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Weathering Wal-Mart

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WEATHERING *WAL-MART*

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"The Sky Is Falling!"
-Henny Penny, *Chicken Little*[1]

ABSTRACT

In Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2531 (2011), the Supreme Court held that a proposed class of over a million women that had alleged pay and promotion discrimination against the nation's largest retailer could not be certified. According to the Court, the plaintiffs had failed to establish a common thread in the case sufficient to tie their claims together. The academic response to* Wal-Mart *was immediate and harsh: the decision will serve as the death knell for mass employment litigation, undermining the workplace protections provided by Title VII of the Civil Rights Act of 1964 (Title VII). This Article embraces the view offered by scholars to date and does not engage the debate over the extent to which* Wal-Mart *will eviscerate the employment rights of workers.*

Instead, this Article attempts to find a solution to the problem created by Wal-Mart*. The academic literature has yet to thoroughly explore possible ways to minimize the impact of the Court's decision, and this Article seeks to fill that void in the scholarship. Though the case undoubtedly weakens the ability of Title VII plaintiffs to pursue class action claims, the decision still leaves substantial room for creative approaches to systemic discrimination. This Article offers three such solutions to the problem created by* Wal-Mart*: the governmental approach, the procedural response, and revised relief. This Article critiques each approach, and explains how they are useful in pursuing workplace cases that involve company-wide discrimination. This Article also situates these proposals in the context of the existing literature.*

The thesis of this Article is simple. Taking at face value the argument of scholars that Wal-Mart *has created a gaping hole for victims of systemic discrimination, this Article asks what tools are still available for plaintiffs to help fill that hole.* Wal-Mart *signals a sea change for mass*

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1 THE YALE BOOK OF QUOTATIONS 21 n.27 (Fred R. Shapiro ed., 2006).

employment litigation. The challenge now will be to find imaginative ways of pursuing systemic discrimination claims. This Article takes on that challenge.

INTRODUCTION

In the wake of the Supreme Court's controversial decision in *Wal-Mart Stores, Inc. v. Dukes*,[2] there has been an outpouring of critics decrying the case as one that will completely eviscerate the employment protections of workers across the country.[3] In *Wal-Mart*, the Supreme Court held that a class of over a million women that had alleged pay and promotion discrimination against the nation's largest retailer could not be certified under the Federal Rules of Civil Procedure.[4] The Court concluded that the claims of the purported class lacked the commonality necessary for certification.[5]

The academic response to *Wal-Mart* was swift, and scholars immediately denounced the decision as one that undermines the rights of workplace discrimination victims.[6] This assessment of *Wal-Mart* is correct, as the class action tool has been critical to the enforcement of employment protections for thousands of workers subjected to discrimination.[7] This Article thus embraces the early literature that has criticized the case as problematic for civil rights litigants. The Court's decision undoubtedly left a void for plaintiffs attempting to vindicate their rights in the face of company-wide discrimination—thus creating the *Wal-Mart* gap.

While accurately identifying the problem, the academic scholarship has yet to thoroughly explore possible solutions to the *Wal-Mart* gap. This Article attempts to fill that void in the literature and proposes several ways for plaintiffs to minimize the negative impact of this decision. *Wal-Mart* is a problem for civil rights litigants, but it is far from a disaster. This paper takes at face value the argument of many scholars that *Wal-Mart* has weakened the protections for Title VII victims.[8] Thus, this Article does not engage the ongoing debate over whether—and to what extent—*Wal-Mart* will undercut employee rights. Instead, this paper responds to a more basic inquiry: Where do we go from here?

Rather than focusing on the various protections *Wal-Mart* may have taken from plaintiffs, it is useful to explore those rights that still remain. The decision still leaves sufficient room for creative approaches to systemic discrimination, and there are many ways to handle these situations. A significant tool has been lost for plaintiffs, but many avenues to recovery still exist. This Article identifies three broad approaches to addressing systemic discrimination in light of *Wal-Mart*: the governmental approach, the procedural

2 131 S. Ct. 2541 (2011).

3 *See infra* Part II (discussing reaction to *Wal-Mart* decision).

4 *Wal-Mart*, 131 S. Ct. at 2561.

5 *Id.* at 2552.

6 *See infra* Part II (discussing scholarship addressing the *Wal-Mart* decision).

7 *See infra* Part II (discussing use of class action in employment discrimination cases).

8 *See infra* note 61 (setting forth various articles critiquing the *Wal-Mart* decision).

response, and revised relief. This Article carefully critiques each approach and explains how they may be useful in the context of company-wide discrimination.

The governmental approach suggests that the United States Equal Employment Opportunity Commission (EEOC)—which is not bound by the constraints of the *Wal-Mart* decision—should become more aggressive in pursuing pervasive discrimination.[9] The governmental approach is particularly appealing as the EEOC is in a unique position to evaluate systemic claims. The EEOC reviews all charges arising from private-sector discrimination and is thus able to quickly identify and correct widespread workplace abuse.[10] The government is also free from the requirements of Federal Rule of Civil Procedure 23, so it can pursue systemic discrimination claims without needing to satisfy the typical class action requirements of commonality, typicality, numerosity, and adequacy of representation.[11] This approach thus offers a class-action-like mechanism that would help enforce the employment rights of victimized workers.

The procedural approach offers a more creative response to *Wal-Mart*. This approach explores different procedural paths to minimizing the Court's decision. First, offensive non-mutual collateral estoppel can be used effectively by plaintiffs to streamline litigation where multiple workers have sued an employer individually.[12] By resolving common issues in these cases only a single time, the courts and litigants will recognize substantial judicial efficiencies. As common employment policies, managers, and discriminatory facts frequently pervade these cases, collateral estoppel is an often overlooked, yet effective tool for addressing multiple claims in workplace disputes. Similarly, judges may also streamline discrimination claims by consolidating cases that are brought against the same employer.[13] Unlike collateral estoppel, where an issue is resolved in an earlier case for subsequent litigation, consolidation allows important questions to be decided *at the same time*.[14] By trying multiple claims or issues through a single trial, the courts have significant discretion and authority to simplify employment litigation.

An additional procedural response to *Wal-Mart* would be to pursue a litigation strategy that attempts to limit the impact of the decision. *Wal-Mart* can be seen as a unique class action case, involving the single largest workplace dispute brought against the country's biggest private employer.[15] In its decision, the Court repeatedly emphasized both the size of the employer and

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9 *See infra* Section II.A (discussing issue of whether EEOC is bound by *Wal-Mart*).

10 *See infra* Section II.A (discussing administrative process for filing Title VII discrimination charges).

11 *See* Gen. Tel. Co. of the Nw. v. EEOC, 446 U.S. 318, 323 (1980).

12 *See* 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4402 (2002 & Supp. 2013).

13 FED. R. CIV. P. 42(a).

14 *Id.*

15 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 ("Wal-Mart is the Nation's largest private employer.").

the enormity of the case that had been brought.[16] An argument can thus be made that the decision should only apply to Wal-Mart itself or to the handful of other corporations that might be similarly situated. By cabining *Wal-Mart*, the lower courts could limit the scope of the decision to only the largest cases brought against the biggest employers.

A final procedural strategy would be to take *Wal-Mart* at its word—an approach contrary to any efforts at cabining the decision. Pursuant to this strategy, plaintiffs who might otherwise pursue class action claims would instead file suit individually against the employer. An employer that would typically face a single class action claim would instead find itself defending against hundreds or even thousands of individual cases.[17] By embracing *Wal-Mart*, plaintiffs could overwhelm employers through carefully orchestrated mass individual litigation.

In addition to the governmental and procedural responses to the Court's decision, this Article advocates taking a renewed look at the relief available to discrimination victims. In light of the *Wal-Mart* decision, the time has come to re-evaluate the effectiveness of punitive damages under Title VII. Punitive relief serves many of the same goals as class action litigation in workplace disputes—deterrence, retribution, and education.[18] The sting of *Wal-Mart* could thus be substantially lessened by adopting a more vibrant role for punitive relief in employment cases.

Though the suggestions proposed in this paper cannot completely undo the damage caused by the Court's decision, they can go a long way toward minimizing its impact. With the weight of the decision bearing down on employment discrimination victims, innovative approaches to mass litigation are critical to weakening the blow of the decision. This Article attempts to take a creative look at alternative solutions, but the suggestions it offers are by no means exhaustive. Instead, this Article opens a dialogue on various ways to approach the problem. No solution, however, can completely take the place of the class action mechanism in employment discrimination cases. These solutions can only help to fill the *Wal-Mart* gap and to help prevent the sky from completely falling on discrimination victims.

This paper begins by providing a brief overview of the Supreme Court's recent decisions impacting mass litigation in the employment discrimination context.[19] Next, this Article offers different approaches to *Wal-Mart*, specifically exploring possible governmental and procedural responses to the decision. The Article then examines the possibility of revising the relief available in workplace cases, carefully critiquing this approach.[20] This Article con-

16 *See id.* at 2547, 2552, 2555–57.

17 As the *Wal-Mart* case illustrates, there could even be over a million individual claims of discrimination. *See id.* at 2547.

18 *See infra* note 209 (noting scholarship discussing the role of punitive damages in litigation).

19 *See infra* Part I (providing an overview of *Wal-Mart* and *Concepcion* cases).

20 *See infra* Part II.

cludes by situating the ideas offered here in the context of the broader academic scholarship.[21]

I. *WAL-MART* (AND A NOTE ABOUT *CONCEPCION*)

Though decided recently, there is already an abundance of scholarship outlining the *Wal-Mart* decision. This Article thus provides a more limited review of the case, focusing only on the key elements of the decision.

In *Wal-Mart*, a proposed class of over one million current and former workers sued the country's largest employer for sex discrimination under Title VII of the Civil Rights Act of 1964.[22] The plaintiffs maintained that the pay and promotion practices of Wal-Mart ran afoul of the statute.[23] The lower court had approved the certification of this class, and the Supreme Court granted certiorari to determine whether the requirements of Federal Rule of Civil Procedure 23(a) and (b)(2) had been satisfied.[24]

Wal-Mart, a nation-wide retailer, placed pay and promotion issues within the "local managers' broad discretion," which often resulted in subjective decisions.[25] The plaintiffs maintained that this subjective process resulted in an unlawful disparate impact against women, as men had been advantaged at the company in pay and promotion decisions.[26] The plaintiffs further alleged intentional discrimination, as Wal-Mart was purportedly aware of this discriminatory impact, yet did nothing to change its procedures.[27] The plaintiffs also alleged that certification of the class was appropriate, as there was "a strong and uniform 'corporate culture'" of bias at the company, to which every female employee was subjected.[28] The victims sought both monetary and injunctive relief.[29]

Reviewing these facts, the Supreme Court considered whether the class should be certified under Federal Rule of Civil Procedure 23.[30] Under this rule, the plaintiffs had to show numerosity, commonality, typicality, and adequacy of representation to certify the class.[31] Additionally, under Rule 23(b)(2)—on which the plaintiffs relied—there must be a further showing that "'final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.'"[32]

The Court concluded that the "crux of the case" centered around Rule 23(a)(2), and whether there was sufficient commonality between the

21 *See infra* Part III.
22 131 S. Ct. at 2547.
23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.* at 2548.
27 *Id.*
28 *Id.*
29 *Id.*
30 *Id.*
31 *Id.* (citing FED. R. CIV. P. 23(a)).
32 *Id.* at 2548–49 (quoting FED. R. CIV. P. 23(b)(2)).

claims.[33] Thus, individuals must "'have suffered the same injury,'" and there must be a common question "capable of classwide resolution."[34] The Court thus looked for the "glue" that might bind the alleged discriminatory actions together.[35] However, the majority was unable to find this common thread in the case.[36]

The Court rejected the argument that the company had maintained a "general policy of discrimination," which would have satisfied this commonality requirement.[37] The plaintiffs' social framework argument that there was a "corporate culture" of discrimination at Wal-Mart failed as it lacked any specificity.[38] And, the discretion given to Wal-Mart managers in making pay and promotion decisions suggested that these decisions were individualized.[39] Thus, there was no uniform, across-the-board policy of discrimination at the company that would have supported the commonality requirement.[40]

Similarly, the statistics and anecdotal submissions offered by the plaintiffs also failed to establish any uniform discriminatory policy at Wal-Mart.[41] The Court emphasized that the data offered "cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends."[42] This is particularly true as local supervisors could have asserted that the number of interested, qualified women in the labor pool in their area did not "mirror the national or regional statistics."[43] The anecdotal evidence offered to support the statistics was also "too weak" to support the class claim, as there were simply not enough instances presented.[44] In proportional terms, there was only one anecdotal discriminatory experience offered per 12,500 class members, implicating only 235 of the 3400 total stores.[45] These numbers fell far short of establishing a pattern or practice of discrimination at the company.[46]

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33 *Id.* at 2550–51.

34 *Id.* at 2551 (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 157 (1982)).

35 *Id.* at 2552.

36 *Id.*

37 *Id.* at 2553.

38 *Id.*

39 *Id.* at 2554.

40 *Id.* The Court noted, "Respondents have not identified a common mode of exercising discretion that pervades the entire company—aside from their reliance on [a] social frameworks analysis that we have rejected." *Id.* at 2554–55.

41 *Id.* at 2555.

42 *Id.*

43 *Id.*

44 *Id.* at 2556.

45 *Id.* The majority also took issue with the dissent's argument that the decision mixes the commonality finding with "Rule 23(b)(3)'s inquiry into whether common questions 'predominate' over individual ones." *Id.* The Court noted that it "consider[s] dissimilarities not in order to determine . . . whether common questions *predominate*, but in order to determine . . . whether there *is* even a single common question. And there is not here." *Id.* (internal quotation marks omitted).

46 *Id.* at 2555.

The Court thus believed that the plaintiffs had failed to establish the commonality requirement of the federal rules. The Court summarized its view that the massive class claim should not be certified by quoting Chief Judge Kozinski's dissenting opinion in the lower court, which noted that the class members

> "held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed . . . . Some thrived while others did poorly. They have little in common but their sex and this lawsuit."[47]

The Court thus rejected the plaintiffs' attempts to certify the class and reversed the lower court's holding. The Court also determined that the plaintiffs' backpay claims should not have been certified pursuant to Rule 23(b)(2).[48] That rule does not permit certification where victims "would be entitled to an individualized award of monetary damages."[49] After this decision, then, monetary claims cannot be certified where "the monetary relief is not incidental to the injunctive or declaratory relief" in the case.[50]

Four Justices dissented from the opinion, highly criticizing the decision.[51] The dissent largely took issue with the majority's interpretation of the "commonality" requirement of Rule 23(a)(2).[52] The dissent accused the majority of importing the "predominance" requirement of Rule 23(b)(3) to the commonality test, thus improperly "blend[ing]" the two rules and raising the bar for plaintiffs.[53] In the dissent's view, the discretion that supervisors exercised in making pay and promotion decisions created a class-wide issue.[54] As the dissent argued, "A system of delegated discretion . . . is a practice actionable under Title VII when it produces discriminatory outcomes."[55]

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47 *Id.* at 2557 (alteration in original) (quoting Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 652 (9th Cir. 2010) (Kozinski, C.J., dissenting)). As the Court also noted, "Other than the bare existence of delegated discretion, respondents have identified no 'specific employment practice'—much less one that ties all their 1.5 million claims together. Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice." *Id.* at 2555–56.

48 *Id.* at 2557.

49 *Id.* The Court noted that they "think it clear that individualized monetary claims belong in Rule 23(b)(3)." *Id.* at 2558.

50 *Id.* at 2557. This Article focuses much more heavily on the commonality discussion set forth in the Court's opinion. For this reason, only a brief summary of the Court's backpay analysis is addressed. *See id.* at 2557–61.

51 *Id.* at 2561 (Ginsburg, J., dissenting).

52 *Id.* at 2561–62.

53 *Id.* at 2561–66. Under Rule 23(b)(3), the plaintiffs must show "questions of law or fact common to class members predominate over any questions affecting only individual members and that a class action is superior to other available methods for . . . adjudicating the controversy." *Id.* at 2566 (internal quotation marks omitted).

54 *Id.* at 2567.

55 *Id.*

Wal-Mart was the second recent Supreme Court opinion to limit the complex litigation rights of workers, as the Court had decided *AT&T Mobility LLC v. Concepcion* less than two months earlier.[56] In *Concepcion*, the Supreme Court held that the Federal Arbitration Act preempted California law, thus restricting the ability of individuals in the case to pursue complex arbitration claims.[57] In its decision, the Court expressed significant concerns over class-wide arbitration, noting that it "requires procedural formality" and "makes the process slower, more costly, and more likely to generate procedural morass."[58] Though *Concepcion* arose in the context of a consumer dispute, its implications for workplace litigants are substantial, as many employers require that employees arbitrate workplace discrimination claims.[59] While *Concepcion* is beyond the scope of this Article, it demonstrates the difficulty plaintiffs now face when attempting to address systemic workplace discrimination.[60]

II. RESPONSES TO *WAL-MART*

The *Wal-Mart* decision is problematic. Scholars immediately—and correctly—denounced the case as one that undermines the rights of workplace discrimination victims.[61] *Wal-Mart* takes away a significant tool from many of

56 131 S. Ct. 1740 (2011).

57 *Id.* at 1753.

58 *Id.* at 1751 (emphasis omitted).

59 *See, e.g.*, EEOC v. Waffle House, Inc., 534 U.S. 279, 282 (2002) (discussing arbitration agreements in the employment context); *see also* Edward A. Marshall, *Title VII's Participation Clause and* Circuit City Stores v. Adams*: Making the Foxes Guardians of the Chickens*, 24 BERKELEY J. EMP. & LAB. L. 71, 75 (2003) (noting that "more employers [are] seeking to impose pre-dispute arbitration agreements on their employees . . . and more courts [are] willing to hold that Title VII claims fall within the scope of disputes that may be subject to compulsory arbitration").

60 *See* L. Camille Hébert, *The Supreme Court's 2010–2011 Labor and Employment Law Decisions: A Large and "Mixed Bag" for Employers and Employees*, 15 EMP. RTS. & EMP. POL'Y J. 279, 280 (2011) (noting that *Wal-Mart* and *Concepcion* "will make it substantially easier for employers to avoid facing class actions by their employees challenging their employment practices, meaning that in many cases, those employers will avoid facing legal challenges by their employees at all"); Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 718 (2012) ("In the near future, we can expect that even more companies will impose arbitral class action waivers as a means to insulate themselves from class actions because *Concepcion* has changed the calculus.").

61 *See generally* Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395, 397 (2011) ("[T]he Court did more than pull the procedural rug out from under the decade-long lawsuit; it called into question the future of systemic disparate treatment law."); Melissa Hart, *Civil Rights and Systemic Wrongs*, 32 BERKELEY J. EMP. & LAB. L. 455, 457 (2011) ("Individual claims alone simply will not ensure—or even permit—full enforcement of federal civil rights laws."); Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, 106 NW. U. L. REV. COLLOQUY 34, 34 (2011), *available at* http://www.law.northwestern.edu/lawreview/colloquy/2011/18/LRColl2011n18Malveaux.pdf (discussing the future of class actions after *Wal-Mart)*; George Rutherglen, Wal-Mart, AT&T Mobility*, and the Decline of the Deterrent Class Action*, 98 VA. L. REV. IN BRIEF

those plaintiffs that allege employment discrimination. The Title VII class action suit has provided significant benefits to victims over the years, and even the threat of this type of litigation serves as an incentive to employers to avoid engaging in unlawful behavior.[62] Class action cases also tend to make headlines, thus educating the public of the ongoing problems of employment discrimination.[63] And, in many ways, these cases punish employers that have permitted widespread systemic discrimination to pervade the workplace. The negative impact of the decision for employment discrimination victims can thus not be overstated.[64]

Putting aside the debate over the extent to which *Wal-Mart* is a problem for plaintiffs, this Article assumes that the problem exists and attempts to identify those avenues that still remain for addressing systemic discrimination. This Part outlines three broad approaches to filling the gap left by *Wal-Mart* for class action litigants: the governmental approach, the procedural response, and revised relief. This Article critiques each approach, and explains how each may be useful in providing relief to those suffering from systemic discrimination. The three approaches explored here are not meant to be exhaustive, and there are certainly numerous ways that plaintiffs may address the *Wal-Mart* decision. Instead, this Article simply explores three viable avenues that litigants may pursue in light of this controversial case.

24, 24 (2012) (discussing the decline of deterrent class action suits); Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After* Wal-Mart v. Dukes, 32 BERKELEY J. EMP. & LAB. L. 477, 479 (2011) ("It is not yet clear what impact the Court's *Wal-Mart* decision will have but it is likely to make certification of a nationwide class far more difficult."); Noah D. Zatz, *Introduction: Working Group on the Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 387, 387 (2011) ("*Wal-Mart v. Dukes* opens up a third dimension to the ongoing judicial enfeeblement of employment discrimination law.").

62 *See* Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301, 1337 (1990) ("An aggregate class-based recovery can have substantial economic repercussions, and the threat of affirmative relief serves as a substantial incentive to cure disparities.").

63 For example, the *Wal-Mart* case itself remained in the headlines for years, thus providing information to the public about the parameters of Title VII. *See* Jenna Goudreau, *Walmart Faces the Largest Sex Discrimination Lawsuit in U.S. History*, FORBES (Apr. 27, 2010, 2:32 PM), http://www.forbes.com/sites/work-in-progress/2010/04/27/wal-mart-faces-the-largest-sex-discrimination-lawsuit-in-u-s-history; Robert Barnes, *Supreme Court Blocks Massive Sex-Discrimination Suit Against Wal-Mart*, WASH. POST (June 20, 2011), http://www.washingtonpost.com/politics/supreme-court-blocks-massive-sex-discrimination-suit-against-wal-mart/2011/06/20/AGCQ81cH_story.html.

64 *Cf.* Nicole Hitch, *Reconsidering the Scope and Consequences of Appellate Review in the Certification Decision of* Dukes v. Wal-Mart Stores, Inc., 53 CLEV. ST. L. REV. 747, 759 (2006) (noting that scholars have identified the benefits of class actions to "include (1) facilitating judicial economy, (2) affording a remedy to victims who cannot obtain relief through individual actions, (3) spreading the costs of litigation in order to enhance access to the courts, (4) protecting defendants from multiple, inconsistent verdicts, and (5) adequately protecting the interests of absent class members").

A. The Governmental Approach

Perhaps the most obvious response to *Wal-Mart* is insisting that the case applies only to *private* plaintiffs bringing suit pursuant to Federal Rule of Civil Procedure 23. Thus, governmental agencies, such as the U.S. Equal Employment Opportunity Commission (EEOC), are not subject to the decision. The EEOC is free to step in and fill the *Wal-Mart* gap by bringing cases of widespread systemic discrimination.[65]

Indeed, the EEOC is not even subject to the requirements of Rule 23[66] and can proceed with pattern-or-practice litigation even if it is unable to satisfy this rule.[67] As the Supreme Court clearly held over three decades ago in *General Telephone v. EEOC*, "Rule 23 is not applicable to an enforcement action brought by the [Commission] in its own name and pursuant to its authority . . . to prevent unlawful employment practices."[68] In a pattern-or-practice claim, the government must satisfy certain basic statutory requirements prior to filing the case.[69] These administrative prerequisites include filing a charge against the employer, providing notice, conducting an investigation that results in a determination of reasonable cause to believe that discrimination has occurred, and making an effort to conciliate the matter.[70] Once these prerequisites have been completed, the EEOC is free to file suit in the matter and need not satisfy the requirements of commonality, typicality, numerosity, or adequacy of representation found under the federal rules for class actions.[71]

One response to *Wal-Mart*, then, would be for the EEOC to become more involved in filing pattern-or-practice claims. A more vibrant governmental approach to systemic employment discrimination could thus help fill the *Wal-Mart* gap.[72] The EEOC is in a particularly appropriate position to

65 *See* Hart, *supra* note 61, at 475 ("One possibility [of addressing *Wal-Mart*] is a greater reliance on the enforcement efforts of the E.E.O.C. Given that pattern or practice claims pursued by the E.E.O.C. are not subject to the requirements of Rule 23, these actions may be a more effective tool for addressing structural discrimination than private litigation subject to the post-*Wal-Mart* interpretation of Rule 23.").

66 *See* Gen. Tel. Co. of the Nw. v. EEOC, 446 U.S. 318, 323 (1980).

67 *See* 42 U.S.C. § 2000e-5(f)(1) (2006).

68 *Gen. Tel.*, 446 U.S. at 318.

69 *See* Charles S. Mishkind & V. Scott Kneese, *Big Risks and Opportunities, Class Actions and Pattern and Practice Cases*, *in* 1 30TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 403, 435 (2001).

70 *Id.* (citing EEOC v. Container Corp. of Am., 352 F. Supp. 262, 264–65 (M.D. Fla. 1972)). *See generally* Timothy G. Healy, Note, *Sexual Pattern: Why a Pattern or Practice Theory of Liability Is Not an Appropriate Framework for Claims of Sexual Harassment*, 10 ROGER WILLIAMS U. L. REV. 537, 537 (2005) (discussing procedural requirements of pattern-or-practice claims brought by the EEOC).

71 Mishkind & Kneese, *supra* note 69, at 435. Indeed, "[t]he EEOC may proceed in a unified action to obtain the most satisfactory overall relief, despite the fact that competing interests may be involved and that particular groups may appear to be disadvantaged." *Id.*

72 *See* Hart, *supra* note 61, at 475 (discussing potential role of EEOC after *Wal-Mart* decision).

take on this role, as it should have knowledge of most widespread claims of workplace abuse. All individuals alleging discrimination in the private sector are required to file a charge with the EEOC as part of the administrative process.[73] And the EEOC investigates all of these charges and issues a determination.[74] As all workplace cases go before the EEOC, the agency could easily track those instances where systemic discrimination is present and become more active in pursuing these claims. Indeed, widespread, egregious discrimination is already a significant consideration used by the agency in deciding whether to bring suit.[75] In a response to *Wal-Mart*, then, the agency would simply need to step up its efforts in this regard.

The governmental response to *Wal-Mart* is appealing for several important reasons. EEOC systemic claims provide several benefits to plaintiffs that are unavailable through individual litigation. Most notably, the EEOC can often recover for victims who have not filed a timely charge of discrimination.[76] In fact, the government takes the view that it can even recover for individuals who are not identified until discovery begins.[77] Not all courts agree with this approach, but it demonstrates the more flexible nature of systemic claims brought by the EEOC.[78]

Additionally, the EEOC will often seek individual *monetary* relief on behalf of specific victims.[79] This is in addition to the injunctive relief that is

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73 *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, FILING A CHARGE OF DISCRIMINATION [hereinafter EEOC CHARGE PRACTICES], *available at* http://www.eeoc.gov/employees/charge.cfm. *See generally* Nancy M. Modesitt, *Reinventing the EEOC*, 63 SMU L. REV. 1237, 1240–43 (2010) (discussing role of EEOC in addressing workplace discrimination). The EEOC sets forth its charge filing process on its website.

74 *See* EEOC CHARGE PRACTICES, *supra* note 73; Modesitt, *supra* note 73, at 1241–42.

75 The EEOC identifies its systemic litigation program as core to its fundamental mission. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, SYSTEMIC DISCRIMINATION, [hereinafter EEOC SYSTEMIC LITIGATION POLICY], *available at* http://www.eeoc.gov/eeoc/systemic/index.cfm ("The identification, investigation and litigation of systemic discrimination cases, along with efforts to educate employers and encourage prevention, are integral to the mission of the EEOC.").

76 *See* Mishkind & Kneese, *supra* note 69, at 435 ("All class members need not satisfy administrative prerequisites when the EEOC brings an action on behalf of a class. For instance, in an EEOC action under Title VII, those who were discriminated against beyond the 300-day EEOC filing period could become class members if one of them alleged a violation within the 300-day period.").

77 *Cf.* EEOC v. United Road Towing, Inc., No. 10 C 6259, 2012 WL 1830099, at *3 (N.D. Ill. May 11, 2012) ("[T]he Court will not inquire into whether the EEOC's administrative investigation adequately supported the claims of the 17 claimants on behalf of whom the EEOC has brought suit.").

78 *See* EEOC v. CRST Van Expedited, Inc., 679 F.3d 657, 690 (8th Cir. 2012) (holding that as to four of the alleged discrimination victims in the case, "we will affirm the district court's grant of summary judgment on the alternative ground that the EEOC failed to discharge its pre-suit duties under Title VII to investigate and conciliate these claims, as they did not even accrue until after the EEOC had instituted the action").

79 *See* Jason R. Bent, *Systemic Harassment*, 77 TENN. L. REV. 151, 193 (2009) ("Currently, when the EEOC brings a systemic harassment case it typically alleges claims under both Section 706 and Section 707 and seeks monetary damages as well as injunctive relief."); *see*

also typically sought in pattern-or-practice claims.[80] The ability of the government to attain monetary relief for individuals in class-action-type litigation provides a substantial benefit to discrimination victims. After *Wal-Mart*, it is clear that individuals will have considerable difficulty securing this type of relief through private class actions, even where such actions are allowed.[81] As the Court made clear, "claims for monetary relief" cannot be certified under Federal Rule of Civil Procedure 23(b)(2), "at least where . . . the monetary relief is not incidental to the injunctive or declaratory relief."[82] The EEOC can thus help fill the *Wal-Mart* gap by seeking monetary relief through pattern-or-practice claims.

Finally, if the government is successful in establishing a pattern or practice of discrimination, it obtains a substantial procedural benefit in the case. Where such discrimination is sufficiently alleged, the burden of proof switches from the EEOC to the defendant.[83] Thus, the company has the burden of establishing that it is *not* liable for specific instances of discriminatory conduct.[84] This is considerably different from the typical case of individual discrimination, where the plaintiff maintains the burden of proof throughout the litigation.[85]

The governmental approach is not without its limitations, however.[86] The EEOC is a historically underfunded agency.[87] Thus, the government would likely lack the resources necessary to adequately fill the role previously

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also Modesitt, *supra* note 73, at 1248–49 (discussing monetary relief attained by EEOC for victims of discrimination).

80 *See* Bent, *supra* note 79, at 193 (noting EEOC's practice of requesting injunctive relief in certain systemic cases).

81 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557–61 (2011).

82 *Id.* at 2557.

83 *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 327 (1977); Ellen M. Athas, *Defendant's Burden of Proof in Title VII Class Action Disparate Treatment Suits*, 31 AM. U. L. REV. 755, 773 (1982) ("In a pattern or practice suit, the plaintiff must show the existence of a policy of discrimination. The burden then shifts to the defendant to rebut such a showing by demonstrating that 'the Government's proof is either inaccurate or insignificant.'" (quoting *Int'l Bhd. of Teamsters*, 431 U.S. at 360)); *see also* Bent, *supra* note 79, at 156–57 (discussing framework for analyzing systemic discrimination cases provided by the Supreme Court in *Teamsters*).

84 *See* Athas, *supra* note 83, at 773 ("Once a pattern or practice of discrimination is proved, the court may infer that any particular employment decision was made according to that illegal policy.").

85 *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973) (setting forth the most commonly used analysis for individual disparate treatment claims). *See generally* Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 110 (2007) (discussing Supreme Court's decision in *McDonnell Douglas*).

86 *Cf.* Hart, *supra* note 61, at 475 ("Of course, the challenge in E.E.O.C. litigation will be whether defendants can successfully argue that they are entitled to present individualized defenses as to every specific employee in these cases as well.").

87 *See, e.g.*, *Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1568, 1575 (1996) ("Because of the policymaking void created by the combination of statutory ambiguity and an underfunded, relatively weak EEOC, other branches and levels of government have clarified and advanced employment discrimination law more aggressively.").

played by the private plaintiffs' bar in pursuing class action suits.[88] And, if the EEOC were to focus its efforts more keenly on systemic discrimination, it would come at the cost of not pursuing as many cases of individual employment wrongs.[89] Cases of individual workplace discrimination also play a critical role in Title VII litigation, and backing away from some of these cases would certainly undermine the EEOC's enforcement efforts. The bottom-line problem would thus be resources. As an underfunded agency, the EEOC could choose to pursue more class action cases, but it would come at a significant cost.[90]

Similarly, there are substantial differences between EEOC pattern-or-practice litigation and suits brought by the private plaintiffs' bar.[91] Most notably, the EEOC represents the government, rather than the individual victims involved.[92] While the interests of the two groups certainly overlap, there are often substantial differences in the goals of litigation between the victims and the government.[93] In particular, there may often be a divergence in the type of relief the two groups view as appropriate in a particular case.[94] Of course, individual plaintiffs would be free to seek their own counsel to intervene in these matters to protect their rights.[95]

Finally, there may be some remaining questions as to whether the *Wal-Mart* decision limits or restructures what a governmental pattern-or-practice case would look like. It is possible that the strict commonality requirement adopted by the *Wal-Mart* Court will also be applied to EEOC pattern-or-practice claims. It is equally possible that the courts will limit the type of relief the government can seek in these types of actions. These possible limitations

88 *Cf.* Modesitt, *supra* note 73, at 1263 ("[T]he EEOC should limit the number of its cases so that it can provide sufficient resources to do the job properly when it elects to do so.").

89 *Cf. id.* at 1260–65 (proposing more effective use of EEOC's limited resources).

90 *See, e.g.*, EEOC v. Britrail Travel Int'l Corp., 733 F. Supp. 855, 862 n.10 (D.N.J. 1990) ("The court appreciates the EEOC, like many government agencies, may well be overworked, underfunded and understaffed.").

91 *See generally* Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 2 (1996) (discussing the role of EEOC and private attorneys in enforcing employment discrimination law).

92 *See* EEOC v. Waffle House, Inc., 534 U.S. 279, 287 (2002) (noting "the difference between the EEOC's enforcement role and an individual employee's private cause of action").

93 *See id.*; Gen. Tel. Co. of the Nw. v. EEOC, 446 U.S. 318, 326 (1980) ("When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.").

94 *See Waffle House*, 534 U.S. at 279; *Gen. Tel.*, 446 U.S. at 326 ("Although the EEOC can secure specific relief, such as hiring or reinstatement, constructive seniority, or damages for backpay or benefits denied, on behalf of discrimination victims, the agency is guided by 'the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement.'" (citation omitted)).

95 42 U.S.C. § 2000e-5(f)(1) (2006) ("The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision.").

seem unlikely, however. *Wal-Mart* was decided specifically under Federal Rule of Civil Procedure 23.[96] And the Court was clear that the contours of that rule were driving its decision. However, the Supreme Court has held that the EEOC is *not* subject to Rule 23, and the *Wal-Mart* decision would thus be largely inapplicable to governmental actions.[97] Notably, the EEOC has already taken the position that *Wal-Mart* does not impact its authority to pursue systemic discrimination claims.[98] Nonetheless, it is difficult to forecast how the lower courts will interpret *Wal-Mart* in the context of pattern-or-practice cases.

In sum, the governmental approach is appealing. It offers a class-action-like mechanism to fill much of the *Wal-Mart* gap. It allows the government to seek both monetary and injunctive relief for employment discrimination victims, even where a timely charge has not been filed. And, there are notable procedural benefits to this type of litigation. However, it is far from a perfect solution. The government simply lacks the resources necessary to completely take over all systemic claims. And the interests of the government are not always aligned with those of individual plaintiffs. Finally, there may be some question as to whether *Wal-Mart* itself undermines the EEOC's ability to bring pattern-or-practice claims.[99]

B. Procedural Responses

In addition to the governmental approach, there are also many procedural vehicles available to plaintiffs that could help fill the *Wal-Mart* gap. These procedural responses help address the shortcomings of individual litigation where the employer discrimination is pervasive and widespread. These procedural responses would thus tend to focus on the similarity in issues between the various victims of employment discrimination and help find ways of streamlining this litigation before the courts. Though there are numerous ways to approach systemic discrimination from a procedural perspective,

96 *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011) ("We consider whether the certification of the plaintiff class was consistent with Federal Rules of Civil Procedure 23(a) and (b)(2).").

97 *See Gen. Tel.*, 446 U.S. at 326 ("The aggrieved person may also intervene in the EEOC's enforcement action. These private-action rights suggest that the EEOC is not merely a proxy for the victims of discrimination and that the EEOC's enforcement suits should not be considered representative actions subject to Rule 23.").

98 *See* EEOC's Opposition to Texas Roadhouse's Motion to Dismiss at 11 n.8, EEOC v. Tex. Roadhouse, Inc., No. 1:11-cv-11732-DJC (D. Mass. Nov. 9, 2012); EEOC's Response in Opposition to Defendants' Motion to Dismiss First Amended Complaint at 12, EEOC v. Bass Pro Outdoor World, LLC, No. 11-CV-03425 (S.D. Tex. Apr. 3, 2012) ("Here, the Commission is not subject to the requirements of Rule 23, does not have to prove commonality, has not engaged in discovery, and does not allege the same kind of pattern or practice of discrimination as the plaintiffs alleged in *Wal-Mart*. In sum, *Wal-Mart* is inapposite.").

99 *See generally* Michael J. Zimmer, Wal-Mart v. Dukes*: Taking the Protection Out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409 (2012) (discussing impact of *Wal-Mart* decision).

using collateral estoppel, consolidating cases, and cabining *Wal-Mart* deserve particular attention.[100]

1. Offensive Use of Collateral Estoppel

One currently overlooked response to the *Wal-Mart* decision would be for plaintiffs to more aggressively use collateral estoppel as part of their litigation strategy. This procedural mechanism could be considered where victims face similar issues or fact patterns arising from a single employer. The classic definition of collateral estoppel provides that it "bars the relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties."[101] Also known as issue preclusion, it is commonly stated that collateral estoppel requires more than that "some question of fact or law in a later suit was relevant to a prior adjudication between the parties."[102] Instead, "the contested issue must have been litigated and necessary to the judgment earlier rendered."[103]

Collateral estoppel serves to prevent important issues from being retried in subsequent litigation.[104] The Supreme Court has clarified that "mutuality of parties" is not necessary for claims of issue preclusion.[105] Thus, a plaintiff need not have been directly involved in prior litigation with the defendant to avail itself of this doctrine.[106] Offensive non-mutual collateral estoppel therefore allows plaintiffs to prevent the defendant from relitigating questions that have already been resolved, even where a different plaintiff was involved in the earlier case.[107] There are obvious concerns in the application of this doctrine, which is why the Supreme Court was clear that the lower courts would have "broad discretion" in how (and whether) it is utilized.[108]

100 One additional procedural response to *Wal-Mart*, not addressed here, is the potential use of issue class certification. *See* FED. R. CIV. P. 23(c)(4) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues."). Issue class certification has the potential to be a highly effective tool when pursuing systemic-type employment litigation. Given the breadth of this issue, however, the author intends to address Rule 23(c)(4) in a subsequent paper.

101 18 WRIGHT ET AL., *supra* note 12, § 4402 (internal quotation marks omitted).

102 *Id.* (internal quotation marks omitted).

103 *Id.* (internal quotation marks omitted).

104 *Id.*; *see also* 50 C.J.S. *Judgments* § 928 (2012) ("Issue preclusion . . . may apply in a second action . . . , but does not extend beyond the matter actually litigated and determined in the first action."); 47 AM. JUR. 2D *Judgments* § 464 (2012) ("Collateral estoppel . . . refers to the effect of a prior judgment in limiting or precluding relitigation of issues that were actually litigated in the previous action, regardless of whether the previous action was based on the same cause of action as the second suit.").

105 *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326–28 (1979). "Under this mutuality doctrine, neither party could use a prior judgment as an estoppel against the other unless both parties were bound by the judgment." *Id.* at 326–27.

106 *Id.* at 327.

107 *Id.* at 329–31.

108 *Id.* at 331; *see* Steven P. Nonkes, Note, *Reducing the Unfair Effects of Nonmutual Issue Preclusion Through Damages Limits*, 94 CORNELL L. REV. 1459, 1460–61 (2009) ("Allowing issue preclusion in the absence of mutuality raises serious fairness concerns, however, and

The touchstone in this regard is the question of fairness.[109] Offensive nonmutual collateral estoppel should only be used "on a case-by-case basis depending on whether the prerequisites of a full and fair opportunity to litigate the issue in the prior action and fairness are present."[110]

In deciding whether the lower courts should permit the offensive use of issue preclusion, the Supreme Court outlined four different factors to consider.[111] These factors all work to ensure fairness in the application of the doctrine:

> First, the [plaintiff] "probably could not have joined in [the prior] action." Second, the seriousness of the case and the possibility of subsequent claims by private parties gave the defendants substantial incentive to contest the first action. Third, the decision in the [prior] action did not contradict any previous decision. Finally, no new procedural advantages likely to produce a different result had accrued to the defendants in the second action.[112]

Simply put, then, plaintiffs may use collateral estoppel where they could not have joined the prior case, where the prior case was of substantial significance to the defendant, where there is no conflict between the prior decision and other holdings, and where different procedural issues are not involved in the new case.[113] And these elements must all be weighed by the district court, whose decision should be given significant deference.[114]

The offensive use of collateral estoppel would provide an important procedural mechanism for plaintiffs to fill the *Wal-Mart* gap in employment discrimination cases. It is not uncommon for an employer to discriminate against multiple individuals.[115] And where this discrimination occurs at a single employment site, there are likely to be many of the same issues, facts, and policies involved in the case.

Take, for example, a typical hostile-environment case where a male supervisor harasses several female workers. In this type of case, there may not be enough individuals involved to certify a class action, or the claims may not have sufficient commonality.[116] Nonetheless, the potential claims would likely share several important issues and facts, such as whether the employer had an effective employment policy in place, whether the alleged harasser was acting as a supervisor under the law of the particular jurisdiction, or

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it may distort the litigation process by providing incentives for litigants to overlitigate, lulling them into underlitigating, or causing them to shift the timing of their suits.").

109 *See* 47 AM. JUR. 2D *Judgments* § 571 (2012).

110 *Id.*

111 *See* John Bernard Corr, *Supreme Court Doctrine in the Trenches: The Case of Collateral Estoppel*, 27 WM. & MARY L. REV. 35, 41–42 (1985) (citing *Parklane Hosiery Co.*, 439 U.S. at 332–33).

112 *Id.* (footnotes omitted) (quoting *Parklane Hosiery Co.*, 439 U.S. at 332–33).

113 *Id.*

114 *Id.*

115 *See* Joseph A. Seiner, *Punitive Damages, Due Process, and Employment Discrimination*, 97 IOWA L. REV. 473, 495 (2012) ("An employer that discriminates against one individual may often discriminate against others as well.").

116 *See generally* FED. R. CIV. P. 23 (setting forth requirements to certify a class).

whether the employer had knowledge that any harassment had occurred.[117] Where established in one case, these facts should not have to be relitigated in subsequent actions.[118] By resolving common issues only once, future cases would be streamlined, leading to significant judicial economies.[119] Collateral estoppel could thus significantly help reduce the role of burdensome litigation in these types of cases.

It is not unusual for an employer to be sued by multiple plaintiffs, and where common facts or policies are involved in the litigation, there would be little reason for a court to resolve these issues more than a single time.[120] By permitting the plaintiffs to estop the issues from being raised in subsequent litigation, the courts would go a long way toward filling the *Wal-Mart* gap.

One key element of the offensive use of collateral estoppel is that it is only permitted where the issue has arisen in a serious case in which the employer has had "substantial incentive to contest the . . . action."[121] Thus, before an employer can be estopped from contesting an issue, it must have seriously litigated the issue in something other than a minor action. In the context of employment discrimination, this likely would not be a difficult element for most plaintiffs to establish, as the employer would have substantial incentive to vigorously defend all allegations of discrimination brought in federal court. An employer is likely to take all such cases, and the corresponding issues therein, very seriously. Nonetheless, issues that are simply incidental to the initial litigation, or issues raised in minor cases (such as frivolous claims brought by pro se plaintiffs), will not be dispositive against the employer in other matters.[122]

This solution is not perfect, and the offensive use of collateral estoppel falls far short of providing the benefits of a true class action claim. Unlike collateral estoppel cases, not all parties to a class action would need to have

117 *See generally* Stephen F. Befort & Sarah J. Gorajski, *When Quitting Is Fitting: The Need for a Reformulated Sexual Harassment/Constructive Discharge Standard in the Wake of* Pennsylvania State Police v. Suders, 67 OHIO ST. L.J. 593, 643 (2006) (setting forth legal standards for harassment cases).

118 *See* Piper Hoffman, *How Many Plaintiffs Are Enough? Venue in Title VII Class Actions*, 42 U. MICH. J.L. REFORM 843, 862 (2009) ("In Title VII cases those inefficiencies would be particularly egregious given that plaintiffs nationwide would rely, for the most part, on the same evidence, such as the employer's documented human resources policies, its documented complaint procedures, the testimony of human resources professionals, and statistical analyses suggesting company-wide discrimination.").

119 *See* Nonkes, *supra* note 108, at 1460 (noting that the "[p]rimary reasons" for courts not requiring mutuality "include judicial efficiency and assurance of consistent results").

120 *See* Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 374–79 (2008) (discussing class action litigation in the workplace context).

121 Corr, *supra* note 111, at 42.

122 *See* Joshua M.D. Segal, Note, *Rebalancing Fairness and Efficiency: The Offensive Use of Collateral Estoppel in § 1983 Actions*, 89 B.U. L. REV. 1305, 1309 (2009) (noting that courts should examine "whether there was a sufficient incentive to fully litigate the claim" before applying collateral estoppel).

filed timely charges of discrimination.[123] Thus, class action claims would allow more plaintiffs to bring suit than would the use of the procedural mechanism suggested here. Similarly, class action claims will often put more dollars at stake as part of the initial suit, which forces defendants to seriously consider settling the claims.[124] Though collateral estoppel may have some negative effects on portions of an employer's subsequent cases, it would not have the same potential financial impact on an employer as class cases. Rather, the damages would likely be lower and spread out over time.[125] Finally, and perhaps most importantly, class actions have the benefit of substantially streamlining the litigation on the issue of liability. Though collateral estoppel offers the potential for significant judicial economies by resolving certain issues before the court, it falls far short of the economies offered under Rule 23.[126] This is particularly true as the ultimate question—the issue of liability—must still be tried in every case.[127]

In sum, the offensive use of collateral estoppel cannot take the place of the class action in employment discrimination cases. Nonetheless, this procedural mechanism would help fill the *Wal-Mart* gap by avoiding the relitigation of issues that have already been resolved. Combined with other procedural tools offered below, issue preclusion offers several benefits to the traditional single employee-employer litigation often brought in the federal courts. Collateral estoppel has not been seriously explored in the academic literature as a means of streamlining employment discrimination claims. In light of *Wal-Mart*, the use of issue preclusion must be considered as a way of avoiding the needless relitigation of issues that have already been resolved.

2. Consolidation

Other procedural mechanisms may also help fill the *Wal-Mart* gap. Similar to the use of collateral estoppel, judges may also streamline employment discrimination claims with common issues through the *consolidation* of cases against the same employer, which is allowed under Federal Rule of Civil Procedure 42(a).[128] Consolidation is effective "as a matter of convenience and

123 *Cf.* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547–48 (2011) (identifying three named plaintiffs who filed discrimination charges on behalf of the plaintiff class).

124 *See* Levit, *supra* note 120, at 367–68 ("These cases have produced scores of multimillion-dollar settlements against some of the nation's largest employers.").

125 *See generally* Nonkes, *supra* note 108, at 1462 (discussing the use of collateral estoppel and damages).

126 *See* Suzette M. Malveaux, *Class Actions at the Crossroads: An Answer to* Wal-Mart v. Dukes, 5 HARV. L. & POL'Y REV. 375, 401 (2011) ("The class action device is designed to achieve judicial economy because aggregate litigation is more efficient than litigating similar individual cases *seriatim*.").

127 *Id.* (describing that after a class-wide finding of liability, individual class members will seek individual relief).

128 Federal Rule of Civil Procedure 42(a) provides that where "actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay." FED. R. CIV. P. 42(a).

economy in judicial administration" where "separate actions present[ ] a common issue of law or fact."[129] Again, substantial deference is given to the district court's decision as to whether to consolidate the matters.[130] Unlike collateral estoppel, where an issue is resolved in an earlier case for subsequent litigation, consolidation allows important issues to be resolved *at the same time*.[131] Thus, consolidation offers the benefit of allowing an issue to be resolved as part of a single proceeding.

Consolidation can take two primary forms. First, where there is a "common question of law or fact," a judge can "join for hearing or trial any or all matters at issue in the actions."[132] Second, the judge can simply "consolidate the actions."[133] Under the federal rules, the court thus has substantial discretion in how to organize the consolidation of a case or issue.[134]

By trying multiple claims or issues through a single trial, the courts are able to simplify the litigation.[135] Witnesses are only required to testify once, and the court and parties are subject to a single suit on a particular issue.[136] Similarly, one trial is likely to be resolved much more quickly and inexpensively than multiple proceedings.[137] And, there is less risk that the trier-of-fact will resolve the disputes differently, which would lead to a potential inconsistency of judgments.[138] Where the individual allegations differ from one another, the court can still bifurcate the proceedings to resolve these specific issues.[139]

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129 9A WRIGHT ET AL., *supra* note 12, § 2383, at 26.

130 *Id.* ("The district court is given broad discretion to decide whether consolidation under Rule 42(a) would be desirable and the district judge's decision inevitably is highly contextual . . . .").

131 *See* FED. R. CIV. P. 42(a) (allowing consolidation for actions with common questions of law or fact).

132 *Id.*

133 *Id.*

134 *See* FED. R. CIV. P. 42(b) (allowing separate trials "for convenience" to the court).

135 *See generally* 32A AM. JUR. 2D *Federal Courts* § 1289 (2012) ("[A] transfer may be permitted if it is feasible to consolidate the actions, and if consolidation would be convenient, would avoid duplicitous litigation, and would avoid inconsistent results." (footnotes omitted)).

136 *See* 9A WRIGHT ET AL., *supra* note 12, § 2383, at 35 n.2 (stating that the critical question for the district court was "whether the specific risks of prejudice and confusion were over borne by the risk of inconsistent adjudications of common issues, the burden on parties, witnesses and judicial resources posed by multiple lawsuits, the length of time required to conduct multiple lawsuits instead of one and the relative expense" to all concerned of the single-trial, multiple-trial alternatives).

137 *Id.*

138 *Id.*; *see also* 32A AM. JUR. 2D *Federal Courts* § 1289 (2012); *cf.* Scott Paetty, Note, *Classless Not Clueless: A Comparison of Case Management Mechanisms for Non-Class-Based Complex Litigation in California and Federal Courts*, 41 LOY. L.A. L. REV. 845, 886 (2008) ("The purpose of the [consolidation] rule is to enhance trial court efficiency (i.e., to avoid unnecessary duplication of evidence and procedures) and to avoid the substantial danger of inconsistent decisions.").

139 *See generally* John P. Rowley III & Richard G. Moore, *Bifurcation of Civil Trials*, 45 U. RICH. L. REV. 1, 2–14 (2010) (discussing the bifurcation of civil trials in general).

In determining whether to consolidate the claims, the court should weigh these potential benefits against "the specific risks of prejudice and [possible] confusion" in merging the matters.[140] Thus, the benefits involved should be considered against the chance that the parties may be harmed through consolidation, or that expanding the scope of the trial will ultimately confuse the trier-of-fact.[141] And from a more practical standpoint, it may also be difficult to identify or isolate the specific issues or claims that can be decided jointly. The courts must be cautious in crafting how consolidation will occur.

Like the offensive use of collateral estoppel, the consolidation of cases offers a procedural mechanism that is particularly attractive in the employment discrimination context.[142] As the policies, managers, facts, and issues often overlap in workplace disputes, merging separate claims can be an effective and efficient way of managing a court's trial docket. As discussed above, harassment provides a useful example of these potential efficiencies. Where two (or more) individuals allege to have been victimized by the same harasser over a similar period of time, the two claims will likely involve the presentation of many of the same witnesses and policies. Whether the company has implemented an effective anti-harassment policy, whether the harasser involved was a management-level employee, and how the employer responded to any complaints are all issues that could be resolved as part of a single trial.[143] This type of consolidation would thus streamline the cases and prevent the needless multiplication of litigation.[144] Common issues could be resolved in a unified manner, and the proceedings could then be bifurcated as necessary to determine issues that are unique to the individual cases.[145]

Again, however, the benefits must be weighed against any potential prejudice to the parties.[146] Such prejudice might arise against the employer, for example, as multiple victims will be alleging the same type of discrimination against the company. An employer will look far less sympathetic in the eyes of the trier-of-fact where numerous litigants have come forward with allegations of discrimination. In addition, harassment claims are often fact-specific, and the experiences of one victim may be completely different from

140 9A WRIGHT ET AL., *supra* note 12, § 2383, at 35 n.2.

141 *Id.*

142 *Cf.* Paetty, *supra* note 138, at 885 ("Consolidation is another formal tool available for judges and practitioners to manage complex cases.").

143 *See generally* Befort & Gorajski, *supra* note 117, at 643 (setting forth legal standards for harassment cases).

144 *See generally* Paetty, *supra* note 138, at 886 (discussing possible benefits of consolidation).

145 *See generally* Rowley & Moore, *supra* note 139, at 2–14 (discussing bifurcation of issues).

146 *See* 9A WRIGHT ET AL., *supra* note 12, § 2383.

those of another.[147] There may be certain instances, then, where consolidation simply does not make sense in the employment context.[148]

The consolidation of cases or issues provides another procedural tool that would help fill the *Wal-Mart* gap in employment discrimination cases. Again, this procedural mechanism cannot completely take the place of Rule 23.[149] The class action offers numerous additional benefits to the simple consolidation of cases.[150] Namely, consolidation does not typically anticipate the mass litigation of claims across the country involving multiple claimants in numerous jurisdictions. Rule 23 is much better suited for these types of claims.[151] And, the administrative requirements (such as filing timely discrimination charges) will likely be more relaxed in the class setting.[152] Similarly, the actual identification of the victims involved is much less stringent in the class action context.[153] Moreover, the appellate courts have largely concluded that "the pattern-or-practice method of proof is not available to private, nonclass plaintiffs."[154] Additionally, it may be more difficult—and not as cost effective—to conduct any needed statistical analysis with consolidated claims (as opposed to traditional class action cases). Furthermore, many cases that might have only a marginal value associated with them may not

147 *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993) (noting the subjective inquiry of harassment claims); *cf.* Forrest v. Brinker Int'l Payroll Co., 511 F.3d 225, 232 (1st Cir. 2007) ("Determining what constitutes a 'prompt and appropriate' employer response to allegations of sexual harassment often requires the sort of case-specific, fact-intensive analysis best left to a jury.").

148 *Cf.* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 8–9 (1991) ("[S]ome particularly aggrieved individual might attempt to bring a large group together in a single lawsuit by using standard joinder and intervention devices. But bringing large numbers of additional parties in by this method would be very costly. Organizing the conduct of litigation with large numbers of additional parties would be a nightmare." (footnote omitted)).

149 *See generally* Paetty, *supra* note 138, at 886 ("FRCP 42 gives the trial judge wide latitude in deciding to consolidate cases, and consolidation has become increasingly useful with the advent of complex litigation." (footnote omitted)).

150 *See* Charles Silver, *Comparing Class Actions and Consolidations*, 10 REV. LITIG. 495, 519 (1991) (providing an overview of similarities and differences between consolidation and class certification).

151 *See* FED. R. CIV. P. 23 (setting forth the requirements to certify a class in federal court).

152 *Cf.* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547–48 (2011) (describing the procedural history of the case).

153 *Cf.* Christodoulos Kaoutzanis, *Two Birds with One Stone: How the Use of the Class Action Device for Victim Participation in the International Criminal Court Can Improve Both the Fight Against Impunity and Victim Participation*, 17 U.C. DAVIS J. INT'L L. & POL'Y 111, 149 (2010) (arguing for use of class actions in a specific context as it would "allow one lawyer to represent all victims, known and unknown").

154 Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135, 149–50 (2d Cir. 2012) (citing cases), *cert. denied sub nom.* Eng v. Port Auth. of N.Y. & N.J., 133 S. Ct. 1724 (2013).

ultimately be pursued where a class cannot be certified.[155] Finally, this procedural tool is not as powerful of a weapon for plaintiffs, who in class action suits are likely able to command higher settlements through the threat of systemic litigation.[156]

Despite these drawbacks, the consolidation of cases or issues is another way to streamline discrimination claims. And, it offers many of the same economies of scale available to class action litigants.

3. Cabining *Wal-Mart*

In addition to the offensive use of collateral estoppel and consolidation, a third procedural response to *Wal-Mart* would be for the courts and parties to limit the reach of the decision. In this regard, *Wal-Mart* can be seen as a very unique class action case, involving the single largest workplace suit brought against the country's biggest private employer.[157]

The courts may not want to extrapolate the principles of *Wal-Mart* beyond the facts of the decision itself. There are likely to be few, if any, employment cases as broad as *Wal-Mart*, which involved over a million individuals.[158] As the Court itself recognized, it was "one of the most expansive class actions ever."[159] Quite simply, then, it is possible that the *Wal-Mart* decision may only apply to Wal-Mart, or to the handful of other corporations that might be seen as similarly situated. By cabining *Wal-Mart*, the lower courts would thus limit the scope of the case, and apply the tenets of the Supreme Court's decision to only the largest cases brought against the biggest employers.

Given the massive size of Wal-Mart as an employer and the sheer magnitude of the class action brought against the company, it is easy to understand the Supreme Court's reluctance in allowing the class action to go forward. Though the opinion is far from a model of clarity on the application of the rules of class certification, there is a fair concern over how this type of enormous systemic class would actually proceed.[160] Trying a class case on behalf of over a million individuals would be a difficult, if not impossible, undertak-

155 *See generally* Hoffman, *supra* note 118, at 862 ("[W]ith multi-district coordination for pre-trial purposes, the complexity and expense of litigating the same issues in multiple venues would be enormous, sometimes even prohibitive.").

156 *See, e.g.*, Levit, *supra* note 120, at 367–68 (discussing settlements in the workplace class action context); *see also* Hitch, *supra* note 64, at 759 ("[C]lass actions, especially employment discrimination class actions, tend to end in settlement. For example, employers such as Home Depot, Boeing, Winn-Dixie, Amtrak, UPS, and Pennzoil have settled class action claims in recent years for millions of dollars.").

157 *Wal-Mart*, 131 S. Ct. at 2547 ("Petitioner Wal-Mart is the Nation's largest private employer.").

158 *Id.* ("The District Court and the Court of Appeals approved the certification of a class comprising about one and a half million plaintiffs . . . .").

159 *Id.*

160 *See* Alexandra D. Lahav, *The Curse of Bigness and the Optimal Size of Class Actions*, 63 VAND. L. REV. EN BANC 117, 118–19 (2010) (discussing concerns raised over the size of the *Wal-Mart* litigation).

ing for the lower court. And it is extremely difficult to imagine what that case would even look like, or how it would be structured.[161] Such a daunting claim would leave the company with little choice but to settle the action.[162]

Putting aside both the reasoning and accuracy of the decision, the reluctance of the Court to certify the class is thus easily understood. What is less clear, however, is how far the principles from the decision should extend. Given the way in which the decision is framed, it seems a fair reading of the case to limit the holding to only the largest claims brought against the biggest employers. In this way, the Court created the "*Wal-Mart* rule"—a tenet that requires a strict interpretation of commonality for *massive* employment discrimination claims.

The decision is replete with instances where the Court expressed concern over the magnitude of the case that had been brought. The Court repeatedly noted the size of the class and employer, and emphasized that the "respondents wish to sue about literally millions of employment decisions at once."[163] Given the enormity of the case, the Court appeared reluctant to find the "glue" that would bind the claims together, thus making it "impossible to say" that there is a commonality of the actions.[164] In the Court's view, there was simply no "specific employment practice" to tie the "1.5 million claims together."[165]

The Court's repeated emphasis of the size of the class and the employer cannot be overstated. For the sake of brevity, this Article will not go through each instance. However, a few illustrative examples will help clarify the importance that the Court placed on these elements of the case. As the Court provided,

> In a company of Wal-Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction. . . .
>
> . . . .
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> . . . [W]hen the claim is that a company operates under a general policy of discrimination, a few anecdotes selected from literally millions of employment decisions prove nothing at all.

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161 *Cf. id.* at 119 (questioning whether "the class is too heterogeneous to support collective treatment" and concluding that "the class action would not be sustainable").

162 *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 161 (2009) ("If upheld, the Ninth Circuit panel's affirmance of class certification in *Dukes* effectively would set into motion pressure on the defendant to embrace by way of settlement precisely the kinds of remedies to which scholarship in the vein of structural discrimination points—say, to have Wal-Mart engage in ongoing consultation with human resource professionals, plaintiffs' lawyers, employee groups, and insurers to redesign its employment structure." (footnote omitted)). *See generally* Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1875 (2008) (noting that the "intense pressure to settle" class claims has been described as resulting in "judicial blackmail" used by plaintiffs' attorneys).

163 *Wal-Mart*, 131 S. Ct. at 2552; *see id.* at 2547, 2555–57.

164 *Id.* at 2552.

165 *Id.* at 2555–56.

> . . . .
>
> . . . [The class members] held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed . . . . Some thrived while others did poorly. They have little in common but their sex and this lawsuit.[166]

The size of Wal-Mart and of the action against it are the threads that hold the decision together. Where a massive claim has been brought against this type of employer, there must be more than "a few anecdotes" of discrimination.[167] In this type of instance, the Court seemed to be asking for the smoking-gun memorandum instructing its managers to discriminate.[168] With no memorandum forthcoming, there were simply too many differences between the individual stores and plaintiffs. Therefore, there was no commonality, and the class claim could not proceed.[169]

The *Wal-Mart* rule created by the Court provides that where a massive claim has been brought against a massive employer, the plaintiff will have a heightened burden of proof in establishing commonality. Or, at a minimum, the courts will examine the commonality requirement much more closely. But what the decision omits is any discussion of the vast majority of class action cases that look nothing like *Wal-Mart* at all. The Court noted that this was one of the largest systemic claims "ever,"[170] yet it failed to instruct us on how to analyze a lesser claim involving a smaller defendant with fewer allegations of discrimination. This is likely because the decision was really only intended to apply to the *Wal-Mart* situation itself.

Given the heavy reliance of the opinion on the size of Wal-Mart and the putative class, then, this Article proposes that the Court's opinion should be limited to the fact pattern before it. *Wal-Mart* should be cabined and restricted to its facts. The problems of litigating this type of class action are obvious, and the Court's reluctance to certify is easily understood. The problems in litigating a less massive class action are not as notable and have been routinely undertaken by the courts.[171]

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166 *Id.* at 2555, 2556 n.9, 2557 (citation omitted) (internal quotation marks omitted). In addition, the Court noted that "[e]ven if [the statistical proof] established (as it does not) a pay or promotion pattern that differs from the nationwide figures or the regional figures in *all* of Wal-Mart's 3,400 stores, that would still not demonstrate that commonality of issue exists." *Id.* at 2555.

167 *Id.* at 2556 n.9.

168 *Cf. id.* at 2563 (Ginsburg, J., dissenting) ("The plaintiffs' evidence, including class members' tales of their own experiences, suggests that gender bias suffused Wal–Mart's company culture." (footnote omitted)).

169 *Id.* at 2561.

170 *Id.* at 2547 (majority opinion).

171 *See generally* Mary Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 186 (1998) (noting that "[a]t some point between the late 1980s and the mid-1990s, class action certification for mass torts ceased to be extraordinary and appeared to become, if not routine, not wholly unusual"); Jeffrey W. Stempel, *A More Complete Look at*

If the *Wal-Mart* decision could be cabined, it would have obvious procedural benefits for plaintiffs. Limited in this way, the *Wal-Mart* decision would have little or no impact on the legal landscape. The vast majority of class cases are much smaller in size and scope than *Wal-Mart*, and the decision would be inapplicable to these claims.[172] Plaintiffs in other cases would be free to seek certification of their claims without a heightened inquiry of commonality. Rather, the courts would examine this question as they had done in the past. This would preserve all of the benefits of class claims that the critics of *Wal-Mart* argue have been destroyed.[173] Most notably, the ability to bring a systemic claim against an employer with relaxed administrative requirements would remain intact.[174] And, the ability to deter the employer from discriminating under even the threat of such a class action claim would still endure.[175] By restoring these benefits, the *Wal-Mart* gap would be filled.

Limiting the *Wal-Mart* decision might have some unintended consequences, however. If only large employers are ultimately protected by the decision, it could encourage companies and industry to consolidate in an effort to thwart this type of systemic litigation. It is unclear how realistic of a possibility this would be. Nonetheless, the temptation of firms to insulate themselves from class litigation would serve as a powerful incentive for these companies to consider merging to increase their size. Moreover, to the extent that *Wal-Mart* can be seen as favorable legal precedent, limiting the decision would undue much of the positive impact of the case. Though this Article takes no express view on the validity of the decision, a strong argument can be made that *Wal-Mart* advances class action law. And, some may view the decision as providing much needed guidance on the interpretation of commonality under the federal rules.[176] Though there is obvious room for debate on these questions, restricting *Wal-Mart* to mega-suits would certainly also limit any positive benefits of the decision.

As a procedural mechanism, cabining *Wal-Mart* may not be a practicable solution. The counterargument is straightforward—*Wal-Mart* is not only about massive lawsuits and applies to *all* employers. The Court's repeated

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Complexity, 40 ARIZ. L. REV. 781, 842 (1998) ("[T]he class action device still holds promise as an efficient means for rendering a considered and consistent decision on issues of fault, causation, and liability.").

172 *See Wal-Mart*, 131 S. Ct. at 2547 (noting that *Wal-Mart* represents one of the largest systemic claims "ever").

173 *See supra* note 61 (setting forth some of the existing scholarship on the *Wal-Mart* decision).

174 *See supra* Section II.A (discussing relaxed administrative requirements for class action claims).

175 *See supra* note 62 and accompanying text (addressing the deterrent effect of class action lawsuits).

176 *Cf.* Suzette M. Malveaux, *Clearing Civil Procedural Hurdles in the Quest for Justice*, 37 OHIO N.U. L. REV. 621, 637 (2011) ("The *Dukes* case has the potential of redefining the terms on which this critical procedural device [the class action] is available."); Nagareda, *supra* note 162, at 162 (noting that "the panel majority in *Dukes* reversed this analytical sequence and then left off its most important step: that of declaring 'what the law is'").

reliance on the size of the employer and class seems to belie this argument, but it will ultimately be a matter for the lower courts to decide how broadly to apply the decision.[177] In the end, the *Wal-Mart* rule proposed by this Article is well supported by the Court's own logic, and offers an additional way around the decision for victimized employees. The procedural strategy of cabining *Wal-Mart* should be advanced by plaintiffs and seriously considered by the courts. This strategy offers another way to fill the *Wal-Mart* gap.

4. Taking *Wal-Mart* at Its Word

A final procedural approach to addressing *Wal-Mart* runs contrary to the previously discussed strategy of cabining the decision. This approach would be to simply take *Wal-Mart* at its word and apply the decision broadly to all employment discrimination cases.

By taking *Wal-Mart* at its word, plaintiffs that might otherwise pursue class action claims would instead file suit individually against the employer. This could mean that employers that would typically be subject to a single class action claim may now be facing hundreds or even thousands of individual actions. In *Wal-Mart*, for example, the class certified by the lower courts included over a million individual claims.[178] *Wal-Mart* does not prevent these plaintiffs from filing suit against their employer individually.[179] If anything, the decision expressly encourages it.[180] A lack of commonality between the claims suggests that each claim should be examined individually.

Rather than attempting to find a way around *Wal-Mart*, then, plaintiffs can simply embrace it. By filing thousands of individual cases against an employer, the company may ultimately become overwhelmed and completely bogged down by the litigation. Instead of defending against one suit, companies will find themselves litigating individual cases across the country. This strategy could put employers in the situation of being careful for what they wished for, as *Wal-Mart* may not be the answer to their litigation problems.[181] This is particularly true where the voluminous individual litigation would result in inconsistent judgments against the employer.[182]

From a procedural perspective, this strategy would involve massive organization by plaintiffs' attorneys. As each individual case would require careful adherence to the administrative requirements of Title VII, the prospective plaintiffs would want to make certain that they have exhausted these requirements. And a careful analysis of which suits to bring initially—and in

177 *See, e.g.*, *Wal-Mart*, 131 S. Ct. at 2547, 2552, 2555–57 (discussing size of Wal-Mart and the proposed class).

178 *Id.* at 2547 ("The District Court and the Court of Appeals approved the certification of a class comprising about one and a half million plaintiffs . . . .").

179 *See id.* at 2541–61 (discussing the authorization of class certification when individual class members are entitled to different individualized relief).

180 *See id.* at 2559 (referring to the option for plaintiffs to "go it alone").

181 *See generally* Hitch, *supra* note 64, at 759 (noting that "protecting defendants from multiple, inconsistent verdicts" is a benefit of class action litigation).

182 *Id.*

what jurisdiction—would also be critical to the overall success of this strategy.[183] Certainly plaintiffs would want to bring the most egregious discrimination cases first in jurisdictions that are particularly sympathetic to these types of claims.[184] Early success in a mass individual litigation setting would increase the likelihood of settlement of the later cases.[185] By taking the decision at its word, plaintiffs could exploit—rather than fill—the *Wal-Mart* gap and use it as a sword against employers that have discriminated against their workforce.

This type of organization would be extremely difficult for plaintiffs to structure.[186] However, successful organization of these claims could have enormous payoff, both financially and through the attainment of injunctive relief against those that run astray of civil rights rules and regulations.[187] It would not be the first time that civil plaintiffs have taken part in an orchestrated nationwide litigation strategy.[188] And civil rights and employment discrimination plaintiffs also have a well-known history of organizing around common causes and the vindication of individual rights.[189]

The strategy of foregoing class action litigation and pursuing mass individual litigation against employers could be enormously burdensome for defendants. The companies would be required to bear the burden of the

183 *See, e.g.*, Eva Paterson et al., *Equal Justice—Same Vision in a New Day*, 115 YALE L.J. POCKET PART 22, 25 (2005) (noting the strategy used in *Brown v. Board of Education* which "combined the use of successive legal openings created by litigation, the innovative use of social science, and collaboration with civil rights organizations linked to varied sectors of society").

184 *See, e.g.*, Kevin K. Washburn, Lara, Lawrence, *Supreme Court Litigation, and Lessons from Social Movements*, 40 TULSA L. REV. 25, 43 (2004) (noting "that the civil rights movement prevailed at least in part by using a strategy of educating the Court by bringing case after egregious case").

185 *See* Benjamin J. Siegel, Note, *Applying a "Maturity Factor" Without Compromising the Goals of the Class Action*, 85 TEX. L. REV. 741, 757 (2007) ("The rational defendant facing an early rash of individualized but related claims will no doubt seek to settle the claims with the highest likelihood for success for the plaintiffs at trial and choose to litigate those claims in which it believes it has the greatest chance for success." (footnote omitted)).

186 *See* Macey & Miller, *supra* note 148, at 9 (discussing difficulties of organizing claims outside the class action context, which can result in "a nightmare").

187 *Cf.* Hoffman, *supra* note 118, at 862 ("The individual plaintiffs in many Title VII class actions already face the prospect of litigating against multi-billion dollar multinational corporations. That economic imbalance would only be exacerbated by the necessity of fighting the same battle on multiple fronts." (footnote omitted)).

188 *See* Paterson et al., *supra* note 183, at 25 (discussing litigation strategy used in *Brown v. Board of Education*); Joseph A. Seiner & Benjamin N. Gutman, *Does* Ricci *Herald a New Disparate Impact?*, 90 B.U. L. REV. 2181, 2188 (2010) (noting the successful litigation strategy for developing unintentional discrimination cases, which "consisted of filing a substantial number of disparate-impact claims[,] . . . developing a monitoring system to identify appropriate cases, and making strategic choices about the most promising cases to pursue").

189 *See* Paterson et al., *supra* note 183, at 25 (discussing *Brown v. Board of Education* litigation strategy); Seiner & Gutman, *supra* note 188, at 2188 (discussing litigation strategy used to develop disparate impact claims).

defense in each specific case that is brought.[190] And in those cases where the defendant loses the claim, the plaintiff can seek attorneys' fees as part of the recovery.[191] Defendants would lose all of the efficiencies and economies of scale that come with class action suits.[192] Instead of a single case that could be quickly settled, employers may now be scrambling to defend individual claims brought throughout the country.[193] Of course, employers may ultimately prevail in the individual cases and not face some of the potential damages that would otherwise be incurred. The attorneys' fees alone in these cases, however, would be an enormous cost to employers—even where the company ultimately prevails in the suit.[194]

Needless to say, this strategy comes at a cost for plaintiffs. While some employment discrimination victims may benefit and have the opportunity to present their claims in court, other prospective plaintiffs may fall through the cracks of the litigation. In this regard, some individuals may not file a timely charge of discrimination or may fail to file suit in a timely manner.[195] Other victims may be unaware of their rights and not file a charge at all.[196] Still others may not feel comfortable with the prospect of individual litigation in the federal courts against their employer and decide not to pursue their claims.[197] And many cases which might have only a marginal value associ-

190 *See Developments in the Law—The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1810 (2000) [hereinafter *Paths of Civil Litigation*] ("Class actions can be similarly beneficial to defendants, who save costs by litigating or settling all similar claims against them in a single trial, thereby barring all future liability based on such claims.").

191 *See, e.g.*, Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 417 (1978) ("It can thus be taken as established, as the parties in this case both acknowledge, that . . . a [Title VII] prevailing *plaintiff* ordinarily is to be awarded attorney's fees in all but special circumstances."); Mitchell H. Rubinstein, *Our Nation's Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147, 181 (2006) (discussing attorney's fees in employment discrimination cases).

192 *See Paths of Civil Litigation*, *supra* note 190, at 1810 (noting benefits to defendants of class action litigation).

193 *See generally id.* at 1810–14 (discussing how multiple suits (including multiple class actions) require "defendants to expend duplicative resources defending similar claims in multiple fora").

194 *Cf.* Robert Brookins, *Mixed-Motives, Title VII, and Removing Sexism from Employment: The Reality and the Rhetoric*, 59 ALB. L. REV. 1, 51 (1995) ("Unsuccessful frivolous litigation is expensive for employers and society; successful frivolous litigation is even more expensive. And, as frivolous litigation mounts, so will successful frivolous litigation.").

195 *See* Joseph M. Aldridge, Note, *Pay-Setting Decisions as Discrete Acts: The Court Sharpens Its Focus on Intent in Title VII Actions in* Ledbetter v. Goodyear Tire & Rubber Co., *127 S. Ct. 2162 (2007)*, 86 NEB. L. REV. 955, 958 n.9 (2007) (discussing filing requirements for Title VII claims).

196 *See generally* Seiner, *supra* note 115, at 495 ("[I]t would not be unusual for an employer that maintains a workplace permeated with discrimination to be sued by only one or two individuals.").

197 *Id.* ("[V]ictims of employment discrimination are particularly hesitant to bring claims for fear of retaliation, disruption of the workplace environment, or concern over the perception of their coworkers.").

ated with them may not ultimately be pursued.[198] Moreover, as already noted, the appellate courts have largely concluded that "the pattern-or-practice method of proof is not available to private, nonclass plaintiffs."[199] Additionally, it may be more difficult—and not as cost effective—to conduct any needed statistical analysis with individual claims. Thus, individual litigation cannot achieve many of the same benefits as class action lawsuits. Such suits offer safety in numbers, relaxed administrative requirements, streamlined costs and efficiencies, and discovery, which can help identify potential victims.[200] Class action claims, where settled, also offer recovery for all victims.[201] In individual litigation, many victims of discrimination may ultimately lose their case through procedural pitfalls, poor lawyering, or an unsympathetic jury.

Similarly, this strategy comes at an immense cost to the entire judicial system. By encouraging mass individual litigation, the *Wal-Mart* decision may end up increasing the workload of the federal courts.[202] *Wal-Mart* itself offers a valuable lesson in this regard. The decision involves over a million potential victims of discrimination.[203] If even a tenth of these individuals decided to pursue individual litigation instead of bringing a class claim, the courts would be burdened with over a hundred thousand additional cases. The efficiencies of Rule 23 would be lost. This multiplier effect could overwhelm the courts. Employment discrimination cases already make up a substantial portion of the federal court docket.[204] *Wal-Mart* may only increase the number of individual cases that the federal courts must address. And, while many class action suits are ultimately settled,[205] the sheer volume of individual cases would assure that some of these claims result in a trial.

Taking *Wal-Mart* at its word may be an effective procedural strategy for plaintiffs. Rather than pursuing class claims, employment discrimination victims may carefully organize and bring individual suits. For the reasons noted above, however, the strategy is not without risks or costs. The multiplication of litigation could ultimately prove overwhelming for both defendants and

198 *See generally* Hoffman, *supra* note 118, at 862 ("[W]ith multi-district coordination for pre-trial purposes, the complexity and expense of litigating the same issues in multiple venues would be enormous, sometimes even prohibitive.").

199 *See supra* note 54.

200 *See generally Paths of Civil Litigation*, *supra* note 190, at 1808–10 (discussing benefits of class action litigation).

201 *See id.* at 1810 ("[A]n increased number of plaintiffs receive compensation for their injuries in a more timely fashion.").

202 *Id.* ("The class action thus frees the court system to adjudicate more claims with less delay.").

203 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011).

204 *See* Ann C. Hodges, *The Limits of Multiple Rights and Remedies: A Call for Revisiting the Law of the Workplace*, 22 HOFSTRA LAB. & EMP. L.J. 601, 623 (2005) ("[J]udges regularly decry the number of labor and employment cases that occupy their dockets.").

205 *See* Charles B. Casper, *The Class Action Fairness Act's Impact on Settlements*, 20 ANTITRUST 26, 26 (2005) ("It is not surprising that the parties settle most antitrust class actions, like most other class actions of every kind, and that only a tiny fraction ever go to trial.").

the courts. Rather than filling the *Wal-Mart* gap, this strategy uses it to the advantage of discrimination victims. But it comes with a price.

C. Revised Relief

The governmental and procedural responses to *Wal-Mart* set forth above are effective ways of addressing the potential negative effects of the decision. A final way of filling the *Wal-Mart* gap would be to take a renewed look at the relief available in employment discrimination cases. This Article suggests that in light of *Wal-Mart*, the time has come to reanalyze the effectiveness of punitive relief under Title VII, and for plaintiffs to more aggressively seek exemplary damages.[206] Punitive damages serve many of the same goals as class action litigation. To the extent that the Supreme Court has weakened the role of systemic litigation, the role of punitive damages in employment discrimination cases should be enhanced. Of the potential plaintiff responses to *Wal-Mart* discussed here, this approach is admittedly the least practical to implement. But it is worth exploring as it offers substantial potential benefits to employment discrimination victims.

I have previously explored the viability of punitive (or exemplary) damages in employment discrimination cases and have explained how this form of relief falls far short of providing an effective remedy for plaintiffs.[207] From both an empirical and anecdotal perspective, punitive damages do not live up to the threat that they purport to be for Title VII litigation.[208] The goals of punitive damages are oft stated and include deterrence, retribution, and education.[209] The goals of exemplary damages in the employment discrimination setting are not as clear, but focus on deterrence and compensation to the victim.[210] The Supreme Court has recently emphasized that, in a more general sense, "the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct."[211]

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206 It is worth noting that punitive damages are available in claims under Title VII and the Americans with Disabilities Act. 42 U.S.C. § 12188(b)(4) (2006). Exemplary relief is not available under the Age Discrimination in Employment Act, which offers liquidated damages. 29 U.S.C. § 626(b) (2006).

207 *See* Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735, 795–96 (2008).

208 *Id.*

209 *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 491–92 (2008) (discussing purposes of punitive relief); Jim Gash, *Solving the Multiple Punishments Problem: A Call for a National Punitive Damages Registry*, 99 NW. U. L. REV. 1613, 1670 (2005) (discussing role of punitive damages); David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 374–78 (1994) (same); Seiner, *supra* note 207, at 745–47 (2008) (same).

210 *See* Seiner, *supra* note 115, at 487 (citing legislative history of Title VII); Seiner, *supra* note 207, at 749–50 (discussing purpose of exemplary relief in employment cases).

211 *Exxon Shipping Co.*, 554 U.S. at 492. *See generally* Seiner, *supra* note 115 (discussing recent Supreme Court case law on punitive damages).

Class action employment discrimination litigation serves many of the same functions as punitive damages for workplace claimants.[212] Even the threat of class claims succeeds in deterring discriminatory conduct.[213] Employers are fully aware of the potential for mass litigation, as well as the enormous awards and attorneys' fees that are associated with these lawsuits.[214] Though many employers strictly comply with Title VII for altruistic reasons, others likely do so to avoid embroiling themselves in systemic disputes.[215] Similarly, class claims can be seen as a form of retribution, and they certainly punish those employers that discriminate. Though punishment is not necessarily a goal of Title VII, the multi-million dollar verdicts and settlements often associated with systemic litigation can be seen as a way to penalize those employers that run afoul of civil rights legislation.[216]

Class action claims also educate the public and employers more generally. These mass claims often make headlines and serve the goal of informing the public about employment discrimination laws.[217] Finally, systemic litigation also helps compensate individual victims of workplace abuse.[218] As noted above, many individuals who suffer from employment discrimination may be unable or afraid to pursue their claims.[219] The class action offers a mechanism for these victims to recover for their injuries, often through a broad settlement of all claims.[220]

Class action litigation thus serves the same broad functions as punitive damages for employment discrimination plaintiffs. Systemic cases serve to

212 *See* Levit, *supra* note 120, at 379–80 ("Long before theorists began noticing that the large-scale remedies required in class action lawsuits had the power to restructure the workplace, class actions were transforming other social institutions, such as schools and prisons.").

213 *See* Kotkin, *supra* note 62, at 1337 ("[T]he deterrent aspect of Title VII is far more pronounced in the systemic realm.").

214 *See Paths of Civil Litigation*, *supra* note 190, at 1809–10 ("Because increased access to the courts leads to more judgments against tortfeasors, the class action deters potential defendants from externalizing the costs of their actions by causing widespread, but individually minimal, harm.").

215 *Cf.* Levit, *supra* note 120, at 372 ("Although the threats of large economic losses (from litigation defense costs and risks of damage awards) and adverse publicity can be the catalysts for settlement, those economic risks do not, on their own, seem to be sufficient factors to prompt significant restructuring of workplaces.").

216 *Cf.* Seiner, *supra* note 115, at 488 ("Though not identical to the purposes Congress expressed for adding punitive relief to Title VII, punishment and deterrence can certainly be seen as playing a role in civil rights litigation more broadly.").

217 *See, e.g.*, 1 Fred Alvarez et al., *Class Actions and Pattern and Practice Claims: Overview of Theories, Defenses, Settlements and the Government's Activist Role*, *in* 27TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 280–81 (PLI Litig. & Admin. Practice, Course Handbook Series No. H-591, 1998) ("[H]eadlines over the last several years have been filled with stories of record settlements reached in various race and gender discrimination class action lawsuits.").

218 *See Paths of Civil Litigation*, *supra* note 190, at 1809–10 (discussing benefits of class action litigation).

219 *See* Seiner, *supra* note 115, at 495 (discussing hesitation of some victims to bring employment discrimination claims).

220 *See* Casper, *supra* note 205, at 26 (discussing settlement of class action claims).

compensate victims, educate the public, punish employers that violate the law, and deter others from discriminating.[221] By potentially eroding the benefits of class claims, *Wal-Mart* leaves many of the goals of Title VII unfulfilled. The decision largely undermines the ability of plaintiffs to bring systemic discrimination claims, thus making the benefits of these actions unavailable to many victims.[222] This is where punitive damages can step in and help fill the *Wal-Mart* gap.

As punitive damages serve many of the same functions as class action claims, courts and litigants could use this form of relief to fill the void left by the *Wal-Mart* decision. Plaintiffs should be more aggressive in pleading for punitive relief, and the courts should more actively entertain this type of claim. In the employment discrimination context, punitive damages are generally appropriate where a managerial agent—acting with knowledge of the law—violates Title VII.[223] The employer also has the opportunity to demonstrate that it was acting in good faith to avoid liability for punitive damages.[224]

The government, and civil rights groups, should actively seek out and prosecute cases that meet this standard. Though egregiousness is not a necessary element to attain punitive relief,[225] those cases with a particularly unsympathetic employer are likely to yield higher exemplary damages.[226] Thus, where possible, plaintiffs should prosecute those claims with egregious fact patterns where the employer had knowledge that it was acting contrary to the tenets of Title VII. As already discussed, the EEOC is in the best position to select these cases, as it has the opportunity to initially review the claims before a lawsuit is ever filed.[227] Victims of discrimination must file a

221 *See* Owen, *supra* note 209, at 374–77 (discussing role of punitive damages).

222 *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

223 *See* Seiner, *supra* note 115, at 501–10 (discussing situations where punitive relief is appropriate under Title VII).

224 *See id.* at 509–12 (discussing the role of good faith in punitive damage awards).

225 *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 546 (1999) ("We have concluded that an employer's conduct need not be independently 'egregious' to satisfy [§] 1981a's requirements for a punitive damages award, although evidence of egregious misconduct may be used to meet the plaintiff's burden of proof.").

226 *See* Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 160–61 (2002) ("The studies have common findings: although there are variations across geographical area and type of case, punitive damages are not often awarded, are rarely extreme in size, are awarded in response to egregious conduct, and are not often collected in the amounts awarded by juries."); Michael W. Roskiewicz, Note, *Title VII Remedies: Lifting the Statutory Caps from the Civil Rights Act of 1991 to Achieve Equal Remedies for Employment Discrimination*, 43 WASH. U. J. URB. & CONTEMP. L. 391, 416 (1993) ("It also suggests that when a jury awards a large amount in punitive damages, it is likely because the employer's conduct was particularly outrageous.").

227 *See Administrative Enforcement and Litigation*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/enforcement_litigation.cfm (last visited Nov. 18, 2013) (providing an overview of the EEOC's role in enforcing employment discrimination statutes).

charge with the government prior to bringing suit, giving the EEOC the unique opportunity to select and pursue those claims that are most likely to yield punitive damages.[228] To the extent *Wal-Mart* applies primarily to larger employers, this also affords the government the opportunity to focus on claims against bigger companies. And, under the sliding scale provided by Title VII, larger employers are potentially subject to higher punitive damage awards.[229]

Similarly, the courts should be particularly sympathetic to claims for punitive relief against employers. Though the judiciary is obviously bound by the legal standards outlined in Title VII and set forth by the Supreme Court for exemplary relief, the lower courts should not apply these standards too rigidly as they have done in the past.[230] The issue of punitive damages is largely a jury question, and the courts should err on the side of allowing the trier-of-fact to resolve the matter.[231] Research has shown that punitive damages have had little impact in Title VII litigation.[232] If a more vibrant exemplary damage scheme can be effectuated, it would substantially help fill the *Wal-Mart* gap.

Moreover, in light of *Wal-Mart*, the time has come to revisit the role of punitive damages in employment discrimination cases more broadly. Punitive and compensatory relief is currently capped in Title VII cases to a maximum combined amount of $300,000 for the largest employers.[233] And these caps are substantially lower for smaller companies.[234] These amounts have remained static since punitive and compensatory damages were added to Title VII as part of the Civil Rights Act of 1991.[235] Given the impact of inflation over the last two decades, punitive relief is a far less effective weapon than it was when the amendments were originally passed. Indeed, it would take over $500,000 in today's dollars to have the same impact as a $300,000 award when the caps originally went into effect.[236]

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228 *See* 42 U.S.C. § 2000e-5(e)(1) (2006) (providing administrative requirements for filing charge of employment discrimination under Title VII).

229 *See id.* § 1981a(b)(3).

230 *See Kolstad*, 527 U.S. at 535 (setting forth standards for punitive relief in employment discrimination cases). *See generally* Seiner, *supra* note 207, at 756–75 (discussing the punitive damages awarded by lower courts in employment discrimination cases).

231 *See* 42 U.S.C. § 1981a; 45C AM. JUR. 2D *Job Discrimination* § 2332 (2013) ("By authority of the Civil Rights Act of 1991, any party may demand a trial by jury when compensatory or punitive damages are sought under Title VII." (footnote omitted)).

232 *See generally* Seiner, *supra* note 207, at 751–56 (discussing punitive damage awards in Title VII cases in the federal courts).

233 *See* 42 U.S.C. § 1981a(b)(3).

234 *See id.*

235 *See* Seiner, *supra* note 207, at 781 ("[T]he statutory caps on [Title VII] exemplary awards have *remained unchanged* for over fifteen years.").

236 *See CPI Inflation Calculator*, BUREAU OF LABOR STATISTICS, http://data.bls.gov/cgi-bin/cpicalc.pl (last visited Nov. 19, 2013); *see also* Seiner, *supra* note 207, at 781 (discussing effect of inflation on punitive awards); Sandra Sperino, *Judicial Preemption of Punitive Damages*, 78 U. CIN. L. REV. 227, 243 (2009) ("Further, most caps do not adjust for inflation.

For punitive damages to be an effective substitute for class action claims, these caps must either be raised substantially or completely eliminated. A single $300,000 award is not likely to grab the attention of a Fortune 500 company. However, a multi-million dollar award likely would, and it would thus serve as a powerful incentive to deter future abusive conduct. Similarly, large punitive awards would also attract substantial media attention and help inform the public of the risks associated with overt discrimination.[237] And heightened awards will also compensate those victims whose lives have been so negatively affected by the unlawful conduct of large corporations.[238] Finally, large punitive awards will punish—in a meaningful way—those employers that do discriminate with full knowledge of the illegality of their actions.[239]

The current caps prevent any of these traditional goals of punitive damages from being effectively carried out.[240] If the caps were eliminated, it would go a long way toward reinstating the purpose of Title VII litigation.[241] This would, however, leave obvious concerns over juries awarding inappropriate awards that would exceed what is warranted by the facts of the case. In these circumstances, however, the courts could reduce the amount of the award through remittitur.[242] Like in many other areas of the law, the courts would police the individual jury verdicts for excessiveness.[243] Indeed, this is already done in Title VII litigation, where awards are often reduced by the

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For example, the Title VII caps do not adjust for inflation, so although they were enacted in 1991, they have not been increased since." (footnote omitted)).

237 *See* W. Kip Viscusi, *The Blockbuster Punitive Damages Awards*, 53 EMORY L.J. 1405, 1405 (2004) ("Because of the magnitude of punitive damages, headlines often tout the levels of penalties being imposed and the economic horrors that could result from such awards.").

238 *See* Janice R. Franke, *Does Title VII Contemplate Personal Liability for Employee/Agent Defendants?*, 12 HOFSTRA LAB. L.J. 39, 45–46 (1994) ("Through amendments in 1991, in order to 'legislatively overrule' a number of limiting interpretations of Title VII and Section 1981 by the Supreme Court, Congress significantly expanded the remedies available under Title VII to more adequately compensate victims and deter unlawful discrimination." (quoting Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 102, § 1981a, 105 Stat. 1071, 1071–74, 1079 (codified at 42 U.S.C. §§ 1981, 1981a, 1988 (Supp. V 1993))).

239 *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 492–93 (2008) ("Regardless of the alternative rationales over the years, the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct.").

240 *See* Philip L. Bartlett II, *Disparate Treatment: How Income Can Affect the Level of Employer Compliance with Employment Statutes*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 419, 468 (2002) ("The problem with statutory caps is that they reduce the average remedy by imposing a ceiling on an award, regardless of the actual damages a plaintiff sustained.").

241 *See* Roskiewicz, *supra* note 226, at 418 ("Only by eliminating the caps on compensatory and punitive damages available to Title VII discrimination victims can Congress accomplish its initial goal of absolute equality.").

242 *See, e.g.*, Thomas v. iStar Fin., Inc., 508 F. Supp. 2d 252, 262–64 (S.D.N.Y. 2007) (discussing remittitur in punitive damage workplace context); Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 736–39 (2003) (defining remittitur).

243 *See generally* Thomas, *supra* note 242, at 747–62 (discussing historical uses of remittitur).

courts.[244] The only difference would be that the courts would have more discretion in determining the appropriate amount of the award, which could be in excess of $300,000 if the caps were eliminated. Similarly, the Supreme Court has emphasized that punitive awards must comply with due process constraints and has expressed a concern over runaway jury awards.[245] The federal courts have the expertise and experience necessary to monitor these awards and to make sure that they are within acceptable levels.

This is certainly not the first time that this proposal has been made, and others have already persuasively argued for eliminating the existing caps.[246] My previous scholarship has even suggested that punitive damages be replaced with liquidated relief, and that the courts reformulate the way they approach exemplary damages.[247] Indeed, legislation has even been proposed that would accomplish the goal of abolishing the statutory caps.[248] This Article admittedly does not offer a novel idea in this regard. What it does do, however, is re-engage this debate in light of the controversial *Wal-Mart* decision. And, it explains how a more vibrant approach to exemplary relief can help fill the gap left by *Wal-Mart*, thus helping to vindicate victims of employment discrimination. This decision will serve as a landmark—and potential low point—for civil rights litigants for years to come. This paper thus revisits the punitive relief debate at a critical juncture in civil rights litigation. In the absence of class action employment discrimination, punitive damages must take on a greater role.

In light of the Supreme Court's recent decision, this Article advocates that plaintiffs and the government more actively pursue punitive relief, that the courts more willingly entertain these claims, and that Congress eliminate the current limits on relief. I acknowledge that this is a broad proposal. Asking for the courts to be more sympathetic to claims for exemplary damages is a substantial request, and one that may go disregarded. And civil rights advocates must be careful in the cases that they select—and how they present the evidence—to help achieve the goals outlined here. Similarly, asking for con-

244 *See, e.g.*, Thorne v. Welk Inv., 197 F.3d 1205, 1211–12 (8th Cir. 1999) (analyzing punitive damage remittitur in workplace discrimination case); Kelly Koenig Levi, *Allowing a Title VII Punitive Damage Award Without an Accompanying Compensatory or Nominal Award: Further Unifying the Federal Civil Rights Laws*, 89 KY. L.J. 581, 600–01 (2001) (noting that "Title VII defendants often make a motion for a new trial or a motion for remittitur, thereby forcing the court to evaluate the amount of the punitive damages award" (footnotes omitted)).

245 *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 501 (2008); Philip Morris USA v. Williams, 549 U.S. 346, 354 (2007); Seiner, *supra* note 115, at 496 (discussing due process and runaway jury concerns of Supreme Court).

246 *See, e.g.*, Bartlett, *supra* note 240, at 468 ("Congress could also raise, or eliminate, the statutory caps on the size of compensatory and punitive damage awards that a successful plaintiff can receive."); Roskiewicz, *supra* note 226, at 394 ("Congress should lift all caps on damages in cases of intentional employment discrimination.").

247 *See* Seiner, *supra* note 207, at 776–95.

248 *See id.* at 783 n.272 (citing Stephen Allred, *Commentary: Congress Acts to Overturn Supreme Court's Wage Discrimination Decision in* Ledbetter, N.C. L. WKLY., Aug. 20, 2007).

gressional intervention to lift the caps is not easily done, and revising legislation is difficult to accomplish.[249] Nonetheless, the time to act is now. *Wal-Mart* is just one of several recent Supreme Court decisions undermining the protections afforded to workplace litigants.[250] Re-evaluating punitive relief—either through more aggressive litigation or legislation—can help civil rights protections from being eroded further.

III. Implications of Proposed Approach

In *Wal-Mart*, the Supreme Court weakened the class action mechanism for civil rights litigants, undermining an important tool for Title VII plaintiffs. The benefits of identifying creative responses to *Wal-Mart* cannot be understated. The governmental approach, procedural response, and revised relief all offer promising approaches to this decision. This Part briefly summarizes those benefits, and situates this argument within the scope of the broader academic scholarship.

If the government, which is not subject to Rule 23, were to take a more active role in pursuing systemic discrimination claims, it would result in a number of clearly identifiable benefits. In particular, the EEOC can often recover for victims that have not filed a timely charge or have not been identified at the time the complaint is filed.[251] The EEOC can also seek both monetary relief and injunctive relief for victims of company-wide discrimination.[252] Nonetheless, the government may lack the resources necessary to fill the role previously performed by the private plaintiffs' bar. And while the EEOC often acts for the benefit of victims, its interests are not always completely aligned with those of the individual claimants.[253]

Similarly, the procedural responses discussed here offer an additional way to address *Wal-Mart*. The offensive use of collateral estoppel and the consolidation of cases could help streamline mass employment litigation and result in substantial judicial efficiencies. These procedural tools both simplify employment matters by reducing the amount of litigation necessary in

249 Congressional intervention in the workplace context is certainly not unrealistic, however. *See, e.g.*, Gowri Ramachandran, *Pay Transparency*, 116 Penn St. L. Rev. 1043, 1052–53 (2012) (discussing passage of the Lilly Ledbetter Fair Pay Act).

250 *See, e.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750–51 (2011) (restricting the ability of workplace litigants to pursue complex arbitration claims by finding that class arbitration is inconsistent with the requirements of the Federal Arbitration Act); Ricci v. DeStefano, 557 U.S. 557 (2009) (evaluating discrimination claims under Title VII); Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 642–43 (2007) (affirming denial of the plaintiff's pay discrimination claim because it was not brought "within the period prescribed by statute"), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, 5–6 (codified at 42 U.S.C. § 2000e-5(e)(3) (2006)).

251 *See supra* Section II.A (discussing possible role of EEOC in responding to *Wal-Mart* decision).

252 *See supra* Section II.A.

253 *See* EEOC v. Waffle House, Inc., 534 U.S. 279, 284–85 (2002); Gen. Tel. Co. of the Nw. v. EEOC, 446 U.S. 318, 326 (1980).

these cases.[254] The mechanisms are particularly attractive for employment disputes, which often involve the same policies, managers, and facts.[255] However, these approaches also have their drawbacks. Specifically, the administrative requirements are not as relaxed as they are in the class action setting, and these mechanisms are not as powerful of a weapon as cases brought under Rule 23.[256]

Plaintiffs may also attempt to minimize the impact of *Wal-Mart* by limiting the reach of the decision. A strong argument can be made that the decision should only apply to the largest cases brought against the biggest employers. Cabining *Wal-Mart* would substantially reduce the impact of the decision on the legal landscape. Few class claims are as big as the one brought against *Wal-Mart*, and no private company is larger.[257] This solution may be difficult to implement, however, as the courts may be reluctant to limit the decision to massive lawsuits and may apply it more broadly to all employers.[258] A counter strategy would be to take *Wal-Mart* at its word and pursue mass individual litigation against employers. This could overwhelm companies with voluminous litigation and force them to settle many individual disputes. This strategy would also present its own challenges—most specifically finding ways to organize and structure the litigation.[259]

Finally, given the similarity in goals between punitive damages and class action relief, the time has come to revisit exemplary relief in employment cases. A more vibrant and effective damages structure as part of Title VII would help attain the goals previously accomplished through systemic litigation—deterrence, retribution, and education.[260] Such change is extraordinarily difficult to achieve, however, and the courts and legislature may be reluctant to revitalize the relief available to victims of discrimination. The idea must be pursued, however, given the importance of replacing the protections previously afforded by class-wide litigation.

As these responses all reflect, no solution is perfect, and each has its own drawbacks. The class action served as a powerful weapon for civil rights plaintiffs and acted as a strong deterrent for employer discrimination. No one tool can take its place. Identifying other means of addressing *Wal-Mart*, and carefully critiquing any alternative approach to systemic litigation, will be critical for Title VII plaintiffs. This Article does not purport to be exhaustive—it only attempts to move the discussion away from the difficulties of *Wal-Mart* and towards a solution.

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254 *See supra* subsections II.B.1–2 (discussing procedural responses to *Wal-Mart*).

255 *See supra* subsections II.B.1–2.

256 *See supra* subsections II.B.1–2.

257 *See supra* subsection II.B.3 (discussing litigation strategy of cabining *Wal-Mart*).

258 *See supra* subsection II.B.3.

259 *See supra* subsection II.B.4 (discussing the litigation strategy of embracing the *Wal-Mart* decision).

260 *See supra* note 209 (noting scholarship discussing the role of punitive damages in litigation).

As noted throughout this paper, there is a wealth of superb scholarship already addressing *Wal-Mart*, and this Article attempts to situate itself within that literature. In her recent article, Professor Melissa Hart does an excellent job of identifying the problems created by the Court's decision.[261] Professor Hart notes that it is "essential to consider other solutions" that would help address the dilemma created by *Wal-Mart*.[262] She outlines some suggestions, noting that the EEOC could become more active in pursuing systemic litigation.[263] Professor Hart also notes different procedural mechanisms that could be used, specifically identifying different provisions of the Federal Rule of Civil Procedure.[264] Finally, she raises the possibility of attempting to correct the decision through some type of "legislative fix."[265] Professor Hart's work superbly identifies the issues created by *Wal-Mart*, and acknowledges the need to move the debate toward a remedy. This Article attempts to pick up where Professor Hart left off by offering additional solutions and carefully critiquing possible responses to the decision.

Similarly, Professor Suzette Malveaux performed an early and helpful analysis of the decision.[266] She noted the problems inherent with *Wal-Mart*, highlighting "the potential to cut short a number of employment discrimination class actions premised on the theory of excessive subjectivity as a discriminatory policy."[267] Professor Malveaux's work did go farther, however, as it also began to consider possible ways through the decision. She correctly observed that the actual impact of *Wal-Mart* could be limited, as "cases the size of *Dukes* are rare," and "[s]maller classes are bound to be more successful."[268] Professor Malveaux also explored additional ways that plaintiffs could pursue class actions.[269] Thus, while she correctly noted that *Wal-Mart* has "tipped the balance in favor of powerful employers over everyday workers,"[270] Professor Malveaux also began to identify different ways that plaintiffs may approach the decision. This Article expands upon that very early analysis, carefully offering different approaches to the decision and considering ways to fill the *Wal-Mart* gap.

In sum, the early academic literature does an excellent job of highlighting the difficulties that plaintiffs will face when addressing systemic employment discrimination. Some of this work also identifies the need to find a solution to the problems created by *Wal-Mart*. The governmental approach,

261 *See* Hart, *supra* note 61, at 458–68.
262 *Id.* at 474.
263 *Id.* at 475.
264 *Id.* (discussing Federal Rules of Civil Procedure 23 and 42).
265 *Id.* at 474.
266 *See* Malveaux, *supra* note 61.
267 *Id.* at 44.
268 *Id.*
269 *Id.* at 51–52 ("Employees bringing a pattern-or-practice employment discrimination case involving monetary relief can seek certification solely under Rule 23(b)(3) or a hybrid—where injunctive or declaratory relief is sought under Rule 23(b)(2) and monetary or individualized relief is sought under Rule 23(b)(3)." (footnote omitted)).
270 *Id.* at 52.

procedural response, and revised relief proposed here attempt to offer such a solution. Each approach has its own challenges, however, and plaintiffs must carefully consider both the benefits and drawbacks before pursuing a particular approach. Other alternatives surely exist as well, and hopefully others will identify additional ways to address the problems created by the decision.

CONCLUSION

Wal-Mart created an enormous challenge for victims of systemic discrimination. The class action is a critical tool in the arsenal of plaintiffs for fighting workplace abuse. Nonetheless, there are numerous ways of addressing mass litigation that go beyond the strict constraints of Rule 23. The EEOC should take a more active role in pursuing complex discrimination claims. Plaintiffs must also consider different procedural mechanisms that are still available to address company-wide abuse. And the issue of the sufficiency of punitive relief in Title VII cases should be revisited. These solutions are not a complete fix, but each approach offers substantial benefits to discrimination victims. The Court's decision should be denounced, but it should not go ignored. Plaintiffs must act quickly to find ways to fill the *Wal-Mart* gap. This Article opens the discussion—let the dialogue begin.