Title VII as a Remedy for Alleged Employment Discrimination by State and Local Government Employers: Is It Exclusive or Only Supplementary to 42 U.S.C. 1983

Brian Richard Henry

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INTRODUCTION

In 1972, Congress expanded the scope of the conciliation-prodding provisions of Title VII of the Civil Rights Act of 1964. As a result of the 1972 amendments, Title VII is now applicable to state and local government employers. For ninety-nine years prior to the amendments, only the provisions of 42 U.S.C. § 1983 protected state and local government employees from unlawful state action. As a result, there has been uncertainty and disagreement among the lower federal courts on the question of whether Congress intended to make Title VII the exclusive avenue available to state and local government employees for litigating their employment discrimination claims. Unfortunately, this issue has not been definitively resolved. Implicit in the conflicting opinions of courts which have considered this issue lies an unofficial petition for authoritative assistance from the Supreme Court.

This Note analyzes the exclusivity issue which has stymied both...
litigants and courts. Part I reviews the purpose and passage of both section 1983\(^6\) and the Civil Rights Act of 1964,\(^7\) and the motivation behind Title VII's expansion to encompass state and local government employers in the 1972 amendments.\(^8\) Part II analyzes two recent, conflicting decisions dealing with the exclusivity issue.\(^9\) Part III explains the problems which exclusivity presents by comparing the substantive, procedural, and remedial provisions of Title VII and section 1983, and the role of res judicata.\(^10\)

In Part IV, this Note demonstrates that both Title VII and section 1983 must be available to state and local government employees as alternative grounds for redress of their employment discrimination claims.\(^11\) Unambiguous congressional purpose, evidenced in extensive legislative history, supports this conclusion.\(^12\) There is further support in the separate and independent substantive bases of Title VII and section 1983.\(^13\) Since section 1983 is an independent remedial provision for enforcing separate rights and affords distinct remedies, the exhaustion of Title VII requirements cannot be compelled in a section 1983 action, even if the same factual allegations support both claims and they are brought in the same action.

I. THE STATUTORY SOURCE OF THE CONFLICT

A. Section 1983

Congress enacted section 1983 as part of the Civil Rights Act of 1871.\(^14\) Section 1983 does not itself confer any substantive right.\(^15\)

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6. See infra notes 14-20 and accompanying text.
7. See infra notes 21-38 and accompanying text.
8. See infra notes 39-48 and accompanying text.
9. See infra notes 49-137 and accompanying text.
10. See infra notes 138-208 and accompanying text.
11. See infra notes 209-59 and accompanying text.
12. See infra notes 219-38 and accompanying text.
13. See infra notes 247-53 and accompanying text.
Instead, it provides a remedy for relief\textsuperscript{16} from actions taken under color of state law which contravene federally protected rights, whether those rights are secured by the United States Constitution or derived from federal legislation.\textsuperscript{17} Thus, if a discharged state or local government employee can establish that his release violates a provision in the Constitution, such as the equal protection clause of the fourteenth amendment\textsuperscript{18} or a federal statute which does not pre-empt section 1983 with its own comprehensive remedial scheme, he may invoke section 1983 to remedy that unlawful action. That plaintiff must establish each element of his underlying claim and must further demonstrate that the employer's action was taken under color of state law.\textsuperscript{19} Congress intended that section 1983 counteract state and local laws that deprive individuals of their federal rights. Section 1983 compensates when state law cannot sufficiently protect federal rights and is supplementary to state remedies which protect individuals from the possibility of state prejudice or ineffective enforcement of state law.\textsuperscript{20}

B. The History and Purpose of Title VII

Surviving a "torrid conception . . . turbulent gestation and . . . frenzied birth,"\textsuperscript{21} Title VII of the Civil Rights Act of 1964 broke new ground as the first major federal remedial scheme for combating discriminatory employment practices. Title VII creates en-
forceable federal substantive rights. It protects against discriminatory employment practices on the basis of race, color, religion, sex, national origin, or retaliatory action.

The only other antidiscrimination legislation enacted prior to 1964 was at the state level. Congressional efforts, extending back to the 1940's, were hindered by resistance from the intended targets of the legislation, by the lack of agreement regarding standards which could be used to determine whether discrimination had actually occurred, and by the lack of machinery and penalties for successful enforcement. But on July 2, 1964, Congress' full frontal attack on these and other obstacles culminated in the passage of Title VII, which was signed by President Johnson.

Congress viewed Title VII as a sound vehicle "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which [had] fostered racially stratified job environments to the disadvantage of minority citizens." However,
instead of opening the courthouse doors for immediate redress of prohibited practices, Congress created an entirely new remedial scheme.

Title VII created the Equal Employment Opportunity Commission (EEOC) to resolve disputes and claims of discriminatory employment practices through informal voluntary agreements and compliance. The EEOC has the power to investigate claims and to promote voluntary conciliation between the employer and the disgruntled employee. Title VII was not intended to be the definitive remedy for correcting discriminatory employment practices; rather, it was "designed to encourage and supplement state and local efforts to eliminate discrimination." To resolve any conflict and to smooth the relationship between the federal and state efforts, the drafters compromised with a provision that requires complainants, if they are going to use the Title VII remedy, to initially resort to existing state procedures. After sixty days, complainants may employ Title VII procedures regardless of the status of state proceedings.

As originally enacted, Title VII applied to the employment practices of employers engaged in an industry affecting commerce with twenty-five or more employees; employment agencies which

31. Id. § 2000e-5(b). See also Tafoya v. Adams, 612 F. Supp. 1097, 1098 (D. Colo. 1985) (the role of the EEOC is "to investigate charges of discrimination, promote voluntary conciliation with the requirements of Title VII, and institute civil actions against private entities engaging in employment discrimination"). The original 1964 provisions were criticized for not granting the EEOC any enforcement powers whatsoever; thus, long, unproductive negotiation sessions ensued with employers who were undeterred by the threat of a potential lawsuit. Sape & Hart, supra note 24, at 825. As part of the 1972 amendments, Congress remedied this dilemma by granting the EEOC the power to file suit on behalf of the aggrieved employee. 42 U.S.C. § 2000e-5(f) (permitting civil action by the EEOC).
33. Those courts which conclude that Title VII precludes a § 1983 action in the public sector employment context would require state and local government employees to resort to state remedial procedures in the first instance, as required by Title VII. See Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755-56 (1979) (resort to state remedies required before asserting Title VII claim). However, § 1983 is an independent remedy which does not require initial resort to state proceedings. See supra notes 14-20 and accompanying text. See also infra note 138 and accompanying text.
34. 42 U.S.C. § 2000e-5(e); Berg, supra note 32, at 68. In the years prior to the adoption of Title VII, more than half of the states had enacted provisions to encourage equal employment opportunity. There were primarily three types of statutes: (1) those that created an administrative hearing process and complementary judicial enforcement of any orders made within that process, (2) those that made employment discrimination a misdemeanor, and (3) those that set up voluntary conciliation measures without any enforcement provisions. Legislative History, supra note 24, at 5-6.
bargain with covered employers; and labor organizations with twenty-five or more members.\(^3\) Title VII did not originally apply to state and local governments.\(^3\) These were originally excluded on the premise that the federal courts were already available to state and local government employees under the equal protection clause of the fourteenth amendment.\(^3\) The exclusion required these employees "to resort only to the courts and fight step by step, with all the expense involved, . . . a never-ending . . . aggravating battle."\(^3\)

**C. The Extension of Title VII to State and Local Government Employers Through the Equal Employment Opportunity Act of 1972**

Congress amended Title VII's enforcement scheme in the Equal Employment Opportunity Act of 1972.\(^4\) Among other changes,\(^4\) Congress provided that the administrative remedies available to private sector employees under Title VII should extend to state and local government employees.\(^4\) This congressional move was motivated, in part, by the findings of several reports examining the extent of discrimination in public sector employment.\(^4\) One report concluded that "state and local governments have failed to fulfill their obligation to assure equal job opportunity . . . . Not only do state and local governments consciously and overtly discriminate in hiring and promoting minority group members, but they do not foster positive programs to deal with discriminatory treatment on the job."\(^4\) Congress concluded that the only effective means to correct

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35. The provisions have since been modified to include employers with 15 or more employees. 42 U.S.C. § 2000e(b).


38. Id. See infra notes 219-20 and accompanying text.


41. This was achieved by expanding the definition of the jurisdiction-defining word "person" to include "governments, government agencies, [and] political subdivisions." 42 U.S.C. § 2000e(a). Congress acted pursuant to its enforcement powers under the equal protection clause of the fourteenth amendment. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 983 (1983).

42. See infra notes 219-21 and accompanying text.

these practices was to expand the coverage of Title VII.\textsuperscript{44}

Thus, Title VII's scope widened to include police, fire, sanitation, welfare and hospital departments, and boards of education.\textsuperscript{45} The number of covered employees increased by an estimated ten million.\textsuperscript{46} Despite concern over the propriety of conferring the power to oversee the employment practices of state and local governmental bodies upon a federal agency,\textsuperscript{47} all "employees subject to the civil service laws of a state government, government agency, or political subdivision"\textsuperscript{48} are now protected.

\section{II. The Conflicting Case Law}

The extension of Title VII protection to state and local government employees seems to have given them a separate and distinct substantive and remedial avenue for public employment discrimination violations. However, courts disagree over whether the employee may pursue relief under both Title VII and section 1983, or whether Title VII is now the exclusive applicable remedy.\textsuperscript{49} Due to the markedly different procedural and substantive requirements between Title VII and section 1983 and their remedies,\textsuperscript{50} this determination is crucial.

The primary distinction, central to this conflict, is that a claimant proceeding under Title VII must initiate administrative remedies before proceeding to federal district court with his

\textsuperscript{44} See infra notes 219-21 and accompanying text.
\textsuperscript{45} 42 U.S.C. § 2000e(a),(b),(f).
\textsuperscript{46} Hill, supra note 25, at 52.
\textsuperscript{47} Senator Ervin placed great emphasis on the undesirability of authorizing a federal agency to determine the employment policies of states and their political subdivisions:

> In my honest judgment, the legislative proposal contained in the bill that the EEOC be given jurisdiction over the employment practices of all the states and of all the political subdivisions of all the states constitutes the most drastic assault upon our Federal system of government which has been proposed in any legislative proposal to come before Congress at any time in its history.

Sape & Hart, supra note 24, at 847-48 (citing 118 CONG. REc. 707 (1972)).
\textsuperscript{48} 42 U.S.C. § 2000e(f).
\textsuperscript{49} There are other available avenues for remedying various forms of employment discrimination, including the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982 & Supp. 1983), and The Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982 and Supp. 1983). Each carries its own barrage of statutory provisions, case law gloss, and scholarly commentary. However, this Note is limited to an analysis of the relationship between Title VII and § 1983. For a discussion of these and other causes of action in the public sector employment context, see Note, supra note 20. Even courts which find that Title VII is the exclusive remedy concede that an independent factual basis may support a section 1983 claim. See infra notes 84-94 and accompanying text.
\textsuperscript{50} See infra notes 138-94 and accompanying text.
discrimination claim.\textsuperscript{51} Yet the claimant who files a section 1983 action based on the same discriminatory action is entitled to immediate federal court jurisdiction.\textsuperscript{52} These procedural differences cause some courts to hesitate when a plaintiff requests judicial determination of a section 1983 claim without first receiving an administrative determination under Title VII.

A. Title VII As an Exclusive Remedy for Victims of Alleged Employment Discrimination by State and Local Government Employers

1. \textit{The Tafoya Decision}

A number of federal district courts have decreed that state and local government employees must seek remedy for employment discrimination exclusively through Title VII.\textsuperscript{53} One of the most recent decisions comes from the District Court of Colorado. In \textit{Tafoya v. Adams},\textsuperscript{54} the court was presented with a claim from a Mexican-American, United States citizen alleging that he was terminated from his position with the Denver Parks and Recreation Department as retaliation for his prior discrimination complaints to the EEOC.\textsuperscript{55}

Prior to bringing his action, Tafoya had obtained a right to sue letter from the EEOC.\textsuperscript{56} In his complaint Tafoya sought relief under Title VII, section 1983, and section 1981.\textsuperscript{57} The district court dismissed the section 1983 and section 1981 claims on the grounds that the plaintiff had not demonstrated an independent basis for those claims and therefore Title VII constituted his exclusive remedy.\textsuperscript{58} The court's rationale was analogous to that of other courts which have deemed Title VII to be an exclusive remedy,\textsuperscript{59}

\begin{footnotes}
\item 51. \textit{See infra} notes 140-50 and accompanying text.
\item 52. 42 U.S.C. § 1343(3).
\item 53. \textit{E.g.}, Talley v. City of De Soto, 37 Fair Empl. Prac. Cas. 375 (N.D. Tex. 1985); Ratliff v. City of Milwaukee, 608 F. Supp. 1109 (E.D. Wis. 1985); Whiting v. Jackson State Univ., 606 F.2d 116 (5th Cir. 1980).
\item 54. 612 F. Supp. 1097 (D. Colo. 1985).
\item 55. \textit{Id.} at 1098.
\item 56. \textit{Id.}
\item 57. \textit{Id.} Section 1981 prohibits discrimination based on race and provides its own remedy to supplement that substantive right. 42 U.S.C. § 1981.
\item 58. \textit{Tafoya}, 612 F. Supp. at 1103-04. \textit{Tafoya}'s dismissal of the § 1981 claim is clearly improper in light of the Supreme Court's decision in \textit{Johnson v. Railway Express Agency, Inc.}, 421 U.S. 454 (1975). In \textit{Johnson}, § 1981 was explicitly found to be a separate and independent remedy from Title VII and thus should be available regardless of the existence of some "independent basis." 421 U.S. at 461.
\item 59. \textit{E.g.}, Torres v. Wisconsin Dept. of Health and Social Services, 592 F. Supp. 922
\end{footnotes}
and therefore its decision is the centerpiece for this discussion of Title VII exclusivity.

2. *Bypassing the Administrative Process*

The *Tafoya* court’s fundamental concern was with the ability of an alleged victim of employment discrimination, specifically a state or local government employee, to bypass the administrative remedial process that Congress had carefully constructed in Title VII. Additionally, “the complainant could obtain remedies and procedural benefits not provided for by Title VII such as punitive damages and a jury trial.” The court found support for its position in what it considered sufficiently analogous Supreme Court cases: *Brown v. G.S.A.* and *Great American Savings & Loan Association v. Novotny.*

In *Brown*, the Supreme Court considered whether a *federal* employee could assert job-related racial discrimination claims under section 1981 instead of pursuing relief under section 717 of Title VII. Section 717 is a separate, comprehensive, substantive and remedial scheme, available only to federal employees, which “establish[es] complementary administrative and judicial enforcement mechanisms designed to eradicate federal employment discrimination.” Based on congressional intent and the elaborate structure

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60. *Tafoya v. Adams, 612 F. Supp. 1097, 1100* (D. Colo. 1985). *See also Day v. Wayne County Bd. of Auditors, 749 F.2d 1199, 1204* (6th Cir. 1984) (to hold that a plaintiff can bypass all of the administrative processes of Title VII and go directly into court under § 1983 would be anomalous); *Torres, 592 F. Supp. at 928-29.*


62. Almost every opinion taking the position that Title VII is exclusive in this context has adopted a similar analysis. *See Day, 749 F.2d at 1203; Torres, 592 F. Supp. at 928.*


64. 442 U.S. 366 (1979).

65. *Brown, 425 U.S. at 824-25.* The Court found that § 717 was added to Title VII in the Equal Employment Opportunity Act of 1972 because of congressional belief that federal employees did not have an effective judicial remedy for employment discrimination claims. *Id. at 826-28.*

66. 42 U.S.C. § 2000e-16 provides that federal employees shall be “made free from any discrimination based on race, color, religion, sex, or national origin.” *Id. at § 2000e-16(a).* Section 2000e-16's other provisions set forth the procedure through which federal employees are to bring their claims. *Id. at § 2000e-16(b)-(c).*

of section 717, the Supreme Court concluded that "[t]he balance, completeness, and structural integrity of § 717 are inconsistent with the . . . contention that the judicial remedy afforded by section 717(c) was designed merely to supplement other putative judicial relief."68 Accordingly, the Court would not permit Congress' administrative scheme to be "circumvented by artful pleading"69 and decreed that section 717 is an exclusive judicial remedy for discrimination claims by federal employees.70

In Novotny, the Supreme Court was presented with the claims of a private sector employee. The substantive basis of the employee's complaint was Title VII.71 Through the remedial device of section 1985(3),72 he contended that he had been injured by a conspiracy to deprive him of equal protection of, and equal privileges and immunities under, the laws as codified in Title VII.73 The Court, echoing the concerns it expressed in Brown regarding bypass and remedy,74 accordingly concluded that section 1985(3) is unavailable to redress actions which are substantially violations of Title VII.75

A major weakness of Tafoya's analysis is that it relied so heavily on Brown and Novotny, yet ignored the significant holding of Johnson v. Railway Express Agency, Inc.76 In Johnson, the Supreme Court held that Title VII is not the exclusive remedy, precluding section 1981, for private sector employees.77 Sections 1981 and 1983

68. Id. at 832. But see Brooks, Use of the Civil Rights Acts of 1866 and 1871 to Redress Employment Discrimination, 62 CORNELL L. REV. 258, 284-85 (1977) (suggesting that the Brown decision was based on fiscal considerations; the Court was motivated by the costs of providing an "extra" remedy).
70. Id. at 835.
71. Novotny's Title VII claim was dismissed by the district court since he was not a proper plaintiff under § 704(a). Novotny, 442 U.S. at 369.
73. See id.
74. The Novotny Court demonstrated its concern:
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. Section 1985(3) expressly authorizes compensatory damages; punitive damages might well follow. The plaintiff or defendant might demand a jury trial. The short and precise time limitations of Title VII would be grossly altered. 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.
75. Novotny, 442 U.S. at 375-76.
76. Novotny, 442 U.S. at 378.
77. Id. at 461. "[T]he remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." Id.
are closely related statutes, and the Johnson decision is relevant to the resolution of the section 1983 and Title VII exclusivity issue.

3. **Implied Congressional Intent**

The Tafoya court also perceived that the implied congressional intent underlying Title VII was to make it an exclusive remedy. The court asserted that the existence of a comprehensive statute conferring substantive rights and implementing its own remedial device implies that Congress intends "to supplant any remedy that otherwise might be available under § 1983." The court found that an analogous rationale was articulated in several Supreme Court cases which precluded section 1983 actions.

A number of other federal courts have expressed similar deference for this perceived congressional intent. The Sixth Circuit cited this rationale in Day v. Wayne County Board of Auditors. Also, the Eastern District Court of Wisconsin concluded in Torres v. Wisconsin Department of Health and Social Services that the “sophisticated mechanism” constructed by Congress for remedy of Title VII claims is the sole avenue available for redress of those claims.

4. **The Independent Basis Exception**

Many courts which view Title VII as an exclusive remedy recognize an independent basis exception. Thus, the Tafoya court...
stated that a state or local government employee may combine Title VII and section 1983 claims in the same judicial proceeding only upon demonstrating an independent basis for the section 1983 claim.\textsuperscript{85} Without such a showing, Title VII thus becomes the only immediately available judicial remedy.\textsuperscript{86} Although the court did not define the term "independent basis," it suggested that those factual allegations which support the Title VII claim cannot be reasserted to establish violations under section 1981 and section 1983.\textsuperscript{87} An independent factual basis alleviates this judicial concern about enlarging the scope of Title VII.\textsuperscript{88}

Other courts have been less explicit, but also seem prepared to allow a section 1983 claim to proceed on separate and distinct factual findings. In the words of one court, a section 1983 action will only be barred "where the plaintiffs' so-called constitutional allegations are so tied up with their cause of action under Title VII that they are, in the [c]ourt's view, nearly unidentifiable as discrete claims."\textsuperscript{89} In a variation on the exclusivity theme, one court has even gone so far as to hold that "[a] plaintiff cannot bring an action under section 1983 based upon Title VII against a person who could not be sued directly under Title VII."\textsuperscript{90}

Several courts take the extreme position that, due to substantial substantive and procedural similarities between Title VII and section 1983 actions, fine distinctions regarding an independent basis

\textsuperscript{85} Tafoya, 612 F. Supp. at 1102. See Green v. Illinois Dep't of Trans., 609 F. Supp. 1021, 1027-28 (N.D. Ill. 1985) (plaintiff's claim dismissed to the extent that it realleged a violation of Title VII).

\textsuperscript{86} Tafoya, 612 F. Supp. at 1103.

\textsuperscript{87} Id. at 1102-03. See also Day v. Wayne County Bd. of Auditors, 749 F.2d 1199, 1204 (6th Cir. 1984); Talley, 37 Fair Empl. Prac. Cas. at 376.

\textsuperscript{88} Huebschen v. Dep't of Health and Social Services, 716 F.2d 1167, 1170 (7th Cir. 1983). See Day, 749 F.2d at 1204.

\textsuperscript{89} Torres v. Wisconsin Dep't of Health and Social Services, 592 F. Supp. 922, 930 (E.D. Wis. 1984).

\textsuperscript{90} Huebschen, 716 F.2d at 1170. The court wanted to ensure that the plaintiff was not simply avoiding the Title VII process by using the remedial device of § 1983 and claiming as substantive violations the rights set forth in Title VII. If the right sued upon under § 1983 is itself a right secured by Title VII, which contains its own detailed remedial provisions a suit under § 1983 to vindicate that particular right "may well be barred." Storey v. Board of Regents of Univ. of Wis. Sys., 600 F. Supp. 838, 841 (W.D. Wis. 1985).

In \textit{Maine v. Thiboutot}, the Supreme Court found that § 1983 protected against state action which violated the Constitution and other federal laws. 448 U.S. 1, 4-8 (1979). Thus, those federal statutes which have their own remedial provisions, would probably satisfy the independent basis requirement as set out by \textit{Trigg}. But see Rivera v. City of Wichita Falls, 665 F.2d 531, 534 n.4 (5th Cir. 1982) ("Consideration of [§ 1981 and § 1983] remedies for employment discrimination is necessary only if their violation can be made out on grounds different from those available under Title VII.").
are essentially irrelevant. Claims based on sections 1981 and 1983 have been described as "superfluous" on the grounds that "[n]o greater or lesser protection against discriminatory practices is provided" by them. Thus, it may simply be more appropriate to try the claim under Title VII. This interpretation assumes that Title VII encompasses section 1983 and therefore extends constitutional protections to state and local government employees.

B. Title VII As the Nonexclusive Complement of Section 1983

1. The Trigg Decision

The recent Seventh Circuit decision, *Trigg v. Fort Wayne Community Schools*, exemplifies the opposing viewpoint. The plaintiff in *Trigg* contended that she had been released from her employment by the Fort Wayne Community Schools because of her race and sex in violation of the fourteenth amendment and brought suit under section 1983. The district court characterized her claim as arising solely under the provisions of Title VII and accordingly dismissed her case since she had not initiated the administrative hearing requirements of Title VII.

Reversing the district court, the Seventh Circuit found that "the Fourteenth Amendment and Title VII have granted public sector employees independent rights to be free of employment discrimination." The court primarily relied on two rationales. First, state and local government employees had a right to sue under section 1983 to remedy employment discrimination long before Title VII was enacted. Secondly, the court found that the legislative history of the Equal Employment Opportunity Act of 1972, which ex-

91. Actually, there are significant differences between Title VII and § 1983. See infra notes 138-94 and accompanying text.


95. 766 F.2d 299 (7th Cir. 1985). A number of courts have determined without analysis that Title VII is not an exclusive remedy and have allowed plaintiff to proceed simultaneously with Title VII and § 1983 claims. Hamilton v. Rodgers, 783 F.2d 1306 (1986); Lewis v. University of Pittsburgh, 725 F.2d 910 (1983); Garner v. Giarrusso, 571 F.2d 1330 (5th Cir. 1978). Other courts have allowed § 1983 claims to proceed alone without considering the exclusivity issue. Jackson v. City of Akron, 411 F. Supp. 680 (N.D. Ohio 1976); Roche v. Foulger, 404 F. Supp. 705 (D. Utah 1975).

96. *Trigg*, 766 F.2d at 300.

97. *Id.*

98. *Id.* at 302.

99. *Id.*
tended Title VII to state and local government employees, evidenced a congressional intent to retain section 1983 as a remedy for employment discrimination in the public sector context. The court concluded that the plaintiff could sue her state government employer for violations of the fourteenth amendment through section 1983 and avoid Title VII's remedial scheme, even though the facts suggested a violation of Title VII.

In the *Trigg* decision, the Seventh Circuit echoed the views of other courts. In one case, the district court permitted the plaintiff to pursue relief under both Title VII and section 1983 even though she had failed to file a discrimination claim with the EEOC. The court reasoned that the individual claims were governed by their own procedural rules. Another court has permitted a section 1983 claim to proceed where a claimant had filed his Title VII action with the EEOC, but commenced the section 1983 suit before receiving his right to sue notice, "since his right to sue under section 1983 was unaffected by Title VII requirements." Yet another court has permitted a plaintiff to pursue a section 1983 claim, despite a possibility that the plaintiff's claim may have been more "appropriately forwarded" under Title VII, because of its belief that Title VII does not pre-empt section 1983 actions.

2. *Distinguishing Brown and Novotny*

To persuasively support its holding that Title VII is not an exclusive remedy, the *Trigg* court squarely faced both the *Brown v. G.S.A.* and *Great American Savings & Loan Association v.*

100. Id.

101. Id.


104. Id. at 1159 n.1 ("Congress . . . did not make the remedies under Title VII and Section 1983 mutually exclusive. Plaintiff is therefore entitled to pursue relief under both counts, with each count governed by its own procedural standards.").

105. Wells v. Hutchinson, 499 F. Supp. 174, 189 (E.D. Tex. 1980). The court also noted that the plaintiff's later filing of his Title VII claim was proper in that it was made after the receipt of his right to sue letter regardless of the existence of prior assertions under § 1983. Id.


Novotny opinions, which found exclusivity in related circumstances. The Trigg court distinguished Brown on its facts. The plaintiff in Brown was a federal employee who could have sought relief under section 717 of Title VII but instead proceeded under section 1981. Prior to the 1972 amendments, Title VII did not encompass federal employees, and there was no effective remedy available. Thus, the Court inferred that Congress did intend to establish an exclusive discrimination remedy for federal employees under section 717. But the Seventh Circuit maintained that state and local government employees had a previously existing right under section 1983 which Congress intended to supplement, rather than to supplant.

Novotny involved a private sector employee's suit under section 1985, a remedial statute similar to section 1983. Novotny had no substantive basis, other than Title VII, upon which to base his section 1985 claim. The plaintiff in Trigg, however, was a state government employee who could use the fourteenth amendment's equal protection clause as an independent substantive basis for her section 1983 claim. As the Trigg court noted, "two Justices in the Novotny majority wrote separately to suggest that Mr. Novotny's employment discrimination claim based on § 1985(3) would have been legally sufficient if he could have asserted Constitutional

109. See supra notes 62-75 and accompanying text.
110. See supra notes 62-75 and accompanying text.
114. Trigg, 766 F.2d at 301. See also Curran v. Portland Superintending School Comm., 435 F. Supp. 1063, 1082 (D. Me. 1977). The Curran court noted that

[i]n extending the coverage of Title VII to State and local government employees, Congress merely deleted the exemption of these workers previously contained in the statute. This contrasts with the remedial scheme set forth in Section 717, which the Court in Brown found to have established a comprehensive system of administrative and judicial remedies for federal employment discrimination and to constitute a balanced and complete whole totally independent of the earlier provisions of Title VII dealing with private employees.

Id.

115. Trigg, 766 F.2d at 301.
116. The fourteenth amendment also compelled Ms. Trigg to further demonstrate unlawful state action upon which to base her § 1983 claim. Trigg, 766 F.2d at 301. See also Skadegaard v. Farrell, 578 F. Supp. 1209, 1218 (D.N.J. 1984). "The plaintiff in Novotny was precluded from asserting similar claims under the Fourteenth Amendment because he was employed by a private employer. No state action was involved in that case. Here, by virtue of plaintiff Skadegaard's state employment, she had additional and independent rights vis-a-vis her employer which she has asserted." Trigg, 766 F.2d at 301.
violations.”¹¹⁷

Further, Novotny’s asserted right under Title VII did not even exist prior to the enactment of Title VII since there were no previous private sector employment discrimination laws.¹¹⁸ However, the right invoked by the plaintiff in Trigg predated Title VII, and, as the court noted, “Title VII could not have impliedly repealed any previously existing rights.”¹¹⁹ Novotny was unhesitatingly distinguished on these bases.¹²⁰

3. Legislative History: Express Congressional Intent and the Johnson Decision

Congressional intent was one of Trigg’s principle justifications for finding that Title VII is not an exclusive remedy. The court reasoned that Congress, in enacting the Equal Employment Opportunity Act of 1972, did not intend to implicitly repeal section 1983 or other avenues available to assert employment discrimination claims.¹²¹ The Seventh Circuit cited to legislative history which specifically supports this interpretation.

"[T]he Committee wishes to emphasize that the individual’s right to file a civil action in his own behalf, pursuant to the Civil Rights Act of 1870 and 1871, 42 U.S.C. §§ 1981 and 1983, is in no way affected.... Title VII was envisioned as an independent statutory authority meant to provide an aggrieved individual with an additional remedy to redress employment discrimination.... The bill, therefore, by extending jurisdiction to State and local government employees does not affect existing rights that such individuals have already been granted by previous legislation."¹²²

Other courts have also found evidence of congressional intent persuasive enough to support a conclusion that Title VII is not exclusive.¹²³ As one court observed, “[I]t is clearly Congress’ prerog-

¹¹⁷. Trigg, 766 F.2d at 301-02 (referring to Novotny, 442 U.S. at 380-81 (Powell, J., concurring), and 442 U.S. at 384-85 (Stevens, J., concurring)).
¹¹⁸. Novotny, 442 U.S. at 376-77.
¹¹⁹. Trigg, 766 F.2d at 302.
¹²⁰. Id.
¹²¹. Id. at 301.
¹²³. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-52 (1971) (finding that a private sector employee’s right to trial de novo under Title VII was not foreclosed by prior claim submission to final arbitration under a nondiscrimination clause of a collective bargaining agreement, the Court asserted that “[t]he clear inference is that Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination”); Zewde v. Elgin Community College, 601 F. Supp. 1237, 1247 (N.D. Ill. 1984).
ative to provide overlapping and duplicative remedial statutory schemes if it chooses." Courts may not inquire into Congressional intent unless "Congress has not articulated its position on the exclusivity of the remedies it has created." Since legislative history indicates an explicit intent to leave existing remedies intact, Title VII does not supplant section 1983 in any way.

The significance of legislative history in this area is underscored by the Supreme Court's decision in *Johnson v. Railway Express Agency, Inc.*, which held that Title VII does not preclude suit under section 1981. There, the statute of limitations had tolled on a discrimination suit filed by a private sector employee under Title VII. The Court was asked to determine whether the employee's section 1981 claim, which was based on the same factual allegations as his extinct Title VII claim, was tolled by a timely filing of that Title VII claim. In concluding that the limitations period did not toll, the Court explicitly recognized the independence of section 1981 in relation to Title VII. The Court used congressional intent to justify its conclusion, citing legislative history and taking specific note of the fact that the "Senate rejected an amendment that would have deprived a claimant of any right to sue under § 1981." Furthermore, the Court found that, although the remedies available under section 1981 are coextensive with Title VII, "they augment each other and are not mutually exclusive." Thus, the Court conceded that a choice of forums is possible and concluded that "the remedies available under Title VII and under section 1981, although related, and . . . directed to most of the same ends, are separate, distinct, and independent." Consequently, Title VII does not limit the availability of section 1981.

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125. Id.
126. Id.
129. Id. at 462-67.
130. Id. at 459. See infra notes 230-32 and accompanying text.
132. Id. at 461. Those courts that view Title VII as an exclusive remedy are generally quick to distinguish Johnson on the grounds that the employee involved in that case was from the private sector. E.g., Brown v. G.S.A., 425 U.S. 820, 833-34 (1976).
section 1983 is clear.

4. A Different Independent Basis Requirement

Some courts which hold that Title VII is not exclusive may still require an independent basis for plaintiff's section 1983 claim. However, this requirement is fundamentally different from that demanded by those courts which interpret Title VII as an exclusive remedy.134 The Tafoya court, which subscribed to exclusivity, held that the section 1983 claim could not be pursued because the facts supporting it were "inherently bound up" with the Title VII claim.135 The independent basis suggested by Trigg, however, is substantive rather than factual; therefore, Ms. Trigg's fourteenth amendment section 1983 claim survived.136 Under this approach, the plaintiff may support both Title VII and section 1983 claims with the same factual allegations.137

III. THE RAMIFICATIONS OF EXCLUSIVITY

There are major procedural, substantive, and remedial differences between Title VII and section 1983 claims in the state and local government employment context. Thus, judicial determinations regarding whether or not Title VII is exclusive bring significant consequences for state and local government employees. Although many courts have asserted that all aspects of a Title VII claim parallel those of a section 1983 claim,138 such statements are inaccurate.139

A. A Procedural Comparison of Section 1983 and Title VII: Section 1983 Provides Immediate Judicial Access

A section 1983 plaintiff who is permitted to proceed independently from his Title VII claim is in an advantageous procedural position. Under section 1983, the plaintiff is not required to resort to state administrative remedies prior to commencing judicial ac-

134. See supra notes 84-94 and accompanying text.
136. Trigg v. Fort Wayne Community Schools, 766 F.2d 299, 302 (7th Cir. 1985).
137. Id.
139. See infra notes 140-94 and accompanying text; see also Noble, Civil Rights—An Analysis of Section 1983 and Title VII: A Comparative Strategy, 23 TRIAL LAW. GUIDE 49 (1979).
This is a significant advantage, since a Title VII claimant must initiate available state and local remedial procedures before approaching the EEOC.

Even after a claimant has fulfilled the requirements to commence a Title VII action, he may not proceed directly to court. Instead, Title VII claims are initially evaluated by the EEOC. The EEOC enforces substantive rights granted under Title VII by conciliatory measures and the art of persuasion. The five-member EEOC "[does] not carry a club." It can only investigate, conciliate, or mediate and has no direct enforcement power.

If the EEOC dismisses the complaint, it notifies the claimant with a "right to sue" letter. The claimant may not seek judicial resolution until he receives this notice.

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141. 42 U.S.C. § 2000e-5(c). The Supreme Court has recognized that where the claimant fails to initiate his state's remedial mechanisms and instead files directly with the EEOC, the EEOC can take measures to initiate the state's mechanisms. Love v. Pullman Co., 404 U.S. 522, 525 (1972).


144. See 42 U.S.C. § 2000e-4 & 5. If the EEOC finds reasonable cause to believe the truth of the unlawful discrimination charge then it is to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." Id. If the EEOC does not find reasonable cause to believe that the charge is true within 120 days of filing, it must dismiss the claim. 42 U.S.C. § 2000e-5(b).
145. Also, if it fails to act on it within 180 days. 42 U.S.C. § 2000e-5(f)(1).
146. The EEOC is authorized to bring civil suit against the respondent. Id. § 2000e-5(f)(1). Where the respondent is a government or government agency, the Attorney General is authorized to file suit. Id.

Title VII has a built-in protective device which permits individuals to intervene in suits brought on their behalf by the EEOC. Id. Thus, the claimant can insure that his interests will be considered by the court and he can further request any additional relief which he feels should be sought. See 19 DUQ. L. REV. 589, 595-96 (1981).

However, "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." Zipes v. TWA, 455 U.S. 385, 393 (1982). See also Jauvitis, Sidestepping the E.E.O.C.: Granting Preliminary Injunctive Relief to Private Plaintiffs, 9 EMPLOY. REL. L.J. 485 (1984); Comment, EEOC-Filing of Discrimination Charges with the EEOC—Statute of Limitations or Jurisdictional Prerequisite?, 27 HOWARD
The Title VII claimant operates under the strict time frames contained in Title VII and is usually required to file within 180 days of the alleged unlawful employment practices. In contrast, the plaintiff's section 1983 claim is governed by his state's statute of limitations, which is likely to be much less restrictive—especially in light of the Supreme Court's recent decision in *Wilson v. Garcia*. Since Congress did not provide for a statute of limitations within section 1983, the state's personal injury statute of limitations is controlling.

B. *Section 1983 Has More Rigorous Substantive Requirements Than Title VII*

The substantive elements of a section 1983 claim are clearly more difficult to meet than those of Title VII. First, the section 1983 plaintiff has the burden of proving that the defendant acted under color of state law in depriving the plaintiff of his federal rights—a requirement that is entirely absent from Title VII. Section 1983 does not protect individuals from purely private conduct or actions of federal officials, unless they are acting in conjunction with state officials or pursuant to local custom, law, or

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148. 42 U.S.C. § 2000e-5(e). The claimant must usually file his charge within 180 days of the alleged unlawful employment practice. *Id.* This timely filing requirement, however, has not been strictly observed, "[r]ather, the courts have applied traditional doctrines of equity to modify inflexible time periods in order to better serve the broad remedial purposes of the Act." Comment, *Civil Rights-Equal Employment Opportunity-Statute of Limitations for Filing a Charge with the EEOC Is Not Tolled for the Period an Employee Seeks Relief Through a Company's Greivance Procedures*, 47 Miss. L.J. 545, 557 (1976).

149. 105 S. Ct. 1938 (1985). The *Wilson* Court held that § 1983 actions are characterized as personal injury actions for determining the appropriate state statute of limitations. *Id.* at 1947-49. In that case, the New Mexico three-year statute of limitations for personal injuries applied. *Id.* at 1949. Predictably, the aftermath of this decision has brought forth conflicting opinions as to precisely which statute will apply in each state. *Compare* Shorters v. Chicago, 617 F. Supp. 661 (N.D. Ill. 1985) (Illinois five-year broad residual statute of limitations applies), *with* Gates v. Spinks, 771 F.2d 916 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1378 (1986) (Mississippi one-year personal injury statute of limitations applies).


regulations.\footnote{154} Title VII creates and protects its own set of substantive rights: freedom from employment discrimination on the basis of race, color, religion, sex, national origin, or retaliatory action.\footnote{155} However, the section 1983 plaintiff must allege that the defendant has deprived him of a right secured by the Constitution or laws of the United States.\footnote{156} Although there is some reason to doubt the continued vitality of its holding, the Supreme Court decreed in \textit{Maine v. Thiboutot} \footnote{157} that section 1983 protects statutory as well as constitutional rights. This decision has since been severely restricted;\footnote{158} however, the Supreme Court has not explicitly reversed its decision.

The section 1983 plaintiff who claims the fourteenth amendment as the substantive basis of his claim must prove by a preponderance of the evidence that the defendant engaged in intentional discriminatory practices,\footnote{159} because the equal protection clause extends only to disparate treatment.\footnote{160} Although the Title VII plaintiff may

\footnotesize{\begin{align*}
154. & \ B. \ SCHLEI \ & \& P. \ GROSSMAN, \ supra \ note 41, \ at \ 681. \\
155. & \ 42 \ U.S.C. \ §§ \ 2000e-2, \ 2000e-3(a). \\
156. & \ Hagans v. Lavine, 415 U.S. 528, 536 (1974); Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970). Through § 1983, constitutional protections against discrimination based on race, color, sex, religion, national origin, age, handicaps, physical attributes, sexual preferences, grooming, and alienage can be asserted. B. SCHLEI & P. GROSSMAN, supra note 41, at 685. There is a limitation of alienage discrimination prohibition where the position involved is bound up with the operation of the states as government entities. Ambach v. Norwick, 441 U.S. 68 (1979). \\
157. & \ 448 U.S. 1 (1980). The Court gave some guidance for determining which federal statutes are covered in \textit{Pennhurst State School v. Halderman}, 451 U.S. 1 (1981) (suggesting inclusion of those which (1) have not been intended by Congress to foreclose § 1983 remedies, and those which (2) create rights, privileges, or immunities). Those courts which hold that Title VII is an exclusive remedy find support in their belief that § 1983 plaintiffs are simply asserting Title VII's substantive statutory rights through § 1983. See supra note 58 and accompanying text.
159. & Massachusetts v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229, 239 (1976) (cases based on the equal protection clause of the fourteenth amendment require a demonstration of discriminatory purpose or intent). There is some doubt as to the validity of this requirement. See Note, supra note 20, at 954-55.
160. & "It remains to be seen whether, in employment cases where there is an extreme statistical disparity revealing a significant under-representation of a protected class, the line between discriminatory impact and purpose will in fact disappear." S. AGID, supra note 159, at 189.
\end{align*}}
proceed under a theory of disparate treatment if he can prove intent, he also has the options of showing either disparate impact (discriminatory effects without intent) or present effects of past discrimination.

The disparate treatment theory demands a showing of discriminatory intent on the part of the employer. Disparate treatment can either be based on discriminatory pattern and practice or on evidence of reprisal or retaliation.

The Title VII claimant, however, may avoid the burden of showing intent and instead show disparate impact or effect. This theory applies where the respondent uses a facially neutral non-job related employment practice which disproportionately affects a protected Title VII classification in hiring, promotion, and other employment decisions. Intent is not an element of disparate impact because "Congress was concerned with the consequences of employment practices, not simply the motivation."

The Title VII claimant's third option is to demonstrate present effects of past discrimination, where an employment related practice

161. To prove disparate treatment, the claimant must demonstrate that he has been treated less favorably than his peers on the basis of one of the enumerated classes set forth in Title VII. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). In order to make a showing of a prima facie case of employment discrimination under this theory, the plaintiff must show that: (1) he belongs to a protected group, (2) he was sufficiently qualified for the position which he sought, (3) he was in fact denied that position, and (4) the position remained open and the employer continued to seek applicants. Id.


163. Williams v. City of New Orleans, 543 F. Supp. 662, 672 (1982). The plaintiff does not have to demonstrate actual subjective intent to discriminate, only that the respondent knows that a specific practice, which is allegedly discriminatory, actually exists. See Sape & Hart, supra note 24, at 884.

164. Thus, the employee may show that the employer has intended to conduct systematic disparate treatment as a standard labor procedure. See Hazelwood School Dist. v. United States, 433 U.S. 299, 307 (1977).

165. Thus, the employee may show that he has been intentionally discriminated against because of his prior assertion of Title VII claims and/or participation in the equal employment opportunity process. See Cooper v. Bell, 628 F.2d 1208, 1211 (9th Cir. 1980). Once the claimant demonstrates disparate treatment the burden shifts to the respondent employer to show a justified business purpose for carrying on the intentional discriminatory actions. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253-56 (1981).


167. Catania, supra note 141, at 786.

"perpetuates discriminatory practices that took place prior to the passage of Title VII."\textsuperscript{169} This theory is often the basis of attacks on seniority systems.\textsuperscript{170}

As a final substantive hurdle, the section 1983 plaintiff must overcome any claims to official immunity.\textsuperscript{171} In a section 1983 action, as opposed to a Title VII action, the plaintiff cannot proceed directly against the state because of eleventh amendment sovereign immunity, but must proceed against the state's officials, unless the state has consented to be a defendant.\textsuperscript{172} However, this prohibition does not extend to municipal corporations or other political subdivisions, sometimes including local school boards.\textsuperscript{173} Thus, municipalities and other local governmental units can be sued under section 1983 for constitutional deprivations where the allegedly unlawful action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."\textsuperscript{174}

C. Section 1983 Offers Remedial Advantages over Title VII

If the section 1983 plaintiff does make the substantive showings of color of law and discriminatory intent, his available remedies are more expansive than those available under Title VII.\textsuperscript{175} This is another advantage of the section 1983 action. The major remedial difference between the two statutes is that section 1983 entitles a

\begin{itemize}
  \item \textsuperscript{169} Id. at A-10.
  \item \textsuperscript{170} Title VII allows an employer to distinguish between employees on the basis of a "bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations," or "to act upon results of any professionally developed ability test," provided that such distinctions are not made with an intent to discriminate. 42 U.S.C. § 2000e-2(h).
  \item \textsuperscript{171} Official immunity doctrines have been generally based on concerns that (1) it would be unjust to subject officers, who are required to make discretionary decisions as part of their job, to such liability; and that (2) this threat of personal liability would hinder the officer's ability to make proper decisions in light of the public good. Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).
  \item \textsuperscript{172} Alabama v. Pugh, 438 U.S. 781, 782 (1978).
  \item \textsuperscript{174} Monell v. Department of Social Servs., 436 U.S. 658, 690 (1978). The Supreme Court reversed Monroe v. Pape, 365 U.S. 167 (1961), finding that local governments are immune from suit under § 1983 and that municipalities and other local governmental units are "persons" under § 1983 and may therefore be liable for both equitable and monetary relief. 436 U.S. at 690.
  \item \textsuperscript{175} The intended purpose of § 1983 remedies is to compensate persons for injuries caused by the deprivation of constitutional rights. Carey v. Piphus, 435 U.S. 247, 253 (1978).
\end{itemize}
plaintiff to recover punitive\textsuperscript{176} and compensatory damages,\textsuperscript{177} including those for mental and emotional distress.\textsuperscript{178} The court’s full range of injunctive and equitable powers is available to remedy section 1983 violations.\textsuperscript{179} The court may grant back pay awards beyond the two-year limitation period provided for in Title VII\textsuperscript{180} and attorney’s fees to the prevailing plaintiff “unless special circumstances would render an award unjust.”\textsuperscript{181}

If the claimant successfully demonstrates a violation of Title VII’s provisions, the remedies available to him are somewhat limited.\textsuperscript{182} The Title VII claimant is not entitled to compensatory or punitive damages,\textsuperscript{183} which must be authorized under some other statute such as section 1983.\textsuperscript{184} Under Title VII, the court may award back pay,\textsuperscript{185} which includes lost salary and overtime, shift pay differential, and fringe benefits,\textsuperscript{186} attorneys’ fees, or other equitable relief.\textsuperscript{187} Back pay awards under Title VII are limited to the two years prior to the action, whereas there is no such restriction with an award under section 1983.\textsuperscript{188}


\textsuperscript{177} Carey, 435 U.S. at 256-57.

\textsuperscript{178} Noble, supra note 139, at 77; Harris v. Harvey, 605 F.2d 330 (7th Cir. 1979).

\textsuperscript{179} Richey, supra note 168, at D2-13.

\textsuperscript{180} “In the individual case, liability commences from the date of the discriminatory conduct, regardless of whether suit is brought under Title VII or one of the other statutes.” Reiss, \textit{Requiem for an “Independent Remedy”: The Civil Rights Act of 1866 and 1871 as Remedies for Employment Discrimination}, 50 S. CAL. L. REV. 961, 1024 (1977). In contrast, Title VII limits damages to the two years prior to EEOC filing. 42 U.S.C. § 2000e-5(g).


\textsuperscript{182} This is one of Title VII’s major drawbacks. Platte, \textit{Employment Discrimination Causes of Action: Alternatives to Title VII}, 57 FLA. B.J. 545, 545 (1983).

\textsuperscript{183} Richerson v. Jones, 551 F.2d 918, 926-28 (3d Cir. 1977); EEOC v. Detroit Edison Co., 515 F.2d 301, 308-10 (6th Cir. 1975).

\textsuperscript{184} Bradshaw v. Zoological Society, 569 F.2d 1066, 1068 (9th Cir. 1978).

\textsuperscript{185} However, there is a major limitation placed on awards of back pay in that they are limited to the two-year period immediately preceding the filing of the charge of discrimination with the EEOC. 42 U.S.C. § 2000e-5(g).


\textsuperscript{188} \textit{See supra} note 179 and accompanying text. Some commentators have concluded that, due to the severe substantive and procedural hurdles that a § 1983 plaintiff must over-
Another advantage for a section 1983 plaintiff is the possibility of a jury trial, if he is claiming non-equitable damages. Thus, a section 1983 plaintiff who seeks punitive and compensatory damages will be permitted a jury trial but is not entitled to one when he only seeks equitable relief such as back pay or reinstatement. The Title VII claimant is not entitled to a jury trial, unless his Title VII claim is joined with an action which permits jury determination of issues common to both claims.

The equitable remedies available under both statutes are similar. Each allows declaratory and injunctive relief, including reinstatement and promotions, and other specific forms of equitable relief. The Title VII claimant can receive an injunction prohibiting the unlawful discriminatory practice.

D. The Role of Res Judicata

Finally, the role of res judicata in the exclusivity conflict merits consideration. Res judicata, or claim preclusion, is a doctrine which holds that a final judgment on the merits of an action precludes both the parties and their privies from relitigating, at any time, those causes of action which were actually litigated. Collateral estoppel, or issue preclusion, dictates that issues litigated and decided in a prior action that culminated in a judgment on the merits, cannot be relitigated by those same parties, even if the subsequent
suit arises out of a different cause of action.\footnote{196} Any time that a state or local government employee invokes Title VII, that employee will be required to exhaust the procedural requirements of Title VII before proceeding with a judicial suit.\footnote{197} There is some possibility that this will lead to preclusion of a subsequent section 1983 action. In \textit{Kremer v. Chemical Construction Co.},\footnote{198} the Supreme Court held that a judgment in state court, on review of a prior administrative hearing which adjudicated a state law claim identical to the elements of a Title VII claim, must receive full faith and credit in federal court and bars a subsequent Title VII filing.\footnote{199}

However, \textit{res judicata} does not apply to unreviewed state administrative determinations.\footnote{200} \textit{Res judicata} also does not apply where the claimant has previously pursued his grievance to final arbitration under a nondiscrimination clause of a collective bargaining agreement.\footnote{201} Of course, if a court dismisses a section 1983 claim for reasons not on the merits, the \textit{res judicata} doctrine is not activated and does not bar eventual commencement of a Title VII action.\footnote{202} Some courts which find Title VII nonexclusive have found a subsequent Title VII action permissible even where a prior suit has occurred, or is proceeding concurrently, under other civil rights

\footnote{196. Commissioner v. Sunnen, 333 U.S. 591, 597-98 (1948).}
\footnote{197. Although a claimant may not have fully exhausted the requirements of Title VII, at least one court would permit him to proceed with the civil action in federal district court if that court’s competing-concerns analysis weighed in his favor. The analysis considers: (1) the existence of potential irreparable harm to the claimant, (2) whether failure to act would cause a permanent foreclosure of adequate relief, and (3) whether the EEOC’s case load precludes the granting of preliminary relief. Eldredge v. Carpenters 46 N. Calif. Counties Joint Apprenticeship & Training Comm., 440 F. Supp. 506, 516 (N.D. Cal. 1977).}
\footnote{198. 456 U.S. 461 (1982).}
\footnote{200. Schwartz, \textit{supra} note 195, at 387; Catania, \textit{supra} note 141, at 779 n.9.}
\footnote{202. However, a Title VII action may be barred if the claimant has had the opportunity to intervene in an EEOC action on his behalf and he has failed to do so. Duquesne, \textit{supra} note 146, at 596. The EEOC’s action may likewise be barred if it parallels a private suit that is already pending. The EEOC’s right to sue terminates when the claimant files his own action. At that point the EEOC may exercise its right to intervene. EEOC v. Cronin, 370 F. Supp. 579, 580 (E.D. Mo. 1973).}
statutes, due to the fact that the plaintiff had not yet received a right to sue notice from the EEOC and thus could not have invoked Title VII in the prior action.203

If a court subscribes to the view that Title VII is not exclusive, then other res judicata considerations are present. Courts have found that a prior civil rights action under section 1983 will not bar a subsequent claim under Title VII.204 But in Harrington v. Vandalia Butler Bd. of Ed., the Sixth Circuit held that a judgment in a Title VII action will bar a subsequent action under section 1983.205 However, this includes only judicial Title VII judgments and not the EEOC's finding that a violation has occurred.206 Preclusion does not apply where the individual is simply procedurally barred, as by the running of the statute of limitations, from proceeding under Title VII,207 but does apply where the plaintiff has obtained a judgment in a state court action if his federal section 1983 claim could have been, but was not, litigated in that state action.208

IV. THE RESOLUTION: SECTION 1983 MUST ALWAYS BE AVAILABLE TO STATE AND LOCAL GOVERNMENT EMPLOYEES

A dilemma has arisen in the employment discrimination law applicable to state and local government employees. The lower federal courts are producing conflicting decisions209 which create significant, detrimental procedural, substantive, and remedial consequences for those employees who are affected.210 Currently, the federal antidiscrimination relief available to state and local government employees varies among jurisdictions. This is clearly an unsatisfactory situation, as federal law ought to be uniformly applied. It is time for a definitive, uniform solution.

This Note asserts that Title VII was not intended to be, nor should it be read as, an exclusive remedy available to employees of

205. 649 F.2d 434, 437 (6th Cir. 1981).
206. Flowers v. Local 6, Laborers Int'l Union of N. Am., 431 F.2d 205, 207 (7th Cir. 1970); Fekete v. United States Steel Corp., 424 F.2d 331, 336 (3d Cir. 1970). This is true regardless of whether the EEOC did or did not find cause to believe the allegation. The nonpreclusiveness of the "cause to believe" finding is considered appropriate due to the nonadjudicatory nature of the EEOC and the informality of its procedures. Note, supra note 28, at 1205.
207. B. SCHLEI & P. GROSSMAN, supra note 41, at 1125.
209. See supra notes 49-137 and accompanying text.
210. See supra notes 138-208 and accompanying text.
state and local governments. Section 1983 ought to be available regardless of any showing of an independent basis. This position is founded on three interrelated premises. First, the legislative history and purpose of the 1972 amendments to Title VII inescapably leads to the conclusion that the extension of Title VII was meant to supplement, rather than supplant, the preexisting remedy under section 1983. Courts have drawn analogous conclusions in other areas based on legislative history. Secondly, plaintiffs who set forth discrimination claims under section 1983 are not simply asserting a Title VII claim through the remedial device of section 1983 but are requesting relief from state actions which violate constitutional rights. Section 1983 was designed precisely to afford such relief. Finally, both Title VII and section 1983 can comfortably coexist in the federal scheme to combat employment discrimination in the public sector.

When a statute does not explicitly address an issue, courts must strive to interpret the words of the statute in light of, and to promote rather than defeat, the underlying legislative purpose. When ascertaining congressional intent, courts should not limit their investigation to an isolated portion of the statute, but should consider the entire statute in light of "the purpose the original enactment served, the discussion of statutory meaning in committee reports, the effect of amendments—whether accepted or rejected—and the remarks in debate preceding passage." Finally, the courts must be mindful that the creation of a new remedy does not automatically invalidate existing remedies. "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Any intention to repeal

211. See infra notes 239-40 and accompanying text.
216. Morton v. Mancari, 417 U.S. 535, 551 (1974). See also Watt v. Alaska, 451 U.S. 259, 267 (1981) ("We must read the statutes to give effect to each if we can do so while preserving their sense and purpose."); Ridgeway v. United States, 558 F.2d 357, 362 (6th Cir. 1977) ("Where Congress has enacted legislation on a particular subject . . . subsequent legislation will not be construed to modify, repeal or supplant the legislation, particularly where both statutes serve distinct purposes . . . [r]ather, the courts will reconcile the earlier statute and the later legislation if possible.").
prior acts must be shown through clear and manifest evidence.\footnote{217} Courts must therefore interpret Title VII according to these doctrines of statutory construction.\footnote{218} Title VII is silent on the issue of exclusivity. It contains no indication of exclusivity in its language. Therefore, the courts must examine the statutory scheme in its entirety, and also the legislative history, for evidence of congressional intent regarding exclusivity. As a starting point, the courts must note that Title VII does not automatically override the remedy, albeit cumbersome, provided by section 1983.

It is anything but clear that Congress intended to repeal section 1983 as a remedy for state and local employees. The 1972 amendments to Title VII were not the first federal statutes to protect state and local government employees from unlawful job discrimination. Such employees were already protected under the fourteenth amendment through section 1983. Thus, one explanation for the exclusion of state and local government employees from the original provisions of Title VII is that Congress may have believed that these employees already were adequately protected from employment discrimination. Because of this omission, however, state and local government employees were denied the opportunity Congress provided their counterparts in the private sector: the right to proceed with a federal remedy for employment discrimination which in its initial stages allows for dispute resolution through informal mechanisms. This restriction, combined with the "empty promise" of section 1983 "due to the expense and time involved in pursuing a Federal court suit,"\footnote{219} probably contributed to the widespread employment discrimination by state and local government employers prior to the 1972 amendments.\footnote{220}

\footnote{217. In \textit{Posadas v. National City Bank}, the Supreme Court declared that even implied repeals are disfavored and should only be found in two circumstances: (1) if the provisions of both statutes are irreconcilable, the latter act will be considered as repealing the conflicting provisions of the earlier one, and (2) if the subsequent act covers the whole first act and is intended as repealing the earlier act, with legislative intention being clear and manifest, it will be so construed. 296 U.S. 497, 503 (1936).}

\footnote{218. \textit{McGuire v. McGuire}, 608 P.2d 1278, 1285 (Wyo. 1980).}


\footnote{220. A 1969 report by the United States Commission on Civil Rights concluded that "[s]tate and local governments have failed to fulfill their obligation to assure equal job opportunity . . . . Not only do State and local governments consciously and overtly discriminate in hiring and promoting minority group members, but they do not foster positive programs to deal with discriminatory treatment on the job." \textit{For All the People . . . By All the People: A Report on Equal Opportunity in State and Local Government Employment}, excerpts reprinted in 118 CONG. REC. 1070 (1972).}
In 1972, the stage was set for Congress to provide state and local government employees with another device to combat employment discrimination. There was "no reason why persons working in the public sector should not enjoy the same protection and rights as those in the private."221 The evidence indicates that this was Congress' rationale when it expanded the scope of Title VII in 1972. Congressional concern was two-fold. First, Congress perceived an injustice to the state and local employees who were denied an administrative forum which was available to their counterparts in the private sector.222 Secondly, "the adequacy of protection against employment discrimination by state and local governments has been severely impeded by the failure of the Congress to provide Federal administrative machinery to assist the aggrieved employee."223 One of the first courts to consider this area after the 1972 amendments concluded that the amended Title VII obviously signified a congressional admission that section 1983 was inadequate to the task of eradicating employment discrimination in state and local government.224

The overall scheme of Title VII supports the conclusion that it is supplementary to preexisting remedies. The deferral provisions of Title VII require claimants initially to proceed with state remedies (many of which were in existence prior to the enactment of Title VII) prior to commencement of a Title VII remedy.225 The lack of an explicit statement of nonexclusivity is understandable—under standard doctrines of statutory construction, Congress would not expect courts to assume that section 1983 had been repealed.

Although the language of Title VII does not explicitly state that it supplementes section 1983, the legislative history of Title VII makes this conclusion very clear.226 The House Education and La-
bor Committee made a clear analogy to section 1981:

In establishing the applicability of Title VII to State and local government employees, the Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to the Civil Rights Act of 1870 and 1871, 42 U.S.C. §§ 1981 and 1983, is in no way affected... Title VII was envisioned as an independent statutory authority meant to provide an aggrieved individual with an additional remedy to redress employment discrimination. Two recent court decisions... have affirmed this Committee's belief that the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive. The bill, therefore, by extending jurisdiction to State and local government employees does not affect existing rights that such individuals have already been granted by previous legislation.227

After explaining in detail the working relationship between the EEOC and the federal courts when an individual submits his claim to the EEOC, the drafters asserted that "neither the above provisions regarding the individual's right to sue under Title VII, nor any of the other provisions of this bill, are meant to affect the existing rights granted under other laws."228 The most emphatic statement asserting nonexclusive intent again comes from the House Education and Labor Committee Report: "Inclusion of state and local employees among those enjoying the protection of Title VII provides an alternate administrative remedy to the existing prohibition against discrimination perpetuated 'under color of state law' as embodied in the Civil Rights Act of 1871, 42 U.S.C. § 1983."229

Furthermore, Congress explicitly considered and rejected the possibility of making Title VII an exclusive remedy. Two amendments to this effect were proposed and rejected. Senator Hruska's proposed amendment would have made Title VII "the exclusive remedy of any person claiming to be aggrieved by an unlawful

instances the legislative history was entirely silent on the issue of preemption. Storey v. Board of Regents of Univ. of Wis. Sys., 600 F. Supp. 838, 840 (W.D. Wis. 1985).

227. H.R. REP. No. 238, 92d Cong., 2d Sess. 18, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 2137, 2154. Both cases referred to in the House Report found that Title VII was not a barrier to a § 1981 suit for private discrimination. Young v. International Tel. and Tel. Co., 438 F.2d 757 (3d Cir. 1971); Saunders v. Dobbs House, 432 F.2d 1097 (5th Cir. 1970). The Young court noted that conciliation should not be disregarded, and that since most § 1981 plaintiffs will be seeking equitable relief, the availability of conciliation by the EEOC will be a factor weighed in granting relief. 438 F.2d at 764.


employment practice of an employer, employment agency, or labor organization. This proposal was rejected by the Senate on both the original vote and again on a motion to reconsider. The House had already attempted and failed to incorporate a similar exclusivity provision. After the Senate's rejection of the Hruska amendment, the House abandoned exclusivity altogether.

The statements of concerned Senators exemplify the ultimate legislative position on exclusivity. Senator Williams noted that the purpose of the 1972 amendments was to "correct deficiencies in the original provisions and to strengthen national policy against employment discrimination." He thought that the Hruska amendment would substantially reduce Congress' ability to rectify and remedy cases of employment discrimination, and that "to lock the aggrieved person into the administrative remedy would narrow rather than strengthen our civil rights enforcement effort." Senator Javits recognized that "[t]here are other remedies, but those other remedies are not surplusage. Those other remedies are needed to implement the promise we make under the Constitution to prevent discrimination in employment. The laws of 1866, 1871, as well as the law of 1964 are to implement that promise."

This same legislative history was cited by the Supreme Court in Johnson v. Railway Express Agency, Inc. The Court specifically

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230. Proposed amend. no. 877 amending S. 2515, reprinted in 2 Legislative History of the Equal Employment Opportunity Act of 1972, at 1382 (1972). Senator Hruska argued that, without an exclusivity provision, respondent employers would be subjected to multiple, non-preclusive actions in a number of separate and distinct forums which would inhibit conciliation, and also, that employees would bypass the administrative process. 118 CONG. REC. 3368-70 (1972) (statements of Sen. Hruska).

231. 118 CONG. REC. 3373 (1972).

232. Id. at 3965.


234. Joint Explanatory Statement of Managers at the Conference on H.R. 1746 to Further Promote Equal Employment Opportunities for American Workers, reprinted in 1972 U.S. CODE CONG. & AD. NEWS, 2179, 2181-82. But see Brief for Appellee at 20, Trigg, 766 F.2d at 299, for an argument that the House retreated on the exclusivity provision on the grounds that Title VII could only be construed as the exclusive remedy and that an explicit provision covering it was unnecessary, or that it was a decision thought best left up to the courts.

235. 118 CONG. REC. 3371 (1972) (statement of Sen. Williams). Senator Williams stated that the congressional purpose was not to repeal existing civil rights remedies for employment discrimination, and that making Title VII the exclusive remedy would be tantamount to negating the "entire legislative history of the Civil Rights Act." Id. at 3372.

236. Id. at 3371.

237. Id. at 3372. He added that, because of very long backlogs in EEOC and trial delays, Congress should augment, not diminish, the range of remedies available. Id. at 3371.


referred to the House Report and the Senate's failed exclusivity amendment and found that "Congress has made [a choice] available to the claimant by its conferring upon him independent administrative and judicial remedies," under Title VII and section 1981. Since section 1983 was considered concurrently with section 1981 throughout the legislative process, the same conclusion applies to section 1983—it is only a matter of time before the Court makes the same explicit finding regarding section 1983 as it has made with respect to section 1981.

In light of the purposes of extending Title VII protections to state and local government employees in 1972, the legislative history supporting those amendments, and persuasive Supreme Court analysis of analogous circumstances, only one conclusion is reasonable. Congress designed the extension to give these employees the option of an expeditious mechanism for resolution of their employment discrimination claims.

This same conclusion was even recognized by the district court in Tafoya v. Adams, a case which subscribed to the view that Title VII is exclusive. Tafoya would allow simultaneous resolution of a section 1983 claim and a Title VII claim, as long as the two have an independent factual basis. Surely, this possibility could not exist if Title VII entirely eclipses section 1983. The Tafoya court's real concern, which seems to be at the hub of the exclusivity issue, is the proper application of Maine v. Thiboutot to the public sector employment context. In Thiboutot, the Supreme Court found that the remedial device of section 1983 could be used to remedy violations of federal statutory law as well as violations of constitutionally guaranteed rights. Although not explicitly stated, the Tafoya court's concern is evident in its observation that “[t]he legislative history, however, does not indicate whether Congress intended to permit the concurrent assertion of Title VII claims with

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240. *Id.* at 459-61. The Court also noted that the two Acts were not coextensive in that "Title VII offers assistance in investigation, conciliation, counsel, waiver of court costs, and attorneys' fees, items that are unavailable at least under the specific terms of § 1981." *Id.* at 460. *See also supra* note 218 and accompanying text.

241. One author has suggested the availability of other potential common law causes of action for employment discrimination including: wrongful termination, tortious interference with the employment relationship, intentional breach of an implied contractual relationship, and intentional infliction of employment discrimination. Platte, *supra* note 182, at 546-47.


243. *Id.* at 1102-03. *See supra* notes 84-94 and accompanying text.

244. 448 U.S. 1 (1980).

245. *Id.* at 4. *See supra* note 17 and accompanying text.
§ 1981 claims and § 1983 claims in a single judicial proceeding.\textsuperscript{246}

Other courts also appear reluctant to allow plaintiffs to use the remedial device of section 1983 to assert violations of federal statutory law, such as provisions of Title VII, and simply bypass the administrative process set forth in Title VII. This apprehension derives from a misconception of what section 1983 plaintiffs, who are state or local government employees, are doing when they are asserting their claims. They are using section 1983 to remedy violations of constitutional rights,\textsuperscript{247} not violations of the substantive rights granted by Title VII. State and local government employees benefit uniquely from the fact that the state is their employer, and therefore any unconstitutional employment discrimination may have been conducted "under color of state law," so that section 1983 applies.

The Supreme Court precedent cited by those courts claiming Title VII exclusivity is distinguishable and unpersuasive. In \textit{Brown v. G.S.A.}, the Court prohibited a federal employee from bypassing the Title VII remedy.\textsuperscript{248} Within Title VII, Congress specifically enacted an independent, comprehensive scheme for federal employees, consisting of administrative and judicial remedies.\textsuperscript{249} But state and local government employees are not provided for in the same manner as federal employees—Congress simply included them in the Title VII provisions which protect private sector employees. Analogy to federal government employees is unwarranted. \textit{Great American Savings \\& Loan Association v. Novotny}\textsuperscript{250} is also distinguishable. There, a private sector employee obtained federal court jurisdiction through section 1985(3) and had no substantive basis other than Title VII upon which to base his claim, so the Court denied it.\textsuperscript{251} That private sector plaintiff was attempting to bypass the administrative process through "artful pleading." The state or local government employee, in contrast, does have another basis upon which to rest his substantive claim: the fourteenth amendment.

It is clear that Title VII's 1972 amendments did not repeal the constitutional rights granted to state and local government employees, nor the device to remedy violations of them. Therefore, the

\textsuperscript{246} Tafoya, 612 F. Supp. at 1102.
\textsuperscript{247} This is precisely what section 1983 was originally designed to do. See supra notes 15-17 and accompanying text.
\textsuperscript{248} 425 U.S. at 834. See supra notes 65-70 and 111-14 and accompanying text.
\textsuperscript{249} 42 U.S.C. § 2000e-16. See supra notes 22-23 and accompanying text.
\textsuperscript{251} Novotny, 442 U.S. at 369-70. Novotny's Title VII claim had been dismissed. See supra note 69.
The only reasonable conclusion is that these employees may still use section 1983 to remedy constitutional violations regardless of the existence of some independent factual basis for the section 1983 claim. It is difficult to understand why some jurisdictions demand an independent factual basis. There is no reason why a single set of facts could not support both a Title VII and a section 1983 claim. Certainly, a court must require the plaintiff to exhaust the Title VII administrative remedies before judicial determination of the Title VII claim. However, the court should not dismiss the section 1983 claim if the plaintiff can make the requisite showing of a constitutional or statutory violation and meet the "under color of state law" requirement. If the plaintiff has exhausted the administrative process and brings suit based on both section 1983 and Title VII, the court should not dismiss the section 1983 claim nor require an independent factual basis since the plaintiff is simply asserting his constitutional rights.

The state or local government employee will actually have an independent substantive basis (such as the fourteenth amendment), which is entirely separate and distinct from Title VII's substantive rights. Also, the section 1983 plaintiff must demonstrate disparate treatment (intentional discrimination), whereas a Title VII plaintiff only has the burden of demonstrating disparate impact (discriminatory effects). Any assertion that the Title VII plaintiff would assume the additional burdens associated with section 1983, simply to avoid the time delay of at least initiating the administrative process, is ludicrous.

Finally, there is an issue of fairness. Section 1983 plaintiffs are entitled to trial by jury and to certain remedial devices which are not available to Title VII claimants. To require a true section 1983 plaintiff to call his first claim a Title VII claim would eliminate that plaintiff's ability to seek the very recovery that was designed to deter constitutional violations.

The state or local government employee must have a choice. He can proceed under section 1983 and assume the additional burdens

252. Analogizing from the Johnson decision, the § 1983 statute of limitations would not be tolled by the filing of a charge with the EEOC. Thus, in order to preserve the § 1983 claim the plaintiff should either file both claims in district court and petition the court to stay the proceedings until the administrative process is completed, or "take the minimal steps necessary to preserve each claim independently." Johnson, 421 U.S. at 465-66. Although the defendant may argue that this places too great a burden on his resources, the result follows directly from a congressional policy judgment. Id.

253. See infra notes 159-70 and accompanying text.
254. See infra notes 189-92 and accompanying text.
it imposes, or he can use Title VII and initially attempt to seek resolution in the administrative realm. As the Supreme Court noted in holding that section 1981 is independent of Title VII, "[T]he choice is a valuable one. Under some circumstances, the administrative route may be highly preferred . . . under others the reverse may be true."255 Notwithstanding the obstacles and delays involved in completing a section 1983 claim, punitive and compensatory damage awards may lie at the end of a successful section 1983 claim. That possibility must remain open to state and local government employees.256 Although it has been argued that there is unfairness in allowing government employees, but not private sector employees, the right to immediate judicial access and other "fringe benefits" of a section 1983 claim,257 private sector employers simply do not have the unique protection of section 1983, nor do they need protection from the state in their employment arrangements.

To restrict state and local government employees to Title VII's administrative process, or to potentially biased state remedies, would severely undermine the federal effort to prohibit employment discrimination by state and local governments. Section 1983 and Title VII must act as a "flexible network of remedies to guarantee equal employment opportunities."258

V. CONCLUSION

The federal courts are in dire need of a decisive resolution to their uncertainty over whether state and local government employees may pursue claims under both Title VII and section 1983.259 The legislative history of the 1972 amendments to Title VII, which expanded the scope of Title VII's provisions to include state and local government employers,260 plainly demonstrates congressional

256. Furthermore, the EEOC process has always been accompanied by a deluge of backlogged cases. A 1974 report showed that the EEOC takes 2 1/2 years to process a charge, another showed that the average time was 32 months. Hill, supra note 25, at 69. The EEOC has traditionally been hampered by inadequate funding and a shortage of staff to meet the rising number of complaints . . . . These problems . . . have resulted in administrative problems and an ever-increasing backlog of pending charges which will further slow the agency's ability to undertake effectively the new responsibilities which it has been granted.
Sape & Hart, supra note 24, at 889.
258. Johnson, 421 U.S. at 472.
259. See supra notes 49-137 and accompanying text.
260. See supra note 41 and accompanying text.
intent to allow state and local government employees to simultane-
ously seek relief under both statutory provisions. Since each of
these claims rests on a separate and independent substantive basis,
the inescapable conclusion is that both claims may be brought in the
same judicial proceeding after exhaustion of the Title VII adminis-
trative process, regardless of whether they are founded upon the
same factual allegations.

BRIAN RICHARD HENRY

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261. See supra notes 226-38 and accompanying text.