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*Title VII — Limitations Periods — Green v. Brennan*

Limitations periods are harsh creatures, borne out of the pragmatic need for the courts and society to “get on with it.” Designed and often perceived by the public to be clear, bright-line rules, the reality of limitations periods is far more complicated<sup>1</sup> and employment discrimination limitations periods are no exception.<sup>2</sup> In *Pennsylvania State Police v. Suders*,<sup>3</sup> the Supreme Court first blessed claims for constructive discharge, in which the employee resigned due to intolerable working conditions, in employment discrimination cases.<sup>4</sup> Last Term in *Green v. Brennan*,<sup>5</sup> the Supreme Court addressed a question *Suders* did not resolve: when does the limitations period for contacting an Equal Employment Opportunity Commission (EEOC)<sup>6</sup> officer begin under a federal agency rule promulgated pursuant to Title VII of the 1964 Civil Rights Act, the federal prohibition on employment discrimination? That rule, 29 C.F.R. § 1614.105(a)(1), requires the aggrieved federal employee to contact an EEO officer “within 45 days of the date of the matter alleged to be discriminatory.”<sup>7</sup> According to the *Green* Court, this forty-five-day period begins running when the employee tenders his or her notice of resignation. In reaching this result, the majority stretched standard rules of limitations period construction. However, the majority’s reasoning appears motivated by a welcome dose of pragmatism, as well as its own intuition about how employees behave in constructive discharge cases. Nevertheless, in relying on this intuition, the majority missed a valuable opportunity to look to social science to bolster and challenge its assumptions about human behavior.

Marvin Green, a black man, worked for the U.S. Postal Service for thirty-five years.<sup>8</sup> Mr. Green rose through the Postal Service ranks, serving fourteen years as a postmaster, several of which were in Englewood, Colorado.<sup>9</sup> In 2008, he applied for a promotion to the postmaster position in Boulder, Colorado, but according to Mr. Green’s allegations was passed over on account of his race.<sup>10</sup> Thereafter, Mr. Green’s relationship with his supervisors deteriorated. He filed an in-

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<sup>1</sup> See Andrew J. Wistrich, *Procrastination, Deadlines, and Statutes of Limitation*, 50 WM. & MARY L. REV. 607, 612–13 (2008).

<sup>2</sup> See *Time Limits for Filing a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/employees/timeliness.cfm> [<https://perma.cc/R3VN-ZPBY>].

<sup>3</sup> 542 U.S. 129 (2004).

<sup>4</sup> *Id.* at 141–43.

<sup>5</sup> 136 S. Ct. 1769 (2016).

<sup>6</sup> The EEOC is the federal agency charged with enforcing employment discrimination law.

<sup>7</sup> 29 C.F.R. § 1614.105(a)(1) (2016).

<sup>8</sup> *Green*, 136 S. Ct. at 1774.

<sup>9</sup> *Green v. Donahoe*, 760 F.3d 1135, 1137 (10th Cir. 2014).

<sup>10</sup> *Green*, 136 S. Ct. at 1774.

formal EEO charge against the Postal Service;<sup>11</sup> his supervisors accused him of “intentionally delaying the mail — a criminal offense”; and the Postal Service’s Office of the Inspector General investigated the allegations against Mr. Green and met with him.<sup>12</sup> Shortly after that meeting, Mr. Green’s supervisors reassigned him to off-duty status until the end of the investigation.<sup>13</sup> Less than a week later, on December 16, 2009, Mr. Green signed a settlement agreement with the Postal Service. In the agreement, “the Postal Service promised not to pursue criminal charges,” and Mr. Green promised to leave his Englewood job, either for a position in Wamsutter, Wyoming, and a significant pay cut or for retirement.<sup>14</sup> “[Mr.] Green chose to retire and submitted his resignation to the Postal Service on February 9, 2010, effective March 31.”<sup>15</sup>

Forty-one days after submitting his resignation and ninety-six days after signing the settlement agreement, Mr. Green “contacted an Equal Employment Opportunity . . . counselor to report an unlawful constructive discharge.”<sup>16</sup> Eventually Mr. Green filed a claim of constructive discharge against the Postal Service in Colorado federal district court.<sup>17</sup> The district court granted summary judgment in favor of the Postal Service on the grounds that Mr. Green “failed to make timely contact with an EEO counselor within 45 days of the ‘matter alleged to be discriminatory.’”<sup>18</sup> The Tenth Circuit agreed, finding “that the ‘matter alleged to be discriminatory’ encompassed only the Postal Service’s discriminatory actions and not Green’s independent decision to resign on February 9.”<sup>19</sup> Thus, his claim was untimely and barred because the clock had begun running when he signed the settlement agreement.<sup>20</sup>

The Supreme Court disagreed. Writing for a six-member majority, Justice Sotomayor<sup>21</sup> found that the limitations period started when Mr. Green resigned. The Court began its analysis by noting that the EEOC regulation that required Mr. Green to contact an EEO counselor within 45 days was unclear. According to the Court, the “matter alleged to be discriminatory” could apply to “all of the allegations un-

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<sup>11</sup> *Green*, 760 F.3d at 1137.

<sup>12</sup> *Green*, 136 S. Ct. at 1774.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1775.

<sup>18</sup> *Id.* (quoting 29 C.F.R. § 1614.105(a)(1) (2015)).

<sup>19</sup> *Id.* (quoting 29 C.F.R. § 1614.105(a)(1)).

<sup>20</sup> *Id.* Notably, when the case went to the Supreme Court, no party chose to support the circuit court’s holding. The Supreme Court appointed Catherine M.A. Carroll to defend it. *Id.*

<sup>21</sup> Justice Sotomayor was joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Kagan.

derlying” the constructive discharge claim, or it could apply only to allegations about employer conduct.<sup>22</sup> Lower courts had split on the interpretation of this rule.<sup>23</sup> To resolve this ambiguity, the Court drew on “the “standard rule” for limitations periods”<sup>24</sup>: the limitations period begins when the plaintiff has a complete and present cause of action, that is, when “the plaintiff can file suit and obtain relief.”<sup>25</sup>

The Court found that in applying this rule, three considerations counseled in favor of a finding that the limitations period began to run after resignation. First, the plaintiff has a “complete and present cause of action” for constructive discharge only after “he was discriminated against by his employer to the point where a reasonable person in his position would have felt compelled to resign,” and he “actually resigned.”<sup>26</sup> In this way, the two necessary elements of the claim — discrimination and discharge — are similar to a regular wrongful discharge claim. Thus, the “matter alleged to be discriminatory” should include these two parts of constructive discharge.<sup>27</sup>

Second, before the Court signed off in full on the application of the standard rule, it acknowledged that the rule had an exception: when “the text creating the limitations period clearly indicates otherwise,” that text governs.<sup>28</sup> However, according to the Court, 29 C.F.R. § 1614.105(a)(1)’s text has no such clear indication.<sup>29</sup> In fact, its natural reading was in keeping with the rule. “[T]he word ‘matter’ generally refers to ‘an allegation forming the basis of a claim or defense.’”<sup>30</sup> The logical reading “of ‘matter alleged to be discriminatory’ thus refers to the allegation forming the basis”<sup>31</sup> of the constructive discharge claim — that is, the discrimination and the discharge.<sup>32</sup> Again, the claim began to run when both elements were present.

Third, the Court looked at the practical reasons for applying the standard rule. Starting the limitations period before the plaintiff could bring the claim would “actively negate[] Title VII’s remedial structure.”<sup>33</sup> It would also force the plaintiff to engage in a two-step procedure to bring his or her remedial claim, since the plaintiff would have

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<sup>22</sup> *Green*, 136 S. Ct. at 1776.

<sup>23</sup> *Id.* at 1775.

<sup>24</sup> *Id.* at 1776 (quoting *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418 (2005)).

<sup>25</sup> *Id.* (quoting *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)).

<sup>26</sup> *Id.* at 1777.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (quoting *Matter*, BLACK’S LAW DICTIONARY (10th ed. 2014)).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1777–78.

<sup>33</sup> *Id.* at 1778.

to file first after the discriminatory act and then later modify his or her complaint after resigning.<sup>34</sup> Common sense, according to the Court, counsels against this confusing approach. Finally, employees are often “reluctant to complain” while still employed, and they may have a host of legitimate reasons for waiting to resign.<sup>35</sup> All this, to the Court, suggested that the limitations period should begin running only after the employee resigns.

In the latter portion of its opinion, the majority addressed the concurrence and dissent. The Court rejected the dissent’s view that constructive discharge “merely allows a plaintiff to expand any underlying discrimination claim to include the damages from leaving his job.”<sup>36</sup> Instead, the majority pointed to *Suders* for the view that “constructive discharge is a claim distinct from the underlying discriminatory act.”<sup>37</sup> It also dismissed as overblown the dissent’s concern that the Court’s resignation rule would enable the plaintiff to indefinitely extend the limitations period by waiting to resign<sup>38</sup> and the concurrence’s concern “that a timely filed discharge claim could resuscitate other time-lapsed claims.”<sup>39</sup> Because the plaintiff must prove that his or her resignation was the inevitable consequence of the employer’s conduct and because the limitations period runs separately for each claim, delay does nothing to aid the plaintiff.<sup>40</sup>

Finally, the majority made clear that the limitations period began to run from the date Mr. Green gave his notice and not his last day of work. The majority vacated the Tenth Circuit’s opinion and remanded the case to determine whether Mr. Green gave his notice “when he signed the settlement agreement” on December 16th or “when he submitted his retirement paperwork” on February 9th.<sup>41</sup>

Justice Alito concurred in the judgment. He found that the majority overlooked a “bedrock principle” of Title VII cases, namely, that the intentionally discriminatory act must have occurred within the limitations period.<sup>42</sup> If the employer acted in a discriminatory fashion with the intent of forcing the employee to resign, the resignation was “tantamount to an intentional termination by the employer, and so gives rise to a fresh limitations period just as a conventional termination would.”<sup>43</sup> If the employer did not intend to force the resignation, then

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 1779.

<sup>37</sup> *Id.* (citing *Pa. State Police v. Suders*, 542 U.S. 129, 149 (2004)).

<sup>38</sup> *Id.* at 1781.

<sup>39</sup> *Id.* at 1782.

<sup>40</sup> *See id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (Alito, J., concurring in the judgment).

<sup>43</sup> *Id.* at 1783.

“the resignation is not an independent discriminatory act.”<sup>44</sup> “The resignation may be a basis for enhancing damages in a claim brought on the underlying discrimination, but it cannot restart the limitations clock.”<sup>45</sup> Because Justice Alito believed that *Green’s* facts supported a finding of intentional, forced resignation, he concurred in the judgment.<sup>46</sup>

Justice Thomas dissented. He found that the meaning of “matter alleged to be discriminatory” was clear. It referred to actions taken by the employer and not the employee.<sup>47</sup> According to Justice Thomas, an employee’s decision to resign is just that, a decision he or she makes, and “[a]n employee cannot plausibly be said to discriminate against himself.”<sup>48</sup> Therefore, the resignation cannot possibly be the “matter” to which the regulation refers.

The majority’s reasoning is facially grounded in an underwhelming textual interpretation, and this, standing alone, leaves something to be desired. However, the opinion is best understood as a commendable embrace of pragmatism. The “complete and present” cause of action rule is practical and intuitive. The three explicit pragmatic considerations — Title VII’s remedial structure, concerns about the practicality of a two-step procedure, and the fact that employees may be reluctant to complain while still employed — are derived from traditional legal concerns, as well as the potentially more controversial concern of fairness. In the specific context of statutes of limitations, this is perfectly appropriate. However, the majority did not look to an important source of information about how its rule would operate in the real world, despite being served up by briefing: social science literature. This was a missed opportunity. Had the Court chosen to do so, it would have taken an important step toward normalizing the use of this important type of evidence in procedural legal decisionmaking.

At first blush, the majority’s opinion looks like a less-than-compelling application of basic textual interpretation. First, the majority strained to find two possible meanings for “matter alleged to be discriminatory.” Reading “matter alleged to be discriminatory” to include the entire claim of discrimination and discharge, as the majority did, is plausible. However, Justice Thomas’s reading is considerably more intuitive.<sup>49</sup> Second, the majority seemingly transformed the

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1790.

<sup>47</sup> *Id.* at 1791 (Thomas, J., dissenting).

<sup>48</sup> *Id.*

<sup>49</sup> This is a reality betrayed — intentionally or not — by one commentator’s summary of his dissent: “Justice Clarence Thomas dissented, arguing that the time should run from the occurrence of the ‘matter alleged to be discriminatory.’” Bill McMahon, *Client Bulletins: Supreme Court’s Constructive Discharge Decision Makes Sense for Employers and Employees*,

“complete and present” cause of action rule from a permissive canon of construction — or one that should be applied only in instances of ambiguity — into a rule that applies absent a reason to except it. At the beginning of the opinion, the Court looked for two understandings of the regulation at issue (in other words, ambiguity) before it moved to the “standard rule.”<sup>50</sup> This approach is supported by recent decisions in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*<sup>51</sup> and *Dodd v. United States*.<sup>52</sup> But in a later portion of the majority’s opinion, instead of suggesting that ambiguity is required before the standard rule applies, the Court’s language seems to suggest that a clear statement is required to displace it.<sup>53</sup>

This internal tension in the Court’s reasoning would be unsatisfying if it was the only thing justifying the Court’s decision. However, the Court’s opinion is best understood as one motivated substantially by pragmatism. In plain English, the “complete and present” cause of action rule ensures that the clock will not begin to run on a plaintiff’s claim until he or she can actually bring it. This intuitive rule has been applied in numerous Supreme Court opinions, many of which were predicated as much on common sense as on strict legal reasoning.<sup>54</sup>

*Green*’s embrace of this intuitive rule of law and explicit consideration of pragmatic concerns are commendable. It is often appropriate for courts to consider purpose, fairness, and other “evolutive” considerations, especially when the legislature does not appear to have

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CONSTANGY, BROOKS, SMITH & PROPHETE, LLP (May 26, 2016), <http://www.constangy.com/communications-638.html> [<https://perma.cc/A5VF-P8ES>].

<sup>50</sup> See *Green*, 136 S. Ct. at 1776.

<sup>51</sup> 545 U.S. 409 (2005). In *Graham*, the Court found there were two reasonable interpretations of the statute and applied the standard rule. See *id.* at 419–22.

<sup>52</sup> 545 U.S. 353 (2005). In *Dodd*, the Court refused to apply the standard rule on the grounds that the statute at issue in the case, unlike the statute at issue in *Graham*, was not ambiguous. See *id.* at 360.

<sup>53</sup> This approach has some support in the language of prior opinions. See *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (“Unless Congress has told us otherwise in the legislation at issue, a cause of action does not become ‘complete and present’ for limitations purposes until the plaintiff can file suit and obtain relief.” (quoting *Rawlings v. Ray*, 312 U.S. 96, 98 (1941))); *Reiter v. Cooper*, 507 U.S. 258, 267 (1993) (“While it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute.”).

<sup>54</sup> In *Reiter v. Cooper*, 507 U.S. 258, for example, the Supreme Court rejected the argument that a statute created a cause of action that accrued at different times for statute of limitations and filing purposes. See *id.* at 267. In doing so, the Court did not cite to case law but instead relied on the common sense position that it would “not infer such an odd result in the absence of any such indication in the statute.” *Id.* When rejecting the government’s arguments that the federal habeas statute of limitations could begin running and expire long before the petitioner could bring his or her case, the Court in *Johnson v. United States*, 544 U.S. 295 (2005), found it “highly doubtful” that Congress would create such a rule. *Id.* at 305.

thought about the question at issue.<sup>55</sup> Admittedly, appeals to pragmatism (at least by appellate judges) are controversial in the legal field. Such reasoning has been maligned as legislating from the bench — or worse.<sup>56</sup> However, limitations periods are different than substantive rules of law. By their nature, they are procedural rules designed to balance some of the justice system's most practical concerns. Limitations periods exist “to allow peace of mind” for the defendant, “minimize deterioration of evidence,” “encourage the prompt enforcement of law,” and “avoid the retrospective application of contemporary standards.”<sup>57</sup> These periods also must take into account concerns about society's desire to adjudicate meritorious claims<sup>58</sup> and its aversion to throwing out such claims on a technicality. Further, as a basic threshold inquiry in most cases, limitations periods' easy applicability continues to be a worthy goal.

In addition to embracing the “standard” rule, the *Green* majority looked to three explicitly pragmatic considerations to bolster its view: “Title VII's remedial structure,” concerns about forcing the plaintiff to engage in a two-step procedure to bring his or her claim, and the fact that employees may be reluctant to complain while still employed.<sup>59</sup> The first two are relatively uncontroversial. First, a law's structure and its underlying purpose are commonly, though not universally, accepted pragmatic considerations for courts interpreting statutes.<sup>60</sup> When linguistic meaning is unclear (and sometimes even when it is clear), it makes sense to consider the law's objectives to resolve the confusion.

Second, requiring a plaintiff to engage in a two-step procedure — reporting the initial discriminatory behavior and then updating that allegation when the employee resigns — runs afoul of classic considerations within the courts' ambit. Courts regularly consider judicial efficiency when applying procedural rules.<sup>61</sup> Not only would a two-step rule be problematic for plaintiffs, but it would also create more work for courts. Further, because such a rule is counterintuitive, it offends important considerations of notice. Statutes of limitations are designed

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<sup>55</sup> See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 358–59 (1990).

<sup>56</sup> See Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 2 (1996) (noting that Ronald Dworkin criticized pragmatism as “an intellectual meal fit only for a dog”).

<sup>57</sup> Wistrich, *supra* note 1, at 617. As Justice Jackson once wrote, statutes of limitations are, among other things, “practical and pragmatic devices to spare the courts from litigation of stale claims.” *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

<sup>58</sup> See Wistrich, *supra* note 1, at 612.

<sup>59</sup> *Green*, 136 S. Ct. at 1778.

<sup>60</sup> See Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 9–10 (2003).

<sup>61</sup> See, e.g., *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009); *Acosta v. Artuz*, 221 F.3d 117, 122–23 (2d Cir. 2000).

in part to induce prompt filing and punish negligent plaintiffs who sit on their claims.<sup>62</sup> Unclear, difficult-to-follow rules undermine these objectives.

With the third factor, however, the Court appealed more directly to a controversial source of legal decisionmaking: considerations of fairness. It seems unfair to force plaintiffs to lose late but legitimate claims when their tardiness is understandable. Even accepting that fairness is worth considering, however, the Court's opinion is still subject to a legitimate criticism levied at results-driven reasoning. Implicit in such reasoning are assumptions about the state of the world and the way people behave that risk being grounded in mistaken impressions or political preferences rather than facts.<sup>63</sup> Anecdotal experience can be a poor approximation for facts in the world.<sup>64</sup> The majority's assertion that an employee might withhold from filing a claim until after he or she had left the office appears to be premised on speculation and the majority's own judgment.<sup>65</sup> Once the Court decided to resort to this intuition, it should have taken the next step and looked to empirical research to corroborate and challenge its assumptions.

Amicus briefing in this case provided specific scientific studies that arguably supported the majority's claims about hesitation and delay.<sup>66</sup> For example, two studies suggested that women and minorities can be hesitant to identify discrimination and harassment as sufficiently severe to be worthy of reporting.<sup>67</sup> Another study showed that "job loss,

<sup>62</sup> See Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 488–92 (1997).

<sup>63</sup> See Ben K. Grunwald, Comment, *Suboptimal Social Science and Judicial Precedent*, 161 U. PA. L. REV. 1409, 1422, 1430–31 (2013) ("Without systematic data, judges must rely upon their own personal experiences or the personal experiences related to them by others. Error may enter this form of nonsystematic data . . ." *Id.* at 1422.).

<sup>64</sup> See Michael Shermer, *How Anecdotal Evidence Can Undermine Scientific Results*, SCI. AM. (Aug. 1, 2008), <http://www.scientificamerican.com/article/how-anecdotal-evidence-can-undermine-scientific-results> [<https://perma.cc/5GYP-LMYG>].

<sup>65</sup> See *Green*, 136 S. Ct. at 1778 ("An employee who suffered discrimination severe enough that a reasonable person in his shoes would resign *might* nevertheless force himself to tolerate that discrimination for a period of time. He *might* delay his resignation until he can afford to leave. Or he *might* delay in light of other circumstances, as in the case of a teacher waiting until the end of the school year to resign." (emphasis added)); see also Transcript of Oral Argument at 17, *Green*, 136 S. Ct. 1769 (No. 14-613) (Roberts, C.J.) [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/14-613\\_6647.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/14-613_6647.pdf) [<https://perma.cc/37QN-YLDM>] ("I think it's fairly common for people to set a resignation date at some point in the future. You know, a schoolteacher will say as soon as this school year is over, I'm out of here.").

<sup>66</sup> See Brief of Amici Curiae NAACP Legal Defense & Educational Fund, Inc. & The National Women's Law Center in Support of Petitioner at 14–15 & nn. 10–11, *Green*, 136 S. Ct. 1769 (No. 14-613).

<sup>67</sup> See Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273, 314–16 (2001) (sexual harassment); Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 L. & SOC. INQUIRY

or fear of it, [i]s the primary trigger for a serious consideration of litigation.”<sup>68</sup> Perhaps it is not surprising, then, that a significant portion of employment discrimination claims involve resignation,<sup>69</sup> as Mr. Green’s claim did. Once employees have left their jobs, however, the risks of reporting discrimination diminish.<sup>70</sup> Only then do many employees with legitimate claims file them. Starting the limitations period before resignation may mean that many legitimate cases never see the inside of a courtroom. Looking to empirical inquiries into these problems for support would have bolstered the majority’s intuition.

Given limitations periods’ origins and dire consequences, it is perhaps surprising how little they actually reflect our modern understanding of human behavior. Beyond the specifics of employment discrimination cases, social science literature provides an abundance of evidence that people procrastinate, underestimate the amount of time a task will take, and are more averse to losses that “make things worse” than favorable to gains that “make things better.”<sup>71</sup> For example, the long deadlines that pervade our statutes, of which four years is standard, are a particularly poor way of encouraging both promptness and even the actual filing of claims.<sup>72</sup> Not all this research may support the majority’s claim,<sup>73</sup> but by engaging with it the Court would have set an important precedent in favor of scientific studies and against assumption-driven reasoning.

There are, of course, persistent and legitimate criticisms of the use of social science research in legal decisionmaking. Scientific studies can be subject to selection bias, “experimenter effects,” “demand characteristics,” or a generally poor design.<sup>74</sup> Studies can be taken out of context or lionized as truth when they are better understood as data points. Some of this criticism can certainly be leveled against the studies cited by the amici, and it would have been reasonable for the Court

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801, 813–17 (2006) (collecting studies on both gender and race). *But see* Kaiser & Major, *supra*, at 803–04 (citing evidence for the theory that women and minorities are more likely to perceive discrimination than majority-group men).

<sup>68</sup> Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women*, 33 L. & SOC’Y REV. 67, 75 (1999). Another article collecting studies suggested that reporting discrimination can have high reputational costs. *See* Kaiser & Major, *supra* note 67, at 818–19.

<sup>69</sup> In a somewhat dated study, over twenty-two percent of sexual harassment complaints involved resignations. *See* Frances S. Coles, *Forced to Quit: Sexual Harassment Complaints and Agency Response*, 14 SEX ROLES 81, 87, 89 (1986). Another forty-five percent were fired. *See id.*

<sup>70</sup> *But see* Beiner, *supra* note 67, at 318–38.

<sup>71</sup> Wistrich, *supra* note 1, at 618.

<sup>72</sup> *See id.* at 634–35, 639.

<sup>73</sup> Some have suggested that shorter limitations periods are preferable, *id.*, and might argue that Justice Thomas’s “last discriminatory act” rule is preferable.

<sup>74</sup> Richard E. Redding, *Forum, Reconstructing Science Through Law*, 23 S. ILL. U. L.J. 585, 593 (1999).

to treat this research carefully. Nonetheless, judges are sophisticated players who are asked to consider such research in a host of contexts.<sup>75</sup> The Rules of Evidence permit them to conduct independent research into existing social science literature,<sup>76</sup> giving them the opportunity to find evidence that both supports and challenges their perspectives. The Supreme Court, unlike lower courts, has more time and resources to assess the reliability of the studies cited by the parties and amici.<sup>77</sup>

Further, in contrast with federal trial courts, where the judge's ruling is mere persuasive authority outside the confines of that case, the Supreme Court hands down rules that bind all federal courts in the country. Case-by-case adjudication can be admittedly ill-suited for that endeavor.<sup>78</sup> Whatever the merits of embracing social science research generally, in the setting of limitations periods courts often base rules on empirical and predictive conjectures already — as this case itself indicates. Social science research is a type of “legislative fact” that enables the Court to better understand how its rule will apply across a broader set of cases.<sup>79</sup> To abandon such research or to obscure its influence on the outcome is to remove an important tool from the Court's toolbox unnecessarily.

Only time will reveal *Green v. Brennan*'s effect on constructive discharge, employment discrimination claims, and limitations periods. The Court's embrace of the pragmatic “standard rule” in the face of limited ambiguity has the potential to reframe discussions of statutes of limitations going forward. Further, while social science and policy instincts are not always appropriate for judges to consider, those views have a rightful place against the backdrop of a harsh but purely procedural bar. Had the Court embraced them further, the opinion might have positively influenced the discussion of whether, when, and to what extent social science evidence is a useful tool in judicial decisionmaking.

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<sup>75</sup> See Sarah H. Ramsey & Robert F. Kelly, *Social Science Knowledge in Family Law Cases: Judicial Gate-Keeping in the Daubert Era*, 59 U. MIAMI L. REV. 1, 7–12 (2004) (discussing the use of social science in child custody cases).

<sup>76</sup> See Grunwald, *supra* note 63, at 1417.

<sup>77</sup> But see Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 100 (1993) (suggesting that, to overcome the problem of social science evidence in amicus briefs, the Court should consider appointing social science experts and special masters, among other things).

<sup>78</sup> See Frank H. Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 8 (1984) (“The process of sequential decision leaves arbitrary or inconsistent precedent embedded in the law.”).

<sup>79</sup> See Grunwald, *supra* note 63, at 1415–16.