Employment Testers: Obstacles Standing in the Way of Standing under 1981 and Title VII

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EMPLOYMENT TESTERS:

OBSTACLES STANDING IN THE WAY OF STANDING UNDER § 1981 AND TITLE VII

"The standing of the testers is, as an original matter, dubious . . . they suffer no harm other than that which they invite in order to make a case against the persons investigated."

INTRODUCTION

Two people apply for the same position at the same company. One of the applicants is a qualified white male and the other is a black male who happens to have similar or even comparatively superior credentials. After interviewing the applicants, the company offers the position to the white applicant, but not to the black applicant. Two federal statutes, 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, enable the black applicant to seek redress for any injuries resulting from the company's alleged hiring discrimination. Un-

1 Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1526 (7th Cir. 1990) (Posner, J).
2 42 U.S.C. § 1981(a) (1994), which provides:
   All persons within the jurisdiction of the United States shall have the same right in every State and Territory 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 as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
   It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .

Title VII also specifically extends this prohibition of private discrimination to employment agencies. 42 U.S.C. § 2000e-2(b) (1994) provides: "It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin . . ."
der either statute, the black applicant has standing to bring suit against the company.  

But what if the black applicant in the scenario above has no interest in the position but applies solely to uncover potential discriminatory hiring practices? Should this person be able to sue the company, under § 1981 and Title VII, for its alleged hiring discrimination? This Note addresses the numerous obstacles such applicants, known as "testers," must overcome in order to have standing under § 1981 and Title VII, statutes which both fail to explicitly mention testers. As the following analysis demonstrates, testers cannot overcome these obstacles with respect to § 1981 and will have extreme difficulty overcoming them with respect to Title VII.

First, I will examine the purpose and use of testers, especially in connection with Title VII. Second, I will review the criteria that must be met before any plaintiff, including testers, can even bring a cause of action. These criteria, comprising the standing doctrine, include constitutional requirements as well as court-imposed prudential barriers to standing. Third, I will examine tester claims to standing under § 1981. A review of the pertinent case law indicates that testers lack standing under this section since their alleged injuries do not fall within the statute's "zone of interests." Fourth, I will examine tester claims to standing under Title VII. This analysis proves far more complex than the analysis for tester standing under § 1981. Courts have differed as to whether employment testers have standing under Title VII. Furthermore, a tangled web of Supreme Court decisions and a questionable analogy to the Fair Housing Act demonstrates that testers, at the very least, will have difficulty satisfying the standing criteria. Finally, I will explain that even if testers overcome these obstacles, granting them standing not only fails to advance the broad aims of Title VII, but also may prove disadvantageous to testers and bona fide job applicants alike.

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4 A grant of standing does not mean that the plaintiff will succeed on the merits. They are separate inquiries. See, e.g., Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151-52 (1970) (explaining that "the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution") (quoting Flast v. Cohen, 392 U.S. 83, 101 (1968)).

5 The Seventh Circuit Court of Appeals recently faced this question and concluded that the applicant has standing under Title VII, but not under § 1981. See Kyles v. J.K. Guardian Sec. Servs., Inc., 222 F.3d 289 (7th Cir. 2000).

6 The Equal Employment Opportunity Commission ("EEOC") has defined "testers" as "individuals who apply for employment which they do not intend to accept, for the sole purpose of uncovering unlawful discriminatory hiring practices." EEOC, Policy Guidance No. 915.062, in EEOC COMPLIANCE MANUAL VOL. II, at 1 (Nov. 20, 1990) [hereinafter 1990 Policy Guidance]. See also Kyles, 222 F.3d at 291 n.1.
It is imperative to realize that the motives of the employment tester and of a bona fide applicant are different—the applicant wants a job while the tester wants to uncover evidence of discrimination. Therefore, the following review of whether the tester has standing will revolve around whether this distinction matters or whether it is merely a distinction without a difference that should not preclude a tester from having standing under § 1981 and Title VII.

I. THE PURPOSE AND USE OF TESTERS

Suits brought by bona fide job applicants shortly after the passage of the Civil Rights Act of 1964, the statute encompassing Title VII, went a long way toward removing the more egregious forms of hiring discrimination. From an institutional standpoint, "testers" were not needed at this time to uncover discrimination in hiring practices since no clear enforcement void existed.

At some point in time, probably beginning in the 1970s, the filing of suits challenging hiring decisions began to decrease dramatically relative to those suits filed to challenge company decisions discharging employees. Although suits initially challenging hiring decisions under Title VII outnumbered suits to contest discharges, a trend in the opposite direction soon emerged. By 1985, suits challenging discharge greatly outnumbered suits challenging hiring decisions.

These figures suggest that suits brought by bona fide applicants under Title VII are far fewer than the actual incidents of hiring dis-

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7 Although case law does not indicate a separate history of utilizing testers to enforce § 1981, many testers that bring actions under Title VII also bring separate actions under § 1981. See Kyles, 222 F.3d at 292 (suing under both Title VII and § 1981); Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp., 28 F.3d 1268 (D.C. Cir. 1994) (same).
8 See Michael J. Yelnosky, Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs, 26 U. MICH. J. LEGAL REFORM 403, 411 (1993) (pointing out that "[l]itigation in the sixties and seventies removed many of the most formidable and blatant employment practices barring the entry of minorities and women into the workforce").
9 See id. at 410 (concluding that when private actions "result in an optimum level of enforcement, then there are few if any benefits to using testers to enforce Title VII").
11 See id. at 1015 ("Hiring charges outnumbered termination charges by 50 percent in 1966... ").
12 See id. (explaining that "by 1985, the ratio had reversed by more than 6 to 1"). See also Minna J. Kotkin, Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy, 41 HASTINGS L.J. 1301, 1346-47 (1990) (finding that between 1974 and 1985, charges filed with the EEOC alleging failure to hire on the basis of race decreased as a percentage of total charges from twelve percent to six percent and charges alleging race discrimination in employment discharge during the same time rose from twenty-three percent to thirty-seven percent).
crimination. Consequently, suits brought under Title VII have not resulted in "an optimal level of enforcement." The resultant enforcement void demonstrates that Title VII is not meeting one of the goals for which it was created, namely, to put an end to discriminatory hiring practices.

In response, organizations charged with combating discrimination in the workplace have looked for other ways to supplement bona fide applicant suits to step up enforcement of Title VII. In 1990, the Equal Employment Opportunity Commission ("EEOC") made a step in this direction by officially supporting the use of testers to increase the level of enforcement of Title VII. During the summer of that same year, the Urban Institute conducted the first pilot study utilizing testers to "fill the gap in empirical evidence concerning the extent and character of hiring discrimination in the United States."

The Urban Institute's study deployed ten groups of two men each into the labor markets of Washington, D.C. and Chicago, Illinois. A black and a white man comprised each of these two-man groups. Altogether, the groups conducted 476 "hiring audits," which revealed "that unequal treatment of black job seekers is entrenched and widespread." Specifically, the study revealed that "in one out of five audits, the white applicant was able to advance further through
the hiring process than his equally qualified black counterpart."22 Furthermore, "in one out of eight—or 15 percent—of the audits, the white was offered a job although his equally qualified black partner was not."23 The study concluded by recommending the development and implementation of an extensive testing program to determine the level of hiring discrimination throughout the U.S.24

Perhaps inspired by the Urban Institute's study, other groups charged with ferreting out hiring discrimination soon developed and implemented similar testing programs. Although many of these programs have focused on uncovering racial discrimination in hiring,25 other studies have focused on sex discrimination in the hiring process.26 Nevertheless, an extensive, nationwide testing program envisioned by the Urban Institute has never materialized.27 Similarly, EEOC efforts to develop and implement comprehensive pilot pro-

22 Id. at 2.
23 Id.
24 Id. at 3 ("The authors conclude that the next logical step is to design and implement a nationwide employment audit for both blacks and Hispanics . . . . [A] full-scale hiring audit would provide statistically reliable estimates of the incidence of discrimination in hiring for the nation as a whole.").
26 See OFCCP: "Tester" Programs Get Under Way in Chicago, San Francisco, OFCCP Says, Daily Lab. Rep. (BNA) No. 89, at AA-2 (May 8, 1997) (describing a San Francisco pilot program sponsored by the Office of Federal Contract Compliance Programs involving "testers of white men and women who apply for jobs at federal contractors"); Sex Discrimination: Employment Testing Project Shows Bias Against Female Mechanics in San Francisco, Daily Lab. Rep. (BNA) No. 119, at A-5 (June 20, 2000) (describing an Impact Fund study where forty matched pairs of testers, consisting of one male and one female, sought immediate openings in San Francisco auto service shops and reporting that "in 60 percent of the tests, or 12 out of 20, the male applicant was preferred, while in 15 percent, or three of 20, the female was preferred").
27 Although it has conducted many pilot studies since 1991, the Urban Institute has yet to conduct a nationwide study. See Discrimination: Urban Institute Researchers Urge Expansion of Testing to Unearth Bias, Daily Lab. Rep. (BNA) No. 41, at A-9 (Mar. 3, 1999) (announcing that "'[a]fter a decade of experience and 10 local pilot studies, we're ready to do paired testing of employment discrimination on a national level'" (quoting Michael Fix, coeditor of a report of a 1998 Department of Housing and Urban Development conference on the subject) (emphasis added).
grams utilizing testers have been met with opposition and have failed to bear fruit.  

Although the EEOC has not sponsored such programs monetarily, it has continued to endorse programs utilizing testers. Throughout the past decade, groups sponsoring these studies have sued employers and employment agencies that have allegedly discriminated against its testers. In addition, the testers themselves have brought claims against these employers and employment agencies under § 1981 and Title VII. Of particular significance to the various issues this Note addresses, the EEOC has declared and reaffirmed that employment testers and organizations utilizing employment testers have standing to bring suit under Title VII. Before endorsing or criticizing the EEOC’s view of tester standing, one must examine the formal barriers a plaintiff must surmount to satisfy a grant of standing.

II. THE STANDING DOCTRINE

A. Constitutional Standing

Before a federal court analyzes the merits of any lawsuit, the party initiating the suit must have standing. This standing requirement has its roots in Article III of the Constitution, which expressly limits the jurisdiction of the federal courts to a resolution of “cases and controversies.” The Supreme Court has held that implicit in

28 See id. (“The [EEOC] has a long-standing policy of supporting the use of testers, but the agency has not been involved in the effort on a more formal basis. And last year, Republican legislators tied a commission budget increase to the agency’s agreement to stop financially supporting a pilot program in the form of contracts to two private civil rights organizations to further explore the concept.”).

29 See 1990 Policy Guidance, supra note 6, at 31-38.


31 See Warth v. Seldin, 422 U.S. 490, 498 (1975) (“In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”).

32 See U.S. CONST. art. III, § 2, cl. 1:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

33 See Warth, 422 U.S. at 498 (explaining that “whether the plaintiff has made out a ‘case or controversy’ between himself and the defendant...is the threshold question in every federal case”).
this constitutional limitation is the requirement that a party invoking a court's jurisdiction have standing. In addition, the Court has held that standing turns on one's personal stake in the dispute. Consequently, determining a party's stake in a dispute will ultimately resolve whether that party has satisfied the constitutional standing requirement.

A personal stake sufficient to confer standing exists only if the following requirements are satisfied: (1) the plaintiff must suffer an "injury in fact, i.e., a concrete and particularized, actual or imminent invasion of a legally protected interest"; (2) "there must be a causal connection between the injury and the conduct complained of"; and (3) "it is 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Employment testers, therefore, must meet these three criteria in order to satisfy the Article III requirements for standing.

B. Prudential Limitations and Statutory Standing

Satisfying the constitutional standing requirements, although necessary to confer standing on a party, may not always be sufficient. The Supreme Court has imposed its own prudential barriers to standing in addition to those limits specifically imposed by the Constitution. These judicially imposed barriers to standing additionally require that a plaintiff's injury must be distinct from the effects felt by other citizens and that a plaintiff "must assert his own legal rights...
and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."\(^{41}\) In addition, a plaintiff's complaint must "fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'\(^{42}\) Therefore, a plaintiff has standing only after both meeting the Article III requirements and satisfying these judicially imposed prudential limitations.\(^{43}\)

These prudential barriers to standing, however, do not apply to all claims brought by plaintiffs. The Supreme Court has recognized that "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules."\(^{44}\) Although an express grant by Congress may eliminate any prudential barriers to standing, Congress cannot eliminate the Article III constitutional requirements for standing.\(^{45}\) In other words, even when Congress has passed a statute that grants an express right of action, the Article III constitutional requirements for standing still must be satisfied.

Although statutorily created rights may not reduce the threshold for standing below Article III requirements, such rights may influence the Article III standing analysis. For example, the Supreme Court has held that the "injury in fact" requirement of Article III\(^{46}\) "may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"\(^{47}\) This language gives rise to the inference that the "injury in fact" requirement is satisfied automatically when a plaintiff invokes a federal statute. Whether this is true or not will greatly affect the standing analysis for employment testers. Significantly, if the "injury in fact" requirement is satisfied when any plaintiff brings actions under § 1981 or Title VII, then employment testers need not make a separate proof that they have been injured.\(^{48}\)

The following analysis of employment tester standing under § 1981 and Title VII will examine the Article III requirements and

\(^{41}\) Id.


\(^{43}\) See Valley Forge Christian Coll., 454 U.S. at 471 ("The term 'standing' subsumes a blend of constitutional requirements and prudential considerations."). See also Warth, 422 U.S. at 498.

\(^{44}\) Warth, 422 U.S. at 501.


\(^{46}\) See supra note 36 and accompanying text.

\(^{47}\) Warth, 422 U.S. at 500 (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973)).

\(^{48}\) Of course, such plaintiffs must still satisfy the other requirements of Article III standing: that the injury is fairly traceable to the challenged action of the defendant and that it is likely the injury will be redressed by a favorable decision. See supra text accompanying notes 37 and 38.
any prudential barriers to standing. The statutes themselves also will be examined since prudential barriers may be eliminated and the "injury in fact" requirement may be satisfied by the creation of statutory rights. Essentially, the inquiry will attempt to answer two central questions: (1) Does the statute invoked by the testers create legal rights which eliminate prudential barriers; and (2) has the tester plaintiff suffered the "injury in fact" required by Article III of the Constitution?

III. EMPLOYMENT TESTER STANDING UNDER § 1981

Employment testers do not have standing under § 1981. This statute does not create substantive rights that eliminate prudential barriers to standing. Rather, any plaintiff bringing an action under § 1981, including testers, must demonstrate that prudential barriers do not preclude standing before even addressing the Article III standing requirements. One of the prudential barriers to standing provides that the injury alleged must be within the "zone of interests" protected by a statute. Since injuries allegedly suffered by tester plaintiffs do not fall within the "zone of interests" protected by § 1981, testers cannot overcome this prudential barrier. As a result, testers do not have standing under § 1981. This Note now examines the judicial rationales for this lack of standing.


Employment tester standing was first addressed in 1993. In *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, an equal employment organization sent two black testers to an employment agency in search of job referrals. The organization also sent two white testers with similar qualifications to the same agency. The white testers both received referrals while the black testers did not. The black testers brought suit, alleging violations of §
1981 and Title VII. The district court denied the agency's motion for summary judgment on both claims.

This decision was partially reversed on appeal. The D.C. Circuit Court of Appeals first addressed the plaintiffs' claims under § 1981. These claims alleged violations of § 1981 on two fronts. First, the testers argued that the agency's failure to hire them prevented them from contracting with it for job referrals. Even assuming that BMC enters into contracts with testers posing as job seekers, the court recognized that such contracts are voidable.

The court determined that "the loss of the opportunity to enter into a void contract... is not an injury cognizable under § 1981, for a void contract is a legal nullity." The contract that resulted between the plaintiffs and BMC, however, was not a void contract, but one voidable at BMC's option. Nevertheless, the court was able to reconcile this distinction and concluded that "the loss of the opportunity to enter into a contract voidable at the other party's will is not cognizable under § 1981."

The plaintiffs also claimed that BMC's refusal to hire the tester plaintiffs prevented them from contracting with potential employers. Once again, the court found no merit to this claim, relying on the fact that the "testers concededly had no interest in securing a job...

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54 Id.
55 Id. at 408. Although the motion was denied with respect to § 1981 and Title VII, the district court granted the defendant's motion as it pertained to § 1981(a)(1). This section codifies the Civil Rights Act of 1991, which amended Title VII by enabling plaintiffs to recover compensatory and punitive damages. Prior to the amendments, plaintiffs could only seek injunctive relief. See infra text accompanying notes 104-09.
57 Id. at 1270 (arguing that the defendant's refusal to hire the testers "deprived them of the opportunity to enter into contracts with BMC for employment referrals").
58 Id. at 1271 ("Any resulting contracts between the tester plaintiffs and BMC would have been voidable at BMC's option... .")
59 Id. at 1270-71. These misrepresentations make the contract voidable at the option of the nonmisrepresenting party. See RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1981) ("If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.").
60 Id. at 1271.
61 Id.
62 Id.
Specifically, the court noted that being deprived of "the opportunity to refuse to enter into an employment contract" with an employment agency's clients is not an injury cognizable under § 1981.

B. Section 1981 and the Prudential Barriers to Standing

Although the D.C. Circuit's decision in *Fair Employment Council* may have held correctly that testers did not receive injuries "cognizable under § 1981," the court reached this resolution absent a thorough analysis of standing doctrine. Since the court's decision only addressed whether the injury was within the "zone of interests" of the statute,§ a prudential consideration, the court should have made an additional inquiry. Specifically, the court needed to determine whether § 1981 removed prudential barriers to standing.

Unless the statute eliminates these prudential barriers, then the testers would not have standing since they could not surmount the "zone of interest" barrier. On the other hand, if § 1981 eliminates prudential barriers, then the plaintiffs need not show that the injuries they received are within the "zone of interests" protected by the statute. Rather, all the plaintiffs would have to do is to satisfy the Article III requirements to gain standing. Consequently, the D.C. Circuit cut the analysis short, possibly assuming rather than expressly enunciating that § 1981 does not eliminate prudential barriers to standing.

Federal courts recently addressing whether employment testers have standing under § 1981 also have concluded that they do not. In *Kyles v. J.K. Guardian Security Services, Inc.* the district court granted defendant's motion for summary judgment, finding that both "Title VII and Section 1981 impose the standing requirement of bona fide applicant for employment." The court based its conclusion

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63 Id. The court noted that the plaintiffs actually promised the Fair Employment Council that they would not accept any job offers obtained "in conjunction with their testing activities."  
64 Id.  
65 Id. The court could have concluded that the alleged harm to the plaintiffs was not an injury cognizable under Article III of the Constitution. Instead, the court's continual reference to "injury cognizable under § 1981" demonstrates that the court was focusing on whether the statute actually protected the alleged injury. As a result, the court was implicating the "zone of interests" prudential limitation to standing rather than the Article III requirements for standing. See supra text accompanying note 42.  
66 See supra notes 39-43 and accompanying text.  
67 See supra note 44 and accompanying text.  
68 See supra note 45 and accompanying text.  
70 Id. at *3.
primarily on case law holding that applicants must intend to accept a job in order to prove a prima facie case of discrimination under either statute. Nevertheless, the court specifically addressed Article III, claiming that "[b]ecause they allege no concrete and personal injury, plaintiffs have no stake in the outcome of the lawsuit." Nevertheless, the court specifically addressed Article I, claiming that "[b]ecause they allege no concrete and personal injury, plaintiffs have no stake in the outcome of the lawsuit." Although the grant of summary judgment with respect to § 1981 was affirmed on appeal, the Seventh Circuit Court of Appeals rejected the district court's rationale. The court instead relied on the rationale from Fair Employment Council. For example, the Seventh Circuit drew comparisons between the testers in Fair Employment Council and the testers in the case before it. Consequently, the court concluded that "in terms of the essential right that section 1981 protects . . . [the plaintiffs] suffered no injury." Similarly to the D.C. Circuit's decision in Fair Employment Council, the Seventh Circuit decision in Kyles also found that testers do not suffer injuries cognizable under § 1981. Nevertheless, there is an important distinction between the two cases. Kyles went one step further than Fair Employment Council by addressing whether § 1981 is one of those statutes that removes prudential barriers to standing. The court determined that § 1981 is not one of these statutes. In making this determination, the Seventh Circuit contrasted § 1981 with a statute that does remove prudential barriers, the Fair Housing Act. The Supreme Court has recognized that Congress intended the Fair Housing Act to remove prudential barriers by extending standing to the limits of Article III. As a result, courts "lack

71 See id. ("In order to establish a prima facie case of employment discrimination under either Title VII or § 1981, a plaintiff must show a genuine intention to accept the employment if offered.") (citing Allen v. Prince George's County, 538 F. Supp. 833 (D. Md. 1982)). For a further discussion on proving the prima facie case under Title VII and its significance for the Title VII standing analysis, see infra notes 223-28 and accompanying text.
72 Kyles, 1998 WL 677165 at *2.
73 Kyles v. J.K. Guardian Sec. Servs., Inc., 222 F.3d 289 (7th Cir. 2000).
74 Id. at 302 ("[The testers] had no genuine interest in employment with [the defendant], and neither would have accepted an offer of employment had one been extended. Indeed, both had signed agreements . . . promising not to accept employment with any of the firms whose employment practices they were directed to test.").
75 Id.
76 Id. at 304 ("The discrimination may be altogether real, and the tester may have suffered an identifiable injury; but the employer has not deprived the tester of her right to make or enforce contracts. The tester's injury, if any, is one that lies outside the zone of interests that section 1981 protects.").
77 See id. at 303-04.
78 42 U.S.C. §§ 3601-3619 (2000). The Fair Housing Act is also known as Title VIII.
79 See Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 103 n.9 (1979) (stating that "Congress intended standing under [the Fair Housing Act] to extend to the full limits of Art. III"); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 (1972) (finding that words used in the Fair Housing Act "showed 'a congressional intention to define standing as broadly
authority to create prudential barriers to standing in suits brought under that [Act].” Consequently, a plaintiff’s alleged injury need not be within the specific “zone of interests” protected by the Fair Housing Act since the statute automatically eliminates this prudential barrier from the standing analysis. Instead, a plaintiff bringing an action under the Fair Housing Act only needs to satisfy the Article III injury requirement.

Kyles, however, distinguished § 1981 from the Fair Housing Act and other statutes that eliminate prudential barriers to standing. In so doing, the court contrasted the broad rights guaranteed by the Fair Housing Act with the more specific right guaranteed by § 1981. Specifically, the court determined that, unlike the broad reach of the Fair Housing Act, § 1981 is narrowly tailored to protect “the right to enter into and preserve a contractual relationship, period.” Having recognized the specific right protected by § 1981, the court concluded that “[t]he class of persons who may bring suit is therefore limited to persons who actually wish to enter into (or remain in) that relationship.” Consequently, § 1981 protects only those plaintiffs within its “zone of interests,” i.e., those persons that intend to enter into contracts or remain in a contractual relationship.

C. Tester Motive and the “Zone of Interests” Protected by § 1981

Since § 1981 does not eliminate prudential barriers to standing, employment testers must demonstrate that they satisfy court-imposed prudential considerations as well as the Article III standing requirements before the merits of their cases are addressed. One of these prudential considerations involves whether the injuries alleged by employment testers are within the “zone of interests” protected by § 1981. Since § 1981 protects only parties who contract or intend to remain in a contractual relationship, a party must contract or intend to

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as is permitted by Article III of the Constitution”) (quoting Hackett v. McGuire Bros., Inc. 445 F.2d 442, 446 (3d Cir. 1971)).


81 Kyles, 222 F.3d at 296 (“Thus the sole requirement for standing to sue under [the Fair Housing Act] is the Art. III minima of injury in fact: that the plaintiff allege that as a result of the defendant’s actions he has suffered ‘a distinct and palpable injury.’”) (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)).

82 Id. at 303. See also Spann v. Colonial Vill., Inc., 899 F.2d 24, 35 (D.C. Cir. 1990) (holding that sections 1981 and 1982 “have a limited province and do not qualify as all-purpose antidiscrimination or comprehensive open housing laws”); Grant v. Smith, 574 F.2d 252, 255 (5th Cir. 1978) (noting that good faith in contracting is necessary under sections 1981 and 1982, but is not pertinent to the broad standing allowed by the Fair Housing Act).

83 Kyles, 222 F.3d at 303.

84 See supra text accompanying notes 65-72.

85 See supra note 42 and accompanying text.
remain in a contractual relationship to allege injuries within the "zone of interests" protected by the statute. Since employment testers have no intention to contract when applying for a job, their alleged injuries do not fall within the "zone of interests" protected by § 1981. Consequently, testers attempting recovery under § 1981 cannot surmount the prudential barriers to standing under the statute and do not have standing as a matter of law.

In addition, since the D.C. Circuit in *Fair Employment Council* found that the testers did not have standing without addressing whether § 1981 removed prudential barriers, one can only assume that this court also recognized that this statute does not extend standing to the full limits of Article III. If the D.C. Circuit believed that § 1981 did remove prudential barriers, then it seemingly would have addressed the Article III requirements to determine standing, an inquiry the court did not make.

As a result, tester plaintiffs seeking recovery under § 1981 have to survive an analysis of the prudential barriers to standing before courts can even entertain an Article III analysis. Since tester plaintiffs cannot demonstrate that their injuries are within the "zone of interests" protected by § 1981, testers do not have standing under the statute. With recovery for employment testers foreclosed under § 1981, employment testers cannot recover for a company's failure to offer to hire them unless they can prove standing in some other way, perhaps under another federal statute. Employment testers, consequently, have also focused their recovery efforts on Title VII of the Civil Rights Act of 1964.

IV. EMPLOYMENT TESTER STANDING UNDER TITLE VII

Title VII was enacted in 1964, nearly one hundred years after § 1981's enactment but before § 1981 was held to apply to private discrimination. Title VII provides in pertinent part that it is unlawful for any employer to refuse to hire any individual for discrimina-

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86 See supra text accompanying notes 65-68.
87 It is also arguable that the court believed the "zone of interests" prudential barrier can never be removed from the standing analysis, possibly by elevating this requirement to an Article III core requirement. See infra notes 200-05 and accompanying text.
tory reasons. The Act also provides that any person claiming to be aggrieved due to a violation of the statute may initiate a cause of action in federal court. Shortly after its enactment, employment testers who were refused employment turned to Title VII to seek recovery for alleged hiring discrimination. As a result, federal courts had to determine if testers could seek redress in a judicial forum.

A. Title VII and the Prudential Barriers to Standing

In Trafficante v. Metropolitan Life Insurance Co., the Supreme Court held that the statutory language “person claiming to be aggrieved” in the Fair Housing Act “showed ‘a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.’” Similar language in Title VII eliminates the need for a plaintiff to surmount the prudential barriers to standing. Consequently, employment testers seemingly do not need to demonstrate that the injuries they receive fall within the “zone of interests” pro-

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90 See supra note 3 for the relevant language of Title VII.
92 Although some organizations fighting discrimination in the workplace later utilized testers to fill an apparent enforcement void, tester cases filed before this void existed, shortly after the enactment of Title VII, were filed by persons seeking to uncover discrimination on their own. See, e.g., Lea v. Cone Mills, Corp., 438 F.2d 86, 88 (4th Cir. 1971); Parr v. Woodmen of the World Life Ins. Soc’y, 657 F. Supp. 1022 (M.D. Ga. 1987).
93 409 U.S. 205 (1972).
94 Id. at 209 (quoting Hackett v. McGuire Bros., Inc., 455 F.2d 442, 446 (3d Cir. 1971)). Hackett actually involved 42 U.S.C. § 2000e-5(a), a provision of Title VII. Therefore, the Supreme Court in Trafficante actually drew an analogy from the Third Circuit’s interpretation of language in Title VII to find that the same language in the Fair Housing Act extends standing to the limits of Article III. Consequently, Trafficante provides a strong presumption that Title VII also extends standing to the limits of Article III. Subsequent court decisions have embraced this presumption. See infra note 96 and accompanying text.
95 See supra note 91 for the relevant text of the statute.
96 See Kyles v. J.K. Guardian Serv., Inc., 222 F.3d 289, 294 (7th Cir. 2000) (“When Congress confers such a broad right to sue, the judiciary may not close the doors to the courthouse by invoking prudential considerations.”) (quoting Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997)). Kyles found that since both statutes permit “any person aggrieved by a violation to file a charge and suit, both reflect a congressional intent to extend standing to the fullest extent permitted by Article III of the Constitution.” Id. at 297-98. See also Angelino v. New York Times Co., 200 F.3d 73, 91 (3d Cir. 1999) (affirming its “view that the statutory language, ‘person claiming to be aggrieved,’ implied a Congressional intent to be liberal in allowing suits that effectuate the purposes of anti-discrimination statutes”); Stewart v. Harmon, 675 F.2d 846, 849 (7th Cir. 1982) (“A similar analysis of standing extending standing to the limits of Article III should hold true under Title VII which, like [the Fair Housing Act], has the purpose of outlawing discrimination based on race, religion, national origin, and sex.”); EEOC v. Mississippi Coll., 626 F.2d 477, 482 (5th Cir. 1980) (“We agree with other circuits that have held that the strong similarities between the language, design, and purposes of Title VII and the Fair Housing Act require that the phrase ‘a person claiming to be aggrieved’ in . . . Title VII must be construed in the same manner that Trafficante construed the term ‘aggrieved person’ in . . . the Fair Housing Act.”).
tected by Title VII. 79 A plaintiff invoking Title VII, therefore, need only satisfy the Article III requirements to attain standing. 98 While it is safe to assume that testers meet the causation and redressability requirements of Article III, it is uncertain that testers satisfy the "injury in fact" requirement. Since injury is necessary to confer standing, having been termed the bedrock or core requirement of standing, 99 testers must demonstrate that they have been injured in order to have the merits of their claims addressed.

B. The Standing Cases

Interestingly, the first federal courts faced with employment tester claims looked past the standing inquiry altogether. Instead, the early tester cases brought under Title VII were decided on the merits. 100 Judges soon realized, however, that before examining the prima facie case of an employment tester, they must first make the threshold determination as to whether the tester has standing to sue. Significantly, when limiting the inquiry to the tester's standing, the U.S. Courts of Appeals have disagreed as to whether a tester has standing under Title VII.

I. Fair Employment Council

As previously mentioned, Fair Employment Council was the first case to address the issue of standing for employment testers. 101 The district court denied defendant's motion for summary judgment, determining that the relevant inquiry is not "whether the plaintiffs made 'a bona fide expression of interest' in employment." 102 The D.C. Circuit, however, reversed and granted the defendant's motion for summary judgment against the employment testers. 103

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79 See supra note 44 and accompanying text. Nevertheless, many courts conducting standing inquiries under Title VII still require that the plaintiff's complaint be within the zone of interests protected by Title VII, a prudential inquiry. Either these courts do not believe that Title VII eliminates prudential barriers or they believe that the zone of interests inquiry rises to the level of a core constitutional requirement for standing under Article III. See infra notes 200-05 and accompanying text.
98 See supra note 45 and accompanying text.
100 See infra notes 218-28 and accompanying text.
101 See supra note 51 and accompanying text.
103 Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp., 28 F.3d 1268, 1281 (D.C. Cir. 1994) ("As for the individual testers, they have not stated a cause of action
Nevertheless, the court chose not to address defendant’s argument that plaintiffs must have a bona fide interest in employment in order to have standing under Title VII, reversing the district court’s decision on other grounds. Specifically, the court relied on the defendant’s alternative argument that the testers do not have standing to sue because there were no damages available to them under Title VII. The court reasoned that since only equitable remedies were available under Title VII prior to 1991, then the testers could not seek damages because the alleged discrimination they complained of happened in 1990. Therefore, the only possible relief that the testers could seek under Title VII was injunctive or declaratory relief, relief not available to the testers because they failed to make “sufficient allegations that they are threatened with any future illegality.” In other words, the testers did not show that they met the necessary Article III requirement that they will suffer “injury in fact.” Consequently, the testers did not have standing under Title VII.

2. Revisiting the D.C. Circuit’s Decision in Fair Employment Council

Fortunately for the D.C. Circuit, it was able to escape the difficult question, i.e., whether a plaintiff must be a bona fide job applicant to have standing under Title VII, by finding narrower grounds to rule against the testers’ standing claims. Of course, had the 1991 amendments applied to the testers’ claims in Fair Employment Council, the court would have needed to either adopt a different rationale for ruling as it did or actually find that testers have standing under Title VII. A later case, also brought in the District of Columbia, actually addressed the significance of the 1991 amendments even though Title

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104 See id. at 1272 n.1 (choosing not to decide whether “people who lack a bona fide interest in employment—such as testers—lack any cause of action under [Title VII]”).
105 See id.
106 The Civil Rights Act of 1991 expanded the remedies available under Title VII to include damages. See 42 U.S.C. § 1981a(a)(1) (2000) (“In an action brought by a complaining party ... prohibited under Section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3). ... and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages ...”).
107 See Landgraf v. USI Film Prods., 511 U.S. 244 (1994) (holding that the remedial provisions of the Civil Rights Act of 1991 cannot be applied to conduct occurring before the enactment of the 1991 statute).
108 See Fair Employment Council, 28 F.3d at 1272.
109 Id. A plaintiff’s standing to seek prospective relief depends on whether the plaintiff is likely to suffer future injury resulting from the defendant’s future conduct. See City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (holding that a plaintiff allegedly injured by a policeman’s chokehold had standing to seek injunctive relief only if “he was likely to suffer future injury from the use of the chokeholds by police officers”).
VII was not even invoked by the plaintiff. In so doing, the District of Columbia Court of Appeals adopted a different rationale than that used by the Fair Employment Council court, one that endorsed standing for testers under Title VII.

In Molovinsky v. Fair Employment Council of Greater Washington, Inc., a woman responding to an employment agency advertisement complained to the Fair Employment Council that she was sexually harassed in a job interview. Two female testers later sent to the agency by the Fair Employment Council also reported that they were sexually harassed. All three females brought suit under the District of Columbia Human Rights Act ("DCHRA"). The Molovinsky court determined that the D.C. Circuit’s Fair Employment Council decision was not persuasive because Title VII did not authorize an award of damages, whereas the DCHRA did. Instead, the District of Columbia Court of Appeals determined that testers had standing to bring suit under the DCHRA.

This case is pertinent to the standing discussion under Title VII for three reasons. First, the DCHRA is almost identical to and in fact modeled after Title VII. Second, its remedy provisions most closely resemble Title VII as amended by the Civil Rights Act of 1991. Finally, the District of Columbia court relied almost exclusively on the Supreme Court’s decision in Havens Realty Corp. v. Coleman to conclude that employment testers have standing under the DCHRA.

The fact that the DCHRA and Title VII are substantially similar suggests that the D.C. Circuit’s prior decision in Fair Employment Council should control the outcome in Molovinsky, or at least the rationale used to determine that outcome. Nevertheless, the fact that the DCHRA authorizes an award of damages for previous violations of the Act precludes the application of the D.C. Circuit’s methodology.

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111 See id. at 144 ("Molovinsky told Henderson that if she would just 'give a little bit part of [her] life,' he would give her 'the greatest deal of [her] life.' When Ms. Henderson asked him what he meant, Molovinsky lowered his voice and said, 'Sex.'").
112 See id. at 145.
113 See D.C. Code § 1-2512(a) (1992) ("It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the race, color, religion, natural origin, [or] sex . . . of any individual: . . . (2) To fail or refuse to refer for employment, or to classify or refer for employment, any individual, or otherwise to discriminate against, any individual . . . .").
114 See Molovinsky, 683 A.2d at 146.
116 See Molovinsky, 683 A.2d at 146 n.2 ("The 1991 Civil Rights Act amended Title VII to provide for damages as a remedy for past violations, as does the DCHRA.") (emphasis added).
Specifically, the Fair Employment Council decision pertained to plaintiffs who were limited to seeking only injunctive or declaratory relief.

The testers in Molovinsky, however, were not seeking this type of relief, but were seeking damages authorized by the DCHRA.\(^{118}\) Although the D.C. Circuit's rationale in Fair Employment Council would probably counsel against granting standing to testers seeking injunctive or declaratory relief under the DCHRA, nothing in that decision speaks to whether testers can maintain standing when seeking damages.

This gap in the D.C. Circuit's decision also has profound effects on the Title VII standing analysis. Since employment testers seeking redress under Title VII for alleged violations occurring after 1991 are seeking damages, it also would appear that the Fair Employment Council methodology standing alone cannot preclude standing for such testers.\(^{119}\) Therefore, the methodology that the Molovinsky court relied on to determine if testers have standing under the DCHRA necessarily will provide insight into the post-1991 Title VII standing inquiry. The Supreme Court's 1982 decision in Havens Realty supplies the Molovinsky court's methodology since the court relied almost exclusively on Havens Realty in finding that testers have standing under the DCHRA.

In Havens Realty, a black tester was falsely told that housing in a predominantly white apartment complex was not available.\(^{120}\) The Supreme Court found that the tester had standing under a section of the Fair Housing Act that created the right "to truthful information concerning the availability of housing."\(^{121}\) The broad reach of the Fair Housing Act, the Supreme Court had already concluded, demonstrates Congress' intent to remove the prudential standing rules as

\(^{118}\) See Molovinsky, 683 A.2d at 145 ("The jury returned a verdict against Molovinsky and awarded damages to each of the plaintiffs.") (emphasis added).

\(^{119}\) See Robert Thomas Roos, Note, No Harm, No Fraud: The Invalidity of State Fraud Claims Brought Against Employment Testers, 53 VAND. L. REV. 1687, 1704 (2000) ("Under today's version of Title VII, the new remedies promulgated in the 1991 amendments are available to prospective plaintiffs, thus removing the impediment to standing that supported the court's decision in Fair Employment Council.").

\(^{120}\) See Havens Realty, 455 U.S. at 368 n.4 ("Camelot Townhouses is an apartment complex predominantly occupied by whites. Coles [the tester plaintiff] was informed that no apartments were available in the Camelot complex. He was told that an apartment was available in the adjoining Colonial Court Complex. The Colonial complex is integrated.").

\(^{121}\) Id. at 364. The section at issue, 42 U.S.C. § 3604(d) (2000), provides that "it shall be unlawful—[to 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." The Havens Realty Court recognized that "Congress' decision to confer a broad right of truthful information concerning housing availability was undoubtedly influenced by congressional awareness that the intentional provision of misinformation offered a means of maintaining segregated housing." Id. at 374 n.14 (White, J., concurring).
contemplated by Warth v. Seldin. The Havens Court, however, did not stop there. It further held that a tester who alleged a violation of her statutory right to truthful housing information, as provided for in the Fair Housing Act, satisfied the Article III requirement of injury in fact. In finding that testers meet the Article III injury requirement, the Court specifically relied on language in its previous Linda R.S. v. Richard D. and Warth decisions, which recognized that injury may exist by virtue of statutes that create legal rights.

The Molovinsky court analogized the Fair Housing Act to the DCHRA. First, the court found that the portions of both acts authorizing persons to bring suit were virtually identical. More significant, however, the court concluded that, as in Havens Realty, the testers satisfied the injury requirement automatically when they claimed a violation of statutory rights under the DCHRA. In so doing, the court recognized that although female testers had no intention of accepting an employment referral, this “did not negate the simple fact of injury within the meaning of [the DCHRA].” The court concluded that the testers met the Article III injury requirement and had standing because “the statutory violation and accompanying injury exist without respect to the testers’ intentions in initiating the encounters.”

Thus, the Molovinsky court’s reliance on Havens Realty ushered in the idea that employment testers automatically meet the Article III injury requirement so long as they bring an action under a statute that creates broad legal rights, such as Title VII. Furthermore, the decision illuminated the limitations of the D.C. Circuit’s Fair Employment Council decision, which cannot apply to alleged violations occurring after the enactment of the 1991 amendments to Title VII authorizing money damages. Nevertheless, as the 1990s came to end, the D.C. Circuit was still the only circuit court to address standing for employment testers and had ruled against them. Finally, in the sum-

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123 See Havens Realty, 455 U.S. at 373-74 (White, J., concurring) (“A tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages under the Act’s provisions.”).
125 See supra note 47 and accompanying text.
126 Compare D.C. Code § 1-2556(a) (1992) (allowing “any person claiming to be aggrieved” to bring suit under the DCHRA) with 42 U.S.C. § 3604 (2000) (allowing “any person who claims to have been injured” to bring suit under the Fair Housing Act).
127 See Molovinsky, 683 A.2d at 146 (“As in Havens, the injury to their rights was direct and personal.”).
128 Id. (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 374 (1982)).
129 Id.
mer of 2000, another circuit court addressed standing for employment testers.

In *Kyles v. J.K. Guardian Security Services, Inc.*, the Seventh Circuit parted ways with the D.C. Circuit while embracing the *Havens Realty* methodology relied on in *Molovinsky*. The *Kyles* court examined the Supreme Court's interpretation of the Fair Housing Act, and found that the Act automatically creates substantive rights "the denial of which alone gives rise to a cognizable injury and the right to sue." The court also stated that the tester in *Havens Realty* "suffered an injury notwithstanding the fact that she was not actually in need or desire of housing." In other words, the statute itself conferred standing on a tester "even if the [tester] does not suffer the type of core injury that the statute protects."

Similar to *Molovinsky*, the *Kyles* court then analogized the Fair Housing Act to Title VII. For example, the court pointed out that the Fair Housing Act, just like Title VII, authorizes "any person" who is aggrieved by a statutory violation to bring suit. After conducting a review of *Havens Realty*, the *Kyles* court then concluded that employment testers also satisfy the Article III injury requirement as housing testers do under the Fair Housing Act. Consequently, the court ruled that employment testers have standing under Title VII.

The *Molovinsky* and *Kyles* departure from the D.C. Circuit's decision in *Fair Employment Council* suggests that, unlike § 1981, the primary motive of plaintiffs should not enter the standing analysis under Title VII. Taken to its logical conclusion, the fact that courts addressing standing have chosen to discount the motive of the plaintiff in "applying" for jobs suggests that tester plaintiffs may have standing. The following analysis, however, challenges this conclu-

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130 222 F.3d 289 (7th Cir. 2000). As previously mentioned, the Seventh Circuit in *Kyles* agreed with the D.C. Circuit's decision in *Fair Employment Council* that testers do not have standing under § 1981. *See supra* notes 74-84 and accompanying text.
131 *Kyles*, 222 F.3d at 303.
132 *Id.*
133 *Id.*
134 *See id.* at 297-98 (explaining that both statutes authorize "any person aggrieved by a violation to file charge and suit"). *See Molovinsky*, 683 A.2d at 146 (making the same comparison between the Fair Housing Act and the DHCRA, a statute modeled after Title VII).
135 *Kyles*, 222 F.3d at 295. *See also id.* at 297 (explaining that "[b]oth [statutes] take broad aim at discrimination in their respective sectors and in that sense are the functional equivalents of one another").
136 *See id.* at 300 ("In this case, Kyles and Pierce have asserted the injury-in-fact that Article III requires.").
sion and suggests that the primary motive of a plaintiff bringing an action under Title VII may be important to the standing inquiry.

C. Obstacles to Standing Under Title VII

As previously discussed, the Havens Realty decision gave housing testers standing to bring suit under the Fair Housing Act. The main rationale leading to this conclusion was the Supreme Court's interpretation in Havens Realty of its previous language appearing in Linda R.S., i.e., the "injury in fact" requirement of Article III "may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." Essentially, the Havens Realty Court took this language to mean that the "injury in fact" requirement is satisfied automatically when a plaintiff invokes a federal statute creating a legal right, even when the plaintiff may not have suffered any injury otherwise.

Therefore, a strong argument emerges in favor of employment tester standing under Title VII. So long as Title VII creates legal rights, employment testers have standing to sue in exactly the same way that housing testers have standing under the Fair Housing Act. The fact that Title VII is extremely similar to the Fair Housing Act suggests that Title VII extends standing to the full extent of the Constitution, eliminating the need to surmount the prudential barriers to standing. This similarity also suggests that Title VII creates legal rights and that the "injury in fact" requirement is satisfied by anyone bringing suit under this statute, even testers. Consequently, the Havens Realty decision, standing alone, supports the conclusion that employment testers have standing under Title VII.

Supreme Court and other federal court jurisprudence, however, challenge this conclusion. First, the Havens Realty Court's interpretation of the "injury in fact" requirement may have been modified recently by the Supreme Court. Second, the analogy between Title VII and

137 See supra note 121 and accompanying text.
139 See Kyles, 222 F.3d at 296 (explaining that through § 804(d) of the Fair Housing Act, "Congress had created a legal right, the denial of which would, in and of itself, give rise to the type of injury necessary to establish standing in conformance with Article III"). See also Michael Rosman, Standing Alone: Standing Under the Fair Housing Act, 60 MO. L. REV. 547, 582 n.158 (1995) ("Linda R.S. strongly suggests that some 'injuries' under a statute would not be injuries at all.").
140 This is the argument proffered by some academics. See, e.g., Steven G. Anderson, Tester Standing Under Title VII: A Rose by Any Other Name, 41 DEPAUL L. REV. 1217 (1992) (concluding that employment testers have standing under Title VII); Shannon E. Brown, Tester Standing Under Title VII, 49 WASH. & LEE L. REV. 1117 (1992) (same).
141 See supra note 44 and accompanying text.
142 See supra note 47 and accompanying text.
and the Fair Housing Act may not be proper with respect to the elimination of prudential barriers and the breadth of the rights protected under Title VII. Finally, cases involving employment testers that have been decided on the merits suggest that testers may need to be bona fide applicants in order to have standing. It is imperative, therefore, to examine this jurisprudence to see how it affects standing for testers under Title VII. This review will demonstrate that employment testers may not have standing under Title VII if they cannot demonstrate an "injury in fact" separate from the "injury" resulting solely from the violation of Title VII. Furthermore, standing may be precluded if the Fair Housing Act cannot be analogized to Title VII.

I. Lujan v. Defenders of Wildlife and the Injury Battle

In 1992, the Supreme Court clarified, or perhaps further muddled, what constitutes the Article III requirement of "injury in fact." In *Lujan v. Defenders of Wildlife*, the Supreme Court held that the Endangered Species Act ("ESA") did not automatically confer standing on plaintiffs even though a provision of the statute permits "any person" to commence a civil suit to enjoin anyone violating the statute. In supporting this conclusion, the *Lujan* Court held that in defining "injury," Congress could create only Article III de jure injuries from previously existing de facto injuries. In other words, according to the *Lujan* methodology, Congress cannot create legal rights automatically satisfying the Article III injury requirement. Instead, a court must separately inquire as to whether the plaintiff invoking rights under a federal statute suffered an injury "if not actual, then at least imminent."

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143 To clarify what is meant by "injury in fact," Rosman looks beyond words used by the Supreme Court, which include "distinct," "palpable" and "not abstract," relying instead on "utilitarian injury." Rosman describes a "utilitarian injury" as "one which leaves a person worse off than he was previously, i.e., one which reduces his or her 'utility.'" Rosman, *supra* note 139, at 566. He also makes the point that an "injury in fact" is different from a "legal injury," which was the standard for determining the Article III injury requirement prior to 1970. *Id.* at 553.


145 *Id.* at 578.

146 *See id.* at 578 (explaining that the cases relied on by the Supreme Court in developing the *Linda R.S.* approach "involved Congress' elevating to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law").

147 This portion of Justice Scalia's majority opinion in *Lujan* was foreshadowed by a lecture he gave in 1983. *See Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881, 886 (1983)* (arguing that "there is a limit upon even the power of Congress to convert generalized benefits into legal rights—and that is the limitation imposed by the so-called "core" requirement"). Whether or not Justice Scalia and the *Lujan* majority meant this limitation to apply only to generalized grievances against the Government rather than to private suits against defendants is not clear.

148 *Lujan*, 504 U.S. at 564 n.2.
On its face, the *Lujan* decision seems to ignore the Court's previous pronouncement in *Linda R.S.* and later in *Warth*, that the "injury in fact" requirement of Article III can be satisfied by statutes that create legal rights, the invasion of which creates standing.\(^{149}\) For example, Congress explicitly gave any person the ability to bring suit against anyone violating the ESA.\(^{150}\) Under the *Linda R.S.* approach, the ESA seems to qualify as a statute that creates legal rights for all persons to bring suit against violators. Therefore, any person bringing suit to enforce the statute should automatically satisfy the Article III injury requirement.\(^{151}\) Since the creation of these legal rights may also demonstrate Congress' intent to remove prudential barriers to standing, the *Linda R.S.* approach may narrow the standing requirements for plaintiffs bringing suit under this provision of the ESA to the remaining two Article III requirements—causation and redressability.\(^{152}\)

A closer examination of Supreme Court jurisprudence, however, demonstrates that *Lujan* may not disrupt the *Linda R.S.* approach. First, one academic has noted that "[t]he underlying supposition of *Warth* is that there are actual, particularized injuries which simply do not cut it as Article III injuries-in-fact without the assistance of a statute."\(^{153}\) The argument is that the *Linda R.S.* and *Warth* Courts' language, regarding the creation of statutory rights, the invasion of which creates standing, applies only to persons whose injuries previously could not be redressed at common law or under the Constitution.\(^{154}\) Conversely, this language would not apply to plaintiffs, like those in *Lujan*, whose sole claim to injury is a violation of a federal statute.

This argument is supported by the Supreme Court's previous pronouncement in *Sierra Club v. Morton*\(^{155}\) that "[statutory] broadening of the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered injury."\(^{156}\) It is also supported by language in *Lujan* itself, pointing out that "[b]oth of the

\(^{149}\) See Rosman, supra note 139, at 581 (commenting that "the opinion in [*Lujan*] appears to be inconsistent with language in certain earlier opinions," including *Linda R.S.*).

\(^{150}\) See 16 U.S.C. § 1540(g) (2000) (the pertinent portion of this section provides that "any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter").

\(^{151}\) See supra note 47 and accompanying text.

\(^{152}\) See supra notes 37 and 38 and accompanying text.

\(^{153}\) Rosman, supra note 139, at 573.

\(^{154}\) See supra note 146 and infra note 158.

\(^{155}\) 405 U.S. 727 (1972).

\(^{156}\) Id. at 738.
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cases\textsuperscript{157} used by [Linda R.S.] as an illustration of that principle involved Congress' elevating to the status of legally cognizable injuries concrete, \textit{de facto} injuries that were previously inadequate in law.\textsuperscript{158} Consequently, Congress can automatically make an injury resulting from the violation of a statutory right satisfy the Article III injury requirement \textit{only if} a violation of that right would cause an actual injury without the assistance of the statute.\textsuperscript{159}

Second, the Court has continually held that the Article III standing requirements must be satisfied in order to gain standing and that these requirements cannot be eliminated or abrogated by an act of Congress.\textsuperscript{160} \textit{Lujan}’s holding that persons do not meet the Article III injury requirement merely by invoking a federal statute creating legal rights reinforces this enduring principle of standing. On the other hand, the \textit{Havens Realty} Court’s holding may contradict this principle by simply relying on Congress’ grant of a broad right to truthful information, through the Fair Housing Act, as the sole requisite for the Article III injury requirement.\textsuperscript{161} Relying on the notion that Congress cannot abrogate standing requirements, however, suggests that the \textit{Havens Realty} Court may have needed to conduct an independent inquiry into whether the testers suffered an actual or utilitarian injury rather than solely giving effect to the words of Congress.\textsuperscript{162}

Finally, the Supreme Court views the Article III injury requirement as a factual determination rather than a legal inquiry. Prior to 1970, the Court utilized the “legal interest” test to determine if a plaintiff satisfied the injury requirement of Article III.\textsuperscript{163} In \textit{Associa-

\textsuperscript{157} The two cases relied on by the \textit{Linda R.S.} Court were \textit{Trafficante v. Metropolitan Life Ins. Co.}, 409 U.S. 205 (1972), and \textit{Hardin v. Kentucky Utilities Co.}, 390 U.S. 1 (1968). In \textit{Trafficante}, the concrete injury previously inadequate in law was “the loss of important benefits from interracial associations.” \textit{Trafficante}, 409 U.S. at 210. The injury in \textit{Hardin} was economic injury resulting from the violation of a statutory provision aimed at “protect[ing] private utilities from TVA competition.” \textit{Hardin}, 390 U.S. at 6.


\textsuperscript{159} Rosman, \textit{supra} note 139, at 580. Rosman explains that “[t]he statutory assistance is to create a ‘right’ not to be injured in ways that the Constitution and/or the common law do not recognize.” \textit{Id.} at 573.

\textsuperscript{160} \textit{See supra} note 45 and accompanying text.

\textsuperscript{161} \textit{See supra} notes 120-125 and accompanying text.

\textsuperscript{162} Michael Rosman, commenting on \textit{Havens Realty}, explains that “the Court did not look for any utilitarian injury” or “look for any ‘adverse consequence’ or injury” or even “determine whether the testers were worse off in some factual sense.” Rosman, \textit{supra} note 139, at 576. He went on to conclude that when determining standing for “common law claims like fraudulent inducement, we normally require plaintiffs to show that they relied on the false information, because, without such a showing, it seems unlikely that the plaintiff suffered injury. As interpreted in \textit{Havens Realty}, section 3604(d) eliminates that requirement.” \textit{Id.}

\textsuperscript{163} \textit{See, e.g.}, Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 137-38 (1939) (denying the competitor’s standing and holding that they did not have the status “unless the right invaded
tion of Data Processing Service Organizations, Inc. v. Camp, however, the Court disavowed the "legal interest" test, asking instead "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." The Court's rationale for this switch was that the legal interest of the plaintiff determines the merits of his case rather than whether or not he has standing. Data Processing suggests that even though testers may have a legal interest emanating from Title VII, the legal significance of this possible interest does not bear directly on the standing analysis.

Lujan can be viewed as reconciling the Linda R.S. Court's notion of Congress' ability to create legal rights, the violation of which confers standing, with prior Supreme Court jurisprudence holding that the Article III injury requirement is determined through a factual inquiry that cannot be eliminated by Congress. Specifically, Congress can create legal rights that did not exist previously under the law. Nevertheless, the injury resulting from a violation of these rights must be an actual, concrete injury in order to satisfy the Article III requirement of injury in fact. Congress cannot simply abrogate this requirement by enabling the violation of a statutory right to automatically give someone claiming that right standing. Rather, a separate inquiry must be made by a court to determine if an actual injury occurred to the plaintiff when the statutory right that he invokes was violated.

This reading of Lujan may have grave consequences for the standing of testers under the Fair Housing Act. In Havens Realty, the Court did not make an independent inquiry as to whether the testers had suffered any injury apart from the violation of the right they claimed under the Act. Following the Lujan precedent, however, would seem to require such an independent inquiry to determine if the testers had suffered an Article III injury. Therefore, these testers must

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165 Id. at 152. See also Rosman, supra note 139, at 553 (explaining that "the 'legal injury' test was expanded in the post World War II era, until it was abandoned in [Data Processing]").
166 See Data Processing, 397 U.S. at 153.
167 Subsequent Supreme Court decisions are consistent with this concept. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992) ("But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.") (quoting Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972)). Nevertheless, Cass Sunstein and other academics have been highly critical of the Data Processing holding and argue that the injury in fact inquiry should be abandoned in favor of a return to the pre-Data Processing legal interest test. See Cass R. Sunstein, What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III, 91 MICH. L. REv. 163, 222 (1992) (explaining that "the real source of current difficulty is Data Processing, which diverted attention from the relevant question of cause of action to the irrelevant question of injury in fact").
168 See supra note 161 and accompanying text.
show that they suffered an injury in addition to demonstrating that they did not receive truthful information as the statute provides. Presuming that these testers did not receive such an injury,\textsuperscript{169} testers would not be able to satisfy the Article III requirements for standing under the Fair Housing Act.

This view of \textit{Lujan}'s effect on \textit{Havens Realty} and tester standing under the Fair Housing Act would render meaningless the analogy that the \textit{Molovinsky} and \textit{Kyles} courts constructed to demonstrate that employment testers meet the injury requirement for standing under Title VII. Specifically, a mere violation of the Fair Housing Act would not automatically supply the injury requirement for housing testers. Assuming, as \textit{Molovinsky} and \textit{Kyles} have assumed, that the Fair Housing Act is properly analogized to Title VII, a mere violation of Title VII similarly would not supply the injury requirement for employment testers.\textsuperscript{170} A number of academics have agreed that this is the proper reading of \textit{Lujan}.\textsuperscript{171} Nevertheless, many disagree that \textit{Lujan} represents the proper approach to the standing inquiry.

Although \textit{Lujan} may present a formidable obstacle precluding standing for employment testers under Title VII, it nevertheless may

\begin{footnotesize}
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\item Not only is it possible that these testers did not receive an injury, they may even have benefited from the failure to receive truthful information. \textit{See}, e.g., United States v. Balistrieri, 981 F.2d 916, 932 (7th Cir. 1992) ("In fact, a tester who helps expose discrimination could conceivably experience certain satisfaction in helping to correct wrongful conduct. Some testers could even be pleased with the success of their undercover operations."); Rosman, supra note 139, at 576-77 ("The tester, in general, is an individual committed to eradicating discrimination from the field of housing, and may truly believe that the persons being 'tested' engage in illegal discrimination but have yet to be detected. It is not altogether unreasonable to assume that a tester might be elated or receive some other form of 'mental joy'—or whatever the name for the opposite of mental distress is—upon learning that his or her efforts have contributed to the ferreting out of evil.").
\item \textit{But see} Robert G. Schwemm, \textit{Standing to Sue in Fair Housing Cases}, 41 OHIO ST. L.J. 1, 53 (1980) (observing that it is unlikely "the Court will ever hold that a plaintiff's injury is covered by [the Fair Housing Act] but that it is inadequate to meet article III requirements").
\item \textit{See} Gene R. Nichol, Jr., \textit{Justice Scalia, Standing, and Public Law Litigation}, 42 DUKE L.J. 1141, 1158 n.125 (1993) ("Under the Defenders methodology, however, the tester actually would have nothing at stake."); Rosman, supra note 139, at 581 (explaining that "[t]he consequences of \textit{Lujan} would be particularly severe for the Fair Housing Act" and that \textit{Lujan} is "difficult to reconcile with the holding of \textit{Havens Realty}"). Rosman also referred to Nichol's article, stating that "[a]s Dean Nichol has noted, it does not seem that black testers like those in \textit{Havens Realty} would have standing if Scalia's opinion in \textit{Defenders} becomes the standard analytic framework for statutory standing." \textit{Id. See also} Richard J. Pierce, Jr., \textit{Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power}, 42 DUKE L.J. 1170, 1179 (1993) (arguing that "the results of the Court's prior statutory standing cases are in grave doubt"); Sunstein, supra note 167, at 230 n.296 (explaining that the Court's decision in \textit{Lujan} could not be reconciled with \textit{Havens Realty} since both cases involved similar congressionally created property interests).
\item \textit{See, e.g.,} Sunstein, supra note 167, at 236 ("Despite the holding of \textit{Lujan}, Congress should be permitted to grant standing to citizens."). Sunstein also commented that "[t]he \textit{Lujan} Court's unprecedented invalidation of a provision for citizen standing has no basis in Article III." \textit{Id.}
\end{enumerate}
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serve as a harmless mirage. For example, *Lujan* is distinguishable from tester cases under Title VII based on the nature of the injuries and the parties involved. *Lujan* specifically addresses suits claiming procedural injury arising from government conduct that is not accompanied by a deprivation of liberty or property. Tester suits under Title VII, on the other hand, involve markedly different claims of alleged personal discrimination arising from the conduct of a private defendant. Consequently, an inference can be made that these distinctions require different analytical frameworks for determining standing.\(^\text{7}3\)

This inference is magnified by previous Supreme Court decisions announcing that "assertion of a right to a particular kind of government conduct, which the government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning."\(^\text{17}4\) Consequently, the breadth of *Lujan*’s application may appropriately be limited to "generalized grievances" against the government.\(^\text{17}5\) If so limited, *Lujan* may give rise to the presumption that a broader reading of *Warth*, finding injury solely on the basis of a statutory violation, is permitted or even required when the government is not itself a defendant, as in employment tester cases against private defendants. Consequently, the Fair Housing Act cases would remain unaffected by *Lujan* and the Act’s analogy to Title VII still could serve as a persuasive argument in favor of employment tester standing.

Another factor diminishing *Lujan*’s effect on tester standing is the argument that *Warth* actually does permit Congress to create legally cognizable injuries that previously were not adequate in law. Support for this argument can be found in Justice Kennedy’s concurrence in *Lujan*. Justice Kennedy disagreed with Justice Scalia’s interpretation of *Warth*, announcing that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."\(^\text{17}6\) Nevertheless, Justice Kennedy qualified this power, requiring that "Congress must at least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."\(^\text{17}7\) The citizen-suit provision of the ESA, however, did not define the injury resulting from a violation of the Act. Consequently, Justice Kennedy concluded that this provision

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\(^{173}\) *But see* Sunstein, *supra* note 167, at 232 ("After *Lujan*, the citizen-suit provisions are probably unconstitutional even when the defendant is a private citizen or corporation.").


\(^{175}\) *See* *Lujan*, 504 U.S. at 578.

\(^{176}\) *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).

\(^{177}\) *Id.*
“does not of its own force establish that there is an injury in ‘any person’ by virtue of any ‘violation.’”

Justice Kennedy’s concurrence, joined by Justice Souter, “does not limit the injuries that Congress could define to pre-existing de facto injuries.” Rather, Justice Kennedy “merely wanted a clear statement of what the injury is.” This concurrence is particularly relevant to ascertaining the proper interpretation of the Linda R.S. (or Warth) statutory rights scheme “because without [Justice Kennedy] and Justice Souter, Justice Scalia’s opinion would have lacked a majority.”

Unlike Justice Scalia’s opinion, Justice Kennedy’s qualified view that Congress can define injuries previously inadequate at law arguably is consistent with the rationale supporting the Havens Realty decision. Although section 804(d) of the Fair Housing Act is not particularly clear about the specific injury resulting from a violation of the right to truthful information, the class of persons affected by the violation is limited to a specific class of right-holders. Rather than a generalized grievance authorizing all citizens from seeing that the law is obeyed, this section specifically permits persons prevented from obtaining housing through deception to seek redress. Therefore, under Kennedy’s interpretation of statutory rights, the housing testers may automatically satisfy the Article III injury requirement merely by claiming a violation of section 804(d) of the Fair Housing Act.

Consequently, Lujan may not render meaningless the analogy that Molovinsky and Kyles have drawn between the Fair Housing Act and Title VII. First, it is arguable that the application of Lujan is properly limited to generalized grievances brought against the government, rather than tester suits brought against private defendants. Furthermore, although Justice Scalia’s interpretation of statutory rights may conflict with Havens Realty and gravely affect standing for testers under either the Fair Housing Act or Title VII, Justice Kennedy’s methodology leaves the Havens Realty decision unscathed. Since Justices Kennedy and Souter are currently the swing votes on this issue, the prior Fair Housing Act jurisprudence may remain unmo-

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178 Id.
179 Rosman, supra note 139, at 583.
180 Id.
181 Id. at 582.
182 Another distinguishing characteristic of Lujan is whether Congress has usurped executive power by authorizing citizen suits. This question raises separation of powers issues that may or may not be present in tester cases, or at least, are not as prevalent in cases where the class authorized to enforce the statutory violation is limited, as in tester cases. For a further discussion of the links between standing doctrine and separation of powers issues, see Scalia, supra note 147, at 890-97.
183 See supra note 121 and accompanying text.
tested after *Lujan*. Consequently, so long as employment testers are able to persuasively analogize the Fair Housing Act to Title VII, then testers have a strong argument in favor of standing.

Nevertheless, the important conclusion drawn from an analysis of *Lujan* and statutory rights is that the ambiguity of Supreme Court jurisprudence on this matter makes it far less than clear that testers can claim Article III injury based solely on a violation of a right created by Congress. Consequently, since standing for housing testers under the Fair Housing Act is no longer a foregone conclusion after *Lujan*, standing for employment testers similarly may be jeopardized.

2. Breadth of Rights, Elimination of Prudential Barriers, and the Fair Housing Act Analogy

Even if the Fair Housing Act survives a statutory rights challenge, the analogy between it and Title VII may be flawed, precluding a finding of standing for employment testers under Title VII. For example, *Molovinsky* and *Kyles* pointed to specific language in the Fair Housing Act granting testers a cause of action. These courts found standing for employment testers by relying on the presumption that Title VII similarly supplies a cause of action for testers. An examination of the relevant language of Title VII, however, reveals differences between it and the language granting testers a cause of action under the Fair Housing Act. Consequently, the presumption that Title VII protects employment testers from discrimination is susceptible to challenge.

As previously mentioned, section 804(d) of the Fair Housing Act makes it unlawful “[t]o represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.” The *Havens Realty* Court concluded that this section gives testers a cause of action since it “con-

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184 The specific language is encompassed by 42 U.S.C. § 3604(d), also known as § 804(d) of the Fair Housing Act. See infra text accompanying note 186.

185 See *Kyles v. J.K. Guardian Serv., Inc.*, 222 F.3d 289, 298 (7th Cir. 2000) (finding that an employment tester has standing under Title VII since she “suffers an injury ‘in precisely the form the statute was intended to guard against,’ just as she would if, as a housing tester, she were falsely informed that a vacant apartment was unavailable”) (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982)); *Molovinsky*, 683 A.2d at 146 (“In *Havens* the Supreme Court held that a tester who alleged a violation of her statutory right to truthful housing information satisfied the Article III requirement of injury in fact. The plaintiff testers in this case alleged a violation of their statutory right to be free from sexual harassment. As in *Havens*, the injury to their rights was direct and personal.”) (citation and footnote omitted).

fer[s] on all ‘persons’ a legal right to truthful information about available housing.”

No analogous language appears anywhere in Title VII. In other words, Title VII does not specifically provide a cause of action for misrepresentations made to any person because of his race or other legally irrelevant factor. Congress, therefore, has not created a broad right to truthful information under Title VII as it has under the Fair Housing Act. Since the right housing testers have sued under is not available under Title VII, the analogy between the Fair Housing Act and Title VII lacks complete symmetry. Although both statutes were enacted to combat discrimination, they adopt different means by which to accomplish this overarching goal. Employment testers, therefore, cannot argue that because housing testers have standing under a certain provision of the Fair Housing Act, they necessarily have standing under dissimilar provisions of Title VII. Consequently, an argument can be made that whatever the extent of congressional power to create causes of action for testers under Article III, Congress has simply failed to do so in Title VII.

Before reaching this conclusion, however, it is entirely possible that Title VII contains other provisions that independently give employment testers a cause of action. Such provisions would obviate the need to draw an analogy to the Fair Housing Act for the purpose of locating a cause of action for employment testers, thereby eliminating the difficulty presented by the absence of a right to truthful information under Title VII. The provisions employment testers have relied on are 42 U.S.C. § 2000e-2(a)(1) and 42 U.S.C. § 2000e-2(b). The first applies to employers and makes race or sex-based refusals to hire unlawful, while the second refers to employment agencies and makes race or sex-based refusals to refer for employment unlawful.

These provisions, however, do not grant a right as broad as that granted under 804(d) of the Fair Housing Act. For example, while it is clear that the Fair Housing Act’s right to truthful information does

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187 Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982). The Court explained that Congress conferred such a broad right in order to combat housing discrimination. See id. at 374 n.14 (“Congress’ decision to confer a broad right of truthful information concerning housing availability was undoubtedly influenced by congressional awareness that the intentional provision of misinformation offered a means of maintaining segregated housing.”).

188 See Kyles, 222 F.3d at 297 (“Title VII contains no provision comparable to section 804(d) of the Fair Housing Act.”); Kyles v. J.K. Guardian Sec. Servs., Inc., No. 97-C-8311, 1998 WL 677165, at *3 (N.D. Ill. Sept. 22, 1998) (explaining that “[a]lthough courts have recognized the standing of testers under the Fair Housing Act, the rights created by that statute are different from the rights created by Title VII”).

189 See supra note 135 and accompanying text.

190 For a discussion of these provisions, see infra text accompanying notes 191-92.

191 See supra note 3.

192 See supra note 3.
not require a bona fide housing applicant, the same cannot be said of the Title VII provisions. *Havens Realty* interpreted the reach of section 804(d) by relying on the structure of the Act as a whole, specifically pointing to another provision of the Act requiring a bona fide applicant. The court concluded that since section 804(d) does not similarly require a bona fide applicant, then the right to truthful information applies to housing testers. Courts, however, cannot rely on the same analysis with respect to the relevant Title VII provisions since no other provisions in Title VII explicitly require a bona fide applicant. Consequently, an inference arises suggesting that, unlike the Fair Housing Act, Title VII requires a bona fide applicant.

Nevertheless, both Title VII provisions may grant a cause of action to non-bona fide applicants, including employment testers. For example, once an employer or an employment agency refuses to employ or refer a tester, it is arguable that his right to be free from such refusals based on his race or other prohibited factor has been implicated. As mentioned above, Title VII does not explicitly require that a person have an actual desire to work for the employer or obtain a referral from an employment agency in order to bring suit under the statute. Consequently, these provisions may provide rights to employment testers that, at the very least, should not preempt conducting an Article III standing analysis for testers.

In addition, whether or not testers have a cause of action may only represent a question on the merits, which need not be clearly ascertained to grant them standing. This argument can work only if courts continue to apply the injury in fact inquiry announced in *Data Processing*. If, as many academics advocate, the pre-*Data Processing* legal interest test is reestablished, then the existence of a cause of

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193 *See* 42 U.S.C. § 3604(a) (2000) (providing that “it shall be unlawful—(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin”).

194 *See* *Havens Realty*, 455 U.S. at 374 (“Whereas Congress, in prohibiting discriminatory refusals to sell or rent in § 804(a) of the Act, 42 U.S.C. § 3604(a), required that there be a ‘bona fide offer’ to rent or purchase, Congress plainly omitted any such requirement insofar as it banned discriminatory representations in § 804(d).”) (footnote omitted).

195 Of course, an opposite inference may also be created by the congressional silence in Title VII with respect to bona fide applicants, i.e., if Congress intended for the bona fide applicant requirement, it would have explicitly addressed it in Title VII, as it had in § 804(a) of the Fair Housing Act. Nevertheless, courts addressing the merits of employment tester claims have concluded that only a bona fide applicant may recover under Title VII. Rather than relying on the structure of Title VII, however, these courts have relied on the failure of testers to establish one of the prima facie elements. *See infra* notes 224-29 and accompanying text.

196 *See* *Fry v. UAL Corp.*, 84 F.3d 936, 939 (7th Cir. 1996) (explaining that when the rights conferred by a statute are not clear, “the question whether a particular class is protected by it becomes just another issue concerning the merits of the suit”).

197 *See* *supra* notes 161-63 and accompanying text.
action becomes essential to the Article III injury inquiry. In other words, the merits of the case become more closely merged with the standing inquiry. Consequently, a failure to state a cause of action would forestall any possible legal avenues available to employment testers under Title VII.

The Fair Housing Act/Title VII analogy also may be flawed with respect to the elimination of prudential barriers to standing. The Fair Housing Act extends standing to the limits of Article III, eliminating any court-imposed prudential barriers to standing. Courts have relied on the Fair Housing Act to find that Title VII has also eliminated prudential barriers. Nevertheless, other courts, including the U.S. Courts of Appeals, have been reluctant to eliminate these barriers to standing under Title VII. Furthermore, the leading treatise on employment discrimination refers to the “zone of interests” test as a core Article III standing requirement.

The tendency of courts to continue to apply a “zone of interests” analysis to actions brought under Title VII is not surprising. Although statutes may eliminate prudential barriers to standing, it is difficult to fathom elimination of the “zone of interest” barrier. This is because it seems counterintuitive for statutes to protect interests that...
were never intended for the statute to protect, a distinct possibility if a statute eliminates the “zone of interests” requirement. This improbability is compounded by the preposterous inquiry left for the courts. Specifically, in order to determine if Congress intended to ignore its own intent, courts must examine the intent of Congress in enacting the particular statute at issue. Consequently, employment testers may have to establish that Title VII not only protects the interests of bona fide applicants, but that it protects their interests as well. Without any express language exhibiting congressional intent to encompass testers, Title VII may arguably only protect bona fide applicants. In fact, the only courts addressing the merits of employment tester claims, with the exception of Kyles, interpret Title VII as requiring bona fide applicants.

V. SHOULD EMPLOYMENT TESTERS HAVE STANDING?

A. Filling the Enforcement Void, the Goals of Title VII, and Organizational Standing

Even if employment testers are able to surmount the various obstacles to standing under Title VII, granting employment testers standing will in no way provide a panacea against hiring discrimination. Title VII was intended to and is written to take aim at a wide range of discriminatory practices. “The efficacy of Title VII depends in part on the willingness and ability of individuals to bring private suits challenging discriminatory employment practices.” It is unlikely, however, that employment testers will fill the Title VII enforcement void and contribute to the efficacy of Title VII by seeking redress for alleged hiring discrimination.

203 See Rosman, supra note 139, at 557 (“It is rather odd to say that Congress intended to eliminate the ‘prudential’ tests. With respect to the zone of interests test, this means that Congress meant to eliminate any inquiry into its own intent as to who should have standing. Moreover, as discussed below, Congress’ intent to ignore its own intent is apparently gleaned by examining its intent.”).
204 But see supra note 195.
205 See infra notes 230-33 and accompanying text.
206 See infra notes 219-29 and accompanying text.
207 In fact, some believe that Title VII is not even the proper instrument to combat hiring discrimination. See, e.g., Ronald Turner, Thirty Years of Title VII’s Regulatory Regime: Rights, Theories, and realities, 46 Ala. L. Rev. 375, 386 (1995) (concluding that “Title VII is not and should not be viewed as a fundamental weapon which will transform or even marginally change the demographics of this nation’s workplaces”). Obviously, adopting this view would eliminate the rationale of extending standing to employment testers to fill the enforcement void under Title VII.
208 See Kyles v. J.K. Guardian Sec. Servs., Inc., 222 F.3d 289, 298 (7th Cir. 2000).
209 Yelnosky, supra note 8, at 413.
210 See supra notes 10-13 and accompanying text.
First of all, the time, energy, and costs associated with litigation and administrative proceedings suggest that employment testers will not help fill the Title VII enforcement void. The very motive of employment testers, however, also suggests that they lack the incentive to bring suit under Title VII. The task of these testers is to uncover evidence of discrimination in the workplace rather than bring suit every time they uncover such evidence. Not only might Title VII fail to protect testers, but it is not clear that testers are harmed since they accomplish the very goal of uncovering discrimination when they are refused employment or a referral. Consequently, this absence of harm not only implicates the Article III injury requirement, but also raises the inference that they lack the necessary commitment to seek redress in the courts. The few cases where employment testers have appeared individually as plaintiffs demonstrate that testers are not filling Title VII's enforcement void.

In addition, just because testers are not granted standing does not mean that the evidence they uncover cannot be used against the defendant. Supreme Court jurisprudence clearly provides that the organization utilizing the testers may have standing under Title VII. Therefore, organizations utilizing testers can still sue to enforce the statute on behalf of those bona fide applicants who, for whatever reason, do not bring actions on their own behalf. As a re-

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211 See, e.g., Turner, supra note 207, at 384 ("The processing of a Title VII charge requires initial compliance with an often lengthy administrative process. The EEOC faces a current backlog of over 90,000 pending charges and has had its budget reduced by $13,000,000.") (footnote omitted); Yelnosky, supra note 8, at 411 (explaining that "high transaction costs" and "other disincentives probably have led to underenforcement of Title VII in [hiring discrimination] cases") (footnote omitted). Of course, organizations utilizing testers may provide monetary and other support to the testers, thereby eliminating or at least reducing the impact of these disincentives.

212 See supra note 6 and accompanying text.

213 See, e.g., Kyles v. J.K. Guardian Servs., Inc., No. 97-C-8311, 1998 WL 677165, at *2 (N.D. Ill. Sept. 22, 1998) ("A favorable outcome would result in nothing more for [the tester plaintiffs] personally than perhaps some satisfaction that their summer work was championing the rights of humanity at large against racial discrimination."). See also note 168 and accompanying text.

214 See Yelnosky, supra note 8, at 412.

215 Fair Employment Council and Kyles are the only reported cases where employment testers individually have brought suit under Title VII since the EEOC endorsed the use of testers in 1990.

216 This evidence is extremely valuable in the enforcement of Title VII hiring discrimination claims as little is known about the nature and extent of this discrimination. See TURNER ET AL., supra note 16, at 5 (explaining that "little is known about how often [minority job applicants] are treated less favorably than equally qualified majority job applicants"). See also Richardson v. Howard, 712 F.2d 319, 321 (7th Cir. 1983) ("The evidence provided by testers . . . is a major resource in society's continuing struggle to eliminate the subtle but deadly poison of racial discrimination.").

suit, the broad aims of the Act can still be met and the enforcement void filled by these organizations. As a part of their prima facie cases, these organizations may rely on the evidence garnered by the testers to support their claims. Since organizations have the funds and time to pursue such lawsuits, unlike most individual plaintiffs, they are in a better position than testers to fill the aforementioned enforcement void. Consequently, so long as testers are still able to seek out discriminatory practices, then they will still be able to advance the broad aims of Title VII absent a grant of standing.\footnote{Nevertheless, some commentators do not believe testers will be utilized on a wide scale due to the difficulties and expense associated with testing programs. See, e.g., Michael Bologna, Discrimination: Seventh Circuit Affirms Testers' Access to Sue Under Title VII in Federal Courts, Daily Lab. Rep. (BNA) No. 131, at AA-1 (July 7, 2000) (reporting the following comments of Christine Cooper, a law professor at Loyola University School of Law: "'I do not think [the Kyles decision] opens the floodgates to testing. Testing is very expensive. Testing is very complex. There are very rigid protocols that have to be followed in any good and fair testing project.'").}

B. The Motive of Testers and the Difficult Road to Recovery

Another factor militating against tester standing is that courts have continually held that plaintiffs must be bona fide job applicants in order to prove the prima facie case for hiring discrimination under Title VII.

The first employment testers seeking recovery under Title VII did not have to confront the standing issue. This is because courts adjudicating early employment tester cases looked past the standing requirement altogether, focusing instead on the merits of the plaintiff's claim. A common theme emerged from these early tester cases: recovery hinges on the primary motive of the plaintiff. Consequently, employment testers could not recover under Title VII in these cases because they were not genuinely interested in the employment for which they applied.

Ironically, the case first enunciating this theme actually resulted in equitable relief for the testers. In \textit{Lea v. Cone Mills Corp.},\footnote{301 F. Supp. 97 (M.D.N.C. 1969).} tester plaintiffs were able to enjoin defendant's discriminatory hiring practices,\footnote{Under the current state of the law, testers cannot successfully enjoin discriminatory practices. Consequently, the debate as to whether employment testers may recover if they are found to have standing focuses on damages rather than on injunctive relief. See supra notes 118-19 and accompanying text.} but were not awarded damages. The district court limited recovery to equitable relief because the plaintiffs were not genuinely interested in employment.\footnote{See \textit{Lea}, 301 F. Supp. at 102.} On appeal, the Fourth Circuit affirmed the district court's decision not to award damages, acknowledging
that "specific employment was not sought"\textsuperscript{222} and that "the application [might] solely [have been] a predicate for the suit."\textsuperscript{223}

Soon after \textit{Lea}, the Supreme Court adopted a three-step test to determine whether or not a plaintiff can recover for employment discrimination under Title VII.\textsuperscript{224} The first step in this process places the burden on the plaintiff to establish a prima facie case of discrimination, the elements of which are enunciated in the 1973 Supreme Court decision \textit{McDonnell Douglas Corp. v. Green}.\textsuperscript{225} Therefore, all plaintiffs seeking recovery under Title VII after 1973, including employment testers, needed to satisfy these elements before they could hope to recover damages under Title VII. Pertinent to employment testers is the second element of the prima facie case, which requires a plaintiff to apply and be qualified for a job for which the employer or employment agency was seeking applicants.\textsuperscript{226} Courts construing this element have determined that employment testers cannot satisfy this element. Specifically, a plaintiff cannot recover if his primary motive is to gather evidence of employment discrimination. Rather, a plaintiff must demonstrate that he is a bona fide applicant, genuinely seeking employment, in order to satisfy the second element of his prima facie case.

For example, a plaintiff who interviewed for a position for the purpose of initiating a Title VII claim was not considered to be a bona fide applicant under the statute.\textsuperscript{227} In another instance, a plaintiff

\textsuperscript{222} \textit{Lea} \textit{v. Cone Mills Corp.}, 438 F.2d 86, 88 (4th Cir. 1971).

\textsuperscript{223} \textit{Id.} Nevertheless, the court did award attorney's fees to the testers. \textit{Id.}

\textsuperscript{224} See \textit{McDonnell Douglas Corp. v. Green}, 411 U.S. 792 (1973). Under the three-step test: (1) the plaintiff has the initial burden of establishing a prima facie case; (2) then the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the action taken; and (3) the burden then shifts back to the plaintiff to show that the employer's articulated reason is merely pretext for discrimination. See \textit{id.} at 802-04.

\textsuperscript{225} 411 U.S. 792, 802 (1973) (explaining that the plaintiff's prima facie case is established if the plaintiff shows (1) that he belongs to a protected class, (2) that he applied and was qualified for a job for which the employer was seeking applicants, (3) that, despite his qualifications, he was rejected, and (4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications).

\textsuperscript{226} See supra note 225.

\textsuperscript{227} \textit{Parr} \textit{v. Woodmen of the World Life Ins. Soc'y}, 657 F. Supp. 1022 (M.D. Ga. 1987). In \textit{Parr}, the plaintiff sued a prospective employer after the employer failed to hire him for the position of field representative. The court found that the plaintiff was not genuinely interested in the position. Rather, his true purpose was to create the basis for a Title VII claim by informing the defendant in his interview that his wife was black. The court granted summary judgment for the defendant after determining that the plaintiff could not satisfy the prima facie case outlined in \textit{McDonnell Douglas} because the plaintiff had not applied for a position. See \textit{id.} at 1032 ("A plaintiff whose primary purpose in interviewing for a job is to create the basis for a Title VII EEOC charge and lawsuit, is not the bona fide applicant for a job that he must be to establish a prima facie case."). This case can be distinguished from other cases involving employment testers, however, since the plaintiff in \textit{Parr} only interviewed for the position but never submitted a resume or application.
who had submitted an application for a job but had not updated the application years later and was being paid substantially more at another job also was not considered to be a bona fide applicant under Title VII. In both of these cases, the courts determined that being a bona fide applicant is necessary to recover under Title VII. Specifically, these courts found that the plaintiffs must be bona fide applicants in order to satisfy the second element of the prima facie case for discrimination as outlined in \textit{McDonnell Douglas}, i.e., that they have "applied for a job." The plaintiffs in these cases, therefore, could not prove that they applied for a job since they were not bona fide applicants. Consequently, courts interpreting the \textit{McDonnell Douglas} prima facie elements have perpetuated the notion that the primary motive of the plaintiff determines whether or not that plaintiff recovers under Title VII.

The only court holding that an employment tester may actually succeed in establishing his prima facie case is the Seventh Circuit in \textit{Kyles v. J.K. Guardian Security Services, Inc.} Instead of defeating the prima facie case, \textit{Kyles} found that the bona fides of applicants only "speak[] to the nature and extent of their injuries as well as the appropriate relief." After concluding that testers have standing, the \textit{Kyles} jury found in favor of the defendant, and the court later denied the employment testers’ motion for a new trial. Therefore, even if the motive of a tester does not preclude establishment of his

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\item[] 228 \textit{Allen v. Prince George's County}, 538 F. Supp. 833 (D. Md. 1982). In \textit{Allen}, the plaintiff initiated an action after the employer failed to contact the plaintiff about a position for which the plaintiff was qualified. The court found that the plaintiff was not genuinely interested in the position because she had not updated her application for over two years and was making more money at her current job. The court granted summary judgment for the defendant after determining that the plaintiff could not satisfy the prima facie case outlined in \textit{McDonnell Douglas} since the plaintiff had not applied for a position. \textit{See id.} at 841 ("The bona fides of plaintiff Allen's desire to work for the [defendant] are suspect. As a part of her case, she must show a genuine intention to accept employment by the [defendant] if offered to her at any time during the period in question. Although plaintiff Allen did initially apply for the position, her actions thereafter do not indicate that she was a person genuinely desiring to work as a secretary for the [defendant].").

\item[] 229 Although the \textit{Parr} case involved a plaintiff that can be categorized as an employment tester, the \textit{Allen} case does not involve a tester plaintiff because the plaintiff did not submit her application in order to gather evidence of discrimination. Nevertheless, the plaintiff in \textit{Allen} is analogous to the employment tester in \textit{Parr} in that neither were bona fide applicants.

\item[] 230 \textit{Id.}

\item[] 231 \textit{Id.}


prima facie case as a matter of law, it appears that his motive nevertheless precludes recovery on the merits. The dim prospect of success for a tester may actually demonstrate that it is better not to grant testers standing. Maybe a truly discriminatory employer or employment agency will be able to claim vindication from such court victories, thereby jeopardizing the deterrent role of Title VII.

Of course, *Kyles* represents only one jury’s view and it is not certain that juries will rule against testers with consistency. If future juries award employment testers damages, then the deterrent role of Title VII might be served. Nevertheless, if the bona fides of an employment tester affect the amount of damages he can recover, the most employers or employment agencies have to fear from employment tester suits are judgments for nominal damages. It is not certain that even these successful employment tester suits would deter future hiring discrimination due to their limited economic effect on employers and employment agencies violating Title VII.

Finally, some commentators believe that employment testers are overstepping ethical boundaries by entrapping otherwise law-abiding employers and employment agencies into discriminating against them. In fact, the parent company of the defendant in *Kyles* even filed suit against the employment testers for fraud. Even though this suit was ultimately dismissed, the threat of similar “retaliation suits” provides an additional disincentive for employment testers to fill the Title VII enforcement void.

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234 See, e.g., Yelnosky, supra note 8, at 409 (concluding that “prevailing testers can obtain only ‘de minimis’ or ‘technical’ relief from an offending employer and therefore cannot recover attorneys’ fees”).

235 See John T. Sanders, *How Ethical is Investigative Testing?*, LAW & POL’Y REP., Feb. 1994, at 17 (contending that the practice of sending employment testers to businesses is easier to defend from an ethical standpoint if an agency’s investigation is based on an actual complaint, rather than on the general antidiscrimination goals of the organizations utilizing the testers).


238 See Roos, supra note 119, at 1693 (explaining that because the resolution of the fraud suit in *K & J Management* “carries the force of law in only one state, the issue of potential fraud claims brought against employment testers remains unsettled in the vast majority of American jurisdictions”). Roos also comments that “the real possibility of being held personally liable for statements and representations made throughout the job search process would discourage all but the most determined individuals from undertaking the watchdog role of employment tester.” *Id.* at 1694.
CONCLUSION

The Civil Rights Act of 1964 and § 1981 have played instrumental roles in eliminating egregious forms of hiring discrimination. A current enforcement void in hiring discrimination cases under Title VII, however, suggests that employers and employment agencies are discriminating with impunity. Organizations dedicated to rooting out hiring discrimination have utilized employment testers to apply for jobs or referrals for the sole purpose of uncovering discriminatory hiring practices. Some of these testers have brought suits under § 1981 and Title VII. Courts have unequivocally determined that testers bringing suits under § 1981 do not have standing to sue because they do not intend to enter into contracts, but only seek to uncover discrimination.

Standing for testers under Title VII, however, is an ambiguous matter as courts directly addressing this issue have ruled both ways. The strongest argument made by employment testers in favor of standing depends on an analogy between Title VII and the Fair Housing Act, a statute interpreted by the Supreme Court in Havens Realty to grant standing to housing testers. Nevertheless, inconsistencies between Title VII and the Fair Housing Act suggest that the analogy is flawed. Furthermore, standing for testers under the Fair Housing Act may no longer be certain after Lujan, possibly precluding standing for employment testers even if they can draw an airtight analogy to the Act.

In addition to these formal obstacles to standing, granting testers standing will not eliminate the enforcement void of Title VII. While information uncovered by employment testers may be utilized by organizations to fill the enforcement void, lack of time, money, and utilitarian injury suggest that individual testers will not fill this void on their own. Furthermore, difficulties in recovering damages under Title VII give testers little incentive to bring suit. Finally, testers are deterred from bringing suit due to their fear that defendants will bring fraud claims against them—suggesting once again that it is better not to extend standing to employment testers.

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