

ESSAY

TITLE VII, THE THIRD-PARTY RETALIATION ISSUE, AND
THE “PLAIN LANGUAGE” MIRAGE

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INTRODUCTION

Consider the following real-world scenario:

Believing that her employer discriminated against her because of her sex and in violation of Title VII of the Civil Rights Act of 1964 (Title VII),¹ Employee A filed a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC). Thereafter, the EEOC notified the employer of Employee A’s charge. Three weeks after that notification the employer informed Employee B (Employee A’s fiancé) that his employment had been terminated. Contending that he was fired in retaliation for the sex discrimination charge filed by his fiancé,

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1. See 42 U.S.C. §§ 2000e to 2000e-17 (2012).

Employee B filed his own discrimination charge with the EEOC and a subsequent federal court lawsuit against the employer.

Did the employer's termination of Employee B's employment violate Title VII? Section 704(a) of the statute, in pertinent part, provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.²

How should a court approach and answer the statutory question presented in Employee B's suit against the employer? Does § 704(a) clearly and definitively provide that an employer's third-party retaliation (i.e., alleged retaliation against an employee as a reaction and in response to another employee's resort to Title VII's protections and procedures) constitutes conduct outlawed by § 704(a)? Or, does the plain language of that section provide no statutory protection for a third party, like Employee B, who did not actually oppose an unlawful employment practice or participate in an EEOC proceeding?

In *Thompson v. North American Stainless, LP*³ a unanimous United States Supreme Court held that § 704(a) provides employees with a Title VII cause of action challenging an employer's alleged third-party retaliation.⁴ In so doing, the Court reversed the judgment of the United States Court of Appeals for the Sixth Circuit and rejected that court's holding that the plain language of § 704(a) does not recognize third-party retaliation claims.⁵ Guided by its 2006 decision and the standard formulated in *Burlington Northern & Santa Fe Railway Co. v. White*,⁶ the Court concluded that it was "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."⁷

This essay examines the Court's approach and solution to the statutory puzzle placed before judges asked to decide whether Title VII prohibited or encompassed third-party retaliation claims. More specifically, I contend that the Sixth Circuit's plain-language reading of § 704(a) led the

2. 42 U.S.C. § 2000e-3(a) (2012).

3. 131 S. Ct. 863 (2011).

4. *Id.* at 870.

5. See *Thompson v. N. Am. Stainless, LP*, 567 F.3d 804, 807(6th Cir. 2006) (reversing panel decision allowing claims for third party retaliation), *rev'd*, 131 S. Ct. 863 (2011).

6. 548 U.S. 53 (2006).

7. *Thompson*, 131 S.Ct. at 868.

court to a mirage and to an outcome ultimately rejected by the Supreme Court.⁸

The discussion proceeds as follows. Part I's prefatory overview surveys methodologies available to and employed by judges engaged in the enterprise of statutory interpretation. Part II focuses on Supreme Court decisions considering and giving operative meaning to § 704(a)'s anti-retaliation mandate, with special reference to the interpretive approaches taken by the Court in its reading and application of that provision.⁹ Part III then turns to and examines Thompson's affirmative answer to the issue of whether § 704(a) prohibits third-party retaliation. That query had been answered in the negative by the Sixth Circuit¹⁰ and other lower courts which had concluded that the statutory text only proscribed two-party retaliation claims against an employer brought by the employee who actually opposed a practice made unlawful by Title VII and/or met the statutory participation requirement.¹¹ As discussed therein, that disagreement stemmed from the lower courts' exclusive reliance on the "plain language" of § 704(a), and the Court's differing emphasis on statutory purpose and precedent and the judicially-formulated and context-sensitive standard applied in the adjudication of § 704(a) actions.¹²

I. STATUTORY INTERPRETATION: AN OVERVIEW

In this age of statutes,¹³ judges must interpret and apply laws enacted by legislatures and resolve cases and controversies brought to the courts for adjudication and decision. The federal judiciary performs this institutional role and function within a separation-of-powers structure popularized by Baron de Montesquieu prior to the founding of the United States.¹⁴

8. See *id.* at 870 (vacating en banc decision of the Sixth Circuit and holding that Title VII encompasses claims for third-party retaliation).

9. The Court has consistently and broadly interpreted § 704(a) in its decisions holding that that section covers and provides protection for employees alleging that their employer engaged in unlawful retaliatory conduct. See *Crawford v. Metro. Gov't. of Nashville & Davidson Cnty.*, 555 U.S. 271 (2009); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). See also *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325 (2011) (holding that the antiretaliation provision of the Fair Labor Standards Act includes oral as well as written complaints); *Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (holding that a federal employee may complain of retaliation under the federal-sector provision of the Age Discrimination in Employment Act); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442 (2008) (holding that an individual claiming unlawful retaliation in violation of 42 U.S.C. § 1981 has a cognizable claim); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (holding that retaliation is a form of intentional sex discrimination encompassed by Title IX of the Education Amendments of 1972).

10. See *Thompson*, 567 F.3d at 807.

11. See *Thompson v. N. Am. Stainless, LP*, 435 F. Supp. 2d 633, 637 (E.D. Ky. 2006).

12. See *Thompson*, 131 S. Ct. at 869.

13. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

14. See BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS: A COMPENDIUM OF THE FIRST ENGLISH EDITION* (David W. Carrithers ed., 1977); See also Jack N. Rakove, *The Nation; Judges: Conferring a Lifetime of Ideology*, N.Y. TIMES, May 13, 2001, § 4, at p. 5 ("Montesquieu was the

The trinity of powers is divided as follows: the United States Congress legislates through the process of bicameral enactment and presentment.¹⁵ The executive branch enforces those duly enacted laws,¹⁶ and the judiciary interprets and applies statutes in cases brought by plaintiffs who claim that certain conduct by defendants violates legislative commands.¹⁷

Judges, it has been argued, are subordinate to the legislature¹⁸ and should and must only declare what the law is; courts should not make law or “substitute their own policy preferences through the creation and application of public values canons for the preferences of Congress as articulated in the words and history of the statute.”¹⁹ Others have argued that it is inevitable that judges will and do make law,²⁰ as it is predictable that legislators will not anticipate all of the post-enactment questions that may or will arise with regard to the meaning and application of statutory provisions.²¹ When unanticipated issues arise, courts are faced with the task of

first to classify the powers of government into the modern trinity of legislative, executive and judicial.”). *But see* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1795 n.181 (2007) (“[Montesquieu’s] England—the England of the threefold division of power into legislative, executive and judicial—was a fiction invented by him” (quoting OLIVER WENDELL HOLMES, *Montesquieu*, in COLLECTED LEGAL PAPERS 250, 263 (1920)).

15. See U.S. CONST. art. I, § 1, cl. 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”); U.S. CONST. art. I, § 7, cl. 2 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it”); *id.* (stating that returned bills shall become law if reconsidered and approved by two thirds of the House and the Senate).

16. See U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”); U.S. CONST. art. II, § 3 (stating that the President “shall take Care that the Laws be faithfully executed”).

17. See U.S. CONST. art. III, § 2, cl. 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority”).

18. See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 283 (1989) (“Legislative supremacy, as a doctrine of statutory interpretation, is grounded in the notion that, except when exercising the power of judicial review, courts are subordinate to legislatures.”). See also Kenneth S. Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, in INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 115 (Sanford Levinson & Steven Mailloux eds., 1988); Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 926 (2012).

19. Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 744 (1992).

20. See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 546 (1991) (White, J., concurring) (“[J]udges in a real sense ‘make’ law”); RICHARD A. POSNER, *HOW JUDGES THINK* 81 (2008) (“Appellate judges are *occasional legislators*.”); RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 61 (2003) (“[J]udges make up much of the law that they are purporting to be merely applying. . . . There are enough other examples to show that while the judiciary is institutionally and procedurally distinct from the other branches of the government, it shares lawmaking power with the legislative branch.”); Erwin N. Griswold, *Cutting the Cloak to Fit the Cloth: An Approach to Problems in the Federal Courts*, 32 CATH. U. L. REV. 787, 801 (1983) (“Everyone knows that judges do make law, and should make law. It is rather a question of how much law they should make.”).

21. See FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY*, VOLUME 1: RULES AND ORDER 119 (1973) (noting that “new situations in which the established rules are not adequate will constantly arise”); H.L.A. HART, *THE CONCEPT OF LAW* 128-29 (2d ed. 1994) (“[H]uman legislators can have no such knowledge of all the possible combinations of circumstances which the future may bring.”);

resolving disputes and deciding cases not explicitly addressed or answered by statutory text.²²

A consequential question thus arises when judges interpret statutes: what methodology or methodologies should courts employ in discerning and declaring the operative meaning of a statutory provision in a case presenting adversarial parties' contested readings of that provision? Courts have developed a menu of interpretive methodologies and techniques as they seek to "reach accurate outcomes or promote other policy goals in deciding cases and controversies."²³ Three of these methodologies—textualism, intentionalism, and purposivism—are discussed in the following sections.²⁴

A. Textualism

Textualism, an interpretative approach championed by Justice Antonin Scalia and other judges and scholars, emphasizes that the "text is the law, and it is the text that must be observed."²⁵ For a textualist, "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material,"²⁶ and "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are gov-

Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CALIF. L. REV. 509, 536 (1994) (explaining that vague expressions by legislatures often present courts with unanticipated issues).

22. See Eric Schnapper, *Statutory Misinterpretation: A Legal Autopsy*, 68 NOTRE DAME L. REV. 1095, 1107 (1993).

23. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2108 (2002).

24. This overview is not and is not intended to be exhaustive. For additional materials, discussions, and sources, see STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* (2010); FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* (2009); REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* (1975); EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* (2008); WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991); KENT GREENAWALT, *LEGAL INTERPRETATION: PERSPECTIVES FROM OTHER DISCIPLINES AND PRIVATE TEXTS* (2010); WILLIAM D. POPKIN, *STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION* (1999); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012); LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* (2010); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

25. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 22 (Amy Guttmann ed., 1998). See also John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 73 (2006) ("'[N]ew' textualism' . . . requires judges to treat the clear import of an enacted text as conclusive"); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005) ("[T]extualism . . . in practice is associated with the basic proposition that judges must seek and abide by the public meaning of the enacted text"); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006).

26. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005).

erned.”²⁷ Thus, “[t]extualism, in its purest form, begins and ends with what the text says and fairly implies.”²⁸ These propositions are grounded in the textualist’s premises “that legislatures have authority only to pass statutes, not to form abstract ‘intentions,’”²⁹ and that the judicial role in interpreting and applying statutes is limited to and bounded by the “plain meaning” of statutory text.³⁰ In the event a court does not go beyond text and “the legislature is unhappy with the particular judicial result, it can always rectify the situation by legislative amendments that may, if the legislature deems necessary, apply retroactively.”³¹

“Plain language” theory and analysis calls for the interpretation of statutes “literally . . . according to the ‘plain meaning’ of their words, without recourse to considerations of legislative history, real-world context or consequences, or other indicia of legislative purpose.”³² The interpreter asks, “given the ordinary meanings of words and accepted precepts of grammar and syntax, what does the provision signify to the reasonable person”?³³ Proponents of textualism have consulted dictionaries and relied on judicial precedents and canons of construction when interpreting statutory text.³⁴

But will the meaning of statutory text always be “plain”? “For any statute of consequence, the legislative drafting process ensures textual ambiguities, which only multiply over time.”³⁵ That language may be

27. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

28. SCALIA & GARNER, *supra* note 24, at 16.

29. Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 83 (2000).

30. See Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 524 (2012); see also CROSS, *supra* note 24, at 24 (noting that the theory of textualism “is grounded in the fundamental principle that judges should give effect to what the legislature actually promulgates in statutory text and not go beyond those words with judicial discretion . . .”).

31. Andrei Marmor, *The Immorality of Textualism*, 38 LOY. L.A. L. REV. 2063, 2068 (2005) (noting this aspect of textualist argument).

32. POSNER, HOW JUDGES THINK, *supra* note 20, at 191. See also Lisa E. Key, *Private Enforcement of Federal Funding Conditions Under § 1983: The Supreme Court’s Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C. DAVIS L. REV. 283 (1996).

33. ESKRIDGE, *supra* note 24, at 38. Consider Justice Scalia’s position on the “regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning.” *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

34. See SCALIA & GARNER, *supra* note 24, at 167–68; James J. Brudney, *Recalibrating Federal Judicial Independence*, 64 OHIO ST. L.J. 149, 176–81 (2003); Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 16 (1998); Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435 (2007). See also BREYER, *supra* note 24, at 90 (discussing judges’ references to dictionaries and arguing that the practice is “rarely helpful”).

35. Robert F. Blomquist, *The Good American Legislator: Some Legal Process Perspectives and Possibilities*, 38 AKRON L. REV. 895, 933 (2005) (quoting ESKRIDGE, *supra* note 24, at 38). See also Peter Linzer, *The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule*, 71 FORDHAM L. REV. 799, 803 (2002) (“The flaw in plain meaning is, of course, the notion of latent ambiguity.”). The multiplication of textual ambiguities over time can also present a reader with a temporal choice: Is

ambiguous and words may have more than one meaning is not a novel observation.³⁶ As Chief Justice John Marshall stated in *McCulloch v. Maryland*,³⁷

Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended.³⁸

“Plain meaning” analysis is thus subject to the critique that, because “English as a language lacks precision” and “possesses a chameleonic quality that spans the color spectrum,”³⁹ there will be circumstances in which courts will not be able to discern any such meaning.

B. Intentionalism

A court employing the interpretive methodology known as intentionalism seeks to determine the subjective intentions of the legislature enacting a statutory provision,⁴⁰ and asks how the case would have been resolved by the enacting legislature if it had explicitly considered that case.⁴¹ Legislative intent may be found in statutory text, or in committee reports, statements by the sponsors and co-sponsors of a bill, floor debates, and other legislative materials and history.⁴² “Conventions that operate within the legislative process, such as deference to committees or sponsors by

the plain meaning of statutory text fixed at the time of enactment, or should the interpreter focus on and be “concerned with how a contemporary reader would understand the language employed, in relation also to the law of the current day?” Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 228 (1999).

36. “[A]mbiguity refers to the multiplicity of meanings; a term is ambiguous if it has more than one sense. A classic example is the word ‘cool,’” which can mean a low temperature or “something like ‘hip’ or ‘stylish’” Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 570 (2010) (footnote omitted). Vagueness, distinguishable from ambiguity, refers to a term that may or may not apply in certain instances. “A classic example is the word ‘tall.’ In one sense, ‘tall’ refers to height . . . that is higher than average. Abraham Lincoln, who stood at almost 6’4”, was certainly tall for his time. Napoleon was not tall, although at 5’6” he was of average height for his time.” *Id.* at 570–71. A term, for example “cool,” can be vague and ambiguous; ambiguous as previously noted and vague as to whether sixty five degrees Fahrenheit is or is not “cool.” *Id.*

37. 17 U.S. (4 Wheat.) 316 (1819).

38. *Id.* at 414.

39. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 54 (2002) (“Virtually all words have a multiplicity of meanings, as the most nodding acquaintance with a dictionary will attest.”).

40. See DICKERSON, *supra* note 24, at 88; VERMEULE, *supra* note 24, at 81.

41. CROSS, *supra* note 24, at 59.

42. See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 327 (1990).

other legislators, ensure that legislative history reflects positions that can (at least in a conventionalist sense) fairly be attributed to the Congress as a whole.”⁴³

Arguing that “[i]t is the *law* that governs, not the intent of the law-giver,”⁴⁴ Justice Scalia has maintained that “it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. . . . Government by unexpressed intent is . . . tyrannical.”⁴⁵ Intentionalism has also been criticized for its search for the “obvious fiction” of the intent of a multimember legislature comprised of members who did not have a specific intent with regard to the statutory question before the court.⁴⁶ As Judge Patricia Wald has observed, resort to and the use of legislative history is like “looking over a crowd and picking out your friends.”⁴⁷

Debates over the issue of the use of legislative history typically reference the Supreme Court’s 1892 decision in *Church of the Holy Trinity v. United States*.⁴⁸ In that case the Court considered the meaning of the Alien Contract Labor Act of 1885,⁴⁹ a statute prohibiting the assistance or encouragement of “the importation or migration, of any alien or aliens, any foreigner or foreigners . . . under contract or agreement . . . to perform labor or service of any kind in the United States, its Territories, or the District of Columbia.”⁵⁰ A section of the statute made specific exceptions for certain occupations, “among them professional actors, artists, lecturers, singers, and domestic servants.”⁵¹

In September 1887, the Holy Trinity Church contracted with E. Walpole Warren, “an alien residing in England,” to serve as the rector and pastor at its church in New York, New York.⁵² The United States sued

43. VERMEULE, *supra* note 24, at 88.

44. Scalia, *supra* note 25, at 17.

45. *Id.*

46. See ESKRIDGE, *supra* note 24, at 16; LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW 119 (2001); Easterbrook, *supra* note 24, at 547 (“Because legislatures comprise many members, they do not have ‘intents’ or ‘designs,’ hidden yet discoverable.”); Mark Tushnet, *Theory and Practice in Statutory Interpretation*, 43 TEX. TECH L. REV. 1185, 1186 (2011) (“Legislatures are not legislators and don’t have mental states, and in any event, legislatures as collective bodies enact statutes, which mean what they do independent of what any individual legislator thinks they mean.”).

47. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (internal quotation marks omitted). See also Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

48. 143 U.S. 457 (1892). For an excellent analysis of *Holy Trinity*, see VERMEULE, *supra* note 24, at 93–107.

49. Act of Feb. 26, 1885, ch. 164, 23 Stat. 332.

50. *Holy Trinity*, 143 U.S. at 458 (quoting statute).

51. *Id.* at 458–59.

52. *Id.* at 457–58.

the church, claiming that the contract was prohibited by the statute.⁵³ In an opinion by Justice David Brewer (“an evangelical Christian and the son of a minister”),⁵⁴ the Court held that the church did not violate the statute.⁵⁵ The Court conceded that the church’s act was “within the letter” of the statute

[F]or the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words labor and service both used [in the statute], but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added “of any kind”⁵⁶

Moreover, the occupations listed in the exceptions section of the statute did not include clergy.⁵⁷

The Court concluded that the text of the statute was not controlling:

While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.⁵⁸

In support of its conclusion, the Court noted that the thought expressed in the title of the Alien Contract Labor Act⁵⁹:

[The thought] reaches only to the work of the manual laborer, as distinguished from that of the professional man. No one reading such a title would suppose that Congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain.⁶⁰

Assuming that words and phrases “are used in their ordinary meaning,” the Court opined that the “common understanding of the terms labor and

53. *Id.* at 458.

54. VERMEULE, *supra* note 24, at 90–91.

55. *Holy Trinity*, 143 U.S. at 472.

56. *Id.* at 458.

57. *See id.* at 458–59.

58. *Id.* at 459. The Court later relied on this reasoning again in *United Steel Workers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 201 (1979).

59. “An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia.” *Holy Trinity*, 143 U.S. at 463 (quoting Alien contract Labor Act, Ch. 164, 23 Stat. 332 (1885)) (internal quotation marks omitted).

60. *Id.*

laborers does not include preaching and preachers”⁶¹ Accordingly, the statute’s title “indicates an exclusion from its penal provisions of all contracts for the employment of ministers, rectors, and pastors.”⁶²

Looking at “contemporaneous events,” the Court stated that the meaning of the statute was found in the evil the law was designed to remedy: preventing the influx of “cheap, unskilled labor” and an “ignorant and servile class of foreign laborers.”⁶³ Furthermore, and significantly, the Court referred to the legislative history of the statute. A report by the Senate Committee on Education and Labor recommending passage of the bill declared the committee’s belief “that the bill in its present form will be construed as including only those whose labor or service is manual in character”⁶⁴ That report was a “singular circumstance, throwing light upon the intent of congress.”⁶⁵ A House committee report stated that the legislation sought to restrain and prohibit the immigration or importation of laborers who were “generally from the lowest social stratum, and live upon the coarsest food and in hovels of a character before unknown to American workmen.”⁶⁶ Going beyond statutory text, *Holy Trinity* searched for and found legislative committees’ views on the meaning and scope of the legislation, attributed those views to the full Congress, and allowed the church to do what the letter of the statute concededly prohibited.⁶⁷

C. Purposivism

A third interpretive methodology, purposivism, focuses on statutory purpose and calls for interpretation “derive[d] not only from the text simpliciter, but also from an understanding [of] what social problems the legislature was addressing and what general ends it was seeking.”⁶⁸ Championed by Henry Hart, Jr. and Albert Sacks,⁶⁹ this theory posits that judges

61. *Id.*

62. *Id.*

63. *Id.* at 463–64.

64. *Id.* at 464 (quoting S. COMM. ON EDUC. & LABOR, 48TH CONG. 6059) (internal quotation marks omitted).

65. *Id.*

66. *Id.* at 465 (quoting H.R. COMM. ON EDUC. & LABOR, 48TH CONG. 5359). *See also id.* at 471 (“[T]his is a Christian nation . . . shall it be believed that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation?”).

67. *See Holy Trinity*, 143 U.S. at 465.

68. Strauss, *supra* note 35, at 227.

69. *See* HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

should assume that the legislature enacting a law was comprised of reasonable persons seeking to achieve a reasonable goal in a reasonable way.⁷⁰

In his recent book *Justice* Stephen G. Breyer, an advocate of purposive statutory interpretation,⁷¹ wrote that judges “faced with open-ended language and a difficult interpretive question . . . rely heavily on purposes and related consequences.”⁷² Avoiding “too rigid” or “too freewheeling” interpretations, “[t]hey must remain truthful to the text and ‘reconstruct’ past solutions ‘imaginatively’ as applied to present circumstances, at the same time projecting the purposes (or values) that inspired those past solutions to help resolve the present problem.”⁷³ The purpose of a specific provision can be judicially determined:

[T]he judge can try to determine a particular provision’s purpose even if no one in Congress said anything or even thought about the matter. In that case the judge (sometimes describing what he does in terms of the purpose of a hypothetical “reasonable legislator”) will determine that hypothetical purpose in order to increase the likelihood that the Court’s interpretation will further the more general purposes of the statute that Congress enacted.⁷⁴

A purpose, or the purposes, of a law may be explicitly stated and codified in the statutory text; in those instances, a court will be able to point to that text and the legislature’s express declaration in making its determination of the law’s purpose(s) and goal(s).⁷⁵ Where such purpose is not so declared, the proposition that a judge can authoritatively determine the relevant and operative purpose or purposes of a statute can be problematic. A purposivist judge “who derives the meaning of text from purpose and not purpose from the meaning of text”⁷⁶ may formulate and

70. *See id.* Professor Mark Tushnet has argued that the “obvious, public-choice inflected response is that such an assumption is patently unrealistic: Legislatures are composed of people who want to get reelected—or, perhaps more generously, composed of people who want to enact public policies they believe to advance the public good within the constraints imposed by elections.” Tushnet, *supra* note 45, at 1197.

71. Preferring a “purpose-oriented approach” over a “purely text-oriented approach,” Justice Breyer has identified three sets of considerations warranting judicial resort to the purposivist methodology: (1) “judicial consideration of a statute’s purpose helps to further the Constitution’s democratic goals”; (2) “a purpose-oriented approach helps individual statutes work better for those whom Congress intended to help”; and (3) “by emphasizing purpose the Court will help Congress better accomplish its own legislative work.” BREYER, *supra* note 24, at 94, 96.

72. *Id.* at 81.

73. *Id.* “To determine a provision’s purpose, the judge looks for the problem that Congress enacted the statute to resolve and asks how Congress expected the particular statutory words in question to help resolve that problem.” *Id.* at 92.

74. *Id.* at 92.

75. National Labor Relations Act, 29 U.S.C. § 151 (2012) (declaring Congressional findings and purposes of the statute). *See, e.g.*, Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2012) (declaring the statutory purpose).

76. SCALIA & GARNER, *supra* note 24, at 19.

declare an imaginary purpose not contemplated or desired by the legislature, thereby undoing compromises made and agreements reached by legislators in their consideration of and votes for the at-issue legislation.⁷⁷ Thus, those who were unable to convince a legislative majority to enact a law favoring their position and beneficial to their interests can instead look to the judiciary for an interpretation of a statute which is consistent with their desired outcomes.

D. Interpretive Approaches And Judicial Choices

No one approach to statutory interpretation is mandatory and binding on courts engaged in the interpretive enterprise.⁷⁸ Thus, “a judge may embrace all the available tools as theoretically legitimate and selectively employ those that are best suited for the particular case” and “could, in his or her judgment, rely on statutory text in one case, legislative history in the next, and perhaps rely on some broad invocation of legislative purpose or pragmatic consideration in the following decision.”⁷⁹

Consider the Supreme Court’s interpretation and application of Title VII in *United Steelworkers of America, AFL-CIO-CLC v. Weber*.⁸⁰ Holding that voluntary race-conscious affirmative action plans do not violate Title VII, the Court, in an opinion by Justice William J. Brennan, Jr., considered the argument that Congress intended in Title VII to forbid such plans as evidenced by “a literal interpretation” of § 703(a) and (d) of the statute.⁸¹ That “argument is not without force,” Brennan stated, but in the context of a voluntarily adopted affirmative action plan, “reliance upon a literal construction” of the aforementioned provisions “is misplaced.”⁸² Quoting *Holy Trinity*,⁸³ Brennan stated: “It is a ‘familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.’”⁸⁴ Reading § 703(a) and (d) “against the background of the legislative history of Title VII and the historical context from which the Act arose,”⁸⁵ the Justice determined that interpreting those sections as forbidding all race-

77. See John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2004, 2016 (2009) (“[R]eliance on purpose threatens to upset necessary legislative compromises because it arbitrarily shifts the level of generality at which the lawmakers have expressed their policy.”). See also Easterbrook, *supra* note 24, at 540 (discussing compromise in legislation).

78. CROSS, *supra* note 24, at 2.

79. *Id.* at 17, 46.

80. 443 U.S. 193 (1979).

81. *Id.* at 201. See also 42 U.S.C. §§ 2000e-2(a) and (d) (2012) (prohibiting discrimination “because of . . . race” in hiring and in the selection of individuals for training programs).

82. *Weber*, 443 U.S. at 201.

83. See *Holy Trinity*, 143 U.S. 457 (1892); VERMEULE, *supra* note 24, at 93–107.

84. *Weber*, 443 U.S. at 201 (quoting *Holy Trinity*, 143 U.S. at 459).

85. *Id.*

conscious affirmative action plans “would ‘bring about an end completely at variance with the purpose of the statute’ and must be rejected.”⁸⁶ As the “‘plight of the Negro in our economy’”⁸⁷ was “Congress’ primary concern in enacting the prohibition against racial discrimination in Title VII:”⁸⁸

“It would be ironic indeed if a law triggered by a Nation’s concern over centuries of racial injustice and intended to improve the lot of those who had ‘been excluded from the American dream for so long’ constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.”⁸⁹

Justice Brennan reasoned, further, that the conclusion that the at-issue affirmative plan was lawful was reinforced by the text and legislative history of Title VII § 703(j).⁹⁰ Noting that that section provided that nothing in Title VII “‘shall be interpreted to *require* any employer . . . to grant preferential treatment . . . to any group because of the race . . . of such . . . group on account of’ a racial imbalance in the employer’s work force,”⁹¹ Brennan opined that the “section does not *state* that ‘nothing in Title VII shall be interpreted to *permit*’ voluntary affirmative efforts to correct racial imbalances.”⁹² For Brennan, “[t]he natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action.”⁹³

86. *Id.* at 202 (quoting *U.S. v. Pub. Util. Comm’n*, 345 U.S. 295, 315 (1953)). A dissenting Chief Justice Warren E. Burger asked “how are judges supposed to ascertain the *purpose* of a statute except through the words Congress used and the legislative history of the statute’s evolution?” *Id.* at 217 (Burger, C.J., dissenting).

87. *Id.* at 202 (majority opinion) (quoting 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey)).

88. *Id.*

89. *Id.* at 204 (citation omitted) (quoting 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey)).

90. See 42 U.S.C. § 2000e-2(j) (2012) (“Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.”).

91. 443 U.S. at 205–06 (alteration in original) (quoting 42 U.S.C. § 2000e-2(j)).

92. *Id.* at 206. Congress has used the words “require or permit” in other statutes. See, e.g., 40 U.S.C. § 3702(b)(1) (“[A] contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall not *require or permit* any laborer or mechanic . . . to work more than 40 hours in that workweek.”) (emphasis added).

93. 443 U.S. at 206. See also *id.* at 206–07 (discussing the legislative record supporting the Court’s reading of § 703(j)). Rejecting this inference, Justice William H. Rehnquist argued that the Court’s reading of § 703(j) was “outlandish in the light of the flat prohibitions of §§ 703(a) and (d)”

An exemplar of textualist analysis is found in *Oncale v. Sundowner Offshore Services, Inc.*,⁹⁴ wherein the Court addressed the question whether claims of same-sex sexual harassment are actionable under Title VII's prohibition of discrimination "because of . . . sex."⁹⁵ A unanimous Court, in an opinion authored by Justice Scalia, rejected the employer's argument that the statute outlawed only opposite-sex harassment.⁹⁶ "[N]othing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."⁹⁷ Focusing on the statutory language, the Court stated:

[M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.⁹⁸

In another case involving federal labor law, *NLRB v. Town & Country Electric, Inc.*,⁹⁹ the Court relied on several interpretive methodologies. Justice Breyer, writing for a unanimous Court, answered in the affirmative the question whether a worker could be a company's "employee" within the meaning of the National Labor Relations Act (Act)¹⁰⁰ when that worker was a "salt" who was also simultaneously employed and being paid by a union seeking to organize that company's workers.¹⁰¹ The Act provides that the "term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer."¹⁰² Breyer noted that the National Labor Relations Board (Board) "often possesses a degree of legal leeway when it interprets its governing statute, particularly where Congress likely intended an understanding of labor relations to guide the

and was "totally belied by the Act's legislative history." *Id.* at 228 (Rehnquist, J., dissenting). See also *id.* at 230–53 (reviewing the legislative history of Title VII).

94. 523 U.S. 75 (1998).

95. 42 U.S.C. § 2000e-2(a)(1) (2012).

96. *Oncale*, 523 U.S. at 80.

97. *Id.* at 79.

98. *Id.* See also *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209 (1998) (holding that Title II of the Americans with Disabilities Act of 1990 covers inmates in state prisons: "the statute's language unmistakably includes State prisons and prisoners within its coverage").

99. 516 U.S. 85 (1995).

100. See 29 U.S.C. § 152(3) (2012).

101. For more on "salts," see Michael C. Duff, *Union Salts as Administrative Private Attorneys General*, 32 BERKELEY J. EMP. & LAB. L. 1 (2011); Ronald Turner, *Reactions of the Regulated: A Federal Labor Law Example*, 17 LAB. LAW. 479 (2002).

102. 29 U.S.C. § 152(3).

Act's application."¹⁰³ He deferred to the Board's position that "salts" were § 2(3) "employees" because the agency's decision: was "consistent with the broad language of the Act itself";¹⁰⁴ was "consistent with several of the Act's purposes, such as protecting 'the right of employees to organize for mutual aid without employer interference'"¹⁰⁵ and with Congressional purpose inferable from floor statements and Congressional reports;¹⁰⁶ was consistent with the Court's precedent;¹⁰⁷ and found support in a provision of the Labor Management Relations Act of 1947,¹⁰⁸ which contemplated the possibility that an employee of a company could also work for a labor union.¹⁰⁹ Accordingly, a textualist-intentionalist-purposivist-deferential Court held that the "Board's construction of the word 'employee' is lawful; that term does not exclude paid union organizers."¹¹⁰

More recently, in *Kasten v. Saint-Gobain Performance Plastics Corp.*¹¹¹ the Court, by a 6-2 vote,¹¹² held that the statutory phrase "filed any complaint" in the antiretaliation provision of the Fair Labor Standards Act of 1938 (FLSA)¹¹³ included oral as well as written complaints.¹¹⁴ Writing for the majority, Justice Breyer began with the text of the statute and the word "filed."¹¹⁵ While some dictionary definitions of that word contemplated a writing,¹¹⁶ others "provide[d] different definitions that

103. *Town & Country Elec.*, 516 U.S. at 90 (citing, among other cases, *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984)). See also *id.* at 94 (holding that the Board's interpretation and construction is entitled to "considerable deference").

104. *Id.* at 90 ("The ordinary dictionary definition of 'employee' includes any 'person who works for another in return for financial or other compensation.'" (quoting *AMERICAN HERITAGE DICTIONARY* 604 (3d ed. 1992)).

105. *Id.* at 91 (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945)).

106. *Id.*

107. See *id.*

108. *Id.* at 92.

109. See *id.*; 29 U.S.C. § 186(c)(1) (2012) (prohibiting employer payments to a person employed by a union but allowing an employer to pay wages to "any . . . employee of a labor organization, who is also an employee" of the company).

110. *Town & Country Elec.*, 516 U.S. at 98.

111. 131 S. Ct. 1325 (2011).

112. Justice Elena Kagan did not participate.

113. 29 U.S.C. § 215 (2012).

114. 29 U.S.C. §215(a)(3) (2006) (explaining that the FLSA sets the minimum wages, maximum hours, and overtime pay for statutory employees. The antiretaliation provision provides that employees cannot "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [the Act], or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee"); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 839 (7th Cir. 2009), *vacated*, 131 S.Ct. 1325 (2011) (explaining that the District Court, "[l]ooking only at the language of the statute," quoted a dictionary definition "of the verb 'to file'" and concluded that "the natural understanding of the phrase 'file any complaint' requires the submission of some writing to an employer, court, or administrative body.").

115. *Kasten*, 131 S. Ct. at 1331.

116. *Id.*

permit the use of the word 'file' in conjunction with oral material."¹¹⁷ Thus, "dictionary meanings, even if considered alone, do not *necessarily* limit the scope of the statutory phrase to written complaints."¹¹⁸ Breyer also examined the use of the word "file" in state statutes, federal agency regulations, and court decisions, noting that the word had been used in conjunction with oral statements.¹¹⁹

Opining that the "word 'filed', considered alone, might suggest a narrow interpretation limited to writings,"¹²⁰ Justice Breyer turned to the phrase "filed any complaint."¹²¹ "Any complaint" suggested a broad interpretation that included an oral complaint, in his view.¹²² "The upshot is that the three-word phrase, taken by itself, cannot answer the interpretive question."¹²³ The word "filed" in other sections of the FLSA did not resolve "the linguistic question before [the Court]," as some provisions involved filed and virtually always written material, specifically required a writing, and did not resolve the written or oral question.¹²⁴ Looking at antiretaliation provisions contained in other statutes, some with language broader than the phrase "filed any complaint" in the FLSA, Breyer concluded that the "language alone does not tell us whether Congress, if intending to protect orally expressed grievances elsewhere, did or did not intend to leave those oral grievances unprotected here."¹²⁵ "The bottom line is that the text, taken alone, cannot provide a conclusive answer to our interpretive question. The phrase 'filed any complaint' might, or might not, encompass oral complaints. We must look further."¹²⁶

Justice Breyer looked to "functional considerations" indicating "Congress intended the antiretaliation provision to cover oral, as well as written, 'complaints.'"¹²⁷ An interpretation limiting the coverage of the provision to written complaints would undermine the basic objectives of the FLSA, including the receipt of information and complaints from employees alleging that their rights have been violated.¹²⁸ "Why would Congress want to limit the enforcement scheme's effectiveness by inhibiting use of the [FLSA's] complaint procedure by those who would find it difficult to reduce their complaints to writing, particularly illiterate, less educated, or

117. *Id.*

118. *Id.*

119. *See id.* at 1331-32.

120. *Id.* at 1327.

121. *Id.* at 1333.

122. *See id.* at 1333-35.

123. *Id.* at 1332.

124. *Id.*

125. *Id.* at 1333.

126. *Id.*

127. *Id.* at 1332.

128. *Id.* at 1333-34.

overworked workers?”¹²⁹ Limiting the statute’s antiretaliation provision “to the filing of written complaints would also take needed flexibility from those charged with the [FLSA’s] enforcement,” preventing the use of “hotlines, interviews, and other oral methods of receiving complaints” and discouraging the use of informal workplace grievance procedures.¹³⁰ Responding to the employer’s argument that the FLSA also seeks to establish an enforcement system that is fair to employers, Breyer stated that while the statute requires fair notice that an employee is making a complaint against the employer, “a fair notice requirement does not necessarily mean that notice must be in writing.”¹³¹ A complaint of unlawful retaliation must meet the following standard:

[It] must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection. This standard can be met, however, by oral complaints, as well as by written ones.¹³²

As can be seen, judges choose from a menu of interpretive approaches as they consider and decide cases presenting the parties’ contested readings of statutory text.¹³³ The next two parts consider interpretive approaches and judicial choices in cases involving the meaning and scope of Title VII § 704(a).

II. THE COURT’S SECTION 704(A) JURISPRUDENCE

Section 704(a) of Title VII provides that an employer violates the law when it discriminates against an employee or applicant because he has

129. *Id.* at 1333.

130. *Id.* at 1334.

131. *Id.* at 1335. Noting that the statute prohibits discrimination against an employee “because such employee has filed any complaint,” 29 U.S.C. § 215(a)(3) (2012), Justice Breyer wrote that it was “difficult to see how an employer who does not (or should not) know an employee has made a complaint could discriminate *because* of that complaint.” *Id.* at 1335.

132. *Id.* at 1335. A dissenting Justice Scalia, joined by Justice Clarence Thomas, argued that the “plain meaning” and the context of the FLSA’s antiretaliation provision “make clear that the retaliation provision contemplates an official grievance filed with a court or an agency, not oral complaints—or even formal, written complaints—from an employee to an employer.” *Id.* at 1337 (Scalia, J., dissenting). Given this clear meaning, he saw “no need to rely on abstractions of congressional purpose.” *Id.* at 1339.

133. The menu of interpretive theories and methodologies discussed in this part is not exhaustive. Other approaches include judicial deference to the determinations and rulings of administrative agencies, *see* *Chevron U.S.A. Inc. v. NRDC* 467 U.S. 837 (1984), and *Skidmore v. Swift & Co., Inc.*, 323 U.S. 134 (1944); consequentialism, *see* SCALIA & GARNER, *supra* note 24, at 17 and BREYER, *supra* note 24, at 88, 92; dynamic interpretation taking account of post-enactment developments in societal, political, and legal conditions, *see* Brudney, *supra* note 34, at 175; and statutory default rules, *see* ELHAUGE, *supra* note 24.

opposed any practice made unlawful by Title VII, or “because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under” the statute.¹³⁴ The Supreme Court has interpreted and applied § 704(a) in several decisions involving disputes over the operative meaning of certain terms of the provision.¹³⁵

*Robinson v. Shell Oil Company*¹³⁶ addressed the question of whether § 704(a)’s use of the term “employees” included an employer’s former employees and not just current workers.¹³⁷ The United States Court of Appeals for the Fourth Circuit, sitting en banc, found that the statutory language unambiguously answered in the negative the question of whether § 704(a) provided a former employee with a cause of action against his former employer for post-employment retaliation.¹³⁸ The court opined that the “judicial inquiry must cease when the language of a statute is plain and unambiguous. Such is the rule of law.”¹³⁹ Congress chose to protect “employees” and “applicants for employment” but not former employees.¹⁴⁰

Reversing the Fourth Circuit, a unanimous Supreme Court, in an opinion by Justice Clarence Thomas, instructed that the “first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case”; plainness or ambiguity are “determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”¹⁴¹ In the Court’s view, “‘employees’ as used in § 704(a), is ambiguous as to whether it excludes former employees,” as

134. 42 U.S.C. § 2000e-3(a) (2012). In a recent decision the Supreme Court held that the mixed-motive causation analysis applicable to Title VII claims alleging race, color, sex, religion, or national origin discrimination is not available to plaintiffs bringing § 704(a) retaliation claims. The latter claims must be proved according to traditional but-for causation principles. See *University of Texas Southwestern Medical Center v. Nassar*, 131 S.Ct. 2517 (2013).

135. For additional discussion and analyses of the Court’s § 704(a) jurisprudence, see Alex B. Long, *Employment Retaliation and the Accident of Text*, 90 OR. L. REV. 525 (2011); Richard Moberly, *The Supreme Court’s Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375 (2010); Michael J. Zimmer, *A Pro-Employee Supreme Court?: The Retaliation Decisions*, 60 S.C. L. REV. 917 (2009); Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859 (2008); Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18 (2005).

136. 519 U.S. 337 (1997).

137. See *id.* Charles Robinson, a former employee, filed a retaliation action against Shell Oil Company alleging that, after Robinson filed a charge of employment discrimination with the EEOC, the company provided false information and negative job references to his prospective employers. Moving to dismiss Robinson’s suit, Shell argued that §704(a) did not provide a former employee with a cause of action for retaliation allegedly occurring after the termination of his employment. *Id.* at 339-340.

138. See *Robinson v. Shell Oil Co.*, 70 F.3d 325, 332 (4th Cir. 1995) (en banc), *rev’d*, 519 U.S. 337 (1997).

139. *Robinson*, 70 F.3d at 332.

140. *Id.* See also *id.* at 330 (“Because Title VII *does not* define ‘employee’ as an individual *no longer employed* by an employer, then, under the rules of statutory construction, that meaning is excluded as a meaning from the term ‘employee.’”).

141. *Robinson*, 519 U.S. at 340, 341.

Title VII contains “no temporal qualifier,” making it plain that the section protects only those persons still employed by the employer at the time of the alleged retaliation.¹⁴² Resolving the ambiguity, the Court reasoned that other sections of Title VII “plainly contemplate that former employees,” such as those discriminatorily discharged in violation of § 703(a) of the statute “will make use of the remedial mechanisms of Title VII.”¹⁴³ As a former employee who was fired can file a charge of unlawful employment discrimination against her former employer, “it is far more consistent to include former employees within the scope of ‘employees’ protected by § 704(a).”¹⁴⁴

Subsequently, in *Burlington Northern & Santa Fe Ry. Co. v. White*,¹⁴⁵ the Court set forth its views on § 704(a)’s scope and meaning.¹⁴⁶ Justice Breyer’s opinion for the Court rejected the employer’s and the Solicitor General’s argument that employer conduct prohibited by § 704(a)’s anti-retaliation provision should be limited to employer conduct proscribed by § 703(a), Title VII’s substantive provision. The latter section provides:

- It shall be an unlawful employment practice for an employer—
- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employ-

142. *Id.* at 341. Justice Thomas observed that Title VII’s definition of “employee”—“an individual employed by an employer,” see 42 U.S.C. § 2000e(f) (2012)—lacks a temporal qualifier, and that the term “employed” in that definition could be read to mean “*is* employed” or “*was* employed.” *Robinson* 519 U.S. at 342. In addition, other Title VII provisions use the term “employees” to refer to workers who are not current employees; for example, the statute’s remedial provisions authorize the reinstatement or hiring of employees. See 42 U.S.C. §§ 2000e-5(g)(1), 2000e-16(b) (1994). “[B]ecause one does not ‘reinstat[e]’ current employees, that language necessarily refers to former employees. Likewise, one may hire individuals *to be* employees, but one does not typically hire persons who already *are* employees.” *Robinson*, 519 U.S. at 342. Noting, further, that the term “employee” in other sections of Title VII addressing matters of salary and promotion refer unambiguously to current employees, Thomas stated that “the term ‘employees’ may have a plain meaning in the context of a particular section—not that the term has the same meaning in all other sections and in all other contexts.” *Id.* at 343.

143. *Robinson*, 519 U.S. at 345.

144. *Id.* Justice Thomas also pointed out that the *amicus* EEOC supported the view that the term “employees” in § 704(a) includes former employees. *Id.* at 345–46. The agency argued that excluding former employees from the protection of that section would allow threats of post-employment retaliation to deter persons from filing charges with the EEOC, thus providing employers with a perverse incentive to fire employees who might bring Title VII charges. *Id.* at 346. “Those arguments carry persuasive force given their coherence and their consistency with a primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory remedial mechanisms.” *Id.*

145. 548 U.S. 53 (2006). In this case the plaintiff, the only woman working in the employer’s maintenance of way department, filed a lawsuit alleging that the employer engaged in unlawful retaliation in violation of § 704(a) when it changed her job responsibilities and suspended her for thirty seven days without pay after she complained to company officials that her immediate supervisor had repeatedly told her that women should not be working in the department. A jury found in the plaintiff’s favor and awarded her \$43,500 in compensatory damages. See *id.* at 58–59.

146. *Id.* at 59–66.

ment, because of such individual's race, color, religion, sex, or national origin; or

- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.¹⁴⁷

Justice Breyer stated that § 703(a) differed from § 704(a) in significant ways.¹⁴⁸ Section 703(a)'s language "explicitly limit[s] the scope of that provision to actions that affect employment or alter the conditions of the workplace. No such limiting words appear in the antiretaliation provision."¹⁴⁹ Congress intended the differences suggested by the language, "for the two provisions differ not only in language but in purpose as well."¹⁵⁰ The substantive provision—prohibiting workplace discrimination by employers because of an individual's protected characteristic—"seeks to prevent injury to individuals based on who they are, *i.e.*, their status."¹⁵¹ The antiretaliation provision—securing the primary antidiscrimination objective by prohibiting retaliation—"seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct."¹⁵² The objective of the substantive provision can be secured by prohibiting employment-related discrimination, Breyer opined, but a focus "only upon employer actions and harm that concern employment and the workplace" would not achieve § 704(a)'s objective, as an "employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace."¹⁵³ "Thus, purpose reinforces what language already indicates, namely, that the antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment."¹⁵⁴ Section 704(a)'s scope "extends beyond workplace-related or employment-related retaliatory acts and harm."¹⁵⁵

147. 42 U.S.C. § 2000e-2(a) (2012).

148. *Burlington Northern*, 548 U.S. at 61–62.

149. *Id.* at 62.

150. *Id.* at 63.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 64.

155. *Id.* at 67. Disagreeing with the Court on this point, Justice Alito argued that the word "discrimination" in § 704(a) "means the discriminatory acts reached by § 703(a)—chiefly, discrimination 'with respect to . . . compensation, terms, conditions, or privileges of employment.'" *Id.* at 75 (Alito, J., concurring) (quoting 42 U.S.C. § 2000e-2(a)(1) (2012)). Admitting that this was not "the most straightforward reading of the bare language of § 704(a)," Alito stated that it was "a reasonable reading that harmonizes §§ 703(a) and 704(a)." *Id.*

What acts of retaliatory discrimination are prohibited by § 704(a)? Believing it “important to separate significant from trivial harms,”¹⁵⁶ Justice Breyer wrote that “a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”¹⁵⁷ This standard was phrased “in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters.”¹⁵⁸ Applying that standard to the facts of the case before the Court, Breyer concluded that the employer engaged in unlawful retaliation when it reassigned the plaintiff to less desirable job responsibilities and duties and suspended her without pay for thirty-seven days before ultimately reinstating her with backpay.¹⁵⁹

*Crawford v. Metropolitan Government of Nashville & Davidson County*¹⁶⁰ asked whether § 704(a)’s opposition clause extended to and protected an employee, Vicky Crawford, who was fired after she spoke about an employee relations director’s discriminatory conduct as she answered questions during the employer’s internal investigation of alleged sexual harassment.¹⁶¹ Justice David H. Souter’s opinion for the Court stated that the “term ‘oppose,’ being left undefined by the statute, carries its ordinary meaning.”¹⁶² “Oppose” was defined by a Webster’s dictionary as “[t]o resist or antagonize . . . ; to contend against; to confront; resist; withstand.”¹⁶³ Crawford’s statement to her employer “is thus covered by the opposition clause, as an ostensibly disapproving account of sexually obnoxious behavior toward her by a fellow employee, an answer she says antagonized her employer to the point of sacking her on a false pretense.”¹⁶⁴ A reasonable juror could find that her description of the

156. *Id.* at 68 (majority opinion).

157. *Id.* at 68 (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)) (internal quotation marks omitted).

158. *Id.* at 69.

159. *See id.* at 70–73.

160. 555 U.S. 271 (2009).

161. In the course of investigating rumors of sexual harassment by an employee relations director, the employer’s human resources officer asked the employee, Vicky Crawford, whether she had witnessed inappropriate behavior on the part of the director. Crawford related several instances of sexually harassing behavior. While no action was taken against the director, two employees who had complained that they were sexually harassed by the director were fired and Crawford was terminated, according to the employer, for embezzlement. *See id.* at 273–74.

162. *Id.* at 276.

163. *Id.* (alteration in original) (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 1710 (2d ed. 1957)) (internal quotation marks omitted). *See also id.* (“Although these actions entail varying expenditures of energy, ‘RESIST frequently implies more active striving than OPPOSE.’”); *id.* (quoting the RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1359 (2d ed. 1987), “oppose” is defined as “to be hostile or adverse to, as in opinion”).

164. *Id.*

“louche goings-on” was resistant or antagonistic to the director’s actions.¹⁶⁵

The Sixth Circuit’s decision reviewed by the Court had concluded that opposition “demands active, consistent ‘opposing’ activities to warrant . . . protection against retaliation,” and that an employee had to instigate or initiate a complaint to be covered by § 704(a).¹⁶⁶ Those requirements exemplified but were not the limits of “oppose,” the Supreme Court reasoned:

“Oppose” goes beyond “active, consistent” behavior in ordinary discourse, where we would naturally use the word to speak of someone who has taken no action at all to advance a position beyond disclosing it. Countless people were known to “oppose” slavery before Emancipation, or are said to “oppose” capital punishment today, without writing public letters, taking to the streets, or resisting the government. And we would call it “opposition” if an employee took a stand against an employer’s discriminatory practices not by “instigating” action, but by standing pat, say, by refusing to follow a supervisor’s order to fire a junior worker for discriminatory reasons. . . . There is, then, no reason to doubt that a person can “oppose” by responding to someone else’s question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.¹⁶⁷

165. *Id.*

166. *Crawford v. Metro. Gov’t. of Nashville & Davidson Cnty.*, 211 F. App’x. 373, 376 (6th Cir. 2006), *rev’d*, 555 U.S. 271 (2009) (quotation marks omitted) (quoting *Bell v. Safety Grooving and Grinding, LP*, 107 F. App’x 607, 610 (6th Cir. 2004).

167. *Crawford*, 555 U.S. at 277–78. In a concurring opinion Justice Alito, joined by Justice Thomas, expressed his concern that silent opposition could be covered by § 704(a)’s opposition clause. *Id.* at 282 (Alito, J., concurring). Protecting employee conduct that was not “active and purposive would have important practical implications. It would open the door to retaliation claims by employees who never expressed a word of opposition to their employers.” *Id.* Agreeing with the Court that the opposition clause protects an employee like Crawford who testified in an employer’s internal investigation, Alito emphasized that the question whether the clause protected employees who have not communicated their views to the employer through purposive conduct was not before and was not reached by the Court. *Id.* at 283 (“The question whether the opposition clause shields employees who do not communicate their views to their employers through purposive conduct is not before us in this case; the answer to that question is far from clear . . .”).

The Court did not reach the question whether the employer’s conduct violated the participation clause of § 704(a), and thus did not review the Sixth Circuit’s conclusion that that clause did not protect an employee’s participation in an employer’s internal investigation. *See id.* at 280. The participation clause prohibits discrimination because the employee “has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing” under Title VII. 42 U.S.C. § 2000e-3(a). Because no EEOC charge had been filed by the employee at the time of the investiga-

The Court's § 704(a) jurisprudence illustrates the ways in which the Court has disagreed with lower court determinations that the provision's language is plain and unambiguous. For example, in *Robinson* a unanimous Court rejected the Fourth Circuit's view that, because the word "employees" was plain and unambiguous, § 704(a) did not provide former employees with a retaliation cause of action against their former employers.¹⁶⁸ That term was in fact ambiguous and had to be considered with reference to the language used by Congress and the specific context of that language and the broader context of the whole statute.¹⁶⁹ *Burlington Northern* focused on the objectives and purposes of Title VII and the statute's antidiscrimination and antiretaliation provisions and set forth a standard to be applied and satisfied by plaintiffs in retaliation cases.¹⁷⁰ In *Crawford*, the Court and the Sixth Circuit defined "oppose" differently, showing that judges can agree that a specific term is applicable while disagreeing about that term's meaning.¹⁷¹

III. THOMPSON¹⁷² AND THE THIRD-PARTY RETALIATION ISSUE

Does § 704(a) recognize a cause of action for third-party retaliation, i.e., a claim that an employer has retaliated against an employee as a reaction and in response to another employee's invocation of Title VII's protections and procedures?¹⁷³ This part examines the path from Eric Thompson's charge of unlawful employment discrimination against his employer to the Supreme Court's answer to the aforementioned question.

A. *The District Court's Ruling*

In September 2002, Miriam Regalado filed a charge with the EEOC alleging that her supervisors had discriminated against her because of her sex.¹⁷⁴ Her employer, North American Stainless, was notified of Regalado's charge on February 13, 2003. On March 7, 2003, the employment of another North American Stainless employee, Eric Thompson (Regalado's then-fiancé) was terminated. Thompson filed his own charge with the EEOC and a subsequent lawsuit alleging that he was fired in re-

tion or before she was discharged, the Sixth Circuit determined that her participation in the internal investigation was not activity protected by the statute. *Crawford*, 211 F. App'x. at 376.

168. See *Robinson v. Shell Oil Co.*, 519 U.S. at 337, 339 (1997).

169. See *id.*

170. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

171. See *Crawford*, 555 U.S. at 277-78.

172. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863 (2011).

173. For a pre-*Thompson* analysis of the third-party retaliation issue, see Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931 (2007).

174. *Thompson*, 131 S. Ct. at 867.

taliation for his fiancé's EEOC charge.¹⁷⁵ The company contended that Thompson was terminated for performance-based reasons.¹⁷⁶

The employer moved for summary judgment. Granting that motion, the district court noted that Thompson did not complain that he was retaliated against because of his own protected activity; rather, he claimed that he was retaliated against because his fiancé filed a charge with the EEOC.¹⁷⁷ "Looking just to the language"¹⁷⁸ of § 704(a), the district court determined that:

Under its plain language, the statute does not permit a retaliation claim by a plaintiff who did not himself engage in protected activity. The statute prohibits an employer from discriminating against any employee because "*he* has opposed any practice made an unlawful employment practice" by Title VII "or because *he* has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing" under Title VII. It is clear that *he* refers to the employee who has suffered discrimination, thus requiring that the person retaliated against be the person who engaged in protected conduct. The statute is not ambiguous in this regard.¹⁷⁹

Accordingly, the district court concluded that Title VII "by its plain language does not permit third party retaliation claims" and dismissed Thompson's lawsuit.¹⁸⁰

B. The Sixth Circuit's Decision

On appeal, the Sixth Circuit, sitting en banc, affirmed the district court's judgment.¹⁸¹ The court opined that "it was Congress's prerogative to create—or refrain from creating—a federal cause of action for civil rights retaliation and to mold the scope of such legislation,"¹⁸² and that "[w]e must look to what Congress actually enacted, not what we believe Congress might have passed were it confronted with the facts at bar."¹⁸³ In the court's view:

175. See *Thompson v. N. Am. Stainless, LP*, 435 F. Supp. 2d 633, 634 (E.D. Ky. 2006), *aff'd*, 567 F.3d 804 (6th Cir. 2009) (en banc), *rev'd*, 131 S. Ct. 863 (2011). See *Thompson*, 567 F.3d at 806.

176. See *Thompson*, 567 F.3d at 806.

177. *Thompson*, 435 F. Supp. 2d at 637.

178. *Id.* at 638.

179. *Id.* (internal citations omitted).

180. *Id.* at 639.

181. *Thompson*, 567 F.3d at 816.

182. *Id.* at 807.

183. *Id.* at 816.

[T]he text of § 704(a) is plain in its protection of a limited class of persons who are afforded the right to sue for retaliation. To be included in this class, plaintiff must show that his employer discriminated against him “because *he has opposed* any practice made an unlawful employment practice by this subchapter, or because *he has made a charge, testified, assisted, or participated* in any manner in an investigation, proceeding, or hearing under this subchapter.”¹⁸⁴

As Thompson did not claim that he had engaged in any activity protected by § 704(a) on behalf of himself or his fiancé, he could not maintain a retaliation suit against the company.¹⁸⁵

Thompson and the amicus EEOC argued (as framed by the Sixth Circuit) that the court should “disregard the text of the statute in favor of their public policy preferences.”¹⁸⁶ The court “decline[d] the invitation to rewrite the law.”¹⁸⁷ Noting that the Sixth Circuit had not directly addressed the third-party retaliation issue,¹⁸⁸ the court referred to decisions by the United States Courts of Appeals for the Third, Fifth, and Eighth Circuits and joined the courts in rejecting the claim.¹⁸⁹

*Fogleman v. Mercy Hospital, Inc.*¹⁹⁰ interpreted the antiretaliation provisions of the Americans with Disabilities Act of 1990¹⁹¹ and the Age Discrimination in Employment Act of 1967 (ADEA)¹⁹² which are “nearly identical” to § 704(a).¹⁹³ The Third Circuit concluded that the “plain text” of those antiretaliation provisions “requires that the person retaliated against also be the person who engaged in the protected activity. . . . By their own terms, then, the statutes do not make actionable discrimination against an employee who has not engaged in protected activity. Read lit-

184. *Id.* at 807.

185. *See id.* at 808.

186. *Id.*

187. *Id.*

188. *See id.* at 809. A “similar issue” had been discussed in dicta in *EEOC v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir. 1993), and in *Bell v. Safety Grooving & Grinding, LP*, 107 F. App’x 607 (6th Cir. 2004).

189. *See Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561 (3d Cir. 2002); *Holt v. JTM Industries, Inc.*, 89 F.3d 1224 (5th Cir. 1996); *Smith v. Riceland Foods, Inc.*, 151 F.3d 813 (8th Cir. 1998).

190. 283 F.3d 561.

191. *See* Americans With Disabilities Act of 1990, Pub. L. No. 110-325 (codified as amended in scattered sections of 42 U.S.C. and 47 U.S.C.); 42 U.S.C. § 12203(a) (“No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.”).

192. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 29 U.S.C. §§ 621-34 (2012); 29 U.S.C. § 623(d) (“It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment . . . because such individual . . . has opposed any practice made unlawful by this Section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Chapter.”).

193. *Fogleman*, 283 F.3d at 567.

erally, the statutes are unambiguous”¹⁹⁴ In *Holt v. JTM Industries, Inc.*¹⁹⁵ the Fifth Circuit reasoned that recognition of a third-party retaliation claim (in that case, protecting one spouse from retaliation in response to the other spouse’s protected activity) would “contradict the plain language” of the ADEA “and will rarely be necessary to protect employee spouses from retaliation.”¹⁹⁶ And in *Smith v. Riceland Foods, Inc.*¹⁹⁷ the Eighth Circuit rejected the plaintiff’s argument that Title VII prohibited “employers from taking adverse action against employees whose spouses or significant others have engaged in statutorily protected activity against the employer.”¹⁹⁸ That requested construction of the statute “is neither supported by the plain language of Title VII nor necessary to protect third parties . . . from retaliation.”¹⁹⁹

Furthermore, the Sixth Circuit continued, the Supreme Court’s *Crawford* and *Burlington Northern* decisions did not require a contrary conclusion.²⁰⁰ The reach of *Crawford* “does not extend to the present circumstances” as Thompson did not allege that he had personally engaged in any activity protected by the statute.²⁰¹ *Burlington Northern*’s analysis of the scope of § 704(a) addressed “an issue that is separate and distinct from whether § 704(a) permits an employee who did not himself engage in protected activity to bring a retaliation claim”²⁰² In that case the Supreme Court pointed out that § 704(a) “seeks to prevent harm to individuals based on *what they do, i.e., their conduct.*”²⁰³ “In other words,” the Sixth Circuit said, “Congress carefully chose qualifying words of *action* (‘opposed,’ ‘testified,’ ‘made a charge,’ ‘participated,’ ‘assisted’), not words of *association.*”²⁰⁴ An act of opposition to discrimination by the plaintiff “is a critical component of a *prima facie* case of retaliation under Title VII,” and the “plain text simply cannot be read to encompass ‘piggy-back’ protection of employees” who are only associated with another employee who has opposed an allegedly unlawful employment practice but has not himself engaged in protected activity.²⁰⁵

194. *Id.* at 568.

195. 89 F.3d 1224 (5th Cir. 1996).

196. *Id.* at 1226.

197. 151 F.3d 813 (8th Cir. 1998).

198. *Id.* at 819.

199. *Id.*

200. See *Crawford v. Metro Gov’t of Nashville & Davidson Cnty.*, 555 U.S. 271 (2009); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

201. *Thompson v. N. Am. Stainless, LP*, 567 F.3d 804, 813 (2009).

202. *Id.* at 815.

203. *Id.* at 816 (quoting *Burlington Northern*, 548 U.S. at 63).

204. *Id.*

205. *Id.*

C. *The Supreme Court Speaks*

In January 2011 a unanimous Supreme Court, in an opinion by Justice Scalia, reversed the Sixth Circuit.²⁰⁶ Assuming that the company retaliated against Regalado by firing Thompson, Scalia relied on the Court's decision in *Burlington Northern* and its holding that § 704(a) "must be construed to cover a broad range of employer conduct."²⁰⁷ Noting the textual distinction made in *Burlington Northern*²⁰⁸ between § 704(a)'s antiretaliation clause and Title VII's substantive antidiscrimination provision and the Court's "understanding of the antiretaliation provision's purpose,"²⁰⁹ Scalia stated that § 704(a) "prohibits any employer action that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'"²¹⁰ Applying that standard, he thought "it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired. Indeed, [North American Stainless] does not dispute that Thompson's firing meets the standard set forth in *Burlington*."²¹¹ The standard adopted by the Court in *Burlington Northern* "is worded broadly" and "there is no textual basis for making an exception to it for third-party reprisals"²¹²

Whether Thompson could sue North American Stainless was the "more difficult question."²¹³ Title VII provides that "a civil action may be brought . . . by the person claiming to be aggrieved"²¹⁴ In its 1972 decision in *Trafficante v. Metropolitan Life Insurance Co.*,²¹⁵ which involved the "person aggrieved" provision of Title VIII of the Civil Rights

206. See *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863 (2011).

207. *Id.* at 868.

208. 548 U.S. 53 (2006).

209. *Thompson*, 131 S. Ct. at 868.

210. *Id.* (quoting *Burlington Northern*, 548 U.S. at 68).

211. *Id.* The employer also argued that recognition of a third-party retaliation claim would present difficult line-drawing problems with regard to the types of relationships that would be protected by the statute. While retaliation against an employee's fiancé could dissuade that employee from engaging in protected activity, could retaliation against an employee's girlfriend, close friend, or a "trusted co-worker" have the same impact? *Id.* Granting "the force of this point," Justice Scalia did "not think it justifies a categorical rule that third-party reprisals do not violate Title VII." *Id.* Reasoning that the discharge of a "close family member" would meet the *Burlington Northern* standard and that the infliction of a "milder reprisal on a mere acquaintance will almost never do so," Scalia "declin[ed] to identify a fixed class of relationships for which third-party reprisals are unlawful." *Id.* For more on this subject, see Jessica K. Fink, *Protected by Association?: The Supreme Court's Incomplete Approach to Defining the Scope of the Third-Party Retaliation Doctrine*, 63 HASTINGS L.J. 521 (2012); Matthew W. Green, Jr., *Family, Cubicle Mate and Everyone in Between: A Novel Approach to Protecting Employees from Third-Party Retaliation Under Title VII and Kindred Statutes*, 30 QUINNIPIAC L. REV. 249 (2012).

212. *Thompson*, 131 S.Ct. at 868.

213. *Id.* at 869.

214. 42 U.S.C. § 2000e-5(f)(1) (2006). The Sixth Circuit had concluded that what it means to be "aggrieved" under Title VII is a question of standing. *Thompson v. N. Am. Stainless, LP*, 567 F.3d 804, 808 n.1 (2009).

215. 409 U.S. 205 (1972).

Act of 1968 (Title VIII),²¹⁶ the Court “concluded that the words used showed ‘a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.’”²¹⁷ Treating that language in *Trafficante* as dictum and “too expansive” and “ill-considered,” Justice Scalia declined to follow it.²¹⁸ “If any person injured in the Article III sense by a Title VII violation could sue, absurd consequences would follow,” such as shareholder suits where a company engaged in racial discrimination in firing a valuable employee.²¹⁹

Pointing to a common usage of person aggrieved that did not equate the term with Article III, Justice Scalia noted that the Administrative Procedure Act²²⁰ authorizes lawsuits challenging actions by federal agencies by any person “adversely affected or aggrieved . . . within the meaning of a relevant statute.”²²¹ That language “establishes a regime under which a plaintiff may not sue unless he falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.”²²² Scalia concluded that the “term ‘aggrieved’ in Title VII incorporates this test, enabling suit by any plaintiff with an interest ‘arguably [sought] to be protected by the statutes’ . . . while excluding plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in Title VII.”²²³ Applying this test, Justice Scalia concluded that Thompson was a person aggrieved with standing to sue: he fell within the zone of interests protected by Title VII given the statute’s purpose of protecting employees from the unlawful actions of their employers.²²⁴ Thompson was “collateral damage” of the employer’s unlawful conduct, as “injuring him was

216. See 42 U.S.C. § 3610(a) (2012).

217. 409 U.S. at 209 (quoting *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (3d Cir. 1971)) (internal quotation marks omitted). See U.S. CONST. art. III, § 2, cl. 1 (“The Judicial Power shall extend to . . . Cases . . . and . . . Controversies”). Article III “confine[s] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.” *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)) (internal quotation marks omitted). See also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (Article III’s “irreducible constitutional minimum of standing contains three elements”: (1) “the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest,” (2) “there must be a causal connection between the injury and the conduct complained of,” and (3) “it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision”) (internal quotation marks omitted).

218. *Thompson*, 131 S. Ct. at 869.

219. *Id.*

220. See 5 U.S.C. §§ 551-59 (2012).

221. 5 U.S.C. § 702 (2012).

222. *Thompson*, 131 S. Ct. at 870 (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990)) (internal quotation marks omitted).

223. *Id.* (citations omitted) (quoting *Nat’l Credit Union Admin. V. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 495 (1998)).

224. *Id.* at 869-70.

the employer's intended means of harming Regalado. Hurting him was the unlawful act by which the employer punished her."²²⁵

As can be seen, the Court did not adopt the Sixth Circuit's plain language approach to § 704(a), an approach that did not recognize Thompson's third-party retaliation claim because Thompson did not himself oppose an unlawful employment practice and did not himself participate in a Title VII proceeding.²²⁶ Rather, the Court applied § 704(a) as construed in its *Burlington Northern* decision, an approach grounded in the Court's understanding of that provision's purpose²²⁷ and the determination that § 704(a) secures Title VII's primary objective of prohibiting discrimination by proscribing retaliation and "prevent[ing] harm to individuals based on what they do, *i.e.*, their conduct."²²⁸ Formulating an implementary and context-sensitive standard to be applied in retaliation cases, a standard not found in the text of § 704(a), *Burlington Northern* declared that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."²²⁹ That standard was easily satisfied in *Thompson*; a reasonable employee contemplating filing or supporting an EEOC charge of discrimination might be dissuaded from doing so if she knew that her employer would retaliate by discharging her fiancé.²³⁰ Any such retaliatory conduct toward a third party is a reactionary response to, and should not be uncoupled from, the initial invocation of Title VII's protection and procedures by another employee.

CONCLUSION

In *Thompson* the Court made clear that allowing an employer to punish a complaining/participating employee by targeting her fiancé or a close family member violates § 704(a) as that provision was glossed in *Burlington Northern*.²³¹ In so doing, the Court (in an opinion by Justice Scalia, a prominent advocate of textualism) did not engage in a "plain language" analysis in which the "plain meaning" of words used in a statute are inter-

225. *Id.* In a brief concurring opinion, Justice Ruth Bader Ginsburg noted that the EEOC's Compliance Manual provides that Title VII "prohibit[s] retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage or prevent the person from pursuing those rights." *Id.* at 871 (Ginsburg, J., concurring) (quoting EEOC Compliance Manual § 8-II(C)(3) (1998)). In her view, that provision warranted *Skidmore* deference and was consistent with other federal agencies' interpretations of analogous statutes. *See id.* at 871.

226. *See Thompson*, 131 S. Ct. at 871

227. *Id.* at 868 (majority opinion).

228. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006).

229. *Id.* at 68 (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006) (internal quotation marks omitted)).

230. *See Thompson v. N. Am. Stainless, LP*, 131 S.Ct. 863, 868 (2011).

231. *Id.*

preted literally and without considerations of statutory purpose or context or consequences. The Sixth Circuit employed that interpretive approach in a way that led it toward a decisional mirage, to a seemingly obvious but ultimately erroneous conclusion that § 704(a) did not encompass third-party retaliation claims, and that recognition of such claims would constitute a judicial rewriting of § 704(a).²³² That mirage disappeared when the Court, viewing the statute from a precedential perspective, went beyond an exclusive reliance on text and looked to statutory purpose and the governing judicially-formulated and context-sensitive standard as it answered in the affirmative the question whether Title VII recognized Thompson's third-party retaliation claim.²³³

232. *Thompson v. N. Am. Stainless, LP*, 567 F.3d 804 (6th Cir. 2009) (en banc) *rev'd*, 131 S.Ct. 863 (2011).

233. *See Thompson*, 131 S.Ct. 863.