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## As Equal as Others? Rethinking Access to Discrimination Law

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## AS EQUAL AS OTHERS? RETHINKING ACCESS TO DISCRIMINATION LAW

*Pam Jenoff\**

“All animals are equal. But some are more equal than others.”<sup>1</sup>

*The purpose of employment discrimination law is to ensure fair and equal conditions in the workplace by preventing and remedying differential treatment based on certain protected characteristics, such as race, sex, and age. However, the federal anti-discrimination claiming system as presently constructed cannot achieve this mandate. The current system excludes close to one-fifth of the American workforce outright, and prevents even greater numbers of individuals from seeking redress for reasons unrelated to the merits of their claims. Stringent statutory requisites as to covered employers, administrative exhaustion, and the limitations period create barriers to access that not only prevent individuals from obtaining relief but permit discrimination to persist on a systemic level, hobbling realization of the anti-discrimination mandate. Thus, there is a fundamental tension between the broad aspirations of anti-discrimination law and the narrow constraints of the claiming system intended to enforce it.*

*Recent scholarship in the employment discrimination area has focused upon the structure of discrimination claims, i.e., whether the required elements of proof and burden-shifting framework are effective in addressing racism, sexism and other biases in the workplace, or whether a new, more fluid schema is required to capture the complexities of modern prejudice and its many manifestations. These articles do not speak to the more fundamental question of access to employment discrimination law.*

*This Article argues that there are costs associated with excluding people from coverage, including significantly diminishing the ability of discrimination law to eliminate discrimination. The Article shows how most of the arguments used for limiting the reach of employment law*

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1. GEORGE ORWELL, ANIMAL FARM 32 (2004).

*have never been substantiated, have been diminished by changing circumstances, or can be alleviated by altering the statutory regimes in important ways.*

*This Article breaks new ground by identifying the conflict between the broad goals of employment discrimination law and the limited protections of the anti-discrimination claiming system, and proposing bold systemic restructuring to widen access, while taking into account countervailing concerns such as overburdening and cost. Part I examines the evolution of the federal employment statutes. Part II considers the nature of the barriers to access, their merits as well as the problems they create.*

*Finally, Part III re-envision the requirements of the anti-discrimination claiming system and offers a proposal whereby: (1) all employees would be covered by the federal anti-discrimination statutes and given access to the Equal Employment Opportunity Commission, which would have adjudicative, rather than merely investigative, authority over claims; (2) individuals employed by larger companies would be permitted to opt out of the EEOC process and proceed directly to federal court; and (3) individuals bringing claims in either forum would be given a minimum two-year statute of limitations in which to do so. These reforms would better achieve the goal of anti-discrimination law by providing protection to a wider spectrum of individuals and claims, while enabling the system to operate more effectively.*

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## I. INTRODUCTION

The purpose of employment discrimination law is to ensure fair and equal conditions in the workplace by preventing and remedying acts of differential treatment based on certain protected characteristics, such as race, sex, and age.<sup>2</sup> However, there is a fundamental tension between the broad goals of anti-discrimination law and the narrow constraints of the claiming system that purports to enforce it. In reality, the system protects only a subset of individuals who work for larger entities. Furthermore, only a fraction of those claims brought by covered persons are ever heard on the merits. The rest are excluded by the requirements that would-be plaintiffs bring their claims very quickly and withstand a protracted administrative agency process in order to seek redress in court.

The federal anti-discrimination statutes as presently written and interpreted by the courts contain three principal barriers to access that prevent individuals from pursuing claims: (1) the minimum-number-of-employees requirement, or “small business exemption,” which excludes from the purview of the statutes employers who do not employ a threshold number of employees;<sup>3</sup> (2) the exhaustion requirement, which mandates an employee file a claim with an administrative agency before being able to bring her claims in federal court;<sup>4</sup> and (3) the statute of limitations, which bars claims that have not been filed within a specified period of time.<sup>5</sup> The cumulative effect of these barriers to access is to exclude from coverage a significant percentage of the workforce and dismiss a great number of claims based on technicalities unrelated to the merits.

The limited access to the claiming system caused by these barriers has serious consequences. Individuals whose complaints go unanswered

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2. Specifically, the law prohibits discrimination against “any individual because of his race, color, religion, sex, or national origin.” Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2011) (emphasis added); *see also* Americans with Disabilities Act, 42 U.S.C. § 12112 (2008); Age Discrimination in Employment Act, 29 U.S.C. § 621 (2006); Family & Medical Leave Act, 42 U.S.C. § 2601 (repealed 1974); Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 (2011).

3. 42 U.S.C. § 2000e(b) (2006); 29 U.S.C. § 630(b) (2006); 42 U.S.C. § 12111(5)(A) (2008); 29 U.S.C. § 2611(2)(B) (2009); *see also* 20 CFR § 1002.34 (2012) (“USERRA applies to all public and private employers in the United States, regardless of size. For example, an employer with only one employee is covered for purposes of the Act.”).

4. 42 U.S.C. § 2000e(5) (2011); 29 U.S.C. § 626 (2011); 42 U.S.C. § 12117 (2011); 29 U.S.C. § 2617 (2011).

5. 42 U.S.C. § 2000e-5 (2011); 29 U.S.C. § 626 (2011); 29 U.S.C. § 2617 (2011); *see also* E.E.O.C. v. W.H. Braum, Inc., 347 F.3d 1192 (10th Cir. 2003) (holding that Title VII statute of limitations applies to ADA claims).

must continue to withstand discrimination in the workplace or suffer the loss of work and income without remedy. Beyond the implications for individuals, restricted access to the claiming system precludes realization of the anti-discrimination mandate. The lack of access to federal anti-discrimination protection for a significant percentage of the American workforce obscures the extent of existing discrimination and prevents enforcement, allowing unlawful conduct to continue in the workplace.<sup>6</sup> Simply put, the claiming system cannot effectively eliminate discrimination while protecting only a subset of individuals and claims.

More fundamentally, the limited protection of the current system is contrary to the anti-discrimination mandate. Anti-discrimination law is premised upon the notion of fairness and equality. The result of these barriers to access is essentially “double discrimination,” whereby some individuals who have faced unfavorable treatment at work are given protection, while others facing similar adverse treatment are arbitrarily denied access to the claiming system. Discriminating among the victims of discrimination is anathema to the most fundamental equality principles of the law, undermining not only the effective functioning of anti-discrimination law, but also its expressive or symbolic function.<sup>7</sup>

Thus, discrimination law as formulated cannot meet its aspirations. Rather, global and consistent access to the claiming system is needed because it effectuates the protection of the right of nondiscrimination which all should enjoy.

Of course, access to the law and its protection is not without limitation or countervailing concerns. Indeed, access requirements exist in all areas of the law and here, as elsewhere, careful consideration must be given to the interests of all parties as well as the system itself. Despite the difficulties presented by these barriers to access and the asymmetries among them, the requirements of employer size, administrative exhaustion and timeliness play a significant gatekeeping function which cannot be dispensed with wholesale if the system is to continue functioning. But given the high costs of denial of access to the employment discrimination claiming system for individuals and the implications for the anti-discrimination mandate as a whole, it is not acceptable to allow the happenstance evolution of the common law and the political compromise needed to effectuate statutory regimes

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6. Caroline R. Fredrickson, *The Misreading of Patterson v. McLean Credit Union: The Diminishing Scope of Section 1981*, 91 COLUM. L. REV. 891, 891 (1991) (noting that part of the problem with the Title VII and Section 1981 overlap is that plaintiffs can bypass the conciliation mandates of Title VII).

7. See Cass R. Sunstein, *On the Expressive Function of the Law*, 144 U. PA. L. REV. 2021, 2023–24 (1996).

determine the scope of protection. Rather, any limitations on access must have a strong justification and be well-tailored to effectuate those aims.

Recent scholarship in the employment discrimination area has focused upon the structure of discrimination claims, i.e., whether the required elements of proof and burden-shifting structures are effective in addressing racism, sexism and other biases in the workplace or whether a new, more fluid schema is required to capture the complexities of modern prejudice and its many manifestations.<sup>8</sup> These articles, while making an important contribution to the field, do not speak to the more fundamental question of access to employment discrimination law.

Understanding the extent to which the current system fails to protect certain individuals and claims and how such exclusions frustrate the purpose and efficacy of the anti-discrimination claiming system is a necessary precursor to any meaningful discussion of the internal mechanisms of the statutes. The discussion of how the laws operate is relevant only in the context of those who have access to the law. Changing the internal mechanisms of the claiming system will have little effect if a significant percentage of individuals and claims are not given a seat at the table. The barriers to access cannot be resolved by merely tinkering with burden-shifting tests. The system requires broad structural rethinking. It is time to start anew.

This Article contributes to the field by comprehensively addressing the barriers-to-access problem in anti-discrimination law. This Article argues that there are costs associated with excluding people from coverage, including significantly diminishing the ability of discrimination law to eliminate discrimination. The Article shows how most of the arguments used for limiting the reach of employment law have never been substantiated, have been diminished by changing circumstances, or can be alleviated by altering the statutory regimes in important ways.

Part I examines the evolution of the federal employment statutes. Part II considers the nature of the barriers to access, their merits as well as the problems they create. Finally, Part III re-envision the requirements of the anti-discrimination claiming system. Central to this proposal is the notion that, in order to achieve the broad goals of

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8. See Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69 (2011); Anastasia Niedrich, *Removing Categorical Constraints on Equal Employment Opportunities and Anti-Discrimination Protections*, 18 MICH. J. GENDER & L. 25 (2011); Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L. J. 1219 (2011); Kerri Lynn Stone, *From Queen Bees and Wannabes to Worker Bees: Why Gender Considerations Should Inform the Emerging Law of Workplace Bullying*, 65 N.Y.U. ANN. SURV. AM. L. 35, 37–38 (2009); Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1439–40 (2009); Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L. J. 643, 644 (2008).

employment discrimination law, all employees should be afforded some protection and access to the claiming system. To that end, the Article proposes a reconfiguration of the Equal Employment Opportunity Commission, the federal administrative agency which handles the processing of employment discrimination charges, to receive claims of discrimination from all employees. The EEOC should also be given adjudicative authority, not just investigative authority, and should be the primary vehicle for individuals seeking redress from small employers. Employees of larger entities who do have the option of bringing claims in court should be given the option of pursuing administrative adjudication or bypassing the agency and proceeding directly to court in order to avoid duplicative processes and waste of resources. The proposal also includes extending the statute of limitations to a minimum of two years in order to provide adequate time in which to pursue claims.

By reconfiguring the EEOC to serve as an agency that provides access for those who need its assistance and providing a longer period of time in which to bring claims, the proposal would better achieve the goal of anti-discrimination law by providing protection to a wider spectrum of individuals and claims while ensuring that the system operates effectively. Properly reconceived to work together, the access requirements can actually further the goals of anti-discrimination law.

## II. THE FEDERAL ANTI-DISCRIMINATION LAWS<sup>9</sup>

Federal anti-discrimination law is composed of a series of laws passed and amended over the past 150 years. The first of these laws originated in the Reconstruction Era legislation passed after the Civil War as an attempt to protect the rights of the newly freed blacks and begin to integrate them into American society.<sup>10</sup> Section 1981 of the Civil Rights Act of 1886 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to

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9. The scope of this article is limited to the “pure” anti-discrimination laws (Section 1981, Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act), which purport to protect against discrimination in employment based upon a protected characteristic such as race, age, etc. For reasons discussed more fully in note 26, I have also included for purposes of the analysis statutes such as the Family and Medical Leave Act and the Uniformed Services Employment and Reemployment Rights Act, which confer a substantive right to a leave of absence and also contain a non-discrimination provision for those who exercise rights under the statute. I have not included laws that relate to wage and hour such as the Fair Labor Standards Act, 29 U.S.C. § 201 (2011). and other laws that follow the FLSA rubric, such as the Equal Pay Act, 29 U.S.C. § 206(d) (2011).

10. Joanna L. Grossman, *Making a Federal Case Out of It: Section 1981 and At-Will Employment*, 67 BROOK. L. REV. 329, 331–32 (2001).

sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.<sup>11</sup>

The language of Section 1981, which prohibits, *inter alia*, discrimination in the making and enforcement of contracts, has been interpreted by the courts to include the contractual relationship between employers and employees and to provide a cause of action with respect to discriminatory employment decisions.<sup>12</sup> Notwithstanding today's complex anti-discrimination scheme and despite the many statutes which have been passed in the past century, Section 1981 remains a separate and independent basis for bringing discrimination claims based on race, ancestry, and ethnicity.<sup>13</sup>

More than eighty years after passing Section 1981, Congress enacted the first comprehensive anti-discrimination law, the Civil Rights Act of 1964, which addressed many of the lingering areas of discrimination faced by minorities in the United States, such as public accommodation, school segregation, and voting registration.<sup>14</sup> Title VII of the Act, which includes the provisions related to employment, provides that it shall be unlawful for a covered employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]"<sup>15</sup>

11. 42 U.S.C. § 1981(a) (2011).

12. Grossman, *supra* note 10, at 330. The Supreme Court attempted to restrict Section 1981 to the formation of contracts, which would have excluded post-hire conduct. *Patterson v. McLean Credit Union*, 491 U.S. 164, 179 (1989). However in passing the Civil Rights Act of 1991, Congress explicitly provided, "[f]or purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071 (1991). Thus, Section 1981 applies to acts at all stages of the employment relationship. *See also* *Lauture v. IBM*, 216 F.3d 258, 264 (2d Cir. 2000); *Perry v. Woodward*, 199 F.3d 1126, 1133 (10th Cir. 1999); *Spriggs v. Diamond Glass*, 165 F.3d 1015, 1018; *Fadeyi v. Planned Parenthood Assn. of Lubbock, Inc.*, 160 F.3d 1048, 1052 (5th Cir. 1998).

13. *See* Theodore Eisenberg & Stewart Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 599 (1988); Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921, 924 (1993). *See also* *Johnson v. Riverside Healthcare Sys. LP*, 534 F.3d 1116, 1123 (9th Cir. 2008) (noting that Section 1981 "creates a cause of action only for those discriminated against on account of their race or ethnicity"); *Pourghoraishi v. Flying J, Inc.*, 449 F.3d 751, 757 (7th Cir. 2006) (recognizing Section 1981 claim based on Iranian ancestry).

14. *See* 42 U.S.C. § 2000e (2011). Also during this period, President Kennedy signed into law the Equal Pay Act, which required that men and women receive equal pay for work requiring comparable skill, effort and responsibility. 29 U.S.C. § 206(d) (2011).

15. 42 U.S.C. § 2000e-2 (2011). Title VII has generally been used to prohibit discrimination against individuals who belong to groups which have been traditionally oppressed such as racial minorities and women. However, a number of plaintiffs have purported to bring reverse discrimination



Now approaching its fiftieth birthday, Title VII has been amended a number of times in the intervening years.<sup>16</sup> However, its fundamental framework has not changed and it remains the centerpiece of federal anti-discrimination legislation today. There are two principal types of claims under Title VII. The first is a disparate treatment claim, whereby an individual alleges that she was intentionally discriminated against based upon race, gender, or other protected characteristic.<sup>17</sup> Alternatively, claims for discrimination may be brought under a disparate impact theory, whereby a plaintiff may challenge an employer's facially neutral practice or policy as having disproportionate negative effects on a particular protected group.<sup>18</sup>

Age is notably excluded from the protected classifications of Title VII. At the time Congress enacted the Civil Rights Act of 1964, it considered including age in the protected classes of Title VII but affirmatively declined to do so.<sup>19</sup> However, in passing Title VII, Congress instructed the secretary of labor to conduct a study with

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claims, arguing that they were discriminated against because of being white, male, etc. These cases most often arise in the context of affirmative action plans, whereby individuals feel that efforts to increase diversity have somehow been taken at their expense. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 269–70 (1978). Courts have differed in their approaches to reverse discrimination claims with some claiming that the same *prima facie* test as regular disparate impact claims, while other courts require a “plus” factor—something to show that it is the unusual case where an employer discriminates against the majority. See Andrea B. Short, *Discriminating Among Discrimination: The Appropriateness of Treating Reverse Age Discrimination Differently from Reverse Race Discrimination*, 83 N.C. L. REV. 1065, 1067 (2005); Ryan M. Peck, *Title VII is Color Blind: The Law of Reverse Discrimination*, J. KAN. B. ASS'N, June 2006; David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 WISC. L. REV. 657, 658–59 (2000).

16. See, e.g., Equal Employment Opportunity Act of 1972, Pub. L. 92-261 (expanding Title VII to the federal government as an employer); Civil Rights Act of 1991, Pub. L. 102-166 (providing for compensatory damages for emotional distress and the right to a jury trial). The 1991 Act was a response to decisions by the Supreme Court which attempted to limit the scope of Title VII. Barbara K. Bucholtz, *Father Knows Best: The Court's Result-Oriented Activism Continues Apace: Selected Business-Related Decisions from the 2002–2003 Term*, 39 TULSA L. REV. 75, 90–91 (2003).

17. In such a case, a plaintiff must show that she: (1) is a member of the protected class; (2) was qualified for the position; (3) was subject to an adverse action; and that (4) others outside the class were treated more favorably. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The employer must proffer a legitimate, nondiscriminatory reason why the action was taken and then the plaintiff must show that the reason given was a pretext for discrimination. *Id.* at 792–93 (referred to hereinafter as the “*McDonnell Douglas* framework”). Intentional discrimination claims may also be based on a theory of systemic disparate treatment, claiming that an employer has a “pattern or practice” of discriminating against a protected group. See, e.g., *United States v. City of Yonkers*, 609 F. Supp. 1281, 1285 (S.D.N.Y. 1984).

18. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971). An employer can defend such an allegation by showing that there was not a disparate impact, or that there is a business necessity for the policy or practice.

19. Kelli A. Webb, *Learning How to Stand on Its Own: Will the Supreme Court's Attempt to Distinguish the ADEA from Title VII Save Employers from Increased Litigation?*, 66 OHIO ST. L. J. 1375, 1379 (2005).

recommendations for “legislation to prevent arbitrary discrimination in employment because of age.”<sup>20</sup> Consequently, the Age Discrimination in Employment Act was enacted in 1967 to prohibit discrimination against those age 40 and older.<sup>21</sup>

Following the passage of the ADEA, there was a lull in the proliferation of new employment discrimination laws for approximately twenty years. The early 1990s saw a second wave of anti-discrimination legislation,<sup>22</sup> starting with the Americans with Disabilities Act<sup>23</sup> and continuing with the Family and Medical Leave Act<sup>24</sup> and Uniformed Services Employment and Reemployment Rights Act.<sup>25</sup> These statutes offered new or expanded protection to certain groups.<sup>26</sup> However, they

20. Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265. Consequently, Secretary W. Willard Wirtz issued a report in 1965, which noted significant differences between age and other forms of discrimination. It found that the most common form of discrimination against older workers, “involves their rejection because of the assumptions about the effect of age on their ability to do a job when there is in fact no basis for those assumptions.” Clint Bolick, *Age Discrimination in Employment Act: Equal Opportunity or Reverse Discrimination?*, CATO INST., Feb. 10, 1987, <http://www.cato.org/pubs/pas/pa082.html>.

21. 29 U.S.C. § 631 (2011). The ADEA has several key similarities to Title VII, most notably the utilization of Title VII’s *prima facie* case and *McDonnell Douglas* framework. *Rahlf v. Mo-Tech Corp., Inc.*, 642 F.3d 633, 636–37 (8th Cir. 2011). However, once a plaintiff has articulated a *prima facie* case of age discrimination, the employer must articulate a reason for its action based on “reasonable factors other than age” for the employment decision. 29 U.S.C. § 623(f)(1) (2011). Courts have generally interpreted this to be a less onerous standard than the “legitimate nondiscriminatory reason” an employer must proffer under Title VII and have accepted a wider range of explanations for an employer’s conduct when the claim is one of age discrimination. *See Smith v. City of Jackson, Miss.*, 544 U.S. 228, 228–29 (2005). Another difference is that under the ADEA, there is no such thing as a reverse age discrimination claim whereby a younger person can allege she was discriminated against. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 586 (2004).

22. Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WISC. L. REV. 663, 666 (2005).

23. 42 U.S.C. § 12101 (2011). The ADA goes beyond requiring the absence of discrimination to require affirmative conduct—that is, an employer must actually take steps to accommodate an individual’s disability and help her perform the job. For example, an employer might have to provide adaptive equipment or modify a work schedule or duties. However, an employer may have a defense where accommodating an individual would be an undue hardship (e.g., if the cost would be prohibitive.) 42 U.S.C. § 12112(5)(A) (2011); *see also Dargis v. Sheahan*, 526 F.3d 981, 988 (7th Cir. 2008) (employer not required to manufacture a job to accommodate a disability).

24. 29 U.S.C. § 2601 (1993). Passed in 1993, the Family and Medical Leave Act provides for 12 weeks of unpaid leave in a 12 month period for eligible employees for the birth or adoption of a child, for the employee’s own serious health condition or for the serious health condition of a family member. The statute prohibits discrimination against anyone who takes or seeks to take leave under the FMLA.

25. 38 U.S.C. § 4301 (1996). USERRA guarantees certain employment benefits while on military leave and protects the employee’s right to reinstatement upon return from military service, provided certain eligibility criteria are met. USERRA prohibits discrimination based on military service.

26. The FMLA and USERRA differ slightly from the previous statutes in that they are enforced by the Department of Labor, rather than the EEOC. However, they are included for purposes of this analysis because their discrimination frameworks are similar to the other statutes, because they are frequently brought in conjunction with the other types of discrimination claims, and because they are an integral part of the framework that seeks to prohibit discrimination in the workplace.

differed from their predecessor statutes in that they had an affirmative component which required employer action beyond simple non-discrimination.<sup>27</sup>

### III. BARRIERS TO ACCESS

Despite the appearance of a comprehensive federal anti-discrimination scheme, the laws described above provide limited access to the claiming system. A significant percentage of the American workforce—close to one-fifth—is excluded from protection under these laws completely.<sup>28</sup> Those who are covered must bring their claims very quickly and withstand a protracted administrative exhaustion process.<sup>29</sup>

However, the barriers to access which exclude these individuals and claims each have a purpose and role within the claiming system, and any elimination or modification of them would have implications for the parties involved in employment discrimination claims as well as for the system itself. Additionally, these barriers to access are not merely procedural requirements, but rather raise important theoretical questions about the purpose, scope and effectiveness of anti-discrimination law and the claiming system which purports to enforce it.<sup>30</sup> How can we

27. Title VII does have a limited duty to provide reasonable accommodation for religious practice. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 66 (1977).

28. See Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 ST. JOHN'S L. REV. 1197, 1200 (2006) (noting Title VII does not reach employees in small firms).

29. 42 U.S.C. § 2000e-5 (2011).

30. It is significant to note that the barriers to access vary widely among the statutes and restrict access to varying degrees. For example, the minimum employee threshold ranges from zero employees (all employers are covered) under USERRA and Section 1981, to statutes that require an employer to have 15 employees in order to be covered, such as Title VII and the ADA, to those such as the ADA and FMLA which have still higher numbers (twenty and fifty employees, respectively.) 42 U.S.C. § 2000e (2011) (fifteen or more); 42 U.S.C. § 12111(5)(A) (same) (2011); 29 U.S.C. § 630(b) (2011) (twenty or more); 29 U.S.C. § 2611 (2011) (fifty or more); *Wagner v. Merit Distrib.*, 445 F.Supp.2d 899, 905–06 (W.D. Tenn. 2006) (all employers covered by Section 1981); 20 CFR § 1002.34 (2012). Most statutes require administrative exhaustion. 42 U.S.C. § 2000e-5 (2011); 29 U.S.C. § 626 (2011); 42 U.S.C. § 12117 (2011). However, claims brought under Section 1981, USERRA and the FMLA have no exhaustion requirement and plaintiffs can proceed directly to court. 42 U.S.C. § 2000e-5 (2011); 29 U.S.C. § 626 (2011); 42 U.S.C. § 12117 (2011). *But see Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1105 (9th Cir. 2008) (exhaustion not required for Section 1981 claims); *Jacobsen v. Dep't. of Justice*, 500 F.3d 1376, 1381 (Fed. Cir. 2007) (exhaustion not required by USERRA). The statutes of limitations are also divergent, running from the 300/90 day framework under Title VII to four years for USERRA and Section 1981 claims. 42 U.S.C. § 2000e-5 (2011); *Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369, 371, 374 (2004); 29 U.S.C. § 2617 (2011). Such asymmetries are not unique to anti-discrimination law but may be particularly problematic for this area of the law, which is effectuated by individuals raising and bringing claims as a means of bringing about systemic justice. In a future paper, I plan to assess the effects of these asymmetries on the claiming system, including the way they affect an individual's propensity to claim, influence employer behavior and impinge upon the claiming system, in order to determine if further harmonization among the access requirements is warranted.

hope to achieve our goal of eradicating discrimination in the workplace globally while protecting only a fraction of individuals and claims, and in essence discriminating against the others? Are there types of claims and individuals who should be excluded from coverage, and if so why? Is it possible to widen access to the claiming system while enabling the system to function effectively?

To answer these questions, it is necessary to examine the intent and effect of each of the three principal barriers to access: the minimum employee threshold, the administrative exhaustion requirement, and the statute of limitations.

### A. *The Minimum Employee Threshold*

An initial matter in considering access to the anti-discrimination claiming system is whether an employer is covered by the anti-discrimination laws.<sup>31</sup> Simply put, if an employer does not have the requisite number of employees, then it will not be covered by the statute and its employees will not be protected, regardless of how egregious the discriminatory conduct.<sup>32</sup>

Three rationales have traditionally been espoused in favor of excluding small businesses from coverage by discrimination statutes.<sup>33</sup> First, the minimum employees threshold is premised upon the notion that it is too expensive for small businesses to comply with anti-

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31. Generally the minimum number of employees required for coverage is set forth in the definitional section of the statute as part of the definition of “employer.” See, e.g., 42 U.S.C. § 2000e (2011) (defining an employer for Title VII as an organization employing 15 or more employees for at least 20 work weeks in the calendar year); 42 U.S.C. § 12111(5)(A) (2011) (same); 29 U.S.C. § 630(b) (2011) (defining employer for ADEA as those with 20 or more employees); 29 U.S.C. § 2611 (2011) (FMLA covers employers who have 50 or more employees for 20 workweeks out of the calendar year). Some statutes, such as Section 1981 and USERRA, do not specify a minimum number of employees and so all employers are covered. *Wagner v. Merit Distrib.*, 445 F.Supp.2d 899, 905–06 (W.D. Tenn. 2006) (all employers covered by Section 1981); 20 CFR § 1002.34 (2012) (“USERRA applies to all public and private employers in the United States, regardless of size. For example, an employer with only one employee is covered for purposes of the Act.”).

32. Determining the number of employees is not always straightforward. Under the “single employer doctrine,” affiliated corporate entities may be counted as a single employer for purposes of determining whether an employer will meet the minimum employee threshold required for coverage under the statute. See *Carlson*, *supra* note 28, at 1267.

33. The minimum employees threshold with respect to Title VII is one part of the larger debate regarding the treatment of small businesses within the law. See C. Steven Bradford, *Does Size Matter? An Economic Analysis of Small Business Exemptions from Regulation*, 8 J. SMALL & EMERGING BUS. L. 1 (2004). Exemptions and other protections for small business, such as the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. § 603 (2011), which requires agencies to take into account the implications of proposed regulations on smaller firms, are well entrenched in the law. However, some scholars are critical of small business exemptions, which are in effect subsidies, arguing that they are harmful because small firms are responsible for disproportionate amount of social ills and that the costs of such exemptions outweigh the benefits. Richard J. Pierce, Jr., *Small Is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 ADMIN. L. REV. 537, 539–40 (1998).

discrimination laws.<sup>34</sup> A second reason given for the exemption is that small businesses need to rely on personal relationships in hiring and other employment decisions, and should therefore not be subject to the anti-discrimination mandates.<sup>35</sup> Finally, there is a concern that extending anti-discrimination protection to employees of smaller businesses would flood the claiming system with additional cases and overburden it to the point where it cannot function.<sup>36</sup>

## 1. Rationales for the Exemption

### *a. Cost*

The primary justification given for the minimum employee threshold is that of cost, i.e., the notion that small employers cannot afford anti-discrimination laws. As scholars such as Richard Carlson have aptly noted, cost is a real consideration for employers and must be taken into account in any contemplated revision of the law.<sup>37</sup> However, the cost discussion tends to be somewhat imprecise and rooted in a number of untested assumptions, which must be unpacked in order to better understand their interplay with access and the potential implications of broadening same.

There are two principal types of cost businesses face with respect to anti-discrimination law. First, there are the costs associated with enforcement of the law, which includes the expense of defending against discrimination lawsuits and charges as well as any potential monetary award to the aggrieved employee.<sup>38</sup> Second, there are the costs of implementing anti-discrimination law. This includes both the expense of putting into place preventative measures (such as anti-discrimination policies and training) and the costs of compliance with the law in making business decisions.<sup>39</sup>

Most of the discussion of the cost justification for the small business exemption in anti-discrimination law has focused upon the cost of enforcement, that is, the notion that small businesses cannot afford to

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34. Carlson, *supra* note 28, at 1247–48; Adam W. Aston, “Fair and Full Employment” *Forty Years of Unfulfilled Promises*, 15 WASH. U. J. L. & POL’Y 285, 293 (2004).

35. Carlson, *supra* note 28, at 1267.

36. *Id.*

37. *See id.* at 1267–69.

38. *Id.* at 1203 n.27.

39. Included in these costs is the development of a complaints procedure, whereby employees can raise internal complaints of discrimination. This is in some sense both a preventative measure, in that it allows for early detection of issues and possible litigation avoidance, and a compliance measure, in that employers have an obligation to detect and investigate incidents of discrimination.

defend expensive litigation.<sup>40</sup> The scenario that is often given is one in which a small business is sued under an anti-discrimination statute and required to spend hundreds of thousands of dollars on litigation and possibly damages.<sup>41</sup>

The cost of enforcement actually embodies two separate cost concerns: the cost of any potential judgment against the company and the cost of legal fees to defend against charges or litigation. With respect to the former, the cost concern appears to be somewhat overstated. In reality, only a small percentage of employment discrimination litigation makes it to the trial stage<sup>42</sup>—a fact that scholars who emphasize the cost of judgments do not seem to readily acknowledge.<sup>43</sup> Cases are often resolved through alternative dispute resolution procedures, such as mediation, or settled before ever getting to court.<sup>44</sup> Additionally, judgments in employment discrimination lawsuits are relatively modest compared to other areas of litigation.<sup>45</sup>

The legal costs of defending against litigation or charges are a more pressing concern for small business. Even a single plaintiff lawsuit may

40. Carlson, *supra* note 28, at 1247–48. Indeed, much of the discussion in the legislative history of Title VII regarding the need to exempt small business centered around excusing them from liability to avoid them having to shoulder burden of costly discrimination lawsuit. *See also* Leykis v. NYP Holdings, Inc., 899 F. Supp. 986, 990 (E.D.N.Y. 1995) (“Congress excused small businesses from ADEA liability to protect them from having to shoulder the costly burden of defending a discrimination lawsuit.”).

41. *See* Carlson, *supra* note 28, at 1263–64.

42. Approximately five percent of employment discrimination cases reach the trial stage. LAURA BETH NIELSEN ET AL., *CONTESTING WORKPLACE DISCRIMINATION IN COURT: CHARACTERISTICS AND OUTCOMES OF FEDERAL EMPLOYMENT DISCRIMINATION LITIGATION 1987–2003* 29 (2008); *see also* Vivian Berger, Michael O. Finkelstein & Kenneth Cheung, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 49 (2005).

43. Carlson, *supra* note 28, at 1267–68.

44. Nielsen et al., *supra* note 42, at iii. Interestingly, to the extent that employment discrimination cases do reach the courtroom, being a small employer no longer necessarily exempts one from the costs of employment discrimination litigation. The minimum number of employees threshold was once considered a jurisdictional requirement. However, in *Arbaugh v. Y & H Corp.*, the Supreme Court held that the minimum number of employees requirement was a substantive element of an employee’s case a question of fact to be raised and argued by the defense during the course of litigation. 546 U.S. 500, 516 (2006). Thus, while savvy plaintiffs’ attorneys are likely to recognize the futility of bringing suit against small businesses and refrain from doing so, small firms may in some cases be required to engage in litigation just to have a case dismissed based on their size, a fact which partially undercuts the “cost of litigation” argument. However, the employee of a small business will still ultimately be precluded from obtaining relief under the statute, resulting in a costly but unproductive lose-lose scenario for both sides. Jeffrey A. Mandell, *The Procedural Posture of Minimum Employee Thresholds in Federal Antidiscrimination Statutes*, 72 U. CHI. L. REV. 1047, 1048–49 (2005); *see also* Patten Courtneil, *Employers Beware - The Supreme Court’s Interpretation of Title VII’s Employee Numerosity Requirement Disadvantages Small Businesses*, 40 LOY. L. REV. 793, 803 (2007).

45. Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law* 96 MINN. L. REV. 1275, 1291 n.49 (noting that the average recovery for an employment discrimination plaintiff in litigation is only \$15,000).

cost upward of a hundred thousand dollars to defend.<sup>46</sup> For this reason, any contemplation of broadening access to the anti-discrimination claiming system to offer protection to small business employees must take into account the very real costs of litigation and be designed to minimize those costs, so as not to cripple small business.<sup>47</sup>

Beyond the cost of litigation, there is also a concern that implementation of employment discrimination statutes is itself too costly.<sup>48</sup> Indeed, many of the obligations of the federal anti-discrimination laws today arise prior to any dispute. This shift is a result of a series of Supreme Court decisions in the late nineties that clarified the standards for employer liability for discriminatory acts of its supervisors and provided that employers that take measures to prevent, detect and remediate discrimination may have affirmative defenses to liability and punitive damages.<sup>49</sup> The effect of these decisions has been to resituate much of the focus of employment discrimination law to measures such as anti-discrimination policies and training and complaint procedures, which are designed to prevent, detect, and remediate impermissible conduct.

Implementing these policies and procedures are straightforward and relatively low-cost. These measures can and should be adopted by all employers, not only for litigation defense reasons but also to ensure a workplace that is free of discrimination.<sup>50</sup> Some scholars such as Carlson have argued that the per capita costs of anti-discrimination training and other compliance is more expensive for small employers, which cannot take advantage of economies of scale.<sup>51</sup> However, this assertion is based on very limited data (comparing the costs for firms with less than twenty employees with firms that employ more than 500

46. Michael Orey, *Fear of Firing: How the Threat of Litigation is Making Companies Skittish About Axing Problem Workers*, BUS. WEEK, Apr. 23, 2007 (noting that a single plaintiff employment discrimination lawsuit costs a company an average of \$100,000 to defend through the summary judgment stage and \$300,000 to defend through trial).

47. Coverage of small businesses by state and local anti-discrimination laws suggests that small business can bear some of these costs without detrimental effect. However, further empirical study of the effect of state anti-discrimination laws effect on local and regional job creation would be beneficial.

48. See Carlson, *supra* note 28, at 1249–50; Courtneil, *supra* note 44, at 804–06.

49. Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742, 747 (1998); Kolstad v. Am. Dental Assoc., 527 U.S. 526, 529–30 (1999).

50. Aside from any legal requirements, educating employees as to appropriate behavior and providing means for raising complaints are advisable businesses practices for improving productivity and morale in the workplace. See Tristin K. Green, *A Structural Approach as Anti-Discrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 850 (2007); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 458–59 (2001). But see Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 3 (2001).

51. Carlson, *supra* note 28, at 1247–49.

employees).<sup>52</sup> Additionally, the cost difference (\$920 for the former group compared with \$841 for the larger) is minimal, much lower than in other areas of the law from which small businesses are not exempt.<sup>53</sup> Finally, the data on which this analysis is based is approximately five years old, and it is unclear if these cost differences remain as pronounced with the advancement of the internet, which has given employers the ability to develop their own preventative programs or purchase them from vendors for a nominal price.<sup>54</sup>

Closely related to the preventative costs described above are the costs that arise from the need to understand and comply with the law.<sup>55</sup> These may include paying attorneys to counsel on what needs to be done with respect to and taking the steps to comply with the law (e.g., documenting an employee's performance to support a legitimate, non-discriminatory reason for an employment decision or performing disparate impact analysis with respect to compensation or layoff decisions).<sup>56</sup> These costs are significant and, in fact, more acute for small businesses without the internal resources of a legal department or human resources professional with compliance expertise.<sup>57</sup> As set forth in Part III, *infra*, any proposed broadening of the discrimination claiming system must include resources to support and educate small businesses with compliance in order to offset these costs.

Thus the cost arguments made in support of the minimum employees threshold have varying degrees of merit, but taken collectively are a real concern for small businesses. However, even accepting the argument that complying with employment discrimination laws and defending cases that arise under them is costly, there are still compelling arguments against the minimum employees requirement as presently codified. First, to the extent that it is true that smaller businesses cannot bear the costs of discrimination laws, it is unclear that the number of employees is the proper metric for determining who should be exempt.<sup>58</sup> Is a business with eight employees and a million dollars in revenue any less able to bear the costs of discrimination laws than a company with eighteen employees and half a million dollars in profits?<sup>59</sup> Nor is there

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52. *Id.*

53. *Id.*

54. *Id.* at 1249 n.239. Indeed, in establishing the requirements for employers to invoke a defense to vicarious liability, the Supreme Court noted in dicta that small businesses might require less formalized procedures. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 770 n.3 (1998).

55. Carlson, *supra* note 28, at 1267–68.

56. *See id.* at 1268.

57. *Id.* at 1259.

58. *See Bradford*, *supra* note 33, at 1; *see also* Carlson, *supra* note 28, at 1204 (noting that other statutory schemes such as the FLSA base coverage on revenues rather than number of employees).

59. *But see* Carlson, *supra* note 28, at 1247 (noting firms with few employees often lack



any empirical basis for the numeric thresholds set forth in the statutes (e.g., 15 employees to be covered by Title VII),<sup>60</sup> which were a subject of widespread debate with the passage of Title VII and every subsequent amendment.<sup>61</sup>

Additionally, the current contours of the small business exemption are not logically calibrated to the costs of the varying statutes. As described more fully in note 30, *supra*, the different federal employment statutes have different thresholds for the minimum number of employees required in order for an employer to be covered. However, these coverage requirements have no correlation to the extent of expenditure or “cost” an employer is expected to bear under the statute.<sup>62</sup> For example, the Uniform Services Employment and Reemployment Rights Act (USERRA), a statute which carries substantial cost in that it requires employers to provide extended periods of military leave, often with benefits, has no small employer exemption.<sup>63</sup> Conversely, the Family and Medical Leave Act (FMLA), which has a similarly onerous leave requirement, applies only to employers with fifty or more employees.<sup>64</sup> The American with Disabilities Act (ADA), which contains some of the greatest potential employer costs because it requires employers to take affirmative steps to accommodate individuals with disabilities, has the same minimum employee requirement as Title VII, which in most circumstances contains only the negative prohibition against discrimination.<sup>65</sup> If cost is truly driving the small business exemption, then the statutes should be calibrated to make the most costly statutes have the highest minimum employee thresholds.

Even where cost is a legitimate consideration with respect to coverage of small businesses by anti-discrimination law, this is not a justification for wholesale exclusion, as there are other ways in which potentially burdensome financial concerns may be ameliorated. A number of the statutes which have an affirmative obligation, such as the duty to

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economies of scale enjoyed by larger firms).

60. See Aston, *supra* note 34, at 294 (noting that the Fair Labor Standards Act covers employers with two or more employees); Carlson, *supra* note 28, at 1198 (noting that the Small Business Administration defines small business as those with 500 or fewer employees).

61. See Aston, *supra* note 34, at 292 (discussing Congressional debate over the number of employees required for coverage).

62. See Michael C. Falk, *Lost in the Language: The Conflict Between the Congressional Purpose and Statutory Language of Federal Employment Discrimination Legislation*, 35 RUTGERS L. J. 1179, 1181 (2004) (noting the discrepancies between statutes which prohibit discrimination and those which require employers to take affirmative steps in favor of a particular group).

63. 20 C.F.R. § 1002.34 (2010).

64. 29 U.S.C. § 2611 (2009).

65. 42 U.S.C. § 2000e (2011); 42 U.S.C. § 12111(5)(A) (2011). Title VII does have a limited duty to provide reasonable accommodation for religious practice. *Trans World Airlines v. Hardison*, 432 U.S. 63, 66 (1977).

accommodate a disability under the ADA, to provide a religious accommodation under Title VII, or to provide leave under the FMLA or USERRA, contain an “undue hardship” exception which an employer may invoke to demonstrate that the obligation is too costly to bear as an excuse from compliance.<sup>66</sup> Statutory “escape hatches” such as these, if properly drafted and interpreted, provide an appropriate mechanism to take into account the financial constraints faced by small business while still holding such entities accountable for the most essential of anti-discrimination provisions.<sup>67</sup>

Perhaps most fundamentally, it is unclear that cost should be the primary concern or that cost concerns should outweigh the anti-discrimination mandate. Indeed, there is no small business exception for other expensive laws such as the Occupational Safety and Health Act and environmental regulations, because in such cases Congress has decided as a matter of public policy that compliance is sufficiently critical to outweigh cost concerns.<sup>68</sup> Fair and equitable treatment of individuals under the anti-discrimination laws deserves no less.<sup>69</sup>

Scholars such as Carlson have argued that global coverage of environmental laws are more important because the harm caused by an environmental infraction is much greater than a discriminatory act whose “effects are not likely to reach beyond the size of the employer’s small workforce.”<sup>70</sup> However, this argument ignores the aggregated effect of the discrimination that is allowed to persist unreported and unchecked across one-fifth of the workforce on the enforcement at large.

### *b. Personal Relationships*

Beyond cost, a second justification often articulated in favor of the small business exception is that small employers need to rely on personal relationships in hiring and other employment decisions, and for this reason small employers should not be subject to anti-discrimination

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66. 42 U.S.C. § 12112(b)(5)(A) (2009); *Barth v. Gelb*, 2 F.3d 1180 (D.C. Cir. 1993) (hiring a diabetic for overseas posting would have created an undue hardship by requiring transfer of personnel among hardship and non-hardship posts with very limited staffing available); 38 U.S.C. § 4312(d)(1)(B) (2009).

67. See Ernest F. Lidge, III, *Financial Costs as a Defense to an Employment Discrimination Claim*, 58 ARK. L. REV. 1, 41 (2005). For example, an employer might be able to establish a defense that a particular employment decision was necessary based on cost or that a particular preventative measure was too costly to implement. Most of the laws presently contain these types of escape hatches. However, to the extent additional ones might be warranted in order to comply with small business cost concerns, those would require substantive statutory changes which are beyond the scope of this article.

68. Carlson, *supra* note 28, at 1250.

69. See H.R. REP. NO. 92-238, at 20 (1971) (“The committee feels that discrimination in employment is . . . equally invidious whether practiced by small or large employers.”).

70. Carlson, *supra* note 28, at 1250.

mandates.<sup>71</sup> This argument is unpersuasive on many levels. First, the notion that small business needs this exemption to maintain collegial relations ignores the fact that personal relationships are not unique to small business.<sup>72</sup> Larger workplaces also function based on interpersonal relationships and manage to do so within the parameters of the federal anti-discrimination laws.

Even if some personal preferences should be taken into consideration in the small-business context, it is clear that certain behaviors, such as sexual harassment, are never justifiable. The present framework, in which small employers are completely excluded from the purview of most federal anti-discrimination laws (including the sex discrimination provisions of Title VII), leaves employees of these smaller businesses excluded from protection against egregious harassing conduct.

As with the “undue hardship” exception, which may serve as an effective counterbalance to small businesses’ assertion that it should be excluded from coverage based on cost, there are other ways to address concerns about any purported justifications such entities may have for taking personal relationships into account. Most anti-discrimination laws utilize the *McDonnell Douglas* framework, whereby once a plaintiff sets forth a *prima facie* case, the employer may proffer a legitimate, non-discriminatory reason for the action taken.<sup>73</sup> In age discrimination cases, the employer’s burden is slightly modified, and an employer may base its decision on “reasonable factors other than age.”<sup>74</sup> Allowing small business to justify employment decisions based on personal relationships that are not discriminatory may provide a vehicle for ameliorating this concern without wholesale exclusion from coverage. To the extent that an employer’s decision based on “personal relationships” cannot be distinguished from discriminatory preferences, those actions should be prohibited, as to do otherwise would undercut the purpose of the anti-discrimination laws.

At its core, the “personal relationships” justification for the small business exemption is representative of the larger complaint that personnel decisions are within the purview of a business and that the

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71. For example, in debating whether the minimum employees threshold should have lowered from twenty-five to eight in the context of the proposed 1971 amendments to Title VII, some legislators argued that these businesses, often family-run, would likely hire the friends and relatives or those of the same ethnicity of the owner. See 118 CONG. REC. 2409–10 (daily ed. Feb. 2, 1972) (statement of Sen. Fannin); 118 CONG. REC. 3171 (daily ed. Feb. 8, 1972) (statement of Sen. Ervin); see also *Armbruster v. Quinn*, 711 F.2d 1332, 1339 (6th Cir. 1983).

72. *Aston*, *supra* note 34, at 308. See also *Lamirande v. Resolution Trust Corp.*, 834 F. Supp. 526, 528 (1993) (noting that Congress likely enacted small business exemption to allow hiring of friends and relatives).

73. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973).

74. 29 U.S.C. § 623(f)(1) (2009).

government's regulation in this area is an intrusion into this private property right. This concern is legitimate with small business as with enterprises of every size. However, in enacting the anti-discrimination laws, Congress has made the determination that the right of individuals to be free from prejudice and harassment in the workplace is a sufficiently important value to our society to warrant some intrusion upon this private property right, subject to consideration of the various aims and interests involved. Small business is not sacrosanct and should not enjoy unfettered latitude to discriminate in its personnel decisions. Rather, it should be subject to the anti-discrimination mandate in a manner that takes into account the unique concerns of the small firm.

*c. Overburdening*

A third principal argument in favor of the small business exemption is that allowing claims by employees against small businesses would open up the litigation floodgates and make the system unworkable.<sup>75</sup> This concern essentially recognizes that there is an inherent tension between providing widespread access to the claiming system and managing the workload of the system so that it can effectively process and resolve disputes.<sup>76</sup>

Based on the estimate that almost one-fifth of the American workforce is currently excluded from protection, and the corresponding possibility that claims could rise as much as twenty percent, the concern is understandable. As Lawrence Friedman observed:

[H]ow much access to justice do we really want? Let us try to imagine a world in which everyone who had any claim whatsoever could get a hearing, had inexpensive and convenient access to counsel, and presumably could get his claim resolved in his favor. Would this be a good society? It could be an Orwellian nightmare.<sup>77</sup>

Most notably, any liberalization of the access requirements would result in significantly more litigation in the courts, and this additional workload would impede judicial efficiency and prevent many cases from being heard.<sup>78</sup> There are two primary variables in assessing access to justice. The first is the number of people who can seek redress under the system, which is one of the primary concerns of this Article in focusing upon those excluded from coverage. However, there is a second factor—whether, once folks have access to the system, their

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75. See Carlson, *supra* note 28, at 1268.

76. Lawrence M. Friedman, *Access to Justice: Some Historical Comments*, 37 *FORDHAM URB. L. J.* 3, 4–5 (2010).

77. *Id.* at 7.

78. Carlson, *supra* note 28, at 1267.

claims can be adjudicated promptly. If the system is so overwhelmed that it takes years to be heard, then the system will be effective for none.<sup>79</sup>

Such questions of access and efficiency are not unique to employment discrimination claims, but are present in virtually all areas of the law where individuals or entities are seeking access to the judicial system, and careful consideration must be given here as elsewhere to these competing aims. However, this “overburdening” argument must not be seen as a roadblock to allowing access to the employment discrimination claiming system. The small business exemption in its present form arbitrarily excludes a significant portion of the workforce from the anti-discrimination claiming system entirely. Adopting such an argument—that access to remedies should be limited to a certain group of workers in order to not flood the system—essentially reflects a value judgment placing the rights of a small subset of individuals above the ability for all to seek redress. This is clearly contrary to the purpose of Title VII to broadly prevent and eradicate workplace discrimination.<sup>80</sup>

## 2. The Price of Exclusion

The small business exemption has serious consequences on a number of levels. First, small firms employ approximately nineteen million individuals.<sup>81</sup> Their exclusion from the coverage of the anti-discrimination laws means that a significant portion of the American workforce has virtually no protection whatsoever under federal anti-discrimination law.<sup>82</sup>

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79. See Marcia L. McCormick, *The Equality Paradise: Paradoxes of the Law's Power to Advance Equality*, 13 TEX. WESLEYAN L. REV. 515, 515–16 (2007) (generally discussing the challenges of utilizing scarce resources to effectuate broad change in the civil rights context).

80. As discussed in note 44, *supra*, with respect to cost, the overburdening argument has similarly been undercut to some extent by the Supreme Court's decision in *Arbaugh v. Y. & H. Corporation* that the minimum number of employees is not a procedural requisite but a question of fact. 546 U.S. 500, 516 (2006). As a result, some portion of these cases may already be taxing the system until the point at which a judge or jury decides that the employer is not covered by the statute. See Courtnell, *supra* note 44, at 797–98.

81. Carlson, *supra* note 28, at 1199; see also Christine Neylon O'Brien & Stephanie Greene, *Employee Threshold on Federal Antidiscrimination Statutes: A Matter of the Merits*, 95 KY. L. J. 429 (2006–2007). Significantly, this number does not include contingent workers or independent contractors, who may account for as much as one-third of the U.S. workforce, and who are often excluded from the protection of anti-discrimination law. Richard S. Belous, *The Rise of the Contingent Workforce: The Key Challenges and Opportunities*, 52 WASH. & LEE L. REV. 863, 863–64 (1995); Mary E. O'Connell, *Contingent Lives: The Economic Insecurity of Contingent Workers*, 52 WASH. & LEE L. REV. 889, 889–90 (1995). The exclusion of this segment of the workforce presents unique problems and will be the subject of a future article.

82. See Carlson, *supra* note 28, at 1199. See also H.R. REP. NO. 92-238, at 20 (1971) (“Because of the existing limitation in the bill proscribing the coverage of Title VII to 25 or more employees or members, a large segment of the Nation's work force is excluded from an effective Federal remedy to

The exemption created for those employers who fall below the minimum employee threshold is not just problematic in that it excludes a large number of workers, but also because of the group that it excludes. Those who work at smaller businesses have more need for protection because such businesses are less subject to the public eye.<sup>83</sup> Additionally, in a small workplace there may not be a human resources department or complaint mechanism for an employee to utilize outside of the manager about whom she is alleging discrimination. Thus, it is even more important for these employees to have access to external remedies.

These exclusions are also harmful in that they obscure the full extent of discrimination in the workplace. Individuals without legal redress have little incentive to raise complaints where no remedies are available to them.<sup>84</sup> Those who are not covered by the anti-discrimination statutes are similarly not protected by their anti-retaliation provisions and thus will not complain and risk retribution at work.<sup>85</sup>

Thus, discrimination in workplaces that are not covered is allowed to persist unchecked.<sup>86</sup> Indeed, the problem of discrimination within firms exempted from coverage has been well-documented.<sup>87</sup> Empirical studies demonstrate that small firms are significantly less likely to hire blacks and other minorities.<sup>88</sup> For example, one study demonstrated that small firms are significantly less likely to hire minorities.<sup>89</sup> The study was performed with multiple regression analysis to account for other

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redress employment discrimination.”).

83. See Aston, *supra* note 34.

84. More empirical research is needed to understand the effect of the small business exemption on the likelihood of individuals employed by those entities to raise complaints. However, studies have shown a correlation between perceptions of inclusion within the protected class and an individual's willingness to complain. See Barry M. Goldman, *Toward an Understanding of Employment Discrimination Claiming: An Integration of Organizational Justice and Social Information Processing Theories*, 54 PERSONNEL PSYCHOL. 361 (2001). See also Nielsen & Nelson, *supra* note 22, at 674 (discussing an individual's available redress under Title VII).

85. Brenda Major & Cheryl R. Kaiser, *Perceiving and Claiming Discrimination*, HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 297 (2005) (addressing the fear of retaliation and its effects on an individual's propensity to bring a claim).

86. See Aston, *supra* note 34. As the legislative history to the 1972 amendments to Title VII notes, “small establishments have frequently been the most flagrant violators.” S. REP. NO. 92-415, at 59 (1971).

87. See Harry J. Holzer, *Why Do Small Establishments Hire Fewer Blacks Than Large Ones?*, 33 J. HUM. RESOURCES 896 (1998) (discussing why there is greater inclination among larger firms to hire black applicants); William J. Carrington et al., *Using Establishment Size to Measure the Impact of Title VII and Affirmative Action*, 35 J. HUM. RESOURCES 503 (1995); see generally Kenneth Y. Chay, *The Impact of Federal Civil Rights Policy on Black Economic Progress: Evidence from the Equal Employment Opportunity Act of 1972*, 51 INDUS. & LAB. RELATIONS REV. 608 (1998); James P. Smith & Finis Welch, *Affirmative Action and Labor Markets*, 2 J. LAB. ECON. 269, 269 (1984).

88. Holzer, *supra* note 87, at 896.

89. *Id.*

factors (such as the geographic location of small firms relative to the minority workforce.)<sup>90</sup> However, the disparity persisted, leaving the author to conclude that discrimination was the most plausible explanation and conclude that remedies at small businesses were needed.<sup>91</sup>

Similarly, significant growth in opportunities for minorities and women has been seen following expansion of coverage of federal anti-discrimination laws.<sup>92</sup> One study found that following passage of the 1972 Act, black employment share grew, wage gap narrowed, and there were significant inroads into certain occupations. This conclusion is further supported by studies that have shown migration of women and blacks to jobs in larger companies following the passage of Title VII.<sup>93</sup>

Beyond the functional costs of exclusion, there are broader conceptual issues. Restricting employment protection to a subset of the workforce is also contrary to the purpose of anti-discrimination laws: to remedy discrimination in the American workplace.<sup>94</sup> Excluding discrimination to persist unchecked for a large portion of the workforce undermines the expressive function of anti-discrimination law, which is to signal clearly that discrimination in *any* workplace is unacceptable.<sup>95</sup> Instead, the limited access to anti-discrimination law sends a contrary message—that preventing and addressing discrimination in the workplace is not of paramount concern, but is secondary to businesses needs and politics.

The small business exception has other drawbacks too. Businesses may be less likely to hire more employees or may engage in disingenuous subcontracting arrangements in an attempt to keep their employee numbers low and avoid coverage.<sup>96</sup> Such subterfuge not only has the potential to obscure the true extent of discrimination in the workplace, but may also deny individuals the benefits they would receive if the company were to recognize them as true employees.<sup>97</sup>

Those in support of the small business exception would argue that

90. *See id.* at 909.

91. *Id.* at 908–09.

92. *See Chay, supra* note 87.

93. Carrington, *supra* note 87, at 504.

94. *See* 109 CONG. REC. 25688 (daily ed. Dec. 30, 1963) (noting that the purpose of Title VII is to “eliminate, through the utilization of formal and information remedial procedures, discrimination in employment based on race, color, religion, or national origin”).

95. *See Sunstein, supra* note 7, at 2043–44.

96. Carlson, *supra* note 28, at 1247. *See also* C. Steven Bradford, *The Cost of Regulatory Exemptions*, 72 U. MO. KAN. CITY L. REV. 857 (2004) (noting that firms have an incentive to modify behavior to fit within the exemption to avoid cost).

97. *See supra* note 81 and accompanying text (discussing the problems presented by “non-employees” and the growth of the contingent workforce).

individuals who are denied access to the federal anti-discrimination claiming system by virtue of their employer's size are protected in many cases by state or local laws, which may have no minimum employee threshold or one that is lower than the federal laws.<sup>98</sup> However, the coverage of state and local laws vary widely and the effect is to leave some employees with little or no protection. Moreover, even where state anti-discrimination laws exist, research suggests that they have been less effective than the comprehensive federal scheme at remedying discrimination.<sup>99</sup> For example, studies have concluded that notwithstanding the existence of state anti-discrimination laws, women and minorities have made significant gains in employment opportunities and wages after the passage of Title VII only in entities that are covered.<sup>100</sup> Scholars have suggested that state anti-discrimination regimes tend to be less effective because they rely more upon agency enforcement than conferring a private right of action.<sup>101</sup>

In sum, the net effect of the small business exception as presently codified is to leave a vast segment of the workforce unprotected. While the overburdening and cost concerns deserve further consideration, they do not justify wholesale exemption of small business from anti-discrimination law.

### *B. Administrative Exhaustion*

For those employees who are protected by the federal anti-discrimination statutes, the road to court is far from simple. Rather, there are a series of roadblocks and hurdles an individual must navigate to gain access to the claiming system. The largest of these is exhaustion of administrative remedies.<sup>102</sup>

Exhaustion is the concept that, under the majority of anti-discrimination laws, a putative plaintiff must file a charge with the Equal Employment Opportunity Commission or equivalent state or local agency prior to bringing suit in federal court.<sup>103</sup> Under the exhaustion

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98. Carlson, *supra* note 28, at 1253–54; *see also* David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943–1972*, 63 STAN. L. REV. 1071, 1073 (2011).

99. *See generally* Carrington, *supra* note 87.

100. *See id.*

101. *See* Engstrom, *supra* note 98, at 1104.

102. Title VII, the ADA and the ADEA all require exhaustion. *See* 42 U.S.C. § 2000e-5 (2011); 29 U.S.C. § 626 (2011); 42 U.S.C. § 12117 (2011). Claims brought under Section 1981, USERRA and the FMLA have no exhaustion requirement and plaintiffs can proceed directly to court. *See* Surrell v. Cal. Water Service Co., 518 F.3d 1097, 1104 (9th Cir. 2008) (exhaustion not required for Section 1981 claims); *Jacobsen v. Dep't. of Justice*, 500 F.3d 1376, 1381 (Fed. Cir. 2007) (exhaustion not required by USERRA).

103. Title VII, the ADA and the ADEA all require exhaustion. *See* 42 U.S.C. § 2000e-5 (2011);



process, a claimant files a charge with the EEOC or a state or local agency that has been delegated authority to receive such charges by the EEOC.<sup>104</sup> An agency staff person investigates the charge, interviewing the complainant and employer representatives and soliciting documents and information.<sup>105</sup> The employer is often asked to submit an answer to the charge as well as a position statement setting forth its explanation in greater detail. The agency may also hold a fact-finding conference at which the complainant provides her version of the alleged discriminatory events and the employer offers witnesses to provide its explanation for what took place.<sup>106</sup> The agency will ultimately issue a determination concluding that there either is or is not probable cause that discrimination occurred.<sup>107</sup> If the agency finds no probable cause that discrimination took place, it will issue a “right-to-sue” letter and the claimant can then go file a complaint in court.<sup>108</sup> If the agency finds cause then it can opt to pursue the matter further itself or decline to do so and advise the complainant of her right to proceed to court.<sup>109</sup> Throughout the agency process, the investigator will make attempts to mediate and settle the controversy.<sup>110</sup> A plaintiff may request a right-to-sue letter, and the agency will terminate its investigation.<sup>111</sup>

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29 U.S.C. § 626 (2011); 42 U.S.C. § 12117 (2011).

104. In 2010, the EEOC received 99,922 charges nationwide. *Enforcement Statistics*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm> (last visited Nov. 16, 2012) [hereinafter *Enforcement Statistics*]; see also Katherine A. Macfarlane, *The Improper Dismissal of Title VII Claims on “Jurisdictional” Exhaustion Grounds: How Federal Courts Require That Allegations Be Presented to an Agency Without the Resources to Consider Them*, 21 GEO. MASON. U. C. R. L. J. 213, 215 (2011); *The Charge Handling Process*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/employers/process.cfm> (last visited Nov. 16, 2012) [hereinafter *Charge Handling*].

105. 29 C.F.R. § 1601.15 (2009). Documents are generally provided to the agency but not shared with the adverse party without the consent of the party which submitted them. 29 C.F.R. § 1601.22 (2009).

106. 29 C.F.R. § 1601.15 (2009). Conferences are less formal than a hearing and are not recorded or transcribed. Each side is able to hear the other speak.

107. 29 C.F.R. §§ 1601.18–.19 (2009). The EEOC found no probable cause for discrimination in 64.3% of the approximately 105,000 charges it resolved in 2010. *Enforcement Statistics*, *supra* note 104. It found probable cause in 4.7%. *Id.* The remaining 25.8% of charges were either settled or administratively resolved. *Id.*

108. *Charge Handling*, *supra* note 104.

109. 29 C.F.R. § 1601.21 (2010). See also Michael Selmi, *The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law*, 57 OHIO ST. L. J. 1, 5–6 (1996).

110. See 29 C.F.R. § 1601.20 (2009); 29 C.F.R. § 1601.24 (2010). The EEOC mediated or settled approximately 10% of the charges it resolved in 2010. *Enforcement Statistics*, *supra* note 104.

111. See David C. Belt, *Election of Remedies in Employment Discrimination Law: Doorway into the Legal Hall of Mirrors*, 46 CASE W. L. REV. 145 (1995); Nancy M. Modesitt, *Reinventing the EEOC*, 63 SMU. L. REV. 1237 (2010). Regulations do provide that a claimant may request a right-to-sue letter and that the agency can issue the dismissal letter at any point 180 days or later after the filing of the charge, or at any point sooner than 180 days if the agency concludes that it will be unlikely to complete an investigation within 180 period. 29 C.F.R. § 1601.28 (2010). However, this argument hardly

Perhaps most significant is what happens after the conclusion of the agency process. Whether the agency finds probable cause or not, the complainant may then file a complaint in federal court.<sup>112</sup> The process effectively begins anew, with the employee filing another complaint and the employer responding.<sup>113</sup> While an EEOC investigator's finding of probable cause of discrimination may be admitted as probative, testimony and evidence from the administrative agency process are given little or no weight, and dismissal letters indicating that the agency did not find probable cause of discrimination are generally inadmissible.<sup>114</sup> Parties in litigation may subpoena the investigator's file; however, they will generally be given only the documents submitted to the agency by the parties (which may be obtained from the adverse party through discovery anyway).<sup>115</sup> The investigator's notes and internal agency correspondence will not be produced but will be withheld under the governmental deliberative process privilege.<sup>116</sup>

There has been considerable debate among scholars as to the value of the administrative exhaustion requirement and the role and value of the EEOC.<sup>117</sup> The agency, as originally conceived, theoretically has a number of meritorious purposes. First, the EEOC is intended to serve as an investigative body, exploring allegations of discrimination and determining whether or not it has taken place.<sup>118</sup> Properly undertaken, this function can both remedy and deter unlawful behavior in the

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supports the merits of the agency process. At a minimum the complainant will need to wait weeks or months for the right-to-sue letter to be issued, and will still have had to go through the time and effort of filing a charge without any consideration of the merits. The employer and the agency itself may have already expended resources by this point as well.

112. See 29 C.F.R. §§ 1601.18, .21 (2010).

113. See FED. R. CIV. P. 3, 7.

114. See *Estate of Hamilton v. City of New York*, 627 F.3d 50 (2d Cir. 2010) (probable cause finding was admissible as probative evidence); *Cortes v. Maxus Exploration Co.*, 758 F.Supp. 1182 (S.D.Tex. 1991) (EEOC's dismissal for lack of probable cause not admissible); *Tulloss v. Near North Montessori Sch., Inc.*, 776 F.2d 150, 154 (7th Cir. 1985) (citing *Gillin v. Fed. Paper Board Co.*, 479 F.2d 97, 99 (2d Cir. 1973) (EEOC investigative file not admissible because it was a "mish-mash of self-serving and hearsay statements and records; . . . justice requires that the testimony of the witnesses be given in open court, under oath, and subject to cross-examination").

115. 29 C.F.R. § 1601.16 (2010).

116. See John Louis Kellogg, *What's Good for the Goose . . . Differential Treatment of the Deliberative Process and Self-Critical Analysis Privileges*, 52 WASH. U. J. URB. & CONTEMP. L. 255, 256 (1997).

117. See Naomi C. Earp, *Forty-Three and Counting: EEOC's Challenges and Successes and Emerging Trends in the Employment Arena*, 25 HOFSTRA LAB. & EMP. L. J. 133 (2007); Selmi, *supra* note 109; Modesitt, *supra* note 111; Belt, *supra* note 111, at 159; Macfarlane, *supra* note 104, at 218 (noting that requiring a plaintiff to first administratively exhaust with the EEOC is in part an attempt to ensure that the agency has a meaningful role in implementing the laws that it was created and empowered to enforce).

118. Originally the powers of the EEOC were limited to investigating and conciliating charges of discrimination. However, the 1972 amendments to Title VII also gave the EEOC power to bring lawsuits either on behalf of an individual or on its own. Selmi, *supra* note 109, at 6.

workplace.<sup>119</sup>

Second, the agency process is intended to foster legal access to redress, particularly for individuals who cannot find or afford an attorney and who are unable to navigate the legal system on their own.<sup>120</sup> Anyone can contact the EEOC and file a charge of discrimination, using the agency's straightforward "check the box" form. The complainant does not have to pay a filing fee and can avail herself of the aid of an agency staffer in filing.<sup>121</sup> EEOC charges require considerably less specificity than filing a complaint in court, requiring only that the plaintiff sufficiently identify the parties and "describe generally the action or practices complained of."<sup>122</sup>

Finally, the administrative process is intended to play a conciliatory role, facilitating resolution of employment disputes without the time and expense of litigation, thereby lessening the workload of the judiciary.<sup>123</sup> When an employer learns from the EEOC that an employee has filed a charge, this may be the first notice it has of any issue, and sometimes the problem may be resolved internally with little or no agency interference. The EEOC also offers a mediation track, which the parties may voluntarily opt to enter prior to investigation of the charge.<sup>124</sup> Other times, disputes may be resolved through the investigative fact-finding process, which may alert an employer to the fact that wrongdoing has taken place and facilitate settlement. The time and effort required to defend a charge can also incentivize an employer to settle as a business

119. See Belt, *supra* note 111, at 159; see also Macfarlane, *supra* note 104, at 218 (noting that requiring a plaintiff to first administratively exhaust with the EEOC is in part an attempt to ensure that the agency has a meaningful role in implementing the laws that it was created and empowered to enforce).

120. Cf. Belt, *supra* note 111, at 189.

121. Selmi, *supra* note 109, at 6.

122. 29 C.F.R. § 1601.12(b) (2009). As discussed more fully in Part III(C) *infra*, the gulf between the liberal requirements for an EEOC complaint and the requirements for filing a well-pled complaint in federal court is perhaps more significant in light of the Supreme Court's recent decisions requiring that plaintiffs plausibly plead a cause of action. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); see also Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613 (2011).

123. See Benjamin J. Morris, *A Door Left Open? National Railroad Passenger Corporation v. Morgan and its Effect on Post-Filing Discrete Acts in Employment Discrimination Suits*, 43 CAL. W. L. REV. 497, 502 (2007) ("The exhaustion requirement plays an important role of encouraging settlement through conciliation and voluntary compliance during administrative proceedings, which 'would be defeated if a complainant could litigate a claim not previously presented to and investigated by the EEOC.'") See also *B.K.B. v. Maui Police Dep't.*, 276 F.3d 1091, 1099 (9th Cir. 2002) (noting purpose of EEOC exhaustion is to afford the agency an opportunity to investigate the charge); *Brown v. Puget Sound Elec. Apprenticeship & Training Trust*, 732 F.2d 726, 729 (9th Cir. 1984) ("Title VII places primary responsibility for disposing of employment discrimination complaints with the EEOC in order to encourage informal conciliation and foster voluntary compliance with Title VII.").

124. See Earp, *supra* note 117, at 144–50. (noting that as many as one third of employees age 65 and older also file a disability discrimination claim).

decision, irrespective of the litigation risk. Conversely, the agency process may serve to educate a would-be plaintiff as to the lack of merit to her claims or unlikelihood of succeeding in court. Simply being heard through the charge process can provide sometimes the plaintiff with the redress she seeks. In these various ways, exhaustion can be an effective dispute resolution tool.<sup>125</sup>

Scholars point out that, despite the laudable aims of the EEOC, the gulf between the intent and reality of the exhaustion requirement is vast.<sup>126</sup> In practice, the EEOC is a highly overburdened agency.<sup>127</sup> The number of claims filed with the EEOC has increased exponentially in recent years, while the staff and resources to process them have remained relatively unchanged.<sup>128</sup> As a result, an investigation of a charge can often take many months.<sup>129</sup> This presents particular problems for the current employee who has exposed himself to retaliation or other potentially adverse consequences by virtue of filing a complaint and then must sit in the place of employment during the lengthy agency process. It also causes issues for the former employee who is now unemployed as a result of the allegedly unlawful workplace discrimination and whose monetary redress is delayed by the administrative process.<sup>130</sup>

In addition to the length of time for charge processing, a second major criticism of administrative exhaustion is that it in fact offers no relief to the overwhelming majority of individuals who file charges. Most claimants who wait out the agency's determination simply receive a "right-to-sue" letter indicating that the agency did not find probable cause of discrimination, and that the plaintiff has ninety days to file a complaint in federal court.<sup>131</sup> Thus, the plaintiff is left in the same

125. Cf. Selmi, *supra* note 109, at 51. The EEOC mediated or settled approximately 10% of the charges it resolved in 2010. *Enforcement Statistics*, *supra* note 104. See also Woodford v. Ngo, 548 U.S. 81 (2006) ("[E]xhaustion promotes efficiency. . . . Claims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court. In some cases, claims are settled at the administrative level, and in others, the proceeds before the agency convince the losing party not to pursue to matter in federal court.").

126. See generally McCormick, *supra* note 79; Selmi, *supra* note 109; Modesitt, *supra* note 111; Belt, *supra* note 111, at 159; Macfarlane, *supra* note 104, at 218.

127. From 2001–2008, the agency lost 25% of its staff. In 2008 the agency had 600 investigators nationwide to investigate over 95,000 new charges. Macfarlane, *supra* note 104, at 230 (citing *Hearing on Commerce, Justice, Science, and Related Agencies Appropriations for 2010 Before the Subcomm. of the Comm. on Appropriations*, 111th Cong. 38 (2009)) (statement of Gabrielle Martin, President, National Council of EEOC Locals) [hereinafter *Martin Statement*].

128. Belt, *supra* note 111, at 153.

129. The EEOC once required that investigations be concluded within 180 days but the average time to investigate a charge is now 229 days. Macfarlane, *supra* note 104, at 230.

130. As of 2008 the agency had a backlog of over 73,000 charges filed by "people who believed they were discriminated against on the job, still waiting for help." *Martin Statement*, *supra* note 127.

131. The EEOC found no probable cause for discrimination in 64.3% of the approximately

position she would have been in without having to exhaust administrative “remedies”—or perhaps a worse position, because all of the witnesses, documents and other evidence needed to prove his case is that much more temporally removed and stale or perhaps unavailable. The length of the EEOC process, coupled with the limited number of cases in which it actually effectuates any meaningful relief, means that the deterrence value of the agency is also marginal.<sup>132</sup>

The slow nature of the administrative process coupled with the remote likelihood of any substantive outcome may have larger deleterious effects. To the extent that an aggrieved individual views the system as ineffective, she may be less likely to bring claims and risk exposing herself to possible adverse consequences of complaining with little hope of relief.<sup>133</sup> The EEOC may also be of limited deterrence value if employers perceive the administrative process to be a nuisance rather than one with prompt and actual consequences.

Scholars also question the qualitative value of the agency process.<sup>134</sup> The EEOC investigators are not judges or attorneys, but civil servants without any formal legal training, a fact which gives rise to questions of their capability to assess employment disputes.<sup>135</sup> There are no formal discovery rules in the agency process, and none of the evidentiary rules such as hearsay apply. This lack of training and procedure raises questions as to the validity of the factual investigation and the proper application of the law in these cases.<sup>136</sup>

Scholars similarly debate the role of administrative exhaustion in today’s anti-discrimination law landscape. Once upon a time, administrative complaints were an employee’s first line of defense, and external assistance when there was no other option. However, as explained in Part III(A) *supra*, the Supreme Court’s decisions in *Faragher*, *Ellerth* and *Kolstad* in the late 1990s fundamentally shifted the American workplace. Employers now have vast incentives to put processes in place to prevent, detect, and remediate discrimination and otherwise demonstrate good faith efforts to comply with anti-discrimination laws as a means of escaping liability and punitive damages. As a result, companies have developed extensive complaint procedures of which an employee may avail herself. These internal complaint procedures have in some sense supplanted the agency

104,000 charges it resolved in 2010. *See Enforcement Statistics*, *supra* note 104.

132. *See Selmi*, *supra* note 109, at 49.

133. *See generally* Major & Kaiser, *supra* note 85.

134. *See Selmi*, *supra* note 109; Modesitt, *supra* note 111; Belt, *supra* note 111, at 159; Macfarlane, *supra* note 104, at 218.

135. Investigators are often not trained on new developments in the law or new laws themselves. Macfarlane, *supra* note 104, at 231.

136. *See id.*

function in that they provide the employee with a first avenue of complaint. They also provide notice to the company of potential issues and problems, allowing the employer to perform an investigation and provide redress before a formal dispute ever arises. Indeed, employees are expected to exhaust these internal complaint procedures before filing a complaint.<sup>137</sup> Given the redundancies between internal and agency complaints, it is unclear that mandatory exhaustion is as necessary or relevant in a post-*Faragher* world.<sup>138</sup>

Aside from the criticisms of the agency process itself, the fact remains that mandatory administrative exhaustion is something of an anomaly in the law. For example, those alleging other types of federal claims do not generally have an administrative exhaustion requirement, nor do those pursuing state law claims such as personal injury or tort claims. The reasons for mandatory exhaustion also seem vague. If the purpose is to assist would-be plaintiffs in gaining access to the law, then requiring all plaintiffs to file charges—even those who are perfectly able to find an attorney and proceed to court—seems counterintuitive. Hampering their claims from reaching court for an extended period similarly contradicts that purpose.

Conversely, if the purpose of exhaustion is to serve as a gatekeeping function and limit the number of employment discrimination cases entering the court system, there is no evidence that this is working either.<sup>139</sup> Any individual who brings an administrative charge can ultimately receive a right-to-sue letter and proceed to court. Indeed, the rise in employment charges has seen a corresponding increase in federal employment discrimination litigation.<sup>140</sup>

### C. Statute of Limitations

The third barrier to access faced by employment discrimination claimants is the statute of limitations. Statutes of limitations are not unique to employment discrimination law, but rather exist for virtually

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137. See Nielsen & Nelson, *supra* note 22, at 686. The standard developed by the Supreme Court in *Faragher* and *Ellerth* requires an employer to show not only that it had processes in place to detect and remedy discrimination but that the employee unreasonably failed to take advantage of those avenues. See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998). Thus it is incumbent upon the employee to utilize the complaint mechanism.

138. This is not to suggest that a company's internal investigation would be as objective as that of the EEOC. Indeed, recognizing the potential for bias among its own employees, some of whom may be decision makers, companies often hire external investigators in order to obtain a more impartial investigation. See David I. Weissman, *Proper Workplace Investigations*, 56 H.R. MAG. 1, May 1, 2011.

139. See Belt, *supra* note 111, at 146 (“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.”).

140. *Id.* at 154.

every type of legal claim. The time period in which a party must bring a claim may be specified within the statute, borrowed from an analogous provision in another federal or state law, or determined by the court as a matter of common law.

The purpose of setting a statute of limitations is to require plaintiffs to act promptly on claims and not “sit on” their rights, so that defendants such as employers are aware of and can cap any potential liability, and that claims are adjudicated while memories are fresh and records still being kept.<sup>141</sup> As the Supreme Court explained, the setting of a time period for filing suit “reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.”<sup>142</sup>

While the purpose behind the statute of limitations exists across virtually all areas of the law, the statute of limitations is much shorter for employment discrimination cases than for other types of claims. Many laws have four or even six year statutes of limitations.<sup>143</sup> By contrast, most employment discrimination statutes, such as Title VII, the ADA and the ADEA, provide that an employee must bring a claim to the EEOC within 180 days.<sup>144</sup> This may be extended to 300 days when there is a work sharing agreement between the EEOC and a state or local agency.<sup>145</sup> Then after the agency investigates and issues a right-to-sue letter, a plaintiff must file a complaint within ninety days or lose the right to do so.<sup>146</sup>

The legislative history and other background materials on the federal anti-discrimination statutes fail to demonstrate any compelling basis for this shorter statute of limitations. One possible rationale is employer notice. Arguably, employment claims by their nature rely more heavily upon the recollection of witnesses. If a would-be plaintiff waits too long to file a complaint, memories may become vague or the witnesses themselves may leave the company. However, these same types of concerns with staleness are present with other types of litigation as well. Moreover, even if such an argument would support the shorter 300-day statute of limitations on the front end (i.e., filing with the EEOC), it would not explain the very brief ninety-day period for filing a complaint

141. See *Cook v. City of Chi.*, 192 F.3d 693, 696 (7th Cir. 1999).

142. *Morris Del. State Coll. v. Ricks*, 449 U.S. 250, 260 (1980).

143. For example, the federal catch-all statute of limitations of four years is generally held to apply to federal statutes which do not contain a statute of limitations. See 28 U.S.C. § 1658(a) (2002).

144. Longer statutes of limitations are provided for certain other employment discrimination statutes, including Section 1981 and USERRA which borrow the four year statute of limitations, and the FMLA which provides a two-year statute of limitations (extended to three years for willful violations). See *Jones v. R.R. Donnelly*, 541 U.S. 369, 282 (2004); 29 U.S.C. § 2617 (2008).

145. 42 U.S.C. § 2000e-5 (2009).

146. *Id.*

after the agency issues the right-to-sue letter since the filing of the claim with the EEOC puts the employer on notice of the need to preserve evidence.

The effect of having such a draconian statute of limitations is to preclude claims. The enforcement of anti-discrimination law is driven by individuals recognizing and bringing claims.<sup>147</sup> As Hirsch & Lyons noted, “Perception of discrimination is arguably the most important stage in dispute formation in that it determines the likelihood of subsequent mobilization of the law.”<sup>148</sup> Hirsch & Lyons continue, “[M]obilization of the antidiscrimination regulatory framework requires that workers identify negative experiences, attribute them to race discrimination, and bring them to the attention of regulatory agents.”<sup>149</sup> However, an employee may not realize that she was the victim of discriminatory conduct in such a brief period.<sup>150</sup> Studies have shown that individuals may not perceive conduct as discriminatory until viewed as part of a spectrum of events over time.<sup>151</sup> As Brake & Grossman have observed, claiming may be delayed by an individual’s lack of information regarding discrimination, deficit in processing information, and perceptions of fairness and what outcomes are possible and deserved.<sup>152</sup>

The recent *Ledbetter v. Goodyear Tire & Rubber, Co., Inc.* illustrates this problem.<sup>153</sup> Lilly Ledbetter sued under Title VII for pay disparities between her and male co-workers and a jury found evidence of discrimination. The Eleventh Circuit held that her claims were untimely because the inequitable pay decisions had been made more than 180 days prior to her bringing her complaint, and the Supreme Court affirmed this ruling.<sup>154</sup> The Court rejected her argument that the act of paying her less with each successive paycheck was an individual

147. Congress gave private individuals a significant role in the enforcement process of Title VII, with individual complaints serving as the catalyst to initiate the Commission’s investigatory and conciliatory procedures. As the Supreme Court noted, “[A]lthough the 1972 amendment to Title VII empowers the Commission to bring its own actions, the private right of action remains an essential means of obtaining judicial enforcement of Title VII.” *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974).

148. Elizabeth Hirsch & Christopher J. Lyons, *Perceiving Discrimination on the Job: Legal Consciousness, Workplace Context, and the Construction of Race Discrimination*, 44 *LAW & SOC’Y. REV.* 269, 291 (2010).

149. *Id.* at 271.

150. *See id.* at 271–75; Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 *N.C. L. REV.* 859, 873 (2008).

151. *Id.* at 872–73; *see also* Hirsch & Lyons, *supra* note 148; Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 *L. & SOC. INQUIRY* 801, 803–06 (2006).

152. *See* Brake & Grossman, *supra* note 150, at 872.

153. 550 U.S. 618 (2007).

154. *Id.* at 621.



discriminatory act sufficient to toll the statute of limitations.<sup>155</sup>

There was a public outcry after the decision in *Ledbetter*, prompting Congress to pass the Lilly Ledbetter Fair Pay Act of 2009.<sup>156</sup> The Act provides that, “a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice, and for other purposes.”<sup>157</sup> The case and resulting legislation demonstrate the tension between recognizing discriminatory conduct as it manifests itself in the workplace and taking action within the short statute of limitations provided by the employment discrimination laws.<sup>158</sup>

Moreover, even where an individual recognized discrimination and wants to pursue redress, the short statute of limitations period can make it difficult for a plaintiff to marshal sufficient facts and information to bring a claim. While it is true that an individual does not need an attorney to file a charge, she at least needs enough information to articulate a claim on the EEOC intake form that provides sufficient information for the agency to commence an investigation.

Once the agency issues a right-to-sue letter, a plaintiff only has the even shorter ninety-day period to bring suit, an inadequate period of time in which to find an attorney and have that attorney gather sufficient information to file a complaint. If an individual cannot find legal counsel, she will either have to forgo legal redress or navigate the bramble of the judicial system on her own. Indeed, there is an argument that employment discrimination plaintiffs should be given a longer statute of limitations than plaintiffs in other types of cases, such as commercial litigation, because they are individuals and tend to be less familiar with the law and less able to obtain legal assistance than the complainants in commercial litigation, which are often times companies with in-house counsel and law firms at their disposal.<sup>159</sup>

With or without counsel, the short filing period is also problematic for gathering the facts needed to draft a well-pled complaint. The problem of this short filing period is further compounded by the Supreme Court’s

155. *Id.* at 629–33; *see also* Friedman, *supra* note 76.

156. Pub. L. No. 111-2 (2009).

157. *Id.* Although the Ledbetter Act has presently been applied only to pay claims, there is a question whether the language is broad enough to extend the limitations period for other types of discrimination claims as well. *See generally* Charles A. Sullivan, *Raising the Dead? The Lilly Ledbetter Fair Pay Act*, 84 TUL. L. REV. 499 (2010).

158. *See* Brake & Grossman, *supra* note 150, at 872. (“[A]n employee may not realize that she has experienced discrimination in time to protect her rights . . . [A]n employee may be unable to recognize discrimination, and insufficiently motivated to act to challenge it, until the effects of discrimination are felt and accumulated.”).

159. *See* Brake & Grossman, *supra* note 150, at 880–90.

recent decisions in *Bell Atlantic v. Twombly*<sup>160</sup> and *Ashcroft v. Iqbal*.<sup>161</sup> Prior to *Twombly*, courts had recognized the more liberal pleading standard of *Conley v. Gibson* requiring plaintiffs to plead only some set of facts entitling the plaintiff to relief.<sup>162</sup> However, in *Twombly*, the Court held that a plaintiff is required to plead allegations that plausibly state a claim on the face of the complaint.<sup>163</sup> The Court held that rather than merely taking a quick look at the complaint, district courts should first carefully examine the complaint to separate pure “legal conclusions” resting on the other “factual allegations.”<sup>164</sup> After removing those legal conclusions, district courts should weigh the remaining facts and determine if they are sufficient to render the plaintiff’s claim plausible.<sup>165</sup>

The new standard developed in *Twombly* and *Iqbal* has significant implications for the short statute of limitations in employment discrimination cases. It is more important now than ever that a plaintiff has the facts to bring a well-pled complaint or otherwise face dismissal of her claims and plaintiffs need time to do that. The short limitations period also means a plaintiff may be able to bring only the allegations which are still timely, resulting in an incomplete picture of the discrimination which occurred and providing thin evidence, which makes a claim more susceptible to dismissal at the summary judgment stage.<sup>166</sup>

Finally, the unduly short statute of limitations for most anti-discrimination claims frustrates the preventative and non-litigious elements of the modern anti-discrimination legal landscape. For example, under *Faragher–Ellerth* framework, an individual is required to take advantage of internal complaint mechanisms unless it is unreasonable to do so under the circumstances. However, filing an internal complaint does not toll the statute of limitations for purposes of

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160. 550 U.S. 544 (2007).

161. 556 U.S. 662 (2009).

162. See 355 U.S. 41, 45–46 (1957).

163. *Twombly*, 550 U.S. at 545–50.

164. *Id.* at 564–66.

165. *Id.*; *Iqbal*, 556 U.S. 662 (2009). *Iqbal* further clarified the *Twombly* standard in a case in which an individual detained by the FBI brought discrimination claims under the First and Fifth Amendment. The Supreme Court reversed the Second Circuit’s decision and held that the plaintiff did not plead sufficiently detailed allegations. Although *Iqbal* was a constitutional case, the fact that it involved discrimination claims make it likely applicable in the employment law arena. See generally Sullivan, *supra* note 122.

166. There is a potential counterargument that employment discrimination plaintiffs do not need a longer period of time in which to articulate their complaints because they have the many months during which the claim is pending with the administrative agency. However, many facts may not become available until the fact-finding process has been completed. Only then will an individual be able to find counsel.

the discrimination statutes. Thus, an individual who raises an internal complaint may be required to file a charge with the EEOC while the internal investigation is still pending in order to have a timely cause of action. This has the negative effects of rendering the internal complaint procedure moot and needlessly taxing the resources of the EEOC where a potential internal resolution still exists.<sup>167</sup>

In sum, the very short statutes of limitations provided by most anti-discrimination laws combined with the requirements to exhaust internally and bring an administrative charge results in a large number of claims being dismissed as untimely.<sup>168</sup>

#### IV. PROPOSAL

The purpose of anti-discrimination law is to eradicate unlawful discrimination and harassment from the workplace.<sup>169</sup> However, the anti-discrimination claiming system as presently constructed contains broad exclusions and restrictions, which arbitrarily exclude a large number of individuals and claims for reasons unrelated to the merits of those claims. The narrow constraints of the claiming system are in direct tension with the law's broad aspirations. Such limited and piecemeal protection makes widespread realization of the anti-discrimination mandate impossible.

Yet despite the problems presented by the barriers to access, such requirements cannot be eliminated wholesale. First, as discussed in their respective sections above, these structures do have some value. For example, the administrative exhaustion requirement, if properly conceived, can play a role in mediating and conciliating disputes. Similarly, a statute of limitations requirement prevents claimants from unduly sitting on their rights and then bringing stale claims about which the employer has had no notice or ability to preserve documents, witnesses, and other evidence.

Additionally, in contemplating access, legitimate countervailing concerns such as overburdening must be taken into account. Indeed, those against liberalization of the employment discrimination claiming system would argue that such reform would open up the floodgates and

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167. Scott A. Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 *FORDHAM L. REV.* 981, 981 (2007).

168. Legislation has been introduced on a number of occasions to extend to two years to make it more consistent with other federal laws but has been defeated or vetoed for political reasons. Brake & Grossman, *supra* note 150, at 869.

169. See 109 *CONG. REC.* 25688 (daily ed. Dec. 30, 1963) (noting that the purpose of Title VII is to "... eliminate, through the utilization of formal and information remedial procedures, discrimination in employment based on race, color, religion, or national origin").

make the system unworkable.<sup>170</sup> Adopting such an argument—that access to remedies should be limited in order to not flood the system—essentially reflects a value judgment that would place the rights of a small subset of individuals above the ability for all to seek redress. This is clearly contrary to the purpose of Title VII.

However, any proposed structural reform must be made with an eye toward the larger implications for the court system. The question then is how can the system be reconceived in a way that provides widespread access while enabling the system to function effectively?

Scholarship addressing this issue is scant. Very few articles have been written about the harsh and exclusionary nature of the small business exemption, administrative exhaustion requirement and statutes of limitations in employment discrimination law and virtually nothing has been written about the ways in which these operate together to exclude a great number of claims, or about the asymmetries among the laws with respect to each of these elements and their consequences. Instead, recent scholarship has focused on the ways in which claims are cast within the courts, focusing on whether the *McDonnell Douglas* burden-shifting framework adequately encompasses the kinds of bias seen in the workplace or whether the rigid constructs of the system exclude intersectional and other types of claims.<sup>171</sup> However, the literature does not acknowledge that the very claiming system it purports to deconstruct excludes many potentially valid claims, thereby rendering any proposed reforms of only limited utility.

This Article seeks to break new ground by suggesting that the claiming system can and should be restructured to achieve the broader goals of anti-discrimination law. Access can be broadened to include all individuals and provide them with a clearer path to pursuing their claims, while taking into account the countervailing overburdening concern. The solution to the access problem lies not in elimination of access requirements, but in making them work together in a way that makes sense. The key is a reconceptualization of the EEOC.

#### A. Reform of the EEOC

Reform of the anti-discrimination claiming system needs to begin with the simple premise that workplace discrimination is unacceptable and must be eradicated. Indeed, even those who support the present limited structure of the claiming system do not suggest that small business employees are undeserving of protection, but rather that the

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170. See Selmi, *supra* note 109.

171. See *supra* note 8.

realities of overburdening and cost justify their exclusion.<sup>172</sup> The question then is how best to provide widespread access while enabling the system to function most effectively. Any consideration of such reform should begin with the EEOC.

The notion of reforming the EEOC is not a novel one. A number of scholars have looked at the gap between the intent and actuality of the agency and its inability to fulfill its mandate and suggested reforms.<sup>173</sup> For example, Nancy Modesitt suggests a refined role for the EEOC, such as focusing only on certain high impact cases while leaving other individuals to seek private attorneys to pursue their claims.<sup>174</sup> However, as Michael Selmi correctly notes, while such a proposal would reduce agency workload, it is contrary to one of the EEOC's most important mandates: providing access to this claiming system.<sup>175</sup>

This Article posits that the EEOC should be reconceived as a tool to broaden access to anti-discrimination law. Specifically, this may be achieved by: (a) amending the statutory definition of "employer" for purposes of Title VII and the other anti-discrimination statutes to include all employers, regardless of size, thereby bringing all employers within the purview of the statutes and their prohibitions against discrimination; and (b) requiring individuals working for employers who fall below the minimum employee threshold to pursue claims exclusively through the EEOC, which would be given an adjudicative role. Reconceiving the avenues to justice and the role of the EEOC would bring all employees within the protection of anti-discrimination law while taking countervailing concerns such as overburdening and cost into account.

The concept of giving the EEOC power to adjudicate claims is not in itself novel. Indeed, Congress contemplated such a scheme in creating the agency before settling upon the investigative and enforcement functions that exist today.<sup>176</sup> More recently, the Committee on Long Range Planning of the Judiciary Conference of the United States issued a report recommending that Congress empower administrative agencies as a means of reducing the judicial caseload.<sup>177</sup> The report recommended that "[C]ongress and the agencies concerned should be encouraged to take measures to broaden and strengthen the administrative hearing and review process for disputes assigned to

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172. See Carlson, *supra* note 28.

173. See Modesitt, *supra* note 111, at 1257; Selmi, *supra* note 109.

174. Cf. Modesitt, *supra* note 111, at 1257.

175. See Selmi, *supra* note 109, at 49.

176. See 109 CONG. REC. 25688 (daily ed. Dec. 30, 1963).

177. JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 75-76 (1995) [hereinafter *Long Range Plan*].

agency jurisdiction . . . .”<sup>178</sup>

Clearly this additional role would be a significant additional workload for the agency and more funding and resources would be needed. In order to reshape the role of the EEOC, the agency’s function with respect to larger businesses should be revamped. Instead of requiring mandatory exhaustion of all claims before going to federal court, employees of those employers with fifteen or more employees should have the option of either filing a charge and pursuing the agency route exclusively or proceeding directly to federal court (essentially an election of remedies).<sup>179</sup>

The revamping of the EEOC to focus on those who do not have access to the courts would have a number of powerful effects. First, it would ensure that every employee has access to some form of redress within the employment discrimination claiming system, regardless of employer size. Second, it would relieve those plaintiffs who do not need the agency’s assistance in bringing a claim from onerous and pointless exhaustion requirements.

Reconceptualizing the EEOC would give it a function consistent with its intended purpose. At present, the administrative process has become little more than a bureaucratic roadblock on the inevitable road to court. However, there is a role to be played by the EEOC in the modern anti-discrimination claiming system: to provide access to those who cannot find legal representation or otherwise need help. Ironically the administrative process could be most useful for those who presently do not have access to it because they are excluded from the scope of Title VII. Indeed, these individuals most need the assistance of the EEOC because they work for small companies that are less likely to have their own complaints procedures or where the alleged perpetrator of the discrimination may stand in the way of the internal complaint route.<sup>180</sup>

Providing small business employees with EEOC adjudication also takes into account the employer cost consideration. As set forth more fully below, a streamlined adjudicative process which could be undertaken without the assistance of counsel would have significantly less cost implication for small business than full-scale litigation.

Finally, the proposal ameliorates concerns about overburdening the courts by providing EEOC adjudication as the venue for redress for claims against small business. It would also avoid overburdening the agency by relieving some of the present caseload and allowing the

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178. *Hearing Before the H. S. Comm. on Social Security*, 105th Cong. 105–11 (1997).

179. Indeed, some state systems which do not require administrative exhaustion of discrimination claims essentially offer election of remedies whereby claimants have the opportunity to pursue remedies in an administrative forum rather than going to court. Belt, *supra* note 111, at 167.

180. See Nielsen & Nelson, *supra* note 22, at 709.

agency to focus its resources where its assistance is most needed and beneficial. This would eliminate duplication between the agency and the judiciary because claimants would have to elect one forum to pursue claims, rather than taxing the resources of both.

Beyond the theoretical reconceptualization of the EEOC, there are myriad complex questions as to the practical redesign, the answers to which are beyond the scope of this Article and the subject of another study in their own right. But it is helpful here to highlight the most important questions surrounding the agency's reconfiguration:

The nature of the adjudicative function. Should the EEOC's adjudicative function involve administrative law judges, whose decisions would be appealable in federal court? Or should it take a form more analogous to arbitration?<sup>181</sup> The challenge will be to create a procedure that ensures a full and fair hearing, and that results in a final determination with limited right to appeal, so that proceedings are not routinely duplicated on appeal.<sup>182</sup>

The adjudicators. There is a related question as to who would adjudicate claims: would the judges be existing EEOC investigators, or new personnel? What training would be required?

The adjudicative procedures. An important question concerns the procedural and evidentiary rules that such an adjudicative function would entail. Should the procedures be more formal and mirror the rules of discovery, in order to give plaintiffs a process as close to litigation as possible, or should they be more informal, in order to streamline proceedings and keep costs low?

The location of the adjudicative function. The housing of the adjudicative law function in the EEOC, which until now has primarily served a one-sided role in advocating on behalf of employees, may be problematic and limit the agency's credibility as an impartial adjudicating body. This paper contemplates the adjudicative function within the EEOC and the solution may involve the reconfiguring of the EEOC to have a more balanced approach, perhaps with renaming or with changes in personnel. However, it is also possible to conceive of placing the adjudicative function with a different entity, such as a board housed within the Department of Labor.

The duties of the existing EEOC. As discussed more fully in Part III(B), *supra*, the EEOC presently has a number of duties, including investigating, mediating and settling disputes. Arguably, if the adjudicative function is placed elsewhere, then the EEOC could continue some of its existing duties. However, to the extent that the

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181. See Federal Arbitration Act, 9 U.S.C. § 2 (2009).

182. See *Long Range Plan*, *supra* note 177; see also Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457 (1992).

adjudicative function is housed within the EEOC, careful consideration must be given to the relationship to its enforcement role, including workload, resources, and potential conflicts of interest.

Remedies. The question of anti-discrimination remedies is generally beyond the scope of this paper but warrants mention in its interplay with any broadening of access. Should the remedies in EEOC adjudication mirror those in the courts? In the purest sense, the imperative to widen anti-discrimination protection suggests that individuals who have suffered the same wrongs and violations of rights should not be entitled to any less. However, the concerns about judgments being unduly burdensome on small business may warrant modifications in some of the more drastic remedies available in court, such as punitive damages.<sup>183</sup>

Relationship to State Agencies. The newly conceived agency would present challenges to the present work-sharing system whereby either a state or federal agency investigates a claim. Still to be determined is whether the EEOC should adjudicate all claims or whether state agencies that have a similar adjudicative function should be able to hear them.

The answers to these and the many related questions are the subject of their own article, and more research is needed to understand fully the design specifics which would best enable the goal of widening access to anti-discrimination law. For purposes of fully understanding the proposal set forth in this Article, however, it is worthwhile to identify certain key mandates that the new adjudicative regime would need to follow. First, the process must afford claimants full and fair hearing of their claims subject to the legal standards in the applicable employment discrimination statutes. This will help to fulfill the overarching goal of increased access to employment discrimination law in order to both protect individual rights and further the anti-discrimination mandate.

Employer cost concerns must also be taken into account. Thus, the procedures and discovery should be kept as straightforward as possible. Additionally, assistance must be provided to both employer and employee sides so that they may proceed through the system without the need for counsel.<sup>184</sup> The program should also contain a robust mediation component to encourage the parties to resolve their dispute without the need for adjudication. The system should also have an

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183. Research suggests that there may be value to individuals to having their claims heard in a relatively short timeframe, and for some a “quick-and-dirty” form of justice may appeal, even where it offers less monetary compensation. See generally Friedman, *supra* note 76; Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 *FORDHAM URB. L. J.* 473 (2010).

184. See Summers, *supra* note 182 (noting that plaintiffs are at a considerable disadvantage, even when opposing small business, in terms of both familiarity with the claiming system and access to information).



educational and support function and mediation in order to help small businesses offset compliance costs.

The proposal is not flawless. One criticism is that by limiting certain claims to agency-only adjudication, some plaintiffs are essentially being relegated to second-class justice. Such criticism essentially mirrors concerns about mandatory arbitration of employment discrimination claims in that they restrict redress to a forum short of the judicial system.<sup>185</sup> Admittedly, the proposal stops short of full access to the judicial system for all: a tacit recognition of the tension between access and efficiency and the need to maintain some restraints on the courts' workload in order to keep them in operation. Moreover, for those individuals who receive no protection whatsoever in the employment discrimination claiming system, access to the EEOC for redress would be a vast improvement. Unlike mandatory arbitration of discrimination claims, which restricts individuals to a forum short of that to which they are statutorily entitled, the proposal opens up administrative adjudication as a venue for redress for individuals who presently have none.

A second potential issue is that despite the pragmatic constraints the proposal purports to include, the system would nevertheless be further taxed by these reforms. Undoubtedly, opening the system to a wider number of individuals and claims will increase the work at both the administrative and judicial levels. More claims will be brought to the EEOC by persons who were previously excluded by virtue of employer size, and some individuals will still choose to file with the agency rather than pursue litigation. Some claimants who might have otherwise not pursued claims beyond the charge stage may now proceed directly into court. Additional research is needed to determine the extent of the increased administrative and judicial workload in order to determine what resources may need to be added or relocated.

A final issue is feasibility. Sweeping reforms such as those proposed by this Article cannot take place without legislative reform. The problem, of course, is whether or not such change is possible, particularly in an era of economic hardship and a conservative Congress which may not be willing to open the floodgates to more litigation and government expenditure at the expense of business.<sup>186</sup> However, the reforms are not as anathema to business interests as they may seem.

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185. Critics of mandatory arbitration frequently argue that the system is skewed in favor of the employer because the arbitrators are biased toward the employer. See Lewis Maltby, *Paradise Lost – How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1 (1994).

186. “[A] general misperception, one that has been fueled by the popular anti-employment discrimination rhetoric often financed by conservative interest groups . . .” Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 556 (2001).

First, it is important not to confuse the interests of the small business lobby with the concerns of business overall. Subjecting all business to some form of anti-discrimination law will level the playing field and remedy the current situation in which small businesses are getting a free pass from anti-discrimination regulatory constraints. This may appeal to big business. Second, the proposed reforms which would allow plaintiffs in larger organizations to bypass the administrative process and proceed directly to court would actually result in cost savings for larger businesses because those businesses would not have to go through duplicative proceedings at the agency and in court.

### *B. Two-Year Statute of Limitations*

The proposal to reconfigure the EEOC would largely address the first two barriers to access. It would provide a forum in which all employees could bring claims, regardless of employer size and would also eliminate the burdensome, duplicative and unproductive administrative exhaustion requirement by requiring individuals to pursue either the agency or, where eligible, federal court as the exclusive remedy. However, still present is the problem of an unduly short statute of limitations.

This problem is most pronounced for those statutes that follow the Title VII scheme of 300 days to file a charge and then ninety days from agency dismissal to file in court. The revisiting of the EEOC model offers the ideal opportunity to address the statute of limitations problem. Elimination of the two-step administrative exhaustion requirement means that individuals would not have to comply with the dual 300-then-ninety day framework. This Article suggests that a two-year statute of limitations is the appropriate replacement. First, a two year statute of limitations would give employees needed additional time to marshal facts, craft a well-pled complaint and in the case of federal litigation secure counsel if not proceeding *pro se*. This would give employees a more reasonable period of time in which to recognize claims and gather facts and information and secure an attorney if possible and desired. However, it is not so long as to unfairly prejudice employers with the staleness or loss of witnesses and evidence. It is also not significantly longer than the cumulative 390 days under the existing statutory framework. Thus, it does not put a much larger burden on employers with respect to notice. It also strikes a balance between the shorter prior statute of limitations and the longer four year statute of limitations offered by some statutes such as USERRA and Section 1981.

## V. CONCLUSION

The anti-discrimination claiming system as presently structured excludes a large number of individuals and claims for reasons other than their merits by imposing arbitrary and overly stringent barriers to access including employer size, administrative exhaustion, and the statute of limitations. The law should be revised to protect all individuals and those who work for small employers should be given remedy in an EEOC that has been empowered to adjudicate claims. Other individuals should be able to elect between the assistance of the EEOC and opting out of the administrative process to proceed directly to court. The statute of limitations should be increased to two years at a minimum. The asymmetries among the barriers to access in anti-discrimination law should be further studied to determine if their effects are significant enough to warrant possible harmonization.

Widening access to the claiming system will bring a significant number of individuals who are presently excluded within the purview of the law so that they can earn a living unencumbered by discrimination and harassment. Such comprehensive protection is essential to fulfilling the law's broad aspirations of eradicating discrimination in the workplace.