## Note

# Modern Statutory Interpolation: Correcting Court-Made Deficiencies in Title VII Law

*Jordan Boudreaux**

*Title VII of the Civil Rights Act of 1964 is a monumentally important piece of legislation that ensures all Americans can enjoy a fair workplace, free of discrimination. Even so, the federal circuits remain split on a significant aspect of Title VII's interpretation. Notably, in some circuits, employees can still be scheduled or transferred based on their protected class, with minimal redress under Title VII.*

*In* Hamilton v. Dallas County*, the Fifth Circuit upheld an employer's explicitly sex-discriminated schedule as unactionable under the court's standard. In doing so, the Fifth Circuit temporarily validated explicit discrimination in a key aspect of employment: the hours that an employee works. This Note argues that* Hamilton *does not exist in a vacuum and that the very possibility for the court to rule as it did in* Hamilton *is indicative of broader deficiencies in Title VII's case law and statutory interpretation.*

*This Note reviews circuit courts' interpretations of Title VII and showcases how those courts ingrained bad precedent into longstanding law through questionable interpretations. While this Note gives particular attention to* Hamilton *and the specific issue of discriminatory scheduling and transfers, it more broadly criticizes courts' general willingness to introduce arbitrary limitations to Title VII that prevent genuinely harmed individuals from seeking recovery. In questioning courts' interpretive*

* J.D. Candidate 2024, University of Minnesota Law School; Managing Editor, *Minnesota Law Review* Volume 108. I give a massive thank-you to Professor Charlotte Garden and to everyone on the *Minnesota Law Review* for providing the academic and technical support to make this Note happen. An additional thank-you to my family and to my partner, Sydnie, for helping me stay on the right side of sanity throughout law school. 

*consistency, this Note also highlights the methodological and practical shortcomings of applying a textualist interpretive methodology to Title VII. This Note concludes by proposing a uniquely broad and purposive interpretation of Title VII. Through this, this Note builds off of other scholars' acknowledgements of the Civil Rights Act as a uniquely influential statute, as well as William Eskridge's particular advocacy for broad interpretations of culturally ingrained statutes.*

## INTRODUCTION

Felesia Hamilton, a correctional officer, works every weekend—she would like both those days off, but only her male coworkers are permitted to take the full weekend off.[1] Elsewhere, Reginald Anderson, a Black firefighter captain, is moved to the nightshift.[2] Despite his respectable seniority, higher command wants to diversify the dayshift by ensuring that a white man is present.[3] And finally, Mary Chambers, a public servant in the D.C. Attorney General's office, is repeatedly denied a transfer to a different office,[4] while her male colleagues are granted those same transfers. Her sex is a sufficient reason to deny her the privilege.[5]

Despite the antiquated nature of the above incidents of discrimination, all three of these scenarios recount facts from cases decided within the past four years.[6] In each of these examples, an employer dictated their employee's work conditions on the basis of that employee's race or sex.[7] Neither common decency, nor any common law or legislative protection, was enough to discourage their employers from denying a shift change or transfer. The essential foundations of these employees' work-lives were dictated by their race or sex. Prior to each court's decision, these

---

1. Hamilton v. Dallas County (*Hamilton I*), 42 F.4th 550, 552 (5th Cir. 2022).

2. Threat v. City of Cleveland, 6 F.4th 672, 676 (6th Cir. 2021).

3. *Id.*

4. Chambers v. District of Columbia, 35 F.4th 870, 873 (D.C. Cir. 2022).

5. *Id.* ("The [district] court concluded that Chambers had proffered no evidence that the denial of her transfer requests, *even if motivated by discriminatory animus*, caused her 'objectively tangible harm.'" (emphasis added) (citation omitted)).

6. *Hamilton I*, 42 F.4th at 552; *Chambers*, 35 F.4th at 873; *Threat*, 6 F.4th at 676.

7. *Hamilton I*, 42 F.4th at 555 ("In other words, no inference or presumption is required to get from the sergeant's statement—that the new scheduling policy was based on gender—to the conclusion that Plaintiffs-Appellants were denied full weekends off because they are women." (footnote omitted)); *Chambers*, 35 F.4th at 874 ("Therefore, the question before us, put in terms of the relevant statutory text, is whether an employer that denies an employee's request for a job transfer because of her sex (or another protected characteristic) 'discriminate[s] against' the employee with respect to the 'terms, conditions, or privileges of employment.'"); *Threat*, 6 F.4th at 676 ("Carlton reassigned Anderson to a night shift. She did so to 'create diversity' among what otherwise would have been a day shift staffed entirely by black captains.").

discriminatory actions were perfectly legal in the respective circuits where each employee filed suit.[8]

Congress passed the Civil Rights Act of 1964 (the Act) to protect individuals from discrimination based on their protected class.[9] Since the Act's passage, legislation and case law have repeatedly reaffirmed the Act as a broad bar to material discrimination based on one's immutable characteristics.[10] Title VII of the Act stands as a key facet of employment law, protecting workers from workplace discrimination in a variety of forms.[11] Even so, its protections are not limitless. Since the decades following its passage, courts have struggled to determine the scope

8. *Chambers*, 35 F.4th at 882; *Threat*, 6 F.4th at 682; *Hamilton I*, 42 F.4th at 557; *see also* Brown v. Body, 199 F.3d 446, 457 (D.C. Cir. 1999) (announcing the rule that applied before the prior cited decisions, that a plaintiff "does not suffer an actionable injury unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of employment . . . such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm"). The court in *Chambers* overturned the rule in *Brown* that prevented plaintiffs from recovering for discriminatory scheduling and transfers based on their protective class, which had effectively legalized discriminatory actions as in *Hamilton I*.

9. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 241 ("[The purpose of the act is to] enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations . . . to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes").

10. *See generally, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (expanding the scope of actionable sex discrimination claims and permitting greater procedural rights for all claimants); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (lengthening the statute of limitations for discriminatory pay claims); Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (holding that policies with disparate impacts on particularized racial groups are forbidden by the Act, even if facially neutral); Bostock v. Clayton County, 590 U.S. 644, 683 (2020) (bringing sexual orientation and gender identity within the scope of Civil Rights Act employment protections).

11. *See generally* Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2) (listing unlawful employment practices); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (recognizing sexual harassment as a Title VII violation); *Bostock*, 590 U.S. at 683 (expanding the interpretation of Title VII to include claims based on sex/gender).

of Title VII's applicability[12]—too frequently to the detriment of wronged employees.[13]

In the end, all three of the above scenarios were decided in favor of the discriminated-against employees.[14] However, in *Hamilton v. Dallas County* (*Hamilton I*), where a female correctional officer sought the opportunity for weekends off like her male coworkers, the Fifth Circuit initially rejected Felesia Hamilton's discrimination claim.[15] This explicitly permitted employers to schedule their employees on the basis of those employees' protected characteristics.[16] The court's standard for harm required that a plaintiff suffer an "ultimate employment decision"—an undefined standard that only held the most severe employer actions as justiciable.[17] Under this standard, the court found that a scheduling dispute was not actionable.[18]

Through this ruling, the Fifth Circuit accomplished two things. First, the court, albeit temporarily,[19] reinforced its stringent standard for bringing a Title VII claim.[20] Second, it continued a circuit split with respect to the specific issue of discriminatory employee scheduling and transfers, by holding those

---

12. *See infra* Part I (discussing how courts have improperly limited the scope of Title VII).

13. *See* Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 255–56 (1993) (concluding that volatility in Supreme Court Title VII decisions has led lower courts to improperly discard cases); *see also* Shannon Vincent, Comment, *Unbalanced Responses to Employers Getting Even: The Circuit Split Over What Constitutes a Title VII-Prohibited Retaliatory Adverse Employment Action*, 7 U. PA. J. LAB. & EMP. L. 991, 992–95 (2005) (noting the stringency of some federal circuit courts' actionable Title VII harm standards).

14. Chambers v. District of Columbia, 35 F.4th 870, 882 (D.C. Cir. 2022); Threat v. City of Cleveland, 6 F.4th 672, 682 (6th Cir. 2021); *Hamilton I*, 42 F.4th 550, 552 (5th Cir. 2022), *vacated* by Hamilton v. Dallas County, 50 F.4th 1216, 1216 (5th Cir. 2022), *reversed* by Hamilton v. Dallas County (*Hamilton II*), 79 F.4th 494, 502 (5th Cir. 2023).

15. *Hamilton I*, 42 F.4th at 556 ("[B]ecause the denial of weekends off is not an ultimate employment decision, the district court correctly granted the County's motion to dismiss on the grounds that Plaintiffs-Appellants did not plead an adverse employment action.").

16. *Id.*

17. *Id.* at 555–56.

18. *Id.* at 555–57.

19. *Hamilton II*, 79 F.4th at 506 (overruling the ultimate employment decision standard).

20. *Hamilton I*, 42 F.4th at 557.

issues outside of Title VII's scope.[21] Where the Sixth and D.C. Circuits had held that transfers and scheduling solely based on one's protected characteristics were covered by Title VII, the Fifth Circuit held that those actions were not covered.[22] Under the Fifth Circuit's logic, a woman could be exclusively scheduled on night shifts or weekends based on her sex, or a Black man could be forced to work in blistering heat because of his race.[23] Upholding the rule validated—or at least avoided punishing—blatant discrimination, challenging Title VII's command.

Even as an overtly conservative court,[24] the Fifth Circuit was quick to acknowledge the unsatisfactory result of its holding, citing the strength and persuasiveness of the plaintiffs' factual allegations.[25] Although bound by existing law and procedural mandates, the court realized that holding discriminatory scheduling and transfers outside of Title VII's scope was in tension with the Act.[26] In justifying its decision, the three-judge panel in *Hamilton I* stated that it was bound by a rule of orderliness.[27] As a three judge panel, it did not have the authority to overturn circuit precedent. Only the en banc court could do so.[28] Shortly after the panel issued its opinion, the court vacated the

21. *Id.*

22. *See infra* Part I.B (discussing the circuit split on the issue of Title VII's applicability to transfers and scheduling).

23. Oral Argument at 20:34, *Hamilton II*, 79 F.4th 494 (5th Cir. 2023) (No. 21-10133), https://www.ca5.uscourts.gov/OralArgRecordings/21/21-10133_1-24-2023.mp3 (last visited Jan. 19, 2024) (noting the focus of the case on whether a woman could have employment decisions made about her based on her gender).

24. *See* Andreas Broscheid, *Comparing Circuits: Are Some U.S. Courts of Appeals More Liberal or Conservative than Others?*, 45 L. & SOC'Y REV. 171, 188 (2011) (analyzing the ideological slants of the federal circuits and confirming that the Fifth Circuit issues more "conservative" decisions than the median).

25. *Hamilton I*, 42 F.4th at 558; *Hamilton II*, 79 F.4th at 499–506.

26. *Hamilton I*, 42 F.4th at 557 ("The strength of the allegations here—direct evidence of a workforce-wide policy denying full weekends off to women in favor of men—coupled with the persuasiveness of *Threat*, *Chambers*, and *James*, make this case an ideal vehicle for the en banc court to reexamine our ultimate-employment-decision requirement and harmonize our case law with our sister circuits' to achieve fidelity to the text of Title VII.").

27. The Fifth Circuit's "rule of orderliness" forbids a three-judge panel from overruling existing circuit precedent—it ensures that major changes are heralded by the en banc court or overriding direction from the Supreme Court. *Id.* (citing Ortega Garcia v. United States, 986 F.3d 513, 532 (5th Cir. 2021)).

28. *Id.*

original opinion and scheduled *Hamilton I* for an en banc rehearing.[29] Indeed, on rehearing (*Hamilton II*) the en banc court overruled the ultimate employment decision standard.[30] The Fifth Circuit reoriented itself to Title VII's text and congressional intent, noting that "Congress did not say that Title VII liability is limited to ultimate employment decisions."[31] Even so, the court did not specify what new standard to apply, and solely recounted Title VII's statutory text in its holding.[32] Further fueling the ambiguity of its decision, the court continued to argue over Title VII's applicable scope in a set of dueling concurrences.[33] Thus, even as the Fifth Circuit has done away with the ultimate employment decision standard through a concerted textualism, the contours of its future approach to Title VII cases remain unclear.

This Note argues that the *Hamilton* decisions do not exist in a vacuum. That it was even possible for the court to rule as it did in *Hamilton I*—and that it was necessary for the en banc Fifth Circuit to overrule a blatantly discriminatory holding—is indicative of broader deficiencies in Title VII's case law and statutory interpretation. The Fifth Circuit was initially bound to uphold its immediate discrimination because of the long-standing circuit precedent that controlled it.[34] Moreover, as the factual examples above show, the legal conditions that led to *Hamilton* were not unique to the Fifth Circuit.[35] Even though the Fifth Circuit course-corrected in the immediate case, the *Hamilton I*

29. Hamilton v. Dallas County, 50 F.4th 1216, 1216 (5th Cir. 2022) (granting petition for rehearing en banc). The court vacating its opinion was not the result of any merits judgment but was rather a product of the Fifth Circuit's procedural rules. *Id.*

30. *Hamilton II*, 79 F.4th at 502.

31. *Id.* at 501.

32. *Id.* ("Absent persuasive indications to the contrary, we presume Congress says what it means and means what it says." (quoting Simmons v. Himmelreich, 578 U.S. 621, 627 (2016))).

33. *Compare id.* at 506–09 (Ho, J., concurring) (praising the majority's textualist reading and arguing that Title VII should be used to defeat affirmative action initiatives), *with id.* at 509–13 (Jones, J., concurring in judgment only) (criticizing the majority for failing to specify a new harm standard and advocating for a narrower textualist reading of Title VII than the majority adopted). For a brief discussion of these concurrences in a broader criticism of textualism, see *infra* Part III.A.

34. *Supra* notes 27–30 and accompanying text.

35. *Supra* notes 1–8 and accompanying text. Though neither the Sixth nor the D.C. Circuits utilized the ultimate employment decision standard, they encountered similar issues. *See also infra* notes 88–102 and accompanying text.

decision is indicative of a larger problem that runs through Title VII's statutory interpretation—not solely of the Fifth Circuit's uniquely high standard for Title VII claims. *Hamilton I* was the ultimate product of a long tradition of curtailing Title VII's effectiveness.

In the decades immediately following its enactment, Title VII suffered from a series of interpretations in the federal circuits that canonized seemingly arbitrary rules about what counted as an actionable injury and generally narrowed the Act's scope.[36] For nearly thirty years, the Fifth Circuit, specifically, maintained an extremely high bar for bringing a Title VII claim, requiring plaintiffs to suffer an ultimate employment decision.[37] Even so, overturning *Hamilton I* is unlikely to solve the problems inherent in many circuits' standards for Title VII claims.[38]

Somewhere in the courts' interpretations, something went wrong. Through errors that courts wrongfully ingrained in Title VII's interpretation, courts have had an avenue to justify unambiguous discrimination.[39] *Hamilton I* is a prime example of the theoretical and practical consequences of Title VII's ingrained misinterpretation. While courts have recently begun to untangle the mess, they have largely relied on textualist reasoning to do so.[40] This Note argues that courts' reliance on textualist and

---

36. *Infra* Part I.B (discussing various circuit courts' interpretations of Title VII).

37. *See generally* Brief of Brian Wolfman et al. as Amici Curiae in Support of Petitioner at 4, Peterson v. Linear Controls, Inc., 140 S. Ct. 2841 (2020) (No. 18-1401) (suggesting that limiting Title VII claims to ultimate employment decisions is inconsistent with Title VII's text); Vincent, *supra* note 13, at 994 (showing that the ultimate employment decision standard is the narrowest standard for Title VII claims, compared to other circuits).

38. *See* discussion *infra* Part I.B.

39. *E.g.*, *supra* note 26 and accompanying text.

40. *See, e.g.*, Chambers v. District of Columbia, 35 F.4th 870, 874 (D.C. Cir. 2022) ("We begin by parsing the statute, giving undefined terms their 'ordinary meaning.'" (quoting Taniguchi v. Kan Pacific Saipan, Ltd., 566 U.S. 560, 566 (2012))); Threat v. City of Cleveland, 6 F.4th 672, 677 (6th Cir. 2021) ("If the words of Title VII are our compass, it is straightforward to say that a shift schedule—whether, for example, the employee works the night shift or the day shift—counts as a term of employment."); Bostock v. Clayton County, 590 U.S. 644, 678 (2020) ("If we applied Title VII's plain text only to applications some (yet-to-be-determined) group expected in 1964, we'd have more than a little law to overturn.").

seemingly realist principles[41] has led to unpredictable results and an ambiguous application of the law.[42] Rather, to properly actualize Title VII, courts should favor purposive and intentionalist methods of interpretation—the prevailing methods at the time of the Act's passage.[43]

Part I of this Note recounts Title VII's general background, contextualizing the legislation within the historical period in which it was passed and connecting Title VII's case law to the specific circuit split posed by *Hamilton*. Part I further analyzes the broader trends of statutory interpretation over the past sixty years, drawing attention to the precedential inadequacies in the circuits' decisions and summarizing the modern state of Title VII law. Part II of this Note argues that focusing on courts' methodological[44] shortcomings unproductively disservices actualizing Title VII's command. In light of those shortcomings, Part III suggests that courts should interpret Title VII through a broad purposive lens in recognition of the Act's historical context and societal impact. This Note concludes with a reminder that its interpretive suggestions are tailored to the Civil Rights Act and Title VII, and cannot be generalized to statutes of lesser significance.

## I. COURTS HAVE IMPROPERLY LIMITED THE SCOPE OF TITLE VII

As a subpart of a larger landmark statute, Title VII is contextualized by the broader history surrounding the Civil Rights Act of 1964. Section A of this Part recounts the historical background of the Civil Rights Act and reviews Title VII's specific text and select aspects of its legislative history. Section B of this Part reviews the case law surrounding Title VII and highlights the specific circuit split presented in *Hamilton*. Section C of this

41. Legal realism, in this context, describes a philosophy of judicial decision-making that is "anti-conceptual" and "anti-doctrinal" in its pursuit of fact-specific justice. Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1038 (1961).

42. *See infra* Part II (discussing various reasons why it is unproductive for courts to focus on methodological applications of Title VII rather than a more purposive focus on the problems Congress sought to address in passing the law).

43. *See infra* Part III.B.

44. In discussing courts' "methodological" actions, I refer to the courts' usage of statutory interpretation methods and general decision-making processes as displayed though case law.

Part begins with a discussion of the trends in Title VII case law, before integrating that discussion into the academic discourse surrounding Title VII and statutory interpretation more broadly.

### A. THE CIVIL RIGHTS MOVEMENT AND BROAD NOTIONS OF EQUALITY CONTEXTUALIZE TITLE VII

The Civil Rights Act of 1964[45] is a monumentally important piece of legislation, with both practical and historical significance. Congress drafted the Act at the height of the Civil Rights Movement[46] after a decades-long struggle by Black Americans against Jim Crow laws and segregation, heralding a change in the United States' social order and the legal conceptualization of equality.[47] At its passage, the Act immediately became one of the most significant civil rights bills in United States history.[48] It made efforts to preclude discrimination in government employment[49] and invoked Congress's commerce powers to address

45. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

46. *See March on Washington for Jobs and Freedom*, THE MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., https://kinginstitute.stanford.edu/encyclopedia/march-washington-jobs-and-freedom [https://perma.cc/Z4E5-DQS4] (describing the heavy civil rights demonstration activity the year before the Civil Rights Act passed).

47. *Cf. id.* (noting that the Civil Rights Act was passed with the input and reflecting the demands of the Civil Rights Movement).

48. *Compare* Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (addressing civil rights with minimal, governmentally-focused measures), *and* Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (introducing minimal protections for voting), *with* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253–66 (establishing a comprehensive regime for addressing private discrimination). While the Civil Rights Act of 1875 may have eventually proven impactful, its quick demise at the hands of the Supreme Court prevents this Author from attributing it substantial significance. *See* Civil Rights Cases, 109 U.S. 3, 26 (1883) (declaring the Civil Rights Act of 1875 unconstitutional for regulating private actors); *see also, e.g.*, Louis Jacobson, *Ten Bills That Really Mattered*, ROLL CALL (May 2, 2005), https://rollcall.com/2005/05/02/ten-bills-that-really-mattered [https://perma.cc/24Z6-USHG] (concluding that the Civil Rights Act of 1964 was the most significant piece of legislation in American history, after noting that "[v]irtually every scholar [that the author consulted], liberal and conservative, ranked this act first on their list" of significant legislation).

49. Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 Stat. 241, 254 ("[I]t shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex or national origin and the President shall utilize his existing

racism and discrimination in the private sector—a feat that other significant civil rights legislation had failed to accomplish.[50] More than just a legislative accomplishment, the Civil Rights Act was a victory for those Americans who had systemically suffered under racism and oppression for the entirety of American history, and who could now wield the law to combat that oppression.

Today, the Civil Rights Act of 1964 remains widely hailed as one of the most significant pieces of legislation in United States history.[51] Commentators have described the Act as "quasi-constitutional"[52] in nature and have praised the Act for ensuring equal protection for all Americans with a strength that the Fourteenth Amendment would not be able to on its own.[53] The Act largely prohibits legal discrimination on the basis of sex and race, making good on the promise of freedom and equality that is inherent in citizenship for many Americans who may otherwise be discriminated against.[54]

---

authority to effectuate this policy."). *But see* 42 U.S.C. § 2000e-16 (expanding the protections available to government workers, where the original Civil Rights Act left gaps).

50. *See, e.g.*, *Civil Rights Cases*, 109 U.S. at 26 (holding the Civil Rights Act of 1875 unconstitutional).

51. *See* Bostock v. Clayton County, 590 U.S. 644, 649–50 (2020) ("[F]ew pieces of federal legislation rank in significance with the Civil Rights Act of 1964."); Jacobson, *supra* note 48 (highlighting praise for the Civil Rights Act by a wide variety of scholars).

52. *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1273 (2001) (arguing that the Civil Rights Act of 1964, among other statutes, has influenced America's normative values in a manner similar to the Constitution, embedding itself in American society and the public consciousness).

53. *Landmark Legislation: The Fourteenth Amendment*, U.S. SENATE, https://www.senate.gov/about/origins-foundations/senate-and-constitution/14th-amendment.htm [https://perma.cc/G8N4-GM3F] (noting that the Fourteenth Amendment enabled Congress to pass the Civil Rights Act of 1964 in order to enforce the Equal Protection Clause); *cf. Legal Highlight: The Civil Rights Act of* 1964, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/oasam/civil-rights-center/statutes/civil-rights-act-of-1964 [https://perma.cc/Q8EW-LDAN] (discussing the Act's role in "fulfill[ing] the promise of the 14th Amendment").

54. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2) (prohibiting discrimination in employer practices such as hiring, compensation, and the provision of employment opportunities); *see* U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

Title VII of the Act plays a significant role in guarding these ideals, specifically forbidding discrimination in employment.[55] The legislation at issue in this Note is subsection (a) of section 703 of Title VII of the Civil Rights Act of 1964.[56] The text of the relevant segment unambiguously establishes broad protections for employment based on protected status, stating that:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, *terms, conditions, or privileges of employment*, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[57]

The statute does not specifically define the words "compensation, terms, conditions, or privileges of employment," nor what it would mean for an action to "adversely affect [one's] status as an employee."[58] Thus, both provisions use broad and general language to establish protections for the classes and reasons specified.

The Act's legislative history communicates similarly broad ideals and protections. The first line of the statement of Purpose and Content of the Legislation within the Act's 1963 House Committee Report (the Report) states that the Act "is designed primarily to protect and provide more effective means to enforce the civil rights of persons within the jurisdiction of the United States."[59] The Report's General Statement goes on to state that the Act is "general in application," labeling it as a "means of dealing with the injustices and humiliations of racial *and other* discrimination."[60] While the Report does specifically highlight

---

55. 42 U.S.C. § 2000e-2(a).

56. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2(a)).

57. 42 U.S.C. § 2000e-2(a) (emphasis added).

58. *Id. See generally* 42 U.S.C. § 2000e (listing statutory definitions not including these terms).

59. H.R. REP. NO. 88-914, at 16 (1963). Notably, the Senate never issued a report because the original bill's proponents directly introduced it to the floor in order to avoid being held up by the bill's opponents. *See The Civil Rights Act of 1964*, U.S. SENATE, https://www.senate.gov/artandhistory/history/civil_rights/civil_rights.htm [https://perma.cc/ACK6-3B3D].

60. H.R. REP. NO. 88-914 at 18 (emphasis added).

protections for Black Americans,[61] it consistently makes generalized assertions of protection from discrimination and non-racialized or class-specific ideals of equality and fair treatment.[62] In light of this, the legal protections that the Act established should not be constrained to those issues specifically considered at the time of passage. Even amidst its historical context, the Act is a *general* anti-discrimination statute.

The sections of the Report concerning Title VII specifically are less broad in their scope and explicitly limit themselves to (most of) the protected classes outlined in the statute.[63] Even so, the Report still uses broad language in outlining the scope of that protection: rather than explicitly or implicitly limiting itself to specifically delineated rights, the Report emphasizes that it is "*also* . . . the national policy to protect the right of persons to be free from such discrimination."[64]

In short, both the text and legislative history of Title VII use broad language that suggests a wide scope for the statute. Courts should respect that scope. The Supreme Court, in its first Civil Rights Act decisions, did so through significant references to the Act's legislative history.[65] Beyond adherence to general

---

61. *Id.* (noting that discrimination against Black Americans was "[m]ost glaring," but also recognizing the importance of "other types of discrimination").

62. *Id.* ("[The Act] is designed as a step toward eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope.").

63. *Id.* at 26 ("The purpose of this title is to eliminate . . . discrimination in employment based on race, color, religion, or national origin."). The House Report does not contain sex in its consideration, which Congress amended into the bill before passage. *See* Caroline Fredrickson, *How the Most Important U.S. Civil Rights Law Came to Include Women*, 43 N.Y.U. REV. L. & SOC. CHANGE: HARBINGER 122 (2017), https://socialchangenyu.com/wp-content/uploads/2019/05/Caroline-Fredrickson_RLSC-The-Harbinger_43.2-1.pdf [https://perma.cc/9C8W-EUNL] (discussing the 1964 passage of the amendment adding "sex" to Title VII of the Act).

64. H.R. REP. NO. 88-914, at 26 (emphasis added); *see also id.* at 16, 18 (indicating the broad geographic scope and discrimination protections of the Act).

65. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 47–48 (1974) (invoking the Act's legislative history to justify plaintiffs' maintenance of multiple causes of action); *cf.* Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (invoking the Act's legislative history to support an Equal Employment Opportunity Commission (EEOC) interpretation of the Act's requirements for employment-related ability tests); Eskridge & Ferejohn, *supra* note 52, at 1273 (noting the "long deliberative history" of "super-statutes" like the Civil Rights Act of 1964 as one of their defining features, enhancing their legitimacy). *But see*

statutory interpretation principles, the Supreme Court has alluded to the uniquely broad influence of the Civil Rights Act in its jurisprudence that immediately followed the Act's passage.[66] Moreover, while the Act and its legislative history do outline specific classes for protection, its legislative history suggests that the list provided is non-exhaustive, in light of the Act's general goals.[67] Similarly, where Title VII's text leaves terms undefined, its legislative history—and early Supreme Court precedent[68]—suggests a broader scope of interpretation than courts have permitted.[69] Where, for example, past Supreme Courts have used Title VII's legislative history and invoked broad ideals to justify a plaintiff's multiple causes of action,[70] modern courts invoke the text and ill-founded case law to justify narrow interpretations.[71] Additionally, both Congress and the Supreme Court have periodically affected the Act's scope.[72] While the Supreme Court tethers itself to its interpretive methodologies, the legislature has periodically corrected the courts' interpretations by

Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88–91 (1973) (invoking the Act's legislative history to exclude non-citizens from Title VII protection).

66. *See* Frontiero v. Richardson, 411 U.S. 677, 687–88 (1973) (plurality opinion) (pointing to the Civil Rights Act of 1964 as evidence of Congress's "sensitivity to sex-based classifications" to justify a heightened standard for constitutional review of sex-based legislation).

67. H.R. REP. NO. 88-914, at 26 (discussing the reach of the Act's employment discrimination protections to "all persons within the jurisdiction of the United States").

68. *See* cases cited *infra* note 131 and accompanying text.

69. *See, e.g.*, Autumn George, Comment, *"Adverse Employment Action"—How Much Harm Must Be Shown to Sustain a Claim of Discrimination Under Title VII?*, 60 MERCER L. REV. 1075, 1083 (2008) (summarizing courts' narrow definitions of adverse employment action, which limit the scope of Title VII).

70. *E.g.*, *Alexander*, 415 U.S. at 47–48.

71. *See* cases cited *infra* notes 119–47 and accompanying text.

72. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1071 ("[A]dditional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace[.]"); Bostock v. Clayton County, 590 U.S. 644, 683 (2020) (bringing sexual orientation and gender identity within the scope of Civil Rights Act employment protections). While the Act has enjoyed other notable expansions, this Note will only discuss those expansions which are particularly relevant to Title VII. *See, e.g.*, Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (amending the Act to significantly expand the EEOC's power).

expanding the Act.[73] Nonetheless, the Act remains widely, and significantly, litigated.[74] Through this litigation, its meaning and implementation has evolved alongside courts' interpretations, resulting in uncertain and inconsistent applications.[75]

### B. CIRCUITS ARE SPLIT IN SIGNIFICANT WAYS ON TITLE VII'S INTERPRETATION

In the past four decades, courts have been unable to maintain cross-circuit consistency with respect to significant issues in Title VII's interpretation.[76] As stated in this Note's Introduction, the federal circuits specifically remain split or undecided on what actions constitute a valid harm that rises to the level of an adverse employment action and justifies a Title VII claim.[77] This has recently surfaced in full form with the specific issue of employee scheduling and transfers, with differences in the development of circuit case law leading to varying results across circuits—some circuits permit scheduling or transfers based on one's protected class, while others explicitly forbid it.[78]

While some federal circuits favor a broader approach to permitting Title VII claims, others have interpreted the Act within a more limited scope. Though the circuits agree that the Act

---

73. *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (expanding the scope of actionable employment discrimination and providing greater procedural rights for all claimants); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, 104 (empowering the EEOC to unilaterally enforce Title VII of the Civil Rights Act).

74. *Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2022*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2022 [https://perma.cc/TH4E-XPLD] (reporting the tens of thousands of Title VII complaints filed with the EEOC over a twenty-five year span).

75. *See supra* notes 3–5 and accompanying text (giving examples of such inconsistent application).

76. *See, e.g.*, Kate Tornone, *Supreme Court Won't Resolve Circuit Split on Sexual Harassment Standard*, HR DIVE (Dec. 9, 2020), https://www.hrdive.com/news/clear-circuit-split-on-sexual-harassment-requires-scotus-review-employee/589579 [https://perma.cc/8S93-NDX5]; Vincent, *supra* note 13, at 992.

77. *See supra* text accompanying notes 20–22.

78. *See infra* notes 79–109 (collecting cases that evaluate the issue of discriminatory scheduling and transfers).

requires an adverse employment action[79] to support a plaintiff's claim, they are inconsistent on whether job transfers and scheduling are within this scope. The Fourth Circuit, for example, generally limits adverse employment actions to actions suffered in the course of work that an employer *required* of the employee, not the work which an employee undertook voluntarily.[80] But even if an employer requires its employee to take a transfer, the Fourth Circuit holds discriminatory job transfers are unactionable.[81] The court will nonetheless deem a transfer an adverse employment action if that transfer is accompanied by other benefit losses.[82]

The Seventh Circuit's approach to actionable harms is similarly limiting. The Seventh Circuit maintains that transfers, in isolation, are not actionable under Title VII.[83] Similar to the

79. Though this requirement is based on Title VII's specific language, the statute does not flag "adverse employment action" as the term of art that it has become. 42 U.S.C. § 2000e-2(a)(2) (using the catchall phrase "otherwise adversely affect [a person's] status as an employee" at the end of the section's definition of "[u]nlawful employment practices"); *cf.* Brief of Brian Wolfman et al. as Amici Curiae in Support of Petitioner, *supra* note 37, at 2 (arguing that the term adverse employment action has "take[n] on a life of its own and now improperly limits the statute's reach").

80. *See, e.g.*, Tabb v. Bd. of Educ. of the Durham Pub. Schs., 29 F.4th 148, 155 (4th Cir. 2022) (upholding a trial court's 12(b)(6) dismissal on the finding that "Plaintiff fail[ed] to allege that Defendant expected or required him to work [the extra] hours"); *cf.* Zack Anstett, *Fourth Circuit Limits Definition of Adverse Employment Action*, JD SUPRA (Mar. 25, 2022), https://www.jdsupra.com/legalnews/fourth-circuit-limits-definition-of-8219091 [https://perma.cc/HZ9S-QUAW] (summarizing the Fourth Circuit's somewhat narrow view of the meaning of adverse employment action in light of *Tabb*).

81. Boone v. Goldin, 178 F.3d 253, 255 (4th Cir. 1999) ("Although [Plaintiff] may have experienced increased stress in the new job . . . she did not allege discharge, demotion, decrease in pay or benefits, loss of job title or supervisory responsibility, or reduced opportunities for promotion—the typical requirements for a showing of an 'adverse employment action' that can support a Title VII claim.").

82. *Id.*; James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 376 (4th Cir. 2004) (requiring that a reassignment have a "significant detrimental effect" on professional development or promotion to qualify as an adverse employment action); *see also* Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981) (en banc) (discussing unlawful employment actions under Title VII as "ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating").

83. Place v. Abbott Lab'ys, 215 F.3d 803, 810 (7th Cir. 2000) ("[B]eing shifted to an essentially equivalent job that [Plaintiff does] not happen to like as much does not a Title VII claim create."); EEOC v. AutoZone, Inc., 860 F.3d

Fifth Circuit's historically strict (and now-defunct) ultimate employment decision rule,[84] the Seventh Circuit's rule is not grounded in the text or legislative history of Title VII.[85] The Eleventh Circuit has adopted an approach that relies on a similar line of circuit precedent, but has permitted a broader scope for recovery if a contested transfer is accompanied by other material losses.[86] Any "serious and material" decision remains actionable, thus permitting recovery for any transfer accompanied by a decrease in pay or prestige.[87]

In contrast, the Fifth, Sixth, and D.C. Circuits have all recently held that transferring or scheduling employees on the basis of their protected class explicitly violates Title VII, even without exacerbating factors.[88] In coming to these decisions, all three circuits relied on textualist reasoning. The D.C. Circuit noted that "[w]ithout any footing in the text of Title VII or Supreme Court precedent," it could not permit job transfers on the basis of one's protected class,[89] while the Sixth Circuit simply stated that Title VII "means what it says" with respect to prohibiting discrimination in terms of employment.[90] Resultingly, both courts reasoned that one's schedule and work location were

564, 569 (7th Cir. 2017) ("It's well established that a purely lateral job transfer does not normally give rise to Title VII liability under subsection (a)(1) because it does not constitute a materially adverse employment action.").

84. *See supra* notes 15–18 and accompanying text.

85. *See Place*, 215 F.3d at 810 (evaluating whether a job transfer constituted an adverse employment action, citing circuit precedent but without referring to Title VII's text or legislative history).

86. Hinson v. Clinch Cnty. Bd. of Educ., 231 F.3d 821, 829 (11th Cir. 2000) ("In a Title VII case, a transfer to a different position can be 'adverse' if it involves a reduction in pay, prestige or responsibility."); *see also* Doe v. Dekalb Cnty. Sch. Dist., 145 F.3d 1441, 1447–49 (11th Cir. 1998) (outlining the court's process for placing limits, in the form of an objective standard, for evaluating adverse employment action claims under Title VII).

87. *See* Crawford v. Carroll, 529 F.3d 961, 970–71 (11th Cir. 2008) (summarizing the Eleventh Circuit's standard for adverse employment actions).

88. *Hamilton II*, 79 F.4th 494, 506 (5th Cir. 2023) (holding that a discriminatory scheduling policy alone can support a Title VII claim); Chambers v. District of Columbia, 35 F.4th 870, 872 (D.C. Cir. 2022) (holding that employee transfers are within the scope of "terms, conditions, or privileges of employment" under Title VII); Threat v. City of Cleveland, 6 F.4th 672, 677–78 (6th Cir. 2021) (noting that an employee's schedule is a "term" and "privilege" of employment, and therefore within the scope of Title VII).

89. *Chambers*, 35 F.4th at 882.

90. *Threat*, 6 F.4th at 680.

"terms of employment," so as to be within the scope of the Act, by the plain meaning of the phrase "terms of employment."[91]

Until it issued the *Hamilton II* decision in August of 2023, the Fifth Circuit employed the nation's strictest approach to Title VII claims.[92] Historically, the Fifth Circuit would require plaintiffs to have suffered an ultimate employment decision before bringing a suit under Title VII,[93] but would permit plaintiffs to challenge their job transfers in circumstances that implicated other terms of employment.[94] When adopted, the ultimate employment decision standard did not have a basis in the text, legislative history, or broad purpose of Title VII.[95] Instead, the standard was based on an alleged connection between the specific facts of individual cases.[96] Rather than tethering themselves to congressional intent or broader representative ideals, the courts solely relied on internal reasoning.[97] In light of this

91. *Id.*; *Chambers*, 35 F.4th at 882.

92. *See* Brief of Brian Wolfman et al. as Amici Curiae in Support of Petitioner, *supra* note 37, at 10–19 (enumerating employer actions found permissible under the Fifth Circuit's stringent ultimate employment decision standard, but held in violation of Title VII in other circuits).

93. Dollis v. Rubin, 77 F.3d 777, 781–82 (5th Cir. 1995) ("Title VII was designed to address ultimate employment decisions . . . ."); McCoy v. City of Shreveport, 492 F.3d 551, 560 (5th Cir. 2007) (reaffirming the ultimate employment decision standard for Title VII discrimination claims).

94. Thompson v. City of Waco, 764 F.3d 500, 506 (5th Cir. 2014) (holding that a transfer is actionable under Title VII when it is the equivalent of a demotion, considering impacts on an employee's "integral and material responsibilities"). Outside of the job transfer context, the ultimate employment decision standard led to other absurd results. *See, e.g.*, Peterson v. Linear Controls, Inc., 757 F. App'x 370, 373 (5th Cir. 2019) ("[Plaintiff] alleged that he and his black team members had to work outside without access to water, while his white team members worked inside with air conditioning. Taking this as true, the magistrate judge did not err in holding that these working conditions are not adverse employment actions because they do not concern ultimate employment decisions.").

95. *See Dollis*, 77 F.3d at 781–82 (solely citing case law as the basis for applying an ultimate employment decisions standard for adverse employment actions).

96. *Id.* (citing Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981) (en banc)) (discussing the kinds of actions considered in precedent cases to confirm a narrow definition of ultimate employment decisions).

97. *See, e.g.*, *Page*, 645 F.2d at 233 (adopting the ultimate employment decision standard by analyzing perceived patterns in Supreme Court cases); *Dollis*, 77 F.3d at 781–82 (adopting the ultimate employment decision standard with reference to *Page*). Despite being the foundation for decades worth of

deficiency, the Fifth Circuit has admitted that "the parentage" of its ultimate employment decision standard was questionable.[98] Now, following *Hamilton II*, the Fifth Circuit claims to have broadened its interpretation to a de minimis standard.[99] Under this standard, a plaintiff must only (1) establish adversity and (2) assert a non-de minimis injury.[100] Despite the apparent breadth of this new standard, its contours, as applied by the Fifth Circuit, remain to be seen.[101] Nonetheless, the Fifth Circuit now unambiguously permits discriminatory job transfers as an actionable injury[102]—a victory for employees after three decades worth of ill-founded precedent demanding the contrary.[103] So, while the Fifth, Sixth, and D.C. Circuits have recently been decisive on the issue of discriminatory transfers,[104] neither the Supreme Court nor the remaining circuits have directly spoken on the issue.

Thus, the Fourth Circuit maintains a notably high standard for plaintiffs to bring Title VII claims, even outside of the specific context of employee scheduling and transfers.[105] Within the context of scheduling and transfers, the Seventh and Eleventh Circuits have also expressed direct hostility to permitting actions for discriminatory claims.[106] While these three circuits have

---

adverse employment action precedent, neither of these cases used statutory interpretation methods to define adverse employment action.

98. Oral Argument, *supra* note 23, at 56:15.

99. *See* Harrison v. Brookhaven Sch. Dist., 82 F.4th 427, 431 (5th Cir. 2023) (highlighting "Title VII's inability to support *de minimis* claims" post–*Hamilton II*). While the Fifth Circuit has yet to test this standard, the court claims to align itself with the Sixth and Seventh Circuits. *Id.* at 432 n.5.

100. *See id.* at 430 (identifying the reasons why the court concluded the plaintiff had plausibly alleged discrimination). As of the time of this Note's drafting, the Fifth Circuit has not published any cases that elaborate on what would or would not constitute a de minimis claim. Nonetheless, the court "remain[s] cognizant of the Supreme Court's warning against 'transform[ing] Title VII into a general civility code for the American workplace.'" *Id.* at 431 (alteration in original) (internal citation omitted).

101. *See id.* at 432 n.5 ("We take no position today on 'whether "material" and "more than *de minimis*" are simply two sides of the same coin, or whether there is more room between those terms.'" (internal citations omitted)).

102. *Hamilton II*, 79 F.4th 494, 506 (5th Cir. 2023).

103. *See supra* note 93 and accompanying text (establishing the historic treatment of job transfers in the Fifth Circuit).

104. *See supra* notes 88–91 and accompanying text.

105. *See supra* notes 80–82 and accompanying text.

106. *See supra* notes 83–86 and accompanying text.

permitted avenues for recovery for egregiously discriminatory transfers,[107] they fall short of the Fifth, Sixth, and D.C. Circuits' blanket disfavoring of transfers based on one's protected class.[108] Absent circumstances that a court would otherwise consider adverse (e.g., a transfer accompanied with a direct demotion), employers can schedule or transfer an employee solely based on their protected class.[109] The circuits' divergent approaches to the broader issue of the harm standard in Title VII cases are the root of their split on the narrower issue of discriminatory transfers and schedule changes. And because discriminatory transfers are only permissible due to a high standard for harm,[110] eliminating that split in favor of a more lenient harm standard will eliminate the legal route by which discriminatory scheduling transfers are permitted.

From a doctrinal perspective, it is difficult to explain the divergence in the circuits' approaches to the harm standard. The broad developmental patterns of Title VII law is similar across the circuits.[111] When the Civil Rights Act first became law, courts often did not deeply rely on the statute's text and gave the Act a broad reading to justify basic protections.[112] As time

107. *See supra* notes 80–86 and accompanying text.

108. *See supra* notes 88–91 and accompanying text.

109. *E.g.*, Hinson v. Clinch Cnty. Bd. of Educ., 231 F.3d 821, 828–30 (11th Cir. 2000) (discussing the adverse employment action requirements); James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 376 (4th Cir. 2004) (noting the need for adverse effects); EEOC v. AutoZone, Inc., 860 F.3d 564, 569 (7th Cir. 2017) (emphasizing the "adverse" aspect of the standard).

110. *See supra* notes 105–07 and accompanying text (noting the correlation between the Fourth Circuit's higher harm standard and the treatment of discriminatory transfers).

111. Early Civil Rights Act litigation was largely characterized by courts answering the "easy questions" of Title VII litigation—examples of discrimination that were so clearly in violation of, or a poor attempt to circumvent, the Civil Rights Act. As a result, it is not surprising that the circuits did not begin splitting until the decades following the Act's passage. *See generally, e.g.*, Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228, 233–36 (5th Cir. 1969) (holding that a gendered lifting restriction in a job description violates Title VII); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 718 (7th Cir. 1969) (forbidding employers from limiting job opportunities by gendered weight restrictions); U.S. v. Int'l Bhd. of Elec. Workers, Local No. 38, 428 F.2d 144, 148–49 (6th Cir. 1970) (holding that a union's barriers towards Black applicants violated the Civil Rights Act).

112. *E.g.*, Garcia v. Lawn, 805 F.2d 1400, 1403 (9th Cir. 1986) ("Flexibility in fashioning remedies under Title VII is an important keystone of the

progressed from the Act's passage, courts generally became less deferential to the Act's broader ideals and more stringent on guarding its boundaries.[113] The Fourth and Fifth Circuits aggressively embodied this through their adoption of the ultimate employment decision standard.[114] The other circuits, with substantially similar bodies of law, adopted notably more lenient standards.[115] Thus, without a substantial body of law compelling them to do so,[116] the Fourth and Fifth Circuits narrowed Title VII in a significant way. The Fourth and Fifth Circuits' turn to the ultimate employment decision standard was not the mark of a uniquely developed body of case law but was instead an avoidable choice that barred plaintiffs from recovery in clear-cut cases of discrimination.[117]

Additionally, the split on the harm standard does not fully explain the circuits' divergent approaches to discriminatory transfers outside of the Fifth Circuit, where courts did not adopt standards tethered to ultimate employment decisions.[118] The

---

administration of the Act. The wording of section 706(g), its legislative history, and subsequent Supreme Court pronouncements make this clear.").

113. *See* Cheryl Krause Zemelman, Note, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 177 (1993) ("While courts in the 1960s and early 1970s interpreted Title VII expansively to remedy pervasive social inequities, courts in the late 1970s and 1980s recharacterized the statute as an individual remedy for privately inflicted harms."); *see also, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 336 (1977) (validating an instance of sex discrimination as the result of a bona fide occupational qualification); Dollis v. Rubin, 77 F.3d 777, 781–82 (5th Cir. 1995) ("Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions.") (citing Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981)).

114. Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981) (en banc); *Dollis*, 77 F.3d at 781–82.

115. *See* Vincent, *supra* note 13, at 993, 995 (discussing the most restrictive adverse employment action standard of the Fourth, Fifth, and Eighth Circuits and the intermediate standard of the Second and Third Circuits).

116. *But see Page*, 645 F.2d at 233 (noting the Supreme Court's concern in Title VII cases exclusively with regard to ultimate employment decisions). The Fourth Circuit's cited concern with ultimate employment decisions does not enjoy explicit or direct support from the Supreme Court.

117. Brief of Brian Wolfman et al. as Amici Curiae in Support of Petitioner, *supra* note 37, at 2 (arguing that limiting Title VII claims to ultimate employment decisions ignores significant amounts of discrimination).

118. *See supra* notes 93–104 and accompanying text (discussing the development and context of the Fifth Circuit's standard).

Seventh Circuit, for example, maintains that discriminatory transfers, on their own, are not actionable under Title VII, even without reference to the ultimate employment decision standard.[119] In doing so, it invokes a narrow textualist interpretation to hold that a discriminatory transfer does not "adversely affect[] [one's] employment status," so as to be protected under Title VII.[120]

The Eleventh Circuit hews closer to the Fifth Circuit's former maintenance of the ultimate employment decision standard in its reasoning. The Eleventh Circuit's facial denial of discriminatory transfers is based on an alleged connection between a series of cases that do not engage with Title VII's text, legislative history, or broad purpose.[121] Thus, while the specific issue of the harm standard is a significant basis for restrictive Title VII law, it is not the sole source of Title VII's limits.[122] The act of resolving deficiencies in Title VII interpretations is more complex than eschewing the ultimate employment decision standard and requires a broader reframing of modern interpretive strategies.

In short, despite modern courts' wide commitment to textualism, the circuits remain split on their approach to the harm standard, and thus on what employer actions are justiciable under Title VII.[123] Across the circuits, Title VII law has settled into a nominally textualist jurisprudence.[124] Despite textualism's supposed objectivity and predictability, its application to Title VII has begotten inconsistent and detrimentally narrowing results.[125] Thus, while this reliance on textualism is consistent with broader trends of statutory interpretation, it has failed to adequately address significant deficiencies that became

119. EEOC v. AutoZone, Inc., 860 F.3d 564, 569 (7th Cir. 2017).

120. *Id.* at 570.

121. Hinson v. Clinch Cnty. Bd. of Educ., 231 F.3d 821, 829 (11th Cir. 2000) (citing Doe v. Dekalb Cnty. Sch. Dist., 145 F.3d 1441, 1448 (11th Cir. 1998)) (relying instead on EEOC regulation).

122. *Cf.* Zemelman, *supra* note 113, at 177 (describing Title VII's shift from being seen as a "remedy [for] pervasive societal inequities" to "an individual remedy for privately inflicted harms").

123. *See supra* note 110 and accompanying text.

124. Victoria Nourse, *The Paradoxes of a Unified Judicial Philosophy: An Empirical Study of the New Supreme Court: 2020–22*, 38 CONST. COMMENT. 1, 8 (2023) (referring to the Court's textualist approach in *Bostock*, a recent Title VII case).

125. *See id.* at 23 (criticizing textualism's inconsistency in the Supreme Court context).

apparent in the decades following Title VII's passage.[126] Title VII remains improperly narrowed at the courts' whims. Outside of the courts, academics have similarly engaged with Title VII on varying levels.[127]

### C. THE CORE OF TITLE VII DISCUSSIONS HAVE SHIFTED FROM PURPOSIVE TO TEXTUAL

Outside of the circuit splits on the harm standard and justiciable employer actions,[128] Title VII has experienced a recognizable pattern of interpretive discussion. In the broadest sense, Title VII's interpretation has tracked with the historical judicial trends of statutory interpretation in the past sixty years.[129] While courts in the 1960s through the mid-1980s favored purposivism (as filtered through a philosophy of realism) to interpret statutes,[130] the Supreme Court was able to lay a broad foundation for the Act's interpretation and expand Title VII's impact in select, but important, ways. Consistently evoking broad language, the Court brought actions with disparate impacts within the scope of Title VII and broadened the types of allowable claims in Title VII cases.[131]

---

126. *Id.* at 8 (noting current trend towards textualism); *see supra* note 121 and accompanying text (discussing early statutory interpretation of Title VII).

127. *Infra* notes 171–80 and accompanying text.

128. *See supra* Part I.B (analyzing these circuit splits).

129. *See generally* VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 4–10 (2018) (describing the historical development of statutory interpretation methodologies and their modern applications).

130. *See id.* at 7–8. Purposivism is a statutory interpretation methodology that seeks to enable legislative intent by asking "what a reasonable legislator would have been trying to achieve by enacting [the disputed] statute." *Id.* at 51. Relatedly, purposivist interpretation frequently invokes a statute's legislative history—and its text—in order to determine legislative intent. *See generally* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847 (1992) (describing Justice Breyer's purposive philosophy and the utility of legislative history).

131. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) ("From the sum of the legislative history relevant in this case, the conclusion is inescapable that the EEOC's construction of § 703(h) to require that employment tests be job related comports with congressional intent."); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973) (allowing plaintiff's 703(a)(1) claim); *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975) (characterizing the Act as addressing a "historic evil of national proportions" and emphasizing courts' equitable powers in actuating the Act's goals).

By way of example, *Griggs v. Duke Power Co.* is emblematic of the Court's methodological approach to Title VII cases shortly following the Act's passage.[132] In *Griggs*, a class of Black employees sued their employer for violating Title VII by requiring either a high school diploma or passage of a general intelligence test as a condition of employment and transfer.[133] The employer did not show that these "intelligence requirements" were related to the jobs in question.[134] While the text of Title VII explicitly permitted non-discriminatory tests,[135] and the Court of Appeals found that the employer *did not* have a discriminatory intent in promulgating its test,[136] the Supreme Court unanimously held that the requirements violated Title VII.[137] The Court rested its analysis entirely on the Act's legislative history, analyzing the House and Senate reports and related floor debates that discussed testing requirements.[138] Synthesizing these pieces of legislative history, the Court ultimately concluded that Congress did not favor intelligence tests which bore no relation to job duties.[139] In doing so, the Court broadened Title VII beyond its text, using the Act as a vehicle to prohibit discriminatory practices that arguably fell outside of the text's reach.[140] Though *Griggs* perhaps showcases the high point of purposive Title VII interpretation, it also displays the Court's initial concerns and general methodological process following the Act's passage.

---

132. *Cf. Griggs*, 401 U.S. at 428 ("The Court of Appeals was confronted with a question of first impression, as are we, concerning the meaning of Title VII.").

133. *Id.* at 425–26.

134. *Id.* at 428 ("Neither was directed or intended to measure the ability to learn to perform a particular job or category of jobs.").

135. *Id.* at 436 ("Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful.").

136. *Id.* at 432.

137. *Id.* at 436.

138. *Id.* at 434–36 (using legislative history to make its holding).

139. *Id.* at 436 ("What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance.").

140. *Cf. id.* at 432 ("We do not suggest that either the District Court or Court of Appeals erred in examining the employer's intent; but good intent . . . does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."); *id.* at 436 ("Nothing in the Act precludes the use of testing or measuring procedures . . . . Congress has commanded . . . that any tests used must measure the person for the job and not the person in the abstract."); *id.* (relying on legislative history to determine congressional intent).

Still, the Supreme Court did not fully commit to a broad Title VII and, at times, even narrowed Title VII to employees' detriment.[141] At least one small, but impactful, ill-founded precedent that significantly narrowed the Act survived the era of judicial purposivism, in the form of the much criticized[142] ultimate employment decision standard that remained good law in the Fourth and Fifth Circuits for a span of decades.[143] Under this standard, a plaintiff must have suffered a terminal—or in other words, ultimate—employment action before they could file a cognizable claim under Title VII.[144] In the decades following the Supreme Court's initial wave of expansions, Title VII suffered in court.[145] In the 1990s and 2000s, courts began to move away from the broad ideals that had originally given the Act weight and started introducing barriers to successful claims, such as requirements for economic harm and higher standards of justiciable employer actions.[146]

Contrasting the broad interpretative mode exemplified in *Griggs*, *Dollis v. Rubin*—the 1995 case in which the Fifth Circuit adopted the ultimate employment decision standard—offers a

---

141. *E.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973) (requiring employees to prove discriminatory intent, even if disparately impacted).

142. *See, e.g.*, Brief of Brian Wolfman et al. as Amici Curiae in Support of Petitioner, *supra* note 37, at 4 (criticizing the Fourth Circuit's ultimate employment decisions); George, *supra* note 69, at 1083 (same).

143. *See* Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981) (en banc) (introducing the ultimate employment decision standard for bringing a Title VII claim); Dollis v. Rubin, 77 F.3d 777, 781–82 (5th Cir. 1995) (adopting the ultimate employment decision standard with little explanation); *Hamilton I*, 42 F.4th 550, 556 (5th Cir. 2022) (applying the ultimate employment decision standard in a modern context). Despite the fact that *Dollis*, the case in which the Fifth Circuit adopted the ultimate employment decision standard, occurred in 1995, after the heyday of purposivism and legal realism, the *Dollis* court did not tether itself to the Act's text, legislative history, or any other significant authority. *See Dollis*, 77 F.3d at 782 (referring only to *Page* in adopting the new standard).

144. *Hamilton II*, 79 F. 4th 494, 499–500 (5th Cir. 2023).

145. *Cf.* Michael J. Zimmer, Wal-Mart v. Dukes*: Taking the Protection Out of Protected Class*, 16 LEWIS & CLARK L. REV. 409, 427–28 (2012) (describing the Rehnquist Court's continual narrowing of Title VII).

146. *E.g.*, *Dollis*, 77 F.3d at 781–82 (limiting Title VII claims to ultimate decisions and excluding tangentially related decisions); Davis v. Town of Lake Park, 245 F.3d 1232, 1245–46 (11th Cir. 2001) (introducing the requirement for a plaintiff to show economic harm to sustain a Title VII claim). *See generally* George, *supra* note 69, at 1082–87 (providing examples of how circuits have narrowed the general term of adverse employment action).

particularly salient example of how circuit courts narrowed Title VII.[147] In *Dollis*, plaintiff Mary Dollis, a Black woman, requested a "desk audit" from her employer.[148] The desk audit would evaluate Dollis's work and ensure that she was paid at the proper level—a positive outcome would directly increase her rate of pay.[149] The employer denied Dollis's request to hold the audit.[150] Dollis sued under Title VII, alleging that she had solely been denied the opportunity to be audited due to her sex and race.[151] Validating the district court's grant of the employer's motion for summary judgment, the Fifth Circuit summarily held that only ultimate employment decisions were actionable under Title VII, "not . . . every decision made by employers that arguably might have some tangential effect upon those ultimate decisions."[152] Despite the long-lasting impact of this decision,[153] the court did not ground its reasoning in any methodological analysis of Title VII—rather, the court unceremoniously cited the Fourth Circuit case from which the ultimate employment decision standard originated.[154]

*Dollis*'s unreasoned narrowing of Title VII did not exist in isolation. Elsewhere, in *Davis v. Town of Lake Park*, the Eleventh Circuit held that a Black police officer was not alleging an actionable harm when he claimed that a temporary demotion and poor performance review, issued solely because of his race, had harmed his future job prospects.[155] As with the Fifth Circuit in *Dollis*, the Eleventh Circuit did not cite Title VII's text or

147. *Dollis*, 77 F.3d at 777.

148. *Id.* at 779. The "desk audit" was a process by which Dollis's employer would "interview[] the employee and his/her supervisor and determine[] (1) whether the employee's job description accurately depict[ed] the work performed by the employee, and (2) whether the job is classified at the proper GS level." *Id.* at 779 n.1. Dollis's pay was attached to her GS level—effectively, she wanted her employer to formally evaluate her to ensure that she was paid the proper amount.

149. *See generally id.* at 779 (demonstrating the importance of the desk audit).

150. *Id.*

151. *Id.* at 779–80.

152. *Id.* at 781–82.

153. *See Hamilton II*, 79 F.4th 494, 506 (5th Cir. 2023) (leaving behind the ultimate employment decision standard).

154. *Dollis*, 77 F.3d at 782 (citing Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981) (en banc)).

155. Davis v. Town of Lake Park, 245 F.3d 1232, 1245–46 (11th Cir. 2001).

legislative history in imposing this restriction.[156] Rather, it solely expressed concerns about the judicial administrability of permitting a broader scope of harms.[157] Thus, in decisions like *Dollis* and *Davis*, Title VII fell victim to public policy arguments and loose connections between cases that questionably curbed the Act's scope.[158] Courts deemed employees to only be "adversely" affected when monetarily harmed.[159] Otherwise, as with the ultimate employment decision standard, they reinforced their own ill-founded precedent.[160] And though courts have attempted to "bless" these precedents through loose and general references to Title VII's statutory text,[161] the reasoning behind them remained ill-founded.

Admittedly, *Dollis* and *Davis* showcase the high-water mark of courts limiting Title VII actions. Those decisions, specifically, have been extensively criticized within, and outside of, their respective circuits.[162] But despite those criticisms, the doctrinal limits that *Dollis* and *Davis* created were cited extensively, building a long-lasting web of binding case law that improperly

---

156. *Id.*

157. *Id.* at 1244 ("Title VII is not designed to make federal courts 'sit as a super-personnel department that reexamines an entity's business decisions.'" (quoting Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991))).

158. *See* George, *supra* note 69 (discussing how courts have limited Title VII application).

159. *E.g.*, *Dollis*, 77 F.3d at 781–82 (reading Title VII to only address ultimate employment decisions, and not decisions with tangential effects on those ultimate decisions); *Davis*, 245 F.3d at 1245–46 (introducing the requirement for a plaintiff to show economic harm to sustain a Title VII claim).

160. *See generally* George, *supra* note 69, at 1082–87 (providing examples of how circuits have narrowed the general term of "adverse employment action").

161. *E.g.*, Wakefield v. State Farm Ins., No. 99-11215, 2000 WL 1239170, at *3 (5th Cir. Aug. 10, 2000) (claiming that the "reading is justified" in recounting the limitations imposed by *Dollis* and the ultimate employment decision standard); Hamilton v. Texas Dep't of Transp., 85 F. App'x 8, 12 (5th Cir. 2004) (reaffirming and applying the ultimate employment decision standard).

162. *See, e.g.*, Porterfield v. SSA, No. 20-10538, 2021 WL 3856035, at *5 (11th Cir. Aug. 30, 2021) (recognizing that aspects of *Davis* were overruled, but using its reasoning to limit the scope of Title VII claims); Hardison v. Skinner, No. 20-30643, 2022 WL 2668514, at *4 (5th Cir. July 11, 2022) (Dennis, J., concurring) (criticizing the lack of foundation for the ultimate employment decision standard); *see also* Brief of Brian Wolfman et al. as Amici Curiae in Support of Petitioner, *supra* note 37, at 4 (advocating for a limitation on the reach of the ultimate employment decision standard).

narrowed Title VII.[163] So, even where courts did not specifically invoke these cases, their ill-founded standards persisted. With limited exception,[164] the Supreme Court did not interfere with the circuits' interpretations in this era. Thus, while Title VII initially enjoyed a regime of enforcement that adequately grappled with the broad questions that Congress sought to address, its fate shifted alongside the larger landscape of statutory interpretation. When courts moved away from broadly purposivist methodologies, Title VII's narrowing became ingrained in law and went increasingly unchallenged.

In the 2020s, there remains significant discussion surrounding Title VII's interpretation in the courts, with varying views of the legitimacy of the courts' interpretations. As modern courts now generally favor textualism as the controlling methodology of statutory interpretation,[165] many scholars have turned their attention towards textual analyses of Title VII.[166] Additionally, the statutory interpretation of Title VII has received renewed attention since the Supreme Court's 2020 decision in *Bostock v. Clayton County*, where the Court expanded Title VII protections to gay and transgender individuals via a hyper-textualist reading of the statute.[167]

Commentators have critiqued and analyzed the courts' interpretative methodologies both generally, and in the statute's specific context. Proponents of textualism have argued that textualism—despite the methodology's common association with

163. *E.g.*, Pegram v. Honeywell, Inc., 361 F.3d 272, 282 (5th Cir. 2004) (invoking the ultimate employment decision standard without reference to *Dollis* and citing cases that also do not reference *Dollis*); Coles v. Post Master Gen. U.S. Postal Servs., 711 F. App'x 890, 895 (11th Cir. 2017) (citing *Davis* as the standard for outlining the scope of actionable Title VII claims).

164. *E.g.*, Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67–68 (2006) (introducing a "reasonable person" standard to determining the materiality of retaliatory actions under Title VII).

165. BRANNON, *supra* note 129, at 19 (discussing the modern textualist-dominated landscape of statutory interpretation); *cf.* Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 08:23 (Nov. 18, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg ("I think we're all textualists now . . . .").

166. *See, e.g.*, Cary Franklin, *Living Textualism*, 2020 S. CT. REV. 119, 123 (analyzing how textualism was used to decide Supreme Court cases involving Title VII); Mitchell N. Berman & Guha Krishnamurthi, Bostock *was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67 (2021) (arguing that *Bostock* was wrongly decided under a textualist reading of Title VII).

167. Bostock v. Clayton County, 590 U.S. 644, 683 (2020).

politically conservative outcomes—leads to politically neutral results, and that *Bostock* is a shining example of its objectivity.[168] Some have gone even further and argued that *Bostock* showcases the potential for progressivism inherent in textualism—thus critiquing the courts' applications that earned textualism a politically conservative reputation.[169] Others have shied away from the Court's progressive result in *Bostock*, claiming that *Bostock*'s textualism largely misapplies the methodology.[170] Given that *Bostock* concerns Title VII's interpretation, these general critiques have also contributed significantly to the conversation surrounding Title VII specifically.[171]

Even prior to *Bostock*, commentators criticized the courts for limiting Title VII's scope through misinterpretation of its text.[172] Theoretically, these complaints largely mirrored the post-*Bostock* comments that advocated for progressive textualism[173] (albeit with a less explicitly textualist focus[174]), in that both the

168. Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 906 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)) (arguing that, while the practice of textualism has led to conservative results, as a theory of statutory interpretation theory, textualism is politically neutral).

169. *See, e.g.*, Deborah A. Widiss, *Proving Discrimination by the Text*, 106 MINN. L. REV. 353, 359 (2021) ("A fair [textual] reading of a progressive statute will often—and should often—advance progressive objectives.").

170. *Bostock*, 590 U.S. at 683–720 (Alito, J., dissenting) (purporting to use textualist methodologies to reach a result opposite of the majority); *see also, e.g.*, Berman & Krishnamurthi, *supra* note 166, at 72 (stating that the form of textualism applied in *Bostock*'s majority opinion was wrong).

171. *See, e.g.*, Franklin, *supra* note 166 (analyzing the text of Title VII within an analysis of the textualism in *Bostock*); Berman & Krishnamurthi, *supra* note 166 (same).

172. *See, e.g.*, Rosalie Berger Levinson, *Parsing the Meaning of "Adverse Employment Action" in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should Be Actionable Wrongdoing?*, 56 OKLA. L. REV. 623, 641 (2003) ("[R]equir[ing] an ultimate employment action or tangible job loss or economic injury to establish a prima facie case of discrimination is error.").

173. *E.g.*, Widiss, *supra* note 169, at 358–59 (claiming that there is nothing inherently conservative about textualism); *see also* Kevin Tobia et al., *Progressive Textualism*, 110 GEO. L.J. 1437, 1444 (2022) (advocating for a methodologically progressive textualist revolution to achieve better, more democratic, rulings).

174. *Cf.* Levinson, *supra* note 172, at 675 ("Congress' goal of affording true equal opportunity in the workplace to all employees cannot be achieved as long as litigants are made to jump through judge-made obstacles that close the doors

modern and past critics highlighted the harm resulting from court-imposed standards that were not rooted in the Act's text or fundamental purpose.[175] While the circuits who have brought employee transfers within the scope of Title VII anchor themselves to textualist reasoning,[176] if they had relied on the intentionalist reasoning of past critics they likely would have come to the same result. Anti-textual scholars have advocated for a broadening, rather than a narrowing, of Title VII.[177] Despite courts' modern favorability towards textualism, the root of Title VII interpretative critiques is both well-trod and methodologically neutral. Thus, both textualism's advocates and detractors have criticized courts for unnecessarily restricting the scope of Title VII law.

Scholars have also argued that courts owe the Civil Rights Act an evolving and dynamic mode of interpretation.[178] William Eskridge has spearheaded this movement, arguing that the Civil Rights Act (and other "quasi-constitutional" pieces of legislation) should be interpreted with an interpretive methodology that even surpasses the flexibility of traditional purposivism.[179]

---

to the courthouse without affording employees the opportunity to prove injury caused by discriminatory wrongdoing."); Tobia et al., *supra* note 173, at 1443 ("[I]f the point of law is to guide the behavior of ordinary citizens in a democracy, then we should search for how those citizens understand legal language. Looking to those facts could lead textualist courts to reconsider some traditional textualist tenets and interpretive principles.").

175. *E.g.*, Zemelman, *supra* note 113, at 193–97 (arguing that courts have departed from congressional intent in imposing greater burdens for litigants to establish Title VII claims); Henry L. Chambers, Jr., *The Supreme Court Chipping Away at Title VII: Strengthening It or Killing It?*, 74 LA. L. REV. 1161, 1193 (2013) ("[T]he Court is chipping away at Title VII. . . . Title VII's relevance will diminish and workplace justice will become more difficult to find.").

176. *Supra* notes 88–91 and accompanying text.

177. *See, e.g.*, Levinson, *supra* note 172, at 642 ("If a sexually harassing work environment constitutes discrimination with regard to the terms and conditions of employment, it is equally clear that other types of employment action, *including transfers . . . or changes in workload or work scheduling*, should be actionable under Title VII . . . ." (emphasis added)); *see also* Part I.A (discussing how the text and legislative history of Title VII favor a broad interpretation of the statute).

178. *See, e.g.*, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1493 (1987) (finding that reading the Civil Rights Act with an evolving interpretation is logical and solves important problems).

179. *Id.* at 1486–87 (advocating for a dynamic method of statutory interpretation for certain statutes that would consider a very broad range of factors around the statute); Eskridge & Ferejohn, *supra* note 52, at 1273–74 (same).

Eskridge argues that the Civil Rights Act, throughout its entire existence, has had such a pervasive impact on American life and lawmaking that courts should inherently construe it liberally.[180] This argument is attributed to the fact that the Civil Rights Act was a rigorously debated piece of legislation with significant implications for the United States' social and cultural status quo,[181] and that the values that the Civil Rights Act protects significantly impacted judicial decisions and Americans' perceptions of their fundamental rights.[182]

To summarize, commentators have widely criticized courts' interpretation of Title VII over time. The existing literature argues that courts have unilaterally narrowed Title VII in a variety of ways, including the way which is most relevant to this Note: the threshold for harm that is necessary to bring a valid Title VII claim.[183] As courts have shifted to generally favoring textualist methodologies, Title VII's interpretation has followed suit. Modern courts have shirked purposive and case-based reasoning in favor of an explicitly textualist interpretation of Title VII. *Bostock*'s impact is readily apparent on circuit courts' interpretations,[184] as well as the literature surrounding both statutory interpretation and Title VII generally. In the decades since its passage, Title VII has both flourished and suffered under the evolving interpretive lenses of federal courts.

## II. THE RESOLUTION TO TITLE VII'S DEFICIENCIES IS NOT SOLELY METHODOLOGICAL

Despite the breadth of methodological concern surrounding Title VII, focusing on the individual interpretive failings of courts—and the potential interpretative paths of the future—misses the mark on ideally actualizing Title VII's goals.

180. Eskridge & Ferejohn, *supra* note 52, at 1247 ("*Super-statutes* should be construed liberally and in a common law way, but in light of the statutory purpose *and principle* as well as compromises *suggested* by statutory texts." (second and third emphases added)).

181. *Id.* at 1237 (listing the important implicated issues in the Civil Rights Act to illustrate the divisive nature of the act).

182. *Id.* at 1242 (showing how the Civil Rights Act affected later judicial decisions).

183. *See supra* Part I.B (discussing the circuit-splitting issue of what harm is required for a Title VII claim).

184. *See* cases cited *supra* notes 88–91 and accompanying text (discussing how circuits have applied *Bostock* to Title VII cases).

Regardless of the methodology employed, courts and commentators have found ample opportunity to interpret Title VII in restrictively narrowing ways.[185] The statutory interpretation methods that courts have employed to interpret Title VII have not achieved consistent results and have led to waves of uncertainty in protecting employee rights.[186] The ultimate employment decision standard survived as good law in the Fifth Circuit for nearly thirty years, and discriminatory scheduling and transfers are still permitted in the Fourth, Seventh, and Eleventh Circuits, despite decades of case law and interpretive development.[187] Title VII demands more than a static protection of enumerated classes, and continuing to apply rote methodologies ignores the Act's uniquely broad command for equality. While courts may frame their ultimate interpretations of Title VII in methodological terms, the key for repairing Title VII lies in its unique command for equality.[188]

Methodological conversations are not useful for determining the efficacy of Title VII's implementation. The Civil Rights Act of 1964 is more than a narrow statutory protection for protected classes—it is the legal embodiment of the American ideal of equality and a snapshot of the historical moment that enshrined that ideal.[189] And, importantly, equality is an evolving concept,

185. *See supra* Part I.C (analyzing how courts have narrowed Title VII).

186. *Cf.* Levinson, *supra* note 172, at 648–69 (illustrating how lower courts have diverged in establishing requirements for Title VII claims, creating confusion); William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 393 (2017) (arguing that, prior to *Bostock*, Title VII already protected LGBT people).

187. *See supra* Part I.B (analyzing how various circuits have interpreted Title VII).

188. *See supra* notes 178–82 and accompanying text (recognizing an argument that the Civil Rights Act should receive evolving and dynamic interpretation due to its unique thorough legislative deliberation and goal of having immense societal impact).

189. *See supra* notes 59–62 and accompanying text (reviewing the broad ambitions of the Civil Rights Act as shown in its legislative history); *The Civil Rights Act of 1964: A Long Struggle for Freedom*, LIB. OF CONG., https://www.loc.gov/exhibits/civil-rights-act/civil-rights-act-of-1964.html [https://perma.cc/6E7D-CJA8] (outlining the historical significance of the Act); *Legal Highlight: The Civil Rights Act of 1964*, *supra* note 53 (highlighting the general significance and broad modern conceptualization of the Act).

not a static boundary.[190] The Supreme Court implicitly acknowledged as much in *Bostock*, even as it tethered itself to a deeply textualist methodology.[191] Congress did the same by opting to include sex within Title VII, rather than uniquely tethering the Act to racial discrimination.[192] And regardless of legislative or judicial mandate, laws that are concerned with equality—such as the Civil Rights Act—*should* track with evolving notions of equality.[193] Subjecting the Act to unpredictable and shifting statutory interpretation methodologies inevitably limits the scope through which courts can support equal workplace treatment and prevents the Act from reaching its full and proper potential. If courts dogmatically rely on traditional methods of statutory interpretation, even reading the Act's text with a broad lens will inevitably lead to loopholes, narrowing, and a degradation of the Act's ideals over time.[194] The Act's significant decades-long

190. For an application of this ideal in the constitutional context, see JACK M. BALKIN, LIVING ORIGINALISM 254 (2011) (noting that "[t]he expected application of 1791 does not control modern-day constructions" of the Fifth and Fourteenth amendments, and that "[t]he question we should ask today is whether a proposed construction is one that the text can bear and makes the most sense of the clause[s] in the context of the larger constitutional plan"); *id.* at 3 ("[Constitutional interpretation] requires us to ascertain and to be faithful to the principles that underlie the text, and to build out constitutional constructions that best apply the constitutional text and its associated principles *in current circumstances*." (emphasis added)).

191. *See* Bostock v. Clayton County, 590 U.S. 644, 683–85 (2020) (Alito, J., dissenting) (accusing the *Bostock* majority of judicially updating Title VII to comport with broadly understood, and modern notions of equality). While Justice Alito uses this argument to delegitimize the majority, this Note proposes that that is, in fact, exactly how Title VII *should* be interpreted. This markedly contrasts Alito's belief that Title VII should only reflect the drafters' 1960s understandings. *Id.* at 1756–57.

192. 42 U.S.C. § 2000e-2(a). Although Jim Crow laws and legalized racism spurred the Act, *supra* Part I.A, the inclusion of "sex" as a protected class detethers the Act from the racial rights revolutions of 1960s America.

193. *See* Gerald Torres, *The Evolution of Equality in American Law*, 31 HASTINGS CONST. L.Q. 613, 614 ("[A]ny consideration of the evolution of the idea of equality in American law is obliged necessarily to engage the cross currents in American life to which the law has responded."); BALKIN, *supra* note 190, at 3 ("In each generation the American people are charged with the obligation to flesh out and implement [constitutional] text and principle in their own time.").

194. *Cf. infra* Part III.A (highlighting textualism's shortcomings as an interpretive method). *Compare* Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (interpreting Title VII to permit a broader scope of action than its facial text may imply), *with* McCoy v. City of Shreveport, 492 F.3d 551, 560 (5th Cir. 2007)

narrowing following its passage proves as much.[195] Title VII has seen multiple eras of interpretation, yet significant, intuitively wrong, shortcomings in its law persist.[196] Solely giving greater fidelity to methodological processes cannot remediate the ingrained errors that arose in the abrogation of those processes. In order to repair Title VII's consistent deficiencies, courts must surpass traditional statutory interpretation values and recognize the Act's larger societal influence, expansive codification of workplace fairness, and the evolutionary nature of equality.

In other words, *no* court has uniformly "got it right" in interpreting Title VII, either on their own methodological terms or on the terms proposed in this Note. Across the methodological spectrum, courts have come to varying interpretive results.[197] With the Civil Rights Act of 1964 recognized as a uniquely protective statute that guards fundamental rights, Title VII should not be subject to the volatile whims of the judiciary[198] or the unpredictable application of new statutory interpretation methodologies. Many courts have either uniformly "missed the point" of Title VII, ignoring its command for equality, or have become so entwined with bad case law that they have become bound by restrictive precedent.[199] Title VII commands that the workplace be free of arbitrary discrimination based on one's protected characteristics and offers a remedy to those who suffer that discrimination.[200] By becoming inundated with interpretive and methodological processes, courts have untethered Title VII from the ideals that it guards and permitted inequality to permeate the workplace.

---

(reaffirming the ultimate employment decision standard that arbitrarily limits actionable claims).

195. *See supra* Part I (providing an overview of the narrowing of Title VII).

196. *Supra* Part I.

197. *See, e.g.*, Widiss, *supra* note 169, at 360–74 (discussing the range of interpretations of Title VII); *supra* notes 109–14 and accompanying text (same).

198. Admittedly, some level of volatility is inherent in tethering justiciable actions to evolving notions of equality. More precisely, this proposal prevents courts from *limiting* Title VII actions due to volatility.

199. *E.g.*, *Hamilton I*, 42 F.4th 550, 552 (5th Cir. 2022) (ruling against a plaintiff due to the lack of an ultimate employment decision); *see supra* Part I.B (providing an overview of the Title VII circuit split); *cf. Hamilton II*, 79 F.4th 494, 510 (5th Cir. 2023) (Jones, J., concurring in the judgment only) (advocating for the continued application of the ultimate employment decision standard).

200. *See* 42 U.S.C. § 2000e-2(a).

Courts and scholars should move beyond trying to find the perfect methodology to resolve inadequacies in Title VII and shift their focus to the Act's broader goals. Neither the text of Title VII, nor the precise purpose that the 1964 Congress envisioned at its passage, are sufficient guideposts to actuate Title VII's modern function. Title VII should—and does—evolve alongside American society. Resultingly, courts should stop using methodological constraints to justify inequitable restrictions on Title VII, such as the ultimate employment decision standard and holding discriminatory scheduling and transfers as unactionable. Nonetheless, courts may realize Title VII's broad command for an evolving notion of equality through the framework of familiar methodologies.

## III. PURPOSIVISM OFFERS A BETTER APPROACH FOR RESOLVING TITLE VII INCONSISTENCIES THAN TEXTUALISM

As a practical matter, encouraging courts to enact the Civil Rights Act's command to protect an evolving notion of equality is a vague truism that provides little guidance. Thus, courts may still frame the Act's broad command for equality within the framework of established statutory interpretation methods. In doing so, courts should reorient their methodology to expansive purposivist values.

The answer to the shortcomings and inconsistencies in Title VII law, including the circuit split on what constitutes an actionable harm, lies in broad purposivism. Under a purposive approach, a court considers a statute's purpose, as informed by the documents surrounding its passage, in order to inform its ruling.[201] Contrary to the modern trends of statutory interpretation, the Civil Rights Act is uniquely suited to a broad purposive interpretation. The shortcomings of textualism in the Title VII context, the doctrinal landscape of the inconsistencies in Title VII case law, and the Civil Rights Act's overall significance as a statute, all showcase the necessity to broaden Title VII's interpretive scope. This Part addresses the difficulties of pinning

201. BRANNON, *supra* note 129, at 12 ("[Purposivists] argue that to preserve the 'integrity of legislation,' judges should pay attention to 'how Congress makes its purposes known, through text and reliable accompanying materials constituting legislative history.'" (quoting ROBERT A. KATZMANN, JUDGING STATUTES 4 (2014))).

Title VII to a methodology and proposes that the Civil Rights Act is uniquely situated for courts to broadly interpret.

### A. TEXTUALISM CANNOT ADEQUATELY RESOLVE TITLE VII INCONSISTENCIES

A persistent reliance on textualism cannot resolve the differences in the circuits' interpretations and will not beget predictable results. In theory, textualism enacts the legislature's intent through loyalty to the specific words of a statute, grounding courts' interpretations in an objective record and respecting the process which made that record.[202] While textualism is dominant in modern courts, the methodology did not enjoy widespread, or even minorly significant, recognition in the 1960s, when the Civil Rights Act first became law.[203] Amongst a massive collection of federal laws, the Civil Rights Act is unique in its significance and accomplishments.[204] It is inappropriate to limit Title VII's scope through applying modern interpretive tools that were largely unpredictable at the time of the Act's passage—to do so would be to influence the law in an unforeseeable and harmfully limiting way.[205] Though non-textual methodologies may lead to fact-specific interpretations that would have been unpredictable at the time of the Act's passage, the factual evolution of the Act's applicability was predictable.[206]

Admittedly, textualism is an attractive interpretive tool, especially in the Title VII context. Courts widely accept the textualist methodology, the text of Title VII can plausibly defend broad interpretations, and courts have already used textualism

---

202. *Id.* at 14 ("Textualism focuses on the words of a statute because it is that text that survived these political processes and was duly enacted by Congress, exercising its constitutional power to legislate.").

203. *Id.* at 7 (explaining how legal realism, not textualism, was the prevailing interpretive theory of the twentieth century); *see also* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 20–21 (2006) (describing how the Warren Court in the 1960s "believed that its responsibility to effectuate statutory purposes was an essential component of judging" rather than focusing on the statutory text).

204. *Supra* Part I.A (describing the contents and history of the Civil Rights Act).

205. *See infra* Part III.C (illustrating how the nature of the Civil Rights Act requires its provisions to be broadly interpreted).

206. *Cf.* Torres, *supra* note 193, at 614 (explaining how the idea of equality in American law must be construed to evolve with changes in social norms).

to expand Title VII protections.[207] Given the breadth of Title VII's language, a court could achieve fidelity to the Civil Rights Act and a broad range of practical results through invoking textualism. Despite this potential, textualism is still not the best methodology because its potential utility is outweighed by its practical inconsistency.[208] The breadth of potential textualist interpretations is significant, and may force courts into volatility in their interpretations in order to achieve just results between cases.[209] In contrast, under a broad purposive approach—where the Civil Rights Act is recognized as a general bar to material discrimination[210] based on one's protected class—courts would have little room to develop sweeping rules that bar material claims.

A consistent reliance on textualism in the Title VII context is hampered by blatant inconsistency in the methodology's practical application. The result and interpretive process of *Bostock*—an extremely textualist opinion—was a surprise, even to other textualist Supreme Court Justices.[211] Even in spite of the Supreme Court's lack of internal consistency, courts have now taken this as permission to wield textualism with a progressive slant, countering detractors to *Bostock* and breathing a new life into the methodology.[212] But textualism continues to produce

---

207. *See, e.g.*, Bostock v. Clayton County, 590 U.S. 644, 683 (2020) (employing a textualist interpretation of Title VII of the Civil Rights Act to expand protections to gay and transgender individuals).

208. *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 71–75 (2006) (highlighting the differing values that various camps of textualists have emphasized in statutory interpretation).

209. *See id.* (demonstrating how applying different forms of textualism to the same matter could yield different results).

210. That is to say, *any* discriminatory action that subjectively has an adverse impact on employment conditions. Of course, an employee could not significantly recover on de minimis impacts and would have a difficult time pleading and proving truly immaterial cases. *See infra* note 240 and accompanying text.

211. *Bostock*, 590 U.S. at 684–85 (Alito, J., dissenting) (purporting to use textualist methodologies to reach a result opposed to the majority); *see also, e.g.*, Berman & Krishnamurthi, *supra* note 165, at 79 ("Justice Alito declared [the majority's judgment in *Bostock*] 'preposterous' and derided the majority's attempt to 'pass off its decision as the inevitable product of' Justice Scalia's textualism as a ruse." (quoting *Bostock*, 590 U.S. at 685 (Alito, J., dissenting))).

212. *E.g.*, Chambers v. District of Columbia, 35 F.4th 870, 874–75 (D.C. Cir. 2022) ("Once it has been established that an employer has discriminated against an employee with respect to that employee's 'terms, conditions, or privileges of

unpredictable results that risk undermining Title VII's command for equality. In *Hamilton II*, the Fifth Circuit—a typically politically and judicially conservative court[213]—reached a nominally progressive result by broadening the scope of actionable Title VII claims and explicitly holding discriminatory transfers as within that scope.[214] Mirroring Justice Alito's *Bostock* dissent, even this clear-cut progressive victory was mired by two concurring opinions. One concurrence criticized the majority's application of textualism and would have used a different textualist strategy to "continue to enforce" the ultimate employment decision standard.[215] The other concurrence celebrated the breadth of the majority's ruling, before criticizing *all* protected class-conscious programs and initiatives.[216] In all three opinions, the Act's textual mandate received deference over the Act's substantive anti-discriminatory purpose.[217]

---

employment' because of a protected characteristic, the analysis is complete. The plain text of Title VII requires no more."); *see also* Franklin, *supra* note 166 ("*Bostock* is not a product of 1964. It is a product of 2020. It reflects today's moral values and partakes in current forms of legal and social contestation—over same-sex marriage, gender identity, and religious liberty—and that is just as true of the dissenting opinions as it is of the majority opinion.").

213. Broscheid, *supra* note 24, at 188 ("Several circuits, including the Fifth, . . . make more conservative decisions than one would expect from their median circuit and three-judge panel ideologies.").

214. *Hamilton II*, 79 F.4th 494, 506 (5th Cir. 2023) ("To adequately plead an adverse employment action, plaintiffs need not allege discrimination with respect to an 'ultimate employment decision.' Instead, a plaintiff need only show that she was discriminated against, because of a protected characteristic, with respect to hiring, firing, compensation, or the 'terms, conditions, or privileges of employment'—just as the statute says." (citing 42 U.S.C. § 2000e-2(a)(1); TEX. LAB. CODE § 21.051(1) (West 2023))).

215. *Id.* at 510 (Jones, J., concurring in the judgment only).

216. *Id.* at 508–09 (Ho, J., concurring) (criticizing race-conscious university admissions). While this Note does not evaluate the substantive efficacy of such affirmative action programs as Judge Ho decries, it is the Author's position that a broader purposive application of Title VII would account for pervasive societal inequalities in evaluating the legality of those programs. *See* H.R. REP. NO. 88-914, at 18 (1963) (emphasizing the need for active intervention to eliminate societal inequality); c*f.* Eric Deggans, '*Not Racist' Is Not Enough: Putting in the Work to Be Anti-Racist*, NPR (Aug. 25, 2020), https://www.npr.org/2020/08/24/905515398/not-racist-is-not-enough-putting-in-the-work-to-be-anti-racistNPR [https://perma.cc/2T4Y-C7GP] (characterizing racial inequality as a systemic problem that requires active work to undo).

217. *Supra* notes 214–16.

In short, even when plausible textualist readings lead to apparently positive outcomes,[218] other textualist readings may "poison" those victories through criticism of the majority's methodological validity and through a continued ignorance of the broader reasons for Title VII's enactment. The existing web of textualist case law and textualism's continued potential for inconsistency prevent the methodology from respecting Title VII's command for equality with the same strength that a broad and purposive lens would.[219]

### B. A BROAD METHODOLOGY IS NECESSARY TO REPAIR TITLE VII LAW

History favors a purposivist—or at least a decidedly broad—approach to Title VII. Purposivism is closer to the favored interpretive methodology at the time of the Civil Rights Act's passage. The Civil Rights Act was not drafted, and should not be interpreted, to be limited by the mechanics of its text. In addition to the historical reasons for abrogating a reliance on the Act's text, the Act specifically acknowledges its generally broad purpose.[220] In its statement of purpose, the Act enumerates the delineated functions that it performs, such as establishing the Equal Employment Opportunity Commission (EEOC), before noting that it also serves "other purposes."[221]

This support for broadening Title VII under a purposive lens should not be confused with a complete abrogation of Title VII's text. The text of the Civil Rights Act informs its broad purpose and is consistent with a broad reading.[222] Complete ignorance of its text may hamper important protections that received less attention during the Act's initial drafting.[223] Moreover, reference

218. By "positive outcomes," I refer to outcomes which combat pervasive societal discrimination, in keeping with the Act's broad command.

219. *Cf.* Widiss, *supra* note 169, at 358–59 (acknowledging textualism's conservative reputation and the growing body of literature encouraging its progressive application).

220. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 241 (outlining the various specific purposes of the Civil Rights Act and including the catch-all phrase "and for other purposes").

221. *Id.*

222. *Supra* notes 57–62 and accompanying text (explaining why the Civil Rights Act's statutory construction lends itself to a broad interpretation).

223. As noted earlier, the Civil Rights Act is largely contextualized by Black Americans' struggles against Jim Crow. *Supra* notes 46–48 and accompanying

to the Act's text can give courts a plausible method by which to repair and expand the Civil Rights Act. Where purposive methodologies have generally become subjugated to textualist values,[224] courts can use Title VII's text to support their broad readings, even as they doctrinally expand the case law from its textual bounds.

Though already litigated, the facts of *Bostock* may be illustrative. In *Bostock*, the United States Supreme Court relied on a heavy textualism to justify modernizing Title VII, bringing gay and transgender people within its reach.[225] Under this Note's proposed interpretative methodology, a court would still find sexual minorities within Title VII's scope through the Act's broad purpose and legislative history. A court would construe Title VII with deference to its status as a fundamental cornerstone of American law. A court would acknowledge that Title VII is representative of the nation's collective consciousness, with reference to its "super-statute" status, to explain why it does not need to broach the text to bring sexual minorities within Title VII's scope.[226] After completing the broad purposive analysis, it would then conduct a textual analysis and, given the broad

---

text. While Title VII provides protections based upon sex, the Civil Rights Act's passage was primarily contextualized by racial issues. *See also* Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 454 (1981) (explaining that the Civil Rights Movement, which contextualized the Act, "had focused on segregation in public accommodations and public schools, rather than on discrimination in factories and businesses" (citing JOSEPH C. GOULDEN, MEANY 320 (1972))).

224. *See* BRANNON, *supra* note 129 at 16–18 (describing a "convergence" of textualist and purposivist methodologies, where statutory interpretation is fundamentally rooted in text); *see also* Harvard Law School, *supra* note 165 (acknowledging textualism's pervasive influence on judicial decision making).

225. Bostock v. Clayton County, 590 U.S. 644, 683 (2020) ("In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.").

226. Eskridge & Ferejohn, *supra* note 52, at 1237 ("[T]he Civil Rights Act is a proven super-statute because it embodies a great principle (antidiscrimination), was adopted after an intense political struggle and normative debate and has over the years entrenched its norm into American public life, and has pervasively affected federal statutes and constitutional law." (footnote omitted)); *see also* Eskridge, *supra* note 178, at 1492–94 (justifying a dynamic interpretation of Title VII that would not have been envisioned by its drafters but is consistent with societal changes).

language of Title VII's text, it is unlikely that the text and broad purpose would conflict with each other.[227] Thus, courts can invoke broad interpretations, even while staying close to Title VII's text. Rather than a heel-turn from modern statutory interpretation principles, this would showcase a synthesis of interpretive methodologies that is decidedly more aware of the Civil Rights Act's broader purpose, function, and effect.

It is important that courts consciously apply a broad version of the purposive methodology to enable plaintiffs to seek proper redress. A narrow purposivism would be harmfully restrictive and inconsistent with permitting the concept of equality to evolve alongside the Civil Rights Act. Because the Civil Rights Act's passage was largely contextualized by the Civil Rights Movement, a narrow reading may find itself overly restricted by the most salient concerns of that time, and while those concerns remain important, this is not the best reading of the Act.[228]

### C. A BROAD PURPOSIVE APPROACH FULFILLS THE FOURTEENTH AMENDMENT'S PROMISES

Policy concerns that are adjacent to constitutional concerns also favor a broad reading of the Civil Rights Act. The Supreme Court eliminated any possibility of the Fourteenth Amendment's application to private actors early in the Fourteenth Amendment's lifespan.[229] The Civil Rights Act of 1964 has largely filled in the gaps of the Fourteenth Amendment by addressing private action. Moreover, the Act's legislative history explicitly concerns itself with constitutional rights, labeling the Act as a safeguard to certain rights.[230] Thus, while Title VII is a piece of legislation, and not a constitutional amendment, it purposefully stretches beyond the scope of rote, pork barrel, or otherwise administrative (in the literal, not technical, sense) legislation. The sheer breadth of its reach, even if narrowly interpreted, and its inextricable connection to fundamental civil rights, necessitate a

227. *Cf.* 42 U.S.C. § 2000e-2(a)(1) (prohibiting discrimination in the catch-all "terms, conditions, or privileges of employment").

228. *See supra* Part I.A (favoring a broad interpretation of the Civil Rights Act).

229. Civil Rights Cases, 109 U.S. 3, 25 (1883) (holding that the Fourteenth Amendment only applies to state actions).

230. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 241 (stating that a purpose of the Civil Rights Act is to "enforce the constitutional right to vote").

broad interpretation. In other words, Title VII protects a specific set of civil rights that courts can protect *only* through reference to Title VII. These rights guarantee freedom from private employment discrimination. Thus, the Civil Rights Act repairs the early Reconstruction-era conception of equality and gives true fidelity to the Fourteenth Amendment.[231]

Additionally, as Eskridge noted in arguing for an expansive Civil Rights Act interpretation, the Civil Rights Act of 1964 signifies a fundamental change in America's social order.[232] While its provisions were not vetted under the same scrutiny as a constitutional amendment, to narrowly construe the Act—even decades after its passage—is to potentially jeopardize the rights of all Americans. The right to access employment without being arbitrarily held back by one's immutable characteristic is a fundamental right. To deny that right by invoking a narrow, textual understanding of Title VII would be to challenge a fundamental tenet of American society by unambiguously legalizing arbitrary loopholes to equality.

### D. A BROAD PURPOSIVE APPROACH REVEALS AN EXPANDED CONCEPTION OF ADVERSE EMPLOYMENT ACTIONS

Under the suggested methodology, adverse employment actions would have a legal scope that generally extends beyond their current conception. Using the text of Title VII as a guide, the purpose of Title VII is to protect against any action that "adversely affects [an individual's] status as an employee."[233] In line with Eskridge's vision for "super-statutes,"[234] courts should interpret this phrase broadly in order to avoid putting significant categorical barriers on plaintiffs' claims. Plaintiffs should not be categorically barred from bringing, for example, claims that they were adversely affected by an employer's discriminatory

231. *Cf.* U.S. CONST. amend. XIV, § 1 (guaranteeing equal protection under the laws).

232. Eskridge & Ferejohn *supra* note 52, at 1242 ("[T]he Civil Rights Act's antidiscrimination principle has saturated American social and political culture.").

233. 42 U.S.C. § 2000e-2(a)(2).

234. Eskridge & Ferejohn, *supra* note 52, at 1273. ("[S]uper-statutes are extensively relied upon by the people and are repeatedly visited and endorsed by legislative, administrative, and judicial institutions in response to the actions taken by private as well as public actors.").

scheduling or transfers.[235] In doing so, courts could enable monetary redress for the non-monetary harms of discrimination.[236]

"Adversity" is likely a sufficient factual threshold for Title VII actions, when "adversity" is not bound by any categorical or monetary limitation. This would clearly make discriminatory transfers and scheduling choices actionable, both being terms of employment that could negatively affect an employee's work experience. The Act's legislative history should be read to confirm the same. Title VII bars any material discrimination, without specific categorical distinction, to include transfers, scheduling, and other facets of employment whose discriminatory deprival would harm an employee.[237]

Admittedly, adoption of this methodology may initially lead to an influx of litigation that would necessarily flesh out the lower bounds of permissible Title VII actions.[238] Still, Title VII actions remain bound by normal pleading standards, and must be facially plausible.[239] Courts (or Congress) may further establish heightened pleading standards—for example, a requirement to allege adverse employment actions with particularity—to ensure that claims meet a certain threshold of plausibility before

---

235. *See, e.g.*, *Hamilton I*, 42 F.4th 550, 552 (5th Cir. 2022) (illustrating the plaintiff's claim of gender-based discriminatory scheduling practices); Threat v. City of Cleveland, 6 F.4th 672, 676 (6th Cir. 2021) (discussing the plaintiffs' allegations of racially discriminatory scheduling practices); Chambers v. District of Columbia, 35 F.4th 870, 873 (D.C. Cir. 2022) (describing the plaintiff's allegations of discriminatory transfer decision-making processes).

236. *See generally Physiological & Psychological Impact of Racism and Discrimination for African-Americans*, AM. PSYCH. ASS'N (2013), https://www.apa.org/pi/oema/resources/ethnicity-health/racism-stress [https://perma.cc/P3JL-VB5M] (summarizing the potential adverse health impacts of experiencing racism).

237. H.R. REP. NO. 88-914, at 16 (1963) (outlining the Civil Rights Act's general purpose); *supra* Part I.A (analyzing Title VII's text and legislative history).

238. *See* Oral Argument, *supra* note 23, at 38:30 (explaining how a key factor of determining the standing of a plaintiff in a Title VII action is the extent to which the alleged harassment affects their conditions of employment per the statutory language).

239. *Twombly* and *Iqbal* demonstrate the judiciary's ability to control threshold pleading requirements. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (holding that the complaint failed to plead sufficiently specific facts to warrant a valid claim).

proceeding.[240] Thus, procedural limitations outside Title VII may help curb the most senseless claims of harm. Even so, a broadening of actionable Title VII claims is inherent to the adoption of a broader purposive lens.

## CONCLUSION

The Civil Rights Act of 1964 guarantees that all Americans can enjoy the benefits of employment without concern for their race, sex, religion, or national origin. Title VII does well to fill in the significant gaps that the Fourteenth Amendment leaves open, ensuring that private actors cannot discriminate in their employment practices. This Note highlights courts' methodological inconsistencies and shortcomings in fulfilling that command and advocates for the application of a broad and decidedly purposive methodology. This Note's proposal is solely responsive to the unique context of the Civil Rights Act of 1964 and does not speak to more generalized preferences of statutory interpretation. While courts should generally strive for consistency in their methodologies, the unique significance, history, and development of Title VII supports a legal reframing of its interpretation. Though dogmatic application of statutory interpretation methodologies cannot, by itself, fix Title VII's deficiencies, courts may nonetheless repair Title VII law by framing their decisions within methodological terms, even as they maintain awareness of Title VII's broader command for equality.

Title VII offers guidance about the legality of clear-cut and obvious employment discrimination; when an individual is discriminated against because of their protected class, they are entitled to recovery. Across the country, case law has developed to uniformly narrow the scope of actionable claims. While no single reason may be sufficient to justify an abrogation of modern interpretive values, the combination of the Civil Rights Act's legal and cultural significance, the unique interpretive development of its case law, and the historical shift in interpretive methods favors a unique approach to the Act's, and thus Title VII's, interpretation. Broad purposivism, with acknowledgement of Title

240. *See, e.g.*, FED. R. CIV. P. 9(b) (requiring fraud to be pled "with particularity"); *In re* IBM Arb. Agreement Litig., 76 F.4th 74, 87 (2d Cir. 2023) (citing Lerner v. Fleet Bank, N.A., 459 F.3d 273, 290 (2d Cir. 2006)) (summarizing the elements necessary to meet Rule 9(b)'s particularity requirement in the Second Circuit).

VII's text, can serve as a methodological hook to restore plaintiffs' rights to recovery in the face of employers' discriminatory conduct.