RECONCILING THE GOALS OF FEDERALISM WITH THE POLICY OF TITLE VII: SUBJECT-MATTER JURISDICTION IN JUDICIAL ENFORCEMENT OF EEOC CONCILIATION AGREEMENTS

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Title VII of the Civil Rights Act of 19641 prohibits employers, employment agencies, and labor organizations from discriminating in employment on the basis of race, color, religion, sex, or national origin.2 If the Equal Employment Opportunity Commission (EEOC)3 finds reasonable cause to believe that a charge of discrimination is valid, it attempts to conciliate.4 Title VII implicitly authorizes the EEOC to negotiate a conciliation agreement,5 which is intended to

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If the author were a federal judge confronted with the question addressed in this Article, he would be inclined to broadly construe section 706(f)(3) in an attempt to find federal jurisdiction of an action to enforce an EEOC conciliation agreement. However, in this Article the author develops the opposing argument, in part to illustrate two points: (1) with a continuing decline in judicial activism in the coming years and decades, the best hope for expansion in civil rights may lie in legislative action; and (2) the most effective judicial means of enhancing the fulfillment of Title VII's remedial goals is expansive interpretation of the express statutory provisions defining Title VII's scope of coverage, prohibitions and remedies.

5. Section 706(b) directs the EEOC to attempt conciliation. Id. Section 706(f)(1) authorizes the EEOC to bring a civil action if it “has been unable to secure from the respondent a conciliation agreement acceptable to the [EEOC].” 42 U.S.C. § 2000e-5(f)(1) (1982).
resolve the charge prior to litigation in federal court. On occasion, the EEOC or a private party has brought suit in federal district court to enforce a conciliation agreement that the respondent allegedly has breached. In some cases the federal district courts have assumed subject matter jurisdiction over such actions, even though diversity jurisdiction is lacking and though the actions


6. A settlement agreement may be negotiated at several different stages during the processing of a discrimination charge. The charge may be resolved in a “pre-determination settlement” negotiated after the charge is filed, but before the EEOC makes a reasonability determination. See 29 C.F.R. § 1601.20 (1983); EEOC v. Henry Beck Co., 729 F.2d 301, 303 (4th Cir. 1984); B. SCHEI AND P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 944 (2d ed. 1983). The settlement of a claim brought under Title VII in a federal district court may be incorporated later in a consent decree, subject to the court's approval and enforceable under the court's contempt powers. See EEOC v. Liberty Trucking Co., 695 F.2d 1038, 1043-44 (7th Cir. 1982); Fairfax Countywide Citizens Ass'n v. County of Fairfax, 571 F.2d 1299, 1303 n.8 (4th Cir. 1978) (court retains jurisdiction to enforce settlement agreement incorporated in consent decree), cert. denied, 439 U.S. 1047 (1978). Cf. Weills v. Caterpillar Tractor Co., 553 F. Supp. 640, 641 (N.D. Cal. 1982) (plaintiff settled after she received notice of right to sue, but before she filed suit in district court). This Article focuses on problems in enforcing "conciliation agreements"— settlement agreements negotiated and executed after a determination of reasonable cause and after conciliation has begun, but before either the EEOC or the alleged discriminatee has filed suit. See B. SCHEI AND P. GROSSMAN, supra this note, at 965-66.


8. Congress has conferred upon the federal district courts diversity jurisdiction of civil actions between “citizens of different states.” 28 U.S.C. § 1332(a)(1) (1982) (conferring jurisdiction within judicial power as set forth in U.S. Const. art. III, § 2, cl. 1). A suit brought solely by the EEOC is not likely to be within the court's diversity jurisdiction, because the EEOC probably is not a "citizen" of any state. Compare McGlynn v. Employers Commercial Union Ins. Co. of Am., 386 F. Supp. 774, 776 (D.P.R. 1974) and FDIC v. National Surety Corp., 345 F. Supp. 885, 887 (S.D. Iowa 1972) (both holding that federal agency is not a citizen of any state) with Garden Homes, Inc. v. Mason, 238 F.2d 651, 653-54 (1st Cir. 1956) (FHA is a "federal corporation" and a citizen of the District of Columbia). A suit brought solely by an individual discriminatee against a corporate employer would not be within federal diversity jurisdiction if the individual was a citizen of the state in which the employer was incorporated or had its principal place of business. See 28 U.S.C. § 1332(c) (1982).
arguably arise solely under state contract law.\textsuperscript{9} Two federal courts of appeal have squarely addressed the jurisdictional issue and have broadly construed Title VII's federal jurisdictional provision\textsuperscript{10} to encompass actions seeking enforcement of EEOC conciliation agreements.\textsuperscript{11} Each court inferred a congressional intent to grant such jurisdiction from the primacy of conciliation in the legislative scheme as a means of achieving the goals of Title VII.\textsuperscript{12} Neither court, however, considered countervailing principles of federalism in its expansive interpretation of Title VII's jurisdictional provision.

This Article seeks to present a more balanced analysis of the jurisdictional question by examining the tension between the principles of federalism and the remedial goals of Title VII. Part I outlines enforcement and conciliation procedures under Title VII. Part II considers whether the express provisions of Title VII provide a basis for subject matter jurisdiction, under either the specific jurisdictional provision of Title VII,\textsuperscript{13} or the general statutory grant of federal question jurisdiction,\textsuperscript{14} and proceeds to examine the theory that an action to enforce an EEOC conciliation agreement arises under and


\textsuperscript{10} 42 U.S.C. § 2000e-5(f)(3) (1982) (U.S. district courts "shall have jurisdiction of actions brought under this subchapter").


\textsuperscript{12} EEOC v. Safeway Stores, Inc., 714 F.2d 567, 572-74 (5th Cir. 1983), cert. denied, 104 S. Ct. 2384 (1984); EEOC v. Liberty Trucking Co., 695 F.2d 1038, 1041-44 (7th Cir. 1982).

\textsuperscript{13} \textit{See supra} note 10.

is governed by federal common law, thus providing a basis for jurisdiction under the general statutory grant.

This Article concludes that under current legislation, an action to enforce an EEOC conciliation agreement does not raise a federal question concerning application of either Title VII or federal common law. Congress may choose to strengthen procedures for federal enforcement of Title VII rights by expressly granting federal jurisdiction of actions to enforce conciliation agreements. Currently, however, absent an independent basis for federal jurisdiction, an action must be brought in state court and must be governed by state rules of decision.

I. Enforcement and Conciliation Procedures Under Title VII

Title VII sets forth complex and comprehensive procedures for remedying unlawful discrimination in employment. A charge of discrimination may be filed with the EEOC by or on behalf of persons claiming to be victims of the alleged discrimination, or by a member of the EEOC. Title VII also sets forth time limitations within which charges must be filed with the EEOC, and it requires prior deferral to state agencies that have authority to remedy employment discrimination.

The EEOC has the power to investigate the discrimination charge to determine whether there is reasonable cause to believe that


A conciliation agreement may include a provision stating that the parties consent to federal jurisdiction in an action to enforce the agreement. See, e.g., 8 FAIR EMPL. PRAC. MAN. (BNA) 431:69 (1978) (sample conciliation agreement). The parties cannot create federal jurisdiction, however, by waiver or agreement. See, e.g., Love v. Turlington, 733 F.2d 1562, 1564 (11th Cir. 1984); C. WRIGHT, LAW OF FEDERAL COURTS § 7, at 23 (4th ed. 1983).

the charge is justified.\textsuperscript{19} If the EEOC finds no reasonable cause to believe that the charge is true, it will dismiss the charge\textsuperscript{20} and notify the alleged discriminatees and the respondent of its action.\textsuperscript{21} If the EEOC finds reasonable cause to believe that the charge is true, it will then attempt to conciliate the dispute.\textsuperscript{22} Conciliation plays an important role in Title VII procedures as a means of assuring equal employment opportunity.\textsuperscript{23}

Successful conciliation avoids litigation through the execution of a formal conciliation agreement.\textsuperscript{24} In such an agreement the respondent routinely denies any violation of Title VII\textsuperscript{25} but promises to grant employment benefits to the alleged victims of discrimination.\textsuperscript{26}

\begin{itemize}
  \item[19.] 42 U.S.C. § 2000e-5(b) (1982) (the EEOC “shall make an investigation”); 2 E.E.O.C. COMPL. MAN. (CCH) ¶ 2022 (1982) (objective of investigation is to obtain enough information to determine truth of charge). If the EEOC has not filed a civil action or successfully conciliated the charge within 180 days of the filing of the charge, the aggrieved party may demand notice of his or her right to sue. 42 U.S.C. § 2000e-5(f)(1) (1982); Johnson v. Railway Express Agency, 421 U.S. 454, 458 (1975).
  \item[20.] As a practical matter, however, the EEOC is unable to investigate fully all charges within 180 days of the filing. \textit{See id.} at 455-56, 465 n.11. \textit{See also} Mohasco Corp. v. Silver, 447 U.S. 807, 811 n.6 (1980); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 848 & n.25 (5th Cir. 1975), \textit{cert. denied}, 425 U.S. 944 (1976); Harshaw v. Pan Am, 70 F.R.D. 462, 464 (D.C.C. 1975); B. SCHLEI AND P. GROSSMAN, supra note 6, at 946 n.115. Therefore, the EEOC has adopted regulations under which it may issue a notice of right to sue prior to the expiration of 180 days if it determines that final action within 180 days is improbable. 29 C.F.R. § 1601.28(a)(2) (1983); Brown v. Puget Sound Elec. Apprenticeship & Training Trust, 732 F.2d 726, 729 (9th Cir. 1984).
  \item[21.] Id.
  \item[22.] Id.
  \item[23.] \textit{See} Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (cooperation and voluntary compliance, facilitated by state and federal conciliation, were selected as the preferred means for achieving the goal of assuring equal employment opportunity); EEOC v. Liberty Trucking Co., 695 F.2d 1038, 1041 (7th Cir. 1982) (before the 1972 amendments to Title VII, the EEOC was empowered only to investigate and to negotiate voluntary compliance, thereby underscoring the importance of that element of the EEOC’s current responsibilities). In recent years, the EEOC has encouraged pre-determination settlements, \textit{see supra} note 6, in an effort to reduce its backlog of charges awaiting investigation. \textit{See}, e.g., EEOC v. Henry Beck Co., 729 F.2d 301, 303 (4th Cir. 1984).
  \item[25.] \textit{See} 8 FAIR EML. PRAC. MAN. (BNA) 431:70k (1981) (sample conciliation agreement); 3 E.E.O.C. COMPL. MAN. (CCH) ¶ 7307 (1981) (standard clause).
  \item[26.] \textit{See}, e.g., 8 FAIR EML. PRAC. MAN. (BNA) 431:70(1) (1981) (sample conciliation agreement); EEOC v. Liberty Trucking Co., 695 F.2d 1038, 1039-40 (7th Cir. 1982) (employer agreed to reinstate charging party, to pay him back wages and other compensation, and to adjust his work schedule to accommodate religious beliefs).
In exchange, the charging party promises to refrain from bringing a civil action on the charge, often on the condition that the respondent continue to perform its contractual obligations. The respondent typically agrees to permit the EEOC to monitor its compliance with the agreement.

In addition, the EEOC often uses the conciliation process to extract relief from a respondent relating to matters outside the charge that prompted the need for conciliation. The respondent, for example, may promise in the conciliation agreement to modify practices or policies that are not mentioned in the charge and that affect employees who are not named in the charge. The respondent may also promise to refrain from violating specified provisions of Title VII during the term of the agreement.

A conciliation agreement stemming from charges of individual discrimination is signed by the alleged discriminatees and by the respondent. Ordinarily, agents of the EEOC also sign the agreement, to signify that the EEOC has "witnessed" the execution of the agreement and has "approved" its provisions. Without more, the EEOC's participation in the execution of the agreement might be viewed as simply a statement of approval that operates to terminate

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27. If the charge was filed by individual victims of alleged discrimination, those persons will normally be principal parties to the conciliation agreement. See, e.g., 8 FAIR EMPL. PRAC. MAN. (BNA) 431:70k, 431:70m (1981) (sample conciliation agreement). If a member of the EEOC files a charge alleging discrimination against a large class of employees, however, the EEOC may be a principal party to the agreement, and individual discriminatees may participate in the settlement by executing separate release forms. See id. at 431:53-69 (sample conciliation agreement); id. at 431:69-70 (sample pre-determination settlement agreement); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 859 n.37 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976) (quoting from sample conciliation agreement); id. at 837-38 (consent decree).

28. See, e.g., EEOC v. Liberty Trucking Co., 695 F.2d 1038, 1040 (7th Cir. 1982). Cf. 8 FAIR EMPL. PRAC. MAN. (BNA) 431:70k (1981) (employee's promise to refrain from suing, but not that of the EEOC, is conditioned upon full counter-performance).


31. Id.


34. See 8 FAIR EMPL. PRAC. MAN. (BNA) 431:70m - 431:70n (1981) (sample conciliation agreement).
or suspend its statutory authority to sue on the charge. At the request of the respondent, however, the EEOC may formally participate in the bargained-for exchange by joining the discriminatees in their promise to refrain from suing on the charge. In those circumstances, the EEOC clearly has done more than simply "approve" the agreement; it has become a full party to it.

If the EEOC is unable to secure an acceptable conciliation agreement from the respondent, it will either bring a civil action against the respondent in federal district court or notify the alleged discriminatees of their right to bring such an action. If the district court finds that the respondent has committed or is committing an

35. The EEOC may bring a civil suit against the respondent if the EEOC has been unable to secure an acceptable conciliation agreement from the respondent. 42 U.S.C. § 2000e-5(f)(1) (1982).

36. "Waiver of the Commission's right to sue shall not be included in an agreement unless it is specifically requested by the Respondent and, if it is so included, it shall be a waiver solely [sic] with relation to the specific charges covered by the agreement." 3 E.E.O.C. COMPL. MAN. (CCH) ¶7308 (1981) (emphasis in original).

37. The traditional requirement of consideration in an enforceable contract is satisfied with the exchange of reciprocally induced promises to engage in acts or forbearance. Restatement (Second) of Contracts § 71 comment b (1981). In a conciliation agreement, the employer's promises to engage in specified acts and forbearance regarding employment practices and compensation are exchanged for promises given by the alleged discriminatee or the EEOC, or both, to forbear from asserting a nonfrivolous claim under Title VII. See 1 A. CORBIN, CORBIN ON CONTRACTS §§ 139-41 (1963). The consideration requirement is met in agreements in which both the EEOC and the alleged victim of discrimination promise not to sue, even though a single respondent exchanges promises with two other parties, see 1 A. CORBIN, CORBIN ON CONTRACTS § 125, at 535-36 (1963), and even though the EEOC's promise is induced by the respondent's promise to grant benefits to persons or entities other than the EEOC. See Restatement (Second) of Contracts § 71(4) (1981).

38. 8 FAIR EMPL. PRAC. MAN. (BNA) 431:70k (1981) (sample conciliation agreement); 3 E.E.O.C. COMPL. MAN. (CCH) ¶7308 (1981) (comment to standard clause).

39. One court has questioned whether the EEOC would be recognized under state law as a party to the conciliation agreement. EEOC v. Liberty Trucking Co., 695 F.2d 1038, 1043 (7th Cir. 1982). In that case, however, the EEOC did not join in the exchange, but merely signified its approval. See EEOC v. Liberty Trucking Co., 528 F. Supp. 610, 612-13 (W.D. Wis. 1981), rev'd, 695 F.2d 1038 (7th Cir. 1982).


41. The statute authorizes relief upon a finding that the respondent has "intentionally engaged in or is intentionally engaging in an unlawful employment practice." 42 U.S.C. § 2000e-5(g) (1982) (emphasis added). This statutory requirement of intent, however, has been liberally construed to require only a finding that the respondent's alleged discriminatory conduct was volitional and not the result of an accident or inadvertence. See, e.g., Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 454-55 nn. 171, 174 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978). Title VII liability may be based on either intentional discrimination, see International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977), or the discriminatory effects of a facially neutral employment policy. See Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).
unlawful employment practice, it may enjoin the unlawful practice and may order "affirmative action," such as "reinstatement or hiring of employees, with or without back pay." The court may also exercise its discretion to award reasonable attorney's fees to the prevailing party.

II. Subject Matter Jurisdiction: Federal Question

Article III of the United States Constitution sets forth the limits of federal judicial power. Part of that judicial power extends to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." Congress has enacted several statutes vesting federal district courts with original subject matter jurisdiction in cases that are within the judicial power of the federal courts by virtue of article III's "arising under" clause. In contrast to the general jurisdiction exercised by most state courts, the jurisdiction of the federal courts is limited to that specifically granted by Congress within constitutional bounds; considerations of federal-state relations grounded in the constitutional reservation of powers to the states have led to narrow constructions and strict applications of congressional grants of federal jurisdiction.

43. 42 U.S.C. § 2000e-5(k) (1982). As prevailing parties, neither the EEOC nor the United States would be eligible to receive attorney's fees. Id.
44. U.S. CONST. art. III.
48. The Supreme Court narrowly construed a federal removal statute, stating that: the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined."

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09 (1941) (quoting Healy v. Ratta, 292 U.S. 263, 270 (1934)). See also Boelens v. Redman Homes, Inc., 748 F.2d 1058, 1067-68 (5th Cir. 1984) (narrowly construing the jurisdictional provision of the Magnuson-Moss Warranty Act); Kantor v. Wellesley Galleries, Ltd., 704 F.2d 1088, 1092 (9th Cir. 1983) (narrowly construing congressional grant of diversity jurisdiction). "[D]ue regard for the constitu-
Of the statutes arguably granting federal jurisdiction for actions to enforce EEOC conciliation agreements, this Article discusses

tional allocation of powers between the state and federal systems requires a federal court scrupulously to confine itself to the jurisdiction conferred on it by Congress and permitted by the Constitution.” In re Carter, 618 F.2d 1093, 1098 (5th Cir. 1980), cert. denied, 450 U.S. 949 (1981), quoted in Gross v. Hougland, 712 F.2d 1034, 1036 (6th Cir. 1983) (“[a] federal court is not a general repository of judicial power”), cert. denied, 104 S. Ct. 1281 (1984). Professor Wright concludes:

Because of [Constitutional and congressional limitations on the jurisdiction] of the federal courts, and because it would not be simply wrong but indeed an unconstitutional invasion of the powers reserved to the states if those courts were to entertain cases not within their jurisdiction, the rule is well settled that the party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is within the competence of such a court. The presumption is that the court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists.

[The rule that a federal court will dismiss an action for want of jurisdiction on the motion of the party who invoked federal jurisdiction but later lost on the merits] could hardly be defended as a sensible regulation of procedure, and can only be justified by the delicate problems of federal-state relations that are involved.

C. WRIGHT, supra note 15, § 7, at 22-23 (footnotes omitted).

49. Title 28 U.S.C. § 1337 (1982) provides for federal jurisdiction of actions arising under any Act of Congress regulating commerce. Section 1337 warrants no separate discussion, because its “arising under” test is no broader than that in § 1331. See Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 8 n.7 (1983). Until a few years ago, § 1337 was significant primarily because it granted jurisdiction of actions involving interstate commerce that did not meet the minimum jurisdictional amount set forth in § 1331. See C. WRIGHT, supra note 15, § 32, at 177 n.10. This distinction disappeared in 1980 with the elimination of the minimum jurisdictional amount requirement from § 1331. See id. at 181 & n.33.

Title 28 U.S.C. § 1343(a)(4) (1982) (formerly § 1343(4)) provides for federal jurisdiction of “any civil action authorized by law to be commenced by any person . . . to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights.” Like § 1337, § 1343 eliminated the requirement of jurisdictional amount in certain actions but did not introduce a broader standard than the “arising under” test of § 1331. See Mahone v. Waddle, 564 F.2d 1018, 1036 n.34 (3d Cir. 1977) (§ 1343(a)(4) is no broader than § 1331), cert. denied, 438 U.S. 904 (1978). See also Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 618-20 (1979) (§ 1343(a)(4) is broader than § 1343(3) only in its omission of the “under color of state law” requirement); Monks v. Hetherington, 573 F.2d 1164, 1167 (10th Cir. 1978) (§ 1343(3) is broader than § 1331 only in its elimination of jurisdictional amount). Congress expanded the scope of § 1343 in 1979 to include the District of Columbia within the scope of some of its provisions; the amendment changed the subsection numbering of § 1343 to § 1343(a)(4), but left the language and purpose of that subsection unchanged. H.R. Rep. No. 548, 96th Cong., 1st Sess. 1-4, reprinted in 1979 U.S. CODE CONG. & AD. NEWS 2609, 2609-12.

Title 28 U.S.C. § 1345 (1982) confers federal jurisdiction of civil actions “commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.” By its terms, § 1345 does not grant jurisdiction of an action brought by a private party to enforce a conciliation agreement. Nor does it grant jurisdiction of such an action brought by the EEOC, because the statute requires express authorization to sue, specific to the
only two: Section 1331 of 28 U.S.C.,50 and section 706(f)(3) of Title VII.51 Neither of these statutes vests the district courts with the full extent of the federal judicial power that Congress is authorized to grant by the "arising under" clause of article III.52 This Article assumes that an action to enforce an EEOC conciliation agreement is within the constitutional limits of federal judicial power,53 and ad-

kind of action brought, see Marshall v. Gibson's Products, Inc., 584 F.2d 668, 676-77 (5th Cir. 1978), and because Title VII does not expressly authorize the EEOC to sue to enforce a conciliation agreement, see infra note 105.

The question of whether the United States would have standing to sue under § 1345 to enforce a conciliation agreement to which the EEOC is a party is beyond the scope of this Article. See generally Marshall v. Gibson's Products, Inc., 584 F.2d 668, 676 nn. 10-11 (5th Cir. 1978).

50. Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1982).


Section 706(f)(3) is limited by its terms to actions brought under Title VII. See supra note 51. In this regard it is narrower than the general federal question judicial power under article III. Moreover, this Article concludes that the phrase "brought under" in § 706(f)(3) is no broader than the phrase "arising under" in 28 U.S.C. § 1331. See infra notes 167-222 and accompanying text.

53. If the merits of the constitutional question were reached, the starting point of the analysis would be with Chief Justice Marshall's opinion for the Court in Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). In Osborn, the Court concluded that article III judicial power extends to suits brought by a federally chartered bank. Id. at 823. To reach that result, the Court stated and applied its celebrated federal-ingredient test:

We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

Id. at 823. The federal law incorporating the bank provided the source of the bank's rights and powers, thus forming an ingredient in any action brought by the bank, even one to enforce a state contract claim, and even one in which the federal "ingredient" is not relied upon or challenged. See id. at 823-28; Bank of the United States v. Planter's Bank, 22 U.S. (9 Wheat.) 904, 905 (1824) (applying Osborn dictum to contract claim). See also C. Wright, supra note 15, § 17, at 91-92 (constitutional question could have been decided on narrower grounds).

Under Marshall's federal-ingredient test in Osborn, article III judicial power probably would extend to suits to enforce EEOC conciliation agreements. The substantive provisions of Title VII both provide a basis for a contractual exchange, see supra note 34, and authorize the conciliation process out of which the agreement arises, see supra note 5.

Earlier language in the Osborn opinion suggested that article III judicial power extends to actions in which "the title or right set up by the party, may be defeated by one construction of
addresses only the question of whether Congress has exercised its legislative power to vest original subject matter jurisdiction over such actions in the district courts. Three theories are discussed: (1) such actions "arise under" the provisions of Title VII, within the meaning of section 1331; (2) the actions are "brought under" Title VII, within the meaning of section 706(f)(3); and (3) the actions "arise under" federal common law, within the meaning of section 1331. As the following discussion illustrates, none of these theories justify federal jurisdiction over EEOC conciliation agreements.

A. Section 1331—Action Arising Under the Provisions of Title VII

Section 1331 of Title 28 confers upon district courts general federal question jurisdiction: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Because Title VII explicitly provides for EEOC conciliation and implicitly authorizes execution of an EEOC conciliation agreement, an action to enforce an EEOC conciliation agreement arguably "arises under" the federal laws contained in Title VII.

The scope of jurisdiction under section 1331 is limited by the controversial rule that the federal question must appear on the face of the plaintiff's "well pleaded complaint." Beyond that "quick rule
of thumb," the "arising under" standard, as explained in a celebrated definition expressed by Justice Holmes in *American Well Works Co. v. Layne & Bowler Co.*, appears simple and straightforward: "A suit arises under the law that creates the cause of action." Under this test, for example, an action for damages under a California statute that imposes personal liability for violation of its provisions is an action that arises under state law; similarly, an action to compel issuance of an EEOC investigative subpoena under a federal labor statute that expressly provides for issuance of subpoenas at the request of a private party is an action that arises under federal law.

Unfortunately, the "arising under" standard is clouded with greater uncertainty than is suggested by Holmes' *American Well Works* test, which does not fully explain the Supreme Court decisions applying section 1331. It may be overinclusive in some circumstances; more often, however, it is underinclusive. In the leading

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60. Id. at 260.
62. See Food Town Stores, Inc. v. EEOC, 708 F.2d 920, 922 (4th Cir. 1983) (action raised conflict between the federal statute and a federal regulation), cert. denied, 465 U.S. 1005 (1984). On the merits, the court concluded that the statute did not require the EEOC to issue the subpoenas. 708 F.2d at 923-25.
63. E.g., *Franchise Tax Bd.*, 463 U.S. at 8 ("the statutory phrase . . . has resisted all attempts to frame a single, precise definition for determining which cases fall within, and which cases fall outside, the original jurisdiction of the district courts"); Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n, 588 F.2d 1216, 1225 (9th Cir. 1978) (relevant Supreme Court "cases do not fit snugly into a single, logical mosaic"), cert. denied, 444 U.S. 826 (1979); C. Wright, LAW OF FEDERAL COURTS § 17, at 91 (4th ed. 1983) (no clear test yet developed); M. Redish, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 64 (1980) ("substantial disagreement exists over the exact meaning and scope of the statute"); Chisum, The Allocation of Jurisdiction Between State and Federal Courts in Patent Litigation, 46 WASH. L. REV. 633, 638-39 (1971) (jurisdictional counterpart to § 1331 for patent litigation raises a question that "leads into one of the darkest corridors of the law of federal courts and federal jurisdiction").
64. See, e.g., Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900) (no federal jurisdic-
example of the latter, Smith v. Kansas City Title & Trust Co., the Supreme Court upheld the exercise of federal jurisdiction in a suit where the outcome was determined by the application of federal constitutional law, even though the plaintiff's underlying cause of action was presumably a creation of state corporation law.

In analyzing and applying the tests of American Well Works and Kansas City Title, attention must be paid to Justice Cardozo's admonition in Gully v. First National Bank to avoid the hazards of unduly broad and abstract definitions:

What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. . . . [T]here has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.

Thus, in borderline cases, section 1331 must be interpreted with a sensitivity to pragmatic considerations of judicial administration and

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65. Judge Friendly concluded that "[i]t has come to be realized that Mr. Justice Holmes' formula is more useful for inclusion than for the exclusion for which it was intended." T.B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964), cert. denied, 381 U.S. 915 (1965). See Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9 (1983) (citing T.B. Harms); C. Wright, supra note 15, § 17, at 94 & n.21 (both interpreting Shoshone).

66. 255 U.S. 180 (1921).

67. See id. at 199-202. See also id. at 213-15 (Holmes, J., dissenting) (cause of action arises under Missouri law); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9 (1983) (in Kansas City Title, "vindication of a right under state law necessarily turned on some construction of federal law").

68. 299 U.S. 109 (1936).

69. Id. at 117-18 (citations omitted). See also Franchise Tax Bd. v. Construction Laborers Vacation Trust Fund, 463 U.S. 1, 21-22 (1983) (statutory interpretation in Gully reflects a "spirit of necessity and careful limitation of district court jurisdiction").
to the broader concerns of federalism.\footnote{70}

1. Remedial Conciliation Agreements Without Incorporation of Federal Law. — The jurisdictional question is raised in its simplest form in an action to enforce provisions of an EEOC conciliation agreement obligating the respondent to take remedial action that is defined without reference to federal law. For example, in an action to enforce a conciliation agreement, the EEOC or the alleged discriminatee might allege that the respondent breached the agreement solely by failing to pay a definite sum of money.\footnote{71} Assuming the applicability of state rules of interpretation and performance of contracts,\footnote{72} such a claim ordinarily would not require application of the Kansas City Title test because it would not raise an outcome-determinative question concerning the interpretation or application of provisions of Title VII or other federal law.\footnote{73} Accordingly, the Ameri-
can Well Works test should determine whether such an action “arises under” the express provisions of Title VII. Within that framework, federal jurisdiction depends upon whether the action is essentially a creation of state contract law or is so strongly rooted in the substantive provisions of Title VII regarding conciliation that it is a creation of federal statutory law.  

The inquiry begins with American Well Works itself. The plaintiff in that case alleged that the defendants had falsely stated that the plaintiff’s pump infringed their patent and that the defendants had sued or threatened to sue users of the plaintiff’s pump. After removal from state court, the federal trial court dismissed the action on the ground that it arose under the federal patent laws and therefore rested within the exclusive jurisdiction of the federal courts, depriving the federal court of derivative removal jurisdiction. The Supreme Court reversed. Writing for the Court, Justice Holmes concluded that an action for injury caused either by a threat to sue under federal patent laws or by a representation of patent infringement “is not itself a suit under the patent law.” Drawing support from a comparative reference to a contract action, Justice Holmes stated that the question whether such threats or statements are wrongful “depends upon the law of the state where the act is done, not upon the patent law,” even though the defendants could raise

and was asserted in bad faith. See generally Restatement (Second) of Contracts § 74 (1981); Fiege v. Boehm, 210 Md. 352, 123 A.2d 316 (Md. Ct. App. 1956). However, even that contention would not require an accurate construction of the federal statute, but only a determination of whether the Title VII claim was legally or factually uncertain or whether the claimant had a good-faith belief in the potential merit of the claim. See Restatement (Second) of Contracts § 74 (1981). That limited inquiry does not implicate sufficiently strong federal interests to invoke the doctrine of Kansas City Title.

74. See generally supra notes 59-62 and accompanying text.
76. Id. at 258. The procedural posture of the case is explained in M. Redish, supra note 63, at 65 n.83:

The specific issue in the case was whether the action could properly be removed to federal court. Under the applicable legal principles, if the case could not have been properly brought originally in state court, the case could not be removed, even if the case could have been brought originally in federal court.

Id. (citation omitted).
77. American Well Works, 241 U.S. at 260. Presumably, the Supreme Court’s reversal obligated the federal trial court to remand the action to state court, rather than to dismiss. See C. Wright, supra note 15, § 41.
79. Holmes concluded that “[t]he fact that the justification may involve the validity and infringement of a patent is no more material to the question under what law the suit is brought than it would be in an action of contract.” Id. at 260.
defenses based upon the validity and infringement of their patent. Because state tort law created the cause of action for "slander of title," the suit arose under state law.

This decision has important implications in actions seeking enforcement of remedial conciliation agreements in which the respondent's obligations are defined without reference to federal law. In rejecting the trial court's finding of federal jurisdiction in American Well Works Co., Holmes did not explicitly interpret the specific language of any jurisdictional statute. Federal statutes at that time conferred upon federal courts original jurisdiction of actions "arising under" the federal patent and copyright laws, and made such jurisdiction exclusive of the state courts. Justice Holmes' implicit interpretation of the "arising under" language of the statute granting patent jurisdiction has been characterized as "the most familiar definition" of the same statutory phrase in the general federal question statute, section 1331. Because the current statutory grant of federal jurisdiction over patent and copyright litigation (section 1338 of 28 U.S.C.) retains the "arising under" language of its predecessor, cases applying the American Well Works test to the section

80. Id. at 259-60. If questions concerning the scope and validity of the defendants' patent rights could be raised only in an affirmative defense, then American Well Works could have been decided on the basis of the well-pleaded complaint rule. See supra note 57. However, Holmes did not rely on that rule; the opinion ascribes no special significance to the possibility that the federal questions might be raised only in an affirmative defense. See American Well Works, 241 U.S. at 259-60. One commentator argues that, in any event, the issue of the validity of the defendants' patents in a trade libel suit would be properly alleged in the complaint as a part of the plaintiff's cause of action. Cohen, supra note 70, at 897.

82. Justice Holmes defined the term "arises under," but cited to no jurisdictional statute. See id. at 260.

83. Federal district courts were granted original jurisdiction "[o]f all suits at law or in equity arising under the patent, the copyright, and the trade-mark laws." Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1092 (codified at 28 U.S.C. § 41(7) (1940)).
85. The Court's opinion reflects awareness of the statutory grant of exclusive jurisdiction in patent cases. American Well Works, 241 U.S. at 258. In addition, the opinion contains Justice Holmes' now-famous definition of the statutory "arising under" language: "A suit arises under the law that creates the cause of action." Id. at 260.
87. Section 1338 of title 28 provides in relevant part:

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

1338 "arising under" clause continue to provide guidance in interpreting the section 1331 language. 88

In *T.B. Harms Co. v. Eliscu*, 89 for example, the United States Court of Appeals for the Second Circuit affirmed a dismissal for lack of federal jurisdiction in a suit for equitable and declaratory relief on a contractual assignment of renewal copyrights 90. Circuit Judge Friendly refined Holmes' test and adapted it to actions involving copyrights, explaining that "an action 'arises under' the Copyright Act if . . . the complaint is for a remedy expressly granted by the Act, e.g., a suit for infringement or for the statutory royalties for record reproduction." 91 Applying that standard, the court determined that the federal copyright laws do not expressly or implicitly create a cause of action to enforce or rescind assignments of copyrights or to fix the locus of ownership. 93 Although the federal copyright statute expressly authorizes assignment of an interest in copyright, it neither authorizes a suit for enforcement of the assignment nor provides a remedy for breach. 94 Thus, the cause of action was created by state law and would turn "on the facts or on ordinary principles of contract law." 95 Judge Friendly did not apply Holmes'
test mechanically. The result in *T.B. Harms* is based partly on the perceived absence of a strong national interest in a dispute over property or contract rights in patents or copyrights.\(^9^6\)

The Ninth Circuit has applied Judge Friendly’s formulation to two actions involving copyrights, and a comparison of these two cases provides insight into the jurisdictional determinations. In *Topolos v. Caldwell*,\(^9^7\) a suit for damages and injunctive relief for copyright infringement arose under the federal Copyright Act, which created the cause of action and the remedy, even though the action presented a threshold question of state contract law to determine ownership of the copyright.\(^9^8\) In *Dolch v. United California Bank*,\(^9^9\) on the other hand, a suit to rescind a gratuitous assignment of renewal copyrights arose under state contract law, even though the federal Copyright Act expressly permits assignment of copyrights by written instrument.\(^1^0^0\) An EEOC conciliation agreement that does not incorporate federal law is analytically analogous to an agreement transferring an interest in a patent or copyright, and a suit to enforce such an agreement is more nearly analogous to *T.B. Harms* and *Dolch* than it is to *Topolos*.\(^1^0^1\) It is not enough for Holmes’ test


\(^9^6\) *T.B. Harms*, 339 F.2d at 826 ("the federal grant of a patent or copyright has not been thought to infuse with any national interest a dispute as to ownership or contractual enforcement turning on the facts or on ordinary principles of contract law"). *See id.* at 828 (insufficient federal interest to warrant development and application of federal common law). *Cf*. *Cohen*, supra note 70, at 907 (criticizing *American Well Works* for failing to vindicate federal interest in patent litigation). *See also* EEOC v. *Liberty Trucking Co.*, 528 F. Supp. 610, 618 (W.D. Wis. 1981) (conflict with federal policy is not likely with state interpretation of narrowly drafted conciliation agreement designed only to give relief to individual), *rev’d*, 695 F.2d 1038 (7th Cir. 1982).

\(^9^7\) 698 F.2d 991 (9th Cir. 1983).

\(^9^8\) *Id.* at 993-95.

\(^9^9\) 702 F.2d 178 (9th Cir. 1983).

\(^1^0^0\) *Id.* at 180-81. The court held that "whether an assignment of renewal rights without consideration is a valid assignment is a state law question." *Id.* at 180.

\(^1^0^1\) In *Dolch*, the court held that the only true issues in the case involved principles of state law. The plaintiff in *Dolch* had brought suit to contest the validity of an assignment of renewal copyrights, based on a claim of lack of consideration. 702 F.2d at 179. The plaintiff alleged that her suit arose under the copyright statute because the statute specifically provides for the assignment of copyrights. *Id.* at 179-80. The Ninth Circuit held, however, that although the assignability of renewal copyrights may be a question of federal law, the conditions
of federal jurisdiction that Title VII expressly authorizes the conciliation process out of which the agreement arises, or that the subject matter of the agreement is the compromise of a Title VII claim. The critical factor is the absence from Title VII of any federal right of action or remedy for breach of a conciliation agreement. The statute contains no express provision for such a right of action or remedy. Although an unexpressed congressional intent to provide a federal right of action or remedy may sometimes be inferred from congressional creation of federal duties and correlative rights, Title VII does not supply the necessary basis for recognizing for a valid assignment are a matter of state law; because the cause of action did not involve any questions of interpretation or policy under the copyright laws, it did not arise under the copyright laws and federal jurisdiction to decide the matter did not exist. Id. at 180-81.

In Topolos, the plaintiff brought suit in federal district court seeking damages and injunctive relief for statutory copyright infringement, unfair competition and breach of contract. 698 F.2d at 992. The district court held that the principal and controlling issue was the ownership of the copyright. Because the issue required the court to determine the rights and obligations of the plaintiff and defendant under the publishing contract, the district court concluded that the case arose under state law and that it therefore lacked jurisdiction. See id. at 993. The Ninth Circuit reversed, finding that while the ownership of the copyright may have been a threshold question, it was not the only question; once ownership of the copyright was established, the court explained, the copyright infringement claim would still require resolution, and should properly be determined by a federal court. Id. at 994.

102. Cf. Dolch v. United Cal. Bank, 702 F.2d 178, 181 (9th Cir. 1983) (federal statute authorizes copyright assignment, but doesn't create cause of action to rescind assignment for want of consideration); T.B. Harms, 339 F.2d at 827 (2d Cir. 1964) (federal statute authorizes copyright assignment, but doesn't create cause of action to enforce assignment).

103. Cf. Topolos v. Caldewey, 698 F.2d 991, 993 (9th Cir. 1983) ("a case does not arise under the federal copyright laws . . . merely because the subject matter of the action involves or affects a copyright"); Graf v. Elgin, Joliet and E. Ry., 697 F.2d 771, 776 (7th Cir. 1983) (suit to enforce a collective bargaining agreement in railroad industry does not arise under the Railway Labor Act merely because that federal statute regulates collective bargaining within the industry).

104. See T.B. Harms, 339 F.2d at 828 (under the American Well Works test, an action arises under the Copyright Act if it seeks a remedy expressly granted by the Act). See also Local Div. 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Auth., 667 F.2d 1327, 1340-44 (11th Cir. 1982) (right to a remedy for breach of an agreement mandated by federal statute is a common law right of action of which § 1331 does not grant jurisdiction).

105. EEOC v. Liberty Trucking Co., 695 F.2d 1038, 1040 (7th Cir. 1982) ("Title VII does not explicitly provide the EEOC with the authority to seek enforcement of conciliation agreements in the federal courts"). Title VII expressly creates rights in both the EEOC and victims of discrimination to bring a "civil action," but only in the event that conciliation has failed. 42 U.S.C. § 2000e-5(f)(1) (1982). The companion relief provision is limited to cases in which a court has made a finding of an unlawful employment practice. 42 U.S.C. § 2000e-5(g) (1982). Breach of a conciliation agreement is not among the unlawful employment practices described in Title VII. See 42 U.S.C. §§ 2000e-2, 2000e-3 (1982).

106. See, e.g., Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) (recognizing implied private right of action to enforce express federal statutory declaration that
ing an implied federal right of action or remedy because it imposes no duty on a party to enter into\textsuperscript{107} or to perform\textsuperscript{108} a conciliation agreement.\textsuperscript{109}

Furthermore, because a suit to enforce an EEOC conciliation agreement does not seek a remedy for adjudicated discrimination,\textsuperscript{110} but rather seeks to vindicate expectations generated by contractual promises,\textsuperscript{111} lack of federal jurisdiction is consistent with respective federal and state interests. Just as enforcement of the conciliation agreement plays an important role in implementing the important national policy of eliminating discrimination,\textsuperscript{112} requiring the enforcement suit to be brought in state court furthers the important and distinct state interest of protecting contractual expectations within the state.\textsuperscript{113} These goals do not conflict.

Consider, for example, a suit by Employee against Employer to enforce Employer’s promises in an EEOC conciliation agreement to contracts formed or performed in violation of the Investment Advisers Act of 1940 shall be void); Cannon v. University of Chicago, 441 U.S. 677 (1979) (recognizing implied private right of action to enforce express federal statutory prohibition of sex discrimination in educational programs receiving federal financial assistance).

107. \textit{See, e.g., EEOC v. Liberty Trucking Co., 695 F.2d 1038, 1041 (7th Cir. 1982) (citing to other federal decisions for the proposition that Title VII does not compel any party “to reach final agreement”).


It is true that in the past our cases have held that in certain circumstances a private right of action may be implied in a statute not expressly providing one. But in those cases finding such implied private remedies, the statute in question at least prohibited certain conduct or created federal rights in favor of private parties. [citations omitted]. By contrast, § 17(a) [of the Securities Exchange Act of 1934] neither confers rights on private parties nor proscribes any conduct as unlawful.

\textit{Id. See also Pavolini v. Bard-Air Corp., 645 F.2d 144, 147 (2d Cir. 1981) (“[t]here must be a duty, the violation of which has caused injury, before we reach the question whether a private remedy exists to redress that injury”) (citation omitted). Cf. Local Div. 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Auth., 667 F.2d 1327, 1333 (11th Cir. 1982) (focusing analysis on implicit grant of jurisdiction rather than on implicit creation of right of action in suit to enforce agreement mandated by Urban Mass Transportation Act of 1964).}

110. By definition, a conciliation agreement is reached without an adjudication of discrimination. \textit{See supra} note 6. Indeed, the respondent typically denies in the conciliation agreement that it has engaged in unlawful discrimination. \textit{See supra} note 25 and accompanying text.

111. \textit{See e.g., E. A. Farnsworth, Contracts § 12.1, at 812-13 (1982).

112. \textit{See supra} note 23.

113. \textit{Cf. Belknap, Inc. v. Hale, 463 U.S. 491, 512 (1983) (“[federal labor law interests], on the one hand, and the interest of the State in providing a remedy to its citizens for breach of contract, on the other, are ‘discrete’ concerns”) (citation omitted).}
pay Employee a definite sum of money and to hire Employee for a designated position at the first available opening. Upon a finding of breach, a state court applying general common law principles would routinely award Employee compensatory damages designed to compensate her fully for her lost expectations. Many state courts would be reluctant, however, to grant specific enforcement of the Employer’s contractual promise to hire Employee. Federal courts, in contrast, have shown a general willingness to grant liberal affirmative relief, such as reinstatement or hiring, as a “make whole” remedy for unlawful discrimination under Title VII. Federal courts have granted this type of relief, however, only upon a judicial finding that the respondent has committed an unlawful employment practice. An action to enforce contractual promises in a conciliation

114. See, e.g., 4 A. Corbin, Corbin on Contracts § 958 (1963); 5 A. Corbin, supra, at § 1095. See also E. A. Farnsworth, Contracts § 12.8, at 839 (1982) (limitations on damage awards “often hold the injured party to a more objective valuation of his expectation”).


A popular explanation for judicial reluctance to specifically enforce an employment contract on behalf of the employee is the difficulty and expense of supervising a court order that compels the continued association of the parties “after disputes have arisen . . . and confidence and loyalty have been destroyed.” 5A A. Corbin, Corbin on Contracts § 1204, at 401-02 (1964 & Supp. 1971). See Kronman, Specific Performance, 45 U. Chi. L. Rev. 351, 357 n.26, 373 (1978).


117. 42 U.S.C. § 2000e-5(g) (1982) provides:
agreement does not require proof of illegal discrimination. The difference in the willingness of state and federal courts to require employers to rehire employees is not due to state hostility toward EEOC conciliation agreements, but stems instead from this fundamental difference between an action to enforce contractual expectations and an action to remedy a proven violation of Title VII. The particularly liberal provisions in Title VII for specific relief should not apply automatically to an action to enforce an EEOC conciliation agreement.  

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

Id.

118. See supra note 73.

119. The reluctance of state courts to grant specific enforcement of employment contracts stems from characteristics common to all employment relations, not just those disrupted by invidious discrimination. See supra note 115; EEOC v. Safeway Stores, Inc., 714 F.2d 567, 573 (5th Cir. 1983), cert. denied, 104 S. Ct. 2384 (1984). The States may not have a substantial interest in enforcing all federal laws. See, e.g., Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468, 1475 (9th Cir. 1983) (“Arizona has little interest in enforcing federal [mine safety] law”). However, the states surely are not so hostile to federal anti-discrimination laws that they would enforce an EEOC conciliation agreement with any less vigor than they would a commercial contract. See generally Wright, In Praise of State Courts: Confessions of a Federal Judge, 11 Hastings Const. L.Q. 165, 181-88 (1984). Indeed, most states have formally expressed a policy of nondiscrimination in employment. The District of Columbia, Puerto Rico, the Virgin Islands, and forty-three states have enacted general employment discrimination statutes with prohibitions similar to those in Title VII. 1 FRES JOB DISCRIMINATION MANUAL 5, 13, 24, 41, 52, 68, 77, 89, 110, 119, 126, 142, 150, 162, 174, 189, 202, 213, 225, 238, 253, 261, 271, 283, 293, 302, 316, 324, 342, 354, 367, 381, 394, 400, 410, 424, 433, 446, 458, 465, 473, 483, 493, 503 (1983). North Carolina, Georgia, Mississippi, and Virginia have enacted similar statutes that apply to state employers. Id. at 99, 253, 341, 473. In addition, North Carolina legislation expresses a public policy of comprehensive equal employment opportunity. Id. at 341. Alabama, Arkansas, and Louisiana have no legislation expressing a public policy of comprehensive equal employment opportunity; however, each has enacted more limited protective legislation, id. at 4, 24, 189, and Louisiana has judicially expressed a policy of equal employment opportunity. Gil v. Metal Service Corp., 412 So. 2d 706, 708 (La. Ct. App.) (dictum) (employer may not terminate an at-will employee because of race, sex, or religious beliefs), cert. denied, 414 So. 2d 379 (La. 1982).

120. The Ohio Supreme Court has approved specific enforcement of a contractual promise of reinstatement in a settlement agreement. State ex rel. Wright v. Weyandt, 50 Ohio St. 2d 194, 363 N.E.2d 1387 (1977). Significantly, however, the employer's promise of reinstatement had been contractually exchanged for the employee's relinquishment of a statutory right to reinstatement based on the judicially affirmed order of a state administrative board, which could otherwise have been enforced through a judicial writ of mandamus. Id. at 1389-90. The
Alleged discriminatees who claim to be victims of a respondent's breach of a conciliation agreement can take advantage of Title VII's liberal remedial provisions by suing directly on the underlying Title VII claim and proving illegal discrimination. EEOC conciliation agreements should expressly condition the surrender of underlying Title VII claims upon the respondent's performance of its contractual obligations. If the respondent breaches the conciliation agreement, the EEOC or the alleged discriminatees can then sue on the underlying Title VII claim, joining a claim for breach of the

employees had not merely compromised a tenable but unadjudicated claim; they had presented the claim to a hearing body created by the legislature and had established the legal and factual basis for invoking a legislative exception to the general policy against judicially enforced reinstatement. See id. In contrast, an EEOC conciliation agreement follows a finding by the EEOC of reasonable cause to believe that the charge is true. See supra note 6. This preliminary finding is not an adjudication of unlawful discrimination. See EEOC v. Liberty Trucking Co., 695 F.2d 1038, 1041 (7th Cir. 1982) (Congress rejected proposal to give EEOC adjudicative powers similar to those of the National Labor Relations Board). It is instead a determination by the EEOC that "the claim has sufficient merit to warrant litigation if the matter is not thereafter conciliated by the Commission or the charging party." 3 E.E.O.C. COMPL. MAN. (BNA) § 40.1 (1979). A federal court may specifically enforce a settlement that is incorporated in a consent decree without an adjudication on the merits of the compromised claim. See United States v. City of Miami, 664 F.2d 435, 439-40 (5th Cir. 1981). That does not suggest, however, that the settlement agreement alone would be specifically enforceable, because "[a] consent decree, although founded on the agreement of the parties, is a judgment" with "greater finality than a compact," and "may be enforced by judicial sanctions, including citation for contempt." Id. (citations and footnotes omitted). See also Turner v. Orr, 759 F.2d 817, 825-26 (11th Cir. 1985); City of Las Vegas v. Clark County, 755 F.2d 697, 701 (9th Cir. 1985); 2 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 56.43, at 11-84.38 to 11-84.39 (1983).


Such a suit is not subject to any limitations period running from the date of the alleged discrimination to the time of filing suit. Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 366-72 (1977); EEOC v. Great Atlantic & Pacific Tea Co., 735 F.2d 69, 73 (3d Cir.), cert. dismissed, 105 S. Ct. 307 (1984). However, the respondent may raise the equitable defense of laches. See id.; Boone v. Mechanical Specialties Co., 609 F.2d 956, 958-59 (9th Cir. 1979). The doctrine of laches presumably would not bar suit against the respondent if the respondent delayed the suit by first entering into a settlement agreement and then breached that agreement. See, e.g., Covelo Indian Community v. Watt, 551 F. Supp. 366, 381 n.12 (D.D.C. 1982) (defendant was guilty of "foot-dragging" and therefore could not assert defense of laches).

The alleged discriminatees must bring suit within 90 days of notice from the EEOC of their right to sue. 42 U.S.C. § 2000e-5(f)(1) (1982). However, the EEOC would not have issued a notice of right to sue at the time of successful conciliation. See id. It can, and should, issue such notice after confirming that the respondent has breached the conciliation agreement and deciding that it will not bring suit itself. See Perdue v. Roy Stone Transfer Corp., 690 F.2d at 1093-96 (Widener, J., dissenting) (suggesting that alleged discriminatees join EEOC
conciliation agreement as a pendent state contract claim. In that way, a single federal court can adjudicate both claims. If the plaintiff can prove discrimination on the underlying Title VII claim, the court may order specific relief with the liberality contemplated by the express provisions of Title VII. Even if the Title VII claim fails, the plaintiff may still establish a breach of the conciliation agreement and the right to seek a monetary remedy designed to protect contractual expectations under state law. The court can fashion a remedy that avoids double recovery to a plaintiff that succeeds on both claims.

In sum, when an action to enforce a conciliation agreement does not require construction of the express provisions of Title VII, the action does not “arise under” the provisions of Title VII within the meaning of section 1331. Consequently, federal courts have no jurisdiction to enforce the agreement. Enforcement by state courts under state principles of contract law is appropriate, and is consistent with federal interests in the conciliation process.

2. Conciliation Agreements Incorporating Title VII Duties. — The jurisdictional question is more difficult to resolve in an action brought to enforce provisions of a conciliation agreement that incorporates the substantive prohibitions of Title VII. In many conciliation agreements, the respondent agrees to remedy the alleged discrimination that is the subject of the EEOC charge, and also to

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as a defendant to compel it to issue notice of right to sue, if necessary).

123. Supra note 15. In a suit in federal court against the state as employer, the eleventh amendment may deprive the court of jurisdiction to hear the pendent contract claim unless the state has waived its sovereign immunity. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984). On the other hand, federal jurisdiction of the Title VII claim may be exclusive. See infra note 170. Therefore, in suits against the state, the plaintiff may have to split his Title VII and contract claims between separate actions in state and federal court.

124. Supra note 117 and accompanying text.

125. See generally supra note 73. The district court will most likely retain jurisdiction of the pendent contract claim if it dismisses the Title VII claim after, rather than before, trial on the merits. See, e.g., United Beverage Co. v. Indiana Alcoholic Beverage Comm'n, 760 F.2d 155, 160 (7th Cir. 1985). Nonetheless, “[a]lthough federal courts have been encouraged to dismiss pendent state claims if all federal claims are resolved before trial, the decision to retain jurisdiction over a remaining state claim is within the discretion of the district court.” Rutledge v. Aluminum Workers Int'l Union, 737 F.2d 965, 970 (11th Cir. 1984) (footnote and citations omitted). Dismissal of a state pendent claim presumably would be an abuse of that discretion if the statute of limitations barred refiling in state court. See United Beverage, 760 F.2d at 160.

126. Supra note 114.

refrain from committing other specified violations of Title VII during the term of the agreement.\(^{128}\) If the plaintiff alleges that the defendant breached the agreement by committing new violations of Title VII, the court may be called upon to construe the incorporated federal law to determine whether the defendant breached contractual duties.\(^{129}\) If so, a federal district court arguably has original subject matter jurisdiction of the action under the doctrine of *Smith v. Kansas City Title and Trust Co.*,\(^{130}\) even though the cause of action is created by state contract law under the standards announced in *American Well Works*.'\(^{131}\) Close examination reveals, however, that federal courts do not have jurisdiction of such actions, because the exercise of jurisdiction in these circumstances would not further important policies of Title VII.

In *Smith v. Kansas City Title and Trust Co.*,\(^{132}\) a corporate shareholder sued to enjoin the corporation and its officers, agents and employees from investing corporate funds in farm loan bonds issued by federal banks under the authority of the Federal Farm Loan Act of July 17, 1916, and its amendments.\(^{133}\) The shareholder argued that the Act was unconstitutional and that the corporation thus lacked authority under Missouri law to invest in the bonds.\(^{134}\) The Supreme Court stated that, as a general rule, a federal district court

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\(^{128}\) See supra notes 30-32 and accompanying text.

\(^{129}\) The parties to a conciliation agreement would be free to describe the respondent's contractual duties without reference to federal law, even though the described duties appear to be substantially identical to the mandates of federal law. See, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36, 39 (1974) (collective bargaining agreement obligated the employer to refrain from discriminating "on account of race, color, religion, sex, national origin, or ancestry," but did not refer to Title VII). In a suit to enforce such an agreement, the court could find that the parties intended the scope of the contractual duty to be different from the statutory duty. See generally E. A. Farnsworth, *Contracts* §§ 7.9, 7.10 (1982) (discussing fundamental principles of contract interpretation). In such a case, the action would not require interpretation of the federal law. This does not appear to be the pattern in EEOC conciliation agreements, however; contractual duties to refrain from discriminating during the term of the agreement are typically expressed by direct reference to provisions of Title VII. See supra note 32. In those circumstances, the court could easily find that the parties intended to incorporate the statutory duties, requiring an interpretation of the statutory language.

\(^{130}\) 255 U.S. 180 (1921).


\(^{132}\) 255 U.S. 180 (1921).

\(^{133}\) Id. at 195.

\(^{134}\) Id. at 195-96, 199; see id. at 214 (Holmes, J., dissenting) (the scope of the directors' duty "depends upon the charter of their corporation and other laws of Missouri").
has jurisdiction of an action in which it appears from the complaint that the plaintiff's "right to relief depends upon the construction or application of the Constitution or laws of the United States." 135 The Court held that the predecessor to section 1331 136 conferred federal jurisdiction in the shareholder suit, because the constitutionality of a congressional act was "directly drawn in question" and was outcome determinative. 137

Justice Holmes, dissenting in *Kansas City Title*, complained that the Court's decision represented an unwarranted departure from the test that he announced in *American Well Works*. 138 Holmes argued that the shareholder's cause of action to enjoin the corporation from making illegal or unauthorized investments was wholly a creation of state law, and that state adoption of federal constitutionality, as a test of corporate investment authority, should not cause the suit to arise under the applicable constitutional provision. 139

The broad jurisdictional approach endorsed in *Kansas City Title* was challenged thirteen years later in *Moore v. Chesapeake & Ohio Railway*. 140 There, an employee of an interstate railroad brought suit under a Kentucky statute for injuries he sustained while engaged in intrastate commerce. 141 The Kentucky statute incorporated duties and correlative rights created by the Federal Safety Appliance Acts, raising questions about the construction of the federal Acts. 142 The Court characterized these as "federal questions" that

135. Id. at 199.
136. "The district courts shall have original jurisdiction... where the matter in controversy... arises under the Constitution or laws of the United States." Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1092 (codified at 28 U.S.C. § 41(1) (1940)).
137. *Kansas City Title*, 255 U.S. at 201.
138. Id. at 213-15 (Holmes, J., dissenting).
139. Id. at 214-15 (Holmes, J., dissenting).
140. 291 U.S. 205 (1934).
141. Id. at 207-08.
142. Id. at 212-13. In defining the carriers' liability for negligence, the Kentucky statute arguably did not incorporate federal law, but created an independent state standard based on the language of a federal statute: "The statute of Kentucky... reproduced in substance, and with almost literal exactness, the corresponding provisions of the Federal Employers' Liability Act." Id. at 212. On that theory, the state statute could be construed independently of the federal law, and no federal question would be presented, obviating application of the *Kansas City Title* doctrine. *Cf.* United Air Lines, Inc. v. Division of Indus. Safety, 633 F.2d 814, 816 (9th Cir. 1980) (scope of FAA authority might not be conclusive in construction of state requirement of "active exercise" of FAA authority), cert. denied, 454 U.S. 944 (1981). The Kentucky statute directly incorporated federal law by abrogating the doctrines of contributory negligence and assumption of risk in any case in which the carrier's violation of a state or federal safety statute, including the Federal Safety Appliance Acts, contributed to the employee's injury or death. *Moore*, 291 U.S. at 212-13. But a question under the Federal Safety
could be reviewed by the Supreme Court on direct appeal from the state courts, but held that the underlying suit was not one arising under the laws of the United States for purposes of original federal jurisdiction in the district courts. The reasoning of the Court is more compatible with *American Well Works* than it is with *Kansas City Title*. The federal Acts prescribed duties and created correlative rights, but "did not attempt to lay down rules governing actions for enforcing these rights"; instead, the right to recover damages for breach of duty was provided by state law.

The decision in *Moore* appears to endorse Holmes' "creation" test and to raise questions about the continued vitality of *Kansas City Title*. Indeed, in several cases since *Moore*, federal circuit courts have ignored the majority opinion in *Kansas City Title* and have cited Justice Holmes' dissent as authority for the proposition that incorporation of federal standards into state law does not create grounds for federal jurisdiction. Yet the Supreme Court recently noted in dictum that Holmes' test "has been rejected as an exclusionary principle," and acknowledged *Kansas City Title* as an established supplement to Holmes' test. Nonetheless, exercise of original federal jurisdiction over every state-created cause of action that incorporates a potential federal question, regardless of how trivial or

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Appliance Acts would arguably be raised only in response to a defense to an action brought under the Kentucky statute, thus precluding federal jurisdiction under the well-pleaded complaint rule. See supra note 57. The Court, however, expressly relied on neither of those arguments to reject federal jurisdiction in *Moore*; rather, it relied on the absence in the federal statute of a provision for a right to recover damages. *Moore*, 291 U.S. at 215.


144. *Id.* at 215-17.

145. *Id.* at 215.

146. *Id.* at 215-16.

147. See, e.g., Mobil Oil Corp. v. Coastal Petroleum Co., 671 F.2d 419, 424 (11th Cir.), *cert. denied*, 459 U.S. 970 (1982); United Air Lines, Inc. v. Division of Indus. Safety, 633 F.2d 814, 816 (9th Cir. 1980), *cert. denied*, 454 U.S. 944 (1981). See also Buethe v. Britt Airlines, Inc., 749 F.2d 1235, 1239 (7th Cir. 1984); Nuclear Eng'g Co. v. Scott, 660 F.2d 241, 249 (7th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982)(citing *United Air Lines*); Till v. Unifirst Fed. Sav. & Loan Ass'n, 653 F.2d 152, 155 n.2 (5th Cir. 1981) (dictum); Lowe v. General Motors Corp., 624 F.2d 1373, 1379 (5th Cir. 1980) (violation of federal statute was only evidence of negligence under state law); C. WRIGHT, supra note 15, § 17, at 96 ("In the absence of holdings applying this broader understanding of what is a federal question, which rests on a single old Supreme Court decision [Kansas City Title], it is difficult to say when or whether the scope of the jurisdiction will be expanded on [the Kansas City Title] theory."); Hirshman, *Whose Law is it Anyway? A Reconsideration of Federal Question Jurisdiction Over Cases of Mixed State and Federal Law*, 60 IND. L.J. 17, 72 (1985) (proposing a return "to the straightforward analysis set forth by Justice Holmes").

tentative, is inconsistent with repeated admonitions by the Supreme Court and commentators that section 1331 must be narrowly construed in light of pragmatic considerations and principles of federalism. According to the Kansas City Title doctrine should be limited to cases where the outcome of a state-created claim depends upon resolution of a federal question in which there is a significant federal interest, thus justifying the addition to the federal caseload and the corresponding diminution in the exercise of state judicial power.

Such a standard is consistent with the result and rationale in Kansas City Title. The Court in Kansas City Title carefully noted that the federal question was outcome determinative; moreover, the decision can be justified by pragmatic considerations. The constitutional issues forming the core of the litigation required an expert and sympathetic federal forum, and sustaining federal jurisdiction in that class of cases was not likely to “add significantly to the workload of an overburdened federal judiciary.”

The need for pragmatic limitations on the Kansas City Title doctrine is particularly strong in some actions to enforce private contracts, such as EEOC conciliation agreements that measure a party’s obligation by reference to federal law. Otherwise, nondiverse, private contracting parties could secure a federal forum for their contract disputes merely by incorporating federal questions into their contracts, thus opening the federal courts to a potential flood of litigation in which there is little federal interest. Assuming that remain-

149. See, e.g., id. at 2852-53 (statutory interpretation in Gully v. First Nat’l Bank reflects a “spirit of necessity and careful limitation of district court jurisdiction”). See supra notes 48, 69-70 and accompanying text.

150. See generally Cohen, supra note 70, at 905-16; Barnhart v. Brinegar, 362 F. Supp. 464, 476 (W.D. Mo. 1973) (rejecting application of Kansas City Title in light of congressional intent to leave interpretation and implementation of federal policy primarily to administrative agency); C. WRIGHT, supra note 15, § 17, at 96 (“may be some room for finding federal jurisdiction” to resolve “important question of federal law”).

151. The Court noted that “[t]he decision depends upon the determination of this issue.” Kansas City Title, 255 U.S. at 201. See T.B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964) (“pivotal” federal question), cert. denied, 381 U.S. 915 (1965).

152. Cohen, supra note 70, at 906. A finding of unconstitutionality by the Missouri courts, unless reversed on direct review by the United States Supreme Court, presumably would halt the activities of the affected federal banks in Missouri.

153. Id. Cf. Moore v. Chesapeake & Ohio Ry., 291 U.S. 205 (1934); Cohen, supra note 70, at 912 (Moore presented a substantial risk of flooding the federal courts with personal injury actions).

154. See Cohen, supra note 70, at 910. For example, employment contracts not governed by federal labor law could raise federal questions under an unrestricted Kansas City
ing legal issues would be governed by state contract law, the bulk of the litigation ordinarily would not require the special expertise or sympathy to federal claims associated with a federal forum.

While it may seem appropriate, at first glance, to permit a federal court to exercise original subject matter jurisdiction of an action to enforce a conciliation agreement if the respondent has allegedly breached a contractual duty that incorporates Title VII duties, that first impression is misleading. Enforcing the agreement would presumably further strong federal interests, both in ending the unlawful discrimination that constitutes the breach of contract, and in promoting the conciliation process by providing a federal forum for enforcement of its goals. This apparent federal interest is underscored by the participation of the EEOC in the negotiation, execution and administration of the agreement, and sometimes in the enforcement of the agreement as well. Critical analysis, however, reveals that such enforcement actions would do little to promote, and in some ways would undermine, important federal interests in the conciliation process. Those interests are expressed by Congress in the statutory requirement of deferral to state and federal administrative agencies prior to vindication of Title VII rights in federal court.

Consider, for example, a hypothetical conciliation agreement negotiated by the EEOC on behalf of Employee X. Employee X filed timely charges with the appropriate state agency and with the EEOC, alleging that Employer denied him a promotion because of

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Title doctrine if they incorporated federal laws. See, e.g., Beverlin v. IRS, 574 F. Supp. 553 (W.D. Mo. 1983).

155. For a discussion of whether an action to enforce an EEOC conciliation agreement should be governed by federal common law of contracts, see infra notes 223-95 and accompanying text.

156. See Cohen, supra note 70, at 912. Professor Cohen has argued in favor of an across-the-board rule that contract actions do not "arise under" federal laws incorporated in the contract. He believes that most contract actions should not fall within federal jurisdiction and that a general rule applied to all contracts would serve the interests of certainty and efficient judicial administration. Id., at 910. See also Beverlin v. IRS, 574 F. Supp. 553, 554 (W.D. Mo. 1983); Mishkin, The Federal "Question" in the District Courts, 53 COLUM. L. REV. 157, 183-84 (1953).

157. See supra notes 4, 5, 36-39, and accompanying text.


159. If the alleged discrimination occurs "in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice," an alleged discriminatee who seeks to file a charge with the EEOC must first allow the state or local agency up to sixty days to process the charge. 42 U.S.C. § 2000e-5(c) (1982). See Mohasco Corp. v. Silver, 447 U.S. 807 (1980).
his race, in violation of section 703(a)(1) of Title VII.\textsuperscript{160} After the state agency terminated its proceedings, the EEOC investigated the charge and found reasonable cause to believe it to be true. The EEOC's conciliation culminated in a conciliation agreement joined in by the EEOC, Employee X, and Employer, with Employer promising to pay Employee X a specified sum of money, to promote Employee X at the next available opening, to refrain from violating section 703(a)(1) in any area of the workplace during the three-year term of the agreement, and to permit the EEOC to monitor Employer's performance under the agreement.\textsuperscript{161} In return, the EEOC and Employee X each promised in the agreement to refrain from bringing suit on Employee X's charge, contingent upon Employer's performance of its contractual duties. A year later, the EEOC received information suggesting that Employer had breached the conciliation agreement by failing to promote Employee X when an appropriate position became available and by discharging another employee, Y, because of her sex, in violation of section 703(a)(1).

In a suit by the EEOC or Employee X to enforce Employer's contractual obligation to promote Employee X, the Kansas City Title doctrine would not apply, because Employer's obligation to promote Employee X is contractually defined without reference to federal law. A federal court would not have subject matter jurisdiction of the action under the American Well Works test because state law creates the cause of action and the remedy, and because the states' interest in enforcing contractual expectations does not thwart the federal policy of encouraging conciliations.\textsuperscript{162}

A federal question would arise in a suit by the EEOC or Employee Y\textsuperscript{163} to enforce Employer's contractual obligation not to engage in sex discrimination or other violations of Title VII during the term of the agreement. To determine whether Employer breached the agreement, the court would have to first determine whether Em-

\begin{itemize}
  \item \textsuperscript{161}  \textit{Cf.} 8 FAIR EML. PRAC. MAN. (BNA) 431:70(k) - 431:70(l) (1981) (sample conciliation agreement; respondent's agreement to pay monetary relief and to refrain from violations of Title VII over term of the agreement); 1 E.E.O.C. COMPL. MAN. (CCH) ¶ 1276 at 1045-52 (1979) (standard clauses).
  \item \textsuperscript{162} \textit{See supra} notes 59-113 and accompanying text.
  \item \textsuperscript{163} Presumably, the EEOC could sue if it had joined in the bargained-for exchange and thus was a party to the conciliation agreement. \textit{See supra} notes 37-39 and accompanying text. Employee Y might be able to sue as a third-party beneficiary of the conciliation agreement in some circumstances. \textit{See generally} E. A. FARNsworth, CONTRACTS §§ 10.1 - 10.7 (1982).
\end{itemize}
ployer breached duties imposed by section 703(a)(1), incorporated into the conciliation agreement. A direct action in federal court to enforce that contractual provision seeks federal adjudication and remedial action on a new Title VII claim that has not first been submitted to the appropriate state agency or to the EEOC for investigation and conciliation.164 Such an action would permit Employee Y to

164. See Parsons v. Yellow Freight System, Inc., 741 F.2d 871, 872-73 (6th Cir. 1984) (employee must pursue administrative remedies under Title VII before bringing action to enforce common law contract claim for breach of a Title VII settlement agreement). The Court of Appeals for the Third Circuit has noted that "premature resort to the district court should be discouraged as contrary to congressional intent. The preference for conciliation as the dispute resolution method in employment discrimination proceedings should not be undermined by a party's deliberate by-pass of administrative remedies." Moteles v. University of Pa., 730 F.2d 913, 917 (3d Cir. 1984) (determining whether to grant equitable relief from the statutory requirement that the EEOC retain a charge for 180 days before issuing notice of right to sue).

The Supreme Court has recognized the strength of the federal interest in the procedural framework of Title VII. Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 371-75 (1979). The Court held that the alleged victim of unlawful discrimination could not bypass Title VII procedures by seeking to vindicate his Title VII rights in a federal court suit brought under 42 U.S.C. § 1985(3), a remedial statute which provides no substantive rights itself:

As part of its comprehensive plan, Congress provided that a complainant in a State or locality with a fair employment commission must first go to that commission with his claim. Alternatively, an employee who believes himself aggrieved must first file a charge with the federal Equal Employment Opportunity Commission.

If a violation of Title VII could be asserted through § 1985(3), a complainant could avoid most if not all of these detailed and specific provisions of the law. . . . Perhaps most importantly, the complainant could completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII.

Id. at 373, 375-76 (footnotes omitted). See Southbridge Plastics Div., W.R. Grace and Co. v. Local 759, Int'l Union of United Rubber Workers, 565 F.2d 913, 917 (5th Cir. 1978) (action brought under Labor Management Relations Act could not be remanded for consideration of Title VII liability, because procedural requirements of Title VII had not been satisfied). On the other hand, the Supreme Court has held that Title VII does not supplant other remedial schemes that independently establish rights to equal employment. See Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) (suit under 42 U.S.C. § 1981, which independently prohibits racial discrimination in employment contracts); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (employee may pursue contract remedy that independently prohibits discrimination; adverse arbitral decision under the contract does not bar subsequent Title VII suit).

An action to enforce a contract provision that incorporates Title VII duties is more like Novotny than Johnson. Although the agreement of the parties triggers independent contract duties under state law, the enforcement action in essence seeks directly to redress a violation of Title VII; otherwise, the action would not present a federal question. See supra notes 129 and 142.

Moreover, it is significant that the alleged discriminatees in both Johnson and Alexander had satisfied the procedural requirements of Title VII. Johnson, 421 U.S. at 456; Alexander, 415 U.S. at 43. If Employee Y in the hypothetical in the text had satisfied all the prerequisites to a direct suit under Title VII, she could bring such a suit and join the contract action as a
contravene federal statutory policy by circumventing congressionally mandated procedures and invoking the processes of the federal courts on a charge that might otherwise have been resolved prior to commencement of a suit brought directly under Title VII.\textsuperscript{166}

In such a case, the policies reflected in Title VII procedures would not be furthered by exercising federal jurisdiction in an action to enforce provisions of an EEOC conciliation agreement that incorporates Title VII duties.\textsuperscript{166} The question of whether Title VII would preempt and preclude a contract action in state court to enforce Employee Y’s claim is beyond the scope of this Article. It is sufficient to conclude here that the federal interest in such an action does not warrant application of the \textit{Kansas City Title} doctrine.

\textbf{B. \textit{Section 706(f)(3) — Action Brought Under Title VII}}

Section 706(f)(3) of Title VII provides that “[e]ach United States district court . . . shall have jurisdiction of actions brought under this subchapter.”\textsuperscript{167} This jurisdictional grant appears similar to section 1331’s grant of jurisdiction of actions “arising under” the provisions of Title VII. The precise relationship between the two statutes must take one of three forms: (1) jurisdiction under section 706(f)(3) may be identical to that conferred by section 1331 in actions “arising under” the provisions of Title VII,\textsuperscript{168} (2) the phrase

\textsuperscript{165}In some circumstances a federal court may adjudicate a litigant’s Title VII claims that were not specified in the original charge filed with the EEOC or the state agency, but only if those claims are sufficiently related to the initial charge that they fall within the scope of the EEOC investigation that could reasonably be expected to grow out of the initial charge. \textit{See}, \textit{e.g.}, Fellows v. Universal Restaurants, Inc., 701 F.2d 447, 449-52 (5th Cir.) (citing to decisions from other federal circuit courts), \textit{cert. denied}, 464 U.S. 828 (1983); Oubichon v. North Am. Rockwell Corp., 482 F.2d 569, 571-72 (9th Cir. 1973) (deferral to state agency not necessary with respect to post-charge allegations related to original charge); \textsc{C. Sullivan}, M. Zimmer \& R. Richards, \textit{Federal Statutory Law of Employment Discrimination} \S 3.10 (1980). In some circumstances, the claim may be adjudicated even though the initial charge was filed by a person other than the current litigant. \textit{See} \textit{id.} \S 3.8, at 312-14 (adjudication of claims of class members and claims of those on behalf of whom charges were filed by another). Liberal though they are, those standards do not encompass a wide range of charges alleging instances of unlawful conduct by the respondent that occur after negotiation of the conciliation agreement and that have no relation to the initial charge that induced conciliation, but that nonetheless constitute both violations of Title VII and breaches of the conciliation agreement if true.

\textsuperscript{166}Under the “well pleaded complaint” rule, \textit{supra} note 57 and accompanying text, a defense based on federal preemption does not create grounds for federal jurisdiction. \textit{See}, \textit{e.g.}, Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 14 (1983).


\textsuperscript{168}Under this approach, \S 706(f)(3) is arguably superfluous. Section 706(f)(3) re-
“brought under” in section 706(f)(3) may be broader than the “arising under” language of section 1331, reflecting a congressional intent to provide a federal forum in a particularly broad range of actions having some nexus with Title VII rights and duties; or (3) the “brought under” language of section 706(f)(3) may have a narrower meaning than the “arising under” phrase in section 1331, permitting the two statutes to operate as complementary jurisdictional provisions, perhaps reflecting congressional intent to confer exclusive federal jurisdiction in a limited class of actions “brought under” Title VII and concurrent jurisdiction of other actions whose relationship to Title VII's remedial provisions is more attenuated.

The process of interpreting section 706(f)(3) is one of determining congressional intent and should encompass three steps: A literal interpretation of the words of the statute, a review of the legislative history of the statute, and an attempt to harmonize the statutory language with statutory policy.

1. Statutory Language. — A literal interpretation of section 706(f)(3) is hardly conclusive; the phrase “brought under” is little
more precise than "arising under." Nonetheless, "brought under" may reasonably be said to suggest a narrower test on its face. One ordinarily thinks of "bringing" an action under the law that authorizes the suit and provides for relief. Such an interpretation of "brought under" is consistent with Holmes' narrow test for "arising under" jurisdiction, which focuses on the law that creates the cause of action.  

Under this interpretation, an action to enforce an EEOC agreement would not routinely be one "brought under" Title VII, for reasons already discussed. This interpretation leaves open the possibility that a federal court could exercise concurrent jurisdiction over an action whose outcome depends upon resolution of a federal question in which there is a significant federal interest.

2. Legislative History. — The legislative history of Title VII, though inconclusive, is consistent with the conclusion that Congress did not intend in section 706(f)(3) to confer jurisdiction of actions to enforce conciliation agreements. In fact, given Congress's rejection of several provisions that would have explicitly extended federal jurisdiction to the enforcement of conciliation agreements, and the lack of any duty on the part of a respondent to negotiate a conciliation agreement, such congressional intent is extremely unlikely.

As originally enacted, Title VII limited the EEOC's role primarily to investigation and conciliation. If the EEOC's investigation of a charge established reasonable cause to believe the charge to be true, it attempted to secure voluntary compliance from the respondent. If those efforts failed, the EEOC notified the alleged discriminatees of their right to bring suit in federal district court. The federal district courts had jurisdiction "of actions brought under this subchapter." The EEOC had no authority to initiate enforcement actions in federal court.

The EEOC's lack of enforcement power limited its ability to secure voluntary compliance. A respondent had little incentive to

174. See supra notes 55-70 and accompanying text.
175. See id.
176. See supra note 171 and accompanying text. This Article concludes that an action to enforce a conciliation agreement would not ordinarily raise such a question. See supra notes 127-66 and accompanying text.
180. The original statute authorized the EEOC to "commence proceedings to compel compliance" with a court order issued in a civil action brought by the alleged discriminatee. 42 U.S.C. § 2000e-5(i) (1970).
enter into and abide by a conciliation agreement unless it faced the alternative of a civil suit.181 Unless the Justice Department brought suit to attack a "pattern or practice" of discrimination,182 the burden of judicially vindicating Title VII rights fell on the alleged discriminatees, some of whom were unable or unwilling to face the burden and expense of litigation.183 The EEOC's poor bargaining position, stemming from inadequate enforcement power, hindered its conciliation efforts.184

Between 1965 and 1971, Congress considered several bills designed to enhance the EEOC's enforcement powers.185 In 1976, the Senate and the House of Representatives introduced similar bills, H.R. 1746186 and S. 2515,187 each of which would have granted the EEOC quasi-judicial powers similar to those enjoyed by the National Labor Relations Board.188 Each bill authorized the EEOC to issue complaints upon failure of conciliation, to adjudicate charges in administrative hearings, and to issue cease-and-desist orders, subject to review and enforcement by the federal courts of appeal.189 Each bill specifically provided for enforcement of EEOC conciliation agreements in the federal courts of appeal.190

182. The Attorney General was authorized to sue to obtain relief from a "pattern or practice" of discrimination. 42 U.S.C. § 2000e-6 (1970).
185. Sape and Hart, supra note 181, at 830-31.
189. See H.R. 1746, supra note 186, § 706, reprinted in LEGIS. HIST. at 2-13; S. 2515, supra note 187, § 706, reprinted in LEGIS. HIST. at 377-93. See also LEGIS. HIST. at 195.
190. Both the House and Senate bills would have empowered the EEOC to petition a federal court of appeals for enforcement of its order and would have conferred subject matter jurisdiction upon the courts of appeal upon the EEOC's filing of the record with the court. H.R. 1746, supra note 186, § 706(k), reprinted in LEGIS. HIST. at 9; S. 2515, supra note 187, § 706(1), reprinted in LEGIS. HIST. at 386-87. Each bill also provided for judicial enforcement of an EEOC conciliation agreement:

After a charge has been filed and until the record has been filed in court as hereinafter provided, the proceeding may at any time be ended by agreement between the Commission and the ["parties" or "respondent"] for the elimination of the alleged unlawful employment practice. . . . An agreement approved by the Commission shall be enforceable under [the provisions authorizing the EEOC to
Both H.R. 1746 and S. 2515 were rejected in favor of subsequent House and Senate bills that omitted provision for EEOC adjudicative hearings and cease-and-desist orders but empowered the EEOC to seek enforcement of Title VII in the federal district courts.\textsuperscript{191} The final version of the amendment passed by both Houses established the current procedure for either an EEOC or private suit in federal district court after failure of conciliation.\textsuperscript{192} The current statute retains the general provision for jurisdiction of "actions brought under this subchapter,"\textsuperscript{193} but it does not specifically provide for enforcement of conciliation agreements.\textsuperscript{194}

The rejection of the express provision for federal judicial enforcement of conciliation agreements supports the view that Congress recognized that federal jurisdiction would not otherwise extend to such actions but, nevertheless, abandoned a proposal to confer such jurisdiction.\textsuperscript{195} The rejected bills would have given the EEOC authority to adjudicate, to issue orders, and to petition for enforcement of those orders.\textsuperscript{196} Provisions for such authority necessarily were abandoned with the adoption of an alternative EEOC enforcement scheme featuring initial adjudication in federal district court. But H.R. 1746 and S. 2515 also expressly authorized actions to enforce agreements approved by the EEOC and specifically granted

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petition a federal court of appeals for enforcement of its order] and [those provisions] shall be applicable to the extent appropriate to a proceeding to enforce an agreement.

H.R. 1746, supra note 186, § 706(i), reprinted in LEGIS. HIST. at 8; S. 2515, supra note 187, § 706(i), reprinted in LEGIS. HIST. at 383-84.


194. At most, the 1972 amendments implicitly recognize the authority of the EEOC to negotiate conciliation agreements: "If... the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission... If... the Commission has not entered into a conciliation agreement to which the person aggrieved is a party..." The Equal Employment Opportunity Act of 1972, § 706(f)(1) (emphasis added), 42 U.S.C. § 2000e-5(f)(1) (1982); see supra note 5; see also EEOC v. Liberty Trucking Co., 528 F. Supp. 610, 613 (W.D. Wis. 1981) ("Conciliation agreements... are the outgrowth of these modest statutory seeds."). rev'd 695 F.2d 1038 (7th Cir. 1982).

195. Cf. Mohasco Corp. v. Silver, 447 U.S. 807, 824 (1980) ("To the extent that Congress focused on [an issue concerning Title VII limitations periods] at all in 1972, it expressly rejected the language that would have mandated the exact result that respondent urges.").

196. See supra note 189.
federal jurisdiction of such actions. Those provisions are consistent with the current scheme for enforcing Title VII rights and could have been retained in modified form.

Of course, legislative rejection of proposed amendments often provides unreliable or ambiguous evidence of legislative intent. Conceivably, Congress could have collectively assumed that the general jurisdictional provision conferred jurisdiction of actions to enforce EEOC conciliation agreements, and that the rejected amendments were intended simply to transfer such actions from the federal district courts to the federal courts of appeal. This is unlikely, however, given the revealing pattern that emerges from the legislative history.

The original enactment, the rejected 1972 amendments, and the adopted 1972 amendments each included grants of subject matter jurisdiction coupled with complementary provisions specifically authorizing the EEOC or a private party to bring an action in federal court. The specific authorizations to sue identify actions intended

197. See supra note 190.

198. Congress could have provided that the EEOC or an alleged discriminatee could enforce a conciliation agreement in federal district court in the same way that either can sue under § 706(f)(1) to redress a violation of Title VII in the event that conciliation fails.


200. Cf. EEOC v. Liberty Trucking Co., 695 F.2d 1038, 1041 (7th Cir. 1982) (no indication that final amendment was intended to change earlier proposal for federal court enforcement of EEOC conciliation agreements).


H.R. 1746 would have provided for the following actions and corresponding subject matter jurisdiction: (1) actions by the EEOC to enforce conciliation agreements or to enforce EEOC adjudicative orders, with jurisdiction in the federal courts of appeals “of the proceeding and of the question determined therein,” H.R. 1746, supra note 186, §§ 706(i), (k), reprinted in Legis. Hist. at 8-9; (2) actions by a party aggrieved by a final order of the EEOC for
to be encompassed by the jurisdictional grant. In that context, the adopted 1972 amendments expanded the effective scope of the general jurisdictional provision, section 706(f)(3), by authorizing the EEOC to sue for preliminary relief or to redress an unlawful employment practice. H.R. 1746 and S. 2515 illustrate that Congress had no difficulty expressly authorizing an EEOC action to enforce a conciliation agreement. Yet Title VII, as enacted and amended, has never expressly authorized any party to sue to enforce an EEOC conciliation agreement; indeed, it does not expressly impose any duty on a respondent to negotiate a conciliation agreement or to per-

review of the order, with jurisdiction in the federal courts of appeals to the same extent as in EEOC actions to enforce an order, id. at § 706(l), reprinted in LEGIS. Hist. at 10-11; (3) actions by the EEOC for preliminary injunctive relief, with jurisdiction in the federal district courts to grant such relief "upon the bringing of any such action," id. at § 706(o), reprinted in LEGIS. Hist. at 12-13; (4) actions by the Commission to enforce record-keeping requirements, with jurisdiction in the federal district courts to issue a compliance order, id. at § 709(c), reprinted in LEGIS. Hist. at 16-18; (5) actions by employers, employment agencies, and labor organizations for exemption from record-keeping requirements, with the provision that the federal district courts "may grant appropriate relief" in such actions, id.; and (6) actions by alleged discriminatees to redress unlawful employment practices, id. at §§ 715(a), 717(c), reprinted in LEGIS. Hist. at 23-24, 28, with jurisdiction in the federal district courts of "actions brought under this section," id. at §§ 715(b), 717(d), reprinted in LEGIS. Hist. at 25, 28.

S. 2515 included provisions substantially similar to those in H.R. 1746. See S. 2515, supra note 187, §§ 706(i), (k-1), (p-r), 709(c), (e), 717 (c-d), reprinted in LEGIS. Hist. at 383-93, 396-99, 408. Additionally, S. 2515 included unusual provisions authorizing the EEOC or a private party to petition for enforcement of an uncontested EEOC order, and empowering the clerk of the federal court of appeals to enter a decree enforcing the EEOC order. Id. at § 706(m-n), reprinted in LEGIS. Hist. at 45-46.


202. See generally Perdue v. Roy Stone Transfer Corp., 690 F.2d 1091, 1092-93 (4th Cir. 1982) (§ 706(f)(3) vests federal courts with jurisdiction over private right of action, as defined in § 706(f)(1)).

203. See supra note 201.

204. See supra note 190. Cf. Hishon v. King & Spalding, 104 S. Ct. 2229, 2235 (1984) ("When Congress wanted to grant an employer complete immunity [from Title VII liability], it expressly did so.").

205. See supra notes 105, 201.
form its duties under an agreement. In light of the care with which Congress has expressly authorized actions falling within the jurisdictional grant and has outlined the procedures for those actions, the argument that Congress simply assumed that the general grant of jurisdiction encompassed actions to enforce EEOC conciliation agreements loses its force.

3. Policy. — An examination of policy considerations reveals that although tension between principles of federalism and the remedial goals of Title VII may exist, the courts may reconcile the interests of federalism and Title VII by strictly construing the jurisdictional grant of Title VII and liberally construing the express remedial provisions of Title VII. The limited nature of federal jurisdiction and the reservation of powers to the states and their courts favors strict construction of congressional grants of jurisdiction. Conversely, the federal interest in eliminating employment discrimination ordinarily calls for liberal construction and application of the provisions of Title VII. In section 706, however, the tension between these interests is more apparent than real.

The interests of federalism are best protected by strictly interpreting the jurisdictional grant in section 706(f)(3) to encompass only those rights of action identified in the complementary provisions.

206. See supra notes 107-08. Surprisingly, Title VII acknowledges only by implication the authority of the EEOC and the parties to resolve a Title VII claim through execution of a conciliation agreement. See supra notes 4-5. A proposal specifically to authorize execution of a conciliation agreement was rejected prior to enactment of the 1964 act. See supra note 5.

207. Cf. W. R. Grace and Co. v. Local 759, Int'l Union of United Rubber Workers, 461 U.S. 757, 772 (1983) (interest in collective bargaining complemented, rather than conflicted with, interest in Title VII conciliation); Badham v. United States District Court, 721 F.2d 1170, 1173 (9th Cir. 1983) (voting rights case presents tension between “fundamental importance of the right to vote” and principles of federal-state comity in the abstention doctrine); EEOC v. Safeway Stores, Inc., 714 F.2d 567, 579 (9th Cir. 1983) (federal interest in collective bargaining prevails over federal policy favoring resolution of Title VII claims in conciliation agreement), cert. denied, 104 S. Ct. 2384 (1984); Association for Retarded Citizens v. Olson, 713 F.2d 1384, 1390-91 (8th Cir. 1983) (suggesting that principles of federal-state comity in abstention doctrine have less force in civil rights cases); Davis v. Ohio Barge Line, Inc., 697 F.2d 549, 557 (3d Cir. 1983) (Aldisert, J., dissenting) (tension between the general policy of interpreting jurisdictional grants narrowly and the federal interest in providing a federal forum for a wide range of disputes involving collective bargaining agreements).

208. See supra note 107.

209. See, e.g., Craig v. Department of HEW, 581 F.2d 189, 192-93 (8th Cir. 1978); Bell v. Brown, 557 F.2d 849, 853 (D.C. Cir. 1977) (“Title VII is remedial in character and should be liberally construed to achieve its purposes”) (citation omitted); Thomas v. KATV Channel 7, 692 F.2d 548, 550 (8th Cir. 1982) (citing Bell and Craig), cert. denied, 460 U.S. 1039 (1983). But cf. Mohasco Corp. v. Silver, 447 U.S. 807, 818-19 (1980) (Title VII is remedial legislation, but also is the product of legislative compromise).
of Title VII that specifically authorize the EEOC or a private party to sue,\textsuperscript{210} thereby excluding jurisdiction of an action to enforce an EEOC conciliation agreement.\textsuperscript{211} This restrictive interpretation, moreover, does little violence to the remedial goals of Title VII. A respondent’s chief inducement to enter into a conciliation agreement is the avoidance of litigation and liability in an action brought on the underlying Title VII claim.\textsuperscript{212} A respondent will be similarly induced to perform that agreement if its breach would release the EEOC and the alleged discriminatees from their promises to refrain from suing on the underlying claim.\textsuperscript{213} The threat of a contract enforcement action supplements the respondent’s incentive to perform,\textsuperscript{214} but the choice of forum for such an action does not substantially alter the total consequences of breach.\textsuperscript{215}

The remedial goals of Title VII can be effectuated best by liberal construction of the express parameters of Title VII rights and remedies. Title VII specifies the persons or entities subject to its provisions,\textsuperscript{216} the conduct that it prohibits,\textsuperscript{217} the procedures for enforcement,\textsuperscript{218} and the remedies for violations.\textsuperscript{219} Interpreting these provisions to ensure generous coverage,\textsuperscript{220} relief from technical procedural

\textsuperscript{210} See supra note 201.


\textsuperscript{212} See supra notes 181 and 184, and accompanying text.

\textsuperscript{213} If the respondent breaches the conciliation agreement, the EEOC and the alleged discriminatees are released from their promises to refrain conditionally from suing on the underlying Title VII claim. See supra notes 28, 121-22 and accompanying text.

\textsuperscript{214} The EEOC or the alleged discriminatees could establish the respondent’s liability for breach of the conciliation agreement without proving the elements of the underlying Title VII claim. See supra notes 73 and 110.

\textsuperscript{215} Cf. Gila River Indian Community v. Henningson, Durham & Richardson, 626 F.2d 708, 715 (9th Cir. 1980) (well developed state contract law is adequate to protect federal interests in protecting Indian tribes that contract with others), cert. denied, 451 U.S. 911 (1981).

\textsuperscript{216} 42 U.S.C. §§ 2000e, 2000e-16(a) (1982).


\textsuperscript{220} See, e.g., Hishon v. King & Spalding, 104 S. Ct. 2229, 2235 (1984) (Title VII does not exempt partnership decisions from scrutiny, and the opportunity to be considered for partnership is a term, condition, or privilege of employment); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (Title VII prohibits some conduct that is discriminatory in effect, regardless of discriminatory intent); Thurber v. Jack Reilly's, Inc., 717 F.2d 633, 635 (1st Cir. 1983) (agreeing with other courts that the restriction on Title VII coverage to persons who employ at least 15 employees should be liberally construed to include regular part-time employees), cert. denied, 104 S. Ct. 1678 (1984); Armbruster v. Quinn, 711 F.2d 1332, 1336, 1340-41 (6th Cir.}
defects in claims,221 and a complete remedy222 furthers the policies of Title VII without direct conflict with concerns of federalism, because it does not extend the jurisdictional grant in section 706(f)(3) beyond that necessary to encompass the rights of action expressly created by Title VII.

C. Section 1331 — Action Arising Under Federal Common Law

Although the provisions of Title VII do not directly provide a basis for federal jurisdiction to enforce EEOC conciliation agreements, an action seeking such enforcement may yet “arise under” federal law within the meaning of section 1331 if the action is governed by federal common law.223 A federal court may have jurisdiction under this theory if federal common law creates a cause of action for the enforcement of EEOC conciliation agreements, thus preempting the state contract action.224 Alternatively, a federal court

1983) (adopting broad interpretation of statutory definitions of “employee” and “employer” in Title VII, consistent with Title VII’s remedial goals).

221. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398 (1982) (period within which to file Title VII charge with administrative agencies is subject to equitable modification, consistent with remedial purpose of Title VII); Missirlian v. Huntington Memorial Hosp., 662 F.2d 546, 549 (9th Cir. 1981) (remedial purposes of Title VII are effectuated by requiring unequivocal notice of right to sue before commencement of the 90-day period within which to file suit in district court), cert. denied, 456 U.S. 906 (1982).


Federal law probably governs the interpretation and enforcement of a settlement agreement that compromises a substantive Title VII claim over which a federal court has properly assumed jurisdiction. See, e.g., Pulgence v. J. Ray McDermott & Co., 662 F.2d 1207 (5th Cir. 1981). Cf. Gamewell Mfg., Inc. v. HVAC Supply, Inc., 715 F.2d 112 (4th Cir. 1983) (patent infringement). In contrast, this Article addresses conciliation agreements reached by the parties before any claim has been filed in district court. See supra note 6.

can exercise jurisdiction under the doctrine of Kansas City Title if outcome-determinative issues in a state-created contract action are governed by substantive rules of federal common law reflecting important national interests.

Under the Erie doctrine, federal judicial power does not extend to the creation and application of "federal general common law." Nonetheless, the federal courts retain the power in a "few and restricted" instances to develop "specialized federal common law" which supplants state law. The role of the federal judiciary in developing federal law may take a variety of forms on the continuum of legislative and judicial lawmaking. At one end of the continuum, a federal court may give more definite meaning to vague statutory language through a process of interpreting or construing the express terms of the statute. At the other extreme, a federal court may create a comprehensive body of federal common law in "wholesale" fashion, sometimes guided by general policies.
expressed in an enabling statute. Those two extremes form the boundaries of a considerable body of "interstitial federal lawmaking," in which the federal courts fill in the gaps created by federal legislation.

Congress may expressly or by implication authorize the federal courts to develop federal common law in an area within congressional regulatory power. Otherwise, federal common law has been restricted to cases where it is "necessary to protect uniquely federal interests." That category includes cases implicating the rights and obligations of the United States as a sovereign, disputes between states, admiralty litigation, and other cases in which the application of state law would likely conflict with important federal interests.

In creating a rule of federal common law, a federal court typically addresses two questions: (1) Should the court use federal common law to supplant state law in an interstice created by incomplete federal legislation? (2) If so, what should be the content of the federal common law rule? In a few cases, however, federal

235. See, e.g., Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (§ 301 of Labor Management Relations Act authorizes judicial development of federal common law of contracts for enforcement of collective bargaining agreements; policy from national labor laws provides guidance for determining content of the federal common law).


243. See, e.g., 19 C. Wright, A. Miller & E. Cooper, supra note 231, § 4514, at 225, 262.
courts have given little attention to the first question, applying federal common law almost automatically in disputes related to, but not specifically governed by, federal legislation. In those cases, the courts typically expend greater energy addressing the second question and determining whether to give content to the federal common law by incorporating a state rule of decision or by developing an independent federal rule.

Such a casual approach to the first question is inimical to our federal system and, at least in some cases, rests on misapplication of Supreme Court authority. In Georgia Power Co. v. Sanders, for example, the United States Court of Appeals for the Fifth Circuit applied federal common law to determine the amount of compensation to be paid by federal licensees that exercised the power of eminent domain pursuant to a federal statute. The court applied federal common law because the federal “licensees derive[d] their authority to exercise the power of eminent domain from” a federal statute. As authority for that conclusion, the court cited to three decisions of the United States Supreme Court: United States v. Kimbell Foods, Inc.; United States v. Little Lake Misere Land Co.; and Clearfield Trust Co. v. United States. The federal interests in those cases, however, were based on more than federal statutory authorization of activities that led to a dispute; in each, the United States acted as a real party in interest and asserted claims that would have a direct effect on the treasury or property rights of the United States government. The Sanders court applied principles of federalism to select the state law as the federal common law


247. Id. at 1115.


250. 318 U.S. 363 (1943).

251. See Kimbell Foods, 440 U.S. at 718-25 (question of priority of federal liens in federal lending program); Little Lake Misere Land Co., 412 U.S. at 582-83 (suit by United States to quiet title in real property that had been subject to conditional reservation of mineral rights); Clearfield Trust Co., 318 U.S. at 364-65 (suit by United States to recover on guarantor's promise). See also United States v. Ellis, 714 F.2d 953, 954 (9th Cir. 1983) (citing Kimbell in case involving rights of the United States).

252. Sanders, 617 F.2d at 1115-16.
It would have adhered more faithfully to those principles of federalism, however, had it required a greater showing of federal interest before applying federal common law, whatever its content.

The threshold determination whether to apply federal common law is significant even if state law is absorbed as the federal common law rule. The development and application of the federal common law rule may affect the division of power between state and federal courts by providing the sole basis for subject matter jurisdiction. It may also present the risk of conflict with the constitutional separation of legislative and judicial powers; the creation of federal common law to facilitate enforcement of rights may encroach upon the congressional legislative function by seeking to supplement "a comprehensive legislative scheme including an integrated system of procedures for enforcement." Title VII is such a legislative scheme.

Accordingly, the initial decision to apply federal common law should be made with the same sensitivity to concerns of federalism as the determination of the content of the federal common law. Those concerns should counsel greater hesitation when a court endeavors to create a comprehensive body of federal common law in "wholesale" fashion than when it engages in more limited forms of interstitial lawmaking that lie closer to simple statutory interpretation on the federal lawmaking continuum.

253. Id. at 1115-24.
254. See id. at 1124-25 (Fay, J., concurring).
255. See Illinois v. City of Milwaukee, 406 U.S. 91, 98-100 (1972). See also Sanders, 617 F.2d at 1126 (Fay, J., concurring) (describing other problems of federalism that arise in the application of federal common law, even where the state rule is adopted).
256. The Court has "consistently . . . emphasized that the federal lawmaking power is vested in the legislative, not the judicial, branch of government; therefore, federal common law is 'subject to the paramount authority of Congress.'" Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 95 (1981) (quoting New Jersey v. New York, 283 U.S. 336, 348 (1931)). Cf. Sanders, 617 F.2d at 1127-29 (Fay, J., concurring) (judicial development of independent federal rule presents separation-of-powers problem). See generally Allen v. Crocker Nat'l Bank, 733 F.2d 642, 644 (9th Cir. 1984) (per curiam) (deferring to Congress rather than supplanting state law with federal common law).
259. See, e.g., Glus v. G.C. Murphy Co., 629 F.2d 248, 259-60, 263-64 (3d Cir. 1980) (Sloviter, J., dissenting) (contrasting interstitial statutory construction with creation of inde-
Judicial development of federal common law that creates a cause of action for enforcement of an EEOC conciliation agreement, or that sets forth substantive rules governing such an action, is more like "wholesale" lawmaking than simple statutory interpretation. Because Title VII does not expressly create any rights or duties concerning conciliation agreements,260 judicial creation of a right of action, or a set of rules to govern such an action, goes beyond simply giving meaning to congressional intent imperfectly expressed in statutory language; it fills a substantial gap or interstice in Title VII, bounded on one end by the comprehensive provisions for actions to redress unlawful employment practices,261 and on the other end by Title VII's implicit recognition of EEOC conciliation agreements as a means of settlement.262 A federal court should engage in such lawmaking only if authorized by Congress to do so or if necessary to protect important federal interests.263

Congressional authorization to create federal common law has sometimes been inferred from legislation that specifically creates a right of action and confers subject matter jurisdiction over the action. In the best known example, Textile Workers v. Lincoln Mills,264 the Supreme Court held that section 301(a) of the Labor Management Relations Act of 1947265 reflects a congressional intent to authorize the federal courts to develop a comprehensive body of federal common law governing suits to enforce collective bargaining agreements.266 Section 301 clearly purports to vest the federal courts with subject matter jurisdiction over such actions,267 and its language and legislative history permit the conclusion that Congress intended to create a right of action to enforce such contracts268 and to impose sanctions for breaches of agreements to arbitrate grievance

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260. See supra notes 107-09 and accompanying text.
261. See supra note 218.
262. See supra note 5.
263. See supra notes 237-38, 254-56 and accompanying text.
266. Lincoln Mills, 353 U.S. at 450-51.
267. Id. at 451-52. The statute provides in part:
Suits for violation of contracts between an employer and a labor organization ... or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
In light of those congressional purposes, the Court inferred from section 301 a congressional intent to delegate to the federal courts the task of creating a body of substantive law describing those federal rights and remedies. The *Lincoln Mills* Court had great incentive to apply substantive federal law: By holding that section 301 not only confers jurisdiction but also authorizes the development and application of substantive federal law governing the interpretation and enforcement of collective bargaining agreements, the Court avoided the difficult question of whether the Constitution empowers Congress to grant "protective" federal jurisdiction of an action in which the parties are nondiverse and the rights and remedies are defined wholly by state contract law.

The *Lincoln Mills* decision may be the "high water mark" in federal common law jurisprudence and, even assuming its continued vitality, its analysis does not apply to an action to enforce an EEOC conciliation agreement. A specific statutory grant of federal jurisdiction of actions to enforce conciliation agreements, coupled with supporting legislative history, could support an inference of direct congressional authorization to develop federal common law governing such actions, thus avoiding potential constitutional problems in the jurisdictional grant. Congress, however, rejected proposed language for Title VII that would have specifically granted federal jurisdiction of actions to enforce conciliation agreements, and this Article has concluded that Title VII's general jurisdictional grant, section 706(f)(3), does not extend to such actions. Creation of a body of federal common law to govern these actions would itself provide the statutory basis for subject matter jurisdiction under the general federal question provisions of 28 U.S.C. § 1331.

269. Id. at 455.
270. Id. at 456-57.
271. Id. at 469-84 (Frankfurter, J., dissenting).
272. *See generally C. WRIGHT, supra* note 15, § 60, at 391-94 (*Lincoln Mills* doctrine led to a "few extreme decisions" from the courts of appeals, but the Supreme Court "more recently has taken a cautious course toward the recognition of federal common law").
273. *See supra* notes 266-71 and accompanying text. *Cf. supra* note 53 (discussing whether an action to enforce an EEOC conciliation agreement is encompassed by article III judicial power).
274. *Supra* note 223.
275. *Supra* notes 167-222 and accompanying text.
276. *See supra* notes 223-40 and accompanying text.
eral common law governing actions to enforce EEOC conciliation agreements.\textsuperscript{277} Consequently, the development of such federal common law must rest on the need to protect important federal interests.\textsuperscript{278} The development and application of federal common law may be necessary to protect national interests in disputes that raise questions about the rights and obligations of the United States.\textsuperscript{279} In accordance with the principles of federalism and separation of powers that counsel judicial restraint,\textsuperscript{280} the courts have invoked this doctrine only in suits raising claims that would directly affect the United States Treasury\textsuperscript{281} or proprietary rights of the United States.\textsuperscript{282} An action to enforce a conciliation agreement, even if initiated by the EEOC as a formal party to that agreement, is not such a suit. Although an enforcement action may vindicate national interests in equal employment opportunity as well as purely individual rights,\textsuperscript{283} all tangible pecuniary and specific relief will be awarded to individual private claimants.\textsuperscript{284}

\textsuperscript{277} Title VII's implicit recognition of conciliation agreements as a means of settling Title VII claims, \textit{supra} note 5, is far less convincing evidence of congressional authorization than the express statutory grant of federal jurisdiction in \textit{Lincoln Mills}. \textit{See} \textit{Local Div. 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Auth.}, 667 F.2d 1327, 1345 (11th Cir. 1982) (contrasting \textit{Lincoln Mills}, court noted that it had "no jurisdictional grant from which to infer a congressional intention that we fashion" federal common law governing agreements mandated by a federal statute).


\textsuperscript{279} \textit{See supra} note 239 and cases cited therein.

\textsuperscript{280} \textit{Supra} notes 48 and 256.

\textsuperscript{281} \textit{Compare} United States v. Standard Oil Co., 332 U.S. 301, 306 (1947) (government suit for indemnity affects U.S. Treasury and is governed by federal law) and Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (applying federal law to government suit against guarantor of endorsement on forged check drawn on U.S. Treasury) \textit{with} Miree \textit{v. DeKalb County}, 433 U.S. 25, 27-29 (1977) (applying state contract law to private third-party claim against county, based on county's contractual duties to federal agency, because the claim would not affect United States Treasury). \textit{See} Sam Macri \& Sons, Inc. \textit{v. United States}, 313 F.2d 119, 124 n.1 (9th Cir. 1963) (action on prime contract between United States and private contractor governed by federal law, but action on subcontract between private parties governed by state law).

\textsuperscript{282} \textit{E.g.}, United States \textit{v. Kimbell Foods, Inc.}, 440 U.S. 715 (1979) (dispute concerning priority of federal liens); United States \textit{v. Little Lake Misere Land Co.}, 412 U.S. 580 (1973) (United States brought suit to quiet title to real property where previous landowner retained a conditional reservation of mineral rights).

\textsuperscript{283} \textit{See} Kirkland \textit{v. New York State Dept of Correctional Servs.}, 711 F.2d 1117, 1128-29 \& n.14 (2d Cir. 1983) (Title VII settlements "vindicate an important societal interest by promoting equal opportunity"), \textit{cert. denied}, 104 S. Ct. 997 (1984).

The most promising basis for federal common law in an enforcement action is the risk that application of state law would directly conflict with important federal policies underlying Title VII. Creation of federal common law may be appropriate if necessary to encourage and maintain conciliation as the primary means of achieving equal employment opportunity. State contract actions might not preserve the credibility of the conciliation process if state contract remedies were inadequate or if diversity in contract law among the states significantly hampered the EEOC's ability to negotiate and administer conciliation agreements. But federal common law should be based on more than a speculative conflict between state law and federal interests. State courts can draw from well developed bodies of state contract law to protect the contractual expectations of parties to conciliation agreements, and there is no reason to suspect that state courts will be generally hostile to such contract actions. Although many state courts would probably hesitate to grant specific relief, the threat of an action on the contract provides only part of the incentive for a respondent to perform its obligations under a conciliation agreement; just as the underlying Title VII claim induced the employer to enter into the conciliation agreement, the prospect of its revival should induce the respondent to re-


286. See supra note 23.

287. See EEOC v. Liberty Trucking Co., 695 F.2d 1038, 1043 (7th Cir. 1982). Diversity in state contract law does not justify application of federal common law, however, unless that diversity significantly conflicts with federal policy. See In re "Agent Orange" Product Liability Litigation, 635 F.2d 987, 994 (2d Cir. 1980) ("uniformity is not prized for its own sake"), cert. denied, 454 U.S. 1128 (1981).


290. See supra note 119.

291. Supra note 115.
frain from breaching the agreement.\textsuperscript{292}

State enforcement of conciliation agreements will undoubtedly preclude perfect uniformity in the rules applied and the results they engender. Although "the principles of contract law do not differ greatly from one jurisdiction to another,"\textsuperscript{293} courts in different states will inevitably give different interpretations to some standard-form clauses intended by the EEOC to have a uniform meaning and will reach decisions at the margin that are arguably inconsistent. But perfect uniformity is not necessary to protect the credibility of the conciliation process. The contract law of each state is designed to protect contractual expectations, thereby encouraging contracting parties to enter into agreements and to rely on contractual promises.\textsuperscript{294} Absence of perfect uniformity among the states should not discourage parties from entering into conciliation agreements any more than it discourages parties from entering into other kinds of contractual relationships. Moreover, absence of perfect uniformity should not significantly hamper the EEOC's administrative function. Where standard-form clauses in conciliation agreements are interpreted differently in different states, the regional offices of the EEOC can tailor conciliation agreements to the occasional peculiarities of a particular state's contract laws.\textsuperscript{295}

The effectiveness of the conciliation process might in fact be enhanced by enforcement of conciliation agreements in a federal forum applying federal common law. Principles of federalism, however, counsel restraint in this area. The problems inherent in state enforcement of conciliation agreements are not so great as to justify the development of federal common law in the absence of a specific congressional grant of jurisdiction or any other reflection of a congressional intent to delegate its legislative function.

\textbf{Conclusion}

Without a clear congressional grant of jurisdiction, the exercise of federal jurisdiction to enforce an EEOC conciliation agreement raises problems of federalism, which the courts must balance against the remedial policy of Title VII. Congress could most easily address

\begin{itemize}
\item \textsuperscript{292} \textit{Supra} notes 181, 184, 213 and accompanying text.
\item \textsuperscript{293} Hall v. Perry, 703 F.2d 1339, 1348 n.4 (9th Cir. 1983).
\item \textsuperscript{294} E. A. Farnsworth, \textit{Contracts} § 12.1, at 812 (1982).
\item \textsuperscript{295} See EEOC v. Liberty Trucking Co., 528 F. Supp. 610, 619 (W.D. Wis. 1981), \textit{rev'd}, 695 F.2d 1038 (7th Cir. 1982).
\end{itemize}
the tension between those policies by amending section 706(f)(1)\textsuperscript{296} of Title VII to specifically authorize the EEOC or alleged discriminatees to bring a civil action to enforce a conciliation agreement, thereby bringing such actions within the express grant of federal jurisdiction under section 706(f)(3). In this way, such actions would be added to the class of actions encompassed within Title VII's general jurisdictional grant.\textsuperscript{297}

Absent such legislative action, the federal courts should resolve the jurisdictional question in a way that is compatible with the interests of federalism as well as with equal opportunity. The courts can best accomplish that goal by broadly construing the express provisions defining Title VII rights and liabilities,\textsuperscript{298} by treating an action to enforce a conciliation agreement as a state contract claim, and by recognizing procedures that permit revival of the underlying Title VII claim in the event of a respondent's breach of a conciliation agreement.\textsuperscript{299}

\begin{flushleft}
\textsuperscript{297} See generally supra notes 202-03 and accompanying text, and text accompanying note 211.
\textsuperscript{298} See supra notes 216-22 and accompanying text.
\textsuperscript{299} See supra notes 121-22, and accompanying text.
\end{flushleft}