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## Federal Regulation and the Problem of Adjudication

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**FEDERAL REGULATION AND THE PROBLEM OF  
ADJUDICATION<sup>©</sup>**

MARCIA L. MCCORMICK\*

ABSTRACT

After decades of deregulation, the United States seems to be entering a period of re-regulation, regulation to prevent harm that many activities might cause and also to create positive external benefits that those activities could yield, but might not without incentives. Most regulatory programs in the United States provide a blend of measures designed to create these positive external benefits, promote good practices in the industry, prevent harms, and provide those harmed with remedies. At a time in which we contemplate new ways to regulate to deal with the crises of the day and prevent the crises of tomorrow, this Article seeks to explore one piece of the solution, a piece not usually thought of as regulatory: adjudication. Adjudication is often part of a broader regulatory web and is used both to deter harmful behavior and to remedy harmful behavior engaged in. And it is used in a variety of contexts.

To explore how we might construct federal agencies with greater adjudicatory power, I will use the regulation of equal employment opportunity as a case study. This Article analyzes the limits Article III may place on the structure of adjudicating agencies and ways those limits might be overcome. It then explains the weaknesses of the current system to enforce the antidiscrimination laws and outlines a proposal for what an adjudicative agency designed to maximize the benefits from an agency perspective might look like.

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INTRODUCTION

Calls for increased regulation are flying fast and furious these days. They are spurred by crises over the last couple of years in a relatively broad range of areas from the financial crisis, to tainted food, to defective consumer products, to consumer and worker exploitation, along with the looming new challenges like averting the worst consequences of global climate change, controlling the rise in healthcare costs, or protecting worker retirement plans as the workforce grows lopsidedly older.<sup>1</sup> Regulatory reform even has significant pop culture

1. See, for example, the widespread outbreak of E-Coli from tainted peanuts, which led to a call for increased regulation of food safety, *PBS NewsHour: Salmonella-Tainted Peanut Butter Raises Wider Health Concerns for FDA* (PBS television broadcast Jan. 23, 2009), (transcript available at [http://www.pbs.org/newshour/bb/health/jan-june09/salmonella\\_01-23.html](http://www.pbs.org/newshour/bb/health/jan-june09/salmonella_01-23.html)), and the hearings on safety problems with Toyota cars, Micheline Maynard, *U.S. Studies A Backup For Brakes*, N.Y. TIMES, Mar. 3, 2010, at B1 (reporting that at least one senator criticized the National Highway Traffic and Safety Administration for having failed to act). Similarly, some have suggested that lack of regulation, or at least a lack of action by regulators, was responsible for the crash of the mortgage market and subsequent financial crisis from late 2007 to the present. See Richard A. Posner, Op-Ed, *Our Crisis of Regulation*, N.Y. TIMES, June 25, 2009, at A23 (suggesting that regulators of the markets and banking industries “were asleep at the switch”); Catherine Rampell, *Lax Oversight Caused Crisis, Bernanke Says*, N.Y. TIMES, Jan. 4, 2010, at A1; Nelson D. Schwartz & Floyd Norris, *Reluctant Eye over Wall St.*, N.Y. TIMES, Mar. 30, 2008, at A1 (reporting on responses to allegations of regulatory failure).

And the Obama administration has proposed both regulatory changes in existing agencies, and also entirely new agencies. See, e.g., David Stout & Stephen Labaton, *Vote Backs a Financial Oversight Body*, N. Y. TIMES, Oct. 23, 2009, at B3 (describing a bill to create a new consumer financial protection agency as well as changes to existing law to strengthen regulation of banks and trade in derivatives); Press Release, U.S. Dep’t of Labor, U.S. Labor Department Rules To Improve Retirement Security Announced As Part of White House Middle Class Task

caché. The comedy website *Funny or Die* and actors from *Saturday Night Live* who had all played presidents during those presidents' administrations produced a video for The Main Street Brigade, a political consumer protection organization, in which former presidents urged President Obama to push for the Consumer Financial Protection Agency.<sup>2</sup> New agencies are rarely the stuff of sketch comedy. Meanwhile, in the background, scholars continue to study ways to regulate better and minimize any inappropriate interference with the market and with individual liberty, while promoting good policy and averting the disasters a lack of regulation can cause.

We use regulation in the United States to prevent harm that various kinds of activities might cause and also to create positive external benefits that those activities could yield, but might not without incentives. For example, we regulate the production of goods to prevent harm to the environment caused by the processes of production, to prevent harm to the consumers of those goods that use might cause, and to protect the health and safety of the workers who produce those goods.<sup>3</sup> We also regulate the production of goods to promote distribution of the benefits that flow from their production and to distribute benefits the government might have to supply instead.<sup>4</sup> So we regulate the number of hours a person can work and set a minimum level of pay.<sup>5</sup> We also regulate the ways in which companies that produce goods interact with their

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Force's Year-End Report (Feb. 26, 2010), <http://www.dol.gov/opa/media/press/ebsa/EBSA20100251.htm> (describing proposals to increase regulation of employee retirement plans); Press Release, White House, Office of the Press Secretary, Statement by the President on House Passage of the Health Insurance Industry Fair Competition Act (Feb. 24, 2010), <http://www.whitehouse.gov/the-press-office/statement-president-house-passage-health-insurance-industry-fair-competition-act> (concerning legislation to regulate the business of health insurance); *Commerce Department Proposes Establishment of NOAA Climate Service*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Feb. 8, 2010), [http://www.noaanews.noaa.gov/stories2010/20100208\\_climate.html](http://www.noaanews.noaa.gov/stories2010/20100208_climate.html) (describing the establishment of a new National Oceanic and Atmospheric Administration office to provide climate information for individuals, businesses, and communities).

And while I was writing this article, two massive reforms became law. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Affordability Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

2. *Funny or Die's Presidential Reunion*, FUNNY OR DIE, <http://www.funnyordie.com/videos/f5a57185bd/funny-or-die-s-presidential-reunion> (last visited Oct. 11, 2011).

3. See 15 U.S.C. § 2601 (2006) (stating that the conditions causing Congress to enact the Toxic Substances Control Act included humans' and the environment's exposure to chemical substances and the dangers in producing such chemicals).

4. See 29 U.S.C. § 202 (2006) (stating that Congress found, in enacting the Fair Labor Standards Act, that minimum labor conditions were necessary to maintain the "minimum standard of living necessary for health, efficiency, and general well-being of workers").

5. See *id.* §§ 206-07.

employees in a way that allows the employees to band together to better their working conditions and pay and to bring in more workers to receive the same benefits.<sup>6</sup> Finally, we provide incentives for those companies to compensate employees in ways that promote their health (by providing health insurance), guard against wage loss that might come with an inability to work (by providing disability insurance), and save for retirement.<sup>7</sup>

Most regulatory programs in the United States provide a blend of measures designed to create these positive external benefits, promote good practices in the industry, prevent harms, and provide those harmed with remedies. At a time in which we contemplate new ways to regulate to deal with the crises of the day and prevent the crises of tomorrow, this Article seeks to explore one piece of the regulatory solution: adjudication. Adjudication is used both to deter harmful behavior and to remedy harmful behavior engaged in. And it is used in a variety of contexts.

The traditional method of adjudication, using courts and the formal trial process, is rather expensive, which is one of the reasons that adjudication works as a deterrent. But that expense means that using this aspect of regulation will be less attractive. Still, it need not be. Much of our federal regulation is done by administrative agencies, created to develop expertise in the area being regulated, to regulate more effectively, and to regulate in a more cost-effective manner. Agencies could perform the adjudicatory function of regulation.

Several agencies do perform adjudicatory functions, but adjudication by agencies has not been adopted wholesale for every area of regulation because of separation of powers concerns. The Constitution places the judicial power of the United States in the judicial branch and requires that those who exercise the judicial power be given life tenure and salary protection.<sup>8</sup> Thus, while Congress has the power to create agencies to enforce the laws,<sup>9</sup> it may not have power to vest those agencies with the judicial power of the United States unless the adjudicators have life tenure and salary protection.<sup>10</sup> So to the

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6. *See* National Labor Relations Act, 29 U.S.C. §§ 151–69 (2006).

7. We create incentives through the federal tax code, for example. Health insurance premiums are not taxed to the employee but are deductible by the employer as a business expense. They are essentially a form of tax-free compensation. Retirement benefits are not taxed to the employee until the employee draws on the funds, but they are deductible to the employer immediately. For a description of this tax system, see S. REP. NO. 110-667, at 737–88, 865–89 (2008).

8. U.S. CONST. art. III, § 1.

9. *See* U.S. CONST. art. I, § 8, cl. 9; *id.* art. III, § 1.

10. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 223 (5th ed. 2007); *see also* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59, 60, 87 (1982) (finding the bankruptcy court unconstitutional because judges without life tenure had jurisdiction over inherently judicial matters without adequate supervision of Article III judges).

extent that regulation through adjudication would require an exercise of the judicial power of the United States, we may need to tread carefully.

To explore how we might construct agencies with greater adjudicatory power, I will use the regulation of equal employment opportunity as a case study. As a preliminary matter, I recognize that we don't usually talk about equal employment opportunity as something to be regulated. Instead, we use the language of rights. But this is an area in which we have used law instrumentally to change broader social norms and it focuses on how businesses operate. Making rules for the conduct of commercial activity *is* regulation, and so regulation seems an apt description of the process that we are using to prevent the harm of discrimination and to remedy the harm discrimination causes.

The regulation of employment discrimination makes a good case study for one more reason. Employment discrimination laws in the United States have not created full equality in the workplace, and, in fact, progress on that front is viewed by many as having stalled, which makes it ripe for regulatory reform. If the rules we have are not working, we need to revisit those rules. The federal government, particularly the legislative and executive branches, needs to take a more active role to vindicate the public interest, create accountability, and help promote equality in the private sector. Agency adjudication could be one tool to accomplish these goals, and it could also be used in other areas to accomplish similar goals. Thus, analyzing this area will tell us important things about the application of agency adjudication in other contexts as well.

I will begin the exploration of the problem of agency adjudication by laying out the limits Article III may place on the structure of adjudicating agencies. Then, in Part II, I will explain a bit more fully the weaknesses of the current system to enforce the antidiscrimination laws. That section will outline my proposal for what an adjudicative agency designed to maximize the benefits of adjudication from an agency perspective would look like. Part III will then discuss ways that the agency could be designed to minimize the constitutional objections while maximizing the benefits that agency adjudication is harnessed for.

## I. ARTICLE III AND AGENCY DESIGN

One reason that agency adjudication is used in only limited circumstances in the federal system is that the Constitution appears to limit the adjudicative function to judges who have life tenure and salary protection. The Constitution states,

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their

Services, a Compensation, which shall not be diminished during their Continuance in Office.<sup>11</sup>

While this language might suggest that judicial power cannot be exercised at all by a tribunal whose judges lack life tenure and salary protections,<sup>12</sup> Congress has created tribunals staffed by judges without those protections since the earliest days of this country.<sup>13</sup> The Supreme Court has validated the use of these legislative courts almost as long as they have existed.<sup>14</sup> And most scholars agree that we could not now adopt any sort of literalist interpretation of this language.<sup>15</sup>

One of the reasons that such an adoption would be impossible is that there is no bright line between adjudication of legal disputes and enforcement of the law. An adjudication could be described as the application of law to facts in a way that binds an individual with an interest at stake. But most enforcement of the law or legislative enactment requires similar application of law and policy to facts in a way that binds individuals with an interest at stake.<sup>16</sup> While some actions are easy to identify as judicial, executive, or legislative, trying to articulate that difference clearly as a functional matter can be very difficult. Take for example a decision about who should get welfare benefits. Is the decision about who is entitled to them a legislative, judicial, or executive decision? You might say that the initial rules, the decision about whether to provide benefits at all or who generally should be entitled to benefits, are purely a policy choice and legislative. Then a decision about whether a particular person meets those criteria, the application of the criteria to a specific instance, is adjudicative. But that application might just as easily be considered executive—a process necessary to the execution of the program. It might even still be seen as legislative in the sense that the ultimate question is whether the legislature intended that this person be entitled to benefits under these circumstances.

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11. U.S. CONST. art. III, § 1.

12. See CHEMERINSKY, *supra* note 10, at 223.

13. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 919–20 (1988).

14. See *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828) (holding constitutional the use of legislative courts).

15. See, e.g., Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 239 (1990); Fallon, *supra* note 13, at 916, 919.

16. See, e.g., M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 618–19 (2001); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 561 (2007); V. F. Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835, 859 (2004); David Orentlicher, *Conflicts of Interest and the Constitution*, 59 WASH. & LEE L. REV. 713, 726–27 (2002).

The difficulty of distinguishing among the judicial, legislative, and executive powers ensures that no rigid rule can be articulated to describe with precision what matters must, as a constitutional matter, be determined by the judicial branch. While in principle we describe the separation of powers as if there is a distinct line around the functions of each branch, in practice, that line is fuzzy, at best. The more federal regulation we have, the fuzzier the lines get.

And so Congress has created and the Supreme Court has approved the use of legislative courts in several areas. For the most part, their constitutionality depends on either a category of historical use, or the nature or source of the interest at stake and the level of control by an Article III court.<sup>17</sup> As a historical matter, legislative courts have been permissible for U.S. possessions or territories, regardless of the subject matter of the dispute.<sup>18</sup> Military courts, which try and punish offenses by members of the armed forces while they are in active service, have also been permissible.<sup>19</sup> Additionally, military tribunals for those engaged in war against the United States may sometimes be allowed.<sup>20</sup>

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17. Nelson, *supra* note 16, at 562–63 (distinguishing between public rights and private rights and noting the level of Article III court involvement necessary for each). Some scholars have suggested that this approach which seeks to determine the permissible jurisdiction of legislative courts by the category of right at stake is not fully accepted by the Supreme Court and lacks coherent boundaries. See, e.g., RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 332–33 (6th ed. 2009); Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2571 (1998); Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 204–05 (1983); Richard B. Saphire & Michael E. Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era*, 68 B.U. L. REV. 85, 111–20 (1988). Professor Nelson demonstrates the underlying logic in historical terms and explains its continuing vitality in the Court's jurisprudence, however. See Nelson, *supra* note 16.

18. CHEMERINSKY, *supra* note 10, at 224–29. Nelson suggests that the reason for this is that the territorial courts do not exercise the power of the “whole” United States, but only the power of their territory. Nelson, *supra* note 16, at 575–76.

19. CHEMERINSKY, *supra* note 10, at 230–33.

20. *Id.* at 233–36; see *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (holding that a military commission could try German nationals for war crimes in Germany without any Article III oversight); *Ex parte Quirin*, 317 U.S. 1 (1942) (allowing a military tribunal to try German saboteurs in the United States for violations of the law of war). Most recently, Congress created a military commission to try those held outside of the United States for terrorism or aiding terrorism. Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, title X, §108, 119 Stat. 2739, 2740–44; Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600. The Supreme Court has held most recently that military detainees must have access to Article III courts to challenge their detention, or the military tribunal must provide most of the key due process protections that are available in federal courts. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2274 (2008) (holding that the procedures provided by the Detainee Treatment Act are not a sufficient substitute for habeas corpus relief in an Article III court and that the Article III review was insufficient).



Aside from these special courts, traditionally, Congress could create legislative courts to adjudicate what are considered to be public rights.<sup>21</sup> Public rights are those created by the federal government or held by the federal government in trust for the benefit of all of us.<sup>22</sup> Expenditures of money from the public treasury, or entitlements, are classic examples.<sup>23</sup> Thus, public rights disputes usually involve non-criminal disputes between the government and private parties in which core private rights of life, liberty, and property are not at stake.<sup>24</sup>

The logic behind this principle was that where Congress has the discretion to create the substantive right, it has the ability to shape that right, and to allow it to be abrogated by congressional action without direct judicial oversight.<sup>25</sup> Similarly, where Congress has created a right, it has the discretion to allow (or not allow) parties to sue the government over that right, and having allowed that, may dictate what shape that litigation must take.<sup>26</sup>

Contrasted with these public rights disputes are private right disputes. Private rights include core rights to life, liberty, and property, but more broadly, those rights held by individuals, and not by the public at large.<sup>27</sup> Your average tort case is a private right dispute, involving two private parties, concerning a right established by common law or state statute, and seeking liability and damages for past acts.<sup>28</sup> Disputes over private rights “lie at the

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21. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69–70, 70 n.24 (1982) (plurality opinion).

22. *See Nelson*, *supra* note 16, at 566.

23. *Id.* at 570.

24. *Id.* at 569–72; *see N. Pipeline*, 458 U.S. at 70 n.24 (plurality opinion).

25. *See Nelson*, *supra* note 16, at 570–72; *see also, N. Pipeline*, 458 U.S. at 80–81 (plurality opinion) (determining that Congress has the power, upon creating a substantive federal right to prescribe the manner of adjudicating that right).

26. *See Nelson*, *supra* note 16, at 582–84; *see also N. Pipeline*, 458 U.S. at 80 (plurality opinion) (“[Congress] possesses substantial discretion to prescribe the manner in which that right may be adjudicated . . .”). Even when a plaintiff had a core private right at stake—where a person sued to redress an injury to liberty or property—the matter could be handled without judicial involvement because the government itself had not actually injured the person, but was simply indemnifying the government official who had. *Nelson*, *supra* note 16, at 584. This rationale is in line with sovereign immunity jurisprudence more generally. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 388 (1971) (implying a private right of action to sue federal officials for injuries caused in violation of federal law or the Constitution); *Ex parte Young*, 209 U.S. 123, 155–56, 167 (1908) (holding that a state official could be sued for prospective injunctive relief for violations of the law because the state itself could not violate the law); *cf. Monroe v. Pape*, 365 U.S. 167, 187 (1961) (holding that government officers could be sued for damages for injuring a person in violation of federal law or the Constitution), *overruled on other grounds by Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

27. *Nelson*, *supra* note 16, at 567.

28. *See N. Pipeline*, 458 U.S. at 69–70 (plurality opinion).

core of the historically recognized judicial power.”<sup>29</sup> Thus, these disputes require significant oversight by an Article III court.<sup>30</sup> Still, even where private rights are at stake, non-Article III actors can exercise significant adjudicatory power.<sup>31</sup>

In addition to the type of interest at stake, the legitimacy of political branch adjudication depends on the manner and extent to which the non-judicial actor can bind individuals. This depends on two things: (1) whether the agency action is forward or backward looking; and (2) whether the non-judicial actor’s decision is self-executing.

Congress has significantly broader power to create obligations reaching into the future and very little power to attach new consequences to past acts.<sup>32</sup> It is primarily the judiciary that has the latter power. Thus, litigation about the amount of social security benefits a person might be entitled to in the future can take place entirely in a legislative court, but challenges to the constitutionality of an action taken by the Social Security Administration might need more oversight by an Article III court.

Whether the non-judicial actor’s decision is self-executing is really more of a mechanism for ensuring a goodly amount of Article III court supervision. If the prevailing party needs to take the agency’s decision to a federal court in order to have the decision enforced, that court will be able to review the grounds of the decision, the processes followed to reach it, and the evidence before the decision maker. This process may allow more reaching review by the federal judiciary than ordinary administrative or appellate review, in which the courts are often required to be very deferential to fact-finding,

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29. *Id.* at 70 (plurality opinion).

30. *Id.* at 77 (plurality opinion). The extent of that oversight has been the subject of much scholarly debate. *See, e.g.*, Fallon, *supra* note 13 (proposing that appellate review by Article III courts be sufficient on something of a sliding scale depending upon the interests at stake); Nelson, *supra* note 16, at 609–13 (summarizing the current state of the law classifying whether Article III oversight is necessary and to what extent based on the type of right at issue); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 689–97 (2004) (arguing that the Supreme Court must have some sort of oversight over agency adjudication); Redish, *supra* note 17, at 208–09, 226–27 (arguing that matters listed in Article III section 2 must get fairly searching review in an Article III court); Saphire & Solimine, *supra* note 17, at 139–44 (arguing that ordinary administrative review with de novo review of the law and something like substantial evidence review of the facts must be available in an Article III court for any agency adjudication).

31. *See* Nelson, *supra* note 16, at 625 (discussing how Congress and the Executive do not need to use “judicial” power to adjudicate many private interests).

32. *See* Nelson, *supra* note 16, at 562, 595–98; *see also* Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1023–27 (2006) (discussing the prohibition of retroactive legislation on private rights).

interpretation of the law, and application of the law to the facts.<sup>33</sup> Additionally, if Article III courts have supervisory authority over the non-judicial actor, they will have even more control over the content of the decision.

While these lines on the nature of the right at stake and the manner in which relief is provided are helpful, the most recent Supreme Court decisions on the issue have not focused on them as explicitly as it had previously. A bit of history here might be helpful.

#### A. *The Supreme Court's Article I Adjudication Decisions*

The Court has several times considered cases in which non-Article III actors have been given the power to adjudicate, or to participate in the adjudication, of what have traditionally been considered private right claims—claims of life, liberty, or “old” property, which include property rights long recognized in tangible and intangible things, as opposed to “new” property, which refers to governmental entitlements, services, and licenses.<sup>34</sup> And while these cases do allocate particular matters and types of decisions to Article I decision makers or Article III decision makers by considering the factors laid out above, a more detailed analysis of the cases reveals the nuances of those factors and how they interact.

##### 1. *Crowell v. Benson*: Setting the Stage

In the first of these cases to go beyond the traditional categories, *Crowell v. Benson*, the Court was asked to consider whether an administrative agency could be given the power to decide workers' compensation disputes for workers injured in maritime accidents.<sup>35</sup> Such workers were not covered by state workers' compensation laws because maritime accidents were covered by maritime law, and thus, exclusively federal.<sup>36</sup> The agency actor, the deputy

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33. See, e.g., *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2529–30 (2007) (applying the deferential “arbitrary and capricious” standard to an Environmental Protection Agency action).

34. The label and analysis of this new kind of property comes from Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964). Both Professors Fallon and Nelson have recognized that old and new property have been treated differently by the Court in this area, with adjudication of rights related to new property receiving less Article III involvement. See Fallon, *supra* note 13, at 952, 966–67 (using the term “right” to talk about things generally considered old property and the term “privilege” to talk about at least some new property and arguing, however, that the distinction between rights and privileges has been eroded and many privileges should get greater Article III court protection); Nelson, *supra* note 16, at 606; see also Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 *J. LEGAL STUD.* 3, 11–13 (1983) (discussing Reich's approach).

35. 285 U.S. 22, 37 (1932).

36. See *id.* at 37–41.

commissioner of the United States Employees' Compensation Commission, was empowered to hold hearings and decide whether compensation was owed under the terms of the statute and if so, in what amount.<sup>37</sup> The deputy commissioner's order was self-executing, in the sense that it was final; it could be set aside on application to a federal district court within thirty days, but payment would proceed as ordered unless the federal court stayed the payment on the ground that the employer would suffer irreparable damage.<sup>38</sup> The order was not wholly self-executing, in the sense that the commissioner lacked the power to compel action by an employer who refused to comply. If the employer refused to comply, the beneficiary of an award had to apply for enforcement to a federal district court, which would decide whether the order "was made and served in accordance with law" and which would issue a mandatory injunction if it was.<sup>39</sup>

The Court determined that this matter, "liability of one individual to another under the law as defined" was a matter of private right.<sup>40</sup> But that fact alone did not mean that all matters related to the decision-making process be handled by an Article III judge.

[I]n cases of that sort, there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges. . . . In cases of equity and admiralty, it is historic practice to call to the assistance of the courts, without the consent of the parties, masters and commissioners or assessors, to pass upon certain classes of questions, as, for example, to take and state an account or to find the amount of damages. While the reports of masters and commissioners in such cases are essentially of an advisory nature, it has not been the practice to disturb their findings when they are properly based upon evidence, in the absence of errors of law, and the parties have no right to demand that the court shall redetermine the facts thus found.<sup>41</sup>

Moreover, the scope of the agency's jurisdiction was quite narrow, "confined to the relation of master and servant, and the method of determining the questions of fact, which arise in the routine of making compensation awards to employees under the Act, is necessary to its effective enforcement. The Act itself . . . establishes the measure of the employer's liability . . ."<sup>42</sup> The agency's function was rather mechanical, and tightly linked to the administration of the program.

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37. *Id.* at 42–44.

38. *Id.* at 44–45.

39. *Id.* at 45.

40. *Crowell*, 285 U.S. at 51.

41. *Id.* at 51–52 (footnote omitted).

42. *Id.* at 54.

Thus, for at least some kinds of cases, non-judicial decision makers can be used by the Article III court to manage litigation and do a preliminary finding of facts, which judges need review only to gauge whether they are “based on evidence” and made in the absence of errors of law. In other words, administrative adjudicators can decide what really happened in the underlying dispute. But the effects of that decision go one step further. At least for fact-intensive questions, administrative adjudicators get to decide, or at least get the first stab at, what the end result of the dispute should be upon application of the law they are charged with enforcing to these facts.

The Court did place some limitations on the kinds of decisions that would receive this much deference. Questions related to the validity of the statute being enforced, its constitutionality, for example, or whether the statute applied to the situation at issue, had to be determined by the Article III court *de novo*.<sup>43</sup> The mechanism of review for these types of decisions, a suit in equity, ensured that parties could plead and prove with evidence before the district court that the statute was invalid or did not apply.<sup>44</sup>

The Court applied the reasoning in *Crowell* to validate the use of magistrates, non-Article III judges, in dispositive matters in criminal cases, which are also private rights matters because they involve rights to life and liberty, in *United States v. Raddatz*.<sup>45</sup> The mechanism of review of magistrate decisions is even more direct: a magistrate issues a report and recommendation on the matter to be decided, and the district court decides how much weight to give, if any, to any part objected to by a party.<sup>46</sup> The district court judge can receive further evidence or send the matter back to the magistrate with instructions.<sup>47</sup> Moreover, the control of the case as a whole is more direct—the case is filed with the district court, and the district court judge decides whether to refer particular matters to a magistrate, or the parties can consent to having a magistrate conduct the proceedings and enter final orders.<sup>48</sup> Additionally, the control of the magistrates themselves is within the judicial branch: Article III judges appoint magistrates for fixed terms and set their salaries.<sup>49</sup>

## 2. *Northern Pipeline*: Stumbling Towards a Test

The Court invalidated adjudication by non-Article III decision makers in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, which struck

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43. *See id.* at 60–63.

44. *Id.* at 46, 63–64.

45. 447 U.S. 667, 682–83 (1980).

46. *Id.* at 673–74 (quoting 28 U.S.C. § 636(b)(1)).

47. *Id.* at 674 (quoting 28 U.S.C. § 636(b)(1)).

48. *See* 28 U.S.C. § 636 (2006).

49. *Id.* §§ 631, 634.

down the Bankruptcy Act of 1978.<sup>50</sup> That Act created a system of bankruptcy judges to adjudicate all civil proceedings arising under the bankruptcy title or “arising in or related to cases under title 11.”<sup>51</sup> That broad grant meant that the bankruptcy judge could hear a wide variety of claims:

suits to recover accounts, controversies involving exempt property, actions to avoid transfers and payments as preferences or fraudulent conveyances, and causes of action owned by the debtor at the time of the petition for bankruptcy. The bankruptcy courts can hear claims based on state law as well as those based on federal law.

The judges of the bankruptcy courts are vested with all of the “powers of a court of equity, law, and admiralty,” except that they “may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment.” In addition to this broad grant of power, Congress has allowed bankruptcy judges the power to hold jury trials, to issue declaratory judgments, to issue writs of habeas corpus under certain circumstances, to issue all writs necessary in aid of the bankruptcy court’s expanded jurisdiction, and to issue any order, process or judgment that is necessary or appropriate . . . .<sup>52</sup>

The decision yielded no majority opinion, but a majority of the judges held that allowing non-Article III decision makers such broad jurisdiction over inherently judicial matters, particularly state law matters, and such broad powers to act without supervision, in the sense of prior approval or searching review, by Article III courts violated Article III and the principle of separation of powers.<sup>53</sup> The plurality’s opinion focused on the traditional categories in which legislative courts had been recognized, stated that those categories should not be expanded, and would have found that this delegation was unconstitutional because it did not fit any of the traditional categories.<sup>54</sup> The concurrence did not agree that the categorical approach urged by the plurality was a wholly accurate summary of prior cases, but did agree that more Article III oversight was necessary.<sup>55</sup>

### 3. *Thomas v. Union Carbide and Commodity Futures Trading Commission v. Schor*: Converging on an Approach

The two most recent cases the Supreme Court has decided were very similar to each other and related to areas heavily regulated by federal law: the licensing and labeling of pesticides and the regulation of the commodities

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50. 458 U.S. 50, 87 (1982).

51. *Id.* at 54 (emphasis omitted) (quoting 28 U.S.C. § 1471(b) (Supp. 1976)).

52. *Id.* at 54–55 (footnote omitted) (citations omitted).

53. *Id.* at 73–76, 83–87 (plurality opinion); *id.* at 91–92 (Rehnquist, J., concurring).

54. *Id.* at 63–64, 70–76 (plurality opinion).

55. *N. Pipeline*, 458 U.S. at 91–92 (Rehnquist, J., concurring).

markets.<sup>56</sup> The statute at issue in *Thomas v. Union Carbide Agricultural Products* allowed companies seeking to register a pesticide to piggyback on a prior company's research to demonstrate the health, safety, and environmental effects of the product.<sup>57</sup> The follow-on company had to pay compensation to the initial company, and the statute created a system of binding arbitration, with very limited review in the federal courts, to determine the appropriate level of compensation.<sup>58</sup> Several companies that had done initial research and that felt the compensation awarded was too low challenged the system, arguing that decisions about their rights to property had to be made with much more involvement by Article III courts.<sup>59</sup>

The Supreme Court disagreed, however. The Court rejected the argument that any dispute between private parties was automatically a "private rights" dispute or that the right to compensation was a state common law right.<sup>60</sup> While there may be some private right characteristics in the statutory right to compensation—the initial company might be said to have some type of property right in its research—the statutory right also had public right characteristics—use of the data serves the public purpose of safeguarding public health.<sup>61</sup> Additionally, there had never actually been a recognized property right in this type of information. While there is a property right in research that falls under trade secrets doctrine, that right exists only while the information is kept secret.<sup>62</sup> Because the research had to be disclosed to the agency for the pesticides to be sold to the public, the research was no longer secret, and no common law or state statute recognized a property interest in that information any more.<sup>63</sup> Moreover, underlying this reasoning was broader context—the system regulating the sale of these dangerous chemicals: there was no freestanding unfettered property right to sell products potentially dangerous to the public health and the environment. In other words, there was an *ex ante* barrier to the sale in the first place.<sup>64</sup>

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56. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 835–36 (1986); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 571 (1985).

57. *Thomas*, 473 U.S. at 571.

58. *Id.* at 573–74. The federal courts could review the arbitrator's findings and determination only for fraud, misconduct, or misrepresentation. *Id.* They also could review any constitutional challenges, however. *Id.* at 592.

59. *Id.* at 584–85.

60. *Id.* at 584–86.

61. *Id.* at 589.

62. *Thomas*, 473 U.S. at 584.

63. *Id.*

64. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1020 (1984) (analyzing the statutes at issue and holding the Federal Insecticide, Fungicide, and Rodenticide Act not to constitute an uncompensated taking that would violate the Fifth Amendment).

Resolving the issue, the Court held that “Congress . . . may create a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.”<sup>65</sup> The import of the Court’s ruling might also be to suggest that if there would be no right but for Congress’ creation, the right/privilege distinction highlighted by Professors Fallon and Nelson,<sup>66</sup> then there is no right sufficiently private, or no matter inherently judicial enough, to require extensive Article III involvement.

In the most recent case on the subject, *Commodity Futures Trading Commission v. Schor*,<sup>67</sup> the statute at issue also related to a field highly regulated by Congress, with ex ante barriers to entry, but the issue that could be decided by the non-Article III decision maker was not quite as narrow. The Commodity Futures Trading Commission (“CFTC”) had jurisdiction to adjudicate claims brought by customers against brokers for violations of the Commodity Exchange Act or the CFTC’s regulations.<sup>68</sup> There was also a permissive counterclaim regulation: the CFTC could adjudicate counterclaims, including state law counterclaims, arising out of the transactions or occurrences set forth in the complaint.<sup>69</sup> The jurisdiction over counterclaims was not exclusive; the counterclaim did not have to be raised in this proceeding, but could be raised in other fora.<sup>70</sup> And the final agency decision was subject to review in federal circuit court, but the review was ordinary administrative review, not very searching.<sup>71</sup>

A customer brought an action within the CFTC against his broker, alleging that a debit balance in his account was caused by the broker’s violations of the Act.<sup>72</sup> The broker brought a diversity action in federal district court seeking to recover that debit balance, and the customer counterclaimed that the debit was caused by the violations of the Act.<sup>73</sup> The customer twice moved in the federal court to stay or dismiss the action as duplicative of the CFTC proceedings, and so the broker voluntarily dismissed the district court action and brought the action to recover the balance as a counterclaim to the customer’s agency action.<sup>74</sup> When the customer lost, he challenged the agency’s decision, and the Court of Appeals, *sua sponte*, raised the question of whether the CFTC’s

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65. *Thomas*, 473 U.S. at 593–94.

66. Fallon, *supra* note 13, at 966–67; Nelson, *supra* note 16, at 566–67.

67. 478 U.S. 833 (1986).

68. *Id.* at 836.

69. *Id.* at 837.

70. *Id.*

71. *See id.* at 838–39.

72. *Schor*, 478 U.S. at 837.

73. *Id.* at 837–38.

74. *Id.* at 838.



jurisdiction over the counterclaim, which arose under state law, was constitutional.<sup>75</sup>

Unlike in *Thomas*, the right at stake for the customer and for the broker was a traditional common law right, and the Supreme Court recognized that the “private rights” nature of the counterclaim was significant to the analysis.<sup>76</sup> However, the Court held that the private rights nature of the claim was not determinative.<sup>77</sup> Article III is not solely concerned with protecting the private rights of individuals<sup>78</sup> in the Court’s view; rather Article III seeks to protect the interests of the judicial branch itself, reserving the judicial branch’s appropriate structural role as a check on the executive and legislative branches, and only to a lesser extent does Article III protect individual rights, primarily through those same checks.<sup>79</sup>

With this structural interest as the touchstone, the Court established a combination balancing and threshold test to take account of those two interests. The balancing part requires a court to look to the scope of the agency’s jurisdiction.<sup>80</sup> When agency adjudication is subject to ordinary review, it will be constitutional as long as the subject-matter jurisdiction of the agency does not encroach too far into the regular work of the judicial branch.<sup>81</sup> And the threshold test focused on the individual right to an independent judiciary.<sup>82</sup> As long as the parties consented to adjudication before the agency, then this right would not be injured.<sup>83</sup>

Applying the new test to the case before it, the Court upheld the CFTC’s decision.<sup>84</sup> Because the CFTC’s jurisdiction over state law counterclaims was very narrow—those claims had to arise in connection with commodities brokerage accounts, an area of law that was highly regulated by Congress—the power to adjudicate the claims did not encroach very far into the regular work of the judicial branch.<sup>85</sup> And because the parties consented to having the agency adjudicate the claim, they had waived any individual interest they may have had in having an Article III court adjudicate the claim.<sup>86</sup>

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75. *Id.* at 838–39.

76. *Id.* at 853.

77. *Schor*, 478 U.S. at 853, 855–57.

78. For a discussion of the personal right to an independent judicial forum, see *id.* at 848–50.

79. *Id.* at 848, 850–52.

80. *Id.* at 851.

81. *Id.* at 851–52.

82. *Schor*, 478 U.S. at 848–49.

83. *Id.* at 849–50.

84. *Id.* at 857.

85. *Id.* at 852–53.

86. *Id.* at 849–50.

### B. *Synthesizing the Whole Mess*

Thus, there are a number of lines that need to be drawn to map out the appropriate role for an administrative agency in any kind of enforcement scheme, any one of which could be the starting point for analysis. First, assuming no concurrent jurisdiction, which is likely relatively rare, what are the mechanism and scope of Article III courts' control over the agency process? Non-judicial determinations that require some kind of positive action in the federal court or direct appeal as of right with de novo review will tend to provide the most oversight of the process for decision. At the same time, the courts provide a mechanism for waiver of that review, essentially consent to the non-Article III adjudication, by anyone not seeking enforcement or direct appeal. Giving Article III judges supervisory control in a human resources sense will provide for even more direct oversight and will allow for corrections where infringement goes beyond the individual interests in Article III adjudication and into the structural interests of the federal courts, in *Schor's* terms. Appointments by the executive branch and ordinary administrative review, on the other hand, will provide for the least amount of oversight, and will make sense when there is little structural interest at stake.

If there is little Article III oversight, only ordinary administrative review, for example, the other question to be asked is, are the rights potentially at stake public rights or private rights? Only in private rights cases need there be Article III oversight, and even in private rights cases, non-judicial actors can decide some matters with little oversight. The amount of oversight seems to depend on the scope of the subject-matter jurisdiction and the type of private rights potentially at stake.<sup>87</sup> In all of the cases, the scope of the non-judicial actor's subject-matter jurisdiction was relevant.<sup>88</sup> The more narrow the jurisdiction, the more likely review could be deferential and the less direct need be the supervision of the non-judicial actor's day-to-day work by the Article III court. That is the structural interest the Court refers to in *Schor*.<sup>89</sup> And, the type of private right at stake also matters here. Decisions about life, liberty, and property recognized at common law need significant oversight, either because they are core private rights or because as core private rights, they are inherently judicial matters and taking them from the courts will work a substantial institutional injury.

Another way to look at the public or private rights distinction is whether the contemplated agency action is forward looking or backward looking. A determination of liability, looking backward on past acts, is more likely to impact a private right and requires significant Article III involvement. A cease

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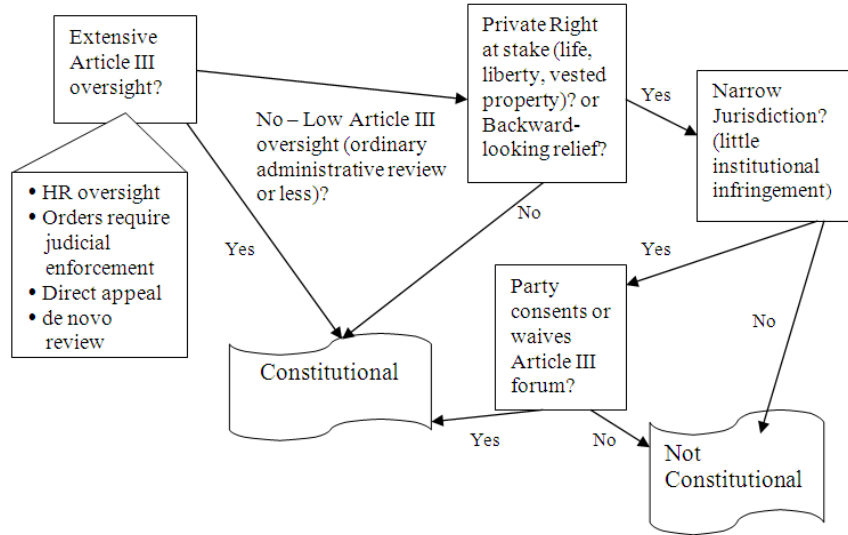
87. See *Schor*, 478 U.S. at 853–54.

88. See *supra* notes 53, 80–81 and accompanying text.

89. See *supra* note 79 and accompanying text.

and desist order limiting permissible conduct in the future is essentially just like Congress declaring a particular practice to be impermissible now and into the future, and thus, requires much less Article III oversight.<sup>90</sup> It also, in most cases, won't involve any sort of private right unless the cease and desist order is so broad as to be confiscatory.

This flowchart illustrates how the analysis plays out.



With this analysis set out, we'll turn now to an explanation of why agency adjudication is a potentially attractive regulatory option in the employment discrimination context, and then apply the analysis to that context to highlight the constitutional difficulties agency adjudication might pose and the design solutions that would avoid these problems.

## II. THE CASE FOR A NEW AGENCY STRUCTURE

As I explained more fully in a prior article, two somewhat interrelated reasons that the employment discrimination laws are not as effective as they could be are what I have called the enforcement gap and the secrecy problem, both of which are caused by an overreliance on adjudication without support from other regulatory tools.<sup>91</sup> This part will explain what those problems are and how reliance on private adjudication causes them.

I will start with the enforcement gap, which simply refers to the fact that our laws prohibiting discrimination are not being fully enforced. The existence

90. See Nelson, *supra* note 16, at 596-97.

91. Marcia L. McCormick, *The Truth Is Out There: Revamping Federal Antidiscrimination Enforcement for the Twenty-First Century*, 30 BERKELEY J. EMP. & LAB. L. 193, 207-22 (2009).

of this gap is demonstrated by the failure of Title VII and the other employment discrimination statutes<sup>92</sup> to substantially eliminate employment discrimination.<sup>93</sup> Title VII of the Civil Rights Act of 1964, the main tool designed to create equality at work, has been in effect for more than forty years—more than two generations.<sup>94</sup> And while Title VII and laws patterned on it that protect additional groups have helped to make a difference for many, the United States is not yet in a position to say that it has achieved equality. In fact, scholars are becoming ever more vocal about the lack of racial and gender equality in the workforce under almost any measure: employment rates, wages, job integration, and labor force participation.<sup>95</sup> And while some people have argued that Title VII has eliminated most overt discrimination,<sup>96</sup> others have contradicted that, pointing, for example, to large class actions brought against

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92. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2006), prohibits employment discrimination on the basis of race, color, national origin, religion, and sex. *Id.* § 2000e-2(a). Several other statutes also prohibit discrimination. One such statute prohibits discrimination in contracts, including at-will employment, on the basis of race. 42 U.S.C. § 1981 (2006). The Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended in scattered sections of 29 U.S.C.), prohibits discrimination in compensation on the basis of sex. The Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–34 (2006)), prohibits discrimination on the basis of age. Similarly Title I of the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, tit. I, 104 Stat. 327, 330–37 (codified as amended at 42 U.S.C. §§ 12111–17 (2006)), prohibits employment discrimination against qualified individuals with disabilities. Sections 501 and 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, tit. V, §§ 501, 504, 87 Stat. 355, 390–91, 394 (codified as amended at 29 U.S.C. §§ 791, 794(a) (2006)), also prohibit discrimination, including in employment, against those with disabilities, but only for recipients of federal funds. Likewise, Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VI, 78 Stat. 241, 252–53 (codified at 42 U.S.C. §§ 2000d to 2000d-7 (2006)), prohibits discrimination, including in employment, on the basis of race by recipients of federal funds, and Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, § 901, 86 Stat. 335, 373–74 (codified as amended at 20 U.S.C. § 1681 (2006)), prohibits discrimination, including in employment, on the basis of gender by recipients of federal funds. Finally, the Family Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601, 2611–19 (2006)), requires that family and medical leave be provided to employees regardless of gender.

93. McCormick, *supra* note 91, at 207.

94. 42 U.S.C. §§ 2000e to 2000e-17.

95. See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 2 & nn.3 & 5–6 (2006); R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1184 (2006); Guy-Uriel E. Charles, *Toward a New Civil Rights Framework*, 30 HARV. J.L. & GENDER 353, 353–54 (2007); Rachel F. Moran, *Whatever Happened to Racism?*, 79 ST. JOHN'S L. REV. 899, 900 (2005).

96. See, e.g., *Bell & Howell Co. v. NLRB*, 598 F.2d 136, 146 n.27 (D.C. Cir. 1979) (stating that “in most instances Title VII has eliminated the more obvious and explicit forms of discrimination”); John J. Donohue III & James J. Heckman, *Re-Evaluating Federal Civil Rights Policy*, 79 GEO. L.J. 1713, 1713–14, 1729 (1991); Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 480 (1995).

big companies for expressly racist and sexist behavior.<sup>97</sup> Michael Selmi, for example, has gone so far as to label the form of discrimination alleged in these current cases “seventies-style” discrimination.<sup>98</sup> In two generations, we should have gotten past the seventies. The system is not working as well as it should.

The system does not work as well as it should because the antidiscrimination norm is unsettled, and the method of enforcing our ban on employment discrimination is not suited to work social change. For the system to work, we need greater public information and greater opportunities to work towards consensus. To accomplish that goal, I have proposed that we create a federal agency designed to make public employee and applicant allegations of discrimination, investigations of charges of discrimination, and adjudication of such claims. Additionally, because of the national public interest in removing discrimination entirely from the workplace, a federal agency with greater regulatory power must also have the power to impose sanctions on offending employers.

Although there are federal agencies with some power to enforce our laws that prohibit employment discrimination,<sup>99</sup> the primary enforcement mechanism is the *ex ante* mechanism of a private right of action for injunctive relief or damages against an employer,<sup>100</sup> and this is what has led to the enforcement gap. Private litigation is a poor enforcement tool for a number of

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97. See, e.g., Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 367–68 (2008) (noting the increase in employment discrimination class-action suits and the resulting multimillion dollar settlements); Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMP. RTS. & EMP. POL’Y J. 1, 3 (2005) (arguing that class-action discrimination suits suggest that discrimination is still present in the labor market).

98. Selmi, *supra* note 97.

99. The Equal Employment Opportunity Commission (“EEOC”) has some power to enforce our employment discrimination laws. The EEOC adjudicates claims against federal employers, and for private sector charges; it can investigate, seek conciliation, or bring an action in federal court. 42 U.S.C. §§ 2000e-5, 2000e-6, 2000e-8, 2000e-16 (2006). Employers with more than 100 employees are required to submit demographic data to the EEOC, as well, and that could lead to investigations or an action in federal court. *Id.* § 2000e-8(c); 29 C.F.R. § 1602.7 (2010). The Department of Labor’s Office of Contract Compliance Programs can require employers not to discriminate as a condition of accepting a contract with the federal government. See U.S. COMM’N ON CIVIL RIGHTS, *FUNDING FEDERAL CIVIL RIGHTS ENFORCEMENT: THE PRESIDENT’S 2006 REQUEST* ch. 3 (Sept. 2005), available at <http://www.usccr.gov/pubs/crfund06/crfund06.pdf>. As part of that power, it can enforce those contractual provisions by conducting compliance evaluations and complaint investigations, obtaining conciliation agreements, monitoring contractors’ progress through periodic compliance reports, recommending enforcement actions to the Solicitor of Labor, and debarring a company’s federal contracts plus obtaining backpay and other relief for employees. *Id.*

100. See McCormick, *supra* note 91, at 205–06, 208 (contrasting the number of charges brought to the EEOC and the number of private actions brought in federal court with the number of actions filed by the EEOC).

reasons. Many employees do not know their rights or do not realize they have been discriminated against.<sup>101</sup> Many who know their rights do not pursue them; they might still be working for the employer and may fear retaliation.<sup>102</sup> They may also fear that they would be labeled a troublemaker by other employers and become essentially unemployable.<sup>103</sup> Furthermore, even where employees pursue their rights, they are rarely successful in federal court.<sup>104</sup> And even when employees are successful, the remedies imposed rarely create the kinds of structural changes that will help prevent discrimination by the employer or other employers in the future.<sup>105</sup>

Reliance on private litigation also leads to suppression of information about allegations of discrimination. I have labeled this the secrecy problem.<sup>106</sup> The secrecy problem is caused in large part by channeling disputes into tracks alternative to the public trial. Alternative dispute resolution is not a public

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101. Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 LAW & SOC. INQUIRY 801, 804–06 (2006) (reporting that many people do not accurately perceive when they have been discriminated against).

102. Sally Riggs Fuller, Lauren B. Edelman & Sharon F. Matusik, *Legal Readings: Employee Interpretation and Mobilization of Law*, 25 ACAD. MGMT. REV. 200, 208 (2000) (summarizing literature).

103. Nantiya Ruan, *Bringing Sense to Incentives: An Examination of Incentive Payments to Named Plaintiffs in Employment Discrimination Class Actions*, 10 EMP. RTS. & EMP. POL'Y J. 395, 396–97, 410–11 (2006); see also KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS 26–29 (1988) (reporting on a 1980 study by the Civil Litigation Research Project).

104. For example, few cases go to trial. E.g., Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 120 (1999) (suggesting that only ten percent of employment discrimination cases go to trial); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 440–41, 444 (2004) (suggesting that seventy percent of employment discrimination cases settle and plaintiffs win just over four percent of pretrial adjudications). When they do go to trial, few cases are resolved in favor of employees. Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 556–58, 566 (2003) [hereinafter Clermont et al., *How Employment-Discrimination Plaintiffs Fare*] (finding that cases decided in favor of plaintiffs are six times more likely to be reversed than those found in favor of defendants); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 283–84, 309 (1997) [hereinafter Selmi, *Proving Discrimination*] (arguing that meritorious cases are lost or reversed on appeal); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 558, 560 (2001) [hereinafter Selmi, *Hard to Win*] (asserting that employers prevail in ninety-eight percent of federal court employment discrimination cases resolved at the pretrial stage).

105. Levit, *supra* note 97, at 371, 379–80, 385; Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Litigation and Its Effects*, 81 TEX. L. REV. 1249 (2003) (documenting how class actions fail to affect shareholder price or real management change in most cases).

106. McCormick, *supra* note 91, at 209–11, 214–22.

process, and resolutions are often kept confidential or at least not made public.<sup>107</sup> The secrecy problem is related to the reliance on litigation to enforce the employment discrimination laws. Because of the expense of traditional litigation, many employers look to alternative methods to resolve disputes.<sup>108</sup> One of these methods has been mandatory, binding arbitration, in which the parties agree before any dispute has arisen to waive any right to go to court and instead to use an arbitral forum. In the mid-nineties, the Supreme Court endorsed pre-dispute arbitration agreements to resolve discrimination claims,<sup>109</sup> and many employers have required employees to agree as a condition of employment to arbitrate any future disputes.<sup>110</sup> Mandatory pre-

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107. See Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 17 (1987); Laura Macklin, *Promoting Settlement, Foregoing the Facts*, 14 N.Y.U. REV. L. & SOC. CHANGE 575, 601, 608–09 (1986).

108. See Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 668–69 (1986).

109. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991). The Court recently confirmed that individual employees not only could be required to arbitrate their statutory disputes as a condition of employment, but also that a union could waive individual employees' rights to bring a statutory claim in court and agree to arbitration instead. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1469–70, 1474 (2009).

110. Several studies have been conducted to try to gauge how many businesses have adopted mandatory arbitration. Those surveys reflected that by the late 1990s and early 2000s, approximately fifteen percent of companies had adopted mandatory arbitration. Alexander J.S. Colvin, *From Supreme Court to Shopfloor: Mandatory Arbitration and the Reconfiguration of Workplace Dispute Resolution*, 13 CORNELL J.L. & PUB. POL'Y 581, 588 (2004) [hereinafter Colvin, *Mandatory Arbitration*] (reporting on several surveys); see also KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 189 (2004) (noting that as of 2004, the number of employees covered by mandatory arbitration agreements equaled the number covered by collective bargaining agreements). A mid-1990s United States General Accounting Office survey suggested almost all firms with 100 or more employees used some method of Alternative Dispute Resolution ("ADR"). U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS 95-150, EMPLOYMENT DISCRIMINATION: MOST PRIVATE-SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION 7 (1995), available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=gao&docid=f:he95150.pdf> (reporting that while only about ten percent of these employers used arbitration, almost ninety percent used some form of ADR). About sixty-four percent of the workforce is employed by employers this size or larger. See *Statistics of U.S. Businesses*, U.S. CENSUS BUREAU (2008), [http://www2.census.gov/econ/susb/data/2008/us\\_state\\_totals\\_2008.xls](http://www2.census.gov/econ/susb/data/2008/us_state_totals_2008.xls). And the larger the company, the more likely it is to have used arbitration. See Michael H. LeRoy, *Getting Nothing for Something: When Women Prevail in Employment Arbitration Awards*, 16 STAN. L. & POL'Y REV. 573, 578 n.22 (2005) (citing *Alternative Dispute Resolution: Most Large Employers Prefer ADR as Alternative to Litigation, Survey Says*, [1997] DAILY LAB. REP. (BNA) No. 93, at A4 (May 14, 1997)). The use of arbitration has increased since the late 1990s. Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J., Nov. 2003–Jan. 2004, at 44, 44. In his most recent article, Alexander Colvin suggests that nearly one quarter of the workforce is covered by pre-dispute arbitration agreements. Alexander J.S.

dispute arbitration for these statutory rights has been attacked, primarily on fairness grounds: that employees really have no choice but to agree, that employers can write the agreements to benefit themselves, and that arbitrators may be more likely to rule in favor of repeat player employers.<sup>111</sup> Such agreements have been defended with arguments that arbitration is simply a change in forum, not in the substantive law to be applied, that the process is quicker and less expensive for employees as well, and that employees are more likely to win in arbitration than in court.<sup>112</sup> The debate will keep empiricists busy for years.

It is not necessary to resolve this debate, though, to call for the solution this Article calls for. In other words, potential unfairness to individual litigants is not the only problem, and it is not the problem that this Article is primarily concerned with. The much bigger problem is that arbitration, or any other alternative form of dispute resolution the way it is currently structured, for that matter, creates a complete lack of public accountability. The law need not be followed in resolving the dispute, and the resolution is usually kept secret, or at

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Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 411 (2007) [hereinafter Colvin, *Empirical Research*].

111. See Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 403, 426 (1996); Alfred W. Blumrosen, *Exploring Voluntary Arbitration of Individual Employment Disputes*, 16 U. MICH. J.L. REFORM 249, 254–55 (1983); Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 936 (1979); Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635, 656 (1995); Lewis Maltby, *Paradise Lost—How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1, 4–5 (1994); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 682–83, 685–86 (1996) (discussing the unfairness of arbitration agreements to consumer plaintiffs).

112. See *Gilmer*, 500 U.S. at 26; Colvin, *Empirical Research*, *supra* note 110, at 414–19; Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1632–34 (2005) (describing both the level of criticism of mandatory arbitration agreements and their expansive use). Some empirical research supports the assertion that arbitration is a boon for employers at the expense of employees, Colvin, *Empirical Research*, *supra* note 110, at 414–19, 423–24, while other empirical research suggests that employees win slightly more often in arbitration than they do in litigation, but are awarded less in damages, Lisa B. Bingham, *Employment Dispute Resolution: The Case for Mediation*, 22 CONFLICT RESOL. Q. 145, 160 (2004); Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 INT'L J. CONFLICT MGMT. 369 (1995); Theodore Eisenberg & Elizabeth T. Hill, *Employment Arbitration and Litigation: An Empirical Comparison*, in ADR & THE LAW: DEVELOPMENTS IN THE LAW: 2003, at 8 (20th ed. 2006); Michael H. LeRoy, *supra* note 110, at 576–77, 589 (asserting that employees tend to win in arbitration but the value of the award is much less than what the courts offer); Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105, 114–115 (2003); Lewis L. Maltby, *The Myth of Second-Class Justice: Resolving Employment Disputes in Arbitration*, in HOW ADR WORKS 915, 921–22 (Norman Brand ed., 2002).



least not made public.<sup>113</sup> If the public cannot find out that there has been a dispute involving discrimination, what was alleged to have occurred, and what the resolution was, the public can neither ensure that the employment discrimination norm is being enforced, nor can it tell the nature of the norms that are developing—in fact, norms don't develop.

Neither the enforcement gap nor the secrecy problem would be especially problematic if the disputes we were talking about were really simply disputes between two private parties. If the injured sleep on their rights, they usually hurt only themselves. And if the injured are satisfied with a relatively quick, easy, and less expensive system of dispute resolution that needs little in the way of public resources, everyone is better off.

Employment discrimination is not solely a private dispute, however. The harm of employment discrimination reaches beyond the individual employee to the group that employee is a member of and to the public at large. Discrimination in the aggregate can create a permanent underclass, or keep one segment of the population dependent on another.<sup>114</sup> Moreover, as the recent housing market crash, massive layoffs, government stimulus plans, move for health care reform, and impending retirement savings crisis have demonstrated, our economy and social welfare system literally depend on effective functioning of the system of employment. Work is the vehicle through which we distribute money and social goods. Thus, because acts of discrimination harm the public and the public has so much at stake in labor relations in the aggregate, the public has an interest to be vindicated in the enforcement

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113. See Brunet, *supra* note 107, at 17; cf. Laura Macklin, *Promoting Settlement, Foregoing the Facts*, 14 N.Y.U. REV. L. & SOC. CHANGE 575, 583–601 (1986) (discussing the functions of judicial fact-finding, including the requirement of adequate factual proof for judicial action); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 789–93 (1984) (arguing that negotiation frees the parties to reach more creative solutions). *But see* Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 776–78, 786–89, 795–96 (1990) (mentioning some of the constitutional problems with using arbitrators to adjudicate disputes involving statutes with important public policy goals and concluding that the normal rules of arbitration need not apply to such claims to bolster the constitutionality of this form of dispute resolution); Samuel Estreicher & Zev J. Eigen, *The Forum for Adjudication of Employment Disputes*, in *Research Handbook on the Economics of Labor and Employment Law* (manuscript at 12–14) (Michael L. Wachter & Cynthia L. Estlund eds. forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1656618](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1656618) (arguing that the shortcomings of arbitration can be compensated for legislatively, making arbitration a better choice for adjudicating employment discrimination claims).

114. See David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement*, 42 VAND. L. REV. 1121, 1130–31 (1989) (outlining the economic arguments advanced in favor of Title VII but noting that those who advanced that argument concluded by saying that despite the economic justification, prohibiting discrimination in employment was “the right thing to do” and an inalienable right).

scheme. In that sense, the regulation of the employment relationship is much more like regulation of the securities markets,<sup>115</sup> the environment, workplace safety, or food and drug safety than it is regulation of individual contractual relationships, or discrete individual harms.

The employment relationship is not regulated like the environment, the securities market, workplace safety, or food and drug safety, however. Those systems of regulation include some ex ante barriers to entry: extensive reporting requirements, the power to spread the information collected, the power to inspect, and some coercive power, including the ability to fine regulated parties.<sup>116</sup> Instead, our enforcement system for employment discrimination law relies primarily on allowing individual employees a private right of action to sue employers for discrimination in courts.<sup>117</sup> There is very little federal oversight except incidentally through the courts when the parties choose to air the issues there—the courts themselves may not vindicate the public interest, although they do make public important information about the dispute.

We might expect the Equal Employment Opportunity Commission (“EEOC”), the agency created to enforce Title VII and given responsibility for subsequent antidiscrimination laws as well, to serve that role, but it does not. For private sector employment discrimination claims, the EEOC has the power to investigate, but it depends primarily on private individuals bringing charges to it, rather than on initiating its own investigations.<sup>118</sup> Additionally, the agency’s investigation is rather thin.<sup>119</sup> Although an employer must respond to a charge of discrimination and the EEOC can subpoena records, the agency does not inspect workplaces, monitor employer behavior, or impose sanctions on uncooperative or discriminating employers.<sup>120</sup> Even more importantly, the

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115. Linda Hamilton Krieger has made this comparison as well. Linda Hamilton Krieger, *The Watched Variable Improves: On Eliminating Sex Discrimination in the Workplace*, in *SEX DISCRIMINATION IN THE WORKPLACE: MULTIDISCIPLINARY PERSPECTIVES* 295, 317–20 (Faye J. Crosby et al. eds., 2007).

116. I do not mean to suggest that enforcement in these areas is perfect. *See supra* note 1.

117. *See supra* notes 99–100 and accompanying text.

118. *See* 42 U.S.C. § 2000e-5(b) (2006).

119. The EEOC has, by statute, 180 days to investigate a charge before it must give a complainant a right to sue letter. 42 U.S.C. § 2000e-5(f)(1). However, a series of cases involving early-issued right to sue letters, where the EEOC has certified that it will be unable to complete its administrative processing within 180 days suggests that the EEOC does not investigate some claims at all. *See Patroski v. Ridge*, No. 2:10-cv-967, 2010 WL 5069941, at \*8–9 (W. D. Pa. Dec. 7, 2010) (holding the EEOC may issue early right to sue letters, but dismissing complaint without prejudice for failure to exhaust remedies where the EEOC issued a right to sue letter six days after a charge was filed).

120. *See* 29 C.F.R. § 1601.15–.17 (2010) (outlining EEOC procedures for investigation of a discrimination suit). *See generally* *EEOC v. Konica Minolta Business Solutions U.S.A., Inc.*, 639

EEOC cannot make public information contained in the charges it receives, nor can it reveal much information it gathers from employers who have to file compliance reports with it.<sup>121</sup>

The EEOC also has little impact on determining when an employee has a valid discrimination claim. It acts as something of a gatekeeper to the courts, but it is a very weak one. An employee has to file a charge with the EEOC before the employee can bring a claim in court under Title VII, but the EEOC's analysis of the claim has no bearing on the employee's ability to pursue the matter in court.<sup>122</sup> After receiving a charge, the EEOC investigates the claim and attempts to conciliate.<sup>123</sup> The EEOC also currently has a policy of encouraging mediation.<sup>124</sup> If those processes fail, the EEOC decides whether the facts suggest that the employer discriminated.<sup>125</sup> If the EEOC believes the employer has discriminated, the EEOC will make a finding to that effect and issue a letter to the employee giving the employee a right to sue the employer in court.<sup>126</sup> While everyone must start with the EEOC, the gate does not close once that step has been satisfied. The EEOC will issue right to sue letters to employees where it has not yet completed its investigation and even where it has found that the facts do not suggest that the employer discriminated.<sup>127</sup> Only the passage of time will cut off an employee's ability to get permission to sue an employer.<sup>128</sup> An EEOC finding thus has no bearing on the ability of an employee to bring a claim in court. Moreover, the action that a person brings is not an action to review the EEOC's judgment about whether the employer discriminated, and so no deference is owed the EEOC's finding of cause or no

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F.3d 366, 368, 369 (7th Cir. 2011) (discussing the standard used to judge the reasonableness of EEOC subpoena power).

121. The EEOC is forbidden from releasing this data by law: 42 U.S.C. §§ 2000e-5(b), 2000e-8(e). The Office of Contract Compliance Programs, the agency that enforces federal laws incorporated into federal contracts against those contractors, similarly keeps some of this information secret, 41 C.F.R. §§ 60-1.20(g), 60-40.3 (2011), but it can release information from employer compliance reports, *id.* § 60-40.4 (interpreting Title VII's bar on disclosure to apply only to EEOC employees).

122. *See* 42 U.S.C. § 2000e-5(f).

123. 42 U.S.C. § 2000e-5(b).

124. NAT'L ACAD. OF PUB. ADMIN., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ORGANIZING FOR THE FUTURE 15 (2003).

125. *See The Charge Handling Process*, EEOC, <http://www.eeoc.gov/employees/process.cfm> (last visited Oct. 10, 2011) (stating that the EEOC will close a charge if they decided they "probably will not be able to find discrimination").

126. The EEOC can instead decide to bring an action, in which an employee can intervene, but the EEOC does so in only a tiny fraction of the charges filed with it. McCormick, *supra* note 91, at 219 (giving figures for the number of cases brought out of the number of charges filed by the EEOC).

127. 42 U.S.C. § 2000e-5(f)(1).

128. *See id.* § 2000e-5(e)(1) (requiring a charge to be filed within 180 days after the alleged unlawful employer activity).

cause even if it has made one in the charge.<sup>129</sup> Thus, the EEOC is a gatekeeper only in the loosest sense of the word.

The EEOC is a weak agency in other respects, as well. It has the power to issue regulations, but not substantive interpretive regulations, having the force of law.<sup>130</sup> Following the EEOC's regulations gives employers an affirmative defense to an action under Title VII,<sup>131</sup> but that is the extent of the EEOC's potential to influence employer behavior to prevent discrimination. Employers are not bound to follow the regulations, and the courts rarely defer to those regulations.<sup>132</sup> And to make matters worse, on the prosecutorial side, the EEOC has never been funded enough to bring claims in all or even a substantial minority of meritorious cases.<sup>133</sup> Additionally, it doesn't appear that the EEOC is any more an expert at assessing discrimination than the courts themselves. A recent study shows that the EEOC system to rate complaints according to the likelihood that cause exists to believe the employer discriminated did not predict case outcomes in federal court.<sup>134</sup> This fact might show that the EEOC lacks the expertise to analyze discrimination claims, that the federal courts lack that expertise, or that the norm defining discrimination is unsettled. Regardless of the explanation, it demonstrates that the EEOC has not been effective at enforcing that norm.

To remedy the enforcement gap and the secrecy problem, the public needs better access to information, more control over development of the antidiscrimination norm, and a more effective incentive system to promote compliance by employers. One way to accomplish these goals is to consolidate the process of adjudication in a body with expertise in discrimination law and expertise in the social sciences, particularly in human and organizational behavior and in economics.

This model is attractive for several reasons. First, the law on employment discrimination is a relatively specialized field, between the complicated proof

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129. Cf. Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *FORDHAM L. REV.* 1937 (2006) (describing the lack of deference the Supreme Court has given to the EEOC's interpretation of Title VII).

130. The EEOC can issue substantive regulations under the Age Discrimination in Employment Act, 29 U.S.C. § 628 (2006) and the Americans with Disabilities Act, 42 U.S.C. § 12116 (2006).

131. 42 U.S.C. § 2000e-12(b).

132. See Hart, *supra* note 129, at 1939, 1941–49.

133. See 4 U.S. COMM'N ON CIVIL RIGHTS, TEN-YEAR CHECKUP: HAVE FEDERAL AGENCIES RESPONDED TO CIVIL RIGHTS RECOMMENDATIONS? 40, 42 (2004), available at <http://www.usccr.gov/pubs/10yr04/10yr04.pdf>.

134. *Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary U.S.*, RESEARCHING L., Spring 2008, at 4. Using a large random sampling of employment discrimination cases filed between 1988 and 2003, the authors studied the resolution of those cases, accounting for the stage of litigation at which they were resolved in addition to the substantive outcome. *Id.* at 2.

structures and the complex theoretical foundation, so that adjudications by experts will be more cost effective and lead to more consistent application of the law. Second, enough individuals injured by discrimination have difficulty getting relief through the system that expanding the availability of adjudications will create greater access to justice. Third, the consistent application of the law and the better dissemination of information will better signal to employers what practices constitute discrimination, which will allow them to better avoid it.

What I propose is for Congress to create a new federal agency to, among other things, adjudicate private sector discrimination claims.<sup>135</sup> Employees would have to file charges with the agency, just as they do now, and this agency would investigate those charges. The agency would also be able to institute its own investigations. So far, this is similar to the EEOC functions, but unlike the EEOC, the new agency would make public the allegations in the charges and the employer's response to those charges.<sup>136</sup> Additionally, it would hold hearings, make findings of fact, and conclude whether the law had been violated. If the law had been violated, the agency would clarify what the employer could do to comply with Title VII and what remedy the individual should be awarded. The agency's decision would be subject to ordinary administrative review by a federal court, which would have to uphold factual findings if based on substantial evidence and would have to accord most legal conclusions and recommendations substantial deference.<sup>137</sup> The new agency would also be empowered to issue regulations with the force of law, codifying its interpretation of what the antidiscrimination laws mean and how they should be enforced.

Having a federal agency adjudicate discrimination claims has a number of advantages over the current system. Agencies are created to harness the expertise of adjudicators—both legal experts and non-law experts in the

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135. The adjudicative body of the agency would be appointed by the President with the advice and consent of the Senate, and members should be balanced by political party. Members should also be balanced by background experience, coming from both the employee and employer side. Finally, members should have some expertise in workplace law, organizational psychology, business management, or some other relevant field.

136. This would be the default, but there would also have to be a process by which some types of information and some proceedings could be kept sealed where privacy interests outweigh the public's need to know. Sexual harassment cases, for example, are likely to involve highly private information and possibly humiliating details. A harassed employee would have a strong interest in not having his or her identity or those details made public. On the employer side, there may be instances in which proprietary information would be revealed. The employer would have a strong interest in keeping that information confidential.

137. Based on the expertise of the agency adjudicators, the courts might be encouraged to accord the legal recommendations significant deference, similar to that often accorded the National Labor Relations Board. *See, e.g., NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990).

field—and having experts to decide discrimination cases could bring greater coherence to this area of law. Administrative adjudications also conserve scarce judicial resources by allowing non-Article III judges to manage the fact-finding process in what can be very fact-intensive inquiries. And using non-Article III judges can be cost effective, since the adjudicating labor market is more flexible, and likely less costly. Because of this cost savings, more parties can have access to the adjudicatory process, creating greater access to that process for those who cannot afford or find legal assistance. Moreover, to the extent that the federal courts might be using summary judgment and motions to dismiss to rid their dockets of meritorious cases because they dislike this area of law,<sup>138</sup> having an agency handle this part of the adjudication may remove such incentives.<sup>139</sup>

Creating a new agency to adjudicate discrimination claims also has significant enforcement advantages. By making the information received by the agency public, this scheme would solve much of the problem with the secrecy gap. The public would know more about the allegations of discrimination and what is happening at work, which would lead to a better picture of whether we are meeting the goal of eliminating workplace discrimination.<sup>140</sup> Additionally, the public would have a better idea of the content of the norm against employment discrimination. Even if the parties agreed to keep the issues confidential, they would not be able to control the agency.

Secrecy might still be achievable by employers; the parties could settle and make the matter confidential by acting before the employee went to the agency. That type of secrecy seems less problematic than the type we currently have. If this scheme simply moves the point of optimal settlement to a point earlier in the process, employers will work harder to not allow employment discrimination to occur or to remedy it as soon as it is brought to their attention, before the employee goes to the new agency, creating a greater incentive for employers to internalize the antidiscrimination norm, avoiding

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138. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 128 n.68 (2009); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 ILL. L. REV. 1011, 1014–15 (2009); Selmi, *Hard to Win*, *supra* note 104, at 558; Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 17–18, 32 (2010); *cf.* Selmi, *Proving Discrimination*, *supra* note 104, at 283–84, 309 (noting the difficulty of proving discrimination and that the Court views the world as “largely unaffected by discrimination”).

139. The fact that verdicts in favor of plaintiffs in employment discrimination cases are more than six times as likely to be reversed than verdicts in favor of defendants, Clermont et al., *How Employment-Discrimination Plaintiffs Fare* *supra* note 104, at 556–58, 566, makes me a little hesitant to even be this optimistic.

140. See Krieger, *supra* note 115, at 318–19.

more injuries in the first place and accomplishing the main goal of antidiscrimination law.

By giving the agency a much more direct role in enforcing Title VII, the proposal also goes a long way towards closing the enforcement gap. There will still be people who don't know their rights, but that number is likely to shrink the more information is made public about other cases. There will also still be people who are deterred from pursuing their rights, but that too should diminish, to some extent, the more settled the norm against discrimination becomes. And with an expert cadre of adjudicators, the norm against employment discrimination is likely to form in a more coherent manner, creating greater predictability for employers and employees alike.

Despite these advantages, there are disadvantages and hurdles to having an agency adjudicate discrimination claims. For example, if the EEOC has been chronically underfunded,<sup>141</sup> there seems little possibility that this new agency would be funded adequately to fulfill its mandate. Similarly, if, as some report, employers are well served by the current system in the sense that they face little liability for discrimination because of the trend in federal courts,<sup>142</sup> they will not support the creation of a new agency with independent enforcement powers. Additionally, agencies, being less independent from influence by market actors than Article III judges and less politically accountable than elected officials, may simply carry out the agenda of a small minority of actors rather than dispense the justice needed.

Aside from these pragmatic concerns are legal concerns as well, the biggest of which in my view is the focus of this Article: Article III's limitations on the judicial power of the United States and life tenure and salary protection for judges.

### III. APPLYING THE ARTICLE III ANALYSIS TO AGENCY ADJUDICATION OF EMPLOYMENT DISPUTES

So given the analysis the Court has used, the necessary question to ask at this point is whether an agency could adjudicate claims in the area to be regulated. To illustrate this analysis, I will go back to the example of employment discrimination. To analyze whether claims of employment discrimination could be constitutionally adjudicated by the agency I have proposed, we must determine whether discrimination is a private rights issue, involving inherently judicial matters.<sup>143</sup> If it is not, then the agency could adjudicate claims with significant autonomy and little oversight by the Article

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141. See *Fiscal Year 2012 Congressional Budget Justification*, EEOC, 1–2 (Feb. 2011), <http://www.eeoc.gov/eeoc/plan/upload/2012budget.pdf>.

142. See *supra* note 138 and accompanying text.

143. See *supra* Part I.A.3.

III courts. If discrimination involves private rights, however, significant Article III oversight would be necessary.

The answer to this question of how much Article III oversight is required is complicated. It requires us to analyze the nature of the right at stake as one important data point, which is not an easy task. I will start by analyzing the nature of the employer's interest, differentiating among different types of employers, and then turn to an analysis of the employee's interest in each context.

Government employers would have no private rights in the sense usually discussed, and so analyzing their interests would seem relatively straightforward. This is particularly true for the federal government, suits against which would fit into the traditional public rights model. Thus, having an agency adjudicate claims of discrimination by the federal government would pose no Article III problems from the federal government's perspective. This is likely why the EEOC currently adjudicates these claims.<sup>144</sup>

States would likely also not be considered to have private rights in any traditional sense, but states have an interest that is analogous in their immunity from suit brought by individuals in federal courts, a right embodied in the Eleventh Amendment.<sup>145</sup> The Supreme Court has held that states cannot be made amenable to suit for damages brought by a private party before a federal agency without their consent.<sup>146</sup> And so regardless of whether a state's interest as an employer would be characterized as a private right, unconsenting states cannot be required to submit to the agency adjudication, at least for money damages. Moreover, this right of the states does not depend on the amount of Article III oversight because unconsenting states cannot be brought to federal court, either.<sup>147</sup> So, these claims might not be appropriate for inclusion in a new agency. States can be sued against their will, however, by the federal government, so any action brought by the agency itself, or the Department of Justice if that was the prosecutorial arm for enforcement of these kinds of cases, could be heard by the agency. Moreover, state officials can be sued against their will for prospective injunctive relief.<sup>148</sup> And so an agency might

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144. See 42 U.S.C. § 2000e-16(b) (2006).

145. U.S. CONST. amend. XI.

146. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002).

147. U.S. CONST. amend. XI; see, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Another potential solution to bring states under the authority of the proposed agency would be to link consent to the acceptance of federal funds. Perhaps those federal programs already administered by the states could include a provision requiring that employment discrimination claims be subject to the agency, or perhaps the statute that creates the agency could also provide funding for state antidiscrimination efforts, but include federal agency jurisdiction over disputes against states as a condition of that funding.

148. *Ex parte Young*, 209 U.S. 123, 155–56 (1908).



be able to exercise jurisdiction over all actions against officials for prospective relief without much Article III oversight.

Private employers, whether private individuals or corporate entities, do have rights to property and liberty, and so we must examine the nature of those rights to determine how much Article III oversight would be required. Title VII, when it was enacted, was revolutionary in many ways. It was a conscious attempt by Congress to change society through legislation.<sup>149</sup> When Congress prohibited the practice of discrimination by employers, it encroached on what had traditionally been nearly sacrosanct: managerial prerogative. In an employment relationship, the law has traditionally protected private employers, often on the rationale that they have property and liberty rights in the use of

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149. Joseph P. Witherspoon, *Civil Rights Policy in the Federal System: Proposals for a Better Use of Administrative Process*, 74 *Yale L.J.* 1171, 1171 (1965); see also ALFRED W. BLUMROSEN, *MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY 4* (1993) (arguing that “[t]he effort to ameliorate longstanding patterns of race and sex subordination [through Title VII] is perhaps *the most ambitious social reform effort ever undertaken in America*” (emphasis added)); David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Enforcement?*, 42 *VAND. L. REV.* 1121, 1129 (1989) (citing H.R. REP. NO. 88-914, at 16 (1964)) (describing the legislative history of Title VII, which made clear the desire for social change). The House Report that Rose cited noted specifically that “[t]oday, more than 100 years after their formal emancipation, Negroes . . . are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are . . . the birthright of all citizens.” H.R. REP. NO. 88-914, at 18.

For a discussion of this evolution in the context of race, see MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 426, 432, 435–36, 441 (2004) (arguing that the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965 were a reaction by the public to end the violent oppression of Blacks); Robert D. Loevy, *Introduction: The Background and Setting of the Civil Rights Act of 1964*, in *THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION 1* (Robert D. Loevy ed., 1997) (describing the evolution of U.S. policy from slavery to the Civil Rights Act of 1964).

The intent of Congress to transform the way that women were treated is not quite as clear. Title VII was originally drafted to prohibit discrimination on the basis of race, color, national origin, and religion, and as a last-minute amendment by a Southern Democrat, proposed as a means to defeat the bill, sex was added to the list of prohibited classifications. 110 *CONG. REC.* 2577–84 (1964), reprinted in *LEGISLATIVE HISTORY OF TITLES VII & XI OF CIVIL RIGHTS ACT OF 1964*, at 3213–28 (1968); see also RAYMOND F. GREGORY, *WOMEN AND WORKPLACE DISCRIMINATION: OVERCOMING BARRIERS TO GENDER EQUALITY* 23–27 (2003) (describing the overt discrimination of women in employment and the evolution of Title VII, but implying that banning discrimination on the basis of sex was not really the goal of the statute). Even though the proponent thought that the inclusion of sex would defeat the bill, Representative Martha Griffiths (D. Mich.) urged liberal groups to support the amendment, reasoning that some conservatives would vote for it because of its proponent, and she could persuade other members of Congress to join in; thus Title VII may indeed have been intended to transform how society treated women. MARY FRANCES BERRY, *WHY ERA FAILED: POLITICS, WOMEN’S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION* 61 (1986).

their capital.<sup>150</sup> They have a right not to have that capital taken away either without due process or just compensation, and that property right includes a right to use their capital in any way that does not infringe on another person's rights or strongly interfere with the public interest, something that also sounds in liberty.<sup>151</sup> The employment relationship is a use of capital, and the employer decides who should receive payment, for what types of services, and under what conditions. So, an employer deciding *not* to use capital to hire a particular person, or to direct the use of capital to hire particular people, pay them a certain amount, and dictate how their jobs should be performed all seem to be part of the employer's property or liberty rights.

At the same time, those rights are not absolute or unbounded. Moreover the extent of those rights are defined by law. Congress has ongoing power to declare particular uses of property impermissible as infringements on the rights of others or as contravening the public interest. So to the extent that an employer would be ordered not to engage in particular practices even as to a particular individual from now on, there is no right that has been infringed upon in a due process sense. Congress can prospectively define a property right to exclude the prior practice—so long as it does not completely destroy the value of the property, take title to real property, or physically take tangible property, there is no constitutional problem.<sup>152</sup> Thus, an agency award of forward-looking relief, an order essentially for an employer to change behavior in the future, likely would not need much oversight by an Article III court.

Declaring that a past action injured a person or violated public policy and assessing a criminal penalty or damages seems more clearly to infringe on liberty or property, though. Retrospective relief, relief that seeks to reach back

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150. Employment statutes and cases ground regulation of employers in notions of property in capital investment. They presume that employers retain the discretion to manage their businesses and at least part of their business is in deciding whom to hire, what to have employees do, how much to pay them, how to treat them, and how, when, and why to discharge them. See Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 953–58 (1984) (grounding the at-will presumption in principles of contract and property on broadly economic terms). Labor cases, especially, demonstrate this underpinning. For example, “[T]he right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it.” *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 102 (1937).

In employment discrimination cases, the economic justification is embodied in the oft-repeated statement that courts do not sit as super-personnel boards, second guessing the employer's business decisions. See Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1115–16 & n.337 (2004) (documenting the hundreds of cases that recite this general principle).

151. U.S. CONST. amend. V.

152. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–40 (2005) (discussing when regulatory action is deemed a taking for Fifth Amendment purposes).

in time more clearly takes away an interest that had vested, in the property sense, or penalizes conduct that was legal at the time, in a liberty sense. In a property sense, the actor had a settled expectation at the time of action that this direction of capital was a part of his or her property right. In a liberty sense, the actor had no notice that his or her conduct would violate any law. Because backward-looking relief likely does involve common law and constitutional rights to property and liberty, for an agency to be able to order such relief, that agency would likely need significant Article III oversight.

On the employee side, the issues are a little more ambiguous. Employees are generally not seen to have property rights in future employment except in very limited circumstances.<sup>153</sup> Thus, where the action that was discriminatory was refusing to hire, refusing to promote, demotion, or termination, the employee's property rights will likely be considered not to be affected. And there has never been a liberty interest found in future work for a particular employer.<sup>154</sup>

At the same time, discrimination is itself an injury to dignity at the least, which is some form of property or liberty interest protected by the common law and the Constitution,<sup>155</sup> which suggests that employees in at least some circumstances may also be able to claim a private rights interest. This may be an especially strong claim in the context of government employers. First, sometimes government employees, more often than private employees, have property rights in their continued employment, created by contract or statute.<sup>156</sup> And second, even where they do not have property rights, public employees have substantive liberty (or equality) rights in not being subject to injury for reasons that would violate the Constitution, like because of the employee's race or sex or in retaliation for engaging in First Amendment activity. Title

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153. A contract will give an employee an enforceable property right or state law right. State tenure laws for teachers or just cause civil service protections for government employees, for example, create property rights. *See, e.g.*, MO. REV. STAT. § 168.114 (2000) (outlining the causes by which a permanent public school teacher can be terminated).

154. That is not to say that there is no liberty or privacy interest that an employer can injure—those rights, like reputation, simply don't extend to continued employment with this particular employer.

155. *See* Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudential Based Inquiry Into Criteria and Content*, 27 HOW. L.J. 145, 158 (1984) (concluding that human dignity, or its equivalent expression, is a fundamental constitutional right and legal principle).

156. PATRICIA H. WERHANE ET AL., *EMPLOYMENT AND EMPLOYEE RIGHTS* 54–55 (2004) (noting that about fifty-five percent of private sector workers are at-will while government employees generally have some job security); *see* *Perry v. Sindermann*, 408 U.S. 593, 599–600 (1972) (holding that a public employer may establish a property interest in continued employment through its policies and practices); *cf.* *Bd. of Regents v. Roth*, 408 U.S. 564, 577–78 (1972) (holding that some process would be due an employee who had statutory tenure or a formal contract of employment, both of which would give an employee a property right in continued employment).

VII protects many of these same rights in much the same way. Thus, to the extent that Title VII overlaps with the Constitution and a discrimination claim might implicate these rights, a private right of the public employee would likely be at stake. Thus, for federal employees, even though Title VII claims are currently adjudicated by an agency, that adjudication may not be constitutional to the extent that the Title VII claims are really constitutional claims. And, for state employees, even if the states consented to agency adjudication, unconsenting employees likely could not be compelled to participate without significant Article III oversight.

However, there is likely no private rights bar under the current state of the law on the private employee side; absent our anti-discrimination laws, there is no remedy for discrimination against private employers. In other words, there is no enforceable right to be free from discrimination by private parties on the basis of race, sex, national origin, religion, age, or disability founded in either the common law or the Constitution. This dignitary, liberty, or property interest has generally been protected only by statute.

Overall then, Title VII and the other employment discrimination statutes do not fall perfectly into the public rights/private rights categories. They involve both. Given that for at least some types of remedies, and some types of parties, a private right might be at stake in adjudication of discrimination, we turn next to the remedies currently available under Title VII to see how much Article III oversight might be needed.

When it was enacting Title VII, Congress could have made a number of different choices. It could have criminalized employment discrimination, but it chose not to do that.<sup>157</sup> It could have conditioned some sort of license to do business on compliance with rules designed to prevent employment discrimination, and an agency could have regulated the licensing process.<sup>158</sup> It could have given primary enforcement power to an agency, allowing no private right of action at all. Conversely, it did not need to create an agency, but instead could simply have given employees private rights of action along with damages and other remedies, leaving to those private parties all enforcement through litigation in state and federal courts. None of these options would have posed constitutional problems.

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157. Julie C. Suk suggests how the U.S. system might look if it had instead chosen to criminalize employment discrimination, comparing Congress' choice with the choice in France to make employment discrimination a criminal issue. Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. U. L. REV. 1315 (2008).

158. Although states are generally the ones with the police power to require these types of licenses, Congress would likely also have the power through the Commerce Clause. As long as the business regulated had enough connection to interstate commerce, and given how loosely that is defined, it is likely that every business does have some connection to interstate commerce, the Commerce Clause would allow Congress to regulate it.

The choice that Congress did make mixed many of these elements. Congress created an agency to enforce the statute, the EEOC, but gave it very limited powers.<sup>159</sup> “Originally, the EEOC was empowered only to provide technical assistance, to investigate, and to attempt conciliation; it could not prosecute charges of discrimination and could not adopt substantive interpretive regulations.”<sup>160</sup> Individuals had a private right of action from the start, however.<sup>161</sup> And “[i]n 1972, the EEOC was given the power to prosecute actions in federal court,” independent of any right of action the individual employee might have, “in order to provide for more effective enforcement.”<sup>162</sup> Additionally, coverage was extended to state and local governments.<sup>163</sup>

And the remedies were somewhat limited as well. The statute originally allowed courts to order injunctive relief including instatement or reinstatement, back pay, and “such [other] affirmative action as may be appropriate.”<sup>164</sup> But by creating a private right of action against employers, Congress created the potential for private rights disputes, which would suggest that Article III courts would have to have substantial oversight. Still, by limiting remedies to back pay, reinstatement, and other forms of equitable remedies,<sup>165</sup> Congress limited the potential agency action to awarding only relief that would not infringe on any vested rights to property or liberty, which made it possible that an agency could act without Article III supervision. In other words, even though employees had a private right of action against employers, something that would likely implicate a private employer’s private right, a public employee’s private right, or a state’s sovereignty interest, because the relief available was

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159. See *supra* notes 99, 118–29 and accompanying text.

160. McCormick, *supra* note 91, at 202; see also *id.* at 202 n.52 (discussing the EEOC’s enforcement powers).

161. Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(e), 78 Stat. 241, 260 (1964) (codified as amended at 42 U.S.C. § 2000e-5(f) (2006)).

162. McCormick, *supra* note 91, at 202 (citing Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103; Statement about Signing the Equal Employment Opportunity Act of 1972, PUB. PAPERS 105 (Mar. 25, 1972) (“Everyone familiar with the operation of title VII over the past 7 years has realized that the promise of that historic legislation would remain unfulfilled until some additional, broad-based enforcement machinery was created. This bill provides that enforcement capability.”)). “The EEOC also has the power to adjudicate federal claims, but not adjudicate private sector disputes.” McCormick, *supra* note 91, at 202 n.53.

163. 42 U.S.C. § 2000e-16c.

164. Civil Rights Act of 1964 § 706(g) (codified as amended at 42 U.S.C. § 2000e-5(g)).

165. It is unclear whether back pay is an equitable remedy or some kind of damages remedy. Before compensatory damages were available, some argued that back pay was not equitable and that jury trials had to be available for Title VII suits. Once the Civil Rights Act of 1991 made compensatory and punitive damages, and also jury trials, available, those arguments were no longer necessary. Most recently, the issue has again arisen in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), where the issue is whether the plaintiff class by seeking back pay is seeking only injunctive relief for class action certification purposes. See Transcript of Oral Argument at 18–21, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10–277).

only prospective, there was likely little constitutional problem with having a federal agency adjudicate the claim with little Article III oversight.

Additionally, by allowing the Attorney General, and later the EEOC, to pursue civil cases of individual or “pattern or practice” discrimination on behalf of the government, for which equitable relief could be awarded,<sup>166</sup> Congress established a system of public rights as between employers and the government. And so, from the start, Congress could have designed the EEOC to adjudicate claims of discrimination, at least those brought by the government as prosecutor, and likely even those brought by employees because of the only available remedy, as long as there was some way to review the decision in an Article III court.

In 1991, Congress amended Title VII to allow for damages to be awarded.<sup>167</sup> When it did that, it may have foreclosed the possibility that it could have an agency adjudicate any discrimination claims seeking damages on behalf of an employee. A declaration of liability for past conduct and retrospective relief would most likely infringe on an employer’s private right, and suits for money damages would implicate state sovereignty rights.

Analysis of the nature of right at stake or the type of remedy available tells us only that some Article III oversight is necessary; it does not determine the *level* of Article III oversight necessary. We still must look to the courts’ structural interests. Structural interests are evaluated by gauging the level of infringement on the ordinary work of the federal courts.<sup>168</sup> We look primarily at the scope of the subject-matter jurisdiction of the proposed agency for this analysis. On the one hand, the jurisdiction might seem to be fairly narrow—simply violations of federal antidiscrimination laws.

However, the subject of employment discrimination is not nearly as narrow, nor the workplace nearly as regulated, as was the situation in either *Thomas* or *Schor*. In both situations, there was no background right to engage in the conduct the regulated parties had engaged in.<sup>169</sup> Congress had created barriers to enter into the field at all. The workplace is not like that. Anyone can become an employer simply by paying another for a service. And there are very few limits on that transaction. Moreover, the background rule of at-will employment, that an employer can refuse to hire or fire a person for a good reason, a bad reason, or no reason at all, means that this exception is actually incredibly narrow. And other workplace laws, like wage and hour laws, workplace safety laws, collective bargaining laws, and employee benefits taxes

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166. This power was transferred to the EEOC by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 5, 86 Stat. 103, 107 (codified at 42 U.S.C. 2000e-6(e)).

167. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072–73 (codified as amended at 42 U.S.C. § 1981a).

168. *See supra* notes 80–81 and accompanying text.

169. *See supra* notes 56–59, 72–74 and accompanying text.

and laws do not regulate how an employer may employ someone in such a comprehensive sense that they consist of barriers to entry into the field of employment. Moreover, discrimination claims often overlap with claims under other statutes or common law contract or tort remedies.

Thus, there seems to be more of an encroachment on the regular work of the judicial branch than in the cases in which the Supreme Court has upheld the use of non-judicial actors with little Article III oversight.<sup>170</sup> At the same time, though, barring giving the new agency jurisdiction over state common law claims that might be related to the adverse employment action, like intentional infliction of emotional distress, discharge in violation of public policy, or breach of contract, the subject-matter jurisdiction is substantially more narrow than that of the Bankruptcy Courts invalidated by the Court in *Northern Pipeline*.<sup>171</sup> And if the structural interest in the subject matter is gauged by the federal courts' interest in the kinds of cases at stake,<sup>172</sup> federal courts seem to have very little interest in discrimination cases.<sup>173</sup> Likely, the jurisdiction would be considered narrow enough not to infringe too far on the structural interests of the federal courts.

One last consideration is mandated by the Supreme Court's Article I cases: the individual interest in having private rights adjudicated by an Article III court. If the adjudication would implicate a private right at all, the individual has some right of access to Article III courts.<sup>174</sup> Likely this individual interest in access to an Article III court would be implicated enough that at the very least, consent by all private and all state employers subject to actions for damages and by government employees in all cases would be necessary.

And so what does this mean for design for the agency? Making the process optional would be one way to comply with Article III. It is likely that making the process optional will mean that it is never used, however. Employers have little incentive to agree to have a claim considered by an

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170. *See supra* Part I.A.

171. *See supra* notes 50–52 and accompanying text.

172. I draw on *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005) and *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986) for an analogy here. Both of those cases concerned when a state-created cause of action might be considered to arise under federal law for purposes of statutory federal question jurisdiction. *Grable*, 545 U.S. at 310; *Merrell Dow*, 478 U.S. at 805. Part of the test is how important the federal interest at issue is, and that is gauged in part, it seems, by how much the federal courts would be interested in that type of case. *See Grable*, 545 U.S. at 315; *Merrell Dow*, 478 U.S. at 814–16, 814 n.12.

173. *See* Scott A. Moss, *Judicial Hostility to Litigation and How It Impairs Legal Accountability for Corporations and Other Defendants*, AM. CONST. SOC'Y 3–10 (May 2010), <http://www.acslaw.org/sites/default/files/ACS%20Issue%20Brief%20-%20Moss%20Judicial%20Hostility.pdf> (discussing the procedural hurdles facing discrimination plaintiffs).

174. *See supra* notes 27–30.

agency when the courts so frequently rule in their favor.<sup>175</sup> Agency proceedings will be less expensive, but that does not, by itself, appear to be enough incentive. The EEOC for some time has been promoting its mediation program.<sup>176</sup> It has had great difficulty getting employers to participate, however, because they see little validity in the employee's complaint and believe that they have little to lose by refusing.<sup>177</sup> If they refuse, the chances that the employee will sue are very small, and so even the prospect of legal fees is not enough to justify the expense of the agency proceedings. Additionally, even if an employee does sue, the chances of the employee surviving a motion to dismiss or summary judgment are very small, and of surviving appeal if they win, also small.<sup>178</sup>

At this point, a reader might be wondering why the answer is not simply to provide for extensive judicial review. Ways to do that might be to make it more like the process of the National Labor Relations Board, in that the agency's order in favor of an employee would not be self-executing.<sup>179</sup> Employees would have to seek payment of damages or issuance of an injunction in federal court based on the agency's factual findings and recommendations. For findings in which private employers were found not to have discriminated, there might need to be little Article III oversight. As an alternative to the enforcement proceeding, perhaps, employees could seek judicial review of the agency's decision in federal court, and employers could seek review rather than comply if they were found to have discriminated. That review might be very searching, considering the matter *de novo*. If the review route were taken or if the employer failed to comply with the recommendations without seeking review, either the agency or the employee would be able to go to court to seek sanctions for that failure to comply.

That extensive judicial review would seem to eviscerate most of the reasons to create an agency adjudicator in the first place. The proceedings will be more efficient and less costly (at least for the courts) if Article III judges are not overseeing the process of managing discovery, taking evidence, and mediating pre-trial motions. However the courts will still have many cases to decide if review is practically automatic. Additionally, to the extent that the process seeks to harness the expertise of the decision maker or more clearly set norms, if the courts have free reign, and don't agree with the agency's views of

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175. *See supra* note 104 and accompanying text.

176. *See supra* note 124 and accompanying text.

177. E. Patrick McDermott et al., *An Investigation of the Reasons for the Lack of Employer Participation in the EEOC Mediation Program*, EEOC, <http://www.eeoc.gov/mediate/study3/index.html> (last modified Dec. 10, 2003).

178. *See supra* note 104 and accompanying text.

179. *NLRB v. P\*I\*E Nationwide, Inc.*, 894 F.2d 887, 890 (7th Cir. 1990).



the norm (much like the current climate with the EEOC), then the agency won't be able to serve that function.

Another solution that would not suffer from either weakness might be to change the system entirely to be more like workers' compensation insurance. Discrimination has been likened to a dangerous condition on land,<sup>180</sup> and so perhaps that analogy is useful. If discrimination is likely, perhaps employers should have to pay into a sort of discrimination insurance fund. The amounts due the fund would be determined by an agency based on findings of discrimination—the more discrimination claims that are found to be valid per employee, the higher the contribution required per employee. Employees who believed they had been discriminated against could apply to the fund, and the agency would determine whether they had, and how much they were due as a result, paying from the fund. Perhaps for particularly egregious instances, the employer would also be subject to civil fines, which would go into the fund. This system, at least in the private sector would appear to avoid the private right problem entirely.

The problem with this system is that the structural changes that injunctive relief could provide would have to be provided for in some separate process. Orders for structural change that are closely monitored appear to be the most effective means of eliminating discrimination and transforming workplace norms,<sup>181</sup> so this could be a big loss of efficiency in accomplishing that function of the employment discrimination laws. However, that may be offset by a gain prompted by removing some of the stigma of what it means to discriminate. Workers' compensation is in some sense a no-fault system.<sup>182</sup> Accidents happen. Much of the current debate about discrimination is whether implicit bias, the biases that we all have and that are exercised sometimes below the level of fully-self aware consciousness, should be the kind of discrimination made illegal by the employment discrimination laws. Being a discriminator carries a huge stigma, which is part of the reason that people resist admitting that they might discriminate. Removing fault for at least this kind of discrimination might lessen the stigma in a way that would allow people to reflect on their implicit biases. And it could do so in a way that would still acknowledge that the person discriminated against was harmed and would provide a remedy for that harm.

Another way to divide the adjudication is to focus on the type of remedy. Perhaps the agency's order regarding liability and awarding equitable relief would be self-executing, but any damages portion would have to be brought to

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180. Marc R. Poirier, *Is Cognitive Bias at Work a Dangerous Condition on Land?*, 7 EMP. RTS. & EMP. POL'Y J. 459, 464 (2003).

181. Levit, *supra* note 97, at 427.

182. See *Howard Delivery Serv., Inc., v. Zurich Am. Ins. Co.*, 547 U.S. 651, 655 (2006) (describing workers' compensation as a no-fault policy).

a federal court for enforcement. That too would likely not involve any private right being finally adjudicated by the agency and would also limit the scope of review the federal courts could exercise over much of the decision. But again, we would lose a significant amount of the efficiency gains of bringing the claims together in one action.

#### CONCLUSION

Article III is not the only potential constitutional barrier to agency adjudication. Other constitutional provisions would have to be considered as well. Due process is likely not a problem as long as the agency process provides for notice, an opportunity to be heard, and minimizes the risk of erroneous deprivation.<sup>183</sup> In theory, there might at some point be a substantive due process or equal protection problem with carving out particular claims or claims of suspect classes for special treatment, although the courts have not yet confronted that issue. Additionally, if the agency awards damages, the Seventh Amendment will likely be implicated.<sup>184</sup> But for the most part, these issues will likely be approached as a matter of balancing with a threshold consent requirement analogous to the balancing that the article III analysis requires us to engage in.

For most of the types of regulatory reform that are on our national agenda for which adjudication will seem a possible regulatory solution, it is likely that some form of private right will be at stake. While there will likely be no absolute bar, then, to the use of adjudication, the key will be to create enough incentive for parties to consent to the system's use, or to rethink the regulatory system more broadly to restructure what might be considered private rights into a more clearly public rights framework. This paper begins to outline ways that might be done.

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183. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 333–35 (1976) (using a balancing test to evaluate what process is due in connection with a deprivation of a public right); *Goldberg v. Kelly*, 397 U.S. 254, 262–66 (1970) (using a balancing test to determine whether certain procedural protections were required before welfare benefits could be terminated even with administrative review afterwards).

184. See *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 51–55 (1989). The question of whether a jury is governed by the same public right/private right distinction as used in Article III, but the scope appears a bit broader, focusing on the distinction between legal and equitable proceedings. In *Granfinanciera*, the Court reserved the question of whether, a jury trial being required, a non–Article III decision maker could oversee such a jury trial. *Id.* at 64. That question remains unresolved. See, e.g., *In re Grabill Corp.*, 967 F.2d 1152, 1158 (7th Cir. 1992) (holding bankruptcy courts do not have the power to conduct jury trials); *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1403–04 (2d Cir.) (holding bankruptcy courts do have the power to conduct jury trials), *vacated sub. nom.*, *Ins. Co. of Pa. v. Ben Cooper, Inc.*, 498 U.S. 964 (1990) (per curiam), *reinstated on remand*, 924 F.2d 36 (2d Cir. 1991).

