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Concurrent Jurisdiction of Title VII Actions

CONCURRENT JURISDICTION OVER TITLE VII ACTIONS

State courts and federal courts generally possess concurrent jurisdiction over actions arising under federal statutes and the federal constitution.[1] The doctrine of concurrent jurisdiction provides that a potential litigant seeking relief under a federal statute may have the right to pursue such relief in

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1. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78 (1981) (state courts enjoy a presumptive right to hear federal claims); General Oil Co. v. Crain, 209 U.S. 211, 228 (1908) (state courts have jurisdiction over actions involving rights granted under the United States Constitution); *see also* Martinez v. California, 444 U.S. 277, 283 n.7 (1980) (state courts and federal courts have concurrent jurisdiction over suits arising under 42 U.S.C. § 1983), *reh'g. denied*, 445 U.S. 920 (1980); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 806-09 (1976) (state courts and federal courts have concurrent jurisdiction of 28 U.S.C. § 1345 actions); Katchen v. Landy, 382 U.S. 323, 331 (1966) (state courts have concurrent jurisdiction with federal bankruptcy courts of necessary plenary suits initiated to recover preferences); Dowd Box Co. v. Courtney, 368 U.S. 502, 508 (1962) (state courts and federal courts have concurrent jurisdiction of 29 U.S.C. § 185(a) actions); Pennsylvania R.R. Co. v. Puritan Coal Mining Co., 237 U.S. 121, 130 (1915) (state courts generally have concurrent jurisdiction with federal courts of claims arising under Interstate Commerce Act); Mondou v. New York, New Haven & Hartford R.R. Co., 223 U.S. 1, 57-58 (1912) (state courts and federal courts have concurrent jurisdiction over claims arising under Federal Employers' Liability Act).

In *Claflin v. Houseman,* the United States Supreme Court established that a state court could adjudicate a claim arising under a federal statute unless Congress expressly provided for exclusive federal court jurisdiction of the federal statute or clear incompatibility existed between the exercise of concurrent state court jurisdiction and the furtherance of federal interests. 93 U.S. 130, 137-38 (1876). The *Claflin* Court based the presumptive right of state courts to hear federal statutory causes of action on both the comments of one of the framers of the United States Constitution and the language found in article III, section 1 and article VI, section 2 of the United States Constitution. *See id.* at 136-38 (laws of United States bind state citizens and state courts); Redish & Muench, *Adjudication of Federal Causes of Action in State Court,* 75 MICH. L. REV. 311, 314 (1976) (suggesting that *Claflin* Court implicitly based holding of presumption of concurrent state court jurisdiction of federal claims in part on article III, § 2 of Constitution). The *Claflin* Court noted that Alexander Hamilton, one of the framers of the Constitution, advocated the existence of concurrent state court and federal court jurisdiction of federal statutory claims. *Claflin,* 93 U.S. at 138 (1876). Alexander Hamilton suggested that allowing both state courts and federal courts the right to adjudicate federal claims would help the federal government and the states to work together as parts of one whole governmental system. THE FEDERALIST No. 82 (A. Hamilton). Hamilton suggested, therefore, that state courts should have concurrent jurisdiction with federal courts over any action arising under a federal statutory law unless Congress expressly restricted jurisdiction of the action to federal courts. *Id.* Article III, section 1 of the Constitution gave Congress the option of whether to create federal courts inferior to the Supreme Court to adjudicate federal causes of action. U.S. CONST. art III, § 1. The framers of the Constitution and the language of article III, section 1 of the Constitution, therefore, contemplated the possibility that the Supreme Court would be the only federal court, or at least that Congress would not create an extensive federal judicial system. *See* Redish & Muench, *supra* at 314 (analyzing rationale underlying holding of *Claflin v. Houseman* that state courts have a presumptive right to adjudicate federal causes of action). Consequently, the framers of the Constitution probably expected that Congress would leave adjudication of federal statutory claims largely in the hands of state courts. *Id.* Furthermore,

either federal court or in state court.[2] An important issue arising from the general rule that state courts can hear federal statutory claims is whether concurrent jurisdiction extends to adjudication of employment discrimination

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the *Claflin* Court suggested that once a state court had jurisdiction to discern and enforce rights arising under a federal statute, the only limitation placed upon the power of the state court to adjudicate the claim of the federal statutory right was the requirement that the state courts follow any applicable Supreme Court decisions or possible lower federal court case law when resolving the action. *See Claflin,* 93 U.S. at 136-37 (laws of United States bind state courts). The idea that state courts must follow applicable and constitutionally valid federal court law derives from article VI, section 2 of the Constitution. *See* U.S. CONST. art. VI, § 2. Article VI, section 2 of the Constitution provides that the Constitution, treaties and laws of the United States take precedence over contrary state laws. *Id.* Supreme Court decisions and lower federal court determinations of alleged rights arising under federal statutes comprise a part of the laws of the United States mentioned in article VI, § 2 of the Constitution. *See* Dowd Box Co., Inc. v. Courtney, 368 U.S. 502, 514 (1962) (state courts fashioning relief in 29 U.S.C. § 185(a) actions must apply federal common law). In sum, the *Claflin* Court based its decision that state courts enjoyed a presumptive right to hear actions arising under federal statutes on the writing of Alexander Hamilton and on principles embodied in Articles three and six of the United States Constitution. *See* C. WRIGHT, LAW OF FEDERAL COURTS, § 45, at 268-69 & nn.3-4 (4th ed. 1983) (discussing relationship of article III, § 2 of Constitution and Alexander Hamilton's writing in analyzing state enforcement of federal law).

Several commentators have questioned directly or indirectly the wisdom behind affording state courts a presumptive right to hear actions arising under federal statutes. *See, e.g.,* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, 166-67 (1969) (state judges generally are not aware of intricacies of federal substantive law); Mishkin, *The Federal "Question" in The District Courts,* 53 COLUM. L. REV. 157, 158-60 (1953) (federal court judges, unlike state judges, are free from local prejudice and are more likely than state judges to follow Supreme Court decisions and to help formulate uniform national law concerning interpretation and enforcement of federal statutes); Redish & Muench, *supra,* at 314-15 (lack of state judges' expertise in dealing with federal law and need for uniformity in adjudging federal statutory claims caution against allowing state courts a presumptive right to resolve federal issues). The Supreme Court, however, continues to hold that state courts enjoy a presumptive right to hear actions arising under federal statutes. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78 (1981) (only explicit statutory language, unmistakable implication from legislative history, or clear incompatibility between exercise of state court jurisdiction and furtherance of federal policy interests rebuts presumption of state court jurisdiction of dispute arising under federal statute); *infra* note 9 (discussing facts and holding of *Gulf).*

2. *See* C. WRIGHT, *supra* note 1, at 268 (unless Congress directs otherwise, state courts can hear action based on federal claim). State courts often have the right to adjudicate actions arising under federal statutes. *See supra* note 1 (citing cases in which state courts enjoyed right to hear actions arising under federal statutes). The state of the law, however, is uncertain concerning whether state courts are obligated to hear actions arising under federal statutes. *See* 16 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4024, at 716-24 (Supp. 1985) (discussing various Supreme Court cases that have addressed issue of whether state court must hear federal causes of action when the state court has concurrent jurisdiction over action) [hereinafter cited as WRIGHT & MILLER]. In *Mondou v. New York, New Haven, & Hartford R.R. Co.,* the Supreme Court held that a plaintiff had the right to use state courts to enforce claims arising under the Federal Employers' Liability Act. 223 U.S. 1, 57-58 (1912). The *Mondou* Court reasoned that congressional statutes establish a policy for all states, and that a state court, absent legislative direction to the contrary, would have to adjudicate claims arising under the federal statute just as the state court would have to adjudicate

claims arising under acts emanating from the state legislature. *Id.* In *Douglas v. New York, New Haven & Hartford R.R. Co.,* however, the Supreme Court ruled that a state court could refuse to hear a Federal Employers' Liability Act claim if the refusal to entertain the claim derived from application of nondiscriminatory rules of forum non conveniens. 279 U.S. 377, 387-88 (1929). The doctrine of forum non conveniens provides that a court having jurisdiction over the litigants and the cause of action can dismiss the action if another forum also has jurisdiction over the litigants and the action. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947) (doctrine of forum non conveniens is available for use in federal courts). In general, a court can dismiss the action only if bringing suit in the other forum would be more convenient overall for the litigants and witnesses, and only if the dismissal would not inhibit greatly the furtherance of justice. *See* 15 WRIGHT & MILLER, *supra,* at § 3828 (discussion of doctrine of forum non conveniens). The *Douglas* Court reasoned that New York State's forum non conveniens statute did not discriminate in favor of citizens of New York as opposed to citizens of other states because the statute afforded privileges only according to residency and not according to state citizenship. *Douglas,* 279 U.S. 377, 387-88; *see* La Tourette v. McMaster, 248 U.S. 465, 467-70 (1919) (holding that rational considerations may permit states to distinguish privileges according to residency). The message derived from the *Douglas* holding was that a state court having jurisdiction over a federal statutory claim could not refuse to adjudicate the action if the attempted refusal would result in discrimination against the federal claim. *See* McKnett v. St. Louis & San Francisco Ry. Co., 292 U.S. 230, 234 (1934). In *McKnett,* a Tennessee citizen brought a Federal Employers' Liability Act suit in Alabama. *Id.* at 230. The Alabama courts based dismissal on the ground that Alabama statutory law permitted state court jurisdiction of the claim if the claim had accrued under Tennessee law, but that the same statutory law denied state court jurisdiction of the claim since the claim arose under federal law. *Id.* at 232-33. The Supreme Court reversed the dismissals and remanded the case to the Alabama court system for readjudication. *Id.* at 233-34. In reversing the Alabama courts, the Supreme Court held that a state acts unconstitutionally when the state discriminates against rights arising under federal law, and that denying jurisdiction simply because of the federal source of the law upon which plaintiff based his claim therefore was unconstitutional. *Id.*

In *Testa v. Katt,* the Supreme Court appeared to discard the nondiscriminatory dismissal standard enunciated in *McKnett* by suggesting that state courts could not refuse to enforce a federal claim over which the state courts had jurisdiction. *See* 330 U.S. 386, 394 (1947) (Rhode Island courts required to enforce federal penal statute). *But see* 16 WRIGHT & MILLER, *supra,* § 4024, at 718 (Testa opinion cryptic and capable of dual interpretation either of mandating state court adjudication of federal statutory claims or of permitting state court to dismiss case if dismissal does not discriminate against federal claim).

In *Martinez v. California,* the Supreme Court offered a somewhat cryptic test for a state court to use in determining whether the state court could refrain from adjudicating a federal claim over which the state court had jurisdiction. *See* 444 U.S. 277, 283 & n.7 (1980) (holding that state court could adjudicate actions arising under 42 U.S.C. § 1983), *reh'g. denied,* 445 U.S. 920 (1980). The *Martinez* Court stated that state courts possessing concurrent jurisdiction with federal courts over a federal claim generally cannot refuse to adjudicate the claim when the same type of claim, if arising under state law, would be enforceable in state courts. *Id.* The *Martinez* Court, however, did not list guidelines concerning which factors would satisfy the "same type of claim" standard. *Id.*

Research has uncovered no application of the *Martinez* same type of claim test to actions arising under Title VII of the Civil Rights Act of 1964. *See infra* note 3 (defining Title VII of the Civil Rights Act of 1964). The Supreme Court case of *Gulf Offshore Co. v. Mobil Oil Corp.,* however, provides some guidance. *See* 453 U.S. 473, 477-78, 488 (1981) (holding that state courts can adjudicate actions arising under the Outer Continental Shelf Lands Act). In *Gulf,* the Court outlined a test for courts to use when determining whether a state court could exercise jurisdiction over an action arising under a federal statute. *Id.* at 478; *see infra* notes 10-172 and accompanying text (discussing application of *Gulf* concurrent jurisdiction test to question of whether state courts can adjudicate Title VII claims). The *Gulf* Court noted,

suits brought under Title VII of the Civil Rights Act of 1964.[3] Exercise of concurrent jurisdiction significantly affects litigants participating in Title VII

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however, that the *Gulf* test only addressed the issue of whether a state court might assume jurisdiction of a claim arising under a federal statute. *Gulf*, 453 U.S. at 477-78. Nowhere in the *Gulf* opinion did the Court require a state court having jurisdiction over an action arising under a federal statute to exercise that jurisdiction. *See id.* at 473-88 (no mention of whether state courts possessing concurrent jurisdiction over federal statutory claims are obligated to exercise that jurisdiction when plaintiff files suit based on the federal claim in state court).

No state or federal courts that have addressed the Title VII concurrent jurisdiction issue after *Gulf* have considered whether the exercise of such jurisdiction is mandatory. *See* Valenzuela v. Kraft, Inc., 739 F.2d 434, 434-36 (9th Cir. 1984) (federal courts have exclusive jurisdiction over Title VII claims); Greene v. County Bd., 524 F. Supp. 43, 43-45 (E.D. Va. 1981) (federal courts and state courts have concurrent jurisdiction over Title VII claims). Furthermore, only one state court addressing the Title VII concurrent jurisdiction issue prior to *Gulf* acknowledged but declined to exercise its jurisdiction over a Title VII claim. *See* Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 74-75, 389 A.2d 465, 474-75 (1978) (dismissing Title VII suit because plaintiff did not follow prelitigation Title VII administrative procedures). Given that the *Gulf* opinion did not contain language mandating state courts with jurisdiction over a federal cause of action to exercise that jurisdiction, three results concerning the Title VII concurrent jurisdiction issue are possible. First, if a state court does possess jurisdiction over a Title VII action, the state court may still decline to exercise that jurisdiction. *See Gulf*, 453 U.S. at 477-78 (stating only that state courts might assume jurisdiction over federal statutory claims absent certain circumstances). Second, a state court contemplating whether to refuse to hear a federal cause of action over which the state court has jurisdiction will have to apply the *Martinez* same type test on a case by case basis to determine whether the Title VII claim sufficiently parallels a similar state law. *See* Martinez v. California, 444 U.S. 277, 283 n.7 (1980) (containing dictum noting that state court cannot refuse to exercise jurisdiction over federal claim if same type of claim arising under state law is enforceable in state court), *reh'g. denied*, 445 U.S. 920 (1980). Alternatively, if state courts do not enjoy jurisdiction over Title VII claims, the *Martinez* same type test would not apply. *See id.* (discussing only whether state court already possessing jurisdiction over federal claim could refuse to adjudicate the claim). *But see infra* notes 10-172 and accompanying text (suggesting that state courts possess jurisdiction of Title VII claims concurrent with federal court jurisdiction of Title VII claims).

3. 42 U.S.C. § 2000e to 2000e3-17 (1982). Title VII of the Civil Rights Act of 1964 prohibits employers of fifteen or more employees, labor organizations, and employment agencies from discriminating in employment practices on the basis of race, color, religion, sex, or national origin. *See* 42 U.S.C. § 2000e(b) (1982) (employers employing less than fifteen employees not subject to coverage under Title VII); 42 U.S.C. § 2000e-2(a) to 2000e-2(d) (1982) (employers, labor organizations and state agencies violate Title VII if they discriminate in employment practices on the basis of race, color, religion, sex, or national origin). Under Title VII, Congress established an intricate enforcement scheme for plaintiffs alleging employment discrimination practices. *See* 42 U.S.C. § 2000e to 2000e-17 (1982) (establishing intricate enforcement scheme for plaintiffs seeking redress of alleged employment discrimination practices). The plaintiff first must file a charge of unlawful employment discrimination with the Equal Employment Opportunity Commission (EEOC) within one hundred and eighty days after the alleged unlawful employment practice occurred. 42 U.S.C. §§ 2000e-5(b), 2000e-5(e) (1982). If, however, the plaintiff seeking relief for the alleged unlawful employment practice instituted proceedings with a state or local agency possessing authority to afford or seek relief for such practice, the plaintiff must adhere to a different schedule for filing his employment discrimination charge. *See* 42 U.S.C. § 2000e-5(e) (1982). Under section 2000e-5(e), a plaintiff who first filed his employment discrimination charge with the appropriate state or local agency must file an employment discrimination charge with the EEOC within three hundred days of the occurrence

actions by allowing parties to avoid multiple suits, to control costly attorney's fees, to benefit from increased judicial efficiency, and to have a fair

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of the alleged unlawful employment practice, or within thirty days of receiving notice from the state or local agency of the termination of state or local law proceedings. *Id.* Under section 2000e-5(c) of Title 42 of the United States Code, if the plaintiff did not first file his employment discrimination charge with an existent appropriate state or local agency, the EEOC must refer the employment discrimination charge received from the plaintiff to the state or local employment discrimination agency for at least sixty days. 42 U.S.C. § 2000e-5(c) (1982). After passage of the sixty day state agency grace period, or after the termination of state proceedings, whichever comes first, the plaintiff may file or refile his employment discrimination charge with the EEOC. *Id.* The EEOC then determines whether reasonable cause exists to support a finding that the alleged discriminatory employment practice violated Title VII. 42 U.S.C. § 2000e-5(b) (1982). The EEOC determination of reasonable cause must give substantial weight to the findings of state agencies concerning rulings on alleged violations of state antidiscrimination employment laws. *Id.*

If no reasonable cause exists to support a finding that the alleged discriminatory employment practice violated Title VII, the EEOC must dismiss the charge. *Id.* Alternatively, if the EEOC finds that reasonable cause supporting the charge exists, the EEOC must attempt to expunge the alleged discriminatory employment practice through informal negotiation between the plaintiff, the EEOC, and the alleged discriminator. *Id.* If, after thirty days of the EEOC's finding of reasonable cause, negotiations to ameliorate the alleged discriminatory practice prove unsuccessful, the EEOC may bring a court action to enforce the Title VII claim. *Id.* The court usually admits the EEOC's finding of reasonable cause into evidence. *Compare* Bradshaw v. Zoological Soc'y., 569 F.2d 1066, 1069 (9th Cir. 1978) (district court must admit EEOC determination of reasonable cause into evidence) *and* Smith v. Universal Servs., Inc., 454 F.2d 154, 158 (5th Cir. 1972) (failure of district court to admit EEOC finding on reasonable cause constituted reversible error) *with* Francis-Sobel v. University of Maine, 597 F.2d 15, 18 (1st Cir. 1979) (exclusion from evidence of EEOC findings on reasonable cause was not abuse of court discretion), *cert. denied,* 444 U.S. 949 (1979) *and* Walton v. Eaton Corp., 563 F.2d 66, 75 (3d Cir. 1977) (district court acted within its discretion when refusing to admit EEOC's findings into evidence). The weight given to the EEOC findings, however, is within the discretion of the judge. *See* Bradshaw v. Zoological Soc'y., 569 F.2d 1066, 1069 (9th Cir. 1978) (district court has discretion to determine weight to which EEOC finding of reasonable cause entitled); Spray v. Kellos-Sims Crane Rental, Inc., 507 F. Supp. 745, 750 (S.D. Ga. 1981) (according EEOC finding on reasonable cause same weight as any other testimony); Fearrington v. American Indem. Co., 22 Fair Empl. Prac. Cas. (BNA) 1538, 1539 (S.D. Tex. 1978) (evidentiary weight of EEOC findings was less than controlling).

If the EEOC fails to act or dismisses the charge within one hundred and eighty days of receiving the charge when no appropriate state or local employment discrimination agency existed, or within one hundred and eighty days after terminations of state proceedings or after culmination of the sixty day state agency grace period when such a state agency existed, the EEOC must notify the plaintiff of the EEOC's inaction or dismissal of the charge. 42 U.S.C. § 2000e-5(f)(1) (1982). The EEOC's notification to the plaintiff must include a right to sue notice. *Id.* The right to sue notice merely notes the EEOC's decision not to proceed to court with the charge and acknowledges the plaintiff's right to bring a private Title VII court action against the party named in the charge. *See* Evans v. McCluskey, 567 F.2d 755, 757 (8th Cir. 1977) (EEOC does not have duty to inform plaintiff in right to sue notice of change of ownership of corporate employer), *cert. denied,* 439 U.S. 867 (1978). The plaintiff, however, cannot bring a private action to enforce a Title VII claim unless the plaintiff has received a right to sue notice prior to the filing of the court action. *See* Jackson v. Seaboard Coast Line R.R. Co., 678 F.2d 992, 1010 (11th Cir. 1982) (defendant seeking to bar Title VII action on grounds that plaintiff did not receive right to sue notice must state specifically in pleadings that

adjudication on the merits of Title VII claims.[4] The United States Supreme Court has not addressed the Title VII concurrent jurisdiction issue.[5] Furthermore, the few federal and state courts that have analyzed the Title VII

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plaintiff did not receive the right to sue notice); Stebbins v. Continental Ins. Cos., 442 F.2d 843, 845-46 (D.C. Cir. 1971) (lack of right to sue notice barred plaintiff from bringing Title VII suit based on alleged racial discrimination), *cert. denied,* 429 U.S. 1107 (1977). *But see* Pinkard v. Pullman-Standard, 678 F.2d 1211, 1215 (5th Cir. 1982) (plaintiffs' reception of right to sue notice after filing of court action but four months before commencement of trial did not bar Title VII action).

4. *See infra* notes 115-66 and accompanying text (discussing policy interests associated with Title VII concurrent jurisdiction issue).

5. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 479 n.20 (1982). The *Kremer* Court refrained from deciding whether federal courts and state courts enjoyed concurrent jurisdiction over Title VII claims or instead whether federal courts alone had exclusive jurisdiction of Title VII claims. *Id.; see infra* notes 118-26 and accompanying text (indepth discussion of *Kremer* opinion). In *Alexander v. Gardner Denver Co.,* however, the Supreme Court addressed tangentially the Title VII concurrent jurisdiction issue. *See* 415 U.S. 36, 47 (1974). The *Alexander* Court held that collective bargaining agreement arbitration which rejected an employee's claim of an alleged discriminatory employment practice did not bar the employee from subsequently pursuing a Title VII action. *Id.* at 51-52. Additionally, the *Alexander* Court listed a number of forums available to an aggrieved party seeking Title VII relief for alleged employment discrimination. *Id.* at 47. The list included the EEOC, state and local agencies, and federal courts. *Id.* The *Alexander* Title VII forum list, however, did not mention state courts. *Id.* Two courts that have attempted to resolve the Title VII concurrent jurisdiction issue have put great weight on the absence of state courts from the *Alexander* Title VII forum list. *See* Valenzuela v. Kraft, Inc., 739 F.2d 434, 436 (9th Cir. 1984) (absence of state courts from *Alexander* Title VII forum list, combined with statutory language and legislative history analysis of Title VII, lead to conclusion that federal courts possess exclusive jurisdiction of Title VII claims reaching court stage); Dickinson v. Chrysler Corp., 456 F. Supp. 43, 47-48 (E.D. Mich. 1978) (same). Two other courts attempting to resolve the Title VII concurrent jurisdiction issue, however, found that the dictum of the *Alexander* Title VII forum list did not suggest the existence of exclusive federal court jurisdiction of Title VII claims. *See* Greene v. County Bd., 524 F. Supp. 43, 44-45 (E.D. Va. 1981) (state courts and federal courts have concurrent jurisdiction of Title VII actions); Peterson v. Eastern Airlines, Inc., 20 Fair Empl. Prac. Cas. (BNA) 1322, 1323 (W.D. Tex. 1979) (holding of concurrent jurisdiction of Title VII claims based in part upon existence of concurrent jurisdiction over civil rights §§ 1982 and 1983). The *Greene* court interpreted the *Alexander* Court dictum as referring only to exclusivity of remedies obtained under Title VII and the requirement of exhausting state remedies. Greene v. County Bd., 524 F. Supp. 43, 44 (E.D. Va. 1981). An examination of the *Alexander* dictum supports the *Greene* court's interpretation of that dictum. The *Alexander* Court did not say that the Title VII forum list was exhaustive. *See Alexander,* 415 U.S. at 47 (no language unequivocally stating that Supreme Court limited Title VII forums solely to EEOC, state and local agencies, and federal court). Moreover, in dictum immediately following the Title VII forum list, the *Alexander* Court emphasized both that submission of an employment discrimination claim to one forum would not bar a later submission of the claim to another forum and that Congress did not intend Title VII remedies to be the only relief available for employment discrimination. *See id.* at 47-48 & n.9 (emphasizing Congress' efforts to avoid making Title VII the exclusive remedy for employment discrimination).

The *Peterson* court emphasized the equivocal wording of the Title VII concurrent jurisdiction issue dictum found in *Alexander* and held that such dictum was insufficient to rebut the traditional presumption of state court jurisdiction over actions arising under federal statutes. *See* Peterson v. Eastern Airlines, Inc., 20 Fair Empl. Prac. Cas. (BNA) 1322, 1323 (W.D. Tex.

concurrent jurisdiction issue are divided concerning whether to limit court adjudication of Title VII claims exclusively to federal courts.[6]

Although the Supreme Court has yet to address the Title VII concurrent jurisdiction issue, the Court has formulated a general three part test for determining whether a state court may exercise jurisdiction over a particular

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1979) (allowing plaintiff to maintain state court Title VII action for alleged racial employment discrimination); *see also supra* note 1 (discussing historical development of traditional presumption that state courts generally enjoy jurisdiction over federal causes of action). Given the divergent lower court interpretations of the *Alexander* dictum and the *Kremer* Court's specific refusal to decide the Title VII concurrent jurisdiction issue, the issue remains open and merits further analysis.

6. *See* Valenzuela v. Kraft, Inc., 739 F.2d 434, 435 n.1 (9th Cir. 1984) (citing several courts that either held for or against right of state court to adjudicate Title VII claims). Courts denying state courts jurisdiction over Title VII actions suggest that Supreme Court dictum, combined with Title VII's statutory language and legislative history, demonstrate a congressional intent to place Title VII actions within the exclusive jurisdiction of federal courts. *See, e.g.*, Valenzuela v. Kraft, Inc., 739 F.2d 434, 435-36 (9th Cir. 1984) (Title VII statutory language directing use of federal rules of civil procedure demonstrates congressional intent to place Title VII actions within exclusive jurisdiction of federal courts); Dickinson v. Chrysler Corp., 456 F. Supp. 43, 46-48 & n.7 (E.D. Mich. 1978) (legislative history of Title VII and Supreme Court dictum relating to Title VII concurrent jurisdiction issue lead to conclusion that Congress intended to deny state courts concurrent jurisdiction over Title VII actions); McCloud v. National R.R. Passenger Corp., 25 Fair Empl. Prac. Cas. (BNA) 513, 514-15 (D.D.C. 1981) (following precedent emphasizing congressional intent through Title VII statutory language to confine jurisdiction of Title VII actions exclusively to federal courts); Lucas v. Tanning Bros. Contracting Co., 10 Fair Empl. Prac. Cas. (BNA) 1104, 1104 (Ariz. Super. Ct. 1974) (statutory language of Title VII reveals congressional intent to deny state court jurisdiction over Title VII actions); Bowers v. Woodward & Lothrop, 280 A.2d 772, 774 (D.C. 1971) (stating without explanation that statutory language of Title VII Requires denial of state court jurisdiction of Title VII actions); Fox v. Eaton Corp., 48 Ohio St.2d 236, 237, 358 N.E.2d 536, 537 (1976) (holding that § 2000e-5(f)3 of Title VII unequivocally precludes state courts from hearing Title VII actions); *see also supra* note 5 (discussing relation of Supreme Court dictum to Title VII concurrent jurisdiction issue). Courts granting state court jurisdiction over Title VII actions emphasize that the statutory language and legislative history of Title VII do not provide strong enough support to rebut the traditional presumption of the right of state courts to hear federal causes of action. *See, e.g.*, Greene v. County Bd., 524 F. Supp. 43, 44-45 (E.D. Va. 1981) (Supreme Court dictum and legislative history of Title VII did not address Title VII concurrent jurisdiction issue); Bennun v. Board of Governors, 413 F. Supp. 1274, 1279-80 (D.N.J. 1976) (statutory language of Title VII restricts EEOC from bringing Title VII action in state court against a government, governmental agency, or political subdivision, but does not otherwise deny state court jurisdiction of Title VII actions); Salem v. LaSalle High School, 31 Fair Empl. Prac. Cas. (BNA) 10, 10-11 (C.D. Cal. 1983) (statutory language of Title VII does not require federal courts either expressly or impliedly to retain exclusive jurisdiction of Title VII actions); Peterson v. Eastern Airlines, Inc., 20 Fair Empl. Prac. Cas. (BNA) 1322, 1323 (W.D. Tex. 1979) (neither statutory language of Title VII nor past Supreme Court dictum rebut presumption that state court should possess jurisdiction over Title VII action); Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 74, 389 A.2d 465, 474-75 (1978) (statutory section of Title VII covering jurisdiction does not preclude state court from adjudicating Title VII action); *see also supra* note 5 (discussing Supreme Court dictum related to Title VII concurrent jurisdiction issue). Additionally, courts affording state courts jurisdiction over Title VII actions often stress that other civil rights statutes already permitting concurrent jurisdiction embody federal interests

federal statutory claim.[7] Under the criteria set forth in the Supreme Court decision of *Gulf Offshore Co. v. Mobil Oil Corp.*,[8] only explicit statutory language, unmistakable implication from legislative history, or clear incompatibility between state court jurisdiction and federal interests will bar a party from pursuing a claim arising under a federal statute in state court.[9] Analysis of Title VII under the *Gulf* test suggests that state courts should have concurrent jurisdiction over Title VII disputes.

Under the *Gulf* test, a court first must examine the actual language of the particular federal statute to determine whether that language exhibits an

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similar to federal interests found in Title VII. *See* Salem v. LaSalle High School, 31 Fair Empl. Prac. Cas. (BNA) 10, 10-11 (C.D. Cal. 1983) (42 U.S.C. § 1983, over which state courts and federal courts possess concurrent jurisdiction, and Title VII embody similar purposes); Peterson v. Eastern Airlines, Inc., 20 Fair Empl. Prac. Cas. (BNA) 1322, 1323 (W.D. Tex. 1979) (holding of concurrent jurisdiction of Title VII claims based in part upon existence of concurrent jurisdiction afforded under 42 U.S.C. §§ 1982 & 1982). Some courts therefore reason that concurrent jurisdiction existent for other civil rights statutes suggests congressional acquiescence to concurrent jurisdiction of Title VII actions because Title VII actions and concurrent jurisdiction civil rights statutes embody similar federal interests. *See Salem,* 31 Fair Empl. Prac. Cas. (BNA) at 10-11 (42 U.S.C. § 1983, over which state courts have jurisdiction, and Title VII both embody federal interest of curbing discriminatory treatment); *Peterson,* 20 Fair Empl. Prac. Cas. (BNA) at 1323 (since Supreme Court has granted concurrent jurisdiction over civil rights actions 42 U.S.C. §§ 1982 & 1983, concurrent jurisdiction should exist for Title VII).

7. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981) (establishing three part test for courts to use when determining whether to extend jurisdiction over a federal statutory claim to state courts).

8. 453 U.S. 473 (1981).

9. *Id.* at 478. The Supreme Court decision of *Gulf Offshore Co. v. Mobil Oil Corp.* grew out of a personal injury action arising under the Outer Continental Shelf Land Act (OCSLA) and based on incorporated state law. *Id.* at 476-77 & n.7; *see* 43 U.S.C. §§ 1331-1356 (1982) (OSCLA) (legislation asserting United States ownership, jurisdiction and regulation over minerals in and under continental shelf including regulation of artificial islands and fixed structures erected on continental shelf); 43 U.S.C. § 1332(a)(2) (when federal law pertaining to claim arising under OSCLA is incomplete, courts adjudicating OCSLA actions must use state law of state whose coast is closest to occurrence of events giving rise to OCSLA claim). Petitioner Gulf Offshore Oil Co. (Gulf) contracted with respondent Mobil Oil Corp. (Mobil) for Gulf to undertake completion operations on oil drilling platforms located off the Louisiana coast. *Gulf,* 453 U.S. at 475. Under the contract, Gulf agreed to indemnify Mobil for all claims arising from the operations. *Id.* Subsequently, a Gulf employee engaged in operations under the contract sustained injuries while attempting to evacuate co-workers from the platforms during a storm. *Id.* at 475-76. The employee, a Texas resident, sued Mobil in Texas state district court, alleging that negligence on the part of Mobil caused his injuries. *Id.* at 476. The Texas court had personal jurisdiction over Mobil and Gulf because Mobil and Gulf did substantial business in Texas. *Id.* at 477 n.2. Mobil then filed a third-party complaint against Gulf based on the indemnification agreement. *Id.* Gulf in turn denied that the Texas court had jurisdiction over the third party complaint. *Id.* at 476. Gulf argued that the Texas court lacked jurisdiction over the third-party complaint because Mobil's cause of action arose under the OCSLA, a federal statute over which Gulf alleged federal courts alone had exclusive jurisdiction. *Id.* The Texas district court rejected Gulf's OCSLA exclusive jurisdiction argument. *Id.* Furthermore, the Texas district court suggested that federal law pertaining to OCSLA was incomplete concerning personal injury and indemnification actions and therefore applied Louisiana personal injury and indemnification law because the injury took place off the Louisiana coast. Petitioner's

explicit congressional intent to preclude concurrent state court jurisdiction

Petition for Writ of Certiorari, at A-25 to 26, Gulf Offshore Oil Co. v. Mobil Oil Corp., 453 U.S. 473 (1981). Subsequently, the Texas district court approved a jury verdict finding that Mobil's negligence resulted in the employee's injuries. *Id.* at A-24, A-26. The Texas district court then held that Gulf had to indemnify Mobil for the personal injury damage award which Mobil owed to the employee. *Id.* at A-26. The Texas Court of Civil Appeals affirmed the Texas district court's decision, and the Texas Supreme Court refused to review the Texas Court of Civil Appeals' affirmation. *Gulf,* 453 U.S. at 476-77; *see* Gulf Offshore Co. v. Mobil Oil Corp., 594 S.W.2d 496, 502, 506 (Tex. Civ. Ct. App. 1979) (affirming Texas district court's decision). The United States Supreme Court then granted certiorari in part to decide whether a state court could adjudicate an OCSLA case based on incorporated state law. *See Gulf,* 453 U.S. at 477 (Court granted certiorari in part to determine whether Texas district court erred in refusing to instruct jury that personal injury awards under OCSLA were not subject to federal income taxation).

The United States Supreme Court held that state courts may exercise jurisdiction over OCSLA claims based on incorporated state law. *Id.* at 484. The *Gulf* Court first reiterated the traditional rule that state courts enjoy a presumptive right to adjudicate actions arising under federal statutes. *Id.* at 477-78; *see supra* note 1 (discussing rationale behind traditional rule that state courts enjoy presumptive right to adjudicate federal causes of action). The Court noted, however, that Congress could restrict jurisdiction over a federal statute to federal courts either expressly or implicitly. *Gulf,* 453 U.S. at 478. The Court then established a three-part test to determine whether Congress, in enacting a statute, meant to rebut the presumption of a state court's right to hear claims arising under the statute. *Id.* at 478. Under the three-part concurrent jurisdiction test, a state court cannot adjudicate a claim arising under a federal statute if the language of the statute explicitly directs exclusive federal court jurisdiction of the claim, if the statute's legislative history implies unmistakably that federal courts have exclusive jurisdiction of the claim, or if a clear incompatibility exists between the exercise of state court jurisdiction and the furtherance of federal interests. *Id.*; *see* Dowd Box Co. v. Courtney, 368 U.S. 502, 508 (1962) (only express statutory provision or existence of clear incompatibility between exercise of state court jurisdiction and furtherance of federal interests bars state court from asserting jurisdiction over federal statutory action).

Applying the three-part concurrent jurisdiction test, the *Gulf* Court found that the language contained in OCSLA did not grant federal courts exclusive jurisdiction of OCSLA claims. *See Gulf,* 453 U.S. at 478-79 (Congress granted United States district courts original jurisdiction of cases arising under OCSLA, but grant of original jurisdiction to federal courts does not preclude state court jurisdiction of OCSLA cases). The *Gulf* Court emphasized that 43 U.S.C. § 1333(a)(2), which directs the appropriate officers and courts of the United States to administer and enforce all applicable state laws arising under OCSLA, did not mandate exclusive federal court jurisdiction over OCSLA actions. *Id.* at n.6; *see* 43 U.S.C. § 1333(a)(2) (1982) (appropriate officers and courts of United States shall administer and enforce applicable state laws in OCSLA actions). Instead, the *Gulf* Court stated that 43 U.S.C. § 1333(a)(2) required only that federal courts adjudicating OCSLA actions could not ignore applicable state laws. *Gulf,* 453 U.S. at n.6. The *Gulf* Court then held that the legislative history of OCSLA did not rebut the presumption of concurrent state court jurisdiction over federal statutes and in particular over OCSLA actions. *See id.* at 482 (opposition criticism suggesting federal courts had exclusive jurisdiction of OCSLA cases not enough to rebut presumption of state court jurisdiction over OCSLA cases when statutory language was silent on concurrent jurisdiction issue). Finally, the *Gulf* Court noted that allowing a state court to adjudicate an OCSLA personal injury action arising under state law did not endanger federal interests of uniformity of federal statutory enforcement and the use of federal judicial expertise to resolve claims arising under federal statutes. *Id.* at 484. The *Gulf* Court reasoned that no need existed to have uniform interpretation of laws varying from state to state and that state judges possessed the sufficient expertise to interpret and apply the laws of other states properly. *Id.*

over the statute.[10] Courts analyzing the Title VII concurrent jurisdiction issue have noted that only section 2000e-5(f)(3)[11] of Title 42 of the United States Code addresses directly the issue of court jurisdiction of Title VII claims.[12] The courts addressing the Title VII concurrent jurisdiction issue generally agree that section 2000e-5(f)(3) grants federal courts jurisdiction over Title VII actions, but that nothing in the language of section 2000e-5(f)(3) excludes the possibility that state courts might also have jurisdiction of Title VII actions.[13]

Since the language found in section 2000e-5(f)(3) does not resolve the Title VII concurrent jurisdiction issue, courts examine other sections of Title VII to determine whether Congress intended explicitly to exclude state courts

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10. 453 U.S. 473, 478 (1981).

11. 42 U.S.C. § 2000e-5(f)(3) (1982). Section 2000e-5(f)(3) of Title 42 of the United States Code states in pertinent part only that federal district courts shall have jurisdiction over Title VII actions. *Id.* Section 2000e-5(f)(3) does not state that federal courts have exclusive jurisdiction over Title VII actions. *Id.* Additionally, section 2000e-5(f)(3) provides that a complainant may bring a Title VII action in any judicial district in the state in which the complainant alleges the unlawful employment practice occurred, in the judicial district in which the alleged discriminator files and administers employment records relevant to the practice, or in the judicial district in which the aggrieved employee would have worked but for the alleged unlawful practice. *Id.* Section 2000e-5(f)(3) states further that if the alleged discriminator is not found within one of the above named districts, a complainant also may bring a Title VII action in the judicial district in which the alleged discriminator's principal office is located. *Id.* The venue portion of section 2000e-5(f)(3), however, does not state either that a Title VII complainant may bring a Title VII action only in the above noted judicial districts or that the judicial districts noted above are per se federal court judicial districts. *Id.; see infra* note 13 (citing cases in which courts ruled that 42 U.S.C. § 2000e-5(f)(3) did not foreclose possibility of state court jurisdiction of Title VII actions).

12. *See infra* note 13 (citing cases in which courts ruled that 42 U.S.C. § 2000e-5(f)(3) did not foreclose possibility of state court jurisdiction of Title VII actions).

13. *See, e.g.,* Valenzuela v. Kraft, Inc., 739 F.2d 434, 435 (9th Cir. 1984) (jurisdictional statute 42 U.S.C. § 2000e-5(f)(3) does not foreclose possibility that state courts have jurisdiction of Title VII actions); Dickinson v. Chrysler Corp., 456 F. Supp. 43, 45 (E.D. Mich. 1978) (§ 2000e-5(f)(3) alone does not require exclusive federal court jurisdiction of Title VII actions); Bennun v. Board of Governors, 413 F. Supp. 1274, 1279 (D.N.J. 1976) (§ 2000e-5(f)(3) contains no express or implied language vesting federal courts with exclusive jurisdiction of Title VII actions); Salem v. LaSalle High School, 31 Fair Empl. Prac. Cas. (BNA) 10, 10 (C.D. Cal. 1983) (basing grant of removal of Title VII action from state court to federal court in part on failure of § 2000e-5(f)(3) to mandate exclusive federal court jurisdiction of Title VII actions). *But see* Fox v. Eaton Corp., 48 Ohio St.2d 236, 237, 358 N.E.2d 536, 537 (1976) (stating without explanation that § 2000e-5(f)(3) precludes state court jurisdiction over Title VII actions). Commentators that tangentially discuss the Title VII concurrent jurisdiction issue agree that section 2000e-5(f)(3) alone does not preclude concurrent state court jurisdiction over Title VII disputes. *See* Catania, *State Employment Discrimination Remedies and Pendent Jurisdiction Under Title VII: Access to Federal Courts,* 32AM. U. L. REV. 777, 804 nn. 126 & 127 (1983) (suggesting that federal courts may have exclusive jurisdiction over Title VII actions due to statutory language found in 42 U.S.C. § 2000e-5(f)(5)); *see also infra* notes 76-80 and accompanying text (discussing 42 U.S.C. § 2000e-5(f)(5) in context of Title VII concurrent jurisdiction issue).

from adjudicating Title VII actions.[14] Courts deciding the Title VII concurrent jurisdiction issue especially examine those sections of Title VII providing for the use of the Federal Rules of Civil Procedure, rules for dispensation of federal court cases, and federal rules governing jurisdiction of appeals for evidence of congressional intent to limit adjudication of Title VII actions exclusively to federal courts.[15] For example, in *Valenzuela v. Kraft, Inc.*,[16] the United States Court of Appeals for the Ninth Circuit examined sections 2000e-5(f)(2)[17] and 2000e-5(j)[18] of Title 42 of the United States Code in determining whether state courts had concurrent jurisdiction over Title VII

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14. *See infra* notes 11-86 and accompanying text (analyzing reasoning of courts that have examined language of various sections of Title VII in attempt to determine whether Congress intended explicitly to exclude state courts from hearing Title VII actions); *cf.* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981) (courts determining whether Congress, in formulating a statute, intended to rebut traditional presumption of state court jurisdiction over federal statutes, first must examine statutory language for explicit clues of such intent).

15. *See* Valenzuela v. Kraft, Inc., 739 F.2d 434, 435-36 (9th Cir. 1984) (suggesting that 42 U.S.C. §§ 2000e-5(f)(2) & 2000e-5(j) provide explicit congressional intent to deprive state courts of jurisdiction over Title VII actions); Dickinson v. Chrysler Corp., 456 F. Supp. 43, 47 & n.7 (E.D. Mich. 1978) (42 U.S.C. §§ 2000e-5(f)(2), 2000e-5(f)(4), 2000e-5(f)(5) & 2000e-5(j) refer to Federal Rules of Civil Procedure or federal statutes applicable only in federal judicial system).

16. 739 F.2d 434 (9th Cir. 1984).

17. 42 U.S.C. § 2000e-5(f)(2) (1982). Section 2000e-5(f)(2) of Title 42 of the United States Code provides in pertinent part:

> . . . The Commission [Equal Employment Opportunity Commission], or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of [a Title VII claim]. Any . . . order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure.

Id. See FED. R. CIV. P. 65. Rule 65 governs the issuance of injunctions and temporary restraining orders in federal courts. *Id.* Under rule 65, no temporary restraining order (TRO) can be issued without notice to either the adverse party or his attorney unless it appears from affidavits or a verified complaint that irreparable injury will result to the applicant before the adverse party can be given notice. *Id.* Furthermore, a federal court cannot grant a TRO unless the applicant's attorney certifies in writing good faith efforts to give notice and the reasons for which notice should not be required. *Id.* The initial duration of the TRO cannot exceed 10 days from the date of issuance, but the federal court can extend this period either for good cause shown or by consent of the party against whom the court issued the TRO. *Id.* Finally, a federal court cannot issue a TRO or preliminary injunction without requiring the applicant to put forth security to cover possible damages that the adverse party might sustain if a court later rules the injunction or restraint to have been wrongful. *Id.* Determination of the amount of the security is left to the discretion of the federal court judge. *Id.; see also infra* notes 57-72 and accompanying text (discussing whether 42 U.S.C. § 2000e-5(f)(2) mandates that all courts addressing Title VII actions must apply Federal Rule of Civil Procedure 65 when fashioning injunctive relief).

18. *See* 42 U.S.C. § 2000e-5(j) (1982). Section 2000e-5(j) suggests that any civil action brought under Title VII is subject to appellate review as set forth in sections 1291 and 1292 of Title 28 of the United States Code. *Id.* Section 1291 of Title 28 of the United States Code provides that federal courts of appeal have appellate jurisdiction of all final federal district court decisions. 28 U.S.C. § 1291 (1982). The purpose for allowing appellate review only of

actions.[19] Section 2000e-5(f)(2) refers to injunction rule 65 of the Federal Rules of Civil Procedure,[20] and section 2000e-5(j) refers to federal appellate review sections 1291 and 1292 of Title 28 of the United States Code.[21] The *Valenzuela* court concluded that Congress' insertion of rule 65 of the Federal Rules of Civil Procedure in section 2000e-5(f)(2) and Congress' reference to sections 1291 and 1292 of Title 28 of the United States Code found in section 2000e-5(j) of Title 42 of the United States Code revealed a congressional intent to restrict adjudication of Title VII actions to federal courts.[22]

The *Valenzuela* court based its conclusion on two rationales.[23] The *Valenzuela* court first suggested that Congress might not have the constitutional power to require state courts adjudicating federal claims to use federal procedural and appellate rules when the state courts adjudicate federal causes of action.[24] The *Valenzuela* court then reasoned that Congress did not enact Title VII to test the constitutionality of congressional power to force state courts to apply federal procedural and appellate rules when the state courts heard federal statutory claims.[25] The *Valenzuela* court, therefore, concluded that the language in Title VII containing federal procedural and appellate rules revealed a congressional intent to exclude state courts from adjudicating Title VII actions.[26]

Similarly, in *Dickinson v. Chrysler Corp.*,[27] the United States District Court for the Eastern District of Michigan, in addition to examining sections 2000e-5(f)(2) and 2000e-5(j), also examined sections 2000e-5(f)(4)[28] and 2000e-5(f)(5)[29] in determining whether state courts had concurrent jurisdiction over

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final decisions is to prevent both delay and piecemeal litigation. United States v. Feeny, 641 F.2d 821, 824 (10th Cir. 1981). Section 1292 of Title 28 of the United States Code provides that federal courts of appeal generally have appellate jurisdiction of all interlocutory orders of federal district courts. 28 U.S.C. § 1292 (1982). An interlocutory order is an order determining an intermediate issue made in the course of a pending litigation that does not dispose of the case but instead abides resolution of the entire controversy. Taylor v. Breese, 163 F. 678, 684 (4th Cir. 1908).

19. 739 F.2d at 435-36.

20. *See supra* note 17 (noting language of section 2000e-5(f)(2) and of rule 65 of Federal Rules of Civil Procedure).

21. *See supra* note 18 (noting language of Section 2000e-5(j) and of 28 U.S.C. §§ 1291 & 1292).

22. 739 F.2d at 436.

23. *See id.* at 436 (offering two rationales for conclusion that Congress' use of federal procedural and appellate rules in Title VII revealed a congressional intent to exclude state courts from adjudicating Title VII actions).

24. *Id.*

25. *Id.*

26. *Id.*

27. 456 F. Supp. 43 (E.D. Mich. 1978).

28. 42 U.S.C. § 2000e-5(f)(4) (1982). Section 2000e-5(f)(4) provides that the chief judge of the district court in which a Title VII action is pending must designate a district judge immediately to hear the action. *Id.*

29. 42 U.S.C. § 2000e-5(f)(5) (1982). Section 2000e-5(f)(5) permits a district court judge designated under 42 U.S.C. § 2000e-5(f)(4) to appoint a master pursuant to rule 53 of the

Title VII actions.[30] Section 2000e-5(f)(4) governs expeditious federal court dispensation of Title VII cases,[31] and section 2000e-5(f)(5) refers to rule 53 of the Federal Rules of Civil Procedure.[32] The *Dickinson* court reasoned that Congress did not possess the constitutional power either to force state courts to use federal procedural or appellate rules when the state courts adjudicated federal statutory claims or to force state courts to expedite adjudication of federal statutory claims.[33] The *Dickinson* court, therefore, concluded that the references to federal procedural rules, federal appellate review rules, and expeditious dispensation of Title VII cases found in sections 2000e-5(f)(2), 2000e-5(f)(4), 2000e-5(f)(5) and 2000e-5(j) required a holding of exclusive federal court jurisdiction of Title VII actions because federal procedural and appellate rules were applicable only in federal courts.[34]

The reasoning of the *Valenzuela* and *Dickinson* courts that Congress does not or should not have the constitutional power to require courts adjudicating federal causes of action to apply federal procedural and appellate review rules is based on two arguments.[35] The first argument is that each state in the federal system is a sovereign and state courts should have the constitutional right to formulate and apply their own procedural rules when adjudicating claims in state court.[36] The second argument is that speed and

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Federal Rules of Civil Procedure to help expedite adjudication of the Title VII action. *Id.* The designated judge may appoint a master if the judge has not scheduled the Title VII case for trial within 120 days after issue has been joined. *Id.* The term "master" includes a referee, an auditor, an examiner, a commissioner, and an assessor. FED. R. CIV. P. 53. The judge may limit the role of the master to that of a factfinder and/or a collector of evidence who will arrive at findings of fact and suggest conclusions of law. *Id.* The master prepares a report of his findings and conclusions and files the report with the court clerk. *Id.* In nonjury actions, the judge may adopt, modify, or reject the report in whole or in part when rendering a decision. *Id.* In jury actions, the report is admissible evidence subject only to evidentiary objections applicable in trials in general. *Id.*

30. *See* 456 F. Supp. at 47 & note 7 (examining sections 2000e-5(f)(2), 2000e-5(f)(4), 2000e-5(f)(5), & 2000e-5(j) in determining whether state courts had concurrent jurisdiction over Title VII actions).

31. 42 U.S.C. § 2000e-5(f)(4) (1982); *see supra* note 28 (discussing 42 U.S.C. §2000e-5(f)(4)).

32. 42 U.S.C. § 2000e-5(f)(5) (applying rule 53 of Federal Rules of Civil Procedure); Fed. R. Civ. P. 53 (discussing use of master in federal court system); *supra* note 29 (discussing provisions of § 2000e-5(f)(5) and of rule 53 of Federal Rules of Civil Procedure).

33. 456 F. Supp. at 47 & note 7.

34. *Id.* at 47.

35. *See infra* notes 36-55 and accompanying text (discussing and rebutting arguments suggeting that Congress should not have power to require state courts to apply federal procedural and appellate rules when state courts adjudicate federal causes of action).

36. *See* Note, *State Enforcement of Federally Created Rights,* 73 HARV. L. REV. 1551, 1556-57 (1960) (state court is branch of sovereign state and forcing that state court to enforce the laws of another sovereign may infringe upon state's sovereignty) [hereinafter cited as *State Enforcement]. But see* Mondou v. New York, New Haven & Hartford R.R. Co., 223 U.S. 1, 57 (1912) (congressional legislation embodies policies created for all people of United States, and state courts should treat congressional legislation as if the state legislature had enacted the legislation).

efficiency in the administration of justice will be impeded if state judges are forced to learn an extra set of procedural rules.[37] Article VI of the United States Constitution, commonly referred to as the supremacy clause, counters the argument that state courts possess an unassailable right to use their own state procedural rules when adjudicating claims in state courts.[38] The supremacy clause of the Constitution provides that the Constitution, constitutional federal legislation, and all authorized United States treaties are binding upon state courts and legislatures notwithstanding contrary state laws.[39] Under the supremacy clause, a state court must adjudicate a controversy in accordance with applicable federal law.[40] Furthermore, Supreme Court precedent suggests that a state court should apply federal procedural and appellate rules if applying state procedural rules effectively would nullify a right granted under a federal law.[41] For example, in *Patterson v. Alabama,*[42] the Supreme Court vacated an Alabama decision that barred appeal of a murder conviction because of failure of the accused to file a timely request for appeal in accordance with state law.[43] The Supreme Court held that the state procedural law requiring timely appeal effectively nullified the accused's federal law right to challenge a conviction allegedly deriving from an unconstitutionally biased jury selection.[44] *Patterson,* therefore, potentially supports the proposition that a state procedural rule effectively nullifying a federal right would have to yield to federal procedural and appellate rules designed or inserted in Title VII to protect Title VII rights.[45] Rights that the federal procedural

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37. *See State Enforcement, supra* note 36, at 1557 (requiring state judge to adopt and apply law of another judicial system puts onerous burden on that state judge to administer justice effectively). *But cf.* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 484 (1981) (state judge possesses sufficient competence to administer law arising from judicial system of another state and is not per se unsympathetic to federal claims).

38. *See* U.S. CONST. art. VI (laws of United States take precedence over contrary state laws).

39. *Id.*

40. *See* Ward v. Board of County Comm'rs., 253 U.S. 17, 20-24 (1920) (Oklahoma Supreme Court decision overruled because Oklahoma Supreme Court adjudicated issue of taxing Indians under local statute instead of applying contrary federal law); H. Hart, *The Relations Between State and Federal Law,* 54 COLUM. L. REV. 489, 507 (1954) (discussing whether state courts can decline jurisdiction of suits brought under federal statutes).

41. *See* Patterson v. Alabama, 294 U.S. 600, 605-07 (1935) (suggesting that state procedural rule effectively nullifying federal law right might have to be subjugated to federal procedural rule designed or inserted to protect the federal law right); *see also infra* notes 42-47 and accompanying text (suggesting that *Patterson v. Alabama* decision may imply right to force state courts to apply federal procedural or appellate rules when state courts adjudicate federal claims).

42. 294 U.S. 600 (1935).

43. *Id.* at 607.

44. *See id.* at 601, 605, 607 (county in which trial took place excluded negroes from jury service).

45. *See id.* (Supreme Court vacated state court decision based on state appellate review rule because state appellate review rule, while in general constitutional, in particular instance effectively had nullified federal law right).

rules inserted in Title VII protect may include preventing the federal government from abusing the use of the injunctive remedy against alleged Title VII employment discriminators[46] and expediting adjudication of Title VII actions.[47]

While the supremacy clause of the Constitution and Supreme Court precedent undermine the argument that Congress does not have the power to force state courts to use federal procedural and appellate rules when the state courts adjudicate federal claims,[48] the existence of highly competent state court judges helps to counter the argument that speed and efficiency in the administration of justice will be impeded if state judges are forced to learn an extra set of procedural rules.[49] State judges generally are just as capable as federal judges in ascertaining and applying federal law efficiently.[50] Indeed, if state judges did not possess the competence, integrity and time to ascertain and apply federal law properly, the Supreme Court probably would have discarded the traditional presumption that state courts enjoy jurisdiction over federal causes of action absent contrary congressional directive.[51] Moreover, assuming that Title VII does require the use of federal procedural rules for courts adjudicating Title VII actions, Title VII requires the use of only a few such rules.[52] Consequently, given the competency of state judges to interpret federal law,[53] the Supreme Court's willingness to vest a presumptive right in state courts to adjudicate federal claims[54] and the very limited

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46. *See* 42 U.S.C. § 2000e-5(f)(2) (1982) (requiring Attorney General or EEOC seeking injunctive relief under Title VII against alleged employment discriminator first to satisfy safeguards outlined in Federal Rule of Civil Procedure 65); *see also supra* note 17 (discussing safeguards in rule 65 that parties must satisfy before a federal court can grant injunctive relief).

47. *See* 42 U.S.C. §§ 2000e-5(f)(4) and 2000e-5(f)(5) (1982) (providing for expeditious adjudication of Title VII actions).

48. *See supra* notes 38-45 and accompanying text (supremacy clause of Constitution and Supreme Court precedent may undermine argument that Congress does not have power to force state courts to use federal procedural and appellate rules when the state courts adjudicate federal claims).

49. *See* Wright, *In Praise of State Courts: Confessions of a Federal Judge,* 11 HASTINGS CONST. L.Q., 165, 166, 185 (1984) (state judges deserve praise for their high competence in safeguarding federal rights); *infra* notes 49-55 and accompanying text (suggesting that competency of state court judges helps to undermine argument that speed and efficiency in administration of justice will be impeded if state judges are forced to learn an extra set of procedural rules for Title VII actions).

50. Wright, *supra* note 49, at 165-66, 185.

51. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 n.4 (1981) (state courts are capable of vindicating federal rights and state court decisions concerning federal rights are subject to safeguard of review by United States Supreme Court).

52. *See supra* notes 17-18 & 28-29 and accompanying text (noting the few sections of Title VII that employ a very limited number of federal procedural and appellate rules).

53. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 n.4 (1981) (state courts are capable of vindicating federal rights).

54. *See id.* at 478 (state courts enjoy a presumptive right to adjudicate federal causes of action); *supra* note 1 (discussing Supreme Court's rationale for holding that state courts continue to enjoy a presumptive right to adjudicate federal causes of action).

amount of federal procedural rules embodied in Title VII, asking state judges to learn the few federal procedural rules of Title VII does not appear to create an onerous impact upon the speed and efficiency of state judicial systems and should not alone preclude state court adjudication of Title VII actions. The supremacy clause of the Constitution, Supreme Court precedent, and the competency of state judges to interpret federal law, therefore, suggest that the *Valenzuela* and *Dickinson* courts erred in concluding that Congress lacked the power to require state courts to use federal procedural and appellate rules when the state courts adjudicate federal causes of action.[55]

An assumption that the *Valenzuela* and *Dickinson* courts correctly forecast the lack of congressional power to require state courts adjudicating federal claims to apply federal procedural and appellate rules, however, does not lead necessarily to the conclusion of exclusive federal court jurisdiction over Title VII actions. Indeed, a closer focus upon the language contained in sections 2000e-5(f)(2), 2000e-5(f)(4), 2000e-5(f)(5) and 2000e-5(j) reveals that references contained therein to federal procedural and appellate rules apply only in narrow circumstances and do not foreclose explicitly the possibility of concurrent state court jurisdiction over Title VII actions.[56]

For example, the *Valenzuela* court cited a portion of the language contained in section 2000e-5(f)(2) requiring the use of Federal Rule of Civil Procedure 65 for the proposition that rule 65 governed the issuance of all injunctions granted in Title VII actions.[57] The *Valenzuela* court then reasoned that the reference to rule 65 found in section 2000e-5(f)(2) provided substantial evidence of explicit congressional intent to limit Title VII actions to federal courts because Congress did not want to infringe on a state court's possible sovereign right to issue injunctions according to state law.[58] In fact, section 2000e-5(f)(2) addresses only the right of the Equal Employment Opportunity Commission (EEOC) to seek injunctive relief in Title VII actions.[59] Section 2000e-5(g) of Title VII allows courts adjudicating Title VII actions discretion to enjoin parties from engaging in unlawful employment

55. *See supra* notes 38-54 and accompanying text (suggesting that existence of supremacy clause of Constitution, Supreme Court precedent and the competency of state judges to interpret federal law lead to conclusion that Congress should have constitutional power to require use of federal procedural and appellate rules in state court adjudications of federal causes of action).

56. *See infra* notes 57-88 and accompanying text (suggesting that language of 42 U.S.C. §§ 2000e-5(f)(2), 2000e-5(f)(4), 2000e-5(f)(5) & 2000e-5(j) does not foreclose explicitly the possibility of concurrent state court jurisdiction of Title VII actions).

57. *See* Valenzuela v. Kraft, Inc., 739 F.2d 434, 435-36 (9th Cir. 1984) (stating that 42 U.S.C. § 2000e-5(f)(2) requires application of Federal Rule of Civil Procedure 65 to all considerations for injunctive relief contemplated in Title VII action); *see also* FED. R. CIV. P. 65 (governing issuance of injunctions in federal court); *supra* note 17 (discussing requirements outlined in rule 65 prerequisite to obtaining and extending injunctive relief).

58. Valenzuela v. Kraft, Inc., 739 F.2d 434, 436 (9th Cir. 1984).

59. *See* 42 U.S.C. § 2000e-5(f)(2) (requiring EEOC seeking injunctive relief under Title VII action first to satisfy procedural prerequisites outlined in Federal Rule of Civil Procedure 65 governing issuance of injunctions in federal court); *see also supra* note 17 (quoting 42 U.S.C. § 2000e-5(f)(2) in pertinent part).

practices and does not mention rule 65.[60] A comparison of sections 2000e-5(f)(2) and 2000e-5(g), therefore, suggests that Congress intended to limit court sovereignty for issuing injunctions only to situations in which the EEOC sought Title VII injunctive relief.[61] Consequently, the *Valenzuela* court's state sovereignty argument becomes less compelling because Congress has the power to limit the enforcement capabilities of federal agencies.[62]

The idea that the language of 2000e-5(f)(2) and 2000e-5(g) reveals a congressional intent only to restrict the manner in which the EEOC may seek Title VII injunctive relief finds support in the legislative history of Title VII.[63] Under the 1964 version of Title VII, the EEOC possessed only the power to attempt conciliation between the alleged employment discriminator and the aggrieved employee.[64] After the 1964 version of Title VII was adopted, however, many congressmen found that restricting the role of the EEOC to mediator status resulted in inadequate enforcement of Title VII.[65] These congressmen proposed that the EEOC receive the power to issue cease and desist orders that would be enforceable in federal court and reviewable in federal courts of appeal.[66] Other members of the House and the Senate, however, believed that granting the EEOC cease and desist power was tantamount to permitting the EEOC to make preliminary determinations of guilt or innocence.[67] Members of the House and Senate disfavoring the grant of EEOC cease and desist power reasoned that the grant of such power would force the alleged employment discriminator to prove his innocence and therefore would result in a guilty until proven innocent standard rather

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60. *See* 42 U.S.C. § 2000e-5(g) (1982) (permitting courts to use discretion to enjoin parties from engaging in unlawful employment practices).

61. *See* 42 U.S.C. § 2000e-5(f)(2) (1982) (EEOC must satisfy prerequisites of Federal Rule of Civil Procedure 65 before EEOC can obtain injunctive relief in Title VII action); 42 U.S.C. § 2000e-5(j) (placing no Federal Rule of Civil Procedure 65 requirements on judges seeking to enjoin parties in Title VII actions); *see also* Bennun v. Board of Governors, 413 F. Supp. 1274, 1279 n.2 (D.N.J. 1976) (legislative history of Title VII reveals concern over limiting EEOC enforcement powers instead of concern over exclusivity of federal court jurisdiction); notes 60-69 and accompanying text (discussing legislative history supporting idea that Congress intended section 2000e-5(f)(2) to limit EEOC enforcement powers).

62. *See* Humphrey's Executor v. United States, 295 U.S. 602, 628 (1935) (suggesting that Congress has legislative power to create agencies and to regulate agency enforcement capabilities).

63. *See infra* notes 64-72 and accompanying text (suggesting that legislative history of Title VII reveals congressional intent to restrict ability of EEOC to obtain injunctive relief).

64. *See* 42 U.S.C. § 2000e-5 (1965) (limiting role of EEOC to that of investigator and conciliator).

65. *See* H.R. REP. No. 238, 92d Cong., 1st Sess. 1, 1, 9 (1971) (role of EEOC as conciliator proved inadequate to insure effective enforcement of Title VII), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2137, 2144.

66. *Id.* at 2145-46.

67. *See* H.R. REP. No. 238: MINORITY VIEWS ON H.R. 1746, 92d Cong., 1st Sess. 58, 58-71 (1971) (granting cease and desist power to EEOC effectively will transform Title VII enforcement into guilty until proven innocent scheme), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2167, 2167-76 [hereinafter cited as MINORITY VIEWS]. *Cf.* H. Conf. Rep. No. 899:

than the traditional innocent until proven guilty principle.[68] Members of the House and Senate opposing a grant of EEOC cease and desist power concluded that determinations of guilt and innocence belonged to the courts.[69] When a bill to amend the 1964 version of Title VII emerged from the House providing for EEOC cease and desist powers, the Senate therefore offered an amendment authorizing the EEOC to seek injunctive relief in Title VII actions.[70] The House, probably under the partial influence of members unhappy at the possibility of cease and desist orders, countered with the proposal that no injunction in a Title VII action could issue unless substantial and irreparable injury to the allegedly aggrieved party otherwise would be unavoidable.[71] The Senate then responded by offering an amendment permitting the EEOC to obtain a court injunction under Title VII only if the EEOC first satisfied the prerequisites of rule 65, which codifies common law injunctive principles by emphasizing the injunction prerequisites of substantial and irreparable injury.[72]

An examination of the language contained in section 2000e-5(f)(4) also reveals that Congress did not preclude the availability of concurrent jurisdiction over Title VII actions. Section 2000e-5(f)(4) provides for expeditious dispensation of Title VII actions.[73] The language of 2000e-5(f)(4), however, discusses only the duty of the chief judge of the federal district in which a Title VII action is pending immediately to designate a district court judge to hear the action.[74] Nowhere in section 2000e-5(f)(4) or elsewhere in Title VII

JOINT EXPLANATORY STATEMENT OF MANAGERS AT THE CONFERENCE ON H.R. 1746 TO FURTHER PROMOTE EQUAL EMPLOYMENT OPPORTUNITIES FOR AMERICAN WORKERS, 92d Cong., 2d Sess. 1, 15-22 (1972) (noting senatorial amendment discarding right to EEOC cease and desist power and instead permitting EEOC to seek injunctive relief through courts), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2179, 2179-86 [hereinafter cited as JOINT STATEMENT].

68. MINORITY VIEWS, *supra* note 67, at 58, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2167, 2167; *cf.* JOINT STATEMENT, *supra* note 67, at 17-18 (noting senatorial amendment granting EEOC right to seek injunctive relief in court), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2179, 2182.

69. *See* MINORITY VIEWS, *supra* note 67, at 58-59 (noting only that EEOC should seek enforcement of Title VII policy through federal court alone and that EEOC should not possess cease and desist power), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2167, 2167-68; *cf.* JOINT STATEMENT, *supra* note 67, at 18 (senatorial amendment permitting EEOC to seek injunctive relief under Title VII in court), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2179, 2181.

70. JOINT STATEMENT, *supra* note 67, at 18, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2179, 2181.

71. *Id.*

72. *Id.; see* United States v. Hall, 472 F.2d 261, 266-67 (5th Cir. 1972) (Federal Rule of Civil Procedure 65 represents common law codification of procedural safeguards prerequisite to obtaining injunctive relief); *see also supra* note 17 (outlining rule 65 safeguards prerequisite to gaining injunctive relief).

73. *See* 42 U.S.C. § 2000e-5(f)(4) (1982) (providing for expeditious dispensation of Title VII actions that complainants have chosen to bring in federal court); *see also supra* note 28 (noting pertinent language of 42 U.S.C. § 2000e-5(f)(4).).

74. 42 U.S.C. §2000e-5(f)(4) (1982).

does Congress infringe upon the possible sovereign right of state courts freely to arrange court calendars.[75] Indeed, section 2000e-5(f)(5) requires a judge adjudicating a Title VII action to assign the action for hearing only at the earliest practicable date, leaving the definition of "practicable" to the discretion of the judge.[76] Moreover, section 2000e-5(f)(5) permits but does not require a judge to appoint a master pursuant to Federal Rule of Civil Procedure 53 for purposes of expediting adjudication of the Title VII claim.[77] Consequently, the instructions contained in sections 2000e-5(f)(4) and 2000e-5(f)(5) to expedite court cases and to apply Federal Rule of Civil Procedure 53 are permissive, not mandatory.[78] Under the *Gulf* concurrent jurisdiction test, explicit and not merely permissive statutory language is necessary to rebut the presumption of concurrent state court jurisdiction over a federal statute.[79] Application of sections 2000e-5(f)(4) and 2000e-5(f)(5) to the *Gulf* test then should not preclude concurrent jurisdiction over Title VII actions.[80]

While sections 2000e-5(f)(4) and 2000e-5(f)(5) do not contain an explicit mandate of exclusive federal court jurisdiction of Title VII actions, section 2000e-5(j) provides the strongest statutory argument for denying concurrent state court jurisdiction over Title VII actions.[81] Section 2000e-5(j) contains language to the effect that any Title VII action brought in court is subject to appellate review as outlined in sections 1291 and 1292 of Title 28 of the United States Code.[82] Congress may not have the constitutional power to force state courts adjudicating federal causes of action to use federal appellate

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75. *See* 42 U.S.C. § 2000e to 2000e3-17 (1982) (containing no language infringing directly upon right of state courts to arrange state court calendars).

76. 42 U.S.C. § 2000e-5(f)(5) (1982) (requiring judges to arrange hearings for Title VII actions at earliest "practicable" date, but never defining meaning of "practicable").

77. *See id.* (permitting but not requiring court adjudicating Title VII action to appoint a master pursuant to Federal Rule of Civil Procedure 53 to help expedite action if court has not scheduled case for trial within one hundred and twenty days after issue has been joined).

78. *See supra* notes 73-77 and accompanying text (suggesting permissive rather than mandatory nature of language contained in 42 U.S.C. §§ 2000e-5(f)(4) and 2000e-5(f)(5) concerning Title VII concurrent jurisdiction issue).

79. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78 (1981) (statutory language must be explicit to preclude concurrent state court jurisdiction over a federal cause of action); *see also supra* note 9 (noting facts, holding, and reasoning of *Gulf Offshore Co. v. Mobil Oil Corp.*).

80. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78 (1981) (statutory language must be explicit to preclude state court adjudication of Title VII actions); *supra* notes 73-77 (suggesting that 42 U.S.C. §§ 2000e-5(f)(4) & 2000e-5(f)(5) do not contain language revealing explicit congressional intent to preclude state court jurisdiction over Title VII actions).

81. *See* 42 U.S.C. § 2000e-5(j) (1982) (containing language that may direct all courts adjudicating Title VII actions to use 28 U.S.C. §§ 1291 & 1292 for appellate review); *see also* 28 U.S.C. §§ 1291, 1292 (1982) (rules for United States Court of Appeals review of United States District Court decisions); *supra* note 18 (discussing provisions of 28 U.S.C. §§ 1291 and 1292).

82. *See* 42 U.S.C. § 2000e-5(j) (civil actions brought under Title VII subject to appeal pursuant to 28 U.S.C. §§ 1291 & 1292).

procedure.[83] If Congress did not possess such constitutional power, Congress would not have intended the language contained in section 2000e-5(j) to require state courts to follow sections 1291 and 1292 of Title 28 of the United States Code concerning appellate review of state court Title VII determinations.[84] The lack of congressional intent to require state courts to follow sections 1291 and 1292 concerning appellate review of Title VII actions, however, does not necessarily lead to the conclusion that jurisdiction over Title VII actions rests exclusively in federal courts. Instead, application of the two traditional statutory rules that courts should interpret civil rights statutes broadly to increase the remedial effect of such statutes,[85] and that courts should interpret a statute as a whole to avoid apparent inconsistencies, suggests that the language of section 2000e-5(j) applies only when a plaintiff chooses to bring a Title VII action in federal court and does not explicitly preclude the plaintiff from bringing Title VII claims in state court.[86]

The preceding discussion of the statutory language of Title VII suggests that such language does not explicitly prohibit the exercise of concurrent jurisdiction over Title VII actions.[87] Under the *Gulf* concurrent jurisdiction

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83. *See supra* notes 38-45 and accompanying text (discussing possibility that Congress has constitutional power to force state courts adjudicating federal causes of action to use federal procedural and appellate review rules to protect rights existent under federal law). *But see* Valenzuela v. Kraft, Inc., 739 F.2d 434, 436 (9th Cir. 1984) (questioning whether Congress has constitutional power to force state courts adjudicating federal causes of action to use federal appellate review rules).

84. *See* Valenzuela v. Kraft, Inc., 739 F.2d 434, 436 (9th Cir. 1984) (stating doubtfulness of possibility that Congress intended to infringe upon state sovereignty by forcing state court adjudicating federal cause of action to use federal appellate review rules).

85. *See* Hamm v. City of Rock Hill, 379 U.S. 306, 308-17 (1964) (suggesting that Civil Rights Act of 1964 should receive broad interpretation to effectuate remedies), *reh'g denied,* 379 U.S. 995 (1964); Valle v. Stengel, 176 F.2d 697, 702 (3d Cir. 1949) (suggesting that civil rights legislation requires broad interpretive reading in order to effectuate purpose of such legislation); Shaw v. Garrison, 391 F. Supp. 1353, 1359-60 (E.D. La. 1975) (suggesting that courts should construe civil rights statutes as broadly as necessary to remedy evils for which legislature enacted such statutes). Congress enacted Title VII to reduce employment discrimination and to provide remedies for victims of employment discrimination. *See* 42 U.S.C. § 2000e-2(a)(1) (1982) (employer acts unlawfully when employer discharges or discriminates against any individual on the basis of race, color, religion, sex, or national origin); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (objective of Title VII is to achieve equality of employment opportunities). Interpreting section 2000e-5(j) to prohibit the exercise of concurrent jurisdiction over Title VII actions would emasculate the remedial effect and frustrate the purpose of Title VII actions because of the impact of the doctrines of res judicata and pendent jurisdiction on the adjudication of Title VII actions. *See infra* notes 118-66 and accompanying text (suggesting that current application of res judicata and pendent jurisdiction doctrines in Title VII actions serverely curtails availability of federal courts as forums for resolution of discriminatory employment claims and mandates the need for concurrent jurisdiction over Title VII actions to vindicate the rights of Title VII claimants).

86. *See* Richards v. United States, 369 U.S. 1, 11 (1962) (court should not read section of statute in isolation from context of entire statute); 2A J. SUTHERLAND & C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.05, at 56 (4th ed. 1973) (statute should be read as a whole to avoid both apparent inconsistencies and frustration of purpose behind statute).

87. *See supra* notes 11-86 and accompanying text (discussing whether statutory language

test, only explicit and not permissive statutory language can rebut the presumption of state court jurisdiction over Title VII actions.[88] Under the *Gulf* test, however, the absence of explicit statutory language denying state court jurisdiction over a federal statutory cause of action does not preclude the possibility of exclusive federal court jurisdiction of the action.[89] A federal court still might have exclusive jurisdiction over claims arising under a particular federal statute if the legislative history surrounding passage of the federal statute unmistakably implies exclusive federal court jurisdiction or if a clear incompatibility between state court jurisdiction and federal interests is embodied in the statute.[90]

A review of the legislative history and statutory language of Title VII reveals that the majority of present day Title VII is much the same as the original Title VII that Congress passed in 1964.[91] Indeed, the most recent amendments to Title VII undertaken in 1972 only expand coverage of Title VII and permit the EEOC to bring suits to address alleged discriminatory employment practices.[92] Interpreting the legislative history of the 1964 version of Title VII, however, is a precarious venture because no legislative reports

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of Title VII explicitly precludes the exercise of concurrent jurisdiction over Title VII actions).

88. *See* Gulf Offshore Oil Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78 (1981) (statutory language must be explicit to rebut presumption of state court jurisdiction over Title VII actions).

89. *See id.* (only explicit statutory language, unmistakable implication from legislative history, or clear incompatibility between state court jurisdiction and federal policy interests will bar state court jurisdiction of an action arising under a federal statute).

90. *Id.*

91. *See* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972,* 40 GEO. WASH. L. REV. 824, 845-89 (1972) (analyzing amendments to 1964 version of Title VII wrought in Equal Employment Opportunity Act of 1972). Prior to the 1972 amendment to Title VII, the EEOC possessed only the power to attempt conciliation between the alleged employment discriminator and the aggrieved complainant. 42 U.S.C. § 2000e-5 (1965). Many congressmen believed that the inability of the EEOC to have any real enforcement capabilities contributed to ineffective enforcement of Title VII in general. *See* H.R. REP. No. 238, 92d Cong., 1st Sess. 1, 1, 9 (1971) (limiting role of EEOC to conciliator proved inadequate to insure effective enforcement of Title VII), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2137, 2144. Congressional belief in the ineffectiveness of the EEOC as conciliator led to the provision in the 1972 amendment allowing for the EEOC to seek injunctive relief in court and to undertake court suits on behalf of aggrieved complainants. *See* The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (amending 42 U.S.C. § 2000e to 2000e-15 and embodied in present 42 U.S.C. § 2000e to 2000e-17). In addition, Congress amended Title VII in 1972 to include coverage of educational institutions, employers of 15 or more employees instead of the previous limit of 25 employees, and governments, governmental agencies or political subdivisions. *Id.; see generally* Sape & Hart, *supra,* at 845-89 (analyzing 1972 amendments to Title VII). The 1972 amendments to Title VII, however, afford little insight on the Title VII concurrent jurisdiction issue. *See infra* notes 109-13 and accompanying text (analyzing legislative history of 1972 amendments of Title VII for information of congressional intent concerning Title VII concurrent jurisdiction issue).

92. *See* Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (1972) (amending 1964 version of Title VII); *see also supra* note 91 (brief discussion of 1972 amendments to 1964 version of Title VII).

accompanied the enactment in 1964 of Title VII.[93] Despite the nonexistence of legislative reports, however, other sources are available for analysis.[94] These sources include an unenacted House version of Title VII, enacted Senate revisions of the unenacted House version of Title VII, and legislators' explanatory statements concerning passage of the 1964 version of Title VII in general.[95]

Some congressmen who helped to construct the unenacted version of Title VII suggested that Title VII should apply only when state enforcement of state fair employment practice statutes did not adequately protect against employment discrimination.[96] Emphasis on the adequacy of state laws protecting against employment discrimination reveals that some congressmen believed in the effectiveness of state fair employment laws, while other congressmen questioned the effectiveness of those state laws.[97] The division of the legislators on the effectiveness of state antidiscriminatory employment laws resulted in inclusion within the unenacted 1964 House version of Title VII a provision stating that the EEOC could defer to state and local agencies to resolve alleged discriminatory practices rather than sue employment discriminators under Title VII.[98] While such a state and federal partnership to combat employment discrimination existed in the House version of Title VII, several congressmen wanted more state involvement in the prevention of employment discrimination.[99] The desire of some congressmen to afford the states a greater role in combatting employment discrimination probably led

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93. *See* Jackson, Matheson & Piskorski, *The Proper role of Res Judicata and Collateral Estoppel in Title VII Suits,* 79 MICH. L. REV. 1485, 1492-93 (1981). The nonexistence of any legislative reports accompanying the ultimate passage of the 1964 version of Title VII makes interpretation of the legislative history of Title VII difficult. *Id.* The existence of other available sources, however, renders interpretation of the legislative history of the 1964 version of Title VII possible. *See infra* notes 95-116 and accompanying text (discussing relation of Title VII legislative history to Title VII concurrent jurisdiction issue).

94. *See, e.g.,* H.R. 7152, 88th Cong., 2d Sess. 1, ____(1964) (unenacted version of Title VII), *reprinted in* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, 2001-2153 (1967) [hereinafter cited as LEGISLATIVE HISTORY]; 110 CONG. REC. 11,926, 11,930-34 (1964) (Senate revisions of H.R. 7152 eventually enacted into Title VII of 1964); LEGISLATIVE HISTORY 3003-08, 3017-21 (discussing Senate revisions of H.R. 7152); *infra* notes 104-10 and accompanying text (discussing various remarks of congressmen on Title VII).

95. *See supra* note 94 (citing legislative history sources for 1964 version of Title VII).

96. *See* 110 CONG. REC. 2728 (1964) (statement of Rep. McClory) (EEOC should not take jurisdiction over Title VII claim arising in particular state unless President of United States first determined that state's enforcement of antidiscriminatory employment laws did not effectively accomplish objectives of Title VII); 110 CONG. REC. 2727 (1964) (statement of Rep. Cramer) (states should have exclusive jurisdiction to prevent employment discrimination unless EEOC determines that state enforcement of antidiscriminatory employment law does not adequately meet objectives of Title VII).

97. *See* Jackson, *supra* note 93, at 1493-94 (discussing legislative history of Title VII).

98. H.R. 7152, 88th Cong., 2d Sess. § 708(b) (1964), *reprinted in* LEGISLATIVE HISTORY, *supra* note 94, at 2009, 2013.

99. *See* 110 CONG. REC. 10,520 (1964) (statement of Sen. Carlson) (expecting state officials

ultimately to the enacted Senate revisions of Title VII. The Senate revisions, embodied in the 1964 Title VII act, provided the EEOC only with powers to attempt conciliation between the aggrieved party and the alleged employment discriminator.[100] The 1964 version of Title VII therefore partially symbolizes Congress' acknowledgement that states could combat employment discrimination and suggests that 1964 Title VII legislators might have been open to the idea of concurrent state court jurisdiction of Title VII actions.[101]

The scattered and diverse comments of various legislators concerning the entire legislative process behind the eventual passage of the 1964 version of Title VII suggest neither absolute disfavor nor support of state court jurisdiction over Title VII actions.[102] For example, one senator noted that the enacted 1964 version of Title VII permitted a plaintiff to commence a Title VII action in federal court if state authorities failed to examine the plaintiff's alleged employment discrimination claim within a reasonable time.[103] The senator's remarks, in effect, did not deny the plaintiff the opportunity to pursue a Title VII action in state court, but stated only that the plaintiff could bring a Title VII action in federal court.[104] In addition, two other senators debating passage of the 1964 Title VII legislation suggested that the EEOC ordinarily might bring a suit in federal district court to enforce Title VII and that, if the EEOC decided not to sue, the aggrieved individual could file a private Title VII action in federal court.[105] As previously noted, Congress possesses the power to limit the enforcement capabilities of federal agencies, and perhaps some congressmen intended to limit EEOC enforcement of Title VII to federal court.[106] The remarks of the three senators, however, did not mandate denial of state court jurisdiction of Title VII

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to handle majority of enforcement of antidiscriminatory employment laws); 110 CONG. REC. 6449 (1964) (statement of Sen. Dirksen) (suggesting that federal and state courts should work together to prevent discrimination in employment).

100. 110 CONG. REC. 11,926, 11,930-34 (1964) (Senate revisions ultimately enacted in 1964 version of Title VII put less emphasis on EEOC involvement in Title VII disputes); 42 U.S.C. § 2000e-5 (1965) (EEOC only has power to attempt conciliation of aggrieved claimant and alleged employment discriminator).

101. *See supra* notes 97-100 and accompanying text (suggesting that several legislators put emphasis on federal and state partnership to enforce Title VII).

102. *See infra* notes 105-11 and accompanying text (suggesting that comments of various congressmen on topic of Title VII reveals only uncertainty as to whether Congress intended to exclude state courts from adjudicating Title VII actions).

103. *See* 110 CONG. REC. 12,708 (1964) (statement of Sen. Humphrey) (individual should be able to bring Title VII actions in federal court if state with antidiscriminatory employment laws fails to act on individual's alleged employment discrimination claim within a reasonable time).

104. *Id.*

105. *See* 110 CONG. REC. 7213 (1964) (statements of Sen. Clark and Sen. Case) (EEOC ordinarily would sue under Title VII in federal court and a decision of EEOC not to sue would leave aggrieved individual with option to pursue Title VII relief in federal court).

106. *Cf.* MINORITY REPORT UPON PROPOSED CIVIL RIGHTS ACT of 1963, COMMITTEE ON JUDICIARY SUBSTITUTE FOR H.R. 7152 (1964) (suggesting that some legislators feared affording

actions, but merely permitted private Title VII actions in federal court.[107] Moreover, other legislators' remarks emphasizing a state and federal partnership to combat employment discrimination refer only to the use of courts and not solely to the use of federal courts for adjudication of Title VII claims.[108]

The legislative history behind the 1972 amendments to Title VII reveals uncertainty similar to that accompanying the 1964 version of Title VII concerning the Title VII concurrent jurisdiction issue.[109] The 1972 amendments to Title VII gave the EEOC the right to seek injunctive relief and to sue on the behalf of employment discrimination victims in court.[110] Moreover, legislators' remarks concerning the enforcement capabilities of the EEOC suggest that Congress expected the EEOC to bring Title VII actions in federal court.[111] Again, however, statements of other legislators concerning court enforcement of Title VII actions did not restrict Title VII complainants

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EEOC and government too much enforcement power would lead to excessive interference with both management prerogatives and union freedoms), *printed in* 1964 U.S. CODE CONG. & AD. NEWS 2431, 2434, 2440-41, 2455; ADDITIONAL VIEWS ON H.R. 7152 of HON. WILLIAM T. CAHILL, HON. GARNER E. SHRIVER, HON. CLARK MACGREGOR, HON. CHARLES MCC. MATHIAS, HON. JAMES E. BROMWELL (1964) (deleting provision that provided EEOC with cease-and-desist power and instead providing federal judiciary with ultimate power to resolve discriminatory employment claims was part of compromise resulting in Civil Rights Act of 1964), *printed in* 1964 U.S. CODE CONG. & AD. NEWS 2487, 2515-16; *supra* notes 59-72 and accompanying text (suggesting both that Congress has legislative power to regulate enforcement capabilities of federal agency and that Congress intended to limit enforcement capabilities of EEOC).

107. *See* 110 CONG. REC. 12,708 (1964) (statement of Sen. Humphrey) (containing no language that required individual suing under Title VII to pursue such suit only in federal court as opposed to state court); 110 CONG. REC. 7213 (1964) (statements of Sen. Clark and Sen. Case) (noting that EEOC, given enforcement powers, ordinarily would sue under Title VII in federal court, but not stating specifically that aggrieved individual could bring a Title VII action only in federal court).

108. *See* 110 CONG. REC. 6417-19 (1964) (statement of Sen. Morse) (courts in general will have difficulty understanding and applying Title VII unless Congress improves upon ambiguous language found in Title VII); 110 CONG. REC. 5813, 5818 (1964) (statement of Sen. Stennis) (refering only to use of courts and not solely to use of federal courts as forums for adjudication of Title VII actions); *cf.* Bennun v. Board of Governors, 413 F. Supp. 1274, 1279-80 (D.N.J. 1976) (suggesting that Attorney General and EEOC can bring Title VII claims only in federal court but that individual complainant is free to bring Title VII action either in state court or in federal court); 110 CONG. REC. 5817 (1964) (statement of Sen. Nelson) (Title VII embodies concurrent jurisdiction between federal law and state law).

109. *See infra* notes 110-14 and accompanying text (suggesting that 1972 amendments to Title VII reveal uncertainty concerning whether Congress intended to restrict jurisdiction of Title VII actions exclusively to federal court).

110. *See* Equal Employment & Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (amending 42 U.S.C. § 2000e to 2000e-15) (amendment of 1964 version of Title VII allowing EEOC to bring Title VII suits in court).

111. *See* H.R. REP. No. 238, 92d Cong., 1st Sess. 1, 1, 9 (1971) (EEOC should enjoy power to issue cease and desist orders that would be enforceable in federal court), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2137, 2144; MINORITY VIEWS, *supra* note 67, at 58-59 (EEOC should seek enforcement of Title VII only through conciliation or by bringing Title VII suits in federal courts), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2167, 2168.

solely to federal courts for adjudication of Title VII actions.[112] Under the *Gulf* concurrent jurisdiction test, legislative history surrounding a federal statute rebuts the traditional presumption of state court jurisdiction over the statute only if the legislative history implies unmistakably that Congress intended to deprive state courts of jurisdiction over actions arising under the statute.[113]

Since no explicit Title VII language exists denying concurrent state court jurisdiction of Title VII actions, and since the legislative history of Title VII does not supply an unmistakable implication of congressional intent to limit adjudication of Title VII actions to federal courts, application of the *Gulf* test permits a conclusion of exclusive federal court jurisdiction of Title VII actions only if clear incompatibility exists between the exercise of concurrent jurisdiction and the furtherance of federal interests associated with Title VII.[114] The major federal policy interest associated with enforcement of Title VII is the effective reduction of employment discrimination.[115] Other federal policy interests associated with enforcement of Title VII include furtherance of uniformity in creation and application of federal common law concerning Title VII, the advantage of relying on federal judicial expertise for resolution of Title VII actions, avoidance of multiplicious suits, and increase judicial efficiency.[116]

An overview of the major case law concerning the jurisdictional aspect of Title VII suggests that no clear incompatibility exists between permitting state court jurisdiction over Title VII and furthering federal interests embod-

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112. *See* MINORITY VIEWS, *supra* note 67, at 69 (statement of Rep. Mazzoli) (stating only a preference for court enforcement of Title VII actions instead of granting EEOC cease and desist powers), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2167, 2177; 118 CONG. REC. 308 (1972) (statement of Sen. Ervin) (suggesting only that EEOC or complainant under Title VII probably would sue a state or a political subdivision of the state in federal court for alleged state or state subdivision employment discrimination).

113. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981).

114. *Id.; see supra* notes 11-86 and accompanying text (suggesting that no statutory language in Title VII explicitly precludes concurrent state court jurisdiction over Title VII actions); *supra* notes 91-112 and accompanying text (suggesting that legislative history of Title VII does not supply unmistakable implication of congressional intent to preclude concurrent state court jurisdiction over Title VII actions).

115. *See* 42 U.S.C. § 2000e-2(a)(1) (1982) (stating that an employer acts unlawfully when an employer discharges or discriminates against any individual on the basis of race, color, religion, sex, or national origin); Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971) (objective of Title VII is to achieve equality of employment opportunities).

116. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 483-84 (1981) (maintaining uniformity of law and relying upon expertise of federal judges to interpret and apply federal law represent two policy reasons against granting concurrent state court jurisdiction over federal causes of action); 118 CONG. REC. 3370 (1972) (statement of Sen. Javits) (discussing whether principle of res judicata would bar relitigation in federal court of employment discrimination issues previously litigated in state court); 118 CONG. REC. 3172-73, 3368 (statement of Sen. Hruska) (expressing concern over expense and delay involved in litigating same discrimination claims in both state and federal proceedings).

ied in the enforcement of Title VII.[117] The Supreme Court decision of *Kremer v. Chemical Construction Corp.*[118] highlights one possible role of state courts in resolving Title VII claims. In *Kremer,* the United States Supreme Court determined whether a state court decision upholding a state agency dismissal of a state employment discrimination claim barred the complainant from bringing a Title VII action in federal court.[119] Although the state court only reviewed a state agency dismissal of an alleged violation of state fair employment laws, the Supreme Court, applying the principle of res judicata, held that a procedurally adequate state court decision on those state laws precluded a complainant from bringing a Title VII suit based on the same alleged discriminatory employment conduct in federal court.[120] The *Kremer* holding, therefore, allows a state court tangentially to judge the merits of a

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117. *See infra* notes 118-71 and accompanying text (suggesting that Title VII cases reveal no clear incompatibility between permitting state court jurisdiction over Title VII and furthering federal interests embodied in Title VII).

118. 456 U.S. 461 (1982).

119. *Id.* at 466-67.

120. *Id.* at 485. In *Kremer v. Chemical Construction Corp.*, the United States Supreme Court held that a procedurally adequate state court affirmation of a state antidiscriminatory employment agency finding of no reasonable cause on a state employment discrimination claim against the plaintiff barred the plaintiff from bringing a Title VII suit based on the same alleged discriminatory employment conduct in federal court). *Id.* The *Kremer* Court relied on section 1738 of Title 28 of the United States Code in holding that the state court affirmation of the state agency finding barred the plaintiff from pursuing a Title VII action in federal court. *Id.* at 466-67, 485; *see* 28 U.S.C. § 1738 (1982) (full faith and credit statute). The full faith and credit statute requires federal courts to give the same preclusive effect to a valid state court judgment that the judgment would receive from the courts of the state in which the judgment arose. *Id.* The *Kremer* Court noted that the state court judgment was procedurally valid because the plaintiff had an attorney present throughout the state agency and state court proceedings and had the opportunity to present evidence and witnesses, to testify, and to rebut evidence presented against the plaintiff. *Kremer,* 456 U.S. at 483-85. Furthermore, the *Kremer* Court stated that the issues giving rise to the state discriminatory employment claim were similar to the issues that would arise under the purported Title VII claim and that the state law was similar to the Title VII law in that both laws provided that an unlawful discriminatory employment practice occurred when an employer refused to hire, discharged, or otherwise discriminated against an employee due to race, religion, or national origin. *Id.* at 479 & n.20; *see* 42 U.S.C. § 2000e-2(a) (1982) (unlawful employment practice occurs when employer refuses to hire, discharges or otherwise discriminates against an individual on basis of race, color, religion, sex, or national origin); N.Y. EXEC. LAW § 296(1) (McKinney 1982) (unlawful employment discrimination practice occurs when an employer fails to hire, discharges or otherwise discriminates against an employer or potential employee on basis of national origin, sex, race, disability or marital status). Under the principle of res judicata, a plaintiff cannot relitigate issues or claims that the plaintiff litigated or should have litigated in a prior action. Allen v. McCurry, 449 U.S. 90, 94 (1980). The *Kremer* Court further noted that section 1738 of Title 28 of the United States Code required federal courts to apply res judicata to prior state court actions. *Kremer,* 456 U.S. at 466 & n.6. The *Kremer* Court then applied section 1738 to hold that the plaintiff could not bring a Title VII action in federal court that would be based on approximately the same issues and the same law adjudicated in the state action. *Id.* at 466, 485 & n.6.

Title VII claim and thereby signals confidence in the ability of state courts to prevent employment discrimination.[121]

The relation between the *Kremer* decision and the federal interest in effectively reducing discriminatory employment practices is especially important to resolution of the Title VII concurrent jurisdiction issue. One initial reason for the development of Title VII was that many interest groups and legislators did not believe that state laws adequately addressed the problem of employment discrimination.[122] Indeed, these interest groups and legislators demonstrated a special concern for the failure of southern states to prevent employment discrimination.[123] The *Kremer* decision effectively held that the concern of interest groups and legislators for the capacity of states to prevent employment discrimination does not supplant the constitutional requirement that a valid state court judgment enjoy the same full faith and credit in subsequent federal court actions as the judgment would receive in other state courts of the state in which the state court rendered the judgment.[124] Consequently, the *Kremer* decision implies increased confidence in the ability of state courts to prevent employment discrimination.[125] Since the *Kremer* decision allows a state court tangentially to judge the merits of a Title VII claim, the next logical step would be to acknowledge state court jurisdiction over Title VII actions.

In addition to placing confidence in the capabilities of state courts to prevent employment discrimination, the *Kremer* decision emphasizes the federal interest in avoidance of multiplicious suits and furtherance of judicial efficiency, two interests embodied in the doctrine of res judicata.[126] A major concern of Congress during the 1972 amendments to Title VII was reduction of overcrowded federal dockets.[127] Allowing a state court tangentially to decide Title VII claims prevents second employment discrimination suits in federal court and thereby reduces the already overburdened federal court

121. *See Kremer*, 456 U.S. at 466 n.6 (final judgment on merits of an action bars relitigation of claim raised or claim that should have been raised in prior action).

122. *See* Vaas, *Title VII: Legislative History*, B.C. INDUS. & COM. L. REV. 431, 431-33 (1966) (discussing pressure that various civil rights organizations put on federal government to address problems of discrimination); *supra* notes 97-98 and accompanying text (noting reluctance of legislators to place faith in adequacy of state antidiscriminatory employment laws).

123. *See* 110 CONG. REC. 7025 (1964) (statement of Sen. Clark) (noting that not a single state of old confederacy had yet to enact comprehensive state antidiscriminatory employment laws).

124. *See Kremer*, 456 U.S. at 466, 485 & n.6 (adverse state court judgment on state antidiscriminatory employment law claim against plaintiff barred same plaintiff from bringing Title VII claim in federal court based on same alleged discriminatory conduct).

125. *See id.* at 479, 483-85 (New York state law, state agency and state court proceedings provided plaintiff with fair opportunity to air employment discrimination claim).

126. *See Kremer*, 456 U.S. at n.6 (federal courts apply doctrine of res judicata to prevent repetitious suits and to encourage judicial efficiency).

127. *See* H.R. REP. No. 238, 92d Cong., 1st Sess. 1, 10-11 (1971) (overcrowded federal court dockets prevent effective enforcement of Title VII), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2146.

dockets.[128] By extension, granting state courts concurrent jurisdiction over Title VII actions probably would result in reduction of federal dockets and would allow attorneys and courts to focus their resources and to bring forth all the relevant evidence concerning the alleged discriminatory employment conduct at one trial.[129] Allowing state courts concurrent jurisdiction over Title VII actions and addressing the problem of employment discrimination at one state trial then may increase judicial efficiency, and may reduce the cost of attorney's fees because the client may pursue or defend against employment discrimination claims in one instead of two judicial systems.[130]

The question of whether to allow a party litigating a Title VII claim to sue or be sued on the Title VII claim in state court takes on importance when considered in light of Title VII pendent jurisdiction case law. Under pendent jurisdiction, a federal court adjudicating a claim arising under federal law sometimes may adjudicate a claim between the same parties that is based on state law despite the nonexistence of diversity between the parties.[131] The federal court's right to exercise pendent jurisdiction over the state claim despite the nonexistence of diversity jurisdiction depends in part on whether the federal and state claims are so closely related as to arise from a common nucleus of operative fact ordinarily leading the plaintiff to expect to try both claims in one judicial proceeding.[132] Federal courts have held that existence of a loose factual connection between the state and federal claims is enough to satisfy the common nucleus requirement.[133] For example, if the

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128. *See* Redish & Muench, *supra* note 1, at 312 (granting of concurrent jurisdiction eases federal court burden of overcrowded dockets).

129. *Id.; cf. Kremer,* 456 U.S. at 466 n.6 (general federal interests include effort to avoid multiple suits and conserve judicial resources).

130. *Cf.,* Bennun v. Board of Governors, 413 F. Supp. 1274, 1280 (D.N.J. 1976) (suggesting wisdom of proceeding with state and federal employment discrimination claims in one court).

131. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 724-25 (1966) (federal court addressing federal claim under certain circumstances also may address state claim despite lack of diversity jurisdiction between parties to state claim). A federal court addressing a federal claim may address a state claim despite a lack of diversity jurisdiction between the parties to the state claim when the federal and state claims are so closely related as to arise from a common nucleus of operative fact ordinarily leading the plaintiff to expect to try both claims in one judicial proceeding. *Id.* at 725. The diversity jurisdiction doctrine, which derives from article III, section 2 of the United States Constitution, provides that federal courts possess the judicial power to adjudicate cases between citizens of different states based on state law. U.S. CONST. art. III, § 2. *See generally* C. WRIGHT, *supra* note 1, at §§ 23-37 (discussing merits and intricacies of diversity jurisdiction).

132. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

133. *See, e.g.,* Tower v. Moss, 625 F.2d 1161, 1163 (5th Cir. 1980) (suggesting that factual connection existing between state consumer claims and federal consumer claims would permit exercise of pendent jurisdiction); Frye v. Pioneer Logging Mach., Inc., 555 F. Supp. 730, 732 (D.S.C. 1983) (existence of loose factual connection between state claim and federal claim permits federal court to exercise pendent jurisdiction over state claim); Mid-State Food Dealers Ass'n v. City of Durand, 525 F. Supp. 387, 392 (E.D. Mich. 1981) (loose factual connection existing between state constitutional claims and claims arising under United States Constitution sufficient to allow federal court to exercise pendent jurisdiction over the state claims).

state and federal cause of action arise out of the same transaction or several of the same facts proffered in court would go toward the merits of both the state claim and the federal claim, then the common nucleus test is satisfied.[134] Even if a common nucleus of facts between the state claim and the federal claim exists, however, the federal courts, in the interest of justice, will not exercise jurisdiction over state law claims if the state court has not yet authoritatively resolved the status of the state law, if state issues or remedies substantially predominate, or if jury confusion would result.[135]

Federal courts adjudicating Title VII claims experience little trouble in finding the existence of a common nucleus of operative facts between the Title VII claim and state claims arising from the same alleged employment discrimination conduct.[136] Several federal courts finding an existence of a common nucleus of operative facts between the state claim and the Title VII claim, however, refuse to grant pendent jurisdiction over state antidiscrimination employment claims because of the unresolved status of state law or the substantial predominance of state issues or state remedies over Title VII issues or remedies.[137] For example, in *Wilkins v. Baldwin Piano & Organ*

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134. *See, e.g.*, Klaus v. Hi-Shear Corp., 528 F.2d 225, 231 (9th Cir. 1975) (state corporate fiduciary duty claim and federal claim based on fiduciary duty standards imposed under Securities Exchange Act arise from same action of alleged management misconduct and therefore permits federal court to exercise pendent jurisdiction over state claim); Vanderboom v. Sexton, 422 F.2d 1233, 1242-43 (8th Cir. 1970) (state common law fraud claim and claims for violations of federal securities laws arise from same series of transactions and therefore federal court may exercise pendent jurisdiction over state claim); Marceno v. Northwestern Chrysler-Plymouth Sales, Inc., 550 F. Supp. 595, 601 (N.D. Ill. 1982) (since state common law fraud, false imprisonment and conversion claims and federal claims under Truth in Lending Act all arose from same attempt to buy and finance car, federal court could exercise pendent jurisdiction over state claims).

135. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 726-27 (1966) (federal courts determining whether to exercise pendent jurisdiction should avoid needless decisions of state law and should not exercise pendent jurisdiction over state claim either if state issues substantially predominate action or if jury confusion would justify separating claims for federal and state trials); Merritt v. Colonial Foods, Inc., 499 F. Supp. 910, 915 (D. Del 1980) (pendent jurisdiction denied because state issues predominated substantially over federal issues); Mazzare v. Burroughs Corp., 473 F. Supp. 234, 241 (E.D. Pa. 1979) (refused to exercise pendent jurisdiction over state claim because of unsettled state law and probability of jury confusion); Fowler v. Department of Educ., 472 F. Supp. 121, 123 (E.D. Va. 1978) (pendent jurisdiction over state claim denied because state supreme court had not yet interpreted applicable state statute).

136. *See* Jong-Yul Lim v. International Inst. of Metropolitan Detroit, Inc., 510 F. Supp. 722, 724-25 (E.D. Mich. 1981) (existence of common nucleus of operative facts between Title VII claim and state employment discrimination law claim satisfied common nucleus portion of pendent jurisdiction test); Palazon v. KFC Nat'l Management Co., 28 Fair Empl. Prac. Cas. (BNA) 458, 459 (N.D. Ill. 1981) (Title VII claim and state discrimination claim arose out of common nucleus of operative fact and therefore permitted federal court to adjudicate state claim); *cf.* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 473-74 (1982) (Title VII claim and state discriminatory employment claim constituted a single claim).

137. *See, e.g.*, Jong-Yul Lim v. International Inst. of Metropolitan Detroit, Inc., 510 F. Supp. 722, 724-25 (E.D. Mich. 1981) (denying pendent jurisdiction over state discriminatory employment law claim because state claim permitted compensatory and punitive damages

Co.,[138] the United States District Court for the District of Kansas refused to grant pendent jurisdiction over a state employment discrimination law claim because the Kansas state courts had not yet resolved the scope of remedies available under the Kansas Civil Rights' Act for discriminatory employment conduct.[139] Additionally, in *Van Hoomissen v. Xerox Corp.*,[140] the United States District Court for the Northern District of California refused to exercise pendent jurisdiction over a state claim for intentional infliction of emotional distress applied in state courts to prevent intentional employment discrimination because the state claim permitted the remedy of punitive damages not available under Title VII.[141] The *Van Hoomissen* court reasoned that the punitive damage issue would predominate over the Title VII claim and that the state claim, therefore, should be relegated to the state courts for adjudication.[142] Similarly, in *Kiss v. Tamarac Utilities, Inc.*,[143] the United States District Court for the Southern District of Florida, while adjudicating a Title VII claim, refused to exercise pendent jurisdiction over a state employment discrimination law claim because the state claim allowed for compensatory damages not recoverable under Title VII.[144]

One effect of the federal court's refusal to exercise pendent jurisdiction over state antidiscrimination employment laws when adjudicating Title VII actions is that the plaintiff then might have to litigate either simultaneously or successively in both federal and state courts to redress the same essential wrong of employment discrimination.[145] If the plaintiff first brings his Title VII action in federal court, the pendent jurisdiction doctrine may require him either to bring a separate action in state court to resolve his state

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unavailable under Title VII); Kiss v. Tamarac Utilities, Inc., 463 F. Supp. 951, 954 (S.D. Fla. 1978) (pendent jurisdiction in Title VII action denied as to state discriminatory employment claim because state claim provided for compensatory damages unavailable under Title VII); Van Hoomissen v. Xerox Corp., 368 F. Supp. 829, 840 (N.D. Cal. 1973) (pendent jurisdiction denied over state claim for intentional infliction of emotional distress applied in state courts in employment discrimination cases because punitive damages recoverable under state claim not recoverable under Title VII); Wilkins v. Baldwin Piano & Organ Co., 28 Fair Empl. Prac. Cas. (BNA) 154, 154-55 (D. Kan. 1980) (pendent jurisdiction over state employment discrimination claim denied because state supreme court had yet to resolve scope of remedies available under state claim); Holden v. H.J. Heinz Co., 21 Fair Empl. Prac. Cas. (BNA) 175, 178 (W.D. Pa. 1977) (pendent jurisdiction denied over state discriminatory employment law claim in part because of lack of state supreme court guidance with which to adjudicate state claim).

138. 28 Fair Empl. Prac. Cas. (BNA) 154 (D. Kan. 1980).

139. *Id.* at 154-55.

140. 368 F. Supp. 829 (N.D. Cal. 1973).

141. *Id.* at 840.

142. *Id.*

143. 463 F. Supp. 951 (S.D. Fla. 1978).

144. *Id.* at 954.

145. *See* Cantania, *State Employment Discrimination Remedies And Pendent Jurisdiction Under Title VII: Access To Federal Courts*, 32 AM. U. L. REV. 777, 801-02 & n.119 (1983) (denying pendent jurisdiction forces plaintiff to institute two proceedings, one in federal court and one in state court, and thereby creates undesired occurrence of piecemeal litigation).

antidiscrimination claim, or to discard pursuit of the state claim.[146] The plaintiff who first brings his Title VII action in federal court might then absorb the cost of the two simultaneous suits in state and federal court.[147] Moreover, if the plaintiff, to avoid simultaneous suits, waits until the federal court adjudicates the Title VII claim before the plaintiff files his state claim in state court, the plaintiff runs the risk that the state statute of limitations on the state claim will expire before the federal court resolves the Title VII claim or that the federal court judgment by res judicata might preclude the state court from adjudicating the state claim.[148] Alternatively, a plaintiff having a state antidiscrimination employment law claim and a Title VII claim arising from the same alleged discriminatory conduct could first pursue his state claim in state court, but the *Kremer* decision would bar him from bringing a subsequent Title VII action in federal court.[149]

Title VII pendent jurisdiction case law and the *Kremer* decision pose a major problem to the plaintiff of a Title VII claim if federal courts alone have exclusive jurisdiction of Title VII actions because the plaintiff might then have to abandon either the Title VII claim or the state claim to avoid either the cost of litigating in two forums, to discard the Title VII claim or the state claim, to lose the cause of action on the state claim due to the running of the statute of limitations, or to suffer preclusion of state court adjudication of the state claim.[150] Permitting the exercise of concurrent state court jurisdiction over Title VII claims, however, would help the plaintiff to avoid such problems.[151] Under a concurrent jurisdiction approach, the plaintiff could bring both his state employment discrimination claim and his Title VII claim in state court in one action.[152] In so doing, the plaintiff does not

146. *Id.*

147. *See id.* (denial of pendent jurisdiction over state discriminatory employment claim in Title VII action would require party seeking recovery under both state claim and Title VII claims to initiate proceedings in state court and in federal court).

148. See 18 WRIGHT & MILLER, § 4468, at 648-54 (discussing numerous cases holding that Constitution requires state courts to give full faith and credit to federal court judgments); Cantania, *supra* note 145, at 785 n.32 (noting that statute of limitation period for bringing state employment discrimination claims generally is only one year or less from time of alleged discriminatory practice).

149. *See* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466-67, 483-85 (1982) (holding that state court judgment on state discriminatory employment claim barred plaintiff from bringing subsequent federal court Title VII action based on same alleged discriminatory conduct).

150. *See* Cantania, *supra* note 145, at 785, 801-02 & n.119 (urging grant of pendent jurisdiction over state discriminatory employment claims in Title VII actions brought in federal court).

151. *See infra* notes 153-57 and accompanying text (suggesting that granting state courts concurrent jurisdiction over Title VII actions helps to relieve plaintiff of problems of costly multiple suits, state statutes of limitations, choosing between discarding the Title VII claim and the state claim, and concern over possible preclusion of state court jurisdiction of the state claim).

152. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78 (1981) (concurrent jurisdiction doctrine provides that a plaintiff may seek state court adjudication of a claim arising under a federal statute).

have to make the unsatisfactory choice between initiating two court actions or discarding either his state claim or his Title VII claim. Without concurrent jurisdiction, however, the plaintiff might reject his Title VII claim and pursue his state claim because state remedies generally are broader than Title VII relief.[153] Congress, moreover, surely did not intend plaintiffs to undermine the federal interest of having federal statutes used actively and enforced effectively, but such a result occurs when plaintiffs discard Title VII claims in favor of pursuing broader state relief. Such vitiation of the effectiveness of Title VII is especially unfair to the potential Title VII plaintiff because state employment discrimination laws do not necessarily further federal policy. Some states have either no employment discrimination statutes or limited employment discrimination statutes, and common law remedies often are more difficult to prove than Title VII remedies.[154] Consequently, dependence on state law alone might result in the failure to remedy the wrong of employment discrimination inflicted on the victim.

In determining whether the exercise of concurrent jurisdiction over Title VII actions is incompatible with the furtherance of federal interests, and thus prohibited under the *Gulf* test, the federal interest in uniformity of interpretation and application of Title VII, and the need for federal judicial expertise, requires consideration. The concern for uniformity of judgments on actions arising under federal statutory law underlines the quest for consistent precedent and public respect for the reliability and fairness of American courts.[155] Inconsistent judgments make legal planning difficult.[156] Furthermore, inconsistency in judgments encourages a lack of public respect in courts as dispute resolution forums because persons facing substantially identical factual situations and seeking redress of wrongs under the same law would for no apparent reason obtain redress of the wrongs in one court and not in another court.[157] The concern for federal judicial expertise in interpreting and applying any particular federal statutory law demonstrates the assumption that federal judges generally have had numerous occasions to hear actions arising under the federal statutory law and therefore understand the intricacies of that federal statutory law better than state judges would

153. *See* Cantania, *supra* note 145, at 784 (state employment discrimination remedies are broader than Title VII remedies); *see also supra* notes 137-44 and accompanying text (discussing cases in which federal courts denied pendent jurisdiction because state discriminatory employment claims provided broader relief than Title VII claims).

154. *See* Cantania, *supra* note 145, at 782-88 (suggesting that many state laws require proof of discriminatory intent, whereas Title VII does not require a showing of discriminatory intent to make out a Title VII violation); *id.* at 783 n.24 (noting that Alabama does not have any employment discrimination statute); TEX. REV. CIV. STAT. ANN. art. 6252-1612) (Vernon 1970) (limited to injunctive relief generally available only upon a showing of irreparable injury).

155. *See* Allen v. McCurry, 449 U.S. 90, 94 (1980) (applying doctrine of res judicata to obtain consistency of federal court decisions).

156. *See* Montana v. United States, 440 U.S. 147, 154 (1979) (increasing consistency in judgments helps citizens to conform personal actions to mandates of legal precedent).

157. *Id.*

understand the federal statutory law.[158] The uniformity argument used against allowing concurrent state court jurisdiction of Title VII is that permitting fifty different states and the twelve federal judicial circuits to render judgments on Title VII instead of confining Title VII judgments to the twelve federal circuits would result in less uniformity in the interpretation and application of Title VII law.[159] Similarly, the federal judicial expertise argument cautioning against the grant of concurrent state court jurisdiction over Title VII actions would be that state judges possess either local prejudice or inexperience that would affect the state judge's ability to interpret and apply Title VII law properly.[160] In *Gulf,* however, the Supreme Court upheld the traditional presumptive right of state courts to adjudicate federal causes of action, that state courts were effective forums for the vindication of federal rights arising under federal laws, and that the Supreme Court was always ready to review questionable state court judgments of federal claims.[161] Moreover, the Title VII action has existed for more than twenty years, and state court judges adjudicating Title VII actions would have more than twenty years of federal Title VII case law from which to draw Title VII precedent.[162] Additionally, state court judges generally possess the equivalent intellectual abilities of federal judges, and therefore state court judges should not have any significant trouble in understanding and further developing Title VII case law.[163]

The preceding review of Title VII pendent jurisdiction case law, the *Kremer* decision, and the need for uniformity and the use of judicial expertise in the interpretation and application of federal statutory law demonstrates that the furtherance of federal interests associated with Title VII is not clearly incompatible with the existence of concurrent state court jurisdiction over Title VII actions.[164] Under the third prong of the Supreme Court *Gulf* concurrent jurisdiction test, the need for furtherance of federal interests associated with a particular federal statute can bar state court adjudication

158. *See* Redish & Muench, *supra* note 1, at 312-13 (federal judges possess broad expertise in dealing with intricacies of federal laws).

159. *See id.* at 331-34 & n.83 (suggesting that likelihood of uniformity in interpretation and application of federal statutory law is greater if federal judges adjudicate such law rather than state courts).

160. *Id.* at 312-13, 330.

161. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 n.4 (1981) (state courts are capable of vindicating federal rights under federal statutory law and Supreme Court has power to review state court determinations of federal statutory claims).

162. *Cf.* 42 U.S.C. § 2000e to 2000e-17 (1982) (originally enacted in 1964 as 42 U.S.C. § 2000e to 2000e-15 (1964)).

163. *See* Wright, *In Praise of State Courts: Confessions of a Federal Judge,* 11 HASTINGS CONST. L.Q. 165, 166, 185 (1984) (state judges deserve praise for their high competence in safeguarding federal rights).

164. *See supra* notes 115-63 and accompanying text (discussing various federal policy interests associated with Title VII and suggesting that granting state court jurisdiction over Title VII actions is not clearly incompatible with maintenance of federal interests embodied in Title VII).

of actions arising under the statute only if a clear incompatibility exists between the maintenance of the federal interests and the exercise of state court jurisdiction over the statute.[165] Since furtherance of the federal interests associated with Title VII is not clearly incompatible with the exercise of concurrent state court jurisdiction over Title VII actions, application of the federal interest prong of the *Gulf* test to the Title VII concurrent jurisdiction issue does not preclude concurrent jurisdiction over Title VII actions.[166]

Permitting state courts concurrent jurisdiction over Title VII claims satisfies not only the third prong of the Supreme Court's *Gulf* concurrent jurisdiction test concerning furtherance of federal interests,[167] but, as noted, also satisfies the statutory language and legislative history portions of the three part *Gulf* concurrent jurisdiction test.[168] The *Gulf* concurrent jurisdiction test provides that only explicit statutory language, unmistakable implication from legislative history, or clear incompatibility between state court jurisdiction and federal policy interests associated with a federal statute will bar a state court from adjudicating an action arising under that statute.[169] As demonstrated, the statutory language of Title VII carries no explicit mandate of exclusive federal court jurisdiction of Title VII actions.[170] Moreover, the sparse legislative history of Title VII conveys only uncertainty concerning whether Congress intended to limit adjudication of Title VII

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165. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981).

166. *See id.* (federal interests associated with federal statute do not preclude state court jurisdiction of claims arising under that statute unless clear incompatibility exists between granting of such jurisdiction and furtherance of federal interests); *supra* notes 115-63 and accompanying text (discussing various federal policy interests associated with Title VII and suggesting that granting state court jurisdiction over Title VII actions is not clearly incompatible with furtherance of federal interests embodied in Title VII).

167. *See supra* notes 115-63 and accompanying text (discussing various federal policy interests associated with Title VII and suggesting that, under *Gulf* concurrent jurisdiction test, granting concurrent state court jurisdiction over Title VII actions is not clearly incompatible with furtherance of federal interests embodied in Title VII).

168. *See Gulf,* 453 U.S. at 478 (only explicit statutory language, unmistakable implication from legislative history, or clear incompatibility between granting state courts concurrent jurisdiction over federal statute and maintenance of federal interests associated with federal statute precludes state court from adjudicating claims arising under the statute); *supra* notes 12-89 and accompanying text (applying *Gulf* concurrent jurisdiction test to analysis of Title VII statutory language and concluding that no explicit statutory language in Title VII exists to preclude concurrent state court jurisdiction over Title VII actions); *supra* notes 92-113 and accompanying text (applying *Gulf* concurrent jurisdiction test to analysis of legislative history of Title VII and concluding that nothing in Title VII's legislative history conveys an unmistakable implication to deny concurrent state court jurisdiction over Title VII actions).

169. *See Gulf,* 453 U.S. at 478 (only explicit statutory language, ummistakable implication from legislative history, or clear incompatibility between exercise of concurrent state court jurisdiction and furtherance of federal interests associated with federal cause of action rebuts presumption of concurrent state court jurisdiction over the federal cause of action).

170. *See supra* notes 11-88 and accompanying text (suggesting that statutory language of Title VII carries no explicit mandate of exclusive federal court jurisdiction of Title VII actions).

actions exclusively to federal courts.[171] Finally, granting state courts concurrent jurisdiction over Title VII not only results in clear compatibility with federal interests associated with Title VII, but in some circumstances actually furthers federal interests.[172] Since application of the *Gulf* concurrent jurisdiction test to Title VII demonstrates that state courts should have concurrent jurisdiction over Title VII actions, the Title VII plaintiff therefore should have the option of bringing his Title VII action either in state or federal court.

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171. *See supra* notes 92-113 and accompanying text (suggesting that legislative history of Title VII does not convey unmistakable implication of congressional intent to preclude concurrent state court jurisdiction of Title VII actions).

172. *See supra* notes 118-71 and accompanying text (suggesting that exercise of concurrent state court jurisdiction over Title VII actions is not clearly incompatible with furtherance of federal interests associated with Title VII).