

1-1-2015

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Recommended Citation

Swanson, Elinor A. (2015) "A Textualist Approach to Title VII: Aggrieved Individuals May Bypass the EEOC," *Hofstra Labor & Employment Law Journal*: Vol. 32: Iss. 2, Article 4.

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A TEXTUALIST APPROACH TO TITLE VII: AGGRIEVED INDIVIDUALS MAY BYPASS THE EEOC

Elinor A. Swanson *

I. INTRODUCTION

This Article demonstrates that a textualist interpretation of Title VII of the Civil Rights Act of 1964 (“Title VII”)¹ permits aggrieved individuals to bypass the Equal Employment Opportunity Commission (“EEOC”). Current judicial doctrine considers a timely-filed EEOC charge a prerequisite to judicial recourse, serving a purpose equivalent to a judicial statute of limitations.²

This Article proves that this interpretation of Title VII’s administrative and judicial enforcement provisions is incorrect. Instead, the plain text of Title VII permits aggrieved individuals to either seek direct judicial recourse, or to delay civil action in order to first seek administrative assistance.³

A close, careful examination of Title VII’s statutory text is not

* J.D., Lewis & Clark Law School. Many thanks go to Henry Drummonds, Professor of Law at Lewis & Clark Law School, for his invaluable advice and guidance, and to my husband for his loving patience and support.

1. See Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-11, 78 Stat. 241, 253-65, (codified as amended at 42 U.S.C. § 2000e (2012)). The Civil Rights subchapter in the United States Code regarding Equal Employment Opportunities is still popularly known as Title VII. “Section 2000e was enacted as Title VII of the Civil Rights Act of 1964 . . . and remains popularly known as Title VII.” *Amin v. Quad/Graphics, Inc.*, 929 F. Supp. 73, 76 n.2, 79 (N.D.N.Y. 1996) (holding that 1991 amendments to Title VII did not apply retroactively).

2. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (holding that filing a timely EEOC charge is a judicial requirement akin to a statute of limitations), *rev’d on other grounds*, *Indep. Fed’n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989); see also *Shikles v. Sprint/United Mgmt. Co.* 426 F.3d 1304, 1317 (10th Cir. 2005) (in considering whether a different statute also had an administrative exhaustion requirement, the court stated “[i]t is well-established that Title VII requires a plaintiff to exhaust his or her administrative remedies before filing suit”).

3. See *infra* Parts II, III.

merely an intellectual exercise, although commentators have thus far avoided that textualist inquiry.⁴ The Supreme Court consistently utilizes a textualist interpretive approach to decipher the meaning of Title VII,⁵ and academics expect that trend to continue.⁶

In Part II, this Article shows that the plain text of Title VII does not require exhaustion of EEOC administrative remedies. The EEOC enforcement provisions dictate that filing a timely EEOC charge is a prerequisite to EEOC investigation and conciliation and that the judicial limitations period is tolled during EEOC enforcement activity.⁷ The judicial enforcement provisions, on the other hand, permit any aggrieved individual to file a judicial complaint in federal court, without exception.⁸ Finally, Title VII's statute of limitations is borrowed from similar state claims.⁹

In Part III, this Article demonstrates that a textualist approach to Title VII requires discarding the judicially-crafted exhaustion

4. Marvin J. Lowenthal, *A Gross Misunderstanding of Employment Discrimination*, 61 DRAKE L. REV. DISCOURSE 35, 43 (2013). Commentators dislike textualism and do not utilize it to interpret Title VII.

5. See *Wal-mart Stores v. Dukes*, 131 S. Ct. 2541, 2554-57 (2011) (J. Scalia) (holding that unstructured and unreviewed manager discretion to make employment decisions was not systemic disparate treatment discrimination, because under the Federal Rules of Civil Procedure a class action must be capable of class-wide resolution because the purported class has common questions of law or fact); *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1977-78 (2011) (concluding that state licensing laws were not preempted by federal law prohibiting national origin and alienage discrimination; the Court's opinion was determined by the section joined by Justice Thomas); *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 174-78 (2009) (determining that "but-for" causation is required in age discrimination cases because there is no statutory corollary to the "motivating factor" provision in Title VII); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 97-100 (2003) (a plaintiff may "demonstrate" discrimination under Title VII with either direct or circumstantial evidence); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-14 (2002) (the *prima facie* elements of a Title VII employment discrimination claim constitute an evidentiary standard, not a pleading burden); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109-11, 115-18 (2002) (evaluating when an alleged Title VII unlawful employment practice "occurs," the Court determined that a discrete discriminatory act happens on the day it occurs but a hostile work environment is a single employment practice that is continuing in nature and that does not occur on any particular day); *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 848-51 (2001) (front pay was not an element of compensatory damages within the meaning of the Civil Rights Act of 1991, and, therefore, was not subject to the Act's statutory cap).

6. Lowenthal, *supra* note 4, at 43. (The textualist interpretive approach "is how these [employment discrimination] statutes are interpreted, and that will not change[.]"); James Steinmann, *Nothing Inevitable About Discriminatory Hiring*: *Lewis v. City of Chicago and a Return to the Text of Title VII*, 44 LOY. L.A. L. REV. 1307, 1318 (2011) ("[T]he Court's textualist interpretation of Title VII" is cemented.).

7. Civil Rights Act § 706, 42 U.S.C. § 2000e-5(b), (e)(1) (2012).

8. § 2000e-5(f)(3).

9. § 2000e-5(c).

requirement. The plain meaning of the statutory text is unambiguous. Non-textual indications of textual meaning, including the statutory scheme and legislative history, support that conclusion.¹⁰ *Stare decisis* plays a minimal doctrinal role under the textualist approach,¹¹ but even if that were not the case, this Article shows that there is ample reason to overrule judicial precedent.

In Part IV, this Article recommends that courts permit aggrieved individuals to seek judicial recourse without first filing an EEOC charge. Though textualism is popularly understood to be a conservative interpretive approach unlikely to favor victims of employment discrimination, Supreme Court precedent contradicts that assumption.¹² Even interpreting the text in light of non-textual context, however, this Article shows that courts should permit aggrieved individuals to bypass the EEOC.

II. THE PLAIN TEXT OF TITLE VII DOES NOT REQUIRE AGGRIEVED INDIVIDUALS TO EXHAUST ADMINISTRATIVE REMEDIES

A textualist statutory interpretation of Title VII must begin with the text.¹³

A. The EEOC Enforcement Provisions are Silent Regarding Direct Judicial Recourse

The relevant Title VII text,¹⁴ with notations, is as follows:

§ 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

10. See *infra* Part III.B.

11. Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 50-51 (2001).

12. See Steinmann *supra* note 6, at 1319 (the “oft-labeled ‘conservative’ textualist approach actually led to the less-conservative result [in Title VII claims] by appropriately protecting the looser standard on limitation-periods.”).

13. See *infra* Part III.A.

14. For purposes of brevity, a summary of the pertinent text is sometimes provided where the exact language is irrelevant to this Article’s analysis.

The plain text of § 2000e-5(a) describes EEOC enforcement authority and is silent regarding judicial enforcement authority.¹⁵ The EEOC's enforcement authority is described as the power "to prevent" Title VII violations, and courts are instructed that subsequent provisions "as hereinafter provided" will further delineate the EEOC's authority.¹⁶

The EEOC's power to "prevent" is the power to "render impractical or impossible" employment discrimination that is intended, possible, or likely to occur in the future.¹⁷ The word "prevent" is temporal, implying that the EEOC might not have authority to redress the wrongs of the past. The future-tense language reflects the EEOC's public purpose, i.e., to eradicate employment discrimination on behalf of the public interest,¹⁸ rather than to remedy the wrongs of the past.

1. A Timely-Filed EEOC Charge is a Prerequisite to EEOC Enforcement Action

EEOC enforcement activity is triggered if an EEOC charge is timely-filed either "by" an aggrieved individual, "on behalf of" an aggrieved individual, or by a member of the EEOC.¹⁹ EEOC enforcement activity cannot be triggered, however, without such a timely-filed EEOC charge.²⁰

15. 42 U.S.C. § 2000e-5(a) (2012).

16. *Id.*

17. *Fowler v. United States*, 131 S. Ct. 2045, 2051 (2011) (The word "prevent" means "to render . . . impractical or impossible" an action which (1) was intended, (2) was possible, or (3) was likely to have otherwise occurred); BLACK'S LAW DICTIONARY 1352 (4th ed. 1968) ("To hinder, frustrate, prohibit, impede, or preclude; to obstruct; to intercept. . . . To stop or intercept the approach, access, or performance of a thing.").

18. *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 675, 682 (5th Cir. 1985) ("[T]he EEOC exists to represent the public interest in equal employment opportunity.").

19. 42 U.S.C. § 2000e-5(b) ("Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, . . . the Commission shall serve a notice of the charge . . . shall make an investigation thereof.").

20. See Richard K. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOK. L. REV. 62, 82 (1965) ("The Commission is not authorized . . . to conduct an investigation in the absence of a formal charge. This is a serious lack since . . . nondiscrimination agencies can achieve more positive results through broad investigations of employment patterns and practices than through procedures geared to the resolution of individual complaints.").

§ 2000e-5

* * * *

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings²¹

* * * *

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission²²

* * * *

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days²³ after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the [employer] . . . within ten days . . . [unless] the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief . . . such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be

21. 42 U.S.C. § 2000e-5(c). The omitted text of 42 U.S.C. § 2000e-5(c) provides that “no [EEOC] charge may be filed . . . by the person aggrieved” while the aggrieved individual seeks State or local law relief until sixty days have passed since the proceeding commenced.

22. § 2000e-5(d). Pursuant to the omitted text of 42 U.S.C. § 2000e-5(d), if an EEOC charge is filed by an EEOC member, the EEOC must notify relevant State or local officials before taking action with respect to the charge, and, upon request, must afford the authority a reasonable time to take action.

23. § 2000e-5(e). Originally, Title VII here provided that an EEOC charge “shall be filed within ninety days after the alleged unlawful employment practice occurred[.]” Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(d), 78 Stat. 241, 260 (current version at 42 U.S.C. § 2000e-5(e)).

filed by the Commission with the State or local agency.²⁴

In context, the EEOC charge-filing period is intended to limit the EEOC's enforcement authority. The original, un-amended version of § 2000e-5(e) prohibited the EEOC from acting on an EEOC charge filed more than ninety days after a Title VII violation.²⁵ EEOC action was thereby limited to Title VII violations likely to continue or recur in the future, either because they occurred recently or were ongoing. The extremely short EEOC charge-filing period thus paralleled the preventative nature of the EEOC's enforcement authority.

The ordinary meaning of the word "shall" is construed as an imperative mandate if it alters an individual's rights or benefits.²⁶ The word "shall" in the EEOC charge-filing period²⁷ of the EEOC enforcement provisions is a mandatory prerequisite to EEOC action. EEOC action can be initiated, however, "on behalf of" an aggrieved individual or by the EEOC, without action by an aggrieved individual.²⁸ Although the EEOC is required to notify an employer if an EEOC charge has been filed, there is no similar requirement that the EEOC notify an aggrieved individual that an EEOC charge has been filed.²⁹ The aggrieved individual thus need not file an EEOC charge in order to

24. *Id.* § 2000e-5(e)(1).

25. Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(d), 78 Stat. 241, 260. Title VII Section 706(d) ("[An EEOC charge] shall be filed within ninety days after the alleged unlawful employment practice occurred[.]"). The statute as amended now provides that "[an EEOC] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred[.]" 42 U.S.C. § 2000e-5(e)(1). The provision also permits the EEOC to obtain judicial relief on behalf of an aggrieved individual for compensation discrimination occurring outside the EEOC filing period in limited circumstances. *See* 42 U.S.C. § 2000e-5(e)(3)(A)-(B).

26. *In re Stewart*, 14 B.R. 959, 960 (Bankr. N.D. Ohio 1981) (quoting *Escoe v. Zerbst*, 295 U.S. 490 (1935)); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999) ("It is a basic canon of statutory construction that use of the word 'shall' indicates mandatory intent. . . . As used in statutes . . . [shall] is generally imperative or mandatory." (citations omitted) (internal quotation marks omitted)); *see* BLACK'S LAW DICTIONARY, *supra* note 17, at 1541-42 (definition of shall) ("As used in statutes, contracts, or the like, this word is generally imperative or mandatory. . . . But it may be construed as merely permissive or directory (as equivalent to 'may,') to carry out the legislative intention Also, as against the government, it is to be construed as 'may,' unless a contrary intention is manifest.").

27. 42 U.S.C. § 2000e-5(e)(1).

28. *Id.*

29. The EEOC is required to notify an aggrieved individual if an EEOC charge has been dismissed, or if the EEOC has failed to take timely action regarding an EEOC charge. 42 U.S.C. § 2000e-5(f)(1). The EEOC is not required, however, to notify an aggrieved individual that an EEOC charge has been filed or that EEOC has commenced investigation or conciliation. *See* 42 U.S.C. § 2000e-5(b), (e).

initiate EEOC action and might not even be notified that an EEOC charge has been filed or that EEOC enforcement activities are underway.³⁰

An aggrieved individual is not a necessary party to EEOC investigations, is not involved in any adversarial procedures before the EEOC, and is not bound by the EEOC's decision.³¹ The word "shall" in the EEOC charge-filing period is therefore a permissive directive as to an aggrieved individual.³² If an aggrieved individual wishes for EEOC assistance, the individual will need to file a timely EEOC charge if another party has not yet taken that step.³³ An EEOC charge does not, however, relate to the aggrieved individual's judicial rights or benefits under the judicial enforcement provisions.³⁴

2. The Judicial Statute of Limitations is Told During EEOC Involvement

The pertinent Title VII equal employment opportunity text,³⁵ with notations, is as follows:

§ 2000e-5(f)

(1) If the EEOC is unable to conciliate, the EEOC may bring a civil action against a private employer.³⁶ If the EEOC receives an EEOC charge "pursuant to subsection (b)" and dismisses it, or if the EEOC fails to take timely action, defined as 180 days, or 300 days if preceded by state administrative action under section § 2000e-5(d),³⁷

30. See § 2000e-5(b).

31. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 799 (1973) (One of the Court's holdings was that, "in view of the large volume of complaints before the Commission and the nonadversary character of many of its proceedings, court actions under Title VII are de novo proceedings and . . . a Commission 'no reasonable cause' finding does not bar a lawsuit in the case." (citations omitted) (internal quotation marks omitted)).

32. 42 U.S.C. § 2000e-5(e)(1).

33. See 42 U.S.C. § 2000e-5(b), (e)(1).

34. See *infra* notes 46-47.

35. For purposes of brevity, a summary is sometimes provided where the complete, exact language is irrelevant to this Article's topic. Quotation marks indicate direct quotes.

36. 42 U.S.C. § 2000e-5(f). The EEOC did not have this authority to bring a civil action in the 1964 enactment of Title VII. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(e), 78 Stat. 241, 260.

37. 42 U.S.C. § 2000e-5(f)(1). Title VII originally tolled the limitations period during EEOC enforcement without that restriction, leaving both aggrieved individuals and employers in indefinite limbo for the duration of the EEOC's proceedings. See Pub. L. No. 88-352, § 706(e)-(f), 78 Stat. 241, 260-61. After Title VII was enacted, Congress heard testimony

the EEOC must notify the aggrieved person, and “a civil action may be brought” within ninety days of that notice “(A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.” The court may permit the EEOC to intervene if the case is of general public importance, and upon request may stay proceedings for sixty days pending termination of state or local proceedings or further EEOC efforts to obtain voluntary compliance. (2) If the EEOC receives an EEOC charge and determines that prompt judicial action is necessary, the EEOC may seek temporary or preliminary judicial relief pending final disposition of such charge.)³⁸

Under the plain text, 42 U.S.C. § 2000e-5(f)(1), (2) applies only when EEOC enforcement authority has been properly triggered by an EEOC charge. That provision does not apply, and thus does not bar judicial recourse, if EEOC enforcement authority has *not* been properly triggered.³⁹ If EEOC enforcement authority has been triggered by a timely-filed EEOC charge, 42 U.S.C. § 2000e-5(f)(1) permits the judicial statute of limitations to be tolled during federal and state administrative enforcement proceedings, for 120 days and 180 days, respectively, plus an additional ninety days to provide an aggrieved individual with adequate notice that the tolling period has come to an end.⁴⁰ For most aggrieved individuals, the effective statutory tolling period is more than one year the period is 390 days, including the ninety-day period following the EEOC’s right-to-sue letter,⁴¹ or even

showing that the EEOC often took “2 to 3 years before final conciliation procedures,” and thus amended the statute to create an earlier exit from administrative procedures. H.R. REP. NO. 92-238, at 12, 54-55 (1971).

38. 42 U.S.C. § 2000e-5(f)(2).

39. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392, 394 (1982) (“The provision specifying the time for filing charges with the EEOC appears as an entirely separate provision [from the grant of judicial jurisdiction], and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.”), *rev’d on other grounds*, *Indep. Fed’n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989). *Zipes* held that “filing timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court,” but is instead a judicial requirement akin to a statute of limitations. *Id.* at 393.

40. 42 U.S.C. § 2000e-5(f)(1).

41. *Love v. Pullman Co.*, 404 U.S. 522, 525-27 (1972) (approving the EEOC’s procedure of referring an EEOC charge to the appropriate state agency before processing the charge); *EEOC v. Commercial Office Prod. Co.*, 486 U.S. 107, 124 (1988) (effectively extending the filing period to 300 days for claimants living in states with civil rights agencies, because a contrary holding “would confuse lay complainants” and “embroil the EEOC in complicated issues of state law”). Similarly, as a matter of policy rather than statutory

longer if the EEOC does not provide a timely right-to-sue letter.⁴² As a result of this statutory tolling, an aggrieved individual might bring a civil action under Title VII regarding employer conduct that occurred many years earlier.⁴³

The statutory tolling mechanism ensures that aggrieved individuals can obtain EEOC assistance without losing the right to seek judicial recourse at a later date.⁴⁴ It also prevents employers from stalling during EEOC investigations and conciliation efforts in the hope that the statute of limitations will run on the underlying grievances.⁴⁵

B. Title VII's Judicial Enforcement Provisions Explicitly Permit Direct Judicial Recourse

The grant of judicial jurisdiction under 42 U.S.C. § 2000e-5(f)(3) signifies the end of the EEOC enforcement provisions⁴⁶ and the beginning of the judicial enforcement provisions.⁴⁷ The grant of judicial jurisdiction was originally titled section 706(f), and was placed beside a side-bar notation: "Courts. Jurisdiction."⁴⁸

interpretation, laypersons and the judiciary should be able to avoid interpreting complicated issues of administrative law regarding the timeliness of an EEOC charge. *Id.*

42. *Burgh v. Borough Council of Montrose*, 251 F.3d 465, 470 (3d Cir. 2001) (holding that Title VII does not borrow from the statute of limitations, thus the two year state statute of limitations never began to run and "[n]othing in the statute . . . requires a complainant to request a right-to-sue letter"). *Id.* at 470-73.

43. *Id.* at 471-73 (Pennsylvania's two-year statute of limitations period did not bar an employee's Title VII claim even though the employee requested an EEOC right-to-sue letter over three years after state and federal agency charges were filed). In the Fourth, Eighth, and Ninth Circuits, a laches defense may not be available where a claimant merely delayed in requesting, or waited for, the EEOC to issue a right-to-sue letter. *See Ashely v. Boyle's Famous Corned Beef, Co.* 66 F.3d 164, 167-70 (8th Cir. 1995) (rejecting the argument that a Title VII plaintiff should be barred from pursuing pay discrimination claims because she waited to challenge a pay disparity for over seven years; reasoning that separation of powers principles dictate that federal courts may not apply laches to bar a federal statutory claim that is timely-filed under an express federal statute of limitations); *Brown v. Cont'l Can Co.*, 765 F.2d 810, 815 (9th Cir. 1985) (although a plaintiff waited six years to file civil suit after filing an EEOC charge, "complainants are not required to terminate the administrative process by requesting a notice of right-to-sue"); *Holley v. Armour & Co.*, 743 F.2d 199, 211 (4th Cir. 1984) (an employer could not use a laches defense against a plaintiff's decision to file an action over four years after filing an administrative charge, because awaiting completion of administrative process is not inexcusable delay).

44. *See Burgh*, 251 F.3d at 473-74.

45. *Id.*

46. *See* Civil Rights Act of 1964 § 706(a)-(e), 42 U.S.C. §§ 2000e-5(a)-(f)(2) (2012).

47. *See* 42 U.S.C. §§ 2000e-5(f)(3)-(g).

48. Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(f), 78 Stat. 241, 260. Although such statutory context "cannot limit the plain meaning of the text," it is of use when it "sheds light on

1. An Aggrieved Individual is Not Required to Seek EEOC Assistance Prior to Bringing Civil Suit

The relevant Title VII equal employment opportunity text,⁴⁹ with notations, is as follows:

§ 2000e-5

* * * *

(f) (3) Each United States district court . . . shall have jurisdiction of actions brought under this subchapter.⁵⁰ Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed[.]

* * * *

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.⁵¹ Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce

some ambiguous word or phrase.” Pa. Dep’t of Corr. v. Yeskey, 524 U.S. 206, 209-12 (1998) (considering application of Title II to state prison inmates).

49. For purposes of brevity, a summary of the pertinent text is sometimes provided where the exact language is irrelevant to this Article’s analysis.

50. As originally enacted, this provision granted judicial jurisdiction “of actions brought under this title.” § 706(f), 78 Stat. at 260-61.

51. Title VII as originally enacted did not include the language “but is not limited to . . . or any other equitable relief as the court deems appropriate.” § 706(g), 78 Stat. 241, 261 (codified as amended at 42 U.S.C. § 2000e-5(g) (2012)).

the back pay otherwise allowable.⁵²

According to the plain text, judicial courts have jurisdiction under 42 U.S.C. § 2000e-5(f)(3) whenever an action is brought under Title VII, without exception. “[Congress provided a] deliberately broad grant of access to federal courts in 42 U.S.C. § 2000e-5(f)(3), which . . . counsel[s] against erecting bars to Title VII claims where Congress does not clearly seek to limit jurisdiction with a restriction.”⁵³ There is no requirement, according to the text, that an aggrieved individual must first seek EEOC assistance by filing an EEOC charge.⁵⁴

Under 42 U.S.C. § 2000e-5(g), judicial enforcement authority exists whenever the court finds that an employer has violated Title VII as alleged “in the complaint,” also without qualification or reference to an EEOC charge.⁵⁵ This omission is a significant textual indication of Congressional purpose.⁵⁶ Congress was capable of drafting language that explicitly required administrative exhaustion, as demonstrated by the defeated Thurmond Amendment proposing mandatory exhaustion of all administrative remedies before commencing private litigation under Title II.⁵⁷ As stated by one academic shortly after Title VII was enacted, “there is no provision [in Title VII] which specifically requires

52. 42 U.S.C. § 2000e-5(f)(3)-(g).

53. *Adamov v. U.S. Bank Nat’l Ass’n*, 726 F.3d 851, 855-56 (6th Cir. 2013) (holding that exhaustion of administrative remedies is not a jurisdictional requirement for a Title VII retaliation claim).

54. *Id.* at 856 (“[After 42 U.S.C. § 2000e-5(f)(1), Title VII] says no more about the exhaustion requirement or any connection between the EEOC process and a limit on courts’ jurisdiction to hear Title VII cases.”); *see also* *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-94 (1982) (holding that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but is instead a judicial requirement akin to a statute of limitations), *rev’d on other grounds*, *Indep. Fed’n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989); *Jackson v. Seaboard Coast Line R.R. Co.*, 678 F.2d 992, 1001-02 (11th Cir. 1982) (“[42 U.S.C. § 2000e-5(f)(3)] unconditionally confers jurisdiction Nothing in the express language . . . [suggests that jurisdiction] is conditioned upon the fulfillment of other procedural requirements. . . . We cannot conclude that Congress’ omission of such qualifying language was inadvertent. . . . [I]f Congress had wanted to limit . . . [jurisdiction,] it certainly knew how to do it. . . . Congress [instead] conferred jurisdiction . . . without special reference to [the EEOC enforcement provisions.]” (citations omitted)).

55. 42 U.S.C. § 2000e-5(g)(1).

56. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2008) (“[I]t is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion[.]” (internal quotation marks omitted)). “We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.” *Id.* at 454.

57. 88 CONG. REC. 13904-05 (1964).

prior recourse or makes such recourse a jurisdictional prerequisite—devices which have been used elsewhere by Congress to make clear its intention.”⁵⁸

Both an aggrieved individual and an employer accused of employment discrimination may benefit in a variety of ways from participating in EEOC enforcement proceedings.⁵⁹ Nonetheless, the text of Title VII permits complainants to directly seek judicial recourse.⁶⁰ Aggrieved individuals should not be penalized for choosing to directly file a civil action, rather than tolling the judicial limitations period in order to seek EEOC administrative assistance.⁶¹

Under established judicial doctrine at the time Title VII was enacted, it was well-settled that Congress intended the federal courts to be “the chief—though not always the exclusive—tribunals for enforcement of federal rights.”⁶² When “federally secured rights” were invaded and a “federal statute provide[d] for a general right to sue for

58. Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968*, 82 HARV. L. REV. 834, 853, 855 (1969) (after examining the text, legislative history, statutory context, and procedural scheme of Title VII, the Author concluded that courts should permit direct access to avoid a “purely formal and useless delay”); see also Note, *Employment Opportunity: Class Membership for Title VII Action Not Restricted to Parties Previously Filing Charges With the EEOC*, 1968 DUKE L.J. 1000, 1001 (1968) (“The ‘permissive rather than prohibitive’ tenor . . . casts considerable doubt on the necessity of prior filing with the EEOC. The statute itself does not explicitly state that an individual may not sue unless he has filed with the EEOC—a procedural prerequisite which could have been expressly provided for by Congress.”).

59. *Id.* at 845-46 (“[The EEOC] procedure has several advantages. The respondent may be able to explain and justify or rectify his action without the public condemnation entailed in a more formal proceeding. The agency’s attempt to conciliate will generally be less disruptive and less expensive than a court trial or full agency hearing. And, perhaps most important, the absence of direct coercion by the government may help lessen the antagonism between the parties and encourage reasonable settlement. . . . Conciliation is a device that may reach the cause of the problem—the individual prejudice which leads to discrimination—whereas a court order is likely to reach only the effects of the discrimination. Also, informal agency action may open doors to the poor and unsophisticated—the groups most commonly subjected to . . . employment discrimination—which would otherwise remain effectively closed because of the complexity and expense of formal proceedings. Finally, in the process of conciliation the type of relief the complainant can achieve is in theory unlimited.”); Arthur M. Brewer, Comment, *Title VII: How To Break The Law Without Really Trying*, 21 CATH. U. L. REV. 103, 105 (1971) (“Although the EEOC’s enforcement powers are limited, its investigatory powers are far [-]reaching.”).

60. See Civil Rights Act of 1964 § 706, 42 U.S.C. § 2000e-5(g)(2)(B) (2012).

61. The “general policy of the law [is] to find a way to prevent the loss of valuable rights, not because something was done too late, but rather because it was done too soon.” *Pinkard v. Pullman-Standard, a Div. of Pullman, Inc.*, 678 F.2d 1211, 1218 (5th Cir. 1982) (quoting *Avery v. Fischer*, 360 F.2d 719, 723 (5th Cir. 1966)).

62. *McNeese v. Bd. of Educ. for Cmty. Unit Sch. Dist. 187, Cahokia, Ill.*, 373 U.S. 668, 671-72 (1963).

such invasion,” federal courts were expected to “use any available remedy to make good the wrong done.”⁶³ It is therefore unlikely that Congress intended to require EEOC administrative exhaustion prior to civil suit, as that would limit judicial remedies. “Unlike so many Governmental structures in administrative law, EEOC is an administrative agency without the power of enforcement. . . . The burden of enforcement rests on the individual through his suit in Federal District Court.”⁶⁴ The Supreme Court therefore erred when it concluded that compliance with the EEOC charge-filing period is a judicial requirement akin to a statute of limitations.⁶⁵

2. Title VII Borrows from State Statutes of Limitations for Similar State Claims

Current judicial doctrine treats EEOC’s administrative deadlines as judicial statutes of limitations.⁶⁶ Courts therefore do not apply state statutes of limitations to Title VII claims, because in their view a federal limitations period is applicable.⁶⁷ The judicial enforcement provisions are silent, however, regarding the judicial statute of limitations for Title VII civil actions.⁶⁸

As a general rule, when there is no specifically stated or otherwise relevant federal statute of limitations for a cause of action, the controlling limitations period is the most appropriate one provided by state law.⁶⁹ From 1830 to the modern era, the Supreme Court has

63. *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) (citations omitted) (internal quotation marks omitted) (“When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.”).

64. *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1005, 1007 (5th Cir. 1969) (holding that a party who files an EEOC charge is exercising a protected right under Title VII and thus may not be discharged in retaliation).

65. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (“We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.”), *rev’d on other grounds*, *Indep. Fed’n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989). The Court came to that conclusion without considering the possibility that filing a timely EEOC charge might be neither a jurisdictional prerequisite nor a judicial requirement akin to a statute of limitations. *See generally id.*

66. *Id.* at 393.

67. *Kirk v. Rockwell Int’l Corp.*, 578 F.2d 814, 819 (9th Cir. 1978) (holding state statutes of limitations do not apply to private Title VII actions), *cert. denied*, 439 U.S. 1004 (1978).

68. *See* Civil Rights Act of 1964 § 706, 42 U.S.C. §§ 2000e-5(f)(3)-(g) (2012).

69. *See Runyon v. McCrary*, 427 U.S. 160, 180-81 (1976) (referring to the Civil Rights

consistently made clear “that state statutes of limitations govern the timeliness of federal causes of action unless Congress has specifically provided otherwise.”⁷⁰ “In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State’s wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim.”⁷¹

Congressional silence regarding the statute of limitations is common in civil rights legislation.⁷² In each case, courts have borrowed the state statutes of limitations for similar state claims.⁷³ Similarly, because Title VII judicial enforcement provisions are silent regarding the statute of limitations for aggrieved individuals seeking judicial recourse, the Title VII statute of limitations is borrowed from state claims.⁷⁴

III. A TEXTUALIST APPROACH TO TITLE VII REQUIRES ABANDONING FIFTY YEARS OF JUDICIAL PRECEDENT

A. Judicial Interpretation Begins, and Ends, With the Statutory Text

Unsurprisingly, the textualist interpretive approach does not stray far from the text, if at all. The basic premise of textualism is that “judges must seek and abide by the public meaning of the enacted text, understood in context” and “choose the letter of the statutory text over its spirit.”⁷⁵

Textualists “do not start from the premise that [the statutory]

Act of 1866); *Cope v. Anderson*, 331 U.S. 461, 463, 465 (1947); *O’Sullivan v. Felix*, 233 U.S. 318, 321-22 (1914); *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 397 (1906); *Campbell v. Haverhill*, 155 U.S. 610, 613, 616, 618 (1895) (referring to the Patent Act).

70. *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703-04 (1966) (citing *McCluney v. Silliman*, 28 U.S. (3 Pet.) 270, 277 (1830)).

71. *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 464 (1975).

72. See Timothy A. Kelley, Note, *Labor Law Gap-Filling: Federal Common Law Ideals Versus Litigation Realities*, 72 OHIO ST. L.J. 437, 441 (2011); see, e.g., 20 U.S.C. §§ 1681-1688 (2012); 42 U.S.C. § 1981; 42 U.S.C. § 1983; 42 U.S.C. § 1985 (illustrating that the statute of limitations is not mentioned within several federal statutes).

73. *Lyons v. Metro. Nashville & Davidson Cnty.*, 416 F. App’x 483, 491 (6th Cir. 2011) (“The statute of limitations for an action alleging a violation of civil rights under 42 U.S.C. § 1983 is the applicable state limitations period governing personal injury claims.”).

74. See *UAW*, 383 U.S. at 703-05 (illustrating that without a governing federal provision the court is not obligated to provide a provision and will look to the “appropriate state statute of limitations”).

75. See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005).

language is imprecise,”⁷⁶ or seek out ambiguity where none exists.⁷⁷ Once a textualist determines that the text is unambiguous, courts “must apply the statute according to its terms.”⁷⁸ The text, as enacted by Congress, trumps even Congressional intent.⁷⁹ Thus, in the face of unambiguous text, legislative history and other non-textual clues are irrelevant.⁸⁰ “When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’”⁸¹

Nothing outside the four corners of a statute “constitutes ‘a Law’ within the meaning of the Bicameralism and Presentment Clause of Article I, § 7[.]”⁸² A textualist might therefore refuse to examine non-textual evidence of statutory meaning even when a statute contains *ambiguous* text.⁸³

76. *United States v. LaBonte*, 520 U.S. 751, 757 (1997).

77. Elliott M. Davis, Note, *The Newer Textualism: Justice Alito’s Statutory Interpretation*, 30 HARV. J.L. & PUB. POL’Y 983, 998 (2007) (“Justice Scalia would have the Court ‘try to find a preferred reading, based on textual and structural arguments, and only if it cannot reach a preferred reading should it conclude the text is ambiguous.’”); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”); see also *Dodd v. United States*, 545 U.S. 353, 357 (2005).

78. *Carcieri v. Salazar*, 555 U.S. 379, 380, 387 (2009).

79. *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 122 (2007) (Scalia, J., dissenting) (“The only sure indication of what Congress intended is what Congress enacted; and even if there is a difference between the two, the rule of law demands that the latter prevail.”).

80. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (“As the conclusion we reach today is directed by the text . . . we need not assess the legislative history of the . . . provision.”); *United States v. Gonzales*, 520 U.S. 1, 6 (1997) (“Given [a] straightforward statutory command, there is no reason to resort to legislative history.”); *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (“But we do not resort to legislative history to cloud a statutory text that is clear.”).

81. *Barnhart*, 534 U.S. at 462 (citing *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). See *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (“As in any case of statutory construction, our analysis begins with ‘the language of the statute.’ And where the statutory language provides a clear answer, it ends there as well.” (citation omitted)).

82. *Zedner v. United States*, 547 U.S. 489, 509-10 (2006) (Scalia, J., concurring) (“I concur in the opinion of the Court with the exception of its discussion of legislative history For reasons I have expressed elsewhere, I believe that the only language adopted in a fashion that entitles it to our attention, is the text of the enacted statute. Here, the Court looks to legislative history even though the remainder of its opinion amply establishes that the . . . Act is unambiguous. . . . Use of legislative history in this context thus conflicts not just with my own views but with this Court’s repeated statements that when the language of the statute is plain, legislative history is irrelevant.” (citations omitted)). See Davis, *supra* note 77, at 988-89 (“Textualists argue that only the statutory text has passed the constitutional requirements of bicameralism and presentment, and that judicial reliance on unenacted intentions or purposes ‘disrespects the legislative process.’ . . . [Thus] the search for intent should be restricted to what can be discerned from the statutory text.”).

83. See *Zuni Pub. Sch. Dist. No. 89*, 550 U.S. at 121 (Scalia, J., dissenting) (“It is bad enough for this Court to consider legislative materials beyond the statutory text in aid of

B. Non-Textual Interpretive Tools Confirm the Conclusion that Title VII's Text is Dispositive

1. Title VII is Part of a Sweeping Statutory Scheme

The Title VII Equal Employment Opportunity provisions are part of the Civil Rights subchapter of the United States Code.⁸⁴ The Civil Rights subchapter describes each individual's civil right to equal treatment in places of public accommodation,⁸⁵ public facilities,⁸⁶ public education,⁸⁷ and employment.⁸⁸ Congress also granted the Attorney General⁸⁹ and civil rights government agencies⁹⁰ strictly limited authority to seek out and penalize recent or ongoing discrimination, in light of the public interest in eradicating discrimination.⁹¹ The Civil Rights subchapter therefore has two separate goals: first, to vindicate

resolving ambiguity, but it is truly unreasonable to *require* such extratextual evidence as a precondition for enforcing an *unambiguous* congressional mandate." (alteration in original) (citing *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 73-74 (2004))).

84. See 42 U.S.C. §§ 2000e-2000e-17 (2012).

85. 42 U.S.C. § 2000a(a) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin.").

86. 42 U.S.C. § 2000b-2 ("[T]he right of any person to sue for or obtain relief in any court against discrimination in any [public] facility . . .").

87. 42 U.S.C. § 2000c-8 ("Nothing in this subchapter shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education.").

88. See 42 U.S.C. § 2000e-2(a)(1) (An employer may not "discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment"); 42 U.S.C. § 2000e-5(g)(1) ("If the court finds that the [employer] has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, . . . or any other equitable relief as the court deems appropriate.").

89. See, e.g., 42 U.S.C. § 2000a-5(a) (referring to public accommodations); 42 U.S.C. § 2000b(a) (referring to public facilities); 42 U.S.C. § 2000c-6(a) (referring to public education); 42 U.S.C. § 2000e-6(a).

90. See, e.g., 42 U.S.C. § 1975a(a), (d) (granting the United States Commission on Civil Rights investigative and advisory functions); 42 U.S.C. § 2000e-4(g) (granting the EEOC authority to assist employer's with compliance and to intervene in an unlawful employment civil action); 42 U.S.C. § 2000e-5(a)-(f) (granting the EEOC the authority to respond to an EEOC charge of ongoing or very recent employment discrimination; to investigate the charge; to attempt conciliation or to bring a civil action against the employer upon the determination of reasonable cause; and sets up that the limitations period for possible subsequent civil action is tolled during these EEOC procedures); 42 U.S.C. § 2000f (granting the United States Commission on Civil Rights authority to recommend that the Secretary of Commerce conduct voter registration and voting statistics).

91. See 42 U.S.C. §§ 2000e-2000e-17.

private civil rights of aggrieved individuals; and second, to eradicate discrimination as a matter of public interest.⁹²

In the past, courts have advocated a broad reading of Title VII, including the enforcement provisions, in order to provide laypersons with judicial recourse.⁹³ The rule that “remedial statutes should be liberally construed”⁹⁴ is not one that textualists follow.⁹⁵ Nonetheless, the broad purpose of Title VII, set within the even-broader Civil Rights Act, logically reinforces the conclusion that when Congress outlined the EEOC’s federal enforcement authority, it did not intend to thereby limit private judicial recourse.⁹⁶

2. Title VII Legislative History Indicates that Aggrieved Individuals May Directly Seek Judicial Recourse

Textualists have often derided legislative history as a source of interpretive authority,⁹⁷ sometimes even if the statutory text is

92. See *Developments in the Law - Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1196 (1971) (“Underlying Title VII is the public interest in eliminating employment discrimination . . . [and] the private individual’s interest in securing equal employment opportunity.”).

93. See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982) (“[A] technical reading [of Title VII’s filing provisions] would be ‘particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.’” (quoting *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972))), *rev’d on other grounds*, *Indep. Fed’n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989); see also *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 685 (5th Cir. 1985) (“It should go without saying that [T]itle VII merits the most generous of applications. This has been and remains the tradition of civil rights litigation in the federal courts—a tradition of solicitude for [aggrieved individuals] . . . [due to] the disparities between litigants in employment discrimination suits[.]”).

94. *Clodfelter v. Republic of Sudan*, 720 F.3d 199, 211 (4th Cir. 2013) (quoting *Peyton v. Rowe*, 391 U.S. 54, 65 (1968)); see also *Jefferson Cnty. Pharm. Ass’n v. Abbott Labs.*, 460 U.S. 150, 159 (1983) (“Because the Act is remedial, it is to be construed broadly to effectuate its purposes.”).

95. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 27-29 (Princeton University Press, 1997) (statement of Scalia, J.) (“[The rule] that ‘remedial statutes’ are to be liberally construed” is “artificial,” “dice-loading,” and “increase[s] the unpredictability, if not the arbitrariness, of judicial decisions.”); *Holland v. Williams Mountain Coal Co.*, 256 F.3d 819, 823 (D.C. Cir. 2001) (Furthering, that the source of courts’ authority to impose the rule is questionable, because “[a]ll statutes seek to remedy some problem, so the maxim does nothing to identify what statutes should be ‘liberally construed’ (assuming that phrase to have a discrete meaning)” (citation omitted)), *rev’d*, 496 F.3d 670 (2007).

96. See *Harris*, 768 F.2d at 684-85.

97. See *Zedner v. United States*, 547 U.S. 489, 510-11 (2006) (Scalia, J., concurring) (“It may seem that there is no harm in using committee reports and other such sources when they are merely in accord with the plain meaning of the Act. But this sort of intellectual piling-on has addictive consequences. To begin with, it accustoms us to believing that what is said by a single person in a

ambiguous.⁹⁸ Even to the extent legislative history indicates legislative intent, legislative intent must take a backseat to legislative text.⁹⁹ For some textualists, however, it might be possible for the legislative history to clarify the meaning of the legislative text.¹⁰⁰

One reason to avoid the legislative history is that it can be intentionally tainted—members of Congress may manufacture legislative history in order to influence textual meaning.¹⁰¹ Courts looking to Title VII's legislative history for interpretive guidance should proceed with caution, as there is evidence that Title VII's legislative history was in fact altered in just that manner.¹⁰² Nonetheless, the legislative history relating to whether Title VII might include an administrative exhaustion requirement has no indication of self-conscious manipulation, in part because Title VII's enforcement provisions were completely overhauled near the end of the legislative

floor debate or by a committee report represents the view of Congress as a whole There is no basis either in law or in reality for this naive belief. Moreover, if legislative history is relevant when it confirms the plain meaning of the statutory text, it should also be relevant when it contradicts the plain meaning, thus rendering what is plain ambiguous. . . . [T]he use of legislative history is illegitimate and ill advised in the interpretation of any statute"; *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002) ("[A] typical story of [the] legislative battle among interest groups, Congress, and the President.").

98. See *supra* Part III.A.

99. *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 117, 119 (2007) (Scalia, J., dissenting) ("The only thing we know for certain both Houses of Congress (and the President, if he signed the legislation) agreed upon is the text. . . . I do not believe that what we are sure the Legislature *meant* to say can trump what it *did* say. Citizens arrange their affairs not on the basis of their legislators' unexpressed intent, but on the basis of the law as it is written and promulgated.").

100. See *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 504 (2006) (statement of Alito, J.) ("I think [reference to legislative history] needs to be done with caution. Just because one member of Congress said something on the floor, obviously that doesn't necessarily reflect the view of the majority who voted for the legislation."); Davis, *supra* note 77, at 984 ("Alito brings a markedly different flavor of textualism to the Court. For him the text of the statute still reigns supreme, but legislative history can be used to establish the context in which the statute should be read.").

101. See Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1323 (1990).

102. See 110 CONG. REC. 6419 (1964) (statement of Sen. Morse) ("Those Senators [debating the bill] cannot agree on any part of the bill. They cannot agree on definitions. They cannot agree on meanings. What can we expect the courts to do when they come to consider legislation about which Senators are in such disagreement?"); Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 444 (1966) ("Seldom has similar legislation been debated with greater consciousness of the need for 'legislative history,' or with greater care in the making thereof, to guide the courts in interpreting and applying the law.").

process.¹⁰³ The legislative history thus might shed some contextual light on the text of those provisions.

Drafting the precursor to Title VII, Congress initially modeled the administrative enforcement provisions after those of the National Labor Relations Act (“NLRA”),¹⁰⁴ providing the EEOC with an enforcement role similar to that of the National Labor Relations Board (“NLRB”).¹⁰⁵ On May 26, 1964, however, Senator Dirksen presented a revised version of Title VII, in the nature of a substitute for the current enforcement provisions of the bill,¹⁰⁶ which was enacted into law less than one month later.¹⁰⁷ The Dirksen revision stripped the EEOC of enforcement authority, removing the EEOC’s power to file suits on its own, and shifting the enforcement burden from the federal, public EEOC to the private aggrieved individual.¹⁰⁸

Title VII’s enforcement provisions were thereby dramatically altered. The “primary responsibility for enforcing Title VII” had shifted from the EEOC to the aggrieved individual, “through the mechanism of a private action in federal district court.”¹⁰⁹ Dirksen had previously criticized the House-passed version of Title VII for the excessive bureaucratic regulatory instruments of administrative power,¹¹⁰ and his Amendment was likely written “with the objective of allaying the fear that the EEOC would develop into another expensive octopus like the NLRB”¹¹¹ As a result of Dirksen’s alterations, “[t]he role of the EEOC is [now] much narrower under the present scheme of Title

103. See *infra* notes 104-14 and accompanying text.

104. See National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (1985) (codified as amended at 29 U.S.C. §§ 151-69 (2012)).

105. See H.R. REP. NO. 914, at 30 (1963); see also *Miller v. Int’l Paper Co.*, 408 F.2d 283, 289 (5th Cir. 1969) (“[T]he charging party would only have had to file his complaint with the EEOC, which would then investigate, conciliate, and enforce.”); *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184, 186 (M.D. Tenn. 1966) (“[T]he enforcement provisions of Title VII were patterned after the provisions of the National Labor Relations Act: the Equal Employment Opportunity Commission was to have authority to issue cease-and-desist orders and to seek enforcement of those orders in the courts, and the emphasis was upon protection of the public interest and upon obtaining broad compliance with the provisions of the title.”).

106. See 110 CONG. REC. 13310 (1964).

107. See *id.* at 14239, 14511.

108. See *id.* at 13311.

109. *Developments in the Law - Employment Discrimination and Title VII of the Civil Rights Act of 1964*, *supra* note 92, at 1196; see *Hall*, 251 F. Supp. at 186 (“[E]mphasis shifted toward the vindication of individual rights and the burden of enforcement shifted from the Commission to the ‘person aggrieved.’”).

110. See 110 CONG. REC. 6449-51 (statement of Sen. Dirksen).

111. *Vaas*, *supra* note 102, at 450-51.

VII than . . . as originally drafted.”¹¹² The enforcement provisions of Title VII more closely resembled those of the Fair Labor Standards Act (“FLSA”)¹¹³ than the NLRA, because the EEOC was no longer a creature akin to the NLRB.¹¹⁴

Congressional remarks made prior to Dirksen’s far-reaching revision of Title VII’s enforcement provisions could not possibly have related to an aggrieved individual’s right to directly pursue a civil action. Only under Dirksen’s alterations did courts have broad, independent, and original jurisdiction of Title VII claims, rather than merely the discretion to review EEOC decisions.¹¹⁵ Prior Congressperson comments expressing a preference for conciliation to precede enforcement could only have related to the EEOC’s conciliatory responsibilities before the EEOC exercised its then-considerable enforcement authority.¹¹⁶

The only debate regarding the possibility that Title VII’s enforcement scheme, newly altered by Dirksen, might require aggrieved individuals to seek EEOC assistance rather than directly filing judicial suit occurred, is described, as follows:

Senator Ervin proposed striking out Dirksen’s proposed text that permitted the EEOC to file an EEOC charge, arguing that the EEOC should not play the dual roles of both prosecutor and judge¹¹⁷ (Senator Ervin’s proposal was later rejected).¹¹⁸ Shortly thereafter, Senator Ervin

112. *Miller v. Int’l Paper Co.*, 408 F.2d 283, 289-90 (5th Cir. 1969).

113. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-06 (2010).

114. Title VII was the second employment discrimination bill enacted by the 88th Congress—the same Congress that earlier amended the FLSA by enacting the Equal Pay Act (“EPA”) of 1963. See 29 U.S.C. § 206(d). Courts have recognized that the EPA “serves the same fundamental purpose” as Title VII. *Rosen v. Pub. Serv. Elec. & Gas Co.*, 477 F.2d 90, 96 (3d Cir. 1973). As a result of similarities between the statutes, “cases interpreting Title VII are often helpful and persuasive in construing the FLSA, and vice versa.” *Vanskike v. Peters*, 974 F.2d 806, 810 n.5 (7th Cir. 1992). Under the EPA and FLSA, aggrieved individuals are permitted, but not required, to seek the assistance of the Secretary of Labor prior to bringing judicial suit. See, e.g., *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207, 214 (1959) (the FLSA does not require administrative exhaustion); *Ososky v. Wick*, 704 F.2d 1264, 1265 (D.C. Cir. 1983) (“[The EPA does] not include an exhaustion requirement.”). Further, at the time Title VII was enacted, “the applicable statute of limitations [for FLSA claims] . . . was the statute of limitations of the particular state where the cause of action accrued.” *Carroll v. Pittsburgh Steel Co.*, 100 F. Supp. 749, 751 (W.D. Pa. 1951).

115. See *EEOC v. Liberty Trucking Co.*, 695 F.2d 1038, 1041 (7th Cir. 1982) (“In place of the complex jurisdiction provisions of the original proposals, . . . the entire provision for federal court jurisdiction was simply subsumed in section 706(f)(3), 42 U.S.C. § 2000e-5(f)(3), which contains the ambiguous phrase ‘actions brought under this title.’”).

116. See *id.*

117. See 110 CONG. REC. 1486-87 (1964).

118. *Id.* at 13698.

stated that “the bill certainly puts the key to the courthouse door in the hands of the Commission. This is true because the aggrieved party cannot sue in the Federal courts unless the Commission first finds that there is reasonable cause to believe the charge is true. . . .”¹¹⁹ In that context, Senator Ervin’s attention was directed to what might occur after the EEOC filed an EEOC charge, and was only tangentially directed to the question of what might occur after an aggrieved individual filed an EEOC charge or sought direct judicial recourse. Senator Ervin also seems to have been concerned that the EEOC would still function as an NLRB-type enforcement entity, given his assumption that the EEOC would spontaneously initiate EEOC enforcement proceedings by filing an EEOC charge, act as the “judge,” and then proceed to judicial review.¹²⁰

Nonetheless, Senator Humphrey responded to that side note, stating that “[t]he individual may proceed in his own right at any time. He may take his complaint to the Commission, he may bypass the Commission, or he may go directly to court.”¹²¹ Senator Javits also responded:

[t]he Commission may find the claim invalid; yet the complainant still can sue, and so may the Attorney General, if he finds reasonable cause for doing so. In short, the Commission does not hold the key to the courtroom door. The only thing this title gives the Commission is time in which to find that there has been a violation and time in which to seek conciliation. [A finding of reasonable cause] is not a condition precedent to the action of taking a defendant to court. A complainant has an absolute right to go into court, and this provision does not affect that right at all.¹²²

When Congress subsequently amended Title VII in 1972, according to the Senate Committee Report, the “primary concern should be to *protect* the aggrieved person’s option to seek a prompt [judicial] remedy” and “the individual *shall* have an opportunity to seek his own [judicial] remedy, even though he *may* have originally submitted

119. *Id.* at 14188.

120. *See id.* at 14186.

121. *Id.* at 14188. Senator Humphrey had earlier characterized the transfer of authority to bring suit from the EEOC to the aggrieved individual as “the most significant change” in Title VII to occur in the Senate. *See id.* at 12722. A sentiment here echoed by Senator Saltonstall. *See id.* at 14188.

122. *Id.* at 14191.

his charge to the Commission.”¹²³ Further, the section-by-section analysis of the final version of the 1972 Amendments, prepared by Senators Javits and Williams, stated: “as the individual’s rights to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief.”¹²⁴ This language is broad and permissive as to aggrieved individuals’ right to seek judicial recourse.

In total, this legislative history supports the conclusion that Title VII’s enforcement provisions permit aggrieved individuals to either seek EEOC assistance by filing an EEOC charge, or to directly seek judicial recourse by filing a judicial complaint.

3. Congress has not Impliedly Endorsed the Conventional Judicial Interpretation of Title VII’s Remedial Scheme

From a textualist perspective, the idea that Congress can endorse a particular judicial interpretation of an earlier Congress’s enactment “is based, to begin with, on the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant.”¹²⁵ When interpreting the meaning of earlier enactments, a textualist is therefore not persuaded by subsequent Congressional inaction or silence regarding a particular statutory provision.¹²⁶ Title VII’s enforcement provisions have changed very little over time, and the manner in which they have changed does not alter their meaning.¹²⁷ Textualism

123. S. REP. NO. 92-415, 92d Cong., 1st Sess., at, 23-24 (1971).

124. 118 CONG. REC. 7168 (1972). However, a subsequent Congress’s statements interpreting an earlier Congress’s enactment is of limited value. *See infra* Part III.B.3.

125. *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 671 (1987) (Scalia, J., dissenting); *Barnhart*, 534 U.S. at 462.

126. *See Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 121 (2007) (Scalia, J., dissenting) (“The only fair inference from Congress’s silence is that Congress had nothing further to say, its statutory text doing all of the talking.”); *United States v. Craft*, 535 U.S. 274, 287 (2002) (“[C]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction”); *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 186 (1994) (“It is ‘impossible to assert with any degree of assurance that congressional failure to act represents’ affirmative congressional approval of the [courts’] statutory interpretation. . . .”); *Johnson*, 480 U.S. at 671-72 (Scalia, J., dissenting) (“‘The complicated check on legislation’ . . . erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.”).

127. *See supra* Part II.A-B.

therefore eschews conjectural speculation regarding the meaning of Congressional failure to alter the text of Title VII.

Even if that were not the case, the conventional judicial understanding of Title VII's enforcement provisions may not be quite as entrenched as it first appears.¹²⁸ Until the mid-1970s, courts rejected most procedural defenses to Title VII.¹²⁹ Jurisprudence has also often interpreted the language of the EEOC enforcement provisions, without addressing the meaning of the judicial enforcement provisions.¹³⁰ For example, in *Nat'l R.R. Passenger Corp. v. Morgan*, Justice Thomas interpreted the text of the EEOC enforcement provisions,¹³¹ but did not interpret the text of the judicial enforcement provisions.¹³² In contrast, cases that have squarely considered the textual meaning of the judicial enforcement provisions appear less certain about Title VII's enforcement scheme.¹³³ Any ambiguity in

128. See *infra* Part III.B.3.

129. Federal courts "have been extremely reluctant to allow procedural technicalities to bar claims brought under [Title VII]." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460-61 (5th Cir. 1970) (holding that an aggrieved individual can amend an EEOC charge, and that a subsequent judicial complaint was limited to the scope of EEOC investigation that could reasonably be expected to grow out of that EEOC charge). "It would be unrealistic to require an employee whose rights are threatened with irreparable harm to exhaust his remedies before the EEOC prior to seeking injunctive relief from the Court." *Bowe v. Colgate-Palmolive Co.*, 272 F. Supp. 332, 338 (S.D. Ind. 1967) (holding that employees who had not filed EEOC charges could join a class action for injunctive relief with a plaintiff who had received notice of a failure to conciliate); see BARBARA T. LINDEMANN, PAUL GROSSMAN & C. GEOFFREY WEIRICH, *EMPLOYMENT DISCRIMINATION LAW* 27-3 to 27-4 (Bloomberg BNA, 5th ed. 2012). Initially, most procedural defenses were rejected, and courts were willing to excuse non-compliance with procedural hurdles. The 1972 amendments seemed to preserve this approach. Yet, judicial attitudes toward procedural defenses shifted in the mid-1970s.

130. See *Pinkard v. Pullman-Standard*, a Div. of Pullman, Inc., 678 F.2d 1211, 1215 (5th Cir. 1982) (interpreting 42 U.S.C. § 2000e-5(f)(1) (2012)); *Cunningham v. Litton Indus.*, 413 F.2d 887, 889-90 (9th Cir. 1969) (interpreting Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(d)-(e), 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e-5(d)-(f)(1))); *Blue Bell Boots, Inc. v. EEOC*, 418 F.2d 355, 356-57 (6th Cir. 1969) (interpreting Civil Rights Act of 1964 § 706(d) (codified as amended at 42 U.S.C. § 2000e-5(d))); *Georgia Power Co. v. EEOC*, 412 F.2d 462, 467 (5th Cir. 1969) (interpreting Civil Rights Act of 1964 § 706(d) (codified as amended at 42 U.S.C. § 2000e-5(d))); *Stebbins v. Nationwide Mut. Ins. Co.*, 382 F.2d 267, 267-68 (4th Cir. 1967) (interpreting Civil Rights Act of 1964 § 706(e) (codified as amended at 42 U.S.C. § 2000e-5(f)(1))).

131. See *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 104-05 (2002).

132. See *id.* at 119 (mentioning 42 U.S.C. § 2000e-5(g)(1) only in passing and neglecting to mention 42 U.S.C. § 2000e-5(f)(3)).

133. See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 503-06 (2006) (illustrating that the Court examining the broad language of 42 U.S.C. § 2000e-5(f)(3), determined that it was intended to avoid the amount-in-controversy limitation that then-existed under 28 U.S.C. § 1331, and unanimously held that Title VII's employee-numerosity requirement does not limit federal subject matter jurisdiction); *Eatmon v. Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503, 1511-12 (11th Cir. 1985) (holding that pursuant to the broad grant of federal jurisdiction, a civil action regarding

judicial precedent signifies corresponding ambiguity in the meaning, if any, of Congressional inaction.

4. In Reality, the Administrative Exhaustion Requirement Serves No Purpose

Treating the EEOC charge-filing period as a statute of limitations currently serves no purpose other than to act as an arbitrary procedural barrier to judicial recourse.

Filing an EEOC charge does not necessarily provide prompt notice to an employer, because “most lower courts have held that private actions are not blocked by the EEOC’s failure to serve notice of the charge on the respondents”¹³⁴ Directly filing a civil action, on the other hand, would serve the aim of providing timely notice to an employer of alleged Title VII violations.¹³⁵

Filing an EEOC charge rarely results in reconciliation.¹³⁶ Courts have held that the EEOC’s failure to attempt conciliation does not bar judicial suit.¹³⁷ An aggrieved individual may choose to file a judicial complaint immediately after filing an EEOC charge.¹³⁸ EEOC case backlogs and delays also make conciliation unlikely.¹³⁹ Filing an EEOC

breach of a settlement agreement may be brought directly without first filing an EEOC charge); *EEOC v. Henry Beck Co.*, 729 F.2d 301, 303 n.7, 305-06 (4th Cir. 1984) (“[The jurisdictional provision] mentions no prerequisite in broadly providing for federal district court jurisdiction over ‘actions brought under’ Title VII[.]” holding that the EEOC prerequisites did not apply to a civil action for preliminary relief); *supra* notes 54-56 and accompanying text.

134. SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION LAW* 595 (4th ed. 2012); *see also* *Schlueter v. Anheuser-Busch, Inc.*, 132 F.3d 455, 458-59 (8th Cir. 1998) (holding that the EEOC’s failure to process an EEOC charge equitably tolled the limitations period for filing judicial suit).

135. *See* 42 U.S.C. § 2000e-5(e)(1) (2012).

136. *See* ESTREICHER & HARPER, *supra* note 134, at 595.

137. *See* *Walker v. UPS, Inc.*, 240 F.3d 1268, 1271-73 (10th Cir. 2001) (reviewing case law to that effect, and determining that attempted conciliation is not required); *see also* *Rosen v. Pub. Serv. Elec. & Gas Co.*, 409 F.2d 775, 778 n.11 (3d Cir. 1969) (“In view of recent decisions in a number of circuits . . . actual efforts at conciliation by the EEOC were not a prerequisite to the filing of a civil action under Title VII”); *Miller v. Int’l Paper Co.*, 408 F.2d 283, 290 (5th Cir. 1969) (“[Aggrieved individuals are] not responsible for the acts or omissions of the Commission. . . . [and] should not be denied judicial relief because of circumstances over which they have no control.”); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 361 (7th Cir. 1968) (“[A] complainant should not be made to suffer innocently for administrative delays for which he is not responsible.”).

138. *See* *Pinkard v. Pullman-Standard, a Div. of Pullman, Inc.*, 678 F.2d 1211, 1219 (5th Cir. 1982) (holding that an aggrieved individual may file a lawsuit immediately after filing an EEOC charge, and then later submit EEOC notice that conciliation is obviated due to the pending lawsuit).

139. ARTHUR B. SMITH, JR., CHARLES B. CRAVER & RONALD TURNER, *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS* 919 (7th ed. 2011) (“Large and unmanageable

charge also serves no screening function.¹⁴⁰ Filing an EEOC charge is not a jurisdictional prerequisite to filing a civil suit in court.¹⁴¹ Filing an EEOC charge is not even a prerequisite to filing civil suit in court if the EEOC or another aggrieved individual happens to have already filed an applicable EEOC charge¹⁴² or if the individual seeks an injunctive remedy.¹⁴³ In the Eleventh Circuit, an employee may bring

-case backlogs at the EEOC led not only to criticism of the conciliation process as a viable mechanism for resolving civil rights disputes but to pressure on the EEOC to release charging parties from the lengthy delays of administrative process so that they could pursue claims without further EEOC involvement. This resulted in an EEOC procedural regulation which permits charging parties to . . . [sue] even though conciliation efforts have not yet commenced or been completed.”). Reconciliation may in fact be deterred by the EEOC charge-filing deadline, because it is not tolled during private reconciliation efforts. *See Int’l Union of Electrical, Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236, 244 (1976) (holding that the EEOC filing period is not tolled during a collective bargaining grievance procedure).

140. Under Civil Rights Act of 1964, Pub. L. No. 88-352, § 706, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e (2012)), a claimant may bring suit even if the EEOC has found no evidence of employment discrimination, although the EEOC must find “reasonable cause” before the EEOC may bring suit. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-99 (1973). The EEOC also issues a right-to-sue letter whenever a charging party requests it. *See* 29 C.F.R. § 1601.28(b)(1) (2014). Finally, the scope of an EEOC charge only loosely determines the potential scope of a subsequent private suit. “Because persons filing charges with the EEOC typically lack legal training, those charges must be interpreted with the utmost liberality in order not to frustrate the remedial purposes of Title VII.” *Cobb v. Stringer*, 850 F.2d 356, 359-60 (8th Cir. 1988) (citing *EEOC v. Michael Constr. Co.*, 706 F.2d 244, 248 (8th Cir. 1983)) (concluding that material issues of fact existed as to whether an EEOC charge was timely-filed). A Title VII claim “may encompass any kind of discrimination like or related to allegations contained in a charge and growing out of such allegation during the pendency of the case before the [EEOC].” *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466-67 (5th Cir. 1970) (quoting *King v. Georgia Power Co.*, 295 F. Supp. 943, 947 (N.D. Ga. 1968)) (permitting the amendment of EEOC charge); *see also Jones v. Calvert Group Ltd.*, 551 F.3d 297, 304 (4th Cir. 2009) (illustrating that a Title VII claimant who alleges discriminatory retaliation against filing an EEOC charge need not file a second EEOC charge encompassing the retaliation).

141. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (holding that filing a timely EEOC charge is not a jurisdictional prerequisite, and that an employer who fails to plead that an EEOC charge was untimely waives its right to object).

142. Under the “single-filing” or “piggy-backing” rule, a plaintiff who fails to file a timely EEOC charge and who cannot justify equitable tolling can pursue a claim by opting into a Title VII class action. *See Howlett v. Holiday Inns, Inc.*, 49 F.3d 189, 194 (6th Cir. 1995); *see also Grayson v. KMart Corp.*, 79 F.3d 1086, 1101 (11th Cir. 1996); *Mooney v. Aramco Serv. Co.*, 54 F.3d 1207, 1223 (5th Cir. 1995). The single-filing rule also permits such a claimant to join an action filed by a similarly-situated person whose timely charge gave notice of the collective nature of the charge. *See Brooks v. Dist. Hosp. Partners, L.P.*, 606 F.3d 800, 807-08 (D.C. Cir. 2010) (piggy-backing permitted where charge alleged screening test discriminated against African Americans); *see also Calloway v. Partners Nat’l Health Plans*, 986 F.2d 446 (11th Cir. 1993).

143. *See Wagner v. Taylor*, 836 F.2d 566, 571 (D.C. Cir. 1987) (court may enjoin retaliation during pendency of EEOC proceedings); *Duke v. Langdon*, 695 F.2d 1136, 1137 (9th Cir. 1983)

civil suit prior to filing an EEOC charge so long as the employee subsequently files an EEOC charge and amends the complaint within ninety days of receiving notice from the EEOC of failure to conciliate.¹⁴⁴ Finally, the EEOC does not have superior fact-finding abilities to courts, nor is judicial discovery limited by the EEOC's investigations.¹⁴⁵

*C. Despite Considerations of Stare Decisis, Separation of Powers
Requires the Judiciary to Respect the Law as Enacted by Congress*

When courts have misinterpreted a legislative act, the judiciary may choose not to correct that misinterpretation due to the doctrine of *stare decisis*, which is a "principle of policy" against overruling precedent.¹⁴⁶ *Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."¹⁴⁷ The textualist interpretive approach may entirely discount the doctrine of *stare decisis*, because separation of powers prohibits judicial usurpation of Congressional authority.¹⁴⁸

(the court may grant preliminary injunction prior to completion of EEOC proceedings); *Holt v. Continental Group, Inc.*, 708 F.2d 87, 89-90 (2d Cir. 1983) (the court may consider request for reinstatement before initiation or conclusion of EEOC proceedings); *Berg v. Richmond Unified Sch. Dist.*, 528 F.2d 1208, 1211-12 (9th Cir. 1975) (the court may grant an injunction before administrative exhaustion) (per curiam), *vacated on other grounds*, 434 U.S. 158 (1977).

144. See *Cross v. Ala., State Dep't of Mental Health & Mental Retardation*, 49 F.3d 1490, 1504 (11th Cir. 1995).

145. "[E]xhaustion rules are often applied in deference to the superior fact-finding ability of the relevant administrative agency." *Patsy v. Bd. of Regents of the State of Fla.*, 457 U.S. 496, 506-07 (1982) (citing CON. GLOBE, 42d Cong., 1st Sess., 216, 322, 476, 692 (1871)) (examining the legislative history of the Civil Rights Act of 1871, 17 Stat. 13, the precursor to Section 1983, the court concluded that the bill enabled plaintiffs to choose from dual or concurrent forums, and that exhaustion of administrative remedies should not be judicially imposed).

146. See *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

147. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); see also *United States*, 514 U.S. 695, 720 (1995) (Rehnquist, J., dissenting) ("The principle of *stare decisis* is designed to promote stability and certainty in the law."); *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) (illustrating that *stare decisis* ensures that "the law will not merely change erratically" and "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals"); Alexander Hamilton, THE FEDERALIST, No. 78, 430 (H. Lodge eds., 1888) (*Stare decisis* ensures that the jurisprudential system is not based on "arbitrary discretion").

148. "Of the Court's current members, Justices Scalia and Thomas seem to have the most faith in the determinacy of the legal texts that come before the Court. It should come as no surprise that they also seem the most willing to overrule the Court's past decisions." Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 50-51 (2001). According to Justice Scalia, Justice Thomas "doesn't believe in *stare decisis*, period." Douglas T. Kendall, *A Big Question About Clarence Thomas*, WASHINGTON POST, Oct. 14, 2004, at A31; Lincoln Caplan,

Textualists are often willing to overrule even long-established judicial precedent in favor of an interpretation that better reflects the text, as enacted by Congress.¹⁴⁹ For example, Justices Scalia and Thomas recently advocated overturning almost thirty-five years of precedent,¹⁵⁰ and Justice Thomas expressed willingness to reexamine precedent that had not been seriously challenged for over 200 years.¹⁵¹ The textualist approach therefore requires adherence to the text of Title VII, despite half a century of precedent to the contrary. The judiciary has the “obligation” to disregard precedent that is contrary to the law, “even when doing so will upset settled expectations, reduce judicial economy, or result in differential treatment for similarly-situated litigants.”¹⁵²

Even under a non-textualist approach to statutory interpretation, refusal to permit aggrieved individuals under Title VII to directly seek judicial recourse due to the doctrine of *stare decisis* would be misplaced. *Stare decisis* is not a “mechanical formula of adherence to the latest decision,”¹⁵³ an “inexorable command,”¹⁵⁴ or “an end in itself.”¹⁵⁵ After weighing the advantages and disadvantages, the Court may overrule precedent to ensure that the law does “not merely change erratically, but . . . [instead] develop[s] in a principled and intelligible fashion.”¹⁵⁶ “[W]hen governing decisions are unworkable or badly reasoned,” the Supreme Court has “‘never felt constrained to follow precedent,’”¹⁵⁷ particularly in cases involving procedural rules.¹⁵⁸

Clarence Thomas's Brand of Judicial Logic, N.Y. TIMES, Oct. 23, 2011, at SR10. Although “the Court must demand a good reason for abandoning prior precedent,” it is “ample reason that the precedent was badly reasoned and produces erroneous . . . results.” *Arizona v. Gant*, 556 U.S. 332, 353 (2009) (Scalia, J., concurring) (expressing the opinion that the Court should overrule *New York v. Belton*, 453 U.S. 454 (1981)).

149. See generally Steven G. Calabresi, *Text vs. Precedent in Constitutional Law*, 31 HARV. J.L. & PUB. POL’Y 947, 951-55 (2008) (the Supreme Court overruled seventy years of long standing precedent on textualist principles in ten cases).

150. Justices Scalia and Thomas advocated overruling *Miranda v. Arizona*, 384 U.S. 436 (1966); see *Dickerson v. United States*, 530 U.S. 428, 444-65 (2000) (Scalia, J., dissenting).

151. *E. Enters. v. Apfel*, 524 U.S. 498, 539 (1998) (Thomas, J., concurring) (“I would be willing to reconsider *Calder [v. Bull]*, 3 Dall. 386, 1 L.Ed. 648 (1798)] and its progeny to determine whether a retroactive civil law that passes muster under our current Takings Clause jurisprudence is nonetheless unconstitutional under the *Ex Post Facto Clause*.”).

152. See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 26-28 (1994).

153. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

154. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

155. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 378 (2010).

156. *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).

157. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S.

As this Article has demonstrated, to the extent that governing decisions consider the procedural EEOC charge-filing requirement to be a judicial requirement, those decisions are badly reasoned.

IV. CONCLUSION: COURTS SHOULD PERMIT VICTIMS OF EMPLOYMENT DISCRIMINATION TO BYPASS THE EEOC

This Article demonstrates that there is a discrepancy between the unambiguous text of Title VII's enforcement provisions and current judicial doctrine: Title VII does not require aggrieved individuals to file an EEOC charge prior to bringing a civil action.¹⁵⁹ Non-textualist interpretive tools, including Title VII's statutory scheme and legislative history, further support the conclusion that Congress did not intend the EEOC charge deadline to serve as a judicial statute of limitations.¹⁶⁰ Even giving due consideration to the doctrine of *stare decisis*, courts should permit aggrieved individuals to bypass the EEOC.¹⁶¹

649, 665 (1944)).

158. *Id.* at 828.

159. *See supra* Part II.

160. *See supra* Parts II.B.2, III.B.

161. *See supra* Part III.C.