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The Case Against Employment Tester Standing Under Title VII and 42 U.S.C. § 1981

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NOTE

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INTRODUCTION

In 1964, Congress passed comprehensive legislation aimed at eradicating discrimination in employment, public accommodations, public facilities, public schools, and federal benefit programs.[1] Title VII of this Act directed its aim specifically at stamping out prejudice in employment.[2] Four years later, the Supreme Court resurrected[3] the

1. *See generally* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C. (1994)).

2. *See generally* 42 U.S.C. § 2000e (1994).

provisions of § 1 of the Civil Rights Act of 1866,[4] which, among other things, protects citizens, regardless of race or color, in their right to "make and enforce [employment] contracts."[5] Together, Title VII and § 1981 serve as the primary legal bases for challenging racially discriminatory actions by private employers. More than thirty years after the passage of Title VII and the Court's resurrection of § 1981, though, society continues to feel the lingering effects of America's history of slavery and segregation in the field of employment.[6] A study by the Urban Institute in the late 1980s and early 1990s determined that black job applicants continued to face discriminatory treatment at all levels of the hiring process.[7] In view of the continuing effects of discrimination in employment, a number of civil rights organizations around the country have employed testing as a means of ferreting out discrimination in the hiring process.[8]

"[A] 'tester' is an individual who, without the intent to accept an offer of employment, poses as a job applicant in order to gather evidence of discriminatory hiring practices."[9] The testing process usually involves the dispatch of pairs of equally credentialed candidates, one black and one white, to job interviews.[10] Organizations that conduct employment testing ensure equivalency within the pairs by selecting

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3. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968) (" 'The fact that . . . [the Civil Rights Act of 1866] lay partially dormant for many years cannot be held to diminish its force today.' " (quoting the oral argument of the Attorney General)).

4. Section 1 of the Civil Rights Act of 1866 is codified at 42 U.S.C. §§ 1981-82 (1994).

5. 42 U.S.C. § 1981; *see also* Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459-60 (1976) ("Although this Court has not specifically so held, it is well settled among the Federal Courts of Appeals — and we now join them — that § 1981 affords a federal remedy against discrimination in private employment on the basis of race." (internal notes omitted)).

6. Daniel M. Tardiff, *Knocking on the Courtroom Door: Finally an Answer from Within for Employment Testers*, 32 LOY. U. CHI. L.J. 909, 909-10 (2001).

7. 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. REFORM 403, 410 (1993); *see also* MARGERY AUSTIN TURNER ET AL., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING 37-66 (1991) (laying out the findings of the Urban Institute study).

8. Shannon E. Brown, *Tester Standing Under Title VII*, 49 WASH. & LEE L. REV. 1117, 1119-20 (1992).

9. Kyles v. J.K. Guardian Sec. Servs., 222 F.3d 289, 291 n.1 (7th Cir. 2000) (citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 370, 374 (1982)).

10. Brown, *supra* note 8, at 1120. The literature and case law in this area have to date focused upon the use of testing in the context of discrimination on the basis of race or color. Testing, however, may prove valuable to ferret out discrimination on the basis of national origin, sex, and other characteristics as well. *See, e.g.*, Chicago Area Council of Boy Scouts of Am. v. City of Chicago Comm'n on Human Relations, 748 N.E.2d 759, 770 (Ill. App. Ct. 2001) (testing for sexual orientation discrimination); Molovinsky v. Fair Employment Council of Greater Wash., Inc., 683 A.2d 142, 146 (D.C. 1996) (testing for sex discrimination); Elizabeth E. Theran, *"Free To Be Arbitrary and . . . Capricious": Weight-Based Discrimination and the Logic of American Antidiscrimination Law*, 11 CORNELL J.L. & PUB. POL'Y 113, 163 (2001) (testing for weight-based discrimination).

testers with similar personalities and providing them with similar backgrounds, credentials, and interview techniques.[11] These testers report back regarding their experiences in the interview process, and the organization analyzes these reports, combined with the outcomes of the interview process, to determine whether the employer is engaging in discriminatory hiring practices.[12] The information provided by these testers can constitute invaluable evidence of discrimination in the job market. Whereas the single applicant can provide only anecdotal evidence regarding her experience, testing provides comparative evidence that can strengthen an individual plaintiff's initial complaint under Title VII or § 1981.[13]

While testing serves as a useful tool in the fight against employment discrimination, many employers have challenged the practice as unethical, deceptive, detrimental, and costly.[14] They argue that testing increases the costs of hiring, as employers must expend valuable interviewing resources on candidates who have no interest in actual employment.[15] Whereas the costs associated with finding each qualified candidate may be limited in some industries, for example, food service, these costs can be quite high in areas such as professional services. In these areas, employers spend significant monies to attract each candidate; the loss of a qualified applicant to maintain a spot for a covert tester can result in an inability to fill the spot with a suitably qualified candidate.[16] Moreover, employers have characterized testing as entrapment, because testers, like undercover agents, utilize false credentials to misrepresent themselves to the intended object of the entrapment.[17]

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11. Brown, *supra* note 8, at 1120.

12. *Id.* at 1120-21.

13. *See* Yelnosky, *supra* note 7, at 414; *see also* Michelle Landever, Note, *Tester Standing in Employment Discrimination Cases Under* 42 U.S.C. § 1981, 41 CLEV. ST. L. REV. 381, 382 (1993).

14. Tardiff, *supra* note 6, at 956; *see also EEOC's Endorsement of Testers in Bias Cases Could Lead to Abuses, Employers' Group Charges*, 31 Daily Lab. Rep. (BNA) No. 31, at A-10 (Feb. 14, 1991) (noting views of the Equal Employment Advisory Council, an umbrella organization of large employers, that employment testing amounts to "trickery and deceit," "fraud," and "deception").

15. Tardiff, *supra* note 6, at 956; *see also EEOC's Endorsement of Testers in Bias Cases Could Lead to Abuses, Employers' Group Charges, supra* note 14.

16. Yelnosky, *supra* note 7, at 414-15; *see also Equal Employment Advisory Council Letter on Proposed Testing Policy at EEOC*, 31 Daily Lab. Rep. (BNA) No. 31, at E-1 (Feb. 14, 1991):

> [The EEOC's tester policy] ignores all the time employers will waste and expense they will incur in interviewing, evaluating, testing, and checking the references of persons who have no real interest in employment. It also fails to consider the opportunities that will be lost when employers discover that their top-ranked candidates are testers only after it is too late to bring back other qualified candidates who had a sincere interest in being hired.

17. Tardiff, *supra* note 6, at 956; *see also EEOC's Endorsement of Testers in Bias Cases*

These policy arguments regarding the merits of employment testing, though valuable to social discourse about the proper means of achieving a colorblind society, fail to reach the primary legal question currently surrounding employment testing — the question of standing for employment testers. The doctrine of standing encompasses two distinct sets of limitations upon the ability of prospective plaintiffs to maintain discrimination suits in federal court: judicially-created prudential requirements[18] and constitutionally-mandated limitations.[19] The circuits that have considered whether testers can meet either the constitutional or prudential standing requirements to sue for damages or prospective relief[20] have split, failing to achieve consensus on the ability of testers to satisfy the standing requirements under either Title VII of the Civil Rights Act of 1964[21] or 42 U.S.C. § 1981.[22] The Fourth Circuit has determined that testers do not possess standing under Title VII,[23] while the Seventh Circuit has found the requisite basis for standing under the statute.[24] The D.C. Circuit has also held against standing for testers under Title VII, but, so far, only with regard to their ability to seek prospective relief.[25] With regard to standing under

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Could Lead to Abuses, Employers' Group Charges, *supra* note 14 at A-10; Alex Young K. Oh, *Using Employment Testers to Detect Discrimination: An Ethical and Legal Analysis*, 7 GEO. J. LEGAL ETHICS 473, 498 (1993).

18. The prudential standing requirements recognized by the Court derive not from Article III of the United States Constitution but rather from concerns about judicial self-governance. Warth v. Seldin, 422 U.S. 490, 500 (1975). These self-imposed standing requirements prevent plaintiffs from asserting the rights of third-parties, *id.*, litigating generalized grievances common to either all citizens or a broad class of citizens, *id.* at 499, or seeking judicial intervention in an area that is not "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970). These requirements, though, may be waived by express congressional action. Bennett v. Spear, 520 U.S. 154, 163 (1997) ("Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated." (citations omitted)).

19. The Court also recognizes three constitutionally-based limitations on the ability of a plaintiff to maintain standing before the Court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). These limitations require that the plaintiff show that she has suffered an injury cognizable under the constitutional or statutory provision cited as the basis for relief, that her injury can be causally linked to the alleged actions of the defendant, and that a favorable decision by the court would redress her injury. *Id.* (These requirements are commonly referred to as injury-in-fact, causation, and redressability.) Unlike with the prudential requirements, Congress lacks the power to abrogate these standing hurdles. Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997).

20. BLACK'S LAW DICTIONARY 1238 (7th ed. 1999) (defining "prospective" as "effective or operative in the future"); *id.* at 1293 (defining "relief" as "redress or benefit, esp[ecially] equitable in nature (such as an injunction or specific performance) that a party asks of a court").

21. 42 U.S.C. § 2000e (1994).

22. 42 U.S.C. § 1981 (1994).

23. *See* Sledge v. J.P. Stevens & Co., 585 F.2d 625, 641 (4th Cir. 1978).

24. Kyles v. J.K. Guardian Sec. Servs., 222 F.3d 289, 298-99 (7th Cir. 2000).

§ 1981, the Seventh and D.C. Circuits have ruled against testers,[26] while the Eleventh and Third Circuits have accorded testers standing to pursue their claims.[27]

This Note argues that, while employment testing may serve a laudable purpose in identifying discrimination and in gathering evidence of discriminatory treatment, employment testers do not meet the requirements for standing under either Title VII or § 1981. Part I maintains that employment testers do not suffer the requisite injury-in-fact[28] necessary for standing to seek compensatory damages under Title VII and further that testers cannot meet the redressability[29] requirements for prospective relief. Part II contends that testers also may not seek standing under § 1981, as they fall outside the zone of interests[30] that Congress sought to protect with the statute. Finally, Part III argues that the purposes of the standing doctrine — to maintain proper respect for separation of powers between the coequal branches of the federal government[31] — require that standing for employment testers be granted not by judicial fiat but only through congressional action. This Note concludes that employment testers cannot satisfy the standing requirements to pursue suits under either Title VII or § 1981; moreover, in light of the courts' responsibility to defer to Congress as creator of statutory bases for standing, any close question regarding tester standing should be resolved against a recognition of standing.

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25. Fair Employment Council of Greater Wash., Inc., v. BMC Mktg. Corp., 28 F.3d 1268, 1275 (D.C. Cir. 1994).

26. *Kyles*, 222 F.3d at 302; *BMC Mktg. Corp.*, 28 F.3d at 1271.

27. Watts v. Boyd Properties, 758 F.2d 1482, 1485 (11th Cir. 1985); Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 898 (3d Cir. 1977).

28. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (defining injury-in-fact as "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical" (internal citations and quotations omitted)); *id.* at 560 n.1 ("By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.").

29. *Id.* at 561 (noting that, in order to meet the redressability requirement, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision" (internal quotations and citations omitted)).

30. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970) ("The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."); *see also* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-19, at 446-47 (3d ed. 2000):

> [T]o say that a particular plaintiff's claim does not fall within the zone of interests of a given constitutional provision is another way of saying that the right claimed is one possessed not by the party asserting it, but rather by others, and that the plaintiff will not have standing to assert a violation of these rights of absent third parties, whose claims *would* fall within the applicable zone of interests.

31. *See generally* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

I. EMPLOYMENT TESTER STANDING UNDER TITLE VII

This Part contends that employment testers fail to meet the minimum requirements necessary for standing to seek either compensatory damages or prospective relief under Title VII. Section I.A argues that employment testers do not suffer the injury-in-fact necessary to pursue Title VII compensatory damages, while Section I.B maintains that employment testers cannot meet the redressability prong essential to achieve standing for prospective relief.

A. *Injury-in-Fact and Compensatory Damages*

Though most plaintiffs face the prospect of satisfying both the constitutional and prudential standing hurdles,[32] in the Title VII context, Congress has waived the prudential standing requirements[33] so that litigants may assert standing to the "outermost limits of Article III."[34] Congress, however, may not waive the Article III standing requirements.[35] Thus, in order to maintain standing under Title VII, employment testers must plead sufficient facts to demonstrate injury-in-fact, causation, and redressability.[36] The injury alleged by employment testers, discriminatory treatment at the hands of an employer or employment agency, meets the causation requirement, as the injury can be directly traced to the alleged actions of the defendant.[37] In addition, taking into consideration the purpose of compensatory damages under Title VII, to provide a "meaningful monetary remed[y] for all forms of workplace harassment,"[38] a favorable damage award could redress the alleged injury of an employment tester.[39] Nevertheless, while the in-

32. *See supra* note 18 (describing the prudential standing requirements).

33. 42 U.S.C. § 2000e-5(b) (1994); *see also* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972) (finding, in context of suit under Title VIII, that "person claiming to be aggrieved" language — present in both Title VIII and Title VII — indicates congressional intent to extend standing to Article III limits).

34. Kyles v. J.K. Guardian Sec. Servs., 222 F.3d 289, 295 (7th Cir. 2000); *accord* Spann v. Colonial Village, Inc., 899 F.2d 24, 27 (D.C. Cir. 1990); EEOC v. Mississippi College, 626 F.2d 477, 482 (5th Cir. 1980).

35. Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997); *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 154; *see also* Doe v. Nat'l Bd. of Med. Exam'rs, 199 F.3d 146, 153 (3d Cir. 1999) (noting, in the context of the Americans with Disabilities Act, that Congress may not, "by statute alone," confer standing absent "actual injury").

36. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); *see also supra* note 19 (describing the Article III standing requirements).

37. *See Lujan*, 504 U.S. at 560.

38. Statement of President George Bush upon Signing S. 1745 (Civil Rights Act of 1991), 27 WEEKLY COMP. PRES. DOC. 1701 (Nov. 25, 1991).

39. Compensatory damages under Title VII are provided under the terms of 42 U.S.C. § 1981a(b) (1994), which provides for punitive damages in cases where the plaintiff proves "malice" or "reckless indifference" and for compensatory damages capped based upon the size, in terms of number of employees, of the defending firm. *See also* RESTATEMENT

jury alleged by an employment tester satisfies both the causation and redressability prongs of the Article III standing requirements, this Part demonstrates that employment testers do not suffer an injury-in-fact cognizable under Title VII.

1. *Umbrella of Statutory Protection*

In order to satisfy the injury-in-fact aspect of the Article III standing, employment testers must show the invasion of a legal right created either by the Constitution or a statute.[40] Because no constitutional provision, absent congressional action, directly provides protection against private discriminatory action in employment, the Constitution itself cannot provide an independent foundation for employment tester standing.[41] Pursuant to its power under the Commerce Clause, however, Congress may make private discrimination unlawful in the economic realm.[42] Nevertheless, in creating statutory rights, the invasion of which would create standing, "Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."[43] In crafting Title VII, Congress failed to create a specific statutory interest that would protect testers;[44] Title VII, by its very terms, extends its protection only to those seeking employment.[45] Employment testers do not seek employment;

(SECOND) OF TORTS § 903 (1977) (" 'Compensatory damages' are the damages awarded to a person as compensation, indemnity or restitution for harm sustained by him."); *id.* at § 905 (noting that compensatory damages may properly be awarded for nonpecuniary, emotional harms).

40. TRIBE, *supra* note 30, § 3-16, at 400-01:

> First, a court must ask whether the injury claimed by the plaintiff qualifies as the type of harm that satisfies Article III. For example, a person subject to criminal prosecution, or faced with its imminent prospect, has clearly established the requisite 'injury in fact' to oppose such prosecution *by asserting any relevant constitutional (or other federal) rights.* (emphasis added).

41. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) (determining that Congress may give effect to the provisions of the Thirteenth Amendment but failing to find a basis for a private right of action within the text of the Thirteenth Amendment itself); Civil Rights Cases, 109 U.S. 3, 11 (1883) ("Individual invasion of individual rights is not the subject-matter of the [Fourteenth] [A]mendment."); *accord* United States v. Morrison, 529 U.S. 598, 599-600 (2000) (reaffirming the central holding of the *Civil Rights Cases* that the Fourteenth Amendment does not reach private conduct); *see also* Warth v. Seldin, 422 U.S. 490, 512-14 (1975) (finding that plaintiff's claim of injury to their ability to enjoy "the benefits of living in a racially and ethnically integrated community" was not judicially cognizable under Article III absent a statutory basis).

42. *See* Katzenbach v. McClung, 379 U.S. 294, 300-01 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241, 250 (1964); *see also* Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." (citations omitted)).

43. Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring).

44. *See* 42 U.S.C. § 2000e-2(a)(1)-(2) (1994).

45. *See id.*

rather, they seek information about a particular employer's hiring practices.[46] Whether adverse or not, the action taken by the employer fulfills the tester's objectives by providing information about the employer's hiring practices.[47] Any injury suffered by the tester as a result of a discriminatory hiring decision does not fall within Title VII's umbrella of statutory protection — an umbrella intended to protect individuals in their pursuit of employment opportunities.[48]

Housing testers, on the other hand, possess standing under Title VIII[49] to pursue claims for discriminatory treatment in the sale or rental of property precisely because Congress created a specific right in all individuals to be free from misrepresentations about the availability of housing.[50] Title VIII provides that "[it shall be unlawful] [t]o represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available."[51] In *Havens Realty Corporation v. Coleman*,[52] the Supreme Court relied upon this specific statutory language to find that Congress had created a particular statutory right under which housing testers could claim standing.[53] The Court founded its decision to accord standing to housing testers upon the injury-in-fact suffered when a tester receives misinformation about the availability of housing, misinformation made illegal by § 804(d) of Title VIII.[54] In fact, the Court noted that the housing tester suffers an "injury in precisely the form that the statute was intended to guard against."[55] Not only did Congress create such a

46. Kyles v. J.K. Guardian Sec. Servs., 222 F.3d 289, 292 n.1 (7th Cir. 2000) (citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 370, 374 (1982)).

47. *Id.*; *see also* Brown, *supra* note 8, at 1120-21.

48. Parr v. Woodmen of the World Life Ins. Soc., 657 F. Supp. 1022, 1032 (M.D. Ga. 1987) ("[H]e . . . would be nothing more than a test plaintiff who never intending to accept employment with Woodmen, he has not been — could not have been — damaged by their failure to hire."). *But see Kyles*, 222 F.3d at 300 (noting that the emotional effects of discriminatory treatment are "cognizable and compensable harms" under Title VII); Molovinsky v. Fair Employment Council of Greater Wash. Inc., 683 A.2d 142, 146 (D.C. 1996) (finding that a local human rights ordinance, like Title VII, creates a general right to be free of discrimination).

49. 42 U.S.C. § § 3601-3631 (1994).

50. 42 U.S.C. § 3604(d) (1994); *Havens Realty Corp.*, 455 U.S. at 373.

51. 42 U.S.C. § 3604(d).

52. 455 U.S. 363 (1982).

53. *Id.* at 373 ("Congress . . . conferred on all 'persons' a legal right to truthful information about available housing."); *accord* Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1526 (7th Cir. 1990); *see also* Steven G. Anderson, *Tester Standing under Title VII: A Rose by Any Other Name*, 41 DEPAUL L. REV. 1217, 1251-1252 (1992).

54. 42 U.S.C. § 3604(d); *Havens Realty Corp.*, 455 U.S. at 373.

55. *Havens Realty Corp.*, 455 U.S. at 373; *accord* Fair Employment Council of Greater Wash., Inc., v. BMC Mktg. Corp., 28 F.3d 1268, 1271-72 (D.C. Cir. 1994) ("Congress had clearly conferred a cause of action on the [housing] testers [under] § 804(d)."); *cf.* Lujan v.

specific right in Title VIII, but Congress also explicitly recognized the role of testing in the Title VIII statutory scheme, granting to the Department of Housing and Urban Development the authority to contract with private groups to perform housing testing for investigative purposes.[56]

In crafting Title VII, however, Congress not only failed to create a broad statutory right in the employment field comparable to the "right to truthful information" enacted in Title VIII[57] but also neglected to recognize a role for testing in the administration of its statutory scheme.[58] In relevant part, Title VII states:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's [membership in a protected class] . . . or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's [membership in a protected class].[59]

While the language of Title VII aims broadly at discrimination in employment, the statute contains no specific statutory right to truthful information regarding the availability of employment opportunities.[60] Rather, the statute protects those individuals who seek employment.[61] On the statute's face, the injury-in-fact necessary for standing under Title VII stems from the loss of an opportunity to be employed or the loss of employment opportunities within the context of one's current employment.[62]

Defenders of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . . .").

56. 42 U.S.C. § 3616a(b)(2) (1994):

> The Secretary shall use funds made available under this subsection to conduct, through contracts with private nonprofit fair housing enforcement organizations, a range of investigative and enforcement activities designed to — (A) carry out testing and other activities in accordance with subsection (b)(1) of this section, including building the capacity for housing investigative activities in unserved or underserved areas.

57. *Havens Realty Corp.*, 455 U.S. at 373. *Compare* 42 U.S.C. § 3604(d) (1994) (including prohibition on misrepresenting the availability of housing to anyone), *with* 42 U.S.C. § 2000e-2(a)(1)-(2) (1994) (failing to include such protection for employment applicants).

58. *Compare* 42 U.S.C. § 3616a(b)(2) (including specific mention of testing in Title VIII statutory scheme), *with* 42 U.S.C. § 2000e (1994) (failing to mention testing of this sort within Title VII).

59. 42 U.S.C. § 2000e-2(a)(1)-(2); *see also id.* at § 2000e-2(b) (granting the same protection to protected class members from discrimination by employment agencies).

60. *See* 42 U.S.C. § 2000e.

61. *Id.* at § 2000e-2(a)(1)-(2).

62. Anderson, *supra* note 53, at 1258 ("If strict standing rules control, Title VII testers may not possess the credentials that courts have required for adjudication."); *cf.* Trafficante

Of course, the text of Title VII includes the term "applicant."[63] Taken out of context, this term could be read to include employment testers, for they act as applicants in order to accomplish their objectives. Nevertheless, such a reading would ignore a central canon of statutory construction, "that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."[64] Taking a holistic view of the language of Title VII, not only does the prepositional phrase "for employment" follow the term "applicant," but "applicant" also nests among six mentions of "employee" or "employment."[65] The term "applicant" cannot be removed from the overall context of employment, or more precisely, the necessity of the applicant to actually be seeking employment.[66] Moreover, the unlawful employment practice — limiting, segregating, or classifying employees or applicants on an impermissible basis — must "deprive or tend to deprive" the applicant of "employment opportunities."[67] Testers plainly do not fit within this overall textual context; the employment tester's only employment relationship stems not from a relationship with the employer with whom she interviews but rather from her employment relationship with the testing organization. The employer's refusal to hire, thus, does not and cannot diminish the employment opportunities of the tester.[68]

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v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972) (White, J., concurring) (noting that, absent the specific congressional creation of a statutory right under Title VIII, he "would have great difficulty in concluding that petitioners' complaint in this case presented a case or controversy within the jurisdiction of the District Court under Art. III of the Constitution"); Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1526 (7th Cir. 1990) (noting that standing for housing testers "is, as an original matter, dubious"); Dash T. Douglas, *Standing on Shaky Ground: Standing Under the Fair Housing Act*, 34 AKRON L. REV. 613, 616 (2001) ("[O]n its face, the standing of [housing] testers is questionable. They have no intent to rent or purchase a home or apartment when they encounter the discrimination." (notes omitted)).

63. 42 U.S.C. § 2000e-2(a)(1)-(2).

64. Deal v. United States, 508 U.S. 129, 132 (1993) (citations omitted); *see also* United States Nat'l Bank of Or. v. Indep. Ins. Agents of Am., 508 U.S. 439, 454-55 (1993) (quoting NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941)) ("[T]ext consists of words living 'a communal existence' . . . the meaning of each word informing the others and 'all in the aggregate tak[ing] their purport from the setting in which they are used.' ").

65. 42 U.S.C. § 2000e-2(a)(1)-(2).

66. *See* 42 U.S.C. § 2000e-2(a)(2) (extending statutory protection to "applicants *for* employment" (emphasis added)); *see also supra* notes 44-48 and accompanying text.

67. 42 U.S.C. § 2000e-2(a)(2). This term has engendered no debate in the case law as to its meaning, and Title VII itself fails to provide a specific definition of "employment opportunities." *See* 42 U.S.C. § 2000e (1994); *cf.* 29 U.S.C. § 630 (1994) (failing to provide a specific definition of "employment opportunities" in the Age Discrimination in Employment Act); 42 U.S.C. § 12112 (1994) (failing to provide a specific definition of "employment opportunities" in the Americans with Disabilities Act). For the purposes of this Note, "employment opportunity" has been interpreted simply to mean the opportunity to be employed.

68. *See* Sledge v. J.P. Stevens & Co., 585 F.2d 625, 641 (4th Cir. 1978) ("Such 'test' plaintiffs are not, of course, harmed by a refusal to hire since they are not seriously interested in the job for which they apply."); *see also* Lea v. Cone Mills Corp., 438 F.2d 86, 88-89 (4th Cir.

2. *Pro-Standing Policy Arguments: Begging the Question*

Although Title VII, especially when read in comparison with Title VIII, does not, by its terms, create a specific statutory right protecting employment testers, advocates for recognizing standing for testers contend that the broad policy goals behind the nation's civil rights laws favor recognizing standing in this context.[69] Specifically, these supporters argue that a broad reading of the Supreme Court's holding in *Havens Realty* and congressional intent behind Title VII favor finding a statutory basis for tester standing within Title VII.

Both the Seventh Circuit and the Equal Employment Opportunity Commission ("EEOC") have found that the Supreme Court's ruling in *Havens Realty* affirmatively answers the question of whether employment testers are entitled to standing under Title VII.[70] In granting standing to employment testers, the Seventh Circuit in *Kyles v. J.K. Guardian Security Services*[71] determined that, while Title VII did not contain a provision similar to the Title VIII provision relied upon by the *Havens Realty* court, "the logic of *Havens*" still supported a ruling in favor of the testers.[72] The court reasoned that *Havens Realty* embraces standing for testers that " 'were treated in a racially discriminatory fashion, even though they sustained no harm beyond the discrimination itself.' "[73] The EEOC similarly has noted that the injury necessary for standing under *Havens Realty* "is disparate treatment based on race, color, religion, sex, or national origin, rather than the

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1971) (affirming district court judgment that plaintiff testers were not entitled to relief in the form of backpay); *cf.* Parr v. Woodmen of the World Life Ins. Soc., 657 F. Supp. 1022, 1032 (M.D. Ga. 1987) ("A plaintiff whose primary purpose in interviewing for a job is to create the basis for a Title VII EEOC charge and lawsuit, is not the bona fide applicant for a job that he must be to establish a prima facie case."); Allen v. Vaughns, 538 F. Supp. 833, 843 (D. Md. 1982), *aff'd*, 737 F.2d 1299 (4th Cir. 1984) (finding that bona fide application necessary to make out a prima facie case of employment discrimination under Title VII).

69. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WHETHER "TESTERS" CAN FILE CHARGES AND LITIGATE CLAIMS OF EMPLOYMENT DISCRIMINATION, Policy Guidance 915.002, at Section III.A.1 (1996), *available at* http://www.eeoc.gov/docs/testers.html [hereinafter EEOC ENFORCEMENT GUIDANCE] ("Standing is generally interpreted broadly under employment discrimination laws to achieve the statutory goal of equal employment opportunity."); Anderson, *supra* note 53, at 1236:

> Congress's objective in enacting Title VII is plain from the language of the statute .... The remedies provision of Title VII accords the right to a private cause of action to any 'person claiming to be aggrieved' .... [S]cholars assert that the Act is aimed more expansively at redressing job discrimination in general.

70. Kyles v. J.K. Guardian Sec. Servs., 222 F.3d 289, 298-99 (7th Cir. 2000); EEOC ENFORCEMENT GUIDANCE, *supra* note 69, at Section III.A.

71. *Kyles*, 222 F.3d 289.

72. *Id.* at 297-98.

73. *Id.* at 297 (quoting Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1527 (7th Cir. 1990)).

loss of employment or housing."[74] Taking this broad view of the *Havens Realty* holding, both the Seventh Circuit and the EEOC have found that "humiliation, embarrassment, and like injuries" resulting from discriminatory treatment and suffered by testers represent actionable harms under Title VII.[75]

The Seventh Circuit and the EEOC, however, base this argument for standing upon a cursory and overbroad view of the Supreme Court's holding in *Havens Realty*. Private discriminatory action, even where it leads to embarrassment or humiliation, is not actionable under federal law absent a proper statutory basis.[76] In fact, the Court in *Havens Realty* relied upon specific statutory language in Title VIII to find a basis for according standing to housing testers.[77] Admitting that Title VII does not create a specific statutory interest that would protect testers, the Seventh Circuit instead noted that the discriminatory treatment of an employment tester creates an injury-in-fact by limiting not only the tester's employment opportunities but also those of all other minority applicants.[78] The relevant language of Title VII, though, emphasizes the opportunities available to a specific individual, requiring a relationship between the employer and a specific employee or applicant.[79] The statutory text does not contemplate the unsubstantiated and conjectural prospective employment opportunities of other imaginary applicants.[80] Absent a more concrete foothold for statutory standing under Title VII, the logic followed by the Court in *Havens Realty* remains inapposite to the employment tester context.[81] While both the Seventh Circuit and the EEOC have tried to effectuate Congress's goals of eradicating discrimination, they have done so in

74. EEOC ENFORCEMENT GUIDANCE, *supra* note 69, at Section III.A.2.

75. *Kyles*, 222 F.3d at 300; *see also* EEOC ENFORCEMENT GUIDANCE, *supra* note 69, at Section III.A.3 (noting that testers may suffer "stigmatization" and are marked with a "badge of inferiority") (quoting Sosna v. Iowa, 419 U.S. 393, 413 n.1 (1975) (White, J., dissenting)); Anderson, *supra* note 53, at 1267 ("[Testers] may claim injury from being denied the benefits of a work environment free of discrimination."); *cf.* TRIBE, *supra* note 30, § 3-16, at 404 ("The legal interest impaired . . . need not be tangible or economic.").

76. *See supra* note 41 and accompanying text.

77. Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982); *see also* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972) (White, J., concurring).

78. *Kyles*, 222 F.3d at 298.

79. *See* 42 U.S.C. § 2000e-2(a)(1)-(2) (2000) (making unlawful, *inter alia*, an employer's failure or refusal to hire "any individual," which requires that the employer have a relationship with a specific individual about whom a hiring decision can be made).

80. *Id.*

81. *See Havens Realty Corp.*, 455 U.S. at 373.

the absence of a statutory basis for recognizing that standing[82] and, in doing so, have violated standing doctrine.[83]

Of course, Title VII, as part of Congress's legislative program to attack discrimination throughout society, may be read broadly to accord wide protection to victims of discriminatory treatment.[84] In crafting the Civil Rights Act of 1964, individual members of Congress expressed in grand terms their intent to eradicate discrimination throughout American society.[85] In *Kyles*, the Seventh Circuit responded to these sentiments in upholding standing for employment testers, finding that, in constructing the language of Title VII, "[Congress] created a broad substantive right that extends far beyond the simple refusal or failure to hire."[86] The *Kyles* court noted that Title VII, in taking broad aim at discrimination in the employment sector, permits individuals to sue for statutory violations as private attorneys general and signals Congress's desire to extend standing under Title

82. *Compare* 42 U.S.C. § 3604(d) (1994) (including prohibition on misrepresenting the availability of housing to anyone), *with* 42 U.S.C. § 2000e-2(a)(1)-(2) (1994) (failing to include such protection for employment applicants).

83. *See supra* notes 40-43 and accompanying text. Even the broadest interpretations of standing under Title VIII, recognizing standing to pursue causes of action for the loss of the benefits of living in an integrated community, are inapposite to the tester context. *See* Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 113-14 (1979); Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210, 212 (1972). The *Gladstone* and *Trafficante* decisions recognized an injury-in-fact under Title VIII, where the plaintiff was directly injured as a member of the community in which residential segregation was occurring. *Id.* An employment tester's injury, if any, does not even come within this broader view of injury-in-fact under the Civil Rights Act of 1964, as a tester is not and will not be a member of the "community" in which the alleged discrimination is occurring, those applicants and employees directly affected in their employment opportunities by a particular employer's adverse and discriminatory employment actions. *Cf. Havens Realty Corp.*, 455 U.S. at 377 ("It is indeed implausible to argue that petitioners' alleged acts of discrimination could have palpable effects throughout the *entire* Richmond metropolitan area .... Our cases have upheld standing based on the effects of discrimination only within a 'relatively compact neighborhood.' " (emphasis in original)).

84. Clayton v. White Hall Sch. Dist., 875 F.2d 676, 679 (8th Cir. 1989) ("Title VII of the Civil Rights Act of 1964 is to be accorded a liberal construction in order to carry out the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of racial discrimination." (internal citations and quotations omitted)); EEOC ENFORCEMENT GUIDANCE, *supra* note 69, at Section III.A.1; Leroy D. Clark, *Employment Discrimination Testing: Theories of Standing and a Reply to Professor Yelnosky*, 28 U. MICH. J.L. REFORM 1, 19 (1994).

85. *See, e.g.*, H.R. REP. NO. 88-914, pt. 2, at 1, 30 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2517 (statements of Rep. McCulloch):

> Aside from the political and economic considerations, however, we believe in the creation of job equality because it is the right thing to do. We believe in the inherent dignity of man.... All vestiges of inequality based solely on race must be removed in order to preserve our democratic society, to maintain our country's leadership, and to enhance mankind.

Id. at 2487; 110 CONG. REC. 12,619 (1964) (statements of Sen. Muskie) (remarking that the Act would finally allow the Nation to begin to achieve the ideals expressed in the Preamble to the Constitution).

86. Kyles v. J.K. Guardian Sec. Srvs., 222 F.3d 289, 298 (7th Cir. 2000).

VII to the limits of Article III.[87] Moreover, employment testers who face discriminatory treatment at the hands of employers or employment agencies experience the lingering vestiges of the once institutionalized discrimination that Congress sought to eradicate through its civil rights legislation.[88] Each of these factors contributed to the Seventh Circuit's finding of a sufficient basis for according standing to employment testers.[89]

Broadly reading the purposes underlying Title VII, however, does not mean that the courts must defer to every novel attempt to assert standing under the statute. While some members of Congress did state the purposes of the 1964 Civil Rights Act and Title VII quite broadly,[90] at no point did Congress actually consider the import of the statutory language defining unlawful employment practices.[91] The most direct reference to these provisions in the congressional debate came from Senator Edmund S. Muskie: "I submit that, read in their entirety, these provisions provide a clear and definitive indication of the type of practice which this title seeks to eliminate."[92] Yet, this most direct reference is conclusory, providing no substantive explanation of the reach of the unlawful employment practices provisions.[93] In fact, no substantive change was made to the unlawful employment practices provisions of Title VII after the Act was reported out of the House Judiciary Committee.[94] Moreover, the text of the House Judiciary Committee's report itself does not speak to the purposes behind or the scope of the unlawful employment practices provisions.[95]

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87. *Id.* at 297-98.

88. EEOC ENFORCEMENT GUIDANCE, *supra* note 69, at Section III.A.2 ("The injury is disparate treatment based on race, color, religion, sex, or national origin, rather than the loss of employment or housing.").

89. *Kyles*, 222 F.3d at 300.

90. *See supra* note 85 and accompanying text.

91. *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLE VII AND XI OF CIVIL RIGHTS ACT OF 1964 1005 (1968) [hereinafter EEOC LEGISLATIVE HISTORY] (noting that, with the exception of the addition of sex as a forbidden basis of discrimination, no substantive changes were made to the unlawful employment practices provisions during Title VII's consideration by the full House and Senate). The relevant statutory language defining unlawful employment practices has been codified at 42 U.S.C. §§ 2000e-2(a)-(d) (1994).

92. 110 CONG. REC. 12,618 (1964).

93. *See id.*

94. EEOC LEGISLATIVE HISTORY, *supra* note 91, at 1005; *see also* 110 CONG. REC. 12,721, 12,722-24, 12,818-20 (1964) (noting that the Dirksen-Mansfield substitute amendment, which eventually was passed as Title VII, made no change to the unlawful employment practices sections); *id.* at 12,812 (illustrating that the annotated version of the bill, showing the changes between the House and Senate versions of the bill, contains no changes to the unlawful employment practices provisions); *id.* at 12,863-67 (containing the Clarke-Case substitute amendment, which, though not adopted, also made no attempt to alter the unlawful employment practices provisions).

95. *See generally* H.R. REP. NO. 88-914 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391.

Most of the references to the purposes of the employment provisions by congressional committees during this period came during the House Education and Labor Committee's consideration of the Equal Employment Opportunity Act, the provisions of which were largely incorporated into or influenced the provisions of Title VII.[96] In its report, the Labor and Education Committee focused on the positive economic benefits that would inure to members of minority groups if they were able to secure employment on a footing equal with whites.[97] The Committee also called attention to the positive economic benefits that would flow to the nation if employment opportunities could be equalized, focusing specifically on lessening the need for welfare assistance among minorities and enhancing labor utilization in an increasingly competitive global economic environment.[98] These concrete goals focus upon the benefits that stem from employment itself. An employment tester does not suffer any injury to her employment prospects; in fact, performing the testing itself fulfills her employment objectives.[99] Congress cannot be said to have foreseen or to have had in mind in crafting Title VII the types of injuries, wholly unrelated to an individual's own employment opportunities, that could be suffered by employment testers.

B. *Redressability and Prospective Relief*

Employment testers also cannot satisfy the requirements for the redressability prong[100] of the Article III standing inquiry. In order to meet the redressability requirement for prospective relief,[101] a plaintiff must show a real and immediate threat of injury.[102] Redressability, in the context of prospective relief, requires this threat of continuing injury because the prospective relief can only redress the plaintiff's injury if she is among those receiving benefits of that relief.[103] Employment testers, however, cannot meet this requirement, as they, by

96. EEOC LEGISLATIVE HISTORY, *supra* note 91, at 2155.

97. H.R. REP. NO. 87-1370, at 2-3 (1962).

98. *Id.*

99. *See supra* notes 44-48, 67-68 and accompanying text.

100. *See supra* note 29.

101. *See supra* note 20; *see also* 42 U.S.C. § 2000e-5(g)(1) (1994) (including injunction, reinstatement, hiring, backpay, or "any other equitable relief as the court deems appropriate" as forms of prospective relief for intentional discrimination under Title VII); *id.* at 2000e-5(g)(2) (including declaratory or injunctive relief but denying reinstatement, hiring, promotion, or backpay as equitable relief in mixed motive cases under Title VII).

102. Lyons v. City of Los Angeles, 461 U.S. 95, 105-06 (1983).

103. Allen v. Wright, 468 U.S. 737, 766 (1984) (" 'The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement.' " (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 39 (1976)).

definition, will not be among the class of persons who would benefit from prospective relief granted against a particular employer.[104] In *Fair Employment Council of Greater Washington, Inc., v. BMC Marketing Corp.*,[105] the D.C. Circuit, following the Supreme Court's analysis in *Lyons v. City of Los Angeles*,[106] held that employment testers lacked standing to pursue prospective relief.[107] While tester plaintiffs may assert that the emotional harms caused by the defendant's alleged discriminatory actions cause continuing harm, the D.C. Circuit noted that, under *Lyons*, the continuing effects of a prior injury, absent a likelihood of a future separate injury, are insufficient to establish standing for prospective relief.[108] Employment testers cannot meet this burden as their lack of interest in either present or future employment with the defendant erases the possibility of them receiving any personal benefit from the issuance of prospective relief.[109]

Proponents of standing for testers argue that denying prospective relief undermines the strength of Title VII by eliminating a key weapon for the eradication of workplace discrimination.[110] Daniel M. Tardiff argues that "adherence to the *Lyons* standard amounts to 'arch-formalism' and is completely inconsistent with the broad standing given by Title VII and accorded by the courts in civil rights cases."[111] In addition to agreeing with Tardiff that applying the *Lyons* standard would undermine congressional intent, the EEOC argues that the text of Title VII "permits a court to award an injunction based on past discrimination without requiring the plaintiff to make a sepa-

104. Fair Employment Council of Greater Wash., Inc., v. BMC Mktg. Corp., 28 F.3d 1268, 1275 (D.C. Cir. 1994); *see also Allen*, 468 U.S. at 766.

105. 28 F.3d 1268 (D.C. Cir. 1994).

106. 461 U.S. 95 (1983). While at least one district court held that the *Lyons* analysis applies only where the plaintiff seeks prospective relief against a governmental actor, Natural Res. Def. Council v. Southwest Marine, Inc., 39 F. Supp. 2d 1235, 1240-41 (S.D. Cal. 1999), several circuit courts have applied the *Lyons* rubric in suits against private defendants. Bowen v. First Family Fin. Servs., 233 F.3d 1331, 1340 (11th Cir. 2000); Armstrong v. Turner Indus., 141 F.3d 554, 562-63 (5th Cir. 1998); Imagineering, Inc. v. Kiewit Pacific Co., 976 F.2d 1303, 1308-09 (9th Cir. 1992).

107. *BMC Mktg. Corp.*, 28 F.3d at 1272-75.

108. *Id.* at 1273 (quoting *Lyons*, 461 U.S. at 107 n.8).

109. Yelnosky, *supra* note 7, at 437 (while arguing for the positive effects of employment testing program, admitting that testers "do not meet the 'personal benefits' requirement for injunctive relief").

110. *See, e.g.*, EEOC ENFORCEMENT GUIDANCE, *supra* note 69, at Section III.A.3 ("[T]o deny injunctive relief to individuals who prove that they were victims of a pattern of discrimination undermines congressional intent to deter discrimination by permitting individuals to function as private attorneys general."); Tardiff, *supra* note 6, at 957-58 ("[D]enying testers standing for equitable relief will leave less incentive for employers to comply with Title VII.").

111. Tardiff, *supra* note 6, at 958.

rate showing of likely future harm."[112] The EEOC notes that Title VII permits a court to "impose injunctive relief whenever 'the [defendant] has intentionally engaged in or is intentionally engaging in an unlawful employment practice,' " allowing prospective relief even for past discriminatory acts.[113]

These arguments fail to reach the crux of the issue. First, the statutory language of Title VII relied upon by the EEOC to justify injunctive relief against past discrimination requires that the defendant have engaged in an "unlawful employment practice."[114] Discrimination against an employment tester, while objectionable, is not an "unlawful employment practice" under the Act, as Title VII only provides protection to those desiring actual employment opportunities, which a tester admittedly does not.[115] Thus, prospective relief would not be available under the statute to enjoin this behavior. Second, even if the statute intends to permit the courts to extend such prospective relief, the statute itself cannot confer upon the courts the power to issue such relief.[116] Congress lacks the power to abrogate the Article III standing requirements.[117] Even if Congress intended the result proffered by the EEOC, the standing requirements of Article III still require that a prospective plaintiff show that the requested relief will redress his injury.[118] While employment testers may be able to assert emotional harm stemming from discriminatory treatment, their lack of interest in pursuing employment opportunities with the defendant prevents any assertion that the defendant's conduct presents a sufficient likelihood of future harm to the plaintiff.[119]

C. *EEOC's Enforcement Guidance and Judicial Deference*

In 1996, the EEOC reaffirmed an earlier enforcement guidance, finding that employment testers possess standing under Title VII.[120] As the administrative agency vested with primary authority to pursue the goals of Title VII,[121] the EEOC's interpretation of Title VII should ar-

112. EEOC ENFORCEMENT GUIDANCE, *supra* note 69, at Section III.A.3 (citing 42 U.S.C. § 2000e-5(g) (1994)).

113. *Id.*

114. 42 U.S.C. § 2000e-5(g).

115. *See supra* notes 44-48, 67-68 and accompanying text.

116. Doe v. Nat'l Bd. of Med. Exam'rs, 199 F.3d 146, 153 (3d Cir. 1999).

117. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979).

118. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).

119. Fair Employment Council of Greater Wash., Inc., v. BMC Mktg. Corp., 28 F.3d 1268, 1275 (D.C. Cir. 1994).

120. EEOC ENFORCEMENT GUIDANCE, *supra* note 69, at Section I.

121. 42 U.S.C. § 2000e-5(a) (1994).

guably be granted respect by the courts.[122] The Supreme Court has held that, because the EEOC lacks rule-making authority, EEOC enforcement guidances are not entitled to deference[123] under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council.*[124] Nevertheless, the Court has also found that pronouncements like the enforcement guidances issued by the EEOC may still be accorded respect.[125] Recently, in *United States v. Mead Corp.*,[126] the Supreme Court reaffirmed its holding in *Skidmore v. Swift & Co.*,[127] defining the level of deference properly accorded to statutory constructions of administrative agencies that lack the force of law: "The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position."[128] The Court has also recognized that whether an administrative interpretation is issued contemporaneously with the legislative act in question bears upon the reliability of that interpretation in reflecting congressional intent and thus also upon the proper weight to be accorded the agency's pronouncement.[129]

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122. Bragdon v. Abbott, 524 U.S. 624, 642 (1998) ("[T]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' " (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139-140 (1944)); *see also* United States v. Mead Corp., 533 U.S. 218, 235 (2001) (reaffirming continuing validity of *Skidmore* deference analysis).

123. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256-58 (1991); Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976) ("[C]ourts properly may accord less weight to [EEOC] guidelines than to administrative regulations which Congress has declared shall have the force of law . . . ."); *see also* Anderson, *supra* note 53, at 1266 (though arguing for validity of EEOC Enforcement Guidance, admitting that the guidance "certainly does not possess the force of law"); *cf.* Christensen v. Harris County, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters — like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law — do not warrant *Chevron*-style deference.").

124. 467 U.S. 837 (1984).

125. *Mead*, 533 U.S. at 276-77.

126. 533 U.S. 218 (2001).

127. 323 U.S. 134 (1944).

128. *Mead*, 533 U.S. at 228 (citing *Skidmore*, 323 U.S. at 139-40).

129. Udall v. Tallman, 380 U.S. 1, 16 (1965) (determining that administrative interpretations deserve respect "[p]articularly . . . when the administrative practice at stake involves a contemporaneous construction of a statute by" the agency charged with its enforcement) (quoting Power Reactor Dev. Co. v. Int'l Union of Electricians, 367 U.S. 396, 408 (1961)); *accord* United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 216 n.13 (2001); Davis v. United States, 495 U.S. 472, 484 (1990); Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 463 n.12 (1989); Fed. Deposit Ins. Corp. v. Philadelphia Gear Corp., 476 U.S. 426, 438 (1986); Watt v. Alaska, 451 U.S. 259, 272-73 (1981); *see also* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257 (1991) (applying the contemporaneous criterion in determining the level of respect to accord EEOC guidelines); Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 465 & n.38 (1986) (same); EEOC v. Assoc. Dry Goods Corp., 449 U.S. 590, 600 n.17 (1981) (same).

Admittedly, the EEOC carefully and formally creates its policy guidances and exercises primary executive authority in the field of employment discrimination.[130] The Commission, however, did not assert its position that Title VII accords standing to employment testers contemporaneously with the passage of the Civil Rights Act of 1964.[131] The EEOC's original 1990 enforcement guidance trailed passage of the Act by twenty-six years — by seventeen years more than the EEOC guidance that the Supreme Court declined to follow in *General Electric Company v. Gilbert*.[132] The EEOC's interpretation deserves some respect based upon its consistency, careful formulation and the agency's status as the primary enforcer of employment rights laws. Nevertheless, given the non-contemporaneous nature of the interpretation and the EEOC's lack of rule-making authority, the level of respect accorded the EEOC's policy guidance should turn upon the persuasiveness of its position[133] — an issue founded upon the proper reading of the statutory language of and the congressional intent behind Title VII.[134] The statutory language and legislative history of Title

130. *See* 42 U.S.C. § 2000e-5 (1994).

131. EEOC ENFORCEMENT GUIDANCE, *supra* note 69, at Section I (noting that original policy guidance on employment testers was promulgated in 1990); *see also supra* note 129 and accompanying text.

132. *Compare* EEOC ENFORCEMENT GUIDANCE, *supra* note 69, at Section I (noting that the latest policy guidance builds upon the original guidance, produced in 1990), *with* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 142 (1976) ("The EEOC guideline in question does not fare well under these standards. It is not a contemporaneous interpretation of Title VII, since it was first promulgated eight years after the enactment of that Title.").

133. The courts have yet to articulate a consistent method for analyzing persuasiveness under *Mead*. *Compare* Heartland By-Products v. United States, 264 F.3d 1126, 1135 (Fed. Cir. 2001), *with* James v. Zemenszky, 284 F.3d 1310, 1319 (Fed. Cir. 2002). In *Heartland By-Product*, the Federal Circuit, for example, held that the power of an agency to persuade depends on "its logic and expertness . . . the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade." 264 F.3d at 1135 (internal quotations and citations omitted); *accord* Mead Corp. v. United States, 283 F.3d 1342, 1346 (Fed. Cir. 2002). This approach, though, reinserts two other *Mead* factors — consistency and expertness — into the persuasiveness analysis. *See Mead Corp.*, 533 U.S. at228. The same circuit in *James*, on the other hand, independently analyzed the persuasiveness of an agency's position under *Mead* by considering the position in light of the statutory text and legislative history in question. 284 F.3d at 1319 (citing *Mead Corp.*, 121 S. Ct. at 2176); *see also* U.S. Freightways Corp. v. Comm'r of the Internal Revenue Serv., 270 F.3d 1137, 1145 (7th Cir. 2001) (treating "persuasiveness" as a separate inquiry under *Mead*). This Note maintains that the *James* approach to the persuasiveness analysis should govern, as it treats the persuasiveness prong as an independent variable rather than double counting criteria to increase the apparent persuasiveness of an agency position. *Cf.* Sec. Indus. Ass'n v. Bd. of Governors of Fed. Reserve Sys., 468 U.S. 137, 143 (1984):

> Judicial deference to an agency's interpretation of a statute only sets the framework for judicial analysis; it does not displace it. A reviewing court must reject administrative constructions of [a] statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement. (internal citations and quotations omitted).

VII, however, undermine the persuasiveness of the EEOC's position on standing for employment testers.[135]

II. EMPLOYMENT TESTER STANDING UNDER 42 U.S.C. § 1981

This Part argues that employment testers cannot meet the standing requirements necessary to pursue claims for damages under 42 U.S.C. § 1981. Section II.A notes that, unlike under Title VII, employment testers pressing § 1981 claims must overcome prudential standing requirements. Section II.B makes the case that employment testers fall outside the zone of interests sought to be protected by the statute in question. Section II.C maintains that public policy arguments proffered by supporters of tester standing under § 1981 are insufficient to overcome the requirements of the standing doctrine.

A. *Applicability of Prudential Standing Requirements*

The traditional standing analysis includes both constitutionally based Article III requirements as well as judicially created prudential standing requirements.[136] Whereas plaintiffs pursuing Title VII claims need only satisfy the Article III requirements, due to congressional waiver of the prudential concerns,[137] no such waiver has been found with respect to § 1981.[138] Under Title VII, congressional intent to waive prudential standing requirements could be found in the statute's broad definition of the claimant class — "person claiming to be aggrieved."[139] Indeed, "[h]istory associates the word 'aggrieved' with a

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134. *James*, 284 F.3d at 1319, (determining that agency position "is unpersuasive because [the agency] . . . has not pointed to any statutory basis for [its] finding"); Student Loan Fund of Idaho, Inc. v. United States Dep't of Educ., 272 F.3d 1155, 1167 (9th Cir. 2001) (considering congressional intent in determining persuasiveness of Secretary's position under *Mead*); *see also* Christensen v. Harris County, 529 U.S. 576, 587 (2000).

135. *See supra* notes 44-48, 58-68, 90-98 and accompanying text (determining that the statutory text and legislative history of Title VII do not evince a desire on the part of Congress to accord standing to employment testers); *cf.* Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971) ("Since *the Act and its legislative history* support the . . . [EEOC's] construction, this affords good reason to treat the guidelines as expressing the will of Congress." (emphasis added)).

136. *See supra* notes 18-19.

137. Kyles v. J.K. Guardian Sec. Servs., 222 F.3d 289, 295 (7th Cir. 2000); *accord* EEOC v. Mississippi College, 626 F.2d 477, 482 (5th Cir. 1980).

138. *Kyles*, 222 F.3d at 303.

139. 42 U.S.C. § 2000e-5(b) (1994); Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972) (finding that such language present in both Title VIII and Title VII indicates congressional intent to extend standing to Article III limits); *see also* Dept. of Commerce v. United States House of Representatives, 525 U.S. 316, 328-29 (1999):

> Congress has eliminated any prudential concerns in this case by providing that "*[a]ny person aggrieved* by the use of any statistical method in violation of the Constitution or any provision of law (other than this Act), in connection with the 2000 census or any later decennial census, to determine the population for purposes of the apportionment or redistricting of

congressional intent to cast the standing net broadly — beyond the common law interests and substantive statutory rights upon which 'prudential' standing traditionally rested."[140] Section 1981, though, does not contain the "aggrieved" language previously relied upon by the Court to find congressional waiver of prudential standing requirements.[141]

Arguably, the language of § 1981, which extends its statutory protection to "any person,"[142] could be interpreted to encompass an even broader class of claimants than would be included in the traditional "aggrieved" language. In *Bennett v. Spear*,[143] the Court expanded its view of standing where Congress used the term "any person" to define the permissible plaintiff class under the Endangered Species Act.[144] This instance, however, can readily be distinguished from the § 1981 context. The *Bennett* Court itself noted that its view rested not upon the inclusion of the term "any person" in the statute but rather upon the fact that the legislation's subject matter, the legislation's purpose to promote enforcement by private attorneys general, and the participation of the government in the statutory enforcement scheme favored an expansive view of standing.[145] While one might rightly argue that civil rights statutes deserve as great a deference to judicial interpretation of their reach as environmental statutes, § 1981 does not include any indicia that the rights granted by its text are meant to be enforced by litigants acting in the role of "private attorneys general."[146] The role of private attorneys general has most often been recognized

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Members in Congress, may in a civil action obtain declaratory, injunctive, and any other appropriate relief against the use of such method." (emphasis added).

140. FEC v. Akins, 524 U.S. 11, 19 (1998) (citations omitted); *see also Dept. of Commerce*, 525 U.S. at 328-29 (extending standing to Article III limits by virtue of congressional inclusion of term "aggrieved" in defining to whom the act extended); Gen. Instrument Corp. of Del. v. Nu-Tek Elecs. & Mfg., Inc., 197 F.3d 83, 89 (3d Cir. 1999) (same); Ass'n of Cmty. Orgs. for Reform Now v. Fowler, 178 F.3d 350, 363 (5th Cir. 1999) (same).

141. 42 U.S.C. § 1981(a) (1994).

142. *Id.*

143. Bennett v. Spear, 520 U.S. 154 (1997).

144. *Id.* at 165.

145. *Id.*; *see also* Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 561 (5th Cir. 2001) (declining to find negation of prudential standing requirements under the Lanham Act, even though the Act accorded to "any person" the right to bring suit); Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 227 (3d Cir. 1998) (same).

146. *See* Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L LAW 219, 222-23 (2001) (noting that the role of private attorneys general is to enhance the government's own enforcement mechanisms); *see also* Robert A. Anthony, *Zone-Free Standing for Private Attorneys General*, 7 GEO. MASON L. REV. 237, 237 n.1 (1999) (outlining role of private attorneys general in seeking judicial review of agency action or aiding the enforcement of statutory programs).

either where the harm in controversy is diffuse[147] or where the actual injured party cannot vindicate its own rights.[148] The harm envisioned by § 1981, on the other hand, is specific; here, Congress created a legal framework to protect individuals in their specific contractual dealings with others.[149] Moreover, the role of private attorneys general is to enhance the enforcement activities of governmental agencies.[150] Section 1981, unlike the Endangered Species Act or Title VII, does not provide for government enforcement or involvement in litigation.[151] As a whole, § 1981 lacks the factors that motivated the Court in *Bennett* to negate its prudential standing requirements.[152]

Some have argued that important public policies underlying the passage of § 1981 support lessening the standing hurdles for claimants under this section.[153] The Third Circuit, determining that Congress had waived the prudential standing requirements with respect to § 1981, found that a strict reading of the requirements of the prudential standing doctrine would frustrate the public policy goals reflected in both Title VII and § 1981.[154] During consideration of the Civil Rights Act of 1964, Congress even noted that Title VII and § 1981 should be treated as "co-extensive."[155] Nevertheless, attributing an intent to waive § 1981's prudential standing requirements to this congressional statement would violate traditional canons of statutory construction in the standing area, which require Congress to "express[ly] negate" these standing requirements.[156] Moreover, congressional intent to

147. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 208 (1972) (recognizing role of private attorneys general in pursuing claims for injury due to loss of "the social benefits of living in an integrated community").

148. Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 16-17 (1981) (noting role of private attorneys general in enforcing ESA to protect endangered species).

149. 42 U.S.C. § 1981(a) (1994).

150. Buxbaum, *supra* note 146, at 223.

151. *Compare* 42 U.S.C. § 2000e-5 (1994) (describing role of EEOC in Title VII enforcement), *and* 16 U.S.C. § 1540(g)(2)(A)-(B) (1994) (describing [role] of government in ESA enforcement), *with* 42 U.S.C. § 1981 (failing to note any role for the government in enforcing § 1981).

152. *See supra* notes 145-151 and accompanying text.

153. Hackett v. McGuire Bros., Inc., 445 F.2d 442, 446-47 (3d Cir. 1971); Landever, *supra* note 13, at 394.

154. *Hackett*, 445 F.2d at 446-47.

155. *See* Johnson v. Ry. Express Agency, 421 U.S. 454, 459 (1975). *But see* Fair Employment Council of Greater Wash., Inc., v. BMC Mktg. Corp., 28 F.3d 1268, 1278 (D.C. Cir. 1994) (citing Johnson, 421 U.S. at 459) (determining that the "co-extensive" language used by Congress "simply mean[s] that the two statutes co-exist[ ], with the result that Title VII . . . [does] not pre-empt whatever rights an individual might enjoy under § 1981.") (emphasis omitted).

156. Bennett v. Spear, 520 U.S. 154, 164 (1997); *see also supra* note 139 and accompanying text (describing language that meets express negation requirement).

waive prudential standing requirements must be part of the contemporaneous adoption of or subsequent amendment to a statute.[157] The congressional statement at issue here, though, occurred during consideration of the Civil Rights Act of 1964, almost a century after the passage of the Civil Rights Acts of 1866.[158] Any relevant congressional belief in the effects of § 1981 statutory language upon the prudential standing requirements would have required either an expression by the Thirty-Ninth Congress of its intent or an amendment to the statute by a subsequent congress.[159] While congressional intent behind passage of the provisions of § 1981 aimed broadly at discrimination, the necessary evidence of congressional desire to waive prudential standing requirements remains lacking.[160]

B. *Statutory Zone of Interests*

The Judiciary's self-imposed prudential standing requirements prevent plaintiffs from asserting the rights of third parties, litigating generalized grievances common to either all citizens or a broad class of citizens, or seeking judicial intervention in an area outside the zone of interests "arguably . . . protected or regulated by the statute or constitutional guarantee in question."[161] Employment tester plaintiffs

157. United States v. Price, 361 U.S. 304, 313 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."); *accord* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117-18 (1980); Waterman Steamship Corp. v. United States, 381 U.S. 252, 269 (1965); *see also* United States v. United Mine Workers, 330 U.S. 258, 282 (1947).

158. *BMC Mktg. Corp.*, 28 F.3d at 1278.

159. *See Price*, 361 U.S. at 313.

160. Kyles v. J.K. Guardian Sec. Servs., 222 F.3d 289, 303 (7th Cir. 2000).

161. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970); *see also* Valley Forge Christian College v. Ams. United for Separation of Church and State, 454 U.S. 464, 475 (1982); Warth v. Seldin, 422 U.S. 490, 499 (1975); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220 (1974); *supra* note 18 (describing the prudential standing requirements). Some commentators continue to argue that the zone of interests test is one of limited application. TRIBE, *supra* note 30, at 434, 446. A proper determination of the correct application of the zone of interests test suffers from the Court's own muddled jurisprudence on the purpose of the zone of interests prong. *Compare* Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 400 n.16 (1987) ("The principle cases in which the 'zone of interest' test has been applied are those involving claims under the APA [Administrative Procedure Act], and the test is most usefully understood as a gloss on the meaning of § 702 [of the APA]."), *with Valley Forge Christian College*, 454 U.S. at 475 (including zone of interests among the prudential concerns to be considered by the Court in reviewing the Establishment Clause case before it). The Court, however, has now resolved this issue in favor of including zone of interests "among [its] other prudential standing requirements of *general* application." Bennett v. Spear, 520 U.S. 154, 163 (1997) (emphasis added). In fact, in the years following the *Bennett* decision, the circuit courts of appeals have applied the zone of interests test in a wide variety of statutory and constitutional contexts. *See* Tennessee Valley Auth. v. EPA, 278 F.3d 1184, 1207-08 (11th Cir. 2002) (Clean Air Act); Oxford Assocs. v. Waste System Auth., 271 F.3d 140, 146-47 (3d Cir. 2001) (Commerce Clause); Casumpang v. Int'l Longshoreman's and Warehouseman's Union, Local 142, 269 F.3d 1042, 1055-56 (9th Cir. 2001) (Labor-Management Reporting and Disclosure Act); Pharm. Research and Mfrs. of Am. v.

clearly do not seek solely to assert the rights of third parties; in their chosen role as testers, these individuals suffer individual, emotional harm due to discriminatory treatment.[162] In addition, while testers share an interest in attacking discrimination with the citizenry as a whole, this common interest does not undermine the tester's claim of individualized harm.[163] Nonetheless, the employment tester plaintiff does not fully satisfy the prudential requirements, as her injury does not come within the statutory zone of interests created by § 1981.

1. *Statutory Text*

While the zone of interests test does not require that Congress express a specific intent to benefit the particular plaintiff before the court, in order for her case arguably to come within § 1981's zone of interests, an employment tester must demonstrate that either the statutory language itself or congressional intent aimed to include testers within the class of claimants able to bring suit under the statute.[164] The language of § 1981 provides for the recognition of every citizen's right "to make and enforce contracts" to the same extent "as is enjoyed by white citizens."[165] Subsection (b) defines "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[166] On its face,

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Concannon, 249 F.3d 66, 73 (1st Cir. 2001) (Supremacy Clause); On the Green Apartments LLC v. City of Tacoma, 241 F.3d 1235, 1239 (9th Cir. 2001) (Dormant Commerce Clause); San Xavier Dev. Auth. v. Charles, 237 F.3d 1149, 1153 (9th Cir. 2001) (General Allotment Act); *In re* Vitamins Antitrust Class Actions, 215 F.3d 26, 29 (D.C. Cir. 2000) (Federal Rules of Civil Procedure); Sac and Fox Nation of Mo. v. Pierce, 213 F.3d 566, 575 (10th Cir. 2000) (Indian Commerce Clause); Weber v. Cranston Sch. Comm., 212 F.3d 41, 51 (1st Cir. 2000) (Individuals with Disabilities Education Act).

162. *Kyles*, 222 F.3d at 300; *see also* EEOC ENFORCEMENT GUIDANCE, *supra* note 69, at Section III.A.2.

163. Landever, *supra* note 13, at 387; *see also* Sierra Club v. Morton, 405 U.S. 727, 734 (1972) ("[T]he fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.").

164. *See* Air Courier Conference of Am. v. Am. Postal Workers Union AFL-CIO, 498 U.S. 517, 524-26 (1991); *see also Weber*, 212 F.3d at 51 ("As noted, we review the language and structure of ... [the statute] to determine whether [plaintiff's] retaliation claim falls within the zone of interests protected by [the statute].").

165. 42 U.S.C. § 1981(a) (1994).

166. 42 U.S.C. § 1981(b) (1994). Section 1981(b) was added by Congress in 1991 in response to the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). In *Patterson*, the Court held that "harassment relating to the conditions of employment is not actionable under § 1981 because that provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations." *Id.* at 171. The Civil Rights Act of 1991 added subsection b to § 1981 in order to make clear Congress's intent to protect contracting parties, especially employees, even after contract formation. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C. (1994)); *see also* Mass v.

the purpose of the statute is to protect those individuals who seek to enter into a contractual relationship.[167] Thus, in analyzing whether testers come under the statutory umbrella of § 1981, one must focus attention upon whether a tester who faced discriminatory treatment has arguably been denied the right to make or enforce a contract.

No one would suggest that a tester, who does not even seek to form an employment relationship with the employer in question, could suffer any injury based on the performance, modification, or termination elements of the statute or from a limitation of her ability to enjoy a continuing contractual relationship. Moreover, testers do not desire to make or enforce contracts;[168] "[a]t most . . . [employers] deprive[ ] the tester plaintiffs of the opportunity to *refuse* to enter into an employment contract."[169] In fact, the contractual relationship sought by the tester, based upon misrepresentations not only of her desire for employment but also of her qualifications for the job, is voidable by the employer.[170] Section 1981 protects the contractual rights of nonwhite citizens to the same extent as those rights might be "enjoyed by white citizens."[171] The basic premises of contract law, however, make clear that no one who materially misrepresents herself in contract ne-

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Martin Marietta Corp., 805 F. Supp. 1530, 1534 (D. Colo. 1992) (noting that the Act "expands the scope of section 1981 . . . overturning the limitations judicially imposed on section 1981 by [*Patterson*]"). Interestingly, in passing the Act, Congress expanded the scope of "make and enforce contracts" under § 1981 only to provide greater protection for individuals *after* the formation of a contractual relationship. *See* 42 U.S.C. § 1981(b). The Act, in fact, made no mention of a congressional desire to expand the definition of "making" contracts to give greater protection to individuals like testers. *See generally* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

167. Morris v. Office Max, Inc., 89 F.3d 411, 414-15 (7th Cir. 1996) ("A claim for interference with the right to make and enforce a contract must allege the actual loss of a contract interest, not merely the possible loss of future contract opportunities.").

168. *See* Kyles v. J.K. Guardian Sec. Servs., 222 F.3d 289, 302 (7th Cir. 2000); *cf.* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n.1 (1992) (confirming that standing must be considered from the perspective of the plaintiff by noting that "the injury must affect the plaintiff in a personal and individual way").

169. Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp., 28 F.3d 1268, 1271 (D.C. Cir. 1994).

170. RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1978) ("If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient."); *see also* Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1140 (9th Cir. 2000) ("Appellants attempted to obtain the seller's consent to sale by a fraudulent and material misrepresentation. The loss of an opportunity to enter into such a voidable contract is not an injury cognizable under § 1981."); *BMC Mktg. Corp.*, 28 F.3d at 1271 ("Any resulting contracts between the tester plaintiffs and BMC [the defendant] would have been voidable at BMC's option . . . Even on plaintiffs' argument, then, BMC did not deny the testers the opportunity to enter into a contract that they could have enforced."); *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 162(1)(a) ("A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker (a) knows or believes that the assertion is not in accord with the facts . . . .").

171. 42 U.S.C. § 1981(a).

gotiations develops a legally protected contract interest in the formation of a voidable contract.[172] In fact, a legally protected interest in the formation of a voidable contract inures only to the object of the misrepresentations — in this case, the employer — not to the party making the misrepresentations, the tester.[173]

While, from the perspective of a discriminating employer, the tester has been denied the opportunity to make an employment contract, standing doctrine neither is an objective test nor does it turn on the subjective perceptions of a party other than the plaintiff.[174] Courts analyze both the prudential and Article III standing requirements from the perspective of the plaintiff, in this case, the tester.[175] In the tester's case, the employer has only denied her the opportunity to enter into a voidable contract, a contract interest to which she has no legal right and for which she can obtain no legal protection.[176] Absent actual formation of, or intent to form, a legally protected contractual interest[177] on the part of the tester, any injury suffered by the employment tester lies outside the zone of interests protected by § 1981.[178]

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172. *See* RESTATEMENT (SECOND) OF CONTRACTS § 164(1); *cf.* Kawitt v. United States, 842 F.2d 951, 953 (7th Cir. 1988) ("[A] job obtained by an admitted and material misrepresentation is not a property right upon which a constitutional suit can be founded.").

173. *See* RESTATEMENT (SECOND) OF CONTRACTS § 164(1); *see also BMC Mktg. Corp.*, 28 F.3d at 1271 ("In any event, the rule that contracts obtained through misrepresentations are merely void*able* rather than void seems designed entirely to protect the *target* of the misrepresentations.") (emphasis in original).

174. TRIBE, *supra* note 30, § 3-14, at 385 (citing Flast v. Cohen, 392 U.S. 83, 99 (1968) ("Standing differs, in theory, from all other elements of justiciability by focusing primarily 'on the *party* seeking to get his complaint before a federal court' . . . .").

175. Raines v. Byrd, 521 U.S. 811, 819 (1997) ("We have consistently stressed that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him."); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 & n.1 (1992) (noting that the standing inquiry focuses upon injury done to the plaintiff and whether the plaintiff will be benefited by redress); Air Courier Conference of Am. v. Am. Postal Workers Union AFL-CIO, 498 U.S. 517, 524-26 (1991) (noting that the zone of interests inquiry focuses upon whether Congress intended to include a person in the position of the plaintiff among the class able to bring suit); Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399-400 (1987) (same).

176. *See supra* notes 168-173 and accompanying text.

177. Morris v. Office Max, Inc., 89 F.3d 411, 414 (7th Cir. 1996) (noting that § 1981 protects against "the actual loss of a contract interest"); *see also id.* (declining to recognize the "general interest in . . . [the] merchandise" plead by the plaintiffs as a cognizable interest under § 1981).

178. Kyles v. J.K. Guardian Sec. Servs., 222 F.3d at 289, 304 (7th Cir. 2000); *accord BMC Mktg. Corp.*, 28 F.3d at 1271; *see also* Mackey v. Nationwide Ins. Co., 724 F.2d 419, 421 (4th Cir. 1984) (finding that housing testers did not have standing to sue under §§ 1981 and 1982); Davis v. The Mansards, 597 F. Supp. 334, 342, 347 (N.D. Ind. 1984) (finding that only couple who actually sought apartment, and not testers, could recover under § 1982 for discriminatory treatment). *Contra* Open Housing Ctr. v. Samson Mgt. Corp., 152 F.R.D. 472, 476 n.8 (S.D.N.Y. 1993); Landever, *supra* note 13, at 386 ("[W]here a tester is denied his right to the initial formation of a contract, that denial gives rise to an injury sufficient to confer standing under § 1981.") (internal quotation omitted).

2. *Congressional Intent*

Congressional intent, like the text of § 1981, fails to provide the requisite safe haven for employment testers. The Civil Rights Act of 1866 aimed to destroy the vestiges of slavery that continued to manifest themselves in relations between blacks and whites following the Civil War[179] and, more specifically, to counteract provisions of the Black Codes.[180] The Codes forced blacks to enter into long-term employment contracts, mandated harsh criminal sanctions for violators of the labor provisions of the Codes, and apprenticed young blacks to their former masters.[181] Congress aimed broadly in passing the Act to counteract the Codes and included the employment context within the purview of the contracts clause of the Act. Nonetheless, the general aims of the Act fail to indicate that Congress intended to include protection for the misrepresenting party in the voidable contract context, the tester in this case.[182]

A reading of the debates over the Civil Rights Act of 1866 reveals only three discussions regarding the nature of the contracts provision of the statute.[183] Although these instances illustrate that Congress con-

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179. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull, sponsor of the legislation).

180. In the period between the end of the Civil War and the initiation of congressional Reconstruction, most of the states of the former Confederacy passed harsh criminal and civil provisions restricting the rights of newly freed slaves. ROBERT CRUDEN, THE NEGRO IN RECONSTRUCTION 27 (1969). These laws are collectively referred to as the Black Codes. *Id.*

181. In South Carolina, for example, black children, whose parents the courts deemed incapable of caring for them, were forcibly apprenticed, usually to their former slave masters, and all blacks were legally bound to enter into labor contracts. CRUDEN, *supra* note 180, at 21. In Mississippi, freedmen were required to enter into employment contracts by the second Monday in January of 1866 or face criminal sanctions. VERNON LANE WHARTON, THE NEGRO IN MISSISSIPPI 1865-1890 87-88 (1984). The Florida law relating to the employment of freedmen permitted a black person to be "punished as for vagrancy if, on complaint of his master, he were convicted of 'willful disobedience of orders, wanton impudence, or disrespect to his employer or his authorized agent, failure to perform his work assigned to him, idleness, or abandonment of the premises.' " THEODORE BRANTER WILSON, THE BLACK CODES OF THE SOUTH 99 (1965).

182. *See infra* notes 183-188 and accompanying text; *see also supra* notes 168-173 and accompanying text.

183. Given the concern of many senators over miscegenation, the first instance involved discussion over the applicability of the contracts language to marriage contracts. CONG. GLOBE, 39th Cong., 1st Sess. 505-06 (1866); *see also* Veto Message of President Johnson, Civil Rights Act of 1866, April 27, 1866, *reprinted in id.* at 1680 (discussing the effect of the legislation upon the states' ability to enact anti-miscegenation laws). The second exchange concerned whether the granting of citizenship to some Native Americans by the bill would require states to grant "an Indian the right to contract." CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866). The final question raised regarding the contracts clause asked whether the federal courts could use the Act to create federal contract law or whether the language merely permitted the courts to enforce state contract laws equally without regard to race; consider the remarks of Senator Cowan:

> Now, a married woman in no State that I know of has a right to make contracts generally. In some of the States she cannot contract at all; in others she contracts *sub modo*; and in all

sidered the extent and purpose of the contracts language later codified at § 1981, they provide no evidence that Congress intended the contracts language to include protection for the formation of voidable contracts.[184] The key to understanding congressional intent lies in the comparison made clear not only by the terms of the statute but also by the language of debate about the bill: "[The bill] simply gives to persons who are of different races or colors the same civil rights."[185] While the bill was considered "absolutely revolutionary" by many of its supporters,[186] Congress did not intend for the Act to grant blacks greater protections than those available to whites but rather equal protections.[187] Just as whites cannot found a suit for damages upon a voidable contract, neither may a non-white employment tester base her argument for standing upon such a legally unprotected contract interest.[188]

C. *Pro-Standing Policy Arguments: Missing the Mark*

Statutory language and original congressional intent provide no shelter for the tester plaintiff. Nevertheless, standing supporters, including two circuit courts of appeals,[189] argue that two factors favor a

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there is a limit upon her power to contract. Is it intended by this bill that it shall be put in the hands of any judge to decide that this bill confers upon married women the unlimited right to contract?

Id. at 1781-82 (statement of Sen. Cowan). In a similar vein, Senator Cowan stated:

I need not remind you, sir, that there are a large number of contracts which are not allowed in the several States, some on account of policy, some on account of morality, and others upon account of positive injunction to the contrary. A contract in my State made upon the Sabbath day is void; but under this bill that contract could be enforced. A contract made against chastity, *prohpudor*, is void; but under this bill that might be enforced.

Id.

184. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 163, 164(1) (1978); *cf.* Kawitt v. United States, 842 F.2d 951, 953 (7th Cir. 1988).

185. CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866) (statement of Sen. Howard); *see also* 42 U.S.C. § 1981(a) (1994).

186. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 570 (1866) (statement of Sen. Morrill).

187. *Id.* at 1159 (statement of Rep. Windom) ("[The bill] declares that henceforth . . . the colored soldier, who has worn the uniform of the Republic and periled his life for its defense, shall have an *equal right, nothing more*, with the white rebel yet reeking with the blood of our murdered defenders . . ." (emphasis added)); *id.* at 1293 (statement of Rep. Shellabarger) ("[The Act's] whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race or former condition in slavery.").

188. Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1140 (9th Cir. 2000); Fair Employment Council of Greater Wash., Inc., v. BMC Mktg. Corp., 28 F.3d 1268, 1270-71 (D.C. Cir. 1994); *cf. supra* note 172.

189. *See* Watts v. Boyd Properties, 758 F.2d 1482, 1485 (11th Cir. 1985); Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 898 (3d Cir. 1977).

broad grant of standing under the Civil Rights Act of 1866: Supreme Court decisions upholding standing for testers under § 1983[190] and the broad import of civil rights legislation.

The weapon of largest caliber possessed by those who argue in favor of standing for testers under § 1981 owes its manufacture to two Supreme Court decisions, *Evers v. Dwyer*[191] and *Pierson v. Ray*,[192] which granted standing to testers under § 1983. In *Evers*, the Court accorded standing to a plaintiff who "boarded this particular bus for the purpose of instituting this litigation."[193] Faced with a similar situation, the *Pierson* court found that, although plaintiffs used a whites-only bus terminal waiting area for the sole purpose of testing the law in question, "their deliberate exercise of that right in a peaceful, orderly, and inoffensive manner does not disqualify them from seeking damages under § 1983."[194] Both the Third and Eleventh Circuits relied heavily upon the Court's holdings in these cases in finding that tester plaintiffs[195] possessed standing under the Civil Rights Act of 1866.[196]

These courts, in analyzing the applicability of *Evers* and *Pierson*, ignored several crucial differences between § 1981 and § 1983. In the context of public facilities, the tester, though seeking to test the law in question, actually uses the public facility or purchases a ticket with the intent to use the public facility in question, thus forming the contractual relationship envisioned by the statute.[197] The rider of the bus, for

190. 42 U.S.C. § 1983 (1994), passed by the Reconstruction Congress as § 1 of the Ku Klux Klan Act of 1871, provides a cause of action to private citizens for the "deprivation of any rights, privileges or immunities secured by the Constitution and laws" by state actors acting under the "color" of state law.

191. 358 U.S. 202 (1958) (per curiam).

192. 386 U.S. 547 (1967).

193. *Evers*, 358 U.S. at 204.

194. *Pierson*, 386 U.S. at 558.

195. The courts in *Meyers* and *Watts* found standing for housing testers under § 1982. Watts v. Boyd Properties, 758 F.2d 1482, 1485 (11th Cir. 1985); Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 898 (3d Cir. 1977). While not directly applicable to the employment tester context under § 1981, the holdings of these courts do create a circuit split with the Seventh and D.C. Circuits, which have held that employment testers do not have standing under § 1981. Kyles v. J.K. Guardian Sec. Servs., 222 F.3d 289, 302 (7th Cir. 2000); Fair Employment Council of Greater Wash., Inc., v. BMC Mktg. Corp., 28 F.3d 1268, 1271 (D.C. Cir. 1994). This split is created because the Supreme Court has held that sections 1981 and 1982 should not be "construe[d] . . . differently when applied." Runyon v. McCrary, 427 U.S. 160, 171 (1976); *accord id.* at 187 (Powell, J., concurring); *id.* at 190 (Stevens, J., concurring); Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 410 U.S. 431, 440 (1973); *Kyles*, 222 F.3d at 301.

196. *Meyers*, 559 F.2d at 898 (citing both *Evers* and *Pierson* for the proposition that "[e]ven assuming *arguendo* that . . . [plaintiff's] application to . . . [defendant] was in fact motivated solely by his desire to test the legality of . . . [defendant's] policies, such a purpose is sufficient to confer standing"); *see also Watts*, 758 F.2d at 1485 (following *Meyers* and noting that *Meyers* relied upon *Evers* and *Pierson* for support).

197. *Kyles*, 222 F.3d at 304; *see also Evers*, 358 U.S. at 204 (noting that the bus rider in question rode the bus and used the public transport).

example, completes the necessary relationship between himself and the defendant by purchasing a bus ticket and attempting to ride the bus. The public facilities tester intends to make use of the public facility, even if her purpose is also to test the law at issue.[198] On the other hand, the employment tester has no intent to form the contractual relationship envisioned by the statute.[199] Moreover, the language of *Pierson*, which notes that the testers neither "tricked [n]or goaded the officers into arresting them,"[200] can be read to exclude employment testers, who present false credentials and lie during interviews.[201]

Finally, while the Third and Eleventh Circuits looked to the Supreme Court's § 1983 jurisprudence without questioning its applicability to §§ 1981 or 1982, history counsels against reading the statutes together as parallel provisions. Section 1983 shares neither a common source nor a common statutory purpose with §§ 1981 and 1982.[202] Sections 1981 and 1982 derive from the Civil Rights Act of 1866, while § 1983 owes its birth to the Ku Klux Klan Act of 1871.[203] Sections 1981 and 1982 aim primarily at private conduct, while § 1983 focuses solely on conduct by state actors.[204] In addition, Congress passed §§ 1981 and 1982 pursuant to its Thirteenth Amendment remedial powers,[205] while it enacted § 1983 under § 5 of the Fourteenth Amendment.[206] Although the Court has previously held that §§ 1981 and 1982 should be given like construction as both statues derive their language from § 1 of the Civil Rights Act of 1866,[207] the Court has delivered no such

198. *Kyles*, 222 F.3d at 304.

199. *See supra* notes 168-173 and accompanying text; *see also Kyles*, 222 F.3d at 304 ("[T]o put it in *Evers'* context, [the employment tester] . . . never set[s] foot on the bus.").

200. Pierson v. Ray, 386 U.S. 547, 558 (1967).

201. Fair Employment Council of Greater Wash., Inc., v. BMC Mktg. Corp., 28 F.3d 1268, 1270-71 (D.C. Cir. 1994) ("[T]he [employment] testers here made conscious and material misrepresentations of fact by deceiving BMC [the defendant] about their intentions and by presenting BMC with fictitious credentials.").

202. Alice M. Beasley and Gail J. Wright, *The Civil Rights Acts Revisited*, 357 PLI/LITIG. 785, 788 (1988).

203. *Id.*

204. *Id.*

205. CONG. GLOBE, 39th Cong., 1st Sess. 603 (1866) (statement of Sen. Hendricks) ("[T]he provisions of this bill are admirably calculated to secure to these colored persons their rights under the [thirteenth] constitutional amendment."); *id.* at 474, 503 (statements of Sens. Howard and Trumbull, the bill's sponsor) (also noting that the bill intended to give effect to the provisions of the Thirteenth Amendment); *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968) ("[Section 1982] is a valid exercise of the power of Congress to enforce the Thirteenth Amendment.").

206. Monroe v. Pape, 365 U.S. 167, 171 (1961), *overruled on other grounds by* Monell v. Dept. of Social Servs., 436 U.S. 658 (1978).

207. Runyon v. McCrary, 427 U.S. 160, 171 (1976).

edict regarding comparisons between §§ 1981 and 1982 and § 1983.[208] Thus, the contention that the Supreme Court's § 1983 tester jurisprudence buttresses the argument for employment tester standing fails, as the § 1983 tester cases are inapposite to the employment tester context under § 1981.

Nevertheless, the broad purposes of civil rights legislation sing a siren's song for standing supporters. Some argue that the courts should liberally interpret § 1981 in order to effectuate Congress's intent to eliminate discriminatory contracting practices.[209] In *Watts v. Boyd Properties*,[210] the Eleventh Circuit accepted the argument that a broad reading of standing doctrine was critical to enforcement of the provisions of the Civil Rights Act of 1866 and its goal of "eliminat[ing] 'the badges and incidents of slavery.' "[211] While correctly noting that the legislation giving rise to § 1981 aimed to eliminate discrimination in broad strokes,[212] these arguments do not independently support a finding of standing. Rather, they merely beg the question of congressional intent behind the statute, for the proper effect to be given legislation lies not in the mind of the judge or legal commentator but must instead be surmised from the intent of the relevant Congress.[213] Congress alone has the power, under § 2 of the Thirteenth Amendment, to outlaw the "badges and incidents of slavery" and to remedy their effects through appropriate legislation.[214] While an overbroad reading of § 1981 serves the desires of tester standing supporters, such a reading was not within the scope of the statute as envisioned by the 39th Congress.[215] Of course, "Congress could have elected to grant standing to plaintiffs to sue [under § 1981] when they were denied . . . a voidable contract,"[216] but it did not. Such an oversight can be properly corrected only by congressional action to amend § 1981, not judicial fiat.

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208. *See id.* at 187 (Powell, J., concurring) ("I consider the posture of §§ 1981 and 1982 in the jurisprudence of this Court to be quite different from that of § 1983.").

209. *See* Watts v. Boyd Properties, 758 F.2d 1482, 1485 (11th Cir. 1985); Landever, *supra* note 13, at 394.

210. 758 F.2d 1482 (1985).

211. *Id.* at 1485.

212. *See supra* note 186 and accompanying text.

213. *Cf.* Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993) ("Although we have found immunities in § 1983 that do not appear on the face of the statute, '[w]e do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy.' " (internal citations omitted)); *see also id.* ("[O]ur role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice." (internal citations omitted)).

214. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968).

215. *See supra* notes 183-188 and accompanying text (discussing congressional debate surrounding passage of the Civil Rights Act of 1866).

216. Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1138 (9th Cir. 2000).

III. LIMITED ROLE OF THE JUDICIARY AND STANDING FOR EMPLOYMENT TESTERS

This Part addresses the policy considerations underlying the standing doctrine and argues that the courts should deny standing in order to serve these policy interests effectively. Section III.A contends that denying standing to employment testers serves the principle of separation of powers by recognizing the singular role of Congress in creating statutory bases for standing. Section III.B notes that the political process can adequately address concerns over judicial activity in the area of civil rights, eliminating the need for activist courts to create a basis for tester standing.

A. *Valuing the Separation-of-Powers Principle*[217]

As outlined in Parts I and II, the doctrine of standing encompasses two separate but interrelated frameworks for analyzing the right of an individual plaintiff to bring suit in federal court: the prudential and the constitutional.[218] Both the prudential and constitutional components of the doctrine of standing are founded in concerns over judicial self-governance, as both seek to limit the interference of the Judiciary in the affairs of the political branches.[219] In *Allen v. Wright*,[220] the Court gave substance to this concern by emphasizing that the principle of separation of powers guides its exposition of the doctrine of standing.[221] Relying on the separation of powers principle, the Court has determined that appropriate use of the standing doctrine can help the Judiciary to avoid straying beyond its proper constitutional role and

217. This Note does not address the myriad constitutional issues surrounding the role of the Judiciary and the separation of powers principle. Rather, this Note seeks to place the question of standing for employment testers in the context of the current Court's view of the standing doctrine as being intimately tied to the principle of separation of powers. *See* Allen v. Wright, 468 U.S. 737, 750, 752 (1984).

218. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); *see also supra* notes 18-19.

219. Bennett v. Spear, 520 U.S. 154, 162 (1997) ("Like their constitutional counterparts, these 'judicially self-imposed limits on the exercise of federal jurisdiction' are 'founded in concern about the proper — and properly limited — role of the courts in a democratic society.' " (internal citations omitted)); *see also* Lewis v. Casey, 518 U.S. 343, 349 (1996) ("The requirement that an inmate alleging a violation of *Bounds* must show actual injury derives ultimately from the doctrine of standing, a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches.").

220. 468 U.S. 737 (1984).

221. *Id.* at 752. In outlining this new perspective, the Court directly rejected the standing philosophy of the Warren Court, which ascribed no importance to the principle of separation of powers in the standing context. *See* Flast v. Cohen, 392 U.S. 83, 100 (1968) ("The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government.").

into the realm of lawmaking.[222] Denying standing to employment testers furthers this judicial goal, by illustrating the Judiciary's recognition of the singular role of Congress in creating statutory bases for a plaintiff's standing.

While the Court has generally expounded upon this ideal in the context of constitutional cases or cases seeking injunctions to force the hand of a government agency,[223] the principle of separation of powers can also play an important role in guiding the Court's determinations regarding statutory bases for standing in suits between private parties. Absent a basis in a remnant of the federal common law, a plaintiff must establish his claim of standing upon either constitutional or statutory ground. In the constitutional realm, the Court has the preeminent role in defining a citizen's right to invoke the power of the Judiciary under a particular constitutional provision.[224] In cases founded upon statutory grounds, on the other hand, Congress exercises plenary authority in defining the duties attendant and remedies afforded to potential plaintiffs, including the right to invoke the judicial power.[225]

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222. *Allen*, 468 U.S. at 750 (citing Warth v. Seldin, 422 U.S. 490, 498 (1975)); *see also* Cannon v. Univ. of Chicago, 441 U.S. 677, 744 (1979) (Powell, J., dissenting) ("The dangers posed by judicial arrogation of the right to resolve general societal conflicts have been manifest to this Court throughout its history.").

223. *See* Raines v. Byrd, 521 U.S. 811, 818 (1997) (denying standing to members of Congress challenging Line-Item Veto Act); Whitmore v. Arkansas, 495 U.S. 149, 161 (1991) (denying standing to death-row inmate who challenged the lack of appellate review of a fellow inmate's conviction under the Eighth Amendment); *Allen*, 468 U.S. at 759-60 (refusing to hear case, on standing grounds, that attempted to enjoin the IRS to more stringently manage the grant of tax-exempt status to private schools); Valley Forge Christian College v. Ams. United for Separation of Church and State, 454 U.S. 464, 475 (1982) (denying standing to civil liberties organization that challenged on Establishment Clause grounds the transfer of government-owned property by a federal agency to a religious university); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221-22 (1974) (declining, based on plaintiffs' lack of injury-in-fact, to hear case challenging "reserve" military status of several members of Congress under Art. I, § 6, cl. 2).

224. Bush v. Lucas, 462 U.S. 367, 375 (1983):

> [T]he federal courts have jurisdiction to decide all cases 'aris[ing] under the Constitution, laws, or treaties of the United States.' This jurisdictional grant provides not only the authority to decide whether a cause of action is stated by a plaintiff's claim that he has been injured by a violation of the Constitution, but also the authority to choose among available judicial remedies in order to vindicate constitutional rights. (internal citations omitted).

See also Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 391-92 (1971) (recognizing private cause of action for damages against federal agents for violations of the Fourth Amendment); *cf.* Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

225. Lujan v. Defenders of Wildlife, 504 U.S. 555, 578, 580 (Kennedy, J., concurring) (1992). The Court, however, has not permitted Congress to run roughshod over the Article III requirements of standing. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979). In fact, where Congress has attempted to afford a judicial remedy to plaintiffs who lacked an injury-in-fact, the Court has denied standing on Article III grounds. *See, e.g.*, *Raines*, 521 U.S. at 818 (denying standing due to lack of constitutionally-required

The extension of standing to areas, such as employment testing, where Congress has not made clear its intent to create statutory protection, constitutes an impermissible legislative act on the part of the Judiciary.[226] Only by demanding that Congress create a specific right, the invasion of which would create standing to sue, can the Court reaffirm the proper balance of power between the legislative and judicial spheres of the government.[227]

The courts have previously declined to exercise their judicial power where Congress has not evinced its intent to create a cause of action applicable to the plaintiff.[228] In declining to recognize the right of particular plaintiffs to maintain a cause of action absent the explicit intention of Congress to provide either a right or remedy to the plaintiff, the courts have noted that only Congress may create a private right of action to enforce federal law.[229] Admittedly, "[s]tanding is a concept distinct from the concept of private rights of action."[230] Nevertheless, in light of the Court's recent concern over maintaining proper limits upon the exercise of the judicial power,[231] taking the same approach with regard to statutory standing as has been taken with regard to private rights of action would serve the separation-of-powers concerns that have come to predominate the Court's standing jurisprudence. In fact, the Court's approach to analyzing whether or not Congress has intended to create a private right of action mirrors in many respects the Court's analysis of both whether a plaintiff has suffered an injury cognizable under the statute in question and whether the plaintiff falls within the statute's intended zone of interests.[232] The

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injury-in-fact even where Act itself granted to members of Congress the "right" to challenge statute in federal court).

226. Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448, 473 (1957) (Frankfurter, J., dissenting) ("[W]e cannot argumentatively legislate for Congress when Congress has failed to legislate. To do so disrespects legislative responsibility and disregards judicial limitations.").

227. *See Cannon*, 441 U.S. at 717 ("When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights.").

228. *See, e.g.*, Women's Equity Action League v. Cavazos, 906 F.2d 742, 752 (D.C. Cir. 1990) ("[The] generalized action plaintiffs pursue against federal executive agencies lacks the requisite green light from the legislative branch. We do not suggest that such an action could not be authorized. The courts, however, may not on their own initiative create the claim for relief. That authority resides in Congress." (internal citations omitted)).

229. Alexander v. Sandoval, 532 U.S. 275, 286 (2001) (citing Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979)).

230. Louisiana Landmarks Soc., Inc. v. City of New Orleans, 85 F.3d 1119, 1122 n.3 (5th Cir. 1996).

231. *See supra* note 223.

232. *Compare Touche Ross & Co.*, 442 U.S. at 579-80 (Brennan, J., concurring) (recognizing that the preeminent factor in determining whether private cause of action was created is whether plaintiff is among "the class for whose especial benefit the statute was enacted"), *with* Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring) (rec-

key question in analyzing whether Congress has intended to create a private right of action is whether the plaintiff is "one of the class for whose especial benefit the statute was enacted."[233] In analyzing statutory standing within the framework of Article III's standing requirements, the Court has indicated that Congress must demonstrate its intent to identify both the statutory injury and the class of persons entitled to enforce the statutory mandate.[234] Even more clearly analogous, the Court's zone-of-interests criterion asks the question whether the plaintiff is among those "protected or regulated by the statute or constitutional guarantee in question."[235] Given the parallels between these two analyses, the lens used by the Court to evaluate questions of statutory standing should be at least as demanding as that used to evaluate questions surrounding private causes of action, as questions of standing go to the heart of the judicial power itself.[236]

Applying this broader assertion to the more specific context of employment tester standing under Title VII and § 1981, standing for employment testers must be denied precisely because Congress has failed to evince its intention either to include testers within the class of plaintiffs whose injury is cognizable under Article III for Title VII purposes[237] or to bring testers within the class to be protected by the terms of § 1981.[238] Denying standing to employment testers thus serves the principle of separation of powers by avoiding the "overjudicialization of the processes of self-governance."[239] Instead of creating judge-made law in the statutory realm,[240] refusing to grant standing to employment testers under the current statutory scheme places the onus of providing statutory protection to employment testers on the political branches, the branches who should bear the ultimate responsibility in our system of divided powers for defining statutory rights and remedies.[241]

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ognizing need, under Article III, for Congress to "at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit"), *and* Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970) (outlining the zone of interests test).

233. Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 26 n.3 (1979); *accord* Thompson v. Thompson, 484 U.S. 174, 189 (Scalia, J., concurring) (1988).

234. *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).

235. *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 153.

236. *Lujan*, 504 U.S. at 560.

237. *See supra* notes 44-68, 90-98 and accompanying text.

238. *See supra* notes 168-188 and accompanying text.

239. Scalia, *supra* note 31, at 881.

240. *See supra note* 226 and accompanying text.

241. *See* JAMES BRADLEY THAYER, JOHN MARSHALL 109-10 (1901) ("[B]y adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation .... For that course — the true course of judicial duty always — will powerfully help to

B. *Recognizing Congressional Responsibility*

In addition to executing its proper role in the tripartite system of federal governance, by denying standing to employment testers the Judiciary would also be taking notice of Congress's proven ability to clarify and expand legislation, especially in the area of civil rights, in response to judicial pronouncements.[242] In fact, the Court has recognized that Congress has the power to refine and create statutory bases for standing where the Court has not previously found a sufficient foundation on which to rest standing.[243]

Congress has not failed to take note of the Court's invitations.[244] With passage of the Civil Rights Act of 1991, for example, Congress acted to supersede Court rulings that had narrowly interpreted Title VII and § 1981.[245] In *Wards Cove Packing Co. v. Atonio*,[246] the Court altered the burden upon the defendant in a disparate impact case under Title VII, holding that an employer need only provide evidence that its employment practice is legitimate to rebut plaintiff's disparate impact claim and that the employer's burden on this point would be one of production rather than persuasion.[247] In *Patterson v. McLean*

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bring the people and their representatives to a sense of their own responsibility."); *see also Lujan*, 504 U.S. at 559-60 ("Obviously, then, the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.").

242. *Cf.* Schweiker v. Chilicky, 487 U.S. 412, 425 (1988) (declining to create *Bivens*-style damages remedy against federal officials under Title II of Social Security Act due to, *inter alia*, frequent congressional attention to issues surrounding Act).

243. Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."); *see also Lujan*, 504 U.S. at 578 ("Nothing in this [opinion] contradicts the principle that [t]he . . . injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.") (internal quotations and citations omitted).

244. See, for example, the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 107 Stat. 31 (codified as amended at scattered sections of 20 U.S.C., 29 U.S.C., and 42 U.S.C. (1994)), which, *inter alia*, amended Title IX to reflect Congress's belief that a finding of discrimination in any program within an institution permitted the Department of Education to terminate applicable federal funding to the entire institution, legislatively overruling Grove City College v. Bell, 465 U.S. 555 (1984); the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e-2(k) (1994)), in which Congress responded to the Court's determination in Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 145-46 (1976), that discrimination on the basis of pregnancy was not impermissible sex discrimination under Title VII; and the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (1994)), which responded to the Court's refusal to award attorney's fees in contravention of the "American rule" in Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 263 (1975).

245. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C. (1994)).

246. 490 U.S. 642 (1989).

247. *Id.* at 650-51.

Credit Union,[248] the Court determined that § 1981's protection against racial discrimination in the "making and enforcement" of contracts did not extend to on-the-job discrimination after the initial contract formation.[249] The 1991 Act specifically responded to the *Wards Cove* decision, naming the decision in the Act and including provisions specifically directed at reversing the Court's holding.[250] The Act also supplanted *Patterson* by redefining the "making and enforcement of contracts" in § 1981 to include "performance, modification, and termination of contracts" within its ambit.[251]

These instances illustrate both the power and the attention of Congress in the area of civil rights. Supporters of standing for employment testers need not fear that adverse judicial pronouncements will forever doom their prospects for creating a statutory haven for tester activities. Congress has the ability and has evinced the will to amend civil rights statutes to effect its intent where the courts have adopted limiting constructions of civil rights legislation. Moreover, as the branch invested with the will of the people, the legislature's pronouncements more accurately reflect the societal purposes of civil rights legislation than the countermajoritarian visions of the judges and justices of the federal Judiciary.

CONCLUSION

While this Note does not argue that society should turn a blind eye to the effects of discrimination even upon employment testers, this Note illustrates that the legal system was not designed to provide automatic protection to members of protected classes from all instances of discrimination. An employment tester must rely on either a constitutional or statutory basis in which to ground her standing. This Note shows, however, that neither Title VII nor § 1981 provides such a foundation for employment tester standing.

While Title VII and § 1981 aim broadly at the effects of discrimination in the field of employment, neither the statutory text nor congressional intent behind either Title VII or § 1981 reveal an intent to include testers in the umbrella of statutory protection or the statutory zone of interests. Moreover, the policy arguments proffered by supporters of standing fail to address the fatal lack of a proper statutory basis for standing under either Title VII or § 1981. Finally, this Note shows that denying tester standing serves the important interest in separation of powers that the Court has made central to the standing

248. 491 U.S. 164 (1989).

249. *Id.* at 171.

250. Civil Rights Act of 1991, § 2.

251. 42 U.S.C. § 1981(b) (1994).

analysis. By denying standing to employment testers, the courts will give respect to the principles of standing in the employment law context while also maintaining the proper balance of power between the Judiciary and the Legislature.