an equal basis. *Id.* Rather, the association in *Warth* focused upon the local government’s refusal to grant it a project that it sought. *Id.* (citing *Warth*, 422 U.S. at 515) (stating that association’s complaint in *Warth* “was not that they could not compete equally; it was that they did not win”). Second, the Court reasoned that, unlike the plaintiff in *Northeastern*, the association in *Warth* never alleged that any of its members had attempted to obtain a particular project so as to sustain an injury. *Id.* (citing *Warth*, 422 U.S. at 516). Moreover, the Court added that the Eleventh Circuit misinterpreted the *Warth* decision because the decision never required that a plaintiff demonstrate that it would have obtained a benefit “but for” a discriminatory policy. *Id.* For a further discussion of the standing decision in *Warth*, see *supra* notes 28-32 and accompanying text and *supra* note 36.

73. *Northeastern*, 508 U.S. at 667 (holding that “injury in fact” for standing to bring equal protection challenge against minority preference program arises from inability to compete equally due to government-imposed barrier, not loss of or inability to obtain specific benefit); see T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 642 (1993) (contending that, in contrast to Court’s typically restrictive interpretation, *Northeastern* greatly eased “injury in fact” requirement); Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 17 n.60 (1995) (citing *Northeastern* as decision that “illustrate[s] the flexibility of the injury characterization”); Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 743 (1993) (stating that Court relaxed its standing requirements in *Northeastern*); Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1423, 1437-52 (1995) (calling *Northeastern* decision “remarkable” and “a suspicious aberration in the Court’s justiciability jurisprudence” in light of past, stringent standing decisions); Cass R. Sunstein, *Article II Revisionism*, 92 MICH. L. REV. 131, 132 n.9 (1993) (describing “serious tension” between *Northeastern* and prior Supreme Court cases regarding standing (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Allen v. Wright*, 468 U.S. 737 (1984); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973))); Daunarummo, *supra* note 9, at 751, 753-55 n.128 (commenting that Court took more relaxed approach to standing in *Northeastern* than in prior cases); *Leading Cases*, *supra* note 9, at 304, 307-08 (describing *Northeastern* as “uncharacteristically ‘liberal’” decision in comparison with other standing jurisprudence); Jost, *supra* note 8, at 74 (stating that *Northeastern* “relaxed standing requirements”); cf. Anton Bell, *Clarence Thomas: Evasive or Deceptive*, 21 N.C. CENT. L.J. 194, 210 (1995) (arguing that *Northeastern* Court granted standing without even requiring plaintiff to demonstrate real “injury in fact”). Compare *Northeastern*, 508 U.S. at 666 (holding that standing of plaintiff arises from imposition of unequal barrier, not ultimate inability to obtain benefit), with *Warth*, 422 U.S. at 516 (refusing to grant standing because plaintiff never identified any specific benefit precluded by governmental action). But see Choundas, *supra* note 29,

Thus, the *Northeastern* decision departed from the line of prior cases, represented by *Warth*,<sup>74</sup> *Simon*<sup>75</sup> and *Allen*,<sup>76</sup> that consistently placed limitations on standing.

Of equal significance, the Court rendered its standing decision in *Northeastern* in the context of a challenge to a government-sponsored affirmative action program.<sup>77</sup> In broadening the definition of "injury in fact," the Court weakened the typically rigid barrier of standing.<sup>78</sup> Consequently, it greatly expanded the possible number of plaintiffs who may bring constitutional challenges against affirmative action programs.<sup>79</sup>

---

at 1140-49 (viewing decision in *Northeastern* as consistent with established exception to Court's typically rigid standing analysis where plaintiff's "injury in fact" is alleged denial of equal treatment) (citing *Northeastern*, 508 U.S. at 656; *Heckler v. Mathews*, 465 U.S. 728 (1984); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980); *Orr v. Orr*, 440 U.S. 268 (1979); *Bakke*, 438 U.S. at 265; *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Baker v. Carr*, 369 U.S. 186 (1962)).

74. 422 U.S. 490 (1975). For a discussion of the standing decision in *Warth*, see *supra* notes 28-32, 36 and accompanying text.

75. 426 U.S. 26 (1976). For a discussion of the standing decision in *Simon*, see *supra* notes 39-46 and accompanying text.

76. 486 U.S. 737 (1984). For a discussion of the standing decision in *Allen*, see *supra* notes 47-51 and accompanying text.

77. *Northeastern*, 508 U.S. at 658. For further discussion of the facts of *Northeastern*, see *supra* notes 62-63 and accompanying text.

78. For a discussion of the *Northeastern* Court's expansion of the "injury in fact" analysis, see *supra* notes 69-70, 73.

79. Daunarummo, *supra* note 9, at 750 & n.127 (citing Tom Provost, *Supreme Court Rulings Have Local Impact*, NATION'S CITIES WKLY., June 21, 1993, at 2 (arguing that *Northeastern* decision makes affirmative action programs vulnerable to suit by more plaintiffs)); *Leading Cases*, *supra* note 9, at 304 (asserting that *Northeastern* "further[s] judicial access for the opponents of affirmative action"); George R. La Noue, *Court's Jacksonvile Decision Opens Affirmative Action Plans to Increased Litigation*, NATION'S CITIES WKLY., July 12, 1993, at 9 (commenting that decision in *Northeastern* will lead to more litigation); see also Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 870 (1995) (discussing *Northeastern* as most recent threat to "the very viability of affirmative action in any setting"). Some commentators have suggested that the Court's allegedly remarkable decision in *Northeastern* can only be explained as racial politics and racist favoritism of the interests of the white majority. See Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 193-94 & n.135 (1994) (claiming that *Northeastern* decision demonstrates that "in a world where race matters . . . this Supreme Court peeks when it decides whose rights to protect"); Spann, *supra* note 73, at 1423-24, 1471-72 (examining Justice Thomas's opinion in *Northeastern* and concluding that his "disingenuous" attempt to distinguish *Warth* illustrates Court's willingness to vary result of standing determinations depending upon race of plaintiff bringing claim). *But cf.* *Comer v. Cisneros*, 37 F.3d 775, 793 (2d Cir. 1994) (citing *Northeastern*, 508 U.S. at 666) (applying "injury in fact" approach of *Northeastern* to conclude that minority plaintiffs had standing to challenge local and federal residency preferences that allegedly prevented minorities from residing in suburbs).

The effect of *Northeastern* on standing analysis is apparent in the Tenth Circuit's decision in *Concrete Works of Colo., Inc. v. Denver*, 36 F.3d 1513, 1518-19 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1315 (1995). In *Concrete Works*, a construction firm sought to enjoin the application of a Denver ordinance that directed prime contractors to meet certain subcontracting participation "goals" for women and

## III. FACTS

In *Bras v. California Public Utilities Commission*,<sup>80</sup> the Ninth Circuit addressed an equal protection challenge to the provisions of a California statute that required particular nongovernmental entities to meet certain minority participation goals.<sup>81</sup> The statute at issue in *Bras* was the Califor-

---

minority-owned businesses. *Id.* at 1516-17. When the firm failed to comply with the participation goals, it allegedly lost three construction contracts. *Id.* at 1517. As a result, the firm challenged the city ordinance on equal protection grounds. *Id.* The district court granted standing to the firm, but the court said that the firm's injury was "extraordinarily weak" because it did not show that it "was refused a contract because of the race or gender of its owner." *Id.* at 1518 (quoting *Concrete Works, Inc. v. Denver*, 823 F. Supp. 821, 827-28 (D. Col. 1993)).

On appeal, the Tenth Circuit considered whether the firm satisfied its burden of establishing standing. *Id.* The court noted that after the district court's decision, the Supreme Court issued its ruling in *Northeastern*. *Id.* Therefore, the court concluded that the Supreme Court's decision controlled its "injury in fact" analysis. *Id.* In light of *Northeastern*, the Tenth Circuit stated that the firm had shown an "injury in fact" because the Denver ordinance prevented the firm from competing equally with women and minority prime contractors for city contracts. *Id.*; see also *Comer*, 37 F.3d at 775 (using *Northeastern* to reason that African-American plaintiffs had standing to challenge suburban residency preferences because court found that preferences were government-imposed barriers that made it more difficult for plaintiffs to obtain benefit of living in suburbs); *Cone Corp. v. Hillsborough County*, 5 F.3d 1397, 1399 (11th Cir. 1993) (reversing and remanding, in light of *Northeastern*, district court's dismissal of nonminority contractor's suit for lack of standing).

The Supreme Court most recently applied its expanded "injury in fact" analysis from *Northeastern* to grant standing to a nonminority subcontractor in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2105 (1995). In *Adarand*, the nonminority subcontractor challenged a federal contracting program that granted prime contractors additional compensation if the contractors met an established "goal" of hiring minority subcontractors. *Id.* at 2101-02. In its standing inquiry, the Court rejected the government's argument that, in order to have an injury for standing, the subcontractor must show that his company has been and will be the lowest bidder on government contracts. *Id.* at 2105. Instead, the Court stated that *Northeastern* stands for the proposition that a plaintiff need only demonstrate an inability to compete equally due to a discriminatory classification to have an "injury in fact." *Id.* (citing *Northeastern*, 508 U.S. at 666). Thus, when the Court reasoned that the challenged federal program would force the nonminority subcontractor to compete unequally for future federal contracts, it held that the subcontractor had established an "imminent" injury for standing. *Id.* For further discussion of *Adarand*, see Spann, *supra* note 73, at 1474-75 (arguing that *Adarand* is consistent with prior affirmative action cases which show that current Supreme Court favors interests of whites over those of minorities); Julie A. Ellis, Recent Case, 34 DUQ. L. Rev. 403 (1996) (discussing facts and opinions of *Adarand* decision); Jost, *supra* note 8, at 70-75 (considering future of federal affirmative action following *Adarand* decision); Rhonda McMillion, *Affirmative Action Struggle*, A.B.A. J., Jan. 1996, at 93 (discussing support for *Adarand* among opponents of affirmative action and reporting that President Clinton stated that some federal affirmative action programs must be altered due to Court's holding).

80. 59 F.3d 869 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 800 (1996).

81. For a discussion of the events leading up to the plaintiff's lawsuit, see *infra* notes 87-98 and accompanying text.



nia Women and Minority Business Enterprise Law of 1986 ("Law").<sup>82</sup> The Law ordered the California Public Utilities Commission ("Commission") to create "guidelines" to aid the major state utilities in their efforts to develop programs for procuring more products and services from women, minority and disabled veteran business enterprises.<sup>83</sup>

Pursuant to its new duty under the Law, the Commission executed General Order 156 ("Order") in 1988 as a guideline for the utilities.<sup>84</sup> The Order mandated that each utility establish "goals" in which the utility would purchase no less than fifteen percent of its products and services from minority-owned businesses.<sup>85</sup> If the utility failed to make progress

82. CAL. PUB. UTIL. CODE §§ 8281-8286 (West 1993). The California Legislature passed the Law after it found that state-regulated public utilities were procuring a disproportionately small share of their products and services from women, minority and disabled veteran business enterprises. *Id.* § 8281(b)(1)(C). The Legislature stated that the specific purpose of the Code was to "encourage greater economic opportunity for women, minority, and disabled veteran business enterprises" and "promote competition among regulated public utility suppliers." *Id.* § 8281(b)(2)(A)-(B).

83. *Id.* § 8283(c). Specifically, the utilities at which the Law was directed included "all electrical, gas, and telephone corporations with gross annual revenues exceeding twenty-five million dollars." *Id.*

The California Legislature categorized and defined women, minority and disabled business enterprises as follows:

(a) "Women business enterprise" means a business enterprise that is at least 51 percent owned by a woman or women . . . .

(b) "Minority business enterprise" means a business enterprise that is at least 51 percent owned by a minority group or groups . . . [and t]he contracting utility shall presume that minority includes Black Americans, Hispanic Americans, Native Americans, and Asian Pacific Americans.

*Id.* § 8282(a)-(b). Additionally, the Legislature defined a "disabled veteran business enterprise" as a sole proprietorship with disabled veteran ownership of at least 51% or more. *Id.* § 8282(c) (citing CAL. MIL. & VET. CODE § 999(g) (West Supp. 1995)).

84. General Order 156 of the Public Utilities Commission of the State of California § 1.1.1 (1988) ("Order").

85. *Id.* § 8.2 ("Each utility shall establish initial minimum long-term goals for each major category of products and services the utility purchases . . . of not less than 15% for minority owned business enterprises."). For clarification, the Order defined a "goal" as a "target which . . . indicates progress in a preferred direction" and explicitly stated that "a goal is neither a requirement nor a quota." *Id.* § 1.3.13. Utilities were also encouraged to "reach parity" with public agencies that were granting at least 30% of their contracts to minority business enterprises. *Id.* § 8.3.

For accountability purposes, the Order directed each of the utilities to provide an annual report on their procurement plan. *Id.* § 9. In the report, the utility must describe its procurement efforts and summarize its purchases and contracts from women or minority businesses. *Id.* § 9.1.1-2. In addition, the utility must explain any reasons for not attaining the minority participation goals. *Id.* § 9.1.4.

The Order also directed each utility to incorporate certain "minimum program elements" into its procurement program. *Id.* § 6.1. These elements primarily consisted of training instructions for those utility employees having procurement responsibilities. *Id.* § 6.1.1. The instructions also mandate, however, that these employees "be evaluated on their progress in meeting the goals of their specific area of procurement." *Id.*

toward these goals, the Commission had the ability to issue a sanction against the utility.<sup>86</sup>

In 1991, the telephone utility Pacific Bell, in accordance with its obligations under the Order, issued a "prequalification criteria" form to various architectural firms.<sup>87</sup> The utility intended to use the form to gather information and evaluate those firms from whom the utility would receive proposals for future architectural work.<sup>88</sup> In February 1991, J. Jack Bras, architect and owner of the architectural firm J. Jack Bras & Associates, completed one of Pacific Bell's forms.<sup>89</sup> Although Bras's firm had regularly provided architectural services for Pacific Bell in the past, Bras also was required to answer the form's questions.<sup>90</sup>

One of the form's questions asked if the particular firm was certified as a minority or women business enterprise.<sup>91</sup> Because Bras was a white male, his firm had not attained this status.<sup>92</sup> Consequently, Bras answered the form's certification question in the negative.<sup>93</sup>

Bras next heard from Pacific Bell in June 1991.<sup>94</sup> At that time, Pacific Bell informed Bras that his firm was not among the three firms that would receive its future business proposals.<sup>95</sup> Pacific Bell based its decisions upon the answers that the various firms had given to the questions on the

86. *Id.* § 8.12. (stating that "no penalty shall be imposed for failure of any utility to meet and/or exceed goals" except for "any penalty imposed as a result of a Commission-initiated investigation"). To penalize a particular utility, the Commission conceded that it could reduce its rate of return. *Bras v. California Pub. Utils. Comm'n*, 59 F.3d 869, 872 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 800 (1996).

87. *Bras*, 59 F.3d at 872.

88. *Id.*

89. *Id.*; Appellant's Opening Brief at 11, *Bras v. California Pub. Utils. Comm'n*, 59 F.3d 869 (9th Cir. 1995) (No. 93-15764).

90. *Bras*, 59 F.3d at 871. Indeed, Bras's firm had provided Pacific Bell with architectural services for 22 years—from 1969 to 1991. *Id.* From 1983 to 1990, the Pacific Bell account gave Bras 30% of his gross receipts. *Id.* Moreover, Bras's most recent service for Pacific Bell was a three-year contract extending from 1989-91. *Id.* Nevertheless, the contract manager of Pacific Bell notified Bras in a letter that his firm would be "disqualified from participating in [Pacific Bell's] corporate long-term plans" if Bras did not complete the form. *Id.*

91. *Id.* The certification process was performed through the Cordoba Corporation Clearing House. *Id.* The Order established rules and guidelines for the eligibility of women business enterprise and minority business enterprises in the utility procurement program. General Order 156 of the Public Utilities Commission of the State of California § 2 (1988). The Order stated that the Commission will establish a "clearinghouse" to verify and audit those enterprises that are considered a women and/or minority business enterprise. *Id.* § 3.1.

92. Appellant's Opening Brief at 11-12, *Bras* (No. 93-15764). For the definitions of women and minority business enterprises as provided by the California Legislature, see *supra* note 83.

93. *Bras*, 59 F.3d at 871.

94. *Id.*

95. *Id.* Bras learned of this decision after he wrote to the President and CEO of Pacific Bell and asked why he was suddenly and unexpectedly not receiving any business from the utility. Appellant's Opening Brief at 12, *Bras* (No. 93-15764).

“pre-qualification criteria” form.<sup>96</sup> Pacific Bell told Bras that his negative response to the form’s certification question prevented his firm from being one of the three that Pacific Bell had selected.<sup>97</sup> Equally important, Pacific Bell’s Director of Project Management-Real Estate stated that the impetus behind Pacific Bell’s development of the “prequalification criteria” form was the Order and its requirement that utilities set certain goals for purchasing from women and minority-owned businesses by 1993.<sup>98</sup>

In response to his exclusion from further business with Pacific Bell, Bras filed a civil rights action in the United States District Court for the Northern District of California against the Commission.<sup>99</sup> Bras sought a

96. *Bras*, 59 F.3d at 871. In particular, the answers were used to rank the 13 responding firms according to nine “attributes.” Appellant’s Opening Brief at 12, *Bras* (No. 93-15764). These attributes included quality of firm’s past performance, experience in central office design, experience in administrative space design, number of licensed architects available, number of years in business, firm expenditures in 1990, size of firm and status of firm as a women or minority business enterprise. *Id.* at 13.

97. *Bras*, 59 F.3d at 871. Pacific Bell told Bras that his firm ranked sixth among the 13 architectural firms that Pacific Bell considered. *Id.* The utility also informed Bras that if his answer to the certification question had been “yes,” his firm would have ranked third in the rankings and would have been invited to develop a long-term working relationship with Pacific Bell. *Id.* Instead, the utility told Bras that a minority-owned business that had answered “yes” to the certification question ultimately ranked third. *Id.*

98. Appellant’s Opening Brief at 13, *Bras* (No. 93-15764) (citing Oct. 1991 letter from Jack Behseresht). The Director stated that the Order “requires Pacific Bell to set goals for purchasing from [minority business enterprises] of 15% of total purchasing dollars from minority-owned businesses.” *Id.* The Director then admitted: “J. Jack Bras and Associates has provided valuable services to Pacific Bell in the past and was not eliminated due to any unsatisfactory performance.” *Id.* Finally, the Director concluded with a promise that Pacific Bell would maintain Bras’s information file if any “reevaluation of our need for architectural services” occurs in the future. *Id.*

99. *Bras*, 59 F.3d at 871. Bras based his civil rights claims on 42 U.S.C. §§ 1981, 1983, 1985 (1988). *Id.* Section 1981 provides that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . as is enjoyed by white citizens.” 42 U.S.C. § 1981(a) (1994). The Supreme Court held that § 1981 protects the ability of both whites and minorities to make and enforce contracts. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 292-93 & n.23 (1976). Section 1983 provides that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . , shall be liable to the party injured.” 42 U.S.C. § 1983. This provision provides the injured party with a remedy for a violation of the Equal Protection Clause of the Fourteenth Amendment. *MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 932 (3d ed. 1994). Section 1985 prohibits two or more persons from conspiring “for the purpose of depriving . . . any person or class of persons of the equal protection of the laws” and permits the injured party to recover damages from the conspirators. 42 U.S.C. § 1985(3). The Supreme Court has not yet determined whether a white male may sue under this provision. *See United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 836 (1983) (commenting that “it is a close question” whether 42 U.S.C. § 1985(3) prohibits any class-based animus other than that directed against African-Americans). The lower courts also have

permanent injunction to prevent the Commission from further implementing the Law and the Order.<sup>100</sup> He alleged that these provisions were unconstitutional and void as violative of the Equal Protection Clause of the United States Constitution.<sup>101</sup> The district court, however, never reached the merits of the case because it dismissed Bras's claim against the Commission for lack of standing.<sup>102</sup>

Bras appealed the adverse decision to the United States Court of Appeals for the Ninth Circuit.<sup>103</sup> That court confronted the issue of whether Bras had established standing to challenge the allegedly discriminatory measures.<sup>104</sup> Reversing the district court's decision, the Ninth Circuit majority held that Bras met his burden and had standing to seek an injunction against the Commission.<sup>105</sup>

#### IV. NARRATIVE ANALYSIS

##### A. *The Majority Opinion*

In *Bras*, the Ninth Circuit considered the sole issue of whether Bras had standing to bring an equal protection claim against the Commission.<sup>106</sup> The majority opinion in *Bras*, authored by Chief Judge Wallace, began by enumerating the three required elements of Article III standing:

---

not reached a consensus on the issue. See *Triad Assocs., Inc. v. Chicago Hous. Auth.*, 892 F.2d 583, 593 (7th Cir.) (allowing white plaintiffs to make allegations of conspiracy motivated by racial animus against whites under 42 U.S.C. § 1985(3)). But see *Moore ex rel. Blakely v. City of Denver*, 744 F. Supp. 1028, 1031 (D. Colo. 1990) (rejecting claim by white male under 42 U.S.C. § 1985(3) because white males, as class, were not subjected to historically pervasive discrimination or racial animus).

Besides filing a complaint against the Commission, Bras also sued Pacific Bell for civil rights violations based upon the utility's selection of architectural firms using its "prequalification criteria" form. *Bras*, 59 F.3d at 871. In particular, Bras alleged that the utility had committed race and sex discrimination against him. *Id.* Notably, however, Bras settled all of his claims against Pacific Bell before the case reached the district court. *Id.* at 872. For a discussion of the significance that Judge Pregerson gave Bras's settlement with Pacific Bell in his dissenting opinion in *Bras*, see *infra* note 134 and accompanying text.

100. *Bras*, 59 F.3d at 871.

101. *Id.* For the relevant portion of the text of the Equal Protection Clause of the Fourteenth Amendment to the Constitution, see *supra* note 5.

102. *Bras*, 59 F.3d at 871-72 (noting that Bras settled all claims against Pacific Bell before district court dismissed claim against Commission).

103. *Id.* at 871.

104. *Id.*

105. *Id.* at 875-76.

106. *Id.* at 878.

“injury in fact,” causation and redressability.<sup>107</sup> The court then focused its inquiry upon whether Bras had satisfied each requirement.<sup>108</sup>

Addressing the “injury in fact” requirement, the court acknowledged that the United States Supreme Court’s decision in *Northeastern* controls the “injury in fact” analysis for equal protection cases.<sup>109</sup> The court stated that, under this standard, Bras only needed to demonstrate that he was “able and ready to bid on contracts and that a discriminatory policy prevent[ed him] from doing so on an equal basis.”<sup>110</sup> Applying these rules, the court determined that Bras had met his burden.<sup>111</sup> In reaching this conclusion, the court acknowledged that Bras was unable to bid on a Pacific Bell contract at the time.<sup>112</sup> The court determined, however, that this inability was because of the long-term nature of Pacific Bell’s contracts and not Bras’s unwillingness to provide architectural services.<sup>113</sup> Instead, the court found that Bras satisfied the requirements of both *Northeastern* and Ninth Circuit precedent by indicating that he wished to “reinstate” his business relationship with Pacific Bell “in the future” so that he was “ready, willing and able” to provide services to Pacific Bell, if given the opportunity.<sup>114</sup>

---

107. *Id.* at 872 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992)). For a discussion of the three required elements of standing, see *supra* notes 23-26. The court indicated that the plaintiff, Bras, had the burden of establishing each of the three requirements to defeat the Commission’s summary judgment motion. *Id.* To do this, the court stated that Bras, as the nonmoving party, had to present specific, affirmative evidence establishing each requirement. *Id.* at 872-73 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). Moreover, the court indicated that because the Commission moved for summary judgment, the court must examine the evidence in the light most favorable to Bras. *Id.* at 872 (citing *First Pac. Bank v. Gilleran*, 40 F.3d 1023, 1024 (9th Cir. 1994)).

108. *Bras*, 59 F.3d at 873-75. For a discussion of the *Bras* court’s “injury in fact” inquiry, see *infra* notes 109-20 and accompanying text. For a discussion of the *Bras* court’s causation and redressability inquiry, see *infra* notes 121-23 and accompanying text.

109. *Bras*, 59 F.3d at 873 (citing *Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993)). Indeed, the court indicated that the *Northeastern* Court actually adopted the Ninth Circuit’s “injury in fact” analysis from the *Coral Construction* and *Associated General* cases. *Id.* (citing *Northeastern*, 508 U.S. at 666). For a discussion of *Coral Construction*, see *supra* notes 52-56 and accompanying text. For a discussion of *Associated General*, see *supra* notes 57-59 and accompanying text.

110. *Bras*, 59 F.3d at 873 (citing *Northeastern*, 508 U.S. 665-67).

111. *Id.*

112. *Id.*

113. *Id.* The court indicated that the three architects would have a three year relationship with Pacific Bell. *Id.* Thus, Bras could not presently bid on a Pacific Bell contract because this term had not yet expired. *Id.* The court viewed this distinction as a mere technicality and stated that Bras’s ability to compete “for long-term contracts every several years rather than on a project-by-project basis does not change the [injury in fact] analysis.” *Id.*

114. *Id.* at 874. To reach this conclusion, the court also considered evidence from the record that Pacific Bell was pleased with Bras’s work and told him that it would keep his information on file for consideration in the future. *Id.* The court

The court next considered the requirement in *Northeastern* that claimants must identify a discriminatory policy that prevents them from competing for contracts “on an equal basis.”<sup>115</sup> As a preliminary matter, the court considered the Commission’s argument that the Law and the Order are not discriminatory policies because their provisions only established “goals” and lacked “discriminatory devices such as preferences or set-asides.”<sup>116</sup> The court, however, dismissed this contention as superficial.<sup>117</sup> Moreover, the court indicated that the plaintiffs in *Northeastern* had demonstrated standing to challenge an ordinance that only established “participation goals.”<sup>118</sup> Finding *Northeastern* analogous,<sup>119</sup> the court de-

---

inferred from this evidence that Pacific Bell would allow architects, including Bras, to compete for its business in the future. *Id.* Thus, the court decided that the continued implementation of the Law and the Order would prevent Bras from competing equally for these future contracts. *Id.* at 874-75.

115. *Id.* at 873 (citing *Northeastern*, 508 U.S. at 666). Although the court introduced this requirement in its “injury in fact” analysis, it noted that an inquiry of whether Bras was unable to compete equally “implicates not only the injury in fact requirement, but also the interrelated requirements” of causation and redressability. *Id.* at 874; see *Northeastern*, 508 U.S. at 666 (noting that Court’s “injury in fact” definition also incorporates elements of causation and redressability).

116. *Bras*, 59 F.3d at 874. For the language of the Order establishing “goals” and the Commission’s definition of a “goal” in the Order, see *supra* note 85 and accompanying text.

117. *Bras*, 59 F.3d at 874 (“The [Law] and Order are not immunized from scrutiny because they purport to establish “goals’ rather than ‘quotas.’”).

118. *Id.* at 874 (citing *Northeastern*, 508 U.S. at 660). In *Northeastern*, Jacksonville repealed the explicit 10% set-aside it had adopted soon after the Supreme Court granted certiorari. *Northeastern*, 508 U.S. at 661. The city replaced the set-aside with women and minority “participation goals” that varied from 5% to 16%. *Id.* As the *Bras* court noted, however, this alteration of the ordinance in *Northeastern* did not change the Supreme Court’s analysis. *Bras*, 59 F.3d at 874. Instead, the Supreme Court held that as long as the goal-based ordinance “accords preferential treatment to black- and female-owned contractors . . . it disadvantages [the plaintiffs] in the same fundamental way” as the repealed, set-aside ordinance. *Id.* (quoting *Northeastern*, 508 U.S. at 662).

119. *Bras*, 59 F.3d at 875. The court discussed other decisions that “have also concluded that the label attached to the program does not change the standing analysis.” *Id.* (citing *Adarand Constructors v. Peña*, 115 S. Ct. 2097 (1995); *Concrete Works of Colo. v. Denver*, 36 F.3d 1513 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1315 (1995); *Harrison & Burrowes Bridge Constructors v. Cuomo*, 981 F.2d 50 (2d Cir. 1992)); see *Adarand*, 115 S. Ct. at 2102 (finding standing to challenge federal program that established “goal” of participation of “socially and economically disadvantaged individuals”); *Concrete Works*, 36 F.3d at 1516-18 (concluding that nonminority contractor had standing to challenge ordinance that created minority participation “goals”); *Harrison*, 981 F.2d at 55 (recognizing standing of non-minority contractor to challenge state statute that directed contractors to comply with “disadvantaged enterprise goals”). The court indicated in each of these cases, the courts granted the plaintiffs’ standing to challenge a government program that established participation or hiring goals. *Bras*, 59 F.3d at 875. Thus, the *Bras* court concluded that each case “supports the conclusion that a program that establishes ‘goals’ rather than rigid ‘quotas’ can still cause ‘injury in fact.’” *Id.*

clared that, rather than “labels,” the “economic realities” of a program and their relation to the plaintiff should control the standing analysis.<sup>120</sup>

In determining that the provisions were discriminatory policies that prevented Bras from competing on an equal basis, the court also addressed the causation and redressability elements of standing from this “economic realities” perspective.<sup>121</sup> The court found that the two standing requirements were met because the economic reality of both the Law and the Order was a requirement that public utilities adopt a discriminatory program or face sanctions.<sup>122</sup> Thus, the court concluded that a “sufficient nexus” existed between Bras’s injury in fact and the Commission’s enforcement of the Law and implementation of the Order.<sup>123</sup>

### B. Judge Pregerson’s Dissent

Dissenting in *Bras*, Judge Pregerson argued that Bras’s claim was too “hypothetical” for judicial review; therefore, the majority was mistaken in

120. *Bras*, 59 F.3d at 874 (“We look to the economic realities of the program rather than the label attached to it.”). Although the court did not provide a definition of what “economic realities” entails, the court later stated in its analysis that it would not limit its evaluation to what the challenged provisions “expressly state[.]” rather it would determine if the provisions have the “practical effect” of encouraging or compelling the adoption of discriminatory measures. *Id.* at 875.

121. *Id.* at 874. For further discussion of the court’s “economic realities” approach to standing, see *supra* note 120 and *infra* note 153 and accompanying text.

122. *Bras*, 59 F.3d at 875 (stating that “[w]hile the [Law] and Order do not expressly state that public utilities must adopt any particular programs such as bidding preferences or set-asides, they clearly have the practical effect of requiring them to do so”). The court reached this conclusion with conviction. *See id.* (stating that causation is present because “the [Law] and Order effectively encourage, if not compel, Pacific Bell to adopt discriminatory programs”). Earlier in the opinion, however, the court intimated that, under *Northeastern*, a plaintiff need not show that a law “requires” a discriminatory program. *Id.* Rather, the court stated that *Northeastern* stands for the proposition that a plaintiff need only demonstrate that the challenged law “authorizes or encourages” discriminatory measures. *Id.*

In reaching its conclusion, the court specifically found it convincing that the Commission monitored each California utility and could sanction it for failure to reach the goals of the Law and the Order. *Id.* For the relevant provisions of the Law and Order, see *supra* notes 82-86. The court also pointed out that utilities had conducted nondiscriminatory outreach programs in the past to increase the participation of women and minorities. *Bras*, 59 F.3d at 875. From this, the court decided that “the clear message” sent by the California Legislature and the Commission in the Law and the Order was that the utilities’ previous outreach programs were inadequate. *Id.*

123. *Bras*, 59 F.3d at 875. The court explicitly declared that its holding was not indicative of the merits of Bras’s equal protection claim. *Id.* at 875-76 (“We express no opinion as to whether the [Law] or Order discriminates against Bras on the basis of race or gender. All we hold is that he has standing . . .”). On remand, the Commission would have the opportunity to characterize the provisions as narrowly tailored to serve a compelling government interest. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (holding that state and local affirmative action programs are subject to strict scrutiny).

its grant of standing.<sup>124</sup> First, Judge Pregerson claimed that *Northeastern* does not support the majority's conclusion that Bras suffered an "injury in fact."<sup>125</sup> Rather, Judge Pregerson said that Bras's injury was "unreasonably abstract"<sup>126</sup> because Bras could not show that his firm would bid on a "currently proposed" project as the association of firms in *Northeastern* did.<sup>127</sup>

Judge Pregerson then asserted that the majority improperly concluded that the Law and the Order created unequal competition based upon race.<sup>128</sup> Again, Judge Pregerson distinguished *Northeastern*.<sup>129</sup> Namely, because the language of the Law and the Order did not explicitly require a set-aside program, Judge Pregerson declared that the provisions do not "foreclose" equal competition so as to constitute "discriminatory policy."<sup>130</sup> Moreover, Judge Pregerson stated that the majority could not

124. *Bras*, 59 F.3d at 876, 879 (Pregerson, J., dissenting) ("We should not exceed our judicial authority by holding that [Bras] has standing.").

125. *Id.* at 877 (Pregerson, J., dissenting) (citing *Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 667 (1993)) ("Bras has not shown an injury of 'sufficient immediacy and ripeness to warrant judicial intervention.'").

126. *Id.* at 877 (Pregerson, J., dissenting). Judge Pregerson also characterized Bras's alleged injury as neither "actual [n]or imminent" to form the basis for Article III standing. *Id.* (Pregerson, J., dissenting) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

127. *Id.* at 877 (Pregerson, J., dissenting) (quoting *Northeastern*, 508 U.S. at 667). Judge Pregerson noted that the *Northeastern* Court distinguished the Court's earlier denial of standing in *Warth v. Seldin*. *Bras*, 59 F.3d at 877 (Pregerson, J., dissenting) (citing *Northeastern*, 508 U.S. at 667). Judge Pregerson asserted that the *Northeastern* Court reached this conclusion because the *Warth* plaintiffs could not establish that they had applied to work on a *current* project. *Id.* (Pregerson, J., dissenting).

Judge Pregerson then reasoned that Bras's case was more analogous to *Warth* than to *Northeastern*. *Id.* (Pregerson, J., dissenting). Namely, Judge Pregerson determined that Bras lacked an imminent injury in fact because the three-year term of Pacific Bell's business relationships made it impossible for Bras to allege that he planned to work on a current Pacific Bell project. *Id.* (Pregerson, J., dissenting). For similar reasons, Judge Pregerson determined that Bras could not show that he was "ready" and "able" to bid as *Northeastern* required. *Id.* (Pregerson, J., dissenting) (citing *Northeastern*, 508 U.S. at 666). He argued that Bras's statement that he was "ready" and "able" to provide Pacific Bell with architectural services was inadequate because Bras could not make this statement in the context of an on-going bidding process as the plaintiff in *Northeastern* could. *Id.* (Pregerson, J., dissenting).

128. *Id.* (Pregerson, J., dissenting) (citing *Northeastern*, 508 U.S. at 666) (arguing that Law and Order do not create barrier "that makes it more difficult for members of one group to obtain a benefit than it is for members of another group").

129. *Id.* at 877-78 (Pregerson, J., dissenting). For a discussion of the facts and holding of *Northeastern*, see *supra* notes 60-79 and accompanying text.

130. *Bras*, 59 F.3d at 877-78 (Pregerson, J., dissenting). Judge Pregerson stated that the program in *Northeastern* made set-asides available as an "explicit option which the defendant, the city itself, could employ at any given time." *Id.* at 878 (Pregerson, J., dissenting). Judge Pregerson then contrasted the provisions at issue in *Bras* by stating that neither the Law nor the Order expressly created "any type of set-aside scheme" or granted the Commission the option to employ a set-



escape the race-neutral language of the provisions by merely arguing that the provisions have the “practical effect” of creating race-consciousness.<sup>131</sup>

Lastly, Judge Pregerson contended that the causal connection between the Commission’s actions and Bras’s alleged injury was lacking.<sup>132</sup> Declaring that the Law and the Order only direct Pacific Bell to set hiring goals, Judge Pregerson took issue with the majority’s holding that the provisions “compel” Pacific Bell to adopt a discriminatory program.<sup>133</sup> Moreover, Judge Pregerson concluded that Bras’s alleged injury was traceable only to Pacific Bell, a party not before the court as a defendant.<sup>134</sup>

---

aside program. *Id.* (Pregerson, J., dissenting) (citing CAL. PUB. UTIL. CODE § 8283(b) (West 1994); General Order 156 of the Public Utilities Commission of the State of California § 8.2 (1988)). For these reasons, Judge Pregerson determined that the Commission did not “erect a barrier” to equal competition. *Id.* (Pregerson, J., dissenting).

131. *Id.* (Pregerson, J., dissenting) (stating that “[t]he majority cites no evidence to support th[e] conclusion” that Law and Order have “practical effect” of requiring utilities to adopt minority bidding preferences or set-asides). Because the Law and the Order did not “specify” or “dictate” how the participation goals would be met, Judge Pregerson asserted that utilities could freely operate gender- or race-neutral programs. *Id.* (Pregerson, J., dissenting). As an example, Judge Pregerson stated that a utility could adopt a nondiscriminatory program helping all inexperienced architects that could also have the effect of achieving the goals of the Law and the Order. *Id.* (Pregerson, J., dissenting). Namely, Judge Pregerson argued that such a program would treat both white and minority inexperienced architects equally, while serving to increase the participation of minorities in procurement of contracts. *Id.* (Pregerson, J., dissenting). Because such an option was feasible under the Law and the Order, Pregerson concluded that the provisions did not create equal protection problems. *Id.* (Pregerson, J., dissenting).

132. *Id.* (Pregerson, J., dissenting) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) (stating that Bras could not prove that his injury was “fairly . . . trace[able] to the . . . defendant”).

133. *Id.* (Pregerson, J., dissenting) (“The provisions do not imply or suggest, and certainly do not compel utilities to use discriminatory programs.”). In addition, Judge Pregerson did not accept the majority’s determination that the Law and the Order sent a “clear message” that the utilities’ race- and gender-neutral outreach programs were inadequate. *Id.* (Pregerson, J., dissenting). First, Judge Pregerson said that the majority reached this conclusion without the support of any legislative history, case law, affidavits or other evidence. *Id.* (Pregerson, J., dissenting). Second, Judge Pregerson found that it was equally likely that the California Legislature had intended the provisions to encourage the utilities to direct “their already sufficient efforts toward specific goals.” *Id.* (Pregerson, J., dissenting). Judge Pregerson claimed that the majority’s conclusion was an attempt to “gloss over” the issue of causation. *Id.* (Pregerson, J., dissenting).

134. *Id.* (Pregerson, J., dissenting). Judge Pregerson compared the case with *Allen v. Wright*. *Id.* at 879 (Pregerson, J., dissenting) (citing *Allen v. Wright*, 468 U.S. 737, 759 (1984)). For a discussion of the *Allen* decision, see *supra* notes 47-51 and accompanying text.

Judge Pregerson noted that the Supreme Court in *Allen* found causation and redressability to be lacking because the plaintiffs’ alleged injury, education in racially segregated schools, was related to the challenged school’s grant of tax exemption by the IRS only “by way of intermediary parties, the private discriminatory schools.” *Bras*, 59 F.3d at 879 (Pregerson, J., dissenting). Pregerson said that Bras’s case was similar because Pacific Bell was an intermediary party like the discriminatory schools in *Allen*. *Id.* (Pregerson, J., dissenting) (“Bras’s future injury, if

## V. CRITICAL ANALYSIS

In *Bras*, the Ninth Circuit determined that Mr. Jack Bras had standing to pursue an equal protection challenge against two California state provisions that created and implemented a "goal"-based minority participation program.<sup>135</sup> In his dissent, Judge Pregerson argued that the majority's reasoning was flawed and unfounded.<sup>136</sup> Yet a thoughtful application of relevant precedent to Bras's case indicates that the majority was correct in holding that Bras did establish the requisite elements for Article III standing.

In *Northeastern*, the Supreme Court held that a party attempting to demonstrate an "injury in fact" must first allege that he or she is "ready and able to bid on contracts."<sup>137</sup> Although Bras could not literally allege that he was "ready and able" to bid on a current or future Pacific Bell contract, his firm's exclusion at an earlier stage in Pacific Bell's contracting process created this disability.<sup>138</sup> In other words, Bras was unable to make this precise allegation because Pacific Bell's "prequalification criteria" form, which evaluated Bras's status as a nonminority, excluded Bras from even *reaching* the list of firms that were entitled to bid on the utility's

---

any, would be traceable to the contracting process of a utility."). Thus, Judge Pregerson stated that, as in *Allen*, the "links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak" for Bras to have standing. *Id.* (Pregerson, J., dissenting) (quoting *Allen*, 468 U.S. at 759). Upon determining that Bras could only trace his injury to Pacific Bell, Pregerson stated that Bras's injury would not necessarily be redressed if the court struck down the Law and the Order. *Id.* (Pregerson, J., dissenting) (citing *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976)). For this reason, Judge Pregerson contended that the requisite element of redressability was absent. *Id.* (Pregerson, J., dissenting).

Earlier in his dissent, Judge Pregerson also discussed Bras's settlement with Pacific Bell. *Id.* at 878 (Pregerson, J., dissenting). He suggested that if Bras sought to challenge a race- or gender-based program at all, he should sue the party that developed the program. *Id.* (Pregerson, J., dissenting). Thus, Judge Pregerson said, the party for Bras to sue was Pacific Bell. *Id.* (Pregerson, J., dissenting). Judge Pregerson, however, argued that Bras's suit against the Commission was meritless as challenging provisions that mandate goals alone because Bras had settled with Pacific Bell and the utility was no longer a defendant. *Id.* (Pregerson, J., dissenting).

135. *Bras*, 59 F.3d at 875-76. For a discussion of the *Bras* court's holding, see *supra* notes 106-23 and accompanying text.

136. *Bras*, 59 F.3d at 876-79 (Pregerson, J., dissenting). For a discussion of the dissent's reasoning, see *supra* notes 124-34 and accompanying text.

137. *Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993); see also *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 423 (D.C. Cir. 1992) (affirming district court's grant of standing because plaintiff alleged that company was "ready, willing, and able" to perform construction work).

138. *Bras*, 59 F.3d at 873 (noting that "Bras cannot presently 'bid' on future projects . . . because Pacific Bell has entered into long-term business relationships with three architects that are now used for all of its architectural service needs").

contracts.<sup>139</sup> In addition, Bras's next opportunity to seek Pacific Bell's consideration would not arise for three years because of the long-term nature of the utility's contracts.<sup>140</sup> The *Bras* court, therefore, recognized that the facts of this case prevented Bras from making an exact replication of the allegations in *Northeastern* and determined that such a distinction should not change the overall "injury in fact" analysis.<sup>141</sup> Thus, it properly found that Bras satisfied the requirements of both *Northeastern* and Ninth Circuit precedent when Bras alleged that he was "ready, willing and able to provide [architectural] services" in the future, if given the opportunity.<sup>142</sup>

---

139. See *id.* at 874 (stating that "Bras would have been one of the three firms considered for work by Pacific Bell" but for Pacific Bell's "prequalification criteria" form).

140. *Id.* at 873 (noting that Pacific Bell had entered into three contractual agreements with architects to supply all of Pacific Bell's architectural service needs).

141. *Id.* ("That Bras can only compete for long-term contracts every several years rather than on a project-by-project basis does not change the [standing] analysis."). For a discussion of the facts in *Northeastern*, see *supra* notes 62-63 and accompanying text.

142. *Bras*, 59 F.3d at 874 (quoting Bras's summary judgment declaration) (emphasis omitted); see *Northeastern*, 508 U.S. at 666 ("[A] party challenging a set-aside program . . . need only demonstrate that it is able and ready to bid on contracts . . ."); *Associated Gen. Contractors v. Coalition For Econ. Equity*, 950 F.2d 1401, 1407 (9th Cir. 1991). In *Associated General*, the Ninth Circuit concluded that the plaintiff association had standing to challenge a San Francisco ordinance because the plaintiffs intended to bid for city contracts and the application of the challenged ordinance to such bids was mandatory. *Id.* at 1407 (citing *Coral Constr. Co. v. King County*, 941 F.2d 910, 929-30 (9th Cir. 1991)). Equally important, the court provided a summary of when the Supreme Court has found "injury in fact" to be lacking. *Id.* The court stated that in all claims in which the Court determined that the plaintiff's injury was "too speculative" for standing, either the plaintiffs did not establish that they had "firm intentions to take action that would trigger the challenged governmental action," or the plaintiffs did not demonstrate that "even if [they] did take such action, they would be subjected to the challenged governmental action." *Id.*

Bras's allegations were not similar to those claims identified by the *Associated General* court as lacking an actual injury. Rather, Bras demonstrated that he did have firm intentions to seek Pacific Bell's business in the future. *Bras*, 59 F.3d at 874 ("I earnestly desire to reinstate my long term business relationship with Pacific Bell . . . in the future . . .") (quoting Bras's summary judgment declaration). Moreover, if Bras did seek Pacific Bell's business, the application of the challenged provisions to the competition would be compulsory. See *id.* at 872 (citing CAL. PUB. UTIL. CODE § 8283(a) (West 1994)) (noting requirements of Law and Order that would apply to Pacific Bell as telephone corporation with gross annual revenues exceeding \$25 million); see also Appellant's Opening Brief at 22, *Bras v. California Pub. Utils. Comm'n*, 59 F.3d 869 (9th Cir. 1995) ("The same [Law] is presently in effect. The same General Order of the [Commission] mandates compliance by the individual utilities."). Therefore, Bras's injury is more substantial than those claims in which the Supreme Court found that the injury was too speculative. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 516 (finding that plaintiff never indicated that it engaged in any specific project that was precluded or delayed by challenged governmental action).

In his dissent, Judge Pregerson refused to look beyond the literal language of *Northeastern*. Judge Pregerson noted that there were no current Pacific Bell projects on which Bras could bid.<sup>143</sup> Relying upon this fact, Judge Pregerson then asserted that Bras lacked an injury and could not demonstrate the possibility of future harm.<sup>144</sup> The Supreme Court's opinion in *Northeastern*, however, does not support such an inflexible application of the facts to the injury analysis.<sup>145</sup>

Furthermore, Judge Pregerson's approach would deny Bras standing simply because the particular contract that Bras sought had a screening process and was long-term in nature. This position ignores the fact that the screening process, Pacific Bell's "prequalification criteria" form, is the stage where Bras alleged that his firm was unable to compete on an equal basis.<sup>146</sup> Moreover, Judge Pregerson's approach does not give effect to evidence in the record that Bras could, if given the opportunity, compete for future projects with Pacific Bell.<sup>147</sup>

To satisfy the *Northeastern* Court's "injury in fact" standing analysis, the court examined whether Bras had identified a "discriminatory policy" that

143. *Bras*, 59 F.3d at 876 (Pregerson, J., dissenting) (noting that Bras's first eligibility would arise in three years).

144. *Id.* at 877 (Pregerson, J., dissenting). Judge Pregerson disregarded Bras's allegation that he intended to seek future business with Pacific Bell because his statement was made *after* he settled with Pacific Bell. *Id.* (Pregerson, J., dissenting). Judge Pregerson's position presumes that Bras cannot make such an allegation after a settlement. Yet, the simple fact of settlement with Pacific Bell, absent other evidence, does not lead to an inference that Bras can no longer attempt to provide services for the utility. Appellant's Reply Brief at 8, *Bras* (No. 93-15764).

145. For a discussion of authorities contending that the *Northeastern* Court took a broad approach to standing and liberalized the "injury in fact" requirement, see *supra* note 73. Judge Pregerson treated the *Northeastern* case as if the Court limited the holding to its specific facts or that the opinion was later restricted to challenges to state or local laws. Yet, in more recent standing determinations, courts have applied *Northeastern* favorably in different factual settings. See *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2105 (1995) (citing *Northeastern*, 508 U.S. at 667) (applying "injury in fact" rule of *Northeastern* in constitutional challenge to federal government affirmative action program); see also *Hopwood v. Texas*, 861 F. Supp. 551, 567-68 (W.D. Tex. 1994) (stating that *Northeastern*'s standing analysis is not limited in application to challenges to express set-asides or racial reservations; rather, *Northeastern* "injury in fact" analysis applies to "any government barrier that either created a discriminatory obstacle or had the effect of producing unequal access to a government benefit"), *rev'd on other grounds*, 78 F.3d 932 (5th Cir.), *reh'g denied*, 84 F.3d 720 (5th Cir.), *cert. denied*, 116 S. Ct. 2580 (1996).

146. See *Bras*, 59 F.3d at 871 (describing Bras's exclusion from further business relations with Pacific Bell and his claim that exclusion resulted from implementation of Law and Order).

147. See *id.* at 874 (providing evidence that Bras will seek future business with Pacific Bell). Bras declared that he would re-establish his business relationship with Pacific Bell if given the chance. *Id.* Moreover, Bras offered evidence from which the court could conclude that there would be future competitions for Pacific Bell's business in which Bras would be eligible to participate. *Id.* The court also noted that the Commission did not offer any evidence that Bras's settlement with Pacific Bell prevented him from seeking future business with the utility. *Id.*

prevented his firm from competing on an equal basis.<sup>148</sup> First, however, the majority confronted the Commission's argument that the Law and the Order could not be deemed "discriminatory" because the explicit language of the provisions only established "goals."<sup>149</sup> In his dissent, Judge Pregerson accepted this contention.<sup>150</sup> The majority properly stated, however, that a law cannot escape judicial scrutiny by its language alone.<sup>151</sup> Instead, the court discussed precedent that also had concluded that a label given to a minority participation program, such as "goals," does not alter the standing analysis.<sup>152</sup> Therefore, the court properly examined the

---

148. *Id.* at 874-75 (examining whether Law and Order "contain any race or gender specific discriminatory devices, such as preferences or set-asides pursuant to which Bras could be denied equal treatment").

149. *Id.* For the pertinent language of the Law and the Order, see *supra* note 85.

150. *Bras*, 59 F.3d at 877-88 (Pregerson, J., dissenting). Judge Pregerson argued that the *Northeastern* Court rendered its standing decision solely because the challenged ordinance in that case contained a set-aside program. *Id.* (Pregerson, J., dissenting) (citing *Northeastern*, 508 U.S. at 666). Therefore, Judge Pregerson concluded that *Northeastern* does not apply to Bras's situation because the Law and the Order did not contain an explicit set-aside. *Id.* at 878 (Pregerson, J., dissenting). Nevertheless, Judge Pregerson failed to recognize that the challenged program in *Northeastern* did not actually call its program a set-aside. *Northeastern*, 508 U.S. at 661. Instead, the program purported to establish "participation goals" and a "Sheltered Market Plan." *Id.* The Court, however, found the descriptions immaterial, looked beyond the terminology, evaluated these methods and concluded that they had the effect of establishing a set-aside. *Id.* at 662 (determining that "Sheltered Market Plan is a 'set aside' by another name . . . [that] disadvantages [the plaintiff] in the same fundamental way" as express set-aside). Therefore, the *Bras* court also has the ability to disregard the labels of the provisions at issue, ascertain their practical effect, determine that they implicitly establish a set-aside or racial preference and apply the *Northeastern* analysis. For further discussion of the Supreme Court's rejection of reliance upon the description or label of an allegedly race-conscious program when evaluating the program, see *infra* note 151.

151. *Bras*, 59 F.3d at 874 ("The [Law and Order] are not immunized from scrutiny because they purport to establish 'goals' rather than 'quotas.'"). In reaching its decision to grant standing, the *Northeastern* Court relied heavily upon *Regents of University of California v. Bakke*, 438 U.S. 265 (1978). *Northeastern*, 508 U.S. at 665. In *Bakke*, the Court noted that the parties were in disagreement over what to call the challenged special admissions program. *Bakke*, 438 U.S. at 288 (opinion of Powell, J.). The plaintiff referred to it as a "racial quota," whereas the defendant called it a "goal of minority representation." *Id.* (opinion of Powell, J.). The Court stated, however, that debates over the labels of programs are irrelevant. *Id.* at 289 (opinion of Powell, J.) ("This semantic distinction is beside the point."). Instead, the Court chose to examine what the program actually did, regardless of its label. *Id.* (opinion of Powell, J.) ("Whether this limitation is described as a quota or goal, it is a line drawn on the basis of race and ethnic status.").

152. *Bras*, 59 F.3d at 874-75 (citing *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2105 (1995) (finding standing to challenge federal program that established "goal" for participation of "socially and economically disadvantaged individuals"); *Northeastern*, 508 U.S. at 661-62 (granting standing to challenge ordinance that established "participation goals"); *Concrete Works of Colo. v. Denver*, 36 F.3d 1513, 1518-19 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1315 (1995) (concluding that nonminority contractor had standing to challenge ordinance that created minority participation "goals"); *Harrison & Burrowes Bridge Constructors v. Cuomo*, 981

"economic realities" or "practical effect" of the challenged provisions and did not simply accept the labels that the California Legislature and Public Utilities Commission had given the provisions.<sup>153</sup>

In determining that the provisions constituted a discriminatory policy, the majority also correctly found that the standing elements of causation and redressability were present.<sup>154</sup> Although the Order claimed to establish only "goals," it also gave the Commission the ability to monitor the "progress" of a utility's minority participation program and issue an economic sanction if that progress was not acceptable.<sup>155</sup> Moreover, a main objective of the Law was to "ensure" that a "proportion" of a regu-

---

F.2d 50, 55 (2d Cir. 1992) (recognizing standing of nonminority contractor to challenge state statute that required contractors to comply with "disadvantaged enterprise goals")). Additional circuit court precedent, not cited in the *Bras* opinion, also supports the majority's conclusion. See *Contractors Ass'n v. City of Phila.*, 6 F.3d 990, 993, 995 (3d Cir. 1993) (affirming grant of standing to associations challenging city ordinance that establishes "goals" for participation of "disadvantaged business enterprises"); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 423 (D.C. Cir. 1992) (granting standing to construction firm to challenge District of Columbia's Minority Contracting Act, which allocated contracts to reach set "goal"). The District of Columbia's failed argument in *O'Donnell* is very similar to the Commission's position in *Bras*. In *O'Donnell*, the D.C. Circuit addressed the District of Columbia's contention that the court could not scrutinize its Minority Contracting Act ("Act") because the Act only established "goals" and did not create explicit quotas. *O'Donnell*, 963 F.2d at 423. Yet the D.C. Circuit agreed with the district court and "placed no importance on this difference in terminology." *Id.* (citing *Contractors Ass'n*, 945 F.2d at 1270-71) (Higginbotham, J., concurring in the judgment)).

153. See *Bras*, 59 F.3d at 874 (stating that court must "look to the economic realities of the program rather than the label attached to it"); see also *Concrete Works*, 36 F.3d at 1519 n.6; *Domar Elec., Inc. v. City of L.A.*, 48 Cal. Rptr. 2d 822, 833 (1995) (stating that *Bras* held that focus of equal protection analysis is "practical effect," instead of label, of race-conscious program). In *Concrete Works*, the court admitted that the challenged Denver ordinance was different from the ordinance that was challenged in *Northeastern* because the Denver ordinance only established goals and lacked an inflexible set-aside. *Concrete Works*, 36 F.3d at 1517, 1519 n.6. The court, however, found this distinction irrelevant and stated: "what is dispositive for . . . standing analysis" is an examination of whether the ordinance "makes it more difficult for members of one group to obtain a benefit than it is for members of another." *Id.* at 1519 n.6 (citing *Northeastern*, 508 U.S. at 666).

Some commentators agree that reliance upon the label of affirmative action programs can be misleading and that, in real practice, "goals" may often have the same effect as quotas. See ROBERT K. FULLINWIDER, *THE REVERSE DISCRIMINATION CONTROVERSY: A MORAL AND LEGAL ANALYSIS* 162-63 (1980) (arguing that "hiring goals" can just as easily lead to racially preferential hiring as explicit quotas can); UROFSKY, *supra* note 3, at 26 ("It is all too easy to go from saying, 'We should have 10 percent blacks . . . and that is the goal we should work toward . . .' to saying, 'The next thirty people we hire must be black . . . so we meet our quota.'").

154. *Bras*, 59 F.3d at 875 ("[T]his argument implicates not only the 'injury in fact' requirement but also the interrelated requirements that there be a causal relationship between the injury and the challenged conduct and that the injury will be redressed by a favorable decision.").

155. General Order 156 of the Public Utilities Commission of the State of California §§ 8.12, 9.1.4 (1988) (allowing Commission to impose "penalty" on utility after investigation, and requiring utilities to provide description of "progress" in

lated utility's contracts go to minority business enterprises.<sup>156</sup> Therefore, the majority properly found that these provisions were discriminatory because they used race to reserve a certain percentage of a utility's contracts.<sup>157</sup> In light of the foregoing, the court correctly concluded that the enforceable, race-conscious reservation of the provisions provided the causal link between the Commission's conduct and Bras's inability to compete equally because of his race.<sup>158</sup>

Finally, the dissent's contention that the majority's decision is irreconcilable with *Allen* and *Simon* lacks merit.<sup>159</sup> In both decisions, the causal connection between the challenged government conduct and the plaintiff's injury was too attenuated because the plaintiff's injury was highly related to actions of independent, third parties who were not before the Court.<sup>160</sup> In contrast, the third party involved in Bras's injury, Pacific Bell, can hardly be considered independent. Rather, the utility is regulated and monitored by a party that *was* before the court: the Commission.<sup>161</sup> Furthermore, unlike the IRS in both *Allen* and *Simon*, the Commission in

meeting goals and explanation of why particular utility may have fallen short of goals).

156. Appellant's Opening Brief at 26, *Bras v. California Pub. Utils. Comm'n*, 59 F.3d 869 (9th Cir. 1995) (No. 93-15764) (citing CAL. PUB. UTIL. CODE § 8281 (a) (West 1994)) (stating that Law's purpose was "to ensure that a fair proportion of the total purchases and contracts . . . for commodities, supplies, technology, property, and services for regulated utilities are awarded to . . . minority . . . business enterprises").

157. *Bras*, 59 F.3d at 875 (stating that Law and Order have "the practical effect" of requiring public utilities to adopt discriminatory programs such as bidding preferences or set-asides).

158. *Id.* (concluding that Law and Order "effectively encourage, if not compel, Pacific Bell to adopt discriminatory programs"). The court did not expressly address whether Bras satisfied the redressability element. Yet, this absence does not suggest that the court simply failed to consider the requirement of redressability. Rather, the analysis for causation and redressability is the same when a party seeks to enjoin unconstitutional conduct, as Bras did. *TRIBE*, *supra* note 5, § 3-18, at 130 n.6; *cf.* Choundas, *supra* note 29, at 1130-31 (indicating that courts often collapse causation and redressability into one analysis).

159. *Bras*, 59 F.3d at 879 (Pregerson, J., dissenting) (citing *Allen v. Wright*, 468 U.S. 737, 758-59 (1984); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976)). For a discussion of *Allen*, see *supra* notes 47-51 and accompanying text. For a discussion of *Simon*, see *supra* notes 37, 39-46 and accompanying text.

160. *Allen*, 468 U.S. at 757-59 (stating that chain of causation is too weak for standing because independent decisions of numerous third parties, such as officials and parents of children at racially discriminatory schools, may greatly influence plaintiff's injury); *Simon*, 426 U.S. at 42-43 (indicating that it is "purely speculative" whether plaintiffs' injury, denial of medical services, is traceable to defendant, IRS or decisions made by third-party hospitals).

161. *Bras*, 59 F.3d at 871-72 (noting that Commission regulates utilities and oversees their minority business procurement plans). For this reason, the Commission has direct regulatory control over Pacific Bell's specific minority procurement efforts. *See id.* In contrast, the IRS defendant in both *Allen* and *Simon* had no such control over the respective actions at issue in those cases—segregated schools in *Allen* and inadequate medical services at hospitals in *Simon*. *Allen*, 468 U.S. at 739; *Simon*, 426 U.S. at 28.

*Bras* is allegedly the source of the discriminatory program.<sup>162</sup> For these reasons, Judge Pregerson's reasoning fails. Indeed, if the court did accept the dissent's argument, it would allow the Commission to institute a race-conscious program and insulate its acts from judicial scrutiny by forcing its regulated utilities to implement the program.<sup>163</sup>

## VI. IMPACT

The Ninth Circuit's decision in *Bras* represents sound Article III standing analysis and application of precedent in the context of a claim that implicates a controversial topic of the law—affirmative action.<sup>164</sup> In the past, many legal scholars have criticized restrictive standing analyses as a means of excluding claims that are disfavored or controversial on the merits.<sup>165</sup> Yet the *Bras* court achieved greater consistency within standing

---

162. *Bras*, 59 F.3d at 871 (alleging that Commission's implementation of Law and Order violates Equal Protection Clause of Fourteenth Amendment). In both *Allen* and *Simon*, the plaintiffs did not allege that certain actions of the IRS directly discriminated against them. Instead, the plaintiffs only maintained that the IRS's favorable tax treatment of a third party encouraged the third party to continue to discriminate against them. *Allen*, 468 U.S. at 744-46 (stating that plaintiffs alleged that IRS grant of tax exemption to racially discriminatory schools encouraged expansion of segregated education); *Simon*, 426 U.S. at 33 (describing allegation that IRS extension of tax benefits to hospitals encouraged hospitals to discriminate against indigent plaintiffs). *Allen* and *Simon* are therefore distinguishable from *Bras*'s case.

163. See Julie Nakashima, *Equal Opportunity for Whom?*, CAL. REAL EST. J., Aug. 1995, at 14, 30 (statement of Pamela A. Lewis, attorney for J. Jack Bras) (“[I]f settling with the utility meant you couldn’t get to the originator of the program, then the [Commission] would be insulated from [constitutional scrutiny] . . . . [W]ithout knocking down the relevant code provisions and general order, it would give the [Commission] leave to force utilities to keep their [race-conscious] programs.”).

164. For a discussion of the Supreme Court's Article III standing analysis, see *supra* notes 23-79 and accompanying text.

165. See, e.g., HOWARD FINK & MARK TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE 321 (2d ed. 1987) (suggesting that “Court restricts standing where the public would disapprove of a conservative result on the merits, and allows it where the public would accept such a result”); LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 100 (1985) (criticizing Court's denial of standing for those claims that Court's substantive doctrines would require it to accept on merits); Gene R. Nichol, *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 658 (1985) (criticizing *Allen* as restrictive standing decision that disguises Court's disfavor of presented claim); Spann, *supra* note 73, at 1423 (claiming that Supreme Court developed stringent standing requirements “so that it could defer to the political process for the resolution of contentious social issues”); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663-64 & n.5-6 (1977) (citing *Simon*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *United States v. Richardson*, 418 U.S. 166 (1974)) (stating that Court denies standing “when the claim would be rejected were the merits reached”); Gottlieb, *supra* note 21, at 1143 (contending that constitutional standing decisions are attempts to avoid controversial issues and are typically decisions on merits); cf. Winter, *supra* note 21, at 1373 n.14 (suggesting that “most academics and practicing lawyers at least share the suspicion that standing law is nothing more than a manipulation by the Court to decide cases while not appearing to decide their



doctrine by basing its conclusion to grant standing on the most relevant Supreme Court and Ninth Circuit precedent.<sup>166</sup> In contrast, the dissent's specific reliance on the explicit language of the challenged provisions and its unwillingness to recognize their race-conscious mandates can only be explained as Judge Pregerson's desire to prevent judicial review of an affirmative action program.<sup>167</sup>

As the law currently stands, all race-based affirmative action programs—federal, state or local—are subject to strict scrutiny review.<sup>168</sup> Although the *Bras* court did not examine the merits of Bras's discrimination claim,<sup>169</sup> the case has two major implications for future challenges to government-sponsored, racial affirmative action. First, *Bras* affirms the proposition that plaintiffs bringing equal protection challenges against such affirmative action programs need only satisfy the more lenient requirements for standing, as identified by the Supreme Court in *Northeastern*.<sup>170</sup> Second, and equally important, the *Bras* decision sends a clear message to other governmental bodies implementing minority participation programs. Namely, they may not evade constitutional strict scrutiny

---

merits"). A former Justice of the United States Supreme Court has also suggested that the Court employs standing analysis to reject disfavored constitutional claims. See *Warth*, 422 U.S. at 520 (Brennan, J., dissenting) (stating that Court's restrictive standing decision in *Warth* "can be explained only by an indefensible hostility to the claim on the merits"). But see *Floyd*, *supra* note 20, at 919-20 (asserting that "[i]f the Court were truly hostile to certain assertions of right, one would expect it to reach out to seize and dispose of such claims on the merits, rather than to temporize on [standing] grounds").

166. For an analysis of the court's reasoning in *Bras*, see *supra* notes 135-42, 148-49, 151-58 and accompanying text.

167. For an analysis of the dissent's rationale in *Bras*, see *supra* notes 143-47, 150, 159-63 and accompanying text. Notably, although a decision was not rendered on the merits in *Bras*, both parties contested the constitutionality of the provisions in their briefs before the Ninth Circuit. See Appellant's Opening Brief at 23-31, *Bras v. California Pub. Utils. Comm'n*, 59 F.3d 869 (9th Cir. 1995) (No. 93-15764); Brief of Defendant-Appellee at 19-25, *Bras* (No. 93-15764). Therefore, the judges were well aware of the significant substantive issues at stake in the case.

168. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2113 (1995) (holding that "all racial classifications, imposed by whatever federal, state, or local governmental actor" are subject to strict scrutiny); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (striking down local affirmative action program for failure to satisfy strict scrutiny review). For a discussion of the *Adarand* decision, see *supra* note 79. For a discussion of the *Croson* opinion and its impact, see *supra* notes 6-8 and accompanying text.

169. *Bras*, 59 F.3d at 875 ("We express no opinion as to whether the [Law] or Order discriminates against Bras on the basis of race or gender.").

170. *Id.* at 873 (citing *Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993)). For further discussion of the *Northeastern* "injury in fact" analysis for standing, see *supra* notes 60-79 and accompanying text.

by couching a racial affirmative action program in a benign term such as “goals” if the “economic reality” of the program is racial preference.<sup>171</sup>

*David J. Antczak*

---

171. See Nakashima, *supra* note 163, at 30 (statement of Pamela A. Lewis, attorney for J. Jack Bras) (“This was just a standing case, but . . . [Bras] sends a beacon light to all governmental bodies who seek to evade constitutional scrutiny of their programs by using the buzzword ‘goal’ for its numerical quotas.”); Reynolds Holding, *Affirmative Action Goals Open to Suit: Appeals Court Allows Challenge to State Plan*, S.F. CHRON., July 6, 1995, at A11 (“The decision . . . means that state programs designed merely to encourage the hiring of minorities and women without quotas may still be vulnerable to legal challenges.”). For a discussion of the Bras court’s “economic realities” analysis for standing, see *supra* notes 120, 153 and accompanying text.

