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David C. Belt

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NOTES

ELECTION OF REMEDIES IN EMPLOYMENT DISCRIMINATION LAW: DOORWAY INTO THE LEGAL HALL OF MIRRORS

INTRODUCTION

Employment discrimination law, most would argue, is in a state of crisis. Since the enactment of Title VII of the Civil Rights Act of 1964, the number of discrimination claims has risen dramatically. Meanwhile, the administrative agency charged with enforcing compliance with these laws, the Equal Employment Opportunity Commission (EEOC), has, by most accounts, failed in its efforts to investigate charges of discrimination, as evidenced by

1. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. V 1993). Basically, Title VII makes it illegal for an employer to fail to hire, to discharge, or otherwise to discriminate against an employee or applicant "because of such individual's race, color, religion, sex, or national origin." Id. § 2000e-2(a)(1). Although the protected groups remain the same throughout the statute, the types of discrimination covered are broad and varied. See id. §§ 2000e-1 and -2 for the full text of types of discrimination covered by Title VII.

2. Id. § 2000e-4 (establishing the EEOC); id. § 2000e-5 (establishing the EEOC's powers and duties with respect to preventing employment discrimination). The EEOC's general responsibilities upon receiving a claim include conducting an initial investigation into whether there is reasonable cause to believe that discrimination has occurred. A decision on reasonable cause should be made, where practicable, within 120 days from receiving the charge. Id. § 2000e-5(b). If the EEOC believes that no good cause exists, it must dismiss the claim and notify the claimant. Id. If the EEOC believes that good cause exists, it must attempt to eliminate the discriminatory practice informally. Id. If that is unsuccessful, it shall bring a civil action. Id. § 2000e-5(f)(1). If the EEOC does not either dismiss the charge, enter into a conciliation agreement with the employer, or file a court action within 180 days, the claimant may request a right to sue letter and bring his or her own action within 90 days of receiving the letter. Id.

3. See, e.g., Stephen J. Shapiro, Section 1983 Claims to Redress Discrimination in

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its 110,000 case backlog as of August 1995. Consequently, the EEOC has had to abrogate much of its “filtering” responsibility to the court system, which is, as a result, overburdened with discrimination claims.

Out of this situation has arisen a series of proposals for reform. The most recent and notable reform proposal is that of the Committee on Long Range Planning of the Judicial Conference of the United States, in a report drafted in November of 1994 and submitted to the Judicial Conference in March of 1995. In the report, the Committee recommends requiring the EEOC “to conduct a more thorough review” and, “where possible, [to] resolve disputes before they ever reach a federal court,” to have Congress empower agencies—presumably including the EEOC—to adjudicate claims, and to restrict judicial review of administrative decisions.

Public Employment: Are They Preempted by Title VII?, 35 AM. U. L. REV. 93, 100 n.50 (1985) (stating that although the administrative process was designed to be a speedier alternative to litigation, the EEOC’s massive backlog usually prevents it from commencing investigations within its statutorily-defined 180-day period); Peter T. Kilborn, Backlog of Cases is Overwhelming Jobs-Bias Agency, N.Y. TIMES, Nov. 26, 1994, at 1 (noting that complaints filed with the EEOC remain uninvestigated an average of 19 months, compared with eight months in 1990). EEOC Chairman Gilbert F. Casellas has recognized the perceived failure of the agency, stating that “[t]he agency has essentially lost credibility with the public.” Id.

4. Peter Eisler, Waiting for Justice: Complainants Now Sit for at Least a Year, USA TODAY, Aug. 15, 1995, at 1A (reporting a backlog of 110,131 cases); Carol Kleiman, Job Bias is Still Rampant, Blatant, EEOC Chief Says, CHI. TRIB., July 30, 1995, ¶ 3 (Jobs) at 1 (reporting a backlog of 108,106). The 110,000 case backlog is up from the estimated 96,945 case backlog at the end of fiscal year 1994, which itself is more than double the number of pending claims the EEOC had not resolved by the end of fiscal year 1991. Hillary Durgin, Labor Mediation Project Eases Agency's Load, HOUS. CHRON., Nov. 27, 1994 (Business), at 1.

5. Peter Eisler, Overloaded System Tests New Strategies, USA TODAY, Aug. 15, 1995, at 1A (reporting that the number of employment discrimination cases filed in federal court increased 109% between 1990 and 1994). See infra note 42 and accompanying text (noting the rise of employment discrimination claims compared to that of all civil claims).

6. COMMITTEE ON LONG RANGE PLANNING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS (March 1995) [hereinafter PROPOSED LONG RANGE PLAN]. The November 1994 draft is substantially similar to the March 1995 document, with some important differences. See COMMITTEE ON LONG RANGE PLANNING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS (November 1994) [hereinafter PROPOSED LONG RANGE PLAN (1994 draft)]; see also infra notes 173-74 (discussing the differences between the two documents).

7. PROPOSED LONG RANGE PLAN, supra note 6, at 33.

8. Id. at 33-34. This proposal is not new, however. See FEDERAL COURTS STUDY COMMITTEE, TENTATIVE RECOMMENDATIONS FOR PUBLIC COMMENT 49-50 (1989) (recommending that Congress authorize the EEOC to adjudicate wrongful discharge cases on a trial basis, thereby reducing the burden on federal courts). In addition, many states have
Another prominent reform proposal analyzed by many commentators encourages employers and employees to submit all employment-related disputes, including charges of discrimination, to binding arbitration, thus taking the cases out of the administrative and judicial systems entirely. These types of proposals are designed primarily to streamline the adjudication process and to alleviate the burden imposed on the EEOC and the federal court system.

Largely overlooked in all of this discussion is a system, grounded entirely in procedural reform, already in place in a minority of states: the principle of forcing discrimination complainants to choose between pursuing their claims through the administrative process and the judicial system. Like the above proposals, this election of remedies concept is designed to streamline the adjudication process and to remove at least some of the burdens imposed on courts and state fair employment practices (FEP) agencies alike. The central assumption underlying this approach is empowered their own fair employment practices agencies to adjudicate discrimination claims. See infra note 99 and accompanying text (discussing states requiring complete exhaustion of state administrative remedies, with some appellate court review); infra note 97 and accompanying text (discussing states requiring an election of remedies, thus allowing the state administrative agency to adjudicate claims filed by those who have "elected" to pursue an administrative remedy).

9. PROPOSED LONG RANGE PLAN, supra note 6, at 44-45.


11. See infra note 165 and accompanying text (distinguishing election of remedies from arbitration on these grounds).

12. See Belton, supra note 10, at 959 (stating that employers favor the use of arbitration and other forms of alternative dispute resolution in part due to its lower cost and enhanced efficiency compared to court litigation).

13. See infra note 97 (referring to states with election of remedies provisions).

14. As an illustration of how much the concept of election of remedies has been overlooked, see, for example, MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 979-82, 984-86 (1994), which devoted only seven of its 1310 pages to issues related to election of remedies, four to the preclusive effects of arbitration, and three to the application of res judicata to prior state agency determinations. See also infra note 146 (noting the dominance of arbitration analysis even in commentary on election of remedies).

15. State FEP agencies are similar to the EEOC in that they investigate charges under discrimination laws. FEP agencies differ, however, in that they investigate claims arising both under state law (pursuant to the individual state's statute) and federal law (as a "deferral" agency for the EEOC). See infra notes 92-99 (discussing the role of FEP agen-
that a claimant will weigh the associated costs, available remedies, speed of disposition, procedural hurdles, and other considerations such as limitations periods, and will choose the path best suited to his or her type of claim under the specific circumstances. As a result, unlike the system currently in place at the federal level and in most states, where both the administrative agency and court system could potentially hear a particular claim, the plaintiff in the election of remedies system will appear before only one body.

Briefly, it would be useful to illustrate how a typical election of remedies system functions. Suppose an Ohio resident alleges age discrimination in employment under state law. He or she has, in addition to any possible common law contract or tort claims, four statutory antidiscrimination provisions in the Ohio Revised Code under which to assert a right to recover. One of these provisions is purely an administrative remedy, in that it authorizes the Ohio Civil Rights Commission (OCRC) to assert a claim, but con-
fers no private right of action. The other three provisions, two specifically prohibiting age discrimination and one simply providing a remedy for any violations of the statute, confer a private right of action in the state courts without having to resort to any initial procedural steps through the state agency. Three of the four provisions expressly state that they are exclusive from the others, and the other has been ruled by an Ohio appellate court as implicitly providing exclusivity.

The idea of forcing discrimination complainants to elect between a remedy provided by the administrative system and one provided by the judicial system seems at first to be a perfect, albeit unimaginative, way to streamline the process. A closer analysis reveals, however, that election of remedies not only fails to have a considerable effect on the speed of adjudication, but also is contrary to a system which, if operating correctly, is specifically designed to speed adjudication. In addition, election of remedies has already produced some anomalous results and has served to

21. Id. § 4112.05(N).
22. Id. §§ 4101.17, 4112.02.
23. Id. § 4112.99.
24. E.g., id. § 4112.02(N) ("A person who files a civil action under this division is barred, with respect to the practices complained of, from instituting a civil action under section 4101.17 of the Revised Code and from filing a charge with the [OCRC] under section 4112.05 of the Revised Code."); see also id. §§ 4101.17, 4112.05 (containing parallel provisions).
26. For example, between 1972 and 1989, the EEOC brought less than 4% of all employment discrimination claims to federal courts. John J. Donohue III & Peter Siegelman, The Changing Nature of Employment Discrimination Litigation, 43 STAN. L. REV. 983, 1000 n.66 (1991). While this figure does not seem to lead to the conclusion that election of remedies would streamline adjudication, it reveals that the overwhelming majority of employment discrimination claimants either have their complaints dismissed, thus enabling them to sue in court, or do not wait for the administrative procedure to run its course, preferring to bring a private action instead. See Kilbom, supra note 3, at 1, 10 (noting that about 60% of claims are rejected by the EEOC as showing insufficient evidence of discrimination, and 25% are closed, usually because the claimant withdraws the complaint, and that only about 3% of cases are put into suit by the agency). The above statistics suggest that it would be beneficial for most plaintiffs to avoid the agency and go straight to court. The practical effect would be to overburden the courts to a much greater degree.
27. See infra note 73 and accompanying text (noting that a goal of spreading agency authority is the speedier resolution of claims).
28. See infra note 118 and accompanying text (discussing the inconsistency in adjudi-
further complicate an already tangled procedural framework. Ultimately, this Note argues that the election of remedies scheme in this context runs contrary both to the theory of employment discrimination law generally and to its own desired effects of streamlining procedures while preserving the autonomy of a complainant. Although the need for a practical solution to overburdening the judicial and administrative systems is one of the most pressing concerns facing both the federal and state legislatures today, it may be that the first steps toward that solution are neither as sweeping nor as complicated as one might imagine.

To these ends, this Note is divided into four parts. Each is aimed at analyzing a different aspect of the employment discrimination crisis. These sections help to explain why an election of remedies system—or any other system that attempts to drive a wedge between courts and administrative agencies—is both an apparently attractive option and a misguided patchwork solution that causes more problems than it solves.29

Part I is a brief general overview of the current employment discrimination crisis, focusing on its scope and its causes. It is important to discuss these at the outset: first, to show that the crisis is multi-faceted and thus not easily nor immediately solvable; second, to explain why it is so important that alternatives are explored.

Part II looks specifically at the problems a complainant alleging employment discrimination faces when bringing a charge, and the procedural hurdles she or he must overcome at both the federal and state levels. Although most commentators and practitioners note that the web of procedures is exceedingly complex,30 there

29. It should be pointed out, however, that an analysis of the concept of election of remedies is not the main purpose of this Note, but rather a window through which to examine the current disarray of the procedural framework in place to vindicate rights under substantive employment discrimination law. Thus, this Note is both broader and narrower than it may appear. It is broader because the concept of election of remedies is primarily an oft-overlooked point of departure through which to reassess how employment discrimination law should work and is working. It is narrower because this Note focuses almost entirely on the procedural aspects of employment discrimination law rather than on substantive law. Additionally, this Note looks primarily at Title VII claims between private parties because Title VII claims account for 80% of all employment civil rights cases. Donohue & Siegelman, supra note 26, at 985 n.3.

30. See, e.g., Shapiro, supra note 3, at 99 (arguing that the “Title VII administrative process has become a long and difficult maze”). The perceived complexity of employment discrimination procedure provides an auxiliary purpose for this Note: assisting a practition-
has been relatively little commentary on why this is so and whether the procedures themselves exacerbate large-scale problems in employment discrimination law. In addition, a general look at procedure explains how and where the concept of election of remedies fits. It also sheds some light on why, at least initially, election of remedies seems to be a viable though incomplete solution to the flooded administrative and judicial systems.

Part III focuses more directly on the concept of election of remedies in the context of the theoretical underpinnings of employment discrimination law, ultimately demonstrating why the concept is contrary to the purposes of employment discrimination law in theory. Also, a look at election of remedies in practice reveals some of the anomalous results stemming from forcing a complainant to choose between pursuing a judicial and an administrative remedy. Finally, this section looks at arbitration, another type of scheme that can also be referred to as one contemplating an election of remedies. Indeed, the limited commentary on election of remedies in the employment context has referred primarily to arbitration. This section discusses the role of the election of arbitration in employment discrimination litigation and explains why this system, although not without its own flaws, is fundamentally different from the scheme that is the focus of this Note.

Part IV weighs some of the competing considerations for dealing with the employment discrimination crisis, focusing particularly on the Long Range Planning Committee's proposal. Although the attempt is not to formulate a definitive solution, a look at some of the competing considerations reveals some of the inherent weaknesses of past and current reform proposals, and indicates both that the solution is not immediately forthcoming and that it may not be as fundamental as it seems. In short, this Note argues that the first, albeit painful, step toward a solution is to define the role of the EEOC and provide the perennially under-funded agency with sufficient funding to carry out its 1964 Civil Rights Act mandate.

er who may not be familiar with the procedural complexities of this system and outlining the types of procedural problems that may arise.
PART I: AN OVERVIEW OF THE EMPLOYMENT DISCRIMINATION CRISIS

Although there is almost universal approval of having employment discrimination laws, and there have almost undeniably been some positive results from these laws, most commentators have agreed that the system for vindicating individual rights in the employment context is currently in a state of disarray, or at least that employment discrimination laws are not as effective as they once were. Certainly, even a brief look at the statistics reveals an escalating trend in employment discrimination claims, which have flooded the administrative and judicial systems charged with adjudicating those claims. This alarming situation has provoked many commentators to look for the causes. The net result of the research is a staggeringly complex web of causes and concerns with no obvious solutions.


32. For example, there has been a decline in the type of overt, blanket exclusions of certain categories of people from jobs that existed at the time Title VII was enacted. Cf. Donohue & Siegelman, supra note 26, at 1015 (noting that there has been a major shift from "fail to hire" cases to termination cases); id. at 1019 (noting that the decline of class action discrimination suits is in part attributable to the elimination of gross, sweeping violations of the law).

33. See, e.g., Sarah E. Wald, Alternatives to Title VII: State Statutory and Common-Law Remedies for Employment Discrimination, 5 HARV. WOMEN'S L.J. 35, 38-39 (arguing that "relief under Title VII is either unavailable or ineffective in a variety of employment discrimination cases," pointing specifically to lengthy administrative procedures and the large EEOC case backlog as two major causes).

34. See, e.g., Donohue & Siegelman, supra note 26, at 1032-33 (arguing that employment discrimination policy used to be more effective than it is now, due to four factors: the decline in flagrant and obvious violations of the law, the consequent decline in the possibility of the class action suit, the shift from failure to hire cases to discriminatory firing cases, and the existence of programs such as affirmative action). See generally EPSTEIN, supra note 31 (arguing that Title VII is no longer necessary because state and local governments no longer practice de jure segregation nor permit private violence).
A. A Brief Look at the Numbers

The statistics certainly provide evidence of a system that cannot handle the sudden explosion of employment discrimination cases in both the administrative and judicial systems. The EEOC, the body charged with policing Title VII, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA), is inundated with claims. From 1991 to 1994 alone, the number of employment discrimination charges filed with the EEOC grew by 50%, resulting in a backlog of cases that rose from approximately 42,000 in 1990 to 110,000 in 1995. While EEOC complaints have grown dramatically, the agency's staffing levels and budget have remained almost static for the last decade. Consequently, even if no more employment discrimination charges are filed within the next nineteen months, it would take the EEOC the entire time just to sort through its pending claims. State agencies have reported similar problems.


36. 42 U.S.C. §§ 12101-12213 (Supp. V 1993). A broad-based antidiscrimination statute, the ADA's employment discrimination provision is similar to Title VII's prohibition. Compare id. § 12112 with 42 U.S.C. § 2000e-2 (noting parallels between the ADA's definition of discrimination and Title VII's definition of unlawful employment practices). The EEOC's enforcement powers were conferred by direct reference to the relevant provisions of Title VII. 42 U.S.C. § 12117(a).

37. In fiscal 1994, 95,447 claims were filed with the EEOC, compared with 67,509 claims filed in fiscal 1991. Janet Novack, Silver Lining, FORBES, Nov. 21, 1994, at 124, 124.


39. See supra note 4 (noting an EEOC estimate of 96,945 pending cases at the end of fiscal 1994 and an estimated 110,000 case backlog in the summer of 1995).

40. See 32 GOV. EMP. REL. REP. (BNA), at 1326 (Oct. 31, 1994) (noting that the EEOC has stayed at a relatively constant staffing level of about 3000 since 1984); Jorge Aquino, EEOC: Too Many Cases, Too Little Leadership, RECORDER, June 6, 1994, at 15 (stating that the EEOC's budget has been static since 1985); Eisler, supra note 5, at 10A (reporting that the number of EEOC investigators dropped 12.6% between 1989 and 1994). One consequence of this is that the EEOC has had to dismiss a growing number of charges, thus allowing a growing number of complainants to file claims in federal court. Aquino, supra, at 15 (EEOC dismissed 88% of charges filed in 1992).

41. See Associated Press, Discrimination Agencies Face Growing Caseloads. Increase in Successes Only Brings More Work, ROCKY MOUNTAIN NEWS (Denver), July 10, 1994, at 3A (reporting the increase in state filings). For example, the Massachusetts commission has received twice as many complaints as it had in 1990, the filings with the Pennsylvania Human Relations Commission have grown by over 250% from 1978 to 1993, California's commission has received over 160% more filings in 1994 than it received in
The court system has also had considerable growth in discrimination cases. While the volume of all federal civil case filings rose by 125% from 1970 to 1989, the employment discrimination caseload rose by over 2,000% during that time. If the number of employment discrimination cases were to continue to rise at this rate, there would be one suit for every currently employed worker by the year 2053. Although the rate of increase will undoubtedly fall, the overall increase in the number of civil filings in the federal system has led the Judicial Conference's Long Range Planning Committee to estimate that by the year 2020, there will need to be a 500% increase in federal judgeships to keep up with overall caseload growth. With employment discrimination claims accounting for a large and increasing percentage of that overall growth, the search for causes and solutions has become increasingly acute.

B. The Search for Causes

Although there has been much commentary, especially in the last five years, on the causes of this explosion in discrimination claims, there has been no consensus. While a detailed evaluation of the competing theories is beyond the scope of this Note, it is 1990, and Rhode Island's commission has its biggest backlog of cases in its 45-year history. Id.

Generally, the complaints aimed at the EEOC's lack of effectiveness have been applied with equal force to state FEP agencies. See, e.g., Wald, supra note 33, at 43 ("[S]tate budgetary constraints generally leave state agencies with staffs and resources that are even more limited than on the federal level, causing additional delays and frustration in resolving complaints."); Kim Clark, Md. Budget Cuts Delay Job Bias Probes: HRC's Effectiveness is Questioned, THE BALTIMORE SUN, April 6, 1993, at 15C (reporting that budget cuts to the Maryland Human Relations Commission "have resulted in delays that are so long that many have begun questioning whether it can effectively protect the rights of workers"); Bill Sanderson & Ovetta Wiggins, N.J. Civil Rights Agency in Crisis: Staff Dwindles as Cases Climb, THE RECORD (Hackensack, N.J.), Aug. 27, 1995, at A1 (reporting that the case backlog and staffing cuts have weakened the New Jersey FEP agency's effectiveness).

42. Donohue & Siegelman, supra note 26, at 985.

43. Id. at 1021. Donohue and Siegelman note, however, that it would be an "absurdity" to suppose that the number of discrimination cases will continue to rise at that level. Id.

44. PROPOSED LONG RANGE PLAN, supra note 6, at 15. The Committee estimates that, based on current trends, the number of federal district and appellate judgeships, which has risen from 289 in 1950 to 816 in 1994, will rise to 4120 by the year 2020. Id. This rise is even more dramatic than the Committee's projections in its November 1994 draft, where the Committee estimated that the number of federal judgeships would be 4013 by the year 2020, indicating that the federal caseload has risen steeply even in the last two years. See PROPOSED LONG RANGE PLAN (1994 Draft), supra note 6, at 13.

45. For an article that does provide in-depth analysis, see generally Donohue &
worth pointing out some of the more agreed-upon factors that have led to and exacerbated the current crisis. At the very least, a look at the wide range of contributing factors indicates that there is no simple solution to the problem.

One major cause of the increased numbers of complainants is the expansion of coverage in the substantive laws. Legislatures and courts at both the federal and state level have dramatically increased the percentage of the work force covered since the passage of the 1964 Civil Rights Act. The impact of federal legislation cannot be understated. In the three decades since Title VII's passage, Congress's two major post-Title VII antidiscrimination statutes, the ADEA (enacted in 1967)46 and the ADA (enacted in 1990),47 have expanded the protection afforded by employment discrimination laws.48 In addition to new types of protection, Congress has expanded existing protection through amending Title VII in 197249 and 1991,50 and the ADEA on multiple occasions.51

Siegelman, supra note 26, at 983-1021, which employs a detailed statistical analysis to uncover the root causes of both the growth and changing nature of employment discrimination litigation, and concludes that the two primary causes of the growth are the increase in the unemployment rate and the percentage of the work force protected by employment discrimination laws.


47. 42 U.S.C. §§ 12101-12213. In 1993, the Act's first full year of implementation, 88,000 claims were filed, up from 72,000 in 1992. Aquino, supra note 40, at 15.

48. The Judicial Conference's Long Range Planning Committee highlighted the ADEA and ADA as two of the 11 "key examples" of congressional legislation that have "contributed to an enormous expansion of private rights of action," and, consequently, to a tremendous expansion of federal court jurisdiction. PROPOSED LONG RANGE PLAN (1994 Draft), supra note 6, at 30.

49. The 1972 Amendments, as well as expanding the EEOC's power to enforce Title VII, expanded the statute's coverage to include employers that have between 15 and 25 employees, state and local government employers, and educational institution employers. Donohue & Siegelman, supra note 26, at 998; see also 42 U.S.C. §§ 2000e-5(a), 2000e(b).

50. The Civil Rights Act of 1991, which passed after heated debate, expanded remedies available under Title VII to include compensatory and punitive damages in cases of intentional discrimination, injunctive and declaratory relief in "mixed motive" cases, and "expert fees" in awards for attorney's fees generally. See 42 U.S.C. §§ 1981a, 1988c (Supp. V 1993). This Act has been the focus of much recent criticism by commentators. See infra notes 129-45 and accompanying text (discussing the 1991 Act).

51. The ADEA's changes have primarily involved broader definitions of what ages are included in its protection. As originally enacted, the ADEA protected employees between the ages of 40 and 65, who work in places employing 50 or more workers. Now it covers all employees 40 and older working at places with 20 or more workers. 29 U.S.C.
Congress also expanded the ADA's coverage in 1994\(^{52}\) and extended the coverage of 42 U.S.C. § 1981 beyond the formation of contracts.\(^{53}\) As a result of all of these changes in coverage, over seventy percent of the total labor force is protected both by federal employment discrimination law and by EEOC enforcement.\(^{54}\) State legislation has also increased since 1964. While only half the states had comprehensive fair employment practices laws at the time of Title VII's enactment, forty-nine states now have such legislation.\(^{55}\) Much of the current state legislation is broader in coverage than federal legislation.\(^{56}\)

Of course, Congress and the state legislatures are not alone in expanding the scope and coverage of employment discrimination laws in the last three decades. The Supreme Court has expanded the coverage of Title VII to reach "reverse discrimination"\(^{57}\) and "disparate impact" discrimination,\(^{58}\) to protect pregnancy leave,\(^{59}\)

\(^{52}\) As of July 1994, the ADA covers work places with 15 or more employees, which is down from 25 at the time of enactment. A provision expanding the work places covered was written into the original act. See 42 U.S.C. § 12111(5)(A) (allowing a two-year grace period before expanding coverage to include more work places). The ADA became effective in July, 1992. Id. § 12111 (References in text).


\(^{54}\) Donohue & Siegelman, supra note 26, at 992 n.18.

\(^{55}\) Catania, supra note 19, at 782 n.24. Alabama is the one state without any comprehensive antidiscrimination laws. Id.

\(^{56}\) For example, 24 states prohibit discrimination on the basis of marital status, while a smaller but growing number of states prohibit discrimination on the basis of sexual orientation, two areas left unprotected by Congress. See 8A Lab. Rel. Rep. (BNA) 451:101-08 (providing state-by-state charts of the types of discrimination prohibited).


\(^{58}\) Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (noting that whites score "far better" on the company tests, and that this disparity is attributable to race). Disparate impact discrimination claims, basically, "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate-impact theory." International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977) (citation omitted).
and to prohibit sexual harassment. And, even in situations where the Supreme Court has attempted to scale back the rights protected under Title VII, Congress has amended the statute to reassert those rights.

In addition to the changes in the scope of statutory coverage, commentators have pointed to a myriad of other internal and external factors that have helped cause the explosion of litigation and administrative filings. These include causes such as the rising unemployment rate, expansion of available remedies, presidential hostility toward the EEOC, expansion of the EEOC's powers in 1972, and the shift from failure to hire cases to wrongful termi-


59. See Nashville Gas Co. v. Satty, 434 U.S. 136, 139-40 (1977) (holding that women are to receive sick pay and retain seniority while on pregnancy leave). This protection was expanded and codified in the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1988) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.").

60. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986) (holding that sex discrimination via a "hostile environment" claim is actionable under Title VII). Despite the recognition of the claim, it was not until the passage of the 1991 Civil Rights Act, and its allowance of compensatory and punitive damages, that victims of sexual harassment had an effective remedy. See Donohue, supra note 31, at 1610-11. The result of this was an explosion of sexual harassment claims in the early 1990s. See Durgin, supra note 4, at 1 (noting the heightened public awareness because of Anita Hill's accusations during the Clarence Thomas confirmation hearings).

61. Donohue, supra note 31, at 1612. For example, the Supreme Court restricted § 1981 in Patterson v. McLean Credit Union, 491 U.S. 164, 176 (1989). Congress responded by adding paragraph (b) to § 1981. See supra note 53 (quoting from the provision of § 1981(b), expressly overruling Patterson).

62. Donohue & Siegelman, supra note 26, at 999 ("When unemployment rates are low and labor markets are tight, workers probably encounter less discrimination and are certainly better positioned to seek remedies outside the litigation process for any discrimination they do encounter." (citation omitted)).

63. For example, many commentators have argued that the allowance of compensatory and punitive damages, as well as jury trials, under the 1991 Civil Rights Act will create a huge explosion in federal litigation. See infra notes 135-38. But see Shapiro, supra note 3, at 101 n.56 (arguing that since there are still caps on damages available under the 1991 Act, plaintiffs are still likely to bring state claims in states that do allow unlimited compensatory and punitive damages).

64. Due to presidential hostility toward the EEOC and the resulting budgetary restraints placed on the agency, many plaintiffs elect to litigate their claims rather than pursue administrative relief. See generally KENT SPRIGGS, REPRESENTING PLAINTIFFS IN TITLE VII ACTIONS § 8.15, at 301 (1994) (arguing that it will be difficult to change the Reagan and Bush EEOC appointees' "deep-seated hostility to charging parties"); Frank Greve, New EEOC Chief Steps Up Bias Fight, TIMES-PICAYUNE (New Orleans), Oct. 27, 1994, at A12 (noting that Presidents Reagan and Bush named EEOC commissioners who were hostile to civil rights groups, and that Congress responded by slashing the EEOC's budget).

65. Before 1972, the EEOC was given only conciliatory powers, and was dubbed a
nation cases. Since compelling arguments and statistical evidence have been offered in support of most of these potential causes, and since there has been no consensus on the cause of the current overload of cases, it is safe to conclude that the causes of the employment discrimination crisis are varied and complex.

PART II: THE IMPACT OF PROCEDURE

"The combination of increasing employee rights coupled with an overloaded legal system . . . indicates that alternatives to the current process must be seriously considered." According to one commentator,

The existence of various federal and state remedies for employment discrimination poses numerous problems with regard to devising a judicial process that will work efficiently and fairly to adjudicate one's rights under all the available remedies. These problems are compounded be-

"toothless tiger." Belton, supra note 10, at 957 (borrowing the term from ALFRED W. BLUMROSEN, BLACK UNEMPLOYMENT AND THE LAW 59 (1971)). In 1972, Congress authorized the EEOC to bring suits and seek judicial enforcement of Title VII. Id. Some commentators have stated that this power is one of the major causes of increased employment discrimination litigation. See EQUAL EMPLOYMENT ADVISORY COMMISSION, REPLY TO THE PRELIMINARY RECOMMENDATIONS OF THE FEDERAL COURT STUDY COMMISSION 3 (1990), quoted in Donohue & Siegelman, supra note 26, at 1000 n.65 (arguing that increased litigation is caused by two major factors—additional private rights of action and the litigation authority given to the EEOC in the 1972 amendments); cf. Neal Devins, The Civil Rights Hydra, 89 Mich. L. Rev. 1723, 1735 (1991) (book review) ("The 1972 amendments, among other things, endorsed the judicial enforcement model."). But see Donohue & Siegelman, supra note 26, at 998, 1000 n.66 (arguing that the EEOC played an "essentially passive role" in the growth of discrimination litigation since it brought less that 4% of employment discrimination cases between 1969 and 1989).

66. Ironically, it has been argued that the shift to wrongful termination cases was caused by the success of employment discrimination law in "(t)he attainment of better and more integrated jobs for minorities." Donohue & Siegelman, supra note 26, at 1014-15. Donohue and Siegelman point out that, while hiring charges outnumbered firing charges by 50% in 1966, firing charges outnumbered hiring charges by nearly 300% in 1985. Id. at 1015. This has led to an increase in overall Title VII litigation because, even if the number of instances of discrimination in hiring and discrimination in firing are roughly equal, the "probability of being sued for the latter violation is roughly six times as great." Id. at 1017 n.107. The authors attribute this increased likelihood to sue in part to the fact that discrimination in firing is easier to detect and to prove: minorities and women can more easily compare their performance to their co-workers. Id. at 1012; see also Ronald Turner, A Look at Title VII's Regulatory Regime, 16 W. New Eng. L. Rev. 219, 239-40 (1994) (explaining that a current employee might be more reluctant to sue an employer, in part due to fear of retaliation or desire not to strain the ongoing employment relationship).

cause the various causes of action are diverse with respect to the substantive rights they accord, the procedures they create, and the remedial schemes they establish.68

The procedural framework in employment discrimination law, implemented when there were fewer claims and fewer substantive rights, is perhaps no longer the most fair and efficient framework. Due to increasing numbers of claims, brought about in large part by an increase in substantive rights, the procedural system to enforce those rights has been rendered "a long and difficult maze, hiding many obstacles."69 Thus, the procedural maze of statutes such as Title VII is, arguably, both a consequence of and a contributing factor to the massive growth in employment discrimination litigation.

Before turning to possible alternatives to the existing system, however, it is important to examine the procedure as it exists now, for at least three reasons: (1) to appreciate why the system is not designed to and cannot handle the explosion in discrimination claims; (2) to put reform proposals in context; and (3) to understand how and where the concept of election of remedies fits. The following analysis looks specifically at the Title VII procedural scheme, primarily because it is procedurally the most complicated of all the antidiscrimination laws70 and because Title VII claims account for eighty percent of all employment discrimination claims filed in U.S. courts.71 However, some of the major variances among different statutory schemes are also noted.

A. The Rationale for the Title VII Procedural System.

The procedural framework implemented by Title VII is a multi-layered structure that seems to revolve around a few interrelated, although often contradictory, guiding principles. The first principle is that authority should not be centralized and that there be cooperation both between the federal and state levels, and among the administrative and judicial systems at each level. The goals of this principle are to keep any one governmental body from being overburdened,72 and to provide for speedier claims resolution.73 The

68. Catania, supra note 19, at 778.
69. Shapiro, supra note 3, at 99 (discussing specifically the Title VII administrative process).
70. ZIMMER ET AL., supra note 14, at 950.
71. Donohue & Siegelman, supra note 26, at 985 n.3.
second principle is that the system should be understandable to unschooled litigants,\textsuperscript{74} since the initial filings and decisions are usually made before the aggrieved employee has the benefit of counsel.\textsuperscript{75} The third principle is that conciliation is favored over litigation, at least initially.\textsuperscript{76} Congress, in enacting the procedural structure under Title VII, "wanted women and minorities on the job, not languishing in the courts."\textsuperscript{77} The fourth principle is that, despite the hope for a conciliatory resolution of grievances, Title VII is ultimately enforced primarily by private litigants. To that end, a complainant’s right to be heard in a judicial forum shall not be
surrendered due to prior proceedings in the state or federal administrative system. The fifth principle, directly related to the previous two, is that employment discrimination law is ideally a two-front battle: (1) to deter employers from engaging in discriminatory practices and (2) to compensate victims of discrimination. A significant way to accomplish both of these purposes is to provide a complainant with a broad range of state and federal remedies for discrimination, each supplementing the other.

To these often divergent ends, Congress created a procedural framework that has remained virtually unchanged since 1964. This framework has both federal and state filing requirements and attempts to balance the role of the EEOC in quickly resolving claims without suit with the role of the courts in making the discrimination victim whole.

B. Administrative Prerequisites Under Federal Law

Contrary to ordinary administrative law principles, a person alleging discrimination under Title VII, the ADEA, or the ADA, is not required to exhaust administrative remedies. In other words, a claimant need not wait until the EEOC has concluded its investigation of the claim before she or he files suit. Rather, a complain-

78. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798-99 (1973) (stating that an EEOC finding that there was no reasonable cause to believe that a complainant was discriminated against does not bar suit and de novo review by a federal judge).

79. See infra note 132 and accompanying text (stating a conception of the "ideal" employment discrimination policy).

80. It is this principle that makes the interplay between federal and state procedural systems most significant. Since Congress never intended to have federal antidiscrimination law preempt state law, but rather to have the two schemes compliment each other, providing ancillary relief, a complainant will often have to avail himself or herself of remedies on both the federal and state level and, consequently, will have to meet the prerequisites imposed on both levels. See BRADD N. SIEGEL & JOHN M. STEPHEN, OHIO EMPLOYMENT PRACTICES LAW § 20.07(B) (1991) (stating that federal discrimination law has never been interpreted to preempt state law except as state law permits a form of discrimination that federal law prohibits); Catania, supra note 19, at 799 (noting that Congress intended Title VII to provide a "threshold of protection," which would then be supplemented by state law); Marjorie H. Gordon, Case Note, Kremer v. Chemical Construction Corp.: Eviscerating Title VII, 17 SUFFOLK U. L. REV. 987, 994-97 (1983) (discussing the legislative history of the 1972 Title VII amendments, and noting that a House bill making Title VII the exclusive remedy for employment discrimination was defeated in the Senate, which determined that the House bill was contrary to the original intent of the drafters of Title VII).

81. The basic Title VII procedures for enforcing its substantive rights are contained in 42 U.S.C. § 2000e-5. The ADA has expressly adopted the same procedures in 42 U.S.C. § 12117(a) (Supp. V 1993), while the ADEA's procedures, distinct in some ways, are functionally identical of the requirement to resort to, but not exhaust, administrative remedies. See 29 U.S.C. § 626 (1988).
ant under these statutes must satisfy two rather straightforward prerequisites to be able to file a lawsuit: timely filing of a charge with the EEOC and timely filing of a lawsuit after the EEOC provides a "right to sue" letter or a notice of dismissal.\textsuperscript{82} The time limit for filing a charge with the EEOC depends on whether the state in which the alleged discrimination took place has its own administrative agency.\textsuperscript{83} If the alleged discriminatory practice occurred in a state with such an agency—known as a "deferral" state\textsuperscript{84}—the charge must be filed with the EEOC by the earlier of 300 days after the date the alleged violation took place, or thirty days after the state agency dismissed the charge.\textsuperscript{85} If the alleged violation occurred in a state without an agency, the charge must be filed with the EEOC within 180 days of the violation.\textsuperscript{86}

After a charge is filed, the EEOC has a minimum of 180 days to investigate, attempt conciliation, and determine whether to bring a suit.\textsuperscript{87} If the EEOC decides to bring a lawsuit, the complainant loses his or her right to bring a private action.\textsuperscript{88} If the EEOC de-

\begin{footnotes}
\item[82] Zimmer et al., supra note 14, at 952. It is the latter prerequisite that most notably sets the ADEA apart from Title VII and the ADA. Under the ADEA, no right to sue letter is necessary; a plaintiff must merely wait a minimum of 60 days after filing the charge with the EEOC before suing in court. See generally James B. Helmer \& Ann Lugbill, Representing the Terminated Employee in Ohio § 2.2(C) (1990) (discussing the principal differences between the ADEA and Title VII).
\item[83] See infra notes 92-100 and accompanying text (discussing the broad categories of state statutory schemes).
\item[84] See Zimmer et al., supra note 14, at 975-78.
\item[85] 42 U.S.C. § 2000e-5(e). Since deferral states are given 60 days of exclusive jurisdiction over a charge, and since a charge is not technically filed with the EEOC until those 60 days have expired or the state agency has dismissed the charge, a complainant must actually file the initial charge within 240 days to ensure the preservation of his or her federal claim. See, e.g., Mohasco Corp. v. Silver, 447 U.S. 807, 814 n.16 (1980).
\item[86] 42 U.S.C. § 2000e-5(e); see also infra note 96 and accompanying text (discussing states with no fair employment practices agencies).
\item[87] 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.28(a) (1995); General Tel. Co. v. EEOC, 446 U.S. 318, 326 (1980) (referring to "the 180-day period of exclusive EEOC administrative jurisdiction").
\item[88] Although the language of Title VII itself only states that "[t]he person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission . . .," 42 U.S.C. § 2000e-5(f)(1), courts "have unanimously ruled that, by negative implication, this right of intervention is exclusive of any right to sue independently." Arthur Larson \& Lex K. Larson, Employment Discrimination, § T48.51 (2d ed. Temp. Transfer Binder 1995); e.g., Adams v. Proctor \& Gamble Mfg. Co., 697 F.2d 582, 583 (4th Cir. 1983) (holding that Title VII "preclude[s] suits by individuals who are charging parties, but who have not intervened in the pending EEOC action in their behalf, once the EEOC action has been concluded by a consent decree"), cert. denied, 465 U.S. 1041 (1984); McClain v. Wagner Elec. Corp., 550 F.2d 1115, 1119 (8th Cir. 1977) ("[I]f the Commission sues first, individual employees are not permitted to sue independently
\end{footnotes}
terminates that there is no reasonable cause to believe that discrimination took place, it will provide the complainant with a notice of dismissal, and the complainant may immediately file a lawsuit, which will be tried de novo. If the EEOC fails to fully investigate the claim within the 180 days, the complainant has two choices. He or she may, at any time, request a "right to sue" letter, enabling him or her to bring a lawsuit within ninety days of receiving the letter. He or she, by not requesting a letter, can also allow the EEOC to continue investigating the charge and come to some form of resolution. If the complainant remains dissatisfied, he or she may still bring a lawsuit within ninety days after receiving notice of the conclusion of the EEOC's proceedings, no matter what the agency's final findings were.

C. Types of State Statutory Schemes and Their Impact on the Title VII Framework.

Although the procedural framework set forth above seems clear enough, it can be complicated considerably depending upon the type of procedural framework a state legislature has adopted. Since Title VII does not preempt state law, and since Title VII provides for a sixty day deferral period to states with fair employment practices (FEP) agencies, it is important to examine how the vari-

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but may intervene . . .

The ADEA, unlike Title VII, contains language expressly terminating a private right of action if the EEOC brings a suit. See 29 U.S.C. § 626(c)(1) ("[T]he right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.").

89. Chandler v. Roudebush, 425 U.S. 840, 844 (1976) (citing the "well-established" rule that claimants have "the right to de novo consideration of their Title VII claims" (emphasis in original)); Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 n.8 (1974) ("[A]n individual's cause of action is not barred by a Commission finding of no reasonable cause to believe that the Act has been violated.").


91. ZIMMER ET AL., supra note 14, at 988.

92. See supra note 80 (discussing preemption). This is another major point of departure from the ADEA. While it is generally true that state remedies for employment discrimination may parallel federal provisions as long as the state law does not conflict with federal law, ZIMMER ET AL., supra note 14, at 982, the ADEA is an exception. The ADEA states that "[n]othing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action." 29 U.S.C. § 633(a) (emphasis added). Thus, while a complainant may seek redress under a state age discrimination statute, he or she may not then file a federal age discrimination claim without waiving the state claim.
ous state procedures operate. This is especially true for complain-
ants asserting a right protected solely under state law, such as state statutes prohibiting discrimination on the basis of marital status, sexual orientation, or having AIDS.93

Although there are many differences between state statutory schemes as to the scope of coverage, procedural requirements, and available remedies, they generally fall in one of three broad categories.94 The first category contains states that place no restriction on a claimant's right to seek judicial redress directly; in other words, states that do not require a claimant to file with or seek redress from a state administrative agency. Under this broad heading are two quite distinct subcategories.95 One subcategory contains those states with no FEP agency at all, and thus not considered deferral states under Title VII.96 The other subcategory contains states with election of remedies provisions, whereby a claimant may seek redress from either the administrative agency or the judicial forum, but not both.97

The second category contains states that require a waiting period after initial filing with a state FEP agency before commencing a private action, but do not require complete exhaustion of administrative remedies. The statutory scheme closely resembles Title VII,
and often follows Title VII procedures precisely.\textsuperscript{98}

The third category contains states that require complete exhaustion of state administrative remedies, and provides some measure of appellate court review.\textsuperscript{99}

Overall, one could think of an election of remedies scheme as one that is partly a "category one" (no administrative requirement) system and partly a "category three" (complete administrative exhaustion requirement) system, except, rather than having the state legislature impose the system, the complainant chooses the system best suited to his or her situation.\textsuperscript{100} However, as discussed in part III, that argument hides a much less attractive reality.

\textbf{PART III: CONCEPTS OF ELECTION OF REMEDIES AND THEIR SHORTCOMINGS IN THEORY AND IN PRACTICE}

Due to a variety of factors, many of which are noted in part I, the current procedural mechanism for vindicating Title VII rights seems to have broken down. Backlogs in the EEOC and state administrative agencies are so great that the agencies rarely begin investigations within their allotted time period. Consequently, administrative agencies have failed to achieve one of their most important goals, which is speedy resolution of claims.\textsuperscript{101} Meanwhile,
the court system, the recipient of the agencies' overflow, has itself
seen an unprecedented rise in employment discrimination litiga-
tion.\textsuperscript{102}

In light of these developments, it is worth examining election of remedies as a possible solution to some of these problems, primarily for three reasons. First, it has been virtually ignored by commentators searching for reform. Second, it is a system already in place in some states.\textsuperscript{103} Third, if the current majority in Congress remains as committed (as it claims to be) to balancing the federal budget, reforming the litigation system, and downsizing the federal bureaucracy, it will be actively searching for mechanisms to achieve these purposes. One potential reform proposal may include reducing the funding, perhaps considerably, to the EEOC. Such a proposal, although of modest cost-cutting value relative to the overall deficit, would potentially be of great political value. An analysis of election of remedies helps to reveal the danger in following such an approach.

Section A notes some of the more persuasive arguments supporting election of remedies in light of the underlying theory behind employment discrimination procedure. Section B looks at some of the anomalous results the election of remedies system has already created. Section C examines how an election of remedies system, by splitting the function of the administrative and judicial forums, is theoretically unsound. Finally, Section D looks at election of remedies in light of another system also known as an election of remedies system, arbitration.

The purpose of this discussion is twofold: (1) to argue that any system premised upon driving a wedge between administrative and judicial remedies is harmful to the vindication of employment

one hundred and twenty days from the filing of the charge." 42 U.S.C. § 2000e-5(b).

102. See supra notes 42-44 and accompanying text (quantifying the increase in employment discrimination litigation).

103. In fact, the concept of election of remedies in the employment discrimination context pre-dates Title VII. See, e.g., Bower Inc. v. Eastern Airlines, 214 F.2d 623 (3d Cir. 1954) (upholding dismissal of plaintiff's judicial complaint after plaintiff first sought adjudication by defendant's System Board of Adjustment), cert. denied, 348 U.S. 871 (1954). In Bower, the Court of Appeals stated,

... or view this as an application of the rationale of res judicata in a new area, we are satisfied that the court should declare and enforce a rule of repose against the reexamination of the merits of plaintiff's claim in this case.

\textit{Id.} at 626.
rights; and (2) to argue that the theoretical principles underlying the
current procedural system of employment discrimination law
are as valid now as they were when Title VII was enacted. Consequent-
ly, any reform proposals for solving the employment discrimi-
nation crisis should be an extension or an alteration of the system
currently in place rather than a complete overhaul of that system.

A. The Case for Election of Remedies

Election of remedies, in its most general meaning, is the act of
choosing "one out of several means afforded by law for the redress
of an injury. . . . Doctrines provide that if two or more remedies
exist which are repugnant and inconsistent with each other, a party
will be bound if he has chosen one of them." 104 In the em-
ployment discrimination context, the idea of expanding the concept of
election of remedies to the federal procedural framework seems at
first to accomplish a great deal. Since both the EEOC and the
federal court system are unquestionably flooded with a growing
number of claims, and since every Title VII claim could potentially
pass through both the administrative and the judicial systems, the
notion of splitting the administrative function from the judicial
function is attractive. Moreover, it does not seem to run contrary to
the principle, embodied in Title VII and many other employment
discrimination laws, that the system's efficacy "depends primarily
on the willingness and ability of workers to bring private suits
challenging discriminatory employment practices." 105 After all, un-
like a state system requiring exhaustion of administrative remedies,
where the ability to bring private suits at the state level is taken
away from the complainant, an election of remedies system pres-
ents the complainant with the option of avoiding the administrative
agency entirely. In short, it seems that the complainant would be
able to choose the method that best vindicates his or her rights. 106

105. Donohue & Siegelman, supra note 26, at 1023; see also Alexander v. Gardner-
means of obtaining judicial enforcement of Title VII. . . . In such cases, the private liti-
gant not only redresses his own injury but also vindicates the important congressional
policy against discriminatory employment practices.").
106. Of course, there is only a true choice where a claimant is aware of the options
and the ramifications of such a choice. See Crisco v. Board of Educ., CA No. 9282,
1988 Del. Ch. LEXIS 120 at *7 (Aug. 29, 1988) ("An election of remedies occurs when
a party, with knowledge of the facts and his rights, pursues one of several inconsistent
remedies by some decisive act.") (citing Stoltz Realty Co. v. Raphael, 458 A.2d 21 (Del.
Since people in different situations will opt for different methods of redress, this will balance the system, leaving two parallel branches with independent, specialized purposes.\(^{107}\)

Other possible justifications for expanding the election of remedies concept to federal employment discrimination law do run contrary to existing employment discrimination theory, but arguably further some of the more popular criticisms of that theory. One of the more appealing justifications is that it prevents complainants, unhappy with the results in one forum, to get a "second bite at the apple" in another.\(^{108}\) Additionally, the administrative agency could

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\(^{107}\) This is the best rationale for the election of remedies structure that is apparent from the little information available. There is staggeringly sparse legislative history available in any state that has implemented such a system. But see Marine Midland Bank v. New York State Div. of Human Rights, 551 N.E.2d 558, 562-63 (N.Y. 1989) (determining that the administrative and judicial forums offer distinct advantages, and it should be left up to the individual to choose); cf. Makovi v. Sherwin-Williams Co., 561 A.2d 179, 199 (Md. 1989) (Adkins, J., dissenting) (noting that reasons exist for not wishing to sue in court, such as a desire to remain with the employer or a desire to prevent "sensitive and emotional" charges from being exposed to the public).

\(^{108}\) See Smith v. Gulf Oil Corp., 79 S.E.2d 880 (N.C. 1954) ("The purpose of the doctrine of election of remedies is not to prevent recourse to any remedy, but to prevent double redress for a single wrong."); cf. BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1074 (2d ed. 1983) (asserting that allowing a claimant with only a 20% chance of prevailing in a given forum to independently assert the same claim in four forums, de novo, raised the chances of success to 60%); Susan Hurt, Symposium Note, Res Judicata Effects of State Agency Decisions in Title VII Actions, 70 CORNELL L. REV. 695, 697 (1985) (articulating a broad concern over allowing plaintiffs to pursue claims in a federal court when "a state level forum may already have heard and decided the issues which would arise" due to questions of fairness and effi-

(stating that election of remedies applies only if the party made the choice with "a full and clear understanding of the problem, facts, and remedies essential to the exercise of an intelligent choice"). But see Magini v. Otnorp, Ltd., 579 N.Y.S.2d 669, 670 (App. Div.) (holding that, in a State which requires election of remedies, a plaintiff alleging age discrimination is barred from suit by his previous resort to the New York City's Commission on Human Rights), appeal denied, 599 N.E.2d 691 (1992). The Magini court rejected plaintiff's argument that he was "unschooled, was without benefit of counsel, and his knowledge of English is 'rudimentary.'" Id. The court stated that,

there is no indication that the Legislature intended to import any "knowledgeable" prerequisite for the election of remedies . . . to become valid. The statute does not provide that a grievant have advice of counsel, or a full appreciation of the finality of an election to proceed in the administrative forum. The policy of the statute is result oriented.

Id. (emphasis added).
provide a filtering function which it does not presently serve, rejecting meritless claims before they bog down the entire system. ¹⁰⁹

B. Practical Problems Posed by Election of Remedies: A Look at Preclusion

Although this proposal has a certain allure, there are some fundamental and insurmountable problems with it. Specifically, the concept of election of remedies produces two fundamentally problematic results. First, it is unduly discriminatory against pro se and otherwise unschooled litigants. These are precisely the people whom the procedural framework of employment discrimination law was meant to help.¹¹⁰ Second, far from achieving some type of equilibrium between the administrative and judicial forums, election of remedies ultimately encourages all complainants to forego the administrative process entirely in favor of judicial action. Although this potentially creates an even more burdensome situation for the court system, many claimants—often those with less money—will still opt for the less expensive administrative process. Generally speaking, then, a person's income may be the determinative factor in which forum he or she elects, a result that is unfair if one forum offers different remedies from the other. In addition, as the potential traps built into the administrative process become more widely known, the court system will remain flooded with employment discrimination claims.

The framework of Title VII and related employment discrimination laws has always been directed toward assisting those unschooled and untrained laypersons who, "unassisted by trained lawyers, initiate the process."¹¹¹ By contrast, an election of remedies system is, by many accounts, "a trap for the unwary and unsophisticated."¹¹² Instead of creating a system that efficiently

¹⁰⁹. Since a complainant under Title VII can currently get a trial de novo in federal court irrespective of any adverse finding by the EEOC, the agency is not empowered to filter out meritless claims. See supra notes 81-91 and accompanying text (discussing the administrative procedures of the EEOC under Title VII).

¹¹⁰. See supra note 74 (noting that the procedure should be available to unschooled litigants).

¹¹¹. Love v. Pullman Co., 404 U.S. 522, 525-26 (1972); see also Donohue & Siegelman, supra note 26, at 1023 ("The efficacy of Title VII and many other federal employment discrimination laws depends primarily on the willingness and ability of workers to bring private suits challenging discriminatory practices."); id. at 1023 n.126 (emphasizing the individual's role in Title VII enforcement).

¹¹². HELMER & LUGBILL, supra note 82, at § 2.3(B)(2)(a) (criticizing Ohio's election of
and effectively fights employment discrimination, the requirement to elect a remedy, even though that election is usually done without the benefit of counsel and without a full understanding of the ramifications of the supposed choice, adds further complexity to a system already mired in procedural hurdles.\textsuperscript{113} The emphasis has shifted to one of strategy, with a greater "likelihood that an individual who wishes to pursue a discrimination claim in federal court will be precluded from doing so for reasons of form rather than substance."\textsuperscript{114}

The greatest example of potential injustice to pro se litigants is claim and issue preclusion, whereby a litigant who appeals and loses a negative finding by a state administrative agency is precluded from asserting the same claims in a federal forum. In \textit{Kremer v. Chemical Construction Corp.},\textsuperscript{115} the Supreme Court determined the preclusive effect in federal court of a state court decision rejecting an individual’s employment discrimination claim under state law. The case arose in the context of New York’s election of remedies scheme, a matter given little attention by the many critics of the decision. In \textit{Kremer}, the Court held that, under 28 U.S.C. § 1738 (the Full Faith and Credit Clause), such a state court decision bars a subsequent Title VII suit in federal court.\textsuperscript{116} That

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\textsuperscript{113} See \textit{Hackett v. McGuire Bros.}, 445 F.2d 442, 446-47 (3d Cir. 1971) (stating that the policy reflected in Title VII must not be frustrated by the development of the overly technical judicial doctrine of election of remedies).
\textsuperscript{114} Mann, \textit{supra} note 76, at 411.
\textsuperscript{115} 456 U.S. 461 (1982).
\textsuperscript{116} \textit{Id.} at 466-67. The \textit{Kremer} decision and its impact on employment discrimination claims has been thoroughly discussed and analyzed by many commentators, most of whom have criticized the ruling. It is, therefore, unnecessary to discuss the issue of preclusion in too much depth here, except to demonstrate the inherent unfairness the decision causes under state election of remedies structures.

Many articles discuss the impact of \textit{Kremer}. See, \textit{e.g.}, \textit{LARSON & LARSON}, \textit{supra} note 88, § T49.15(c)(3) ("The result reached by the majority in \textit{Kremer} was unjust, not only to Kremer himself but also to the spirit and intent of Title VII and the Court's
decision's implications for election of remedies are enormous. Not only is a complainant who elects an administrative remedy at the state level barred from asserting a judicial action at the state level, if that complainant is unfortunate enough to appeal a negative administrative finding to the state appellate court and loses, the complainant is also barred from asserting a similar federal cause of action in the federal judicial system. Thus, contrary to the long-accepted notion that a Title VII claimant gets a trial de novo in federal court regardless of the outcome of administrative proceedings, a claimant in an election of remedies context can elect herself or himself out of the judicial process entirely.

earlier decisions. Title VII requires aggrieved persons to refer their charges to state agencies and neither Title VII nor the Kremer Court provides for the appointment of counsel prior to the filing of a suit in federal court.

Gordon, supra note 80 (concluding that the Supreme Court misconstrued the language and legislative history of Title VII, and misapplied the Full Faith and Credit Clause); Mann, supra note 76, at 430-31 (arguing that the Kremer decision increased the likelihood that individual rights might be precluded over issues of form, comity, and procedure, and that the notion that a state administrative proceeding could limit a complainant's right to Title VII relief is misguided and contrary to long-established precedent); Marjorie A. Silver, In Lieu of Preclusion: Reconciling Administrative Decisionmaking and Federal Civil Rights Claims, 65 Ind. L.J. 367, 369 (1990) (arguing that the Supreme Court's "generous application of the preclusion doctrine" undercuts the goals of civil rights laws generally).

117. WILLIAM L. DIEDRICH, JR. & WILLIAM GAUS, DEFENSE OF EQUAL EMPLOYMENT CLAIMS § 9.18 (1982) ("The concurrent and independent nature of the various statutory remedies for employment discrimination means that a Title VII claimant is entitled to a trial de novo in federal court regardless of the outcome of prior administrative proceedings." (footnote omitted)).

118. Until 1991, the election of remedies law in New York, which was the law at issue in the Kremer case, was even less of a true election. Before 1991, a claimant who filed a charge with the EEOC as required by Title VII, the ADEA, and the ADA, was considered to have elected an administrative remedy at the state level when the EEOC automatically referred the charge to the state agency—despite the fact that the claimant herself never filed with the state agency. Promisel v. First Am. Artificial Flowers, 943 F.2d 251, 257 (2d Cir. 1991), cert. denied, 502 U.S. 1060 (1992).

The 1991 amendment of N.Y. Exec. Law § 297(9) changed this. See N.Y. Exec. Law § 297(9) (McKinney 1993) ("A complaint filed by the [EEOC] to comply with the requirements of [federal antidiscrimination law] shall not constitute a filing of a complaint within the meaning of this subdivision."). The amendment, however, left the anomalous result that a claimant who files a charge with the EEOC as required by Title VII, the ADEA, and the ADA, was considered to have elected an administrative remedy at the state level when the EEOC automatically referred the charge to the state agency—despite the fact that the claimant herself never filed with the state agency. Promisel v. First Am. Artificial Flowers, 943 F.2d 251, 257 (2d Cir. 1991), cert. denied, 502 U.S. 1060 (1992).

The clear message of Kremer is that an individual who wishes to preserve his right to assert a Title VII claim in federal court should not seek state judicial review of an unfavorable agency action. However, even this strategy does not guarantee that a claimant will protect his or her federal claim. Circuit courts have extended the Kremer preclusion principle to cases in which a claimant, electing a state administrative remedy, initially prevails, but later loses when the defendant employer appeals the administrative decision and obtains a reversal. Since "[b]oth Congress and the courts envisioned state agency proceedings and remedies as ancillary to federal administrative and judicial proceedings," it

1227, 1231 (S.D. Ohio 1993) (holding that a claimant who had previously filed an age discrimination claim under OHIO REV. CODE § 4101.17, which would normally bar a subsequent filing with the state administrative agency, is not precluded from filing with the agency for the sole purpose of satisfying the mandatory prerequisite to an action under the ADEA). In dicta, the Baker Court explained,

Federal law requires that in order to have a judicial remedy in the district courts, [a claimant] must first file with the OCRC [Ohio Civil Rights Commission] under section 4112.05. This filing, the Defendant argues, should make it impossible for the Plaintiff to pursue pendant state claims under section 4101.17 or 4112.02(N). The practical effect of following this argument would be to force the age discrimination claimant to elect between state and federal judicial remedies. However, the Court finds this interpretation to be at odds with its view that the interrelated enforcement scheme mandated by federal employment law evinces a Congressional intent to create federal remedies which are complementary and supplemental to available state remedies for employment discrimination.

Id.

119. ZIMMER ET AL., supra note 14, at 985.
120. E.g., Trujillo v. County of Santa Clara, 775 F.2d 1359, 1369 (9th Cir. 1985); Hickman v. Electronic Keyboarding, Inc., 741 F.2d 230, 232 n.3 (8th Cir. 1984); Gonsalves v. Alpine Country Club, 727 F.2d 27, 29 (1st Cir. 1984). It was precisely the fear of this scenario that prompted Justice Blackmun, writing for the dissent in Kremer, to state, in addition to recommending that an unsuccessful state discrimination complainant should not seek judicial review, that,

[1] Indeed, a prudent discrimination complainant may make every effort to prevent that state agency from reaching a final decision. If the complainant prevails after a full hearing, he runs the risk that his adversary may seek judicial review. . . . For a complainant with some evidence to support his claim, the wiser course might well be to thwart all state proceedings.

Kremer v. Chemical Constr. Corp., 456 U.S. 461, 504-05 n.18 (1982) (Blackmun, J., dissenting) (emphasis in original); see also LARSON & LARSON, supra note 88, § T49.15(c)(3) ("To preserve his Title VII rights, a plaintiff is required to initiate state proceedings, but he must then make sure that he does not have the misfortune to prevail."); Catania, supra note 19, at 837 (arguing that, since New York was an election of remedies state, Kremer should have bypassed the state administrative scheme entirely).
121. Mann, supra note 76, at 418.
is problematic that a state agency proceeding can indirectly serve to terminate Title VII rights. Unlike state schemes that confer no private right of action and thus make filing with the state administrative agencies unavoidable, election of remedies schemes are perhaps more disturbing because, as the cases indicate, an unschooled litigant may forego the opportunity to assert rights that a more savvy litigant—or an attorney—would not.\footnote{122}

In short, an informed choice of remedies exists only for people who know the ramifications of a particular decision.\footnote{123} Apart from disadvantaging uninformed litigants,\footnote{124} it also encourages litigation over conciliation.\footnote{125} Anyone who is aware that an ad-

\footnote{122} This is particularly disturbing in light of evidence that people experiencing job discrimination are less likely to consult a lawyer than are people experiencing nearly all other types of legal problems. Donohue & Siegelman, \textit{supra} note 26, at 1004-05. Of course, even the most savvy of litigants has fallen into the election of remedies trap. \textit{See}, \textit{e.g.}, Bouker v. Cigna Corp., 847 F. Supp. 337, 340 (E.D. Pa. 1994) (holding that an attorney’s filing of an administrative charge on the client’s behalf constitutes an election of remedies).

\footnote{123} \textit{See} \textit{LARSON \\& LARSON, supra} note 88, § T49.15(c)(3) (arguing that, since Title VII requires an administrative filing with a state agency, and since neither Title VII itself nor the court in \textit{Kremer} provides for the appointment of counsel prior to filing a federal action, many pro se litigants, upon receiving an adverse determination from the state agency and a notice of right to appeal, will likely file an appeal unaware that they may be forfeiting their rights to a federal remedy).

\footnote{124} A slight majority of states require exhaustion of administrative remedies prior to appeal. \textit{Id.} § T53.30. Thus, it could be argued that this system is even more unfair, because claimants could lose their federal right by doing what is required by Title VII and state law. At least an election of remedies offers a complainant the initial choice of whether to avoid the state administrative procedure entirely. However, it is perhaps more disturbing that election of remedies falls unevenly on people who are not aware of the way the system operates. Although both the “exhaustion” and “election” systems discourage legitimate appeals and encourage claimants to avoid state proceedings, an election of remedies system has the further unfairness of its uneven application.

Moreover, an exhaustion of remedies system reflects some policy considerations that would not be furthered by an election of remedies system. \textit{See} \textit{Catania, supra} note 19, at 828 (Catania notes that state exhaustion of remedies requirements reflect at least three policy considerations: (1) conserving judicial resources by allowing the administrative agency to narrow issues, dispose of meritless claims, and make initial determination of merits, thus making the process more economical and expeditious; (2) strengthening the administrative process by giving the agency the chance to develop the necessary background to make better determinations of cases; (3) forwarding the judicial desire to defer to administrative autonomy.); \textit{see also infra} notes 169-85 and accompanying text (discussing the Judicial Conference’s Long Range Planning Committee’s proposal).

\footnote{125} The New York court system alone has, through its incredibly strict interpretation of election of remedies, done quite a bit to ensure that a claimant never even contemplates an administrative filing. \textit{See}, \textit{e.g.}, \textit{Marine Midland Bank v. New York State Div. of Human Rights}, 551 N.E.2d 558 (N.Y. 1989) (disallowing plaintiff’s court case after plaintiff filed an administrative complaint, even though the administrative filing was time barred and the court filing was not).
ministrative decision at the state level can ultimately bar a Title VII claim at the federal level will be more apt to pursue a private judicial action at both levels. This has two harmful effects. First, since private litigation is more expensive to claimants on a case by case basis than an administrative investigation, people with less money are forced to choose between the “high stakes gamble”\(^\text{126}\) of private litigation and an administrative system that may ultimately foreclose the vindication of certain rights. Second, the idea of encouraging everyone to litigate their claims is inefficient\(^\text{127}\) and runs contrary to the theoretical underpinnings of Title VII’s “detailed administrative and judicial process designed to provide an opportunity for nonjudicial and nonadversary resolution of claims.”\(^\text{128}\)


Perhaps the most pervasive criticism of the direction in which employment discrimination law is presently heading is that it has become “tortified,” replacing a thoughtful balance between conciliation and litigation with a purely adversarial system in which workers and lawyers with questionable claims unabashedly pursue their complaints in the judicial system with the hopes of winning a considerable recovery. While commentators have tried to discern the causes of this phenomena, none have looked specifically to the concept of election of remedies.

Title VII, it has been argued, was founded on a somewhat modified labor model of employment law.\(^\text{129}\) The theory was that, because discrimination is systemic and because the central purpose of the law is to encourage employers to hire qualified employees

\[\text{126. Berger, supra note 10, at 715.}\]
\[\text{127. See infra note 145 and accompanying text (discussing the problems, in terms of the efficiency of the statutory scheme, of allowing plaintiffs to sue without at least a preliminary resort to the administrative process).}\]
\[\text{129. See David A. Cathcart & Mark Snyderman, The Civil Rights Act of 1991, in THE CIVIL RIGHTS ACT OF 1991, at 12 (1993) (“Title VII previously was structured on the traditional labor model, with the emphasis on conciliation and the availability of equitable relief only; the underlying theme was the preservation of employer-employee relations.”). See generally Hemicz, supra note 76 (criticizing the 1991 Civil Rights Act as representing a fundamental shift in employment discrimination theory, from one of remediation and conciliation to one of litigation and damages).}\]
in the protected groups, the law should not, where possible, be adversarial in nature. This ideal is borne out somewhat in the language of Title VII itself, which emphasizes an initial resort to "informal methods of conference, conciliation, and persuasion." Of course, since conciliation is not always possible, Title VII allows for civil actions to force compliance with its provisions. As stated by John J. Donohue III and Peter Siegelman, the ideal employment discrimination policy, then, "should generate the appropriate volume and composition of litigation in order both to provide an adequate deterrent for employers considering discriminatory practices and to compensate victims of discrimination." This two-front approach to discrimination, emphasizing conciliation first, followed by litigation to force punishment for noncompliance, has always been at the heart of employment discrimination policy.

An election of remedies system transforms the model into one purely of litigation, certainly no less than has the Civil Rights Act of 1991, which has been a primary target of recent criticism. The principal argument against the 1991 Civil Rights Act, which amended Title VII to provide for compensatory and punitive damages and jury trials, is that it would encourage

130. 42 U.S.C. § 2000e-5(b). This provision states that, "[i]f the Commission determines after [its initial] investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." Id. It is only upon the event that "the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission [that] the Commission may bring a civil action." Id. § 2000e-5(f)(1).

131. Id. § 2000e-5(f).

132. Donohue & Siegelman, supra note 26, at 984; see also Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (stating that the trial court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future" (footnote omitted)).

133. See supra notes 78-79 and accompanying text (discussing litigation and private enforcement).


135. See, e.g., Cathcart & Snyderman, supra note 129, at 6 ("[The 1991 Act's] incorporation of civil jury trials and compensatory and punitive damages suggests that many federal employment discrimination claims are likely to be resolved through ordinary civil litigation. This may result in a diminished role for the [EEOC] and state fair employment agencies."); Hernicz, supra note 76, at 2 (arguing that in the 1991 Civil Right Act, "Congress has radically altered the evolution of employment discrimination law and thrust on the courts the task of fostering its ill-conceived creation").

136. 42 U.S.C. § 1981a(b). The amount of compensatory and punitive damages available for future losses, emotional pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life, are subject to a sliding scale of "damage caps" depending on the num-
all alleged victims of discrimination to forego conciliation efforts entirely in the hopes of recovering substantial damages, thereby reducing the role of the EEOC and overburdening the court system. 138

The Civil Rights Act, however, contains a dual message in keeping with the traditional policy justifications of employment discrimination procedure. While the 1991 Act did provide for expanded recovery, it also expressly encouraged the use of “alternative means of dispute resolution, including settlement negotiations . . . , mediation, factfinding, minitrials, and arbitration.” This at least indicates that, regardless of the practical implications of the Act, 139 Congress saw the traditional policy underpinnings of employment discrimination law—of conciliation and of the quick resolution of claims—as having a continuing viability. Additionally, the expansion of available remedies brought by the 1991 Act is

ber of employees an employer has. See id. § 1981a(b)(3). In addition, compensatory and punitive damages are limited to cases involving intentional discrimination. Id. § 1981a(a)(1). Claimants alleging “disparate impact” discrimination may not recover compensatory or punitive damages. Id.; see also 42 U.S.C. § 2000e-2(k)(1) (defining the elements of a disparate impact claim, which is most noteworthy for not requiring intentional discrimination by the employer).

137. Id. § 1981a(c).
138. See supra note 135 (discussing recent criticism); see also Hemicz, supra note 76, at 63. Hemicz comments on the testimony offered in opposition to the 1991 Act:

Next to the great “quota” dispute, damage awards for intentional discrimination was the most hotly debated issue in the 1991 Act and the failed 1990 Act. Opponents of expanded damage awards presented testimony that similar changes in state discrimination laws had spurred plaintiffs' attorneys to file suits instead of seeking conciliation and to refuse settlements in “hopes of a large jury verdict, large punitive damage verdict, and a contingent fee coming into their pocket.” A spokesman for the National Foundation for the Study of Equal Employment Policies estimated that the cost of Title VII litigation would skyrocket from 775 million dollars to over two billion dollars per year.

Hemicz, supra note 76, at 63 (citations omitted). Hemicz further states that “[m]ore troubling than the anticipated increase in litigation costs, however, is the doctrinal genesis that compensatory and punitive damages symbolize... The 1991 Act vaults employment discrimination law from this basic underpinning of conciliation into a litigation-oriented system with tort-like damages.” Id. at 63-64.

140. Some have argued that the 1991 Act could enhance the possibility of alternate dispute resolution. See, e.g., Belton, supra note 10, at 957 (noting that “Congress’s encouragement of the use of ADR was undoubtedly influenced by... the current debate over the so-called litigation explosion”); Berger, supra note 10, at 712 (arguing that the Act evidences congressional approval of alternative dispute resolution and encourages the use of procedures such as negotiation, mediation, fact finding, and minitrials).
conceivably justified by providing adequate protection to victims of some forms of discrimination,\textsuperscript{141} simplifying procedure,\textsuperscript{142} or filling gaps in state employment discrimination law.\textsuperscript{143} In short, while the Civil Rights Act of 1991 can be seen as an attempt, and perhaps even a failed attempt, to effectuate the policies of Title VII,\textsuperscript{144} election of remedies is a wholehearted abandonment of those policies.\textsuperscript{145}

\textsuperscript{141} For example, in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), victims of sexual harassment who were not fired, although covered under Title VII, seemed to be left without an adequate federal remedy. See also Cathcart & Snyderman, supra note 129, at 11 (noting that the expansion of Title VII remedies now provides a monetary reward for victims of sexual harassment not tied to lost compensation); Donohue, supra note 31, at 1610 (arguing that the 1991 Act provides the first adequate remedy for sexual harassment, and stating that Congress has "boldly advanced the law of sexual harassment").

\textsuperscript{142} Cf. Belton, supra note 10, at 947, 957 (arguing that Congress attempted to harmonize the scope of damages recoverable under all federal employment discrimination law, but also noting that Congress "added yet another layer of complexity" by encouraging alternative dispute resolution procedures).

\textsuperscript{143} See Cathcart & Snyderman, supra note 129, at 11 (noting that the 1991 Act's broader coverage will probably have the greatest impact in states that do not currently provide comparable protection under state law).

\textsuperscript{144} But see id. at 12 ("The [1991] Act bases Title VII and the ADA on a tort model: Employment disputes are to be resolved through litigation, with compensation to the victim and punishment for the offender."). See generally supra note 133 and accompanying text (discussing employment discrimination policy).

\textsuperscript{145} See East v. Romine, Inc., 518 F.2d 332, 336 (5th Cir. 1975) (arguing that the purpose of Title VII, particularly the opportunity to end discrimination through conciliation, would be frustrated if the EEOC could be avoided entirely), overruled by Burdine v. Texas Dep't of Community Affairs, 647 F.2d 513 (5th Cir. 1981); Pennsylvania Human Relations Comm'n v. Alto-Reste Park Cemetery Ass'n, 306 A.2d 881, 887 (Pa. 1973) ("[O]nly an administrative agency with broad remedial powers, exercising particular expertise, could cope effectively with the pervasive problem of unlawful discrimination.").

For an analogous discussion on policy grounds, but applied to a state's statutory scheme similar to Title VII, see Clay v. Advanced Computer Applications, Inc., 559 A.2d 917, 920 (Pa. 1989), in which the Pennsylvania Supreme Court, referring to the Pennsylvania Human Relations Commission (PHRC), argued that,

the statutory scheme would be frustrated if aggrieved employees were permitted to circumvent the PHRC by simply filing claims in court. This would result in the very sort of burdensome, inefficient, time consuming, and expensive litigation that the PHRC was designed to avert, and would substantially undermine the proper role of the PHRC. . . .

The reasons the Legislature chose thus to postpone a complainant's right to seek redress by an action in court are clear. The PHRC possesses a "particular expertise" in the area of unlawful discrimination not possessed by the courts. By requiring a complainant first to repair to the PHRC, the Legislature ensured maximum use of the PHRC's expertise, thereby minimizing the inefficient use of judicial resources (and its attendant expense and embarrassment of the parties).
D. Arbitration: A Different Conception of Election of Remedies

In the employment discrimination context, the most common usage of the term "election of remedies," as well as most of the commentary on the concept, has been in the context of arbitration.\textsuperscript{146} Generally, the issue revolves around whether the resort of a discrimination grievance to arbitration can preclude an employee from concurrently or subsequently utilizing the statutory mechanism of Title VII or its state equivalent to enforce the same grievance. In light of two leading Supreme Court decisions, \textit{Alexander v. Gardner-Denver Co.}\textsuperscript{147} and \textit{Gilmer v. Interstate Johnson Lane Corp.},\textsuperscript{148} there has been much speculation as to the circumstances under which contracts entered into between employers and employees can—or should—constitute the type of election of remedies that would preclude the employee from litigating his or her employment discrimination claims in federal court. The relative merits of applying the election of remedies doctrine to arbitration in the discrimination context have been assessed and analyzed by many commentators.\textsuperscript{149} The focus of this section is more narrow, however, and

\textsuperscript{146} See supra note 10-11 and accompanying text (discussing binding arbitration); see also Larson & Larson, supra note 88, § T49.15 (in a three-part discussion of election of remedies, one part is devoted to arbitration, one to the jurisdictional question of whether a Title VII claim can be filed in state court at all, and one to preclusion); Schlei & Grossman, supra note 108, at 1075-91 (discussing election of remedies for 17 pages, with 15 pages devoted to arbitration). See generally Belton, supra note 10, at 959-62 (discussing arbitration in light of the 1991 Civil Rights Act's embracing of alternative dispute resolution); Berger, supra note 10, at 696-721 (evaluating the potential role of arbitration in the employment discrimination context); Maria C. Whittaker, \textit{Gilmer v. Interstate: Liberal Policy Favoring Arbitration Trammels Policy Against Employment Discrimination}, 56 Alb. L. Rev. 273 (1992) (discussing the effect of Gilmer).\textsuperscript{147} 415 U.S. 36 (1974) (holding that the prior resort to arbitration pursuant to a collective bargaining agreement does not preclude a Title VII plaintiff from seeking a judicial remedy).\textsuperscript{148} 500 U.S. 20 (1991) (upholding an agreement entered into by a plaintiff as a condition of employment where the agreement requires that all disputes would be resolved by arbitration, thus precluding plaintiff's ADEA suit).\textsuperscript{149} Arbitration is a method of alternative dispute resolution in which parties voluntarily submit their dispute to an impartial judge and agree that the decision rendered will be binding. Arbitration has been the subject of considerable debate in the employment discrimination context, particularly since the Supreme Court's decision in \textit{Gilmer}. Most of this criticism and praise has been aimed at the decision itself. See, e.g., Christine Godsil Cooper, \textit{Where Are We Going with Gilmer?—Some Ruminations on the Arbitration of Discrimination Claims}, 11 St. Louis U. Pub. L. Rev. 203 (1992) (criticizing the \textit{Gilmer} decision). Perhaps significantly, the Court gained some noteworthy praise from Senator Robert Dole, now the Majority Leader in the U.S. Senate, see 137 Cong. Rec. S15472, S15478 (daily ed. Oct. 30, 1991), who applauded both the 1991 Civil Rights Act generally and the Supreme Court's apparent endorsement of alternative dispute resolution embod-
has not been thoroughly analyzed by these commentators. In short, the concept of election of remedies in the arbitration context, irrespective of whether it is a more justifiable application of the elec-

Since *Gilmer*, the debate has intensified, particularly as to the issue of whether an employer can preclude all employees from ever asserting a federal discrimination claim in court by inserting a boilerplate arbitration requirement in all employment contracts. In part, this debate stems from an issue left open from the *Gilmer* court regarding whether the Federal Arbitration Act [FAA], which mandates the submission of grievances to arbitration, applies to employment contracts. Section 1 of the FAA expressly exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1994). Conceivably, this exemption could be broad enough to reach all employment contracts. See, e.g., Whittaker, supra note 146; Heidi M. Hellekson, Note, Taking the "Alternative" Out of the Dispute Resolution of Title VII Claims: The Implications of a Mandatory Enforcement Scheme of Arbitration Agreements Arising Out of Employment Contracts, 70 N.D. L. REV. 435, 437-48 (1994). But see ZIMMER ET AL., supra note 14, at 981 (arguing that "more natural reading" of the FAA exemption applies only to collective bargaining agreements—"classes" of workers). The Court in *Gilmer* did not rule on this issue, both because it was not preserved for appeal and because the arbitration clause in that case was in a contract with the New York Securities Exchange Commission, not with defendant. *Gilmer*, 500 U.S. at 25 n.2. A further argument raised by some commentators is that *Gilmer*, decided under the ADEA, should not extend to Title VII. See Hellekson, supra, at 435-57. But see Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991) (applying *Gilmer* to Title VII).

Ironically, if *Gilmer* does apply to individual employment contracts under Title VII, it would also apply to other statutes, such as the Old Workers Benefit Protection Act (OWBPA), 29 U.S.C. § 621 (Supp. V 1993), which imposes strict requirements for the validity of a waiver of statutory rights. See infra notes 156-57 and accompanying text (discussing the requirements for the waiver of rights under OWBPA). The Ninth Circuit recently invalidated an arbitration clause on facts similar to those in *Gilmer* based on the plaintiff's lack of knowledge of waiver. See Prudential Ins. Co. of America v. Lai, 42 F.3d 1299 (9th Cir. 1994), cert. denied, 64 U.S.L.W. 3240 (U.S. 1995). One of the rights invoked by a widespread application of *Gilmer* would be a plaintiff's right to jury trial. This argument has been brought in a case filed in January 1995 in the Northern District of California. The suit alleges that an arbitration clause of the type the plaintiff in *Gilmer* was required to sign is a violation of the Seventh Amendment, based on a state-action theory. See Peter F. Blackman, Arbitration Suit Asserts Constitutional Arguments, Nat'L L.J., Feb. 27, 1995, at B1, B2 (discussing the recent case and presenting arguments on both sides of the issue).

In addition to the battles over the scope of *Gilmer*, many commentators have brought forth policy arguments for and against the widespread use of arbitration contracts. Most of those arguments were addressed in *Gilmer*. See infra notes 150-54 and accompanying text (discussing the arguments in *Gilmer*). One argument not extensively addressed seems to be that employers may not be willing to require all employees to sign employment contracts because that would bring the employees within the broad scope of contract law.

State courts have imposed their own limitations on the preclusive effects of arbitration as well. See, e.g., Devine v. City of Des Moines, 366 N.W.2d 580, 582 (Iowa 1985) (holding that arbitration is inappropriate where administrative remedies are exclusive).
tion of remedies doctrine in employment discrimination law, is fundamentally different from that in the administrative context. Consequently, arbitration election of remedies does not evoke the same types of practical and theoretical problems posed by the "prior resort to administrative agency[-type]" election of remedies. The arguments for and against the widespread use of arbitration as a mechanism for resolving Title VII disputes are, therefore, not identical to those for and against the concept of election of remedies in the administrative context.

On one level, the primary distinction between the arbitration election of remedies and the administrative election of remedies is that the former is based squarely upon freedom of contract and individual control over the prosecution of an action, two factors not present in the latter. The Court in *Gilmer*, after rejecting arguments that arbitration is contrary to the purposes of the statutory framework\(^\text{150}\) and that the procedures are inadequate,\(^\text{151}\) distinguished *Alexander* and other cases in the collective bargaining context because of the "tension between collective representation and individual statutory rights, a concern not applicable to the present case."\(^\text{152}\) While the plaintiff in *Alexander* had his grievance arbitrated under a clause contained in a collective bargaining agreement that he had no part in drafting, the plaintiff in *Gilmer* actively agreed to arbitrate all employer-employee disputes. Thus, the *Gilmer* Court held that the individual agreement, and not the collective bargaining agreement, served "to advance the [ADEA's] objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise."\(^\text{154}\)

\(^{150}\) *Gilmer*, 500 U.S. at 27-29 (rejecting arguments that arbitration is improper because it prevents the ADEA's advancement of broad social policies, interferes with the EEOC's enforcement of the statute, and deprives the plaintiff of a judicial forum). As to this last argument, the Court noted that since the EEOC is mandated to pursue conciliation and other informal processes, this "suggests that out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress." *Id.* at 29.

\(^{151}\) *Id.* at 30-32 (rejecting arguments that arbitration panels would be biased toward employers, that discovery is inadequate, that the results of arbitrators' findings would be hidden from the public, and that remedies would be more restrictive).

\(^{152}\) *Id.* at 35.

\(^{153}\) Although the *Gilmer* holding only addressed rights under the ADEA, it has since been made applicable to Title VII. See, e.g., *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 307 (6th Cir. 1991) (holding that *Gilmer* makes the Federal Arbitration Act applicable to Title VII claims).

A large part of the “freedom of contract” rationale is that contracts are entered into knowingly and voluntarily, two conditions absent from the administrative election of remedies context. In exploring the circumstances under which an agreement to arbitrate should preclude a subsequent judicial action under Title VII, one commentator noted that such an agreement should reflect “a choice made with full awareness of the nature of the claim as well as the procedure which will be used to resolve it, and this should have a bearing on the enforceability of the arbitration context.”

Congress seems to have advanced this goal with the passage of the Older Workers Benefit Protection Act (OWBPA), which imposes extremely strict requirements for the unsupervised waiver of ADEA “rights and claims” to be considered “knowing and voluntary.” Although the precise scope of this Act is not yet determined, it does indicate a concern that elections of remedies in the arbitration context truly be elections based on full information. By contrast, elections of remedies in the administrative context are usually made by people without the benefit of counsel and without any knowledge of the consequences.

155. Berger, supra note 10, at 713 (arguing that post-dispute agreements to arbitrate are much less troubling, and should be enforced more often, than pre-dispute agreements); see also supra note 106 and accompanying text (providing a “knowledge” requirement for the enforceability of all election of remedies provision, but noting the lack of such a requirement in one state’s administrative election of remedies framework).


157. For a waiver of ADEA rights to be deemed voluntary, it must meet eight criteria: (1) it must be in writing and in language calculated to be understood by the employee or the average eligible individual; (2) it must refer specifically to rights and claims that arise under the ADEA; (3) a waiver only applies to rights and claims that have already arisen, not to future rights; (4) there must be consideration given; (5) the employee must be advised, in writing, to consult with an attorney before signing the agreement; (6) the employee must be given at least 21 days to consider the agreement; (7) the employee must have at least seven days after signing the agreement to revoke it; and (8) if part of an agreement offered to a group, the agreement must inform the employee of the right to participate in the group action and the identity of all individuals also entitled to participate. Id.

158. See supra notes 111-14 and accompanying text (discussing how pro se litigants are disadvantaged by an overly technical election of remedies doctrine).
Even if, however, the legislature in an election of remedies state requires an employment discrimination complainant have “full awareness” before choosing an administrative or a judicial forum, there would still be a fundamental difference between such system and an arbitration election of remedies system. In the arbitration context, the so-called election of remedies is, arguably, merely an election of forum, and not really an election of the type of remedies available. One commentator noted that while it may be rational to conclude that an employee’s agreement to arbitrate waives his or her right to a judicial forum, “there is no basis . . . to conclude that [the employee] has also agreed to forego relief otherwise available under the statute. Such an approach would raise serious public policy concerns which might be sufficient to render the agreement to arbitrate unenforceable.” Ultimately, arbitration election of remedies is concerned with preventing a windfall to plaintiffs by prohibiting the possibility of double recovery. By contrast, an employee who is confronted with a choice between an administrative and judicial forum must often truly make an election of available remedies. This is especially so when an election of remedies available to the courts may grant only injunctive relief, reinstatement, promotion, and back pay. Ohio REV. CODE ANN. § 4112.05(G) (Baldwin 1994). Compensatory and punitive damages are unavailable. Crawford v. ITT Consumer Fin. Corp., 653 F. Supp. 1184, 1189 (S.D. Ohio 1986). In contrast, for an age discrimination complainant who elects a judicial forum under § 4112.02(N) or § 4112.99, compensatory and punitive damages are available. Id. at 1190 (§ 4112.02(N)); Elek v. Huntington Nat’l Bank, 573 N.E.2d 1056, 1058 (Ohio 1991) (§ 4112.99); see also State Div. of Human Rights v. Luppino, 313 N.Y.S.2d 28, 32

159. One potential exception to this assertion is the award of punitive damages. Courts have held that arbitrators are allowed to award punitive damages in federal claims. See, e.g., Kerr-McGee Refining Corp. v. M/T Triumph, 924 F.2d 467, 470 (2d Cir.), cert. denied, 502 U.S. 821 (1991). Some states, however, do not allow punitive damage awards in arbitration of state claims. See, e.g., Garrity v. Lyle Stewart, Inc., 353 N.E.2d 793 (N.Y. 1976).

160. Berger, supra note 10, at 720 & n.173 (concluding that, if “arbitration is to be an adequate substitute for litigation, it is necessary that the arbitrator’s remedies parallel those available to the courts”); see also James A. King Jr. et al., Agreeing to Disagree on EEOC Disputes, 9 LAB. LAW. 97, 103 (1993) (stating that social policy does not preclude the waiver of one’s right to a judicial forum); cf. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991) (stating that remedies available through arbitration will be adequate and on par with those available under the ADEA, and that the EEOC may itself bring an action to supplement any shortcomings an arbitrator may have in fashioning equitable relief).

161. This is not the case with administrative election of remedies, which has at most been concerned with preventing a plaintiff from getting two opportunities to recover once. See supra note 108 and accompanying text (discussing the prevention of double opportunities for recovery for a single wrong).

162. For example, the state fair employment practices agency in Ohio, the OCRC, may grant only injunctive relief, reinstatement, promotion, and back pay. Ohio REV. CODE ANN. § 4112.05(G) (Baldwin 1994). Compensatory and punitive damages are unavailable. Crawford v. ITT Consumer Fin. Corp., 653 F. Supp. 1184, 1189 (S.D. Ohio 1986). In contrast, for an age discrimination complainant who elects a judicial forum under § 4112.02(N) or § 4112.99, compensatory and punitive damages are available. Id. at 1190 (§ 4112.02(N)); Elek v. Huntington Nat’l Bank, 573 N.E.2d 1056, 1058 (Ohio 1991) (§ 4112.99); see also State Div. of Human Rights v. Luppino, 313 N.Y.S.2d 28, 32
a state administrative forum serves to preclude a claimant from subsequently litigating in a federal forum.163 The idea of making only some statutory remedies available to a particular claimant runs contrary to the purpose of the remedial scheme of employment discrimination law, which allows concurrent remedies in an effort to make victims of discrimination whole.164

On a broader level, arbitration election of remedies is different from administrative election of remedies because only the latter fundamentally disrupts the procedural framework established under Title VII and other employment discrimination statutes.165 Claimants who elect arbitration, provided that it is a fully informed choice, have simply taken their claims outside of the employment discrimination framework entirely. By contrast, administrative election of remedies drives a wedge between the administrative and judicial bodies and, by providing incentives for employees to pursue the judicial remedy,166 exacerbates the two interrelated problems with employment discrimination law today—that the EEOC is ineffectual and that the court system is backlogged.

An election of remedies, as generally defined, presupposes remedies that are "repugnant and inconsistent."167 In the case of arbitration, a person who contractually waives the statutory right to

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163. See supra notes 74, 111-28 and accompanying text (discussing preclusion of federal claims). This would be especially troubling if the remedies available under Title VII were greater than those afforded by state statutory law, which is increasingly possible in light of the 1991 Civil Rights Act. See supra note 136 and accompanying text (explaining that compensatory and punitive damages are available under Title VII).

164. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (stating that the fundamental objective in remedying Title VII violations—making the victims whole—"is shown by the very fact that Congress took care to arm the courts with full equitable powers"); see also supra text accompanying note 79 (discussing ideal employment discrimination policy).

165. In fact, not only does the arbitration system not disrupt the procedural framework, it could be argued that it helps the framework operate more efficiently by taking some claims out of the system entirely. In addition, it has been pointed out that arbitration furthers other policy objectives of employment discrimination law, such as providing support for "unschooled" litigants. See Berger, supra note 10, at 717 (arguing that there are no inherent disadvantages in arbitration's ability to adjudicate discrimination claims and that, by offering lower cost and assistance of an arbitrator beyond that which a judge could provide, there are advantages to claimants with less money).

166. See supra notes 117-19 and accompanying text (discussing current complications with the election of remedies system among state and federal judicial systems).

167. BLACK'S LAW DICTIONARY, supra note 104, at 518.
litigate his or her Title VII claim arguably acts inconsistently with the statutory right itself. By contrast, a person who elects to pursue an administrative hearing is ultimately electing between two complementary portions of a single remedy. In other words, to say that someone who elects an administrative remedy can no longer file a court action is to misinterpret the remedial scheme under Title VII.

PART IV: CONCLUSION: WHERE DO WE GO FROM HERE? THOUGHTS ON THE LONG RANGE PLANNING COMMITTEE'S PROPOSAL, THE ROLE OF THE EEOC, AND THE FIRST STEPS TO REFORM

The problem with the idea of election of remedies, apart from the wildly unfair and anomalous results it helps produce, is that by encouraging claimants to avoid administrative bodies entirely, it splits the function of the administrative and judicial systems. Since the necessary consequence of this or any similar proposal is to reduce the effectiveness of the administrative body and to overload the court system, it is fundamentally inconsistent with the way employment discrimination law is supposed to operate. In fact, many criticisms of the way employment discrimination law operates today are grounded primarily by the notion that the EEOC is too weak to effectuate the policies of the antidiscrimination statutes.168

In light of this, the Judicial Conference’s Long Range Planning Committee’s recent proposal, encouraging an expanded role for the EEOC,169 seems promising.170 But it, like previous proposals “to strengthen the law by strengthening the EEOC,”171 is incomplete

168. See, e.g., SPRiggs, supra note 64, § 8.11, at 289 (“Generalizations about a large agency’s performance may be dangerous. . . . Nonetheless, some generalizations are clear, and they are not complementary to EEOC. . . . EEOC is an agency both in disarray and biased against those seeking to redress discrimination.”); id. § 8.12, at 291 (noting that, based on data from the EEOC Office of Program Operations, the EEOC never filed more than 6.2% of civil suits in the federal courts); Berger, supra note 10, at 695 (arguing that, because the EEOC has been inundated with claims, it “is in no position to speed the resolution of employment discrimination disputes”).

169. See supra notes 6-9 and accompanying text for specific proposals.

170. But see Donohue & Siegelman, supra note 26, at 1023 (arguing that the original decision by the drafters of the 1964 Civil Rights Act to prefer the courts over the administrative process as the primary enforcement body of Title VII was “sensible, in light of the quarter century of failures by state and federal administrative agencies” (footnote omitted)).

171. Gordon, supra note 80, at 994 (referring to the thinking in Congress behind the 1972 amendments to Title VII).
and perhaps dangerous unless accompanied by a substantial increase in funding. In one view, the EEOC has continually become "stronger," as each expansion of employment discrimination rights has conferred greater authority upon the EEOC. Without adequate funding, however, a proposal such as the Long Range Planning Committee's will inevitably lead to longer delays in the vindication of rights. In addition, larger backlogs in administrative agencies will occur\(^\text{172}\) without the concurrent benefit of reducing the judiciary's caseload.

The Long Range Planning Committee has, albeit belatedly, apparently recognized the need for adequate EEOC funding. The Committee's November 1994 draft of its Long Range Plan chastised the EEOC for according employment discrimination claims "only cursory review before issuing 'right-to-sue' letters," and called for "more careful administrative scrutiny."\(^\text{173}\) The March 1995 version of the Long Range Plan addresses a more fundamental problem: funding. The Committee now attributes the EEOC's cursory review of claims to "serious underfunding," and adds that "[i]f the resources were provided for the kind of careful investigation, evaluation and conciliation originally contemplated by Congress, the number of employment discrimination cases requiring federal court action might be reduced."\(^\text{174}\)

Of course, an influx in resources is only useful if it is going to pay for needed reforms. The Committee's proposal for reforming employment discrimination law is essentially two-fold: first, to have the EEOC conduct more thorough review of cases and to resolve disputes where possible without resorting to the courts; second, to have Congress give the EEOC power to adjudicate claims, and to restrict judicial review of those determinations.\(^\text{175}\) The first of these proposals is not a departure from the EEOC's mandate\(^\text{176}\) as

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174. PROPOSED LONG RANGE PLAN, *supra* note 6, at 33.

175. See *supra* notes 6-9 and accompanying text (referring to the language used in the proposal).

176. 42 U.S.C. § 2000e-5(b) requires the EEOC to investigate charges and, upon determining that reasonable cause exists to believe that discrimination has occurred, to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." See also *supra* note 2 (outlining the EEOC's responsibilities).
much as it is a commentary on the EEOC’s inability to fulfill that mandate, caused in large part by the expansion of substantive rights and the agency’s lack of funding.\textsuperscript{177}

The second proposal does represent a shift in employment discrimination policy.\textsuperscript{178} The court system has always been the final arbiter of these statutory rights. This proposal, by adding a quasi-judicial function to the EEOC’s screening function, is more like the exhaustion of remedies systems set up in many states, with the same built-in advantages and disadvantages.\textsuperscript{180} Among other things, Congress would have to increase the EEOC’s period of exclusive jurisdiction, because very few investigations are completed within the current 180-day period.\textsuperscript{181} Because of the slowdown such a system could create, perhaps people will be encouraged to pursue alternative dispute resolution, such as arbitration.\textsuperscript{182}

\textsuperscript{177} See supra notes 46-61 and accompanying text (discussing the congressional and judicial expansion of employment discrimination rights).

\textsuperscript{178} See An Equal Opportunity Tune-Up, THE PLAIN DEALER (Cleveland), Dec. 6, 1994, at B8 (noting the EEOC Commissioner requested a 25% budget increase); cf. supra notes 42-43 and accompanying text (discussing the dramatic increase in employment discrimination cases).

\textsuperscript{179} See Silver, supra note 116 (stating that Congress designed the administrative process, and its emphasis on less expensive and formal alternatives to litigation, to supplement, not supplant, judicial causes of action).

\textsuperscript{180} As stated in ZIMMER \textsc{et al.}, supra note 14, at 986-87, Contrary to normal administrative law proposals . . . exhaustion of agency remedies is not [presently] required, reflecting a congressional decision not to subject private plaintiffs to long delays that have always plagued the Commission’s charge processing. Nevertheless, it is still desirable that charging parties willing to tolerate delay be permitted to exhaust EEOC processes because a court action might be thereby avoided through the agency’s conciliatory efforts.

\textit{See also} Glover v. St. Louis-San Francisco Ry., 393 U.S. 324, 331 (1969) (arguing that an exhaustion requirement “would only serve to prolong the deprivation of [a claimant’s] rights”); Catania, supra note 19, at 832 (arguing that any statutory scheme that requires exhaustion of remedies will discourage claimants from bringing legitimate as well as illegitimate claims).

\textsuperscript{181} See Aquino, supra note 40, at 15 (noting that the EEOC spends an average of 290 days processing each charge); Shapiro, supra note 3, at 100 n.50 (“Although the administrative process was designed to be a speedier alternative to litigation, this has not been the case. The EEOC’s administrative backlog is so great that the commission rarely commences investigations within the 180-day period . . . .”).

\textsuperscript{182} See Berger, supra note 10, at 696 (“To the extent that procedures [including arbitration] other than traditional litigation can produce fair employment dispute dispositions with lower cost and greater speed than the judicial system, common sense suggests that they be used.”); see also Durgin, supra note 4, at 1 (discussing the EEOC’s trial mediation project, which has been successful in reducing the average time of resolution by 300% and increasing the settlement rate by 250%).
brings another set of advantages and disadvantages. Although there has been some criticism of giving the EEOC expanded authority, including from the EEOC itself, there is some merit to the idea of using the EEOC's fact-finding expertise in a judicial capacity, at the expense of speed.

On a broader level, the Committee's recommendations point to the fundamental questions of the need for and the role of the EEOC. Ideally, the EEOC is the first tier of a two-tier system, resolving as many claims as possible quickly and fairly. The court system, the second tier, should be viewed as a last resort rather than the forum where claims are ultimately and inevitably resolved. Obviously, if more claims are resolved by the EEOC and thus taken out of the system entirely, fewer cases will reach the courts. As presently structured, however, the EEOC's ability to take cases out of the system exists only when both sides agree to a settlement.

Conceptually, the notion of election of remedies attempts to keep cases out of the courts by giving claimants the choice of the "tier" in which they wish to have their claims resolved. Even if this were to result in a net decrease in administrative and judicial filings, however, election of remedies does not serve the fairness concerns inherent in the procedural framework of Title VII and most state statutes. At the time the critical choice is made, most claimants are not aware of the broad ramifications of choosing one tier over another. Even if claimants were informed of the possible preclusive effects of such a choice, and even if claimants were told of any differences in available remedies, there is no way to inform them of why one forum may be better than another under

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183. Since it is generally agreed that arbitration is faster and less expensive than litigation, Berger, supra note 10, at 696, and also faster and probably less expensive than exhaustion of remedies, see supra note 180, the remaining question is whether it is as fair. See Berger, supra note 10, at 713 (noting critics' arguments that the system is unfair since it favors defendants (the "repeat participators"), and judges and juries are not the decision-makers, but concluding that there is no evidence that the system is unfair or biased).

184. See, e.g., EEOC Should Not Be Given More Duties, Plaintiffs' Lawyers Tell Judicial Panel, PENS. & BEN. REP. (BNA), Jan. 2, 1995, at 15 (reporting the testimony of the National Employment Lawyers Association, which argues that the EEOC should not be given more power, because this approach has "been unworkable before and will be unworkable now").

185. See supra note 172 (noting an instance of EEOC self-criticism).

186. See supra notes 74-75 and accompanying text (discussing the policy inherent in Title VII of making the procedural framework understandable to untrained litigants, most of whom are not represented by counsel).
the specific circumstances of their case.

If the Title VII procedural framework accomplishes nothing else, it puts this decision off until there is enough available information, and it does not force a claimant to make the decision alone. Once 180 days elapse after a claimant files her or his charge with the EEOC, assuming it is not resolved, the claimant faces a choice similar to that envisioned by an election of remedies scheme. The claimant may allow the agency to continue investigating the claim, or she or he may request a right to sue letter and take the case to court.

Although this scenario is, in one sense, an “election of remedies,” it differs in at least three significant ways from the system that is the focus of this Note. First, the decision happens later in the process. Second, the decision is not absolute. For instance, a decision to allow the EEOC to continue its investigation does not compromise the claimant’s—or the defendant’s—right to de novo court review. The decision is not inconsequential, however. If a claimant decides, after 180 days, to request a right to sue letter, the EEOC’s investigation almost always ends.87 Third, and relatedly, the decision is not the claimant’s alone.

These critical differences in Title VII’s procedural framework recognize that employment discrimination is complex, calling for case-specific solutions. Sometimes it is appropriate to punish the discriminator and compensate the victim, while other times it is more fair and effective to simply resolve a misunderstanding or correct a systemic barrier. Title VII’s framework also recognizes that employment discrimination is a major societal problem, and that individual claimants are not necessarily the best people to decide how to combat it.88 Title VII’s framework, by assigning complementary roles to the EEOC and the court system, reflects these concerns in a way an election of remedies system does not. Although it is procedurally very complex, that complexity provides flexibility. Title VII is structured in a way that the merits of a claim are heard, rather than having procedural or strategic concerns govern a case.

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88. See Marjorie A. Silver, The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement, 55 Geo. Wash. L. Rev. 482, 519 (1987) ("[T]he procedure that might be preferred by a given complainant[] might not be preferred by the respondent, or the agency, or—to the extent it can be ascertained—the public.").
While the existing Title VII framework avoids many pitfalls of election of remedies, the framework can still be streamlined. Rather than allowing claimants the choice of whether to skip the administrative tier, we should be focusing on how to achieve the primary goals of election of remedies—simplicity and speed—within the existing framework. The EEOC must formulate a clear mandate, with an emphasis on preventing cases from ever reaching the court system. One potential approach may be for the EEOC to distinguish among types of claims, determining at the outset which cases are more appropriate for judicial resolution. Assuming that claims involving compensatory and punitive damages—claims aimed at punishing the discriminator and compensating the victim—are better resolved by the court system, perhaps the EEOC should investigate these claims only to the point of making a “reasonable cause” determination. In addition, the agency should limit itself to this initial determination in cases involving statutory interpretation or other cases in which court precedent will help determine the outcome of future cases. If the EEOC finds reasonable cause to believe discrimination has occurred, it should automatically issue a right to sue letter or, in the case of a claimant without the means to afford a court action, bring a court claim itself. If it finds the claim to be frivolous, it should dismiss the claim, and Title VII should be amended so as to give preclusive effect to this finding. If the EEOC is given more authority to make this initial determination, fewer cases will reach the courts.

Meanwhile, by automatically issuing right to sue letters in all meritorious claims of intentional discrimination, the EEOC can focus more closely on systemic discrimination claims, and on conflict resolution generally. This approach would reconcile the need for speed of adjudication and the recognition that different types of situations call for different types of solutions; at least, it would do so better than an election of remedies system or a system requiring

189. This mandate has, arguably, existed since the 1972 amendments to Title VII, which granted the EEOC the authority to litigate claims. See id. at 511 (“The 1972 changes were intended to place the decisionmaking authority as to whether to proceed to litigation within the hands of the agency with the expertise on employment discrimination.”).

190. In fact, if the EEOC is given the power to dismiss frivolous claims entirely, the number of court cases may be reduced quite significantly. Of the 68,366 cases the EEOC resolved in 1993, 61% were resolved by a finding of no reasonable cause. Michael Mankes, Comment, Combatting Individual Employment Discrimination in the United States and Great Britain: A Novel Remedial Approach, 16 COMP. LAB. L.J. 67, 72 n.34 (1994) (citing EEOC OFFICE OF PROGRAM OPERATIONS, 1992 ANNUAL REPORT app. 2 (1993)).
all claims to be heard by an arbitrator.

Of course, this approach addresses only half the problem. The other half is that the EEOC itself is increasingly overwhelmed with claims. Unless society supports scaling back the protections available under the substantive discrimination statutes, the EEOC needs an influx of resources to fulfill its mandate. Commentators are quick to identify the EEOC's failures, but rarely note that the EEOC's individual agents are resolving claims at record rates. ¹⁹¹ In other words, it is possible that the agency is failing while the agents are not. If that is the case, an increase in resources for more agents is worthwhile.

We are living in a time, however, where a prime concern on Congress's collective mind is balancing the federal budget. At the same time, both the federal judiciary¹⁹² and the EEOC¹⁹³ are calling for reductions in their responsibilities due to backlog. In this environment, it is and will continue to be tempting to look at procedural schemes where claimants who take their discrimination claims to one forum are precluded from taking them to another.

Such a procedural system would be a mistake, creating unfairness without streamlining adjudication. Instead, the first step to strengthening the operation of employment discrimination law is to, again, strengthen the EEOC. Unlike similar past proposals, however, the key lies in the Ways and Means Committee. The EEOC's budgets and staffing have remained frozen for the last decade, during the heart of the litigation explosion. The 1995 EEOC budget is approximately $233 million, a $3 million increase over the 1994 budget, but a $13 million less than the amount requested for 1995 by the President.¹⁹⁴ The new Chair of the EEOC has requested a 25% increase, or an increase of less than 0.001% of the GDP.¹⁹⁵ Even if such an increase is not forthcoming from Con-

¹⁹¹. Mankes, supra note 190, at 78 n.70 (citing EEOC OFFICE OF PROGRAM OPERATIONS, supra note 190, at 3).
¹⁹². See supra notes 6-9 and accompanying text (discussing the Committee on Long Range Planning's proposal).
¹⁹³. See supra note 172 (noting that an increase in the issuance of right to sue letters will lead to a decrease in the litigating responsibilities of the EEOC).
¹⁹⁵. The United States' Gross Domestic Product in 1993 was $6.343 trillion. THE WORLD ALMANAC AND BOOK OF FACTS 1995, at 112 (Robert Fanighetti ed., 1994). The increase proposed by the EEOC Chair is approximately $58 million (25% of $233 million), An Equal Opportunity Tune-Up, supra note 178, at B8, or less than 0.001% of the GDP.
gress, we should actively search for alternate sources of funding. For example, Congress could alter Title VII to provide that a set percentage of all punitive damages awards under the statute be given to the EEOC. Such an approach would be consistent with the deterrent and punishment rationales of punitive damage awards, while maintaining the incentive for attorneys to bring claims. Congress could enhance the revenue-generating potential of such an approach by removing or adjusting the damages caps available under Title VII.

Overall, increased funding is not the ultimate solution to the EEOC’s problems, but it could be the first and largest step toward emerging from the existing crisis in employment discrimination law. If that is the case, it will be well worth the investment.

DAVID C. BELT