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**ADDRESSING SYSTEMIC DISCRIMINATION:  
PUBLIC ENFORCEMENT AND THE ROLE OF THE EEOC**

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INTRODUCTION

In passing the Civil Rights Act of 1964, Congress broadly prohibited employment discrimination on the basis of race, color, religion, sex, and national origin.<sup>1</sup> Although Title VII of the Act unambiguously declares that these forms of discrimination are forbidden, it does not specify which employer practices are lawful and which are not. The case law that subsequently developed reflects deep societal tensions over what exactly is meant by discrimination and how far the law should go to eliminate it.<sup>2</sup> In particular, cases targeting systemic discrimination have been controversial. In contrast to the individual case seeking redress for a particular employee, cases involving systemic discrimination target workforce-wide policies and practices that systematically disadvantage racial minorities, women, and other protected groups.<sup>3</sup> Although the courts have permitted workforce-wide challenges, some critics have argued that the doctrine is inadequate to capture or address many pervasive, yet subtle forms of systemic discrimination.<sup>4</sup> Others decry the

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<sup>1</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (2012).

<sup>2</sup> See Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1399 (2014) (arguing that anti-discrimination law “does not offer a consistent conception of prohibited discrimination”).

<sup>3</sup> See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1 (2006); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

<sup>4</sup> See, e.g., Bagenstos, *supra* note 3, at 14-15 (arguing that current anti-discrimination

attention paid to systemic claims, asserting that discrimination is best understood as a problem of individual prejudice, and that employers should not be held responsible for societal forces over which they have no control.<sup>5</sup> These competing views reflect broader debates regarding the nature of systemic bias and whether it is a form of discrimination forbidden by law.

Despite the lack of consensus, systemic cases have always constituted an important slice of litigation under Title VII. Early government enforcement efforts included systemic cases, which sought thorough-going reform of the practices of leading firms in steelmaking, banking, utilities, and transportation.<sup>6</sup> Private litigants also pursued cases alleging systemic discrimination, bringing class actions under Rule 23 of the Federal Rules of Civil Procedure on behalf of numerous employees to challenge the practices of a common employer. Over time, the private employment class action became more dominant, and many high-profile cases were brought by employees represented by private counsel.<sup>7</sup> In 2011, however, the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*<sup>8</sup> struck down a proposed nationwide class action against Wal-Mart alleging sex discrimination. In doing so, it not only raised the bar for certifying a Rule 23 class action, it also made it considerably more difficult for private plaintiffs to pursue claims of systemic employment discrimination.<sup>9</sup> In the wake of the Court's decision in *Wal-Mart*, many expected that the Equal Employment Opportunity Commission ("EEOC") would use its enforcement powers to take up the slack.<sup>10</sup>

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doctrine is a "poor tool for addressing discrimination that does its work through an accumulation of small, repeated instances of biased perception and evaluation"); Green, *supra* note 3, at 111 ("[E]xisting Title VII doctrine . . . is ill-equipped to address the forms of discrimination that derive from organizational structure and institutional practice in the modern workplace . . .").

<sup>5</sup> See Bagenstos, *supra* note 3, at 40-45 (explaining the judicial resistance to holding employers responsible for deep-rooted structural barriers to minority employment); see also, e.g., Amy L. Wax, *Disparate Impact Realism*, 53 WM. & MARY L. REV. 621, 625 (2011) (arguing that workforce imbalances reflect disparities in human capital and therefore, the "disparate impact rule is fatally overbroad and ensnares far too much conduct"); cf. Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006) (criticizing experimental studies purporting to show pervasive implicit bias and rejecting the argument that such studies establish the existence of legally actionable discrimination in real world settings like employment).

<sup>6</sup> See FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* 103 (2009).

<sup>7</sup> See Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1254-68, 1311 (2003) (analyzing employment discrimination class actions over a ten-year period and noting that the EEOC had not been actively pursuing large class cases).

<sup>8</sup> 131 S. Ct. 2541 (2011).

<sup>9</sup> See Margo Schlanger & Pauline Kim, *The Equal Employment Opportunity Commission and Structural Reform of the American Workplace*, 91 WASH. U. L. REV. 1519, 1520 (2014).

<sup>10</sup> See *infra* notes 12 and 13.

For a number of reasons, the EEOC is uniquely positioned to litigate claims of systemic discrimination. In particular, the EEOC has the power to bring suit on behalf of all employees affected by an employer's discriminatory practices and is not required to certify a class or to satisfy the requirements of Rule 23 when doing so.<sup>11</sup> Thus, it appears that the *Wal-Mart* decision would have little impact on the EEOC's ability to pursue cases affecting large groups of workers. Noting these procedural advantages, those critical of the decision have called on the EEOC to play a greater role in addressing systemic discrimination, urging the agency to take advantage of its statutory authority to bring suit on behalf of all aggrieved individuals and to more aggressively pursue cases involving broad-based discrimination.<sup>12</sup> Employer advocates have warned their clients that the EEOC might do exactly that.<sup>13</sup>

This Essay explores the possibilities and the limitations of the EEOC, acting in its role as enforcer of anti-discrimination laws, to address systemic discrimination in the workplace. In doing so, it assumes, without attempting a full defense, that systemic bias exists and is a matter of policy concern. Accepting the premise that combating systemic discrimination will advance anti-discrimination norms, it responds to the suggestion that more aggressive enforcement by the EEOC is a promising means for pursuing such cases. More specifically, it explores the often overlooked fact that the EEOC's ability to pursue its enforcement goals may be constrained by the institutional context in which it operates.

I start by considering the potential for vigorous EEOC enforcement in cases of systemic discrimination. As a matter of formal statutory authority, the EEOC appears empowered to pursue litigation targeting employer policies and practices that systematically limit opportunities for women, racial minorities and other protected groups, and indeed, the EEOC's recent strategic plans place increased emphasis on systemic litigation. In actual practice, however, the agency faces significant constraints on its ability to fully leverage its enforcement powers. Its systemic enforcement efforts are hampered by

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<sup>11</sup> *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 323 (1980).

<sup>12</sup> See, e.g., Melissa Hart, *Civil Rights and Systemic Wrongs: The Future of Employment Discrimination Class Actions*, 32 *BERKELEY J. LAB & EMP. L.* 455, 475 (2011) (suggesting a greater reliance on EEOC enforcement efforts to address systemic discrimination); Angela D. Morrison, *Duke-ing Out Pattern or Practice After Wal-Mart: The EEOC as Fist*, 63 *AM. U. L. REV.* 87, 92 (2013) (arguing that the EEOC should take a greater role in pursuing pattern and practice cases after the *Wal-Mart* decision); Noah D. Zatz, *Introduction: Working Group on the Future of Systemic Disparate Treatment Law*, 32 *BERKELEY J. EMP. & LAB. L.* 387, 387 (2011) (arguing that the EEOC might drive the next wave of systemic cases).

<sup>13</sup> See *EEOC's Systemic Program Set to Fill Gap in Private Class Actions*, *Attorneys Predict*, 244 *DAILY LAB. REP. (BNA) A-5* (Dec. 19, 2012); Barry A. Hartstein et. al., *Annual Report on EEOC Developments: Fiscal Year 2011*, *THE LITTLER REPORT* 5 (January 2012), [http://www.littler.com/files/press/pdf/TheLitterReportAnnualReportOnEEOCDevelopmentsFiscalYear2011\\_0.pdf](http://www.littler.com/files/press/pdf/TheLitterReportAnnualReportOnEEOCDevelopmentsFiscalYear2011_0.pdf), archived at <http://perma.cc/9CP5-KT7G>.

significant resource constraints, especially given a shrinking budget and the agency's heavy workload processing individual charges of discrimination. In addition, the agency's initiatives can be checked by Congress and the courts, and both branches have recently signaled some disagreement with the EEOC's systemic efforts. Thus, the same divisions and controversies over the reach of anti-discrimination law that have plagued the private class action may also hamper the EEOC's ability to vigorously pursue cases of systemic discrimination.

#### I. SYSTEMIC DISCRIMINATION AND THE EEOC

In the individual case, one worker, or at most a handful, alleges discrimination at the hands of an identifiable supervisor. Systemic discrimination, by contrast, is not discrete and isolated; it cannot be located in the animus held by a particular individual or individuals. Instead, as the term suggests, it is bias that is built into systems, originating in the way work is organized.<sup>14</sup> It refers to structures that shape the work environment or employment prospects differently for different types of workers.<sup>15</sup> For example, highly subjective criteria might allow unconscious bias to shape promotion decisions; objective criteria or written tests with no connection to job performance might work to screen out qualified women and minorities from positions they are capable of filling; workplace environments laden with racial hostility or gender stereotyping might make success more difficult for certain groups. The systemic case seeks to address these structural barriers to equality. Systemic discrimination can affect large numbers of employees, but it is not solely about numbers—it is, importantly, more than the aggregation of a large number of individual claims.<sup>16</sup>

In doctrinal terms, the individual case is handled through the disparate treatment model of proof, which requires a plaintiff to show an adverse employment action motivated by that individual's race, sex or other protected class characteristic. Systemic cases are typically brought under either a "pattern or practice" or a disparate impact theory. An employer engages in a pattern or practice of discrimination when discrimination is the "company's

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<sup>14</sup> See, e.g., Bagenstos, *supra* note 3, at 5 ("[C]hanges in the nature and organization of work over the past few decades have made employment discrimination less a problem of discrete, harmful management decisions and more a problem arising from workplace interactions among workers at all levels of an occupational hierarchy."); Green, *supra* note 3, at 92 (arguing that discriminatory bias is "influenced, enabled, and even encouraged by the structures, practices, and dynamics of the organizations and groups within which individuals work"); Sturm, *supra* note 3, at 460 ("[S]econd generation manifestations of workplace bias are structural, relational, and situational.").

<sup>15</sup> See Sturm, *supra* note 3, at 460.

<sup>16</sup> See Hart, *supra* note 12, at 476; Richard Thompson Ford, *Beyond Good and Evil in Civil Rights Law: the Case of Wal-Mart v. Dukes*, 32 BERKELEY J. LAB & EMP. L. 513, 513 (2011).

standard operating procedure—the regular rather than the unusual practice.”<sup>17</sup> These types of claims are often thought of as group-based disparate treatment claims. Disparate impact claims do not require proof of intent to discriminate, but rather focus on neutral practices that have the effect of disadvantaging a protected class and cannot be justified by business necessity.<sup>18</sup> Both private plaintiffs and the EEOC rely on these substantive theories when bringing cases alleging systemic discrimination; however, as discussed further below, they follow different procedural paths.

When Title VII was first passed in 1964, the EEOC had no independent enforcement authority. It was authorized to receive charges of discrimination, to investigate them, and, where it found cause to believe discrimination had occurred, to seek voluntary resolution through conciliation.<sup>19</sup> If attempts at conciliation failed, enforcement was only available through either a private lawsuit or referral to the Attorney General, who could bring suit on behalf of the United States in cases involving a pattern or practice of discrimination.<sup>20</sup> With no power of its own to sanction firms or enforce its findings of discrimination, the agency was relatively powerless to force a recalcitrant employer to reform.

The 1972 Amendments greatly expanded the EEOC’s enforcement role. They authorized the EEOC to file suit in court against private employers when conciliation failed, and specifically shifted power to pursue pattern or practice cases from the Attorney General to the EEOC.<sup>21</sup> The legislation also loosened the criteria for Commissioner charges, enhancing the EEOC’s ability to initiate an investigation even in the absence of a charge by a complaining party.<sup>22</sup> These changes were clearly intended to bolster the EEOC’s role as an independent locus of enforcement by authorizing it to bring suits vindicating the broad public interest in ending employment discrimination. At the same time, the Amendments preserved the earlier structure mandating that aggrieved individuals file charges with the EEOC as a prerequisite to a private suit and requiring the EEOC to investigate those charges and to seek conciliation before filing suit.<sup>23</sup>

In empowering the EEOC to sue private employers, the statute gave the agency a unique role in addressing broad-based discrimination. The Supreme Court recognized this role in *General Telephone Co. of the Northwest v. EEOC*,<sup>24</sup> which held that Rule 23 does not apply to enforcement suits by the

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<sup>17</sup> *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

<sup>18</sup> *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

<sup>19</sup> *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 358-59 (1977).

<sup>20</sup> *Id.* at 359-60; Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972*, 2 *INDUS. REL. L. J.* 1, 7-8 (1977)

<sup>21</sup> *Id.* at 51-52.

<sup>22</sup> *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62-64.

<sup>23</sup> *Occidental Life*, 432 U.S. at 359-60.

<sup>24</sup> 446 U.S. 318 (1980).

EEOC.<sup>25</sup> The Court explained that when the EEOC brings suit, it sues in its own name in order to vindicate “the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement.”<sup>26</sup> Because it is “not merely a proxy” for individual victims of discrimination, EEOC suits are not “representative actions” dependent upon satisfying Rule 23 requirements in order to proceed.<sup>27</sup> Rather, the EEOC’s authority to bring suit includes the power to seek relief for a group of individuals—a power drawn directly from the statutory language of Title VII.<sup>28</sup>

An examination of Rule 23’s requirements reinforced the Court’s conclusion that the EEOC was not required to meet them in order to seek class-wide relief. It found that the usual Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation simply do not fit the type of action brought by the EEOC.<sup>29</sup> For example, Rule 23(a)(3) requires that the claims of the class representative be typical of those of the class members.<sup>30</sup> And yet, it was widely understood that “EEOC enforcement actions are not limited to the claims presented by the charging parties. Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party’s complaint are actionable.”<sup>31</sup> Similarly, the Rule 23(a)(4) requirement of adequacy of representation, which ensures that the class representative does not have interests in conflict with class members, does not apply to EEOC actions.<sup>32</sup> The EEOC, the Court explained, is authorized “to obtain the most satisfactory overall relief even though competing interests are involved and particular groups may appear to be disadvantaged.”<sup>33</sup> The agency represents the public interest, not any particular private interest, when it sues in its own name.<sup>34</sup> Potential conflicts within the group are addressed by allowing private parties to intervene, rather than by imposing a requirement of adequacy of

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<sup>25</sup> *Id.* at 330.

<sup>26</sup> *Id.* at 326 (quoting 118 CONG. REC. 4941 (1972)).

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

<sup>28</sup> *Id.* at 324 (“[A] straightforward reading of the statute . . . authorize[s] the EEOC to sue in its own name to enforce federal law by obtaining appropriate relief for those persons injured by discriminatory practices forbidden by the Act.”).

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

<sup>30</sup> See FED. R. CIV. P. 23(a)(3).

<sup>31</sup> *Gen. Tel. Co. of the Nw.*, 446 U.S. at 331 (citing *EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 366 (4th Cir. 1976) and *EEOC v. McLean Trucking Co.*, 525 F.2d 1007, 1010 (6th Cir. 1975)).

<sup>32</sup> See FED. R. CIV. P. 23(a)(4).

<sup>33</sup> *Gen. Tel. Co. of the Nw.*, 446 U.S. at 331.

<sup>34</sup> See also *EEOC v. Waffle House Inc.*, 534 U.S. 279, 291 (2002) (“The statute clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake.”); *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 368 (1977) (“[T]he EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties . . .”).

representation before the EEOC can proceed.<sup>35</sup>

In the years since the 1972 Amendments, the EEOC has focused its litigation efforts on combating systemic discrimination to varying degrees. In the early 1970s, the agency targeted leading employers in industries like communications, utilities, steel and transportation. These efforts resulted in a number of high-profile consent decrees, which required employers to reform salary classifications, use only validated job tests, restructure seniority systems and develop programs for recruiting women and minorities.<sup>36</sup> In 1977, then-Commission Chair Eleanor Holmes Norton created a new program focused on systemic cases.<sup>37</sup> The initiative restructured field offices to include units dedicated to investigating pattern or practice charges and created a centralized Office of Systemic Programs (“OSP”) to develop large regional or national cases and to support and oversee the work of the field systemic units.<sup>38</sup> Several years later, when Clarence Thomas was Chair of the Commission, the OSP was abolished and the agency’s priorities shifted to full investigation of individual charges, while class actions and other systemic efforts were de-emphasized.<sup>39</sup> Numerous reorganizations occurred in subsequent years, with consequent shifts in the responsibility for, and the degree of focus on, systemic cases. The shifts are too numerous to document here; however, a critical backdrop to this history is the enormous number of individual charges filed with the agency, an issue discussed below.

Over the years, the EEOC’s enforcement efforts became less visible, as the role of the private bar grew. Currently, approximately 15,000 employment discrimination suits are filed in federal court annually, the overwhelming majority of them by private attorneys.<sup>40</sup> Many of the most visible cases

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<sup>35</sup> See *Gen. Tel. Co. of the Nw.*, 446 U.S. at 326.

<sup>36</sup> DOBBIN, *supra* note 6, at 103.

<sup>37</sup> See EEOC, SYSTEMIC TASK FORCE REPORT, app. C, 57-58 (2006), available at [http://www.eeoc.gov/eeoc/task\\_reports/upload/systemic.pdf](http://www.eeoc.gov/eeoc/task_reports/upload/systemic.pdf), archived at <http://perma.cc/6VF9-6ESW>.

<sup>38</sup> See *id.* at 58.

<sup>39</sup> See *id.*; William M. Welch, *Thomas Presided Over Shift in Policy at EEOC*, *Records Show*, ASSOCIATED PRESS (Jul. 25, 1991), <http://www.apnewsarchive.com/1991/Thomas-Presided-Over-Shift-in-Policy-at-EEOC-Records-Show/id-b419883e871b5117649d1f3fdacf6f95>, archived at <http://perma.cc/ADY2-XTBC> (“During [Thomas’s] eight year tenure, critics say the agency charged with enforcing employment discrimination laws shifted its focus away from class action cases aimed at providing remedies to large groups of people, to a more narrow emphasis on individual cases remedying specific acts of discrimination”).

<sup>40</sup> See ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2006, tbl.C-2 (2006), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2006/appendices/c2a.pdf>, archived at <http://perma.cc/5R4C-H9TK>; ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2012, 2012 tbl.C-2A (2012), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/C02ASep12>.

addressing systemic discrimination have been class action suits brought by private counsel.<sup>41</sup> Because of the possibility of significant damages and fees in class cases, it seemed for a while that private lawyers could be relied on to aggressively pursue these cases, and that the EEOC was a marginal player.<sup>42</sup> And even when the EEOC pursued class cases, it often settled them with consent decrees that promoted fairly common personnel “best practices,” rather than requiring the types of transformative structural relief obtained in its earliest litigation.<sup>43</sup>

Among private class actions, the sex discrimination case brought against Wal-Mart on behalf of a nationwide class of female employees was most salient.<sup>44</sup> The plaintiffs in that case argued that Wal-Mart’s policy of leaving pay and promotion decisions to the relatively unguided discretion of a mostly male managerial workforce permitted gender stereotypes to affect those decisions.<sup>45</sup> They produced statistical evidence showing unexplained gender disparities throughout the company, personal accounts of discrimination and stereotyping from approximately 120 women employees, and expert testimony by a sociologist explaining how Wal-Mart’s corporate culture and decision-making structures permitted sex stereotyping.<sup>46</sup> Based on this evidence, the district court certified the class, a decision affirmed by the Ninth Circuit.<sup>47</sup>

The Supreme Court reversed, holding that the plaintiff class failed to satisfy the Rule 23(a) requirement of commonality—that “there are questions of law or fact common to the class.”<sup>48</sup> In the view of the majority, “showing that Wal-Mart’s policy of discretion has produced an overall sex-based disparity does not suffice” to establish the existence of a common question.<sup>49</sup> Rather, the court was looking for evidence that “the entire company ‘operate[s] under a general policy of discrimination.’”<sup>50</sup> Commonality, it explained, depends upon “a common contention—for example, the assertion of discriminatory bias on

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pdf, archived at <http://perma.cc/H8QQ-7DJ4>. The EEOC typically files only a couple hundred merits cases per year.

<sup>41</sup> For example, Susan Sturm and Michael Selmi focus almost exclusively on private class actions in their studies of large-scale employment discrimination cases. *See generally* Sturm, *supra* note 3; Selmi, *supra* note 7.

<sup>42</sup> *See* Selmi, *supra* note 7, at 1311 (asserting that “profit-motivated attorneys” who obtained awards of three to five times their actual fees brought most large class action cases, while the EEOC had not been actively pursuing large claim claims).

<sup>43</sup> *See generally* Schlanger & Kim, *supra* note 9.

<sup>44</sup> Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

<sup>45</sup> *Id.* at 2548.

<sup>46</sup> *Id.* at 2549.

<sup>47</sup> *See* Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 143, 154-66 (N.D. Cal. 2004), *aff’d*, 603 F.3d 571 (9th Cir. 2010).

<sup>48</sup> FED. R. CIV. P. 23(a)(2).

<sup>49</sup> *Wal-Mart*, 131 S. Ct. at 2556.

<sup>50</sup> *Id.* at 2556 (citing *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982)).

the part of the same supervisor.”<sup>51</sup> Finding no such evidence in the case, the Court reversed the certification of the case as a class action.<sup>52</sup>

There was no shortage of commentary and analysis following the Court’s decision in *Wal-Mart*. Much of it focused on whether or how the Court had altered the requirements for class certification, and what effect the decision would have on class actions generally.<sup>53</sup> Many concluded that the decision significantly raised the bar for certification, making class cases—especially employment discrimination class actions—more difficult to bring.<sup>54</sup> With the prospect of fewer private class actions, attention turned to the EEOC and many observers predicted that the agency would respond by more aggressively pursuing systemic cases.<sup>55</sup>

Even before the *Wal-Mart* decision, the EEOC had identified systemic discrimination as a litigation priority. A task force formed in 2005 was charged with evaluating how the agency addresses systemic discrimination, which it defined as “pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location.”<sup>56</sup> It produced a report in 2006 concluding that the EEOC’s approach was “in need of fundamental change” and identifying a number of shortcomings.<sup>57</sup> The EEOC was not utilizing the tools available to it to identify and pursue systemic discrimination.<sup>58</sup> Relevant data was incomplete and difficult to access by staff; little guidance or training was provided on how to investigate and recognize systemic discrimination; technical expertise in labor economics and statistics was lacking; and agency staff had little incentive to look beyond individual charges given that systemic cases are considerably more time- and resource-intensive to pursue.<sup>59</sup>

At the same time, the report recognized that the EEOC has a “unique role and responsibility in combating systemic discrimination.”<sup>60</sup> Its access to data about firms’ workforce composition and overall labor market trends gives it a “unique ability to identify potential systemic cases,” particularly hiring cases, where victims of discrimination are often unable to see the patterns that

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<sup>51</sup> *Id.* at 2551.

<sup>52</sup> *Id.* at 2554-55.

<sup>53</sup> See, e.g., *Symposium: Class Action Rollback? Wal-Mart v. Dukes and the Future of Class Action Litigation*, 62 DEPAUL L. REV. 653 (2013).

<sup>54</sup> See, e.g., Tristan K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395 (2011); Hart, *supra* note 12; Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After Wal-Mart v. Dukes*, 32 BERKELEY J. EMP. & LAB. L. 477 (2011).

<sup>55</sup> See sources cited *supra* notes 12 and 13.

<sup>56</sup> EEOC, SYSTEMIC TASK FORCE REPORT, *supra* note 37, at 1.

<sup>57</sup> *Id.* at 5.

<sup>58</sup> *Id.* at 9.

<sup>59</sup> *Id.* at 9-10.

<sup>60</sup> *Id.* at 2.

suggest a discriminatory practice.<sup>61</sup> The report noted the agency's power to bring a class suit without meeting the requirements of Rule 23, and its ability to focus on systemic cases that private attorneys might not bring, "for example, where the monetary relief might be limited, the focus is on injunctive relief, or the victims are in underserved communities."<sup>62</sup> And, the report noted, the "EEOC's nationwide presence permits it to act as a large yet highly specialized law firm with a unique role in civil rights enforcement."<sup>63</sup> The report recommended that systemic work should be a "top priority"—"a critical, intrinsic, and ongoing part of the Commission's work" and suggested numerous changes to the agency's structure and work.<sup>64</sup>

Following the Task Force Report, the EEOC again emphasized its commitment to pursuing systemic cases. Its Strategic Plan for FY 2012-2016 identified one of its outcome goals to be "us[ing] administrative and litigation mechanisms to identify and attack discriminatory policies and other instances of systemic discrimination,"<sup>65</sup> and it reaffirmed that commitment in its most recent Strategic Enforcement Plan.<sup>66</sup> The agency set a goal that 22-24% of its active litigation docket would be systemic cases by FY 2016, and it had already exceeded that goal by FY 2014, when systemic cases constituted 25% of its litigation docket.<sup>67</sup>

The EEOC has also begun to address some of the shortcomings identified in the 2006 Task Force Report. It has expanded its use of technology to help identify and manage systemic cases, made increased training available to field personnel, and significantly increased the number of investigators focused on systemic cases.<sup>68</sup> The agency has also undertaken structural changes, such as creating systemic units within some district offices, and integrating legal and enforcement personnel efforts to focus on priority enforcement issues.<sup>69</sup> Thus, the EEOC currently prioritizes systemic cases, and has in fact increased the portion of its docket targeting class-wide relief.<sup>70</sup> These developments suggest

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 5.

<sup>65</sup> EEOC, STRATEGIC PLAN FOR FISCAL YEARS 2012-2016 11, available at [http://www.eeoc.gov/eeoc/plan/upload/strategic\\_plan\\_12to16.pdf](http://www.eeoc.gov/eeoc/plan/upload/strategic_plan_12to16.pdf), archived at <http://perma.cc/4496-F2N4>.

<sup>66</sup> See EEOC, STRATEGIC ENFORCEMENT PLAN FOR FISCAL YEARS 2013-2016 12, available at <http://www.eeoc.gov/eeoc/plan/upload/sep.pdf>, archived at <http://perma.cc/M293-W7V9>.

<sup>67</sup> EEOC, PERFORMANCE AND ACCOUNTABILITY REPORT, FISCAL YEAR 2014 at 3, 10, available at <http://www.eeoc.gov/eeoc/plan/upload/2014par.pdf>, archived at <http://perma.cc/ZKL5-3WHF>.

<sup>68</sup> *Id.* at 28-29.

<sup>69</sup> *Id.* at 29.

<sup>70</sup> See *id.* at 3 (reporting the current percentage of systemic discrimination as "the largest proportion of systemic suits since tracking began in FY 2006").

that the EEOC's efforts might compensate for *Wal-Mart's* impact on the private class action. However, as discussed in the following sections, other factors may constrain the EEOC's ability to pursue systemic cases.

## II. RESOURCE CONSTRAINTS

A significant constraint on the EEOC's ability to pursue systemic litigation is its limited resources given its statutory responsibilities. All government agencies, particularly in recent years, have had to deal with stagnant or shrinking budgets, and the EEOC has been no different. Funding levels for the agency have been roughly level for the past several years, while the number of authorized personnel has declined.<sup>71</sup> Long-term trends show an even more dramatic reduction in personnel. For example, in 1980, the agency had 3390 full-time equivalent staff, but by FY 2013, the staffing level had fallen to 2147.<sup>72</sup>

The challenges posed by limited resources are compounded by the EEOC's particular statutory mandates, which further constrain its flexibility in targeting systemic discrimination.<sup>73</sup> Although charged with the responsibility of enforcing employment discrimination laws, the agency does not have legislative rule-making authority to interpret Title VII, which would have allowed it to use the regulatory process to establish authoritative standards distinguishing discriminatory from acceptable employer practices.<sup>74</sup> Instead, in order to advance its views regarding which circumstances should render an employer liable for race or sex discrimination, it must rely on various forms of guidance, which are more advisory in nature,<sup>75</sup> or seek to establish precedent through federal court litigation. At the same time, the agency is required to meet other statutory obligations, such as adjudicating claims of discrimination in federal sector employment and processing individual charges of discrimination.<sup>76</sup>

The latter responsibility has proven particularly significant, absorbing a substantial proportion of the agency's limited resources. From its founding, the

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<sup>71</sup> EEOC, EEOC BUDGET AND STAFFING HISTORY 1980 TO PRESENT, *available at* <http://www.eeoc.gov/eeoc/plan/budgetandstaffing.cfm> (last visited Feb. 14, 2015), *archived at* <http://perma.cc/B4P9-8JAM>.

<sup>72</sup> *Id.*

<sup>73</sup> *See, e.g.,* Hill, *supra* note 20 (describing how inadequacies in the statutory scheme have rendered the EEOC ineffective in enforcing antidiscrimination law).

<sup>74</sup> *See* Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *FORDHAM L. REV.* 1937, 1941 (2006) ("In Title VII, the only explicit delegation of rulemaking authority directs the Commission to issue 'suitable procedural regulations to carry out the provisions of this subchapter.'").

<sup>75</sup> *See, e.g., id.* at 1942. In practice, federal courts often decline to follow these statements.

<sup>76</sup> *See* EEOC, STRATEGIC PLAN FOR FISCAL YEARS 2012-2016, *supra* note 65, at 6-9 (listing other statutory obligations and enforcement mechanisms).

EEOC has been required to accept and investigate charges from any individuals who believe they have been discriminated against at work on one of the bases specified in Title VII.<sup>77</sup> No filing fee is required, nor are the allegations meaningfully screened for merit before a charge is filed.<sup>78</sup> Because individuals cannot bring a suit in court under Title VII without first filing with the agency and exhausting the administrative process, even complainants who have private counsel to represent them must file charges with the agency.<sup>79</sup> Over the years, Congress has added additional statutory claims to the EEOC's responsibilities, such that it is now responsible for processing charges under the Age Discrimination in Employment Act,<sup>80</sup> the Americans with Disabilities Act,<sup>81</sup> and the Genetic Information Nondiscrimination Act as well.<sup>82</sup>

From the very outset, the EEOC received far more charges than anticipated, and the number climbed rapidly, reaching 90,000 in 1976.<sup>83</sup> The number of charges has fluctuated since then, but tens of thousands of new charges continued to come in annually, reaching a high of nearly 100,000 during FY 2010-12.<sup>84</sup> As a result, the EEOC has faced a persistent backlog, and individual complainants often have to wait many months for resolution of their complaints.<sup>85</sup> Various efforts to reform charge handling procedures or speed up investigations have at times reduced the backlog, but the agency has never successfully cleared the inventory of pending charges.<sup>86</sup>

Under the agency's current system, some charges are resolved through voluntary settlements and some are thoroughly investigated, but many thousands end when the agency issues a "right to sue letter" even though no serious evaluation of the merits has occurred.<sup>87</sup> Once the administrative process is ended, a small fraction of complainants, usually those with the

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<sup>77</sup> Hill, *supra* note 20, at 10-11.

<sup>78</sup> See Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 6 (1996).

<sup>79</sup> 42 U.S.C. § 2000e-5 (2012).

<sup>80</sup> 29 U.S.C. § 626 (2012).

<sup>81</sup> 42 U.S.C. § 12117.

<sup>82</sup> *Id.* § 2000ff-6.

<sup>83</sup> DOBBIN, *supra* note 6, at 80.

<sup>84</sup> See David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 690 (2013). The EEOC received 99,922 charges in FY 2010; 99,947 in FY 2011; and 99,412 in FY 2012. See EEOC, *Charge Statistics, FY 1997 through FY 2013*, EEOC.GOV, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Feb. 14, 2015), archived at <http://perma.cc/DD2F-2UZD>.

<sup>85</sup> See Selmi, *supra* note 78, at 8 ("Because the EEOC has an enormous backlog of claims, it takes on average one year to complete an investigation, and many cases remain at the EEOC for two or more years.").

<sup>86</sup> See Nancy M. Modesitt, *Reinventing the EEOC*, 63 SMU L. REV. 1237, 1241 (2010) ("Over the decades since the establishment of the EEOC, the backlog of charges from private sector employees has ebbed and flowed, but has never been eliminated.").

<sup>87</sup> See Engstrom, *supra* note 84, at 696; Selmi, *supra* note 78, at 8-9.

strongest cases, will obtain private representation. However, many complainants, even in cases where the agency found cause to believe that discrimination occurred, have no legal assistance if they want to pursue their claims in court.<sup>88</sup> The EEOC, which typically files only a couple of hundred lawsuits each year, cannot possibly meet the demand for representation in all potentially meritorious cases.

Observing this situation, one might argue—as many have—that the EEOC should be relieved of its charge processing function, which often amounts to little more than pro forma processing of tens of thousands of individual complaints.<sup>89</sup> Instead, its resources might be deployed in ways more likely to remedy workplace discrimination, whether by “licensing” systemic cases,<sup>90</sup> focusing on labor market trends and employer assistance,<sup>91</sup> or pursuing cases unlikely to be taken by the private bar.<sup>92</sup> Congress, however, has never seen fit to relieve the EEOC of its charge processing function. As a result, inventory management goals compete with efforts to prioritize systemic litigation. The continuing flood of new charges and the persistent backlog put constant pressure on the agency, restricting its flexibility to shift priorities, and, in particular, to focus greater attention on systemic discrimination.

Even apart from the demands imposed by its charge processing function, the EEOC faces ongoing tradeoffs regarding how to deploy its litigation resources. Systemic cases are highly resource-intensive.<sup>93</sup> They require technical expertise, demand greater inter-staff cooperation, and take far more time to investigate and litigate than individual cases.<sup>94</sup> Suits alleging pattern and practice or disparate impact claims typically involve extensive data collection and statistical analysis. Because systemic cases are more complex both factually and legally, pursuing one such case may preclude work on several individual cases. And these cases are riskier to bring, given skepticism about group-based claims of discrimination on the part of some judges. To the extent that agency performance is measured by a simple count of cases litigated or resolved, agency personnel will feel pressure not to prioritize systemic suits

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<sup>88</sup> See, e.g., *id.* at 32 (observing that regardless of the strength of the claim, a low-value case is unlikely to be taken by a private attorney).

<sup>89</sup> See, e.g., Engstrom, *supra* note 84, at 699 (suggesting abolition of the EEOC’s role in processing individual charges); Modesitt, *supra* note 86, at 1256 (arguing that the EEOC should no longer be required to accept and investigate all charges of discrimination); Selmi, *supra* note 78, at 10 (questioning the value of the EEOC’s charge processing as “a rather strange and vacuous process—one where thousands of claims are filed at no financial cost to the plaintiff, few are truly investigated, fewer still resolved, and none of which is binding on any of the parties”).

<sup>90</sup> See Engstrom, *supra* note 84, at 700.

<sup>91</sup> See Modesitt, *supra* note 86, at 1256.

<sup>92</sup> See Selmi, *supra* note 78, at 60.

<sup>93</sup> See EEOC, PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 67, at 28.

<sup>94</sup> See *id.* at 28-29 (discussing collaborative strategies, programs, and tools used in connection with systemic suits).

over simpler individual cases.

As discussed above, a lively theoretical debate exists over whether discrimination is the result of individual bad actors or less intentional, more structural forces. In concrete terms, that debate has played out in disputes over whether the EEOC should focus its efforts on representing individual victims of discrimination or whether it should prioritize class cases attacking systemic bias. In the past, those unenthusiastic about or even hostile to pursuing systemic discrimination suits have emphasized the large number of individual claims as a reason to turn away from systemic enforcement efforts. And so, when the agency seeks to prioritize systemic cases, as it presently does, it must do so while managing the tide of individual charges and the expectations they raise. As noted above, the EEOC's most recent strategic initiative has produced an increased proportion of systemic cases on its active litigation docket; however, the backlog of pending charges has also increased, opening the agency to criticism by those who disagree with its renewed emphasis on class cases.<sup>95</sup>

### III. CONGRESSIONAL OVERSIGHT

A vast literature in both law and political science addresses congressional oversight of the bureaucracy.<sup>96</sup> Although scholars debate the extent to which Congress can effectively control agency behavior, there is little doubt that the legislative branch holds a number of levers that it can utilize to try to influence policies or to put pressure on agencies. In addition to the Senate's authority to confirm the President's nominations to the Commission, Congress has budget authority over the EEOC; it can exercise oversight by calling hearings focused on the EEOC's policies and activities; and it holds the ultimate power to amend the statutory grant under which the agency operates.<sup>97</sup> To the extent that Congress, or perhaps key members of Congress, disagrees with the EEOC's policy priorities, it may exercise one or more of these levers in an attempt to curb agency initiatives.

In recent years, Congress has in fact utilized some of these levers to express

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<sup>95</sup> The charge backlog fell to a low of 70,312 in FY 2012, but has since increased to 70,781 in FY 2013 and 75,935 in FY 2014. EEOC, PERFORMANCE AND ACCOUNTABILITY REPORT, FISCAL YEAR 2014, *supra* note 67, at 46; EEOC, PERFORMANCE AND ACCOUNTABILITY REPORT, FISCAL YEAR 2013, at 45, available at <http://www.eeoc.gov/eeoc/plan/upload/2013par.pdf>, archived at <http://perma.cc/5V3P-XYWR>; EEOC, PERFORMANCE AND ACCOUNTABILITY REPORT, FISCAL YEAR 2012, at 3, available at [http://www.eeoc.gov/eeoc/plan/upload/2012par\\_1.pdf](http://www.eeoc.gov/eeoc/plan/upload/2012par_1.pdf), archived at <http://perma.cc/VV2P-SSXJ>.

<sup>96</sup> For a brief overview of the literature, see Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 NW. U. L. REV. 535, 548-52 (2011).

<sup>97</sup> See Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 768 (1983).

its own policy preferences. Through the budget appropriations process, it has repeatedly expressed concern about the agency's pending inventory of charges and emphasized the high priority it places on reducing the backlog.<sup>98</sup> Members of Congress have also used their oversight powers to signal disagreement with EEOC priorities. For example, in May of 2013, the House Committee on Education and the Workforce held a hearing to examine the regulatory and enforcement actions of the EEOC and called then-Commission Chair Jacqueline Berrien to testify.<sup>99</sup> The chair of the House Committee, Representative Tim Walberg, stated that the hearing was prompted by a "significant shift" in the enforcement priorities at the EEOC, including its stated goal that systemic cases comprise up to twenty-four percent of its litigated cases.<sup>100</sup> Walberg's opening statement questioned the focus on systemic cases in light of the backlog of over 70,000 discrimination charges.<sup>101</sup> Arguing that "we should not be diverting scarce resources away from workers who believe they have been harmed,"<sup>102</sup> he reprised a familiar argument from past years that the EEOC should focus its resources on individual claimants rather than seeking to address systemic discrimination.

In 2014, several bills were introduced which targeted, in part, the EEOC's systemic litigation efforts. One proposed bill would require the agency to post detailed information on its public website about certain of its litigation activities, including systemic cases.<sup>103</sup> In addition, the bill would impose particular requirements that the EEOC must meet before it could bring suit in federal court.<sup>104</sup> Other proposed legislation would require that the Commissioners approve by a majority vote any litigation "involving multiple plaintiffs, or an allegation of systemic discrimination or a pattern or practice of discrimination," and that the agency post detailed information on its public website about each case approved by the Commission.<sup>105</sup> As a witness

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<sup>98</sup> EEOC, CONGRESSIONAL BUDGET JUSTIFICATION, FISCAL YEAR 2012, at 2, available at <http://www.eeoc.gov/eeoc/plan/upload/2012budget.pdf>, archived at <http://perma.cc/992W-5ST9> ("The Office of Management and Budget, Congress, and other observers of the EEOC have frequently expressed concerns about the agency's charge processing backlog, especially during periods in which there was a large disparity between the number of charges received and the number of charges processed by the EEOC.").

<sup>99</sup> See *Examining the Regulatory and Enforcement Actions of the Equal Employment Opportunity Commission: Hearing Before the H. Comm. on Educ. & the Workforce*, 113th Cong. 7-29 (2013).

<sup>100</sup> *Id.* at 2 (statement of Rep. Tim Walberg, Chairman, H. Comm. on Educ. & the Workforce).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> EEOC Transparency and Accountability Act, H.R. 4959, 113th Cong. § 2 (2014) (as introduced in the House, June 25, 2014).

<sup>104</sup> *Id.* § 3(3).

<sup>105</sup> Litigation Oversight Act of 2014, H.R. 5422, 113th Cong. § 2 (2014) (as introduced in the House, Sept. 9, 2014).

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testifying in support of the legislation explained, full Commission approval would not be required for “small-dollar or uncontroversial cases,”<sup>106</sup> once again reflecting the preference of some policy-makers that the EEOC focus its attention on limited-impact, individual cases rather than seeking broader structural reform of the workplace.

Although neither of these bills appeared to have much chance of being enacted at the time they were introduced, they clearly signaled to the EEOC that some members of Congress disapprove of its increased focus on systemic cases. In particular, Representative Walberg was the sponsor or co-sponsor of each of the recent bills seeking to check the EEOC’s identified priorities. The bills he proposed are clearly intended to restrict the scope of the agency’s activities, including the pursuit of systemic cases. And even if these bills never become law, Walberg, as chair of a committee with oversight authority over the EEOC, can impose costs on the agency simply by calling hearings to scrutinize its activities.

In the 2014 mid-term elections, Republicans increased their majority in the House and gained control of the Senate. Soon after, certain members of Congress stepped up their criticism of the EEOC. For example, during the November 2014 confirmation hearings for EEOC General Counsel P. David Lopez, the ranking Republican member of the Senate Health, Education and Labor Committee, Senator Lamar Alexander, criticized Lopez’s performance during his first term as General Counsel for placing “too much emphasis” on “high-profile” lawsuits rather than effectively dealing with the more than 70,000 pending charges.<sup>107</sup> Soon after, Senator Alexander issued a twenty-page Minority Staff Report that detailed Republican complaints about the EEOC’s recent litigation activities.<sup>108</sup> The report noted with disapproval that the agency had filed fewer lawsuits under the Obama administration than during a comparable period under the Bush administration, and that 70,781 charges remained unresolved.<sup>109</sup> Again reflecting on-going disagreement about whether discrimination is best addressed by combating systemic bias or by pursuing individual instances of discrimination, the report suggested that the EEOC’s recent focus on high-impact litigation came at the expense of individual

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<sup>106</sup> *EEOC Transparency and Accountability Act, the Litigation Oversight Act of 2014, and the Certainty in Enforcement Act of 2014: Hearing on H.R. 4959, H.R. 5422, and H.R. 5423 Before the Subcomm. on Workforce Prot. of the H. Comm. on Educ. and the Workforce*, 113th Cong. (2014) (statement of Eric Dreiband).

<sup>107</sup> 160 CONG. REC. S6275-76 (daily ed. Dec. 3, 2014) (statement of Sen. Alexander). Alexander expressed disapproval of other agency activities as well. *Id.*

<sup>108</sup> See MINORITY STAFF OF S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS, 113TH CONG., REP. ON EEOC: AN AGENCY ON THE WRONG TRACK? LITIG. FAILURES, MISFOCUSED PRIORITIES, AND LACK OF TRANSPARENCY RAISE CONCERNS ABOUT IMPORTANT ANTI-DISCRIMINATION AGENCY (Comm. Print 2014), available at [http://www.help.senate.gov/imo/media/FINAL\\_EEOC\\_Report\\_with\\_Appendix.pdf](http://www.help.senate.gov/imo/media/FINAL_EEOC_Report_with_Appendix.pdf), archived at <http://perma.cc/DJK2-H7ZN>.

<sup>109</sup> *Id.* at 8.

victims of workplace discrimination.<sup>110</sup>

Although Congress has not yet taken any concrete actions to curb the EEOC's systemic efforts, the repeated comments by key members criticizing the agency's litigation activities and emphasizing the charge backlog serves as a reminder that the legislative branch possesses strong tools with the potential for cabining agency discretion—namely the power to cut appropriations or reduce agency power through statutory amendment. Even short of wielding those tools, Congress can use its oversight powers to distract agency attention from its policy priorities and thereby undermine its efforts. As the new chair of the Senate Health, Education and Labor Committee, Senator Alexander has already clearly signaled his disapproval of the agency's current priorities, and observers expect that the Republican-led Congress will use its power to closely scrutinize the work of the EEOC.<sup>111</sup> Thus, continuing its emphasis on systemic cases will require the EEOC to withstand ongoing political pressure to return its focus to small, uncontroversial individual cases.

#### IV. JUDICIAL SCRUTINY

As noted above, observers have argued that the EEOC should aggressively pursue systemic cases in order to compensate for the effect of *Wal-Mart* on private class actions. The fact that the agency is not required to satisfy the requirements of Rule 23 means—at least in theory—that it should more easily be able to pursue class claims because it will be unaffected by the heightened “commonality” standard articulated in *Wal-Mart*. In fact, however, courts retain significant power to cabin the EEOC's efforts to address systemic bias, even without applying the requirements of Rule 23.

First, as noted by a number of scholars, *Wal-Mart* was hardly a purely procedural decision.<sup>112</sup> Justice Scalia's majority opinion acknowledged as much, noting that the question whether the proposed class met the

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<sup>110</sup> *Id.*

<sup>111</sup> See Chris Opfer, *Republicans to Focus on Agency Oversight in Control of Labor, Employment Committees*, 214 DAILY LAB. REP. (BNA) AA-1 (Nov. 5, 2014) (reporting that the Chamber of Commerce expects “very aggressive oversight” of the NLRB and EEOC by new Congress).

<sup>112</sup> See, e.g., Natalie Bucciarelli Pedersen, *The Hazards of Dukes: The Substantive Consequences of a Procedural Decision*, 44 U. TOL. L. REV. 123 (2012) (examining how *Wal-Mart v. Dukes* changes substantive employment discrimination law); George Rutherglen, *The Way Forward after Wal-Mart*, 88 NOTRE DAME L. REV. 871 (2012) (describing the close connection between procedural questions and substantive law in *Wal-Mart*); Elizabeth M. Schneider & Nancy Gertner, “Only Procedural”: *Thoughts on the Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases*, 57 N.Y.L. SCH. L. REV. 767 (2012-13) (arguing that *Wal-Mart v. Dukes* had a substantial effect on substantive employment discrimination law); Michael J. Zimmer, *Wal-Mart v. Dukes: Taking the Protection Out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409 (2012) (analyzing how *Wal-Mart v. Dukes* treated substantive employment discrimination law).

commonality requirement necessarily overlapped with an examination of the merits of plaintiffs' claims.<sup>113</sup> And to that extent, the majority's conclusion that the commonality requirement was not satisfied signaled some skepticism about the systemic nature of employment discrimination. Rather than recognize that workplace structures could systematically disadvantage women workers relative to men, the majority in *Wal-Mart* seemed to be looking for an explicit policy or a specific bad actor,<sup>114</sup> implicitly assuming that discrimination is always the product of discrete acts by identifiable decision-makers. This perspective does not recognize the possibility that discrimination may result from systemic factors, but sees class claims as merely the aggregation of a series of individual complaints that can only be joined together if the plaintiffs can point to an express policy or the involvement of the same supervisor. On this view, proof of discrimination is more difficult, because an employer is likely to be able to articulate some explanation for each individual decision, obscuring the extent to which broader workplace structures may be biasing outcomes. To the extent that other judges share the *Wal-Mart* majority's assumptions about the nature of discrimination, they are also likely to be skeptical of cases alleging systemic discrimination.

Even before reaching the merits, however, judges who are skeptical of systemic discrimination claims can and have erected procedural hurdles to the EEOC's pursuit of these cases. One prominent recent example involves judicial scrutiny of the agency's conciliation efforts prior to filing suits. As explained above, the EEOC receives and investigates charges of discrimination filed by aggrieved workers. If, after conducting an investigation, the agency believes that discrimination likely occurred, it issues a "reasonable cause" finding and then must attempt to resolve the case through informal conciliation.<sup>115</sup> The EEOC is only authorized to file a lawsuit on behalf of the charging party after the effort at conciliation fails.<sup>116</sup>

In the early decades after the EEOC gained litigation authority, a few courts held that the agency is required to conciliate in good faith before filing suit, but were highly deferential to the EEOC's judgment that additional efforts at conciliation were futile.<sup>117</sup> In many of these cases, the courts found the EEOC's conciliation efforts sufficient without closely scrutinizing the process,

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<sup>113</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (observing that the "rigorous analysis" that the prerequisites of Rule 23(a) have been satisfied "will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped.").

<sup>114</sup> *See, e.g., id.* at 2551, 2553 (arguing that the plaintiffs' claims "must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor" or "significant proof" that Wal-Mart "operated under a general policy of discrimination").

<sup>115</sup> 42 U.S.C. § 2000e-5(b) (2012).

<sup>116</sup> *Id.* § 2000e-5(f)(1).

<sup>117</sup> *See, e.g., EEOC v. Keco Indus., Inc.* 748 F.2d 1097, 1102 (6th Cir. 1984); *EEOC v. Pet, Inc., Funsten Nut Div.*, 612 F.2d 1001, 1002 (5th Cir. 1980); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978).

or else simply stayed the case to permit further efforts at settlement. More recently, however, employers facing EEOC complaints in court have become more aggressive in raising “failure to conciliate” claims, arguing that inadequate effort on the agency’s part requires dismissal of the lawsuit.<sup>118</sup> Although these arguments have also been made in individual cases,<sup>119</sup> they are increasingly being wielded by employers—and accepted by some courts—as an indirect method of challenging broad-based litigation.<sup>120</sup>

Of course, both employers and the EEOC will benefit if cases that *can* be settled *are* settled before litigation is initiated. Controversy has arisen, however, over whether the EEOC is required to *prove* the adequacy of its conciliation efforts to a court, and if so, what standard it must meet. These issues are currently pending before the Supreme Court in *Mach Mining v. EEOC*,<sup>121</sup> and the decision in that case has the potential to significantly affect the EEOC’s systemic litigation. *Mach Mining* arose from a charge of discrimination filed with the EEOC by Brooke Petkas, a woman whose repeated applications for a coal mining job with Mach Mining were rejected.<sup>122</sup> An investigation revealed that Mach Mining had never hired a woman for a mining position, despite receiving numerous applications from qualified and trained female miners, and that a newly constructed company facility had no bathrooms or changing rooms for women.<sup>123</sup> The EEOC concluded that there was “reasonable cause to believe Mach Mining had discriminated against a class of female job applicants.”<sup>124</sup>

The EEOC attempted conciliation, but eventually concluded that additional efforts would be futile and filed suit on behalf of a class of female applicants denied non-office jobs at the company.<sup>125</sup> The employer denied the charge of discrimination and asserted that the EEOC’s suit should be dismissed because its pre-suit conciliation efforts were inadequate. More specifically, Mach Mining has argued that the EEOC should have identified each of the women

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<sup>118</sup> See Stephanie M. Greene and Christine Neylon O’Brien, *Judicial Review of the EEOC’s Duty to Conciliate*, 119 PENN ST. L. REV. (forthcoming 2015), available at <http://ssrn.com/abstract=2527949> (collecting and describing cases addressing the EEOC’s duty to conciliate).

<sup>119</sup> See, e.g., *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1261 (11th Cir. 2003).

<sup>120</sup> See, e.g., *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 677 (8th Cir. 2012); *EEOC v. Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005, 1027 (D. Ariz. 2013); *EEOC v. Bloomberg LP*, 751 F. Supp. 2d 628, 631 (S.D.N.Y. 2010).

<sup>121</sup> *EEOC v. Mach Mining, LLC*, 738 F.3d 171 (7th Cir. 2013), cert. granted 134 S. Ct. 2872 (2014).

<sup>122</sup> *Id.* at 173.

<sup>123</sup> Becky Malkovich, *Female Miner: I Never Got a Call*, S. ILLINOISAN (Oct. 1, 2011), available at [http://thesouthern.com/news/local/female-miner-i-never-got-a-call/article\\_b51d1e58-ebe3-11e0-a6fd-001cc4c002e0.html](http://thesouthern.com/news/local/female-miner-i-never-got-a-call/article_b51d1e58-ebe3-11e0-a6fd-001cc4c002e0.html), archived at <http://perma.cc/Q3NU-2XAT>.

<sup>124</sup> *Mach Mining*, 738 F.3d at 173.

<sup>125</sup> *Id.*

affected—i.e., who were not hired—and attempted to conciliate their claims individually before filing suit.<sup>126</sup>

As in *Mach Mining*, defendants in EEOC class cases often use the allegation of a “failure to conciliate” as a way of challenging the gap between an individual charge that initiates an EEOC investigation and subsequent litigation on behalf of an affected class of employees. Courts have long recognized that EEOC enforcement litigation is not confined to the allegations of the individual who filed the initial charge.<sup>127</sup> Rather, the agency’s investigation and subsequent litigation may encompass any discrimination uncovered through a reasonable investigation of the charge.<sup>128</sup> When an individual like Brooke Petkas files a charge alleging that she has been discriminated against, the subsequent EEOC investigation may reveal that the employer has systematically discriminated against all women applicants. In such a case, the EEOC may pursue relief on behalf of the entire class of affected employees.<sup>129</sup>

Employers, however, have used the “failure to conciliate” defense as an indirect method of challenging the class-based nature of a suit. For example, they have argued that if the EEOC has not attempted conciliation on behalf of each individual member of the class, it should not be able to seek relief on behalf of a group of workers. This type of argument has had mixed success in the lower courts. As one district court explained in rejecting the argument, “requiring individualized conciliations on behalf of hundreds of class members could, by making the conciliation of such claims unreasonably expensive and time consuming, ‘reward the employer who discriminates on a large scale and undermine the legislative goal of obtaining voluntary compliance in these cases.’”<sup>130</sup> Other courts have been more sympathetic to employers’ arguments, dismissing cases for failure to identify individual class members and to

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<sup>126</sup> Brief for Petitioner at 37-40, *Mach Mining, LLC v. EEOC*, 134 S. Ct. 2872 (2014) (No. 13-1019) (2014 WL 4380090, at \*37-40) (arguing that, *inter alia*, the Commission must identify the particular individuals for whom it seeks relief and attempt conciliation with defendant regarding every claim and claimant).

<sup>127</sup> See, e.g., *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 316, 331 (1980) (recognizing that the courts of appeals had held that EEOC suits are not limited to the claims of the charging party).

<sup>128</sup> *EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 366 (4th Cir. 1976) (“[T]he original charge is sufficient to support action by the EEOC as well as a civil suit under the Act for any discrimination stated in the charge itself or developed in the course of a reasonable investigation of that charge . . . .”); see also *EEOC v. Delight Wholesale*, 973 F.2d 664, 668 (8th Cir. 1992) (same).

<sup>129</sup> See, e.g., *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1101 (6th Cir. 1984) (permitting EEOC to bring a claim alleging sex discrimination on behalf of all female employees that grew out of an individual employee’s charge of sex discrimination).

<sup>130</sup> *EEOC v. Bass Pro Outdoor World, LLC*, 1 F. Supp. 3d 647, 663 (S.D. Tex. 2014) (quoting *Marshall v. Sun Oil Co.*, 605 F.2d 1331, 1334 (5th Cir. 1979)).

conciliate on behalf of each of them.<sup>131</sup>

The “failure to conciliate” argument makes it more difficult for the EEOC to bring class claims. Even when allegations of inadequate conciliation are not ultimately successful, they divert the agency’s enforcement efforts to defending its pre-suit actions and delay consideration of the merits.<sup>132</sup> And when successful, the employer may escape liability even where there is substantial evidence of discrimination, because the suit is dismissed before the merits are reached. The impact on class cases should not be surprising because the underlying premise of the attacks on the EEOC’s conciliation efforts is that these cases are really just an aggregation of individual claims. Because the EEOC class suit is viewed as nothing more than a joinder device for resolving a series of individual claims, it seems to follow that attempts to conciliate each of them is necessary. If, however, class cases are about systemic discrimination—about workplace structures that are systematically biased against certain groups—then the conciliation that is required should occur on a class-wide basis. And if the parties cannot resolve the allegations of systemic discrimination, efforts to resolve the claims of affected individuals are beside the point.

Because of the procedural posture in *Mach Mining*, the Court’s decision in the case may not definitively resolve the question of what particular requirements must be met in order to satisfy the EEOC’s pre-suit obligation to conciliate. The broader point, however, is this—just as a Congress that disagrees with EEOC policy can detract from its enforcement efforts, so, too, federal judges who disfavor systemic suits can use procedural obstacles to make these cases more difficult to bring. Thus, the EEOC’s ability to target structural bias through its enforcement litigation also depends upon the response of the courts to systemic suits.

#### CONCLUSION

In creating the EEOC and granting it litigation authority, Congress clearly intended it to play a critical role in enforcing federal policy against employment discrimination. The agency is uniquely situated to address problems of systemic discrimination, and yet its ability to prioritize structural reform over individual cases may be constrained in significant ways by resource limitations or resistance from Congress or the courts. The agency’s

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<sup>131</sup> See, e.g., *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 672-73 (8th Cir. 2012).

<sup>132</sup> Disputes over the “failure to conciliate” defense significantly delayed consideration of the merits in *Mach Mining*. The Seventh Circuit described the litigation in the trial court:

The parties have spent nearly two years sparring over whether this is a sufficient ground for dismissing the discrimination case. The defense has been the subject of extensive discovery requests by Mach Mining seeking information about the EEOC’s investigation and conciliation efforts. The defense has also slowed discovery on the merits of the underlying discriminatory hiring claim. Mach Mining has asserted failure to conciliate as a basis for objecting to a number of the EEOC’s discovery requests.

*EEOC v. Mach Mining, LLC*, 738 F.3d 171, 173 (7th Cir. 2013).

mission—eradicating discrimination in employment—is uncontroversial when stated at a high level of generality. However, what constitutes discrimination and how far the law should go in redressing bias are deeply contested political questions. Without a broader societal consensus that systemic bias *is* unlawful discrimination, the EEOC's ability to pursue its enforcement priorities will depend not only on its own efforts, but on the responses of other actors in the system as well.