



Summer 6-1-1992

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Recommended Citation

Shannon E. Brown, *Tester Standing Under Title VII*, 49 Wash. & Lee L. Rev. 1117 (1992).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol49/iss3/10>

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TESTER STANDING UNDER TITLE VII

A black person walks into your business at 2:00 p.m.
A white person walks into your business at 2:10 p.m.
They're alike in dress, height, weight and class.
Would you treat them alike?¹

Many scholars assert that discriminatory treatment of members of certain racial groups is fast ebbing from society.² Other studies indicate that discrimination remains prevalent in almost every facet of daily life.³ These

1. Dennis Cauchon, *Undercover Tests Identify Bias*, USA TODAY, Sept. 26, 1991, at A3 (discussing increasing discovery of widespread bias in housing, home insurance, hiring, car buying and other services). The article states that most people in response to the question would say that they would treat the applicants equally, but in reality most people would not treat the applicants equally. *Id.*

2. See Howard Schuman et al., *Racial Attitudes in America: Trends and Interpretations*, (1985) (stating that discriminatory beliefs have declined in last forty years); David A. Strauss, *The Law and Economics of Racial Discrimination in Employment*, 79 GEO. L.J. 1619 (1991) (stating that most overt discrimination in society has been eliminated); see also *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting) (questioning whether majority of Supreme Court still believes racism is problem in society or even remembers that it existed); Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673, 673 (1985) (stating that political right considers civil rights changes in United States so sweeping that they believe basic civil rights problems of past have been resolved).

3. See Cauchon, *supra* note 1, at A3 (stating that recent studies have indicated great disparity in treatment of minorities in areas such as housing, home insurance, purchasing new cars and catching cabs); Pettigrew, *supra* note 2, at 673 (stating that "severe and difficult manifestations of both individual and institutional racism remain a prominent part of American life").

A 1989 study by the Department of Housing and Urban Development (HUD) concluded that Hispanics encountered bias 50% of the time when they were trying to rent housing and 56% of the time when they attempted to buy homes. Ann Mariano, *HUD Study Finds Bias Nationwide; Blacks, Hispanics Blocked in Majority of Cases*, WASH. POST, Aug. 30, 1991, at G1. Blacks faced bias even more often—56% of the time when seeking to rent housing and 59% of the time when seeking to buy homes. *Id.*

A 1990 study by the Federal Reserve Board documented widespread racial differences in mortgage approval rates. Jerry Knight, *Race Factor in Mortgage Lending Seen*, WASH. POST, Oct. 22, 1991, at A1. The Federal Reserve Board study showed that mortgage lenders turned down minority home buyers for home mortgages two to three times more often than white home buyers. *Id.* The most troublesome discrepancy was that lenders approved mortgages for white borrowers in the lowest income category more often than they approved mortgages for blacks in the highest income category. *Id.* at A6.

In 1988 the Washington Lawyer's Committee conducted a study using testers to expose discrimination by cab drivers. Rochelle L. Stanfield, *Measuring Job Bias*, 23 NAT'L J. 2598 (1991); see also *infra* notes 10-17 and accompanying text (discussing tester method). Two testers, one black and one white, would stand 30 feet from each other. Stanfield, *supra* at 2600. When a cab drove by one tester but picked up the other, nine times out of ten the black tester was the bypassed party. *Id.* In addition, it was twice as hard for either tester to get a taxi driver to drive to a predominantly black neighborhood rather than to an equidistant

disparate views suggest that discrimination may not be vanishing from our society but rather taking on a different form.⁴ Blatant discrimination, no longer a common occurrence,⁵ has been replaced by a more subtle, but just

white neighborhood. *Id.*

Ian Ayres, a Northwestern University law professor, conducted a study using testers to determine if car dealers took race and gender into account when dealing with customers. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 818-19 (1991). The study revealed that white males receive a significantly better price than both blacks and women. *Id.* at 828-29.

The television show *Primetime Live* conducted a two and one half week study using one black tester and one white tester in St. Louis, Missouri. *Primetime Live: True Colors; Running in Place; Bossy Little Thing* (ABC television broadcast, Sept. 26, 1991), available in LEXIS, Nexis library [hereinafter *Primetime*]. This study graphically illustrates the constant, often subtle discrimination faced by black Americans in many daily activities. *Id.* The *Primetime* crew sent the testers into a variety of situations while the *Primetime* reporters monitored the ensuing activity from a van. *Id.* at 3-4. In the first situation, the testers, posing as customers, separately entered a shoe store. *Id.* at 4. The shoe salesman immediately approached the white tester and began a joking, casual conversation with him. *Id.* When the black tester walked in several minutes later, the salesman looked away and made no effort to converse with or assist the customer. *Id.* In a second situation, a record store salesman not only neglected to offer to assist the black tester, he suspiciously trailed the black tester around the store. *Id.* at 4-5. The same salesman did not trail the white tester. *Id.* at 5. In a third situation, both testers appeared to be locked out of their cars which were about forty feet apart. *Id.* A small crowd gathered around to offer assistance to the white tester while the black tester struggled alone to open his car. *Id.* In a fourth situation, the testers walked down the street one night, one tester walking just ahead of the other. *Id.* A police car drove by the testers. *Id.* When the police officer saw the black tester, the officer slowed his vehicle and suspiciously viewed the tester. *Id.* When the police officer saw the white tester, however, he simply passed the tester driving normally. *Id.* In a fifth situation, on another walking expedition, a truck driver slowed down, leaned out of his truck and told the black tester that the tester was in the wrong neighborhood. *Id.* at 5-6. In a sixth situation, the testers posed as interested car purchasers. *Id.* at 6-7. The car salesman quoted the white tester both a lower down payment and a lower price than he quoted the black tester. *Id.* In a seventh situation, at a storefront job service, the employment agent pleasantly informed the white tester of the rules on confidentiality. *Id.* at 7. The same agent proceeded to give the black tester a lecture, including a warning about laziness. *Id.* In more than one instance, a business, upon an inquiry by the testers about a job opening, immediately informed the black tester that no openings existed, while the same business told the white tester that it still needed workers. *Id.* at 8. In an eighth situation, the testers received disparate treatment while attempting to find a place to live. *Id.* at 8-11. In one instance the building manager told the white tester that the advertised apartment was available, while a few minutes later the manager told the black tester that regrettably, he had rented the apartment earlier that morning. *Id.* at 9-10. Finally, in a ninth situation, while standing in the same vicinity on a New York City street each tester tried to catch a cab; the first cab to approach them bypassed the black tester and instead picked up the white tester. *Id.* at 11.

4. See *infra* notes 5-6 and accompanying text (discussing change in nature of racism in United States from overt to covert).

5. See Leroy D. Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization*, 38 CATH. U. L. REV. 795, 823 (1989) (stating that discriminatory practices today are less overt than in past); Deborah L. Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207, 1218 (stating that changing attitudes and statutory mandates have made overt discrimination increasingly rare).

as injurious, type of discrimination.⁶ Finding that old methods of fighting discrimination are less effective in combatting these newer, more subtle forms of discrimination, many civil rights organizations feel compelled to turn to alternative methods to combat and detect discrimination.⁷ One emerging method of fighting discrimination centers around the use of testers.⁸ In response to the implementation of this technique, legal controversy has arisen concerning whether or not testers have standing to bring suit under Title VII of the Civil Rights Act of 1964 (Title VII).⁹

6. See Ayres, *supra* note 3, at 865 (stating that as various overt forms of discrimination have become illegal, more subtle manifestations of discrimination have replaced them); Pettigrew, *supra* note 2, at 674 (stating that modern forms of both racial prejudice and discrimination have become more subtle, indirect, procedural, and ostensibly nonracial). Congress has noted the changing nature of discrimination. See HOUSE COMM. ON EDUCATION AND LABOR, EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, H.R. REP. No. 238, 92d Cong., 2d Sess. 8 (1972), reprinted in 1972 U.S.C.C.A.N. 2137, 2144. The House report, in explaining the rationale behind the expansion of the Equal Employment Opportunity Commission (EEOC) enforcement power in the 1972 amendments to Title VII, stated:

[e]mployment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject [now] generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs. . . . The forms and incidents of discrimination which the Commission is required to treat are increasingly complex.

Anita M. Alessandra, Comment, *When Doctrines Collide: Disparate Treatment, Disparate Impact, and Watson v. Fort Worth Bank & Trust*, 137 U. PA. L. REV. 1755, 1776 n.111 (1989) (quoting HOUSE COMM. ON EDUCATION AND LABOR, EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, H.R. REP. No. 238, 92d Cong., 2d Sess. 8 (1972), reprinted in 1972 U.S.C.C.A.N. 2137, 2144).

7. See Jerome M. Culp, *A New Employment Policy for the 1980's: Learning from the Victories and Defeats of Twenty Years of Title VII*, 37 RUTGERS L. REV. 895, 895-96 (1985) (stating that new strategies must be developed in continuing struggle against employment discrimination); Pettigrew, *supra* note 2, at 697 (noting difficulty in detecting, remedying and researching indirect discrimination). Joseph Sellers of the Washington Lawyers Committee for Civil Rights Under Law has proclaimed that the tester method represents the next generation of enforcement. Anne Kornhauser, *Fair-Housing Tactic Enters the Workplace; 'Testers' With Fake References, Bogus Resumes Spawn Job-Bias Suit*, LEGAL TIMES, May 6, 1991, at 17. Sellers noted that while the previous methods of enforcement waited for victims of discrimination to come forward, the testing method allows for a proactive attitude toward eliminating discrimination in employment hiring. *Id.*

8. See Cauchon, *supra* note 1, at A3 (discussing rising use of testers); J. Jennings Moss, *Use of Job-Bias 'Testers' Assailed*, WASH. TIMES, Feb. 18, 1991, at A1 (quoting National Association for Advancement of Colored People (NAACP) regional director as stating that he believes testing method will be common tool in dealing with and redressing entire issue of employment discrimination). Civil rights and housing groups have long used testers to uncover discrimination in the housing field. Ruth Marcus, *Agency to Accept 'Tester' Job-Bias Claims; EEOC Will Consider Cases of Applicants Sent to Detect Discrimination*, WASH. POST, Dec. 2, 1990, at A4. Many groups are beginning to use testers in new areas such as entry-level hiring, car buying and mortgage lending. *Mortgages, FED's Consumer Group Urges Study, Refinement of Paired Testers Method*, DAILY EXEC. REP. (BNA) No. 214, at A-3 (Nov. 5, 1990) (discussing Federal Reserve Board's Consumer Advisory Council recommendation of use of testers to uncover discriminatory mortgage lending practices). See *infra* notes 10-17 and accompanying text (discussing details of tester method).

9. See *infra* notes 28-32 and accompanying text (detailing cases relating to use of testers

Testers are individuals who, without the intent to accept employment, pose as prospective employees for the purpose of collecting evidence of discriminatory hiring practices.¹⁰ The testing concept rests on the presumption that the two testers possess identical characteristics except for one, such as race, traditionally associated with discrimination.¹¹ Civil rights organizations pair testers with similar personalities and backgrounds and provide them with equivalent credentials.¹² To ensure similarity, the civil rights organizations often send the paired testers to training sessions to teach them to act in a like manner¹³ before sending them out to "test" a business.¹⁴ Through the entire interview process the testers note the treatment they receive from the business, the information they receive from the business and their progress in the interview process.¹⁵ After the interview, the testers report back to the sponsoring civil rights organization and fill out debriefing

in employment field and overall conflict between civil rights organizations, employers and employers' groups).

10. See *EEOC Policy Guidance on Use of 'Testers' in Employment Selection Process*, DAILY LAB. REP. (BNA) No. 234, at D-1 (Dec. 5, 1990) (defining term "tester" as person who applies for employment for purpose of testing for discriminatory hiring practices but does not intend to accept such employment).

11. See Steven A. Holmes, *U.S. Is Asked to Expand Undercover Bias Testing*, N.Y. TIMES, Sept. 26, 1991, at A18 (stating that testers are virtually alike in every way except race or ethnicity); Margery A. Turner et al., *Opportunities Denied, Opportunities Diminished: Discrimination in Hiring*, 1991 URBAN INST. 4 (noting that testers are matched in terms of age, physical size, education, experience and other 'human capital' characteristics as well as intangibles such as openness, apparent energy level and articulateness); *Urban Institute Research Using Testers Documents Bias Against Black Job Seekers*, DAILY LAB. REP. (BNA) No. 94, at A-4 (May 15, 1991) (stating that testers are matched carefully on all characteristics that could affect hiring decision).

12. See Kornhauser, *supra* note 7, at 19 (describing how testers receive "[f]ictionalized resumes [and] false job references," to appear equivalent in job-related aspects and are often from similar backgrounds); Stanfield, *supra* note 3, at 2598 (stating that groups choose professional testers carefully and train them to match each other in education, job skills and experience as well as size, demeanor, personality, articulateness and other intangibles); *EEOC: Policy Guide on Use of 'Testers' in Employment Selection Process*, Fair Employment Practices Manual (BNA) § 405:6899, at 31 (Nov. 20, 1990) [hereinafter *Policy Guide*] (stating that civil rights groups create profile for each tester and provide tester with script for each assignment).

13. See Kornhauser, *supra* note 7, at 1 (stating that testers usually go through training period); *Urban Institute Research Using Testers Documents Bias Against Black Job Seekers*, DAILY LAB. REP. (BNA) No. 94, at A-4 (May 15, 1991) (stating that civil rights groups train testers to behave similarly).

14. See Stanfield, *supra* note 3, at 2598 (stating that testers go around to firms and employment agencies to "test" agencies' hiring practices); Frank Swoboda, *EEOC: Job Agencies Draw Fire; 'Alarming Rise' Seen in U.S. Complaints*, WASH. POST, June 11, 1991, at D1 (stating that groups send testers to apply for jobs); Turner et al., *supra* note 11, at 4 (stating that groups often send testers in response to job-seeking advertisement in local newspaper).

15. See Kornhauser, *supra* note 7, at 20 (remarking that civil rights groups, as sponsors, tell testers to be very observant). To ensure the accuracy of their reportings testers often carry tape recorders to their interviews. Kevin M. McCarthy, *EEOC Policy Allowing Testers Will Face Increasing Challenges*, NAT'L L.J., June 10, 1991, at 28.

forms.¹⁶ The organization then decides whether any basis exists for a legal action and, if so, brings suit.¹⁷

Using this tester method, the Urban Institute¹⁸ undertook a pilot study to measure the extent of differential treatment experienced by young, black males applying for entry level jobs in Washington, DC and Chicago, Illinois.¹⁹ The study concluded that discrimination against young, black men in the employment field remains pervasive despite extensive legislative and regulatory protections and incentives to hire minorities.²⁰ The study revealed that in one out of five instances a black jobseeker receives unfavorable differential treatment.²¹ Upon completion of this study, the Urban Institute asserted its belief in the reliability of the testing method and urged a nationwide implementation of the testing technique in the employment field.²²

At roughly the same time, the Equal Employment Opportunity Commission (EEOC), in a November 20, 1990 policy guide,²³ for the first time officially endorsed the use of testers to uncover discriminatory hiring practices.²⁴ In its endorsement of the testing technique, the EEOC asserted that

16. See Linda P. Campbell, *Housing Discrimination Widespread, Study Says*, CHI. TRIB., Sept. 26, 1991, at C1 (noting that testers write detailed reports about treatment they received from businesses); Kornhauser, *supra* note 7, at 20 (stating that testers filled out 33 page debriefing forms after job interview).

17. See Turner et al., *supra* note 11, at 16 (stating that Urban Institute determined incidence of differential treatment by comparing experiences and outcomes for two testers).

18. The Urban Institute is a private, nonprofit organization located in Washington, DC. The organization was founded to meet the need for an independent, broadly based, research organization to conduct studies and propose solutions to the nation's social and economic problems. The Urban Institute works closely with government officials and administrators to improve decisions and performance by providing better information and analytic tools. The aim of the Urban Institute is to translate research findings into forms that can be readily understood and used.

19. See Turner et al., *supra* note 11, at 7 (detailing extensive discrimination in hiring process). The Urban Institute chose to focus on discrimination in hiring because little data exists in this area. *Id.* at 4. The study used the tester method to obtain data. *Id.* at 8. Researchers at the Institute designed the testing system so that systematic differences could only be attributable to race. 94 DAILY LAB. REP., *supra* note 13, at A-4.

20. See Turner et al., *supra* note 11, at 18 (stating that in one out of five instances white applicant is able to advance farther through hiring process than equally qualified black applicant). The recent sharp increase in the number of discrimination complaints that the government has received supports this conclusion. See Swoboda, *supra* note 14, at D1 (stating that government observed 20% increase in discrimination complaints between 1990 and 1991).

21. See Turner et al., *supra* note 11, at 18-30 (stating results of Urban Institute's study).

22. See *id.* at 33 (stating Urban Institute noted that it has conducted two tester studies of hiring practices, and that next logical step is to implement technique nationwide).

23. See *Policy Guide*, *supra* note 12, at 31-38 (asserting that testers have standing to sue under Title VII and encouraging civil rights groups to use tester method).

24. See *EEOC Is Expanding Look at 'Testers' Issue; Agency May Use Its Own to Investigate Bias*, DAILY LAB. REP. (BNA) No. 6, at A-9 (Jan. 9, 1991) (noting first official EEOC endorsement of tester method); *Use of 'Testers' to Unearth Job Bias Follows Lead of Fair Housing Laws, EEOC Says*, DAILY LAB. REP. (BNA) No. 234, at A-2 (Dec. 5, 1990) (reporting that EEOC will accept discrimination charges from testers). Evan J. Kemp, Jr., the

testers have standing to sue under Title VII.²⁵ While many civil rights attorneys and groups applaud the EEOC's endorsement,²⁶ many employer groups and representatives strongly oppose the EEOC's endorsement.²⁷

Both prior to, and in response to, the EEOC's stance, testers have brought several law suits based on their discovery of discriminatory hiring practices.²⁸ Citing the tester's lack of real interest in obtaining the job for

EEOC Chairman, stated that a CBS '60 Minutes' report last winter featuring the use of testers sparked his interest in the concept. Marcus, *supra* note 8, at A4. Other factors that prompted the EEOC's endorsement include the recent sharp rise in discrimination complaints and the relatively low cost of using testers. See *EEOC Chairman Says Agency Receiving Influx of Charges Against Job Agencies*, DAILY LAB. REP. (BNA) No. 113, at A-1 (June 12, 1991) (stating that problem of hiring discrimination has become more pervasive and, therefore, EEOC has agreed to accept charges of employment discrimination from groups that use testers); *EEOC's Endorsement of Testers in Bias Cases Could Lead to Abuses, Employers' Group Charges*, DAILY LAB. REP. (BNA) No. 31, at A-10, A-11 (Feb. 14, 1991) (quoting EEOC Vice Chairperson, Ricky Silberman, stating that tester method is "intriguing new weapon during the time of a shrinking budget").

25. See *Policy Guide*, *supra* note 12, at 38 (concluding that testers have standing to sue under Title VII); see also *infra* note 31 (detailing relevant text of Title VII).

26. See Marcus, *supra* note 8, at A4 (stating that civil rights lawyers feel testing could be valuable tool both to detect job biases that might otherwise go undetected and to act as deterrent to employers). Joseph Sellers remarked that testers are one of the most powerful weapons available in the civil rights field to identify and challenge discriminatory conduct. *Id.*; see also *Civil Rights Group Uses Testers as Basis for Suit Against Personnel Agency*, WASH. INSIDER (BNA) (May 3, 1991) (relating positive reaction of many civil rights groups to EEOC's tester announcement); Holmes, *supra* note 11, at 18 (stating that Urban Institute researcher believes testing is cheap, workable and provides conclusive evidence of discrimination).

27. See *Employers Are Mounting Campaign to Head Off Use of Testers in EEOC Cases*, DAILY LAB. REP. (BNA) No. 134, at A-10 (July 12, 1991) (remarking on employers' campaign to head off use of testers in EEOC cases); *Former NLRB Counsel Irving Questions EEOC's Endorsement of Testers in Bias Cases*, DAILY LAB. REP. (BNA) No. 82, at A-9, A-10 (Apr. 29, 1991) (reporting on former National Labor Relations Board (NLRB) General Counsel, John S. Irving, questioning EEOC's endorsement of testers); *Correspondence Between John Irving and EEOC Chairman Evan Kemp on Use of 'Testers' By Commission*, DAILY LAB. REP. (BNA) No. 82, at E-1 (Apr. 29, 1991) (detailing employers' groups' policy concerns regarding use of testers); 31 DAILY LAB. REP., *supra* note 24, at A-10 (stating employers' concerns over possible illegal entrapment, and comparing use of testers to use of unauthorized wiretaps); *Equal Employment Advisory Council Letter on Proposed Testing at EEOC*, DAILY LAB. REP. (BNA) No. 31, at E-1 (Feb. 14, 1991) (providing letter from Equal Employment Advisory Council (EEAC) to EEOC Chairman Kemp cautioning against use of testers in employment field); Marcus, *supra* note 8, at A4 (stating that EEOC's endorsement of testers concerns Stephen A. Bokart of United States Chamber of Commerce for many reasons, including wasted time and expense of employers, difficulty of proving cases and increased subjective considerations in hiring); *infra* notes 162-79 and accompanying text (discussing employers' policy objections to use of tester technique in hiring process).

28. See *Fair Employment Council v. BMC Mktg. Corp.*, No. 91-8909-NHJ (D.D.C. filed May 5, 1991) (alleging racial discrimination in hiring in case brought by testers). The individual plaintiffs in *BMC* are two black testers hired by the Fair Employment Council (FEC). Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss at 6, *BMC* (91-0989-NHJ). The FEC paired the black testers with comparably qualified white testers. *Id.* The FEC then sent the testers to the BMC employment agency to determine whether the agency would allow

which the tester interviews, defendants in these suits, have asserted that testers do not have standing to sue.²⁹ Section 2000e-5(b) of Title VII³⁰ authorizes the EEOC to accept charges of employment discrimination "filed by or on behalf of a person claiming to be aggrieved."³¹ The question thus

the black testers the same right to enter employment contracts as white citizens. *Id.* at 7. Both black testers allege that the agency denied them their rights because the agency treated similarly situated white testers substantially different. *Id.* at 8. The agency referred both white testers for jobs, but did not refer either black tester for any job. *Id.* The FEC and the testers subsequently filed suit against BMC alleging race discrimination. Defendant BMC Marketing Corporation's Motion to Dismiss Pursuant to Rules 12(b)(1) and 12(b)(6), at 1 [hereinafter *BMC's motion*]. BMC has filed a motion to dismiss the case on the grounds that the testers lack standing. *Id.* Both the EEOC and the EEAC have filed briefs *amicus curiae*. See On Defendant's Motion to Dismiss—Brief of the Equal Employment Opportunity Commission as *Amicus Curiae* in Opposition to the Motion; On Defendant's Motion to Dismiss—Brief *Amicus Curiae* of the Equal Employment Advisory Council in Support of Defendant's Motion to Dismiss.

In another case the plaintiff FEC, alleging sex discrimination in hiring, brought suit based on the experiences of three female testers. See *Fair Employment Council v. Executive Suite*, No. 91-CA07202 (D.C. Sup. filed June 7, 1991); *Testers Used in Sex Harassment Suit*, DAILY LAB. REP. (BNA) No. 111, at A-12 (June 10, 1991). The proprietor of a local referral agency sexually propositioned three female testers when the female testers sought job referrals. *Id.* The proprietor did not similarly harass two male testers. *Id.* Based on the differential treatment experienced by the female testers, the FEC has brought suit under the D.C. Human Rights Act. *Id.*

On December 19, 1990, the National Association for the Advancement of Colored People (NAACP) filed with the EEOC a class-wide race discrimination complaint against Lord & Taylor department stores in Miami, Florida. *NAACP Uses 'Testers' as Basis of Bias Complaint Against Miami Store*, DAILY LAB. REP. (BNA) No. 247, at A-5 (Dec. 24, 1990). The NAACP filed this action based on the particular experiences of several job testers. *Id.* On two occasions, the department store treated black and white applicants who were similarly qualified for sales positions differently. *Id.* Early in December, NAACP testers visited eight stores and encountered discrimination in three of the stores, including Lord & Taylor. *Id.* During a retest in the middle of the month, only Lord & Taylor again discriminated against the black tester. *Id.* In the first test case, a black, female law student with extensive work experience filled out a job application for a sales position, but Lord & Taylor did not offer her a job. *Id.* That same day a white female undergraduate student with some work experience filled out an application and Lord & Taylor immediately offered her a sales position. *Id.* In addition, the white tester overheard a manager directing the personnel office to hire as many people as they could. *Id.* In the second test, Lord & Taylor gave a black college student with some work experience a job for two weeks, while later that same day the store gave a white college student with no experience a job for a month. *Id.*

See also McCarthy, *supra* note 15, at 28 (stating that "there is likely to be a significant increase in the number of discrimination charges involving the hiring practices of employers"); 31 DAILY LAB. REP., *supra* note 27, at E-1 (stating that EEOC policy guide will provide fertile new ground for litigation); 234 DAILY LAB. REP., *supra* note 24, at A-2, A-3 (quoting Richard Seymour of Lawyers Committee for Civil Rights Under Law as stating that follow-through of groups on EEOC's endorsement will instigate many court challenges).

29. See BMC's motion, *supra* note 28, at 1 (arguing for dismissal of suit due to plaintiff's lack of standing); see also McCarthy, *supra* note 15, at 28 (stating that use of testers will result in many legal challenges).

30. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1988)) [hereinafter Title VII].

31. 42 U.S.C. § 2000e-5(b) (1988). Title VII provides:

arises whether testers qualify as "persons claiming to be aggrieved" within the meaning of the statute.³² An examination of the pertinent case law reveals that testers are included in the aggrieved person requirement of Title VII. In addition, such standing comports with the current Supreme Court's judicial treatment of Title VII.

The standing doctrine is rooted in Article III of the United States Constitution³³ which limits a federal court's jurisdiction to actual "cases" or "controversies."³⁴ The doctrine stems from a desire to ensure that adverse litigants who have a direct stake in the outcome present federal courts with a concrete case.³⁵ The standing doctrine has both a constitutional and a prudential component.³⁶ To satisfy the constitutional component, the plaintiff must assert a specific,³⁷ redressable³⁸ harm caused by the defendant.³⁹

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge . . . on such employer

Id.

32. See *infra* notes 36-45 and accompanying text (discussing requirements plaintiff must meet before court grants plaintiff standing).

33. See *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (stating that Article III limits power of judiciary, and standing is threshold issue federal courts use to ensure that courts do not exceed constitutional jurisdiction); *Church of Scientology Flag Servs. Org., Inc. v. City of Clearwater*, 756 F. Supp. 1498, 1507 (M.D. Fla. 1991) (stating that standing is aspect of Article III that limits federal jurisdiction to cases and controversies).

34. U.S. CONST. art. III, § 2, cl. 1.

35. See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988) (discussing purpose of standing doctrine); see also *Valley Forge*, 454 U.S. at 472 (stating that standing assures that courts will resolve issues in concrete factual context and will respect autonomy of persons likely to be most affected by judicial order); *Woods v. Milner*, 760 F. Supp. 623, 635 (E.D. Mich. 1991) (stating that standing adds essential dimension of specificity to litigation and ensures framing of relief no broader than required by precise facts of case), *aff'd*, 955 F.2d 436 (6th Cir. 1992).

36. See *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154-55 (1970) (establishing that in order to have standing plaintiff must allege injury in fact and fall within zone of interest test); Fletcher, *supra* note 35, at 222 (stating that standing has both constitutional and prudential components).

37. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (stating that alleged injury cannot be "abstract," or "conjectural" or "hypothetical"); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (stating that plaintiff's alleged injury must be distinct and palpable); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 (1973) (holding that injury in fact is not confined to economic harm); *Data Processing*, 397 U.S. at 152 (asserting that first question of standing inquiry is whether plaintiff has alleged injury in fact).

38. See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976) (stating that plaintiff must show injury that court can redress by favorable decision in order to have standing).

39. See *id.* at 44-45 (stating that in order to satisfy Article III standing requirements plaintiff must allege injury that can be traced to challenged action of defendant).

Even if a court determines that the constitutional standard is satisfied, a court may, as a prudential matter, address further questions concerning the suitability of the plaintiff as a party to bring the action.⁴⁰ Some of these court-imposed prudential considerations include whether the plaintiff's complaint falls within the zone of interests protected by the statute or constitutional provision at issue; whether the complaint raises abstract questions amounting to generalized grievances; and whether the plaintiff is asserting his or her own legal rights and interests rather than those of a third party.⁴¹

Congress, however, can direct a court to hear a case despite prudential limitations.⁴² Congress effects this waiver of prudential matters by creating a legal right, the violation of which satisfies the constitutional component of the standing doctrine.⁴³ When Congress confers standing by statute a plaintiff need only satisfy the Article III component of the standing doctrine.⁴⁴ Congress has directed federal courts to disregard prudential concerns when analyzing standing under Title VII.⁴⁵

Only one federal court has decided a case in which plaintiff testers alleged hiring discrimination under Title VII.⁴⁶ In *Lea v. Cone Mills Corp.*,⁴⁷ black female plaintiffs filed suit under Title VII alleging discriminatory hiring practices by a potential employer.⁴⁸ The plaintiffs had applied for

40. See Fletcher, *supra* note 35, at 251-52 (stating that once plaintiff satisfies constitutional requirements, court will grant or deny standing as prudential matter); Thomas R. Lee, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. CHI. L. REV. 543, 559 (1990) (stating that prudential requirement is additional barrier to standing beyond constitutional requirements created by Supreme Court).

41. See Allen v. Wright, 468 U.S. 737, 751 (1984) (stating that zone of interests, generalized grievances and third party rights are self-imposed judicial limits on exercise of federal jurisdiction); Church of Scientology Flag Servs. Org., Inc. v. City of Clearwater, 756 F. Supp. 1498, 1509 (M.D. Fla. 1991) (same).

42. See Lee, *supra* note 40, at 559 (stating that Congress may, with legislation, command courts to disregard prudential limitations).

43. See Warth v. Seldin, 422 U.S. 490, 501 (1975) (stating that sometimes statutory provision in question implies right of action for plaintiff); Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973) (stating that statute expressly can confer standing); Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1526-27 (7th Cir. 1990) (stating that Congress can create new substantive right, which if violated, enables holder of right to sue without violating Article III of Constitution, even if holder incurs no other injury).

44. See Fletcher, *supra* note 35, at 253 (observing that with statutory standing Court should not require plaintiff to show injury in fact over and above violation of statutory right); Warth, 422 U.S. at 501 (stating that Congress may grant express right of action to persons who would otherwise be barred by prudential standing rules).

45. See Stewart v. Hannon, 675 F.2d 846, 849 (7th Cir. 1982) (stating that Congress' use of words "person aggrieved" in statute indicated intent to define standing as broadly as Constitution permits); Hackett v. McGuire Bros., Inc., 445 F.2d 442, 446-47 (3d Cir. 1971) (same).

46. See *Lea v. Cone Mills Corp.*, 438 F.2d 86, 88 (4th Cir. 1971) (stating that plaintiffs were not actually seeking employment when they applied for jobs); 134 DAILY LAB. REP., *supra* note 27, at A-10, A-11 (stating that *Lea v. Cone Mills Corp.* is only case where federal court has addressed use of testers in employment context).

47. 438 F.2d 86 (4th Cir. 1971).

48. See *Lea v. Cone Mills Corp.*, 301 F. Supp. 97, 101 (M.D.N.C. 1969) (stating that

employment at defendant's plant primarily to test the defendant's employment practices.⁴⁹ However, neither the district court nor the circuit court of appeals addressed the issue of whether the plaintiffs had standing to sue.⁵⁰ Because the *Lea* court did not address this issue, *Lea* is not dispositive of tester standing under Title VII.

Lack of case law on tester standing under Title VII increases the importance of case law on tester standing under Title VIII, the Fair Housing Standard Act. In the analogous field of fair housing litigation,⁵¹ civil rights and community groups extensively have used the practice of engaging testers to ferret out discriminatory practices.⁵² In a 1982 case, *Havens Realty Corp. v. Coleman*,⁵³ the Court held that testers have standing to sue under Title VIII.⁵⁴ In *Havens*, the plaintiffs—a black tester, an equal opportunity housing group, and individual residents of the city—filed suit under Title VIII alleging racial steering by a real estate agent.⁵⁵ The Court determined that the defendant real estate agent had falsely informed the black tester that no apartments were available.⁵⁶ In analyzing the issue of tester standing under Title VIII, the Court noted that Congress, under section 804(d) of Title VIII, had conferred upon all persons a legal right to truthful information about available housing.⁵⁷ The congressional creation of this legal right curtailed the Court's ability to impose prudential barriers to standing

plaintiffs filed charges with EEOC alleging they had been denied employment due to race), *aff'd in part, vacated in part*, 438 F.2d 86 (4th Cir 1971).

49. See *Lea*, 301 F. Supp. at 100 (stating that pursuant to previous agreement, plaintiffs planned to fill out complaints upon denial of employment).

50. See *Lea v. Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971); *Lea v. Cone Mills Corp.*, 301 F. Supp. 97 (M.D.N.C. 1969). The district court opinion focuses on the merits of the claim. *Lea*, 301 F. Supp. at 101-03. Primarily, the district court's decision discussed the inherently discriminatory nature of the employer's hiring policy. *Id.* at 102. The decision only addressed the plaintiffs' motives for applying for jobs in the discussion of available remedies. *Id.* The district court concluded that because the plaintiffs' primary motive in applying for a job was to test the employer's hiring practices, the plaintiffs were entitled only to an injunction, and not to backpay or to counsel fees. *Id.* On review, the circuit court of appeals addressed the case only in terms of the appropriateness of the district court's ruling on the remedies. *Lea*, 438 F.2d at 87-88. The Fourth Circuit upheld the injunction and the denial of backpay but reversed the district court's denial of attorney fees. *Id.* at 88. The circuit court ruled that because the testers had prevailed on the merits, they were entitled to counsel fees. *Id.*

51. See *infra* notes 78-89 and accompanying text (discussing extensive similarities between Title VII and Title VIII which indicate why courts often consider two fields analogous).

52. See 134 DAILY LAB. REP., *supra* note 27, at A-10, A-11 (stating that civil rights groups have long used tester method in fair housing litigation).

53. 455 U.S. 363 (1982).

54. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 382 (1982).

55. *Id.* at 366-67.

56. *Id.* at 368.

57. *Id.* at 373. Section 804 of Title VIII states that it is unlawful for an individual or firm covered by the Housing Act "[t]o represent to any person because of race, color, religion, sex, . . . or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." 42 U.S.C. § 3604(d) (1988).

under Title VIII.⁵⁸ By misrepresenting information about available housing to the black tester, the real estate agent violated the tester's legally recognized right to receive truthful information.⁵⁹ Because the tester did not receive truthful information regarding the availability of housing, the tester suffered a legally recognized injury that satisfied the constitutional component of the standing doctrine.⁶⁰ Section 812(a) of Title VIII provided the tester with a mechanism to enforce this right.⁶¹ The *Havens* Court stated that although the tester may have approached the real estate agent without the intention of buying or renting a home and fully expected that he would receive false information, the tester nevertheless suffered an injury within the meaning of section 804(d).⁶²

Although a Title VIII case, *Havens* establishes a strong precedent for federal courts to hold that employment testers have standing under Title VII.⁶³ Courts traditionally have construed the term "person aggrieved" under Title VII and Title VIII in the same manner.⁶⁴ Courts base their comparable analyses of Title VII and Title VIII on the numerous, important similarities between the two statutes.⁶⁵ The Sixth Circuit Court of Appeals gives a detailed comparison of Title VII and Title VIII in *EEOC v. Bailey*

58. *Havens*, 455 U.S. at 373-74. The Supreme Court noted that Congress intended standing under section 804(d) to extend to the full constitutional limits. *Id.* This legally created right places the issue of standing under Title VIII in the statutory standing context. *Id.*; see also *supra* notes 42-44 and accompanying text (discussing requirements for statutory standing).

59. *Havens*, 455 U.S. at 373. The Supreme Court stated that misrepresentation is the precise form of injury against which the statute is intended to protect. *Id.*

60. See *id.* at 374 (noting that if plaintiff's facts are as alleged then plaintiff has suffered legally recognized injury).

61. *Id.* at 373-74.

62. *Id.* at 374. The *Havens* Court noted that in prior cases the plaintiff's motive did not affect the merits of the dispute. *Id.* (citing *Evers v. Dwyer*, 358 U.S. 202, 204 (1958) (holding that plaintiff had standing to sue even though sole purpose of going to bus terminal was to test legality of segregated public accommodations)); see also *Pierson v. Ray*, 386 U.S. 547, 558 (1967) (granting plaintiff standing even though plaintiffs' sole purpose in riding bus was to test segregation law); *Watts v. Boyd Properties, Inc.*, 758 F.2d 1482, 1485 (11th Cir. 1985) (rejecting argument that tester's experience is merely academic exercise and asserting that even if tester's motivation is solely desire to challenge legality of discriminatory practice tester has standing).

63. See *Waters v. Heublein, Inc.*, 547 F.2d 466, 470 (9th Cir. 1976) (stating that extension of Title VIII case to Title VII area "really makes no new law"), *cert. denied*, 433 U.S. 915 (1977); *infra* notes 79-90 and accompanying text (discussing propensity of courts to interpret Title VII and Title VIII in same manner).

64. See *Stewart v. Hannon*, 675 F.2d 846, 849-50 (7th Cir. 1982) (stating that standing should be analyzed similarly under Title VII and Title VIII); *EEOC v. Mississippi College*, 626 F.2d 477, 482 (5th Cir. 1980) (stating that strong similarities between Title VII and Title VIII require that a definition of "a person claiming to be aggrieved" should be construed in same manner both under Title VII and Title VIII), *cert. denied*, 453 U.S. 912 (1981); *EEOC v. Bailey Co.*, 563 F.2d 439, 451-54 (6th Cir. 1977) (discussing extensive similarities between Title VII and Title VIII), *cert. denied*, 435 U.S. 915 (1978); *Waters*, 547 F.2d at 469-70 (stating that standing analysis under Title VIII applies with equal force to actions brought under Title VII).

65. See *infra* notes 79-89 (discussing similarities between Title VII and Title VIII).

Co..⁶⁶ In *Bailey*, the Sixth Circuit, confronted with a Title VII standing case, bases its holding on the ruling in *Trafficante v. Metropolitan Life Insurance Co.*,⁶⁷ a Title VIII standing case.

In *Bailey*, a white, female plaintiff, alleging racial discrimination against black, female employees, brought a Title VII suit against her employer.⁶⁸ The employer, in defense, argued that "a person claiming to be aggrieved" under Title VII must be a person who is a member of the class against which the discrimination allegedly is directed.⁶⁹ Following this logic, if the plaintiff is not a member of the class against which the discrimination allegedly is directed, then that person cannot suffer an injury cognizable under Title VII.⁷⁰ In support of this contention, the employer cited several district court cases holding that whites do not have standing to file Title VII charges alleging discrimination against blacks.⁷¹ The Court of Appeals for the Sixth Circuit in *Bailey* acknowledged the seeming correctness of the employers' arguments,⁷² but felt compelled as a result of the Supreme Court's decision in *Trafficante*, a Title VII case, to rule for the plaintiff.⁷³

In *Trafficante*, white tenants sued their landlord under Title VIII alleging racially discriminatory conduct against nonwhites.⁷⁴ The plaintiffs asserted that the landlord's discrimination caused the tenants to lose the social benefits of living in an integrated community, to miss the business and professional advantages that would have accrued from living with members of minority groups and to suffer from being stigmatized as residents of a "white ghetto."⁷⁵ The Court, noting the broad and inclusive language of Title VIII, held that the plaintiffs had standing to sue.⁷⁶ The Court concluded that the plaintiffs had alleged a particular, individual injury.⁷⁷

66. 563 F.2d 439 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978).

67. 409 U.S. 205 (1972). -

68. EEOC v. *Bailey Co.*, 563 F.2d 439, 442 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978).

69. *Id.* at 452.

70. *Id.* Defendant supported his position that if plaintiff is not a member of the class being discriminated against then that plaintiff cannot suffer the requisite injury by citing to dicta in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The *McDonnell Douglas* Court, in dicta, asserted that to establish a prima facie case of discrimination under Title VII, complainant must belong to a racial minority. *Id.* at 802.

71. See *Bailey*, 563 F.2d at 452 (citing *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205, 208-09 (N.D. Ala. 1973) (holding that white plaintiff cannot represent allegedly aggrieved black person); EEOC v. *New York Times Broadcasting Serv. Inc.*, 364 F. Supp. 651, 654 (W.D. Tenn. 1973) (stating that white female not proper representative of black employees generally), *aff'd in part, rev'd in part*, 542 F.2d 356 (6th Cir. 1976)).

72. *Bailey*, 563 F.2d at 452.

73. *Id.*

74. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 206-07 (1972).

75. *Id.* at 208.

76. *Id.* at 212.

77. *Id.* at 209-11 (recognizing that plaintiff's alleged injury was loss of important social benefits from interracial interactions).

Following the reasoning in *Trafficante*, the Sixth Circuit in *Bailey* analyzed the similarities between Title VIII and Title VII.⁷⁸ First, the *Bailey* court addressed the similarity of the pertinent statutory language.⁷⁹ Both Statutes provide for charges to be filed by a "person aggrieved."⁸⁰ Next, the *Bailey* court examined the nearly identical functional design of the two Statutes.⁸¹ Both Statutes include a list of discriminatory practices, establish enforcement procedures triggered by the charge of an aggrieved person and providing for notification to alleged offenders, investigation of alleged offenders, and conciliation procedures.⁸² In addition, both Statutes allow an aggrieved person to bring a private action.⁸³ The *Bailey* court noted that the only major structural difference between the two Statutes was that Title VII grants the EEOC the power to bring a public suit, while Title VIII does not grant the Secretary of Housing and Urban Development any such corresponding power.⁸⁴ The court disregarded this difference, however, stating that Congress had amended Title VII by adding the enforcement power in order to expand Title VII's coverage, and to increase compliance with the law.⁸⁵ The court therefore concluded that Congress had not intended the amendment to narrow the class of complainants.⁸⁶ The *Bailey* court continued to compare the two Statutes and explained that both Statutes extend standing as broadly as is permitted under Article III of the Constitution.⁸⁷ Finally, the *Bailey* court stated that the purposes and effects of both Title VII and Title VIII are identical.⁸⁸ Both Title VII in the employ-

78. *EEOC v. Bailey Co.*, 563 F.2d 439, 452-54 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978).

79. *Id.* at 452-53.

80. *Id.* The *Bailey* court concluded that because both Title VII and Title VIII are civil rights acts, Congress could not have intended for identical words to have different meanings. *Id.* at 453. Section 706(b) of Title VII provides for the filing of charges with the EEOC by a "person claiming to be aggrieved." 42 U.S.C. § 2000e-5(b) (1988). Section 810(a) of Title VIII provides for the filing of a suit with the Secretary of Housing and Urban Development by "an aggrieved person." 42 U.S.C. § 3610(a) (1988). *See also* *Waters v. Heublein, Inc.*, 547 F.2d 466, 469 (9th Cir. 1976) (stating that enforcement procedures of Title VII and Title VIII are virtually identical), *cert. denied*, 433 U.S. 915 (1977).

81. *Bailey*, 563 F.2d at 453.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*; *see also* *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) (holding that "person aggrieved" language of Title VIII indicates congressional intent to define standing as broadly as permitted by Article III of Constitution); *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446-47 (3d Cir. 1971) (holding that "person claiming to be aggrieved" language of Title VII showed congressional intent to define standing as broadly as permissible under Constitution).

88. *Bailey*, 563 F.2d at 453-54; *see also* *Waters v. Heublein, Inc.*, 547 F.2d 466, 469 (9th Cir. 1976) (describing distinction between laws aimed at desegregation and laws aimed at equal opportunity as illusory), *cert. denied*, 433 U.S. 915 (1977); *infra* note 89 and accompanying text (discussing congressional purposes of Title VII and Title VIII).

ment context and Title VIII in the housing context outlaw discrimination based on race, religion, national origin, and sex.⁸⁹ Finding the analyses in *Trafficante* and the case before it indistinguishable, the *Bailey* court held that the white plaintiff had standing to assert a claim that her employer racially discriminated against a black female employee.⁹⁰

The federal court system's apparent willingness, as evidenced by the *Bailey* case, to read Title VII and Title VIII standing cases as precedent for one another strongly supports the contention that the *Havens* case should be viewed as precedent supporting tester standing under Title VII. The *Havens* case clearly held that testers had standing to sue under Title VIII.⁹¹ The logical extension of the *Havens* analysis to Title VII tester standing leads to the conclusion that under current case law testers do have standing to sue under Title VII.

In addition to the strong precedent established by *Havens*, granting testers standing under Title VII would be consistent with the federal courts' traditionally liberal construction of the standing doctrine in civil rights litigation.⁹² Specifically, the Supreme Court has held that plaintiffs who had no intention of personally accepting any tangible benefit from challenging

89. 42 U.S.C. § 2000e-2 (1988); 42 U.S.C. § 3604 (1988); see *Bailey*, 563 F.2d at 453 (stating that effect of both Title VIII and Title VII will be increased interracial contact in home and workplace, respectively); Regina Cahan, Comment, *Home Is No Haven: An Analysis of Sexual Harassment in Housing*, 1987 Wis. L. Rev. 1061, 1077 (stating that Congress enacted both Title VII and Title VIII "to ensure the removal of artificial, arbitrary, and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of impermissible characteristics"). Title VII addresses and attempts to provide a remedy for discrimination in the workplace; Title VIII addresses and attempts to provide a remedy for discrimination in the sale or rental of housing.

90. *Bailey*, 563 F.2d at 454.

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

92. See *EEOC Policy Guidance on Use of 'Testers' in Employment Selection Process* DAILY LAB. REP. (BNA) No.234, at D-1 (Dec. 5, 1990) (quoting *Wright v. Regan*, 656 F.2d 820, 829 (D.C. Cir. 1981) (stating that federal courts have construed standing liberally in order to further "an overriding, constitutionally rooted national policy against racial discrimination"), *rev'd sub nom. Allen v. Wright*, 468 U.S. 737 (1984)); see also Constance Baker Motley, *The Supreme Court, Civil Rights Litigation, and Deja Vu*, 76 CORNELL L. REV. 643, 643 (1991) (stating that Supreme Court decisions declaring unconstitutional all laws that sanction racial segregation sparked Congress to rewrite and strengthen civil rights laws); G. Nelson Smith, II & Rodney P. Ruffin, *Title VII Litigation Before the Rehnquist Court: Attempting to Change a Judicial Leopard's Spots*, 2 GEO. MASON U. CIV. RTS. L.J. 45, 45 (1990) (stating that civil right advocates view Supreme Court as branch of government most receptive to their concerns and branch most likely to implement policies and programs designed to promote racial equality); James C. Harrington, *Once Again, Bush Works Against Expanding Civil Rights*, TEXAS LAWYER, Apr. 15, 1991, at 22 (stating federal courts filled vacuum that politicians created in civil rights field); see, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954) (overturning "separate but equal" doctrine which had legalized segregation as long as equal facilities were provided to segregated groups); *Dawson v. Mayor of Baltimore*, 220 F.2d 386, 388 (4th Cir.), *aff'd*, 350 U.S. 877 (1955) (declaring segregated parks unconstitutional); *Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala.) (declaring segregated public transportation unconstitutional), *aff'd*, 352 U.S. 903 (1956).

a discriminatory practice have standing to sue.⁹³ In *Evers v. Dwyer*,⁹⁴ a black person boarded a bus for the sole purpose of instituting an action to contest a Tennessee statute that required segregated seating.⁹⁵ The Supreme Court held that the plaintiff had standing to sue and that a plaintiff's motive was irrelevant in determining standing.⁹⁶ In *Pierson v. Ray*,⁹⁷ civil rights activists, in an act of social protest, attempted to use segregated facilities.⁹⁸ The Supreme Court ruled that the plaintiffs' conscious exercise of their constitutional rights did not affect their standing to sue.⁹⁹ The Court was not disturbed by the fact that the plaintiff in *Evans* did not really want the seat for the purpose of sitting or that the plaintiff in *Pierson* did not really want to use the facilities.¹⁰⁰ It did not trouble the Court that the plaintiffs' desire for the seat or facilities rested solely on the motive to exercise their rights.¹⁰¹ Similarly, the Court should not be troubled by whether a plaintiff tester's motivation in applying is obtaining the job. The controlling inquiry should be whether plaintiff tester is exercising a right to be considered non-discriminatorily for a job.

The interaction between the federal court system and EEOC guidelines also needs to be considered in an analysis of tester standing under Title VII. The EEOC's position in their policy guide that testers' have standing

93. See *infra* notes 94-100 and accompanying text (discussing cases where Supreme Court has held that motive for testing statutory or constitutional right was irrelevant to whether plaintiff had standing to sue).

94. 358 U.S. 202 (1958).

95. *Evers v. Dwyer*, 358 U.S. 202, 203 (1958). In *Evers*, a black person boarded a bus for the purpose of instituting an action to contest a Tennessee statute that required segregated seating arrangements. *Id.* at 202-03. The *Evers* Court noted that an actual controversy must exist before the plaintiff may bring suit. *Id.* at 203. The Court determined that an actual controversy existed because a resident of the municipality who cannot use transportation facilities therein without being subjected by statute to special disabilities has a substantial, immediate and real interest in the validity of the statute that imposes the disability. *Id.* at 204. The Court concluded that the fact that the plaintiff boarded the bus with the intention to institute the litigation was irrelevant. *Id.*

96. *Id.* at 204.

97. 368 U.S. 547 (1967).

98. *Pierson v. Ray*, 368 U.S. 547, 549 (1967). In *Pierson* the petitioners, a group of white and black clergymen, attempted to use segregated facilities at an interstate bus terminal. *Id.* The defendants, city policemen, arrested the petitioners for violating a breach of the peace statute. *Id.* After eventually winning in the state court, petitioners brought suit in the federal district court alleging that respondents had violated section 1983 of the Civil Rights Act. *Id.* at 550. The plaintiffs alleged that the officers arrested them solely for attempting to use the "white only" waiting room. *Id.* at 557. The plaintiffs also asserted that no crowd was present in the waiting room and that no one threatened violence or seemed about to cause a disturbance. *Id.* Defendants alleged that they arrested the plaintiffs to prevent an outbreak of violence, not to preserve the segregated customs of Mississippi, and that a crowd had gathered and imminent violence was likely. *Id.* The Supreme Court ruled that the plaintiffs' deliberate exercise of their rights did not disqualify them from seeking damages under section 1983. *Id.* at 558.

99. *Id.* at 558.

100. *Evers*, 353 U.S. 202, 204 (1958); *Pierson*, 368 U.S. 547, 558 (1967).

101. *Evers*, 353 U.S. at 204.

to sue under Title VII rests on the Agency's interpretation of Title VII.¹⁰² The federal courts recognize that an EEOC interpretation of Title VII, while not controlling,¹⁰³ comes from a body of experience and hence consider the EEOC's interpretation as informed judgment.¹⁰⁴ In acknowledgement of this view, the Supreme Court generally accords deference to administrative statutory interpretations.¹⁰⁵ The EEOC's policy guide concerning tester standing is an actual construction¹⁰⁶ of an ambiguous statute.¹⁰⁷ In addition, the EEOC's interpretation is in accordance with Title VII's congressional purpose¹⁰⁸ and has a reasonable basis in the law.¹⁰⁹ These factors support

102. See *infra* notes 103-09 and accompanying text (discussing federal courts' treatment of EEOC guidelines).

103. See *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-46 (1976) (noting that Congress did not confer upon EEOC ability to promulgate rules or regulations).

104. See *id.* at 140 (stating that, depending upon certain factors, courts give EEOC guidelines deference). The general rule of the Supreme Court is to show deference to the interpretation given a statute by an agency charged with its administration. *Youakim v. Miller*, 425 U.S. 231, 235 (1976) (stating that interpretation of statute by agency charged with statute's enforcement is substantial factor to be considered in construing statute); *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 421 (1973) (citations omitted) (ruling that construction of statute by agency charged with statute's execution should be followed unless there are compelling indications that interpretation is wrong).

105. See *supra* note 104 (discussing general rule that Supreme Court applies when dealing with statutory interpretations by agencies).

106. See *Baltimore & Ohio R.R. v. Jackson*, 353 U.S. 325, 330-31 (1957) (stating that general rule only applies to positive action taken by administrative agency). The EEOC has issued a policy guide and filed an *amicus curiae* brief in support of its interpretation. *Policy Guide*, *supra* note 12, at 31; Brief of the Equal Employment Opportunity Commission as *Amicus Curiae* in Opposition to the Motion (No. 91-8909-NHJ)(D.D.C. filed May 5, 1991).

107. See *Brewster v. Gage*, 280 U.S. 327, 336 (1930) (citations omitted) (stating that settled rule is that practical interpretation of ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons); *McLaren v. Fleischer*, 256 U.S. 477, 481 (1921) (stating that practical interpretation given to act of Congress fairly susceptible of different interpretations, by those charged with duty of executing it, is entitled to great respect). Title VII grants standing to all "persons aggrieved." 42 U.S.C. § 2000e-5 (1988). As evidenced by the controversy over whether testers have standing, many lawyers disagree over the meaning of the words "person aggrieved." See *supra* notes 29-32 and accompanying text (discussing dispute over whether testers have standing to sue under "person aggrieved" language of Title VII).

108. See *Estate of Sanford v. Commissioner*, 308 U.S. 39, 52 (1939) (applying general rule that when administrative interpretation is not in conflict with statute construed, courts should follow administrative interpretation). The congressional purpose behind Title VII was to outlaw discrimination based on race, religion, national origin and sex by providing equal employment opportunities. *EEOC v. Bailey*, 563 F.2d 439, 453 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978). Construing Title VII to allow testers standing would allow for greater enforcement of the statute. See *infra* note 181-89 (discussing effectiveness of testing method).

109. See *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973) (stating that administrative construction of statute will ordinarily be affirmed if interpretation has reasonable basis in law). The EEOC bases its interpretation of Title VII on strong precedent of tester standing under a similar statute. See *supra* notes 51-101 and accompanying text (discussing existing case law supporting ruling that testers have standing under Title VII).

the contention that this particular EEOC interpretation is one to which the Court should accord deference.¹¹⁰

Although precedent and history indicate that the Supreme Court should rule that testers have standing under Title VII, the Courts use of the standing doctrine¹¹¹ is "among the most amorphous in the entire domain of public law."¹¹² The Court, itself, has remarked upon the obscure nature of the standing doctrine.¹¹³ Many commentators have criticized both the substance of the doctrine and the Court's erratic use of the concept.¹¹⁴ Some critics accuse the Court of manipulating the doctrine in order to decide cases without revealing its views on the merits.¹¹⁵ The Court's nebulous

110. See *supra* notes 106-09 and accompanying text (discussing various factors that Supreme Court considers to determine if it will accord deference to administrative interpretation of statute).

111. See *supra* notes 51-101 and accompanying text (discussing case law relevant to issue of tester standing under Title VII and standing in civil rights cases in general).

112. *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 89th Cong., 2d Sess. 498 (1966) (statement of Professor Paul A. Freund).

113. See *Flast v. Cohen*, 392 U.S. 83, 94 (1968) (commenting on complexity of standing doctrine). In *Flast*, the Supreme Court commented that the complexity of standing law results because the doctrine is often used as a shorthand for all the various elements of justiciability. *Id.* at 99. The term "justiciability" refers to a matter that is appropriate for court review. *Id.* at 95. The Supreme Court in *Flast* noted the uncertain meaning and scope of justiciability. *Id.* A court's use of justiciability is often the result of many subtle pressures. *Id.* The Court related that these same subtle pressures cause policy considerations to blend into constitutional limitations when considering the question of standing. *Id.* at 99; see also *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (stating that courts have not defined concept of standing with complete consistency); *Flast*, 392 U.S. at 129 (Harlan, J., dissenting) (referring to standing doctrine as "a word game played by secret rules"); *Public Citizen, Inc. v. Simon*, 539 F.2d 211, 218 (D.C. Cir. 1976) (stating that standing doctrine lacks rational framework due to lack of clarity in doctrine's development).

114. See KENNETH DAVIS, *ADMINISTRATIVE LAW TREATISE* § 22.00-2 (Supp. 1970) (characterizing standing law as "cumbersome, inconvenient, and artificial"); Albert Broderick, *The Warth Optional Standing Doctrine: Return to Judicial Supremacy?*, 25 CATH. U. L. REV. 467, 517-29 (1976). (criticizing *Warth* decision for claiming selective process of deciding where constitutional jurisdiction exists and thus adopting position of judicial supremacy); Abram Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 23 (1982) (stating that standing is ritual after which court chooses up sides and decides case); Kenneth Culp Davis, *Standing 1976*, 72 NW. U. L. REV. 69, 69 (1977) (describing law of standing as extraordinarily uneven); Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 635 (1985) [hereinafter *Abusing Standing*] (criticizing Burger Court's inconsistent application of standing doctrine); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 68 (1984) [hereinafter *Rethinking Standing*] (alleging that standing doctrine is possibly most uniformly criticized area of constitutional law by scholars). One commentator has even suggested that the concept of standing is unworkable and should be discarded entirely. Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 700 (1977) (stating that it is time for standing doctrine to "fade away").

115. See *Fletcher*, *supra* note 35, at 228 (stating that it is common knowledge that from time to time Supreme Court has used standing as mechanism to control appellate docket); *Abusing Standing*, *supra* note 114, at 635 (stating that Burger Court used standing to fence out disfavored federal claims); Tushnet, *supra* note 114, at 663-64 (stating that standing has become surrogate for decisions on merits).

application of the standing doctrine renders the composition of the Court an important factor in any standing analysis.

Recent appointments to the Supreme Court by Presidents Reagan and Bush¹¹⁶ have solidified a conservative majority on the present Court.¹¹⁷ These conservative appointments have produced case law that commentators characterize as a retreat from the strong civil rights position previously occupied by the Court.¹¹⁸ Specifically, the Court in its 1989 Term used procedural

116. See Linda Greenhouse, *Senate Confirms Judge O'Connor; She Will Join High Court Friday*, N.Y. TIMES, Sept. 22, 1981, at A1 (stating Reagan nominee, Sandra Day O'Connor, was confirmed as Associate Justice by Senate on September 21, 1981); Al Kamen, *Rehnquist Confirmed in 65-33 Senate Vote; Scalia Approved as Associate Justice, 98-0*, WASH. POST, Sept. 18, 1986, at A1 (stating that Reagan nominee, Antonin Scalia, was confirmed as Associate Justice by Senate on September 17, 1986); Joseph R. Tybor, *Kennedy Confirmed for High Court*, CHI. TRIB., Feb. 4, 1988, at C5 (stating that Reagan nominee, Anthony Kennedy, was confirmed as Associate Justice by Senate on February 3, 1988); Richard L. Berke, *Senate Confirms Souter, 90 to 9, as Supreme Court's 105th Justice*, N.Y. TIMES, Oct. 3, 1990, at A1 (stating that Bush nominee, David H. Souter, was confirmed as Associate Justice by Senate on October 2, 1991); David A. Wiessler, *Thomas Next Step: Supreme Court*, UPI, Oct. 16, 1991, available in LEXIS, Nexis Library, UPI File (stating that Bush nominee, Clarence Thomas, was confirmed as Associate Justice on October 15, 1991 by vote of 52-48).

117. See Jeffrey W. Stempel, *The Rehnquist Court, Statutory Interpretation, Inertial Burdens, and a Misleading Version of Democracy*, 22 U. TOL. L. REV. 583, 608 (1991) (stating that Supreme Court in 1989 had conservative working majority); Harrington, *supra* note 92, at 22 (stating that President Reagan and President Bush used ideological litmus tests in nominating candidates to Supreme Court); Robert A. Sedler et al., *Civil Rights and Civil Liberties: The Supreme Court's 1990-91 Term*, NAT'L BAR ASS'N MAG., Sept. 21, 1991, at 13 (stating that in 1990-91 Supreme Court entered new era of conservative consolidation).

118. See James A. Kushner, *Symposium: The State of the Union: Civil Rights: The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1072 (1989) (suggesting that Rehnquist Court may reverse many civil rights advances of past generations); Motley, *supra* note 92, at 649 (stating that hostility toward systematic challenges to inequality together with desire to protect "innocent" members of dominant groups pervaded Court's decisions in 1988-89 Term); *id.* at 643 (drawing parallel between twentieth century's weariness with civil rights issue and nineteenth century's weariness with civil rights following abolition of slavery and end of Civil War); Charles Stephen Ralston, *Court v. Congress: Judicial Interpretation of the Civil Rights Act and Congressional Response*, 8 YALE L. & POL'Y REV. 205, 205 (1990) (quoting Civil Rights Act of 1990, § 2(a)(1), H.R. 4000, S.2104, 101st Cong. 2d sess. (1990), which states that "Congress finds that . . . in a series of recent decisions addressing employment discrimination claims under federal law, the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protections"); Herman Schwartz, *Trends in the Rehnquist Court*, 22 U. TOL. L. REV. 559, 568 (1991) (noting consistent pattern of ruling against civil rights plaintiffs by Rehnquist Court in both constitutional and statutory cases); Smith & Ruffin, *supra* note 92, at 411-12 (discussing Reagan appointees' insensitivity to political minorities); Harrington, *supra* note 92, at 22 (listing 1989 Supreme Court cases that negatively impacted discrimination victim's rights and concluding that Rehnquist Court is decidedly hostile to civil rights in work place); Will Dunham, *Senate Confirms Supreme Court Nominee Souter*, UPI, Oct. 2, 1990, available in LEXIS, Nexis Library, UPI file (stating that Senator Edward Kennedy expressed concern that Souter would solidify a 5-4 anti-civil rights majority); Sedler et al., *supra* note 117, at 13 (quoting Justice Marshall's dissent in *Payne v. Tennessee*, 112 S. Ct. 28 (1991), that "[t]he majority today sends a clear signal that scores of constitutional liberties are now ripe for reconsideration"); see also *infra* notes 120-59 and accompanying text (detailing recent Supreme Court decisions concerning civil rights).

devices as a means of restricting the substantive rights of Title VII plaintiffs.¹¹⁹

This judicial narrowing of Title VII through procedural means, as reflected in the Court's 1989 civil rights cases,¹²⁰ might indicate a proclivity of the Court to deny tester standing under Title VII. This possibility is further buttressed by the Court's apparent willingness to disregard precedent concerning Title VII cases.

An illustrative case demonstrating the current Court's inclination for limiting Title VII substantive rights is *Wards Cove Packing Co. v. Atonio*.¹²¹ In *Wards Cove*, the Court altered the manner of proof that an aggrieved person must assert to prove a violation of his Title VII rights.¹²² The *Wards Cove* plaintiffs, former salmon cannery workers, brought a class action suit under Title VII alleging employment discrimination on the basis of race.¹²³ The employer had two basic job categories: cannery and noncannery.¹²⁴ The noncannery jobs consisted of mostly skilled positions and provided higher wages.¹²⁵ These positions were filled predominantly by white workers and the cannery positions were filled predominantly by minority workers.¹²⁶ The plaintiffs asserted that the racial stratification of the workforce resulted from various hiring and promotion practices of the employer and alleged that their employer had denied them noncannery positions on the basis of their race.¹²⁷

These allegations constituted a prima facie case of discrimination under the standards established previously by the Supreme Court in *Griggs v. Duke Power Co.*¹²⁸ The *Griggs* Court established that facially neutral employment policies that had an adverse impact on protected groups were subject to disparate impact claims.¹²⁹ However, in *Wards Cove* the Court

119. See Smith & Ruffin, *supra* note 92, at 50-51, 54 (discussing Court's use of procedural devices to effectively narrow civil rights plaintiff's substantive rights).

120. On November 21, 1991, President Bush signed into law the Civil Rights Act of 1991 (Civil Rights Act). This legislation's main effect will be to overturn many of the Supreme Court's 1989 civil rights decisions. Among the cases changed by The Civil Rights Act are *Wards Cove*, *Patterson*, *Price Waterhouse* and *Lorance*. The fact that legislation has changed the holdings in these cases is not relevant to their use in this note. These four cases are used to demonstrate the tilt of the current Supreme Court. They are still useful as indicators of the current Court's judicial views on Title VII.

121. 490 U.S. 642 (1989).

122. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-51, 659-60 (1989); see Smith & Ruffin, *supra* note 92, at 51 (stating that alteration of employment discrimination law effected by *Wards Cove* would prove as effective barrier to Title VII plaintiffs as if Supreme Court simply had rewritten significant portions of Act).

123. *Wards Cove*, 490 U.S. at 647-48.

124. *Id.* at 647.

125. *Id.*

126. *Id.*

127. *Id.* at 647-48.

128. 401 U.S. 424 (1971).

129. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (establishing disparate impact theory that construes Title VII to proscribe "not only overt discrimination but also

declared that disparity in racial composition alone no longer sufficed to establish a prima facie case of disparate impact.¹³⁰ According to the *Wards Cove* Court a plaintiff, to establish a prima facie case, now had to specify the challenged employment practice leading to the disparity.¹³¹ In addition, even if a plaintiff establishes a prima facie case, the employer now only bears the burden of proving a valid business purpose rather than the previously required business necessity.¹³² Using this revised method of analysis, the *Wards Cove* Court determined that the plaintiffs had not established a prima facie case because they had failed to establish a causal link between the challenged employment practice and the racial imbalance in the workforce.¹³³ As a result of the *Wards Cove* decision, it is extremely difficult for a plaintiff with a disparate impact claim to establish a prima facie case.¹³⁴

Three other 1989 Supreme Court cases further exemplify the Court's preoccupation with not burdening the employer and the Court's implementation of this position by altering procedural precedent. In *Patterson v. McLean Credit Union*¹³⁵ the Supreme Court, using Title VII as a means, limited the scope of section 1981 claims.¹³⁶ In contrast to prior case law,¹³⁷

practices that are fair in form but discriminatory in practice"); see also Robert Belton, *Causation and Burden-Shifting Doctrines in Employment Discrimination Law Revisited: Some Thoughts on Hopkins and Wards Cove*, 64 *TUL. L. REV.* 1359, 1360 (1990) (stating that *Griggs* is most important Supreme Court decision in seeking remedies that are sufficient to correct legacy of slavery); Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 1991 *FORDHAM L. REVIEW* 523, 525 (stating that in *Wards Cove* Supreme Court adopted evidentiary standard for disparate impact cases that was inconsistent with standard adopted over two decades ago in *Griggs*).

130. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-51 (1989). The Supreme Court declared that disparity between workforce and local population is irrelevant in disparate impact inquiry, and stated that instead the appropriate basis for a statistical comparison is the relevant labor market. *Id.*

131. *Id.* at 655.

132. *Id.* at 659.

133. *Id.* at 657-58.

134. See C. Ray Gullett & Michael Styles, *Wards Cove on Remand: Implications for Equal Employment Opportunity*, *LAB. L.J.* 635, 639 (Sept. 1991) (stating that *Wards Cove* has shifted employment law heavily in favor of employer); *supra* notes 132-33 and accompanying text (discussing procedural effects of Court's holding in *Wards Cove* on burdens parties must carry).

135. 491 U.S. 164 (1989).

136. *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989). In *Patterson* the plaintiff, a black woman, brought a racial harassment suit under section 1981 alleging that her employer had failed to promote her in her employment and that her employer discharged her because of her race. *Id.* at 169. The *Patterson* Court emphasized that section 1981 applies only to racial discrimination in the making and enforcing of contracts. *Id.* at 176. Because post-hiring race discrimination did not involve the "making" or "enforcing" of a contract, but only involved the performance of the contract, the Court in *Patterson* reasoned that such activity was outside the scope of section 1981. *Id.* at 177. Section 1981 provides that:

All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property

the Court held that the performance of a contract was outside the scope of section 1981.¹³⁸ In limiting the reach of section 1981, the Court seriously restricted the liability of private employers who engage in racial discrimination.¹³⁹ In a second case, *Price Waterhouse v. Hopkins*,¹⁴⁰ the Supreme Court limited the reach of Title VII.¹⁴¹ Although prior case law had determined that once a plaintiff proved that the defendant employer had

as is enjoyed by white citizens

42 U.S.C. § 1981 (1988).

137. See *Runyon v. McCrary*, 427 U.S. 160, 173-74 (1976) (holding that section 1981 reached private contractual relations).

138. *Patterson*, 491 U.S. at 176-77.

139. See Ivan E. Bodensteiner, *Recent Developments in Civil Rights*, 24 *IND. L. REV.* 675, 676 (1991) (stating that Supreme Court's decision in *Patterson* eliminates from section 1981's scope racial harassment claims and most likely will eliminate discharge claims as well). The Supreme Court's interpretation of section 1981 severely limits the remedies available to a discriminatee because under Title VII compensatory, nominal, and punitive damages are not available to a victim of discrimination. See *King v. Board of Regents of Univ. of Wis. Sys.*, 898 F.2d 533, 537 (7th Cir. 1990) (stating that 42 U.S.C. §§ 2000e-5(g) limits damages to reinstatement, back pay and attorney fees). Congress attempted to correct these remedial deficiencies with the Civil Rights Act of 1990. S. 2104, 101st Cong., 2d Sess. (1990). This bill would have provided for compensatory and punitive damages for discriminatees. *Id.* § 8. President Bush, however, vetoed the bill. Bodensteiner, *supra* at 695.

In particular, the Court's harmonizing of Title VII and section 1981 vastly reduces the protections of civil rights laws for many Americans. See Stempel, *supra* note 117, at 614 (stating that Title VII does not protect employees of businesses of fewer than fifteen workers). Rather than reading Title VII and section 1981 as instruments created by Congress to fight discrimination in different but complementary ways, the Court in *Patterson* chose to read the administrative requirements of Title VII and the limit of the remedies offered by Title VII as creating a special balance of interests which should not be disturbed. Motley, *supra* note 92, at 654.

140. 490 U.S. 228 (1989).

141. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989); see Stempel, *supra* note 117, at 627 (stating that *Price Waterhouse* decision limits Title VII's reach). In *Price Waterhouse* the plaintiff, a female senior manager at Price Waterhouse, brought suit under Title VII alleging sex discrimination. *Price Waterhouse*, 490 U.S. at 232. The previous year the partners of plaintiff's office had put the plaintiff in the "hold" category for partners. *Id.* at 231. The next year the partners in the plaintiff's office refused to repropose her for a partnership position. *Id.* at 231-32. The plaintiff alleged that Price Waterhouse had violated Title VII because of its biased decision-making partnership process, which tended to deprive women of partnership positions on the basis of their sex. *Id.* at 232. Plaintiff based her complaint on the many sex-based comments found in her evaluations. *Id.* The partnership evaluations contained numerous remarks such as "to improve her chances for partnership . . . [she] should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry,'" "she 'overcompensated for being a woman,'" and advised that she should "take 'a course at charm school.'" *Id.* at 235. Under the Supreme Court's earlier decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), once the Court discovered a discriminatory motive by an employer, the inquiry was over and the employee won. *Id.* at 807. Nevertheless, in *Price Waterhouse* the Court established that the employer can prevail in spite of a finding of discriminatory intent. *Price Waterhouse*, 490 U.S. at 252-53. To avoid liability, the employer need only prove by a preponderance of the evidence that the employer would have made the same decision concerning the plaintiff, even if the employer had not taken the plaintiff's membership in a protected class into consideration. *Id.* at 258.

acted with a discriminatory motive the plaintiff won, the *Price Waterhouse* Court ruled that an employer could now prevail in spite of a finding of discriminatory intent.¹⁴² An employer could now escape liability by proving that the same decision would have been made even if the plaintiff's membership in a protected class had not been taken into account.¹⁴³ In a third case, *Lorance v. AT&T Technologies, Inc.*,¹⁴⁴ the Rehnquist Court again retracted civil rights protection by limiting the time period in which a plaintiff can file a Title VII claim.¹⁴⁵ Previously the Court had held that a discriminatory seniority system was a continuing violation that created a cause of action every time it was applied.¹⁴⁶ The Court now ruled that the limitation period begins to run upon the adoption of the discriminatory seniority system.¹⁴⁷ The decision in *Lorance* has the practical effect of discouraging employees from challenging seniority systems.¹⁴⁸

These four 1989 Supreme Court cases represent the Court's continuing restriction of the substantive rights protected by Title VII.¹⁴⁹ The Supreme Court's initial interpretations of Title VII were broad and strongly pro-plaintiff.¹⁵⁰ The Supreme Court, however, soon began to retreat from this

142. *Price Waterhouse*, 490 U.S. at 252-53.

143. *Id.* at 258.

144. 490 U.S. 900 (1989).

145. *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 911 (1989). Title VII claims are subject to a 300 day limitation period in states that have state agencies to which discrimination complaints may be referred by the EEOC, and 180 day limitation periods in states which have no such agencies. 42 U.S.C. § 2000e-(5)(e) (1988). The *Lorance* plaintiffs, three female employees, brought suit against their employer alleging that the employer's seniority system was discriminatory. *Lorance*, 490 U.S. at 902. Plaintiffs' employer had demoted the plaintiffs from their positions on the basis that they had less seniority at these positions, despite the fact that the plaintiffs had more plantwide seniority than males who retained these same positions. *Id.* at 902-03. Previous case law had held that the application of a facially neutral but discriminatorily adopted seniority system was a continuing violation which gave rise to a Title VII claim on each occasion the employer applied the seniority system. See *Cook v. Pan Am. World Airways, Inc.*, 771 F.2d 635, 646 (2d Cir. 1985) (holding that where violation is continuous, alleged discriminatee has cause of action each time discriminatory practice is applied to discriminatee), *cert. denied*, 474 U.S. 1109 (1986). The *Lorance* decision, in contrast to earlier decisions, held that the limitation period begins to run upon the adoption of a seniority system in which some discriminatory intent exists. *Lorance*, 490 U.S. at 911.

146. *Cook v. Pan Am. World Airways, Inc.*, 771 F.2d at 646.

147. *Lorance*, 490 U.S. at 911.

148. See Stempel, *supra* note 117, at 633 (stating that many potential plaintiffs simply will not realize that they are adversely affected by seniority rule until it is too late, and that many potential plaintiffs might choose to gamble that they will not be laid off or demoted rather than incur cost of being Title VII litigant).

149. See *supra* notes 121-48 and accompanying text (discussing effect of *Wards Cove*, *Price Waterhouse*, *Lorance* and *Patterson* on rights of Title VII plaintiffs).

150. See Motley, *supra* note 92, at 646 (stating that Burger Court's recognition of disparate impact suits under Title VII provided federal judges, civil rights attorneys and government with potent weapon with which to fight discrimination); Smith & Ruffin, *supra* note 92, at 48 (stating that Supreme Court's initial interpretation of Title VII provided powerful tool for civil rights advocates).

expansive reading of Title VII.¹⁵¹ The 1989 civil rights cases mark a renewed effort by the Court to stem the tide of civil rights litigation.¹⁵² Both a hostility toward challenges to systematic inequality and a desire to protect "innocent" members of dominant groups pervaded these recent decisions.¹⁵³ These decisions implemented changes in the procedural process of establishing or defending a Title VII claim or used Title VII to limit the scope of another civil rights statute.¹⁵⁴ Both *Wards Cove* and *Price Waterhouse* shifted the burdens of proof.¹⁵⁵ *Wards Cove* shifted the burden in disparate impact cases totally to the plaintiff, while simultaneously lightening the defendant's burden by requiring that the employer only need establish a business rationale rather than a business necessity for the alleged discriminatory practice.¹⁵⁶ *Price Waterhouse* established that even if a plaintiff proves his burden by establishing discrimination, the defendant employer can avoid liability by showing that the employer would have acted the same regardless of the plaintiff's membership in a protected class.¹⁵⁷ *Lorance* severely limited challenges to systemic inequality resulting from discriminatorily adopted seniority systems by ruling that the limitation period begins to run upon the adoption of a seniority system and not upon each application of the system.¹⁵⁸ *Patterson*, in an ironic twist, used Title VII to effectuate a limitation of the substantial rights protected by another civil rights statute, section 1981.¹⁵⁹ The Supreme Court's narrowing interpretation of the rights of plaintiffs protected under Title VII raises serious questions as to whether the Rehnquist Supreme Court will follow the logical progression of the existing case law and rule that testers have standing under Title VII.

Given the disposition of the current Supreme Court and the manipulable nature of the standing doctrine,¹⁶⁰ policy arguments may indirectly affect

151. See Smith & Ruffin, *supra* note 92, at 50-51 (discussing Supreme Court's continuing shift away from expansive reading of Title VII established by *Griggs*).

152. See Motley, *supra* note 92, at 649 (discussing signal regarding civil rights that Rehnquist Court sent during the 1989 Term).

153. See *id.* (discussing philosophy emerging from Supreme Court's 1989 employment decisions); see also Motley, *supra* note 92, at 654 (stating that both *Patterson* and *Wards Cove* reflect Court's strong concern about not burdening those accused of civil rights violations). To accomplish this one commentator has speculated that the Rehnquist Court may draw back on standing under Title VII. See Kushner, *supra* note 118, at 1072-73 (stating that Justice Kennedy may urge reconsideration of broad standing in civil rights cases).

154. See *supra* notes 149-53, *infra* notes 155-59 and accompanying text (discussing procedural effects of cases).

155. See *supra* note 130-33 and accompanying text (discussing *Wards Cove*'s impact on burdens that plaintiff and defendant must bear in disparate impact case).

156. See *supra* notes 130-33 and accompanying text (discussing change in proof needed by plaintiff in disparate impact case to establish prima facie case and lessening of justification needed by defendant to support challenged business practice).

157. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989).

158. *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 911 (1989).

159. *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989).

160. See *supra* notes 111-15 and accompanying text (discussing malleable nature of standing doctrine).

the Court's decision on whether testers have standing to sue under Title VII. Therefore, despite the fact that the question of whether testers have standing under Title VII is a question of statutory standing,¹⁶¹ the policy arguments on both sides are relevant to an analysis of tester standing.

Employers strenuously have voiced their many policy arguments against the use of testers in the employment field.¹⁶² The numerous faults cited by employers focus on the deceit inherent in the technique, the adverse effects on employers, the high potential for abuse and the possibly negative impact on the EEOC itself.¹⁶³ Jeffery Norris, the president of the Equal Employment Advisory Committee (EEAC),¹⁶⁴ voiced his concerns over the implementation of the use of testers in a letter to the EEOC Chairman, Evan Kemp.¹⁶⁵ Attorney John Irving, former General Counsel of the National Labor Relations Board, in a letter to the EEOC chairman, questioned the soundness of a policy that relies on covert activity and deliberate deception.¹⁶⁶ Irving questioned the wisdom of the EEOC in vouching for the honesty of a witness who was a "liar and a cheat" from the outset.¹⁶⁷ Other employers have likened the testing technique to unauthorized wiretaps.¹⁶⁸ The EEAC dismisses the assertion that law-abiding employers need not be concerned by equating that assertion with one that states that law abiding Americans have no cause to be concerned with unauthorized wiretaps or warrantless searches.¹⁶⁹

In addition to the employers' criticism of the use of testers as a deceitful process, employers also voice concern over the potentially detrimental effects that the use of testers will have on the employer.¹⁷⁰ Critics of the tester method focus on the time and money that employers will waste in interviewing, evaluating, testing and checking references of persons who have no real interest in employment.¹⁷¹ Further, an employer may incur a lost

161. See *supra* note 44 and accompanying text (discussing doctrine of statutory standing); see also *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (stating that subtle pressures of justiciability often cause policy considerations to blend into constitutional limitations when considering question of standing).

162. See *infra* notes 164-79 and accompanying text (discussing many concerns raised by employers in connection with use of testers in employment field).

163. See *infra* notes 164-79 and accompanying text (discussing many concerns raised by employers in connection with use of testers in employment field).

164. The Equal Employment Advisory Committee is a non-profit association advising 230 corporations and trade associations on affirmative action issues.

165. See 31 DAILY LAB. REP., *supra* note 27, at E-1 (containing text of letter from Jeffrey Norris to Jack Kemp voicing Norris' concerns over EEOC's endorsement of testers).

166. See 82 DAILY LAB. REP., *supra* note 27, at E-1, E-2 (discussing nature of testing technique as deceitful because tester has no genuine interest in job).

167. *Id.* Irving asserted that the tester's misrepresentations to secure evidence could not be separated neatly from the quality of the evidence obtained. *Id.*

168. See 31 DAILY LAB. REP., *supra* note 24, at A-10 (stating that employers' groups have raised possibility that use of testers in employment field might be illegal entrapment).

169. See *id.* (comparing tester technique in employment field to illegal searches).

170. See *id.* (discussing effect of tester technique on employers' hiring process).

171. See *id.* (discussing negative repercussions that testing technique will have on employers' hiring process).

opportunity when the employer discovers that its top ranked candidates for employment positions are testers, and that it is too late to recall other sincere, qualified candidates.¹⁷²

Due to the subjectiveness of the hiring process, employers also assert that a high potential for abuse in the implementation of the testing technique exists.¹⁷³ Jeffrey Norris fears that the EEOC has ignored the potential possibility that groups will use the technique for retaliatory and extortionary purposes.¹⁷⁴ In his letter to the EEOC Chairman, Norris cites possible ways abuse may occur, such as community groups sending testers to call on employers that do not donate generously to the group's fundraising drive, unions using testers to gain leverage in labor disputes, companies using testers to harass business rivals and even attorneys using them to generate lawsuits.¹⁷⁵ Employers state that the potential for misuse in the tester process is accentuated by the EEOC's failure to publish any guidelines governing this technique.¹⁷⁶

Finally, employers assert that the use of testers will undermine the reputation and function of the EEOC.¹⁷⁷ Employers allege that an endorsement by the EEOC of testing, a technique based on falsehoods, will undercut the EEOC's integrity and thus its effectiveness.¹⁷⁸ This effect will be particularly damaging to the Agency because its main directive is conciliation and settlement, a technique that requires the EEOC to have the respect of both the employers and the complainants.¹⁷⁹

Advocates of the tester method respond by pointing to the effectiveness of the technique.¹⁸⁰ Discrimination is difficult to both detect and prove,¹⁸¹

172. See *id.* (discussing possibility of lost opportunities, such as loss of qualified candidates, that employer will experience as result of implementation of tester technique).

173. See 31 DAILY LAB. REP., *supra* note 27, at E-1 (highlighting potential abuses resulting from use of tester method in employment context).

174. See *infra* note 175 and accompanying text (citing instances where retaliation or extortion may lead to abuses of tester technique).

175. See 31 DAILY LAB. REP., *supra* note 27, at E-1 (citing potential abuses of testing technique).

176. See 31 DAILY LAB. REP., *supra* note 24, at A-10 (expressing concern over ability of EEOC to control outside testers); McCarthy, *supra* note 15, at 28 (stating that at no point in EEOC's policy guide did EEOC give instructions on proper implementation of tester technique).

177. See 82 DAILY LAB. REP., *supra* note 27, at E-1, E-2 (stressing importance of both sides having confidence in EEOC).

178. See *id.* (stating necessity of both parties' cooperation in EEOC investigations).

179. See 134 DAILY LAB. REP., *supra* note 27, at A-10, A-11-A-12 (stating that use of testers is likely to generate suspicion and resentment by employers).

180. See *infra* notes 181-89 and accompanying text (detailing benefits of tester method).

181. See *U.S. to Prosecute Job Discrimination Cases Brought By 'Testers'*, CHI. TRIB., Dec. 3, 1990, at C11 (quoting EEOC Chairman Kemp as stating that many discriminatees do not even know that they have been victim of discriminatory treatment); Holmes, *supra* note 11, at A18 (stating that scholars argue that much discrimination goes undetected, that testing technique would go long way in documenting problem and enforcing antidiscrimination laws, that use of testing method is one of best and cheapest ways to fight pervasive discrimination); Marcus, *supra* note 8, at A4 (stating that hiring discrimination is one area in which efforts

and testers are an effective method of discovering and proving prejudicial practices.¹⁸² The Court of Appeals for the Seventh Circuit, in *Richardson v. Howard*,¹⁸³ addressed some of the controversial aspects of the testing method yet advocated the technique's use.¹⁸⁴ The court recognized that the federal courts had repeatedly approved the role of testers in racial discrimination cases.¹⁸⁵ In support of this approval of the tester technique, the court pointed out the difficulty in developing proof in discrimination cases and the fact that the evidence produced by testers is frequently indispensable.¹⁸⁶ The court referred to the tester evidence as a "major resource" in society's battle against racial discrimination.¹⁸⁷ The court stated that the deception inherent in the technique was a relatively small price to pay to defeat racial discrimination.¹⁸⁸ Further, the court dismissed the allegations that testers are not credible witnesses stating that their dispassionate observation of the events would tend to make them, if anything, better witnesses.¹⁸⁹

Good arguments exist on both sides of the policy debate over the use of testers in the employment field; many of the employer's complaints could be taken into account by the EEOC issuing a set of guidelines to govern the testing process.

CONCLUSION

Title VII, enacted as a part of the omnibus Civil Rights Act of 1964,¹⁹⁰ established for the first time a comprehensive federal law to assure equality of employment opportunity in the private sector.¹⁹¹ The broad language of the statute increased the importance of the federal court system's role in

by EEOC have been least effective, and that EEOC views testers as attempt to improve EEOC efforts in alleviating hiring discrimination); *Handy Strategy: Go Undercover*, NEWSDAY, Oct. 23, 1991, at 46 (describing effectiveness of testing technique and possible use of testers as guide for federal policymakers).

182. See Richard H. Sander, Comment, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 NW. U. L. REV. 874, 882 (1988) (stating that testing technique is very effective method for detecting discriminatory practices). Testers have proven to be effective in court cases. See Kornhauser, *supra* note 7, at 18 (citing success of tester method in housing field). Civil rights activists further state that the tester method has resulted in a higher than normal percentage of settlements. See *id.* (stating that Washington Lawyers Committee has settled 50 out of 53 fair housing cases that have relied on testers).

183. 712 F.2d 319 (7th Cir. 1983).

184. *Richardson v. Howard*, 712 F.2d 319, 321-22 (7th Cir. 1983).

185. *Id.* at 321.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 322.

190. 42 U.S.C. §§ 2000a-2000h-6 (1988).

191. See Robert Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U. L.J. 225, 240-246 (1976) (describing debate over what type of discrimination Congress intended Title VII to combat).

effectuating Title VII's purpose.¹⁹² As a result of this broad language, a controversy arose as to whether Congress intended the Statute to go beyond remedying intentional discrimination and to address facially neutral employment practices that adversely effect the employment opportunities of racial minorities and women.¹⁹³ The Supreme Court first addressed this issue in *Griggs v. Duke Power Co.*¹⁹⁴ and held that Title VII proscribed facially neutral employment policies with an adverse impact, as well as overt discrimination.¹⁹⁵ The *Griggs* Court concluded that Congress had directed the thrust of the Act to the "consequences of employment practices" and not merely motivation.¹⁹⁶ Since the Supreme Court's early interpretation of Title VII, however, the Court has begun to narrow its reading of the statute, and, as a result has limited severely the impact of Title VII.¹⁹⁷ In its 1989 *Wards Cove* decision the Supreme Court, by shifting the burden of proof in a disparate impact case and reducing the scrutiny of employment practices, virtually nullified the holding of *Griggs*.¹⁹⁸ The *Wards Cove* decision, in effect, mandates that Title VII only applies to cases involving intentional discrimination.¹⁹⁹

Because the testing method is conducted to determine if like applicants are treated similarly, the testing method is clearly a good technique for implementing the present Court's requirement of proof of intentional discrimination.²⁰⁰ The Supreme Court's insistence on proof of intent, which is elusive evidence at best,²⁰¹ would be difficult to accommodate if the Court

192. See *id.* at 228 (stating that Title VII, when first enacted, had "more bones than flesh"); Eleanor Holmes Norton, *Overview: Civil Rights in the 1990's - Title VII and Employment Discrimination*, 8 YALE L. & POL'Y REV. 197, 197 (1990) (discussing impact of judiciary's interpretation of Title VII on effectiveness of Title VII); Smith & Ruffin, *supra* note 92, at 46 (noting that although Congress penned words to Civil Rights Act of 1964, Supreme Court gave meaning to words of Title VII).

193. See Robert Belton, *The Dismantling of the Griggs Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 YALE L. & POL'Y REV. 223, 223 n.2 (1990) (stating that Congress' failure to define conception of equality or discrimination left scope of statute debatable issue).

194. 401 U.S. 424 (1971).

195. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

196. *Id.* at 432.

197. See Ralston, *supra* note 118, at 209 (discussing Supreme Court's increasingly conservative interpretation of civil rights statutes).

198. *Id.* at 213 n.64 (stating that *Wards Cove* will totally change thrust of employment discrimination law); Belton, *supra* note 193, at 237 (describing *Wards Cove* as dismantling of *Griggs*); Motley, *supra* note 92, at 653 (stating that Supreme Court perceived evil as undue burdening of employers not found to have intentionally discriminated).

199. See Belton, *supra* note 193, at 244 (stating that *Wards Cove* adopted only intent-based theory of discrimination).

200. See *supra* notes 10-17 and accompanying test (describing tester method).

201. See Motley, *supra* note 92, at 652-53 (labeling task of proving discriminatory intent as "burdensome, if not impossible"). With the Court's new emphasis on intent in Title VII cases, it would seem incongruous for the Supreme Court to invalidate one of the few reliable methods, testing, for documenting intent.

proceeded to severely restrict the method of proving intent. The legal precedent has been laid for the Supreme Court to find that testers have standing under Title VII.²⁰² To give merit to its recent analysis in civil rights cases, the Supreme Court must rule that testers have standing to sue under Title VII.

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202. See *supra* notes 51-109 and accompanying text (discussing existing case law that provides precedents for Supreme Court to rule that testers have standing to sue).