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COMMENT

TESTER STANDING UNDER TITLE VII: A ROSE
BY ANY OTHER NAME

INTRODUCTION

Recently, the Urban Institute, a Washington, D.C., civil rights group, commissioned a research study aimed at comparing the treatment of black and white job seekers. The results indicated significant employment discrimination against blacks.1 For instance, in one out of every five cases, the study found that a white applicant advanced further through the hiring process than an equally qualified black applicant.2 The researchers concluded that "despite extensive legislative and regulatory protections and incentives to hire minorities, unfavorable treatment of young black men is widespread and pervasive across firms offering entry-level jobs."3 One of the authors of the study stated that the findings point out the need for the Equal Employment Opportunity Commission ("EEOC" or "Commission") to reprioritize its allocation of resources. He argued that the EEOC needs to focus more effort toward the area of hiring, where extensive discrimination occurs but is difficult to uncover, versus continued efforts to investigate claims of discrimination against already employed individuals.4

1. Urban Institute Research Using Testers Documents Bias Against Black Job Seekers, Daily Lab. Rep. No. 94 (BNA), at A-4 (May 15, 1991). The study employed 476 sets of paired testers who applied for jobs in Chicago and Washington, D.C. Each set of testers consisted of one black and one white male who were matched on all characteristics that could affect a hiring decision. The individual testers were trained to behave similarly throughout the interview sessions. The audits were designed so that systematic differences in treatment by employers could only be attributable to race. The results indicated that a black male was three times as likely to be unfavorably treated as his white counterpart. Id. at A-4.

2. Id. at A-4. The white applicant was more likely to be asked to submit an application, to receive a formal interview, or to receive a job offer. Black applicants, on the other hand, advanced further than their white counterparts only seven percent of the time. Id.

3. Id. Researchers also concluded that reverse discrimination against white applicants was far less common, that unequal treatment was more likely to occur in white collar than in blue collar jobs, and that discrimination was more prevalent in Washington, D.C., than in Chicago. Id.

4. Id. at A-5.
Pursuant to its equal employment opportunity enforcement role, the EEOC announced in December of 1990 that it would accept employment discrimination complaints by civil rights groups, acting on behalf of individuals who had posed as job applicants ("testers").\textsuperscript{5} under Title VII of the Civil Rights Act of 1964 ("Title VII" or "Act").\textsuperscript{6} Predictably, this endorsement of testers was praised by civil rights groups and criticized by employers and their attorneys.\textsuperscript{7}

This use of testers as a vehicle for bringing Title VII claims raises the legal issue of standing to sue. Essentially, standing requires a plaintiff to allege a distinct and cognizable injury, to allege that the injury was a result of the defendant's conduct, and to show that the injury can be redressed by the court. These are threshold requirements for every plaintiff who wishes to have the merits of his or her case heard by a federal court. No recent court has decided whether testers in Title VII actions have standing,\textsuperscript{8} but a tester standing case

5. EEOC Endorses Use of 'Testers' To Uncover Employment Discrimination, Daily Lab. Rep. (BNA) No. 232, at A-11 (Dec. 3, 1990). The EEOC announced that it would consider the possibility of using its own testers to investigate job discrimination as well. In supporting the new policy, the EEOC indicated that discriminatory rejection itself constitutes an injury. It stated that testers should have standing under Title VII even if they do not seek the jobs for which they are applying; they simply have a statutory right not to have been rejected on the basis of race, color, religion, sex, or national origin. Employers Are Mounting Campaign To Head Off Use of Testers in EEO Cases, Daily Lab. Rep. (BNA) No. 134, at A-10 (July 12, 1991) [hereinafter Employers Are Mounting Campaigns].


7. Employer groups stress that the use of testers is likely to generate suspicion and resentment, that there is no need to resort to such potentially divisive methods, and that this approach constitutes "trickery and deceit." Employers Are Mounting Campaign, supra note 5, at A-10. Civil rights attorneys, along with the EEOC, argue that testers have been used successfully to enforce fair housing laws. They say that this supports their use in the employment discrimination area as well. Kevin M. McCarthy, EEOC Policy Allowing Testers Will Face Increasing Challenges, NAT'L L.J., June 10, 1991, at 28.

8. In Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971), three black women asserted that the defendant-employer broke the law by refusing to employ persons of their race and sex, although the employer did hire white female and black male workers. The district court found the employer in violation of Title VII; however, it declined to grant the plaintiffs' attorney's fees permitted under the Act. The district court reasoned that, because the plaintiffs' primary motive was to test the defendant's employment practice rather than to seek actual employment, they were not entitled to such fees. Lea v. Cone Mills Corp., 301 F. Supp. 97, 102 (M.D.N.C. 1969), aff'd in part and vacated in part, 438 F.2d 86 (4th Cir. 1971).

The Fourth Circuit affirmed the district court's findings on the merits, but disagreed with regard to attorney's fees. It found that, even though the plaintiffs did not primarily seek specific employment, their victory in the case and the court's pronouncement of Title VII rights warranted the granting of attorney's fees, consistent with the policy of encouraging private attorney general actions. The court stated, "Plaintiffs should not be denied attorney's fees merely because theirs was a 'test case':" Lea, 438 F.2d at 88. In so holding, the Fourth Circuit stamped its imprimatur on the use of testers in Title VII actions, and arguably lent the practice a sort of legitimacy.

Nevertheless, other courts have either ignored the holding of Lea or have not been faced with a
was recently filed in the Washington, D.C., District Court. The court's standing analysis in that case, and the subsequent response of other federal courts, will significantly impact Title VII enforcement within the hiring context.

This Comment discusses the meaning, purpose, and scope of Title VII, and focuses upon the issue of tester standing within this context. First, this Comment explores the use of testers. It then reviews the specific aims of Title VII, its parameters, and the procedure that it invokes. Next, the Comment interprets the meaning of Title VII through the eyes of legislators and judges. An overview of the judicial standing doctrine is then provided by outlining a number of important United States Supreme Court cases in this area and by analyzing litigation under Title VIII, a civil rights statute analogous to Title VII. After assessing this background, and in light of the need for broader enforcement of the guarantees of Title VII, this Comment ultimately supports standing for testers in Title VII actions.

I. Background

A. The Role of Testers in Civil Rights Enforcement

A tester, at least in the civil rights context, is generally understood to be an individual employed to collect evidence of discriminatory behavior by a third party against a protected class or class member. The fair housing arena provides a classic example of how testers are utilized to collect such evidence. Typically, two individuals seeking to invoke Title VII, as Lea stands alone among reported Title VII cases addressing tester standing. Employers Are Mounting Campaign, supra note 5, at A-11. Its precedential value is further questionable, given the passage of over twenty years since its publication. Thus, while Lea should not be ignored in the Title VII tester standing field, the Lea court's abbreviated analysis provides little to build upon and the tester standing issue is not dispositively addressed.

9. Fair Employment Council of Greater Wash. v. B.M.C. Mktg. Corp., No. 91-8909-NHJ (D.D.C. filed July 9, 1991). In this case, four individuals hired by a civil rights group approached an employment agency and sought referral to entry level jobs. Although the four testers possessed similar backgrounds and experience, the two white testers were sent on employment interviews while the two black testers were not. The black testers were named as plaintiffs in the complaint filed by the civil rights group under the Civil Rights Act of 1866 and another local ordinance. Employers Are Mounting Campaign, supra note 5, at A-11.

10. McCarthy, supra note 7, at 28.

11. Evan Tsen Lee, DeConstitutionalizing Justiciability: The Example of Mootness, 105 HARV. L. REV. 605 (1992). Professor Lee discusses the tester-plaintiff in Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), and defines the tester there as a person with "no intention of renting or buying [a home] in the neighborhood but rather ... there only to collect evidence of discriminatory behavior." Lee, supra, at 615-16 n.61.
als, one black and one white, are dispatched by a civil rights group to approach a real estate agent, seller, or landlord. These individuals subsequently express an equal interest in the same property or type of property. The test is to see whether the two are treated with equal fairness and consideration by the agent, seller, or landlord.\textsuperscript{12}

Testers serve varied purposes, depending upon the groups or interests that employ them. For instance, they are employed by researchers to provide empirical evidence of disparate treatment or impact based upon race, gender, or other protected traits.\textsuperscript{13} Testers are also employed by civil rights groups to provide evidence of discrimination for use in litigation against the third-party discriminator.\textsuperscript{14}

As such, testers have become increasingly crucial to civil rights enforcement as civil rights law and views toward discrimination in the United States have evolved. Prior to the passage of the Civil Rights Act of 1964,\textsuperscript{15} racial discrimination was widespread and seemingly overt.\textsuperscript{16} Arguably, racial discrimination is now met with at least general public disapproval;\textsuperscript{17} the discrimination that remains

\textsuperscript{12} Ian Ayres, \textit{Fair Driving: Gender and Race Discrimination in Retail Car Negotiations}, 104 \textit{Harv. L. Rev.} 817, 818-19 n.7. Professor Ayres describes this tester scenario and borrows its methodology in his empirical analysis of discrimination against women and racial minorities in negotiating with automobile dealers for new cars. In his study, Professor Ayres employed numerous testers of different races and both genders to conduct more than 180 negotiations for new cars at 90 Chicago-area dealerships.

The tests revealed that white males received significantly better prices on new cars than did blacks and females. White women were forced to pay a 40% higher markup than white men, black men had to pay twice the markup that white men paid, and black women were forced to pay more than three times the markup imposed on white men, even though all the groups employed the exact same bargaining techniques and strategy. \textit{id.} at 818-19.

The fair housing methodology for testers that Professor Ayres describes and borrows from is evident in the cases of Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), and Gladstone v. Village of Bellwood, 441 U.S. 91 (1979), both discussed \textit{infra} note 14.

\textsuperscript{13} See \textit{supra} note 12 (noting use of testers to study discrimination against blacks and women in new car sales); \textit{supra} notes 1-4 and accompanying text (noting the employment of testers to document employment discrimination on the basis of race).

\textsuperscript{14} See Havens Realty Corp., 455 U.S. 363 (using testers to provide evidence of fair housing discrimination); \textit{Gladstone}, 441 U.S. 91 (use of fair housing testers); Fair Employment Council v. B.M.C. Mktg. Corp., No. 91-8909-NHJ (D.D.C. filed July 9, 1991) (use of testers to provide evidence of employment discrimination by an employment agency against blacks). In all these cases, the testers were used not only to provide evidence of discrimination, but also to become plaintiffs in actions against the discriminatory party whom they had tested.


\textsuperscript{17} See David A. Strauss, \textit{The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards}, 79 Geo. L.J. 1619 (1991). Professor Strauss asserts that, after the 1964 Civil Rights Act was passed, "the consensus in favor of some form of civil rights laws, and against racial discrimination, became virtually beyond challenge in mainstream political
today is often well hidden and covert. Because of this shift, it has become more difficult for putative plaintiffs to document purposeful discriminatory treatment at the hands of their employers, landlords, and others to whose biased conduct they are subject. Testers mitigate this evidentiary concern by providing documented proof of disparate, discriminatory treatment. This is particularly true where the testers are trained in such a way that unequal treatment can only be explained on the basis of wrongful discriminatory motives.

Scholars now commonly use testers as research tools. Furthermore, the Supreme Court has directly endorsed their use as witnesses and as plaintiffs in the fair housing context. Yet the use of testers to bring Title VII actions is a fairly recent and unproven phenomenon. In order to determine how their use is likely to be met by courts, the parameters of Title VII must first be explored.

B. Title VII of the Civil Rights Act of 1964

Title VII is broadly directed toward eradicating discriminatory employment practices. The Act imposes certain obligations, grants specific rights, and establishes administrative machinery to enforce those rights. Section 2000e-2 of the Act imposes obligations on various groups, exempts certain conduct and certain classes of persons from coverage, and establishes limits to its reach. Under the

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18. Id. at 1619. Professor Strauss goes on to claim that "by the mid-1970s anyone who would not publicly condemn racial discrimination was outside the boundary of acceptable political debate," and that "[overt] discrimination essentially does not exist today." Id.
19. See supra note 1.
20. See supra notes 1-4, 12 (discussing studies done by the Urban Institute and Professor Ian Ayres in which testers were used).
22. See supra note 5 and accompanying text (discussing the EEOC's policy on Title VII testers).
24. THE CIVIL RIGHTS ACT OF 1964: WHAT IT MEANS TO EMPLOYERS, BUSINESSMEN, UNIONS, EMPLOYEES, MINORITY GROUPS 1 (BNA 1964) [hereinafter THE CIVIL RIGHTS ACT OF 1964: WHAT IT MEANS].
It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire . . . any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
Act, no employer may discharge, refuse to hire, or otherwise discriminate against any individual on the basis of race, color, religion, sex or national origin ("protected trait" or "protected group").

Also, no employer may segregate, classify, or limit an employee in a way that would deprive that person of employment opportunities or affect the employee's job status on the basis of one or more of these traits.

Title VII, however, does not impose an affirmative obligation on employers to rectify existing imbalances in workforce representation by class or trait. The Act clearly states that it is not to be interpreted to require any employer to grant preferential treatment to an individual or group with one or more of the protected traits in order to remedy representation imbalances. Thus, the Act is broadly

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2(a).

Section 2000e-2(e) of the Act exempts discrimination on the basis of religion, sex, or national origin where membership in one of these specific classes is an occupational qualification that is reasonably necessary to the normal operation of the particular business. Id. § 2000e-2(e). Communist party members are also exempted from the Act's coverage. Id. § 2000e-2(f).

In addition, section 2000e-2(j) limits the reach of the Act by indicating that the Act was not meant to prescribe preferential employment treatment for members or groups previously subjected to discrimination. Id. § 2000e-2(j).

26. Id. § 2000e-2(a).

27. Id. § 2000e-2(b). Employers are also proscribed from discriminating in training, from retaliating against employees who invoke the process of Title VII, and from publishing employment notices that indicate preferences or limits based upon one or more of the protected traits. Id. § 2000e-3.

Title VII is also directed toward other groups that are not considered employers. Section 2000e-2(b) applies to employment agencies and provides that no agency may fail to refer an individual for employment, or otherwise discriminate against a person on the basis of one or more of the protected traits. Id. § 2000e-2(b). Also, no agency may classify an individual or refer an individual for employment solely on the basis of one of the protected traits. Id. § 2000e-2(b). The prohibitions against retaliation, as well as the provisions regarding training and advertising, which apply to employers, also apply to employment agencies. Id. § 2000e-3.

Finally, labor organizations are brought under the Act's purview by section 2000e-2(c). These groups may not exclude or expel any individual from membership on the basis of one or more of the protected traits. Id. § 2000e-2(c)(1). Further, these groups may not segregate or classify for membership any individual on the basis of one of the protected traits, id. § 2000e-2(c)(2), and they may not cause or attempt to cause an employer to discriminate on the basis of one or more of the protected traits, id. § 2000e-2(c)(3). The retaliation, advertising, and training provisions that apply to employers also apply to labor organizations. Id. § 2000e-3.

28. Id. § 2000e-2(j) ("Nothing contained in this subchapter shall . . . require any employer . . . to grant preferential treatment to any individual or to any group because of [a protected trait].").

29. Id. Thus, Title VII does not establish a quota system. In fact, the Civil Rights Act of 1991 amends Title VII by making any adjustment of test scores, use of different cut-off scores, or other
aimed at removing barriers to equal employment opportunity.\textsuperscript{30}

Ultimately, if a complainant can prove that he or she was victimized by a type of discrimination to which Title VII applies, the Act provides for a number of possible remedies.\textsuperscript{31} First, the Act provides for injunctive relief.\textsuperscript{32} Courts finding a violation of Title VII have enjoined a wide range of discriminatory employer conduct engaged in by employers including the use of physical measurements,\textsuperscript{33} the use of discriminatory tests,\textsuperscript{34} and the imposition of educational requirements without a legitimate purpose.\textsuperscript{35} Despite this wide-ranging relief granted to Title VII plaintiffs in the past, the relief likely to be accorded successful Title VII testers remains speculative.\textsuperscript{36} Given the dictates of the Civil Rights Act of 1991, however, it is conceivable that Title VII testers could be awarded equitable relief, compensatory damages, and/or punitive damages.\textsuperscript{37}


If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practices and order such affirmative action as may be appropriate, which may include but is not limited to, reinstatement or hiring of employees, . . . or any other equitable relief as the court deems appropriate.

\textsuperscript{Id.}

32. \textsuperscript{Id.}

33. Dothard v. Rawlinson, 433 U.S. 321 (1977) (finding the use by an employer of height and weight measurements discriminatory, and enjoining the use of such measurements in employment decisions).


36. In Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971), the court enjoined the employer's continued discriminatory treatment and, contrary to the lower court, awarded attorney's fees to the victorious plaintiffs who also happened to be testers. The court reasoned that the plaintiffs had not only obtained an injunction against an unfair employment practice, but also had opened the way for black women in the employer's plant. It held that attorney's fees should not be denied merely because the plaintiffs acted as testers. Nevertheless, the court went on to deny the plaintiffs' claim for equitable backpay. It found that the plaintiffs' primary motive as testers, coupled with a lack of evidence to show that the employer hired other women with the plaintiffs' qualifications, precluded a backpay award. In sum, the court awarded only prospective relief.

Second, the Act specifically provides for an order of reinstatement or hiring, with or without backpay, to persons aggrieved. 38 Third, the Act provides for other affirmative, equitable relief as deemed appropriate by the court. 39 Under this provision, courts have ordered discriminatory employers to grant various benefits to aggrieved individuals including tenure, 40 promotions, 41 and "frontpay." 42 Finally, the Act provides for the recovery of attorney's fees for prevailing plaintiffs. 43

While courts historically denied requests for compensatory and punitive damages in straight Title VII actions, 44 plaintiffs sometimes recovered such awards by joining a Title VII claim with another civil rights cause of action. 45 Of course, the Civil Rights Act of 1991

reckless indifference to the federally protected rights of an aggrieved individual.").

38. 42 U.S.C. § 2000e-5(g) (1988); see Locke v. Kansas City Power & Light Co., 660 F.2d 359 (8th Cir. 1981) (ordering that the person discriminated against be hired in a job above the entry level on the basis of a Title VII violation); Spiva v. Copperweld Steel Co., 22 Fair Emp. Prac. Cas. (BNA) 900 (N.D. Ohio 1980) (ordering that an unlawfully discharged plaintiff be reinstated and be granted seniority, retirement, pension, and pay benefits that the plaintiff would have had absent the discharge).


40. Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980) (holding that a college instructor should be awarded retroactive tenure by his employer upon completion of a master's degree within two years).


42. See Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945 (10th Cir. 1980) (ordering that the plaintiff be granted five years of pay in lieu of reestatement because of the employer's hostility toward the employee).

43. 42 U.S.C. § 2000e-5(k) (1988). It is not necessary that the plaintiff actually be restored to his former job or qualify for the job sought in order to prevail and be awarded such fees. See King v. Trans World Airlines, 738 F.2d 255 (8th Cir. 1984) (holding that an individual who proved that he was discriminated against in an interview process was a prevailing party in the suit, even though the employer demonstrated that the individual would not have been hired absent any discrimination). Furthermore, attorney's fees have been awarded to prevailing plaintiffs for time spent at mandatory administrative proceedings related to their Title VII claim. See Curtis v. Bill Hanna Ford, Inc., 822 F.2d 549 (5th Cir. 1987) (reversing the holding of the district court and awarding attorney's fees to the prevailing plaintiff for time spent on EEOC hearings).

44. Barbara L. Schleif & Paul Grossman, Employment Discrimination Law 543 (2d ed. Supp. 1988); see Boddy v. Dean, 821 F.2d 346 (6th Cir. 1987) (settling beyond dispute that a plaintiff may not recover either compensatory or punitive damages in a Title VII action); Walker v. Ford Motor Co., 684 F.2d 1355 (11th Cir. 1982) (adopting the rule that compensatory and punitive damages are unavailable in Title VII suits, but cautioning that the ban on such damages does not include fringe benefits, pension benefits, or other employment benefits that, at times, have been referred to as damages); Padway v. Palches, 665 F.2d 965 (9th Cir. 1982) (concluding that Congress intentionally left out of Title VII any provision for either general or punitive damages, and that Title VII provides only for equitable relief, including backpay).

now permits a complaining party who sues under Title VII alone to recover compensatory and punitive damages in certain circumstances and up to established dollar limits. A prevailing Title VII plaintiff, including a tester, may thus expect to receive injunctive relief, monetary, compensatory or punitive damages, other equitable relief, and/or attorney fees incurred in the process of bringing an action.

Given the dictates of Title VII, it is important to understand how the Act was intended to operate and how it actually operates. In this regard, what immediately follows is a discussion of the primary theories of recovery in employment discrimination cases. Following this is a brief overview of the Title VII claim procedure. Finally, the purpose of Title VII is explored by looking to the language of the Act and interpretations of that language.

1. The Primary Theories of Recovery Under Title VII

Most Title VII claims may be grouped into one of two large categories of discrimination; namely, either disparate treatment discrimination or disparate impact discrimination. At issue in disparate treatment discrimination is whether the plaintiff was subjected to different treatment because of membership in a protected class.

At issue in disparate impact discrimination is whether some facially


46. The Civil Rights Act of 1991 extended the availability of compensatory and punitive damages to victims of intentional discrimination under Title VII. Compensatory damages are available only in cases of intentional discrimination, and punitive damages are available only to plaintiffs who can prove that the defendant-employer engaged in a discriminatory practice with malice or reckless indifference to the federally protected rights of the plaintiff. 42 U.S.C. § 1981(b)(1) (1988 & Supp. III 1991).

47. Id. § 1981(b)(3). The 1991 Civil Rights amendments limit the sum of compensatory and punitive damages awardable to each complainant to $50,000 for employers with 14 to 100 employees, $100,000 for employers with 101 to 200 employees, $200,000 for employers with 201 to 500 employees, and $300,000 for employers with over 500 employees in each of twenty or more calendar weeks during the preceding or current calendar year. Id.

48. Again, testers, by definition, will likely base their claims on a disparate treatment theory of discrimination. Pursuant to the Civil Rights Act of 1991, disparate treatment plaintiffs who can prove intentional discrimination may be awarded compensatory and/or punitive damages. Id. § 1981(b)(1). Of course, this raises the issue of whether testers should be granted the same monetary relief as that accorded other successful Title VII plaintiffs. The issue is resolvable by assessing the standing of testers to raise Title VII claims. Because the standing doctrine invokes redressability as one of its required elements, it seems that a tester who meets this, as well as the other standing requirements, should be granted the same remedies as other plaintiffs properly before the court. This, of course, does not negate any requirements that are properly imposed upon plaintiffs to prove their damages.

neutral employment practice adversely impacted a protected class member. These theories of discrimination will be discussed in turn.

a. Disparate treatment discrimination

The essence of disparate treatment discrimination is the different treatment, for better or worse, of similarly situated persons. The United States Supreme Court stated that this theory is "the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of [one of the protected traits]." While this theory requires the plaintiff to prove discriminatory motive, such motive may be inferred from the "mere fact of differences in treatment."

While the plaintiff bears the ultimate burden of proving intentional discrimination, courts follow a three-step allocation of burdens in the majority of disparate treatment cases. The Supreme Court clarified this allocation in McDonnell Douglas Corp. v. Green. There, a black mechanic sued the McDonnell Douglas Corporation under Title VII, alleging that the company refused to rehire him because of his race and his involvement in the civil rights movement. Ultimately, the Supreme Court remanded the case to the district court for a determination consistent with its opinion. First, however, the Court addressed a number of important issues within the Title VII context, chief among which was the proper order and allocation of proof in a private employment discrimination case.

50. Id. at 82-83. The issue of tester standing generally falls into the disparate treatment category of discrimination. Testers present an employer with a choice between individuals possessing equal qualifications but different race, color, religion, sex, or national origin. Therefore, an employer who consistently chooses a person belonging to an unprotected class over a person belonging to a protected class for employment, where qualifications for that employment are essentially identical, is guilty of intentional, or disparate treatment, discrimination.

51. Id. at 13.
53. Id.
54. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Legrand v. University of Ark. at Pine Bluff Trustees, 821 F.2d 478 (8th Cir. 1987); Sylvester v. Callon Energy Servs., Inc., 781 F.2d 520 (5th Cir. 1986); see also Sumner v. San Diego Urban League, Inc., 681 F.2d 1140 (9th Cir. 1982) (remanding case for findings showing the required three-step analysis rather than simply the ultimate issue). But see Monroe v. Burlington Indus., 784 F.2d 568 (4th Cir. 1986) (affirming the district court decision and holding that the trier of fact was allowed to consider evidence used to demonstrate the plaintiff's prima facie case to resolve the issue of whether the defendant's explanation was pretextual).
56. Id. at 796.
The Court held first that the Title VII plaintiff carried the initial burden of establishing a prima facie case of discrimination. It found that he could carry this burden by proving: (1) that he belonged to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that despite his qualifications, he was rejected by the employer; and (4) that after his rejection, the position sought remained open, and the employer continued to seek applications from persons with the plaintiff's qualifications, or the position was filled by a member of the nonprotected class. The Court found that the plaintiff in *McDonnell Douglas* carried this burden, and thus that he established a presumption of illegal discrimination.

Once the plaintiff established a prima facie case of discrimination, the Court held that the burden shifted to the defendant employer. To escape a finding of intentional discrimination, the court held, the employer must articulate a legitimate, nondiscriminatory reason for the employee's rejection. In *McDonnell Douglas*, the Court found that the employer met this burden by pointing to the plaintiff's unlawful conduct, including his past participation in a civil rights protest that disrupted business. According to the Court, """nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it."" It thus found that the employer sufficiently responded to the plaintiff's prima facie case.

Nevertheless, the Court explained that the inquiry must not end upon the employer's successful rebuttal. It reasoned that Title VII does not permit an employer to use evidence of the employee's conduct as a mere pretext for invidious discrimination against that emp-

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57. *Id.*
58. *Id.* at 802.
59. *Id.* The Court noted that """petitioner sought mechanics, respondent's trade, and continued to do so after respondent's rejection. Petitioner, moreover, does not dispute respondent's qualifications and acknowledges that his past work performance in petitioner's employ was 'satisfactory.'"" *Id.*
60. *Id.; see also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (clarifying burdens in disparate treatment action).*
62. *Id.* at 803. The Court noted that, in this case, the plaintiff's activity was directed specifically against the employer. It refused to consider whether conduct not directed against the particular employer may be legitimate grounds for refusal to hire. *Id.* at 803 n.17.
63. *Id.* at 803.
ployee. Therefore, the Court remanded and directed the lower court to afford the plaintiff-employee an opportunity to show that the employer's stated reason for its action was a mere pretext for purposeful discrimination. The Court explained that relevant to such a showing would be evidence that the employee was treated differently than white employees involved in similar acts against the employer. Other relevant showings advocated by the Court included evidence of the employer's past discriminatory policies and practices.

As might be expected, many Title VII cases involve a disagreement over the real reason for the employer's conduct, and are deemed mixed-motive cases. Where there is evidence showing both a discriminatory motive for an employment decision, proffered by the plaintiff employee, and a legitimate, nondiscriminatory motive for an employment decision, proffered by the employer, the Court has altered the allocation of burdens set out in McDonnell Douglas.

In Price Waterhouse v. Hopkins, the Court was faced with just such a situation. In Price Waterhouse, a senior manager in an accounting firm was passed over for partnership, partially on the basis of sex, and partially on the basis of shortcomings in interpersonal skills. The Court found that a balancing of an employee's Title VII protection and employer's freedom of choice requires a different analysis from that used in straight disparate treatment cases. It held that an employer may not be held liable under Title VII, in mixed-motive circumstances, if the employer could prove that it would

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64. Id. at 804.
65. Id. at 804-05. The Court pointed out that statistics as to petitioner's employment practices would be helpful to determine whether the employer's refusal to rehire the plaintiff conformed to a pattern of discrimination. Id. In this regard, the use of testers to at least provide evidence of employment discrimination in Title VII actions appears implicitly endorsed by the McDonnell Douglas Court.
66. SCHLIER & GROSSMAN, supra note 44, at 25 ("[T]he vast majority of disparate treatment cases continue to depend on the issue of pretext, with comparative evidence being the primary type of proof.").
68. 490 U.S. 228 (1989) (plurality).
69. Id. at 235. The individual at Price Waterhouse responsible for informing the plaintiff of the reasons for her being passed over advised her that she should "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry." Id.
70. Id. at 234-35. The Court noted that "both supporters and opponents of her candidacy indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with, and impatient with staff." Id.
have come to the same decision regarding the plaintiff-employee's status with the company even if it had not applied the discriminatory basis for its decision.\(^7\) In essence, the Court found that if the employer could show that its legitimate reason for the employment decision, standing alone, "would have induced it to make the same decision,"\(^7\) that decision will not later be the subject of the employer's liability for discriminatory employment practices.\(^7\)

While this altered mixed-motive analysis is certainly interesting, it also is rendered ineffective by enactment of the Civil Rights Act of 1991. Under the 1991 Act, a plaintiff successfully proves an unlawful employment practice by showing merely that the defendant-employer was motivated by a single prohibited factor. This is so even if the employer can show that other legitimate and lawful factors also motivated its employment decision.\(^7\)

Nevertheless, should an employer be able to demonstrate that it would have taken the same employment action, even absent the discriminatory reason for doing so, a court is precluded by the Act

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71. *Id.* at 242. The Court went to great lengths to explain that it was not amending the burden allocation set out in earlier cases involving discriminatory treatment. It reasoned that since we hold that the plaintiff retains the burden of persuasion on the issue of whether gender played a part in the employment decision, the decision before us is not one of shifting burdens that we addressed in *Burdine*. Instead, the employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the fact-finder at one point, and then the employer, if it wishes to prevail, must persuade it on another. *Id.* at 246.

72. *Id.* at 252.

73. *Id.* at 253-54. The Court found that the employer had the burden of proving this by a preponderance of the evidence. In so holding, it rejected the lower court's determination that the employer must prove its legitimate basis by clear and convincing evidence. It found that conventional rules of civil litigation apply to Title VII actions and that such rules generally require proof only by a preponderance of the evidence. *Id.* It thus reversed the appellate court's judgment against Price Waterhouse and remanded the case for further proceedings. *Id.* at 258.

Though the *Price Waterhouse* Court imposed the obligation on the employer to prove that its legitimate reason for the action alone warranted the action taken, it is unclear how the employer would prove this. The plurality stated that "in most cases, the employer *should be able* to present some objective evidence as to its probable decision in the absence of an impermissible motive." *Id.* at 252 (emphasis added). Justice White concurred in the judgment but disagreed on the objective evidence requirement. He found no basis for imposition of an objective evidence requirement on the employer. *Id.* at 261 (White, J., concurring). Thus, under either analysis, objective evidence is not mandatory. Of course, this decision is seemingly rendered moot by enactment of the Civil Rights Act of 1991.

74. 42 U.S.C. § 2000e-2(m) (1988 & Supp. III 1991)). This amendment to Title VII states: "Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." *Id.*
from awarding damages or from requiring reinstatement, hiring, or promotion. Courts may continue, however, to award declaratory relief, injunctive relief, attorney’s fees, and costs. These amendments are particularly pertinent to this Comment because testers, by definition, allege discriminatory treatment by employers. In the context of hiring and other employment decisions, employers may be able to demonstrate legitimate reasons for their decisions. Yet the 1991 Act indicates that any discriminatory motive will render an employer’s conduct unlawful regardless of any other circumstances. Thus, a tester denied employment for both legitimate and discriminatory reasons may still prevail against a discriminating employer, and may enjoin that employer’s future discriminatory conduct.

Still, some plaintiffs may be unable to prove that an employer intentionally discriminated in hiring, promotion, or some other job-related conduct. Indeed, commentators have acknowledged that today’s discrimination is no longer overt, but is well concealed. If this is true, plaintiffs may have some difficulty procuring evidence of an employer’s discriminatory motives. Yet this possible frustration should not necessarily preclude plaintiffs from bringing Title VII claims under a disparate impact theory of discrimination.

b. Disparate impact discrimination

The second theory under which a plaintiff may recover for a Title VII violation is termed disparate impact discrimination. In such cases, the employer’s policy or conduct may have such an adverse impact on a protected class that discriminatory intent should be presumed from the facts, even if a discriminatory motive cannot be proved. Similar to disparate treatment cases, courts in disparate impact cases generally impose a three-step allocation of burdens. Part of this allocation is evident in the seminal case of Griggs v.

75. Id. § 2000e-5(g)(2)(B)(ii).
76. Id. § 2000e-5(g)(2)(B)(i).
77. Id. § 2000e-2(m).
78. Id. § 2000e-5(g)(2)(B)(i).
79. See supra note 17 (discussing one commentator’s view on the existence of overt workplace discrimination today).
80. SCHLEI & GROSSMAN, supra note 44, at 83.
81. Id.; see Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (“If an employment practice which operates to exclude [a protected class] cannot be shown to be related to job performance, the practice is prohibited.”).
First, the plaintiff-employee bears the initial burden in disparate impact cases. The employee must show that an employer’s policy or practice has had a statistically adverse impact on a protected class. In Griggs, black employees brought a Title VII suit against their employer, who had established high school diploma and intelligence test requirements for certain jobs previously held only by white employees. At trial, the plaintiffs proved that this requirement effectively precluded blacks from higher paying jobs with the company, even though the requirements were applied prospectively to all employees seeking promotion or transfer to one of the higher paying jobs. The plaintiffs alleged that the requirements were thus being used by the employer to preserve the effects of past racial discrimination.

In assessing the plaintiffs’ claim, the Court found that the plaintiffs had met their initial burden of showing that an employer’s policy or practice had a statistically adverse impact on a protected class. Evidence reflected that whites met the company requirements far easier than blacks, and that blacks were effectively precluded from obtaining higher paying jobs. Since plaintiffs had met this initial burden of showing adverse impact, the Court found further inquiry necessary.

82. 401 U.S. 424 (1971). The Griggs case is discussed throughout this Comment, notwithstanding its temporary overruling by the decision in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), because of its reinstatement and codification in the Civil Rights Act of 1991. The Act states explicitly that one of its purposes is to “codify the concepts of ‘business necessity’ and ‘job related’ enunciated by the Supreme Court in Griggs v. Duke Power Co.” 42 U.S.C. § 1981 (1988 & Supp. III 1991). It thus reinstates the requirement that an employer charged with an employment practice that has a discriminatory impact must demonstrate that its policy not only is job related, but is also warranted by a business necessity. Id. § 2000e-2(k)(1)(C). In this way, the Act effectively overrules the Wards Cove decision on this point.

83. SCHLEI & GROSSMAN, supra note 44, at 82.

84. Griggs, 401 U.S. at 428. The Court agreed that there had been no showing of overt intentional discrimination by the employer against the plaintiffs. Yet it found that this did not preclude a finding of Title VII discrimination. Id. at 429.

85. Id. at 430. The plaintiff may also, for instance, show that an employment test selects those from a protected class at a significantly lesser rate than it selects those belonging to an unprotected class. Moore v. Southwestern Bell Tel. Co., 593 F.2d 607 (5th Cir. 1979) (per curiam) (holding that a test’s validity is irrelevant unless the plaintiff meets this initial burden).

86. Griggs, 401 U.S. at 430. Statistics reflected that, while 34% of white males had completed high school in the subject state, only 12% of black males had done so. With respect to the intelligence tests employed, evidence reflected that 58% of whites passed, while only 6% of blacks passed the same test. Id. at 430 n.6.

87. Id. at 429-30. Subsequent courts have stated that the plaintiff must establish the causal connection between the adverse impact and the employer’s conduct by a preponderance of the
Once this adverse impact is shown, the burden shifts to the employer. To escape liability, the employer must show that its policy or practice was job related.\(^8\) In *Griggs*, the Court found that both the high school diploma requirement and the intelligence testing were adopted without a thorough analysis by the employer of their relation to job performance. In fact, evidence indicated that employees hired prior to the adoption of diploma and testing requirements continued to perform their jobs satisfactorily and were making progress in their respective departments.\(^8\) The Court held that the requirements were unnecessary for effective or improved job performance; therefore, the employer had failed to prove job relatedness.\(^9\) In disparate impact cases then, the employer must prove that the test or policy is applied to select candidates on the basis of necessary qualifications and not on the basis of one of the protected traits.\(^9\)

Finally, should the employer successfully rebut the evidence of disparate impact, the burden reverts back to the plaintiff. The plaintiff must then show that, even if the employer’s test or policy is job related, it does not constitute a business necessity.\(^9\) The plaintiff evidence. See *e.g.*, Bazemore v. Friday, 478 U.S. 385 (1986) (finding that a causal connection must be shown by a preponderance of the evidence, and that such does not require scientific accuracy).

\(^8\) *Griggs*, 401 U.S. at 431 ("If an employment practice which operates to exclude [blacks] cannot be shown to be related to job performance, the practice is prohibited.").

\(^9\) *Id.* at 431-32. The Court noted that the percentage of white employees over a given period of time who were promoted but who were not high school graduates was similar to the percentage of nongraduates in the entire workforce. *Id.* at 432 n.7.

\(^9\) *Id.* at 431.

\(^9\) *Id.*. But see *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (agreeing that the burden of producing evidence of a legitimate business justification for practices or policies with a discriminatory impact shifts to the employer, but holding that the burden of persuasion rests with the plaintiff-employees at all times).

The Civil Rights Act of 1991 effectively overruled the *Wards Cove* decision. Section 2 of the Act declares, "The Congress finds that ... (2) the decision of the Supreme Court in [*Wards Cove*] has weakened the scope and effectiveness of federal civil rights protections." 42 U.S.C. § 1981 (1988 & Supp. III 1991). Furthermore, section 3 of the Act states that it is intended, partially, to codify the concepts of "business necessity" and "job related" enunciated in *Griggs*, and to provide statutory guidelines for the adjudication of disparate impact suits under Title VII. *Id.* Finally, the Act amends Title VII by directing that an unlawful employment practice based on disparate impact is established only if the plaintiff establishes a prima facie case of disparate impact discrimination, and the employer "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." *Id.* § 2000e-2(k)(1)(A)(i).

\(^9\) *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975). The Court explained that, "[i]f an employer . . . meet[s] the burden of proving that its tests are "job related," it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer’s legitimate interest in ‘efficient and trustworthy workmanship.’" *Id.* at 425.
meets this burden by furnishing an alternate test or policy that would have a comparable business utility to that implemented by the employer, but would have less of an adverse impact on a protected class.\(^93\)

While the preceding discussion of theories of discrimination is by no means exhaustive, it provides a useful basis for better understanding the scope and purpose of Title VII. An overview of the Title VII procedural machinery may also enlighten the analysis of tester standing.

2. The Procedure for Filing a Title VII Claim

The procedure for enforcing one’s Title VII rights varies depending upon the state in which the alleged violation occurred. According to Title VII, if an allegedly unlawful employment practice occurred in a state that provides an administrative remedy for injuries resulting from such a practice (“deferral jurisdiction”), the complainant must exhaust this state remedy first.\(^94\) However, assuming that the Title VII violation occurs in a state without an applicable fair employment remedy (“non-deferral jurisdiction”), a hypothetical Title VII procedure would operate as follows.\(^95\)

To set the Title VII machinery in motion, an individual must file

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93. *Id.* at 425. Disparate impact discrimination under Title VII was recently strengthened by Congress via the Civil Rights Act of 1991. See *supra* note 91.

94. 42 U.S.C. § 2000e-5(c) (1988). This subsection states that “no charge may be filed ... by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the state or local law.” *Id.*

Title VII complainants should be aware, however, that exhaustion of their state administrative remedy, coupled with an adverse state court review of the administrative determination, may preclude a subsequent suit over the same case in federal district court. *Joel W. Friedman & George M. Strickler, Jr., The Law of Employment Discrimination* 398 (2d ed. 1987).

In Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982), a plaintiff filed an employment discrimination charge, and the EEOC referred this charge to the administrative agency in the plaintiff’s state for review. The state agency concluded that there was no probable cause for the complaint, so the plaintiff sought state court review of this determination. The state court affirmed the state agency decision, and the plaintiff filed a Title VII action in federal district court. Both the district and the federal appellate courts dismissed the plaintiff’s federal claim on the basis of res judicata, holding that the state court’s final determination of no probable cause for the plaintiff’s complaint precluded federal judicial review of the same issue.

The Supreme Court, by a 5-4 vote, affirmed. It held that a plaintiff has no absolute right to “relitigate in federal court an issue resolved by a state court.” *Id.* at 473. The Court found that the general rules of res judicata apply to Title VII actions. *Id.* at 485. But cf. University of Tenn. v. Elliott, 478 U.S. 788 (1986) (holding that unreviewed state administrative determinations were not meant by Congress to have a preclusive effect on Title VII claims).

an unlawful employment practice charge with the EEOC.96 Within ten days of this filing, the EEOC must serve notice of the charge on the employer,97 and thereafter it will investigate the complaint to determine whether there is reasonable cause to believe that the charge is true.98 If the EEOC finds that there is reasonable cause for the complaint, it will attempt to eliminate the employer's discriminatory practices through the informal methods of conference, conciliation, and persuasion.99

If the Commission is unable to obtain voluntary compliance by the employer within thirty days after the charge is filed, it may bring a civil action against the employer.100 Again, should the Commission choose not to do so, based upon its investigation of reasonable cause, or if it fails to do so within the prescribed time limits, it will notify the aggrieved individual.101 Thereafter, the aggrieved individual may file a civil action against the employer in federal district court, regardless of whether the Commission found reasonable cause for the charge.102

96. 42 U.S.C. § 2000e-5(e) (1988) (“A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge . . . shall be served upon the person against whom such charge is made within ten days thereafter . . . . ”).

Again, this 180-day period refers to states without an administrative remedy for employment discrimination (non-deferral jurisdictions). In states possessing an administrative remedy (deferral jurisdictions), the complainant must file a charge with the EEOC within 300 days after the alleged unlawful employment practice occurred. Id. § 2000e-5(c).

97. Id. § 2000e-5(e).

98. Id. § 2000e-5(b) (“Whenever a charge is filed by or on behalf of a person claiming to be aggrieved . . . the [EEOC] . . . shall make an investigation thereof.”).

99. Id. (“If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”). Should the EEOC find that there is no reasonable basis for the charge, it notifies both the claimant and the respondent of its findings. The EEOC's reasonable cause determination must be made within 120 days of the claimant's filing of the charge. Id.

100. Id. § 2000e-5(f)(1).

101. Id. § 2000e-5(b). The Commission has 120 days from the filing of the charge to make its determination. Id.

102. The complainant must file in district court within 90 days of this notification. Id. § 2000e-5(f)(1). The complainant also has the right to intervene should the EEOC, upon a finding of probable cause and a failure to secure resolution through informal methods, bring an action against the Title VII violator. Id.

If the court finds in favor of the plaintiff, it may enjoin the discriminatory practice, order reinstatement or hiring, or provide other equitable relief. Id. § 2000e-5(g). Furthermore, the court may order the payment of reasonable attorney's fees and customary costs to a prevailing plaintiff. Id. § 2000e-5(k) (“In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.”). Should the employer refuse to comply with the court's order, the EEOC may seek to compel compliance in a
This statutory process allows the EEOC to respond to charges of discrimination and to prevent any employer, agency, or union from continuing to engage in any unlawful employment practice as set forth in the Act. However, the EEOC's authority does not end there. While the Act directs the Commission to seek voluntary compliance by the employer, the Commission is also empowered to investigate possible Title VII violators prior to specific charges of discrimination.

The Equal Employment Opportunity Act of 1972 expanded the EEOC's enforcement powers by conferring upon it the authority to investigate, file complaints, and bring actions against alleged Title VII violators. Within this context, the EEOC has discretionary power to decide which suits it wishes to prosecute. These powers were further expanded when the EEOC was assigned responsibility, formerly reserved for the Attorney General, to bring suits against persons believed to be engaged in a pattern or practice of discrimination in contravention of the Act. The expansion in powers accorded the EEOC by Congress confirms that Title VII aims to do more than merely redress specific instances of job discrimination. Indeed, the EEOC defines its mission as "insuring equality of opportunity by vigorously enforcing federal legislation prohibiting discrimination in employment through investigation, conciliation, regulation in the federal sector, and through education, policy research and provision of technical assistance."
3. The Purpose of Title VII

The primary purpose of Title VII's enactment was first to assure equality of employment opportunity, and second to remove the discriminatory practices that prevent such equality.\footnote{Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).} The language of the Act, the legislative history surrounding it, and the Supreme Court's interpretation of that language all illustrate this broad purpose.

a. Statutory language

Congress's objective in enacting Title VII is plain from the language of the statute.\footnote{Id. at 429.} First, the drafters of the final bill gave it a broad scope. The remedies provision of Title VII accords the right to a private cause of action to any "person claiming to be aggrieved."\footnote{42 U.S.C. § 2000e-5(f)(1) (1988).} Furthermore, the Act forbids not only discrimination by employers but also by labor organizations\footnote{42 U.S.C. § 2000e-2(b); see Schattman v. Texas Employment Comm'n, 330 F. Supp. 328 (N.D. Tex. 1971) (holding that this statutory provision applies not only to referral activities of employment agencies, but also to agencies' own manpower and staffing practices).} and employment agencies.\footnote{See Linda S. Greene, Title VII Class Actions: Standing at its Edge?, 58 U. DET. J. URB. L. 645, 654 (1981) (arguing that the interests protected by Title VII are broad, encompassing the rights to freedom of "harms to conscience," and freedom from both direct and indirect discrimination in the workplace); N. Morrison Torrey, Indirect Discrimination Under Title VII: Expanding Male Standing To Sue for Injuries Received as a Result of Employer Discrimination Against Females, 64 WASH. L. REV. 365, 372-73 (1989) (arguing that by granting a right to sue under Title VII to "any person claiming to be aggrieved," Congress intended Title VII protection to encompass anyone injured by discrimination, rather than only those directly discriminated against).} Thus, commentators have urged that Title VII does more than remedy specific instances of job discrimination. Rather, these scholars assert that the Act is aimed more expansively at redressing job discrimination in general.\footnote{See e.g., Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978) (holding that persons who had not applied for jobs could recover seniority relief if they could show, among other things, that they were deterred from applying for vacant jobs by the employer's discriminatory practices); Warth v. Seldin, 422 U.S. 490, 511 (1975) (finding that "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members").} The legislative history surrounding...
the enactment of Title VII appears to confirm such commentary.

b. Legislative history

Title VII represents the culmination of years of fair employment debate in both the House and the Senate. Senator Humphrey, one of Title VII’s sponsors, indicated that the Act derived its constitutional basis from the Commerce Clause of the United States Constitution. Given this basis, legislators perceived that the Act would sweep broadly, as illustrated by a number of comments and debates on the House floor during deliberation on the bill.

First, the legislators debating the proposed bill perceived its broad scope. During House deliberations on February 8, 1964, a heated debate transpired between Representative Roosevelt of California and Representative Williams of Mississippi. Representative Williams proposed an amendment to the House bill that would have allowed for a greater range of exceptions to employers in making employment decisions. Williams expressed concern that, under the existing bill, the government would be reaching too far into the realm of private business.

Representative Roosevelt, on the other hand, supported the existing bill under which only limited exceptions were granted to employers in making hiring decisions based on a protected trait. He responded to William’s criticism by declaring that the sponsors’ intent was, broadly, to break down the barriers to employment that had unfairly prevented particular classes of persons from obtaining jobs. In summary, Representative Roosevelt stated, “[W]e are trying to get rid of discrimination in our national life.”

Perhaps the most articulate summary of the aims of Title VII was

against).

117. THE CIVIL RIGHTS ACT OF 1964: WHAT IT MEANS, supra note 24 (indicating that Title VII derived its basis from the Declaration of Independence, the depression, the crisis of World War II, and various labor bills of the 1950s, among other sources).

118. 110 Cong. Rec. 6328 (1964) (statement of Senator Humphrey) (“The courts have held time and again that the commerce clause authorizes Congress to enact legislation to regulate employment which affects interstate and foreign commerce.”).

119. Id. at 2563.

120. Id.

121. Id.

122. Id.

123. Id.

124. Id. (statement of Rep. Roosevelt) (“So all we are trying to do is to break down this unfortunate idea—this wrong idea—which unfortunately is prevalent in many areas of the country.”). Representative Williams’ proposed amendment was defeated by a vote of 108 to 70. Id.
provided by Representative Cohelan of California during early House deliberations. Cohelan noted that, while black Americans are required to meet the same obligations and responsibilities of citizenship as white Americans, they are denied many of the same rights and privileges enjoyed by white Americans. Representative Cohelan went on to explain that, in response to this injustice, the 1964 Civil Rights Bill would allow the nation to fight more effectively for racial justice and human equality and "to do what is right."  

While Cohelan admitted that the bill would not solve inequality in the marketplace, he opined that it would nevertheless go a long way toward "fulfilling the pledges upon which the nation was founded—pledges that all men are created equal; that they are endowed equally with inalienable rights; that they are entitled to equal opportunity in the pursuit of their daily lives." Representative Corman of California further responded to the bill's opponents by confirming their suspicions. He stated that "[t]he opponents of this measure are accurate when they label it the most far reaching civil rights bill ever to come before this house." So, although proponents and opponents of Title VII disagreed on its merits, both clearly understood that the reach of the Act would be broad, and that its purpose was to eradicate employment discrimination in general.

c. Supreme Court interpretation

The Supreme Court acknowledged the broad reach of Title VII in *Griggs v. Duke Power Co.* Again, in *Griggs*, a group of black employees sued a company under Title VII, alleging discriminatory hiring and promotion practices. Specifically, the claim alleged that the employer established arbitrary barriers to advancement by requiring a high school diploma and separate intelligence testing. The plaintiffs claimed that these barriers effectively excluded blacks from higher paying jobs. Both the district and appellate courts found that the plaintiffs failed to provide evidence of discriminatory

125. *Id.* at 1593 (statement of Rep. Cohelan).
126. *Id.*
127. *Id.*
128. *Id.* at 1592 (statement of Rep. Corman).
129. *Id.*
131. *Id.* at 427-28.
132. *Id.*
intent. Absent such intent, both courts held that the testing requirements were permissible, even if they rendered a disproportionate number of blacks ineligible for jobs.  

Reversing the lower court decision in part, the United States Supreme Court held that, although there was no evidence of discriminatory intent, the plaintiffs had stated a valid Title VII claim. The Court found that the employer's requirements had effectively prevented blacks from being promoted and were unrelated to specific job performance. It reasoned that because the employer had shown no meaningful relationship between the new requirements and improved job performance, the practice must be prohibited as working an invidious discrimination on the black plaintiffs. According to the Court, Congress intended for Title VII to "remove the unnecessary barriers that have operated invidiously to discriminate on various bases."  

The above discussion thus demonstrates that the statutory language of Title VII, its legislative history, and the Supreme Court's interpretation of the Act all confirm its broad aim of eradicating employment discrimination. Still, not every person seemingly aggrieved by a discriminatory act is entitled to have a federal court decide the merits of his or her Title VII claim. Rather, in order to have a day in court, a claimant must show some connection between an employer's discriminatory act and the claimant's resulting injury. What follows is an overview of standing—one of the doctrines that guides a court in determining whether it has jurisdiction to decide the merits of a case.  

C. The General Law of Standing  

Assuming that a victim of employment discrimination has met the procedural requirements discussed above and has chosen to sue his or her employer in federal court, the individual must still meet the requirements for standing before a court will adjudicate that indi-

133. Id. at 429.  
134. Id. at 432.  
135. Id.  
136. Id. at 431.  
individual’s Title VII rights. Standing doctrine requires that a plaintiff have a distinct basis for invoking the court’s jurisdiction.\textsuperscript{138} The second section of Article III of the United States Constitution confines the federal court’s jurisdiction to “cases or controversies.”\textsuperscript{139} This language forms the basis for the general law of standing that limits judicial authority.\textsuperscript{140}

A full history of standing decisions would serve only to convolute this discussion.\textsuperscript{141} Furthermore, because standing is generally regarded as a modern concept,\textsuperscript{142} only more recent Supreme Court decisions will be explored to define the doctrine’s present contours. A useful method of understanding this doctrine is to separate it into three categories; namely, (1) core Constitutional standing require-

\begin{itemize}
  \item \textsuperscript{138} Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) (holding that plaintiff had standing because he could demonstrate injury); Flast v. Cohen, 392 U.S. 83, 99 (1968) (stating that “the question is whether the person whose standing is challenged is a proper party to request adjudication”).
  
  \item \textsuperscript{139} Article III, Section 2, states, “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States . . . to Controversies to which the United States shall be a Party; [and to Controversies] . . . between Citizens of different States.” U.S. CONST. art. III, § 2, cl. 1.
  
  \item \textsuperscript{140} The doctrine of standing derives from the Article III “cases or controversies” clause of the Constitution, but the development of the doctrine is inconsistent. See Allen v. Wright, 468 U.S. 737, 751 (1984) (“[T]he constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition.”); see also David A. Logan, Standing To Sue: A Proposed Separation of Powers Analysis, 1984 Wis. L. Rev. 37, 39-40 (“In spite of the large number of cases that the Supreme Court has decided on standing grounds, the concept unfortunately remains a shifting and elusive one.”).
  
  \item \textsuperscript{141} For a general discussion of standing law and how this law has been misinterpreted, see Paul A. Lebel, Standing After Havens Realty: A Critique and an Alternative Framework for Analysis, 1982 Duke L.J. 1013; see also Mark V. Tushnet, The Sociology of Article III: A Response to Professor Brilmayer, 93 Harv. L. Rev. 1698, 1715 n.72 (1980) (arguing that standing is prone to manipulation and incoherence); Steven L. Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 Stan. L. Rev. 1371, 1386-93 (1988) (arguing that standing is a myth that has unfortunately reshaped our thinking about adjudication).
  
  \item \textsuperscript{142} It is believed that Justice Frankfurter was the first to discuss standing as an Article III concept of justiciability. See Coleman v. Miller, 307 U.S. 433, 464-68 (1939) (Frankfurter, J., concurring); Winter, supra note 141, at 1371 (claiming that for the first 150 years of the Republic, the framers were oblivious to the concept that standing was a component of the “cases and controversies” provision of Article III).
\end{itemize}
ments under Article III, (2) prudential standing barriers imposed by the courts, and (3) statutory grants of standing by Congress.  

1. Constitutional Standing Requirements

The Supreme Court has interpreted Article III to require that a plaintiff have a personal stake in the outcome of the controversy to invoke federal jurisdiction. This requires the plaintiff to make a three-fold showing. First, the plaintiff must allege a “distinct and palpable injury.” Second, the plaintiff must prove a “fairly traceable causal connection between the claimed injury and the challenged conduct of the defendant.” Third, the plaintiff must show that there is a “substantial likelihood” that the relief requested will redress the injury alleged. This three-fold test is best understood by looking to its application in some recent cases.

a. The injury-in-fact requirement

First, the standing doctrine requires the plaintiff to prove that he suffered an injury in fact. While it may seem that this would require a showing of a direct, tangible injury, the Court found otherwise in United States v. Students Challenging Regulatory Agency Procedures (“SCRAP”). In S scrap, an environmental group sued to enjoin the Interstate Commerce Commission (“ICC”) from enforcing its order allowing freight carriers to impose a surcharge on freight rates. The Interstate Commerce Act had empowered the ICC to suspend rate increases sought by railroads pending an investigation into the lawfulness of the increase. The plaintiffs claimed that the ICC’s failure to suspend rate increases in this case would cause them “economic, recreational, and aesthetic harm.” They asserted, among other things, that the rate increases would discourage the transportation of recyclable materials, and would

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143. While standing may be best understood under this model, these separate standing categories often overlap in court opinions. See Allen, 468 U.S. 737 (holding that both abstractness of injury and failure of the plaintiffs to prove sufficient causation precluded standing).
145. Id. at 72.
146. Id.
147. Id. at 79. See generally RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.13(f)(2) (1986).
150. Id.
thus burden their aesthetic enjoyment of the outdoor environment.\textsuperscript{151}

In perhaps the most liberal interpretation of injury in the history of the Supreme Court,\textsuperscript{152} the Court found that the plaintiffs had standing to bring their claim.\textsuperscript{153} First, the Court held that the plaintiffs claimed a real injury. It reasoned that they were harmed in their enjoyment of the country's natural resources by the adverse environmental impact of the increased freight rates.\textsuperscript{154}

While the Court noted that all persons who utilize the scenic resources of the country could claim a similar harm, it reasoned that standing could not be denied simply because "many people suffer the same injury."\textsuperscript{155} Furthermore, the Court stated that injury was not limited merely to economic harm, but extended to "‘aesthetic and environmental well-being.'"\textsuperscript{156} Because the evidence thus conformed to the Court's definition of injury, and because the plaintiffs also met the causation and redressability prongs of the standing test, the Court held that the plaintiffs' claim was justiciable.\textsuperscript{157} Thus, while tangible injuries may be easier to prove, a plaintiff may satisfy the injury-in-fact requirement by asserting an intangible injury.

Nevertheless, the Supreme Court recently clarified that injury-in-fact requires more than a mere injury to a cognizable interest. In \textit{Lujan v. Defenders of Wildlife}, a group of wildlife conservationists sought to extend the coverage of endangered species protection past the United States borders.\textsuperscript{158} The Court held that, although the

\begin{footnotes}
\textsuperscript{151} Id. at 676.
\textsuperscript{152} KENNETH C. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 22.02-2, at 489 (1976) (arguing that \textit{SCRAP} represented "an all-time high in Supreme Court liberality on the subject of standing").
\textsuperscript{153} \textit{SCRAP}, 412 U.S. at 687-88.
\textsuperscript{154} Id. at 686.
\textsuperscript{155} Id. at 687. The Court distinguished the claimed injuries here from those claimed in Sierra Club v. Morton, 405 U.S. 727 (1972). In \textit{Sierra Club}, the plaintiff claimed that aesthetic and recreational values of the area would be lessened by certain commercial development, but it failed to allege that it or its members would be negatively impacted in their activities by the development. Id. at 735-36. In \textit{SCRAP}, on the other hand, the Court found that the plaintiffs sufficiently alleged that they were adversely impacted in their enjoyment of natural resources, pursuant to the Commerce Commission's failure to suspend freight rate surcharges and the subsequent disuse of recyclable goods. \textit{SCRAP}, 412 U.S. at 687.
\textsuperscript{156} \textit{SCRAP}, 412 U.S. at 686 (quoting \textit{Sierra Club} v. Morton, 405 U.S. 727, 734 (1972)).
\textsuperscript{157} Id. at 686-87.
\textsuperscript{158} \textit{Lujan v. Defenders of Wildlife}, 60 U.S.L.W. 4495 (U.S. June 12, 1992). The plaintiff sought to ensure that any actions authorized or funded by federal agencies would not endanger a threatened species not only in the United States, but in other countries as well. It argued that a failure by the Secretary of the Interior to promulgate rules extending endangered species protection would increase the threat of extinction; such threat negatively impacting the ability to observe
\end{footnotes}
plaintiffs undeniably had a cognizable interest in their desire to benefit from the preservation of animals, injury for standing requires that the party seeking review actually be among the injured, and that a mere speculation of injury would not suffice.\textsuperscript{159}

b. The causation requirement

The doctrine of standing also requires that the plaintiff prove a causal connection between the alleged injury and the defendant’s act or omission. In \textit{Allen v. Wright},\textsuperscript{160} the Court addressed this requirement. In \textit{Allen}, parents of black school children brought a class action suit in federal court. The plaintiffs alleged that the IRS had failed to fulfill its obligation to deny tax-exempt status to discriminatory private schools.\textsuperscript{161} They claimed that this failure encouraged the expansion of racially segregated private schools to the detriment of public school education. As a result, the parents asserted, their children were deprived of an integrated education, and they were harmed directly by the IRS failure.\textsuperscript{162}

After assuming that the plaintiffs had claimed a real injury, the Court nevertheless found that the plaintiffs lacked standing because they had not proven a sufficient causal connection between the IRS failure and segregation of schools.\textsuperscript{163} According to the Court, the plaintiffs had failed to prove specifically that deficient tax exemption enforcement directly contributed to the segregation of the schools. It reasoned that the conclusory comments by the plaintiffs in this regard were unsupported and speculative.\textsuperscript{164} The Court thus refused to decide the merits of the claim.\textsuperscript{165} The \textit{Allen} holding indicates that a clear, causal link between the defendant’s conduct and the plaintiff’s

\begin{footnotes}
\item[159] \textit{Id.} The Court clearly rejected the plaintiffs’ broad standing plea based upon loss of aesthetic rights. It stated that “[i]t goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.” \textit{Id.} at 4498-99.
\item[161] \textit{Id.} at 739.
\item[162] \textit{Id.}
\item[163] \textit{Id.} at 759.
\item[164] \textit{Id.} at 756-61. Essentially, the Court reasoned that, even if it were to decide for the plaintiffs on the merits of the case and enjoined the IRS from failing to enforce the tax exemption rules, there was an uncertain likelihood that this would remedy segregation. \textit{Id.} In this sense, the causal connection and the redressability prongs of the standing requirement can be seen as opposite sides of the same coin.
\item[165] \textit{Id.}
\end{footnotes}
alleged injury must be shown before the Court's jurisdiction will be invoked.

c. The redressability requirement

Finally, the standing doctrine requires that the relief sought be substantially likely to redress the plaintiff's alleged injury. In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, the Court held that its power to declare an act unconstitutional satisfied the redressability requirement for standing. In *Duke Power*, an environmental organization, a labor union, and a number of individuals living near nuclear power plants sued the Nuclear Regulatory Commission and a public utility that was constructing and maintaining the plants. The plaintiffs claimed that they were injured by pollution emanating from the nuclear plant in question. They further alleged that the Price-Anderson Act enabled the utility to construct and maintain these plants to their detriment. The plaintiffs sought a declaration that the Price-Anderson Act was unconstitutional on the basis of the Due Process and Equal Protection Clauses of the Fifth Amendment.

The Price-Anderson Act was created with the dual purpose of protecting the public in the event of a nuclear accident and encouraging development in the nuclear energy industry. It imposed a monetary limit on owner liability for nuclear accidents resulting from the operation of federally licensed private nuclear power plants. In addition, the Act required that such plants waive all legal defenses in exchange for this indemnification, and provided Congress with authority to take additional measures in the event of an accident.

The Court first held that the plaintiffs met the injury-in-fact requirement for standing. They had alleged immediate harm as a result of pollution. Second, the Court found a clear causal connec-

168. *Id.* at 67.
169. *Id.*
170. *Id.* at 76-78.
173. *Id.*
tion between the provisions of the Act, which enabled the defendant to construct and maintain nuclear plants, and the alleged harm done to the plaintiffs. Finally, because the plaintiffs sought declaration of the Act's unconstitutionality, the Court held that this relief would effectively redress their alleged injuries. The Court thus found that the plaintiffs had standing to bring their claim. The redressability prong of standing therefore requires that judicial intervention be able to remedy the plaintiff's alleged injury.

The preceding analysis suggests that, once a plaintiff has met the three requirements for constitutional standing, the merits of the claim may be heard. However, the Court has occasionally denied standing to plaintiffs who met these constitutional requirements. In such cases, the policy of judicial restraint has led the court to apply additional barriers to standing.

2. Prudential Barriers to Standing

Although the reasons proffered are anything but uniform, the Court has sometimes fashioned procedural standing requirements in addition to the constitutional requirements for standing. For example, the following cases illustrate that generally the Court will impose prudential barriers to standing where the plaintiff has failed to assert a sufficiently specific harm.

The Supreme Court found that an injury claim was too abstract and thus nonjusticiable in Schlesinger v. Reservist's Committee to Stop the War. In Schlesinger, the Court was faced with a challenge to the armed forces reserve status of certain members of Con-

176. Id.
177. Id. The Court reasoned that, because Duke Power had relied on the indemnification provided by the Act to build and maintain plants, a declaration of the Act's unconstitutionality would preclude further construction and maintenance of the plants, and would thus remedy the plaintiffs' injuries. Id. at 81 n.26.
178. Id. at 81. The Court nevertheless denied the remedy sought by the plaintiffs on the merits of the case. In doing so, it held that the Act did not violate the Due Process Clause of the Fifth Amendment. Id.
179. See Allen v. Wright, 468 U.S. 737, 750-52 (1984) (pointing out that the issue of standing presents questions that must be answered with regard to the Article III notion that federal courts are to exercise power only in the last resort, only when adjudication is consistent with a system of separated powers, and only when the dispute is capable of resolution via the judicial process).
180. See Davis, supra note 152, § 2.21, at 523 (addressing standing as a decisional tool used by the courts to avoid deciding difficult cases, and arguing that the law of standing is the wrong tool for this purpose); Logan, supra note 140, at 37 (arguing that the courts should use prudential barriers to deny standing to parties alleging amorphous grievances).
gress when an association of present and former members of the armed forces reserves brought a class action suit on behalf of all United States citizens and taxpayers.\textsuperscript{182} The plaintiff association sued the Secretary of Defense for violating the Incompatibility Clause\textsuperscript{183} of the United States Constitution by allowing certain members of Congress to remain members of the armed forces reserves.\textsuperscript{184} The plaintiff claimed that the members of Congress who were also reservists were effectively unable to render objective service to their constituents.\textsuperscript{185} The association claimed that it was injured as a result of this legislative failure, and it sought injunctive relief and an order directing the Secretary of Defense to discharge all House members from the reserves.\textsuperscript{186}

Under a strict constitutional standing analysis, the plaintiff arguably would have established the requisite elements. First, it claimed a distinct injury in not being accorded fair representation by its elected officials.\textsuperscript{187} Second, this injury was fairly traceable to the alleged conduct of the defendant.\textsuperscript{188} Third, the injury was redressable by the court; an injunction would have remedied the plaintiff's injury.\textsuperscript{189}

Nevertheless, the Court denied the plaintiff standing both as a class of citizens and as a class of taxpayers.\textsuperscript{190} As a class of taxpayers, the Court held that the plaintiff had failed to establish the required nexus between its taxpayer status and its claim before the Court.\textsuperscript{191} As a class of citizens, the Court held that the association's

\begin{itemize}
\item \textsuperscript{182} Id. at 209.
\item \textsuperscript{183} U.S. CONST. art. I, § 6, cl. 2. This clause states, "[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." \textit{Id.}
\item \textsuperscript{184} Schlesinger, 418 U.S. 208.
\item \textsuperscript{185} \textit{Id.} at 212. The plaintiffs opposed the war and essentially claimed that congressmen who were also reservists could not impartially exercise their legislative duties. The plaintiffs therefore claimed that they were injured by being deprived of\textsuperscript{186} objective governance. \textit{Id.}
\item \textsuperscript{186} \textit{Id.} at 211.
\item \textsuperscript{187} \textit{Id.} at 212. The plaintiff alleged that congressmen's reserve status imposed inconsistent obligations which could cause them to violate their duty faithfully to perform either as congressmen or as reservists. This was said to deprive citizens and taxpayers of the right to faithful discharge of duties by elected congressmen. \textit{Id.}
\item \textsuperscript{188} The injury was said to have been suffered because of the congressmen's conflicting duties. \textit{Id.}
\item \textsuperscript{189} \textit{Id.} at 211. Among other relief sought, the plaintiff sought a declaration that membership in the reserves was prohibited to members of Congress by Art. I, § 6, cl. 2, and incompatible with membership in Congress. \textit{Schlesinger}, 418 U.S. at 211.
\item \textsuperscript{190} \textit{Schlesinger}, 418 U.S. at 227-28.
\item \textsuperscript{191} \textit{Id.} Standing in taxpayer suits represents an entirely different analysis that is beyond the scope of this Comment. Courts generally undertake an analysis similar to that undertaken in nontaxpayer suits, but add a "logical nexus" requirement as illustrated in \textit{Flast} v. \textit{Cohen} 392 U.S. 83
\end{itemize}
claim of injury was too abstract. The Court indicated that it was not within a federal court's limited jurisdiction to "resolve abstract questions." Thus, even though the plaintiff met the constitutional standing requirements, prudential barriers prevented adjudication on the merits of its claim.

One year later the Court applied the prudential standing rule that bars litigants from asserting the legal rights of others. In *Warth v. Seldin*, various not-for-profit organizations with an interest in alleviating housing shortages, individual taxpayers, and individual low- and moderate-income minority citizens sued a town and members of the town's zoning, planning, and town boards. The plaintiffs claimed that the town's zoning ordinance effectively excluded persons of low income from living in the town, in contravention of certain constitutional and civil rights. They sought damages as well as injunctive and declaratory relief.

The Supreme Court affirmed the lower courts' denial of standing to all plaintiffs. After dismissing the low-income plaintiffs' standing for traditional constitutional reasons, the Court went on to address the standing of the taxpayer class of plaintiffs. First, the Court found that this class failed to meet the causal relation prong of the constitutional standing doctrine. It found that there was not a sufficient causal connection between the defendant's alleged zoning conduct and the increased taxes in the neighboring communities to

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(1968). In *Flast*, the Court held that to have standing a taxpayer had to establish a logical nexus between his status as a taxpayer and the claim sought to be adjudicated. The Court explained that this nexus requirement was seemingly to bar an endless number of taxpayers from suing the government based merely on regulatory expenditures which do not impact the taxpayer's constitutional rights. Id. at 91-94.

192. Schlesinger, 418 U.S. at 223.
193. Id.
194. 422 U.S. 490 (1975).
195. Id. at 494.
196. Id. at 493. The plaintiffs alleged violations of 42 U.S.C. § 1981 (establishing the statutory right to equal rights under the law), 42 U.S.C. § 1982 (extending the same real and personal property rights enjoyed by white persons to all citizens of the United States), 42 U.S.C. § 1983 (granting civil remedies to persons deprived of equal constitutional or statutory privileges). They claimed that requirements for lot size, setback, and floor area combined to disfavor the construction of low- to moderate-income housing. *Warth*, 422 U.S. at 493.
197. Warth, 422 U.S. at 496.
198. Id. at 502-08. These plaintiffs alleged that they had attempted to procure housing in the town but were unsuccessful in their attempts due to the costs involved. Nevertheless, the Court found that their complaints in no way tied the high costs to the town's zoning ordinances. Furthermore, the Court found that the plaintiffs were merely speculating when they asserted that, by striking down the ordinance, they would be successful in procuring housing. Id.
199. Id. at 509.
which this class belonged.200

Furthermore, the Court rejected the taxpayer class’s standing on a prudential basis. It held that the taxpayer class could not base standing on the legal rights of those who may have been directly impacted by the defendant’s zoning laws.201 Such a claim, the Court said, fell “squarely within the prudential standing rule that normally bars litigants from asserting the legal rights or legal interests of others in order to obtain relief from injury to themselves.”202 The taxpayer class failed to allege that it suffered specific and direct harm. Therefore, it could not directly benefit from the court’s intervention in this dispute.203

Finally, the Court addressed the standing of the not-for-profit organization that asserted an interest in promoting and encouraging low- and moderate-income housing for its members.204 The organization specifically claimed that its members were denied the benefit of interracial living by virtue of the defendant’s zoning laws. The Court held that, even if this injury met Article III’s case or controversy requirements, “prudential considerations strongly counsel against according [the organization] standing to prosecute this action.”205 In essence, the Court was unwilling to grant standing because the organization was attempting to litigate the rights of third parties while failing to allege specific statutory injury to those third parties or to itself.206

In both Schlesinger and Warth the Court imposed prudential barriers that barred the plaintiffs’ standing and prevented adjudication

200. Id. The taxpayers alleged that the defendant’s zoning laws produced insufficient low-income housing, that their town (which bordered that of the defendant) was forced to erect excess low-income housing because of this, and that, as a result, their property taxes increased. Id. at 508-09.

201. Id. at 509.

202. Id.

203. Id. at 510.

204. Id. at 511. The Court quickly dismissed this group’s claim of standing based on its status as a taxpayer and on behalf of persons of low and moderate income generally. However, the organization also alleged standing on the basis that nine percent of its membership actually resided in the defendant town. It claimed that, as a result of the defendant’s zoning laws, these members were deprived of the benefits of living in an ethnically and racially integrated community. This claim resulted in the invocation of prudential principles to bar standing for the group. Id. at 513-14.

205. Id. at 514.

206. Id. at 513-14. The Court distinguished Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972), by noting that the plaintiff there asserted a statutory injury while the plaintiffs here failed to do so. Warth, 422 U.S. at 513 n.21.
on the merits. In *Schlesinger*, the Court refused to reach the merits of an abstract matter, while in *Warth* the Court refused to address third-party claims absent some statutory direction that it do so. Nevertheless, the *Warth* Court explained that the prudential barriers that preclude standing in some instances may not be applicable in others.

3. **Statutory Standing**

The decision in *Warth* indicated that Congress may remove prudential barriers to standing by statute. This means that Congress may create a statutory right, the deprivation of which automatically confers standing upon the aggrieved individual. In such cases, the Court will apply the core constitutional standing doctrine, but it will not apply prudential standing principles to bar adjudication of the merits. The following case illustrates the Court's standing analysis where the plaintiff has alleged the deprivation of a statutory right, and where the statute itself establishes a standing clause.

The Court refused to apply prudential barriers, and it granted standing based on intangible injuries in *Trafficante v. Metropolitan Life Insurance Corp.* In *Trafficante*, the Court was faced with a housing discrimination claim brought separately by one black and one white tenant of a large housing complex against the landlord of the complex. Each alleged that the landlord's rental policy was racially discriminatory in violation of the Fair Housing Act. Furthermore, each alleged specific injury as a result of this discrimination. Both claimed loss of the social benefits from living in an integrated community, loss of professional advantages available from integrated living, embarrassment, and economic damage from racial stigmatization. The Court unanimously granted both plain-

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209. *Id.* at 513-14.
210. *Id.* at 514.
211. *Id.* at 514.
212. *Id.* at 509.
213. *Id.* at 514 (citing Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1972)). The Court stated, "Congress may create a statutory right or entitlement, the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of the statute." *Id.*
216. *Id.* at 208.
tiffs standing to sue.\textsuperscript{217} It held that such standing was invoked by virtue of a real case or controversy and a real injury in "loss of important benefits from interracial association."\textsuperscript{218} Furthermore it held that this injury was attributable to the defendant's alleged discriminatory conduct,\textsuperscript{219} and that the injury was redressable.\textsuperscript{220} The Court thus applied a constitutional standing doctrine, and failed to impose separate prudential barriers.\textsuperscript{221}

The language of the Fair Housing Act proved crucial for the Court in its standing analysis.\textsuperscript{222} The statute clearly granted the right to make a claim to "the person aggrieved."\textsuperscript{223} Citing the Third Circuit's interpretation of similar jurisdictional language in another civil rights statute,\textsuperscript{224} the Court concluded that this language reflected "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution."\textsuperscript{225}

\textit{Trafficante} is one of a number of cases within the fair housing arena that addresses standing.\textsuperscript{226} For a number of reasons, fair

\begin{itemize}
\item \textsuperscript{217} Id. at 212.
\item \textsuperscript{218} Id. at 210.
\item \textsuperscript{219} Id.
\item \textsuperscript{220} Id.
\item \textsuperscript{221} Id. at 209-10.
\item \textsuperscript{222} 42 U.S.C. § 3610(a) (1988).
\item \textsuperscript{223} Id.
\item \textsuperscript{224} The Court cited Hackett v. McGuire Bros., Inc., 445 F.2d 442 (3d Cir. 1971), a Title VII case in which the Third Circuit found the statutory language, "the person aggrieved," to convey a congressional intent for broad standing. \textit{Trafficante}, 409 U.S. at 209.
\item \textsuperscript{225} \textit{Trafficante}, 409 U.S. at 209 (citing Hackett v. McGuire Bros., Inc., 445 F.2d 442, 446 (3d Cir. 1971)). The \textit{Trafficante} holding is important with regard to Title VII tester standing in at least two respects. First, the case establishes that the Court will look to statutory language to determine if legislators explicitly addressed the standing issue. \textit{Id.} If certain language confers standing on the aggrieved party, \textit{Trafficante} seems to hold that the Court will defer to congressional intent and will not apply separate prudential barriers to standing. \textit{But see} Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 n.22 (1976) (stating that "when Congress has so acted, the requirements of Article III remain: 'the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants' " (quoting \textit{Warth} v. Seldin, 422 U.S. 490, 501 (1975))).
\item Second, \textit{Trafficante} provides precedent for indirect standing in the civil rights context. While the white plaintiff was not the direct object of the defendant's discriminatory conduct, the Court nevertheless found that he was aggrieved. \textit{Trafficante}, 409 U.S. at 209. Essentially, the Court looked to the Fair Housing Act and determined that the Act was not intended to protect only minorities. Rather, the Court found that the Act was also intended, broadly, to protect the entire community from housing discrimination. \textit{Id.} at 211.
\item Proponents of amendments to the Title VII legislation then at issue also emphasized that those who were not the direct objects of discrimination still had an interest in fair housing. \textit{See Hearings Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency}, 90th Cong., 1st Sess. 1358, 2114, 2280 (1967).
\item \textsuperscript{226} Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); Gladstone Realtors v. Village of
Title VIII tester standing

housing litigation, particularly within the Title VIII context, serves as a useful comparison to tester standing under Title VII. Both Title VII and Title VIII are civil rights acts and both contain similar jurisdictional language.\(^2\)\(^2\)\(^7\) Perhaps most importantly, the Supreme Court has addressed the issue of tester standing under Title VIII.\(^2\)\(^2\)\(^8\) For these reasons, a brief overview of Title VIII, followed by an analysis of some specific Title VIII cases involving testers is appropriate.

D. Title VIII and Tester Standing

Title VIII of the Civil Rights Act of 1968,\(^2\)\(^2\)\(^9\) commonly known as the Fair Housing Act, was enacted to provide equal housing opportunities throughout the country.\(^2\)\(^3\)\(^0\) Consistent with this purpose, the Act proscribes discrimination on the basis of race, color, religion, sex, or national origin in the sale or lease of any dwelling.\(^2\)\(^3\)\(^1\) Specifically, the Act makes it unlawful to fail to negotiate over the sale or rental of dwellings, to advertise discriminatorily with regard to the sale or rental of dwellings, or to misrepresent the availability of a dwelling for sale or rent, on the basis of any of the protected traits.\(^2\)\(^3\)\(^2\) Similar to Title VII, the Act exempts certain religious and private organizations from coverage,\(^2\)\(^3\)\(^3\) and it vests responsibility for administration of the Act in a governmental agency.\(^2\)\(^3\)\(^4\)

The Act is directed toward protecting any “person aggrieved” by a discriminatory housing practice.\(^2\)\(^3\)\(^5\) The Court has emphasized this specific language when assessing a claimant’s standing to sue under

227. See infra notes 299-303 and accompanying text.
228. Havens Realty, 455 U.S. at 363.
230. Id. § 3601.
231. Id. § 3604.
232. Id. This section also proscribes individuals from inducing any person to sell or rent dwellings on the basis of representations regarding entry into the neighborhood of persons possessing any of the protected traits. Id. § 3604(e). Furthermore, the Act proscribes discrimination in the financing of housing by banks and other creditors, and proscribes discriminatory bars to membership in real estate brokerage services. Id. §§ 3605-3606.
233. Id. § 3607.
234. Id. § 3608. Responsibility for administering the Act is vested in the Secretary of Housing and Urban Development. Id.
235. Id. § 3610(a). This section states, “Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter ‘person aggrieved’) may file a complaint with the Secretary.” Id.
the Act. As the following cases illustrate, the Court's interpretation of this provision has provided standing to claimants that may not have had standing under the prudential barriers imposed in Warth and Schlesinger.

The Court established that only the constitutional doctrine should be applied to assess standing in Title VIII actions in Gladstone v. Village of Bellwood. There, the conduct of a real estate brokerage firm was the subject of a fair housing suit. A village and six individuals (two black and four white), acting as testers, brought Title VIII claims against two real estate brokers and certain employees of the brokers. The plaintiffs alleged that the brokers had engaged in racial steering and that they had injured the village by manipulating its housing market to the detriment of its residents. Furthermore, it was asserted that the brokers injured the individual plaintiffs by denying them the benefits of living in an integrated society. The plaintiffs sought monetary, injunctive, and declaratory relief under the Fair Housing Act.

The Court first addressed the statutory construction of the Act. It concluded that Congress clearly intended standing under Title VIII to extend to the limits permitted by Article III of the United States Constitution. Because of this congressional intent, the Court found that it was inappropriate to erect prudential barriers to standing. It thus assessed the case under the constitutional standing doctrine alone.

Similar to its decision in Trafficante, the Court found that the loss of benefits of living in an integrated community constituted a sufficiently palpable injury to satisfy the first prong of the constitutional standing requirement. Furthermore, the plaintiffs met the causation requirement, as their alleged injury resulted from the defendant's discriminatory conduct. While the Court did not decide

236. 441 U.S. 91 (1979).
237. "Steering" is the practice of "directing prospective home buyers interested in equivalent properties to different areas according to their race." Id. at 94.
238. Id. at 95.
239. Id.
240. Id. at 100-04.
241. Id. at 103-04.
242. Id. at 103.
243. Id. at 100.
246. Id. at 113-14.
specifically on the tester standing issue, it established that standing in Title VIII actions should be assessed under the constitutional standing doctrine, and not under a further prudential analysis. It affirmed the appellate court's remand for a determination by the trial court on the merits of the plaintiff's claim.

Nevertheless, the Court demonstrated an unwillingness to categorically extend standing to all plaintiffs alleging the loss of benefits of interracial association in \textit{Havens Realty Corp. v. Coleman}. In \textit{Havens Realty}, a civil rights group and two individuals (one black and one white) employed as testers by the group sued the owner of an apartment complex under Title VIII. The plaintiffs alleged that the owner had engaged in racial steering practices and had deprived them of the benefits of interracial association. They sought monetary, injunctive, and declaratory relief.

With regard to the individual plaintiffs, the Court separated its standing analysis into three parts. First, it held that the black plaintiff had standing to sue in her capacity as a tester. Having received false information concerning the availability of an apartment, her right to truthful housing information had been abridged. This constituted a specific injury according to the Court.

However, the Court denied standing to the white plaintiff in his capacity as a tester. Since the landlord had correctly informed this individual that apartments were available, his right to truthful housing information had not been abridged. The Court reasoned that, absent the receipt of untruthful information, this plaintiff could claim no specific injury in his tester capacity.

Finally, the Court addressed the assertion by all the plaintiffs that they should be granted standing on the basis of being deprived the benefits of interracial association. The Court held that the apart-

\begin{itemize}
  \item \textbf{247.} \textit{Id.} at 111. The individual plaintiffs failed to press their standing as testers on appeal. Rather, they asserted standing on the basis of indirect injury in being denied interracial benefits. \textit{Id.}
  \item \textbf{248.} \textit{Id.} at 115.
  \item \textbf{249.} \textit{Id.} at 116.
  \item \textbf{250.} 455 U.S. 363 (1982).
  \item \textbf{252.} \textit{Havens Realty}, 455 U.S. at 366.
  \item \textbf{253.} \textit{Id.} at 367.
  \item \textbf{254.} \textit{Id.} at 374.
  \item \textbf{255.} \textit{Id.}
  \item \textbf{256.} \textit{Id.} at 375.
  \item \textbf{257.} \textit{Id.}
  \item \textbf{258.} \textit{Id.}
\end{itemize}
ment owner's alleged discriminatory conduct was unlikely to have palpable effects throughout a large enough geographic area to truly deprive the plaintiffs of interracial association. It thus reasoned that, absent a more clearly defined and specific claim of injury, standing could not be granted on this basis.

_Havens Realty_ and _Gladstone_ thus establish some important rules for standing in the Title VIII context. First, courts will look to the language of the statute to determine whether standing is addressed. However, even after a court concludes that a statutory right has been created, it will apply the constitutional standing doctrine. Second, whether the plaintiff asserts standing as a tester or as a member of the community, courts will only decide the merits of cases in which they can truly remedy the plaintiff's injury, consistent with the constitutional standing doctrine. These rules apply equally to Title VII claims.

**E. Standing Under Title VII**

Though the courts, subsequent to the EEOC's recent endorsement of Title VII testers, have neither advocated nor rejected tester standing in the Title VII context, they have addressed the general issue of standing under Title VII. Standing represents a barrier that all Title VII plaintiffs must overcome to have their claims adjudicated. Beyond this generality, certain Title VII cases reflect the courts' approach to specific standing issues that are useful to an informed discussion of tester standing.

First, similar to Title VIII actions, courts look to the language of Title VII to determine the proper scope of standing. In _Hackett v. McGuire Bros., Inc._, a minority pensioner sued his former em-

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259. *Id.* at 377.
260. *Id.* at 377-78 (remanding to allow the plaintiffs the opportunity to redraft their complaint with more specific allegations of injury).
263. *Id.* For a detailed discussion of Title VIII jurisprudence and its relationship with Title VII jurisprudence, see Mark W. Zimmerman, *Note, Opening the Door to Race-Based Real Estate Marketing: South-Suburban Housing Center v. Greater South Suburban Board of Realtors, 41 DePaul L. Rev. 1271* (1992).
264. This is not surprising given the fact that the EEOC announced its endorsement of tester claims in December of 1990. _See supra_ note 5 and accompanying text.
266. _See supra_ notes 138-40 and accompanying text.
267. 445 F.2d 442 (3d Cir. 1971).
ployer and labor union for discrimination in violation of Title VII. The plaintiff alleged that while he was employed by the defendant, he was subjected to intimidation and harassment, and that his working conditions were adversely affected, solely on the basis of his race.\textsuperscript{268} He further alleged that the union, of which he was a member in good standing, failed to protect him and acquiesced in his discharge because of his race. The plaintiff sought reinstatement with backpay and other seniority rights, money damages against both defendants, and injunctive relief from further intimidation and harassment.\textsuperscript{269}

Although the plaintiff filed a timely complaint, the EEOC found no reasonable cause for the charge and so notified the plaintiff.\textsuperscript{270} Thereafter, the plaintiff commenced his own suit in federal court. The district court dismissed the suit on the ground that, among other things, the plaintiff was a pensioner and thus not an employee within the meaning of Title VII.\textsuperscript{271} The plaintiff then appealed this decision.\textsuperscript{272}

The Third Circuit reversed the district court's finding with regard to the plaintiff's standing. The court found that the definition of employee in the Act,\textsuperscript{273} which the district court had relied on for its standing decision, was not intended to address the standing question at all. Rather, the appellate court looked to the remedies provision of Title VII.\textsuperscript{274} It found that this section spoke more directly to the issue of standing.\textsuperscript{275}

The court held that the "use in [the remedies provision of Title VII] of the language 'a person claiming to be aggrieved' shows a congressional intent to define standing as broadly as is permitted by Article III of the Constitution."\textsuperscript{276} Therefore, even though the plaintiff was not a current employee, the court found that he was injured as a result of the defendant's allegedly discriminatory conduct.\textsuperscript{277} According to the court, by defining standing within the Act, Con-

\begin{itemize}
  \item 268. \textit{Id.} at 444.
  \item 269. \textit{Id.}
  \item 270. \textit{Id.} at 445.
  \item 271. \textit{Id.}
  \item 272. \textit{Id.} at 443.
  \item 273. 42 U.S.C. § 2000e(f) (1988) (defining an employee as "an individual employed by an employer").
  \item 274. \textit{Id.} § 2000e-5(b) (granting the right to sue to “a person claiming to be aggrieved”).
  \item 275. \textit{Hackett.} 445 F.2d at 446.
  \item 276. \textit{Id.}
  \item 277. \textit{Id.}
\end{itemize}
gress meant to impose federal court jurisdiction whenever a plaintiff claimed an injury that was meant to be protected by the Act. As a result, the court found it unnecessary to impose prudential barriers to adjudication, and it granted the plaintiff standing to sue.278

As noted previously, the Supreme Court approvingly cited the Hackett interpretation of Title VII’s standing language in Trafficante.279 In Trafficante, the Court found that Congress’s use of jurisdictional language in the statute aimed to grant standing to those meeting the constitutional standing requirements.280 Other courts have also interpreted the remedies provision of Title VII broadly.281

Nevertheless, even though courts have refused to apply prudential barriers to standing in view of Title VII’s jurisdictional language, a separate standing doctrine is evident from Title VII case law. In numerous cases, courts have required that the plaintiff reside within the “zone of interest” meant to be protected by the statute.282 This doctrine is best explained in the context of a few cases.

In Patee v. Pacific Northwest Bell Telephone Co.283 a group of male employees sued their employer under Title VII.284 The plaintiffs worked within a department made up predominantly of women. They alleged that, as part of this predominantly female department, they received lower wages than males working in a different department, but performing the same functions. They asserted that this discrepancy was a direct result of the employer’s sex discrimination.285

The court refused to grant the plaintiffs standing.286 It held that

278. Id. The court went on to explain its rejection of additional prudential barriers to standing and stated,

The national public policy reflected . . . in Title VII . . . may not be frustrated by the development of overly technical judicial doctrines of standing . . . . [I]f the plaintiff is sufficiently aggrieved so that he claims enough injury in fact to present a genuine case or controversy in the Article III sense, then he should have standing to sue.

Id. at 446-47.


283. 803 F.2d 476 (9th Cir. 1986).

284. Id. at 477.

285. Id.

286. Id. at 479.
the male employee’s alleged injury did not fall within the zone of interest to be protected by the statute. Even if their female coworkers could conceivably frame a Title VII claim, the court found that this should not allow the plaintiffs to “bootstrap” their grievances into an employment discrimination claim. According to the court, the plaintiffs were denied standing because the Act was not intended to protect them as members of the majority; rather, Title VII’s aim was to equalize opportunities for members of one of the protected classes.

However, application of the zone of interest doctrine will not always bar standing to plaintiffs alleging an injury that results from a discriminatory work environment. In *Clayton v. White Hall School District,* a white woman employed as a cafeteria manager by a school district sued that district under Title VII. The woman alleged that the district’s implementation of a policy requiring district residence as a prerequisite for enrollment of children in district schools was racially motivated.

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287. *Id.* at 478. For further definition of the zone of interest doctrine, see *Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970).

288. *Patee,* 803 F.2d at 478-79. The Supreme Court framed the zone of interest test as a question of whether “the interest sought to be protected by the complaint is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” *Data Processing,* 397 U.S. at 153.

In *Data Processing,* the plaintiffs, providers of data processing services to other businesses, challenged a ruling by the Comptroller of the Currency. The comptroller’s ruling allowed national banks to make their data processing services available to other banks, incident to correspondent banking services. The plaintiffs claimed direct economic injury as a result of this ruling as they suffered a significant competitive disadvantage and a drop in business. The Court held that the plaintiffs, as competitors harmed by the comptroller’s ruling, were within the zone of interests protected by section 4 of the Bank Service Corporation Act, a statute that precluded data processing services by bank service corporations. Because of their position, they were accorded standing to sue. *Data Processing,* 397 U.S. at 158.

The zone of interest test may prove crucial for testers in Title VII actions. The issue is whether persons merely testing job discrimination are within the zone of interest meant to be protected by Title VII. The answer will depend upon the courts’ response to the legislative and executive endorsements of testers that arguably place testers within this zone.

289. 875 F.2d 676 (8th Cir. 1989).

290. *Id.* at 678.

291. *Id.* Apparently the residence policy had existed for years, but the district had failed to enforce it until the 1983 school year. In that year, a black janitor employed by the school district but residing outside the district’s boundaries, sought to enroll his child in the district’s school. The district applied its previously dormant residence policy to deny enrollment to the janitor’s child. *Id.* Thereafter, it was forced to rigidly apply this policy to preclude claims of direct racial discrimination, and the plaintiff, a nonresident of the district, was forced to remove her child from the district school. Besides the direct injury of having to interrupt her child’s schooling, the plaintiff claimed that the district’s underlying racial motivation for implementing the long-dormant residency requirement created a hostile working environment permeated by racial discrimination. *Id.*
The appellate court began by affirming the constitutional standing analysis applied by other courts in similar contexts.\(^\text{292}\) First, it held that the plaintiff met the core test because she alleged a real injury, the injury was a result of the defendant's conduct, and the injury was redressable by the court.\(^\text{293}\) Next, the court affirmed the zone of interest test applied by other courts.\(^\text{294}\) Unlike the court in \textit{Patee},\(^\text{295}\) however, this court held that a hostile working environment was within the zone of interest meant to be protected by Title VII.\(^\text{296}\) Because the plaintiff alleged a real injury that the Act sought to prevent, the court granted her standing.\(^\text{297}\) The court thus included an individual indirectly aggrieved by discriminatory conduct in the zone of interest meant to be protected by Title VII.\(^\text{298}\)

As the preceding discussion has shown, there exists a clash between the broad standing aims of Title VII and the narrowing aims of the federal standing doctrine. While Title VII aims to grant anyone claiming to be aggrieved the opportunity to sue, standing doctrine acts to limit this opportunity by imposing certain constitutional and prudential rules to bar adjudication. This conflict comes to a head where testers are concerned. If strict standing rules control, Title VII testers may not possess the credentials that courts have required for adjudication. If Title VII aims control, testers would appear to be aggrieved parties, and could therefore seek relief from the courts. The question thus becomes Which of the conflicting policies should control, and why?

\section*{II. Analysis}

Although no court has addressed in recent times the issue of the

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\(^{292}\) \textcite{Id. at 679. The court cited approvingly from \textit{United States v. SCRAP}, 412 U.S. 669 (1973), in which the Court enumerated a two-pronged test for standing: (1) injury in fact, and (2) injury within the zone of interest of the statute.}

\(^{293}\) \textcite{Clayton, 875 F.2d at 678.}

\(^{294}\) \textcite{Id. at 679-80. Again, the court looked to the Supreme Court's reasoning in \textit{SCRAP}.}

\(^{295}\) \textcite{Patee v. Pacific Northwest Bell Tel. Co., 803 F.2d 476 (9th Cir. 1986).}

\(^{296}\) \textcite{Clayton, 875 F.2d at 679-80. The court looked to EEOC v. Shell Oil Co., 466 U.S. 54, 77 (1984) (stating that the “dominant purpose of [Title VII] ... is to root out discrimination in employment”), and to Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 425 (8th Cir. 1970) (holding that Title VII is to be accorded a liberal construction in order to carry out Congress’ purpose of eliminating discrimination).}

\(^{297}\) \textcite{Clayton, 875 F.2d at 680.}

\(^{298}\) \textcite{Again, courts have yet to address whether testers rightfully fall within the zone of interest meant to be protected by Title VII.}
standing of Title VII testers, one may draw upon the Supreme Court's approach to Title VIII testers to determine how the lower courts may react to initial Title VII tester claims. More importantly, by assessing the policies underlying both Title VII and the federal standing doctrine, one may draw a reasoned conclusion as to how the courts should react to Title VII testers. Such a conclusion supports tester standing in Title VII actions.

A. The Title VIII Analogy

The use of testers in the Title VIII context provides a useful analogy to the issue of tester standing under Title VII. Yet, such an analogy would not be helpful if the two Acts were too dissimilar. The requisite connection between Title VII and Title VIII is provided by looking to the standing provisions of the respective Acts, and by assessing the aims of each.

First, the standing provision in Title VII is quite similar to that found in Title VIII. Title VIII provides for the filing of charges of housing discrimination with the Department of Housing and Urban Development by a “person aggrieved.” Similarly, Title VII provides for the filing of charges of employment discrimination with the EEOC by any “person claiming to be aggrieved.” The Sixth Circuit noted this similarity in *EEOC v. Bailey Co.*, a Title VII case. In discussing the standing provisions of Titles VII and VIII, the court stated, “Since both Titles VII and VIII are civil rights acts, it is difficult to believe that Congress intended such similar language to have different meanings.” It held that the language “person aggrieved” represented a congressional intent to define standing as broadly as permitted under Article III of the Constitution.

Second, the aims of Titles VII and VIII are similar. Both are aimed at outlawing discrimination based on race, color, religion, sex, and national origin. Both “empower persons aggrieved to bring

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301. 563 F.2d 439 (6th Cir. 1977).
302. *Id.* at 453. The court went on to discuss the similarity in design of Titles VII and VIII, noting that the only major difference between the two is that, under amendments to Title VII, the EEOC possesses public enforcement powers that HUD has not been accorded under Title VIII. The court nevertheless explained that this difference provided no basis for interpreting the standing provisions of the two titles differently. *Id.*
303. *Id.*
private actions to end the alleged discrimination." Logically, successful enforcement of each promotes interaction between persons of different colors, sexes, religions, races, and national origins.

This is not to say that Titles VII and VIII are identical. On the contrary, while Title VIII is limited to eradicating discrimination in the housing market, Title VII is limited to eradicating discrimination in the job market. Nevertheless, for standing purposes, these apparently distinct aims overlap. In *Waters v. Heublein, Inc.*, the Ninth Circuit summarized the overlap of Titles VII and VIII. It stated,

\[
\text{[I]n modern America, a person is as likely to . . . know his fellow workers as the tenants next door or down the hall. The possibilities of advantageous contacts are certainly as great at work as at home. The benefits of interracial harmony are as great in either locale. The distinction between laws aimed at desegregation and laws aimed at equal opportunity is illusory. These goals are opposite sides of the same coin.}\]

There is thus a commonality of language and purpose between Titles VII and VIII that lends itself to a useful analogy.

Given the similarity of Title VII and Title VIII, it is helpful to assess the Court's initial analysis of tester standing in the Title VIII context. As discussed earlier, the Court first granted standing to a Title VIII tester in *Havens Realty Corp. v. Coleman*. In *Havens*, two testers, one black and one white, along with the civil rights group that employed them, sued a landlord under Title VIII for failing to render truthful housing information. The Court granted standing to the black tester, finding that she had been lied to concerning the availability of an apartment. It held that her right to truthful housing information had been abridged, even though she was only acting as a tester and even though she was not, in fact, interested in obtaining an apartment from the defendant.

305. *Bailey Co.*, 563 F.2d at 453.
308. 547 F.2d 466 (9th Cir. 1976). *Waters* involved a Title VII suit brought by a white employee who sought to enjoin his employer's discriminatory conduct aimed at certain minority groups to which the plaintiff did not belong. The court granted the plaintiff standing, finding that he was "a person claiming to be aggrieved." *Id.* at 469-70.
309. *Id.* at 469.
311. *Id.* at 368-69.
312. *Id.* at 374.
Nevertheless, the Court denied standing to the white tester. It held that this individual received truthful housing information; the acknowledgement by the landlord that there was, in fact, an apartment available for rent. Therefore, the Court refused to accord this plaintiff standing because he failed to claim any injury to his statutorily created right.

While there is a temptation to invoke *Havens Realty* as a basis for tester standing under Title VII, the holding is not clear enough to guarantee a court's acceptance of this reasoning. *Havens Realty* does indicate that the Court will look to statutory language to determine whether a right, other than a constitutional right, is created by the statute. In *Havens Realty*, the Court found that the Fair Housing Act created a right to truthful housing information for all persons. Therefore, it found that a person deprived of this right would have standing to sue, and it refused to apply prudential principles to bar such standing.

Nevertheless, an assessment of the holding should not end there. The Court refused to grant standing to the white tester because it found he had received truthful housing information. Yet the Court seemingly ignored the standing language of Title VIII that grants the right to sue to any person aggrieved, not merely to any person failing to receive truthful housing information. The white tester alleged that he was aggrieved in his loss of interracial benefits at the hands of the defendant/landlord. Had the Court paid closer attention to the white tester's claim in light of the Act's standing language, it is arguable that the white tester would have met the requirements for standing under the constitutional doctrine.

*Havens Realty* opens the door to tester standing both under Title VIII and beyond. Yet the holding also leaves many questions unanswered. After *Havens Realty*, it is entirely uncertain whether courts will apply only the constitutional standing doctrine, or whether additional prudential barriers will be imposed in cases where the appli-
cable statute appears to invoke standing. It is further uncertain what type of personal injury will be sufficient for the court to deem a party aggrieved and thus within the zone of interest of the applicable statute. Using *Havens Realty* as a guide, a Title VII tester would be well advised to emphasize the broad scope of the Act and the congressional intent that all aggrieved persons be accorded the right to bring a claim.

**B. The Policies of Title VII and the Standing Doctrine**

For the putative tester there still exists a serious conflict between the broad aims of Title VII and the limits that the standing doctrine imposes on adjudication. By assessing the underlying policies of each, however, these conflicting interests can be reconciled in favor of testers in Title VII actions.

**1. The Policies Underlying Title VII**

Title VII was enacted to eradicate employment discrimination on the basis of race, color, religion, sex, or national origin.\(^{321}\) It obligates employment agencies, labor organizations, and employers to follow a policy of equality in employment opportunity.\(^{322}\) Not only did sponsoring legislators interpret the aims of the statute to be broad, but opposing congressmen also perceived a far-reaching result from the proposed legislation.\(^{323}\) Perhaps most importantly, the Supreme Court has imputed to Title VII a broad aim—that of eradicating employment discrimination.\(^{324}\)

As written, Title VII provides any “person claiming to be aggrieved”\(^{325}\) with the opportunity to sue for discrimination. This language is similar to the language used under the Fair Housing Act, which grants the right to sue to any “person aggrieved.”\(^{326}\) In interpreting this language, courts have deemed its use a clear indication of congressional intent to define standing broadly—as broadly as permitted under strict constitutional guidelines.\(^{327}\) Arguably, Title

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\(^{321}\) See *supra* notes 26-27 and accompanying text.

\(^{322}\) See *supra* notes 23-27 and accompanying text.

\(^{323}\) See *supra* notes 118-29 and accompanying text.

\(^{324}\) EEOC v. Shell Oil Co., 466 U.S. 54, 77 (1984) (acknowledging that “the dominant purpose of Title VII is to root out discrimination in employment”); see also *supra* text accompanying notes 130-37.


\(^{326}\) Id. § 3610(a).

\(^{327}\) See *supra* notes 213-21 and accompanying text (discussing *Trafficante*).
VII's standing language is even broader than that of Title VIII. On its face, Title VII grants the right to sue even to those claiming to be aggrieved, while Title VIII only grants the right to sue to any person actually aggrieved.\footnote{328}

As a practical matter, Title VII may be invoked not only when an employer acts to discriminate, but also when an employer's policies have the effect of discriminating against a protected class.\footnote{329} Thus, discriminatory treatment, regardless of the underlying motive, is at the heart of Title VII.\footnote{330}

Furthermore, even though the Title VII machinery is normally invoked in response to alleged discriminatory conduct by employers, its remedies tend toward eradication of discriminatory treatment, not punishment of the offender.\footnote{331} Indeed, the conciliatory approach to enforcement that is favored in the statute itself indicates that it is primarily aimed at correcting discrimination.\footnote{332} Clearly then, the broad policy underlying Title VII is one of equal opportunity in the marketplace. If the only concern with testers is whether they met the criteria for Title VII aims, it would be difficult to oppose their use. However, the doctrine of standing presents conflicting goals from that of Title VII. In order to reconcile standing doctrine and Title VII, it is necessary to understand the sometimes implicit policies underlying the standing doctrine.

2. The Policies Underlying the Standing Doctrine

The doctrine of standing derives principally from the "cases or controversies" clause of Article III of the United States Constitution.\footnote{333} Essentially, constitutional standing principles require that, before a court will reach the merits of a case, it must be assured that the parties have a sufficient stake in the outcome of the controversy.\footnote{334} In addition to the constitutional requirements, courts have often employed prudential standing rules to bar adjudication on the
merits.\textsuperscript{335} Underlying the standing doctrine is a crucial policy upon which that doctrine has been built.

The standing doctrine is employed by modern courts primarily to prevent litigants from drawing the federal courts into unnecessary conflicts with coordinate branches of government.\textsuperscript{336} Indeed, the Supreme Court stated that the doctrine of standing is "built on a single basic idea—the idea of separation of powers."\textsuperscript{337} Yet this pronouncement has not always been so obvious to the Court. In fact, the Warren Court clearly indicated that standing did not, "by its own force, raise separation of powers problems," but rather that such problems arose "if at all, only from the substantive issues the individual seeks to have adjudicated."\textsuperscript{338}

What has led the Court to address the separation of powers doctrine as a threshold standing issue rather than as an issue on the merits? One possible explanation is that the role of litigation has changed dramatically in the United States.\textsuperscript{339} While the courts were formerly employed to adjudicate disputes between private individuals, they are now employed as vehicles for participation by individuals in government policy.\textsuperscript{340} Accordingly, the courts may have responded to this shift by erecting rigid standing rules in order to preserve the balance of powers to the extent possible.\textsuperscript{341}

Whether one agrees with this analysis or not, the Court has made it quite clear that it aims to protect the separation of powers doctrine, and that it aims to do so as a threshold standing matter.\textsuperscript{342} Essentially then, there exists a conflict between the broad protections afforded by Title VII and the narrowing aims of the standing doctrine. Title VII aims to eradicate employment discrimination in general and grants the right to sue to all aggrieved persons. The standing doctrine, on the other hand, seeks to limit access to the courts by imposing constitutional and prudential barriers to federal court jurisdiction. The Title VII tester is caught in the middle of this conflict, and it is uncertain which of the conflicting aims, those

\textsuperscript{335} See supra notes 180-210 and accompanying text (discussing prudential standing requirements).

\textsuperscript{336} Laurence H. Tribe, American Constitutional Law 109 (2d ed. 1988).


\textsuperscript{338} Flast v. Cohen, 392 U.S. 83, 100-01 (1968).

\textsuperscript{339} Abram Chayes, Forward: Public Law Litigation and the Burger Court, 96 Harv. L. Rev. 4, 4-5 (1982).

\textsuperscript{340} Id.

\textsuperscript{341} Id. at 9-10.

of Title VII or those of the standing doctrine and the separation of powers, will determine the tester's destiny. Perhaps most crucial is determining which aims should control, or whether the aims can somehow be reconciled.

As noted, the primary concern of the modern Court, within the realm of standing, is in maintaining the separation of powers and in avoiding unnecessary entanglement with the other branches of government. Nevertheless, in the case of Title VII testers, both the executive and legislative branches have endorsed tester standing either explicitly (in the case of the executive branch), or implicitly (in the case of the legislative branch through the language of the statute itself). Thus, it can be seen that, even in the face of criticism by those who oppose the use of testers, the Court would not be entangling itself with the other branches of government, but would merely be allowing the law to proceed as dictated, quite consistently with the separation of powers aims.

3. Executive Approval of Tester Standing

As noted previously, Congress has not only charged the EEOC with the duty to enforce the guarantees of Title VII on behalf of aggrieved complainants, but also has entrusted it with the authority to initiate its own discrimination investigations. The EEOC's recent endorsement of testers is perhaps best understood in the context of this broad enforcement authority.

First, the EEOC is responsible for the enforcement of only three acts: Title VII, the Age Discrimination in Employment Act of 1967, and the Equal Protection Act of 1967. Because of its limited scope, the EEOC has concentrated exclusively on employment discrimination. It has thus developed expertise that no other governmental body can claim. By virtue of this expertise, the EEOC is in the best position to determine which policies promote equal opportunity.

Second, the Commission's recent endorsement of testers is an obvious step toward more effective enforcement. The Supreme

343. See supra notes 5-6 and accompanying text.
344. See supra notes 113-16 and accompanying text.
345. 42 U.S.C. § 2000e (1988). Again, following such investigations, the EEOC is empowered to bring a Title VII suit on its own behalf. Id.
346. Id.
347. See supra note 110 and accompanying text.
Court has stated that administrative interpretations of Title VII by the EEOC are entitled to great deference owing to the Commission's special expertise.\textsuperscript{348} This does not mean that any interpretation made by the EEOC should or will be accepted as law. In fact, the Court stated, "[C]ourts properly may accord less weight to [EEOC] guidelines than to administrative regulations which Congress has declared shall have the force of law."\textsuperscript{349}

Nevertheless, the EEOC's endorsement of testers should be used to guide courts in their standing determinations. While the endorsement certainly does not possess the force of law, it represents a clear policy choice that should be given due weight. Furthermore, the endorsement represents an informed judgment, by an experienced and specially tailored agency, that more must be done to guarantee equal opportunity in the workplace. By granting standing to testers in Title VII actions, the Court clearly would not be trudging on the policies of the executive branch, but would be following the dictates of that branch.

4. Legislative Approval of Tester Standing

Title VII grants the right to bring a private cause of action to any "person claiming to be aggrieved."\textsuperscript{350} The legislative history of the Act reflects an understanding by both proponents and opponents that Title VII would have broad aims and far-reaching results.\textsuperscript{351} The Supreme Court acknowledged this broad aim when it stated that Congress intended for Title VII "to root out discrimination in employment."\textsuperscript{352} Still, the Act does not explicitly grant testers the right to a private cause of action.

Nevertheless, if a tester can prove that she was aggrieved, she would appear to meet the criteria for standing as devised by Congress in Title VII. As noted earlier, an individual need not necessarily prove that she was intentionally discriminated against in order to invoke the Title VII machinery.\textsuperscript{353} Depending on the circumstances, she may be able to prove a Title VII violation via discriminatory impact.\textsuperscript{354} Still, opponents of testers point to a number of

\textsuperscript{351} See supra notes 117-29 and accompanying text.
\textsuperscript{353} See supra notes 80-93 and accompanying text.
\textsuperscript{354} See supra notes 80-93 and accompanying text.
factors that, they say, call for denial of tester standing in the Title VII context.

A recently filed case provides an excellent example of the arguments posed by opponents of testers. In *Fair Employment Council of Greater Washington v. B.M.C. Marketing Corp.*, a civil rights group and the testers employed by the group sued an employment agency under the Civil Rights Act of 1866. The plaintiffs alleged that the agency discriminated against the two black testers by failing to refer them for employment, even though they were qualified for open positions.

In its motion to dismiss the suit, the defendant’s attorney raised many of the arguments normally asserted against testers. First, he argued that the testers suffered no actual or threatened injury as a result of the defendant’s alleged conduct. Second, he claimed that the court should limit access to those litigants best suited to assert a particular claim. Finally, an amicus brief in support of the defendant pointed out that testers create the potential for trickery and deceit, and that they generate “suspicion and resentment.”

These points are certainly well taken. However, by discussing them in order, they can be dismissed, and it becomes clear that testers fall within the broad standing rules envisioned by Congress in enacting Title VII. First, testers may certainly have suffered an actual injury, even if they were not the direct objects of discriminatory treatment. In *Trafficante v. Metropolitan Life Insurance Co.*, both a black and a white tenant sued their landlord for his racially discriminatory housing policy. While the white tenant was not the direct object of the discrimination, the Court nevertheless granted him standing. It held that his loss of interracial benefits represented a real injury. Similarly, testers under Title VII, because they are by definition not truly interested in the jobs they pretend to seek, are not directly discriminated against. Nevertheless, they may claim injury from being denied the benefits of a work environment free of discrimination. Under the standard announced by the *Trafficante*

357. *See supra* note 9.
359. *id*.
361. *id.* at 211-12.
Court and by later Courts, such testers could properly claim aggrievement.

Second, testers are well suited to assert the claims of discrimination in the workplace. Again, Title VII does not address itself to those either directly or significantly aggrieved. Rather, Title VII grants the right to sue to anyone claiming to be aggrieved. While admittedly begging the question, the best-suited Title VII litigator is the individual aggrieved by discriminatory practices; there is no better plaintiff under Title VII.

Finally, the use of testers is admittedly deceptive. Testers use false names and credentials and act as if they are seeking jobs when they are truly not interested in obtaining those jobs. Nevertheless, one must ask whether their use is necessary under the circumstances. As noted earlier, discrimination in the workplace remains a serious problem in this country. It has not and it will not disappear voluntarily.

By enacting Title VII, Congress aimed to eradicate employment discrimination, not simply to respond to specific instances of it. Furthermore, any concern with the deceitful aspect of tester evidence is mitigated by the EEOC's endorsement of testers, and its plans to employ testers in its own investigations. The use of testers in Title VII claims is an idea whose time has come.

III. Conclusion

The aims of Title VII and those of the standing doctrine, though seemingly conflicting, should be reconciled in favor of tester standing. The concern of federal courts with maintaining separation of powers would be misplaced by denying standing to testers under Title VII. Because both of the other branches have endorsed tester standing, courts would merely be acting upon the dictates of those branches in deciding the merits of tester cases. While courts should continue to concern themselves with the balance of powers and the limited roles of each branch in our system of government, they may do so without infringing upon the statutory rights created by Title

364. See supra notes 1-4 and accompanying text.
365. See supra note 112-29 and accompanying text.
VII. Anyone truly dedicated to equal employment opportunity should both applaud and encourage the use and standing of testers in Title VII actions.

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