and petitioned for rehearing en banc.[96] Regrettably, the *Sanchez-Llamas* decision will not give helpful direction to the court because "the Supreme Court has not addressed the issue that is at the heart of Mr. Jogi's case": the availability of monetary damages.[97]

Moreover, the Court did not consider whether a defendant may be prejudiced by an Article 36 violation or what the appropriate test for prejudice might be. An Oklahoma court, for example, has ruled that a defendant need not prove that consular assistance would have affected the outcome of the trial in order to prevail on the prejudice issue.[98] Yet in *Breard*, the Court noted that "it is extremely doubtful that the [Article 36] violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial."[99] The test for prejudice, then, is another area in which the Court dropped a hint as to the appropriate holding but failed to provide an affirmative solution.

From *Breard* to *Medellin*, Article 36 of the VCCR has had a long history in the U.S. courts. Yet the Supreme Court has persistently refused to resolve the basic question of the existence of an individually enforceable right. Unfortunately, in *Sanchez-Llamas*, it again failed to "provide the ultimate answer[]."[100]

III. FEDERAL STATUTES AND REGULATIONS

A. Civil Rights Act, Title VII

Standard for Retaliatory Conduct. — In the past decade, the number of retaliation claims under Title VII of the Civil Rights Act of 1964[1] has skyrocketed,[2] and commentators have highlighted the impact of retaliation on workplace dynamics.[3] However, the circuits

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[96] *See* Jennifer Koons, *Reaction:* Sanchez-Llamas v. Oregon/Bustillo v. Johnson, MEDILL NEWS SERVICE, June 2006, http://docket.medill.northwestern.edu/archives/003751.php.

[97] *Id.*

[98] Torres v. State, 120 P.3d 1184, 1187 (Okla. Crim. App. 2005).

[99] Breard v. Greene, 523 U.S. 371, 377 (1998) (per curiam).

[100] Medellin v. Dretke, 125 S. Ct. 2088, 2095 (2005) (Ginsburg, J., concurring).

[1] Pub. L. No. 88-352, 78 Stat. 241.

[2] The number of retaliation charges increased from 10,499 in fiscal year 1992 (approximately 14.5% of all annual Equal Employment Opportunity Commission cases) to 19,429 in fiscal year 2005 (approximately 25.8% of all annual cases). Equal Employment Opportunity Commission, Charge Statistics FY 1992 Through FY 2005, http://www.eeoc.gov/stats/charges.html (last visited Oct. 15, 2006); *see also* Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 122 (1995) (describing a survey of state employees in which sixty-two percent of respondents indicated that they experienced retaliation after reporting harassment).

[3] *See, e.g.*, Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 67–76 (2005) (discussing the importance of retaliation protection to the goals of achieving equal citizenship, eradicating sexism, and facilitating the development of social bonds across the sexes); Edward A. Marshall, *Excluding*

have developed divergent standards for how severe and job-related an employer's conduct must be to constitute cognizable retaliation and have differed as to whether the retaliation standard is the same as that for the discrimination prohibited by the statute's core provision. Last Term, in *Burlington Northern & Santa Fe Railway Co. v. White,*[4] the Supreme Court sided with a minority of circuits in establishing a standard for retaliatory conduct broader than the standard for the underlying discrimination: actionable retaliation must be "material" but need not occur in the workplace or be employment-related.[5] The expansive, flexible new standard recenters a jurisprudence that had run off course in the lower courts and advances Title VII's antidiscrimination goals by reducing deterrents to employee claims. However, while clarifying the statute's retaliation standard, the Court compounded existing uncertainty regarding the scope of Title VII's core discrimination provision.

Sheila White was the only woman employed in the Maintenance of Way Department at Burlington Northern's Memphis rail yard.[6] She was hired as a track laborer, a job that involved hauling heavy equipment and manually clearing refuse from the right-of-way.[7] In light of her experience operating forklifts, White was quickly assigned to the more prestigious and desirable job of forklift operator when that position became available.[8] In September 1997, White complained to company officials of offensive sex-based remarks by her supervisor.[9] Burlington sent the supervisor to sexual harassment training[10] but also removed White from forklift duty on grounds that the more desirable job should go to a "more senior man."[11] White subsequently filed two charges with the Equal Employment Opportunity Commission (EEOC), claiming that her employer had retaliated against her for her original sexual harassment complaint.[12] A few days after the charges were mailed, White was suspended without pay for alleged insubordi-

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Participation in Internal Complaint Mechanisms from Absolute Relation Protection: Why Everyone, Including the Employer, Loses, 5 EMP. RTS. & EMP. POL'Y J. 549, 586–87 (2001) (presenting a study showing that almost seventy percent of female employees who were asked about their decision not to report on-the-job sexual harassment identified the potential for retaliation as a "moderate or strong influence on their decision").

4 126 S. Ct. 2405 (2006).

5 *Id.* at 2414–15.

6 *Id.* at 2409.

7 *Id.*

8 *See id.* at 2409, 2417. White continued to perform other track-laborer tasks, but operating the forklift became her main duty. *Id.* at 2409.

9 *Id.* at 2409.

10 *See id.*

11 *Id.* (quoting White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 792 (6th Cir. 2004) (en banc)) (internal quotation marks omitted).

12 *See id.*

nation stemming from a disagreement with a supervisor.[13] She invoked internal grievance procedures, which led Burlington to conclude that she had not, in fact, been insubordinate; the company subsequently reinstated her with back pay for her thirty-seven-day suspension.[14] White filed an additional charge with the EEOC, alleging that the suspension was retaliatory,[15] and then exhausted administrative remedies before filing suit in the United States District Court for the Western District of Tennessee.[16] Her complaint alleged that her changed job responsibilities and her suspension each amounted to unlawful retaliation under section 704 of Title VII.[17] A jury found in her favor on both claims and awarded her $43,500 in damages.[18]

The Sixth Circuit reversed, holding that White had failed to make a prima facie retaliation claim because neither her changed job responsibilities nor her suspension constituted the requisite "materially adverse employment action" under the court's standard.[19] Subsequently, the full court vacated the decision and agreed to hear the case en banc.[20] The en banc court unanimously voted to affirm the district court's judgment, but the judges disagreed on the correct standard for retaliation.[21] Writing for the court, Judge Gibbons defended the existing Sixth Circuit definition of an adverse employment action, which required "a materially adverse change in the terms of . . . employment."[22] She explicitly rejected the more expansive definition advanced by the Ninth Circuit, the EEOC, and Judge Clay's concurrence,[23] but held that White's shift in duties and suspension each were adverse employment actions under the existing definition.[24]

The Supreme Court affirmed. Writing for the Court, Justice Breyer[25] agreed that Burlington Northern had unlawfully retaliated against White, but rejected the Sixth Circuit's standard for retalia-

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13 *See id.*

14 *See id.*

15 *See id.*

16 *See id.* at 2410.

17 *Id.*

18 *Id.* The damage award included $3250 in medical expenses. *Id.*

19 *See* White v. Burlington N. & Santa Fe Ry. Co., 310 F.3d 443, 455 (6th Cir. 2002).

20 *See* White v. Burlington N. & Sante Fe Ry. Co., 321 F.3d 1203 (6th Cir. 2003).

21 White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 797 (6th Cir. 2004) (en banc).

22 *Id.* (quoting Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 885 (6th Cir. 1996)) (internal quotation marks omitted).

23 Judge Clay was joined by Judges Martin, Daughtrey, Moore, and Cole.

24 *White*, 364 F.3d at 800–03. According to Judge Gibbons, the expansive definition would render actionable *any* retaliatory conduct, no matter how slight. *Id.* at 798. Judge Clay, however, characterized the Ninth Circuit's standard as a "reasonably likely to deter" test. *Id.* at 809 (Clay, J., concurring).

25 Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Souter, Thomas, and Ginsburg joined Justice Breyer's opinion.

tion.[26] Justice Breyer began with a textual argument that the standard for retaliatory conduct under section 704 is not the same as the standard for discriminatory conduct under section 703.[27] Unlike section 703, which limits unlawful workplace discrimination to actions "with respect to [an employee's] compensation, terms, conditions, or privileges of employment,"[28] section 704 merely prohibits employers from "discriminat[ing] against" employees who have engaged in protected activity.[29] Adhering to the presumption that "Congress acts intentionally and purposely in the disparate inclusion or exclusion" of language when subsections of a statute are worded differently, Justice Breyer reasoned that the absence of limiting language in section 704's antiretaliation provision implies that it includes discriminatory actions that do not affect employment or the workplace.[30]

Justice Breyer found additional support for this reading in the purpose of the statute. First, he emphasized that the antiretaliation provision's primary purpose is to "[m]aintain[] unfettered access to statutory remedial mechanisms."[31] Given this purpose, Justice Breyer asserted, affording victims of retaliation more protection than victims of the unlawful workplace discrimination at Title VII's core is not anomalous.[32] Achieving unfettered access to Title VII's remedies under section 704 requires rooting out retaliation inside *and* outside the workplace and scope of employment, Justice Breyer explained, whereas achieving workplace equality under section 703 necessitates eliminating discrimination in more limited contexts.[33] Although Justice Breyer did not specify exactly how broad a standard section 703 requires, he illustrated the distinction by referring to *Rochon v. Gonzales*,[34] in which the FBI retaliated against an agent and violated agency policy by refusing to investigate a death threat against him and his wife.[35] The employer's conduct was "*outside* the workplace" and not "directly

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[26] Justice Breyer simultaneously rejected the more restrictive standard of the Fifth and Eighth Circuits and the unqualified standard of the Ninth Circuit. The definition that Justice Breyer adopted instead was the expansive standard of the Seventh and District of Columbia Circuits. *See Burlington*, 126 S. Ct. at 2410, 2415.

[27] *See id.* at 2411–14.

[28] 42 U.S.C. § 2000e-2 (2000).

[29] *Id.* § 2000e-3.

[30] *Burlington*, 126 S. Ct. at 2411–12 (quoting Russello v. United States, 464 U.S. 16, 23 (1983)) (internal quotation marks omitted).

[31] *Id.* (alteration in original) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)).

[32] *Id.* at 2414. Justice Breyer also noted that other statutes, such as the National Labor Relations Act, 29 U.S.C. §§ 150–169 (2000), have retaliation standards that encompass more employer conduct than their core substantive provisions. *Burlington*, 126 S. Ct. at 2413.

[33] *Id.* at 2412.

[34] 438 F.3d 1211 (D.C. Cir. 2006).

[35] *Id.* at 1213.

related to [the agent's] employment," yet it still functioned as retaliation.[36]

In addition to finding support in statutory purpose, Justice Breyer asserted that neither precedent nor EEOC interpretations contradicted the Court's decision. He found no applicable binding precedent and rejected petitioners' request to import the "tangible employment action" standard from *Burlington Industries, Inc. v. Ellerth*[37] into section 704.[38] As Justice Breyer emphasized, neither *Ellerth* nor any other Supreme Court case established a standard for retaliatory conduct; *Ellerth* addressed the vicarious liability of employers for the conduct of employees in sexual harassment cases.[39] Moreover, Justice Breyer construed the EEOC Manual, together with the agency's Interpretive Manual, to support an interpretation not limited to workplace actions.[40]

Having rejected the possibility that sections 703 and 704 are "coterminous,"[41] Justice Breyer explained the metes and bounds of the new standard under section 704. Employer conduct can now amount to retaliation if "a reasonable employee would have found the challenged action materially adverse" — that is, if the action "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[42] Justice Breyer explained that materiality is necessary because Congress did not intend Title VII to render unlawful trivial harms,[43] and the reasonable-worker standard provides an objective, and therefore judicially administrable, criterion.[44] At the same time, Justice Breyer presented his formulation as a context-specific standard rather than a bright-line rule, explaining that in employment cases, "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships."[45] Applying the new test, Justice Breyer concluded

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[36] *Burlington*, 126 S. Ct. at 2412 (emphasis in original).

[37] 524 U.S. 742 (1998). In *Ellerth*, the Court required that the employer's action constitute a "tangible employment action" such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761.

[38] *Burlington*, 126 S. Ct. at 2413. The United States's amicus brief also supported this position. Although the United States supported a ruling in favor of White, it advocated the same legal standard as Burlington. *See* Brief for the United States as Amicus Curiae Supporting Respondent at 9–15, 24, *Burlington*, 126 S. Ct. 2405 (No. 05-259), 2006 WL 622123.

[39] *See Burlington*, 126 S. Ct. at 2413; *Ellerth*, 524 U.S. at 760.

[40] *Burlington*, 126 S. Ct. at 2413–14.

[41] *Id.* at 2414.

[42] *Id.* at 2415 (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)) (internal quotation marks omitted).

[43] *See id.*

[44] *See id.*

[45] *Id.* (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81–82 (1998)).

that White's reassignment and suspension constituted unlawful retaliation by Burlington.[46]

Justice Alito concurred in the judgment.[47] In his view, consistent with the Sixth Circuit's decision below, Title VII provides a single standard for prohibited conduct: an action is retaliatory under section 704 only when that action would violate section 703 if motivated by discrimination against a protected class.[48] Justice Alito argued that the Sixth Circuit's single standard was not as narrow as the Court implied; employer actions outside the workplace *could* relate to the "terms, conditions, and privileges of employment" and thus satisfy the standard.[49] For example, Justice Alito contended that the FBI's refusal to investigate an off-the-job death threat in *Rochon* would have been actionable under the Sixth Circuit's standard: "for an FBI agent whose life may be threatened during off-duty hours, providing security easily qualifies as a term, condition, or privilege of employment."[50] Under this reading, the refusal to investigate was sufficiently employment-related to fall within the scope of both section 703[51] and section 704, and thus a broader standard was not needed.[52] Even applying the Sixth Circuit's less expansive standard, Justice Alito agreed that Sheila White had been the victim of unlawful retaliation.[53]

Despite Justice Alito's criticisms, the Court was correct to establish a low threshold for actionable workplace-related retaliation. The new standard advances Title VII's goals by both reducing deterrents to employees filing discrimination charges and providing incentives for employers to tolerate Title VII claims and avoid section 704 violations in the first instance. By interpreting section 704 expansively, the *Burlington* decision took the crucial step of correcting the circuit courts that had strayed from Title VII's text and purpose. Although the Court's comparative reasoning was somewhat strained — in articulating the 704 standard by reference to the nebulous 703 standard, the Court overstated the divide between them and created a need for fu-

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[46] *See id.* at 2416.

[47] *Id.* at 2418 (Alito, J., concurring in the judgment).

[48] *Id.* at 2421.

[49] 42 U.S.C. § 2000e-2 (2000).

[50] *Burlington*, 126 S. Ct. at 2420 (Alito, J., concurring in the judgment).

[51] To be actionable under section 703, the refusal to investigate would have to be based on a protected trait. *See id.* ("Certainly, if the FBI had a policy of denying protection to agents of a particular race, such discrimination would be actionable under § 703(a).").

[52] In addition, Justice Alito took issue with the ambiguity of the Court's "reasonable worker" and "well might dissuade" standards, *id.*, and criticized the "topsy-turvy" results that he thought the Court's "well might dissuade" standard would produce in practice, *see id.* at 2420–21. Because the same act of retaliation might dissuade a victim of subtle yet actionable discrimination, but not a victim of egregious discrimination, he argued, the victim of lesser discrimination would receive more protection. *See id.*

[53] *See id.* at 2421–22.

ture clarification — *Burlington* is nonetheless a victory for employees and a step toward achievement of Title VII's objectives.

When Congress enacted Title VII in 1964, it sought to "assure equality of employment opportunities" and undo the "stratified job environments" that arise from discrimination against minorities.[54] Because employment statutes like Title VII can be enforced only if employees are willing to voice complaints, the Court has long emphasized the importance of retaliation provisions.[55] Recently, the Court has specified that a primary purpose of section 704 is to "[m]aintain[] unfettered access to statutory remedial mechanisms,"[56] and that antidiscrimination laws "would unravel" without effective protection against retaliation.[57] *Burlington* plainly furthers these Title VII goals by proscribing a broad range of retaliatory conduct that would otherwise be likely "'to deter victims of discrimination from complaining to the EEOC,' the courts, and their employers"[58] without expanding the provision beyond all workability.[59]

It is worth noting that *Burlington*'s advancement of Title VII's antiretaliation goals may not play out in precisely the way the Court suggested. The opinion implies that employees will be more willing to file Title VII charges in light of the new retaliation standard, and indeed, numerous studies expose fear of retaliation as a deterrent to filing discrimination claims.[60] However, employees may also be deterred from

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[54] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

[55] *See Burlington*, 126 S. Ct. at 2414 ("Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." (quoting Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960)) (internal quotation marks omitted)).

[56] Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997).

[57] Jackson v. Birmingham Bd. of Educ., 125 S. Ct. 1497, 1508 (2005).

[58] *Burlington*, 126 S. Ct. at 2415 (quoting *Robinson*, 519 U.S. at 346).

[59] The Court's flexible "well might dissuade" standard limited the scope of redressable conduct while hewing more closely to Title VII's purposes than a bright-line rule could have. As the extensive hypotheticals discussed at oral argument illustrate, context matters in ascertaining the significance of a particular action. *See* Transcript of Oral Argument at 8–18, *Burlington*, 126 S. Ct. 2405 (No. 05-259), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-259.pdf. Excluding an employee from a social lunch with her bosses could be insignificant, but excluding her from a training lunch could diminish her advancement opportunities. *See Burlington*, 126 S. Ct. at 2415–16. Similarly, a schedule change could be immaterial for some employees, but could make continued employment nearly impossible for employees caring for family members. *See id.* at 2415. By devising a standard capable of considering these differences, the Court breathed practicality into the statute.

[60] *See* Brake, *supra* note 3, at 37 & nn.57–58; Kristin Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 SIGNS 421 (1987) (analyzing the results of a survey of employees who chose not to report discrimination); *see also* AAUW EDUC. FOUND. & AAUW LEGAL ADVOCACY FUND, TENURE DENIED: CASES OF SEX DISCRIMINATION IN ACADEMIA 68 (2004) [hereinafter TENURE DENIED] (noting comments from sex-discrimination plaintiffs that the "troublemaker" stigma harms one's professional prospects). The latter two studies and others are referenced in Susan Sturm, *The Architecture of Inclusion: Advancing*

filing discrimination charges by factors other than fear of retaliation, such as the stigma associated with bringing a Title VII claim.[61] Moreover, employees may misunderstand or even overestimate their legal rights,[62] such that a broader rule will have little effect on their decisionmaking. Thus, the prediction of increased reporting of discrimination is speculative at best.

A more likely result of the decision is that *Burlington*'s individualized standard will help employees in the ongoing employment-law battle for summary judgment positioning.[63] Employers will now rarely succeed by arguing that the alleged retaliation was not sufficiently severe or work-related to proceed to the merits. This will further Title VII's goals by ensuring that courts fully consider legitimate claims.[64] Moreover, barring settlement, it will allow more cases to reach a jury, which may be better equipped to evaluate what would deter a reasonable employee.[65]

Furthermore, faced with the likelihood of losing at summary judgment, proceeding with expensive litigation, and potentially facing hefty damages,[66] employers may react to the *Burlington* decision by avoid-

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Workplace Equity in Higher Education, 29 HARV. J.L. & GENDER 247, 262 nn.54–55, 263 n.59 (2006).

[61] *See, e.g.*, TENURE DENIED, *supra* note 60, at 68.

[62] Studies show that some employees consistently overestimate their rights vis-à-vis their employers. *See* Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 110 (1997) (presenting surveys in which "respondents overwhelmingly misunderstand the background legal rules governing the employment relationship"); Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447 (confirming prior studies indicating that workers consistently misunderstand their legal rights in an employment-at-will scheme). If Professor Kim's findings extend to the Title VII context, the effect of a broader retaliation standard on employee claims could be minimal.

[63] Employment law cases that reach the Supreme Court are often battles over whether employers can get summary judgment or judgment as a matter of law on a particular issue. *See, e.g.*, Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).

[64] On the other hand, critics of broader standards frame the change in summary judgment positioning as a nightmare for judicial administration, arguing that the new standard opens the floodgates to retaliation claims. *See* Reply Brief of Petitioner at 8, *Burlington*, 126 S. Ct. 2405 (No. 05-259), 2006 WL 937535 ("White's assurances that her standard would not open the floodgates of trivial litigation are unavailing."). *But see* White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 813 (6th Cir. 2004) (en banc) (Clay, J., concurring) ("[T]here are no indications that the broad rules still employed in the Ninth, Tenth, and Eleventh Circuits have opened unmanageable floodgates to aggrieved Title VII plaintiffs." (footnote omitted)).

[65] *See generally* Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. CAL. L. REV. 791 (2002) (examining social science data regarding what people perceive to be harassment and concluding that judges often get harassment assessments wrong).

[66] Under the Civil Rights Act of 1991, employers can be liable for punitive and compensatory damages of up to $300,000, including awards for emotional distress. *See* 42 U.S.C. § 1981a(b) (2000).

ing conduct that could be considered retaliatory in the first place. The Court's conclusion that suspensions without pay easily satisfy the "well-might-dissuade" threshold — even if the employee is ultimately awarded back pay — may deter employers from instituting suspensions without pay against employees who have complained of discrimination and are subsequently accused of misconduct.[67] To this end, employers may resort to suspensions *with* pay while investigating employee misconduct.[68]

In addition to advancing Title VII's goals, the Court's expansive standard provides a crucial response to the departure by most federal appellate courts from Title VII's origins. Over the past two decades, the circuits have gradually undermined Title VII's purposes by incorporating extrastatutory criteria into the standard for retaliatory conduct.[69] Almost every circuit requires a baseline "adverse employment action," but the statute does not mandate that threshold; it comes from circuit courts' interpretations of an early employment law treatise.[70] This imported requirement can inhibit Title VII's efficacy by serving as an evidentiary threshold for vindicating antidiscrimination rights.[71] Similarly, the additional requirements that courts have imposed — that the action be "materially adverse" or an "ultimate employment action" — are imprudent judicial inventions that impede Title VII's operation.[72] Courts may have derived these requirements from the Supreme Court's "tangible employment action" standard in *Ellerth*, but neither

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[67] *See* Brief Amici Curiae of the Equal Employment Advisory Council and the Chamber of Commerce of the United States of America in Support of Petitioner at 16–17, *Burlington*, 126 S. Ct. 2405 (No. 05-259), 2006 WL 235013.

[68] *See White*, 364 F.3d at 803 (stating that the fears of the Equal Employment Advisory Council, an organization of employers, should be allayed by the fact that "a suspension *with* pay and full benefits pending a timely investigation into suspected wrongdoing is not an adverse employment action" (citing Jackson v. City of Columbus, 194 F.3d 737, 752 (6th Cir. 1999))); *see also id.* at 803 n.8 (noting that the amicus brief of the National Employment Lawyers Association on behalf of White "concedes that a suspension with pay pending a timely, good-faith investigation does not constitute an adverse employment action and recommends this course to employers concerned about possible misconduct").

[69] *See* Joel A. Kravetz, *Deterrence v. Material Harm: Finding the Appropriate Standard To Define an "Adverse Action" in Retaliation Claims Brought Under the Applicable Equal Employment Opportunity Statutes*, 4 U. PA. J. LAB. & EMP. L. 315, 316–17 (2002); Ernest F. Lidge III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs To Prove that the Employer's Action Was Materially Adverse or Ultimate*, 47 U. KAN. L. REV. 333, 346–67 (1999).

[70] *See White*, 364 F.3d at 796 n.2.

[71] *See* Lidge, *supra* note 69, at 367–99; *see also* Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1147–67 (1998).

[72] This argument does not rule out the possibility of a de minimis exception to Title VII's antiretaliation rule. The Court has stated that the permissibility of inferring de minimis exceptions depends on statutory purpose. *See, e.g.*, Wis. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 232 (1992) ("Whether a particular activity is a *de minimis* deviation from a prescribed standard must, of course, be determined with reference to the purpose of the standard.").

the text nor the purpose of Title VII supports importing the *Ellerth* standard into the retaliation context.[73] *Burlington* corrects these divergences from Title VII's purpose by reiterating the Court's long-standing position that robust antiretaliation provisions are essential to the operation of civil rights laws.[74]

However, the Court drew too starkly the contrast between the appropriate scopes of sections 703 and 704, thus implying a narrow reading of section 703 that is inconsistent with prior case law and statutory purpose. The Court's argument for a broader standard for retaliation than for discrimination relies on its unelaborated distinction between employment-related and non-employment-related conduct. The Court argues that workplace equality would be achieved "were all employment-related discrimination miraculously eliminated," whereas antiretaliation goals would not.[75] To be employment-related for purposes of section 703, conduct must relate to "the terms, conditions, and privileges of employment," a phrase the Court has never directly defined. However, the Court sheds light on its current reading of the phrase by portraying the FBI's refusal to investigate a death threat in *Rochon* as outside the scope of section 703 because it was "not directly related to . . . his employment" and "caus[ed] . . . harm [only] *outside* the workplace."[76] To characterize the FBI's conduct as outside the scope of 703 even though it violated agency policy suggests that, in order to be actionable under 703, conduct must have a physical locus inside the workplace or a close connection to the employee's duties.

This apparently narrow reading of the phrase "term, condition, or privilege of employment" is at odds with the Court's explanation in *Hishon v. King & Spalding*,[77] which stated that "incidents of employment" or benefits that "form 'an aspect of the relationship between the employer and employees'" — not just written contractual provisions — are included in the phrase.[78] The *Burlington* Court's reasoning is also inconsistent with Title VII's goals: why would conduct have to occur inside the workplace walls in order to affect workplace equality? Rather than reflecting an interpretation of the statute, such a cramped reading of section 703 may reflect an aversion to "watering down" sec-

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[73] *See* 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, 634–35 (2003) ("[Courts] have indiscriminately borrowed terminology from the U.S. Supreme Court's sexual harassment cases to impose unwarranted obstacles on employees . . . .").

[74] *See* Brief of the Nat'l Women's Law Ctr. et al. as Amici Curiae in Support of Respondent at 8–9 & n.5, *Burlington*, 126 S. Ct. 2405 (No. 05-259).

[75] *Burlington*, 126 S. Ct. at 2412.

[76] *See id.*

[77] 467 U.S. 69 (1984).

[78] *Id.* at 75–76; *see also* White, *supra* note 71, at 1151–52 (discussing *Hishon*).

tion 703 by permitting too many claims.[79] A cleaner opinion might have limited the realm of cases covered by section 704, but not section 703, to those that do not at all relate to the employment relationship, like a bank employer's denial of an employee's application for a loan.[80]

To the extent that the Court intended no such narrow reading of section 703, *Burlington* illustrates that granting certiorari to resolve circuit splits rather than to decide cases can complicate opinions.[81] The facts in *Burlington* did not directly raise the question of the relationship between sections 703 and 704, as Burlington retaliated against Sheila White even under a limited construction of section 704. The Court nevertheless was willing to hold that section 704 is broader than section 703 in order to resolve the circuit split. The resulting opinion's disconnection from the facts leaves unclear the Court's reading of section 703 and creates a need for future clarification of that provision's scope.

If the Court eventually adopts the narrow reading of section 703 suggested by its dicta, *Burlington* could emerge as an obstacle to Title VII's goals rather than a step toward achieving them. For now, however, the *Burlington* Court has provided employees a victory and has hauled the circuit courts back on track by defining retaliatory conduct in a way that facilitates efforts to redress workplace inequality.

B. Criminal Law

Firearms Regulation — Defense of Duress. — Herman Melville wrote that "[s]ilence is at once the most harmless and the most awful thing in all nature."[1] It is also perhaps the most versatile, mutable thing in law: courts have ascribed varying meanings to congressional silence without ever having established a coherent generalized framework for its interpretation.[2] Last Term, the Court spun silence into cacophony in *Dixon v. United States*,[3] holding that Congress, despite

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[79] Transcript of Oral Argument, *supra* note 59, at 15–16 ("I'm — I'm a little concerned that — that you're trying to persuade us to interpret 704 the same as 703 at the expense of watering down 703." (statement of Scalia, J.)).

[80] *See* White, *supra* note 71, at 1151 n.162.

[81] Commentators and judges have remarked on this practice. *See, e.g.*, United States v. Simpson, 430 F.3d 1177, 1195 (D.C. Cir. 2005) (Silberman, J., concurring) (referring to the Supreme Court as a "non-court court" for its tendency to decide issues rather than cases and controversies).

[1] HERMAN MELVILLE, PIERRE 284 (Constable & Co. 1923) (1852).

[2] *Compare, e.g.*, Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (holding that congressional silence in an agency's enabling statute delegates interpretive authority to the agency), *and* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 687–88 (1978) (observing that Congress's failure to define "restraint of trade" for purposes of antitrust law delegates interpretive authority to the courts), *with* Staples v. United States, 511 U.S. 600, 618–19 (1994) (adopting the substantive presumption that Congress did not intend to dispense with the mens rea requirement in a statutory crime despite the statute's silence on that issue).

[3] 126 S. Ct. 2437 (2006).