STANDING AND DELIVERING ON TITLE VII'S PROMISES: WHITE EMPLOYEES' ABILITY TO SUE EMPLOYERS FOR DISCRIMINATION AGAINST NONWHITES

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I.
INTRODUCTION

Over twenty-five years ago, the Supreme Court in *Trafficante v. Metropolitan Life Insurance Co.* held that a white resident of an apartment complex had standing to sue the building owners for rental practices that discriminated against minority applicants.[1] In a unanimous ruling, the Court reasoned that because the owner's racially discriminatory rental policies injured all residents of the housing complex, the white plaintiff had standing to sue under Title VIII of the Civil Rights Act of 1968 for "loss of important benefits from interracial associations."[2] In the years since *Trafficante*, this theory of standing based on the loss of associational benefits has been intermittently extended to workplace antidiscrimination suits brought by white plaintiffs under Title VII of the Civil Rights Act of 1964.[3] Applying *Trafficante*, numerous courts have held that white employees have standing to claim that their employer's discriminatory actions[4] against minority employees or applicants have "polluted" their work environment.[5]

This article attempts to reinvigorate the strategy of having white plaintiffs bring Title VII suits for unlawful employment practices against racial

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1. 409 U.S. 205 (1972).

2. *Id.* at 210–11; *see* discussion *infra* Part IV.

3. Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e (1994). Under Title VII, an "unlawful employment practice" is defined as employer discrimination "against any individual . . . because of such individual's race, color, religion, sex, or national origin." *Id.* § 2000e-2(a)(1).

4. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986) ("One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . . .") (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)).

5. *See infra* Parts V–VI (discussing judicial application of *Trafficante* standing principles to Title VII cases).

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minorities.[6] This mechanism has not been a traditional thrust of civil rights litigation, but as affirmative action plans are dismantled and "reverse discrimination" claims enforced,[7] to emphasize the cognizable injury to whites in discriminatory work environments would address the chronic underenforcement of Title VII. Minority applicants who are rejected for employment often cannot substantiate a Title VII claim because of their inability to secure necessary evidence that may be more readily accessible to white employees. Claims brought by white plaintiffs alleging discriminatory hiring practices may be more likely to succeed than suits by minority applicants because of the evidentiary materials available to white employees as company "insiders." Additionally, if this strategy were fully exploited, the onus of equal opportunity enforcement would no longer fall exclusively on members of minority groups. Thus, with white employees bringing litigation, Title VII enforcement would be more complete and the Civil Rights Act would serve as a greater deterrent to discrimination in the workplace.

In Part II of this paper I describe the low percentage of Title VII "hiring claims"[8] and examine the legal and practical impediments that decrease the likelihood that wronged applicants will bring such claims. I show that the procedural hurdles faced by claimants impede enforcement of Title VII

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6. This paper focuses on whites bringing racial discrimination suits, rather than men bringing sex discrimination claims. Ironically, while there is significant case law allowing a white employee to bring a racial discrimination claim under *Trafficante*, courts have divided on whether to grant men standing to bring Title VII suits alleging sex discrimination against women. *See infra* notes 130–31. *But see* Laura M. Jordan, *The Empathetic, White Male: An Aggrieved Person Under Title VII?*, 55 WASH. U. J. URB. & CONTEMP. L. 135 (1999) (arguing that permissive standing principles are incongruent with Title VII's process and structure and that Title VII requires individuals outside the protected class to oppose discriminatory practices personally before seeking judicial redress). *See generally* N. Morrison Torrey, *Indirect Discrimination Under Title VII: Expanding Male Standing to Sue for Injuries Received as a Result of Employer Discrimination Against Females*, 64 WASH. L. REV. 365 (1989) (describing circuit split on whether male plaintiffs have standing to bring Title VII sex discrimination claims and concluding that restrictive view of standing is inappropriate).

7. *See, e.g.*, Adarand v. Pena, 515 U.S. 200 (1995) (extending *Croson*'s strict scrutiny standard to federal affirmative action programs); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). In *Croson*, the Court invalidated a city set-aside program that reserved 30% of construction contracts for minority-owned businesses. Instead of following its earlier ruling in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), in which it evaluated the city's affirmative action program under rational basis review, the Court applied the strict scrutiny standard of review previously used for race-based classifications outside of the affirmative action context. *Croson*, 488 U.S. at 492–99 (discussing applicant standard and citing as controlling the plurality's application of strict scrutiny in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986)). When the city failed to identify specific instances of past discrimination against minority subcontractors, the Court concluded that the program was unconstitutional. *Croson*, 488 U.S. at 499–500, 510–11. *See also* TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE (1997); ROBERT ZELNICK, BACKFIRE: A REPORTER'S LOOK AT AFFIRMATIVE ACTION (1996).

8. In this article, the term "hiring claims" refers to Title VII suits brought by minority applicants who have been denied employment.

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protections and detract from the statute's ability to deter employers from discriminating against minority applicants. In Part III I explain the general requirements of standing to provide a backdrop for the significance of the *Trafficante* decision, and in Part IV I discuss the decision itself. In Part V I analyze how the *Trafficante* court's interpretation of standing in suits contesting discriminatory housing policies under Title VIII was adapted to claims brought under Title VII. In Part VI I describe the more recent interpretation of *Trafficante* in Title VII suits, including contemporary challenges to its applicability. Finally, in Part VII I suggest the viability of a *Trafficante* strategy in Title VII hiring suits, and I include an assessment of whether such claims are likely to be filed and actually succeed in the present legal and political climate.

II.
Difficulties of Bringing a Successful Title VII Hiring Claim

Plaintiffs in Title VII suits fall into two categories: those discriminated against over the course of employment or in termination and those discriminated against during the hiring process but not hired. Although it is unlikely that discrimination in hiring occurs less frequently than in the conditions of employment, statistics demonstrate that fewer hiring claims are filed. According to the Equal Employment Opportunity Commission (EEOC), while charges alleging discriminatory hiring outnumbered charges alleging discriminatory firing by fifty percent in 1966, the ratio had reversed to more than six firing charges to each hiring charge by 1985.[9] Between 1990 and 1993, only one out of four disparate impact decisions in federal courts involved claims of discrimination in hiring.[10] An American Bar Foundation (ABF) survey contemporaneous to the four-year EEOC study found that nineteen percent of the employment suits alleged discrimination in hiring, while almost sixty percent alleged discrimination in firing or promotion.[11] Although the smaller percentage of discriminatory hiring cases does not in itself connote a decrease in the quantity or frequency of those suits, the increasing disproportion between the two different types of suits may indicate that hiring claims are more difficult to file than firing or promotion claims, or that hiring claims are perceived by potential litigants as less likely to succeed.[12]

Even though a lower percentage of hiring claims are being filed, this decrease does not necessarily constitute evidence of less discrimination in

9. John J. Donohue, III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015 (1991).

10. Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487, 1490 (1996).

11. Donohue & Siegelman, *supra* note 9, at 1015 (citing 1990 American Bar Foundation Employment Discrimination Litigation Survey).

12. *See infra* Part I.

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the application processes. Researchers from the Urban Institute analyzed data from the Fair Employment Council of Greater Washington comparing white and black testers in job applications and found that a white applicant was twenty-two percent more likely to get an interview than a comparable black applicant. Of those granted interviews, white testers were four times more likely than black testers to receive a job offer, and when both a white tester and black tester were offered the same job, the white tester was offered higher pay than the black tester. Finally, black testers who made it this far through the application process were more likely than white testers to be offered a job below the level for which they applied and less likely to be offered a job better than that for which they had applied.[13]

In 1991, the Urban Institute released a study described as the first to "directly measure differential treatment of white and black job seekers applying for entry-level employment."[14] The study found that among 476 hiring audits conducted in both Chicago and Washington, D.C., the white male applicant was able to advance farther through the hiring process than his equally-qualified black male counterpart in one out of every five audits,[15] and that black applicants received differential treatment as compared to white applicants at every stage of the hiring process.[16] Additionally, the probability that African-Americans would face unfavorable treatment increased in higher paying, higher status jobs and in jobs involving substantial contact with whites, such as positions in primarily nonminority neighborhoods or those with white employers.[17] The authors concluded that although African-American men have made substantial progress relative to white men in terms of wages, income, and access to managerial positions over the last several decades, there has been no real progress in "labor force participation," or the ability of black men to enter the labor market.[18]

Other research has found that discrimination by employers during the hiring process takes many forms. Some employers may associate a black applicant with lower education (background or capacity), there-

13. Marc Bendick, Jr., Charles W. Jackson & Victor A. Reinoso, *Measuring Employment Discrimination Through Controlled Experiments*, 23 REV. BLACK POL. ECON. 25 (1994).

14. MARGERY AUSTIN TURNER, MICHAEL FIX & RAYMOND J. STRUYK, OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED *xi*, 1 (1991).

15. *Id.* at 38.

16. *See id.* at 42–55 (discussing different stages of hiring process including steering, request for application, submission of application and interview, and other aspects including waiting time, length of interview, number of interviewers, and positive or negative comments).

17. *Id.* at 50–51. In a similar 1989 Urban Institute study comparing white males and Hispanic males in Chicago, the white applicants advanced farther than their Hispanic counterparts thirty-one percent of the time. *Id.* at 56.

18. *Id.* at 61.

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fore necessitating higher training costs.[19] An employer may also take this prejudice a step further and use race as a signal of potential under-productivity.[20]

In spite of the persistence of discrimination in the hiring process, significant impediments exist to bringing successful Title VII hiring suits when a job applicant believes that she was discriminated against during the hiring process. First, the Supreme Court has added a number of legal requirements to the plaintiffs' burden of proof. Second, the job applicant who believes she has been refused employment because of a discriminatory reason faces a number of practical hindrances to gathering sufficient evidence to maintain a successful Title VII claim. These obstacles are understood best by separating and briefly explaining the two different types of Title VII claims: disparate treatment and disparate impact.

A. Disparate Treatment Cases

In disparate treatment cases, an individual alleges that an employer has intentionally treated her worse than others because of her race, color, religion, or national origin.[21] Under the analysis developed in a series of decisions beginning with *McDonnell Douglas Corp. v. Green*,[22] the plaintiff alleging racial discrimination must establish a prima facie case that (1) the plaintiff belongs to a racial minority, (2) she applied and was qualified for a job for which the employer was seeking applicants, (3) she was denied employment despite being qualified, and (4) the employer, after having rejected the plaintiff's application for a job or promotion, continued to seek applicants with qualifications similar to those of the plaintiff.[23] The employer may rebut this claim by producing a legitimate, nondiscriminatory reason for the decision,[24] but the burden of persuasion remains continually

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19. *See* Kenneth J. Arrow, *The Theory of Discrimination*, in DISCRIMINATION IN LABOR MARKETS (Orley Ashenfelter & Albert Rees eds., 1973) (using "neoclassical tools" to analyze racial discrimination in labor markets); Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659, 659–61 (1972) (employing statistical analysis of racial and gender-based discrimination in labor market).

20. Joleen Kirschenman & Kathryn M. Neckerman, *We'd Love to Hire Them, But. . . : The Meaning of Race for Employers*, *in* The Urban Underclass (Christopher Jencks & Paul E. Peterson eds., 1991) (arguing that race interacts with employers' perceptions of productivity in ways that may bias their evaluation of job performance, resulting in use of race as proxy not only for job skills but also for behavioral and attitudinal attributes).

21. *See* Civil Rights Act of 1991 § 703, 42 U.S.C. § 2000e-2(a) (1994); Int'l Bd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); United States v. North Carolina, 914 F. Supp. 1257, 1267 (E.D.N.C. 1996).

22. 411 U.S. 792 (1973).

23. *Id.* at 803. *See generally* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–53 (1981).

24. *McDonnell Douglas*, 411 U.S. at 803; *see Burdine*, 450 U.S. at 254–55. In *Burdine*, the court stated that after the plaintiff establishes her prima facie case, the defendant has the burden to "rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason. The defendant need not persuade the court that it was actually motivated by the

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on the plaintiff to prove that race was a motivating factor for the employer's decision.[25] If the employer satisfies her burden of production, the plaintiff must prove by a preponderance of the evidence that the reasons proffered by the employer were only a pretext and that a discriminatory motive was behind the employer's decision.[26] The plaintiff essentially has three categories of evidence with which she can prove pretext: (1) direct evidence, such as discriminatory statements or admissions, (2) comparative evidence, and (3) statistics.[27]

Because the rejected applicant's only interaction with the business is from the outside, the potential plaintiff has little possibility of accessing information sufficient to satisfy these requirements. To prove disparate treatment, the rejected applicant typically must discover the qualifications of those who were actually hired for the position at issue and obtain evidence proving that the employer's race-neutral explanation was pretextual. Job applicants have limited access to the required evidence, and the evidentiary burden on plaintiffs requires not only a recognition of the discriminatory action against them, but also a comprehensive understanding of the complete hiring process. Most incriminating evidence of discriminatory patterns of intentional behavior by an individual or company are simply out of the plaintiff's reach.

B. Disparate Impact Cases

Plaintiffs may also bring a claim under a disparate impact (also termed "adverse impact") framework by proving that a facially neutral employment practice has significant adverse effects on protected groups.[28] The

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proffered reasons.... It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.... To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." *Id.* (citation and footnote omitted).

25. *Burdine*, 450 U.S. at 257.

26. *McDonnell Douglas*, 411 U.S. at 805; *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 243 (1989). If the plaintiff satisfies this burden of persuasion, the employer may affirmatively defend her employment practice by arguing that she would have made the same decision if race had not been taken into account. Under the Civil Rights Act of 1991, when the employer invokes this defense she bears the burden of showing that she "would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. § 2000e-2(m). If the employer satisfies this burden, the court may still rule for the plaintiff, although the plaintiff's damages are limited by statute to declaratory relief and attorneys' fees. 42 U.S.C. § 2000e-5(g)(2)(B). In 1993, in *St. Mary Honors Center v. Hicks*, 509 U.S. 502 (1993), the Court clearly described the plaintiff's burden as not only to prove that the employer's explanations were false, but also that that discrimination ultimately did in fact drive the employer's decision. *Hicks*, 509 U.S. at 515–18. This clarification of Title VII law arguably defined plaintiff's burden as a "pretext-plus" requirement, thus making a successful Title VII claim even more elusive. *Id.* at 535–40 (Souter, J., dissenting).

27. BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 27 (3d ed. 1996).

28. Although Title VII cases are technically divided into disparate treatment and disparate impact cases, many suits allege a combination of these claims.

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Supreme Court's holdings in *Griggs v. Duke Power Co.*[29] and *Albemarle Paper Co. v. Moody*[30] (later codified in the Civil Rights Act of 1991[31]) dictate that a plaintiff in a disparate impact employment discrimination case need not prove discriminatory intent,[32] although the Court, by implication, continues to require the plaintiff to have access to the inner-workings of an employer's business practices. The plaintiff's prima facie burden is first to identify the "particular employment practice" that is responsible for the disparate impact, isolating it from any other objective or subjective criteria used by the employer, and then to prove a causal relationship[33] between that employment practice and the disparate impact.[34] If the plaintiff's evidence[35] satisfies the prima facie requirement, the burden of production and persuasion shifts to the employer, who may (a) impeach the plaintiff's statistical evidence or rebut it with countervailing evidence, or (b) defend the employment practice by proving it is "job-related for the position in question and consistent with business necessity."[36] The plaintiff, in turn, can rebut the defendant's justification by showing an alternative business practice that would have had a less adverse impact without compromising legitimate business goals.[37]

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29. 401 U.S. 424 (1971).

30. 422 U.S. 405 (1975).

31. Civil Rights Act of 1991 § 105, 42 U.S.C. § 2000e-2(k)(1)(B) (overruling Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) and Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)).

32. In *Albemarle*, the Court cited *Griggs* for the proposition that "Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent,' for 'Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.'" *Albemarle*, 422 U.S. at 422–23 (citing *Griggs*, 401 U.S. at 432).

33. Unlike plaintiffs in disparate treatment cases, who rely on specific incidents as well as statistical evidence, *see supra* PartI.A, plaintiffs in disparate impact cases often rely primarily on statistical analyses of the employment practices that exerted an adverse impact.

34. 42 U.S.C. § 2000e-2(k). However, if the plaintiff proves that the elements of the challenged employment practice are "not capable of separation for analysis," the process as a whole can be analyzed as a singular practice. *Id.* § 2000e-2(k)(1)(B)(i). *See also* LINDEMANN & GROSSMAN, *supra* note 27, at 89–92 (discussing statistical models for demonstrating adverse impact).

35. The appropriate kinds of proof can include selection rates, population/workforce comparisons, and other statistical comparisons such as regression analyses. LINDEMANN & GROSSMAN, *supra* note 27, at 89. Although the Civil Rights Act of 1991 overruled some aspects of *Wards Cove*, its stringent definitions of appropriate statistical evidence remain good law, for example, in limiting comparisons between the "racial composition of the qualified persons in the labor market and the persons holding at-issue jobs." *Wards Cove*, 490 U.S. at 650 (quoting Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 (1977)). *See also Watson*, 487 U.S. at 992 (noting "it is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance").

36. 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see also Griggs*, 401 U.S. at 431 (holding that discrimination based on classification not shown to be related to job performance is prohibited).

37. 42 U.S.C. §§ 2000e-2(k)(1)(A)(i), -2(k)(1)(C); *see also Albemarle*, 422 U.S. at 425 (holding that where qualifications are shown to be job related, burden shifts to complaining

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The evidentiary burden on the plaintiff in a disparate impact claim is similar to the disparate treatment burden requiring a showing of a race-neutral pretext,[38] and for a rejected applicant plaintiff, disparate impact requirements create an even greater burden. The applicant must not merely understand the method of hiring, but must be so familiar with the business itself and its service that she could offer equally viable hiring practices that would not have a discriminatory impact. For an outsider like the applicant, these requirements are virtually impossible to satisfy.

Such high legal standards are not the only deterrents to plaintiffs who would file Title VII claims. Professors Donohue and Siegelman have described a number of more practical reasons why potential Title VII plaintiffs, especially those who believe that they were discriminated against during the hiring process, will have difficulty filing successful Title VII claims.[39] One category of obstacles derives from the incentives or disincentives to bringing any type of Title VII claim. The likelihood that a worker will sue is typically a function of the wage associated with the job from which she was fired or rejected. In the case of a fired employee, the compensation she could receive from a victorious Title VII suit will be the back pay for the time she was unemployed.[40] Therefore, the higher the salary of the position from which the employee was fired, the more she has to gain from a legal victory, and the more likely the employee will file suit attacking the termination. For those who have not been hired, especially applicants for lower-wage positions in service or manual labor industries, the monetary incentive to sue is weaker. Additionally, when an applicant for a lower-income position is rejected, she may be more concerned with quickly securing an income at another company and probably lacks both the resources and the time to file a formal charge against the person who discriminated; she may prefer obtaining employment as soon as possible and not

party to show that other methods would serve employer's interest in hiring for "efficient and trustworthy workmanship").

38. *See supra* note 26 and accompanying text.

39. Donohue & Siegelman, *supra* note 9, at 1022–23.

40. The compensation that a discharged employee may receive if the employer is found to have violated Title VII is back pay and reinstatement to previous position. 42 U.S.C. § 2000e-5(g). Additionally, a court may award any other equitable relief it deems appropriate. *Id.* Although the award of back pay is technically discretionary, the Supreme Court in *Albermale Paper v. Moody*, 422 U.S. 405 (1975), held that there is a presumption in favor of awarding back pay and that a court must clearly articulate its reasons for denying such an award. *Albermale*, 422 U.S. at 421–22. If it is not possible for the employee to be reinstated, some courts may award front pay as compensation for lost future wages and benefits. *See* James v. Stokham Valves & Fittings Co., 559 F.2d 310, 358 (1977) (awarding front pay for period between judgment and time when plaintiff could attain his rightful position). Finally, if the employer is found to have acted with "malice" or with "reckless indifference," victims are entitled to both compensatory and punitive damages. 42 U.S.C. § 1981(a)(b)(1) (1994).

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engaging in a protracted legal battle with only a distant possibility of compensation.[41]

Another, more serious impediment to Title VII plaintiffs is the inaccessibility of the evidence necessary for an employee (or applicant) even to recognize that there has been discrimination, much less to succeed with her claim. As suggested earlier, rejected applicants are much less likely to have access to this evidence than minority employees within the company. In what Donohue and Siegelman term the "integration effect," the less that minorities are part of a predominantly white male work force, the less likely will they be able to measure their own treatment against that of their white male coworkers.[42] Although she may have suspicions of discriminatory treatment, a minority applicant who is rejected may have little concrete evidence available to overcome even her own skepticism. Assuming that she does feel confident in her suspicion, she must amass sufficient evidence to satisfy the legal requirements.[43] In the case of intentional discrimination, presumably only "inside" company personnel will have access to incriminating information. If the discrimination is unintentional, company employees are more likely to have access to statistical information sufficient to prove disparate impact. In addition, because this statistical information must be very narrow in scope, the rejected applicant's unfamiliarity with the business renders this legal burden highly onerous. The Supreme Court has stated that the relevant statistics in a Title VII claim should compare the racial composition of employees in disputed jobs to that "'of the qualified . . . population in the relevant labor market,'"[44] or of the "other-

41. *See* Michael Mankes, *Combatting Individual Employment Discrimination in the United States and Great Britain: A Novel Remedial Approach*, 16 COMP. LAB. L.J. 67 (1994) (discussing negative effect of minimum 180-day waiting period before victims can file suit in federal court). During this period, the EEOC has jurisdiction to investigate the claim, but, given the backlog at the agency, it is rarely able to do so in time. *Id.* at 74–75. Mankes argues that this waiting period may force employees who are struggling financially to accept unfavorable settlement offers rather than wait for their day in court. *Id.* at 75–76.

42. Donohue & Siegelman, *supra* note 9, at 1012. The authors note that "[d]iscrimination occurs when blacks are treated differently from whites, or women differently from men. Without reference groups against which blacks or women can judge their own treatment by employers, discrimination is more difficult both to detect and to prove." *Id.*

43. 42 U.S.C. § 2000e-2(k)(1)(B).

44. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650 (1989) (quoting Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 (1977)). This portion of *Wards Cove* was unaffected by the Civil Rights Act of 1991, 102 Pub. L. No. 166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.). In *Wards Cove*, the Supreme Court stated that, while the burden of producing evidence that the disputed employment practice was justified by "business necessity" fell to the employer, the burden of persuasion that the practices resulted in disparate impact remained with the plaintiff. *Wards Cove*, 490 U.S. at 659. After this ruling, Congress passed the Civil Rights Act of 1991, in an effort to return to a more pro-plaintiff standard under which a plaintiff would prevail once she demonstrated that the defendant's hiring practices had a disparate impact and the defendant could not prove that the practice at issue was "job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k).

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wise-qualified applicants."[45] It is doubtful that applicants who have been discriminated against will have access to any of these statistics, and even though the federal statutes may require the employer to keep records which may disclose disparate treatment or impact,[46] the applicant may access that information only through discovery and after he has initiated a suit and retained a lawyer. Realistically, an individual considering litigation will be less inclined to bring a claim when such evidence is not readily accessible.

This combination of high evidentiary burdens and inaccessibility of information may have contributed to the smaller percentage of hiring claims brought as compared to firing or promotion claims. According to Donahue and Siegelman, as a workplace becomes more integrated and minority employees begin to fill the historically-segregated positions in the company, minority employees are more likely to file a Title VII suit if they are illegally fired: they have greater financial concerns at stake, they have white and male coworkers with whom to compare their performance, and they have access to evidence within the company that would prove a pattern of discrimination against them or the minority group of which they are a member.[47] Conversely, while a workplace remains completely segregated, minority applicants have weaker incentives to file and greater difficulty in winning a Title VII claim for having been rejected.[48] The situation in which minority or female employees are more likely to sue than minority or female applicants creates a dynamic not anticipated or likely to have been endorsed by the framers of the Civil Rights Act.

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45. New York City Transit Auth. v. Beazer, 440 U.S. 568, 585 (1979).

46. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4 (A), (C) (1998) (requiring employers to "maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group" and to evaluate individual portions of employee selection process in cases where records demonstrate disparate impact associated with race, sex, or ethnic group).

47. Donohue & Siegelman, *supra* note 9, at 1012. The authors state:

> Our review of a number of employment discrimination cases reveals a common fact pattern: A worker is fired as part of a reduction in force or because of some alleged individual misconduct such as tardiness. The worker then alleges that workers of the opposite race or gender were either less productive or even more guilty of the alleged offense but were not fired. If the firm had been completely segregated, this comparative evidence of discrimination would not have been available. Integrating the work force by race and gender, then, is likely to produce more evidence and allegations of discrimination, even if the incidence of discrimination itself is falling. Due to the increased awareness of relative mistreatment, discrimination in an integrated firm may be more personally harmful than general discrimination against an entire group in a segregated firm.

Id. at 1012–13.

48. This view assumes that employers are driven by a rational and fully-informed, cost-benefit analysis. It has limited application but nonetheless illustrates the inherent failings of current Title VII policies.

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Although the drafters of the Civil Rights Act of 1964 considered the antidiscrimination policy to be of the "highest priority,"[49] case law and legislation have created obstacles that give employers an implicit incentive to maintain a segregated workplace; if nonwhites are never hired, they can never sue for being fired. Strikingly, Donohue and Siegelman found that the likelihood of suit when an employer fires a minority or female employee is *thirty* times greater than the likelihood of suit if the employer simply fails to hire the job applicant.[50] This creates a powerful disincentive for employers to hire minority applicants.[51] Donohue and Siegelman conclude: "Due to [a minority employee's] increased awareness of relative mistreatment, discrimination in an integrated firm may be more personally harmful [to the employer] than general discrimination against an entire group in a segregated firm."[52]

Much of the strength of antidiscrimination statutes derives from the threat of litigation they pose, not from any financial settlements or awards obtained under them. Given the nature of traditional Title VII litigation, the absence of minority employees virtually inoculates the employer against any Title VII threats. Accordingly, assuming that employers act upon a "rational" incentive to be less concerned about discrimination in hiring, the overwhelming barriers rejected applicants face in bringing Title VII suits make the threat of litigation unexercisable. To further the goals of Title VII and deter employers from discriminating against minority applicants, private litigation to enforce Title VII must emerge from a nontraditional source: currently employed white workers.

49. Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968).

50. Donohue & Siegelman, *supra* note 9, at 1027.

51. *Id.* at 1024. The authors state:

> When discrimination is illegal, the employer must also take into account the potential costs of rejecting the applicant. These costs include the possible litigation costs if the applicant decides to sue and the damage award if the suit is successful, all weighted by their respective probabilities of occurrence.
>
> The equation becomes more complicated when the possibility of discriminatory firing suits is introduced. A worker who is not hired in the first place is obviously in no position to bring a future firing suit. Thus, an employer must consider the increase in expected costs when he hires a female or minority worker, because some probability exists that the worker will be fired and will sue. Whether the increase in expected costs from hiring outweighs the savings realized by preventing a hiring discrimination suit depends on a number of factors. The greater the likelihood that the worker will ultimately be fired, and the higher the probability of a firing suit, the greater are the expected costs imposed by hiring. With the enormous increase in discharge cases, the probability that a worker will bring a discriminatory firing suit is now substantially higher than the probability that a worker will bring a failure to hire suit. Consequently, antidiscrimination laws may actually provide employers a (small) net disincentive to hire women and minorities.

Id.

52. Donohue & Siegelman, *supra* note 9, at 1012.

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III.
STANDING REQUIREMENTS

The efficacy of this strategy fundamentally depends on white employees having legal standing to bring suits against their employers for discrimination against nonwhite applicants. The core component of standing "is an essential and unchanging part of the case-or-controversy requirement" under Article III of the Constitution.[53] To have standing in a federal court the litigant must have suffered an injury before or arising out of the suit and have a "personal stake in the outcome of the controversy."[54] The Supreme Court has articulated three requirements for standing that the plaintiff must establish under Article III: (1) the plaintiff must have suffered an "injury-in-fact," an invasion of a legally protected interest which is both concrete and particularized as well as actual or imminent, not conjectural or hypothetical; (2) there must be a "fairly traceable" causal connection between the injury and the conduct complained of; and (3) it must be "likely," and not just speculative, that the injury will be redressed by a favorable decision.[55] Additionally, in recognition of the need to maintain a balance in the federal government's separation of powers, the Court has also elaborated a set of "prudential" principles that further limit the scope of standing beyond Article III's requirements.[56] In light of such rigid requirements, it was significant when in 1974 the Supreme Court recognized that because whites suffer from discrimination against minorities, they had standing to stop such illegal action.

IV.
TRAFFICANTE V. METROPOLITAN LIFE INSURANCE CO.

On August 18, 1970, Paul Trafficante, a white man, and Dorothy Carr, a black woman, filed a complaint against the Metropolitan Life Insurance Company, the owner of the Parkmerced Apartment complex in San Francisco.[57] They alleged that under Title VIII of the Civil Rights Act of 1968[58]

53. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Section 2 of Article III of the Constitution extends the jurisdiction of federal courts to "Cases" and "Controversies." U.S. CONST. art. III, § 2.

54. Baker v. Carr, 369 U.S. 186 (1962); *see also* 13 & 13A CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE 3531.16 (2d ed. 1982) (describing scope of standing requirements).

55. *Lujan*, 504 U.S. at 560–61.

56. Flast v. Cohen, 392 U.S. 83 (1968). The Court in *Flast* described "judicial self-restraint" as a nonconstitutional limitation on plaintiff standing that stemmed from the separation of powers doctrine. *Id.* at 92–93, 96–97. More recently, the Supreme Court has described judicial self-restraint as an "overriding and time-honored concern" that demands careful inquiry into "whether appellees have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable." Raines v. Byrd, 521 U.S. 811, 820 (1997).

57. Trafficante v. Metro. Life Ins. Co., 446 F.2d 1158, 1159 (9th Cir. 1971).

58. 42 U.S.C. § 3610 (1994).

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and 42 U.S.C. § 1982,[59] Metropolitan Life was engaging in racially discriminatory rental practices. Mr. Trafficante and Ms. Carr brought their challenge as two of the 8200 established residents in the predominantly white complex and contested the policies as they impacted rejected applicants (who were not party to the action).[60] The federal district court summarily dismissed the claim with very little explanation beyond finding that the plaintiffs had not themselves been denied the rights guaranteed by Title VIII.[61] The Court of Appeals for the Ninth Circuit addressed two issues related to standing: the Article III requirements for standing in federal cases and the legislative purposes and history of Title VIII. Relying on *Association of Data Processing Service Organizations v. Camp*,[62] the court found that, in order to have standing as "persons aggrieved" under the statute, not only did the plaintiffs need to satisfy the "cases and controversies" requirement of Article III, but they also needed to fall within the "zone of interests to be protected or regulated by the statute."[63]

Trafficante and Carr's suit was unusual not in the allegations of the discriminatory action by Metropolitan Life, but rather in the character of the injuries alleged. The residents claimed that the acts of discrimination caused them to:

> (a) [be] deprived of the social benefit of living within a community which is not artificially imbalanced in a manner which excludes minority group members;
> (b) suffer the loss of business and professional advantages which accrues from contact and association with minority group members;
> (c) [be] stigmatized within both the white and minority group communities as residents of a segregated 'white ghetto,' causing such residents both embarrassment and economic damage in social, business and professional activities.[64]

Trafficiante and Carr argued that the discriminatory practices resulted in a nonintegrated environment which by its very nature caused injury to the current residents—the overwhelming majority of whom were white. Even though the appellate court concluded that the Attorney General had

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59. For the purposes of this paper, discussion of *Trafficante*'s relevant claims will be limited to Title VIII.

60. Over ninety-nine percent of the tenants in the apartment complex were white. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 208 n.5 (1972).

61. Trafficante v. Metro. Life Ins. Co., 322 F. Supp. 352 (N.D. Cal. 1971).

62. 397 U.S. 150 (1970).

63. Trafficante v. Metro. Life Ins. Co., 446 F.2d 1158, 1160 (9th Cir. 1971). The Fair Housing Amendments Act of 1988 defined a person aggrieved as one who "claims to have been injured by a discriminatory housing practice" or "believes that [she] will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. § 3602(i) (1994).

64. *Trafficante,* 446 F.2d at 1162.

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the right to sue to correct "patterns and practices" of discrimination independent of the identity of the injured, the court found "nothing in the congressional discussion or debate to suggest that Congress intended to grant standing to sue to any private persons other than the direct victims of the discriminatory housing practices proscribed by the Act."[65] Therefore, the plaintiffs lacked standing because they themselves were not the "direct victims" of the discrimination.[66]

The Supreme Court subsequently reversed the judgment of the Ninth Circuit.[67] To overcome the prudential preclusion of third-party standing, the white plaintiffs in *Trafficante* argued three theories to incorporate into their claims of discrimination. First, the white tenants had suffered an injury-in-fact because they had suffered and were continuing to suffer sociological injury.[68] Second, the interests asserted by the white petitioners were within the "zone of interests" protected by Title VIII of the Civil

65. *Id.* at 1163.

66. Shortly after the district court's dismissal, five African-Americans filed a class action against Parkmerced Corporation, to whom Metropolitan Life had sold the apartment complex, alleging that they had been denied housing in violation of Title VIII and § 1982. *Trafficante*, 446 F.2d at 1163 n.10. Their standing was unchallenged. *Id.*

67. *Trafficante*, 409 U.S. at 205.

68. Brief for Petitioners at 10–13, Trafficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972) (No. 71-708). The brief cited recent Supreme Court decisions on standing, including *Ass'n of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970). Brief for Petitioners at 9, *Trafficante* (No. 71-708). More recently, the Supreme Court has found that although an "injury-in-fact" is ordinarily proven by showing actual or imminent physical or economic harm, the Supreme Court has preserved the principle that "[t]he injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992) (citing Warth v. Seldin, 422 U.S. 490, 500 (1975)). Standing may also arise from claims of noneconomic injury under Congressional statutes; *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), is illustrative. In that case, the Court granted standing to the student organization under the Administrative Procedure Act, which confers standing to a person "aggrieved by agency action within the meaning of a relevant statute." 412 U.S. at 690–91. The student organization sought an injunction against an order by the Interstate Commerce Commission allowing railroads to collect a surcharge on freight rates. *Id.* at 679. The student organization alleged that failure to suspend the surcharge would "discourage the use of recyclable materials, and promote the use of new raw materials that compete with scrap, thereby adversely affecting the environment," as well as forcing the students to pay more for finished products and impair their use of forests and streams. *Id.* at 677. The Court found irrelevant that there was little economic injury, stating, "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Id.* at 687 (quoting Sierra Club v. Morton, 405 U.S. 727, 734 (1972)). The Court also found irrelevant the number of people harmed, and the degree of harm incurred, as long as the groups claiming injury had defined a "specific and perceptible harm that distinguished them from other citizens" and could draw a causal connection between the action at issue and the predicted injury. *SCRAP*, 412 U.S. at 690.

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Rights Act of 1968.[69] Finally, policy interests in full enforcement of civil rights statutes warranted permitting white plaintiffs to act as "private attorneys general."[70]

The Court found that, in using the phrase "a person claiming to be aggrieved" to describe individuals who could bring suit under Title VII of the Civil Rights Act of 1964, Congress intended "to define standing as broadly as is permitted by Article III of the Constitution" when it created a statutory right to sue.[71] Justice Douglas, writing for the unanimous Court, articulated two reasons for extending the Title VII framework of standing to a Title VIII case. First, because the enforcement powers of the Department of Housing and Urban Development (HUD) were limited compared to the "enormity of the task of assuring fair housing," Congress needed to rely on private persons to act as "private attorneys general in vindicating a policy that Congress considered to be of the highest priority."[72] Second, the Civil Rights Act of 1968 was not only intended to protect those who were the direct objects of discrimination, but also those whose complaint was that the discriminatory housing management was negatively affecting "the very quality of their daily lives."[73] The Court looked to the "not too helpful" legislative history of the Act and quoted Senator Mondale's statement that the overarching goal of Title VIII was to ultimately replace the ghettos with "truly integrated and balanced living patterns."[74]

69. Brief for Petitioners at 15–21. The brief cited a determination by the Department of Housing and Urban Development that the plaintiffs were indeed "persons aggrieved" under Title VIII. *Id.* at 21.

70. *Id.* at 22–32. The brief cited a number of Supreme Court and lower court precedents in public accommodations and other EEOC decisions to demonstrate not only the firm basis on which the Court could extend standing to the white plaintiffs in *Trafficante*, but also the larger public policy of ensuring access to nondiscriminatory treatment, *see, e.g.*, Sullivan v. Little Hunting Park, 396 U.S. 229 (1969); Newman v. Piggie Park Enter., 390 U.S. 400, 402 (1968); Bailey v. Patterson, 369 U.S. 31 (1962); NLRB v. Tanner Motor Livery, Ltd., 349 F.2d 1 (9th Cir. 1965); Bailey v. Patterson, 323 F.2d 201 (5th Cir. 1963); Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd* 402 U.S. 935 (1971); Walker v. Pointer, 304 F. Supp. 56 (N.D. Tex. 1969).

71. *Trafficante*, 409 U.S. at 209 (citing Hackett v. McGuire Bros., 445 F.2d 442, 446 (3d Cir. 1971)). In *Hackett*, an African-American driver for a laundry company filed a Title VII suit for racial discrimination and harassment after being fired. The Third Circuit Court of Appeals found that even though he was no longer an "employee" and had accepted pension benefits, under the public policy reflected in Title VII, Hackett's rights under the statute should not be "frustrated by the development of overly technical judicial doctrines of standing" as long as he was "sufficiently aggrieved." *Hackett*, 445 F.2d at 444, 446–47.

72. *Trafficante*, 409 U.S. at 211. For a discussion of this point, see the lower court opinion in *Trafficante v. Metropolitan Life Insurance Co.*, 446 F.2d 1158, 1163 (9th Cir. 1971).

73. *Trafficante*, 409 U.S. at 211 (quoting Shannon v. United States Dep't of Housing & Urban Dev., 436 F.2d 809, 818 (1970)).

74. *Trafficante*, 409 U.S. at 211 (quoting 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale)).

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In their decision, the justices made no reference to the plaintiffs' race as relevant to the disposition of the standing question. Although the plaintiffs themselves had not experienced any direct racial discrimination, the segregated environment of the apartment complex alone constituted a violation of the Civil Rights Act of 1968. With *Trafficante*, the race of the plaintiff became irrelevant to determine standing in Title VIII cases. Only discriminatory action by a housing owner became necessary for any of the tenants to bring suit since the artificially-engineered, discriminatory environment itself caused the injury. The theories by the plaintiffs in *Trafficante* were soon applied to the workplace.

V.
EARLY EXTENSION OF *TRAFFICANTE* TO TITLE VII AND THE WORKPLACE

A. *Overview of Cognizable Title VII Discrimination Claims*

Before an individual may bring a Title VII claim in federal court, the Civil Rights Act requires that she go through an administrative complaint process with the EEOC. Accordingly, an employee must first file a formal charge of an unlawful discriminatory practice with the EEOC within 180 days of the occurrence of the allegedly unlawful practice.[75] Once an employee files a charge, the EEOC investigates, looking for evidence of unlawful practices.[76] Upon completion of the investigation, the EEOC will dismiss the charge if it fails to find reasonable cause.[77] If the EEOC does find reasonable cause, the agency "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[78] If such extra-judicial settlement with the employer is unsuccessful, the EEOC may bring a civil action.[79] Regardless of whether the investigation finds reasonable cause to support the claim, the complainant may bring a civil suit against the employer after the EEOC has notified the complainant of its findings.[80]

The subsequent judicial complaint brought by the EEOC is not limited in scope to the claimant's allegaion; it may include evidence "of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation."[81] Yet in spite of the broad license granted to the EEOC by statute, courts were initially reluctant to permit the investigation to go beyond the scope of the claimant's administrative charge. In *Sanchez*

75. 42 U.S.C. § 2000e-5(e) (1994).
76. *Id.* § 2000e-5(b).
77. *Id.*
78. *Id.*
79. *Id.* § 2000e-5(f)(1).
80. *Id.*
81. *Id.* § 2000e-8(a).

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v. Standard Brands, the Fifth Circuit Court of Appeals discussed the scope of a Title VII judicial complaint in relation to the administrative charge.[82] The court stated that "the 'scope' of the judicial complaint is limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination."[83] Courts sometimes amended this rule slightly, acknowledging the broad scope of the EEOC's investigatory powers, but limiting the EEOC's judicial challenge to the issues for which the complainant would have had standing to sue.[84] Through the early 1970s, courts made no reference to *Trafficante* and accepted the more limited conception of EEOC's power to sue.[85]

EEOC procedures aside, employers' actions against white employees that give rise to cognizable discrimination claims under Title VII (other than the traditional discrimination claims explained in Part II) can be categorized into three groups: (1) retaliatory action; (2) discrimination by association; and (3) under *Trafficante*'s rationale, denial of nondiscrimination. While these delineations may be artificial, a discussion of them will highlight the various ways courts have construed standing for white employees, as well as the impact of *Trafficante*'s reasoning on Title VII claims.

In situations where a white employee challenges an employment practice as discriminatory and the employer subsequently takes adverse action against the white employee for her advocacy, Title VII specifically allows the employee to bring a retaliation claim.[86] The purpose of the retaliation claim is to protect the employee who utilizes the tools provided by Congress to oppose discrimination, regardless of whether or not the employee's charge is ultimately meritorious.[87] Courts have also interpreted Title VII as permitting white employees to bring discrimination by association claims. In an association claim, a white employee essentially argues that

82. 431 F.2d 455 (5th Cir. 1970).

83. *Id.* at 466. In *Sanchez*, a Latino woman brought an amended charge of discrimination based on her sex and national origin. Although the EEOC concluded that reasonable cause did not exist on the charge of sex discrimination, it allowed the claim of national origin discrimination to proceed because the plaintiff was a member of a statutorily protected group. *Id.* at 459.

84. *See, e.g.*, King v. Ga. Power Co., 295 F. Supp. 943, 947 (N.D. Ga. 1968) (holding that EEOC's scope of investigation is limited to issues complainant has standing to raise).

85. *See, e.g.*, EEOC v. Nat'l Mine Serv. Co., No. 74-41, 1974 WL 10558 (E.D. Ky. Nov. 8, 1974) (holding that white male, in his capacity as president of all-white local union, could not file charge of race discrimination on behalf of black employees); EEOC v. N.Y. Times Broad. Serv., Inc., 364 F. Supp. 651 (W.D. Tenn. 1973) (holding that white female complainant's charge of sex discrimination could not be expanded to charges of race discrimination).

86. 42 U.S.C. § 2000e-3(a). The statute provides that

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants . . . because he has opposed any practice made an unlawful employment practice by this subchapter [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Id.

87. *See, e.g.*, Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9th Cir. 1978).

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she was injured because she associated with a member of a statutorily-protected group, usually through a social relationship such as marriage.[88] In these cases, courts have essentially described the white plaintiff's standing using a traditional interpretation of Title VII: the white plaintiff was discriminated against because of her race since, had she been the race of the person with whom she associated, she would have not been subjected to the employer's adverse action. In other words, the employer was not discriminating against the employee's companion, but against the employee for not being the race of the companion.[89]

As *Trafficante*'s influence spread through Title VII cases, a third kind of claim emerged which did not require the white employee either to have actively opposed an employer's discriminatory practices or to have had some personal relationship with a nonwhite person. Based on the *Trafficante* plaintiffs' claim that their injury was a denial of associational benefits, white Title VII plaintiffs framed their injury essentially as a denial of nondiscrimination. The utility of this theory in the Title VII context is significant because it provides for the more complete realization of Title VII's intent and more comprehensive enforcement of antidiscrimination laws in the workplace.[90] Two points will clarify this claim and its uniqueness. First, it is important to distinguish between traditional association

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88. *See, e.g.,* Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316, 1327 n.6 (8th Cir. 1994) (stating that appellate court is "not inclined to say the [district] court erred" in holding that white plaintiff had cognizable Title VII claim by alleging that she was discriminated against because of her association with black employee); Reiter v. Ctr. Consol. Sch. Dist. No. 26-JT, 618 F. Supp. 1458, 1459, 1462 (D. Colo. 1985) (finding white employee had Title VII standing based on allegations that she was discriminated against because of her "close association with the Spanish citizens of the [school] district"); Gresham v. Waffle House, Inc., 586 F. Supp. 1442, 1445 (N.D. Ga. 1984) (finding white plaintiff stated valid claim under Title VII by alleging that she was discharged from her employment because of her interracial marriage); Holiday v. Belle's Rest., 409 F. Supp. 904, 908–09 (W.D. Pa. 1976) (finding white waitress had standing to assert Title VII claim against her employer for her dismissal because of her employer's belief that she was married to black man); Whitney v. Greater N.Y. Corp. of Seventh Day Adventists, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975) (finding white plaintiff had standing to argue that she was discharged because her employer disapproved of her social relationship with black man). This protection against discrimination because of association may derive in part from the Supreme Court's declaration of the fundamental right of marriage, including interracial marriage, in *Loving v. Virginia*, 388 U.S. 1 (1967).

89. *See, e.g., Gresham*, 586 F. Supp. at 1445. The court stated:

> Clearly, if the plaintiffs in [similar] cases, or the plaintiff in the instant case, had been black, the alleged discrimination would not have occurred. In other words, according to their allegations, but for their being white, the plaintiffs in these cases would not have been discriminated against. This Court cannot imagine what more need be alleged to bring such plaintiffs within the plain meaning of Title VII's proscription of discrimination against an individual "because of such individual's race."

Id. (quotation in original).

90. 42 U.S.C. § 1981 provides similar protections against discriminatory actions by employers:

> 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

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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 . . . .

42 U.S.C. § 1981 (1994). Prior to 1991, however, courts refused to apply the statute to discriminatory acts affecting the conditions of employment. In 1991, Congress made it clear that the statutory use of the phrase "make and enforce contracts" referred to those activities undertaken in the course of the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* § 1981(b). Although the Supreme Court subsequently ruled that § 1981 could not be applied retroactively or to pending cases, Rivers v. Roadway Express, Inc., 511 U.S. 298, 313 (1994), courts have accepted claims brought under the statute alleging a racially hostile work environment. *See, e.g.*, Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1008 (11th Cir. 1997), *reh'g and suggestion for reh'g en banc denied*, 167 F.3d 542 (11th Cir. 1998) (stating "[w]e read § 1981, as amended by the Civil Rights Act of 1991, to encompass [a hostile work environment] claim"); Dennis v. County of Fairfax, 55 F.3d 151, 155 (4th Cir. 1995) (holding that § 1981, as amended, now covers "general conditions of employment, including incidents of racial harassment in the workplace"); Johnson v. Uncle Ben's, Inc., 965 F.2d 1363, 1372 (5th Cir. 1992), *cert. denied*, 511 U.S. 1068 (1994) ("Under § 1981 as amended by the [1991] Act, racial harassment and other discrimination in an employment relation occurring after contract formation is actionable.").

White plaintiffs in a majority of circuits have been granted § 1981 standing to bring association claims. *See, e.g.*, Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 890 (11th Cir. 1986) (white plaintiff can maintain a § 1981 claim alleging discrimination because of marriage to a nonwhite); Alizadeh v. Safeway Stores, Inc., 802 F.2d 111, 114 (5th Cir. 1986) (holding that white employee can sue employer under § 1981 on grounds that he dismissed her because of her marriage to nonwhite man); Fiedler v. Marumsco Christian Sch., 631 F.2d 1144, 1150 (4th Cir. 1980) (holding white plaintiff can assert that his daughter was expelled from private school because of her association with black schoolmate); Des Vergenes v. Seekonk Water Dist., 601 F.2d 9, 14 (1st Cir. 1979) (holding low-income housing developer has cognizable claim that water district denied his petition to include his real estate in water district because he made contracts with nonwhites); DeMatteis v. Eastman Kodak Co., 511 F.2d 306, 312 (2d Cir. 1975) (holding white plaintiff has standing under § 1981 to assert that his employer forced him to retire prematurely for his sale of his house to black man).

A majority of circuits have also recognized the standing of white plaintiffs who bring retaliation claims under § 1981. *See, e.g.*, Malhotra v. Cotter & Co., 885 F.2d 1305, 1316–17 (7th Cir. 1989) (Cudahy, J., concurring) (approving § 1981 claim for retaliatory discharge in hypothetical situation where white employee was fired because of his opposition to employer's discriminatory practices); Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1447 (10th Cir. 1988) (holding white employee who alleges that he was terminated for assisting black employee could maintain claim under § 1981); Pinkard v. Pullman-Standard, a Div. of Pullman, Inc., 678 F.2d 1211, 1229 n.15 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983) (finding valid retaliatory discharge claim brought under § 1981 where evidence showed plaintiff was discharged for lawful advocacy of minority rights); Liotta v. National Forge Co., 629 F.2d 903, 906–07 (3d Cir. 1980), *cert. denied*, 451 U.S. 970 (1981) (finding summary judgment inappropriate where material issues of fact remained on § 1981 claim brought by plaintiff alleging retaliatory discharge because of his advocacy for rights of company's black employees); Winston v. Lear-Siegler, Inc., 558 F.2d 1266, 1270 (6th Cir. 1977) (holding that plaintiff had standing to bring § 1981 retaliatory discharge claim for allegedly unlawful employer action taken after plaintiff protested alleged discriminatory firing of black coworker). *But see* Halet v. Wend Invest. Co., 672 F.2d 1305, 1308 (9th Cir. 1981) (holding that white plaintiff did not have standing under § 1981 to challenge adults-only rental policy as it affected himself and minority families because white plaintiff did not satisfy Supreme Court's Article III requirement that he be "only effective adversary").

Compared to § 1981, Title VII is limited in both its applicability, *see, e.g.*, 42 U.S.C. § 2000e(b) (1994) (stating that Title VII does not apply to businesses with fewer than fifteen employees), and its breadth of relief, *see, e.g.*, *id.* § 2000e-5(g)(1) (limiting back pay liability

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claims and those claims alleging that the employer's discriminatory actions create a segregated work environment which denies a white employee the ability to associate with nonwhites. In the former, the association already exists and a white is punished for that association; in the latter, its possibility is foreclosed. Furthermore, the denial of associational benefits means that the white person wants the opportunity to work in an environment that is not artificially segregated, and is being discriminated against because she does. By contrast, the denial of nondiscrimination claim is broader—the white plaintiff alleges that even if the work environment is numerically integrated, the actions of the employer create an environment that discriminates against a protected class. Under the denial of nondiscrimination claim, the white employee asserts standing under Title VII because her employer has instituted discriminatory policies that create an environment which denies the white employee either the opportunity to associate with nonwhites or to work in an environment free from discriminatory comments and behaviors.

B. Extension of Trafficante*'s Rationale to Title VII Claims*

Although this additional and admittedly nontraditional basis for a Title VII claim was first suggested in *Trafficante*, it was not actually used in the employment context until the Ninth Circuit Court of Appeals decided *Waters v. Heublein, Inc.* in 1976.[91] In *Waters*, a white woman filed two complaints with the EEOC against her employer. The first alleged:

> I am doing the same job as men have done for more pay. I think women are discriminated against by this company by being hired in low-pay and low-status work compared to men, in job assignments and in promotions. I think the same is true of Negroes—they are discriminated against in the same way, as are other minority groups.[92]

In deciding Ms. Waters's standing to bring a suit enjoining discrimination against groups of which she was not a member, the appellate court used *Trafficante*'s denial of nondiscrimination analysis to determine whether she was a "person claiming to be aggrieved" by the discrimination.[93] The court rejected the district court's contention that Title VII is narrower in scope than Title VIII, and found that the purpose of Title VII

to two years prior to filing of charge with EEOC). Title VII does provide more educational and investigative assistance to potential claimants, however, than does § 1981. *See id.* § 2000e-4(g), (h). Moreover, it is only under Title VII that courts have allowed the full enforcement of the antidiscrimination statute to include denial of nondiscrimination claims.

91. 547 F.2d 466 (9th Cir. 1976), *cert. denied*, 433 U.S. 915 (1977).

92. *Id.* at 467. Later, Waters filed an additional charge alleging that she was retaliated against for filing her first complaint. *Id.*

93. *Id.* at 469; *see* 42 U.S.C. § 2000e-5(b).

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was "'functionally identical' to the fair housing legislation construed in *Trafficante*."[94] The court wrote:

> We have no doubt that one of the purposes of Title VII is the purpose stated by the district court [to improve the economic status of persons belonging to racial and ethnic minorities by providing equal access to employment opportunities]. But interpersonal contacts—between members of the same or different races—are no less a part of the work environment than of the home environment. Indeed, in modern America, a person is as likely, and often more likely to know his fellow workers than the tenants next door or down the hall. The possibilities of advantageous personal, professional or business contacts are certainly as great at work as at home.[95]

The court further justified application of Title VIII standing principles to a Title VII claim by turning to legislative and regulatory history, as well as to constitutional evidence. The court found that enforcement procedures of Title VII and VIII were "virtually identical" before 1972 (the year *Trafficante* had been decided) and found nothing in the Equal Employment Act[96] (passed later in 1972) that narrowed the class of plaintiffs who could bring suit under Title VII.[97] Constitutionally, the court stated that it was only reapplying *Trafficante*'s definition of "persons aggrieved" as it related to Article III's "case or controversy" requirement.[98]

Despite the court's claim that this "extension of *Trafficante* to the Title VII area really makes no new law," the *Waters* decision did broaden *Trafficante*'s reach.[99] In *Trafficante*, the Supreme Court found that the management's discriminatory policies prevented integration of the apartment complex and that this segregation injured the white tenants, damaging "the very quality of their daily lives."[100] In *Waters*, the plaintiff did not allege that the company had failed to hire African-Americans, but rather that the company had relegated these employees to low-paying and low-

94. *Waters*, 547 F.2d at 469 (quoting Note, *Work Environment Injury Under Title VII*, 82 YALE L.J. 1695, 1701–02 (1973)).

95. *Id.* at 469.

96. Equal Employment Act of 1972, Pub. L. No. 92-261, 86 Stat. 104 (1972) (codified as amended in scattered sections of 42 U.S.C. (1994)).

97. *Waters*, 547 F.2d at 469–70.

98. *Id.* at 470 (citing Hackett v. McGuire Bros., Inc., 445 F.2d 442 (3d Cir. 1971)). According to *Hackett*, "if the plaintiff is sufficiently aggrieved so that he claims enough injury-in-fact to present a genuine case or controversy in the Article III sense, then he should have standing to use in his own right and as a class representative." *Hackett*, 445 F.2d at 447.

99. *Id.*

100. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting Shannon v. United States Dep't of Hous. & Urban Dev., 436 F.2d 809, 818 (3d Cir. 1970)).

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status positions. Waters charged that, by subjecting female and black employees to discriminatory policies, the employers were inhibiting an integrated work environment; the employers' failure to promote Waters was a symptom of a larger disease that injured all employees, nonwhite and white. Her standing, therefore, was valid since she acted as a private attorney general; her goals to work in a discrimination-free environment were congruent with the goals of Title VII.

Additionally, while *Trafficante* did not refer to, much less explain, the plaintiff's claim of being deprived of the "social benefit"[101] of living in an integrated community, the court in *Waters* paused to comment that the injury to whites went beyond simply that of working in a segregated environment: "The benefits of interracial harmony are as great in either locale. The distinction between laws aimed at desegregation and laws aimed at equal opportunity is illusory. These goals are opposite sides of the same coin."[102] By capitalizing on the "social benefit" concepts endorsed in *Trafficante*, the court in *Waters* viewed the injury to whites as stemming from any environment that discriminated against minorities, whether by segregating the environment (suggested in part by statistical data) or by otherwise jeopardizing the "interracial harmony" of the integrated environment (a more inchoate phenomenon describing the work environment itself) through discriminatory practices. The conditions of employment protected under Title VII had been substantively expanded to allow a denial of non-discrimination claim.

In *Waters*, the EEOC investigation uncovered evidence to support the plaintiff's allegations.[103] But what if the EEOC's investigation found evidence of discrimination that was unrelated to the original charge and concerned protected groups of which the complainant was not a member? This situation occurred in *EEOC v. Bailey*, where a white female had filed an EEOC complaint against her employer for discriminatory practices against women, particularly African-American women.[104] The EEOC investigation found no discrimination against the woman who filed the charge, but it did uncover a pattern of discrimination against black women and men, and consequently the EEOC brought a suit against the company. The Sixth Circuit Court of Appeals concluded that although the EEOC suit detailed evidence of discrimination unrelated to the charge prompting its investigation, the agency was permitted to bring the racial discrimination suit.[105] Following the analysis in *Waters*, the *Bailey* court concluded that Title VII conferred standing upon a white person "who may have suffered

101. *Waters*, 547 F.2d at 469.

102. *Trafficante*, 446 F.2d at 1162.

103. *Id.* at 467.

104. 563 F.2d 439, 442 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978).

105. *Id.* at 454. In an interesting footnote, the court reserved judgment on whether a male could file charges alleging sex discrimination against females, whether native-born

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from the loss of benefits from the lack of association with racial minorities at work" because she was a plaintiff "claiming to be aggrieved."[106]

Similar cases followed in other circuits. Relying on *Waters*'s and *Bailey*'s extensions of *Trafficante*, courts granted whites standing to charge that racial discrimination against minority job applicants or coworkers resulted in either a loss of associational benefits or of interracial harmony and thus adversely affected the employment conditions of the white workers. For example, in *EEOC v. Mississippi College*, a white female complainant charged that the college was discriminating against women and blacks in hiring and recruiting practices.[107] The court accepted the EEOC's argument that the complainant could claim that "the discrimination deprived her of the benefits arising from association with racial minorities in a working environment unaffected by discrimination."[108]

In *Stewart v. Hannon*, the Seventh Circuit Court of Appeals overturned a lower court's denial of standing to a white assistant principal who

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Americans could file charges alleging national origin discrimination against Mexican-Americans, and whether a Methodist could file charges alleging religious discrimination against Seventh Day Adventists. *Id.* at 454 n.9.

106. *Id.* at 452 (citing, inter alia, *Waters*, 547 F.2d at 469-70). The *Bailey* court added that the EEOC's own (and arguably more inclusive) interpretation of Title VII supported application of *Trafficante*'s rationale to the facts before it. *Id.* at 454 (noting "the EEOC has interpreted Title VII to confer upon every employee the right to a working environment free from unlawful employment discrimination"). Citing *Griggs v. Duke Power Co.*, the court stated that an EEOC interpretation of Title VII was a guide and not to be viewed as controlling or even entitled to "great deference," yet it chose to apply the EEOC's interpretation. *Id.* at 454 (citing Griggs v. Duke Power Co., 401 U.S. 124, 133-34 (1971)).

107. 626 F.2d 477, 479-80 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).

108. *Id.* at 483. In reaching its conclusion, the court in *Mississippi College* cited several other cases, including *Rogers v. EEOC*, 454 F.2d 234, 236 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), a case decided one year before *Trafficante* that presaged the extension of Title VII from protecting interracial associations to preserving a workplace free of discrimination. *Mississippi College*, 626 F.2d at 482. In *Rogers*, a Latina doctor filed a charge that her employer not only discriminated against her because of her Spanish surname, but also that the employer discriminated against her patients on the basis of their Spanish surnames. *Rogers*, 454 F.2d at 236. The court found that

> employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase 'terms, conditions, or privileges of employment' in Section 703 [of Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . I am simply not willing to hold that a discriminatory atmosphere could under no set of circumstances ever constitute an unlawful employment practice. One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think Section 703 of Title VII was aimed at the eradication of such noxious practices.

Id. at 238. Because the plaintiff was Latina, this argument did not explicitly consider whether whites could suffer from similar discrimination against races other than their own. However, the broader, more basic proposition set forth in this analysis—that Congress had intended for Title VII to protect all those affected by discrimination in the workplace—did provide the court in *Mississippi College* with a useful starting point. *See EEOC v. Mississippi College*, 626 F.2d at 482.

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alleged that the school district's criteria for certifying principals were discriminatory with respect to minority applicants.[109] The court of appeals, citing *Waters*, stated that the complaint alleged that "the plaintiff worked in an environment which was subject to racial discrimination," and because she was denied "important benefits from interracial associations," she was a "person aggrieved" under Title VII.[110] Federal district courts have also applied Trafficante's denial of non-discrimination claim.[111]

In sum, recognizable trends had emerged in the Title VII standing context. First, federal courts were willing to transpose the "denial of nondiscriminatory environment" injury to whites from the housing to the employment context. If nonwhites were discriminated against in hiring or promotion, whites in any other department of the company had standing to sue for the denial of association benefits that resulted from the discriminatory practices or policies. Second, the distinction between a nonsegregated workplace and a workplace free of discrimination was increasingly blurred. In the course of applying the *Trafficante* "loss of associational benefits" theory of standing to the employment context, the courts read the purpose of Title VII's protections as covering not simply numerical or visual racial composition of the workplace, but also the "racial atmosphere" of the workplace. This interpretation may have gone beyond the Supreme Court's statement in *Trafficante*, but was arguably not beyond Congress's intent in drafting Title VII. The "interracial harmony" phrase of *Waters* became the means with which whites could assert their statutory rights against a discriminatory employer regardless of whether nonwhites were employees.

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109. 675 F.2d 846 (7th Cir. 1982).

110. *Id.* at 850.

111. In *Richardson v. Restaurant Marketing Associates.*, 527 F. Supp. 690 (N.D. Cal. 1981), the district court granted a white woman standing to bring a discrimination claim, citing *Waters*, even though her work environment was integrated. The plaintiff's standing stemmed from her claim that her employer had deprived her of the benefits of a work environment conducive to interracial harmony and association. *Id.* at 695. In *Smithberg v. Merico, Inc.*, 575 F. Supp. 80 (C.D. Cal. 1983), another California district court relied on *Trafficante* and *Waters* to allow a white woman to bring a claim against an employer who made "racially derogatory comments in the presence of the plaintiff, for the purpose of causing great emotional distress to the plaintiff and creating a stressful and unhealthful working environment for the plaintiff," even though the comments were not directed at her race. *Smithberg*, 575 F. Supp. at 81. The court based its affirmation of plaintiff's Title VII standing partly on the principle that "a white plaintiff has standing to sue because he has been injured by the loss of important benefits derived from interracial associations." *Id.* at 82 (citing, inter alia, *Trafficante* and Bailey v. Patterson, 369 U.S. 31 (1962)). The court also stated that the plaintiff had successfully "established a violation of [her] personal right to work in an environment unaffected by racial discrimination." *Id.* at 82–83.

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VI.
MORE RECENT APPLICATIONS OF *TRAFFICANTE*

In 1986, the Supreme Court affirmed that a Title VII claim could be brought for sex discrimination that created a "hostile work environment"—that is, a degree of sexual discrimination so severe or persuasive as "to alter the conditions of [the victim's] employment and create an abusive working environment" in violation of Title VII.[112] In *Patterson v. McLean Credit Union,* the Court accepted that a "hostile work environment" claim could be brought under Title VII also to challenge racial discrimination in the workplace.[113] Thereafter, both association claims and denial of nondiscrimination claims were folded within allegations of a "hostile work environment" under Title VII, and cases continued to affirm standing for white plaintiffs in both categories of Title VII litigation. In *Clayton v. White Hall School District*, the Eighth Circuit explained the use of the phrase in its finding that a white cafeteria employee had standing under Title VII because the alleged injuries fell within the zone of interests protected by the statute:

> The hostile work environment theory of discrimination is based upon an employee's right to work in an environment free of unlawful discrimination, and the injury results from the lost benefits of associating with persons of other racial groups. It is an emotional or psychological injury to the plaintiff which is the gravamen of this cause of action.[114]

By framing the injury to whites as caused by the existence of a harmful environment rather than by the absence of a beneficial environment as in *Trafficante*, *Waters*, and others, the injury more closely resembled a traditional tort claim and also appeared to be a more tangible injury.

Similar cases brought in the 1990s affirmed standing for white plaintiffs in Title VII litigation when the alleged discrimination resulted from a work environment polluted by discrimination. In *Chandler v. Fast Lane, Inc.*, a white manager of a restaurant was prevented from hiring and promoting minorities because of the restaurant owner's discriminatory employment practices.[115] She claimed that being forced to implement these discriminatory practices violated "her fundamental right to associate with

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112. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (citation omitted). Note that the EEOC first recognized the "hostile work environment" theory of sex discrimination in 1980. 29 CFR § 1604.11a (2000) (codifying 45 Fed. Reg. 74,677 (1980)) ("Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when ... such conduct has the purpose or effect of ... creating an intimidating, hostile, or offensive working environment.").

113. 491 U.S. 164, 180 (1989)

114. 875 F.2d 676, 679–80 (8th Cir. 1989) (citing Clayton v. White Hall Sch. Dist., 778 F.2d 457, 459 (8th Cir. 1985), which had been remanded for entry of dismissal without prejudice four years earlier).

115. 868 F. Supp. 1138 (E.D. Ark. 1994).

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African-Americans."[116] The district court in Arkansas found that Chandler had standing to assert a Title VII claim because the discriminatory employment practices impinged on her right to associate and created an environment that "became so intolerable that she was forced to resign."[117] The court in *Chandler* essentially found that the plaintiff could claim an injury as a white person required to work in an environment that discriminated against minorities, even though the court made no mention of whether minorities were present in the workplace.[118] The court in *Chandler* characterized the plaintiffs' Title VII claim as "somewhat novel,"[119] failing to realize that hers was of a type that had been permitted consistently since *Trafficante*.[120]

Although the courts in the previous two cases accepted the plaintiff's claim of a denial of nondiscrimination, now termed a hostile work environment claim, in *Gavenda v. Orleans County*[121] a New York district court refused to extend *Trafficante*'s reasoning beyond a denial of association claim. In *Gavenda*, the court found that a white man had standing under Title VII to allege that his employer had caused him "associational loss resulting from the defendants alleged discrimination against others based on their race, religion, ethnicity, and/or gender."[122] Although the Second Circuit had decided no case on point, the trial court recognized that "every other Circuit's Court of Appeals that has dealt with the issue of standing

116. *Id.* at 1143.

117. *Id.*

118. *Id.* at 1144.

119. *Id.* at 1143.

120. For instance, in *Chacon v. Ochs*, 780 F. Supp. 680 (C.D. Cal. 1991), a white woman married to a Hispanic man asserted a Title VII "hostile work environment" claim and alleged that individuals at her place of employment made denigrating comments about the Hispanic race "knowing her husband and children were Hispanic." *Id.* at 680. The court did not mention whether Hispanic employees also worked at the company, but nonetheless found that a hostile work environment existed. *Id.* at 682. In *Brosmore v. City of Covington*, Civ. A. No. 89-156, 1993 WL 762881 (E.D. Ky. Oct. 14, 1993), a white man was ruled to have standing when he was subjected to derogatory comments against blacks by his fellow firefighters when he began dating, married, and had a child with a black woman, although she was not employed by the company. Although most of the comments were directed against blacks, and some specifically against the white plaintiff's wife (such as "nigger" and "blue gummer"), some of the comments were made against the plaintiff specifically (openly referring him as a "nigger lover"). *Id.* at *1. The district court found that by alleging that racial slurs regarding the plaintiff and his family were made in the workplace, the white plaintiff alleged a sufficient Title VII hostile work environment claim. *Id.* at *6. In this case, the plaintiff's denial of nondiscrimination claim appeared to be very similar to an association claim, for the court cited the plaintiff's allegations that he was a denied a promotion and harassed because of his interracial relationship. *Id.* at *6.

121. No. 97-CV-0074E(SC), 1998 WL 136122 (W.D.N.Y. Mar. 19, 1998).

122. *Id.* at *4.

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under Title VII in these circumstances has found that it extends to a plaintiff who alleges suffering the loss of association from a violation of another's rights under the statute."[123] Strangely, this volume of precedent did not convince the court that the plaintiff's injuries were sufficient to allege claims for a hostile work environment, and the court drew a distinction between the right of association and freedom from a hostile work environment that other circuits had not made.[124]

Only recently has an appellate court refused to uphold a *Trafficante* claim. In the Fourth Circuit case of *Childress v. City of Richmond*,[125] white police officers claimed that racist remarks made by the chief of police created a racially hostile environment.[126] Applying *Trafficante* and *Waters*, the court of appeals found that the white men were "persons aggrieved" under Title VII and had standing to assert hostile environment claims when the discriminatory conduct is directed at blacks.[127] However, this decision was overturned in an evenly divided per curiam opinion by the Fourth Circuit sitting en banc. The superceding opinions provided no discussion of the legal issues other than a restatement of the lower court's reasoning in denying such a claim. In a concurring opinion, Judge Luttig argued that Title VII's "aggrieved person" was distinguishable from Title VIII's "aggrieved person": Title VII did not define "aggrieved person" and Title VIII, which antedated Title VII, did.[128] With this explanation, the court effectively ignored clear court precedent that had interpreted both statutes similarly. While this decision alone does not undermine two decades of precedent, the Supreme Court's refusal to grant certiorari[129] may cast some doubt on how far courts today may extend the reasoning of *Waters*. Nonetheless, it is extremely doubtful that the *Childress* decision, written by an evenly divided court, signals the demise of *Trafficante*'s application; news of *Trafficante*'s death would not only be premature, but unrealistically pessimistic.

123. *Id.* at *3. The court subsequently cited *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972), *Bailey v. Patterson*, 369 U.S. 31 (1962), *Clayton v. White Hall School District*, 778 F.2d 457 (8th Cir. 1985), *Stewart v. Hannon*, 675 F.2d 846 (7th Cir. 1982), *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), and *Waters v. Heublein, Inc.*, 547 F.2d 466 (9th Cir. 1976).

124. *Id.* at *4. *Compare* Waters v. Heublein, Inc., 547 F.2d 466, 469–70 (9th Cir. 1976) *with* Richardson v. Rest. Marketing Assocs., Inc., 527 F. Supp. 690, 695–96 (N.D. Cal. 1981).

125. 120 F.3d 476 (4th Cir. 1997), *rev'd en banc*, 134 F.3d 1205 (4th Cir. 1998), *cert denied*, 524 U.S. 927 (1998).

126. The white officers claimed that the racial discrimination by their supervisor acted to "destroy the necessary sense of 'teamwork' between officers of different sexes and races, and that this resultant loss of teamwork raised the possibility that officers in one group might be reluctant to assist officers in another group when performing their duties on the streets." *Id.* at 478.

127. *Id.* at 480.

128. *Childress*, 134 F.3d at 1209.

129. 524 U.S. 927 (1998).

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Although *Trafficante*'s denial of nondiscrimination rationale has undergone an expansive evolution during the last quarter century, its application to the Title VII context has been most successful in cases in which a white employee brings a claim alleging discrimination against a racial minority employee or applicant. No similarly solid line of precedent has emerged enabling men to have standing for discrimination against women. When men claim that the discriminatory actions against women caused them to be subjected to a "hostile work environment," courts have been reluctant to grant standing, even though the reasoning set forth in claims of racial animus in the environment is virtually identical.[130] An exception to this trend against allowing males to have standing for discrimination against females seems to be the *Childress* case, in which the white male police officers' Title VII complaint against the discriminatory treatment by their supervisors involved sex discrimination claims as well as racial discrimination claims. The Fourth Circuit Appeals Court initially accepted this claim, stating that "*Trafficante* compels this result,"[131] but its decision was ultimately overturned by the Fourth Circuit's en banc decision.[132]

VII.
PHILOSOPHICAL AND PRACTICAL VIABILITY OF *TRAFFICANTE* IN THE CURRENT LEGAL CLIMATE

Although less than overwhelming, there is substantial and sustained evidence that federal courts are willing to apply *Trafficante* and its progeny to enable white employees to bring Title VII claims against their employers

130. *See, e.g.*, Lyman v. Nabil's Inc., 903 F. Supp. 1443, 1446 (D. Kan. 1995) (characterizing as "loss of associational benefits" claim an allegation that men were subjected to a work environment that was hostile towards women); Clayton v. White Hall Sch. Dist., 875 F.2d 676 (8th Cir. 1989) (same). The court in *Lyman* stated: "No court has extended Title VII's contemplation of associational benefits to the [claim of injury as a result of the sexual discrimination in the workplace]." *Lyman*, 903 F. Supp. at 1446. *But see* Anjelino v. N.Y. Times, Co., 200 F.3d 73 (3d Cir. 2000). In *Anjelino*, male employees who worked in the mail room of the *New York Times* sued because the employer's discrimination against women directly affected the men as well. *Id.* at 78. A list of employees' names was created periodically from which assignments to the mail room would be made. However, most of the employees and names on the list were men, and when supervisors would start drawing from the lists, they would assign all names until they reached a female name, at which time they would stop making assignments. *Id.* at 80. The appellate court affirmed that the male plaintiffs in *Anjelino* had standing to sue under Title VII because their names were listed below the first female name on the list and thus, they were injured by the discrimination directed at women. *Id.* at 92.

A similar view had been adopted by an Indiana district court in 1986 in *Allen v. American Home Foods,* 644 F. Supp. 1553 (N.D. Ind. 1986). There, men who worked at a plant argued that the plant was selected by the company for closure because its labor force was comprised of predominantly women workers. *Id.* at 1554–55. The court found that the men did have standing to bring a Title VII injury because they suffered financial injury as a direct result of the company's discrimination against women. *Id.* at 1557.

131. *Childress*, 120 F.3d at 480.

132. *Childress*, 134 F.3d at 1205 (en banc).

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for discrimination toward minority employees, either because such discrimination denies white workers an integrated work environment—even when the segregation occurs in only part of the workplace—or because it creates a racially hostile work environment. The once-steady stream of precedent through the 1970s and 1980s has dwindled to a trickle in the last decade. Therefore, a revitalization of these viable *Trafficante*-type claims could further civil rights efforts.

For reasons described earlier, evidentiary burdens imposed by case law and statute are more likely to be satisfied by those who have access to the internal workings of the business. White employees who bring *Trafficante*-type workplace discrimination claims are much more likely to know about and obtain evidence of discriminatory treatment or impact than rejected applicants. If a few such cases are successful, the possibility that such suits will continue to be brought by white employees in the future can reduce substantially the perverse incentive employers presently have to not hire nonwhites. Employers could no longer believe that they were immune from discrimination suits merely because they had hired no minority employees who would bring them. It is important to note that use of this strategy does not supplant the need for affirmative action or mandate integration per se. Conversely, the traditional reliance on these latter strategies to secure people's civil rights does not diminish the utility of lesser-known strategies such as those advocated in this article, especially if they embolden whites to fight racial discrimination in the workplace.[133]

Although a Title VII-*Trafficante* approach could improve minority applicants' employment opportunities, the underlying legal theory raises a number of challenging issues for courts. *Trafficante* implies that in the employment context, an employer's discriminatory practice itself creates an artificially segregated environment that injures current employees. However, it is somewhat unclear whether courts will allow plaintiffs to prove these somewhat tenuous causal relationships so easily. *Trafficante* and its progeny in the Title VII context clearly suggest that they can, especially as such reasoning supports more complete enforcement of Title VII, although a few recent circuit court cases have subordinated these principles to the artificial and technical limits of standing explicitly rejected by the Supreme Court in 1972.[134]

133. An additional strategy is for employees to ensure through collective bargaining agreements that their employment contracts contain antidiscrimination clauses. Not only would this provide another possible legal action under a theory of breach of contract, but it may enable unions to represent their employees against an employer's discriminatory hiring practices.

134. In *Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176 (7th Cir. 1998), a white employee brought a Title VII action challenging working conditions that the court said "reflect[ed] actionable discrimination against applicants for employment." *Id.* at 1181. However, the court of appeals rejected her claim because the comments she heard did not create an "objectively hostile" environment since they did not threaten her personally. *Id.*

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Additionally, the court's role conceivably could extend beyond mere adjudication of the Title VII claim. As voluntary affirmative action plans in the workplace are being subjected to greater scrutiny in the courts and in public fora,[135] *Trafficante*-style litigation in the employment context brought by whites would transfer the burden of promoting integration from the employer to the courts. To demonstrate the removal of the vestiges of a Title VII violation, courts might require evidence of a more integrated workplace at all levels of the company, in addition to good faith compliance with relevant statutes. Courts initially will be unclear as to what their oversight role should require, especially insofar as ensuring that the work environment provides white employees with associational benefits: Will the court mandate affirmative action hiring and promotion policies virtually identical to those often struck down in *Adarand*'s wake? When will the environment be sufficiently integrated so that white employees are no longer denied those associational benefits? Questions such as these require further research and analyses, but the fact that they are challenging should not deter the use of *Trafficante*-type suits.

Finally, how broadly the courts choose to define the "work environment" may raise the potential for more lawsuits and greater concomitant civil rights enforcement. Just as the Title VIII cases following *Trafficante* extended the field of possible plaintiffs from those residing in an apartment complex in *Trafficante* to a compact neighborhood,[136] to a twelve- by thirteen-block neighborhood,[137] to a county of 900,000,[138] possible plaintiffs under Title VII could include an employee at any level of a company, or

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The court concluded that a proper plaintiff is one who is "directly injured" and not a "bystander appalled to learn that discrimination is ongoing." *Id.* at 1181. Although the specifics of the plaintiff's claim are unclear from the decision, this court's reasoning clearly endorses what the Supreme Court unequivocally rejected in *Trafficante* when it overturned the Ninth Circuit's denial of plaintiffs' standing on the grounds that they were not "direct victims" of the alleged discrimination. *See* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972), *rev'g* 446 F.2d 1158, 1163 (9th Cir. 1971).

135. *See, e.g.*, Adarand v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (adopting strict scrutiny for equal protection review of race conscious remedial measures).

136. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 377 (1982) (holding that discrimination in single housing complex does not give rise to claims of "distinct and palpable injury" throughout metropolitan area, but that such claims are valid where plaintiffs establish that they live in areas where discriminatory practices had "appreciable effect").

137. *See* Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 114 (1979) (holding that for standing analysis, there is "no categorical distinction between injury from racial steering suffered by occupants of a large apartment complex and that imposed upon residents of a relatively compact neighborhood").

138. Fair Hous. Council v. E. Bergen City Multiple Listing Serv., Inc., 422 F. Supp. 1071, 1080 (D.N.J. 1976) (holding that injury from segregated housing in county of 900,000 was "precisely the same injury" suffered by *Trafficante* plaintiffs).

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perhaps in any branch or franchise of the company.[139] Managing or supervising employees could bring *Trafficante*-type Title VII suits against discriminatory promotion practices, for example.[140] Although this strategy may stretch the application of *Trafficante* beyond its current conception, the threat of such litigation alone may act as an additional deterrent to employers who otherwise would violate Title VII with impunity.

A challenging issue for potential plaintiffs and civil rights legal institutions is whether such a strategy only reinforces the implicitly paternalistic notion that white support is necessary to further the rights of nonwhites. While some aspect of paternalism may motivate whites to file *Trafficante*-type suits, this issue underscores an unfortunate yet practical reality of the judicial system. Courts may interpret a white's charge of discrimination more seriously than a minority person's identical assertion because of a judge's predilection to believe that whites are more "objective" in discerning discrimination than the more closely-affected minority claimant.[141] Although this strategy seems to accept a terrible and unjust propensity of the judicial system, it exploits inherent biases in the courts for the gains of those who most often feel its negative effects.[142]

Moreover, this strategy also raises fundamental issues that go to the heart of U.S. culture as well as to the identities of and relationships among our nation's members. As traditional approaches toward diversity and equal opportunity are being disparaged more frequently in the national debate, *Trafficante*-style suits could help reframe the public's conception of equal opportunity from a policy that interferes with whites' individual rights to a national goal that benefits every citizen. To prevent American society from succumbing to the Kerner Commission's prognosis of "moving

139. Waters v. Heublein, Inc., 547 F.2d 466, 466 (9th Cir. 1976). Of course, the plaintiff would have to show that a specific actor who had authority over them also had authority over the segment of the company which showed evidence of discrimination.

140. The "glass ceiling" that prevents full integration of minority employees into management and supervisory positions has been well documented. *See, e.g.*, REPORTS OF THE U.S. DEP'T OF LABOR, GLASS CEILING COMMISSION (1994).

141. *See, e.g.*, *Report of the Special Committee on Race and Ethnicity to the D.C. Task Force on Gender, Race, and Ethnic Bias*, 64 GEO. WASH. L. REV. 189 (1996); *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 117 (finding that a significant percentage of attorneys view judges and lawyers as treating minority plaintiffs disparately, which impacts perceptions of a minority plaintiff's credibility); Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261 (1996).

142. *Cf.* David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 LAW & INEQUALITY 33; MARGARET A. BERGER, LITIGATION ON BEHALF OF WOMEN: A REVIEW FOR THE FORD FOUNDATION (1980). Cole and Berger both point out the irony that male plaintiffs have had far greater success at the Supreme Court level in sex discrimination cases than have female plaintiffs. Cole, *supra*, at 34; BERGER, *supra*, at 19. Cole confirms that some women's rights litigators deliberately adopted the strategy of using male plaintiffs. Cole, *supra*, at 37 (describing early approach taken by Women's Rights Project of the American Civil Liberties Union to employ male plaintiffs in major litigation).

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toward two societies, one black, one white—separate and unequal,"[143] and to avoid further exacerbation of the racial conflict and societal disruption, whites need to ensure fair employment opportunities. Another rhetorical framework would borrow from John Brown and the slavery abolitionists: the promotion of fair employment opportunities as a moral imperative, a religious or ethical command that whites must endorse and act upon to promote and realize their own humanity.[144] To reframe this issue in any of these ways might embolden those whites who would bring such a suit; the strength to speak out against employment discrimination will be difficult to amass and even more challenging to maintain throughout the litigation processes, but whites will be more satisfied with themselves and proud of their society if they have worked to make it more just.[145]

But not all whites will embrace these reconceptualizations. Although the concept of integration may rise to the level of a moral imperative for some whites, such convictions may not be sufficient to motivate many white employees. One reason is that because an applicant is generally hired by the person who would be her immediate supervisor, when minorities apply for jobs, they are perceived as potential status threats not only to the (usually male) whites in the same position, but also to those at the next highest level, including the person usually making the hiring decision.[146] There is also a reluctance to hire nonwhites in industries that have been composed historically of white employees.[147] A study that analyzed the integration of black males in a manufacturing plant in the Chicago metropolitan area found tremendous resistance among skilled white labor not only to hiring black labor and but also to sharing their skills with black workers.[148]

For many whites, before they endorse policies that benefit nonwhites and make the possibility of Title VII suits a real deterrent to employers who would discriminate, they must believe that their own self-interests are furthered.[149] Civil rights initiatives often have been most successful when

143. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, THE KERNER REPORT 1 (1968).

144. Telephone Interview with Noel Ignatiev, Founding Editor of *Race Traitor* (Oct. 18, 1999). The publication's credo is "Treason to whiteness is loyalty to humanity," and encourages whites to challenge the institutions that reproduce race as a social category and to resist and rebel against the privileges and punishments that American society projects on its citizens by virtue of their race.

145. *Id.*

146. DONALD TOMOASKOVIC-DEVEY, U.S. DEP'T OF LABOR, RACE, ETHNIC AND GENDER EARNINGS INEQUALITY: THE SOURCES AND CONSEQUENCES OF EMPLOYMENT SEGREGATION 21 (1994).

147. *See, e.g.,* BRUCE B. WILLIAMS, BLACK WORKERS IN AN INDUSTRIAL SUBURB (1987); DONALD TOMASKOVIC-DEVEY, GENDER AND RACIAL INEQUALITY AT WORK (1993).

148. *See* WILLIAMS, *supra* note 147, at 183.

149. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 525 (1980) [hereinafter Bell, *Interest-Convergence*] ("[A]s in the abolition of slavery, there were whites for whom recognition of the racial equality principle was sufficient motivation. But, as with abolition, the number who would act on morality alone was insufficient to bring about the desired racial reform.")

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there is a "racial interest convergence"—when the interests of whites and nonwhites overlap.[150] In fact, under Article III standing requirements, this racial interest convergence seems implicit; a plaintiff cannot bring suit unless her self-interests are jeopardized. Professor Derrick Bell[151] interprets this phenomenon more cynically, however, asserting not that rights of minorities can be furthered if whites' interests converge with those of nonwhites, but that "[t]he interest of blacks in achieving racial equality will be accommodated *only* when it converges with the interests of whites."[152] Whether whites' interests are to prevent unrest,[153] to further their own freedoms or profits,[154] to appear favorable in the world view,[155] or to expiate guilt,[156] their interests must be aligned with minorities' before they fight against racial injustice. While none of these theories encapsulate the profoundly complex issue of white-black relations, they suggest conceptual frameworks in which whites' *Trafficante*-type suits would not just be practical, but valuable in the minds of whites.

VIII.
CONCLUSION

If the rights of minorities are more likely to be furthered when white and minority interests converge, then it is worthwhile to frame convincing arguments that those groups' interests do in fact converge; whites have much to gain by pursuing *Trafficante* Title VII suits and enabling nonwhites to gain equal access to employment. Although little attention has been paid to the harm whites incur in segregated workplaces, in *Trafficante* and

150. DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 49 (3d ed. 1992) [hereinafter BELL, RACE, RACISM].

151. Visiting Professor, New York University School of Law, 1991-present.

152. Bell, *Interest-Convergence*, *supra* note 149, at 523 (emphasis added). *See also* BELL, RACE, RACISM, *supra* note 150, at 50 (arguing that "despite the continuing pressures exerted by some whites and many blacks, progress will occur for the group as with individuals only if most whites perceive that their interests will benefit or not suffer any serious loss").

153. Protest movements threatened continued disruptions and turmoil during the passage of the 1964 and 1968 Civil Rights Acts. In fact, the 1968 Fair Housing Act along with an antilynching law were passed only a week after the assassination of Dr. Martin Luther King, Jr.

154. BELL, RACE, RACISM, *supra* note 150, at 49.

155. Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5, 12 (1976); *see also* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) (arguing that desegregation served important foreign policy interests of federal government).

156. BELL, RACE, RACISM, *supra* note 150, at 49 (arguing that if whites allow small number of highly qualified blacks to succeed, there is a "rationalizing link between the nation's espousal of racial equity and practice of racial dominance").

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other cases, courts have found an inherent associational benefit from working in a mixed environment and free from discrimination.[157] As whites recognize the injuries endemic to working in a workplace that is polluted with discrimination, *Trafficante*-type suits will further the aims of minorities to enter historically-segregated fields and all levels of the workplace, as well as to ensure a workplace free of hostility against minorities, regardless of whether they are employees.[158] *Trafficante* hinted at, and *Waters* properly articulated, what the school desegregation cases had failed to grasp. A physically nonsegregated environment is not alone sufficient to further the goals of the Civil Rights Acts; the conditions of that integrated environment must also be free from discrimination.

The revitalization of *Trafficante*'s litigation theories, while perhaps not destined to become a primary thrust of Title VII enforcement, would nonetheless add several crucial arrows to the nearly-depleted quivers of civil rights advocates. No longer would the full onus of creating racial equality rest on those who are in the smallest number in the workplace and, arguably, in the weakest position to advocate for it. Such a strategy would encourage coalition-building initiatives between white and nonwhite employees who, as the composition of workers and consumers becomes more diverse, will become increasingly interdependent. Hopefully this article serves to remind advocates and potential litigants that the battle for equal employment opportunity can and should be waged by many members of society, and in whose mutual interests such a battle must be won.

157. *See, e.g.*, Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972); Waters v. Heublein, Inc., 547 F.2d 466, 469 (9th Cir. 1976) (noting potential for advantageous interracial associations and "the benefits of interracial harmony" at home and at work).

158. *See also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–13 (1978) (explaining constitutionality of state's interest in ensuring diversity as partly within First Amendment right to associate).

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