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Thomas D. Brierton
University of the Pacific, tbrierton@pacific.edu

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Statutory Construction of Title VII and 42 USC 1983 in Employment Discrimination Actions

By Thomas D. Brieron

Professor Brieron is with the Northern Illinois University College of Business in DeKalb.

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Title VII of the Civil Rights Act of 1964 allows an employee a private cause of action for discrimination on the basis of race, color, religion, sex, or national origin against private and governmental employers. A governmental employer may also be sued for employment discrimination under 42 USC 1983 for depriving an individual of a constitutional or statutory right.¹ Employees, in some cases, have attempted to bring a Section 1983 cause of action concurrently with a Title VII claim or entirely side-step Title VII's administrative scheme by proceeding directly to the federal court under Section 1983.

The United States Supreme Court has failed to provide the lower courts with direction on whether Title VII should be considered the exclusive remedy in employment discrimination cases.² Currently, the federal courts are clearly split on the question. The exclusivity issue is an important one in light of the thousands of employment discrimination litigants who bring cases each year. Under Section 1983, the plaintiff is afforded various procedural and remedial advantages not available under Title VII.

Although the Supreme Court has not directly resolved the issue, the Court has set the parameters for its resolution. The Court has stated that the maxims of statutory construction are essential to resolving the problem. Congressional intent of Title VII clearly allows for alternative remedies under Section 1983, except when federal employees are involved.

The second issue for resolution is one of procedure. Should litigants be allowed to proceed directly to a federal court under Section 1983 in employment cases? The resolution of this issue depends on the amount of deference the court affords to the administrative process. Although a much more difficult issue, the court should allow litigants to choose their forum in light of the pernicious effect discrimination has had on the nation and Congress' intent to make the abrogation of discrimination one of the highest priorities.

This article first will examine 42 USC 1983 and Title VII and explain the overlap between the two statutes. The article then will provide an analysis of the Supreme Court cases involving the statutory construction of Title VII and Section

¹ See *infra* notes 8 and 11.

² In *Tafoya v. Adams*, 43 EPD ¶ 37,038, 816 F2d 555 (10th Cir., 1987), cert. denied S.Ct., 44 EPD ¶ 37,425 (1988), the appellate court relied on *Great American Fed-*

eral Savings & Loan Association v. Novotny, 20 EPD ¶ 30,004, 442 U.S. 366, 99 S.Ct. 2345, 60, (1979), as mandating dismissal of *Tafoya's* claim.

1983 on the exclusivity issue, demonstrating the Court's present approach as one of restraint on civil rights relief. Next, this article will examine the procedural aspects of allowing alternative remedies under both Title VII and Section 1983. The article then will demonstrate that the interest a discrimination victim has in litigating his claim in federal court under Section 1983 outweighs the EEOC's interest in attempting a conciliation under Title VII. This leads to the conclusion that state and local government employees may directly proceed to the federal court under Section 1983 in employment discrimination cases.

The Civil Rights Act of 1871

By 1865, the North won the Civil War, President Abraham Lincoln had issued the Emancipation Proclamation, and the Thirteenth Amendment became part of the Constitution. Even though the Union was preserved and slaves were now free men and women, the war was not over, and for the next one-hundred years Congress and the courts continued to battle over civil rights. The Thirteenth Amendment officially brought an end to slavery but fell far short of providing blacks with the rights guaranteed by the Fourteenth Amendment. Once the troops were removed from the South, blacks once again were dominated by whites and unprotected by the courts.

In 1883, the United States Supreme Court declared the Civil Rights Act of 1875 unconstitutional. Sections 1 and 2 of the Civil Rights Act of 1875 prohibited racial discrimination in private-sector facilities such as restaurants, business establishments, and railroads. The Court ruled that private individuals were free to

discriminate on the basis of race because the Fourteenth Amendment only constrained congressional regulation as to incidents of state deprivations.³

In 1896, the U.S. Supreme Court endorsed Louisiana's separate but equal facilities in public transportation. The separate but equal concept became the springboard for segregated public schools, transportation, and almost all other areas of social life. The courts endorsed disenfranchising and segregating blacks through various measures, thus denying blacks fundamental rights.

The Forty-Second Congress passed the Ku Klux Klan Act of 1871 after holding extensive committee hearings and publishing a six-hundred page report exposing the Ku Klux Klan as responsible for murdering and brutally beating blacks.⁴ During the congressional debates over the Act, one Congressman from the North condemned the activities of the Klan, stating: "The whole South, Mr. Speaker, is rapidly drifting into a state of anarchy and bloodshed, which renders the worst Government on the face of the earth respectable by way of comparison."⁵

The Act was modeled after the second section of the Civil Rights Act of 1866 for the purpose of enforcing the Fourteenth Amendment.⁶ The Ku Klux Klan Act evolved into civil rights law under 42 USC Section 1983. Section 1983 was wrought in the Reconstruction Era through federal legislation and constitutional amendment primarily to establish the federal government as a guarantor of basic federal rights.⁷

State courts were being utilized to cause injury to minorities either because the courts were powerless to eradicate

³ 109 U.S. 3 (1883).

⁴ S. Rep. No. 1, 42nd Cong., 1st Sess. (1871). This report was the main impetus for passage of the Act.

⁵ Congressman Stoughton of Michigan, *id.*, at 320.

⁶ See remarks of Representative Shellabarger, Chairman of the House Select Committee that drafted the Civil Rights Act of 1871, Cong. Globe, 42nd Congress, 1st Session, App. 68 (1871).

⁷ Section 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress. 42 USC 1983 (1976).

deprivations or in conspiracy with the abrogation of federally protected rights. Section 1983 made the way for private citizens to seek a unique federal remedy against incursions under the authority of state law upon the rights secured in the Constitution and the laws of the United States in federal court.⁸

The United States Supreme Court in the 1972 case of *Mitchum v. Foster* said: "The very purpose of Section 1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' *Ex parte Virginia*, 100 U.S., at 346."⁹

A private individual may commence a civil action under Section 1983 by pleading two essential elements. By Section 1983's terms, the plaintiff must allege (1) that some person deprived him of a federal right, and (2) that such person acted under color of state or territorial law.¹⁰ In order to obtain relief, a plaintiff must also prove causation and damages or that they are entitled to an equitable remedy.

Title VII

Just seventy-four years after the founding fathers refused to settle the issue of slavery at the Constitutional Convention, Confederate troops attacked Fort Sumter, commencing a war that would spur a constitutional amendment and a multitude of federal civil rights laws, including 42 USC

1983. Despite the surrender of the Confederacy, the shackles of slavery continued to plague blacks through humiliation and the lack of opportunity in employment. One-hundred years of racial discrimination culminated in the enactment of the Civil Rights Act of 1964.

The Civil Rights Act of 1964 prohibits discrimination in housing, public accommodations, education, and employment. The proponents of the Act sought to abrogate incidents of discrimination based upon race, color, religion, sex, and national origin. The Civil Rights Act of 1964 was passed primarily to abolish racial discrimination.

Title VII of the Act is devoted to the problems of discrimination in employment. Title VII covers employers, employment agencies, and labor organizations and prohibits unlawful employment practices.¹¹ The Act established the Equal Employment Opportunity Commission as an independent regulatory agency to administer the Act. In 1972, the Act was amended to include federal, state, and local government employers.¹² Title VII specifically regulates covered employers in activities that affect commerce. Commerce has been broadly construed by the U.S. Supreme Court.¹³

Title VII does not define the term discrimination. The U.S. Supreme Court has ruled that both disparate treatment (intentional discrimination) and disparate

⁸ *Mitchum*, 407 U.S. 225, at 239.

⁹ *Mitchum*, 407 U.S. 225, at 242. In this case, a Florida prosecutor brought proceedings to close down the appellant's bookstore as a nuisance. The appellant filed an action under 42 USC 1983 asking for injunctive and declaratory relief for violations of his First and Fourteenth Amendment rights.

¹⁰ *Gomez v. Toledo*, 446 U.S. 635, 640. In this case, Carlos Rivera Gomez brought an action based on 42 USC 1983 for being terminated from his position as an agent for a police department in violation of his procedural due process rights.

¹¹ Title VII of the Civil Rights Act of 1964, 42 USC, 2000e (1982) provides: It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate

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

¹² Equal Employment Opportunity Act of 1972; Pub. L. No. 92-261, 2, 86 Stat. 103 L1972 (amending Title VII).

¹³ *Heart of Atlanta Motel v. United States*, 379 U.S. 241, (1964). In this case, the appellant, motel owner, was found in violation of Title VII. The Court said the reach of the Commerce Clause extends to local activities if they might have a substantial or harmful effect upon commerce.

impact are unlawful employment practices under Title VII.¹⁴

A private civil action under Title VII in a disparate treatment case requires proof of four elements: (1) the plaintiff is a member of the protected class; (2) the plaintiff was qualified for the job; and (3) the plaintiff was discharged, not promoted, or not offered the job; (4) the plaintiff suffered damages.¹⁵ In a disparate impact case, the plaintiff must prove that the employment practice has an adverse impact on the protected group of which the plaintiff is a member.¹⁶ In disparate treatment cases, the employer may raise the defense that the rejection was due to a legitimate, nondiscriminatory reason. The employer in a disparate impact case must prove a business necessity to be exonerated of liability.

Section 1983 and Title VII

Section 1983 and Title VII provide remedies against state and local government employers who have discriminated against government employees on the basis of race, color, religion, sex, and national origin. Both statutes may be utilized unless the defendant makes a case to have Title VII declared the exclusive remedy by the court. Some federal district courts have held that Title VII preempts actions against state employers under 42 USC 1983.¹⁷

Under Title VII, the claimant is required to file with the EEOC; however, in most states, local agencies require a claim to be filed with them before filing with the EEOC. In any case, the claimant may not bring the case to the federal district court unless the EEOC issues a right to sue letter.¹⁸ The plaintiff must

file the complaint with the EEOC within 180 days after the alleged unlawful employment practice has occurred. The EEOC will attempt to investigate the allegations brought by the complainant and conciliate the matter.¹⁹

Section 1983 allows the plaintiff to directly file a discrimination case with a federal district court. The plaintiff need not exhaust state administrative process before bringing a lawsuit in federal court.²⁰ For statute of limitations purposes, a Section 1983 action is considered a tort action for recovery of personal injury damages and usually carries a several year statute of limitations.²¹

Title VII allows an injured party equitable relief including reinstatement, back pay, or what may be appropriate.²² Section 1983 allows equitable and legal relief including compensatory and punitive damages.²³ Attorney's fees may be obtained by the plaintiff under either statute.

Title VII does not give the plaintiff a right to a jury trial since equitable relief is the sole remedy. However, a jury trial is available in most Section 1983 cases.

A litigant pleading a Section 1983 cause of action obtains various procedural and remedial advantages over Title VII. Litigants failing to file under Title VII due to the relatively short statute of limitations alternatively may attempt to utilize Section 1983.

A litigant may file a Title VII action and Section 1983 claim in the same lawsuit, alleging a Section 1983 claim based upon an unlawful employment practice as defined under Title VII. Or the plaintiff may allege a Title VII violation and a

¹⁴ *Griggs v. Duke Power Co.*, 3 EPD ¶ 8137, 401 U.S. 424 (1971).

¹⁵ *McDonnell Douglas v. Green*, 5 EPD ¶ 8607, 411 U.S. 792 (1973).

¹⁶ *Griggs*, 401 U.S. 424 (1971).

¹⁷ *Torres v. Wisconsin Department of Health & Social Services*, 35 EPD ¶ 34,610, 592 F.Supp. 922 (E. D. Wis. 1984); *Keller v. Prince George's County Department of Social Services*, 616 F. Supp. 540 (D. Md. 1985).

¹⁸ 42 USC 2000e-5(e) (1982); 42 USC 2000e-5(f)(1).

¹⁹ 42 USC Sections 20003-20005(b) (1982).

²⁰ *Patsy v. Board of Regents*, 29 EPD ¶ 32,821, 457 U.S. 496, 516 (1982).

²¹ *Wilson v. Garcia*, 105 S. Ct. 1938, 1947 (1985).

²² 42 USC 2000e-5(g) (1982). Back pay is restricted to a two-year period preceding the claim.

²³ *Smith v. Wade*, 461 U.S. 30, 37 (1983).

Section 1983 action based upon constitutional grounds. Such a cause of action must be against a state employer due to the state action requirement.

Supreme Court Consideration of Title VII Exclusivity

In the first fifty years after Section 1983's enactment, only twenty-one cases had been litigated. In more recent times, civil rights litigation has expanded under Section 1983 and Title VII. In 1984, 37,333 civil rights cases were brought in federal court, most of which were Section 1983 suits. Between 1976 and 1984, the number of civil rights lawsuits increased 113 percent.

The explosion in civil rights litigation can be attributed to the antiquated and open-ended language of Section 1983. In 1980, the Supreme Court in *Maine v. Thiboutot* interpreted the "and laws" portion of Section 1983 according to its plain meaning.²⁴ The Court not only allowed the respondents relief under Section 1983 for a violation of the Social Security Act but dramatically expanded the coverage of Section 1983. Broadly interpreting *Thiboutot* allowed any federal law to be the basis for federal court jurisdiction. Justice Brennan, writing for the majority, held: "Even were the language ambiguous, however, any doubt as to its meaning has been resolved by our several cases suggesting explicitly or implicitly, that the Section 1983 remedy broadly encompasses violators of federal statutory as well as constitutional law."²⁵

The dissenting opinion, written by Justice Powell joined by Justice Rehnquist and Chief Justice Burger, criticized the majority for simplistically interpreting Section 1983. The *Thiboutot* decision interrupted the Court's previous course of

cases, which restricted the coverage of Section 1983 to claims providing for equal rights.

Justice Stewart in three cases before the High Court, each three years apart, has narrowed potential claims under Section 1983. The first case was decided in 1973 involving a Section 1983 claim and the federal habeas corpus statute, 28 USC Section 2254. Justice Stewart writes for the majority in *Preiser v. Rodriguez*:

"The broad language of Section 1983, however, is not conclusive of the issue before us. The statute is a general one, and, despite the literal applicability of its terms, the question remains whether the specific federal habeas corpus statute, explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement, must be understood to be the exclusive remedy available in a situation like this where it so clearly applies."²⁶

The Court held that the federal habeas corpus statute was the exclusive remedy when a state prisoner was challenging the duration of his physical imprisonment.²⁷ The second case, *Brown v. General Services Administration*, was decided in 1976 and involved Section 717 of Title VII and 42 USC 1981.²⁸ The principal question of the case was whether Section 717 of Title VII was the exclusive judicial remedy for claims of discrimination in federal employment. Justice Stewart delivering the opinion of the Court set out the legislative history of Title VII and Section 717. Section 717 was an amendment to Title VII in 1972 to allow federal employees a remedy when discriminated against. Justice Stewart, after analyzing the congressional record, states: "This unambiguous congressional perception seems to indicate that the congressional intent in 1972 was to create an exclusive, preemp-

²⁴ 448 U.S. 1 (1980), at page 6.

²⁵ *Id.*, at page 3.

²⁶ 411 U.S. 475, 491 (1973).

²⁷ In this consolidated case, the respondents were state prisoners who challenged the cancelling of good-time credits

by prison officials as a violation of due process. The court explained that the respondents were seeking the same remedy under both statutes, release from prison. As such, the court considered federal-state comity.

²⁸ 425 U.S. 820 (1976).

tive administrative and judicial scheme for the redress of federal employment discrimination."²⁹

The Court relying on its decision in *Preiser v. Rodriguez*, supra, explained its holding: "In a variety of contexts, the Court has held that a precisely drawn detailed statute preempts more general remedies."³⁰

The final case in the trilogy is *Great American Federal Savings & Loan Association v. Novotny*.³¹ In *Novotny*, the respondent filed a claim with the EEOC and subsequently a lawsuit in federal district court alleging a conspiracy to deprive him of equal protection and equal privileges and immunities under the law according to 42 USC 1985(c).

The issue presented was whether the rights created by Title VII may be asserted within the remedial framework of Section 1985(c). Justice Stewart, writing for the majority, provided an analysis of Title VII's comprehensive plan for dealing with discrimination cases. As the Court noted, the plan encourages conciliation and an opportunity to settle disputes before the aggrieved party is permitted to file a lawsuit.

The Court concluded the differences between Title VII and Section 1985(c) are material in most aspects, stating: "Perhaps most importantly, the complainant could completely bypass the administrative process, which plays a crucial role in the scheme established by Congress in Title VII."³² The Court held that Section 1985(c) may not be invoked to redress violations of Title VII.

Middlesex County

Coming full circle, in consideration of Title VII as the exclusive remedy over Section 1983, *Middlesex County Sewerage*

Authority v. National Sea Clammers Association serves as an important decision written by Justice Powell.³³ *Middlesex* is the most damaging to potential Section 1983 litigation. *Middlesex* involved claims under the Federal Water Pollution Control Act (FWPCA), the Maine Production, Research and Sanctuaries Act (MPRSA), and Section 1983. Respondents were an organization whose members harvest fish and shellfish off the coast of New York and New Jersey. In 1977, they brought suit against the federal government and various New York and New Jersey governmental entities for dumping sewage, sludge, and other materials in the New York Harbor and the Hudson River.

Justice Powell, writing to restrict the reach of *Maine v. Thiboutot*, states: "[when] a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under Section 1983."³⁴ The Court concluded that the FWPCA and MPRSA provided express remedies which foreclosed implied private actions and supplanted any remedy available under Section 1983.

The latest pronouncement by the Supreme Court concerning Section 1983 came in 1984 in the case of *Smith v. Robinson*.³⁵ *Smith* involved a plaintiff who sued the State of Rhode Island for failing to provide his child with a special education program under the federal Education of the Handicapped Act (EHA), Section 504 of the Rehabilitation Act of 1973, and Section 1983. The Section 1983 claim was based on constitutional grounds. Justice Blackmun, for the majority, writes: "In this case, we think Congress' intent is clear. Allowing a plaintiff

²⁹ *Id.*, at 828, 829.

³⁰ 425 U.S. 820, at 834. In *Brown*, the petitioner filed a complaint under Title VII and 42 USC 1981 because he was not promoted to GS-9 even though qualified. The petitioner alleged the failure to be promoted was due to racial discrimination.

³¹ 442 U.S. 366 (1979).

³² *Id.*, at 376.

³³ 453 U.S. 1 (1981).

³⁴ *Id.*, at 20.

³⁵ 468 U.S. 992 (1984).

to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored scheme."³⁶

The *Smith* decision has given appellate courts a justification for preempting Section 1983 in Title VII cases. The Court held that EHA could not be the basis for a Section 1983 claim and that the EHA was a comprehensive scheme set up by Congress to aid the states in compliance with their constitutional obligations to provide public education to the handicapped and as such was the exclusive remedy. Nonetheless, *Smith* left open the door for Section 1983 claims based upon constitutional grounds.

Despite an array of Supreme Court cases that limit Section 1983 claims in employment discrimination actions, congressional intent clearly fails to declare Title VII the exclusive remedy. In 1973, Justice Powell wrote the opinion for a unanimous court in *Alexander v. Gardner-Denver Co.*³⁷ In *Alexander*, the petitioner, a black, filed a grievance under a collective-bargaining agreement which contained a broad arbitration clause. The petitioner's claim based upon racial discrimination was dismissed by both the EEOC and the district court, holding the petitioner was bound by the prior arbitral decision and had no right to sue under Title VII. The Court reversed the district court providing an extensive legislative history of Title VII.

The Court stated: "Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant existing laws

and institutions relating to employment discrimination."³⁸

The Court further asserted: "In the Civil Rights Act of 1964, 42 USC Section 2000a et seq., Congress indicated that it considered the policy against discrimination to be of the "highest priority."

In *Johnson v. Railway Express Agency*, Justice Blackmun, writing for the majority, provided a detailed analysis of the purpose and intent of Congress in enacting Title VII.³⁹ In particular, Blackmun noted "that the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 USC Section 1981, and that the two procedures augment each other and are not mutually exclusive."⁴⁰ The legislative history of Title VII contains a clear expression of congressional intent. The congressional intent preserves preexisting remedies under Section 1983.

In 1972, the Senate further strengthened the coexistence of a Section 1983 and Title VII action by rejecting an amendment which would have expressly made Title VII the exclusive remedy for employment discrimination.⁴¹ Despite what seems to be a clear congressional directive, some federal district courts have dismissed Section 1983 claims when Title VII claims were present.⁴²

Analysis of Cases

Despite the extensive case history narrowing the application of Section 1983 in Title VII cases, the Court has failed to decisively preclude Section 1983 from employment discrimination cases. Several arguments provide a synergism which mandates Section 1983 as supplementary relief in Title VII cases.

³⁶ *Id.* at 1012.

³⁷ 415 U.S. 36 (1973).

³⁸ *Id.*, at page 48.

³⁹ 421 U.S. 454 (1975).

⁴⁰ *Id.*, at 459. This case presented the issue of timely filing of a charge of employment discrimination with the EEOC under Section 706 of Title VII and 42 USC 1981.

⁴¹ 110 Cong. Rec. 13650-13652 (1964). A similar amendment was rejected in connection with the Equal Employment Opportunity Act of 1972, H.R. 9247, 92nd Cong. 1st Sess. (1971).

⁴² Title VII Preempting Section 1983 in Sex Discrimination—*Torres v. Wisconsin Department of Health and Social Services*, 592 F. Supp. 922 (E.D. Wis. 1984), 54 Cincinnati Law Review 333, 342 (1985).

The first argument in favor of allowing Section 1983 claims in employment discrimination cases comes from Justice Blackmun's opinions in *Smith* and *Johnson*. In *Smith*, Justice Blackmun solely relied on the intent of Congress to determine the exclusivity of EHA. Justice Blackmun states in the opinion: "The question to be asked, therefore, is whether Congress intended that the EHA be the exclusive avenue through which a plaintiff may assert those claims."⁴³

In subsequent paragraphs, Justice Blackmun adds: "We do not lightly conclude that Congress intended to preclude reliance on Section 1983 as a remedy for a substantial equal protection claim. Since 1871, when it passed by Congress, Section 1983 has stood as an independent safeguard against deprivations of federal constitutional and statutory rights."⁴⁴

In *Johnson*, Justice Blackmun provides insight into the legislative history and congressional intent behind Title VII. Justice Blackmun concludes: "The legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes."⁴⁵

The issue of exclusivity stands firmly on the Court's interpretation of congressional intent of Title VII. Even though the Court is split on what Congress' intent was in passage of Title VII, the Court unanimously agreed that intent will govern the issue.⁴⁶ Justice Blackmun and four other justices have interpreted the congressional intent of Title VII as allowing alternative state and federal causes of action.

The second argument directly considers the legislative record. During congress-

sional debates over the 1972 amendments, the House report states "the bill does not affect existing rights that individuals may already have under previous legislation."⁴⁷

During the same session of Congress, the Senate refused to adopt an amendment to Title VII which would have made Title VII the exclusive remedy in employment discrimination cases.⁴⁸ Clear congressional intent precludes the Court from applying the implied exclusivity rule when state and local employees are involved, although the congressional record fails to provide any insight as to federal employees' right to pursue a Section 1983 claim.

The final argument against exclusivity concerns the history of discrimination in the United States. Discrimination and unequal treatment of minorities has plagued the nation from its inception. The founding fathers realized slavery was antagonistic to the principals written in the Declaration of Independence.⁴⁹

It took a war to abrogate slavery, the most overt form of discrimination. Both Section 1983 and the Civil Rights Act of 1964 were enacted to cure the nation of a disease which was so pervasive it could not be left up to the states to provide relief. The bondages of slavery allowed whites to dominate blacks in employment as well as in social life. Once slavery was abolished, whites continued to dominate blacks through depriving blacks of equal opportunities in employment and social advancement. Congress, in reviewing the status of minorities in the early 1960s, concluded that discrimination had not been eradicated and enacted the Civil Rights Act of 1964 to further combat the problem. Congress, perceiving discrimina-

⁴³ 468 U.S. 992, 1009.

⁴⁴ 468 U.S. 992, 1012.

⁴⁵ 421 U.S. 454, 459.

⁴⁶ Justices Brennan, Marshall, and Stevens usually have disagreed with present interpretations of the majority in Section 1983 cases. See *Smith v. Robinson*, 468 U.S. 992, 1022.

⁴⁷ H. R. Rep. No. 238, 92nd Cong. Session, reprinted in 1972 U.S. Code Cong. Ad. News 2137 (1972).

⁴⁸ 118 Cong. Rec. at 3371-3373 (1972) statement of Senator Williams.

⁴⁹ The *Dred Scott* decision reasoned that blacks were not citizens and not protected under the U.S. Constitution as such. 19 How. 393 (1857).

tion as one of the highest priorities, provided an additional legal mechanism, Title VII, to promote equal opportunity. Discrimination has such a pernicious effect on the nation that alternate forms of relief are necessary.

Access to Section 1983 Remedies

Upon resolution of the exclusivity issue, the second issue is whether litigants should be allowed to go directly to the federal court under Section 1983. The dissent in *Smith* offered a solution to the issue. In *Smith*, the majority declared the Education of the Handicapped Act (EHA) the exclusive remedy over Section 504 of the Rehabilitation Act of 1973 and Section 1983. The dissent acknowledges the conflict between the federal statutes and proposes a resolution through statutory construction.

Justice Brennan, writing the dissenting opinion, joined by Justices Marshall and Stevens, states: "Accordingly, our guide must be the familiar principle of statutory construction that conflicting statutes should be interpreted so as to give effect to each but to allow a later enacted, more specific statute to amend an earlier, more general statute only to the extent of the repugnancy between the two statutes."⁵⁰ The dissent would require a plaintiff to pursue relief through administrative channels before seeking redress in the courts under Section 1983.

In Title VII cases, Justice Brennan would not allow plaintiffs to side-step the EEOC by going directly to the federal court under Section 1983. Proponents of this view also might argue that the EEOC has been delegated the responsibility of investigating and conciliating employment discrimination matters without the expense or time delays involved in litigation. Additionally, it might be argued that the EEOC serves the purpose of eliminating unjustified claims from the court's docket.

In *Johnson*, Justice Blackmun presented an alternative view holding that Title VII and 42 USC 1981 were separate, distinct, and independent. Justice Blackmun, for the majority, writes: "We are satisfied, also, that Congress did not expect that a Section 1981 court action usually would be resorted to only upon completion of Title VII procedures and the commission's efforts to obtain voluntary compliance."

Justice Blackmun, continuing to cite the advantages of conciliation and voluntary compliance through EEOC efforts, states: "The choice is a valuable one. Under some circumstances, the administrative route may be highly preferred over the litigatory; under others, the reverse may be true. We are disinclined, in the face of congressional emphasis upon the existence and independence of the two remedies, to infer any positive preference for one over the other, without a more definite expression in the legislation Congress has enacted, as, for example, a proscription of a Section 1981 action while an EEOC claim is pending."⁵¹

Justice Blackmun in *Johnson* considers the opportunity of being able to file a Title VII claim or proceed directly to the federal court under Section 1981 as mandated by the lack of congressional intent on the issue. The majority recognizes that in some situations the appropriate procedure may be litigation and in other situations administrative process. Relying on the lack of a clear directive by Congress, the Court in *Johnson* would allow both a Title VII and a Section 1981 action to proceed unrestrained by administrative process.

Even though the EEOC has a comprehensive program for investigation and conciliation of discrimination cases, the system does not seem to be operating efficiently. The EEOC, in most cases, fails to conduct an investigation within six

⁵⁰ See *infra* note 35, at 1024.

⁵¹ 421 U.S. 454, 461.

months and sometimes may take several years to complete the process. Many litigants wait for the EEOC's jurisdiction to expire so a private action can be brought.⁵²

Conclusion

The roots of Title VII and Section 1983 date back to the founding fathers' refusal to constitutionally abolish slavery. The framers set the issue aside to preserve the union for the moment but revisit the question one-hundred years later. The attitudes of slavery became ingrained in the South and continued to proliferate long after the Civil War. Congress battled the courts over civil rights legislation until the enactment of the Civil Rights Act of 1964, at which time civil rights gained prominence.

The Civil Rights Act of 1871 later became codified as 42 USC 1983. The purpose of the Act was to protect the constitutional rights of blacks through the federal courts. Title VII also sought to protect blacks and other minorities from unequal treatment in employment. Section 1983 was written in very broad language so as to provide comprehensive coverage against racial discrimination, whereas Title VII was written in specific language to provide a comprehensive administrative scheme for eliminating employment discrimination. Both statutes promote and protect equal treatment for individuals and require employers to make employment decisions exclusive of an employee's race, color, religion, sex, or national origin, although a Section 1983

action may only be brought by a state or local employee for employment discrimination. The Supreme Court has ruled that Section 1983 may not be invoked to litigate a substantive right created by Title VII.⁵³

The congressional history clearly demonstrates that Title VII was not intended as the exclusive remedy in employment discrimination cases. The congressional record, along with the rejection of an amendment by Congress to make Title VII the exclusive remedy, provides strong evidence against exclusivity. The Supreme Court has agreed unanimously that statutory interpretation of Title VII will control the issue. A further argument against exclusivity considers the damage perpetrated on the nation as a result of unequally treating minorities. The law should make available as many remedies as possible for those victimized.

The issue of direct access to the federal court under Section 1983 involves the statutory interpretation of Title VII. Despite a comprehensive scheme for processing employment discrimination claims, the Court should not require a plaintiff to first file with the EEOC. The majority in *Johnson* realized that the administrative process is not always appropriate. Allowing litigants to forego filing with the EEOC will not thwart the agency's purposes of conciliation and screening but may reduce its administrative burdens.

[The End]

⁵² B. Schlei & Grossman, *Employment Discrimination Law*, 996 n. 115, 997 (2nd ed., 1983).

⁵³ See *infra* note 31.