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Rights in Recession: Toward Administrative Antidiscrimination Law

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YALE LAW & POLICY REVIEW

Rights in Recession: Toward Administrative Antidiscrimination Law

*Stephanie Bornstein**

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INTRODUCTION: A VISION OF COMPROMISE

From the outset, Congress's crafting of Title VII of the Civil Rights Act of 1964—the main federal law prohibiting employment discrimination—was marked by compromise. The Equal Employment Opportunity Commission (EEOC) was initially conceived as a strong federal enforcement agency that could issue binding orders and oversee adversarial hearings. But the EEOC that ultimately emerged from legislative bargaining in the year the Act was passed was limited to a mostly investigatory and gatekeeping role. The final enforcement scheme of Title VII relied heavily on an individual private right of action, through which employees could file private lawsuits alleging discrimination against their employers in federal court. Fifty years and numerous amendments later, Title VII's enforcement mechanism remains largely unchanged: the EEOC provides a crucial, but circumscribed administrative and enforcement function, while the bulk of federal antidiscrimination enforcement responsibility falls to private civil lawsuits.¹

Numerous scholars have written about the relative advantages and, more often, disadvantages of this enforcement scheme. Employment law scholars have mostly criticized the public side of the enforcement balance as too limited, suggesting that the EEOC should be strengthened, expanded, re-imagined, or—if all else fails—relieved of its gatekeeping role and re-focused.² Empirical schol-

1. See *infra* Part I.

2. See, e.g., Pam Jenoff, *As Equal as Others?: Rethinking Access to Discrimination Law*, 81 U. CIN. L. REV. 85 (2012); Marcia L. McCormick, *The Truth Is out There: Revamping Federal Antidiscrimination Enforcement for the Twenty-First Century*, 2009 BERKELEY J. EMP. & LAB. L. 193; Nancy M. Modesitt, *Reinventing the EEOC*, 63 SMU L. REV. 1237 (2010); Maurice E. R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219 (1995); Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 708-09; Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Roles in Employment Discrimination Law*, 57 OHIO ST. L.J. 1 (1996); Julie Chi-hye Suk, *Antidiscrimination Law in the Admin-*

ars have identified the limitations of an antidiscrimination enforcement system that relies on employees to initiate private lawsuits against their employers: the problem of “naming, blaming, and claiming” when employees may neither perceive nor report discrimination.³ On the other hand, political scientists and administrative law scholars have explained the value of *private* mechanisms for the enforcement of *public* laws—to (among other things) ensure separation of powers and freedom from politics and regulatory capture.⁴ If the normative assumption is that employment discrimination is undesirable (as a matter of either fairness or business efficiency), and if the normative goal is effective anti-discrimination enforcement (to both root out meritless claims swiftly and pursue legitimate claims vigorously), then strong enforcement through both public and private mechanisms is likely ideal. In the real world, however, the opposite has occurred.

This Article documents how, over the past six years and coinciding with the “Great Recession of 2008,”⁵ both public and private antidiscrimination enforcement mechanisms have become increasingly constrained, such that the ability to enforce the mandate of Title VII may be facing a crisis point. While

istrative State, 2006 U. ILL. L. REV. 405; Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434 (2003). For other interesting discussion and proposals, see David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 699-711 (2013), which applies an agency theory to reconceive the EEOC’s role as litigation gatekeeper; Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 335-57 (2001), which proposes private mandatory mediation of EEOC charges; and Charles A. Sullivan, *The Enforcement of Title VII: Meshing Public and Private Efforts*, 71 NW. U. L. REV. 480 (1976), which discusses the early procedural complications of the EEOC’s hybrid public-private enforcement scheme.

3. See, e.g., Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859 (2008); Andrew Tae-Hyun Kim, *Culture Matters: Cultural Differences in the Reporting of Employment Discrimination Claims*, 20 WM. & MARY BILL RTS. J. 405 (2011) (developing a theory of how values within Asian-American communities contribute to under-reporting); Nielsen & Nelson, *supra* note 2, at 68. The term and typology of “naming, blaming, and claiming” comes from William L. F. Felsteiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631 (1981).
4. See, e.g., Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 662-66 (2013); Sean Farhang, *Legislative-Executive Conflict and Private Statutory Litigation in the United States: Evidence from Labor, Civil Rights, and Environmental Law*, 37 LAW & SOC. INQUIRY 657, 667-73 (2012); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012).
5. See Catherine Rampell, ‘Great Recession’: A Brief Etymology, N.Y. TIMES: ECONOMIX BLOG (Mar. 11, 2009, 5:39 PM), <http://economix.blogs.nytimes.com/2009/03/11/great-recession-a-brief-etymology>.

enforcement mechanisms for federal antidiscrimination law have long left room for improvement, recent developments in the economy, due to the 2008 recession, and in federal case law, due to a series of procedural decisions by the Roberts Court, compels a reconsideration of the existing enforcement scheme. The Article then theorizes a new model for combining public and private enforcement efforts and using administrative procedures under existing law more robustly to leverage the relative strengths of each part of the statutorily designed compromise. This proposed model offers both a strategic response to recent economic and legal developments that threaten effective antidiscrimination enforcement and an opportunity to more perfectly realize Congress's original enforcement vision.

Part I of this Article provides an overview of the existing enforcement mechanism for Title VII, including its development over time. Title VII emerged from the legislature in 1964 with virtually no public agency enforcement. Congress has since passed two major amendments to the Act's enforcement scheme, slightly expanding public enforcement in 1972 and significantly enhancing incentives for private enforcement in 1991.⁶ As a result, while the EEOC plays an important but limited public enforcement role, the private right of action guaranteed to individuals under Title VII remains the key to enforcing federal antidiscrimination law.

Part II illustrates how, over the past six years, the Great Recession of 2008 has impacted the public side of the enforcement equation, placing the EEOC—already criticized as having too limited an enforcement role—in an even more untenable position. Some economic and social science data indicate that workplace inequality, particularly by race, has likely been exacerbated by the 2008 recession.⁷ Moreover, during the recession, the number of discrimination charges filed with the EEOC rose so significantly that, by 2011, the EEOC reported “a record number of new charges of discrimination” received by the agency in its fifty year history, “[f]or the second year in a row.”⁸ Whatever the root cause of the increase and whether or not the charges are meritorious, this influx of charges presents an increased drain on public enforcement resources. The 2008 recession has also had a direct impact on the EEOC itself: as a result of

6. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972); *infra* Part I.

7. See *infra* Part II.A.

8. See U.S. EEOC, Press Release, *Private Sector Bias Charges Hit All-Time High* (Jan. 25, 2012), <http://www.eeoc.gov/eeoc/newsroom/release/1-24-12a.cfm>; U.S. EEOC, Press Release, *EEOC Reports Job Bias Charges Hit Record High of Nearly 100,000 in Fiscal Year 2010* (Jan. 11, 2011), <http://www.eeoc.gov/eeoc/newsroom/release/1-11-11.cfm>; *infra* Part II.B; see also Catherine Rampell, *More Workers Complain of Bias on the Job, a Trend Linked to Widespread Layoffs*, N.Y. TIMES (Jan. 11, 2011), <http://www.nytimes.com/2011/01/12/business/12bias.html> (documenting how experts hypothesized the principle reason for the increase was linked to the number of individuals being laid off permanently).

recessionary federal budget cuts and sequestration, both the number of EEOC staff available to respond to charges and the number of enforcement lawsuits filed by the EEOC have now dropped to their lowest point in recent history.⁹ A future economic rebound has the potential to reduce some of this strain on the EEOC; indeed, the number of discrimination charges filed with the EEOC dropped modestly between fiscal years 2012 and 2013.¹⁰ But the longer-term “economic scarring” caused by the recession, which has both chilled businesses’ re-hiring¹¹ and decreased federal agency budgets going forward,¹² makes it likely that the EEOC will remain overburdened for the foreseeable future.

In Part III, the Article turns to documenting how, during the same time period, private enforcement efforts have suffered even more dramatic constraints than the public efforts of the EEOC. Between 2007 and 2013, the U.S. Supreme Court made a series of procedural¹³ decisions that, in cumulative effect, signifi-

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9. See U.S. EEOC, *EEOC Budget and Staffing History 1980 to Present*, <http://www.eeoc.gov/eeoc/plan/budgetandstaffing.cfm> (showing approved staffing for 2013 and 2014 as the lowest number since 1980); *infra* Part II.B.
 10. See U.S. EEOC, *Charge Statistics, FY 1997 Through FY 2013*, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (showing a decrease from over 99,000 charges filed in FY 2010, 2011, and 2012 to 93,727 charges filed in FY 2013—but still a significant increase over the 82,792 charges filed in FY 2007, prior to the 2008 recession).
 11. See, e.g., John Irons, *Economic Scarring: The Long-Term Impacts of the Recession*, ECON. POL’Y INST. 3, 6-9, (Sept. 30, 2009), <http://s4.epi.org/files/page/-/img/110209scarring.pdf> (providing a general overview of the long term economic effects of recession).
 12. See, e.g., D. Andrew Austin, *The Budget Control Act and Trends in Discretionary Spending*, CONG. RES. SERVICE 5, 12-14, 21-27, 35-36 (Nov. 26, 2014), <http://fas.org/sgp/crs/misc/RL34424.pdf> (discussing post-recession federal budget legislation and the declining proportion of the budget allocated for non-defense discretionary spending); *Table 8.7—Outlays for Discretionary Programs: 1962-2019*, WHITE HOUSE OFF. OF MGMT. & BUDGET, <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2015/assets/histo8z7.xls> (forecasting discretionary spending budget outlays from 2013 to 2019 to show a decline in non-defense spending from 2012 to 2013 and 2013 to 2014, followed by incremental increases until 2019, never reaching the 2012 number).
 13. Substantively, the Roberts Court shrank the doctrine of antidiscrimination law during this time period as well, by: limiting employer efforts to avoid disparate impact claims, *Ricci v. DeStefano*, 557 U.S. 557 (2009); prohibiting a “mixed motive” theory of proof under the Age Discrimination in Employment Act, *Gross v. FBL Fin. Servs.*, 557 U.S. 167 (2009); expanding the “ministerial exception” under Title VII, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012); and limiting who constitutes a “supervisor” for purposes of hostile work environment claims, *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013). Even the one area of antidiscrimination law that the Court seemed to expand during this time period—the law of retaliation—has not proven particularly helpful to plaintiffs. Despite broadening both what types of actions constitute retaliation,

cantly narrowed the scope of the individual private right of action key to enforcing Title VII.¹⁴ Acting in three key areas—pleading requirements, arbitration agreements, and class certification rules—the Court charted a course procedurally constraining the ability of employees who experience discrimination to assert such claims in a judicial forum. In 2007 and 2009, in *Bell Atlantic Corp. v. Twombly*¹⁵ and *Ashcroft v. Iqbal*,¹⁶ the Court amplified the pleading requirements needed to survive a motion to dismiss for failure to state a claim in civil lawsuits, including employment discrimination suits. In a series of cases decided between 2009 and 2013—including *14 Penn Plaza v. Pyett*,¹⁷ *AT&T Mobility v. Concepcion*,¹⁸ and *American Express v. Italian Colors Restaurant*¹⁹—the Court strengthened the mandatory nature of agreements to arbitrate employment and consumer disputes, upholding arbitration agreements over varied challenges to their enforceability. In 2011, in *Wal-Mart v. Dukes*,²⁰ the Court interpreted the rules of class certification narrowly, making large-scale employment discrimination class actions more difficult to pursue. The collective result of these decisions has been to narrow plaintiffs' access to federal courts during a time when employees may have needed it the most—a narrowing that will remain long af-

Crawford v. Metro. Govt. of Nashville, 555 U.S. 271 (2009); Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006), and who may constitute the victim of retaliation, Thompson v. N. Am. Stainless, 131 S. Ct. 863 (2011), analysis of cases applying the Roberts Court's retaliation precedent at the district court level reveals, as Professor Deborah Brake describes it, a "picture of retaliation law for employees [that] is not nearly as rosy as the Court's decisions have led legal scholars to believe." Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L. REV. 115, 115-16 (2014). Moreover, the Court's most recent retaliation decision retreated from its prior trend of expanding retaliation doctrine, instead prohibiting a "mixed motive" theory of proof for retaliation claims, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013).

However, a discussion of the constraints imposed on the *doctrine* of Title VII by the Roberts Court is beyond the scope of this Article's focus on the *procedural* constraints on Title VII's private right of action and suggestions for use of administrative enforcement procedures to overcome them. Substantive limitations to the doctrine of Title VII apply equally to a plaintiff's claims regardless of whether the plaintiff pursues those claims using administrative procedures, litigation, or both.

14. See *infra* Part III.

15. 550 U.S. 544 (2007).

16. 556 U.S. 662 (2009).

17. 556 U.S. 247 (2009).

18. 131 S. Ct. 1740 (2011).

19. 133 S. Ct. 2304 (2013).

20. 131 S. Ct. 2541 (2011).

ter the Great Recession has passed, with the potential to change the enforcement of federal antidiscrimination law going forward.²¹

Part IV of this Article offers a model for responding to this perfect storm of challenges to antidiscrimination enforcement, first identifying the EEOC's procedural advantages in the wake of recent precedent and the private bar's practical advantages given federal budget tightening, and then proposing ideas for combining public and private enforcement efforts. Interestingly, because of the statutory enforcement authority Congress delegated to the EEOC in the text of Title VII, the agency itself remains largely unaffected by the recent procedural Supreme Court decisions. The EEOC serves a gatekeeping role, providing a basic administrative exhaustion procedure that all plaintiffs must meet before they can file a lawsuit,²² and a crucial, but limited enforcement role, representing a few hundred plaintiffs out of the nearly 100,000 who file charges (less than 0.5 percent) each year.²³ The agency's exhaustion procedures also offer opportunities for administrative resolution, such as voluntary mediation, that parties may, but are not required to, take advantage of prior to filing a lawsuit.²⁴ Filing a charge with the EEOC remains unaffected by *Twombly* and *Iqbal* and requires completing a simple intake and charge form.²⁵ The EEOC has administrative enforcement authority to pursue a lawsuit in court against an employer who has committed discrimination, even if the employees are covered by arbitration agreements binding under *Pyett*, *Concepcion*, and *Italian Colors*.²⁶ And, the EEOC may litigate systemic discrimination cases without having to satisfy Federal Rule of Civil Procedure 23 for class certification—a process made more difficult for private plaintiffs in *Wal-Mart v. Dukes*.²⁷ Part IV suggests how to capitalize on these procedural and practical advantages through partnership between public and private enforcers and reinvigoration of what I call “administrative antidiscrimination law”—the advocacy that occurs during enforcement steps between filing an EEOC charge and pursuing a private lawsuit in court.

Recent legal and economic developments threaten to undermine both public and private enforcement of federal antidiscrimination law; new models for

21. See, e.g., SCOTT DODSON, *NEW PLEADING IN THE TWENTY-FIRST CENTURY: SLAMMING THE FEDERAL COURTHOUSE DOORS?* 79-126 (2013).

22. See 42 U.S.C. § 2000e-5(f) (2012); U.S. EEOC, *Filing a Lawsuit*, <http://www.eeoc.gov/employees/lawsuit.cfm>.

23. See U.S. EEOC, *Enforcement and Litigation Statistics*, <http://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm> (reporting that, between 2007 and 2013, the EEOC represented between 148 and 362 plaintiffs in litigation out of the 82,792 to 99,947 charges employees filed with it each year).

24. See *infra* Part IV.B.

25. See *infra* Part IV.A.

26. See *infra* Part IV.A.; see also *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

27. See *infra* Part IV.A.; see also *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 320 (1980).

fulfilling Title VII's mandate are needed. Legal scholars have written about how to improve either a private attorney general model or a public agency model of Title VII enforcement, offering suggestions that are useful but would require significant additional funding or legislative change.²⁸ This Article proposes an alternative: a pragmatic combined public-private approach, in which private plaintiffs' attorneys and the EEOC work together to leverage their relative strengths to overcome the limitations of recent precedent and a slow economy. Given the significant constraints imposed in recent years on both pieces of the statutory mechanism to enforce federal antidiscrimination law, the time is ripe for re-envisioning its design. A public-private enforcement partnership and more rigorous use of administrative processes already available under existing law can provide a way out of this "recessionary period" in the enforcement of antidiscrimination rights.

I. THE HYBRID ENFORCEMENT SCHEME FOR FEDERAL ANTIDISCRIMINATION LAW

A. *The Original Compromise*

Title VII of the 1964 Civil Rights Act prohibits employers from discriminating in hiring, firing, compensation, and all other "terms, conditions, and privileges of employment" on the basis of race, color, national origin, sex, or religion.²⁹ Since its enactment, Title VII's enforcement mechanism has been marked by a "hybrid" approach: a combination of limited public agency enforcement with an express private right of action provided to individuals.³⁰ As passed in 1964, the statute gave the EEOC virtually no enforcement authority, relying almost exclusively on individuals to bring private lawsuits under the Act.³¹ Facing strong opposition in the Senate, advocates of the original bill were forced to compromise, accepting a highly circumscribed level of public en-

28. See *infra* Part IV.C.

29. 42 U.S.C. § 2000e, 2000e-2 to -17 (2012).

30. See, e.g., Burbank, Farhang & Kritzer, *supra* note 4, at 661 (describing how, in "hybrid regimes" of statutory enforcement, "either public or private enforcement can be given the dominant role, with the other playing a more ancillary one"). Title VII's private right of action is now codified at 42 U.S.C. § 2000e-5(f).

31. See *Civil Rights: Private Cause of Action Exists Under Title VII Notwithstanding EEOC Determination of No Reasonable Cause*, 1971 DUKE L.J. 467, 468-72; U.S. EEOC, *Pre 1965: Events Leading to the Creation of EEOC*, <http://www.eeoc.gov/eeoc/history/35th/pre1965/index.html>. In the five decades since its passage, numerous legal scholars have recounted the legislative history of Title VII and the development of the EEOC and its administrative procedures. For others' accounts of these matters, see, for example, Green, *supra* note 2, at 335-57; McCormick, *supra* note 2, at 201-07 and Selmi, *supra*, note 2, at 5-10.

forcement.³² Earlier versions of the Act would have empowered the EEOC to hold adversarial hearings and issue orders enforceable by a court or, instead, to bring a civil lawsuit against a discriminating employer.³³ Yet a series of amendments to get the bill out of the Senate reduced the agency's authority, with the effect of making federal government involvement a "secondary, rather than primary enforcement alternative."³⁴ Proponents then used this limited public enforcement authority to assuage conservative fears, arguing that the amended Act would have "a small incremental effect" on antidiscrimination laws already in effect in some states.³⁵

Under the 1964 statute, the EEOC's role was limited to taking, investigating, and attempting to conciliate discrimination complaints; when conciliation failed, individual employees were required to bring a lawsuit themselves.³⁶ If a complaint had the potential to involve "pattern or practice" claims, the EEOC did not litigate, but instead referred the complaint to the Department of Justice.³⁷ Indeed, the EEOC's role was so secondary to private enforcement actions that even a Commission finding of "no reasonable cause" to support an employee's discrimination complaint to the EEOC did not—and still to this day, does not—bar a plaintiff from separately pursuing her complaint in federal court.³⁸ At the core of the limited authority Congress ultimately conferred on the EEOC in 1964 was capitulation to many congressmembers' preference that "the ultimate determination of discrimination rest with the Federal judiciary," rather than with an enforcement agency.³⁹

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32. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH BARRETT, *CASES AND MATERIALS ON STATUTORY INTERPRETATION* 20-21 (1st ed. 2012); U.S. EEOC, *Pre 1965*, *supra* note 31.
33. *Civil Rights: Private Cause of Action Exists*, *supra* note 31, at 469.
34. ESKRIDGE ET AL., *supra* note 32, at 21; see also *Civil Rights: Private Cause of Action Exists*, *supra* note 31, at 470-72.
35. ESKRIDGE ET AL., *supra* note 32, at 21.
36. See 42 U.S.C. § 2000e-4 to -5 (2012); McCormick, *supra* note 2, at 202-07; U.S. EEOC, *Pre 1965*, *supra* note 31.
37. See Green, *supra* note 2, at 316-23; U.S. EEOC, *Pre 1965*, *supra* note 31.
38. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-99 (1973) (citing with approval several appellate court holdings that "court actions under Title VII are de novo proceedings and . . . a Commission 'no reasonable cause' finding does not bar a lawsuit in the case"); see also *Civil Rights: Private Cause of Action Exists*, *supra* note 31 (describing the Third Circuit's similar holding in *Fekete v. U.S. Steel Corp.*, 424 F.2d 331 (3d Cir. 1970)).
39. *Civil Rights: Private Cause of Action Exists*, *supra* note 31, at 469 (citing H.R. REP. NO. 88-914, pt. 2, at 29 (1963)); see also Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. L. REV. 431, 436 (1966).

B. Congressional Expansion of Public Enforcement

For the first seven years after Title VII's enactment, the EEOC was focused on establishing procedures, processing charges, and issuing policy guidance—earning its description as a “toothless tiger.”⁴⁰ During this period, the shortcomings of the original Act's enforcement scheme became apparent. While the agency leveraged its limited power to reach some major conciliation agreements, increase awareness of Title VII remedies, and encourage employer compliance, congressional hearings held in 1971 revealed that employment discrimination remained both widespread and severe.⁴¹ As a result, Congress amended the Act in 1972 to increase the scope of the EEOC's enforcement capability, but left the essential enforcement mechanism of the individual private right of action untouched.⁴² The 1972 amendment expanded the scope of the EEOC's enforcement, giving the Commission the authority—after conciliation attempts failed—to initiate civil lawsuits seeking injunction and other remedies against private employers, either on its own or on behalf of an employee who had filed a charge with the agency.⁴³ The EEOC was also granted the ability to litigate “pattern or practice” systemic discrimination claims (in conjunction with the Attorney General at first, then later, alone).⁴⁴

Again, debate over increasing the EEOC's authority was vigorous, and legislative compromise ruled the day: an earlier version of the amendment had tried once more to grant the EEOC authority to issue binding orders on employers, but this was dropped from the final version of the bill.⁴⁵ Thus, while the EEOC was granted the ability to bring suit in federal court, two key elements of the Act's original enforcement scheme remained: the judiciary, not the EEOC, still ultimately determined whether illegal discrimination had occurred, and the private right of action for individuals to bring federal lawsuits was “expressly preserved.”⁴⁶

40. See Green, *supra* note 2, at 313, 316-23; U.S. EEOC, *1965-1971: A “Toothless Tiger” Helps Shape the Law and Educate the Public*, <http://www.eeoc.gov/eeoc/history/35th/1965-71/index.html>.

41. See Green, *supra* note 2, at 323-24; U.S. EEOC, *The 1970s: The “Toothless Tiger” Gets Its Teeth—A New Era of Enforcement*, <http://www.eeoc.gov/eeoc/history/35th/1970s/index.html>.

42. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103; Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 *INDUST. REL. L.J.* 1, 47-52 (1977).

43. See 42 U.S.C. § 2000e-4 to -5 (2012); Hill, *supra* note 42, at 51-52.

44. See 42 U.S.C. § 2000e-4 to -5 (2012); Hill, *supra* note 42, at 51-52.

45. See Hill, *supra* note 42, at 47-52.

46. See *id.* at 47, 51.

C. Congressional Expansion of Private Enforcement

In its next amendment to Title VII twenty years later, Congress essentially doubled down on its reliance on private lawsuits as the primary means of enforcing the Act. After two decades in which EEOC enforcement rose and fell in response to internal agency efforts and changing executive branch priorities,⁴⁷ a series of Supreme Court decisions limiting Title VII doctrine and proof structures finally spurred Congress to action.⁴⁸ In passing the Civil Rights Act of 1991, Congress not only restored prior proof structures to Title VII, but also enhanced the private right of action significantly. The 1991 Act clarified that plaintiffs could allege discrimination under three different theories of proof: disparate treatment, where an employer engaged in intentional discrimination because of an employee's protected classification (race, color, national origin, sex, or religion); mixed-motive disparate treatment, where an employee's protected classification was at least one "motivating factor" for an employer's intentional discrimination; and disparate impact, where a facially neutral employer policy or practice led to discriminatory results in the workplace.⁴⁹

Moreover, the 1991 Act established a plaintiff's right to jury trial, enhanced a prevailing party's attorneys' fees to include expert fees, and added compensatory and punitive damages (subject to caps) as available remedies for intentional discrimination under the Act.⁵⁰ Believing that "additional remedies . . . [were] needed to deter unlawful . . . discrimination in the workplace,"⁵¹ Congress focused on strengthening plaintiffs' potential rewards to offset the risks associated with acting as private attorneys general. Access to a jury trial and significantly expanded remedies attracted the plaintiffs' bar. As intended, the number of attorneys willing to represent plaintiffs in private civil lawsuits to enforce Title VII on a contingency basis rose significantly after 1991.⁵²

47. See U.S. EEOC, *Prelude to the 1980s—Reorganization and Expanded Authority*, <http://www.eeoc.gov/eeoc/history/35th/1970s/prelude.html>; U.S. EEOC, *The 1980s: A Period of Change and Reassessment*, <http://www.eeoc.gov/eeoc/history/35th/1980s/index.html>.

48. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, §§ 2(2), 3(2) & (4); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (mixed motive proof); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (disparate impact); see also U.S. EEOC, *The Civil Rights Act of 1991*, <http://www.eeoc.gov/eeoc/history/35th/1990s/civilrights.html>.

49. Civil Rights Act §§ 105, 107(m).

50. *Id.* §§ 102, 103; see 42 U.S.C. § 1981a (2012).

51. Civil Rights Act § 2(1).

52. See Sean Farhang, *Congressional Mobilization of Private Litigants: Evidence from the Civil Rights Act of 1991*, 6 J. EMPIRICAL LEGAL STUD. 1, 1-2, 30-31 (2009).

D. Antidiscrimination Enforcement Today

In the decades since the 1991 amendment, the EEOC has actively pursued strategic litigation to enforce and shape antidiscrimination law; yet, private lawsuits still constitute the vast majority of Title VII enforcement litigation. Today, the EEOC's main role is one of a gatekeeper: before any employee can file a lawsuit in federal court, the employee must go through the EEOC's administrative exhaustion procedure, in which the employee files a charge with the agency and the agency (usually, but not always) conducts an investigation.⁵³ Throughout this process, the EEOC also offers voluntary opportunities for administrative resolution of the case, such as mediation, prior to the parties going to court.⁵⁴ In the vast majority of cases, the administrative process ends with the EEOC issuing a "Notice of a Right-to-Sue" to the employee, which then allows the employee to find an attorney and file a private lawsuit in federal court.⁵⁵

In a small number of cases, the EEOC itself pursues enforcement litigation. Such litigation derives either from a plaintiff's charges filed with the agency or from the agency's own investigation and enforcement priorities.⁵⁶ Since 2000, the EEOC has filed between 148 and 428 lawsuits from the 75,428 to 99,947 charges it has received each year—meaning that the agency filed lawsuits to enforce between 0.2% and 0.6% of the charges it received each year.⁵⁷ In contrast, during the same time period plaintiffs filed between 12,910 and 21,928 employment-related civil rights lawsuits in federal district courts each year—on average, 55 times as many lawsuits as filed by the EEOC each year.⁵⁸

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53. See 42 U.S.C. § 2000e-5(f) (2012); C. Elizabeth Hirsh, *Settling for Less? Organizational Determinants of Discrimination-Charge Outcomes*, 42 LAW & SOC'Y REV. 239, 243-46 (2008); U.S. EEOC, *The Charge Handling Process*, <http://www.eeoc.gov/employees/process.cfm>; U.S. EEOC, *Filing a Lawsuit*, *supra* note 22.
 54. See *infra* Part IV.B; Hirsh, *supra* note 53, at 243, 247; U.S. EEOC, *Filing a Lawsuit*, *supra* note 22; U.S. EEOC, *Resolving a Charge*, <http://www.eeoc.gov/employers/resolving.cfm>.
 55. See 42 U.S.C. § 2000e-5(f); U.S. EEOC, *Filing a Lawsuit*, *supra* note 22.
 56. U.S. EEOC, *Litigation Procedures*, <http://www.eeoc.gov/eeoc/litigation/procedures.cfm>.
 57. Data compiled by comparing U.S. EEOC, *EEOC Litigation Statistics, FY 1997 Through FY 2013*, <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>, with U.S. EEOC, *Charge Statistics, FY 1997 Through FY 2013*, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>, for each of the years between 2000 and 2013.
 58. Data compiled by comparing the number of private cases filed—from Administrative Office of U.S. Courts, *Federal Judicial Caseload Statistics, Table C-2. U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit*, <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/Co2Mar14.pdf>, under the category "civil rights" and the subcategory "employment"—with the number of cases filed by the EEOC—from U.S. EEOC, *EEOC Litigation Statistics*, *supra* note 57—for each of the years be-

While perhaps shocking to the average employee, the significant disproportion between the number of public and private Title VII enforcement lawsuits is the result of congressional design magnified over time. By creating a federal agency to enforce Title VII while channeling all ultimate decision making about whether discrimination occurred through the federal judiciary, Congress limited the EEOC's reach from the outset. Congress also relied heavily on the ability of individual employees to act upon Title VII's private right of action—a reliance that was purposefully deepened with the Civil Rights Act of 1991. Today, then, both precious EEOC resources to support public efforts and plaintiffs' access to federal courts to support private efforts are essential to the successful enforcement of Title VII. Yet, as Parts II and III below describe, both sides of this hybrid enforcement scheme are now at risk, creating the need—and the opportunity—to reimagine effective enforcement within the bounds of existing law.⁵⁹

II. RECEDING PUBLIC ENFORCEMENT: THE OVERBURDENING OF THE EEOC, 2007-2013

As a result of the Great Recession of 2008, the demand for public enforcement of federal antidiscrimination law increased at the same time that available resources for public enforcement efforts declined. Compelling economic and social scientific evidence suggests that race and sex inequality at work—and with it, the possibility of discrimination—was exacerbated by the recession.⁶⁰ Measuring discrimination is inherently difficult, and these data alone cannot serve as a proxy for proof of intentional discrimination. Yet the evidence does support erring on the side of believing that discrimination may have worsened during the recession, which compounds the urgency of a problematic decline in antidiscrimination enforcement. More concretely, regardless of whether discrimination *actually* increased over the past six years, the number of discrimination charges filed with the EEOC (whether meritorious or not) grew dramatically during this period, just as recessionary federal budget cuts limited the

tween 2000 and 2013, and then averaging the multiplier over this period. Note that this is a rough comparison: because the Administrative Office of the U.S. Courts data category does not specify the statutory basis for all “civil rights” “employment” lawsuits filed, such cases may likely include claims under statutes beyond just those enforced by the EEOC.

59. By documenting the historical development of the enforcement mechanisms of Title VII, I do not mean to imply that the decreasing access to federal courts, *see infra* Part III, is problematic *because* it contravenes congressional intent in passing Title VII, but that, instead, it is especially problematic *in light of* congressional design placing the bulk of enforcement on private actors' shoulders. In fact, limiting the EEOC's enforcement power and relying on the private right of action was a strategy used by opponents of the Civil Rights Act of 1964 to limit its overall reach, *see* ESKRIDGE ET AL., *supra* note 32, at 18-21, a strategy made all the more effective by recent procedural decisions limiting access to federal courts, *see infra* Part III.

60. *See infra* Part II.A.

EEOC's capacity to respond.⁶¹ For antidiscrimination enforcement to be effective, the agency must both weed out meritless claims expeditiously and pursue legitimate claims vigorously. Instead, the sole federal agency charged with enforcing federal employment antidiscrimination law now faces an unprecedented strain, diminishing its ability to accomplish either task.

A. Increased Inequality in the Great Recession

Economic inequality, particularly along racial lines, likely increased during and in the wake of the 2008 recession. Data on job losses and gains during the recession and compelling recent social science data indicating such trends are, of course, not absolutely probative of an increase in actionable workplace discrimination during this time. Nevertheless, such evidence does support a reasonable inference that the need for antidiscrimination enforcement may have increased in the past six years. Indeed, advocates and media outlets have documented racial differences in how people have experienced the recession⁶² and that the recession has deepened economic inequality between racial groups.⁶³

One source of relevant data is economic data on unemployment, and particularly race and sex differences in job losses and gains over the past six years. When the U.S. economic recession began in late 2007, the country entered a period marked by deep job losses and near record high unemployment.⁶⁴ Data

61. See *infra* Part II.B.

62. See, e.g., Kevin A. Hassett, *Racial Recession*, NAT'L REV. (Mar. 22, 2010), <http://www.nationalreview.com/articles/229444/racial-recession/kevin-hassett>; Caroline Heldman, *A Recession for White Americans, a Depression for Black and Latino Americans*, MS. MAGAZINE BLOG (July 28, 2011), <http://msmagazine.com/blog/2011/07/28/a-recession-for-white-americans-a-depression-for-black-and-latino-americans>; Amanda Logan & Christian E. Weller, *The State of Minorities: The Recession Issue*, CENTER FOR AM. PROGRESS (Jan. 16, 2009), <http://www.americanprogress.org/issues/race/news/2009/01/16/5482/the-state-of-minorities-the-recession-issue>.

63. See, e.g., Rakesh Kochhar, Richard Fry & Paul Taylor, *Twenty-to-One; Wealth Gaps Rise to Record Highs; Between Whites, Blacks and Hispanics*, PEW RES. CENTER 1 (July 26, 2011), http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf; Annie Lowrey, *Wealth Gap Among Races Has Widened Since Recession*, N.Y. TIMES (Apr. 28, 2013), <http://www.nytimes.com/2013/04/29/business/racial-wealth-gap-widened-during-recession.html>; Signe-Mary McKernan et al., *Less Than Equal: Racial Disparities in Wealth Accumulation*, URB. INST. 2-4 (Apr. 2013), <http://www.urban.org/UploadedPDF/412802-Less-Than-Equal-Racial-Disparities-in-Wealth-Accumulation.pdf>.

64. See *Determination of the December 2007 Peak in Economic Activity*, NAT'L BUREAU ECON. RES. (Apr. 13, 2010), <http://www.nber.org/dec2008.pdf>; WSJ Staff, *NBER Makes It Official: Recession Started in December 2007*, WALL ST. J. (Dec. 1, 2008, 12:13 PM), <http://blogs.wsj.com/economics/2008/12/01/nber-makes-it-official-recession-started-in-december-2007>.

from the U.S. Department of Labor's Bureau of Labor Statistics show that the impact of job losses during the recession was felt most deeply by African-American and Latino workers.⁶⁵ As the U.S. unemployment rate grew steadily between 2007 and 2010, the unemployment rate for white and Asian workers grew by about 4.5 percentage points;⁶⁶ for African-American and Latino workers, unemployment climbed 1.5 to 2 times as steeply, growing by around 7 percentage points.⁶⁷ Thus, when unemployment reached its height in 2010, the unemployment rate for white workers was 8.7%; for African Americans, it was 16%.⁶⁸

Moreover, the gains in economic recovery to date have been unevenly distributed by race and gender. For instance, when unemployment rates began to drop during the recovery in 2011 and 2012, unemployment rates dropped most quickly for white men, indicating greater hiring rates for men than for women, and for white men than for African-American men.⁶⁹ While early job losses fell more heavily on men than women, leading some to describe the recession as a

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65. See *Labor Force Characteristics by Race and Ethnicity, 2007*, BUREAU LAB. STAT. 4 tbl.1 (Sept. 2008), <http://www.bls.gov/cps/cpsrace2007.pdf>; *Labor Force Characteristics by Race and Ethnicity, 2008*, BUREAU LAB. STAT. 5 tbl.1 (Nov. 2009), <http://www.bls.gov/cps/cpsrace2008.pdf>; *Labor Force Characteristics by Race and Ethnicity, 2009*, BUREAU LAB. STAT. 5 tbl.1 (Aug. 2010), <http://www.bls.gov/cps/cpsrace2009.pdf>; *Labor Force Characteristics by Race and Ethnicity, 2010*, BUREAU LAB. STAT. 5 tbl.1 (Aug. 2011), <http://www.bls.gov/cps/cpsrace2010.pdf>.
66. For white workers, between 2007 and 2010, the unemployment rate grew by 4.6 percentage points from 4.1 to 8.7% unemployment; for Asian workers, it grew by 4.3 percentage points from 3.2 to 7.5% unemployment. See *supra* note 65.
67. For African-American workers, between 2007 and 2010, the unemployment rate grew by 7.7 percentage points from 8.3 to 16.0% unemployment; for Latino workers, it grew by 6.9 percentage points from 5.6 to 12.5% unemployment. See *supra* note 65.
68. See *Labor Force Characteristics by Race and Ethnicity, 2010*, *supra* note 65, at 5 tbl.1.
69. See *Employment Status by Hispanic Ethnicity and Detailed Ethnic Group*, BUREAU LAB. STAT. (2013), <http://www.bls.gov/cps/cpsaat06.pdf>; *Employment Status by Race*, BUREAU LAB. STAT. (2013), <http://www.bls.gov/cps/cpsaat05.pdf>; *Labor Force Characteristics by Race and Ethnicity, 2011*, BUREAU LAB. STAT. 5-6 tbls.1, 2 (Aug. 2012), <http://www.bls.gov/cps/cpsrace2011.pdf>. Between 2010 and 2012, the unemployment rate for all men dropped by 1.7 percentage points and for white men by 2.2 percentage points (from 10.5 to 8.2% and from 9.6 to 7.4% respectively). *Id.* In contrast, the unemployment rate for all women dropped only 0.7 percentage points (from 8.6 to 7.9%). *Id.*; see also Dylan Matthews, *The Recovery Is Racist*, WASH. POST: WONKBLOG (Sept. 6, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/09/06/the-recovery-is-racist>; Ron Scherer, *Recovering US Job Market Is Leaving Black Men Behind*, CHRISTIAN SCI. MONITOR (July 26, 2011), <http://www.csmonitor.com/USA/Society/2011/0726/Recovering-US-job-market-is-leaving-black-men-behind>; *The African-American Labor Force in the Recovery*, U.S. DEP'T LAB. (Feb. 29, 2012), http://www.dol.gov/_sec/media/reports/BlackLaborForce/BlackLaborForce.pdf.

“mancession,”⁷⁰ the jobs women kept were lower paid, and the job gains since 2010 have come more quickly for men.⁷¹

Racial disparities among the unemployed are compounded by another trend during the recovery: hiring discrimination based on unemployment status. Unemployment status is not a “protected classification” entitled to legal protection under federal antidiscrimination law (like race, color, national origin, sex, or religion).⁷² But if employers are increasingly discriminating against job applicants because they are or were recently unemployed—a problem pervasive enough that it has sparked legislative efforts in nearly half the states and at the federal level⁷³—this may have a disproportionately negative impact on African-American and Latino applicants, who are more likely to be unemployed. Recent legal scholarship has identified the potential for such workers to allege unemployment discrimination as a Title VII discrimination

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70. See Joan C. Williams & Allison Tait, “Mancession” or “Momcession”?: Good Providers, a Bad Economy, and Gender Discrimination, 86 CHI.-KENT L. REV. 857, 860-62 (2011) (describing the media coverage identifying a “mancession”).
71. See *id.* at 876-78 (discussing the criticism of women’s relative advantage during the recession); Jenna Goudreau, *Mancession or Momcession?*, FORBES (May 11, 2010), <http://www.forbes.com/sites/work-in-progress/2010/05/11/jobs-recession-economy-women-earnings-mancession-momcession>; Rakesh Kochhar, *In Two Years of Economic Recovery, Women Lost Jobs, Men Found Them*, PEW RES. CENTER (July 6, 2011), http://www.pewsocialtrends.org/files/2011/07/Employment-by-Gender_FINAL_7-6-11.pdf; *Understanding the Economy: Working Mothers in the Great Recession*, U.S. CONG. J. ECON. COMM. (May 2010), http://www.jec.senate.gov/public/?a=Files.Serve&File_id=82216270-c7f0-46bf-a54f-6ab221ac586f; see also *supra* note 69 (showing a rapid decrease in the unemployment rate for white men in 2011 and 2012).
72. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to –e17 (2012).
73. See Winnie Hu, *When Being Jobless Is a Barrier to Finding a Job*, N.Y. TIMES (Feb. 17, 2013), <http://www.nytimes.com/2013/02/18/nyregion/for-many-being-out-of-work-is-chief-obstacle-to-finding-it.html>; *Discrimination Against the Unemployed*, NAT’L CONF. OF STATE LEGISLATURES (July 24, 2013), <http://www.ncsl.org/research/labor-and-employment/discrimination-against-the-unemployed.aspx> (citing related legislation introduced in twenty-four states and D.C. and at the federal level since 2011); *Briefing Paper: Hiring Discrimination Against the Unemployed*, NAT’L EMP. L. PROJECT (July 12, 2011), <http://www.nelp.org/page/-/UI/2011/unemployed.discrimination.7.12.2011.pdf>; Jasmine A. Williams, “Unemployed (and Black) Need Not Apply”: A Discussion of Unemployment Discrimination, Its Disparate Impact on the Black Community, and Proposed Legal Remedies, 56 HOW. L.J. 629, 657-59 & 658-59 n.181 (2013) (citing legislation in New Jersey, Florida, California, Ohio, and as part of the federal Jobs Act of 2011).

claim under a disparate impact theory,⁷⁴ and the EEOC held a public Commission meeting on this issue.⁷⁵

Social scientific research provides a second source of data indicating that workplace inequality may have increased during the recession. Developed in the late 1960s and early 1970s, “realistic group conflict theory” explains how “realistic threats (i.e., competition for scarce resources) increase . . . in-group bias while simultaneously increasing hostility toward out-group members”⁷⁶; when faced with a perceived “threat” (such as a scarcity of jobs), individuals are more likely to be biased toward people with whom they identify (their “in-group”). Even the perception or prediction of competition—whether real or not—may increase hostility toward those “out-group” members, who are perceived to be the cause of the threat.⁷⁷ Numerous researchers have documented how realistic group conflict theory applies to a variety of resource-related “threats” to in-group members and shapes their attitudes toward “organizational, structural, and societal policies” that may benefit out-groups.⁷⁸ Of particular relevance to recessionary attitudes, existing studies have documented how changes in economic conditions and job opportunities affect attitudes toward members of racial minorities⁷⁹ and immigration policy.⁸⁰

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74. See, e.g., Helen Norton, *Excluding Unemployed Workers from Job Opportunities: Why Disparate Impact Protections Still Matter*, 2011 HASTINGS L.J. VOIR DIRE 1; Williams, *supra* note 73, at 649-50.
75. U.S. EEOC, *Meeting of February 16, 2011—EEOC to Examine Treatment of Unemployed Job Seekers* (Feb. 16, 2011), <http://www.eeoc.gov/eeoc/meetings/2-16-11/index.cfm>.
76. Eden B. King, Jennifer L. Knight & Michelle R. Hebl, *The Influence of Economic Conditions on Aspects of Stigmatization*, 66 J. SOC. ISSUES 446, 447 (2010) (citing and describing R.A. LEVINE & D. T. CAMPBELL, *ETHNOCENTRISM: THEORIES OF CONFLICT, ETHNIC ATTITUDES, AND GROUP BEHAVIOR* (1972)). See generally MUZAFER SHERIF, *GROUP CONFLICT AND COOPERATION: THEIR SOCIAL PSYCHOLOGY* (1966); MUZAFER SHERIF ET AL., *THE ROBBERS CAVE EXPERIMENT: INTERGROUP CONFLICT AND COOPERATION* (1988).
77. Lawrence Bobo, *Whites' Opposition to Busing: Symbolic Racism or Realistic Group Conflict?*, 45 J. PERSONALITY & SOC. PSYCHOL. 1194 (1983).
78. See King, Knight & Hebl, *supra* note 76, at 447-48 (describing studies from the 1980s, 1990s, and 2000s).
79. See, e.g., David A. Butz & Kumar Yogeeswaranb, *A New Threat in the Air: Macroeconomic Threat Increases Prejudice Against Asian Americans*, 47 J. EXPERIMENTAL SOC. PSYCHOL. 22 (2011); Alexandra Filindra & Shanna Pearson-Merkowitz, *Together in Good Times and Bad? How Economic Triggers Condition the Effects of Intergroup Threat*, 94 SOC. SCI. Q. 1328 (2013); King, Knight & Hebl, *supra* note 76, at 447-48; William W. Maddux et al., *When Being a Model Minority Is Good . . . and Bad: Realistic Threat Explains Negativity Toward Asian Americans*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 74 (2008); Blake M. Riek et al., *Intergroup Threat and Outgroup Attitudes: A Meta-Analytic Review*, 10 PERSONALITY & SOC. PSYCHOL. REV. 336 (2006); Stephanie Seguino & James Heintz, *Monetary Tightening and the Dynamics*

Realistic group conflict theory has recently been used to test attitudes during periods of economic recession. In one such study, industrial-organizational psychologist Eden King and her colleagues gave participants information about the state of the economy and a particular company, and then asked participants to review and rank candidates for an open marketing position in the company; candidates were identical in qualifications but different by race and gender.⁸¹ When told that the economy and company finances were in decline, participants were more likely to value the “traditional applicant”—a white male—and rated him more positively, while rating the Latina candidate significantly more negatively.⁸² Conversely, when told that the economy and company finances were in an upswing, participants were more likely to value diverse applicants.⁸³ As a result of these and related manipulations, the researchers concluded that “[r]atings and rankings of diverse job applicants confirm that economic conditions can directly affect stigmatization in selection decisions.”⁸⁴ These findings, the researchers noted, “indicate[] that vigilance in addressing discrimination may be particularly important in the context of the current turmoil of the world economy.”⁸⁵

In another recent work, social psychologists Amy Krosch and David Amodio tested how economic scarcity alters perceptions of race. The results of their studies, they contend, “provide strong converging evidence for the role of perceptual bias as a mechanism through which economic scarcity enhances discrimination and contributes to racial disparities.”⁸⁶ As Krosch and Amodio explain, increased racial disparity during periods of resource scarcity is often attributed to existing structural disparities (for example, greater layoffs in jobs that require less education, which are more likely to be held by African Ameri-

of US Race and Gender Stratification, 71 AM. J. ECON. & SOC. 603 (2012); Walter G. Stephan et al., *The Role of Threats in Racial Attitudes of Blacks and Whites: An Integrated Threat Theory Analysis*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1242 (2002).

80. See, e.g., Victoria M. Esses et al., *Intergroup Competition and Attitudes Toward Immigrants and Immigration: An Instrumental Model of Group Conflict*, 54 J. SOC. ISSUES 699 (1998); Lincoln Quillian, *Prejudice as a Response to Perceived Group Threat: Population Composition and Anti-Immigrant and Racial Prejudice in Europe*, 60 AM. SOC. REV. 586 (1995); Walter G. Stephan et al., *Prejudice Toward Immigrants*, 29 J. APPLIED SOC. PSYCHOL. 2221 (1999); Walter G. Stephan et al., *The Effects of Feeling Threatened on Attitudes Toward Immigrants*, 29 INT’L J. INTERCULTURAL REL. 1 (2005).
81. King, Knight & Hebl, *supra* note 76, at 450-51.
82. *Id.* at 452-53, 455.
83. *Id.*
84. *Id.* at 455.
85. *Id.* at 446.
86. See Amy R. Krosch & David M. Amodio, *Economic Scarcity Alters the Perception of Race*, 111 PROC. NAT’L ACAD. SCI. 9079, 9079-84 (2014).

cans).⁸⁷ But social scientific research has also suggested that scarcity affects perceptions of—and behaviors toward—in-groups and out-groups.⁸⁸ Building upon this body of work, the researchers conducted four studies to identify “[h]ow . . . scarcity effects on social perception [might] contribute to widening racial disparities during economic recession.”⁸⁹ In two studies, participants—most of whom self-identified as white—were asked to identify the race of a mixed-race person. When the participants either believed in zero-sum scarcity or were primed to think about scarcity while completing the task, participants perceived mixed-race faces as “‘Blacker’ than their objective racial content.”⁹⁰ In two other studies, participants who were asked to allocate resources (ten dollars) represented African-American recipients as “Blacker” when the resources were framed as scarce, which in turn affected discriminatory resource allocation.⁹¹ These findings indicate, the researchers explain, that “scarcity motivates perceivers to exaggerate the Afrocentric appearance of an African-American face, which in turn supports the goal of distributing resources in favor of one’s own group.”⁹² These results were also consistent with other research on how “scarcity is cognitively taxing,” making it harder for an individual to moderate and overcome “unintended prejudices.”⁹³ Krosch and Amodio suggest that their results show “pernicious” and widespread “destabilizing effects of scarcity on society” that present “a new challenge to efforts aimed at reducing discrimination.”⁹⁴

Data on racial and gender differences in job losses and gains since 2007, when viewed together with social scientific research documenting that resource scarcity exacerbates underlying biases, support a robust need for enforcement of federal antidiscrimination law in light of the Great Recession.

B. The Recession’s Impact on EEOC Capacity

A separate, but related challenge to antidiscrimination enforcement post-recession is that, regardless of whether discrimination *actually* increased, complaints of discrimination to the EEOC (whatever their root cause and whether meritorious or not) increased dramatically during the 2008 recession. In Part II.A, racial disparities in job losses and gains and studies on how scarcity exacerbates bias were offered to support an inference that the problem of discrimi-

87. *Id.* at 9079.

88. *Id.*

89. *Id.*

90. *Id.* at 9079-81.

91. *Id.* at 9080-81.

92. *Id.* at 9082.

93. *Id.*

94. *Id.*

nation likely worsened during the recession. This Part provides data on increased charges filed with the EEOC, not to further support this inference but, instead, to show that the EEOC has had to do more enforcement work with fewer resources during and in the wake of the recession.⁹⁵

On this point, the data is clear: in each of the fiscal years 2010 and 2011, the EEOC received a new record high number of charges, approaching 100,000 per year.⁹⁶ Data from the EEOC's Enforcement Statistics indicate that total charges to the agency filed rose from 2009 to 2010, and rose slightly more in 2011, before leveling off in 2012.⁹⁷ Claims of age discrimination rose in 2008, even before the worst of the recessionary job losses took effect.⁹⁸ It is not surprising that dis-

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95. Inferring that employers committed more unlawful discrimination during the recession from the fact that more employees filed EEOC charges is problematic. A closer look at the empirical data on EEOC charges filed during this period tells a more complex story, showing a jump in claims in 2010, but in the wake of a drop in claims between 2008 and 2009. Changes in the law in 2008 and 2009—including the passage of the Americans with Disabilities Act Amendments Act, Pub. L. No. 110-325, 122 Stat. 3553 (2008), and the Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009), may have contributed to an increase in charge filings. Terminated employees who face limited prospects for finding new employment may be more likely to file a complaint than they would be in less economically dire times. See, e.g., John J. Donohue III & Peter Siegelman, *Law and Macroeconomics: Employment Discrimination Litigation over the Business Cycle*, 66 S. CAL. L. REV. 709, 710-11, 717-18 (1993). On the other hand, individuals experiencing discrimination on the job may be less likely to complain out of fear of rocking the boat during an economic slowdown. A complete empirical analysis of EEOC charge filing data during the recession and the factors that may have influenced it is beyond the scope of this Article. What is undeniable, however, is that in the wake of the Great Recession of 2008, the EEOC received more discrimination charges to process than ever before in its fifty-year history.
96. See U.S. EEOC, Press Release, *Private Sector Bias Charges Hit All-Time High* (Jan. 25, 2012), <http://www.eeoc.gov/eeoc/newsroom/release/1-24-12a.cfm>; U.S. EEOC, Press Release, *EEOC Reports Job Bias Charges Hit Record High of Nearly 100,000 in Fiscal Year 2010* (Jan. 11, 2011), <http://www.eeoc.gov/eeoc/newsroom/release/1-11-11.cfm>; see also Catherine Rampell, *More Workers Complain of Bias on the Job, a Trend Linked to Widespread Layoffs*, N.Y. TIMES (Jan. 11, 2011), <http://www.nytimes.com/2011/01/12/business/12bias.html>; John W. Schoen, *Dismal Job Market Fuels Job Bias Claims*, NBC NEWS (Jan. 11, 2011, 2:25 PM), http://www.nbcbayarea.com/news/business/Dismal_job_market_fuels_job_bias_claims-113294029.html; Melanie Trotman, *Charges of Bias at Work Increase*, WALL ST. J. (Jan. 12, 2011), <http://online.wsj.com/articles/SB10001424052748703791904576075802209115360>.
97. U.S. EEOC, *Enforcement and Litigation Statistics*, *supra* note 23. Total charges filed rose from 93,277 in 2009 to 99,922 in 2010 and 99,947 in 2011. Since then, the number of charges leveled off to 99,412 in 2012 and dropped to 93,727 in 2013, yet still remain noticeably higher than before the recession (82,792 charges were filed in 2008). *Id.*
98. See, e.g., Allison Linn, *Age Bias Complaints Surge in Bad Economy*, NBC NEWS (June 29, 2010, 7:47 AM), <http://www.nbcnews.com/id/37924201/ns/businessstocks>

crimination charges would rise in a time of historic layoffs⁹⁹ and unemployment, and, no doubt, the number of unmeritorious charges rose, too. Nevertheless, even unmeritorious charges require at least some EEOC resources, as each charge received goes through an intake and initial investigation process before those deemed lacking in merit are given a “no cause” determination and dismissed.¹⁰⁰

At the same time, recessionary federal budget policies limited the resources available for the EEOC’s public enforcement efforts, magnifying the demands placed on the agency. The EEOC’s budget must be authorized by Congress and the President each fiscal year, and the level of EEOC staffing for discrimination charge intake, investigation, and litigation is directly related to its annual fiscal year budget.¹⁰¹ Thus the operating budget of the EEOC—and, therefore, the number of potential attorneys hired and enforcement actions litigated—is susceptible to the economy and related budgetary politics. For the first several years of his presidency, President Obama was able to make good on a promise to restore budget and staffing levels to the EEOC that had been reduced under President George W. Bush’s administration.¹⁰² After the EEOC’s budget was effectively frozen at the same level between 2003 and 2008, and the ceiling for approved EEOC staff reduced from over 3,000 employees when President Bush took office to 2,381 employees in 2008, the budget was increased in fiscal years 2009 and 2010, raising the approved number of EEOC staff from 2,381 to 2,571.¹⁰³ The EEOC was, nevertheless, impacted by a budget rescission and staffing cuts in 2011, and by sequestration and additional staffing cuts in 2013.¹⁰⁴ By fiscal year

_and_economy/t/age-bias-complaints-surge-bad-economy; Steve Vogel, *Age Discrimination Claims Jump, Worrying EEOC, Worker Advocates*, WASH. POST (July 16, 2009), http://articles.washingtonpost.com/2009-07-16/politics/36797602_1_age-discrimination-older-workers-eec-headquarters.

99. See, e.g., Donohue & Siegelman, *supra* note 95 (noting increases in federal discrimination lawsuits during economic recessions).
100. 29 C.F.R. § 1601.18-19 (2014); U.S. EEOC, *The Charge Handling Process*, *supra* note 53.
101. See U.S. EEOC, *Congressional Oversight*, <http://www.eeoc.gov/eeoc/legislative/oversight.cfm>; U.S. EEOC, *Fiscal Year 2014 Congressional Budget Justification* (Apr. 2013), <http://www.eeoc.gov/eeoc/plan/upload/2014budget.pdf>.
102. See Wes Allison, *Restore Funding to the EEOC and the U.S. Department of Labor’s Office of Federal Contract Compliance Programs*, TAMPA BAY TIMES (Jan. 8, 2010), <http://www.politifact.com/truth-o-meter/promises/obameter/promise/297/restore-funding-to-the-eeoc-and-the-us-departmen/>; U.S. EEOC, *EEOC Budget and Staffing History 1980 to Present*, <http://www.eeoc.gov/eeoc/plan/budgetandstaffing.cfm>.
103. See U.S. EEOC, *EEOC Budget and Staffing History 1980 to Present*, *supra* note 102.
104. See *id.*; see also Josh Hicks, *Equal Employment Opportunity Commission Faces Furloughs If Sequester Continues*, WASH. POST (Mar. 21, 2013), <http://www.washingtonpost.com/blogs/federal-eye/wp/2013/03/21/equal-employment>

2013, the number of approved EEOC staff dropped to 2,354—lower than under the Bush administration and the *absolute lowest* number of approved staff in the thirty-four years of data published by the EEOC.¹⁰⁵ This low point in staffing is all the more noteworthy given that EEOC charge filings reached their fifty-year apex in 2011.

Not surprisingly, the number of enforcement lawsuits the EEOC has pursued in the years since the recession has also decreased. The number of enforcement actions litigated by the EEOC itself is only a small fraction of those brought by private plaintiffs' attorneys,¹⁰⁶ but this constraint makes the cases litigated by the EEOC all the more important: given extremely limited resources, each EEOC case is selected for its potential impact in advancing the law or redressing systemic harms.¹⁰⁷ Yet despite the dramatic increase in charges filed with the EEOC since 2008, the number of lawsuits filed by the EEOC has dropped significantly during the same period. Between 2001 and 2008, the EEOC filed between 325 and 428 lawsuits each year. In contrast, in each of the years since 2009, the agency filed fewer than 325 lawsuits.¹⁰⁸ In 2013, the number of lawsuits filed dropped to only 148—the absolute lowest number of lawsuits filed per year in 17 years of data published by the EEOC.¹⁰⁹

Viewed together, the empirical data of the EEOC's operations since the beginning of the Great Recession of 2008 paint a stark picture: public enforcement of federal antidiscrimination law is on the ropes. Discrimination charges filed with the EEOC have reached their all-time high, just when EEOC staffing and EEOC lawsuits filed have reached their lowest point in recent history. An economic recovery has the potential to counter both trends, yet this potential is unlikely to come to fruition any time soon. Businesses are often slow to resume growth and hiring in the wake of a major recession, part of a phenomenon

-opportunity-commission-faces-furloughs-if-sequester-continues; Eric Katz, *EEOC Considers New Wave of Furloughs*, GOV'T EXEC. (July 2, 2013), <http://www.govexec.com/pay-benefits/2013/07/eec-considers-new-wave-furloughs/65960>.

105. See U.S. EEOC, *EEOC Budget and Staffing History 1980 to Present*, *supra* note 102. Between 1980 and 2001, the budget ceiling for the number of EEOC employees ranged from a low of 2,680 (in 1998) to a high of 3,740 (in 1982). The approved staff for FY 2014 dropped further, just very slightly, to 2,347. *Id.*

106. See *supra* notes 57-58 and accompanying text.

107. See U.S. EEOC, Office of the General Counsel, *Regional Attorney's Manual*, Part 2.IV, C. *Presentation Memoranda* n.3, http://www.eeoc.gov/eeoc/litigation/manual/2-4-c_pms.cfm (describing the justification required by EEOC attorneys seeking approval to litigate a case: "Include a discussion of whether the claims recommended for litigation raise strategic or emerging issues or National Enforcement Plan priorities, and how the case fits within your office's litigation docket. In addition, where applicable, identify whether the case involves an underserved population or would be filed in an underserved geographic area").

108. U.S. EEOC, *EEOC Litigation Statistics*, *supra* note 57.

109. *Id.*

known as “economic scarring.”¹¹⁰ Likewise, discretionary federal agency budgets, like that of the EEOC, have suffered long-term consequences from the recession and are unlikely to return to pre-recession amounts anytime soon.¹¹¹ At least for the near future, the EEOC will likely have to do more with less.

III. RECEDING PRIVATE ENFORCEMENT: THE DIMINISHING PRIVATE RIGHT OF ACTION, 2007-2013

During the same time period that the economy was in recession, exacerbating demand on public enforcement, the Supreme Court decided a series of key cases that created a “procedural recession” within the private right of action guaranteed to individual employees under Title VII.¹¹² In decisions between 2007 and 2013 in three key areas—civil pleading standards, mandatory arbitration agreements, and class action certification—the Court has imposed procedural barriers on an individual’s ability to bring a lawsuit in federal court, thus restricting the private right of action at the core of Title VII’s enforcement scheme.¹¹³ In each area comprising this restriction, dissenting Justices raised concerns about access to the courts, arguing that procedural changes are likely

110. See, e.g., Irons, *supra* note 11.

111. See, e.g., Austin, *supra* note 12; WHITE HOUSE OFF. MGMT. & BUDGET, *supra* note 12, at 5, 12-14, 21-27, 35-36.

112. I do not mean to suggest that the relationship between these two occurrences is causal, but rather, that it is correlated. The cause of the “procedural recession” in the Court is likely the shift in the majority position with the arrival of Justices Roberts and Alito in 2006 and 2007. Regardless, the timing of these two recessionary phenomena is worth noting: just when the economic recession limited public enforcement of antidiscrimination law, the procedural recession undermined the ability of discrimination plaintiffs to seek private legal redress.

113. The Court decided two additional cases that are arguably both procedural and substantive in nature, addressing when the statute of limitations clock starts ticking within which a plaintiff must file a Title VII complaint. In *AT&T v. Hulteen*, 556 U.S. 701 (2009), the Court held that an employer applying a seniority calculation that may have been infected with pre-1979 discrimination at an employee’s retirement today did not constitute a current violation of Title VII. In *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2008), the Court held that the clock for filing a lawsuit started ticking at the time a discriminatory pay decision was instituted, not when an employee discovered it or in an ongoing fashion, with each discriminatory paycheck. Because decisions affecting *when* a plaintiff may complain would apply equally to an administrative complaint and a lawsuit, they are beyond the scope of this Article’s focus, see *supra* note 13 and accompanying text (explaining the omission of substantive cases). Moreover, *Hulteen* is arguably limited in its application to female employees who took pregnancy leave from work prior to 1979, see *Hulteen*, 556 U.S. at 724 (Ginsburg, J., dissenting), and Congress acted to overrule the *Ledbetter* decision by amending Title VII, see Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

to affect substantive rights when the statute in question relies on a private right of action for enforcement.¹¹⁴

A. Intensified Pleading Standards

In 2007 and 2009, the U.S. Supreme Court decided two cases involving motions to dismiss that changed longstanding pleading requirements under the Federal Rules of Civil Procedure (“FRCP” or “Rules”). These decisions increased what is required from a plaintiff in an initial complaint, thus raising the height of the first hurdle a Title VII litigant must scale in order to pursue private enforcement.

Since the creation of the Rules in 1938—in part to overcome the impediments to plaintiffs posed by early “code pleading” standards¹¹⁵—and the interpretation of Rule 8(a) in the seminal 1957 case of *Conley v. Gibson*,¹¹⁶ plaintiffs and their attorneys had operated under a broad “notice pleading” standard.¹¹⁷ To “state[] a claim for relief” under Rule 8(a), a complaint must include only “a short and plain statement of the claim showing that the pleader is entitled to relief,” along with a basis for jurisdiction and a demand for that relief.¹¹⁸ In *Conley*, in upholding a claim of African-American railroad workers against their union for violating the right to fair representation under the Railway Labor Act, the Court interpreted this rule as requiring that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief.”¹¹⁹ This standard, the Court explained, was necessary to meet the Federal Rules’ goal of construing pleadings “to do substantial justice.”¹²⁰

In 2007, in *Bell Atlantic Corp. v. Twombly*,¹²¹ the Court departed from fifty years of precedent applying the notice pleading standard to require something more of plaintiffs’ complaints: “plausibility.”¹²² In *Twombly*, the Court reinterpreted Rule 8(a) and dismissed plaintiffs’ antitrust conspiracy case against local

114. See *infra* text accompanying notes 146, 154, 163, 172, 189-92.

115. See Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 288-89, 333 (2013) (citing JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 501-53 (10th ed. 2009)).

116. 355 U.S. 41 (1957).

117. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 577-78 (2007) (Stevens, J., dissenting).

118. FED. R. CIV. P. 8(a).

119. *Conley*, 355 U.S. at 45-46 (emphasis added).

120. *Id.* at 48.

121. 550 U.S. 544 (2007).

122. *Twombly*, 550 U.S. at 557.

telephone and internet providers under the Sherman Act.¹²³ The majority recast *Conley* and the body of precedent applying it, reasoning that *Conley*'s language had been taken out of context.¹²⁴ Instead, the language of *Conley* was meant to “describe[] the breadth of opportunity to prove what an adequate complaint claims,” and not to establish “the minimum standard of adequate pleading to govern a complaint’s survival.”¹²⁵ Having done away with the *Conley* standard, the Court articulated its own interpretation of what Rule 8(a) requires: enough facts that a plaintiff’s claims are *plausible*, not just *possible*—that the facts alleged “plausibly suggest[]” rather than are “merely consistent with” the alleged claims.¹²⁶ Applying this standard to the facts at hand, the Court found that, although plaintiffs’ claims provided a basis from which a jury could infer that the defendants had violated the Sherman Act (conspiring to behave the same way, interdependently), because there was another possible explanation for the facts cited that was perfectly legal (behaving the same way, independently), plaintiffs’ factual support was no longer enough.¹²⁷ Finding that the *Twombly* plaintiffs “ha[d] not nudged their claims across the line from conceivable to plausible,” the Court dismissed the claim.¹²⁸

Two years later, in *Ashcroft v. Iqbal*,¹²⁹ the Court extended its holding in *Twombly* beyond the context of antitrust suits, applying its “plausibility” standard to dismiss the complaint of a Pakistani detainee who alleged he was deprived of his constitutional rights and discriminated against when abused in federal custody.¹³⁰ Revisiting its *Twombly* test, the Court provided additional guidance. While the plausibility standard is not a “probability requirement,” it does require “more than a sheer possibility” that the defendant violated the law; the analysis is “context-specific” and “requires the reviewing court to draw on its judicial experience and common sense.”¹³¹

The *Twombly* Court’s discussion of its 2002 decision in the employment discrimination case of *Swierkiewicz v. Sorema*¹³² is particularly relevant to Title VII’s private right of action. To prove a claim under Title VII, a plaintiff must first allege a *prima facie* case of employment discrimination under Title VII,

123. *Id.* at 553.

124. *Id.* at 562-63.

125. *Id.* at 563.

126. *Id.* at 557-58.

127. *Id.* at 553-57.

128. *Id.* at 570.

129. 556 U.S. 662 (2009).

130. *Id.* at 684, 669-70 (“Our decision in *Twombly* expounded the pleading standard for ‘all civil actions,’ . . . and it applies to antitrust and discrimination suits alike.”).

131. *Id.* at 678-79.

132. 534 U.S. 506 (2002).

which shifts the evidentiary burden (temporarily) to the employer.¹³³ In *Swierkiewicz*, the Court clarified that a Title VII *prima facie* case is an “evidentiary standard, not a pleading requirement”; as such, an employment discrimination complaint need not allege facts establishing a full *prima facie* case of discrimination to survive a motion to dismiss.¹³⁴ Revisiting this decision in *Twombly*, the Court distinguished *Swierkiewicz* by noting that that decision did not address the law of pleading generally, but rather struck down a particular heightened pleading standard that had been impermissibly applied by the court of appeals to dismiss a plaintiff’s employment discrimination complaint.¹³⁵ The implication was that *Swierkiewicz*’s complaint itself alleged enough facts to meet the *Twombly* “plausibility” standard, which is less than the “heightened” *prima facie* pleading standard at issue in *Swierkiewicz*.¹³⁶ For employment discrimination plaintiffs, then, the question is what, after *Twombly* and *Iqbal*, remains of *Swierkiewicz*¹³⁷: if a plaintiff need not plead a full *prima facie* case of employment discrimination to survive a motion to dismiss, where is the line between discrimination being “merely” a “possible” explanation for an adverse employment action (which may be dismissed under *Twombly* and *Iqbal*) and being a “plausible” explanation (which will not)?¹³⁸

The *Twombly* and *Iqbal* decisions have generated a colossal amount of scholarship, even a partial survey of which is beyond the scope of this Article.¹³⁹ A sampling of key civil procedure scholarship on the two cases provides a range of opinions on their impact on plaintiffs’ complaints.¹⁴⁰ Empirical studies of the impact of *Twombly* and *Iqbal* on overall dismissal rates paint a similarly murky

133. See *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).

134. *Swierkiewicz*, 534 U.S. at 510.

135. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569-70 (2007) (discussing *Swierkiewicz*).

136. *Id.* at 570.

137. See, e.g., Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1618-21 (2001).

138. See *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009); *Twombly*, 550 U.S. at 557-58. See generally Sullivan, *supra* note 137 (discussing post-*Twombly* and *Iqbal* pleading strategies in employment discrimination cases).

139. A recent Westlaw search generated over 1600 law review articles citing *Twombly* and over 1200 citing *Iqbal*.

140. See Miller, *supra* note 115, at 331-39, 346-47 (describing the two cases as “a procedural ‘sea change’ in plaintiffs’ ability to survive the pleading stage” with “dramatic” effects, potentially merging motions to dismiss with motions for summary judgment); A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710, 1713 (2013) (describing and responding to scholarship arguing that the two cases “did not fundamentally change pleading doctrine” or had a “negligible if not nonexistent” impact).

picture.¹⁴¹ As applied to employment discrimination claims specifically, the scholarship has been more consistently pessimistic about the prospects for plaintiffs.¹⁴² Plausible pleading is particularly difficult for discrimination plaintiffs in the employment context, given the information asymmetry between employers (who have knowledge of their own practices, policies, and motivations) and employees (who cannot access this information without the discovery that comes if they survive a motion to dismiss).¹⁴³ And, while empirical studies of the impact on *all* types of complaints may be inconclusive, the same cannot be said of discrimination complaints specifically: several studies have documented empirically that *Twombly* and *Iqbal* have increased dismissal rates for civil rights cases,¹⁴⁴ and one scholar suggests an even greater negative impact on cases in which African-American plaintiffs allege race discrimination.¹⁴⁵ Whether *Twombly* and *Iqbal* will lead to a significant reduction in the number of federal lawsuits that proceed beyond the pleading stage remains to be seen. Regardless, it is safe to say that, for Title VII—a statute in which the chief

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141. See Suzette M. Malveaux, *The Jury (or More Accurately the Judge) Is Still out for Civil Rights and Employment Cases Post-Iqbal*, 57 N.Y.L. SCH. L. REV. 719, 727-43 (2013) (discussing the many empirical studies and their criticisms); see also JOE S. CECIL, et al., FEDERAL JUDICIAL CENTER, MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER IQBAL: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011); DODSON, *supra* note 21, at 83-106; Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 604-07 (2012); Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1 (2011).
142. See, e.g., Malveaux, *supra* note 141, at 721 n.10 (discussing employment related scholarship); *Trial by Jury or Trial by Motion? Summary Judgment, Iqbal, and Employment Discrimination*, N.Y.L. SCH. L. REV. (Apr. 23, 2012), <http://www.nylslawreview.com/trial-by-jury-or-trial-by-motion-summary-judgment-iqbal-and-employment-discrimination>.
143. See DODSON, *supra* note 21, at 108-12; Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010); Miller, *supra* note 115, at 340-43.
144. See, e.g., Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 597, 609, 630 tbl.D (2010) (noting comparatively higher rate of dismissals in Title VII cases than in other types of cases); Moore, *supra* note 141, at 618-19 (same); Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal's Effect on Claims of Race Discrimination after Iqbal*, 17 MICH. J. RACE & L. 1, 4, 35-38 (2011) (documenting increased rate of dismissal after *Iqbal*); Victor D. Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure* 3 U.C. IRVINE L. REV. 187, 189, 205-207 (2013) (same). *But see generally* David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203 (2013) (discussing impact of empirical methodology on results in body of work assessing impact of *Twombly* and *Iqbal*).
145. See Quintanilla, *Beyond Common Sense*, *supra* note 144; Quintanilla, *Critical Race Empiricism*, *supra* note 144.

mechanism for enforcement is a private right of action—the result of intensified pleading standards is unlikely to be *more rigorous* enforcement.

Justice Stevens suggested as much in his *Twombly* dissent when—noting that provisions for attorneys’ fees and treble damages written into the Sherman Act (under which the *Twombly* plaintiffs brought suit) “indicate[] that Congress intended to encourage, rather than discourage, private enforcement of the law”—he warned that, in such cases, “[i]t is . . . more, not less, important . . . to resist the urge to engage in armchair economics at the pleading stage.”¹⁴⁶ Given congressional design that leaves the lion’s share of antidiscrimination enforcement to federal court determinations of employee-initiated complaints, the same can be said of cases arising under Title VII.

B. Increased Mandatory Individual Arbitration

A second area of recent U.S. Supreme Court procedural precedent that has curtailed Title VII’s private right of action is mandatory arbitration. Beginning in 2009, the Supreme Court decided a series of cases that enforced the mandatory nature of predispute arbitration agreements over assertions that the consumer and employee plaintiffs had had little choice but to accept such agreements. In these decisions, the Court separated the existence of a statutory right (i.e., antidiscrimination protections provided by Title VII) from the judicial forum in which that statutory right may be heard (i.e., private arbitration or federal court). As dissenting Justices in these cases pointed out, however, this distinction is particularly problematic when the chief enforcement mechanism of the underlying statute is a private right of action.

In 2009, the Court significantly shifted its position on the enforceability of mandatory predispute arbitration agreements that require arbitration of individual federal statutory rights. In *14 Penn Plaza LLC v. Pyett*,¹⁴⁷ the plaintiffs, a group of building night watchmen and members of the Service Employees International Union (SEIU), suspected age discrimination when their employer reassigned them from security jobs to less lucrative porter and janitor positions.¹⁴⁸ The SEIU and the plaintiffs’ employer’s realty business association had negotiated a collective bargaining agreement (CBA), requiring that all employment discrimination claims be subject to mandatory arbitration—“the sole and exclusive remedy for violations” of the statutes related to the plaintiffs’ claims.¹⁴⁹ Because their union had agreed to the provision and was unable to

146. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 587 (2007) (Stevens, J., dissenting) (citing *Radovich v. Nat’l Football League*, 352 U.S. 445, 454, for the proposition that, where “Congress itself has placed the private . . . litigant in a most favorable position . . . this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws”).

147. 556 U.S. 247 (2009).

148. *Id.* at 251-53.

149. *Id.* at 251-52.

help, the plaintiffs filed charges under the federal Age Discrimination in Employment Act (ADEA) with the EEOC and attempted to pursue their claims in court. In response, the employer moved to compel arbitration under the CBA.¹⁵⁰ The Court distinguished and distanced itself from long-standing precedent that a union may not waive a judicial forum for an individual statutory employment right.¹⁵¹ Instead, the Court held that, because the “agreement to arbitrate statutory antidiscrimination claims [was] ‘explicitly stated’” in the CBA, it was enforceable;¹⁵² there was no legal difference between “arbitration agreements signed by an individual employee and those agreed to by a union representative.”¹⁵³

Justice Souter dissented, highlighting—just as Justice Stevens had done in his *Twombly* dissent—the important role of the private right of action in enforcing the underlying statutory law. Rejecting clear prior precedent that prohibited a union from waiving an individual’s statutory right, he argued, was particularly ill-suited to federal antidiscrimination statutes given the “vital element” of those statutes’ private right of action—which was necessary both to redress individual injury and to “vindicat[e] the important congressional policy against discriminatory employment practices.”¹⁵⁴

Having drawn a clear line separating statutory rights from judicial fora, the Court majority set off on a path of related decisions in the four years that followed *Pyett*, making predispute arbitration agreements increasingly mandatory. In 2010,¹⁵⁵ in *Rent-A-Center, W., Inc. v. Jackson*,¹⁵⁶ the Court held that an employee who was required to sign an arbitration agreement as a condition of getting hired could be compelled to arbitrate even his challenge to the enforceability of the mandatory predispute arbitration agreement in question.¹⁵⁷ The

150. *Id.* at 254.

151. *Id.* at 260-61, 263-66, 268 (distinguishing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)).

152. *Id.* at 258.

153. *Id.* at 281 (citation omitted).

154. *Id.* at 278 (Souter, J., dissenting) (citations omitted).

155. In 2010, the Court also decided *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), holding that where two parties stipulated that they had not agreed on whether their arbitration clause included class claims, an arbitrator who ordered class arbitration exceeded his authority under the FAA. While the majority opinion evinces hostility to class arbitration that may bear relation to the general trend I am analyzing, *see id.* at 685-86, I have omitted a discussion of this case, because it focuses more on the scope of an arbitrator’s authority than on enforceability of an arbitration agreement.

156. 561 U.S. 63 (2010).

157. *Id.* at 65-68, 73-75. The Court did note that “had Jackson challenged [only] the delegation provision by arguing that [the fee-sharing provision] *as applied to the delegation provision* rendered *that provision* unconscionable, the challenge should

following year, in *AT&T Mobility LLC v. Concepcion*,¹⁵⁸ the Court upheld a mandatory predispute arbitration agreement in the consumer context, despite the fact that the agreement waived the ability to pursue claims on a class basis—making it unlikely that any attorney would agree to pursue the case. The plaintiffs purchased cell phone service from AT&T that was advertised as including a free cell phone, but were charged \$30.22 in sales tax on the estimated value of the phone.¹⁵⁹ When they sought to pursue a class claim for false advertising and fraud, the Court upheld the enforceability of a broad arbitration clause in the contract they were required to sign to obtain cell service that required all disputes be brought in individual, not “purported class or representative” arbitration, and which prohibited an arbitrator from consolidating claims or hearing “any form of . . . class proceeding.”¹⁶⁰ The plaintiffs challenged the arbitration agreement as unconscionable under California state law designed to prevent “cheat[ing] large numbers of consumers out of individually small sums of money.”¹⁶¹ The Court held that the Federal Arbitration Act (FAA) preempted any state law that conflicted with the FAA’s “principal purpose” of maximizing the enforcement of agreements to arbitrate, which, by requiring class arbitration, the California precedent did.¹⁶² Yet another dissent raised concern over the forum’s impact on statutory rights: Justice Breyer dissented, noting that requiring individual instead of class arbitration for such small potential damages may “have the effect of depriving claimants of their claims.”¹⁶³

Most recently, in 2013,¹⁶⁴ the Court extended its *Concepcion* holding on the preemptive reach of the FAA beyond state law to its own federal precedent. In

have been considered by the court,” but that “[t]hat would be, of course, a much more difficult argument to sustain.” *Id.* at 74 (first emphasis added).

158. 131 S. Ct. 1740 (2011).

159. *Id.* at 1744.

160. *Id.* at 1744, 1744 n.2 (citation omitted).

161. *Id.* at 1744-46 (citing *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005)).

162. *Id.* at 1748, 1750 (citations omitted) (“Although § 2’s saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”).

163. *Id.* at 1761 (Breyer, J., dissenting).

164. In 2013, the Court also decided *Oxford Health Plans v. Sutter*, 133 S. Ct. 2064 (2013), unanimously upholding an arbitrator’s ruling that class arbitration was available where an arbitration agreement was silent on the issue of class claims and the parties agreed to submit that specific question to the arbitrator. As with 2010’s *Stolt-Nielsen*, while Justice Alito’s concurrence indicates hostility to class arbitration that may be relevant to my argument, *see* 133 S. Ct. at 2071-72, because the case focuses more on the scope of an arbitrator’s authority than the enforceability of an arbitration agreement, I have omitted a discussion of it.

American Express Co. v. Italian Colors Restaurant,¹⁶⁵ a group of business owners filed a class action lawsuit against American Express alleging antitrust violations under the Sherman Act based on fees they incurred as a result of accepting American Express cards.¹⁶⁶ As in *Concepcion*, the plaintiffs' service agreements with American Express contained an arbitration clause requiring "all disputes between the parties to be resolved by arbitration," and prohibiting any arbitration "on a class action basis."¹⁶⁷ The plaintiffs argued that the arbitration agreement was unenforceable because the cost of expert testimony to prove their allegations (hundreds of thousands to one million dollars or more) would far exceed the maximum damages each individual could possibly receive (no more than \$39,000).¹⁶⁸ Building upon its holding in *Concepcion*, the Court held that an arbitration agreement was enforceable, absent a clear intention by Congress to preclude waiver of a judicial forum in a particular statute.¹⁶⁹ The Court distinguished and distanced itself from an earlier decision in which it had recognized an "effective vindication" exception to the FAA that could render an arbitration agreement unenforceable if it "operat[ed] . . . as a prospective waiver of a party's right to pursue statutory remedies."¹⁷⁰ Appearing to sever any connection remaining between choice of judicial forum and statutory rights, the Court explained that "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy."¹⁷¹ Writing for the dissent—as Justices Souter and Breyer had done before her, Justice Kagan warned that the majority had dismantled the "mechanism" that "prevent[s] arbitration clauses from choking off a plaintiff's ability to enforce congressionally created rights," constituting "a betrayal . . . of federal statutes like the antitrust laws," and setting off down the wrong road—one of "poorer enforcement of federal statutes."¹⁷²

As with the impact of intensified pleading standards, that of the Court's suite of mandatory arbitration decisions on the ability of plaintiffs to seek legal redress remains to be seen. Recent legal scholarship has described the Court's expansive reading of congressional intent behind the FAA as posing a serious threat to access to the courts.¹⁷³ In terms of Title VII's private right of action, the

165. 133 S. Ct. 2304 (2013).

166. *Id.* at 2308.

167. *Id.* (citations omitted).

168. *Id.*

169. *Id.* at 2308-09.

170. *Id.* at 2310 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).

171. *Id.* at 2311.

172. *Id.* at 2313, 2315 (Kagan, J., dissenting).

173. See, e.g., Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 629-30 (2012);

impact is likely to be stark. When Congress, in drafting Title VII, purposely curtailed the reach and power of the EEOC and denied the EEOC adjudicatory power (which many other federal agencies have) over private employment disputes, the goal was to leave determinations of discrimination to the federal courts.¹⁷⁴ As Title VII—and alternative dispute resolution—evolved over time, Congress specifically included a section in the Civil Rights Act of 1991 that “encouraged” alternative dispute resolution of Title VII claims, “[w]here appropriate and to the extent authorized by law.”¹⁷⁵ Yet Congress also maintained the primary importance of a plaintiff’s private right of action, enhancing enforcement through increased damages available to private plaintiffs and their attorneys under the statute.¹⁷⁶ Today, it is long settled under the FAA that a plaintiff’s claims arising under a federal statute—including federal antidiscrimination statutes such as Title VII and the ADEA—may fall under an arbitration agreement and need not be heard by a federal court.¹⁷⁷ But there is a world of difference between Congress *encouraging* resolution of federal statutory claims through private dispute resolution and the Court’s recent precedent *compelling* mandatory arbitration on an individual basis at the risk of foreclosing a plaintiff’s ability to assert a federal statutory right. Indeed, in the 1991 Supreme Court decision affirming the arbitrability of federal antidiscrimination claims, *Gilmer v. Interstate/Johnson Lane Corp.*,¹⁷⁸ the Court based its ruling on the fact that “arbitration agreements . . . serve to advance the objective of allowing [claimants] a *broader right* to select the forum for resolving disputes, whether it be judicial or otherwise.”¹⁷⁹

For employment discrimination plaintiffs, particularly those earning low wages who may not be able to find an attorney to represent them without a pu-

Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 815-22 (2013); Miller, *supra* note 115 at 327-31; Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704, 720-27 (2012).

174. *See supra* Part I.A.

175. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 259 n.6 (2009) (citing Civil Rights Act of 1991, Pub. L. 102-166, § 118, 105 Stat. 1081); *see also* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) (discussing the congressional intent regarding arbitration of ADEA claims).

176. *See supra* Part I.C.

177. *See infra* Part III.B; *Gilmer*, 500 U.S. at 26 (“It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. . . . ‘[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.’” (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985))).

178. 500 U.S. 20 (1991).

179. *Id.* at 29 (emphasis added) (internal citation omitted) (internal quotation marks omitted).

tative class claim, the Court's recent holdings allow employers to require agreements that make arbitration so "unavailable or pointless" that they are, in effect, "backdoor waivers of statutory rights."¹⁸⁰ This includes the private right of action essential to the enforcement of Title VII.

C. Limited Class Employment Discrimination Claims

In addition to decisions on pleading requirements and mandatory arbitration, recent U.S. Supreme Court precedent in a third area—class certification rules—has constrained Title VII's private right of action.¹⁸¹ In 2011, in *Wal-Mart v. Dukes*,¹⁸² a group of employees sued Wal-Mart, alleging sex discrimination in pay and promotion and seeking to represent a class of 1.5 million current and former female employees. At issue was Wal-Mart's challenge to the plaintiffs' motion for class certification, which the district and appellate courts had granted.¹⁸³ The Supreme Court reversed the judgment in favor of the plaintiffs and denied the motion for class certification;¹⁸⁴ in so doing, the Court narrowed prior interpretations of Federal Rule of Civil Procedure 23, which governs the requirements for class certification.

The Court held that to determine if plaintiffs have met Rule 23(a)(2)'s requirement of "commonality," the relevant inquiry of whether "there are questions of law or fact common to the class" involves whether class treatment would "generate common *answers* apt to drive the resolution of the litigation."¹⁸⁵ Moreover, in assessing the commonality question, the Court could look beyond certification issues and look toward the merits of the case.¹⁸⁶ Here, the plaintiffs claimed that Wal-Mart engaged in a company-wide policy of allowing local manager discretion in setting pay and promotions that, because of the "uniform 'corporate culture' permit[ing] bias against women," was exercised in a way that disadvantaged female employees; company executives knew this and did nothing to correct the problem.¹⁸⁷ The Court majority discounted

180. *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2315 (2013) (Kagan, J., dissenting).

181. In 2013, the Court also decided two cases involving class certification rules, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) and *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013). Both affirmed and applied *Wal-Mart v. Dukes*; yet because the significant limitations on Title VII's private right of action had already been established under *Wal-Mart v. Dukes*, discussion of these cases is omitted.

182. 131 S. Ct. 2541, 2547 (2011).

183. *Id.* at 2549.

184. *Id.* at 2561.

185. *Id.* at 2548, 2550-51 (internal citation omitted).

186. *Id.* at 2551-52.

187. *Id.* at 2548.

plaintiffs' social framework and statistical expert evidence and held that, because plaintiffs lacked "some glue holding the alleged reasons for all those [discriminatory] decisions together," they failed to prove commonality under Rule 23(a)(2).¹⁸⁸

Writing for the dissent, Justice Ginsburg criticized this holding as going too far into the merits at the class certification stage and merging analysis under Rule 23(a) with that of Rule 23(b)(3).¹⁸⁹ Instead, she argued, the record supported the existence of a common question: whether Wal-Mart's uniform policy and "system of delegated discretion . . . produce[] discriminatory outcomes"—a question that had been held to be actionable under Title VII.¹⁹⁰ Even if the class members had "unique circumstances" that entitled them to individual relief, the question of which type of class action plaintiffs could bring "should not factor into the Rule 23(a)(2) determination."¹⁹¹

The Court also held, unanimously on this issue, that the case could not be certified under Rule 23(b)(2), which allows plaintiffs to proceed automatically on behalf of all members of the relevant class.¹⁹² Instead, cases that seek monetary damages that are more than "incidental" to injunctive relief must proceed under Rule 23(b)(3)—which requires plaintiffs to provide notice to class members and allow them to opt out of the class—even if the monetary relief does not "predominate" over the injunctive claims.¹⁹³ Although unanimous, this ruling was also novel: the Court had not previously weighed in on this issue, and plaintiffs in some circuits had successfully brought class actions seeking some monetary relief without having to follow the notice and opt-out requirements of Rule 23(b)(3).¹⁹⁴

Once again, the full reach of *Wal-Mart v. Dukes* on potential class action plaintiffs has yet to be seen. For the most part, legal scholars have predicted that, while the case may be distinguishable by its unusually large class size, it will still have a limiting impact on class action employment litigation.¹⁹⁵ As it

188. *Id.* at 2552, 2554-55.

189. *Id.* at 2562 (Ginsburg, J., dissenting).

190. *Id.* at 2567 (Ginsburg, J., dissenting).

191. *Id.* (Ginsburg, J., dissenting).

192. *Id.* at 2557-58; *id.* at 2561 (Ginsburg, J., dissenting).

193. *Id.* at 2557-58.

194. *Id.* at 2559 ("In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here.").

195. *See, e.g.,* Joseph A. Seiner, *Weathering Wal-Mart*, 89 NOTRE DAME L. REV. 1343, 1350-51, 1350-51 n.61 (2014) (describing and citing the body of scholarship that "denounced the [*Wal-Mart*] case as one that undermines the rights of workplace discrimination victims"). *But see* Elizabeth Tippet, *Robbing a Barren Vault: The*

relates to Title VII's private right of action, *Wal-Mart* imposes still more procedural hurdles for plaintiffs, particularly those earning low wages, seeking to bring a private lawsuit. Because the EEOC can pursue as complainant only a fraction of a percent of the charges it receives each year¹⁹⁶, most employees who have experienced unlawful discrimination must find a private plaintiffs' attorney to represent them in their enforcement action. Plaintiffs' attorneys generally work on a contingency basis, taking a portion of the damages awarded to the plaintiffs they represent, in addition to any attorneys' fees they are able to recover;¹⁹⁷ lower-wage employees have lower compensatory damages, often making their cases financially viable only if an attorney can pursue their claims on behalf of a class. With the Court's ruling tightening up class certification under Rule 23(b)(2), plaintiffs' attorneys seeking any significant monetary relief now face the additional costs of providing notice and allowing individuals to opt out of a potential class.¹⁹⁸ More importantly, the majority's holding on Rule 23(a) commonality has the potential to open the door to wider-reaching merits-based challenges against plaintiffs at the class certification stage.¹⁹⁹ This uncertainty adds to the financial risks plaintiffs' attorneys already undertake when filing a putative class claim. Raising the height of—and the costs to scale—the procedural hurdle of Rule 23 lessens the likelihood that individuals will be able to exercise their Title VII private right of action; what is more, it threatens to limit the overall enforcement of antidiscrimination law by deterring private attorneys from litigating the systemic cases the EEOC is unable to pursue.

When viewed together, the Roberts Court's procedural decisions since 2007 evince a troubling reality: plaintiffs' access to federal courts is being narrowed in ways that will negatively impact enforcement of statutory antidiscrimination rights. Federal pleading standards and class certification rules now require more of plaintiffs earlier, despite the information asymmetry inherent in any employee-employer dispute. Mandatory predispute arbitration agreements may now be enforceable, even when they require plaintiffs to waive the class claims that may provide their only hope of obtaining legal representation. The vast majority of Title VII enforcement rests upon individuals being willing and able to exercise their statutory private right of action—an ability now jeopardized by this “procedural recession.”

Implications of Dukes v. Wal-Mart for Cases Challenging Subjective Employment Practices, 29 HOFSTRA LAB. & EMP. L.J. 433, 435 (2012) (suggesting a more limited impact given that similar cases make up a small proportion of all employment discrimination claims).

196. See *supra* notes 57-58 and accompanying text.
197. See Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 935-44 (2006).
198. See Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. COLLOQUY 34, 51-52 (2011).
199. See *id.* at 44-45; Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After Wal-Mart v. Dukes*, 32 BERKELEY J. EMP. & LAB. L. 477, 500-01 (2011).

IV. TOWARD ADMINISTRATIVE ANTIDISCRIMINATION LAW

By statutory design, Congress limited the authority of the EEOC and placed much of the responsibility for the enforcement of Title VII's antidiscrimination protections on individual employees through a private right of action. From the Act's original drafting in 1964, through its amendment in 1972 and 1991, to today, the core of Title VII's enforcement scheme has always been predominantly private civil lawsuits supplemented by limited public gatekeeping.²⁰⁰ Over the past six years, and coinciding with the Great Recession of 2008, the Supreme Court has hamstrung private enforcement efforts by procedurally constricting plaintiffs' abilities to pursue the private right of action guaranteed under Title VII.²⁰¹ As a public enforcement agency, the EEOC itself does not rely on the private right of action and thus remains mostly free from the constraints of this case law. Yet with limited enforcement authority and limited funding as a public agency, the EEOC alone cannot take full advantage of its unique procedural advantages.

To overcome the respective challenges of recent economic and procedural "recessions," this Part proposes that private plaintiffs' attorneys and the EEOC leverage their relative strengths by collaborating in a public-private enforcement partnership. This collaboration would require a reinvigoration of "administrative antidiscrimination law"—that is, all of the steps and tools available in the process of enforcement that occurs between an employee filing a charge with the EEOC and a plaintiffs' attorney filing a private Title VII case in federal court. Private plaintiffs' attorneys should consider using existing EEOC administrative procedures like mediation and investigation more robustly, rather than rushing straight to the courtroom. Doing so may serve to avoid potential early dismissals (made more likely by *Twombly* and *Iqbal*) and potential mandatory arbitration (made more likely by *Pyett* and its progeny). Likewise, the EEOC should consider partnering with private class action plaintiffs' attorneys and staffing more systemic cases more leanly, to help plaintiffs avoid potential challenges to class certification (made more likely by *Wal-Mart*).

Legal scholars have suggested a variety of proposals to revamp the EEOC and increase antidiscrimination enforcement; yet, for the most part,²⁰² the proposals seek to improve upon either a purely private attorney general or a purely

200. See *supra* Part I.

201. See *supra* Part III.

202. For other interesting discussion and proposals that go beyond the traditional private attorney general/public agency dichotomy see, for example, Engstrom, *supra* note 2, at 699-711, which applies agency theory to reconceive the EEOC's role as litigation gatekeeper and perfects the existing "hybrid" public-private enforcement model" post *Wal-Mart v. Dukes*; Green, *supra* note 2, at 335-57, which proposes private mandatory mediation of EEOC charges; and Modesitt, *supra* note 2, at 1274-75, which proposes, among other things, a mediation partnership between federal courts and the EEOC.

public agency model (or both) of antidiscrimination enforcement.²⁰³ On the public agency model side, for example, Professor Michael Waterstone proposed beefing up existing public agency enforcement through increased public law litigation and diversified “new governance” approaches to redress disability discrimination.²⁰⁴ Professor Marcia McCormick proposed the addition of a non-judicial fact-finding body modeled after the transitional justice concept of a truth commission.²⁰⁵ Professor Julie Suk looked to British law and theories of distributive justice to revisit giving the EEOC cease-and-desist and other adjudicatory authority.²⁰⁶ On the private attorney general side, in an early work, Professor Michael Selmi suggested that the EEOC be relieved entirely of its gatekeeping role, leaving private plaintiffs free from the administrative hurdles that often harm their private lawsuits.²⁰⁷ As a result, Selmi suggested, this could free up public agency resources to focus on low-value cases not likely to attract attorney representation, while allowing lawsuits against large employers to proceed directly to federal court.²⁰⁸ Professor Pam Jenoff later echoed this suggestion in work proposing an expanded adjudicatory role for the EEOC over small employers.²⁰⁹

While each of these well-reasoned suggestions offers the possibility of improved antidiscrimination enforcement, they suffer from three significant limitations in light of recent economic, political, and jurisprudential events. First, to the extent these proposals seek to expand public agency efforts, they require more financial resources, an issue that scholars have addressed,²¹⁰ but which has now been made all the more difficult post-Great Recession. Second, to the extent the proposals require congressional authorization to expand EEOC authority, modern legislative gridlock and a lack of political capital on the side of employee advocates make such amendments highly unlikely. Indeed legislation directed solely at reversing the three recent procedural constraints imposed by the Roberts Court—which would require arguably less political capital than legislation expanding EEOC authority overall—has failed to make it beyond the committee stage.²¹¹ Lastly, to the extent the proposals rely on or seek to expand

203. See, e.g., Jenoff, *supra* note 2; McCormick, *supra* note 2; Modesitt, *supra* note 2; Munroe, *supra* note 2; Nielsen & Nelson, *supra* note 2, at 708-09; Selmi, *supra* note 2; Suk, *supra* note 2; Waterstone, *supra* note 2.

204. See Waterstone, *supra* note 2, at 461-65, 479-81, 485-88.

205. See McCormick, *supra* note 2, at 222-30.

206. See Suk, *supra* note 2, at 405-09, 467-73.

207. See Selmi, *supra* note 2, at 3-4, 57-63.

208. See *id.* at 60-62.

209. See Jenoff, *supra* note 2, at 119-25.

210. See *id.* at 121; McCormick, *supra* note 2, at 230; Selmi, *supra* note 2, at 63.

211. See Notice Pleading Restoration Act of 2010, S. 4054, 111th Cong. (2010) (to reverse the impact of *Twombly* and *Iqbal*); Arbitration Fairness Act of 2013, S. 878, 113th

the private attorney general model of antidiscrimination enforcement, none address the constrained access to federal courts in the wake of the Roberts Court's procedural decisions as described in Part III, above.

In contrast to prior proposals, this Part suggests that, even under existing law and without requiring significantly more financial resources, a combined public-private model of "administrative antidiscrimination law" can enhance antidiscrimination enforcement and overcome limitations imposed by recent Supreme Court precedent and a slow economy.

A. The EEOC's Advantages in an Era of Receding Private Rights of Action

While the ability of an employee plaintiff to assert her private right of action under Title VII has been significantly constrained by the Supreme Court decisions discussed in Part III, much of this precedent does not apply to the EEOC as a *complainant*. As part of its 1972 amendments to improve enforcement under Title VII, Congress delegated specific enforcement authority to the EEOC.²¹² This statutory grant is separate from the authority provided to individuals to enforce Title VII through a private right of action.²¹³ As a result, the procedural requirements for the EEOC's involvement in an antidiscrimination claim are different from those of private individuals and, therefore, relatively insulated from the Court's recent narrowing precedent.

1. Charges, Not Pleadings

The first, and most obvious, difference in filing a complaint with the EEOC and filing a private lawsuit in federal court is in the specificity of what must be alleged. For a plaintiff to begin the process of filing a private antidiscrimination lawsuit under Title VII, she must first file a charge of discrimination with the EEOC and "exhaust" her administrative remedies.²¹⁴ Completing an EEOC charge requires providing the EEOC with basic information on the parties involved and the basis upon which the employee believes he has been discriminated: by federal regulation, "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of" is considered "sufficient" to serve as an EEOC charge.²¹⁵ The intake form used to

Cong. (2013) (to exclude employment, civil rights, consumer, and antitrust cases from mandatory predispute arbitration precedent); Equal Employment Opportunity Restoration Act of 2012, S. 3317, 112th Cong. (2012) (to reverse the impact of *Wal-Mart v. Dukes*).

212. See 42 U.S.C. § 2000e-4 to -5 (2012); *supra* Part I.B.

213. See 42 U.S.C. § 2000e-5(f) (2012).

214. See 42 U.S.C. § 2000e-5(b) (20012); U.S. EEOC, *Filing a Lawsuit*, *supra* note 22.

215. 29 C.F.R. § 1601.12 (2014).

complete the charge includes check boxes and blanks, and contemplates a minimum amount of information required to get the EEOC involved.²¹⁶

Once the charge is filed, the administrative process begins, including notifying the employer of the charge and investigating the potential discrimination.²¹⁷ This notification alone can have a benefit for the employee by putting the employer on notice to correct current discriminatory behavior.²¹⁸ In comparison, to file a private lawsuit a plaintiff must file a civil complaint that complies with the Federal Rules of Civil Procedure and, most relevant here, the Court's recent interpretation of "plausibility" under *Twombly* and *Iqbal*.²¹⁹

Of course, once the EEOC's administrative process concludes and an employee receives a "right to sue letter," should the case remain unresolved and should the employee wish to file a lawsuit, the civil complaint will still have to meet the requirements of Rule 8(a). Likewise, the EEOC must also comply with Rule 8(a) when it files a complaint in federal court on behalf of an individual or in its own enforcement capacity.²²⁰ At that point in the process, however, the EEOC will already have had the benefit of using all of its resources to complete a full investigation, making the likelihood of meeting "plausibility" greater at the outset of the litigation.

Regardless, the plausibility standard has no impact on the simple standard that remains for completing an EEOC charge, creating an administrative opportunity between filing a charge with the EEOC and filing a complaint in court in which an employee may attempt to get early information and relief, free from the standards imposed by *Twombly* and *Iqbal*.

216. See Selmi, *supra* note 2, at 7; U.S. EEOC, *U.S. Equal Employment Opportunity Commission Intake Questionnaire*, <http://www.eeoc.gov/form/upload/Uniform-Intake-Questionnaire.pdf>.

217. See 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.14(a) (2014); Hirsh, *supra* note 53, at 239, 243.

218. See, e.g., *Balas v. Huntington Ingalls Indus., Inc.*, 711 F.3d 401, 406-07 (4th Cir. 2013) ("The requirement of filing a charge with the EEOC . . . serves two principal purposes: ' . . . it notifies the charged party of the asserted violation . . . and [it] permits effectuation of the [Civil Rights] Act's primary goal, the securing of voluntary compliance with the law.' . . . The filing of an administrative charge, therefore, 'is not simply a formality to be rushed through so that an individual can quickly file his subsequent lawsuit.' . . . Rather, the charge itself serves a vital function in the process of remedying an unlawful employment practice.") (citations omitted).

219. See *supra* Part III.A.

220. See, e.g., *EEOC v. Concentra Health Servs.*, 496 F.3d 773 (7th Cir. 2007).

2. Not Bound by Arbitration Agreements

In addition, the EEOC is not bound by the terms of any predispute mandatory arbitration agreements to which an employee may be subject. In two decisions in which the Court held that employees could be compelled to submit statutory claims arising under federal antidiscrimination laws to arbitration under the FAA, the Court also clarified that the EEOC was not similarly bound.²²¹ In *Gilmer v. Interstate/Johnson Lane*, the plaintiff sought to sue his employer for age discrimination under the ADEA when he was terminated from his position as a financial services manager.²²² The employer moved to compel arbitration under an arbitration clause to which the plaintiff had agreed when registering with several stock exchanges, as required for the position.²²³ The Court upheld the arbitration agreement: because Congress did not express any intent to preclude a waiver of judicial forum under the ADEA, there was no reason why federal statutory rights under the ADEA could not be subject to arbitration.²²⁴ In so holding, the Court rejected the plaintiff's argument that compelling arbitration of claims under the ADEA would undermine the EEOC's enforcement efforts.²²⁵ As the Court explained,

An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action. . . . In any event, the EEOC's role in combating age discrimination is not dependent on the filing of a charge; the agency may receive information concerning alleged violations of the ADEA "from any source," and it has independent authority to investigate age discrimination.²²⁶

Because the EEOC's authority to enforce antidiscrimination statutes is independent from an individual's private right of action, the Court held that an employee's arbitration agreement has no bearing on the EEOC.²²⁷ When the plaintiff raised a separate concern that mandatory arbitration of ADEA claims could limit the ability to bring class actions, the Court again invoked the EEOC's separate authority, noting that "arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief."²²⁸

221. EEOC v. Waffle House, Inc., 534 U.S. 279 (2002); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

222. 500 U.S. at 20, 23-24 (1991).

223. *Id.* at 23-24.

224. *Id.* at 25-29.

225. *Id.* at 28, 32.

226. *Id.* at 28.

227. 42 U.S.C. § 2000e-5 (2012); *Gilmer*, 500 U.S. at 28.

228. *Gilmer*, 500 U.S. at 32.

A decade later, in *EEOC v. Waffle House*,²²⁹ the Court further clarified how the EEOC's separate enforcement authority fits with an individual's private right of action under Title VII when that individual is covered by an arbitration agreement. When a restaurant worker was fired after he had an epileptic seizure at work, he filed a charge with the EEOC against his employer alleging disability discrimination under the Americans with Disabilities Act (ADA).²³⁰ The EEOC, which has the same statutory enforcement authority under the ADA as it has under Title VII and the ADEA,²³¹ investigated the charge and filed a lawsuit to enforce the ADA against the employer, seeking injunctive relief and individual damages for the employee. However, the employee was not a party to the lawsuit: the plaintiff in the enforcement action was the EEOC.²³² Because the employee individually had signed an agreement to arbitrate "any dispute or claim" concerning his employment" as a condition of getting the job, the employer moved to compel arbitration.²³³

Looking at the statutes, prior precedent, and the FAA, the Supreme Court found "no language . . . suggesting that the existence of an arbitration agreement between private parties materially changes the EEOC's statutory function or the remedies that are otherwise available" or that "purport[s] to place any restriction on a nonparty's choice of a judicial forum."²³⁴ The EEOC's enforcement action did not require the employee's consent and was in no way controlled by the employee: after filing an EEOC charge, the EEOC becomes "the master of its own case," able to seek whatever statutorily-allowed remedies it deems appropriate, even if the employee no longer wishes to pursue the claims.²³⁵ Relief for a specific victim serves an important *public* purpose, the Court reasoned—for example, obtaining punitive damages on behalf of an individual employee serves a deterrent effect on potential future violations.²³⁶ As such, the Court held the EEOC could pursue victim-specific relief in court on behalf of the employee in addition to injunctive relief, despite an arbitration agreement between the employer and employee; to rule otherwise would "turn[] what is effectively a forum selection clause into a waiver of [the EEOC's] statutory remedies."²³⁷

229. 534 U.S. 279 (2002).

230. *Id.* at 283-84.

231. See 2 U.S.C. § 12117(a) (2012); 29 U.S.C. § 626 (2012); *Waffle House*, 534 U.S. at 285-86.

232. *Waffle House*, 534 U.S. at 283.

233. *Id.* at 282-83.

234. *Id.* at 288, 289.

235. *Id.* at 291-92.

236. *Id.* at 294-95.

237. *Id.* at 295, 298.

An employee, therefore, may file and pursue an employment discrimination charge with the EEOC before being compelled to submit to mandatory arbitration, and the EEOC may pursue a charge itself on behalf of the employee in court, regardless of any arbitration agreement that may apply to the individual employee.²³⁸

3. Systemic Class Claims Without Rule 23

Lastly, with its statutory authority to bring “pattern or practice” cases, the EEOC can bring “systemic cases” affecting many plaintiffs, regardless of class size and without having to meet the hurdle of class certification under Rule 23.²³⁹ As legal scholars have noted, this statutory authority confers an obvious advantage to plaintiffs in the wake of *Wal-Mart v. Dukes*, which suggests that the EEOC should bring more systemic cases.²⁴⁰ What scholars have yet to highlight, however, is that the EEOC may obtain this advantage whether it *initiates* the lawsuit itself or *intervenes* in an existing lawsuit by an individual—meaning that the EEOC may retain this procedural advantage even in cases it co-counsels with private attorneys.

In 1980, in *General Telephone Co. of the Northwest, Inc. v. EEOC*, the U.S. Supreme Court interpreted the 1972 amendments to Title VII to hold that Rule 23 procedural requirements for certifying a class action did not apply to the EEOC’s own enforcement actions.²⁴¹ In subsequent cases, several federal courts have held that this ruling applies equally to enforcement actions initiated by private plaintiffs in which the EEOC later intervenes.²⁴² In *United Telecom. v.*

238. An employee who has signed a mandatory arbitration agreement may, however, be compelled to arbitrate any cross-claims she files individually against the employer while she is an intervenor in the EEOC’s enforcement action. *See EEOC v. Woodmen of World Life Ins. Soc’y*, 479 F.3d 561, 568-70, 568 n.2 (8th Cir. 2007) (discussing the case law on the issue).

239. *See* 42 U.S.C. §§ 2000e-5 to -6 (2012); *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 320 (1980).

240. *See, e.g.*, Angela D. Morrison, *Duke-ing out Pattern or Practice After Wal-Mart: The EEOC as Fist*, 63 AM. U. L. REV. 87, 138-54 (2013); Seiner, *supra* note 195, at 1352-56 (discussing the “governmental approach” to responding to *Wal-Mart v. Dukes*); Noah D. Zatz, *Introduction: Working Group on the Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 387, 394 (2011).

241. *General Telephone Co. v. EEOC*, 446 U.S. at 323-34.

242. *See Harris v. Amoco Prod. Co.*, 768 F.2d 669, 673 (5th Cir. 1985); *United Telecoms., Inc. v. Saffels*, 741 F.2d 312, 313-14 (10th Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985); *EEOC v. Dial Corp.*, 156 F. Supp. 2d 926, 948 (N.D. Ill. 2001) (holding that an EEOC pattern and practice case that arose from an individual, rather than a Commissioner’s charge, still need not comply with Rule 23); *Glass v. IDS Fin. Servs.*, 778 F. Supp. 1029, 1050 n.34 (D. Minn. 1991) (explaining the history of federal decisions on this issue); *Fields v. Beech Aircraft Corp.*, 95 F.R.D. 1, 6 (D. Kan. 1981) (stating that “[t]he presence of the EEOC as plaintiff makes it academic

Saffels, the EEOC was granted a motion to intervene in a private plaintiff's sex discrimination lawsuit against her employer, alleging class claims on behalf of all similarly situated female employees.²⁴³ Six years later, the district court granted the EEOC permission to seek relief for the putative class without requiring Rule 23 certification procedures.²⁴⁴ When the employer appealed to compel the trial court to require the EEOC to meet Rule 23, the Tenth Circuit held that the EEOC's ability to pursue systemic cases free from Rule 23 applied equally when the EEOC "acts not as the initiator of a suit, but as an intervenor."²⁴⁵ Citing *General Telephone*, the Tenth Circuit explained that, based on Title VII and its legislative history, "Congress viewed the Commission's role in suits initiated by it or in which it intervened to serve the identical purpose," and thus the rationale for the inapplicability of Rule 23 was the same.²⁴⁶

Likewise, in *Harris v. Amoco Prod. Co.*, the Fifth Circuit allowed the EEOC to pursue class claims against an employer without requiring compliance with Rule 23, even after the original four plaintiffs in whose case the EEOC had intervened settled their individual claims.²⁴⁷ The plaintiffs brought a putative class action for race discrimination in assignments, pay, and promotions on behalf of all African-American employees in their division.²⁴⁸ After the EEOC was granted permission to intervene, and before the plaintiffs had been certified as class representatives, the plaintiffs settled their individual claims and moved to dismiss the case.²⁴⁹ Reversing the district court, the Fifth Circuit held that, having properly intervened in accordance with Title VII, the EEOC could pursue the case without the original plaintiffs and that, "Rule 23's class action prerequisites are as inapplicable when the EEOC intervenes as when it brings a direct suit."²⁵⁰ As the court explained, when the EEOC litigates a case, "whether by direct suit or by intervention," the agency is acting on behalf of those who filed charges, their similarly situated co-workers, and the public: "[t]he EEOC's ability to maintain suit 'in its own name' has no meaning apart from whatever relief the Commission obtains for employees who have been treated as less than equal."²⁵¹

whether to certify a class under Rule 23"). *But see* *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 899-900 (7th Cir. 1999); *Horn v. Eltra Corp.*, 686 F.2d 439, 441 n.1 (6th Cir. 1982).

243. *See Saffels*, 741 F.2d at 313.

244. *Id.*

245. *Id.*

246. *Id.* at 314.

247. *Harris*, 768 F.2d at 673.

248. *Id.* at 672.

249. *Id.* at 673.

250. *Id.* at 686.

251. *Id.* at 682.

Thus, the court held, the rationale of *General Telephone* applies equally to agency intervention and direct action.²⁵²

Yet this ability of the EEOC as intervenor to avoid Rule 23 for a putative class is not unlimited. In a case in which plaintiffs' class certification was affirmatively denied and the EEOC's status as an intervenor was revoked, the Sixth Circuit indicated, in a footnote, that *General Telephone* was limited to direct actions by the EEOC and not applicable where the EEOC intervened in a private suit.²⁵³ In a later case, *Jefferson v. Ingersoll International Inc.*, the Seventh Circuit stopped short of "choos[ing] sides" between the Fifth and Tenth Circuit approach and the Sixth Circuit's potential conflict, but raised another consideration: differences in relief sought.²⁵⁴ In *Jefferson*, the EEOC moved to intervene in the plaintiffs' race discrimination in hiring case *after* the district court had already granted certification to a limited class and the employer had filed an interlocutory appeal on an issue under Rule 23.²⁵⁵ The Seventh Circuit was unpersuaded that the EEOC's intervention at that point mooted the ongoing Rule 23 dispute.²⁵⁶ The EEOC and private plaintiffs may differ in the relief they seek, particularly where plaintiffs may wish to pursue discrimination claims not enforced by the EEOC (for example, under Section 1981 of the Civil Rights Act of 1866); this would render the claims "logically and legally distinct," giving plaintiffs the choice to join the EEOC litigation or not.²⁵⁷

The Fifth Circuit applied a similar consideration in its *Harris* decision, too. While it reversed the district court's dismissal of the case and allowed the EEOC to pursue systemic claims as intervenor without the named plaintiffs and free from Rule 23 requirements, it did so only "within the scope of the original plaintiffs' claims."²⁵⁸ When the EEOC had sought to intervene, it stipulated that "the scope of its participation would be 'no greater than the scope of claims raised in Plaintiffs' complaint'" and that it would not "depart from the 'field of litigation' established by the original parties."²⁵⁹ Noting that the ability to intervene pursuant to Title VII "is not a carte blanche for agency investigation," the Fifth Circuit upheld the district court's protective order that limited the agen-

252. *Id.* at 683.

253. *Horn v. Eltra Corp.*, 686 F.2d 439, 441 n.1 (6th Cir. 1982) ("*General Telephone* is limited to EEOC actions brought in its own name and not . . . to EEOC interventions in a private action."). *But see Harris*, 768 F.2d at 681 n.21, 683 n.26 (distinguishing and discounting *Horn* as dicta).

254. *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 899-900 (7th Cir. 1999).

255. *Id.* at 896.

256. *Id.* at 899.

257. *Id.* at 899-900.

258. *Harris*, 768 F.2d at 686.

259. *Id.* at 673.

cy's ability to use data it had collected in discovery about the age and sex of the defendant's employees to the current *Harris* race discrimination case only.²⁶⁰

The impact of EEOC intervention in an ongoing lawsuit on Rule 23 requirements may vary depending on when the EEOC chooses to intervene and the scope of the relief the plaintiffs and the EEOC seek on behalf of a similarly situated class. Nevertheless, federal case law establishes that, within certain parameters, the EEOC's participation in a private plaintiff's putative class action may help plaintiffs avoid Rule 23 altogether.

B. The Private Bar's Practical Advantages in an Era of Recessionary Federal Budgets

Despite the EEOC's significant procedural advantages when litigating on behalf of a Title VII plaintiff, the agency faces its own limitations. Thus, private attorneys who represent plaintiffs enforcing private rights of action provide practical advantages in Title VII enforcement efforts.

The most significant limitation on the EEOC, and relative advantage of private plaintiffs' attorneys, is one of funding and capacity. As described previously, Congress and the President set the budget for public enforcement efforts of the EEOC annually, making the EEOC beholden to politics and budgetary woes.²⁶¹ The amount of enforcement litigation the EEOC can pursue is directly related to its authorized budget, keeping the "historically underfunded"²⁶² agency's caseload abysmally low: on average, the EEOC itself files a few hundred cases annually, a mere 0.2% to 0.6% of the charges it receives each year.²⁶³ By contrast, private plaintiffs' attorneys tend to take cases on a contingency basis (for a portion of the damages they recover) and, if they prevail, can seek attorneys' fees and costs.²⁶⁴ This means that, in theory, a private case can finance itself (and more), with no set cap on the number of cases private attorneys can pursue. As a result, private plaintiffs' attorneys across the country file tens of thousands of discrimination lawsuits in federal courts each year.²⁶⁵ Relatedly, private plaintiffs' attorneys are also free from bureaucratic processes inherent in any federal agency operation. For example, where the EEOC may require certain

260. *Id.* at 686.

261. See U.S. EEOC, *Congressional Oversight*, *supra* note 101; U.S. EEOC, *Fiscal Year 2014 Congressional Budget Justification*, *supra* note 101; *supra* Part II.B.

262. See *Seiner*, *supra* note 195, at 1354.

263. See *supra* text accompanying note 57.

264. See 42 U.S.C. § 1981a(a)(1), (b) (2012); 42 U.S.C. § 2000e-5(k) (2012); Wayne N. Outten & Piper Hoffman, *Working with the Equal Employment Opportunity Commission*, 10 EMP. RTS. & EMP. POL'Y J. 615, 621 (2006).

265. See *supra* note 58 and accompanying text.

steps for approval before it can incur litigation expenses,²⁶⁶ a plaintiffs' attorney enjoys the flexibility provided by its private operations.

Limited delegated authority and insufficient operating budgets have impacted the EEOC's reputation for effectiveness among the private bar. While many plaintiffs' attorneys appreciate working with the EEOC and take advantage of the administrative procedures it offers,²⁶⁷ others view the agency as more of an obstacle to pursuing private lawsuits and want little more than a right to sue letter from the EEOC, so that they may file in court.²⁶⁸ To date, public and private enforcement channels have operated in a predominantly separate and parallel manner, with the vast majority of employment discrimination lawsuits filed solely by private counsel or, alternatively, by the EEOC. Yet, as discussed in Part IV.C, below, limited coordination already exists at various points in the enforcement process, which provides the opportunity for deeper collaboration to combine public procedural and private practical advantages in antidiscrimination enforcement.

C. Reinvigorating the Administrative Resolution of Discrimination Claims

In light of recent constraints the U.S. Supreme Court has imposed on plaintiffs in civil lawsuits, and considering the procedural advantages of the EEOC that avoid these constraints, plaintiffs' attorneys and the EEOC should reconsider their enforcement relationship. The diminished state of the private right of action, in a time of the most constrained public enforcement in recent history, has changed the field of play. Private litigation as usual may no longer be enough to ensure Title VII's protections; to do so may now require working more collaboratively and creatively through the administrative process. This Part offers ideas for ways in which plaintiffs' attorneys and the EEOC could collaborate, proposing a reinvigorated combined public agency/private attorney general model of Title VII enforcement.

To implement any of these ideas would require tackling the practical challenges each presents. Greater study to identify best practices and what can be done within existing resources is needed; more importantly, willingness and some amount of cultural change by both public and private enforcers would be necessary. However, having presented both impending constraints facing anti-discrimination enforcement and the legal framework supporting the potential

266. Outten & Hoffman, *supra* note 264, at 620; U.S. EEOC, Office of General Counsel, *Regional Attorney's Manual*, *supra* note 107, at 39-46 (describing procedures for initiating certain types of cases requiring approval).

267. *See, e.g.*, Outten & Hoffman, *supra* note 265 at 621 ("Most plaintiffs' lawyers who have litigated with the EEOC have found the agency's participation to be an asset.").

268. *See, e.g.*, Selmi, *supra* note 2, at 40.

for its change, the goal of this Part is to serve as a jumping off point for future inquiry.²⁶⁹

1. Continue to Expand and Improve the EEOC Mediation Program

The EEOC currently offers administrative procedures that plaintiffs may, but are not required to, take advantage of in addition to those required by administrative exhaustion under Title VII. Chief among these is voluntary mediation: as soon as an employee files a charge with the EEOC, and before any investigation has occurred, the employee is offered the chance to mediate his claims. If the employee agrees, the employer is invited to participate, again, voluntarily. The mediation occurs before the employer has to respond to the charges filed against it; the incentive for the employer to participate is that the employer need not draft an answer or respond to information requests from the EEOC before attempting mediation.²⁷⁰

The advantages to employees—particularly those who may be compelled to arbitrate their claims individually under post-*Pyett* Court precedent—are clear: mediation may resolve the case quickly, and allow an employee to agree to a particular resolution (or not) rather than be bound by an arbitrator's ruling. For plaintiffs' attorneys who have opted out of the voluntary mediation altogether, now may be the time to reevaluate that position. One impediment to plaintiffs' participation may be the assumption that any offer of damages by an employer during voluntary mediation will be too low for a reasonable contingency fee and provide little in the way of attorneys' fees. Plaintiffs' attorneys could consider developing a new model of structuring fees based on their participation in the administrative process. For example, plaintiffs' attorneys could set a reasonable flat fee for drafting an EEOC charge and representing an employee through mediation or other stages of the administrative process, rather than investing significant time in the hopes of high damages and attorneys' fees at the end of protracted litigation.

Early mediation also benefits employers by allowing them to avoid responding to an EEOC charge or request for information.²⁷¹ Early mediation, however, may not deter an employer from making a "low-ball" offer to the employee to make the case go away. To get around this drawback, the EEOC could consider pushing back the timing of the mediation until after the employer's

269. In future work, I plan to provide the theoretical framework and best practices for specific administrative antidiscrimination law interventions.

270. See U.S. EEOC, *An Evaluation of the Equal Employment Opportunity Commission Mediation Program* (Sept. 20, 2000), <http://www.eeoc.gov/eeoc/mediation/report/chapter4.html#IV.D.3>; U.S. EEOC, *Mediation*, <http://www.eeoc.gov/eeoc/mediation/index.cfm>. For analysis of a proposal to *mandate* EEOC mediation, see generally Green, *supra* note 2.

271. See U.S. EEOC, *An Evaluation of the Equal Employment Opportunity Commission Mediation Program*, *supra* note 270; U.S. EEOC, *Mediation*, *supra* note 270.

response is due, or offering mediation again later in the investigation process.²⁷² While moving mediation to follow the employer's response or to later in the investigation process may affect the number of employers volunteering to mediate, these changes could also place the employee and employer on more equal footing in negotiations and make resolution more likely for those parties who do participate.

In the wake of the suite of mandatory arbitration decisions, the EEOC could also include, in its case intake process, a screening procedure to identify complainants who may be subject to mandatory and binding predispute arbitration agreements. This screening would allow the EEOC to focus its efforts through investigation and possible voluntary dispute resolution, as permitted under *Waffle House*, before the complainant finds himself compelled into mandatory arbitration.

Of course, increasing voluntary mediation does not guarantee that more cases will be resolved; nevertheless, there is potential for the EEOC to enhance its current efforts and programs toward this end. Over the past decade, parties in only eleven to fifteen percent of total discrimination charges received by the EEOC each year have participated in voluntary mediation, yet those that do so achieve good rates of success: two-thirds to three-quarters of cases that participated resulted in a resolution.²⁷³ Given the increased procedural challenges plaintiffs now face once they receive their right to sue letters and attempt to proceed in court, plaintiffs' attorneys and the EEOC should revisit the potential for alternative dispute resolution throughout the administrative exhaustion process to maximize the enforcement impact.

2. Encourage Plaintiffs' Attorneys to Work Through the EEOC Investigatory Process

Another administrative function of the EEOC now made more important by recent Court precedent is the agency's factual investigation. When the EEOC receives a charge of discrimination, the charge is assigned to an investigator, who is tasked with conducting an investigation of the allegations in the charge to determine whether the employee has reasonable cause for a discrimination claim.²⁷⁴ According to the EEOC, a typical investigation takes an average of six

272. See E. Patrick McDermott, Anita Jose & Ruth Obar, *An Investigation of the Reasons for the Lack of Employer Participation in the EEOC Mediation Program*, U.S. EEOC (2003), <http://www.eeoc.gov/eeoc/mediation/report/study3/index.html> ("Another way to change the employer perception of the merits of the charge may be to allow the charge investigation to proceed and offer mediation at a later point.").

273. See U.S. EEOC, *EEOC Mediation Statistics FY 1999 Through FY 2012*, http://www.eeoc.gov/eeoc/mediation/mediation_stats.cfm; U.S. EEOC, *Charge Statistics FY 1997 Through FY 2013*, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

274. See Hirsh, *supra* note 53, at 243-46; U.S. EEOC, *The Charge Handling Process*, *supra* note 53. Note that an employee may also or instead file a charge with the state

months, and the investigator will issue a request for information to obtain statement positions and all relevant policies, files, and documents from both parties.²⁷⁵ Indeed, the EEOC has broad investigative and subpoena authority to request any documents “in the possession or under the control of the person subpoenaed,” to interview witnesses of all kinds, and to visit the workplace.²⁷⁶

Yet the EEOC’s authority during the investigation process is underutilized by many plaintiffs. Not all claims are provided the same depth of investigation, based on an assessment of the strength of the charge at intake: one study estimated that as a result of “priority charge handling” procedures, only twenty percent of cases received deep investigation, while another sixty percent received moderate investigation.²⁷⁷ Moreover, an employee has the right to request that the EEOC close the case and issue a right to sue letter prior to completing its investigation.²⁷⁸ Because opinions about the efficacy of the EEOC’s investigations vary, some plaintiffs’ attorneys opt not to engage in the investigatory process and simply obtain a right to sue letter to pursue the case in court on their own.²⁷⁹

The EEOC’s investigatory process is a second area in which plaintiffs’ attorneys and the EEOC can take affirmative steps to limit the damage that may be caused by *Twombly* and *Iqbal*. Plaintiffs’ attorneys who generally opt not to engage with the investigation could work more actively with their assigned investigators to put the EEOC’s resources to use developing enough facts early on to allow them to draft a complaint that clearly meets the new “plausibility” pleading standard. The EEOC could focus on helping their investigators understand what the law now requires and ensure that they are helping employees meet the challenge of new pleading standards, should its investigation result in a finding that discrimination may have occurred.

Fair Employment Practices Agency (FEPA), which may conduct its own investigation pursuant to a worksharing agreement with the EEOC. See, e.g., Lisa M. Durham Taylor, *Untangling the Web Spun by Title VII’s Referral and Deferral Scheme*, 59 CATH. U. L. REV. 427 (2010); U.S. EEOC, *FY 2012 EEOC/FEPA Model Worksharing Agreement*, http://www.eeoc.gov/employees/feпа_wsa_2012.cfm. A full discussion of state FEPAs’ roles in this process is beyond the scope of this Article.

275. See U.S. EEOC, *The Charge Handling Process*, *supra* note 53.

276. See 29 C.F.R. § 1601.15-17 (2014).

277. See Hirsh, *supra* note 53, at 243-47; see also Paul M. Igasaki & Paul Steven Miller, *U.S. EEOC, Priority Charge Handling Task Force, Litigation Task Force Report* (Mar. 1998), http://www.eeoc.gov/eeoc/task_reports/charge_handling.cfm.

278. See 42 U.S.C. § 2000e-5(f)(1) (2012); U.S. EEOC, *Filing a Lawsuit*, *supra* note 22.

279. See, e.g., Selmi, *The Value of the EEOC*, *supra* note 2, at 12, 40 (noting the significant proportion of plaintiffs who request right to sue letters).

3. Establish Public-Private Partnerships for Systemic Cases

Lastly, in light of *Wal-Mart v. Dukes*, the ability of the EEOC to pursue systemic discrimination claims on behalf of a class without having to meet Rule 23, *whether the EEOC initiates or intervenes* in the case, offers a unique opportunity for an enforcement partnership. The EEOC has recently identified pursuing systemic litigation as an agency priority.²⁸⁰ And the EEOC already co-counsels a small number of cases each year with private counsel: one EEOC report identified that, between 1993 and 1998, the EEOC intervened in, on average, six cases per year.²⁸¹ In a recent study of cases litigated by the EEOC in the decade between 1997 and 2006, Professors Margo Schlanger and Pauline Kim identified that only about 9% were “systemic” cases.²⁸² Their dataset showed the EEOC intervening in only 0.5% (11 of 2316) of cases, but plaintiffs hiring their own counsel who intervened in the EEOC’s case in 31 percent (718 of 2316 cases).²⁸³ Thus, there is both an existing model of, and significant room for an increase in, collaborative co-counseling by the EEOC and private plaintiffs’ attorneys, particularly for systemic cases.

The EEOC could consider establishing a more formal relationship with select private plaintiffs’ counsel whom the agency preapproves to co-counsel systemic cases. By partnering with select private attorneys to co-counsel systemic cases, the EEOC could spread its existing litigation resources exponentially, staffing many more systemic cases more leanly. Co-counseling would also allow private plaintiffs’ attorneys some protection from the increased financial risk of pursuing class actions under a narrowed Rule 23 by avoiding the Rule altogether. This “super-hybrid” form of enforcement would go beyond deputizing private attorneys to act on their own, instead fusing public and private enforcement resources—and their relative advantages.

For such a partnership to work if the EEOC seeks to intervene in a class case filed by a private attorney, the agency must meet the requirements of Fed-

280. See U.S. EEOC, *Strategic Enforcement Plan FY 2013-2016*, at 7, <http://www.eeoc.gov/eeoc/plan/upload/sep.pdf>; U.S. EEOC, *Strategic Plan for Fiscal Years 2012-2016*, at 19 http://www.eeoc.gov/eeoc/plan/upload/strategic_plan_12to16.pdf.

281. See Igasaki & Miller, *supra* note 277 (“During the past five years, the Commission has approved no more than 30 interventions. At the beginning of June 1997, only seven of the nearly 350 Commission lawsuits were based on interventions.”); see also Outten & Hoffman, *supra* note 264, at 619 (describing how the EEOC’s involvement in co-counseled cases ranges from the “EEOC steer[ing] the litigation” or “sharing the load equally” to “plaintiffs’ attorneys tak[ing] the lead role, with the EEOC lending its name and resources”).

282. Margo Schlanger & Pauline Kim, *The Equal Employment Opportunity Commission and Structural Reform of the Workplace*, 91 WASH. U. L. REV. 1519, 1541 (2014).

283. Data and a description of their data set are available at EEOC Litigation Project, <http://eeoclitigation.wustl.edu>, and by downloading “Date Codebook” (for an explanation of variables) and “Master” under “Data Downloads,” and comparing variables 37 “eeocIntervened” and 39 “plaintiffPrivCounsel.”

eral Rule of Civil Procedure 24 and its enforcement authority under Title VII—which it has done regularly in the cases it has co-counseled in the past.²⁸⁴ These requirements are not steep, but do ensure that the EEOC has a meaningful role in each systemic case rather than just providing a “rubber stamp” designed to do an end-run around Rule 23. Under Rule 24, the EEOC may move for permissive intervention, which a court may allow for a government agency “if a party’s claim or defense is based on . . . a statute or executive order administered by the officer or agency; or . . . any regulation, order, requirement, or agreement issued or made under the statute or executive order.”²⁸⁵ So long as the EEOC’s motion is timely and does not “unduly delay or prejudice the adjudication of the original parties’ rights,” the intervention may be granted.²⁸⁶ (Should the EEOC initiate the systemic case, a private plaintiff on whose EEOC charge the case is based can also intervene as a matter of right under Rule 24(a).)²⁸⁷

In addition, for the EEOC to intervene in a private case, Title VII requires the agency to certify that the case is of “general public importance,” which means that the case “directly affect[s] a large number of aggrieved individuals, involve[s] a discriminatory policy or practice requiring injunctive relief, or ha[s] potential for addressing significant legal issues.”²⁸⁸ In making this certification, the EEOC will consider “[p]rivate counsel’s ability to litigate the case effectively without the Commission’s participation,” including the fact that “intervention may be appropriate if it significantly increases the likelihood of success in an important case.”²⁸⁹ By definition, a potential systemic case that now faces a steeper hurdle to class certification post-*Wal-Mart v. Dukes* meets these requirements.

4. Responses to Likely Counterarguments

As with any proposal to change an enforcement status quo, these three ideas for reviving administrative antidiscrimination law will likely face objections and legitimate practical challenges.

First, if the goal is to maintain enforcement efforts without additional funding to the EEOC, couldn’t all of these suggestions arguably be *more* demanding on existing EEOC resources? One response to this challenge is that the resources that exist are sufficient; they need only be reallocated. For example,

284. See 42 U.S.C. § 2000e-5(f)(1) (2012); see, e.g., *Billouin v. Monsanto Co.*, 162 F.R.D. 351 (E.D. Mo. 1995).

285. FED. R. CIV. P. 24(b)(2).

286. FED. R. CIV. P. 24(b)(3).

287. FED. R. CIV. P. 24(a).

288. See U.S. EEOC, Office of the General Counsel, *Regional Attorney’s Manual, Part 2.IV D. Standards for Commission Intervention in Private Actions*, http://www.eeoc.gov/eeoc/litigation/manual/2-4-d_standards_intervention.cfm.

289. *Id.*

increased mediation efforts and more rigorous investigation may result in more early case resolution and settlement, thus freeing up resources that would be spent later on in the enforcement process. Additional costs in the early stages of the EEOC administrative process could be offset by reduced costs later in the process, requiring a redistribution of existing resources rather than a net increase. Likewise, given that the EEOC has an existing budget for pursuing direct litigation, a small portion of this could be redirected to establish screening and co-counseling procedures for systemic case partnerships that would return dividends by spreading existing resources to more cases overall.

Alternatively, the EEOC could expand current or seek new means of defraying the cost of increased investigation and mediation. For investigations, the EEOC could explore increased participation of, or partnership with, investigators from state fair employment agencies, with whom the EEOC currently maintains worksharing agreements.²⁹⁰ For increased mediation efforts, the EEOC could expand relationships with law school mediation clinics to perform mediations pro bono,²⁹¹ or could consider requiring employer defendants to provide some portion of the costs of mediation—which is currently free to participants and funded entirely by the EEOC²⁹²—should the case be resolved by mediation. And, to the extent that screening for mandatory arbitration clauses and conducting more rigorous investigation help plaintiffs overcome potential challenges in court posed by *Iqbal/Twombly* and post-*Pyett* constraints on the private right of action, anticipating and resolving these challenges may make private attorneys more willing to take on individual plaintiffs' cases, thus removing them from the EEOC's caseload entirely.

Second, if the legal and legislative framework for a coordinated (as opposed to parallel) public/private hybrid enforcement system already exists, why hasn't there been significant coordination to date? The clearest response to this challenge is that, from the passage of the 1991 Civil Rights Act until 2007, there was little incentive for either public or private enforcers to combine their efforts. The EEOC could rely on private plaintiffs' attorneys to pursue most middle- and high-value enforcement cases, while focusing their efforts on public enforcement priorities and lower damages cases of underrepresented workers. Yet, as this Article documents, budget constraints and high demand on the EEOC since the recession and procedural constraints on the private right of action under the Roberts' Court have radically altered this reality, providing new motiva-

290. See 29 C.F.R. § 1601.13, 1601.15 (2014); U.S. EEOC, *FY 2012 EEOC/FEPA Model Worksharing Agreement*, *supra* note 274.

291. The EEOC has already established such relationships. See, e.g., *Mediation Clinic*, BENJAMIN N. CARDOZO L. SCH., <http://www.cardozo.yu.edu/mediationclinic>; *Mediation Clinic*, COLUM. L. SCH., web.law.columbia.edu/clinics/mediation-clinic; *Mediation Clinic*, U. PA. L. SCH., www.law.upenn.edu/clinic/mediation.

292. U.S. EEOC, *Facts About Mediation*, <http://www.eeoc.gov/eeoc/mediation/facts.cfm>; U.S. EEOC, *Fiscal Year 2014 Congressional Budget Justification*, *supra* note 101, at 29-10.

tion to combine forces. No longer can either half of the enforcement equation rely on the other to pick up the slack; a coordinated effort may now be necessary to ensure the promise of Title VII.

One concrete obstacle that public and private enforcers will need to overcome for greater co-counseling of systemic cases is agreement on any issues where their requirements and goals differ. Specifically, unlike private attorneys, the EEOC is not entitled to recover attorneys' fees when it prevails in litigation.²⁹³ Likewise, the EEOC and private plaintiffs' attorneys may place different emphasis on obtaining injunctive relief for plaintiffs and may feel differently about agreeing to a confidentiality agreement.²⁹⁴ Nevertheless, these differences are resolvable, as coordination already occurs in the small number of cases the EEOC currently co-counsels with private attorneys, which may serve as a model for future co-counseling agreements.²⁹⁵

Relatedly, cultures and reputations developed over the past two decades pose attitudinal barriers that may have hampered coordination. Depending on experiences with their local district office, some private plaintiffs' attorneys may view the EEOC as providing little help to their cases.²⁹⁶ Even worse, they may view EEOC participation as detrimental to their private lawsuits: in a handful of recent cases, the EEOC has been subject to sanctions and ordered to pay large attorneys' fees awards,²⁹⁷ and has been challenged on whether it met its statutory obligation to conciliate prior to filing suit (the legal import of which is currently pending before the U.S. Supreme Court).²⁹⁸ From the EEOC's perspec-

293. 42 U.S.C. § 2000e-5(k) (2012); Outten & Hoffman, *supra* note 264, at 617-18, 622.

294. Outten & Hoffman, *supra* note 264, at 617-18, 622.

295. *Id.*; see also Igasaki & Miller, *supra* note 277 (“[T]he General Counsel should provide specific guidance to the field on the relationship between private counsel and the EEOC in intervention actions. This could perhaps best be done by the creation of model agreements between Commission attorneys and private counsel containing standard language to be required, unless special defined circumstances exist, before intervention is authorized.”).

296. See, e.g., Selmi, *supra* note 2, at 12, 40 (noting the significant proportion of plaintiffs who request right to sue letters); see also *Written Testimony of Daniel Kohrman, National Employment Lawyers Association, Meeting of July 18, 2012—Public Input into the Development of EEOC’s Strategic Enforcement Plan*, US EEOC (July 18, 2012), <http://www.eeoc.gov/eeoc/meetings/7-18-12/kohrman.cfm> (discussing the impact of the EEOC’s policies on private plaintiffs’ attorneys).

297. See, e.g., *EEOC v. Peoplemark, Inc.*, 732 F.3d 584 (6th Cir. 2013) (upholding award of over \$750,000 in attorneys’ fees and costs to defendant employer); *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2013 WL 3984478 (N.D. Iowa 2013) (awarding more than \$4.6 million in attorneys’ fees, costs, and expenses to defendant employer); see also Engstrom, *supra* note 2, at 704-05 (discussing recent EEOC missteps).

298. See *EEOC v. Mach Mining, LLC*, 738 F.3d 171 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2872 (June 30, 2014) (No. 13-1019).

tive, some EEOC investigators and attorneys may view private plaintiffs' attorneys as primarily focused on monetary damages with little regard for ensuring injunctive relief to truly remedy discrimination.²⁹⁹ These attitudinal barriers are not insurmountable, however, as evidenced by the close cooperation of plaintiffs' attorneys and EEOC employees on the vast majority of EEOC cases pursued and the handful of cases already co-counseled each year. There is no doubt that, for plaintiffs' attorneys, submitting a case to more rigorous agency investigation and, for EEOC attorneys, co-counseling a greater portion of cases with private attorneys would require some culture change and giving up of one's enforcement "turf." These are no small issues. However, the dramatic changes in the landscape of antidiscrimination enforcement over the past seven years may provide the motivation necessary to help enforcers recognize that their similar interests outweigh any differences in their approaches.

Each suggestion proposed in this Part requires the willingness of those tasked with antidiscrimination enforcement efforts to collaborate, and calls for a closer study of costs, efficiencies, and best practices for achieving coordination. Nevertheless, these suggestions provide a starting point for how revived use of administrative procedures and public-private enforcement partnerships can mitigate the potential damage from recent Supreme Court precedent during a recessionary economy on Title VII enforcement. A combined public agency/private attorney general enforcement approach also makes the most of both mechanisms Congress provided in the design of Title VII: the EEOC's statutory enforcement authority and the individual private right of action.

CONCLUSION: PERFECTING THE VISION

When Congress passed Title VII in 1964, it did so with a hybrid enforcement scheme: the EEOC was established to set policy and provide stewardship, and individual plaintiffs were given a private right of action to enforce the statute's antidiscrimination mandate. In amending the statute throughout the decades that followed, Congress expanded the EEOC's enforcement authority slightly and enhanced incentives for private attorneys to enforce plaintiffs' rights. The EEOC has played an essential role, particularly in gatekeeping and policy guidance; yet the EEOC's enforcement capability has been severely limited by Congress's reduction of its annual operating budget. Meanwhile, employee plaintiffs and their ability to pursue private litigation in court have been crucial to enforcing the nation's antidiscrimination laws.

Over the past six years, while the U.S. economy was in a near historic recession, data indicate that inequality in the American job market was exacerbated, making antidiscrimination protections all the more important. But just as the recession affected workplaces and unemployment rates, the economic downturn also affected the EEOC directly: as a result of recessionary budget cuts, the staffing and litigation capacity of the agency appears to be at its lowest point in recent history.

299. See Schlanger & Kim, *supra* note 282, at 1583 & 1582-83 n.258.

During this same time period, the U.S. Supreme Court has made a series of procedural decisions that have significantly narrowed the private right of action provided under Title VII. In a series of cases decided between 2007 and 2013, the Court increased pleading standards, strengthened mandatory arbitration, and interpreted the rules of class certification narrowly. As the collective result of these decisions, the ability of employees to bring private enforcement actions in federal court—an ability key to the enforcement scheme of Title VII—appears to be in jeopardy.

With both public and private means for enforcing U.S. antidiscrimination law now threatened, those who enforce Title VII—the EEOC and private plaintiffs’ attorneys—should consider how they can work together to make more robust use of administrative procedures available under current law and funding availability. Combining the procedural advantages of the EEOC (which remains mostly insulated from the Court’s recent procedural decisions), with the practical advantages of the private bar (which remains free from recessionary budget caps and bureaucracy), offers a new model for ensuring enforcement. Engaging in public-private partnership and moving toward greater use of administrative antidiscrimination law can serve as a way out of this “recession” in antidiscrimination enforcement. Such a partnership can also maximize the enforcement potential of Title VII by making the most of both parts of Congress’s hybrid enforcement compromise.

