PRIVATE RIGHTS AND PRIVATE ACTIONS: THE LEGACY OF CIVIL RIGHTS IN THE ENFORCEMENT OF TITLE VII

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INTRODUCTION

Recent scholarship has offered a revisionist history of the enforcement provisions of Title VII of the Civil Rights Act of 1964.[1] The revisionists contend that supporters' tactical retreat from administrative to judicial enforcement of the Act betrayed the fundamental lessons of how to obtain effective compliance with state fair employment practice laws. The lesson from the New Deal, which energized both supporters and opponents of Title VII, was that only a strong administrative agency like the National Labor Relations Board ("NLRB") could effectively bring businesses into line with the new prohibitions against discrimination. Instead, Republican opposition to Title VII led to the watered-down role that the Equal Employment Opportunity Commission ("EEOC") received under the statute as first enacted, and which, although augmented by amendments, continues to stop well short of adjudication with respect to private employers. The EEOC today exercises this power only with respect to federal employees, confining it to the role of investigating and conciliating charges of discrimination against private employers.[2]

The revisionist conclusions have much to be said for them, both in amplifying the historical record and the state law background of the provisions that came to be enacted in Title VII, and in the critique of the hybrid system of

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[1] Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-18, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2012)).

[2] *See infra* Part I.

administrative investigation and conciliation followed by judicial enforcement of the statute. Reform of the cumbersome scheme of time limits, procedures, and remedies under Title VII is long overdue. Nevertheless, the revisionist accounts leave out a crucial feature of Title VII as civil rights legislation: it gives control over enforcement of the statute to the individuals whose civil rights have been violated. The long history of civil rights, dating back to Reconstruction, makes them quintessentially private rights, whose exercise and enforcement should depend primarily on the initiative of the individuals who bear those rights.[3] Public enforcement no doubt remains necessary, and it has an equally long and distinguished pedigree in civil rights law, but it cannot entirely displace individual control over individual rights. To do so is to transform the nature of those rights: from private to public, from individuals to groups, from legal control by plaintiffs to political control by administrators. Once identified as a civil right—a right inherent in citizenship—the right to equal opportunity must remain under the control of the individual citizens themselves.

Part I of this Article examines the recent revisionist history, recognizing the insights it has offered, but raising questions about the perspective that it takes. No one can doubt the retreat of civil rights supporters in the intense debates over Title VII, both in 1964 when the Civil Rights Act was passed and in 1972 when Title VII was expanded and amended. In both instances, EEOC enforcement stopped well short of adjudication of claims against private employers. This result marked a sharp break with state fair employment practice laws. It did not, however, represent any departure from traditional enforcement of civil rights laws. Part II takes up that tradition, beginning with the original civil rights acts passed in the wake of the Civil War and the ratification of the Reconstruction amendments. That history goes back to the contrast between enforcement through "the machineless functioning of the rule of law,"[4] by a combination of public and private litigation, and the limited duration of the extraordinary measures undertaken by the Freedmen's Bureau and the Union Army in the immediate aftermath of the war. Some historians find, in this limited commitment to these measures, the seeds of failure of Reconstruction.[5] They might well be right, but the abandonment of administrative enforcement by these means restored the default mechanism of enforcing private rights: through litigation. Part III finds the same dynamic in the debates over Title VII and links it to the nature of civil rights. These rights can be interpreted in the colloquial sense of rights against discrimination or in their original sense of the rights of citizens. The first sense risks making civil

[3] *See infra* Part II.

[4] HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 14 (1973).

[5] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 602-04 (1988) (summarizing the ways in which the Southern states exhausted the will of the reformers).

rights a matter of special interest politics, of greatest concern to those groups which traditionally have suffered from discrimination, while the second links prohibitions against discrimination to the rights of citizens to equal participation in public life. As a technical matter, civil rights have expanded beyond the rights of citizens alone, to those of all "persons,"[6] yet the principle of equality has only become stronger as its scope has increased. Title VII represents part of this process of expansion, and it affects both the content of the rights that it protects and the means by which they are enforced. The revisionist scholarship must take this history into account.

I. REVISIONIST HISTORY

Recollections of the achievements in civil rights always carry the risk of nostalgia for struggles won in the past and complacency about the need for reform in the present. The revisionist history of Title VII's origins, with its emphasis on the compromises necessary to secure enactment of the statute and the complexity of its enforcement provisions, offers a welcome antidote to such triumphalism. Important as the passage of the 1964 Act was, still more important are the goals of nondiscrimination and equal opportunity that the act sought to achieve. Declaring principles of equality may represent a national commitment, but, in the end, it amounts to little more than hypocrisy if those principles lack effective enforcement. That is the doubt raised by the revisionist scholars, particularly regarding the effectiveness of litigation as the principal mechanism for enforcement.

Anthony Chen identifies the critical compromise over Title VII at exactly the point where litigation might leave substantive rights under-enforced.[7] For him, the cost of getting Title VII enacted was "the fact that key liberal demands had gone unheeded by Congress. Of these, one of the most important was a provision for the establishment of a robust agency akin to the NLRB, with the regulatory scope and authority to eradicate job discrimination root and branch."[8] He recounts in detail the compromise made to originally obtain enactment of Title VII, chiefly to secure Republican support to overcome the filibuster by southern Democrats in the Senate.[9] The Republican leader in the Senate, Everett Dirksen, became the key player in securing the compromise

[6] The expansion was accomplished in the Due Process and Equal Protection Clauses of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1. Implementing legislation, such as the Civil Rights Acts of 1870 and 1871, then carried through on this expansion. Act of May 31, 1870, ch. 114, § 16, 16 Stat. 140, 144 (codified as amended at 42 U.S.C. § 1981 (2012)); Act of April 20, 1871, ch. 22, §§ 1-2, 17 Stat. 13 (codified as amended at 42 U.S.C. §§ 1983, 1985 (2012)).

[7] *See* ANTHONY S. CHEN, THE FIFTH FREEDOM: JOBS, POLITICS, AND CIVIL RIGHTS IN THE UNITED STATES, 1941-1972, at 170-229 (2009).

[8] *Id.* at 171.

[9] *See id.* at 170-90 (describing the battle over the passage of the Civil Rights Act of 1964).

over enforcement in 1964.[10] The uneasiness of liberals with the powers of the EEOC, which did not initially include the right to sue, led to repeated attempts to expand its authority, culminating in the Equal Employment Opportunity Act of 1972.[11] Liberals again pushed for cease-and-desist authority on the model of the NLRB.[12] They received only the right of the EEOC to sue private employers in court and a narrowly won victory on the continued use of class actions by private parties.[13]

Throughout this period, both supporters and opponents of the Act viewed administrative enforcement as the only way to effectively secure compliance with its prohibitions against discrimination.[14] Chen shares this premise, although with the necessary qualification that in hindsight, judicial enforcement of the statute and the growth of the civil rights bar picked up much of the slack left by the limited powers of the EEOC.[15] That premise had its roots both in the New Deal model of expert regulatory agencies and in state fair employment practice commissions ("FEPCs").[16] World War II had amplified the power of the federal agencies and led to expanded federal regulation of labor issues, including efforts to conciliate and publicize discrimination in war-related industries.[17] After the war, states outside the South began to enact legislation, beginning with New York in 1945, and the issue reached the platforms of both national parties by 1948.[18] Some had voiced doubts by this time about the effectiveness of the New Deal model of regulation and the experience under the state FEPC laws.[19] Yet civil rights supporters continued to insist on the model of administrative enforcement through the passage of Title VII in 1964 and its amendment in 1972.[20] The only strong dissent from this consensus came from civil rights lawyers, who exploited the advantages of private litigation,[21] particularly after the effective expansion of class actions under the amendments to Federal Rule of Civil

[10] *See id.* at 185.

[11] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2012)).

[12] *See* CHEN, *supra* note 7, at 190-93 (cataloging various calls for such authority).

[13] *See id.* at 207-10 (describing the difficult passage of the Equal Employment Opportunity Act of 1972).

[14] *See id.* at 179 (describing administrative enforcement as "the sword that liberals had sought or the leviathan that conservatives had feared").

[15] *See id.* at 228-29.

[16] *See supra* text accompanying note 8.

[17] *See id.* at 46-47.

[18] *See id.* at 115-16.

[19] *See id.* at 113-14.

[20] *See id.* at 177, 203-04, 208-09.

[21] *See* Sean Farhang, *The Political Development of Job Discrimination Litigation, 1963-1976*, 23 STUD. AM. POL. DEV. 23, 48-50 (2009).

Procedure 23, which followed in 1966 close on the heels of enactment of Title VII.[22]

David Engstrom offers a more nuanced view of how administrative enforcement came to be the preferred position of civil rights supporters. The factors emphasized by Chen, in his view, failed to account for the uneasy relationship between labor unions and the civil rights organizations and the conflicts among those organizations themselves.[23] Unions worked in alliance with civil rights groups politically, but not necessarily legally.[24] Discriminatory and exclusionary union policies made them the frequent target of efforts to desegregate the work force.[25] Some of those efforts took the form of individually initiated litigation against unions, which mainline civil rights groups, notably the NAACP, found difficult to control.[26] FEPC legislation offered a solution to both problems; first, by securing enforcement on the model of the NLRB's protection of labor unions, and second, by centralizing control over complaints, which were brought solely under the control of the administrative agency.[27] Unions could hardly complain about an enforcement scheme from which they had benefited under the NLRB, and as that act still provides today, vests access to administrative enforcement almost entirely in the hands of the NLRB.[28] Only upon a finding of good cause by the Board's general counsel does a charge under the act go forward as a complaint to be heard by the Board.[29] Opting for administrative enforcement, as in Title VII as originally proposed, also meant opting against any form of individual control over bringing a claim.[30]

This issue was obscured at the time by the hope that the EEOC would aggressively enforce the statute on behalf of individuals who could not afford to litigate themselves and by the coincidental association of litigation with rigid forms of affirmative action that resembled quotas.[31] The case for aggressive administrative enforcement rested in part on the disappointing experience of litigation under the Reconstruction civil rights acts. Those

[22] *See* George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688, 696-706 (1980) (discussing the revisions to Rule 23 in the context of Title VII).

[23] *See* 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, 1108-09 (2011) (tracing the "shaky black-labor alliance").

[24] *See id.* at 1110-13.

[25] *See id.* at 1084-85.

[26] *See id.* at 1116-17.

[27] *See id.* at 1117, 1125.

[28] 29 U.S.C. § 160(a) (2012) (empowering the NLRB to "prevent any person from engaging in any unfair labor practice," with limited exceptions).

[29] *See id.* §§ 153(d), 160(b).

[30] *See* Engstrom, *supra* note 23, at 1104 (mentioning that administrative enforcement would preclude private rights of action).

[31] *See id.* at 1090, 1131 (describing such beliefs in the late 1940s).

statutes had been narrowly interpreted in a variety of ways by courts increasingly unsympathetic to civil rights.[32] Yet as the NAACP achieved increasing success in its campaign of desegregation by litigation, that experience seemed more and more outdated.[33] Individual plaintiffs also had succeeded in civil rights litigation in obtaining significant relief, sometimes under statutes that shifted attorney's fees onto a losing defendant.[34] Litigation no longer appeared to be the distant and elusive remedy that it had been at the height of the Jim Crow era. Civil rights organizations took advantage of the new opportunities to sue for relief that included immediate hiring of African-American workers.[35] With individual control over litigation, it comes as no surprise that a wider range of remedies would be sought, particularly in the early days as employment discrimination law just began to take shape. The association of group remedies with individual litigation still appears to be surprising, as if the broad relief for a group could be based on the narrow foundations of an individual action.

The opposite, by contrast, has much more to be said for it: that right, procedure, and remedy exercise a profound influence on one another. The choices at each level structure the options available at the others. Common law remedies, such as damages, force a case against a private party into court, with a right to jury trial if in federal court under the Seventh Amendment.[36] Characterizing the underlying right as public moves it in the opposite direction, with the option of administrative enforcement.[37] Making class actions available as a procedural device transforms the nature of the remedy from one focused on the individual plaintiff to one that extends to an entire group. All of these were live issues when Title VII was enacted in 1964 and amended in 1972.[38] Even after defeat of the option of administrative enforcement, courts were limited to granting equitable relief in order to avoid the risk of jury nullification of Title VII, especially in the South.[39] Class actions, as they

[32] *See* GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866, at 93-110 (2013).

[33] *See* Engstrom, *supra* note 23, at 1142 ("As Title VII suits proliferated, civil rights groups had grown far more comfortable than they were two decades before with private pursuit of tort-like money damages as a discrimination remedy.").

[34] *See id.* at 1097.

[35] *See id.* at 1137-38 (recounting the impact of litigation, both actual and threatened, after the passage of Title VII).

[36] *See* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 577-82 (2007) (chronicling the development of judicial review of private rights).

[37] *See id*. at 602-05 (2007) (describing the use of nonjudicial adjudication for administrative enforcement).

[38] *See* Rutherglen, *supra* note 22, at 690-720.

[39] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(g), 78 Stat. 241, 261 (codified as amended at 42 U.S.C. § 2000e-5(g) (2012)) (giving courts equitable discretion to grant individual compensatory relief); *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 415-26 (1975) (setting forth standards for award of back pay as an equitable remedy).

developed soon after passage of Title VII, became the principal vehicle for structural relief, and were therefore the target of efforts at repeal.[40] These specific issues revolved around the more fundamental question of whether Title VII protects private rights, and therefore preserves individual control over enforcement, or whether it protects public rights, which can be entrusted to an administrative agency.

For some rights, like those to life and liberty, the connection between rights, procedures, and remedies has crystallized into constitutional rules. Administrative agencies cannot impose criminal penalties.[41] Property rights have been treated more equivocally in modern constitutional law, and with the expansion of constitutional protection to "new property" in the twentieth century,[42] individual claims under Title VII could receive a degree of constitutional protection.[43] Exactly what form that protection would take is an interesting, but fortunately, largely hypothetical question under the current version of the statute. With the addition of damages as a remedy for employment discrimination, the right to jury trial under the Seventh Amendment has now foreclosed any possibility of returning to the alternative of administrative enforcement.[44] That might seem to be a highly technical, if not entirely artificial, way to finesse important policy questions of procedure and remedies, but it reveals the powerful influence of the model of common law rights.[45] Creating a right not to be subject to employment discrimination led to a private right of action for victims of discrimination that then led to a damage remedy for violation of the right. None of these steps necessarily had to be taken, either as a matter of logic or constitutional law, but they fit together within the traditions of the common law. Nothing requires strict adherence to those traditions, and civil rights law has properly embraced alternative methods of enforcement, but rarely have those alternatives

[40] *See* Rutherglen, *supra* note 22, at 713-20.

[41] *See* Nelson, *supra* note 36, at 610 (outlining the restrictions on the administrative role in criminal cases).

[42] *Id.* at 606, 612.

[43] *See* Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U. L. REV. 277, 305 & n.121 (1988) ("The contours of causes of action are set by legal standards sufficiently clear to allow claims of entitlement under the 'new property' doctrine."); Mary Ann Glendon & Edward R. Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C. L. REV. 457, 484 (1979) ("[W]omen and members of certain minority groups have limited access to some forms of work-related new property that presently are important sources of economic security in our society.").

[44] *See* Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 102, § 1977A, 105 Stat. 1071, 1072-74 (codified as amended at 42 U.S.C. 1981a (2012)) (adding said damages remedy).

[45] *See* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 455 (1977) (allowing administrative adjudication because federal statute created no private rights with a right to jury trial).

completely displaced enforcement through individual actions on the common law model.

The next part of this Article examines the historical support for this claim as a descriptive matter. As a normative matter, it is important to see how far the implications of the common law model extend. The limited claim put forward here is this: the implications reach at least as far as individual control over a charge of discrimination, whether brought in court, before an administrative agency, or in arbitration. Engstrom, for one, concedes this point in his proposal to make the EEOC the gatekeeper for class actions under Title VII.[46] Perhaps he offers this concession just as recognition of the status quo of private litigation and the difficulty of limiting private remedies.[47] Yet the present system has more to be said for it than simple inertia in favor of the path-dependent outcomes of the legislative process. The rationale for the resulting outcome has an inherent logic, which, if not impossible to overcome, puts the burden of proof on those who would depart from it. Recognizing an individual right to equal consideration for a job creates a presumption in favor of individual control over asserting that right. To create the right in the individual and then give control over it to someone else takes away much of the significance of conferring the right in the first place. Stripped of their technicalities, the proposals for full-fledged administrative enforcement of Title VII in 1964 and 1972 did just that. The right not to suffer from discrimination could be retrofitted to collective schemes of enforcement, but only by downgrading it from a full-fledged claim right of the individual, with a correlative duty imposed upon the employer. It would no longer allow the individual to insist that the employer observe its duty not to discriminate, and to sue if the duty was violated, but it would instead give control over observance of the duty and the right to sue to the government. The individual would be left only with a legally recognized interest enforceable entirely at the discretion of the government.

That scheme suited the National Labor Relations Act ("NLRA")[48] even though it conferred rights on individual workers, because those rights mainly were to promote labor organization and collective bargaining. The rights were, in the words of the statute, to engage in "concerted activities, for the purpose

[46] *See* David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 710-11 (2013) ("So long as Congress characterizes—or, in the case of already-existing statues, *re*characterizes—the underlying right as contingent on agency action, vesting an agency with gatekeeper powers does not appear to run afoul of the Due Process Clause, Article III, or the Seventh Amendment.").

[47] *See* Sean Farhang, *Congressional Mobilization of Private Litigants: Evidence from the Civil Rights Act of 1991*, 6 J. EMPIRICAL LEGAL STUD. 1, 10-11 (2009) (recounting efforts of civil rights groups to overturn unfavorable judicial decisions and expand individual remedies in the Civil Rights Act of 1991).

[48] Pub. L. No. 74-198, § 7, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 157 (2012)).

of collective bargaining or other mutual aid or protection."[49] The statute did not protect individual rights as an end in themselves, but instead as a means of protecting group rights. As amended by the Taft-Hartley Act, the NLRA also protected the right to refrain from supporting unions,[50] but the focus of the statute has always been on the group rather than the individual. The rights under the statute have always had a more public character than the private rights recognized by the common law, a difference accentuated by the failure of the common law to recognize unions at all.[51] The collective nature of the rights, and the absence of any history of common law litigation over them, made them amenable to administrative enforcement. If the worker had no individual interests ultimately at stake under the statute, as opposed to interests that could be furthered by a union, then delegating enforcement to an administrative agency threatened no truly individual right. Prosecution and adjudication could be left to the NLRB because the rights were created by statute without any common law antecedents that triggered the right to jury trial, as the Supreme Court held in sustaining the constitutionality of the NLRA.[52]

The analogy to enforcement of civil rights can succeed only if they are conceived as group rights, like those to engage in collective bargaining. It remains possible to categorize rights against discrimination as group rights,[53] as the frequent references to "protected classes" under the civil rights acts attest.[54] The objections to taking this step implicate many of the disputes over affirmative action.[55] Statutes like Title VII confer rights upon "any individual," impose restrictions on affirmative action, and confine compensatory remedies to qualified individuals.[56] But even taking the case for collective rights under

[49] *Id.*

[50] *See* Labor-Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, sec. 101, § 7, 61 Stat. 136, 140 (codified at 29 U.S.C. § 157 (2012)) (providing that employees "shall also have the right to refrain from any or all" union activity).

[51] *See* Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry, 494 U.S. 558, 565-66 (1990) (plurality portion of majority opinion of Marshall, J.) (finding no common law cause of action corresponding to right of employee to sue because unions were illegal at common law).

[52] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937) (finding that NLRB statutory proceedings are "unknown to the common law" and not subject to the Seventh Amendment).

[53] *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147-70 (1976) (integrating "group-disadvantaging principle" into anti-discrimination law).

[54] *See, e.g.*, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2540 (2013) (quoting reference to "protected class status" in EEOC compliance manual).

[55] *See* Fiss, *supra* note 53, at 129-36 (investigating the defenses of preferential treatment in the context of individual versus group rights).

[56] 42 U.S.C. §§ 2000e-2(a), (b), (c), (d), (j), 2000e-3(a) (2012) (using the phrase "any individual").

Title VII at full force, it does not displace individual rights.[57] The presence of fundamentally individual rights, which serve no purpose other than protecting the individual from discrimination, tends to support individual control over claims under the statute. As we have seen, that is precisely what enforcement modeled on the NLRB denied. The next part goes into the common law antecedents of Title VII and of civil rights generally. These, too, support individualized litigation as a necessary mode of relief.

II. THE COMMON LAW ORIGINS OF CIVIL RIGHTS

The Civil Rights Act of 1964 sought to overcome the failures of Reconstruction and the civil rights acts passed in that era. Title II of the 1964 Act covered virtually the same public accommodations as those covered by the Civil Rights Act of 1875,[58] and it differed from the earlier act only in seeking a foundation in the Commerce Clause rather than in the Thirteenth and Fourteenth Amendments.[59] Title VII had a more distant predecessor in the Civil Rights Act of 1866, which protected the right "to make and enforce contracts,"[60] but was interpreted to limit its scope to the capacity to contract.[61] Under this interpretation, the 1866 Act prohibited racial discrimination only with respect to state action denying the capacity to contract, not private action involving a refusal to enter into a contract, as would occur if private employers refused to hire black employees. After the passage of Title VII, the 1866 Act received a much broader interpretation,[62] but at the time that Congress

[57] *See* Connecticut v. Teal, 457 U.S. 440, 452-55 (1982) (emphasizing that Title VII protects "any individual" from discrimination); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579 (1978) ("A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.").

[58] *Compare* Civil Rights Act of 1964, Pub. L. No. 88-352, § 201(a), 78 Stat. 241, 243 (codified as amended at 42 U.S.C. § 2000a(a) (2012)) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."), *with* Act of March 1, 1875, ch. 114, § 1, 18 Stat. 335, 336 ("[A]ll persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.").

[59] *Compare* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250-52 (1964) (relying on the Commerce Clause to support Title II), *with* The Civil Rights Cases, 109 U.S. 3, 19 (1883) (not invoking the Commerce Clause to support the Civil Rights Act of 1875).

[60] Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981 (2012)).

[61] *See* RUTHERGLEN, *supra* note 32, at 103-05 (showing that Civil Rights Act of 1866 was limited to the basic "civil rights" of citizenship, rather than "social rights").

[62] *See id.* at 137-51 (chronicling the revival of the 1866 Act in light of Title VII).

considered Title VII, it marked the broadest reach of federal law into discrimination in private contracting.[63] Guaranteeing equal capacity to contract, as the 1866 Act had, did not guarantee actual equality in entering into contracts, and in particular, into contracts of employment.

Comparing the 1964 Act to its predecessors in Reconstruction reveals both continuities and discontinuities with these earlier efforts. The 1964 Act focused on racial discrimination, although it also extended to discrimination on other grounds, such as national origin and religion, and in a far-reaching innovation, discrimination on the basis of sex in Title VII.[64] The later act also depended heavily on enforcement through litigation, but not necessarily private litigation, and like the earlier acts, it also provided for enforcement through executive action.[65] Private individuals could bring claims under Title II and Title VII, but the government could also bring such claims.[66] Title VI provided for the cut-off of federal funds to recipients who discriminated on the basis of race, and it relied entirely on executive decisions to secure compliance, directed initially at school districts that refused to desegregate.[67] Only some years later was a private right of action read into the statute.[68] Since funding was a public act, it gave rise primarily to a public right and public control over enforcement. In other provisions, like Title II and Title VII, the 1964 Act conferred individual rights and relied upon a mixed system of enforcement, with public actions supplementing individual litigation.[69]

Much the same mixture of private and public enforcement can be found in the Reconstruction civil rights acts. The 1866 Act conferred a range of individual rights: in addition to the right "to make and enforce contracts," it conferred rights to hold property, to participate in legal proceedings, to "full and equal benefit of all laws and proceedings for the security of person and property," and to be "subject to like punishment, pains, and penalties, and to none other."[70] The only actions that could originally be brought directly to

[63] *See* FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY 8 (2009) (calling the Civil Rights Act "revolutionary" for extending the role of the state into the employment relationship).

[64] Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)-(d) (codified at 42 U.S.C. § 2000e-2(a)-(d) (2012)).

[65] *Id.* §§ 204, 206, 706, 707 (codified as amended at 42 U.S.C. §§ 2000a-3, 2000a-5, 2000e-5, 2000e-6 (2012)) (providing for the Attorney General to file suit in certain situations).

[66] *Id.*

[67] *Id.* §§ 601, 602 (codified as amended at 42 U.S.C. §§ 2000d, 2000d-1 (2012)); *see* GAVIN WRIGHT, SHARING THE PRIZE: THE ECONOMICS OF THE CIVIL RIGHTS REVOLUTION IN THE AMERICAN SOUTH 156-58 (2013) (recounting success of school desegregation after enactment of Title VI).

[68] Cannon v. Univ. of Chi., 441 U.S. 677, 689-709 (1979) (implying a private right of action into Title IX).

[69] *See supra* note 65 and accompanying text.

[70] Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. §§ 1981, 1982 (2012)).

protect these rights were criminal prosecutions, although the rights themselves could be asserted in other cases and could be the basis for removing state cases to federal court.[71] It took several years for another statute, the Civil Rights Act of 1871,[72] to confer a private right of action on individuals, who could then bring suit for denial of any federal right under color of state law, in effect extending the authority to bring criminal proceedings to enforce the 1866 Act to civil proceedings by private individuals.[73] That provision survives as the general federal civil rights statute, § 1983.

The 1866 Act also authorized enforcement directly by the President[74] in a provision that paralleled the authority given to the Freedmen's Bureau to protect a similar list of rights.[75] Throughout the early years of Reconstruction, administrative enforcement through the Freedmen's Bureau, established within the War Department, co-existed with enforcement through judicial proceedings.[76] The Freedmen's Bureau, however, never received authorization for more than a few years at a time; it permanently ceased operations in the South in 1869, and all its affairs were wound up in 1872.[77] At that point, enforcement of civil rights returned entirely to the courts.[78] Although the courts established by the Freedmen's Bureau, and the proceedings within them to enforce civil rights, hardly constituted the most controversial of its programs, they stood and fell with criticism of the creation of a federal bureaucracy that displaced state courts and other institutions in the South.[79] Transposed to the circumstances of Reconstruction, criticism of the Freedmen's Bureau bears a certain resemblance to the attack on administrative enforcement of Title VII nearly a century later. If anything, uneasiness with bureaucratic expansion and uncertainty over the proper role of the federal

[71] *See id.* § 2, 3 (making violations of the act a misdemeanor and granting the federal courts jurisdiction).

[72] Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended at 42 U.S.C. § 1983 (2012)).

[73] *See id.* (providing that any violator "be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress").

[74] Act of April 9, 1866, § 9 ("[I]t shall be lawful for the President . . . to prevent the violation and enforce the due execution of this act.").

[75] *See* Act of July 16, 1866, ch. 200, §§ 14, 14 Stat. 173, 176-77 (listing rights and providing for enforcement).

[76] *See* RUTHERGLEN, *supra* note 32, at 94 ("The Freedmen's Bureau during its brief existence . . . augmented the capacity of the federal courts with tribunals of their own.").

[77] George Rutherglen, *The Origins of Arguments over Reverse Discrimination: Lessons from the Civil Rights Act of 1866*, *in* "THE GREATEST AND GRANDEST ACT": THE CIVIL RIGHTS ACT OF 1866 FROM RECONSTRUCTION TO TODAY 11-22 (Christian Samito ed.) (forthcoming 2015) (manuscript on file with the author).

[78] RUTHERGLEN, *supra* note 32, at 94 ("When [the Freedmen's Bureau] left, the courts and prospective civil rights litigants were thrown back on their own resources.").

[79] Rutherglen, *supra* note 77, at 20-22.

government in enforcing civil rights were even greater then than they were later, after the growth of the federal government during the New Deal.

Although no analogy between the two periods and between the Freedmen's Bureau and the EEOC can be precise, what correspond almost exactly are the consequences of abandoning administrative enforcement: reversion to ordinary litigation under the processes and remedies of the common law. To the extent that rights are enforceable at all, litigation constitutes the default option for protecting those rights. This alternative might appear to be meager, especially given the neglect that civil rights fell into after Reconstruction. The Fourteenth Amendment, instead of becoming a charter for racial equality, became the foundation for protecting established property rights under the doctrine of substantive due process.[80] Not coincidentally, the property holders of that era had the means to protect themselves through litigation, which always has imposed a costly screening mechanism that selected only highly valued rights for the full attention of the courts. Getting the resources together to prosecute civil rights claims became a predominant concern of organizations like the NAACP, which gradually brought them out of neglect and onto the national agenda in the first half of the twentieth century.[81]

Yet litigation takes a large step forward from efforts simply at voluntary compliance. Without the risk of liability in some form, such efforts can amount to little more than window-dressing, as they did in the several advisory committees and presidential commissions that preceded enactment of Title VII.[82] Especially in a competitive market, firms might not want to take the risk of alienating customers and other employees by adopting new, nondiscriminatory policies, unless all firms are forced by law to do the same.[83] They want some assurance that even recalcitrant competitors will be playing by the same rules. Exposure to litigation and to liability furnishes a degree of assurance, as well as a neutral reason that can be offered to doubtful constituencies that the firm depends on. Even intermittent and infrequent lawsuits can shift the balance within a firm in favor of obeying the law. Human resources departments, on some accounts, took exactly this approach in promoting compliance with the new civil rights laws.[84] Litigation, with all its limitations, can make a difference.

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[80] *See* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 197-200 (1988) (discussing the Fourteenth Amendment immediately before and during the *Lochner* era).

[81] *See* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 33-37 (1994) (describing expansion of NAACP legal staff).

[82] *See* Engstrom, *supra* note 23, at 1073 (describing one such committee as having "purely advisory orders that employers and unions could, and often did, ignore").

[83] *See* Michael J. Klarman, Brown*, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 59 n.251 (1994) (noting instances in which firms wanted such blanket rules).

[84] *See* DOBBIN, *supra* note 63, at 6-12 (arguing that spotty enforcement of civil rights laws "stimulated private-sector activism in the protection of citizens' rights").

The nature and origin of civil rights as common law rights also make them uniquely suited to enforcement through litigation. Before Reconstruction changed the specific meaning of the term, "civil rights" were the rights of citizens.[85] They overlapped to a large degree with the "privileges and immunities" of citizenship protected by the original Constitution and in different form by the Fourteenth Amendment.[86] They were the rights that citizens had as full legal persons. Exactly what those rights were, and whether to confer them on the newly freed slaves, was a pressing issue after emancipation.[87] It was left open by the Thirteenth Amendment, which abolished slavery and involuntary servitude without specifying the legal status of the slaves who were now free.[88] The initial clause of both the 1866 Act and the Fourteenth Amendment settled the issue in favor of granting them full citizenship.[89] The 1866 Act specified the list of rights discussed earlier and provided that they were the same "as is enjoyed by white citizens."[90] These provisions together established the connection between civil rights as the rights of citizens and civil rights as rights against discrimination.

To put this historical development in modern terms, the 1866 Act sought to define the terms on which all citizens could participate in public life without discrimination.[91] At a very high level of abstraction, that is the same goal as the 1964 Act, which differed only in deploying a much broader conception of public life. The 1964 Act did not just guarantee equal capacity as a citizen, but also equal rights to public accommodations, to the benefit of federal funds, and to employment.[92] It also expanded those protected from "citizens" to "persons," following the precedent set by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and by civil rights

[85] *See* RUTHERGLEN, *supra* note 32, at 41-42 (discussing how, in Roman law and subsequently, "the possession of civil rights distinguished the citizen from someone who was merely free and not a slave").

[86] *Id.* at 42-43.

[87] *See id.* at 63.

[88] *See id.*

[89] U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."); Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. §§ 1981, 1982 (2012)) (recognizing equal rights regardless of race).

[90] Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. §§ 1981, 1982 (2012)).

[91] *See* RUTHERGLEN, *supra* note 32, at 11 ("Consistent with the understanding of civil rights at the time, the act stopped well short of protecting full participation in public life." (citation omitted)).

[92] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (promising to protect against "discrimination in public accommodations, . . . to prevent discrimination in federally assisted programs, [and] to establish a Commission on Equal Employment Opportunity" in its full title).

legislation implementing that amendment.[93] The expanded scope of the protection does not detract, however, from its origins in the rights of citizens. Those rights do not presuppose any collective goal that they are meant to implement. They are firmly rooted in protection of the individual, whether as a full-fledged citizen or simply as a person. For Title VII, in particular, no goal in the form of group rights or racially balanced employment justifies or limits the rights of individual applicants and employees to equal consideration for employment. That has consequences, as noted earlier, for the form that enforcement takes under the statute.

The association between civil rights and litigation clearly emerges from the historical record, and if there were any doubt, the very first rights protected in the 1866 Act go directly to participation in judicial proceedings: "to sue, be parties, and give evidence."[94] It does not follow from this history that civil rights claims must come before a court. The example of workers' compensation is instructive. Statutes like the federal Longshoremen's and Harbor Workers' Compensation Act ("LHWCA")[95] abolished tort claims against an employer recognized at common law and transferred them to an administrative tribunal, whose decisions were subject only to limited judicial review.[96] The Supreme Court upheld this scheme in *Crowell v. Benson*,[97] a decision often taken to be the foundation of the administrative state.[98] The Court, however, had to resort to several technical distinctions that narrowed the scope of its holding. The Court found no denial of the right to jury trial because the claimant previously had only a claim in admiralty, in which the court sits without a jury.[99] The Court also required de novo judicial review of "jurisdictional facts" that determined the power of the compensation board.[100] Subsequent decisions have both relaxed and elaborated upon these distinctions, resulting in a complex body of law that allows some, but not all, private rights previously recognized by the common law to be decided by administrative tribunals.[101] Public rights, by contrast, have always been subject to

[93] *See* RUTHERGLEN, *supra* note 32, at 130.

[94] Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981(a) (2012)).

[95] Longshoremen's and Harbor Workers' Compensation Act, Pub. L. No. 69-803, 44 Stat. 1424 (codified as amended at 33 U.S.C. §§ 901-50 (2012)).

[96] *See id.* §§ 19, 21 (codified as amended at 33 U.S.C. §§ 919, 921 (2012) (creating administrative claim procedures and detailing their review by courts).

[97] 285 U.S. 22 (1932).

[98] *See, e.g.*, Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 248 & n.106 (1985).

[99] *See Crowell*, 285 U.S. at 51-54.

[100] *Id.* at 54-65 (construing the statute at issue to allow judicial review of whether an agency was operating in its "proper sphere").

[101] *See* Nelson, *supra* note 36, at 605-12 (outlining some of the "famously difficult to summarize" cases and law regarding private rights).

administrative determination, on the model of claims against the federal government, which have always been subject to adjudication by courts established outside the scope of Article III, like the Court of Federal Claims.[102]

A more limited lesson can be drawn from *Crowell v. Benson* apart from its implications for the validity of the entire administrative state. It is that the claimant retained control over the presentation of his claim for compensation.[103] This procedure under the LHWCA stands in stark contrast to the procedure under the NLRA, in which the General Counsel acts as an absolute gatekeeper for complaints that can be brought before the Board. The decision of the General Counsel not to issue a complaint is subject to virtually no judicial review at all.[104] Control over enforcement of the worker's statutory rights rests entirely with a public official. The enforcement of collective bargaining agreements provides an instructive comparison. When Congress saw a need to remedy claims under such agreements, analogous to common law claims for breach of contract, it conferred jurisdiction upon the federal courts, not upon an administrative agency.[105] This history may not establish a hard-and-fast rule that statutory substitutes for common law rights must preserve individual control over presentation of a claim, but it does establish a strong connection between the two. Congress has rarely granted individuals new statutory rights, or substituted them for traditional common law rights, without giving them some degree of control over enforcement of those rights. Title VII fits this historical pattern. Although it does provide for actions by the EEOC and the Attorney General based on a charge filed by an individual, these do not displace the individual's right to intervene in the resulting litigation.[106]

The historical tendency to link individual rights with individual enforcement remedies reflects a conceptual connection between rights and remedies. Giving the first to an individual creates a presumption in favor of giving the second as well. Good reasons have to be offered for turning to an alternative enforcement regime, even if individual rights need not entail individual control over enforcement. The maxim "where there is a right, there is a remedy" holds only

[102] *Id.* at 594, 602-05, 611-13 ("The disposition of public rights still does not trigger the same need for judicial involvement as the disposition of private rights that have vested in individuals . . . .").

[103] Longshoremen's and Harbor Workers' Compensation Act, Pub. L. No. 69-803, § 19(a), 44 Stat. 1424, 1435-36 (codified as amended at 33 U.S.C. § 919(a) (2012)) (providing for filing of claim for compensation).

[104] NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 118-33 (1987) (holding that the General Counsel has wide authority, outside both the courts and the Board, to issue complaints up until the commencement of a hearing).

[105] Labor-Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, § 301, 61 Stat. 136, 156 (codified at 29 U.S.C. § 185 (2012)) (giving federal district courts jurisdiction of contract suits between employers and labor organizations).

[106] *See supra* note 66 and accompanying text.

in the general run of cases, but it nevertheless exercises a pervasive influence over the scope and nature of remedies.[107]

Rights under the employment discrimination statutes take the form of full-fledged claim rights. An individual can insist that employers observe their duties not to take account of race, sex, or other prohibited personal characteristics. The individual can choose to exercise that right or not, but the individual controls the decision whether the employer must perform its duty. A further public interest in compliance with the laws against discrimination might come into play, but it is the individual's interest in equal treatment that determines the structure of the rights and duties established as a matter of substantive law. The natural consequence of the individual's control over observance of the duty is control over the remedy when the employer fails to fulfill the duty. An individual exercises the right to equal treatment most forcefully by insisting upon a remedy for unequal treatment. This consequence is natural, but not inevitable, because the government could limit the individual's participation in enforcement proceedings to simply initiating them, as a worker does by filing a charge under the NLRA. It is possible for the government to grant an individual limited control over enforcement of an individual right, but in doing so, it necessarily dilutes individual control over the exercise of the right and observance of the correlative duty. Lax enforcement might also dilute the right itself, or conversely, strict enforcement might better protect the individual than proceedings directly under her control. There is an obvious trade-off between public, collective enforcement and private, individual enforcement.

To take a less dated example of the competition between these alternatives, class actions raise exactly the same trade-off between collective and individual control. The class action rule, as it operates today, tries to strike a balance that preserves individual control through the mechanism of notice and the right to opt out of class actions that seek substantial individual relief.[108] The recent decisions interpreting Rule 23, notably *Wal-Mart Stores, Inc. v. Dukes*,[109] suggest that the Due Process Clause might require no less by way of individualized procedures.[110] That suggestion has been intensely disputed, as have other aspects of the decision.[111] These disputes, however they are

[107] *See* John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1388 (2007) ("When plaintiffs succeeded in establishing liability . . . they were presumptively assured of some relief, even if it was not fully compensatory or ideally complete.").

[108] *See* FED. R. CIV. P. 23(c)(2)(B) (requiring notice to class members, who then have the right to opt out).

[109] 131 S. Ct. 2541 (2011).

[110] *Id.* at 2559-61 (raising, but not deciding, the possibility of a Due Process conflict when seeking monetary damages for a 23(b)(2) class).

[111] *See, e.g.*, Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097, 1109-10, 1120 (2013).

resolved, make sense only against the background of a presumption in favor of individual control over individual rights. The Court's apparent concern has been to prevent procedures under Rule 23 from taking away substantive rights granted by Title VII and, in particular, by preserving the individual's right to opt out of a class action for individual relief.[112] That concern rests upon the presumption that individual rights support individual participation in enforcement proceedings. How far that support goes remains an open question. The next part of this article addresses the elements that go into an answer for it, based upon the mixed systems of enforcement, including enforcement of the laws against discrimination, that predominate in the modern administrative state.

III. PRIVATE RIGHTS IN A MIXED SYSTEM OF ENFORCEMENT

History supports individual control over civil rights actions, but not to the exclusion of public actions, or in recent decades, administrative proceedings. All three alternatives were evident in the effort immediately after passage of Title VII to desegregate the South.[113] The choice is not all-or-nothing in favor of one alternative or the other. Constitutional constraints leave room for a wide range of choices among mixed enforcement regimes. In that light, the proper role of individual actions becomes mainly a matter of policy and experience, rather than principles and doctrine. The question is what works in practice rather than what can be deduced in theory. The record of private litigation as the principal device for enforcing Title VII itself is mixed, as is the prevailing role of the EEOC in investigating charges against private employers. Mixed enforcement, in another sense of the term, needs to be re-examined to address the imbalances and defects in the existing regime.

As noted earlier, private and public enforcement have co-existed from the beginning of civil rights law. The Civil Rights Act of 1866 established two principles avenues for assertion of civil rights: the Department of Justice could bring a criminal action for denial of such rights under color of state law;[114] or the individual could assert those rights directly in ordinary cases brought on other grounds, and if necessary, remove them to federal court.[115] When the

[112] *Wal-Mart*, 131 S. Ct. at 2559 ("That possibility underscores the need for plaintiffs with individual monetary claims to decide *for themselves* whether to tie their fates to the class representatives' or go it alone—a choice Rule 23(b)(2) does not ensure that they have.").

[113] WRIGHT, *supra* note 67, at 106-22 (reviewing the immediate impact of the Civil Rights Act on southern industries such as textiles); James J. Heckman & Brook S. Payner, *Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks*, 79 AM. ECON. REV. 138, 173-74 (1989) (summarizing effects of various federal initiatives to increase black employment after 1964).

[114] Act of April 9, 1866, ch. 31, § 2, 14 Stat. 27, 27 (codified as amended at 18 U.S.C. § 242 (2012)) (making violations of the Act a misdemeanor).

[115] *See id.* § 3 (codified as amended at 28 U.S.C. § 1443 (2012)) (allowing for private

1866 Act was passed, and for a few years thereafter, courts in the Freedmen's Bureau could also enforce a similar list of rights protected by that legislation.[116] Although the Freedmen's Bureau soon ceased operations, the criminal action created by the 1866 Act persists to this day. When it was re-enacted in 1870 and extended to create a civil remedy in 1871, Congress also enacted further criminal and civil remedies.[117] The resulting statutes have since then formed the core of general enforcement of civil rights claims: for civil actions, §§ 1981, 1982, 1983, and 1985; for criminal actions, §§ 241 and 242.[118]

The limited effect of these statutes became all too obvious during the regime of Jim Crow. Civil actions depended upon the resources available to private litigants. Where resources could be assembled, as they were by Chinese merchants in San Francisco in the litigation culminating in *Yick Wo v. Hopkins*,[119] members of minority groups could effectively assert their claims to equality.[120] More frequently, they were denied access to litigation by the disadvantaged position that they found themselves in because of pervasive discrimination. To take the most obvious example, the newly freed slaves were shut out of the judicial system by the poverty resulting from their previous condition of servitude and their continuing experience of discrimination.[121] The wrongs that the civil rights statutes were meant to cure also prevented the victims of those wrongs from taking advantage of the remedies provided by those statutes. Public enforcement suffered from the greatly diminished standing of civil rights on the national political agenda after the end of Reconstruction.[122] As the Compromise of 1877 resulted in the withdrawal of Union troops from the South, it also discouraged prosecution of federal criminal actions for denial of civil rights.[123] The victims of discrimination again were caught in a bind: they lacked political power because of past

suit, removable to federal court, for violations of the Act).

[116] *See* Act of July 16, 1866, ch. 200, § 14, 14 Stat. 173, 176-77 (enumerating "immunities and rights" to be enforced).

[117] Act of May 31, 1870, ch. 114, §§ 6, 17, 18, 19, 16 Stat. 140, 141, 144-45 (codified as amended at 29 U.S.C. §§ 241, 242 (2012); 42 U.S.C. §§ 1981, 1982 (2012)); Act of April 20, 1871, §§ 1, 2, 17 Stat. 13, 13 (codified as amended at 42 U.S.C. §§ 1983, 1985 (2012)).

[118] *Id.*

[119] 118 U.S. 356 (1886) (holding enforcement of local ordinance exclusively against Chinese laundries to be a denial of equal protection).

[120] *See* RUTHERGLEN, *supra* note 32, at 115-18.

[121] *See id.* at 94 ("[C]ommon law enforcement depended on the initiation of a lawsuit or the assertion of a defense, both of which required legal assistance not readily available to the poor, as virtually all the freedmen were.").

[122] *See id.* at 97-100 (describing how "[i]ndifference rather than hostility defeated the efforts to achieve the ambitious goals of Reconstruction").

[123] *See* WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION, 1869-1879, at 335-57 (1979) (describing the negotiations leading to the withdrawal of troops and the subsequent fallout).

discrimination, but because they lacked political power, they could not insist on public actions to end discrimination.

The long road out of the entrenched institutions of the Jim Crow era has been recounted many times. Mobilization of private resources for private litigation and concentration of minority political power form two sides of the story. These came together in the developments leading from *Brown v. Board of Education*[124] to the Civil Rights Act of 1964. As the result of private litigation, sponsored largely by the NAACP, *Brown* discredited segregation as a constitutionally acceptable practice.[125] The 1964 Act represented the political commitment to make desegregation a reality in public life. It returned to the combination of public and private enforcement that had characterized civil rights from its inception. The combination of enforcement mechanisms established in Title II on public accommodations and Title VI on cut-off of federal funds has already been summarized.[126] An independent initiative under the executive orders that prohibited discrimination and then later required affirmative action by federal contractors also made a significant difference.[127] Industries, such as the textile producers in South Carolina, moved quickly—under the threat of the cut-off of federal contracts—from a heavily segregated work force to one that was integrated.[128] The threat to withhold federal funds from segregated schools, covered as recipients of federal funds by Title VI, led to the abandonment of massive resistance and token integration as the predominant southern response to *Brown*.[129] Public pattern-or-practice actions, along with private class actions, figured prominently in the initial enforcement of Title VII.[130]

In light of this history, both early and late in the development of civil rights law, the combination of administrative proceedings and litigation under Title VII should come as no surprise. The EEOC, even with its diminished powers, took up the mantle long since lost by the Freedmen's Bureau, with a similar degree of political controversy. Federal administrative agencies might have

[124] 347 U.S. 483 (1954).

[125] *See* Farhang, *supra* note 21, at 54-55 (discussing how, despite general fears about the cost of litigation, the NAACP "shaped the law" through *Brown*).

[126] *See supra* text accompanying notes 64-68.

[127] *See* Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65).

[128] *See* Heckman & Payner, *supra* note 113, at 167-73 (modeling the change in labor statistics and concluding the change was caused by government activity).

[129] *See* WRIGHT, *supra* note 67, at 155-58 (finding the watershed moment for desegregation to be the passage of the Civil Rights Act of 1964, not *Brown*); Klarman, *supra* note 83, at 9-10 (calculating rates of desegregation and finding the threat of losing funds to be the main force).

[130] *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (public pattern-or-practice action); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (private class action); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1019-21 (1991) (describing rise and fall of class actions in employment discrimination cases from 1969-89).

become more familiar in the intervening decades, but they were not more acceptable to those who objected to expanded regulation by the federal government. What is surprising is the durability of what began as an expedient compromise over the EEOC's powers in cases against private employers and against state and local government. Only in cases against the federal government does the EEOC have the power to adjudicate charges of discrimination.[131] For all others, it is confined to investigating the charge, seeking conciliation, and in a small percentage of cases, suing on behalf of victims of discrimination.[132] In the remaining cases, if they are not settled, the EEOC issues a right-to-sue letter to the charging party, who is then free to sue regardless of the EEOC's disposition of the charge.[133] From the perspective of private plaintiffs, the outcome of these procedures seems to be innocuous enough. The plaintiff retains the right to sue and can decide whether, all things considered, it makes sense to do so. The award of attorney's fees to nearly all prevailing plaintiffs—and few prevailing defendants—alters the calculus in favor of suit,[134] especially if the plaintiff's lawyer is willing to take most of her compensation in the form of the award of attorney's fees.

Yet the dark side of this arrangement has become apparent. First, the various stages of presenting and litigating a Title VII claim each come with their own time limits attached. If a state or local agency entertains claims under state law, the time periods become longer—up to 300 days from the date of discrimination—but calculating them becomes more complicated.[135] In the absence of a state agency, the plaintiff's charge has to be filed with the EEOC within 180 days.[136] Then the plaintiff has to sue within 90 days of receipt of a right-to-sue letter.[137] Adjusting all these time limits is a matter of some complexity, despite regulations issued by the EEOC to reduce the burden upon plaintiffs of calculating and complying with all the resulting deadlines.[138] The statute of limitations has become a defense frequently, and often successfully,

[131] 42 U.S.C. §§ 2000e-16 to -16b (2012) (concerning employment by the federal government). The same procedures apply to certain staff members of elected state officials. 42 U.S.C. § 2000e-16c (2012) (concerning otherwise exempt state officials).

[132] *See* Rutherglen, *supra* note 22, at 694-95.

[133] 42 U.S.C. § 2000e-5(f) (detailing the civil action process); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798-99 (1973) (holding that an aggrieved party can file suit no matter the cause determination from the EEOC).

[134] *See* 42 U.S.C.§ 2000e-5(k) (allowing for shifting of attorney's fees); Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418-22 (1978) (reviewing the reasoning and standards for awarding attorney's fees under Title VII).

[135] 42 U.S.C. § 2005e-5(b) to (c) (providing altered deadlines when dealing with state and local agencies).

[136] *Id.* § 2005e-5(e)(1).

[137] *Id*. § 2000e-5(f)(1).

[138] EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 114-25 (1988) (upholding "worksharing agreements" with state and local agencies to assist charging parties in compliance with time limits under Title VII).

invoked by defendants.[139] This thorny doctrinal problem reveals a second, functional problem. If the administrative process gave rise to all these complications, did it produce benefits commensurate with the resources invested in routinely processing tens or hundreds of thousands of charges? David Engstrom recently has argued that it did not, and that the resources can be redeployed to the more productive task of screening cases for treatment as class actions.[140] At the very least, exhaustion of administrative remedies should no longer be required as a prerequisite for bringing a claim to court. That would relieve the EEOC of the burden of investigating charges that are brought to it only because the charging party cannot go directly to court. Under the present system, the EEOC can screen out these claims only by finding no jurisdiction or no reasonable cause, or by obtaining a settlement that depends upon the agreement of the real parties in interest.

Engstrom is also careful to preserve the individual right to sue, at least in cases in which the EEOC decides against allowing a class action to go forward.[141] He could have taken this qualification a step further and recommended adjudication by the EEOC of such individual claims. Perhaps that alternative no longer has any chance of enactment, after it was rejected in debates over the 1964 Act and then in proposed amendments to it in the Equal Employment Opportunity Act of 1972.[142] To opponents of adjudication by the EEOC, the difference between administrative and individual control over which claims came before the EEOC would appear to be minimal, while the difference between adjudication and litigation would appear to be momentous. Plaintiffs' attorneys would lose this line of business if adjudication precluded any form of litigation. A lesson might be drawn from the EEOC's role in adjudicating claims by federal employees. The EEOC's role does not prevent plaintiffs from exiting the administrative process and presenting their claims in court. Moreover, the procedures themselves are extraordinarily complicated, partly because they must dovetail with civil service protections and remedies, making this branch of employment discrimination law into an esoteric subspecialty in the field.[143] Administrative adjudication of claims against other employers promises to be no less complicated.

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[139] *See* Charles A. Sullivan, *Raising the Dead?: The Lilly Ledbetter Fair Pay Act*, 84 TUL. L. REV. 499, 506-07 (2010) (describing how the timing scheme "often result[s] in hapless plaintiffs being poured out of court").

[140] Engstrom, *supra* note 46, at 689-711 (investigating how "insights regarding agency gatekeeping might be deployed in refashioning American job discrimination regulation").

[141] *Id.* at 710-11 (preserving the rights of individuals to seek their day in court).

[142] *See supra* notes 131-134 and accompanying text.

[143] Steven M. Ranieri, *"If at First You Don't Succeed…": An Argument Giving Federal Agencies the Ability to Challenge Adverse Equal Employment Opportunity Commission Decisions in Federal Court*, 2008 ARMY LAW. 23, 44 (characterizing the EEO complaint process for federal employees as "complex").

Similar lessons from the past caution against Engstrom's proposal to make the EEOC the gatekeeper for Title VII class actions. The EEOC would likely become the political lightning rod for disputes between employers, civil rights groups, and plaintiffs' lawyers over the equivalent of decisions of whether or not to certify a class. As the reaction to *Wal-Mart* has shown, restrictive decisions are praised by groups on the defense side while they are vilified by those on the plaintiff side.[144] Expansive decisions would generate equal and opposite reactions from the same groups. The experience of the NLRB, while not strictly analogous, reveals the pitfalls that face an administrative agency that enters into contentious disputes between labor and management. The Board has been subjected to intense political scrutiny, so much so that for several years the Board could not muster a quorum of members.[145] Recess appointments to the Board recently led the Supreme Court to severely restrict this method of filling vacancies in positions that require Senate confirmation.[146] The EEOC could easily attract the same degree of controversy as it becomes enmeshed in decisions on certification, which have remained the subject of continued and fractious disagreement in the courts over the last several decades. EEOC participation in these decisions brings with it a degree of democratic accountability that recommends it to Engstrom.[147] Yet it comes at the price of political controversy and stalemate.

No alternative to the present scheme for enforcing Title VII comes without its own distinctive risks, which make it all the more important to identify the problems that the alternative seeks to solve. Simplification of the procedures for enforcement would be desirable, but if the experience with federal employees is any guide, administrative determination of claims is likely to introduce its own complications. A more promising approach would be to address the deficiencies of private litigation, particularly in the selection of disputes to receive the full attention of lawyers and the courts. Litigation does best with high-value claims, as determined by the plaintiff's potential recovery multiplied by the likelihood of success on the merits. Plaintiffs' attorneys are likely to take these cases, especially when they are compensated essentially on a contingent-fee basis, as they are by agreement with plaintiffs themselves or through the award of fees when the plaintiffs succeed on the merits. At one extreme are the claims of highly paid employees who have been discharged

[144] *See* Greg Stohr, *Wal-Mart Ruling Gives Employers Shield from High-Dollar Suits*, BLOOMBERG BUS. (June 21, 2011), http://www.bloomberg.com/news/articles/2011-06-21/wal-mart-ruling-gives-employers-shield-from-high-dollar-suits, *archived at* http://perma.cc/7JX5-92KB (recounting reactions to decision).

[145] New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635, 2638-39 (2010) (describing how the NLRB had only two members, out of five board positions, for over two years).

[146] *See* NLRB v. Noel Canning, 134 S. Ct. 2550, 2565-67 (2014) (recess appointments can be made during recess within one session of Congress, but only if the recess is substantial in length).

[147] *See* Engstrom, *supra* note 46, at 674-88 (discussing methods to avoid regulatory capture).

and can provide strong evidence of discrimination. These plaintiffs have a good chance of a substantial recovery and their attorneys can expect a correspondingly large fee. At the opposite extreme are claims by applicants for low-wage jobs. They have little incentive to pursue these claims instead of searching for a new job, and they have little access to evidence of discrimination. The stakes for them are lower and the likelihood of recovery is reduced, so much so that few attorneys may be willing to take the case. Departures from the model of individual litigation make the most sense in these cases, assuming that the value of the claim rises above a threshold to make litigation socially useful at all. It is here where administrative proceedings, public actions, and class actions need to be considered most seriously.

No single device holds the promise of properly handling these claims. A combination of devices, possibly including private arbitration, offers the best chance for finding the low-value claims that are worth pursuing despite the fact that they have been screened out by the selection effects of litigation. Any device that does work begins by subsidizing the pursuit of such claims by making them easier for individual plaintiffs to present, either in administrative proceedings, in arbitration, or in the remedy stage of public actions or private class actions. Each of these devices has selection effects of its own so that devising the right balance among them depends upon the details of any remedial scheme. They do, however, share one common feature: they all are likely to operate better if individual plaintiffs have the right to opt out and pursue their claims in court. That option might seldom be exercised, but it provides a check upon processes that otherwise can be easily captured by insiders familiar with how they operate, and whose interests might not align with those of a plaintiff pursuing an individual claim for discrimination.

The need to invoke the checking function of litigation follows directly from the individual nature of the right to equal opportunity guaranteed by the laws against employment discrimination. Once it is granted, the individual needs some assurance that the right will be protected in the enforcement process. The existing system for enforcing Title VII, wholly apart from the complexity of its administrative preliminaries, might put too much faith in litigation without recognizing how it prefers the pursuit of some claims over others. Looking to alternatives therefore offers a promising avenue for reform. Holding litigation in reserve as a check upon those alternatives suffers from none of these defects. Existing procedures make a start in this direction; for instance, in the right of federal employees to resort to de novo proceedings in federal court instead of relying completely upon administrative adjudication, and in the right of class members to opt out from class actions that seek substantial individual relief. These safeguards built into the current procedural scheme amount to more than respect for litigation as the default option for enforcement in American law. They should be integrated into alternatives that can substitute for it, but that can go awry if they are not subject to monitoring by those most

interested in their successful operation. Individual victims of discrimination can fulfill this role by bringing claims themselves.

CONCLUSION

This Article has argued for the deep roots of individual control over individual rights under Title VII. These roots go back to the first civil rights act and forward to important aspects of current procedure. Civil rights as common law rights strongly support enforcement through litigation in the common law model. Although Congress might have made a different choice when Title VII was enacted, the fact that it did not, either then or later, has only reinforced the lessons of this history. These lessons do not determine the optimal scheme for enforcing equal opportunity and remedying discrimination. Litigation has its blind spots that prevent good claims from getting a fair hearing. Identifying those claims before the facts can be found, but after the events giving rise to the claim have occurred, has proved to be a perennial problem in the institutional design of remedial mechanisms. Bringing in too many claims costs too much and leads to too much opportunism on the part of plaintiffs and their attorneys. Bringing in too few leads to the underenforcement of laws that define the ideals of public life. Without defending unlimited reliance upon private litigation by individual plaintiffs, this Article has argued for the crucial role that private litigation has traditionally played in civil rights and that it should continue to play in the future.