

NOTES

TITLE VII AND STATE COURTS: DIVINING IMPLICIT CONGRESSIONAL INTENT WITH REGARD TO STATE COURT JURISDICTION

Title VII,¹ enacted as part of the Civil Rights Act of 1964,² prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.³ To initiate Title VII proceedings, an employee files a charge of discrimination with the Equal Employment Opportunity Commission (EEOC).⁴ If the EEOC dismisses the charge for lack of reasonable cause⁵ or has not acted on the complaint within a specified period, the EEOC must notify the employee, who then has the right to file a civil action against the employer.⁶

The text of Title VII provides that federal district courts have jurisdiction of civil actions brought to enforce its provisions.⁷ While the statute expressly authorizes trials in

¹ Civil Rights Act of 1964, title VII, §§ 701-718, 78 Stat. 253 (1964) (current version at 42 U.S.C. §§ 2000e-2000e-17 (1982)).

² Pub. L. 88-352, 78 Stat. 241 (1964).

³ § 703(a), 42 U.S.C. § 2000e-2(a) provides:

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§ 703(b),(c), 42 U.S.C. § 2000e-2(b),(c) extends similar prohibitions to employment agencies and labor organizations.

⁴ § 706(b), 42 U.S.C. § 2000e-5(b). Title VII also authorizes EEOC commissioners to file charges on behalf of employees. *Id.*

⁵ *Id.*

⁶ § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).

⁷ § 706(f)(3), 42 U.S.C. § 2000e-5(f)(3) provides:

Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under [Title VII]. 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, in the judicial

federal district court, the jurisdictional language does not indicate whether state courts have concurrent authority to hear Title VII actions. Because neither Congress, in subsequent amendments,⁸ nor the Supreme Court⁹ has addressed the jurisdictional ambiguity, lower federal courts and state courts have drawn their own conflicting conclusions as to the jurisdiction of state courts under Title VII.¹⁰

Underlying the diverse decisions regarding state court jurisdiction is a longstanding principle which provides that state and federal courts have concurrent jurisdiction of federal law claims where Congress neither expressly nor implicitly prohibits state court jurisdiction.¹¹ Looking to Title VII nonjurisdictional provisions and legislative history, as well as Supreme Court decisions, some courts have concluded that state courts may exercise jurisdiction under Title VII.¹² The findings of concurrent jurisdiction rest on the lack of evidence, in either Title VII itself or its legislative history, that Congress expressly or implicitly prohibited state courts from hearing Title VII claims.¹³ Other courts, however, have interpreted the same sources differently, concluding that only federal courts have Title VII jurisdiction.¹⁴ In support of their findings of exclusive federal court jurisdiction, the courts have cited Congress's affirmative references to federal courts alone, in both the text and legislative history of Title VII, as evidence of Congress's implicit intent to authorize federal court jurisdiction to the exclusion of state courts.¹⁵ Of the two contrasting analyses of the Title VII jurisdictional provision, only one can fairly reflect congressional intent regarding the role of state courts.

Regardless of how they decide the Title VII jurisdiction issue, courts must look to the legislative history for evidence of congressional intent. In scrutinizing the legislative history of Title VII, however, courts have tended to focus on what Congress said or omitted to say regarding the states and state courts, without giving comparable consideration to the events that led to the drafting of the Civil Rights Act of 1964.¹⁶ It is the historical context, rather than specific language in the statute or congressional debates and reports, which best illuminates Congress's intent with regard to state courts under Title VII.¹⁷

district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the [employer] is not found within any such district, such an action may be brought within the judicial district in which the [employer] has his principal office

⁸ The Title VII jurisdiction provision remains substantially unchanged. Compare the original version, § 706(f), 78 Stat. 260-61 (1964) with the current provision, *supra* note 7.

⁹ See *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 479 n.20 (1982), discussed *infra* notes 87-88 and accompanying text.

¹⁰ See *infra* notes 95-149 and accompanying text.

¹¹ *Claffin v. Houseman*, 93 U.S. 130, 136 (1876).

¹² See, e.g., *Bennun v. Board of Governors*, 413 F. Supp. 1274, 1280 (D.N.J. 1976). For a discussion of cases where courts have found concurrent state court jurisdiction, see *infra* notes 122-49 and accompanying text.

¹³ See, e.g., *Bennun*, 413 F. Supp. at 1279-80.

¹⁴ See, e.g., *Valenzuela v. Kraft, Inc.*, 739 F.2d 434, 435-36 (9th Cir. 1984). For a discussion of cases where courts have found exclusive federal court jurisdiction, see *infra* notes 97-123 and accompanying text.

¹⁵ See, e.g., *Valenzuela*, 739 F.2d at 436.

¹⁶ See *infra* notes 52-80, 95-147.

¹⁷ See *infra* notes 52-80.

As the balance of this note will discuss, resolution of the dispute regarding state court authority under Title VII is contingent on what role Congress intended for state courts. Identifying congressional intent, in turn, depends on evidence in Title VII itself and its legislative history. Part I will review the statutory provisions, legislative history, and Supreme Court precedents on which lower federal courts and state courts have relied in deciding the issue of state court jurisdiction under Title VII.¹⁸ The courts' failure to address Congress's motivation in enacting Title VII and the Civil Rights Act generally will be evident in Part II, which summarizes select decisions on the Title VII jurisdiction issue.¹⁹ Discussion first will focus on cases where courts have concluded that federal courts have exclusive jurisdiction and then will turn to cases where courts have concluded that state courts share jurisdiction with federal courts. Part III will analyze the text and legislative history of Title VII for evidence of congressional intent and conclude that under Title VII as it now stands, federal courts have exclusive jurisdiction.²⁰

Finally, Part IV will propose that Congress amend Title VII to provide expressly for the concurrent jurisdiction of state courts, at least in states that have and are enforcing adequate state fair employment laws.²¹ Although exclusive federal court jurisdiction might have been essential when Congress first proposed Title VII, the states have since become more able and willing to remedy the effects of discrimination. The change in circumstances since Congress enacted Title VII indicates not only that exclusive jurisdiction is unnecessary but that concurrent state court jurisdiction is desirable.

I. STATUTORY TEXT, LEGISLATIVE HISTORY AND JUDICIAL INTERPRETATION

With the enactment of Title VII, which was an exercise of Congress's constitutional authority to regulate interstate commerce,²² Congress established a wide-ranging federal prohibition against private employment discrimination.²³ To implement the new federal policy, Congress created the EEOC, whose primary responsibility was to investigate employee complaints,²⁴ and authorized the federal district courts to grant relief where the complaints were meritorious.²⁵ Nonetheless, although it was the inadequacy of state fair employment laws which had necessitated the enactment of Title VII,²⁶ Congress required that the EEOC permit those states with comprehensive laws a prior opportunity to remedy employee complaints in accordance with state law.²⁷ Several years after enactment, Congress amended Title VII to provide broader coverage of both private and public sector employment and enhance the EEOC's authority to resolve employee complaints.²⁸ The intricate enforcement structure otherwise remained unchanged.

¹⁸ See *infra* notes 22-94 and accompanying text.

¹⁹ See *infra* notes 95-149 and accompanying text.

²⁰ See *infra* notes 150-75 and accompanying text.

²¹ See *infra* notes 176-231 and accompanying text.

²² U.S. CONST. art. I, § 8, cl. 3. See *infra* note 57 and accompanying text. Title VII expressly applies to employers in industries "affecting commerce." See § 701(b), 42 U.S.C. § 2000e(b).

²³ See *supra* note 1.

²⁴ See *infra* notes 61-64 and accompanying text.

²⁵ See *infra* notes 70-74 and accompanying text.

²⁶ See *infra* notes 66-68 and accompanying text.

²⁷ See *infra* notes 65-68 and accompanying text.

²⁸ See *infra* notes 75-83 and accompanying text.

A. The Text of Title VII

Title VII contains an expansive prohibition of private and public sector employment discrimination²⁹ and particularly describes the roles of the EEOC,³⁰ state agencies responsible for enforcing state fair employment laws,³¹ and federal district courts³² in furtherance of its purposes. The Title VII enforcement procedure is set in motion when an employee files a charge with the EEOC.³³ If, however, the alleged discriminatory practice occurred in a state that has authorized state agency enforcement of a state law comparable to Title VII, Title VII directs that the employee exhaust the state administrative remedy before filing a charge with the EEOC.³⁴ Consequently, if the employee first pursues relief with the EEOC, the EEOC refers the charge to the state agency and postpones consideration of the charge until state agency proceedings end.³⁵ Once the deferral requirement has been satisfied, the EEOC serves notice of the charge on the employer and investigates the employee's allegations.³⁶ If the EEOC concludes on the basis of its investigation that there is reasonable cause to believe that discrimination has occurred,³⁷ it will try to persuade the employer to settle the dispute³⁸ by agreeing to eliminate the discriminatory practice and to provide appropriate relief to the employee.³⁹ Should the employer be uncooperative, the EEOC may file a civil action against the employer.⁴⁰

²⁹ § 701, § 703, 42 U.S.C. § 2000e, § 2000e-2.

³⁰ See § 705(a), 42 U.S.C. § 2000e-4(a), which creates the EEOC, and § 706(a),(b),(f), 42 U.S.C. § 2000e-5(a),(b),(f), which set forth the EEOC's general powers of enforcement.

³¹ § 706(c), 42 U.S.C. § 2000e-5(c). Title VII specifies state and local agencies. *Id.* Express references in this note to states and state agencies implicitly include political subdivisions of states and local agencies. See also § 709(b),(d), 42 U.S.C. § 2000e-8(b),(d), which authorizes EEOC cooperation with state agencies in the enforcement of Title VII.

³² § 706(f)(3)-(5) and (g), 42 U.S.C. § 2000e-5(f)(3)-(5) and (g).

³³ § 706(b), 42 U.S.C. § 2000e-5(b). Ordinarily, filing must be within 180 days after the alleged violation occurred. § 706(e), 42 U.S.C. § 2000e-5(e).

³⁴ § 706(c), 42 U.S.C. § 2000e-5(c). The EEOC defers to state agencies only where the state law and enforcement standards are comparable to the Title VII standards. See 8A Lab. Rel. Rep. (BNA) 451:1 (1984). EEOC regulations authorize deferral where (1) the state fair employment law prohibits discrimination on the basis of race, color, religion, sex, or national origin, and (2) the state enforcement agency provides remedies for discrimination by granting or seeking relief or initiating criminal proceedings. 29 C.F.R. § 1601.70(a)(1),(2) (1985). For a list of state agencies qualifying for deferral, see 29 C.F.R. § 1601.74 (1985) ("designated 706 agencies").

³⁵ See 29 C.F.R. § 1601.13(a)(5) (1985). Once state administrative proceedings terminate, EEOC investigation commences automatically without the need for a second employee filing. See *Love v. Pullman*, 404 U.S. 522, 525-26 (1972).

³⁶ § 706(b), 42 U.S.C. § 2000e-5(b).

³⁷ *Id.* The EEOC gives substantial weight to final findings and orders in state proceedings. *Id.*; 29 C.F.R. § 1601.76 (1985). In addition, there are certain state agencies whose findings and resolutions the EEOC will not simply accord substantial weight but will accept as conclusive, provided EEOC review is not otherwise required. 29 C.F.R. § 1601.80 (1985) ("Certified designated 706 agencies"). See 29 C.F.R. § 1601.75 (1985) for the certification procedure. Agencies qualifying for such deferential EEOC treatment are subject to disqualification. 29 C.F.R. § 1601.79 (1985). The EEOC reviews the performance of each qualifying agency either a minimum of every three years or whenever the EEOC, on review, has rejected a significant proportion of the state agency's findings. 29 C.F.R. § 1601.78 (1985).

³⁸ § 706(b), 42 U.S.C. § 2000e-5(b).

³⁹ See 29 C.F.R. § 1601.24 (1985).

⁴⁰ § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1). Where the employer is a government, governmental

In some instances, however, the EEOC will either decline to prosecute for lack of reasonable cause⁴¹ or fail to prosecute or settle with the employer within a reasonable time.⁴² When the EEOC refuses or fails to act on the complaint, the EEOC must so inform the employee, who then has the right to file a civil action against the employer within ninety days of receiving EEOC notification.⁴³ The civil action is not limited in scope to review of the EEOC determination but secures for the employee a trial de novo.⁴⁴

Title VII confers jurisdiction on the federal district courts to hear Title VII actions⁴⁵ and dictates the procedures which govern Title VII actions. Title VII actions are tried before a judge, not a jury.⁴⁶ The judge must act in accordance with the Federal Rules of Civil Procedure in appointing a master to hear the case⁴⁷ or in granting preliminary or temporary relief.⁴⁸ If the court finds that the employer intentionally has engaged in discriminatory practices, Title VII provides that the court may order appropriate equitable relief, including but not limited to reinstatement and back pay.⁴⁹ The court also may in its discretion award a prevailing employee attorney's fees as part of costs.⁵⁰ Finally, any appeal of the district court's decisions is subject to requirements set forth in federal appeals statutes.⁵¹ The enumerated requirements signify that Title VII trials must conform with federal court procedures.

As the text of Title VII clearly indicates, Congress contemplated that both the federal courts and various state administrative proceedings would play a role in Title VII. In contrast, however, the text of the statute does not indicate whether Congress approved of state court participation in Title VII enforcement. Consequently, courts

agency, or political subdivision, the EEOC must refer the case to the Attorney General, who then may bring a civil action against the employer. *Id.*

⁴¹ § 706(b), 42 U.S.C. § 2000e-5(b).

⁴² The EEOC must prosecute or reach settlement within 180 days after the employee files the charge or state proceedings terminate. § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).

⁴³ *Id.* Similarly, where the employer is a government, governmental agency, or political subdivision and the EEOC has referred the case to the Attorney General, who decides not to pursue the case, the Attorney General must give the employee an opportunity to file a civil action. *Id.*

⁴⁴ See 110 CONG. REC. 7212, 7213 (1964) (Interpretive Memorandum of Title VII of H.R. 7152 Submitted Jointly by Senator Joseph S. Clark and Senator Clifford P. Case, Floor Manager) [hereinafter Interpretive Memorandum of Title VII].

⁴⁵ § 706(f)(3), 42 U.S.C. § 2000e-5(f)(3). See *supra* note 7.

⁴⁶ See § 706(f)(4), 42 U.S.C. § 2000e-5(f)(4). The legislative history confirms that Congress intended judges to try Title VII actions. See 118 CONG. REC. 4917, 4919-20 (1972) (remarks of Senators Ervin and Javits preceding Senate rejection of amendment to require jury trial of Title VII actions for backpay); Interpretive Memorandum of Title VII, *supra* note 44, at 7214 (judge trial is customary practice for suits for injunctive relief). See also *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 420 n.13 (1975).

⁴⁷ § 706(f)(5), 42 U.S.C. § 2000e-5(f)(5) (citing FED. R. CIV. P. 53).

⁴⁸ § 706(f)(2), 42 U.S.C. § 2000e-5(f)(2) (citing FED. R. CIV. P. 65).

⁴⁹ § 706(g), 42 U.S.C. § 2000e-5(g). An employee may also seek relief under state law because Title VII expressly does not preempt state laws consistent with the purposes of Title VII. § 708, 42 U.S.C. § 2000e-7.

⁵⁰ § 706(k), 42 U.S.C. § 2000e-5(k). The Supreme Court has construed the fees provision broadly to permit recovery even where a plaintiff prevails in state administrative and judicial proceedings on deferral and requires no additional equitable relief under Title VII. See *New York Gaslight Club v. Carey*, 447 U.S. 54, 66, 71 (1980).

⁵¹ § 706(j), 42 U.S.C. § 2000e-5(j) (citing 28 U.S.C. §§ 1291-1292).

have turned to the legislative history of Title VII for evidence of congressional intent regarding the jurisdiction of state courts in Title VII actions.

B. *The Legislative History of Title VII*

Title VII was part of the Civil Rights Act of 1964, which Congress enacted in response to the nationwide persistence of racial and other discrimination against minority groups and the inadequacy of state efforts to combat discrimination.⁵² Congress particularly was concerned about the deficiency of state remedies for discrimination with regard to black Americans because state laws either provided no remedy for the wrongs done to black Americans or affirmatively denied them rights.⁵³ Proponents of the Civil Rights Act asserted that federal legislation and federal remedies would benefit black Americans and thereby benefit the nation.⁵⁴ The Civil Rights Act addressed discriminatory conduct in several contexts,⁵⁵ with discrimination in employment being the focus of Title VII.⁵⁶

To assure that Congress's authority to establish broadly applicable federal fair employment standards was unassailable, Congress justified the proposed Title VII legislation as an exercise of its regulatory power under the commerce clause.⁵⁷ Opponents denounced the Civil Rights Act generally as an unjustified federal intrusion on the police

⁵² H.R. REP. NO. 914, 88th Cong., 2d Sess., reprinted in 1964 U.S. CODE CONG. & ADMIN. NEWS 2355, 2393-94 [hereinafter H.R. REP. NO. 914]. The bill that gave rise to the Civil Rights Act of 1964 originated in recommendations from President Kennedy to Congress in February of 1963. 109 CONG. REC. 3245 (1963) (H.R. Doc. No. 75). In his message to Congress, the President observed that although the Emancipation Proclamation had abolished slavery 100 years earlier, black Americans continued to suffer unequal treatment and opportunity. *Id.* The President resolved that Congress and the executive branch should focus efforts on eliminating discrimination in the areas of voting, education, employment, and public accommodations. *Id.* at 3245-49. In June of 1963, in the wake of mounting racial tension in the South, the President delivered another message to Congress, declaring the urgent need for a national solution to discrimination. 109 CONG. REC. 11174, 11175 (1963) (H.R. Doc. No. 124). Accompanying the message was the Administration's proposed bill, which represented the concerted efforts of the Administration and members of Congress. *Id.* at 11075-76, 11179.

⁵³ 109 CONG. REC. at 11174-75.

⁵⁴ In his second message to Congress, President Kennedy expressed concern that the result of continued denial of equal treatment to black Americans would be their increasing frustration and resort to violence. The escalation of violence, the President warned, would impede the nation's economic and social progress and undermine the worldwide respect which the nation enjoyed. The President therefore considered prompt Congressional action to be essential. *Id.* at 11175.

⁵⁵ H.R. REP. NO. 914, *supra* note 52, at 2392-93.

⁵⁶ *Id.* at 2401. The Kennedy Administration hoped that a federal fair employment law would increase employment of black Americans, whom unemployment and poverty affected disproportionately, and eventually foster economic growth. 109 CONG. REC. 11174, 11177 (1963) (H.R. Doc. No. 124); *Civil Rights — The President's Program, 1963: Hearings on S. 1731 and S. 1750 Before the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 93, 104-05 (1963) (statement of Robert F. Kennedy, United States Attorney General) [hereinafter *Hearings on S. 1731*].

Other titles of the Civil Rights Act addressed discrimination in voting, public facilities, federally assisted programs, and public education. H.R. REP. NO. 914, *supra* note 52, at 2392-93.

⁵⁷ Congress received assurances from respected legal authorities that Title VII was a valid exercise of the commerce power. See 110 CONG. REC. 7052-54 (1964) (letter and memorandum of twenty-two attorneys and law school deans on proposed Title II and Title VII); *id.* at 8453-56 (memorandum of the Association of the Bar of the City of New York on proposed Title VII).

powers of states and the right to privacy of both business enterprises and individuals.⁵⁸ Title VII appeared to opponents to be an unconstitutional extension of the authority that the commerce clause confers on the federal legislature.⁵⁹ The legislation ultimately enacted would establish a national policy prohibiting employment discrimination, but preserve the effect of state laws that were comparable to Title VII in providing remedies for employment discrimination.⁶⁰ It was in Title VII enforcement provisions that Congress expressly allowed for state regulation of fair employment under state law.

To assure that the purposes of Title VII would be accomplished, Congress created a multi-tiered enforcement scheme comprising state and federal administrative proceedings and federal judicial proceedings. First, Congress created the EEOC,⁶¹ thereby providing statutory authority for an already existing Presidential committee on equal employment opportunity.⁶² The newly formed EEOC had authority to investigate discrimination complaints⁶³ and to seek informal resolution of disputes through employer cooperation.⁶⁴

In delineating the EEOC's authority, however, Congress required that the EEOC defer to state administrative agencies responsible for enforcing state fair employment

⁵⁸ See, e.g., *id.* at 15880-81, 15890-91 (1964) (remarks of Representatives Abitt and Flynt prior to House approval of Civil Rights Act). Representatives of the southern states were among the opponents of the proposed legislation, which would have a substantial impact on the South. Southern representatives asserted that congressional consideration of the civil rights bill had focused unfairly on discrimination in the South, despite evidence of discrimination in other parts of the country. See, e.g., *id.* at 15880-81 (remarks of Rep. Roberts of Alabama); *id.* at 15882 (remarks of Rep. Rivers of South Carolina). Similarly, governors of the southern states were not among the 37 governors (three governors of territories) who urged prompt enactment. *Id.* at 14510-11 (remarks of Sen. Dirksen).

⁵⁹ See, e.g., H.R. REP. NO. 914, *supra* note 52, at 2431, 2434 (opponents' views on proposed Civil Rights Act). Title II, the public accommodations provision, also premised on the commerce clause, provoked similar reactions. *Id.*

⁶⁰ See *infra* notes 65-69 and accompanying text.

⁶¹ Pub. L. 88-352, title VII, § 705(a), 78 Stat. 258 (1964) (current version at 42 U.S.C. § 2000e-4(a) (1982)).

⁶² Hearings on S. 1731, *supra* note 56, at 104 (statement of Robert F. Kennedy, United States Attorney General). The Committee on Equal Employment Opportunity, overseen by Vice President Johnson, was created by executive order in 1961 and administered a fair employment program which applied to the federal government and federal government contractors. *Id.*; Interpretive Memorandum of Title VII, *supra* note 44, at 7215. Congress deemed statutory recognition of the committee, through the proposed Title VII, important because the lack of statutory authority had created funding problems for the committee, which depended on agencies and departments for support. 109 CONG. REC. 11076 (1963) (remarks of Sen. Dirksen).

In contrast to the authority of the Presidential committee and the proposed authority of the EEOC set forth in the Administration's bill, see 109 CONG. REC. 11081 (1963), the EEOC's authority under Title VII, as enacted, extended only to private employers. Pub. L. 88-352, title VII, § 701(a), (b), 78 Stat. 253 (1964). The federal government remained exempt from regulation until Congress amended Title VII in 1972. See Pub. L. 88-352, title VII, § 701(b), 78 Stat. 253 (1964); Pub. L. 92-261, § 11, 86 Stat. 111-13 (1972).

⁶³ Pub. L. 88-352, title VII, § 706(a), § 709-§ 710, 78 Stat. 259, 262-64 (1964) (current version at 42 U.S.C. §§ 2000e-5(b), 2000e-8, 2000e-9).

⁶⁴ Pub. L. 88-352, title VII, § 706(a), 78 Stat. 259 (1964) (current version at 42 U.S.C. § 2000e-5(b)). Under Title VII, as originally enacted, if the EEOC could not procure the employer's voluntary compliance, the EEOC gave the employee an opportunity to sue the employer in federal district court. Pub. L. 88-352, title VII, § 706(e), 78 Stat. 260 (1964).

laws.⁶⁵ At the time that Congress was considering the Title VII legislation, nearly half of the states already regulated employment discrimination.⁶⁶ Supporters of the federal bill nonetheless concluded that national legislation was necessary in light of the sizable proportion of black American employees who lived in states lacking fair employment laws.⁶⁷ Consequently, Congress drafted Title VII to provide a federal fair employment standard which would protect employees in states without fair employment laws but not preempt existing state fair employment laws.⁶⁸ Thus, in states with their own fair employment laws, Title VII would supplement the state law to the extent the state law protection fell short of the protection provided under Title VII. As is evident from the supplemental role that Title VII would play with regard to state fair employment laws, Congress intended that other remedies, whether under federal or state law, would continue to be available notwithstanding the enactment of Title VII.⁶⁹

Finally, the broad investigatory power that Congress accorded the EEOC was subject to the ultimate authority of the federal courts.⁷⁰ Title VII authorized the district courts not simply to review the findings of the EEOC and state administrative proceedings, but also to conduct a trial de novo⁷¹ to determine whether the employer had discriminated.⁷² Congress contemplated that the judicial proceeding would protect the employer from

⁶⁵ Pub. L. 88-352, title VII, § 706(b), 78 Stat. 259-60 (1964) (current version at 42 U.S.C. § 2000e-5(c)).

⁶⁶ *Equal Employment Opportunity: Hearings on H.R. 405 and Similar Bills Before the General Subcomm. on Labor of the House of Representatives Comm. on Education and Labor*, 88th Cong., 1st Sess. 499-557 (1963) (synopsis and charts of state law provisions, prepared by Library of Congress) [hereinafter *Hearings on H.R. 405*]. Twenty-three states prohibited employment discrimination on the basis of race, creed, color, national origin, ancestry, and/or age: Alaska, California, Colorado, Connecticut, Delaware, Illinois, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, West Virginia, and Wisconsin. *Id.* at 550-51, 556-57. In addition, Iowa's legislature had passed a resolution disapproving of employment discrimination, *id.* at 516, Louisiana law prohibited age discrimination alone, *id.* at 550-51, and both Maryland and Virginia had appointed study commissions on employment discrimination. *Id.* Only Wisconsin law, like Title VII, prohibited sex discrimination. *Id.* See Pub. L. 88-352, title VII, § 703(a), 78 Stat. 255 (1964).

Opponents of the proposed legislation contended that in view of the extensive state regulation, Title VII was unnecessary. See Interpretive Memorandum of Title VII, *supra* note 44, at 7214.

⁶⁷ Interpretive Memorandum of Title VII, *supra* note 44, at 7214; 110 CONG. REC. at 7217 (printed remarks of Sen. Clark in response to opponents of Title VII). None of the southern states had fair employment laws. See *supra* note 66.

⁶⁸ 110 CONG. REC. 7216, 7216-17 (1964) (written responses of Sen. Clark to Sen. Dirksen) [hereinafter *Clark-Dirksen*]; Interpretive Memorandum of Title VII, *supra* note 44, at 7214. Proponents hoped that deferral would induce more states to enact and enforce their own laws, thereby freeing the EEOC to concentrate on the remaining uncooperative states. *Clark-Dirksen, supra*, at 7216-17.

⁶⁹ See 110 CONG. REC. at 7207 (remarks of Sen. Clark to Sen. Hill); *id.* at 13650-52 (Senate rejection of proposed amendment to make Title VII an exclusive remedy for unlawful employment practices). See also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 and n.9 (1974). For federal employees, however, Title VII currently provides the exclusive judicial remedy. See *Brown v. General Servs. Admin.*, 425 U.S. 820, 828-29 (1976).

⁷⁰ Pub. L. 88-352, title VII, § 706(f), (g), 78 Stat. 260-61 (1964) (current version at 42 U.S.C. § 2000e-5(f), (g)).

⁷¹ See Interpretive Memorandum of Title VII, *supra* note 44, at 7213.

⁷² Pub. L. 88-352, title VII, § 706(g), 78 Stat. 261 (1964) (current version at 42 U.S.C. § 2000e-5(g)).

overzealous EEOC investigation⁷³ and also assure the employee of an additional forum for relief where the EEOC was slow or unable to negotiate a remedy.⁷⁴

In 1972, Congress amended Title VII.⁷⁵ In addition to expanding the coverage of Title VII to include a broader range of private and public sector employment,⁷⁶ the 1972 amendment strengthened the EEOC's enforcement authority. Under Title VII as enacted in 1964, the EEOC's ability to resolve disputes depended on the voluntary compliance of the employer.⁷⁷ If the employer was uncooperative, the EEOC could do nothing more than give the employee an opportunity to sue.⁷⁸ Because of its limited authority, the EEOC was unable to address adequately the increasing number of charges being filed.⁷⁹ In hearings on the proposed amendment of Title VII, the Department of Justice recommended that Congress authorize the EEOC to file civil actions against uncooperative employers,⁸⁰ rather than confer quasi-judicial powers on the EEOC.⁸¹ Congress ultimately agreed with the Department of Justice. The 1972 amendment extended to the EEOC the authority to initiate civil actions against employers⁸²

⁷³ See H.R. REP. NO. 914, *supra* note 52, at 2515-16 (additional views of seven members of Judiciary Committee); *Kremer*, 456 U.S. at 474.

⁷⁴ Pub. L. 88-352, title VII, § 706(e), 78 Stat. 260 (1964) (current version at 42 U.S.C. § 2000e-5(f)(1)).

⁷⁵ Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (1972).

⁷⁶ One consequence of the 1972 amendment was that Title VII applied to employment by state and local governments. Pub. L. 92-261, § 2(1),(2), 86 Stat. 103 (1972). Title VII as originally enacted expressly exempted states and political subdivisions. Pub. L. 88-352, title VII, § 701(a),(b), 78 Stat. 253 (1964). Another effect of the 1972 amendment was extension of Title VII to a broader range of private employment. Pub. L. 92-261, § 2(2), 86 Stat. 103 (1972) (employers with 15 or more employees). Compare Title VII as originally enacted. Pub. L. 88-352, title VII, § 701(b), 78 Stat. 253 (1964) (employers with 25 or more employees). Finally, the 1972 amendment extended Title VII coverage to the federal government, Pub. L. 92-261, § 11, 86 Stat. 111-13 (1972), which had been exempt under Title VII as originally enacted. Pub. L. 88-352, title VII, § 701(a),(b), 78 Stat. 241 (1964).

⁷⁷ Pub. L. 88-352, title VII, § 706(e), 78 Stat. 260 (1964). See 110 CONG. REC. 15865-66 (1964) (A Concise Explanation of the Civil Rights Act of 1964, submitted by Sen. Humphrey).

⁷⁸ See *id.*

⁷⁹ See H.R. REP. NO. 238, 92d Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2139-41, 2144 [hereinafter H.R. REP. NO. 238].

⁸⁰ See *Equal Employment Opportunities Enforcement Act of 1971: Hearings on S. 2515, S. 2617, H.R. 1746 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess. 49, 125-29 (1971) (statement of David Norman, Assistant Attorney General, Civil Rights Division, Department of Justice) [hereinafter 1971 Hearings]. See *Kremer*, 456 U.S. at 475 n.15.

⁸¹ The EEOC recommended that Congress authorize the EEOC to issue cease-and-desist orders. 1971 Hearings, *supra* note 80, at 54-55 (statement of William H. Brown, III, Chairman, EEOC). The proposal was similar to proposals which Congress had rejected in enacting Title VII in 1964. H.R. REP. NO. 914, *supra* note 52, at 2515-16 (additional views of seven members of the Committee on the Judiciary). The Department of Justice countered that district courts should continue to be and were more suitable than the EEOC as the final fact-finding forum under Title VII. 1971 Hearings, *supra* note 80, at 125. The Department of Justice asserted that there was greater respect for and confidence in judicial proceedings, district court judges had the requisite expertise, and judicial resolution of disputes would be faster. *Id.* at 126. Contributing to the federal courts' greater efficiency, the Department added, would be their capacity to handle company-wide or industry-wide disputes encompassing numerous individual complaints of the type the EEOC normally handles. *Id.* at 127-29.

⁸² Pub. L. 92-261, § 4(a), 86 Stat. 105 (1972). In 1978, the EEOC became the federal agency with primary responsibility in the area of employment discrimination when the President streamlined federal fair employment regulation through Reorganization Plan No. 1, 92 Stat. 3781, reprinted

but preserved the status of the federal district courts as the final fact-finding forum.⁸³

As in the text of Title VII, Congress did not expressly address state court jurisdiction in the legislative history of Title VII.⁸⁴ Congress's primary concern was with assuring the availability of the new federal remedy through the EEOC and the federal courts, but without disabling the states from providing state law remedies for employment discrimination.⁸⁵ What the legislative history failed to indicate clearly, however, was whether the states were authorized to provide the federal law remedy. Even when Congress amended Title VII in 1972, the issue of state court authority to provide Title VII relief remained unresolved.⁸⁶ Consequently, because both the text and legislative history of Title VII are inconclusive on the issue of state court jurisdiction under Title VII, courts have looked to Supreme Court decisions for guidance.

C. Supreme Court Decisions

There is no Supreme Court decision that is conclusive as to the role Congress intended for state courts under Title VII. Indeed, the Supreme Court has stated that it has not yet decided the issue of state court jurisdiction to hear Title VII actions.⁸⁷ The Court thus has negated any inferences to the contrary that might be drawn from prior decisions.⁸⁸

in 42 U.S.C. § 2000e-4, at 39-40. The Plan transferred to the EEOC fair employment functions which the Department of Labor, Department of Justice, Civil Service Commission, Equal Employment Opportunity Council, and various agencies previously had handled. *See id.* at 40-42 (Message of the President). The Reorganization Plan was an exercise of the authority Congress conferred on the President to reorganize executive branch agencies in the interest of administrative efficiency and implementation of laws. *See* 5 U.S.C. §§ 901-912 (1982). Section 901(d) authorizes the President to determine what changes are necessary where a review of agency functions reveals overlapping responsibilities. Pursuant to Section 903, the President then must prepare and submit to Congress a plan for reorganization. Section 906 provides that unless Congress disapproves of the plan, the plan automatically becomes effective after a sixty-day period when Congress is in session.

⁸³ § 706(f)(3),(g), 42 U.S.C. § 2000e-5(f)(3),(g). Congress also retained the deferral provisions on the ground that states often are best suited to handle violations occurring within their borders. H.R. REP. NO. 238, *supra* note 79, at 2154.

⁸⁴ There were numerous references in the legislative history to the federal district courts because the proposed legislation referred to the federal district courts. *See, e.g.*, Interpretive Memorandum of Title VII, *supra* note 44, at 7213-14; 110 CONG. REC. 17243, 17244 (1964) (Summary of the Basic Provisions of the Civil Rights Act of 1964, submitted by Sen. Burton). In contrast, there was little reference to state courts. During an exchange between Senators Dirksen and Clark, there was a fleeting reference to state courts. Clark-Dirksen, *supra* note 68, at 7216. Senator Dirksen observed that if coverage under the proposed Title VII overlapped with existing state law, an employer could conceivably be subject to simultaneous federal and state court suits and possibly conflicting results regarding the same discriminatory act. Senator Clark, in response, explained that Title VII would not preempt any state or local regulation consistent with the purposes of Title VII. Moreover, Senator Clark continued, the EEOC would defer to any state that had and was effectively enforcing an adequate state law. *Id.* (Both Senator Clark and Senator Dirksen were sponsors of the Senate civil rights bills. *See* 109 CONG. REC. 11084, 11541 (1963)).

⁸⁵ *See supra* notes 65-69 and accompanying text.

⁸⁶ *See supra* notes 75-83 and accompanying text.

⁸⁷ *Kremer*, 456 U.S. at 479 n.20. The Court stated that "[w]e of course do not decide in this case whether jurisdiction to entertain Title VII claims is limited to federal courts." *Id.*

⁸⁸ *Id.* *See Alexander*, 415 U.S. 36; *Lehman v. Nakshian*, 453 U.S. 156 (1981). In *Alexander*, the Supreme Court considered whether by prior submission of an employment grievance to arbitration,

Although the Supreme Court has not yet offered a definitive interpretation of the Title VII jurisdictional statute, the Court has set forth the principle it applies in interpreting federal jurisdictional statutes. In *Claffin v. Houseman*,⁸⁹ decided in 1876, the Supreme Court considered whether federal courts have exclusive jurisdiction of actions arising under federal statutes. The Court concluded that state courts of general jurisdiction have concurrent jurisdiction with federal courts in cases arising under the federal Constitution, laws, and treaties, provided Congress neither expressly nor impliedly prohibits state court jurisdiction.⁹⁰ Where Congress has not expressly prohibited concurrent jurisdiction, the Court explained, "incompatibility" between the state court's exercise of jurisdiction and the subject matter involved would be evidence of Congress's implicit intent to preclude state court jurisdiction.⁹¹ The trend since *Claffin* has favored concur-

an employee had waived the option of filing a Title VII action in federal court. *Alexander*, 415 U.S. at 38. The Court concluded that the employee still could bring an action under Title VII, noting that the trial court, in its discretion, could consider the arbitral decision as evidence. *Id.* at 59-60. In reaching its conclusion, the *Alexander* Court made statements which seemed to indicate the Court's conclusion that federal courts have exclusive jurisdiction under Title VII. First, the Court observed that "final responsibility for enforcement of Title VII is vested with federal courts," as opposed to the EEOC. *Id.* at 44. Next, the Court noted, Title VII expressly provides for several forums, namely, the EEOC, state and local agencies, and the federal courts. *Id.* at 47. Moreover, the Court continued, because Title VII provides a supplemental remedy, an employee still is free to pursue other remedies under federal and state law. *Id.* at 48-49 and n.9. The Court concluded that for a court to grant preclusive effect to arbitral rather than judicial proceedings would be inappropriate because "Congress intended federal Courts to exercise final responsibility for enforcement of Title VII." *Id.* at 56-58.

In *Lehman*, the Supreme Court made similar remarks in concluding that a federal employee asserting a claim under the Age Discrimination in Employment Act (ADEA) was not entitled to a jury trial. *Lehman*, 453 U.S. at 160-64. The Court relied in part on the fact that Title VII enforcement provisions, on which the corresponding ADEA provisions are based, do not afford a right to a jury trial. *Id.* at 163-64. While endeavoring to explain why the federal district courts, rather than the federal Court of Claims, have jurisdiction of ADEA claims against the government, the *Lehman* Court first noted that federal district courts and state courts have concurrent jurisdiction of ADEA claims against private employers. *Id.* at 164 n.12. With regard to ADEA claims against the government, however, the Court observed that Congress had restricted jurisdiction to the district courts to avoid the circumstance of state courts hearing claims against the federal government. *Id.* The Court then added that "[e]xclusive district court jurisdiction is also consistent with jurisdictional references in Title VII" (citing 42 U.S.C. § 2000e-5(f)(3), which confers jurisdiction on the district courts, and 42 U.S.C. § 2000e-16(c), which gives federal employees the right to file an action in district court). *Id.* For a discussion of cases where courts, both prior to and since *Kremer*, have relied on the language in *Alexander* and *Lehman* to conclude that federal courts have exclusive jurisdiction under Title VII, see *infra* notes 100-23 and accompanying text.

⁸⁹ 93 U.S. 130, 133 (1876). The particular statute was the Bankrupt Act of Mar. 2, 1867, 14 Stat. 517. 93 U.S. at 130.

⁹⁰ *Claffin*, 93 U.S. at 136-37. In support of its conclusion, the Court cited several precedents. First, the Court referred to Alexander Hamilton's analysis, in THE FEDERALIST NO. 82, of federal legislative and judicial authority. *Id.* at 138. The Court noted that Hamilton had concluded that federal judicial authority, like legislative authority, should be exclusive only where Congress expressly so provides and state courts should have jurisdiction where Congress does not prohibit it. *Id.* Second, the Court observed that there were no lower federal courts until the Judiciary Act of Sept. 24, 1789. *Id.* at 139. Even with the creation of lower federal courts, however, the Court noted that there was an underlying presumption that absent Congressional provision to the contrary, state courts would continue to exercise jurisdiction, but concurrently with the new federal courts. *Id.* Finally, the Court cited its prior endorsement of the concurrent jurisdiction principle in *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 26-28 (1820). *Claffin*, 93 U.S. at 141.

⁹¹ *Claffin*, 93 U.S. at 136. Some commentators have suggested that the Court discard the *Claffin*

rent state court jurisdiction to hear federal law claims, with exclusive federal court jurisdiction being the exception rather than the rule.⁹²

In 1981, however, the Court expanded upon the notion that Congress implicitly can prohibit state court jurisdiction of federal question suits. In *Gulf Offshore Co. v. Mobil Corp.*, the Court reiterated the *Clafin* rule that state courts have jurisdiction of federal claims absent congressional prohibition.⁹³ The Court added, however, that the presumption of concurrent jurisdiction can be rebutted not only by explicit congressional prohibition but also by unmistakable implication from legislative history or by a clear incompatibility between state court jurisdiction and federal interests.⁹⁴

II. SELECT DECISIONS ON THE TITLE VII JURISDICTION ISSUE

Because neither the text nor the legislative history of Title VII contains an express congressional provision for state courts, the issue of state court jurisdiction under Title VII must be resolved through the implication of congressional intent. Federal and state courts have found differing implications of congressional intent in the text and legislative history of Title VII and consequently have reached different conclusions regarding the jurisdiction of state courts under Title VII. Because the text and legislative history of Title VII contain references only to federal courts, several courts have concluded that Congress implicitly intended that federal courts have exclusive jurisdiction under Title VII.⁹⁵ Other courts, however, have relied on the absence of prohibitions regarding state courts, rather than the affirmative references to federal courts, to conclude that state courts have Title VII jurisdiction concurrently with federal courts.⁹⁶

Several lower federal and state courts have concluded that federal courts have

principle. They assert that Congress and the courts manifest inconsistent understanding of the principle and the principle itself, particularly the concept of implicit Congressional intent to confer exclusive jurisdiction, is flawed. See Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 76 MICH. L. REV. 311, 313-40 (1976).

⁹² *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962). *Dowd Box* concerned the Labor Management Relations Act of 1947 jurisdictional provision, which indicates that suits "may be brought in any district court of the United States . . ." *Id.* at 502-03 & n.1. The Court applied the *Clafin* principle to uphold the state court's exercise of jurisdiction over a collective bargaining complaint under the Act. *Id.* at 506.

⁹³ *Gulf Offshore Co. v. Mobil Corp.*, 453 U.S. 473, 477-78 (1981).

⁹⁴ *Id.* at 478. In *Gulf*, the Court upheld a state court's exercise of jurisdiction over the personal injury claim of a Gulf employee working on a platform on the Outer Continental Shelf. *Id.* at 484. The Outer Continental Shelf Land Act expressly confers "exclusive federal jurisdiction" with regard to the Outer Continental Shelf. *Id.* at 479. The Court concluded on the basis of the legislative history, however, that exclusive federal regulation of Shelf resources did not compel exclusive federal court jurisdiction of Shelf workers' personal injury claims. *Id.* at 482-83. The Court further noted that the factors which normally favor exclusive federal court jurisdiction — desirability of uniform interpretation, federal judge expertise on federal law, and the presumed greater hospitality of federal courts to federal claims — were absent. *Id.* at 483-84. Finally, the Court observed, concurrent state court jurisdiction would afford injured workers the option of pursuing claims in a "familiar, convenient, and possibly less expensive [forum]." *Id.* at 484.

⁹⁵ See *infra* notes 97-123 and accompanying text.

⁹⁶ See *infra* notes 122-49 and accompanying text.

exclusive jurisdiction under Title VII.⁹⁷ Insofar as they have discussed their reasoning,⁹⁸ these courts have indicated that the affirmative references to federal courts in the text and legislative history of Title VII, as well as Congress's incorporation of state administrative proceedings but not state judicial proceedings, are evidence of Congress's implicit intent to exclude state courts from Title VII jurisdiction.⁹⁹

For example, in 1978, the federal district court for the Eastern District of Michigan concluded in *Dickinson v. Chrysler Corp.*¹⁰⁰ that federal courts have exclusive jurisdiction of Title VII actions. The plaintiff in *Dickinson*, upon receipt of an EEOC right-to-sue letter, sued in state court, alleging race and sex discrimination in violation of Title VII and state law.¹⁰¹ The defendant removed the action to federal court and then moved for dismissal.¹⁰² The defendant alleged that federal district courts have exclusive jurisdiction of Title VII actions, so the plaintiff's filing in state court did not satisfy the requirement that an employee file suit within ninety days of receiving a right-to-sue letter. The plaintiff contended that his state court filing satisfied the ninety-day filing requirement because the state court had jurisdiction. Alternatively, the plaintiff claimed that under the principle of equitable tolling, the state court filing should suffice to preserve the Title VII claim.¹⁰³ The district court held that the state court lacked original jurisdiction and the federal district court therefore lacked derivative jurisdiction on removal.¹⁰⁴ In addition, the court refused to apply the principle of equitable tolling to

⁹⁷ For cases, other than those discussed in this section, where courts have concluded that federal courts have exclusive jurisdiction of Title VII claims, see *McCloud v. National R.R. Passenger Corp.*, 25 FEP Cases 513, 515 (D.D.C. 1981) (D.C. Court of Appeals has found exclusive jurisdiction); *Lucas v. Tanner Bros. Contracting Co.*, 10 FEP Cases 1104, 1104 (Ariz. Sup. Ct. 1974) (Title VII impliedly requires that actions be brought in federal court); *Bowers v. Woodward & Lothrop*, 280 A.2d 772, 774 (D.C. 1971) (Title VII confers jurisdiction on federal courts); *Fox v. Eaton Corp.*, 48 Ohio St. 2d 236, 237-38, 358 N.E.2d 536, 537 (1976) (Title VII confers jurisdiction on federal courts). See also *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1083 & n.4, 1084 & n.5 (8th Cir.), cert. denied, 446 U.S. 966 (1980) (Eighth Circuit acknowledged that the jurisdiction issue is in dispute but also noted that the concurrent jurisdiction argument is questionable).

⁹⁸ Several courts have provided only perfunctory explanations of their decisions. See *supra* note 97.

⁹⁹ See *supra* note 97; see *infra* notes 100-23 and accompanying text.

¹⁰⁰ 456 F. Supp. 43, 47-48 (E.D. Mich. 1978).

¹⁰¹ *Id.* at 44. The plaintiff received an EEOC right-to-sue letter on February 18, 1976, and filed a complaint in state court on February 26, 1976. *Id.*

¹⁰² *Id.* The defendant, who was not served with the complaint until July 7, 1976, removed to federal court on July 23, 1976. *Id.*

¹⁰³ *Id.* For a discussion of the equitable tolling principle, see Note, *The Seventh Circuit's Reformulation of the Equitable Tolling Doctrine*, 1982 U. ILL. L. REV. 565 (1982). Although the purpose of statutes of limitations is protection of defendants from stale claims, *id.* at 565, defendants may not use the statutes to their unfair advantage. *Id.* at 567. Hence, where the defendant commits a wrong of which the plaintiff is unaware, either because the wrong naturally conceals itself or the defendant actively conceals it, the statute is equitably tolled until the plaintiff discovers or reasonably should have discovered the wrong. *Id.* at 565, 567. See *Bailey v. Glover*, 88 U.S. (21 Wall.) 340, 349-50 (1874).

¹⁰⁴ *Dickinson*, 456 F. Supp. at 48. The Supreme Court set forth the standard on derivative jurisdiction in *Lambert Run Coal Co. v. Baltimore & Ohio R.R.*, 258 U.S. 377, 382 (1922):

The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction.

save the plaintiff's Title VII claim.¹⁰⁵ Consequently, the court dismissed the plaintiff's Title VII claim and remanded the state law claims to state court.¹⁰⁶

The *Dickinson* court based its determination of exclusive jurisdiction on the legislative history and text of Title VII.¹⁰⁷ First, the court noted, the legislative history of Title VII documents Congress's intent that the right to file a civil action under Title VII merely supplement and not supplant other remedies available under federal and state law. Because other remedies for employment discrimination still are readily available, the court reasoned that its holding that the Title VII remedy is exclusively federal would not frustrate the remedial purpose of Title VII.¹⁰⁸ Second, the district court observed that Congress expressly provided for participation of only certain state bodies in the enforcement of Title VII. The court cited by way of example the provisions incorporating state administrative proceedings without mention of state courts.¹⁰⁹ Third, the district court noted that all congressional discussion of the Title VII civil action presumed a federal forum.¹¹⁰ Further, the court continued, the text of Title VII confirms Congress's presumption of a federal forum because it specifies Federal Rules of Civil Procedure and federal statutes applicable only in federal courts.¹¹¹

Six years after *Dickinson*, in 1984, the federal Court of Appeals for the Ninth Circuit, like the *Dickinson* court, concluded that federal courts have exclusive jurisdiction under Title VII. In *Valenzuela v. Kraft, Inc.*,¹¹² the Ninth Circuit conceded the ambiguity of the Title VII jurisdictional provision but found in other statutory provisions and the legislative history Congress's implicit intent to make Title VII jurisdiction exclusively federal. The plaintiff in *Valenzuela* filed suit in California state court, alleging sex discrimination in violation of Title VII.¹¹³ The defendant removed the case to federal court.¹¹⁴ The

¹⁰⁵ *Dickinson*, 456 F. Supp. at 48. The court concluded that *Burnett v. New York Central R.R.*, 380 U.S. 424 (1965) was not controlling. *Dickinson*, 456 F. Supp. at 48. In *Burnett*, the plaintiff filed an action under the Federal Employers' Liability Act (FELA) in Ohio state court. *Burnett*, 380 U.S. at 424. The state court had concurrent jurisdiction but dismissed for lack of venue under Ohio law. *Id.* at 424-25. The plaintiff then filed an identical action in federal district court, which was dismissed because the FELA statute of limitations had run. *Id.* at 425. The Supreme Court held that the plaintiff's timely filing in a state court with jurisdiction tolled the FELA limitations period and the federal action therefore was timely. *Id.* at 426, 434-35. The *Dickinson* court distinguished *Burnett*, where the Ohio state court had concurrent jurisdiction under the FELA, from the circumstances in *Dickinson*, where the state court lacked jurisdiction under Title VII. *Dickinson*, 456 F. Supp. at 48.

¹⁰⁶ *Dickinson*, 456 F. Supp. at 48.

¹⁰⁷ *Id.* at 45-47.

¹⁰⁸ *Id.* at 45.

¹⁰⁹ *Id.* at 46.

¹¹⁰ *Id.* at 46-47.

¹¹¹ *Id.* at 47. The district court also found language in *Alexander*, 415 U.S. 36 (1974), to be compelling. *Dickinson*, 456 F. Supp. at 47 & n.8. See *supra* notes 87-88 and accompanying text for a discussion of the limited significance of *Alexander*.

¹¹² 739 F.2d 434, 435-36 (9th Cir. 1984). The Ninth Circuit is the first federal court of appeals to take a position on the Title VII jurisdiction issue. Other federal appeals courts have simply addressed the issue without deciding it. See, e.g., *Gunther*, 612 F.2d at 1083 & n.4, 1084 & n.5 (concurrent jurisdiction questionable); *Fox v. Eaton Corp.*, 615 F.2d 716, 719 & n.7 (6th Cir. 1980), cert. denied, 450 U.S. 935 (1981) (jurisdiction issue is difficult, particularly in the absence of language expressly excluding state courts from jurisdiction); *Patzer v. Board of Regents*, 763 F.2d 851, 855 n.4 (7th Cir. 1985) (jurisdiction issue is undecided but the court will assume for purposes of decision that state courts have jurisdiction).

¹¹³ 739 F.2d at 435.

¹¹⁴ *Id.*

federal district court granted the defendant's motion for dismissal of the plaintiff's Title VII claim concluding that the state court lacked subject matter jurisdiction of the Title VII claim, and the district court therefore lacked jurisdiction on removal.¹¹⁵ The Ninth Circuit affirmed.¹¹⁶

In reaching its decision that federal courts have exclusive jurisdiction under Title VII, the *Valenzuela* court first evaluated the provisions of Title VII in light of the *Clafin* principle, as embellished by *Gulf*. Although state courts are presumed to have concurrent jurisdiction of federal claims, the Ninth Circuit stated, Congress can rebut the presumption by explicit provision, implication from legislative history, or incompatibility between state court jurisdiction and federal interests.¹¹⁷ The court acknowledged that the Title VII jurisdictional provision alone, in simply authorizing federal courts to hear Title VII claims, does not exclude the possibility of state court jurisdiction. Looking beyond the jurisdictional provision, however, the court found a clear implication of exclusive federal court jurisdiction.¹¹⁸ Citing the Title VII requirement that court proceedings accord with the Federal Rules of Civil Procedure and federal appeals statutes, the *Valenzuela* court reasoned that Congress could not have intended to regulate the procedures and priorities of the state courts.¹¹⁹ The court therefore concluded that the incorporation of federal procedure is evidence that Congress contemplated an exclusively federal forum.¹²⁰ Turning to the legislative history, the court stated that the express references to federal courts and absence of references to state courts suggest congressional intent to make jurisdiction exclusively federal.¹²¹

Thus, in *Dickinson* and *Valenzuela*, lower federal courts concluded on the basis of language in the Title VII text and legislative history that Congress implicitly intended to confine Title VII jurisdiction to federal courts. Both courts found support for their interpretations of congressional intent in the statutory requirement that federal court procedure govern Title VII actions and Congress's affirmative references, in the legislative history, to federal courts.

Other courts, however, have found nothing in the Title VII text or legislative history to rebut the presumption that state courts have jurisdiction to hear Title VII claims. Accordingly, a few lower federal and state courts have concluded that state courts have

¹¹⁵ *Id.* The district court decision was out of the Central District of California. *Id.* at 436. In an earlier case, a different judge in the Central District had concluded that state courts have concurrent jurisdiction. See *Salem v. La Salle High School*, 31 FEP Cases 10, 10-11 (C.D. Cal. 1983).

¹¹⁶ *Valenzuela*, 739 F.2d at 436. The plaintiff subsequently refiled her Title VII action in federal district court, where the defendant alleged that the filing was not timely and moved for judgment on the pleadings. The district court concluded that the plaintiff's earlier state court filing tolled the ninety-day filing period, and denied defendant's motion. 801 F.2d 1170, 1171-72 (9th Cir. 1987). The Ninth Circuit affirmed, concluding that the circumstances — plaintiff's mistaken but diligent filing in state court, and the interest in furthering the remedial purpose of Title VII — were sufficient to justify the district court's resort to equitable tolling. *Id.* at 1174-75.

¹¹⁷ 739 F.2d at 435.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 435-36.

¹²⁰ *Id.*

¹²¹ *Id.* at 436. In support of its conclusion, the *Valenzuela* court also cited language from *Alexander*, 415 U.S. 36 at 47 (enumeration of EEOC, state and local agencies and federal courts as forums available to Title VII plaintiff), and *Lehman*, 453 U.S. at 164 n.12 (exclusive federal jurisdiction of ADEA actions is consistent with jurisdictional references in Title VII). *Valenzuela*, 739 F.2d at 436. See *supra* notes 87-88 and accompanying text for a discussion of the limited significance of *Alexander* and *Lehman*.

jurisdiction to hear Title VII claims.¹²² Generally, these courts have relied on the *Claffin* principle that state courts have jurisdiction of federal law claims, absent evidence of congressional intent to the contrary.¹²³ That Congress expressly authorized federal court jurisdiction, the courts indicate, does not compel the conclusion that Congress intended federal courts to have exclusive jurisdiction under Title VII.¹²⁴

For example, in 1976, the federal district court for the District of New Jersey concluded in *Bennun v. Board of Governors*¹²⁵ that state courts exercise concurrent jurisdiction with federal courts over suits arising under Title VII. The district court determined that the text and legislative history of Title VII neither expressly nor implicitly prohibit state court jurisdiction, so state courts are authorized to hear Title VII claims.¹²⁶ The plaintiff in *Bennun*, a Rutgers University professor, sued individual faculty members and the university in New Jersey state court, alleging wrongful denial of tenure under state law and seeking compensatory and punitive damages.¹²⁷ The state court tried the action and dismissed the plaintiff's complaint.¹²⁸ One month after filing the state court action, the plaintiff commenced an action against the same parties in federal district court, alleging wrongful denial of tenure in violation of Title VII and other federal law.¹²⁹ The plaintiff sought damages and back pay.¹³⁰ Shortly after the plaintiff filed his federal suit, the university granted him tenure.¹³¹

Three years after commencing the federal court action, and while it was pending, the plaintiff filed a second federal court action, alleging continued discriminatory treatment in violation of Title VII.¹³² The district court observed that the federal court claims arose out of the same facts as the state law claims previously adjudicated in state court

¹²² For cases, other than those discussed in this section, where courts have concluded that state courts have concurrent jurisdiction under Title VII, see *Greene v. County School Bd.*, 524 F. Supp. 43, 44-45 (E.D. Va. 1981) (neither text nor legislative history of Title VII expressly or by necessary implication vests federal courts with exclusive jurisdiction); *Vason v. Carrano*, 31 Conn. Supp. 338, 338, 330 A.2d 98, 98 (Conn. Super. Ct. 1974) (state courts have concurrent jurisdiction of suits under federal civil rights statutes, 42 U.S.C. §§ 1981-2000h-6); *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 74, 389 A.2d 465, 474-75 (1978) (Title VII jurisdictional statute does not vest federal courts with exclusive jurisdiction). See also *Patzer*, 577 F. Supp. at 1559 (Wisconsin district court expressly did not decide the jurisdiction issue but said there appears to be no reason that a state court may not hear a Title VII claim).

No federal court of appeals has determined that state courts have Title VII jurisdiction, although one court has alluded to the possibility. See *Fox*, 615 F.2d at 719 & n.7 (Sixth Circuit expressly did not decide the Title VII jurisdiction issue but noted that the issue is not an easy one, particularly in the absence of any language expressly excluding state courts from jurisdiction).

¹²³ Once the courts have cited the *Claffin* presumption of concurrent jurisdiction, they engage in minimal discussion of their reasons for concluding that nothing in Title VII or its legislative history forecloses state court jurisdiction of Title VII claims. See *infra* notes 137, 147 and accompanying text.

¹²⁴ See *infra* notes 138-39.

¹²⁵ 413 F. Supp. 1274, 1280 (D.N.J. 1976).

¹²⁶ *Id.* at 1279-80.

¹²⁷ *Id.* at 1276.

¹²⁸ *Id.* at 1277.

¹²⁹ *Id.* The plaintiff also asserted claims under 42 U.S.C. §§ 1983 and 1985 and the fifth and fourteenth amendments. *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

and were merely different theories of recovery for the same injury.¹³³ If the plaintiff could have asserted all federal claims in the earlier state court proceeding, the court determined that principles of res judicata would bar the district court from hearing the federal claims in both federal actions.¹³⁴ Addressing the Title VII claim, the court concluded that state courts have jurisdiction under Title VII and the plaintiff therefore could have asserted the Title VII claim in the prior state court trial.¹³⁵ The court consequently dismissed both federal actions insofar as they related overwhelmingly to events that the state court proceeding could have resolved.¹³⁶

In reaching its conclusion that state courts have concurrent jurisdiction, the *Bennun* court relied on the *Clafin* principle that state courts have concurrent jurisdiction where Congress neither expressly nor impliedly denies state court jurisdiction.¹³⁷ First, the court noted that although Title VII confers jurisdiction on the federal courts, the jurisdictional language neither expressly nor impliedly vests the federal courts with exclusive jurisdiction.¹³⁸ The court briefly addressed the legislative history, stating only that nothing in the history indicates congressional intent to create an exclusive federal remedy.¹³⁹ Consequently, the *Bennun* court said, there was no reason to conclude that state courts do not have concurrent jurisdiction under Title VII.¹⁴⁰

Three years after *Bennun*, in 1979, the federal district court for the Western District of Texas adopted the *Bennun* court's approach in *Peterson v. Eastern Airlines*.¹⁴¹ Acknowledging decisions by other courts that Title VII jurisdiction is exclusively federal, the district court nonetheless relied on the *Clafin* presumption of concurrent state court jurisdiction to conclude that state courts have jurisdiction under Title VII.¹⁴² The plaintiff in *Peterson*, after receiving a right-to-sue letter, filed a timely action in Texas state court, alleging a racially discriminatory discharge in violation of Title VII and section

¹³³ *Id.* at 1278.

¹³⁴ *Id.* at 1279-80.

¹³⁵ *Id.* at 1280. The court similarly concluded that the plaintiff could have asserted his section 1983 and section 1985 claims in state court. *Id.* at 1279. The court indicated summarily that concurrent state court jurisdiction to hear section 1983 and section 1985 claims is established. *Id.*

¹³⁶ *Id.* at 1280. Because the state court earlier had warned the plaintiff of the risk of splitting claims, but the plaintiff had refused to consolidate the claims, the district court concluded that dismissal would not be unfair. *Id.* The court, however, did permit the plaintiff to file an amended complaint as to events following the state court proceedings. *Id.*

¹³⁷ *Id.* at 1279 (citing *Houston*, 18 U.S. (5 Wheat.) 1 and *Dowd Box*, 368 U.S. 502). See *supra* notes 89-94 and accompanying text.

¹³⁸ *Bennun*, 413 F. Supp. at 1279. The court suggested, however, that actions initiated by the Attorney General against a government, governmental agency, or political subdivision might be the exclusive province of federal courts. *Id.* See § 706(f)(1) and § 707, 42 U.S.C. § 2000e-5(f)(1) and § 2000e-6.

¹³⁹ 413 F. Supp. at 1280.

¹⁴⁰ *Id.* at 1279. In 1978, the New Jersey Supreme Court held on the basis of *Bennun* that state courts have concurrent jurisdiction of Title VII actions. See *Peper*, 77 N.J. at 74, 389 A.2d at 474-75 (1978). But see *Kyriazi v. Western Elec. Co.*, 476 F. Supp. 335, 336 n.3 (D.N.J. 1979) (New Jersey district court, without reference to its decision in *Bennun*, suggested that federal courts have exclusive jurisdiction under Title VII).

¹⁴¹ 20 FEP Cases 1322, 1323 (W.D. Tex. 1979).

¹⁴² *Id.*

1981 of Title 42.¹⁴³ The defendant removed the case to federal court and then moved for dismissal on the grounds that the district court lacked jurisdiction.¹⁴⁴

The defendant contended that the state court lacked jurisdiction of the plaintiff's claims because federal courts have exclusive jurisdiction of actions under Title VII and section 1981. Moreover, the defendant asserted, if the plaintiff filed the Title VII and section 1981 claims in a court lacking jurisdiction, then the filing did not toll the statute of limitations for either claim. As a consequence, the defendant concluded, the district court action was not timely because removal occurred after the statutory periods had expired.¹⁴⁵ The court rejected the defendant's argument, concluding that the state court had original jurisdiction of the Title VII claim, as well as of the section 1981 claim, and that the district court therefore had jurisdiction on removal.¹⁴⁶

In support of its conclusion that state courts have concurrent jurisdiction under Title VII, the *Peterson* court first cited the *Claffin* principle that state courts have jurisdiction of federal law claims unless Congress expressly or by implication makes jurisdiction exclusively federal.¹⁴⁷ The court noted the split in federal and state authority regarding the Title VII jurisdiction issue and the absence of a determinative Supreme Court decision.¹⁴⁸ The court then concluded that it would follow the authority of *Bennun* and similar decisions where courts have concluded that state courts have jurisdiction to hear Title VII claims.¹⁴⁹

In sum, the absence of express congressional authorization or prohibition of state court jurisdiction in either the text or legislative history of Title VII has led to conflicting court conclusions regarding Congress's implicit intent. In some cases, the express authorization of federal district court jurisdiction and requirement of federal court procedure in Title VII trials, combined with express preservation of state law remedies, have persuaded courts that Congress implicitly intended only federal courts to hear Title VII claims. Other courts, however, have found nothing in the text or legislative history that implicitly rebuts the presumption following from *Claffin* that state courts have jurisdiction to hear Title VII claims.

III. IMPLICIT CONGRESSIONAL INTENT: EXCLUSIVE FEDERAL COURT JURISDICTION UNDER TITLE VII

The jurisdictional provision in Title VII confers jurisdiction on federal district courts without stating whether state courts have similar authority.¹⁵⁰ Lower federal and state

¹⁴³ *Id.* The plaintiff was discharged on April 17, 1977. The EEOC issued the right-to-sue letter on December 18, 1978. The plaintiff filed the Title VII action on March 15, 1979, just before the ninety-day period for filing would have elapsed. *Id.*

¹⁴⁴ *Id.* Removal was on April 19, 1979. *Id.*

¹⁴⁵ *Id.* A two-year statute of limitations under Texas law applied to section 1981 actions. *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1323. The *Peterson* court also cited an order in an earlier, unpublished decision where the court had concluded that state courts have concurrent jurisdiction under Title VII. *Id.* at 1323 & n.1.

¹⁴⁸ *Id.* at 1323. The *Peterson* court noted that it would not construe the "loose language" in *Alexander*, 415 U.S. 36, to mean that the Supreme Court had decided that federal courts have exclusive jurisdiction. *Peterson*, 20 FEP Cases at 1323. See *supra* notes 87-88 and accompanying text regarding the limited significance of *Alexander*.

¹⁴⁹ *Peterson*, 20 FEP Cases at 1323. The EEOC, as amicus curiae, asserted that state courts have jurisdiction under Title VII. *Id.*

¹⁵⁰ § 706(f)(3), 42 U.S.C. § 2000e-5(f)(3).

courts therefore have looked to other Title VII provisions and the legislative history of Title VII for evidence of implicit rather than express congressional intent regarding state court authority to hear Title VII claims. The statutory text and legislative history together suggest that Congress contemplated an exclusively federal forum for Title VII actions.

Congress's implicit intent to confer exclusive jurisdiction on federal courts emerges in statutory language beyond the jurisdictional provision. First, Title VII trial proceedings must accord with the Federal Rules of Civil Procedure where the judge decides to appoint a master to hear the case¹⁵¹ or orders preliminary or temporary relief.¹⁵² In addition, federal appeals statutes govern appeals from the trial judge's decisions.¹⁵³ The federal rules and statutes apply only to federal courts,¹⁵⁴ not state court proceedings. Given that Title VII actions must conform with federal procedure but state courts are not bound by such federal provisions, state court jurisdiction of Title VII claims would be inconsistent with the express statutory requirements. Both *Clafin* and *Gulf* instruct that incompatibility between state court jurisdiction and the federal interest to be served is sufficient to rebut the presumption that state courts have jurisdiction of federal claims.¹⁵⁵ Thus, Congress's requirement that Title VII actions accord with federal procedure demonstrates Congress's implicit intent that federal courts have Title VII jurisdiction to the exclusion of state courts.¹⁵⁶

In addition to expressly authorizing federal courts and procedure, the language of Title VII provides for only indirect state involvement in furthering the purposes of Title VII. In delineating the authority of the EEOC and federal courts to enforce Title VII directly, Congress expressly permitted the states to remedy employment discrimination only through state agencies and in accordance with state fair employment laws.¹⁵⁷ When a state has and is enforcing a fair employment law that is substantially similar to Title VII, Title VII requires that the EEOC defer consideration of an employee's complaint

¹⁵¹ § 706(f)(5), 42 U.S.C. § 2000e-5(f)(5) (citing Fed. R. Civ. P. 53, which sets forth the guidelines for district court appointment of a master and describes the extent of the master's authority).

¹⁵² § 706(f)(2), 42 U.S.C. § 2000e-5(f)(2) (citing Fed. R. Civ. P. 65, which sets forth notice and hearing requirements for issuance of preliminary injunctions or restraining orders).

¹⁵³ § 706(j), 42 U.S.C. § 2000e-5(j) (citing 28 U.S.C. §§ 1291-1292 (1982)). Section 1291 provides:

The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1291 (1982). Section 1292 provides:

(a) [T]he courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court

. . . .

28 U.S.C. § 1292 (1982).

¹⁵⁴ Fed. R. Civ. P. 1 provides:

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity

See *supra* note 153 for the text of the federal appeals statutes.

¹⁵⁵ See *supra* notes 89-94 and accompanying text.

¹⁵⁶ See *Valenzuela*, 739 F.2d at 435-36; *Dickinson*, 456 F. Supp. at 47. See *supra* notes 100-23 and accompanying text.

¹⁵⁷ See *supra* notes 34, 65-69 and accompanying text.

until the state agency has had an opportunity to resolve the dispute under state law in state administrative proceedings.¹⁵⁸ Congress, instead, might have authorized both state agencies and state courts to enforce Title VII directly. That Congress did not confer such authority, preferring to limit state agencies to enforcement of state law without any mention of state courts, indicates that Congress intended to exclude state courts, as well as state agencies, from hearing Title VII claims.¹⁵⁹

Beyond the language of the statute itself is the legislative history of Title VII, which explains Congress's motivation in drafting Title VII. Although Congress did not specifically address the issue of state court jurisdiction in its consideration of Title VII,¹⁶⁰ the legislative history indicates that Congress implicitly intended federal courts to have exclusive jurisdiction of Title VII claims.¹⁶¹ The inadequacy of state laws in eliminating discrimination, particularly against black Americans, compelled Congress to enact the Civil Rights Act of 1964, of which Title VII was part.¹⁶² State laws were inadequate not simply in failing to remedy discrimination but, in some states, in affirmatively perpetuating discrimination.¹⁶³ In the area of employment, half of the states, home to a majority of black Americans, lacked laws prohibiting discrimination.¹⁶⁴ Consequently, Congress insisted on a federal fair employment remedy that would be available to the extent that state remedies were inadequate.¹⁶⁵ Congress was willing to defer to states in their enforcement of state fair employment laws¹⁶⁶ and would not preempt other state remedies to the extent they were consistent with the purposes of Title VII.¹⁶⁷ Nonetheless, Congress was reluctant to involve states, even those with fair employment laws, in direct enforcement of Title VII, as opposed to state laws. Given the circumstances that spawned the Civil Rights Act and Title VII, it is improbable that Congress would have considered state courts to be suitable forums for the protection of Title VII rights.

Congress's implicit intent to exclude state courts from jurisdiction continued when Congress amended Title VII in 1972.¹⁶⁸ The 1972 amendment extended the coverage of Title VII to a wider range of employers, including state and local governments,¹⁶⁹ and, by authorizing the EEOC to sue employers, improved the EEOC's ability to handle the rising volume of complaints.¹⁷⁰ The expansion of Title VII coverage indicates that state regulation continued to be inadequate and suggests that Congress still would

¹⁵⁸ § 706(c), 42 U.S.C. § 2000e-5(c).

¹⁵⁹ See *Dickinson*, 456 F. Supp. at 46. There is further evidence that in enacting Title VII, Congress contemplated state, and specifically state court, enforcement of only state law. Title VII expressly provides that the federal fair employment provisions do not preempt state laws which are consistent with the purposes of Title VII. § 708, 42 U.S.C. § 2000e-7. Because Title VII does not restrict the authority of states to provide their own remedies for employment discrimination, one reasonable conclusion is that federal courts should have exclusive authority to enforce the federal remedy set forth in Title VII. See *Dickinson*, 456 F. Supp. at 45.

¹⁶⁰ See *supra* notes 52-86 and accompanying text.

¹⁶¹ See *id.*

¹⁶² See *supra* notes 52-69 and accompanying text.

¹⁶³ See *supra* note 53 and accompanying text.

¹⁶⁴ See *supra* note 67 and accompanying text.

¹⁶⁵ See *supra* note 68 and accompanying text.

¹⁶⁶ See *supra* notes 65-69 and accompanying text.

¹⁶⁷ See *supra* note 69 and accompanying text.

¹⁶⁸ Pub. L. 92-261, 86 Stat. 103 (1972). See *supra* notes 75-83 and accompanying text.

¹⁶⁹ See *supra* note 76 and accompanying text.

¹⁷⁰ See *supra* notes 77-83 and accompanying text.

consider state courts to be inappropriate forums for enforcement of Title VII rights. Moreover, although the expansion of Title VII coverage and the EEOC's authority was likely to increase Title VII litigation in federal district courts, Congress did not consider the possibility of state court jurisdiction.¹⁷¹ The district court jurisdictional provisions remained intact,¹⁷² as did the function of the district courts as ultimate factfinders in the Title VII enforcement scheme.¹⁷³ That Congress extended the coverage of Title VII and yet retained the original provisions for federal court authority is evidence of Congress's implicit intent that federal district courts continue to have exclusive jurisdiction of Title VII claims.¹⁷⁴

IV. A PROPOSAL FOR CONGRESSIONAL AMENDMENT OF TITLE VII TO AUTHORIZE STATE COURT JURISDICTION

Although Title VII currently does not authorize state court jurisdiction, Congress should amend Title VII¹⁷⁵ to expressly authorize state court jurisdiction of Title VII claims, at a minimum, in states that the EEOC has adjudged to have adequate fair employment laws and enforcement proceedings. A number of considerations indicate that state courts, as well as federal courts, should have jurisdiction of federal causes of action. First, the concurrent jurisdiction of state courts may be appropriate where there are parallel federal and state laws and claims and uniformity of interpretation therefore is not a concern.¹⁷⁶ Where there are comparable state laws, state courts are likely to have the requisite subject matter expertise and inclination to enforce federal laws adequately.¹⁷⁷ Second, concurrent jurisdiction may be appropriate where the federal law is likely to generate a sizable caseload that would benefit from allocation among federal and state courts.¹⁷⁸ Third, concurrent jurisdiction may better serve the convenience of potential plaintiffs by affording a choice of forums and possibly expediting resolution of claims.¹⁷⁹

Changes in circumstances since the 1972 amendment of Title VII indicate the need for a change in the jurisdiction that Title VII currently authorizes. Since 1964, when Congress enacted Title VII and only half of the states had their own fair employment laws,¹⁸⁰ most states have enacted fair employment laws which, similarly to Title VII,

¹⁷¹ See *supra* notes 75-83 and accompanying text.

¹⁷² § 706(f)(3), 42 U.S.C. § 2000e-5(f)(3).

¹⁷³ See *supra* notes 82-83 and accompanying text.

¹⁷⁴ Hence, the decisions in *Bennun*, 413 F. Supp. 1274 and *Peterson*, 20 FEP Cases 1322, were improper. See *supra* notes 125-49 and accompanying text.

¹⁷⁵ Congress justified Title VII as an exercise of its commerce clause power and could amend Title VII on the same basis. See *supra* notes 57-59 and accompanying text. U.S. CONST. art. I, § 8, cl. 2 authorizes Congress to regulate interstate commerce. U.S. CONST. art. I, § 8, cl. 18 further authorizes Congress to "make all laws which shall be necessary and proper" in regulating interstate commerce.

¹⁷⁶ Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 HARV. L. REV. 509, 515, 517 (1957).

¹⁷⁷ *Id.* Conversely, where uniformity of decisions is a concern, the federal bench is more likely to have the requisite expertise to address federal law issues and to be sympathetic to a federal law, particularly a controversial law. Congress then may prefer exclusive federal court jurisdiction. *Id.* at 511-12; Redish & Muench, *supra* note 91, at 314-15.

¹⁷⁸ Note, *supra* note 176, at 516.

¹⁷⁹ *Id.* at 517.

¹⁸⁰ See *supra* note 66 and accompanying text.

prohibit discrimination on the basis of race, religion, sex, age, and national origin.¹⁸¹ Where the EEOC has determined that a state qualifies for deferral because the state has and is enforcing a law comparable to Title VII,¹⁸² concurrent jurisdiction of the state's courts to hear Title VII claims would be appropriate. Because Title VII and the laws of states qualifying for deferral serve similar purposes, state courts, in hearing state law discrimination claims, are more likely to have the familiarity necessary to handle comparable Title VII claims competently.¹⁸³

The authorization of state court jurisdiction to hear Title VII claims would be a reasonable extension of the jurisdiction that state courts already exercise with regard to other federal civil rights statutes such as sections 1981,¹⁸⁴ 1982,¹⁸⁵ 1983,¹⁸⁶ and

¹⁸¹ See 8A Lab. Rel. Rep. (BNA) 451:101-451:107 (1984) for charts of state laws and *id.* at 451:201-451:206 for a list of state administrative agencies. State laws often have broader coverage than Title VII because, for example, they prohibit more types of discrimination or apply to employers with fewer than fifteen employees. *Id.* at 451:1. The laws of Alabama and Arkansas, however, prohibit only age discrimination, and the laws of Georgia, Mississippi, North Carolina and Virginia protect only state employees. *Id.* at 451:102-451:107.

State counterparts to the EEOC enforce most state laws. *Id.* at 451:201-451:206. State agencies usually provide enforcement procedures similar to the Title VII enforcement procedure, commencing with the employee's filing of a charge, continuing with informal conciliation and a hearing, and concluding with a formal finding. *Id.* at 451:2. After the agency's finding, many state laws permit interested parties to seek enforcement orders, injunctions or review in state court. *Id.*

¹⁸² See *supra* note 34. Forty-six states have laws and administrative proceedings qualifying for deferral under section 706, 42 U.S.C. § 2000e-5. See 29 C.F.R. § 1601.74 (1985). Alabama, Arkansas, Louisiana, and Mississippi are the only states without agency proceedings qualifying for deferral. *Id.* See *supra* note 181 regarding the shortcomings of the fair employment laws of Alabama, Arkansas, and Mississippi.

¹⁸³ One commentator, surveying changes in the states since the 1960's, suggests that the state judiciary is just as well-suited as the federal judiciary to try Title VII cases and probably will not decide them much differently. R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 188 (1985). Posner continues: "The time may have come to stop thinking in terms of stereotypes that, however descriptive of the attitudes of some state officials decades ago, ignore the peaceful but profound social revolution that has occurred since the mid-1960's." *Id.*

¹⁸⁴ Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144 (1870) (current version at 42 U.S.C. § 1981 (1982)). Section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1982).

¹⁸⁵ Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1982 (1982)). Section 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property." 42 U.S.C. § 1982 (1982).

¹⁸⁶ Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1983 (1982)). Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

42 U.S.C. § 1983 (1982).

1985¹⁸⁷ of Title 42. The Supreme Court has explicitly recognized that state courts have jurisdiction of actions under sections 1982¹⁸⁸ and 1983.¹⁸⁹ Moreover, lower federal courts have recognized state court jurisdiction with regard to sections 1981 and 1985.¹⁹⁰ Finally, state courts have demonstrated a willingness to exercise jurisdiction of civil rights claims.¹⁹¹ Although the other civil rights statutes, unlike Title VII, are broadly phrased¹⁹² and lack a comprehensive enforcement scheme,¹⁹³ they share the remedial purpose of Title VII. The similarity of purpose alone would not support the conclusion that state courts currently have Title VII jurisdiction,¹⁹⁴ but indicates that state courts are capable of protecting civil rights and should be given the authority to remedy discrimination complaints under Title VII.

Because the proliferation of state fair employment laws, as well as state court enforcement of other federal civil rights statutes, indicates that state courts would adequately enforce Title VII rights, concurrent jurisdiction would be appropriate to allocate the Title VII caseload among federal and state courts. The 1972 amendment¹⁹⁵ expanded Title VII coverage to employment by state and local government,¹⁹⁶ to more private employers,¹⁹⁷ and to employment by the federal government.¹⁹⁸ The amendment also

¹⁸⁷ Act of July 31, 1861, ch. 33, 12 Stat. 284 (1861); Act of Apr. 20, 1871, ch. 22, § 2, 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1985(3) (1982)). Section 1985(3) provides:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . [and] do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3) (1982).

¹⁸⁸ *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238 (1969).

¹⁸⁹ *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980); *Martinez v. California*, 444 U.S. 277, 283 n.7 (1979).

¹⁹⁰ See, e.g., *DeHorney v. Bank of Am. Nat'l Trust & Savings Ass'n*, 777 F.2d 440, 445 (9th Cir. 1985) (§ 1981); *Peterson*, 20 FEP Cases at 1323 (§ 1981); *Bennun*, 413 F. Supp. at 1279 (§ 1983, § 1985).

¹⁹¹ *Vason*, 31 Conn. Supp. at 338, 330 A.2d at 98 (§§ 1981-2000h-6); *Royer v. Adams*, 121 N.H. 1024, 1026-27, 437 A.2d 316, 317-18 (1981) (§ 1983); *Gray v. Serruto Builders*, 110 N.J. Super. 297, 305, 265 A.2d 404, 408 (1970) (§ 1982).

¹⁹² See *supra* notes 184-87.

¹⁹³ 28 U.S.C. § 1343 (1982) confers original jurisdiction on the district courts and authorizes their issuance of relief, including damages and equitable relief, and 42 U.S.C. § 1988 (1982) permits the courts to award attorney's fees. Otherwise, determination of the scope of the remedies provided in sections 1981 through 1985 is left to the courts. C. SULLIVAN, M. ZIMMER & R. RICHARDS, *FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION* § 8.1, at 467 (1980) (hereinafter *EMPLOYMENT DISCRIMINATION*).

¹⁹⁴ The federal court of appeals for the Ninth Circuit, which decided *Valenzuela*, recently indicated that while federal courts have exclusive jurisdiction of Title VII claims, the same is not necessarily true with regard to claims under other federal civil rights statutes. In 1985, in *DeHorney*, the Ninth Circuit concluded that claims under section 1981 are not analogous to Title VII claims and held that state courts have concurrent jurisdiction of section 1981 claims. *DeHorney*, 777 F.2d at 445.

¹⁹⁵ Pub. L. 92-261, 86 Stat. 103 (1972).

¹⁹⁶ Pub. L. 92-261, § 2(1),(2), 86 Stat. 103 (1972) (current version at 42 U.S.C. § 2000e(a),(b)).

¹⁹⁷ Pub. L. 92-261, § 2(2), 86 Stat. 103 (1972); § 701(b) (current version at 42 U.S.C. § 2000e(b)).

¹⁹⁸ Pub. L. 92-261, § 11, 86 Stat. 111-13 (1972) (current version at 42 U.S.C. § 2000e-16).

authorized the EEOC to sue employers in federal district court.¹⁹⁹ An important motivation for the amendment was the inability of the EEOC, limited to seeking employers' voluntary compliance, to handle adequately the increasing number of charges being filed.²⁰⁰ Of the thousands of charges filed, the EEOC had been able to remedy satisfactorily fewer than half.²⁰¹ As a consequence, many employees, unless they had the resources and time to pursue their claims in federal court, had to forgo their Title VII claims and remedy, thus defeating the purpose of Title VII.²⁰² Thus, by authorizing the EEOC to initiate civil actions on behalf of employees, Congress increased the likelihood of civil actions because the EEOC has the resources to bring suit where an individual employee cannot. Therefore, the expansion of Title VII coverage was likely to increase both the number of charges filed with the EEOC and the number of Title VII claims pursued in federal court.²⁰³ The authorization of state court jurisdiction would create additional forums and possibly reduce delay in resolving a dispute, once the complaint has passed through the cumbersome Title VII administrative proceedings.²⁰⁴ This potential for expediting resolution of Title VII claims is a compelling reason for Congress to extend jurisdiction to state courts.²⁰⁵

Congress's provision for the concurrent jurisdiction of state courts also would eliminate problems that arise when Title VII defendants remove cases from state court to federal district court. The ambiguity of the Title VII jurisdictional provision has led some employees to bring their Title VII actions in state court, in the mistaken belief that state courts have Title VII jurisdiction.²⁰⁶ Because the federal removal statute permits unrestricted removal of federal question cases to federal court,²⁰⁷ defendants in

¹⁹⁹ Pub. L. 92-261, § 4(a), 86 Stat. 105 (1972) (current version at 42 U.S.C. § 2000e-5(f)(1)).

²⁰⁰ See H.R. REP. NO. 238, *supra* note 79, at 2139-40, 2144.

²⁰¹ See 1971 Hearings, *supra* note 80, at 53 (statement of William H. Brown, III, Chairman, EEOC). From its inception in 1965 until the time of the hearings in 1971, the EEOC received 81,004 charges, with the number of charges filed increasing each year. *Id.*

²⁰² *Id.*

²⁰³ The district courts may be more efficient than the EEOC in disposing of disputes because the courts have the capacity to handle complex discrimination cases encompassing many employees and claims. See *id.* at 125-29 (statement of David Norman, Assistant Attorney General, Civil Rights Division, Department of Justice). The greater efficiency of the district courts, however, does not preclude the possibility of burdensome Title VII litigation which could be better handled if state courts had concurrent jurisdiction. The state court caseload, moreover, may not be as burdensome as the federal court caseload. Recent statistics on the state court caseload indicate that state courts have not suffered the much touted "litigation explosion" that has afflicted the federal courts. *In Search of the Litigation Explosion*, NAT'L CTR. ST. CTS. REP., May 1986, at 2-3.

²⁰⁴ EMPLOYMENT DISCRIMINATION, *supra* note 193, § 3.2, at 267-68.

²⁰⁵ It should be noted that in *Peterson*, the EEOC, as amicus curiae, successfully contended that state courts should have concurrent jurisdiction. *Peterson*, 20 FEP cases at 1323. That approach contrasts with the EEOC's insistence, in hearings prior to the 1972 amendment, that granting the EEOC adjudicative powers rather than authorizing the EEOC to file civil actions was a better way to strengthen Title VII enforcement. See 1971 Hearings, *supra* note 80, at 54-55. The EEOC's position in *Peterson* suggests that the EEOC has found civil actions effective in enforcing Title VII and seeks concurrent jurisdiction to allocate the caseload among federal and state courts and assure that such enforcement continues.

²⁰⁶ See *supra* notes 100-23, 141-49 and accompanying text.

²⁰⁷ The federal removal statute provides:

[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants,

Title VII cases commenced in state court generally remove the cases to federal court.²⁰⁸ Jurisdiction of a federal court on removal, however, is derivative in nature.²⁰⁹ If the state court where the case originated lacks subject matter jurisdiction, the federal court to which the action is removed also lacks jurisdiction.²¹⁰

Dismissal for lack of removal jurisdiction is technically sound but difficult for the Title VII plaintiff to fathom where the dismissing court is the one with exclusive jurisdiction.²¹¹ Further, the district court's dismissal may foreclose the employee from any forum, federal or state, for his or her Title VII claim where the ninety-day period for filing a civil action has elapsed.²¹² The district court could apply the principle of equitable tolling, so that the employee's timely filing in state court would be deemed to have tolled the ninety-day period for filing in federal court.²¹³ Equitable tolling, however, is a wholly discretionary remedy of limited scope²¹⁴ and may not be available to save the employee's Title VII claim.²¹⁵ If, instead, Congress were to authorize the jurisdiction of state courts, then not only would state courts have original jurisdiction to hear Title VII claims, but federal district courts would have jurisdiction on removal. Concurrent state court jurisdiction would eliminate both the need for equitable tolling and the loss of Title VII claims absent equitable tolling.²¹⁶

Finally, by authorizing state courts to hear Title VII claims, Congress would provide employees with an alternative forum that could hear Title VII and related state claims

to the district court of the United States of the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a) (1982).

²⁰⁸ See *supra* notes 100–23, 141–49 and accompanying text.

²⁰⁹ *Lambert Run Coal Co. v. Baltimore & Ohio R.R.*, 258 U.S. 377, 382 (1922). See *supra* note 104.

²¹⁰ See note 209. See also *supra* notes 100–23 and accompanying text.

²¹¹ In *Dyer v. Greif Bros.*, the Ninth Circuit observed:

This is the kind of legal tour de force that most laymen cannot understand, particularly in a case where the federal court not only has subject matter jurisdiction, but has exclusive subject matter jurisdiction. One would have thought that the purpose of removal in such a case is to get the case out of the court that lacks jurisdiction to hear it, and into the court that has jurisdiction, and to keep it in the latter court, so that it can be tried and a valid [judgment] can be entered.

755 F.2d 1391, 1393 (9th Cir. 1985) (quoting *State of Washington v. American League*, 460 F.2d 654, 658–59 (9th Cir. 1972)).

²¹² See § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).

²¹³ See *supra* note 103 for a discussion of equitable tolling.

²¹⁴ See *Valenzuela*, 739 F.2d at 436 n.2 and *Dickinson*, 456 F. Supp. at 48, discussed *supra* notes 100–23 and accompanying text. See also *McCloud* 25 FEP Cases at 515 (equitable tolling inappropriate where plaintiff had no reasonable basis for believing state court had jurisdiction of Title VII claims); cf. *Fox*, 615 F.2d at 720–21 (equitable tolling appropriate where plaintiff reasonably believed state court had jurisdiction of Title VII claims).

²¹⁵ Of course, even if the employee loses his or her Title VII claim, the employee still may seek redress under state law because Title VII does not preempt other remedies. § 708, 42 U.S.C. § 2000e-7. See *supra* notes 68–69 and accompanying text. Moreover, the state remedy may prove adequate and obviate the need for the Title VII remedy. See *Carey*, 447 U.S. at 65–66. Nonetheless, the purpose of Title VII — to compensate to the extent that a state law remedy is inadequate — seems to require that the employee be able to assert a Title VII claim, whether or not the employee recovers on the basis of that claim.

²¹⁶ The result in *Peterson*, 20 FEP Cases at 1323, although based on improper interpretation of Title VII, illustrates the advantages of authorizing state court jurisdiction. See *supra* notes 141–49 and accompanying text.

together. If an employee sues in federal district court, alleging discrimination in violation of both Title VII and state law, the federal and state claims will be tried in one proceeding only if the district court exercises pendent jurisdiction over the state claims. Pendent jurisdiction is appropriate where there are federal claims and state claims sufficiently related to each other that they comprise essentially one "case,"²¹⁷ and consolidated trial of all claims would serve judicial economy, convenience, and fairness to litigants.²¹⁸ Nonetheless, the exercise of pendent jurisdiction is discretionary.²¹⁹ If the state claims are likely to predominate, by reason of the proof required or the remedy sought, the federal court may dismiss the state law claims for resolution in state courts.²²⁰ The discrepancy between the limited, equitable relief available under Title VII and broader remedies available under state law may persuade a district court to refuse pendent jurisdiction.²²¹

Without state court jurisdiction to hear Title VII claims, a federal court's refusal of pendent jurisdiction forces the employee to pursue the federal and state claims in two forums or pursue only one remedy in one forum. Bifurcated resolution of the employee's claims is burdensome to the employee.²²² Moreover, where Title VII and state claims generate similar issues, there is a risk that proceedings in one forum will preclude action in the other, to the possible detriment of the employee.²²³ Bifurcated litigation therefore

²¹⁷ *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). The Court in *Gibbs* stated that "[t]he federal claim must have substance sufficient to confer subject matter jurisdiction on the court" and "[t]he state and federal claims must derive from a common nucleus of operative fact." *Id.* Federal and state claims must compose one "case," in accordance with U.S. CONST. art. III, § 2.

²¹⁸ *Gibbs*, 383 U.S. at 726.

²¹⁹ *Id.*

²²⁰ *Id.* at 726-27.

²²¹ In *Bouchet v. National Urban League*, the appeals court upheld the district court's refusal to exercise pendent jurisdiction. 730 F.2d 799, 806 (D.C. Cir. 1984). The plaintiff, alleging sex discrimination and defamation in employment, sought a jury trial, equitable relief under Title VII, and full compensatory and punitive damages under state law. *Id.* at 802-03. The district court eventually dismissed the state law claims and, after a non-jury trial, decided against the plaintiff on the merits. *Id.* at 803. The appeals court first noted that the plaintiff's demand for a jury trial, if successful, could compel trial by jury of the ordinarily non-jury Title VII claim. *Id.* The appeals court said that there would be a conflict, however, only if the plaintiff was entitled to try the legal and equitable claims in one federal action. *Id.* at 804. The appeals court observed that there was a discrepancy between the limited equitable relief under Title VII and the broader relief available for the state claims. *Id.* at 805. Consequently, the court continued, there was a risk that the pendent state claims might predominate in the lawsuit and be pendent to the Title VII claims "much as a dog is pendent to its tail." *Id.* at 805-06. The appeals court therefore concluded that the district court's refusals of pendent jurisdiction and a jury trial were proper. *Id.* at 806. For similar outcomes, see *Jong-Yul Kim v. International Inst. of Metro. Detroit*, 510 F. Supp. 722, 725-26 (E.D. Mich. 1981); *Kiss v. Tamarac Utils.*, 463 F. Supp. 951, 954 (S.D. Fla. 1978).

²²² For a discussion of problems arising where a federal court refuses to exercise pendent jurisdiction, see Catania, *State Employment Discrimination Remedies and Pendent Jurisdiction Under Title VII: Access to Federal Courts*, 32 AM. U.L. REV. 777, 834-37 (1983).

²²³ *Id.* at 835. It is arguable that where federal courts have exclusive jurisdiction of Title VII claims, then a state court's adjudication of a plaintiff's state law claims should not foreclose the plaintiff's right to assert the Title VII claim in federal court, because the plaintiff could not have asserted the Title VII claim in state court. *Id.* at 836. The Supreme Court, however, has indicated that the prior state adjudication might bar the subsequent federal court adjudication, even if the state court lacked jurisdiction to hear the Title VII claim. See *Kremer*, 456 U.S. at 479 n.20, 485, discussed *infra* note 231.

is undesirable not only because it is inefficient and burdensome but also because the doctrine of *res judicata* may apply to prevent the employee from fully pursuing a remedy for employment discrimination.

One solution to the claims bifurcation problem would be increased federal court exercise of pendent jurisdiction. Indeed, one commentator, specifically addressing Title VII, has concluded that if federal courts have exclusive jurisdiction of Title VII claims, then there is implicit congressional intent that federal courts exercise pendent jurisdiction over related state law claims.²²⁴ A better solution, however, preferable because it would not infringe on the discretion of federal courts with regard to pendent jurisdiction, would be Congress's express authorization of state court jurisdiction under Title VII. Congressional authorization of concurrent state court jurisdiction would, like pendent jurisdiction, further judicial economy through consolidated trial of related federal and state claims²²⁵ and reduce the risk that litigation of one claim will foreclose litigation of the other.

Finally, although congressional authorization of state court jurisdiction under Title VII is desirable, state court jurisdiction need not be identical to the Title VII jurisdiction that federal courts enjoy. Congress may limit the newly recognized state court jurisdiction in order to assure adequate state court enforcement of Title VII. One reasonable restriction would be Congress's extension of jurisdiction only to state courts in states with fair employment laws and administrative proceedings that qualify for EEOC deferral.²²⁶ Where states have enacted fair employment laws comparable to Title VII, the state courts will, by virtue of their familiarity with the issues arising under state law, be more adept at handling Title VII litigation.²²⁷ Congress also could refrain from extend-

²²⁴ See Catania, *supra* note 222, at 805-06. The author notes that a federal court's refusal of pendent jurisdiction would force a plaintiff to litigate in two forums or abandon one and concludes that "[i]t is unlikely that Congress would intend that such a result occur." *Id.* at 805.

²²⁵ See Schenkier, *Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction*, 75 Nw. U.L. Rev. 245, 250-51 (1980). The author, in asserting that judicial economy and convenience to the parties could not have been the primary rationale for pendent jurisdiction in *Gibbs*, observes that the same purposes would be served by "encouraging recourse to the state courts in those instances in which jurisdiction over the claim is concurrent." *Id.* at 250.

State court jurisdiction of Title VII claims may not eliminate, however, the possibility of claim bifurcation. It is conceivable that a state court, even if authorized to hear a Title VII claim, could force bifurcation by refusing to hear it. The Supreme Court, however, has indicated that state courts may not refuse enforcement of federal claims if they hear analogous state claims. *Testa v. Katt*, 330 U.S. 386, 394 (1947). It is therefore reasonable to assume that a state court that enforces a state law comparable to Title VII could not refuse to enforce Title VII.

Finally, it should be noted that congressional recognition of state court jurisdiction under Title VII would be beneficial in one other respect. As a consequence of the Reorganization Plan No. 1 of 1978, see *supra* note 82, the EEOC acquired various administrative and enforcement powers of the Department of Labor with regard to wages and hours under the Fair Labor Standards Act (FLSA). 29 U.S.C. §§ 201-219 (1982). Unlike Title VII, the FLSA wage and hour enforcement provisions expressly authorize the jurisdiction of state courts as well as federal courts. *Id.* § 216(b). Also unlike Title VII, the FLSA permits a civil action without an intervening administrative proceeding. *Id.* Where Title VII and the FLSA overlap with regard to an employment discrimination claim, the current inconsistencies in enforcement provisions may generate problems. Congressional recognition of state court jurisdiction under Title VII would reduce the inconsistency.

²²⁶ See *supra* notes 34, 181-82.

²²⁷ See *supra* notes 177, 180-83 and accompanying text.

ing jurisdiction to state courts if it determined that state court jurisdiction would be inappropriate for reasons other than state court competence.²²⁸ For example, exclusive federal court jurisdiction might be preferable with regard to Title VII actions brought by federal employees.²²⁹ Absent such legislative restrictions, state courts would be subject to few restraints in enforcing Title VII.²³⁰ Although the lack of restraint would not necessarily undermine Title VII enforcement, Congress may prefer to qualify state court jurisdiction of Title VII claims.²³¹

CONCLUSION

The absence of express reference to state courts in the Title VII jurisdictional provision has resulted in conflicting decisions regarding state court authority to hear Title VII claims. The text and legislative history of Title VII, however, document Congress's implicit intent to restrict jurisdiction of Title VII claims to federal district courts. Nonetheless, while Title VII currently does not authorize state court jurisdiction, changes in circumstances since Congress enacted Title VII in 1964 and amended Title VII in 1972 indicate that exclusive federal court jurisdiction no longer is appropriate. Given that most states have enacted and are enforcing fair employment laws comparable to Title VII, state courts as a group are more inclined and able than they were in 1964 or 1972 to provide the remedy for employment discrimination that Title VII authorizes. Indeed, the Supreme Court and lower federal courts have recognized the concurrent jurisdiction of state courts to hear claims arising under other federal civil rights statutes. For these reasons, Congress should amend Title VII to authorize state court jurisdiction of Title VII claims, particularly in states that are enforcing adequate state fair employment laws.

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²²⁸ See *Bennun*, 413 F. Supp. at 1279-80 (possibility that federal courts have exclusive jurisdiction of Attorney General actions against governmental employers). See *supra* note 138.

²²⁹ § 717, 42 U.S.C. § 2000e-16. Title VII currently provides the sole judicial remedy for federal employees alleging employment discrimination. See *supra* note 6.

²³⁰ State court disposition of Title VII cases would be subject to the remote authority of the United States Supreme Court to review state court decisions, 28 U.S.C. § 1257 (1982), the precedential effect of Supreme Court Title VII decisions which would obligate the state courts by reason of the supremacy clause, U.S. CONST. art. VI, cl. 2, and the authority of Congress to alter state court authority through amendment of Title VII.

²³¹ The extent to which state and local law may influence state courts in Title VII litigation is beyond the scope of this note. The weight to be given prior state agency determinations, however, appears to be one area where federal courts and state courts may have different standards. In *Kremer*, the plaintiff filed a charge with the EEOC, alleging a discriminatory discharge and exclusion from rehiring. 456 U.S. at 463-64. The EEOC referred the charge to the state agency responsible for enforcing the state fair employment law, and the employee pursued the claim unsuccessfully through administrative proceedings and state court appeal. *Id.* at 464. Upon receipt of a right-to-sue letter, the employee then sought relief in federal district court under Title VII. *Id.* at 465. The district court eventually dismissed on res judicata grounds, and the appeals court affirmed. *Id.* at 465-66. The Supreme Court concluded that through the state administrative and judicial proceedings, the employee had enjoyed a full and fair adjudication of the discrimination claim. *Id.* at 483-84. Thus, the Court held that the state court's prior review and decision precluded the employee from asserting the Title VII claim in district court. *Id.* at 485. The Court noted, however, that an unreviewed state agency determination would not preclude a trial de novo in federal court, even if the agency decision would preclude de novo consideration in state court. *Id.* at 470 n.7.