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In Response to Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.: Employment Testers Do Have a Leg to Stand On

Jonathan Levy

Comment

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In December 1990, the Fair Employment Council of Greater Washington ("the Council")[1] tested an employment agency run by BMC Marketing Corporation ("BMC").[2] On two separate days, the Council sent one white and one black tester, an individual who poses as a job candidate to uncover discriminatory practices,[3] with comparable credentials to BMC.[4] Although BMC referred both white testers for employment, it did not refer their black counterparts.[5] The black testers and the Council sued BMC alleging violations of Title VII of the Civil Rights Act of 1964 ("Title VII")[6] and 42 U.S.C. § 1981 ("§ 1981").[7] In *Fair*

1. The Council is an organization that seeks to further equal employment opportunity in the Washington, D.C., metropolitan area. Fair Employment Council of Greater Washington, Inc. v. BMC Mktg. Corp., 829 F. Supp. 402, 406 (D.D.C. 1993), *rev'd in part and aff'd in part*, 28 F.3d 1268 (D.C. Cir. 1994). In addition to its testing program, the Council also engages in various education, counseling, and research projects. *Id.*

2. Fair Employment Council of Greater Washington, Inc. v. BMC Mktg. Corp., 28 F.3d 1268, 1270 (D.C. Cir. 1994) [hereinafter *FEC*].

3. *See* EEOC Notice No. N-915-062, 2 EEOC Compl. Man. (CCH) ¶ 2168 (Nov. 20, 1990) [hereinafter EEOC Notice] (providing guidance as to whether testers have standing to file charges of employment discrimination). In practice, agencies like the Council match employment testers in pairs of minority and majority class individuals with manufactured similar characteristics and credentials. Michelle Landever, Note, *Tester Standing in Employment Discrimination Cases Under 42 U.S.C. § 1981*, 41 CLEV. ST. L. REV. 381, 383 (1993). In the civil rights arena, organizations employ testers for litigation and research purposes. Steven G. Anderson, Comment, *Tester Standing Under Title VII: A Rose by Any Other Name*, 41 DEPAUL L. REV. 1217, 1220 (1992).

4. *FEC*, 28 F.3d at 1270. The Council manufactured the testers' credentials to ensure objective similarity. *Id.*

5. *Id.* Furthermore, BMC allegedly "refused even to accept an application from one of the black testers." *Id.*

6. *Id.* Title VII provides in relevant part: "It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his

Employment Council of Greater Washington, Inc. v. BMC Marketing Corp. ("*FEC*"), the District of Columbia Circuit Court of Appeals dismissed the testers' suit for lack of standing,[8] and held that the Council had standing only to the extent it could show programmatic injury[9] apart from injury to the testers.[10]

Although the issue of whether employment testers and their sponsoring organizations have standing to sue has generated a great deal of commentary,[11] courts have not explicitly addressed the issue until *FEC*. The Supreme Court, however, has recognized standing for fair housing testers under Title VIII of the Civil Rights Act of 1964,[12] and lower courts have conferred standing on housing testers under 42 U.S.C. §§ 1981, 1982.[13]

Employment-tester standing has significant ramifications for civil rights enforcement. Minority labor force participation has remained stagnant, while "failure-to-hire" cases under civil rights laws have diminished.[14] Tester suits target the enforce-

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race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(b) (1988). *See infra* notes 73-86, 93 and accompanying text (discussing Title VII generally).

7. *FEC*, 28 F.3d at 1270. Section 1981 guarantees all citizens of the United States "the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981 (1988).

8. *FEC*, 28 F.3d at 1270-74. *See infra* part II (discussing the *FEC* court's holding).

9. The court defined programmatic injury as set-backs to the organization's specific programs rather than to its abstract goal of fair employment. *FEC*, 28 F.3d at 1276. *See infra* notes 29-32 (discussing organizational standing), 153-64 and accompanying text (discussing the *FEC* court's treatment of organizational standing).

10. *FEC*, 28 F.3d at 1277. *See infra* part II (discussing the circuit court's opinion).

11. The EEOC sparked the controversy when it published guidelines inviting complaints from testers. *See* EEOC Notice, *supra* note 3, ¶ 2168. *See also infra* notes 117-21 and accompanying text (discussing the EEOC's reasoning). Proponents and critics responded in law journals and the legal press. *See, e.g.*, Anderson, *supra* note 3, at 1262-68 (arguing that employment testers should have standing under Title VII); Landever, *supra* note 3, at 392-402 (arguing that employment testers have standing under § 1981); Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-skilled, Entry Level Jobs*, 26 U. MICH. J.L. REF. 403, 469-84 (1993) (arguing that the EEOC should implement a testing program); Alex Young K. Oh, Note, *Using Employment Testers To Detect Discrimination: An Ethical And Legal Analysis*, 7 GEO. J. LEGAL ETHICS 473, 481-96 (1991) (arguing that testing is ethical).

12. *See infra* notes 109-12 (discussing fair housing tester standing under Title VIII).

13. *See infra* notes 113-16 (discussing fair housing tester standing under the Civil Rights Act of 1866).

14. A number of factors weigh into the relative dearth of failure-to-hire suits. Employees have greater incentive to sue in a discriminatory discharge

ment gap at entry-level positions and provide a mechanism for revealing discriminatory conduct.[15]

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situation because they have given "time and energy to the relationship with the employer." Yelnosky, *supra* note 11, at 410-15. The nature of failure-to-hire actions also creates obstacles to success. Unsuccessful applicants probably do not recognize, or even suspect, the discrimination. *Id.* Furthermore, if their job search ultimately succeeds, victims of discrimination will have only negligible amounts of backpay available as a remedy and little cause to question the motives of earlier rejections. *Id.* In the case of low-skill, entry-level jobs, the absence of a paper trail makes discrimination difficult to prove, and the small amount of potential backpay may make it difficult to find a lawyer. *Id.*

Commentators also argue that the face of discrimination has changed, becoming more subtle and difficult to detect. Leroy D. Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization*, 38 CATH. U. L. REV. 795, 823 (1989); Deborah L. Rhode, *Occupational Inequality* 1988 DUKE L.J. 1207, 1218 (1988). *See* Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673, 673 (1985) (arguing that "severe and difficult manifestations" of racism are prevalent in American society); Rochelle L. Stanfield, *Measuring Job Bias*, 23 NAT'L L.J. 2598, 2600 (1991) (describing a study using testers to uncover discrimination by cab drivers); *PrimeTime Live: True Colors; Running in Place; Bossy Little Thing* (ABC television broadcast, Sept. 26, 1991), *available in* LEXIS, News Library, Script File (reporting on results of the program's investigation using testers in St. Louis to reveal widespread discrimination in a variety of everyday transactions).

15. Yelnosky, *supra* note 11, at 410-15; *Urban Institute Research Using Testers Documents Bias Against Black Job Seekers*, 1991 Daily Lab. Rep. (BNA) No. 94, at A-4 (May 15, 1991) [hereinafter *Urban Institute Research Using Testers*]. In an Urban Institute study that had 476 pairs of testers audit employers in the Washington, D.C., and Chicago areas, the white tester progressed further than her black counterpart in one out of every five cases. Anderson, *supra* note 3, at 1217 nn.1-4 (citing *Urban Institute Research Using Testers*, *supra*). The study concluded that "unfavorable treatment of young black men is widespread and pervasive across firms offering entry-level jobs." *Id.* (quoting *Urban Institute Research Using Testers*, *supra*).

Some critics point to the increasing number of employment discrimination suits to argue that employment discrimination laws are overenforced. *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 159-81 (1992) (arguing that Title VII distorts labor markets); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 983-86 (1991) (stating that between 1970 and 1989, employment discrimination case filings multiplied by 2166% while other civil filings grew 125%, thereby leading some Americans to believe Title VII's "drain on business" had exceeded the utility of the statute); *see also* James R. Kluegel & Eliot R. Smith, *Whites' Beliefs About Blacks' Opportunity*, 47 AM. SOC. REV. 518, 518 (1982) (arguing that many whites believe that opportunities for minorities have become equal).

Discriminatory firing cases, however, constitute the bulk of Title VII litigation today. Donohue & Siegelman, *supra*, at 984, 1015; *see* Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301, 1346-47 (1990) (finding that between 1974 and 1985, failure to hire charges decreased from 12% of all charges filed with the EEOC to 6% while discriminatory firing charges increased from 23% to 37%);

This Comment contends that testers should have standing to sue under both Title VII and § 1981. Part I explores the doctrine of standing in general and as applied in the civil rights context. Part II discusses the *FEC* court's reasoning in denying tester standing and significantly limiting the sponsoring organization's standing. Part III argues that the *FEC* court misconstrued the requirements of standing by defining the rights at stake too narrowly and the standing requirements too stringently. This Comment concludes that *FEC* represents an unfortunate trend whereby courts displace the public nature of civil rights laws with analyses traditionally reserved for private litigation.

I. STANDING: DEFINING THE COURT'S ROLE IN THE MODERN STATE

A. THE STANDING DOCTRINE

Standing is one component of justiciability.[16] The standing doctrine has two components, one constitutional and the other prudential, which serve to delimit the cases and plaintiffs that courts will hear. The constitutional component, derived from Article III, ensures that courts have a real, live "case or controversy"[17] before them.[18] To pass constitutional muster, a plaintiff must allege that she has sustained, or is "likely" to sustain,[19] an injury-in-fact,[20] that such injury is causally connected to acts

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Yelnosky, *supra* note 11, at 195 ("Title VII now is used predominantly to protect the existing positions of incumbent workers.").

16. Jusiticiability defines the proper cases for consideration by the courts. DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW 1045-54 (1993). Other components of justiciability include the political questions doctrine, Goldwater v. Carter, 444 U.S. 996, 1002-06 (1979) (Rehnquist, J., concurring), the prohibition of advisory opinions, Muskrat v. United States, 219 U.S. 346, 356-63 (1911), and ripeness and mootness, FARBER, *supra*, at 1047-53.

17. Article III provides that the "judicial power shall extend to all Cases, in Law and Equity" and to certain "Controversies." U.S. CONST. art. III, § 2.

18. In essence, the case or controversy requirement ensures that the parties hold a sufficient interest in the issue for the adversarial system to function, Flast v. Cohen, 392 U.S. 83, 99-101 (1968), and to warrant the interest of the court, Baker v. Carr, 369 U.S. 186, 204 (1962).

19. Lujan v. Defenders of Wildlife, 112 S.Ct. 2130, 2136-40 (1992); City of Los Angeles v. Lyons, 461 U.S. 95, 101-05 (1983); Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973).

20. Warth v. Seldin, 422 U.S. 490, 499 (1975); Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 151-54 (1970). *See infra* notes 35-59 and accompanying text (describing injury-in-fact jurisprudence).

of the defendant, and that it is redressable by the courts.[21] These requirements represent an "irreducible minimum" of facts that a plaintiff must allege to obtain standing under Article III.[22]

The prudential component assures that courts have the "proper"[23] or "best" plaintiff before them.[24] This component consists of rules adopted for the court's self-governance.[25] For instance, courts normally will not entertain suits where a plaintiff's injury resulted from the violation of a third-party's rights.[26] Congress, however, may override prudential rules by a statutory grant of standing.[27] Furthermore, where "countervailing considerations" outweigh the policies behind prudential rules, courts, in effect, infer that Congress intended to confer a cause of action.[28]

Because the Supreme Court has recognized only "programmatic" injuries to organizations,[29] the law puts an organization in no better position than an individual to assert "generalized grievances"[30] or setbacks to its abstract goals.[31] Thus, the challenged conduct must "perceptibly impair" an organization's spe-

21. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 36-46 (1976); *Warth*, 422 U.S. at 498-502; *Linda R.S.*, 410 U.S. at 616-18.

22. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982); *see Warth*, 422 U.S. at 498 (stating that constitutional barriers are a "threshold question in every federal case").

23. Flast v. Cohen, 392 U.S. 83, 99-100 (1968).

24. Prudential barriers seek "to limit access to the federal courts to those litigants best suited to assert a particular claim." Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979).

25. *Warth*, 422 U.S. at 509.

26. That is, plaintiffs ordinarily will be allowed to assert only a violation of their own rights. *Id.* at 499. *But see infra* notes 60-69 (discussing exceptions to the presumption against third-party standing).

27. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 (1972) (citing Hackett v. McGuire Bros., Inc., 445 F.2d 442 (3d Cir. 1971)). The Administrative Procedure Act, for instance, grants judicial review to "any person claiming to be aggrieved under a relevant statute." Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970) (citing 5 U.S.C. § 702 (Supp. IV 1964)). *See infra* notes 100-02 and accompanying text (describing grant of standing in Title VII).

28. *Warth*, 422 U.S. at 501.

29. *See id.* at 499 (citing Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 602, 634 (1974); United States v. Richardson, 418 U.S. 166 (1974)). Nor may an organization assert "abstract questions" that are "of wide public significance." *Id.* at 499-500.

30. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982).

31. *Id.* at 378-79. Thus, analysis of organizational standing does not differ from individual standing: the organization must allege a "concrete and demonstrable injury." *Id.* at 379.

cific activities before a court will grant the organization standing.[32]

Although grounded in seemingly settled principles, standing remains one of the more confusing and roundly criticized facets of modern Supreme Court jurisprudence.[33] Critics argue that the Court manipulates standing barriers with no explicit rhyme or reason.[34]

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32. *Id.*

33. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 475 (1982) ("[T]he concept of 'Art. III standing' has not been defined with complete consistency."); United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193, 219-55 (1979) (Rehnquist, J., dissenting) (labeling the Court's opinion Orwellian due to its "unremarked switch" in interpreting Title VII); Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting) (describing standing as "a word game played by secret rules").

34. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223, 250-51 (1988) (urging the abandonment of traditional, incoherent standing doctrine); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 68-69 (1984) (arguing the Court's application is erratic and unfocused); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977) (claiming "the law of standing lacks a rational conceptional framework"); *see* Abram Chayes, *The Supreme Court 1981 Term - Foreword: Public Law Litigation and The Burger Court*, 96 HARV. L. REV. 4, 22-23 (1982) (describing standing doctrine as a litany that the court recites before it "chooses up sides").

Commentators have argued, further, that beneath the apparent lawlessness, courts use the standing doctrine to serve a variety of purposes beyond its scope. *See, e.g.*, Nichol, *supra*, at 78-84. For instance, some have asserted that courts employ standing as a means of docket maintenance, of avoiding difficult issues, especially political questions, and of dismissing cases to which the judge is hostile without reaching the merits. Fletcher, *supra*, at 228 (docket maintenance); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1373 (1988) (avoiding difficult questions and merits); Nichol, *supra*, at 98-101 (avoiding political questions); Tushnet, *supra*, at 663-64 (avoiding difficult questions and merits); Scott A. Powell, Comment, *Global Protection of Threatened and Endangered Species: Rethinking Section 7 of the Endangered Species Act*, 31 WILLAMETTE L. REV. 523, 544 (1995) (avoiding difficult questions); Tony E. Monzingo, Note, *I Think That I Shall Never See, Standing for a Tree; or Has the* Lujan v. Defenders of Wildlife *Decision Spelled Doom for Extraterritorial Environmental Standing*, 10 ARIZ. J. INT'L & COMP. L. 431, 438 (1993) (avoiding political questions).

Positive suggestions range from simple pleas for honesty to scrapping the modern framework altogether. Fletcher, *supra*, at 223, 250-51 (arguing to abandon the modern standing doctrine); Nichol, *supra*, at 70 ("If such factors are to be introduced into the standing calculus they should be addressed openly and individually."); Tushnet, *supra*, at 700 (arguing to abandon the modern standing doctrine).

1. Cognizable Injury: Mediating Public and Private Notions of Harm

Standing evolved in response to the modern administrative state.[35] Citizen challenges to state action represented a new model of litigation, resting on public harms and seeking public remedies.[36] As public actions became more common, courts struggled to define the kinds of intangible or non-economic injuries deemed justiciable.[37]

The modern doctrine of standing emerged in the 1970s as the Supreme Court sought to insulate the standing inquiry from the merits of the claim.[38] The modern doctrine constituted a progressive change from the public litigation perspective because the traditional doctrine impeded novel claims by requiring the legal recognition of the plaintiff's allegedly infringed inter-

35. *E.g.*, Barlow v. Collins, 397 U.S. 159, 178 (1970) (Brennan, J., concurring in part and dissenting in part) (quoting *Flast*, 392 U.S. at 111 (Douglas, J., concurring) and noting the "growing complexities of government" and that courts often provide the "only place" where relief can be obtained); Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970) ("[T]he trend is toward enlargement of the class of people who may protest administrative action."). Standing did not emerge as a doctrine until the 1930s, when courts began to recognize circumstances where broad judicial review for individuals acting as "private attorneys general" was appropriate. *See, e.g.*, Frothingham v. Mellon, 262 U.S. 447, 487 (1923) (describing the plaintiff's interest as a taxpayer "indeterminable," the Court dismissed the case without explicitly relying on standing); Associated Indus. of N.Y. State v. Ickes, 134 F.2d 694, 704 (2d. Cir. 1943) (recognizing congressional grant of a private cause of action to prevent violation of government official's authority); *see also* Fletcher, *supra* note 34, at 224-28 (discussing the origins of modern standing).

36. *See, e.g.*, Simon v. Eastern Ky. Welfare Rights Organ., 426 U.S. 26 (1975) (challenge by indigents to Internal Revenue Service policies governing charitable tax status of hospitals); Linda R.S. v. Richard D., 410 U.S. 614, 614-15 (1973) (class action alleging "discriminatory application" of child support laws); *Flast*, 392 U.S. at 88 (taxpayer challenge to federal expenditures for parochial schools allegedly in violation of Establishment Clause); *see also* Chayes, *supra* note 34, at 56-60 (arguing that public model litigation grows in spite of judicial hostility); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1285-1304 (1976) (describing public and private models of litigation).

37. *See, e.g.*, *Association of Data Processing*, 397 U.S. at 153-54 (rejecting legal interest because it "goes to the merits" and does not adequately address non-economic issues); *see also* Nichol, *supra* note 34, at 74 (arguing that the *Association of Data Processing* court sought to broaden judicial access).

38. *Association of Data Processing*, 397 U.S. at 153; Nichol, *supra* note 34, at 74-75 & 74 nn.36-37.

est.[39] Initially, the modern doctrine simply required that an alleged injury be "distinct" or "palpable."[40]

The Court has since indicated that a distinct or palpable injury must be "cognizable" under the law invoked.[41] Consequently, a tension has emerged in the cases under the rubric of distinct and palpable injury that reflects judicial wavering as to the appropriateness of public litigation.

One line of cases extends standing to a seemingly broad range of intangible injuries.[42] In *United States v. Students Challenging Regulatory Agency Procedures* ("*SCRAP*"),[43] for instance, a student group had standing based on harm to "environmental and aesthetic values."[44] The *SCRAP* plaintiffs challenged regulatory approval of a freight surcharge on the theory

39. In *Association of Data Processing*, which inaugurated modern standing doctrine, the Court reconsidered the Administrative Procedure Act's grant of judicial review to "a person 'aggrieved by agency action within the meaning of a relevant statute.'" 397 U.S. at 153 (quoting 5 U.S.C. § 702 (Supp. IV 1964)). The Court rejected the traditional "legal interests test." *Id.* Under *Association of Data Processing*, a plaintiff must allege an injury in fact that arguably falls "within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* The Court abandoned its traditional approach in part because it found the test's essential conservatism inappropriate in an era where citizen challenges to a growing bureaucracy have become common. *See id.* at 154 (emphasizing that non-economic values are cognizable); Barlow v. Collins, 397 U.S. 159, 168-78 (1970) (Brennan, J., concurring in part and dissenting in part) (arguing that standing inquiries have become confused).

40. Warth v. Seldin, 422 U.S. 490, 501 (1975).

41. *See* International Primate Protection League v. Administrators of Tulane Educ. Fund, 111 S.Ct. 1700, 1704 (1991) (citing with approval Fletcher, *supra* note 34, at 231-34 (arguing that standing simply cannot be non-normative as to the legal merits because every plaintiff who does not lie has sustained an injury)); Allen v. Wright, 468 U.S. 737, 752 (1984) (stating that standing decision requires "examination" of whether plaintiff "is entitled to an adjudication of the particular claims asserted").

42. These cases typically emerge from the Warren Court. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 91-106 (1968) (granting standing to a taxpayer challenging federal expenditures on parochial schools allegedly in violation of the Establishment Clause); Baker v. Carr, 369 U.S. 186, 204-08 (1962) (granting standing to challenge reapportionment on basis of alleged vote-dilution). The Burger Court, however, also recognized intangible injuries. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280 n.14 (1978) (granting standing to white medical school applicant on ground that affirmative action program precluded him from competing for all available places); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 81 (1978) (granting residents near nuclear facility standing to challenge congressional limitations on nuclear accident liability).

43. United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) [hereinafter *SCRAP*].

44. *Id.* at 683-90 (quoting Sierra Club v. Morton, 405 U.S. 727, 734 (1972)).

that it would discourage recycling and thus harm environmental resources the students enjoyed.[45]

Another line of cases, however, calls for judicial restraint.[46] In *Lujan v. Defenders of Wildlife*,[47] for example, the Supreme Court denied standing to plaintiffs challenging foreign development policy[48] because no actual or "imminent" threat of injury to the plaintiffs existed.[49] Although the challenged dam project allegedly posed an immediate threat to endangered species, the plaintiffs' failure to allege a present intention to visit the impacted area defeated standing.[50]

Although these two lines of cases appear to conflict irreconcilably,[51] one possible explanation posits that the Supreme

45. *Id.* at 678-83.

46. These cases typically originate with the Burger and Rehnquist courts. *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215-18 (1974) (holding the Incompatibility Clause does not confer standing to challenge the presence of reservists in congress); United States v. Richardson, 418 U.S. 166, 171-80 (1974) (holding interference with a citizen's ability to be an informed elector insufficient injury to challenge the secrecy of the CIA's budget); *cf.* Simon v. Eastern Ky. Welfare Rights Organ., 426 U.S. 26, 39-46 (1976) (holding as insufficient, the causal relationship between indigents' access to health care and regulations defining amount of pro bono care requisite for hospital's charitable tax status); Linda R.S. v. Richard D., 410 U.S. 614, 614-18 (1973) (holding that an injunction requiring a district attorney to prosecute delinquent fathers would not redress plaintiff's alleged deprivation of child support).

47. 112 S.Ct. 2130 (1992).

48. In *Lujan*, plaintiffs sought an injunction requiring the Secretary of the Interior to apply the Endangered Species Act to government conduct outside the United States. *Id.* at 2135.

49. *Id.* at 2137-40.

50. Thus, there was no "imminent" danger that the dam project would deny the plaintiffs the opportunity to observe the threatened species. *Id.* The Court rejected the theory that because the plaintiffs could simply purchase airplane tickets and return to the affected countries in the near future, the Court could presume the likelihood of injury. *Id.* at 2138 n.2. Moreover the Court dismissed theories based on the plaintiffs' personal or professional interest in the endangered species or an "ecosystem nexus" theory, arguing that the repercussions of environmental harm produced cognizable injuries in "contiguous ecosystems." *Id* at 2139-40. The Court dismissed such theories as "academic exercises in the conceivable." *Id.* (quoting *SCRAP*, 412 U.S. at 688). *But see SCRAP*, 412 U.S. at 683-90 (granting a broad basis of standing to an environmental group).

51. *Compare Lujan*, 112 S. Ct. at 2133-38 *with SCRAP*, 412 U.S. at 686. Despite the different outcomes, *SCRAP* and *Lujan* involved similar underlying claims. Indeed, the dissent in *Lujan* argued that the Court bordered on reviving old form pleading that required exacting specificity. *Lujan*, 112 S. Ct. at 2151-54 (O'Connor, J., dissenting). The Court in *SCRAP* could just as easily have held the plaintiffs' injuries lacked sufficient immediacy. Although the Court found the challenged rate hike imminent, the injury itself, adverse effect on aesthetic resources, appeared rather attenuated. *See supra* text accompany-

Court in the 1980s embraced the view that the standing doctrine primarily serves to preserve federalism and the separation of powers by preventing the federal judiciary from encroaching on the states and the other branches of government.[52] Thus, under a separation of powers analysis, the *Lujan* plaintiffs' request for the Court to scrutinize foreign policy, a traditional executive function, distinguished them from the *SCRAP* plaintiffs.[53]

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ing notes 43-45 (discussing *SCRAP*). Similarly, in *Lujan*, the injury of eliminating resources valuable to the plaintiffs appeared quite imminent, although the effect on the plaintiffs seemed distant. *See supra* note 34 (citing commentators who have attempted to reconcile Supreme Court standing jurisprudence). The different laws invoked in each respective case did not produce the disparate outcomes because the Endangered Species Act, in an unprecedented grant of standing, purports to empower any individual to bring suit to enforce its provisions. 16 U.S.C. § 1540(g) (1994).

52. Allen v. Wright, 468 U.S. 737, 750-51 (1984) (explaining constitutional barriers must be interpreted in light of separation of powers principles). In *Allen v. Wright*, parents of black children attending public schools brought a nationwide class action alleging Internal Revenue Service procedure allowed racially exclusive private schools to retain their tax-exempt status illegally. *Id.* at 739. Plaintiffs claimed, essentially, that the IRS policy abetted discriminatory private schools, thus limiting children's ability to obtain an integrated education. *Id.* at 739-40. Although plaintiffs alleged cognizable injuries, the Court denied standing under the causation prong. *Id.* at 756-61. The Court found speculative any effect a change in IRS procedure would make on private school behavior or the racial composition of public schools. *Id.* The Court explicitly evaluated the plaintiffs' causation allegations in light of the knowledge that to recognize standing would require permanent judicial monitoring of the wisdom of internal executive affairs. *Id.* at 759-61 & 761 n.26. *Allen v. Wright* marked the first time the Court specifically invoked separation of powers as an overriding standing consideration.

The courts, however, have consistently understood separation of powers values to underlie standing principles. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 498 (1978) (stating standing is based on a "concern about the proper—and properly limited—role of the courts in a democratic society); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 39 (1976) (stating the Court must keep to "its assigned role in our system"); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974) (explaining that standing protects against distortion of "the role of the Judiciary in its relationship to the Executive and the Legislature"); United States v. Richardson, 418 U.S. 166, 179 (1974) (arguing that the supervision of government belongs with representatives responsible to constituents, not the judiciary); Laird v. Tatum, 408 U.S. 1, 15 (1972) (urging it is not the role of the judiciary to review executive action unless unlawful governmental action poses an actual immediate threat).

Further, such values have arguably influenced standing decisions. *See, e.g.*, Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA .L. REV. 635, 649-58 (1985) (arguing unspoken application of separation of powers and federalism policies has distorted standing doctrine).

53. *See* Symposium, *Group Discussion on the Supreme Court's Recent Administrative Jurisprudence*, 7 ADMIN. L.J. AM. U. 287, 291-93 (1993) (stating *Lujan* is a separation of powers opinion); Craig R. Gottlieb, Comment, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Con-*

This potential reconciliation receives support from *City of Los Angeles v. Lyons*,[54] where federalism concerns influenced the court's analysis. The Supreme Court apparently based its denial of standing on its view that "local authorities" provided a more appropriate forum.[55] Lyons alleged that Los Angeles police officers had unjustifiably subjected him to a dangerous chokehold.[56] Emphasizing that Lyons's injuries sustained a suit for damages, the court held that Lyons lacked standing to pursue an injunction prohibiting the use of the hold.[57] The Court

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cerns, 142 U. PA. L. REV. 1063, 1065, 1105-12 (1994) (recognizing *Lujan* raised issues impacting international relations); Donald Stern Higley II, Note, *A Slash-and-Burn Expedition Through the Law of Environmental Standing:* Lujan v. Defenders of Wildlife, CAMPBELL L. REV. 347, 368-69 (1993) (arguing *Lujan* is a separation of powers case).

54. 461 U.S. 95 (1983).

55. *Id.* In dicta, the Court asserted that federalism "should inform" a federal court's decision "when asked to oversee state law enforcement authorities." *Id.* Moreover, the Court noted that a "major civic controversy" had arisen over the chokehold. *Id.* at 111-12 n.10. Given the Court's constricted reading of Lyons's complaint and hyperbolic statement on the likelihood of future injury, it appears that the Court's standing analysis was motivated by their reluctance to interfere with the operations of local police. *See infra* notes 56-59 and accompanying text (discussing the Court's standing analysis in *Lyons*). Additionally, the authorities cited by the Court throughout *Lyons* originate in cases challenging local government conduct. *See Lyons*, 461 U.S. at 101-04 (citing O'Shea v. Littleton, 414 U.S. 488 (1974)) (concerning plaintiffs alleging that police had subjected them to discriminatory enforcement of the criminal law); Rizzo v. Goode, 423 U.S. 362 (1976) (concerning plaintiffs alleging widespread police misconduct aimed at minority citizens and against city residents in general)); *see also* Laura L. Little, *It's About Time: Unraveling Standing and Equitable Ripeness*, 41 BUFF. L. REV. 933, 966 (1993) (arguing that federalism influenced the Court's decision in *Lyons*); Suzanna Sherry, *Issue Manipulation by the Burger Court: Saving the Community from Itself*, 70 MINN. L. REV. 611, 626-29 (1986) (same).

56. *Id.* at 114-15 (Marshall, J., dissenting). After stopping Lyons for driving a car with a burnt-out taillight, the police ordered him out of his vehicle and frisked him. *Id.* at 114 (Marshall, J., dissenting). Apparently without provocation, one officer began to choke Lyons by applying a forearm against his throat. *Id.* at 115 (Marshall, J., dissenting). The officer choked Lyons until he blacked out; when he came to, "he was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt." *Id.* (Marshall, J., dissenting). The police released him after issuing him a traffic citation. *Id.* (Marshall, J., dissenting).

At least 16 people, including twelve African-American men, died after Los Angeles police officers had placed them in chokeholds during the time period between 1975 and the *Lyons* decision in 1983. *Id.* at 115-16 (Marshall, J., dissenting). Criticisms of the Los Angeles Police Department's relations with the minority community remain prevalent today. *See, e.g.*, GRAND PUBA, *Soul Controller, on* REEL TO REEL (Elektra Records 1992) ("[C]heck out the thing that they did to Rodney King; goes to show ya, who controls ya [sic].").

57. *Id.* at 106 n.7, 111-12. Thus, *Lyons* establishes that a plaintiff must have an independent basis for standing on each form of relief sought. The

found that the future use of the hold was not sufficiently imminent to provide Lyons standing unless he alleged that the police employed a policy to "choke any citizen whom [officers] happen to . . . encounter."[58] The dissent objected, finding that Lyons's allegation that the police had choked him pursuant to departmental policy met this standard.[59]

2. Limiting Third Party Standing Absent Countervailing Considerations

The question of whether a litigant may assert the rights of third parties essentially reframes the cognizable injury requirement.[60] The prudential rule against third-party standing rests on the reasoning that rightholders represent the most assertive advocates of their rights.[61] Barring claims of indirect victims

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Court emphasized the availability of damages under its holding that equity bars Lyons suit. *Id.* Although the Court found that while the police may have illegally choked him on October 6, 1976, thus presumably affording him standing to claim damages against the individual officers and perhaps against the city, Lyons did not establish a real or immediate threat that a Los Angeles police officer would subject him to another unprovoked, injury-causing chokehold. *Id.* at 105-07.

58. *Lyons*, 461 U.S. at 106. Indeed, the Court stated that Lyons would not have standing unless he alleged that all Los Angeles police officers always choke every citizen they encounter whether for the purpose of arrest, issuing a citation, or questioning. *Id.* Taken at face value, these standards require plaintiffs to establish a virtual certainty that the threatened injury is imminent. This statement is probably hyperbolic, however, because elsewhere the Court talks simply of likelihood. *Id.* at 104.

59. *Id.* at 120-21 (Marshall, J., dissenting) (noting that Lyons alleged that the police choked him without provocation pursuant to official policy despite the conclusion by the majority that Lyons had not alleged a policy of choking without provocation). The dissent objected vehemently to this revival of code pleading. *Id.*; *cf. Lujan*, 112 S. Ct. at 2151-54 (O'Connor, J., dissenting) (arguing that the majority's reading of the complaint revived code pleading).

60. *See* Warth v. Seldin, 422 U.S. 490, 498-500 (1975) (stating that the Court bases both constitutional and prudential barriers on its concern about the role of the courts). Whereas the constitutional barriers limit exercise of judicial power to actual controversies between the litigants, prudential barriers limit the judicial power by excluding cases of "wide public significance," where other governmental institutions exercise greater competency and individual rights are not at stake. *Id.* at 500. At least one commentator has argued that third party standing is "not conceptually different from" ordinary standing. Fletcher, *supra* note 34, at 244 (asserting that the issue as a matter of law in both situations is whether the plaintiff has the right to enforce the legal duty in question).

61. Singleton v. Wulff, 428 U.S. 106, 114 (1976) (plurality opinion) ("Third parties themselves usually will be the best proponents of their own rights.") (citing Holden v. Hardy, 169 U.S. 366, 397 (1898) (finding that assertion of third parties' rights would come with "greater cogency" from the third parties themselves)).

enables courts to evade "abstract questions" and "generalized grievance[s]" better addressed by other institutions.[62]

The Supreme Court has delineated several factors relevant to whether a litigant may assert the rights of third parties:[63] potential "obstacles" preventing suit by the third party,[64] the closeness of the relationship between the litigant and the third party,[65] and the alignment of interests between the litigant and the third party.[66] The Court, however, has inconsistently applied these factors.[67] In effect, the Court has merged the relationship and alignment-of-interests analyses[68] and left unclear

62. *Warth*, 422 U.S. at 499-500.

63. As a prudential rule, third party jurisprudence seeks to ensure the "best suited" litigant. *See supra* notes 23-26 and accompanying text (discussing the prudential component's best plaintiff rule). The Supreme Court has stated that the presumption against third party standing "like any general rule . . . should not be applied where its underlying justifications are absent." *Singleton*, 428 U.S. at 114 (plurality opinion). In *Singleton*, the Court explained that the relationship between the plaintiff and the third party should reflect that the plaintiff represents as astute a proponent as the third party. *Id.* at 114-15 (plurality opinion). Likewise, where obstacles to suit by the third party exist, the third party's absence no longer implies that her right is unimportant or not at stake, and the court views the plaintiff as the "best available proponent." *Id.* at 115-16 (plurality opinion).

64. Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 623 n.3 (1989); NAACP v. Alabama *ex. rel.* Patterson, 357 U.S. 449, 459 (1958). The requisite pronouncement of the obstacle to suit remains unclear. *See* Powers v. Ohio 499 U.S. 400, 414-15 (1991) (describing "daunting" barriers to suit by juror excluded on the basis of race); Barrows v. Jackson, 346 U.S. 249, 255 (1953) (stating that the court requires a "difficult if not impossible" obstacle). In *Singleton*, the Court allowed two physicians to assert the rights of indigent women denied public funding for abortion. 428 U.S. at 108 (plurality opinion). The plurality noted that the desire for privacy might chill potential litigants and that imminent mootness presented an additional difficulty. *Id.* at 117 (plurality opinion). The Court also recognized that the use of pseudonyms, the "capable of repetition yet evading review" doctrine, or a class action could surmount these obstacles but reasoned there was "little loss in terms of effective advocacy" in allowing suit by the physician. *Id.* (plurality opinion). Justice Powell objected that case law demanded that the obstacles present a practicable impossibility. *Id.* at 126 (Powell, J., concurring in part and dissenting in part). The plurality responded by noting possible alternatives in cases where courts granted third party standing and reasoning that such alternatives "differed only in the degree of difficulty." *Id.* at 116 n.6 (plurality opinion).

65. *Caplin & Drysdale*, 491 U.S. at 623 n.3.

66. *Id.*

67. *See* Amato v. Wilentz, 952 F.2d 742, 749-50 (3d. Cir. 1991); *see also* Fletcher, *supra* note 34, at 243 (describing the "apparent lawlessness of so-called third party standing").

68. *Compare Caplin & Drysdale*, 491 U.S. at 623 n.3. (discussing all three factors) *with* Powers v. Ohio, 499 U.S. at 413-14 (discussing the alignment-of-interests under the rubric of the closeness of the relationship). *See also Amato*, 952 F.2d at 749 n.7 (concluding that the "closeness of the relationship" factor

whether the factors should have independent thresholds or whether courts should balance the showing of each factor.[69]

B. Standing and Civil Rights Legislation

Because standing depends on whether the alleged injuries are cognizable under the law invoked, an understanding of the essentials of employment discrimination jurisprudence is a necessity. Furthermore, opposing views of discrimination and its remedies mirror the tension between private and public litigation models in standing jurisprudence. In one view, discrimination lingers as a pervasive and public problem.[70] In the other

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encompasses both its own nature and the alignment-of-interests in the specific litigation).

69. *Id.* at 749. In *Caplin & Drysdale*, the Court suggests that courts should balance the relevant factors. 491 U.S. at 623 n.3. *Powers*, however, contains language indicating that both obstacles and a close relationship are mandatory for third-party standing. 499 U.S. at 411. The Court has made a number of ambiguous pronouncements on the balancing versus prerequisite question. In *Singleton v. Wulff*, the Court stated, "Even where the relationship is close, the reasons for requiring persons to assert their own rights will *generally* still apply." 428 U.S. 106, 116 (1976) (plurality opinion) (emphasis added); *see also* Warth v. Seldin, 422 U.S. at 500-01 (1975) (stating that "countervailing considerations may outweigh" the policies supporting prudential barriers); Secretary of State of Md. v. Munson, 467 U.S. 947, 957 (1984) (stating that the absence of an obstacle "might defeat a party's standing" in cases outside the First Amendment arena); Fowler v. McCrory Corp., 727 F. Supp. 228, 233 (D. Md. 1989) (stating that relevant factors include "concreteness of the claimed injury" and the degree to which granting the third party standing can vindicate the policies underlying the statute allegedly violated by the defendant).

The Court's third-party standing analysis shifts according to context. In First Amendment overbreadth challenges, for instance, the Court found that the danger of chilling speech justifies putting aside the obstacle factor. *Munson*, 467 U.S. at 957. In cases involving attorney-client or doctor-patient relationships, the Court has allowed third party standing without requiring the showing of an obstacle. *Caplin & Drysdale*, 491 U.S. at 623-24. Similarly, "vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." Craig v. Boren, 429 U.S. 190, 195 (1976).

The Third Circuit, responding to these seemingly inconsistent strains in the Supreme Court's third-party standing decisions, adopted a balancing approach. *Amato*, 952 F.2d at 750. The court reasoned that balancing "has the virtue of incorporating the *strength* of the showings on each factor." *Id.* The court further explained that because obstacles to suit come in many sizes, as do potential conflicts of interest between plaintiffs and third parties, a balancing approach provides the best inquiry to ascertain the appropriateness of standing. *Id.*

70. *See supra* notes 14-15 (discussing commentators views of discrimination).

view, it has become largely a concern of the past—thought of as isolated, essentially private incidents.[71]

Congress enacted the Civil Rights Act of 1964,[72] the touchstone of employment discrimination legislation, in the midst of a national crisis.[73] Congress imbued Title VII of the Act with a far-reaching public dimension, intending to eradicate discriminatory practices in the workplace.[74] Thus, as originally enacted, Title VII's remedies were strictly equitable, using injunctive re-

71. *See supra* notes 14-15 (same).

72. 42 U.S.C. §§ 2000-2000e (1994).

73. Cheryl Krause Zemelman, Note, *The After-acquired Evidence Defense to Employment Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 189 (1993). Congress acted in an atmosphere of widespread, and at times violert, discontent. Mary L. Dudziak, *Desegregation as a Cold War Imperative* 41 STAN. L. REV. 61, 62-63 (1988) (explaining that the contradiction between American race-relation ideology and practice led to foreign policy difficulties with countries in Asia, Africa, and Latin America in the years following World War II). Congress also believed that racial employment discrimination limited national economic productivity. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973); H.R. REP. No. 914, 88th Cong., 1st Sess., pt. 2, at 28 (1963).

Congress overcame many barriers in enacting the Civil Rights Act of 1964. Indeed, passage of strong civil rights legislation took 20 years: "Between 1943 and 1963, bills were introduced in each house of each Congress to regulate or at least to conciliate matters involving alleged discrimination for reasons involving race, creed, color, religion, sex, age or national origin." BUREAU OF NATIONAL AFFAIRS, THE CIVIL RIGHTS ACT OF 1964, at 18 (1964) [hereinafter BNA]. The death of President Kennedy played an instrumental role in the Act's eventual passage because it became part of Kennedy's legacy in both a moral and a political sense. CHARLES W. WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 235 (1985). Although many thought Kennedy would ultimately have compromised on the legislation, the passage of a strong bill became imperative for President Johnson. *Id.* Some abnormally truncated congressional procedures ushered the bill past its opponents. BNA, *supra*, at 22. The Act also had to overcome a record filibuster. *Id.* at 21; WHALEN & WHALEN, *supra*, at 124-217. For a detailed description of the torturous route the Civil Rights Act of 1964 took to passage, see WHALEN & WHALEN, *supra*, at 29-229.

74. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 429-31 (1971) (finding that Congress intended Title VII to remove discriminatory barriers to employment); *McDonnell Douglas*, 411 U.S. at 800-01 (noting that Congress's purpose in enacting Title VII was to "eliminate those discriminatory practices and devices which have fostered racially stratified job environments" and to "tolerate[ ] no racial discrimination, subtle or otherwise"); H.R. REP. No. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963) (explaining that Title VII aims to "prohibit discrimination in employment"); 110 CONG. REC. 2563 (1964) (statement of Rep. Roosevelt) ("We are trying to get rid of discrimination in our national life."); 110 CONG. REC. 1593 (1964) (statement of Rep. Cohelan) (explaining that the bill would aid the nation's struggle for justice and equality); *Id.* at 1592 (statement of Rep. Corman) ("The opponents of this measure are accurate when they label it the most far reaching civil rights bill to ever come before this House."); 110 CONG. REC. 7212-13 (1964) (interpretive memorandum of Title

lief to open doors for minorities.[75] Moreover, Congress created the Equal Employment Opportunities Commission ("EEOC") to mediate disputes and facilitate systemic changes in employment practices.[76]

Title VII prohibits purposeful discrimination[77] on the basis of race, color, religion, sex, or national origin.[78] The Supreme Court has articulated a series of burdens and presumptions that operate to ascertain the employers' intent regarding a challenged employment decision.[79]

VII by Senators Clark and Case, the bill's floor managers) (defining discrimination broadly).

75. *Griggs*, 401 U.S. at 429-31. "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* at 431.

76. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 705, 78 Stat. 241, 258 (1964) (codified at 42 U.S.C. § 2000e-5 (1994)); *see also* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 8(d)-(f), 86 Stat. 103, 109-10 (1972) (codified at 42 U.S.C. § 2000e-5 (1994)) (expanding powers of EEOC).

77. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577-78 (1978). The Title VII plaintiff may prosecute her case under two theories, disparate treatment and disparate impact. The disparate impact theory challenges practices which, regardless of employer intent, discriminate against protected classes in practice. *Griggs*, 401 U.S. at 431.

Suits brought by testers follow the disparate treatment approach. The gravamen of this approach is intentional discrimination. Lower courts initially interpreted the standard broadly to include purposeful maintenance of a policy that discriminates. *See, e.g.*, Robinson v. Lorillard Corp., 444 F.2d 791, 796 (4th Cir. 1971) (holding that Title VII does not require intent to discriminate); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 996-97 (5th Cir. 1969) (same), *cert. denied*, 397 U.S. 919 (1970). Today, however, the linchpin of the disparate treatment theory is that the employer intentionally treated the plaintiff differently on the basis of a protected characteristic. *Furnco Construction Corp.*, 438 U.S. at 577 (1978).

78. Title VII prohibits the failure or refusal to hire any individual, the discharge of any individual, or the limitation, segregation, and classification of any individual on one of the proscribed bases. 42 U.S.C. § 2000e-2(a)(1), (2) (1994). Essentially, the same prohibitions apply to employment agencies and labor organizations. 42 U.S.C. § 2000e-2(b), (c) (1994). After exhausting certain administrative remedies, "a person claiming to be aggrieved" may bring suit in federal court. 42 U.S.C. § 2000e-5 (1994).

79. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (stating that a defendant can rebut a prima facie case by articulating a legitimate reason for its employment decision, in which case plaintiff must show pretext, or actual intent, to prevail); *McDonnell Douglas*, 411 U.S. at 802 (defining a prima facie case under Title VII). The Court has recently affirmed the principle that the inquiry must focus on the employer's motivation at the time the employer made the employment decision. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 885 (1994); *see also infra* note 81 and accompanying text (discussing private attorney general model); *infra* notes 83-85 and accompanying text (discussing judicial narrowing of Title VII).

The Supreme Court initially recognized the broad scope of Title VII[80] and congressional intent that Title VII plaintiffs act as private attorneys general to vindicate congressional policy along with individual grievances.[81] Over time, however, courts have taken an increasingly restrictive view of Title VII[82] by first placing restrictions on class actions[83] and ultimately characterizing violations as analogous to torts.[84] Congress has responded

80. *Griggs*, 401 U.S. at 429-30 (stating that Title VII's purpose is to remove discriminatory barriers); *see also* EEOC v. Shell Oil Co., 466 U.S. 54, 77 (1984) (stating that Title VII aims "to root out employment discrimination"); Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 463 U.S. 1073, 1103 (1983) (stating that Title VII aims "broadly to proscribe discrimination in employment practices").

81. EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 595-96 (1981) (describing the process of bringing a Title VII claim and the EEOC's handling of that claim); Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974) (describing private individuals' "significant role in the enforcement process of Title VII"); Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 402 (1968) (per curiam); Stewart v. Hannon, 675 F.2d 846, 850 (7th Cir. 1982); *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (stating that Congress intended Title VII as a "spur or catalyst" to employers to eliminate the "last vestiges" of discrimination). The Supreme Court recently reaffirmed the private attorney general model. *See McKennon*, 115 S. Ct. at 884-85 (finding that a private litigant who seeks redress vindicates the objectives of Title VII).

82. *See, e.g., Title VII at 20*, 1985 EEOC Compl. Man. (BNA) No. 83, at 1 (Oct. 18, 1985) (In 1977, a "new era" began "in which plaintiffs were far less certain of victory."); Zemelman, *supra* note 73, at 195 & n.158 (stating that the Supreme Court made it more difficult to bring disparate impact suits in the 1970s and 1980s).

83. Courts initially granted class certification liberally on the theory that "race discrimination is by definition class discrimination." Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966). In time, however, courts curtailed class actions by rejecting the across-the-board method and requiring all class actions to fit the requirements of Rule 23 of the Federal Rules of Civil Procedure. *See* General Tele. Co. of the S.W. v. Falcon, 457 U.S. 147, 156-57 (1982) (rejecting the across-the-board approach by holding that all class members must have suffered the same injury, have common questions of law, and have the same litigation interests); East Tex. Motor Freight Sys. v. Rodriguez 431 U.S. 395, 403-04 (1977) (rejecting the across-the-board approach because mere allegation of racial or ethnic discrimination does not satisfy class action requirements); *see* Zemelman, *supra* note 73, at 195 & n.158. Class actions declined from 1106 in 1975 to 51 in 1989. *Id.* at 196. The court also raised obstacles to disparate impact claims. *See*, e.g., Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656-57 (1989) (holding that to make a prima facie showing of disparate impact causation a plaintiff must identify a specific practice causing the disparate impact), *modified by* 42 U.S.C. § 2000e-2(m) (1994).

84. Although courts initially regarded such a characterization as unthinkable, see Jiron v. Sperry Rand Corp., 423 F. Supp. 155, 166 (D. Utah 1975); Whitney v. Greater N.Y. Corp. of Seventh Day Adventist, 401 F. Supp. 1363, 1379 (S.D.N.Y. 1975), it has become somewhat common. *See, e.g.*, United States v. Burke, 112 S.Ct. 1867, 1878 (1992) (O'Connor, J., concurring) (comparing Title VII to tort law by analogy); Price Waterhouse v. Hopkins, 490 U.S.

by repeatedly modifying and overruling Supreme Court decisions[85] and otherwise signaling that courts should interpret Title VII broadly.[86]

228, 264 (1989) (O'Connor, J., concurring) (same), *modified by* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 2000e-2 (1994)). Courts have also analyzed Title VII violations as similar to a breach of implied contract. Dotson v. United States Postal Serv., 977 F.2d 976, 978 (6th Cir.) (per curiam) (evaluating harm in terms of right to the job), *cert. denied*, 113 S. Ct. 263 (1992); Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988) (finding after-acquired evidence of misconduct precludes recovery); *see also* Johnson v. Honeywell Info. Sys., 955 F.2d 409, 413 (6th Cir. 1992) (determining that resume fraud may constitute a just cause defense to civil rights suit).

Last term, in a case involving "after acquired evidence," the Court took a step towards restoring Title VII's broad social purposes and empowerment of private attorneys general. *See McKennon*, 115 S. Ct. at 884 (1995) (indicating that private litigants vindicate the objectiveness of Title VII). In holding that such evidence cannot act as a bar to recovery, the Court emphasized the role of the Age Discrimination in Employment Act ("ADEA") in "an ongoing congressional effort to eradicate discrimination in the workplace." *Id.* The after-acquired evidence defense arises when the employer, after the initiation of litigation, discovers evidence of a material misrepresentation in the application process (or misconduct of the employee), that would have justified the termination if known. *McKennon* arose under the ADEA, but the Court made it clear that its reasoning and holding applied to Title VII and other laws bearing on employment discrimination. *See id.* at 883-84 (stating that ADEA is only part of a wide statutory scheme to protect employees).

85. Indeed Title VII has produced more legislative overrulings of Supreme Court decisions than any other statute enacted. *See, e.g.*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (expanding Title VII to include discrimination on the basis of pregnancy, childbirth, or related medical conditions by overruling Supreme Court precedent holding that pregnancy discrimination was not sex discrimination); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982) (clarifying dates and definitions concerning voting rights by modifying Supreme Court precedent). In a particularly dramatic example, the Civil Rights Act of 1991 overturned or modified six Supreme Court decisions. Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(3) 105 Stat. 1071 (1991) (providing additional employment discrimination remedies by modifying Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659-60 (1989), and overruling EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991); West Virginia Univ. Hosps., Inc. v. Casey 499 U.S. 83 (1991); Patterson v. McLean Credit Union, 491 U.S. 164, 177 (1989); Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989)).

86. The 1991 Amendment, for instance, expressly states that one of its purpose was "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat 1071 (1991). *See also* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (establishing EEOC); Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076 (1978) (expanding Title VII protection to include pregnancy). Thus, Congress intended for courts to interpret such statutes broadly.

Section 1981, derived from Section One of the Civil Rights Act of 1866, guarantees all citizens the same right "to make and enforce contracts" regardless of race.[87] The rights guaranteed by § 1981 encompass formation[88] and judicial enforcement[89] of contracts. Section 1981 also redresses humiliation and embarrassment resulting from violations of its provisions.[90]

Where Title VII and § 1981 overlap, § 1981 has procedural advantages over Title VII.[91] Prior to the Civil Rights Act of 1991, plaintiffs used § 1981 to obtain legal damages unavailable under Title VII.[92] The 1991 Act overturned Supreme Court precedent holding that § 1981 did not reach performance of con-

87. 42 U.S.C. § 1981 (1994). The Court has held that Congress enacted § 1981 to overcome chronic discrimination in contracting and that it was constitutional under Congress's remedial provision in § 2 of the Thirteenth Amendment. Runyon v. McCrary, 427 U.S. 160, 168-70 (1976). Section 1981 is broader than Title VII in that it reaches all contracts, not just those for employment. It is "co-extensive" with Title VII, in that it is not abridged by the existence of Title VII. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975). It is narrower than Title VII, however, in that it only reaches discrimination on the basis of race. 2 CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION § 21.2.1, at 468 (2d ed. 1988). Where the statutes' coverage overlaps, courts often apply precedent under either one. *See infra* notes 94-98 and accompanying text (discussing interrelation of civil rights statutes).

The history of § 1981 reflects a cycle of expansion. Courts originally applied § 1981 only to the federal government, then expanded its reach to the states, and finally to private parties. *Runyon*, 427 U.S. at 170. Consequently, § 1981 became a significant element of employment discrimination litigation because it offered remedies not available under Title VII until 1991. 2 SULLIVAN, *supra*, § 21.1, at 464-67. In 1989, the Supreme Court limited the scope of § 1981, holding that it did not reach discriminatory firing claims. *Patterson*, 491 U.S. at 171. In 1991, Congress responded by overruling that holding. 42 U.S.C. § 1981(b) (1994).

88. Thus the statute prohibits the refusal, on the basis of race, to enter into a contract. *Patterson*, 491 U.S. at 176-77. Section 1981 reaches a broad range of conduct. *See, e.g.*, Wyatt v. Security Inn Food & Beverage, 819 F.2d 69, 70-71 (4th Cir. 1987) (finding that covered conduct includes discriminatory application of hotel bar's policy of ejecting persons who do not order drinks); Grier v. Specialized Skills Inc., 326 F. Supp. 856, 860 (W.D.N.C. 1971) (finding that covered conduct includes discrimination in admissions to barber school).

89. *Patterson*, 491 U.S. at 177.

90. *Runyon*, 427 U.S. at 182 (affirming holding that § 1981 makes injured feelings and humiliation compensable).

91. Namely, § 1981 does not require administrative exhaustion. Prior to the Civil Rights Act of 1991, which extended the statute of limitations under Title VII, § 1981 also had the advantage of incorporating those state statutes of limitations which were longer than Title VII's.

92. 2 SULLIVAN, *supra* note 87, §§ 23.1-23.11, at 521-27.

tracts and bolstered Title VII by making legal damages available thereunder.[93]

The Court views laws bearing on employment discrimination as an interwoven system[94] and frequently reads them *in pari materia*.[95] For instance, the elements of a prima facie case under Title VII also apply to § 1981 suits.[96] Courts treat precedent under the Fair Housing Act, Title VIII of the 1964 Act, as particularly relevant authority under Title VII.[97] Similarly, 42 U.S.C. § 1982,[98] which addresses discrimination in real estate markets, has particular bearing on § 1981 because both derive from the Civil Rights Act of 1866.

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93. 42 U.S.C. § 1981 (Supp. III 1991). Congress declared that "additional remedies under federal law are needed to deter . . . intentional discrimination in the workplace." Civil Rights Act of 1991, Pub. L. No. 102-166, § 2(1), 105 Stat. 1071 (1991). In Patterson v. McLean Credit Union, 491 U.S. 164, 165-82 (1989), the Supreme Court limited § 1981 to the formation of contracts and their enforcement in court. The Court reasoned that the enactment of Title VII implied areas of the employment relationship not covered by § 1981. *Id.* The 1991 Act made it clear that § 1981 covers "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." 42 U.S.C. § 1981(b) (Supp. III 1991). As a practical matter, since the 1991 Act, the issue of where § 1981 and Title VII overlap has lost most of its significance.

94. *See* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 884 (1995).

95. Stewart v. Hannon, 675 F.2d 847, 849-50 (7th Cir. 1982) (en banc); EEOC v. Bailey, 563 F.2d 439, 453 (6th Cir. 1977); Waters v. Heublein, Inc., 547 F.2d 466, 469 (9th Cir. 1976) ("The distinction between laws aimed at desegregation and laws aimed at equal opportunity is illusory.").

96. *Patterson*, 491 U.S. at 185-87. *See supra* note 79 (discussing burden of proof in employment discrimination litigation).

97. *Bailey*, 563 F.2d at 453; *Waters*, 547 F.2d at 469-70. Both statutes are civil rights measures that permit charges brought by a person who has suffered "a distinct and palpable injury." Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1982) (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)). Both statutes empower litigants to act as private attorneys general. Although the administrative phase is optional under Title VIII and mandatory under Title VII, the enforcement provisions are "essentially the same." *Yelnosky*, *supra* note 11, at 424-25 (noting that courts have recognized the congressional intention to construe Title VII standing broadly).

98. Section 1982 provides: "All citizens of the United States shall have the same right as enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1988). Although the language of § 1982 raises questions as to the coverage of whites, the Supreme Court has interpreted § 1981 to forbid any distinctions on the basis of race. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976).

C. Standing in the Civil Rights Context

Courts have granted standing liberally in civil rights cases.[99] Title VII, in particular, confers standing to the fullest extent permissible under the Constitution.[100] Lower courts, however, have reached inconsistent decisions concerning whether indirect injuries are constitutionally cognizable under Title VII.[101] It is also unclear under what circumstances courts will grant injunctive relief. Although courts articulate the low

99. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280-81 n.14 (1978) (granting standing to white medical school applicant although he could not show that the school would admit him absent challenged policy); Coit v. Green, 330 F. Supp. 1150, 1164 (D.D.C.), *aff'd*, 404 U.S. 997 (1971) (granting standing to black parents of public school children challenging tax-exempt status of racially exclusive private schools); *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 477, 483 (1989) (concerning challenge to minority set-aside where plaintiffs could not show they would receive contracts absent policy); Norwood v. Harrison, 413 U.S. 455, 457 (1974) (concerning parents of black schoolchildren challenging state's provision of textbooks to racially exclusive schools); Gilmore v. City of Montgomery, 417 U.S. 556, 558 (1973) (concerning black citizens challenging provision of temporary exclusive use of park facilities to racially exclusive groups); EEOC Notice, *supra* note 3, ¶ 2168 (arguing that in such cases the plaintiffs "acted as testers" because "they had no intention of personally accepting any tangible benefit").

Test cases played an important role in attacking state sanctioned segregation. For instance, the conduct of black protesters testing the legality of segregation resulted in challenges to segregated transportation facilities. Evers v. Dwyer, 358 U.S. 202, 202-03 (1958) (per curiam); *see* Pierson v. Ray, 386 U.S. 547, 552-53 (1967). In these cases, the protesters' intention to use the facilities in question solely to instigate a law suit did not preclude standing. *Evers*, 358 U.S. at 204; *see Pierson*, 386 U.S. at 558.

100. Courts reason that the language of Title VII permitting suit "by a person claiming to be aggrieved" manifests congressional intent that standing extend to the fullest possible extent. Trafficante v. Metropolitan Life Ins. Corp., 409 U.S. 205, 209 (1971) (finding congressional intent to extend standing under Title VII to the extent Article III permits) (citing with approval Hackett v. McGuire Bros., 445 F.2d 442, 446 (3d Cir. 1971)).

101. A comparison of two cases reveals the inconsistency. In Patee v. Pacific Northwest Bell Telephone Co., 803 F.2d 476, 477 (9th Cir. 1986), male employees alleged that they suffered diminished wages because the employer discriminated against the predominantly female department in which they worked. Although the alleged prohibited conduct, sex discrimination, resulted in concrete injuries, diminished wages, the Ninth Circuit denied standing to the male employees because Title VII does not protect majority class members' interests. *Id.* at 478-79.

In contrast, the Eighth Circuit found no barrier to standing when a white cafeteria school district employee challenged an allegedly discriminatory enrollment policy. Clayton v. White Hall Sch. Dist., 875 F.2d 676, 680 (8th Cir. 1989). The Court held that Title VII protects the freedom from a discriminatory workplace, regardless of the plaintiff's class status. *Id.* at 679-80; *see Waters*, 547 F.2d at 469 (granting standing to white employee suing for discriminatory hiring practices which excluded African Americans and Hispanics).

standard of a "reasonable expectation" of future discrimination,[102] in effect, the burden of proving the need for injunctive relief appears heavy, and the inquiry focuses on the extent of prior discrimination.[103]

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102. Most courts hold injunctive relief appropriate where an employer has violated Title VII unless there is "no reasonable expectation that the employer will discriminate in the future." Yelnosky, *supra* note 11, at 436; *see, e.g.*, Bouman v. Block, 940 F.2d 1211, 1233 (9th Cir.), *cert. denied*, 502 U.S. 1005 (1991); EEOC v. Hacienda Hotel, 881 F.2d 1504, 1519 (9th Cir. 1989) (granting injunctive relief unless employer proves the unlikeliness of repeating discriminatory practices); EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539, 1544-45 (9th Cir. 1987) (same); Walls v. Mississippi State Dep't of Pub. Welfare, 730 F.2d 306, 325 (5th Cir. 1984) (granting injunction when some cognizable danger of recurrent violation exists); *see also* Bundy v. Jackson, 641 F.2d 934, 946 n.13 (D.C. Cir. 1981) (granting injunctive relief when the offender did not take any affirmative steps to prevent recurrences of sexual harassment). Some courts have gone further by holding injunctive relief mandatory. Berkman v. City of N.Y., 705 F.2d 584, 595 (2d Cir. 1983) (holding injunctive relief "appropriate" whenever court finds a Title VII violation); NAACP v. City of Evergreen, 693 F.2d 1367, 1370-71 (11th Cir. 1982) (finding injunctive relief mandatory absent clear and convincing proof that there is no reasonable probability of future discrimination).

103. Courts frequently conclude that a reasonable expectation that an employer will discriminate in the future does not exist. *See, e.g.*, Spencer v. General Elec. Co., 894 F.2d 651, 660 (4th Cir. 1990) (denying injunctive relief where defendant had taken curative steps during litigation); *Hacienda Hotel*, 881 F.2d at 1519 (granting injunction unless employer proves the unlikeliness of repeating discriminatory practices); Johnson v. Brock, 810 F.2d 219, 226 (D.C. Cir. 1987) (finding that judgment for plaintiff sufficiently encourages employer to comply with Title VII); *Walls*, 730 F.2d at 325 (holding that a "cognizable danger" must exist to support an injunction).

Courts have not spoken with a single voice on whether a Title VII plaintiff must be a member of the class benefiting from the injunction. Normally the "personal benefit" doctrine requires that the plaintiff requesting injunctive relief must personally benefit from any change in the defendant's conduct. For Title VII litigants this has meant that injunctive relief is unavailable unless the plaintiff is an employee of the defendant or likely to become one. *Yelnosky, supra* note 11, at 436; *e.g.*, Beattie v. United States, 949 F.2d 1092, 1093-94 (10th Cir. 1991) (holding that plaintiff who voluntarily quit could not prove likely future injury); Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982) (stating that plaintiff who left employment and did not seek reinstatement was unlikely to get an injunction); Miller v. Texas State Bd. of Barber Examiners, 615 F.2d 650, 654 (5th Cir. 1980) (holding that injunctive relief is unavailable where plaintiff experienced discrimination while an employee but employer discharged him for legitimate reasons). In some circumstances, however, courts have ignored the personal benefits doctrine. *E.g.*, Taylor v. USAIR, Inc., 56 Fair Empl. Prac. (BNA) 357, 366 (W.D. Pa. 1991) (holding that a plaintiff, against whom defendant discriminated during application process but eventually hired, may enjoin the discriminatory hiring practices despite no direct effect on plaintiff).

Section 1981, in contrast, subjects suits to prudential barriers.[104] Only interference with a person's contract rights on the basis of race is actionable.[105] Courts have granted third party standing where plaintiffs have alleged that their injuries resulted from the defendants' interference with the contractual relations between plaintiffs and third parties.[106]

D. Standing in Tester Cases

Although the Fourth Circuit in 1971 presumed that standing presented no obstacle to employment testers under Title VII,[107] some courts have subsequently demonstrated antipathy towards employment tester suits.[108] Housing testers, on the other hand, have received standing for some time.[109] In *Havens Realty Corp. v. Coleman*,[110] the Supreme Court ruled that hous-

104. Warth v. Seldin, 422 U.S. 490, 512-14 (1975). *See supra* notes 7, 87-90 and accompanying text (discussing the provisions of § 1981).

105. *Warth*, 422 U.S. at 512-14.

106. *See, e.g.*, Des Vergnes v. Seekonk Water Dist., 601 F.2d 9, 14 (1st Cir. 1979) (recognizing that § 1981 implies cause of action for interference with "right to make contracts with nonwhites"); Winston v. Lear-Siegler, Inc., 558 F.2d 1266, 1270 (6th Cir. 1977) (recognizing cause of action for white person whom his employer injured in retaliation for refusing to violate minorities rights); DeMatteir v. Eastman Kodak Co., 511 F.2d 306, 311-12 (2d Cir. 1975) (same); Fowler v. McCrory Corp., 727 F. Supp. 228, 232-33 (D. Md. 1989) (granting third-party standing to white employee fired for opposing employer's hiring discrimination); *cf.* Sullivan v. Little Hunting Park, 396 U.S. 229, 237 (1969) (stating § 1982 confers a cause of action for interference with property contracts on the basis of race); *see also* Landever, *supra* note 3, at 400 & n.160 (arguing that the cited cases endorse standing for injuries suffered as a result of defending those whom § 1981 protects).

107. Lea v. Cone Mills Corp., 438 F.2d 86, 87 (4th Cir. 1971) (per curiam). The defendant did not contest the issue of standing. *See id.* One judge, foreshadowing future developments, complained that the "entire case smacked of nothing but manufactured litigation." *Id.* at 90 (Boreman, J., concurring in part and dissenting in part).

108. The Fourth Circuit suggested in dicta that it considered an applicant's motive a relevant factor. Sledge v. J.P. Stevens & Co., 585 F.2d 625, 641 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). Likewise, a Georgia District Court held that a plaintiff must be a bona fide applicant to show a prima facie case of discrimination. Parr v. Woodmen of the World Life Ins. Soc'y, 657 F. Supp. 1022, 1032-33 (M.D. Ga. 1987) (citing *Sledge*, 585 F.2d at 641; *Lea*, 438 F.2d at 90 (Boreman, J., concurring in part and dissenting in part)). The reasoning of these courts, however, conflicts with the disparate treatment theory's focus on employer's intent. *See supra* notes 77, 79 and accompanying text (discussing Title VII's litigation structure).

109. *See* Richardson v. Howard, 712 F.2d 319, 321 (7th Cir.1983) ("[T]he evidence provided by testers is frequently valuable, if not indispensable."); William M. Kunstler, My Life As a Radical Lawyer 95 (1994) (describing testing to discover housing discrimination as an "old and proven practice").

110. 455 U.S. 363 (1982).

ing testers had standing under Title VIII.[111] Further, the Court held that the "resources drain" of identifying and counteracting a defendant's discriminatory practices constituted a cognizable injury to the sponsoring organization.[112] Following *Havens*, lower courts have found standing for housing testers under § 1981[113] and § 1982.[114] These courts have held that the infringement of contract or property rights[115] and the consequential emotional harm satisfy standing's injury requirement.[116]

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111. *Id.* at 372-74. The defendant allegedly subjected the testers to "racial steering practices." *Id.* at 366 n.1. On the same day, a white and a black tester inquired about apartments. The defendant showed the white tester an all-white building but only informed the black tester about an opening in an integrated building. *Id.* at 368. Both the white and black testers brought suit. *Id.* at 373.

The Court held that Title VIII created a right to truthful information and a violation of that right occurs regardless of the inquirer's intent. *Id.* at 373-74. *See* Trafficante v. Metropolitan Life Ins. Corp., 409 U.S. 205, 211 (1971) (stating that Title VIII empowers a litigant to act as private attorneys general). The Court, however, denied standing to the white tester who received truthful information. *Havens*, 455 U.S. at 373-74.

In holding the tester's intent irrelevant, the Court relied on classic civil rights cases where protesters with no interest in the integrated facilities nonetheless brought suit. *Id.* (citing Evers v. Dwyer, 358 U.S. 202 (1958) (per curiam); Pierson v. Ray, 386 U.S. 547, 558 (1967)); *see infra* note 120 and accompanying text (discussing EEOC's similar reasoning on employment tester standing).

112. *Havens*, 455 U.S. at 379-80. Housing Opportunities Made Equal's identifying and counteracting defendant's discriminatory conduct allegedly forced the sponsoring organization to divert significant resources from its counseling and referral services. *Id.*

113. Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 898 (3d Cir. 1977); Coel v. Rose Tree Manor Apartments, Inc., No. 84-1521, 1987 U.S. Dist. LEXIS 9212, at *16 (E.D. Pa. Oct. 13, 1987); Sherman Park Community Ass'n v. Wauwatosa Realty Co., 486 F. Supp. 838, 842 (E.D. Wis. 1980).

114. Watts v. Boyd Properties Inc., 758 F.2d 1482, 1484-85 (11th Cir. 1985); Village of Bellwood v. Gorey & Ass'n, 664 F. Supp. 320, 325-26 (N.D. Ill. 1987). Section 1982, also codified from Section One of the Civil Rights Act of 1866, is pertinent authority for § 1981, mirroring the relationship between Title VII and Title VIII. *See supra* notes 81-84 and accompanying text (describing the relationship of civil rights statutes).

115. *Watts*, 758 F.2d at 1484-85; *Meyers*, 559 F.2d at 898; *Coel*, 1987 U.S. Dist. LEXIS 9212, at *16; *Village of Bellwood*, 664 F. Supp. at 327; *Sherman Park Community Ass'n*, 486 F. Supp. at 842.

116. Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1238 (D.C. Cir 1984); Gomez v. Alexian Bros. Hosp., 698 F.2d 1019, 1021 (9th Cir. 1983) (per curium); Davis v. Mansard, 597 F. Supp. 334, 336 (N.D. Ind. 1984). *See also* Runyon v. McCrary, 427 U.S. 160, 166 (1976) (affirming award of damages for humiliation and embarrassment under § 1981).

E. Standing According to the EEOC

The EEOC has concluded in its compliance manual that employment testers have standing to sue under Title VII.[117] The EEOC reasoned that Title VII prohibits employers from rejecting employment applicants on impermissible bases.[118] Thus, discrimination itself constitutes an injury.[119] The EEOC noted that historically "testers in one form or another" have advanced civil rights.[120] Relying further on housing tester precedent, the EEOC argued that employment testers "serve essentially the same function" as housing testers.[121]

Despite less authoritative weight than administrative regulations,[122] the EEOC's extensive expertise in employment discrimination matters has entitled its guideline interpretations of Title VII to great deference.[123] Courts generally have deferred to agency interpretations of ambiguous statutes.[124] In deter-

117. EEOC Notice, *supra* note 3, ¶ 2168. The EEOC considered this step after a national investigation revealed widespread discrimination in recruiting. *EEOC Chairman Says Agency Receiving Influx of Charges Against Job Agencies*, 113 Daily Lab. Rep. (BNA) No. 113, at A1 (June 12, 1991).

118. EEOC Notice, *supra* note 3, ¶ 2168.

119. *Id.* Accordingly, the testers' intentions are irrelevant. *Id.*

120. *Id.* The EEOC argues that testers advanced many important civil rights cases. *Id.* The EEOC cited cases where plaintiffs challenged the tax-exempt status of racially exclusive schools but had no intention of attending those schools or sought to desegregate transportation facilities but had no intention of using those facilities. *Id.* (citing Wright v. Regan, 656 F.2d 820, 829 (D.C. Cir. 1981) (challenging state benefits to racially exclusive schools); Coit v. Green, 404 U.S. 997 (1971) (same); Norwood v. Harrison, 413 U.S. 455 (1974) (same); Pierson v. Ray, 386 U.S. 547 (1967) (black clergymen went to segregated bus terminal for sole purpose of testing legality of segregation); Evers v. Dwyer, 358 U.S. 202 (1958) (per curiam) (plaintiff rode Memphis bus for sole purpose of testing legality of segregation)).

121. Title VIII is "functionally identical" to Title VII. *Id.* (quoting Waters v. Heublein, 547 F.2d at 469).

122. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 141-45 (1976).

123. *Id.* at 140-45; Griggs v. Duke Power Co, 401 U.S. 424, 433-34 (1971). *See also* Youakim v. Miller, 425 U.S. 231, 236 (1976) (stating that when construing a statute, courts should give significant consideration to the construction of that statute by the agency responsible for its enforcement); New York State Dep't of Social Servs. v. Dublino, 413 U.S. 405, 421 (1973) (stating that absent compelling indications of inaccuracy, courts should follow construction of statute by the agency responsible for its enforcement); Federal Maritime Comm'n v. Seatrin Lines, 411 U.S. 726, 745 (1973) (stating that courts will ordinarily affirm the administrative interpretation of a statute if it has a reasonable basis in law); Estate of Sanford v. Commissioner, 308 U.S. 39, 52 (1939) (stating the general rule as following the administrative interpretation when not conflicting with the statute itself).

124. Brewster v. Gage, 280 U.S. 327, 336 (1930); McLaren v. Fleischer, 256 U.S. 477, 481 (1921).

mining the weight of agency interpretation, courts have also contemplated whether the agency carefully considered the matter and reached a result consistent with congressional intent and case law.[125]

II. *FAIR EMPLOYMENT COUNCIL OF GREATER WASHINGTON, INC. v. BMC MARKETING CORP.*

After BMC referred only the white testers for employment in 1990,[126] the Council and the testers brought suit against BMC under Title VII[127] and § 1981.[128] The district court held that the Council and the testers had standing under both statutes.[129] In *FEC*, the D.C. Circuit denied the testers standing[130] and only granted the organization standing under Title VII to the extent it could show injury to its programs, apart from any resources the Council expended on testing BMC.[131]

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125. *E.g.*, *Estate of Sanford*, 308 U.S. at 52; *Brewster*, 280 U.S. at 327.

126. *FEC*, 28 F.3d at 1270. *See supra* notes 1-5 and accompanying text (discussing the Council's test of BMC).

127. *FEC*, 28 F.3d at 1270. *See supra* notes 63-74 and accompanying text (discussing the history and scope of Title VII and § 1981). In particular, the Title VII claim rested on 42 U.S.C. § 2000e-2(b), which provides:

> It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(b) (1994).

128. *FEC*, 28 F.3d at 1270. *See supra* notes 87-93 and accompanying text (discussing § 1981).

129. Fair Employment Council of Greater Washington, Inc. v. BMC Mktg. Corp., 829 F. Supp. 402, 404-07 (D.D.C. 1993), *rev'd in part and aff'd in part*, 28 F.3d 1268 (D.C. Cir. 1994). The District Court's analysis rested on the Supreme Court's grant of standing to testers in other contexts. *Id.* at 404 (citing Evers v. Dwyer, 358 U.S. 202 (1958) (per curiam) (holding that plaintiffs boarded segregated bus "for the purpose of instituting this litigation is not significant"); Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) (holding testers have standing under the Fair Housing Act)). The court found that the plaintiffs' injuries were cognizable because the testers actually possessed an interest in referrals, a protected right under § 2000e-2(b). *Id.* at 405. In rejecting the argument that the testers had not alleged likelihood of future injury, the court reasoned that because the testers control whether they have any future contact with BMC they "have no problem establishing a probability of future injury." *Id.* The court further held that the Council's allegations of BMC's forcing it to "devote scarce resources to identifying and counteracting" discriminatory conduct sufficiently supported standing. *Id.* at 407.

130. *FEC*, 28 F.3d at 1270-74.

131. *Id.* at 1276-81.

A. The Testers' Standing

The Court of Appeals found that the testers did not suffer an injury cognizable under § 1981.[132] The court dealt separately with the allegations that BMC denied the testers opportunities to contract with BMC itself and with others on referral.[133] The court found that the testers had made material misrepresentations to BMC[134] and that the agency had the right to void at will any resulting contracts.[135] Loss of the opportunity to enter into a voidable contract, the court held, could not constitute an injury in fact.[136] Likewise, the court found that because the testers had no intention of accepting any positions on referral, at most, they lost the "opportunity to refuse" to enter into contracts with BMC's clients.[137]

The court declined to follow precedent from other circuits,[138] which upheld housing testers' standing under § 1981 and § 1982.[139] The court found that these cases had merely assumed the existence of a cause of action.[140] Likewise, the court found inapposite the Supreme Court's holding in *Havens Realty Corp. v. Coleman* that housing testers have standing under Title VIII.[141] The court reasoned that, whereas Title VIII creates an

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132. *Id.* at 1271.

133. *Id.* at 1270-71.

134. The testers misrepresented their intentions respecting employment and presented "fictitious credentials" to BMC. *Id.* at 1271.

135. *FEC*, 28 F.3d at 1271.

136. *Id.* The court reasoned that "a void contract is a nullity." *Id.* at 1270-71 (citing Kawitt v. United States, 843 F.2d 951, 953 (7th Cir. 1988) (holding that a job obtained by material misrepresentation is not a property right for Fifth Amendment Due Process purposes)).

137. *Id.*

138. *Id.* at 1271-72. *See supra* notes 113-16 and accompanying text (discussing cases granting standing under § 1981 and § 1982).

139. *FEC*, 28 F.3d at 1271.

140. *Id.* (distinguishing Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894 (3d Cir. 1977), *overruled on other grounds by* Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985), *aff'd*, 482 U.S. 656 (1987); Watts v. Boyd Properties, 758 F.2d 1482 (11th Cir. 1985)); *see supra* notes 113-16 and accompanying text (discussing housing tester standing under § 1981 and § 1982). The court found Meyers only affirmed the principle "that a plaintiff's standing is not defeated by the fact that he subjected himself to legal injury solely for the purpose of determining whether his rights would be violated, with the intent to bring suit if they were." *Id.* The court found *Watts* unpersuasive because the decision relied primarily on *Meyers*. *Id.*

141. *Id.* at 1271-72 (distinguishing Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982)). *See supra* notes 110-12 and accompanying text (discussing *Havens*).

"enforceable right to truthful information,"[142] § 1981 contains no comparable guarantee.[143]

Turning to Title VII, the court found the testers could not recover damages[144] and did not have standing to seek prospective relief.[145] While acknowledging that Title VII is more analogous to Title VIII than § 1981, the court found critical differences in the available remedies.[146] Because the conduct at issue occurred prior to 1991, only prospective relief remained available to the testers.[147]

Without addressing whether the testers could sustain injuries cognizable under Title VII,[148] the court held that the testers lacked standing under *City of Los Angeles v. Lyons* because they had not alleged sufficient likelihood of future injury.[149] The court rejected the district court's reasoning that the testers' ability to re-initiate contact with BMC obviated the requirement to plead the likelihood of future injury.[150] The court relied on *Lujan v. Defenders of Wildlife*, where the plaintiff's ability to purchase airline tickets to the countries allegedly affected by the challenged foreign aid policy did not cure their failure to plead a

142. *FEC*, 28 F.3d at 1272.
143. *Id.*
144. *Id.* at 1272.
145. *Id.* at 1272-74.
146. *Id.* at 1272.
147. *Id.* (citing Landgraf v. USI Film Products, 114 S.Ct. 1483 (1993) (holding that new remedial provisions in the 1991 Amendments did not apply retroactively)).
148. *Id.* at 1272 n.1.
149. *Id.* at 1273 (citing City of Los Angeles v. Lyons, 461 U.S. 95, 107 n.8 (1983)); *see supra* notes 54-59 and accompanying text (discussing the Court's reasoning and holding in *Lyons*).
150. *FEC*, 28 F.3d at 1272-73. The District Court distinguished *Lyons* on the ground that the testers, themselves, controlled whether contact with BMC would be re-initiated, whereas Lyons had no control over whether the police would stop him again. Fair Employment Council of Greater Washington, Inc. v. BMC Mktg. Corp., 829 F. Supp. 402, 405 (D.D.C. 1993), *rev'd in part and aff'd in part*, 28 F.3d 1268 (D.C. Cir. 1994). *See supra* notes 54-59 and accompanying text (discussing *Lyons*). The circuit court objected to this reading of *Lyons*. *FEC*, 28 F.3d at 1274 (citing Lujan v. Defenders of Wildlife 112 S. Ct. 2130, 2139 n.2 (1992) (rejecting argument that plaintiff need only plead future injury where harm depends on actions of third parties)). The court reasoned that even if the testers returned to BMC as bona fide candidates, they would assume the same position as Lyons, who could have initiated an incident with the police but could not control whether the police would employ the challenged chokehold. *Id.* The court also rejected arguments based on "BMC's continuing failure" to refer the testers. *Id.* at 1273-74. The court further rejected the testers' argument that ongoing humiliation and embarrassment caused an injury, reasoning that such harms were "effects" rather than threatened injuries. *Id.* at 1274 (citing *Lyons*, 461 U.S. at 107).

present intention to visit those countries.[151] The court added that BMC had no duty to consider the testers for referral because they now knew of the testers' deception.[152]

B. The Council's Standing

Turning to the Council's § 1981 claim, the court found that it did not have a personal claim[153] and could not base standing on injury to third persons.[154] Defining prudential standing analysis as a set of canons of statutory interpretation, the court found that the Council's suit ran afoul of the presumption against claims based on the violation of other's rights.[155]

The court declined to adopt an approach balancing the third-party standing factors[156] by holding that "obstacles" and alignment-of-interest are independent prerequisites for third-party standing.[157] The court reconciled Supreme Court precedent by recognizing exceptions for "special relationships," such as doctor-client or vendor-vendee relationships.[158] The court found the "obstacles" confronting direct victims of BMC's alleged discrimination insufficient to support the inference that § 1981 conferred a cause of action upon the Council.[159] Noting that direct victims may not know that prospective employers had dis-

151. *Id.* at 1274 (citing Lujan v. Defenders of Wildlife 112 S.Ct. 2130, 2139 n.2 (1992) (rejecting argument plaintiff need only plead future injury where harm depends on actions of third parties)). *See supra* notes 47-53 (discussing the holding in *Lujan*).

152. *FEC*, 28 F.3d at 1274. Moreover, given the testers "adversarial relationship with BMC," the court found the possibility they would return as bona fide candidates or even as testers implausible. *Id.*

153. *Id.* at 1277. BMC's alleged conduct did not interfere with the Council's ability to contract, and the Council could not seek an employment referral. *Id.*

154. *Id.* at 1278-81.

155. *Id.* at 1277-81. The court distinguished cases finding standing for indirect injuries under § 1981 as resting on the principle that § 1981 protects those who refuse to violate other's § 1981 rights against "private retaliation." *Id.* at 1278-79.

156. *Id.* at 1280. The Third Circuit, recognizing "inconsistent streams" in the Supreme Court's third party standing analysis, adopted a balancing approach in Amato v. Wilentz, 952 F.2d 742, 749-50 & n.8 (3d Cir. 1991). The approach weighs the plaintiff's showing of both obstacle and relationship factors. *Id. See supra* notes 67-69 and accompanying text (explaining *Amato*).

157. *FEC*, 28 F.3d at 1280-81.

158. *Id.* The court distinguished four types of third-party standing cases: obstacle cases, cases where "the third party's rights protect that party's relationship with the litigant,"such as in a vendor-vendee relationship, cases involving "special relationships," such as the one between attorney and client, and First Amendment overbreadth challenges. *Id.* at 1280.

159. *Id.*

criminated against them, the court reasoned that the Council could solve the problem by publishing the results of its test.[160]

The court granted the Council standing under Title VII only to the extent that BMC's refusal to refer bona fide candidates "perceptibly impaired" the Council's activities.[161] The court rejected the argument that the diversion of resources from other programs to the testing project in itself caused an injury in fact[162] because it found such reasoning circular and a circumvention of the injury requirement.[163] To maintain its action, the Council would have had to demonstrate specific programmatic injuries such as diminished effectiveness of outreach or job counseling programs resulting from BMC's discriminatory conduct.[164]

III. A CRITICAL RESPONSE TO *FEC* AND AN ALTERNATIVE ANALYSIS OF TESTER STANDING

The *FEC* court should have granted standing to the testers under both Title VII and § 1981. The court should have recognized that BMC's discriminatory conduct caused programmatic injury, manifesting itself in the Council's testing program. The court misapplied general standing principles and precedent and ignored the true nature of the claims the testers and the Council asserted. Moreover, the court's reasoning represents an unfor-

160. *Id.* (citing Warth v. Seldin 422 U.S. 490, 510 (1975) (denying third-party standing because direct victims are "not disabled from asserting" their own claims); Powers v. Ohio, 499 U.S. 400, 414-15 (1991) (granting third-party standing because of "daunting" barriers to suit by excluded juror)).

161. *Id.* at 1277.

162. *FEC*, 28 F.3d at 1276-77.

163. *Id.* The court reasoned that the testers inflicted the injury themselves because the testing program came out of the Council's "own budgetary choices." *Id.* at 1276. Although the court acknowledged Supreme Court precedent holding the resources drain of counteracting discrimination cognizable under Title VIII, it reasoned that such precedent did not confer standing on the basis of resources diverted from one program to another because the resources drain was not a "manifestation of the injury" that the allegedly illegal conduct had caused. *Id.* at 1277 (citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 n.20 (1982)). The court declined to follow the Seventh Circuit, which held that "deflection of the agency's time and money" to legal efforts sustains sufficient injury. *Id.* (citing Village of Bellwood v. Dwiveldi, 895 F.2d 1521 (7th Cir. 1990)). Extension of such logic, the court noted, would lead to the absurdity that an organization dedicated to securing enforcement of civil rights laws could base standing on the ground that litigating against one discriminating employer had drained resources from potential suits against other employers. *Id.*

164. *Id.*

tunate trend whereby analyses construing civil rights legislation narrowly diminish civil rights claims by severing their public aspects. The resulting tort-like jurisprudence does not serve congressional intent.

A. The *FEC* Court Misconstrued Standing Doctrine and Mischaracterized Testers' Claims

The *FEC* court construed both § 1981 and Title VII inconsistently with their remedial purposes by treating injury more narrowly than either statute warrants. Indeed, the court consistently mischaracterized the injuries alleged by the testers and the Council, casting them as private harms devoid of the public significance Congress vested in civil rights statutes. The court erred in relying on *City of Los Angeles v. Lyons*[165] and *Lujan v. Defenders of Wildlife*,[166] because these cases rested on policies inapplicable to either tester or organizational standing. Moreover, the court failed to defer to the EEOC guidelines.

1. Section 1981 Protects Broader Rights than the *FEC* Court Recognized

a. *Discriminatory Treatment of Testers' Applications Constitutes Injury Under Section 1981*

Section 1981's broad language and remedial purposes encompass the injuries sustained by the testers. Congress enacted § 1981 to eliminate pervasive discrimination in contracting.[167] By its terms, § 1981 guarantees "the same . . . right to make and enforce contracts" to all citizens regardless of race.[168] An applicant whose credentials receive discriminatory consideration does not enjoy the same right to make contracts, in any meaningful sense, as other citizens.[169]

The testers' injuries derive from the infringement of their right to non-discriminatory consideration of their applications.[170] When an employer or employment agency segregates

165. 461 U.S. 95 (1983).
166. 112 S.Ct. 2130 (1992).
167. *See supra* notes 87-90 (describing § 1981).
168. 42 U.S.C. § 1981(a) (1994).
169. Discriminatory treatment denies the applicant not only the particular employment opportunity but also valuable information about their worth on the market and employment opportunities generally. *See supra* note 88 (discussing § 1981's coverage of contract formation). The refusal to consider or refer the testers' applications clearly falls within the province of § 1981.
170. *Cf.* Patterson v. McLean Credit Union, 491 U.S. 164, 184 (1989) ("[T]he question under § 1981 remains whether the employer, *at the time of the forma-*

applicants on the basis of race, it violates the applicants' rights under § 1981,[171] regardless of their intentions toward taking the job.

Purposeful discrimination in itself violates § 1981.[172] Courts must look to the *employer's* intent in assessing claims under § 1981,[173] for which the Supreme Court has developed a burden-shifting analysis to assist in determining the employer's intent.[174] The Court, however, has never subjected plaintiffs to such scrutiny.[175] Thus, § 1981 entitles testers to an adjudication of their claims of differential treatment on the basis of race.

Testers' intentions toward a job should not determine their rights under § 1981 because only the factors that actually moti-

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tion of the contract, in fact intentionally refused to enter into a contract with the employee on racially neutral terms."); *id.* at 210-11, 221 (Brennan, J., dissenting) (arguing § 1981's broad application counsels against narrow construction in the employment context and denial of opportunity to advance constitutes violation thereof); Runyon v. McCrary, 427 U.S. 160, 173 (1976) (finding that the Court of Appeal's conclusion that denial of admission to school based on race violates § 1981 "follows inexorably" from text of statute). Although Congress overturned *Patterson*'s essential holding that § 1981 does not reach post-formation conduct, 42 U.S.C. § 1981(b) (1994), the *Patterson* court's focus on whether the employer intentionally offered differing terms on the basis of race remains valid. Moreover, Congress's overruling of *Patterson* implicitly ratifies the dissent's position that denial of opportunity constitutes a violation of civil rights. *See also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280 n.14 (1978) (holding that an affirmative action program preventing plaintiff from competing for all available places in medical school injured plaintiff within cognition of Title VII).

171. Goodman v. Lukens Steel Co., 482 U.S. 656, 669 (1987); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-80 (1976); *cf.* Delaware State College v. Ricks, 449 U.S. 250, 252-58 (1980) (discussing discriminatory treatment of a college professor); Runyon v. McCrary, 427 U.S. 160, 172-73 (1976) (discussing similar discriminatory treatment of school applicants).

172. *See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981) (emphasizing that intentional discrimination constitutes a violation of Title VII); Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978) (same); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 796-805 (1973) (same).

173. *See supra* notes 77-79 and accompanying text (discussing Title VII's litigation structure).

174. *See supra* notes 77-79 and accompanying text (same).

175. Although the Court's analytical framework incorporates applicant or employee characteristics, it does so only in the context of raising an inference about the employer's intent. *See McDonnell Douglas*, 411 U.S. at 802-04. Indeed, the Court has recently affirmed the principle that unless the defendant knows of a plaintiff's misconduct when the allegedly discriminatory conduct occurred, such misconduct has no bearing on whether the defendant violated the plaintiff's rights. McKennon v. Nashville Banner Publishing Co., 115 S.Ct. 879, 885-87 (1995).

vated an employer's decision are relevant.[176] Testers' intentions have no bearing on the question of whether an employer invidiously discriminated against them. Likewise, although testers admittedly make material misrepresentations in their applications, an employer does not know of such misrepresentations when it makes the challenged decision. Thus, the misrepresentations cannot motivate an employer's decision.

Moreover, the precedent set by the *FEC* decision provides no rational limitation. *FEC* places informational interviewing, applications to price oneself on the market, and other job-search steps taken without an intention to accept a particular job beyond the reach of § 1981. Yet, employers discriminating in these areas deny applicants the same right to make employment contracts as other citizens.[177]

b. *Testers Suffer Emotional Injuries*

Testers also suffer embarrassment and humiliation resulting from invidious discrimination.[178] Courts recognize these as injuries cognizable under § 1981 when alleged by bona fide applicants.[179] Because testers experience the same stigma and belittlement as bona fide applicants, discriminatory employment practices denigrate testers and bona fide applicants alike.[180]

Opponents of tester standing may assert that testers do not suffer emotional injuries because they expect to experience discrimination. As the EEOC noted, however, courts have consistently recognized the injuries of "test" plaintiffs[181] in the civil rights context.[182] Moreover, where, as here, testers have alleged emotional injuries,[183] doubts as to the veracity of their claims

176. *See, e.g., Burdine*, 450 U.S. at 255 (stating that defendant must clearly set forth the reasons for rejecting plaintiff).

177. *See* Landever, *supra* note 3, at 394-95 (discussing race discrimination in contracting).

178. *See supra* note 3 (discussing testers generally).

179. Runyon v. McCrary, 427 U.S. 160, 182 (1976).

180. As the courts once recognized, racial discrimination is, by definition, class discrimination. *See supra* note 83 (discussing liberal judicial policies for class certification in the past). Therefore, testers experience disparagement and degradation along with other minorities who employers exclude by the discriminatory conduct.

181. The EEOC defines "test" plaintiffs as plaintiffs who subject themselves to discriminatory conduct for the purpose of testing its legality. EEOC Notice, *supra* note 3, ¶ 2168.

182. *Id.*

183. *FEC*, 28 F.3d at 1273-74.

merely raise questions of fact, which courts should decide at trial.

c. *Courts Recognize Fair Housing Testers' Similar Injuries*

Other courts, recognizing the nature of testers' injuries, have correctly held that § 1981 and § 1982 confer a cause of action on fair housing testers.[184] As the EEOC noted, fair housing and fair employment testers serve essentially the same function.[185] The *FEC* court should have followed precedent and EEOC guidelines by holding that § 1981 recognizes employment testers' injuries as cognizable.

Furthermore, the Supreme Court has recognized tester standing under Title VIII.[186] While Title VIII explicitly creates a right to truthful information, the remedial nature of civil rights legislation as a whole counsels against restrictive construction of precedent thereunder.[187] Fair employment and fair housing are but "opposite sides of the same coin,"[188] and truthful information is as relevant to the job search as to the housing market. The *FEC* court should have followed Title VIII precedent in its § 1981 analysis and found that employment testers have standing.

d. *The* FEC *Court Severed the Public Aspect of Section 1981 by Reducing Testers' Allegations to an Untenable Property Claim*

The circuit court's holding erroneously reduces § 1981's protection to narrow economic interests.[189] By focusing on the testers' interest in contracts with BMC or on referral, the court completely evades the substance of their claims.[190] Section 1981, however, protects more than a narrow property interest in a particular job. Indeed, in 1991 Congress rebuffed judicial efforts to so limit § 1981's coverage.[191]

184. *See supra* notes 113-16 and accompanying text (discussing cases in which courts found standing for housing testers under § 1981 and § 1982).

185. *See supra* notes 117-21 and accompanying text (discussing EEOC Policy Guidance).

186. Havens Realty Corp. v. Coleman, 455 U.S. 363, 372-74 (1982).

187. *See supra* note 99 (discussing liberal standing in civil rights cases).

188. Waters v. Heublein, Inc., 547 F.2d 466, 469 (9th Cir. 1976), *cert. denied*, 433 U.S. 915 (1977).

189. *See FEC*, 28 F.3d at 1270-71.

190. *See id.* The court's comparison of testers' injuries to Fifth Amendment takings jurisprudence is telling in this regard.

191. 42 U.S.C. § 1981(b) (1994) (overruling Patterson v. McLean Credit Union, 491 U.S. 164 (1989)). Even the *Patterson* court, moreover, acknowl-

In addition to narrowing the scope of injuries that Congress designed § 1981 to redress, the *FEC* court's analysis divests § 1981 of its public aspects. Section 1981 contemplates societal and structural change.[192] The court, however, treated the testers as if they had merely alleged an interference with contractual relations or another strictly private harm.[193] Thus construed, the testers' claim to § 1981's protection became incomprehensible.

Testers' intentions and misrepresentations do not determine their rights under § 1981.[194] Only by mischaracterizing the testers' claims does the court purport to render such facts relevant to the standing inquiry. The same mischaracterization renders irrelevant the congressional interest of having discriminatory practices removed through litigation.

2. *The* FEC *Court Misinterpreted Third-Party Standing Exceptions as Categorical Rather than Policy-Based*

The court of appeals treats organizational standing under § 1981 as narrowly as it treats cognizable injuries.[195] As the court acknowledged in its Title VII analysis, the Council alleged concrete injury in the form of set-backs to its programs furthering equal employment.[196] Although such injuries result from BMC's conduct toward third parties, § 1981 renders the rule inapposite in the case of an organization sponsoring testers.

In this case, powerful countervailing considerations support third-party standing. As the court itself noted, prudential rules are rules of construction.[197] Courts should balance third-party factors to accommodate the showing on both obstacle and relationship factors and to address the standing policies served.[198] Where "countervailing considerations" outweigh a prudential

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edged that discriminatory conduct occurring at the initial stages of the contracting relationship violates § 1981. 491 U.S. at 180-81.

192. *See supra* notes 87-90 and accompanying text (discussing § 1981 generally).

193. *FEC*, 28 F.3d at 1270-71.

194. *See supra* notes 87-90 and accompanying text (discussing § 1981 generally).

195. *See supra* notes 153-64 (discussing D.C. Circuit's analysis of organizational standing under § 1981).

196. *See supra* notes 167-71 (discussing testers' injuries).

197. *FEC*, 28 F.3d at 1278.

198. Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 623 n.3 (1989); Amato v. Wilentz, 952 F.2d 742, 749 (3d Cir. 1991); *see supra* notes 60-69 and accompanying text (discussing third party standing generally).

rule's underlying policies, the rule must give way.[199] Although the Council's association with bona fide candidates may not be as "strong" as a doctor-client or vendor-vendee relationship,[200] the Council's interests converge with bona fide job seekers because both seek equal opportunity in the employment market. Bona fide job applicants also face significant barriers to suit.[201] Indeed, direct victims of BMC's alleged conduct will likely not recognize any discriminatory acts against them because the nature of the employment process hides the reasons, discriminatory or otherwise, behind its results.[202] Because the Council has suffered concrete harm[203] and has aligned its interests with rightholders[204] who face substantial barriers to suit,[205] the D.C. Circuit should have granted third-party standing to vindicate the important policies behind § 1981.

Moreover, denying the Council standing furthers none of the policies behind the prudential rules. While the Council could conceivably recruit some bona fide applicant plaintiffs by publishing the results of its test,[206] the benefits of having those plaintiffs as parties remains unclear. Recruiting actual applicants would not produce a "better plaintiff" or a more adversarial hearing because the interests of the Council and those hypothetical plaintiffs are nearly identical.[207] Nor is the Council's complaint the kind of generalized grievance best addressed by another governmental forum.[208] To the contrary, both Congress and the Executive Branch have spoken, and the Council seeks to vindicate their common policy.[209] Countervailing con-

199. Warth v. Seldin, 422 U.S. 490, 500-01 (1975).

200. *See supra* notes 69 (discussing inconsistencies in Supreme Court third party standing jurisprudence), 158 (*FEC* court's reconciliation of same).

201. *See supra* notes 14-15 (discussing barriers to suit in failure to hire cases generally).

202. *See supra* note 14 (discussing barriers to suit in failure to hire cases generally).

203. *FEC*, 28 F.3d at 1276-78.

204. *See supra* notes 65-66, 68 (discussing relationship factors).

205. *See supra* note 64 (discussing the obstacle factor).

206. The *FEC* court itself suggested that the Council could recruit bona fide plaintiffs by publishing the results of its tests. *FEC*, 28 F.3d at 1280.

207. *See supra* notes 61-62 and accompanying text (describing policies behind prudential rule against third party standing and exceptions); *cf.* Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) (discussing what constitutes a proper party for purposes of standing); Singleton v. Wulff, 428 U.S. 106, 114-15 (1976) (plurality opinion) (same); Flast v. Cohen, 392 U.S. 83, 99-100 (1968) (same).

208. Warth v. Seldin, 422 U.S. 490, 500 (1975).

209. Congress has spoken through enactment and amendment of § 1981. *See supra* notes 87-90 (discussing congressional intentions in enacting § 1981),

siderations clearly outweigh the policies against third-party standing in the case of employment testers.

The court should have noted § 1981's significance as part of the foundation of our nation's civil rights legislation[210] and the importance Congress has placed on the policy of eliminating employment discrimination.[211] The court should have evaluated the Council's third-party standing in light of congressional intent.[212] The *FEC* court, however, evades policy-based arguments by characterizing third-party standing jurisprudence as categorical in nature.

3. The *FEC* Court Subjected Testers' Title VII Claims to Unnecessary Formalism

Although the *FEC* court effectively avoids the question, Title VII by its express terms reaches BMC's alleged conduct.[213] Precedent under Title VIII supports tester standing under Title VII,[214] and tester standing serves Title VII's broad deterrent purposes.[215] The D.C. Circuit, however, employed a constricted view of standing requirements for litigants seeking injunctive relief.

a. *The* FEC *Court Improperly Relied on* City of Los Angeles v. Lyons *and* Lujan v. Defenders of Wildlife

In denying tester standing under Title VII, the *FEC* court relied on precedent serving separation of powers and federalism values. Although the Supreme Court has indicated that these

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93 (discussing congressional intentions in amending § 1981). The Executive Branch, through the EEOC, has spoken in published guidelines. *See supra* notes 117-21 (discussing the relevant EEOC notice).

210. *See supra* notes 73-74 and accompanying text (discussing the origins of U.S. civil rights legislation).

211. *See supra* notes 73-74 and accompanying text (discussing some congressional intentions in passing civil rights legislation).

212. *Cf. supra* note 81 and accompanying text (describing role of private attorneys general under Title VII). Although Congress has not granted standing under § 1981 to the full extent of Article III, this determination does not end the inquiry. If, as the court itself suggests, prudential rules are rules of statutory interpretation, congressional intent must inform the court's evaluation of the third-party standing factors.

213. Title VII prohibits refusal, by an employment agency, to refer for employment on the basis of race. 42 U.S.C. § 2000e-2(b) (1994); *see also* EEOC Notice, *supra* note 3, ¶ 2168 (finding standing for testers under Title VII).

214. Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-74 (1982).

215. *See supra* notes 73-81 (discussing Title VII's remedial purposes).

values animate standing doctrine,[216] they are irrelevant in the context of employment tester standing under federal statutes.

The *FEC* court erred in its reliance on the denial of standing in *City of Los Angeles v. Lyons*.[217] The balance of equities in *FEC* differs from those in *Lyons*[218] because *Lyons* repeatedly emphasized that the plaintiff still had his damages remedy.[219] In *FEC*, however, the denial of prospective relief left the testers with no recourse. Moreover, because bona fide applicants probably will not discover the discrimination, denial of standing to testers leaves BMC, and others who refer or employ entry level job-seekers, with less incentive to comply with the law.[220]

In addition, *Lyons* served important federalism principles not found in employment tester cases. The *Lyons* plaintiff asked federal courts to supervise the policies of a metropolitan police force.[221] The Court emphasized that "local authorities" would better address these concerns.[222] Here, the testers did not ask the court to supervise any state agency. Furthermore, no more appropriate authority exists to address BMC's conduct than the federal courts. Thus, the court improperly applied *Lyons*'s stringent standard for pleading likelihood of injury to the employment tester case.

The court similarly misapplied *Lujan v. Defenders of Wildlife*.[223] *Lujan*'s denial of standing to challenge foreign aid policy for want of imminent injury[224] reflected a concern for the proper relationship between the judiciary and the executive. The Supreme Court understandably declined to dictate American foreign policy. *FEC*, however, involved no similar concerns.

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216. Allen v. Wright, 468 U.S. 737, 752 (1984)

217. *See FEC*, 28 F.3d 1268, 1272-74 (D.C. Cir. 1994) (citing City of Los Angeles v. Lyons, 461 U.S. 95 (1983)); *supra* notes 54-59 (discussing *Lyons* generally), 150 (describing *FEC* court's interpretation of *Lyons*).

218. *See supra* note 55 (discussing the Supreme Court's appraisal of the equities in *Lyons*).

219. *Lyons*, 461 U.S. at 103 (citing O'Shea v. Littleton, 414 U.S. 488, 502 (1974)).

220. Indeed the very obstacles which support the Council's third party standing under § 1981 make it likely that BMC, and other employment agencies, will face no deterrence to discriminatory conduct. *See supra* note 14 and accompanying text (discussing barriers to suit in failure to hire cases generally).

221. *Lyons*, 461 U.S. at 111-12.

222. *Id.* at 111.

223. *See FEC*, 28 F.3d 1268, 1273 (D.C. Cir. 1994) (citing Lujan v. Defenders of Wildlife, 112 S.Ct. 2130, 2138 (1992)); *supra* notes 48-50 (discussing *Lujan*).

224. *Lujan*, 112 S.Ct. at 2138.

FEC's denial of tester standing under Title VII thus rests on inapplicable precedent. As the dissents in both *Lujan* and *Lyons* noted, those decisions almost revived the kind of formal pleading abolished by the Federal Rules of Civil Procedure.[225] Ordinarily, however, courts must read pleadings to encompass the specific within the general.[226] Where, as here, the plaintiff has the power to initiate contact with the employer and has alleged a pattern or practice of discrimination,[227] the court's action becomes an arch-formalism when it denies standing for failure to allege an intention to approach the employer. Absent important separation of powers or federalism concerns, such as those present in *Lujan* and *Lyons*, the court has no basis for extending such formalism to the standing inquiry.

b. *Title VII Confers Broad Standing*

The D.C. Circuit also should have granted standing because, under Title VII, plaintiffs receive broad standing. Congress expressly granted Title VII plaintiffs the broadest possible standing.[228] Because the EEOC has asserted that testers have standing,[229] granting testers standing constitutes neither impropriety nor judicial trespass. Moreover, precedent in the civil rights arena exists for liberal standing to pursue injunctive relief.[230] Under Title VII the inquiry tends to focus on the extent of discriminatory conduct.[231] Where, as here, the evidence indicates a "pattern or practice" of discrimination, it justifies the issuance of injunctive relief.[232]

4. The Testing Program Manifests the Council's Injury

Although an organization itself decides where to "invest its limited resources,"[233] the *FEC* court erroneously concluded that

225. *Id.* at 2151-54 (Blackmun, J., dissenting); *Lyons*, 461 U.S. at 120-21 (Marshall, J., dissenting).
226. *Lujan*, 112 S.Ct. at 2151-54.
227. *FEC*, 28 F.3d at 1273-74.
228. Trafficante v. Metropolitan Life Ins. Corp., 409 U.S. 205, 209 (1972).
229. EEOC Notice, *supra* note 3, ¶ 2168.
230. *See supra* notes 99 (discussing liberal standing in civil rights generally), 102-03 (discussing injunctive relief under Title VII), 120-23 and accompanying text (discussing EEOC Interpretation of Title VII).
231. *See supra* note 103 (discussing the court's expectation that an employer will discriminate in the future).
232. Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982).
233. *See supra* notes 161-64 and accompanying text (discussing the *FEC* court's limitations on organizational standing).

testing represented a self-inflicted injury.[234] Rather, expenditures on such programs manifest the injury to the organization. In the housing context, the Supreme Court has granted standing based on the "drain on resources" of "identifying and counteracting" discrimination.[235] Furthermore, all organizations necessarily make budgetary determinations. Discriminating employers, however, necessitate the expenditure of resources on testing. Expenditures to counteract discrimination[236] are thus a "manifestation of the injury that those [asserted illegal] practices had inflicted"[237] upon the organization's interests.

5. The *FEC* Court Failed to Defer to EEOC Guidelines

By relegating the EEOC guidelines and amicus brief to a mere footnote in the opinion,[238] the *FEC* court ignored the well established principle that courts give substantial deference to the governmental agency responsible for administering a statute.[239] The *FEC* court should have followed the EEOC's position that testers have standing under Title VII[240] because the agency made a well-reasoned interpretation of an ambiguous statute, consistent with case law and congressional intent.[241]

B. *FEC* Represents an Unfortunate Trend of Judicial Hostility to Public Litigation

The D.C. Circuit Court's narrow analysis follows an unfortunate trend in civil rights jurisprudence.[242] As courts view invidious discrimination more as isolated private torts than as a public structural impediment to equal access to the employment marketplace,[243] the scope of injuries deemed cognizable under

234. *FEC*, 28 F.3d at 1276. Almost any organizational injury imaginable is "self-inflicted" as the *FEC* court defines the term. Rather, courts must ask whether the challenged action necessitates the budgetary choice.

235. *Havens*, 455 U.S. at 379.

236. *See FEC*, 28 F.3d at 1276 (finding that expenditures made to counteract discriminatory conduct are cognizable).

237. *Id.* at 1277.

238. *Id.* at 1272 n.1.

239. *See supra* notes 122-25 and accompanying text (discussing agency deference).

240. EEOC Notice, *supra* note 3, ¶ 2168. *See supra* notes 117-21 (describing EEOC guidelines and reasoning).

241. *See supra* note 125 and accompanying text (discussing cases in which courts considered sufficiency of agency interpretation).

242. *See* Zemelman, *supra* note 73, at 189-96 (discussing judicial narrowing of Title VII); *supra* notes 82-84 and accompanying text (same).

243. *See supra* notes 82-84 and accompanying text (discussing judicial narrowing of Title VII).

civil rights legislation narrows in proportion.[244] Although the modern standing doctrine arose as a manifestation of the rise of public litigation,[245] it has become a tool for avoiding the merits of public claims.

The circuit court's analysis reified judicial hostility toward public litigation by masking its antipathy in seemingly neutral, prophylactic rules. The court reduced the testers' § 1981 claim to an untenable property claim, never acknowledging the nature of the rights at stake.[246] Further, the court divided third-party standing cases into narrow categories,[247] existing, along with *Lyons* and *Lujan*,[248] without reference to the policies they serve. Just as the discrimination that testers seek to uncover, the standing doctrine becomes an unspoken, invisible barrier that never signifies its purposes.

Commentators have described judicial treatment of civil rights litigation as subversive of congressional intent.[249] Courts manipulate standing, a doctrine ostensibly insuring that courts respect their proper bounds, to impose judicial views on the propriety of certain kinds of suits.[250] Restrictions on class certification in the late 1970s and the 1980s accompanied the notion that federal laws had largely remedied discrimination and that Title VII had become overenforced.[251] Today, restrictions on the individual litigant follow.[252]

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244. *See* Chayes, *supra* note 34, at 10-26 (discussing judicial narrowing of Title VII); Zemelman, *supra* note 73, at 189-95 (same); *supra* notes 82-84 and accompanying text (same).

245. *See supra* notes 34-39 and accompanying text (discussing the evolution of modern standing doctrine).

246. *See supra* notes 189-94 and accompanying text (discussing the method and consequences of reducing testers' allegations to an untenable property claim).

247. *See supra* notes 195-212 and accompanying text (discussing the *FEC* court's division of third party standing cases into narrow categories).

248. *See supra* notes 215-26 and accompanying text (discussing the inapplicability of *Lyons* and *Lujan* as precedent).

249. Chayes, *supra* note 34, at 8; *see also* Wards Cove Packing Co., Inc. v. Atontio, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting) ("One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was."); Zemelman, *supra* note 73, at 189-95 (discussing the enactment and judicial interpretations of Title VII).

250. *See, e.g.*, Chayes, *supra* note 34, at 9-10 (discussing judicial manipulation of standing); Nichol, *supra* note 34, at 75-79 (same); *see also* notes 42-53 and accompanying text (describing inconsistencies in the injury in fact prong).

251. Zemelman, *supra* note 73, at 195; *see also supra* notes 82-83 (describing restrictions on class actions).

252. *See supra* notes 83-84 and accompanying text (discussing judicial narrowing of Title VII).

The judiciary, however, has clearly not overenforced Title VII. Indeed, in certain areas, most notably entry-level hiring, courts have dramatically underenforced the law.[253] Because of the particular nature of the entry-level employment search,[254] testers come well equipped to ferret out discriminatory conduct that goes otherwise undetected. Testers can identify discrimination particularly well in a referral situation where a discriminating employer may erect yet another barrier to detection of its practices. Furthermore, Congress has repeatedly signified its intention to eliminate employment discrimination in all its vestiges.[255] Because enforcement by testers falls within the ambit of both Title VII and § 1981, courts should therefore recognize standing in such cases.

C. Standing Inquiry Must Explicitly Account for the Policies Implicated

Courts must recognize the value and place of public model litigation. Standing inquiries pitched in ostensibly neutral terms but framed to exclude public model arguments are simply unacceptable. Although structurally-minded legislation raises genuine questions about the role of the judiciary in the modern state, society comes no closer to answers by avoiding discussion of the questions. Rather, courts must explicitly address the issues implicated in a given standing question.

One Supreme Court Justice described standing as a "word game played by secret rules."[256] Courts should make these rules clear. The judiciary needs a gate-keeping mechanism for its own orderly operation as well as the maintenance of its separation from other branches. Standing fulfills that function, but the inquiry must become an open one.

CONCLUSION

The D.C. Circuit Court of Appeals erred in denying employment testers standing under Title VII and § 1981 and in granting only limited standing to the sponsoring organization. The *FEC* court mischaracterized the nature of the testers' claims,

253. *See supra* notes 14-15 and accompanying text (discussing barriers to suit in failure-to-hire cases).

254. *See supra* note 15 and accompanying text (discussing judicial underenforcement in certain types of hiring cases).

255. *See supra* notes 86-87 and accompanying text (discussing congressional intention that the court interpret Title VII broadly).

256. Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

treating them as if they had alleged a loss of property interests. The court's strict construction of civil rights laws conflicts with their remedial purposes. The court's narrow definition of injury and failure to consider the purposes of either Title VII or § 1981 represent an unfortunate trend. By viewing public wrongs through the lens of a private litigation model, courts eliminate the structural aspect of remedial legislation and undermine congressional intent. Courts should not twist the standing inquiry, which exists to ensure that courts confine themselves to their proper role, to fit the private litigation model. Under an analysis that accounts for congressional policies and justiciability values, tester standing becomes clear. It is time for a standing doctrine that openly addresses the issues and policies at stake.