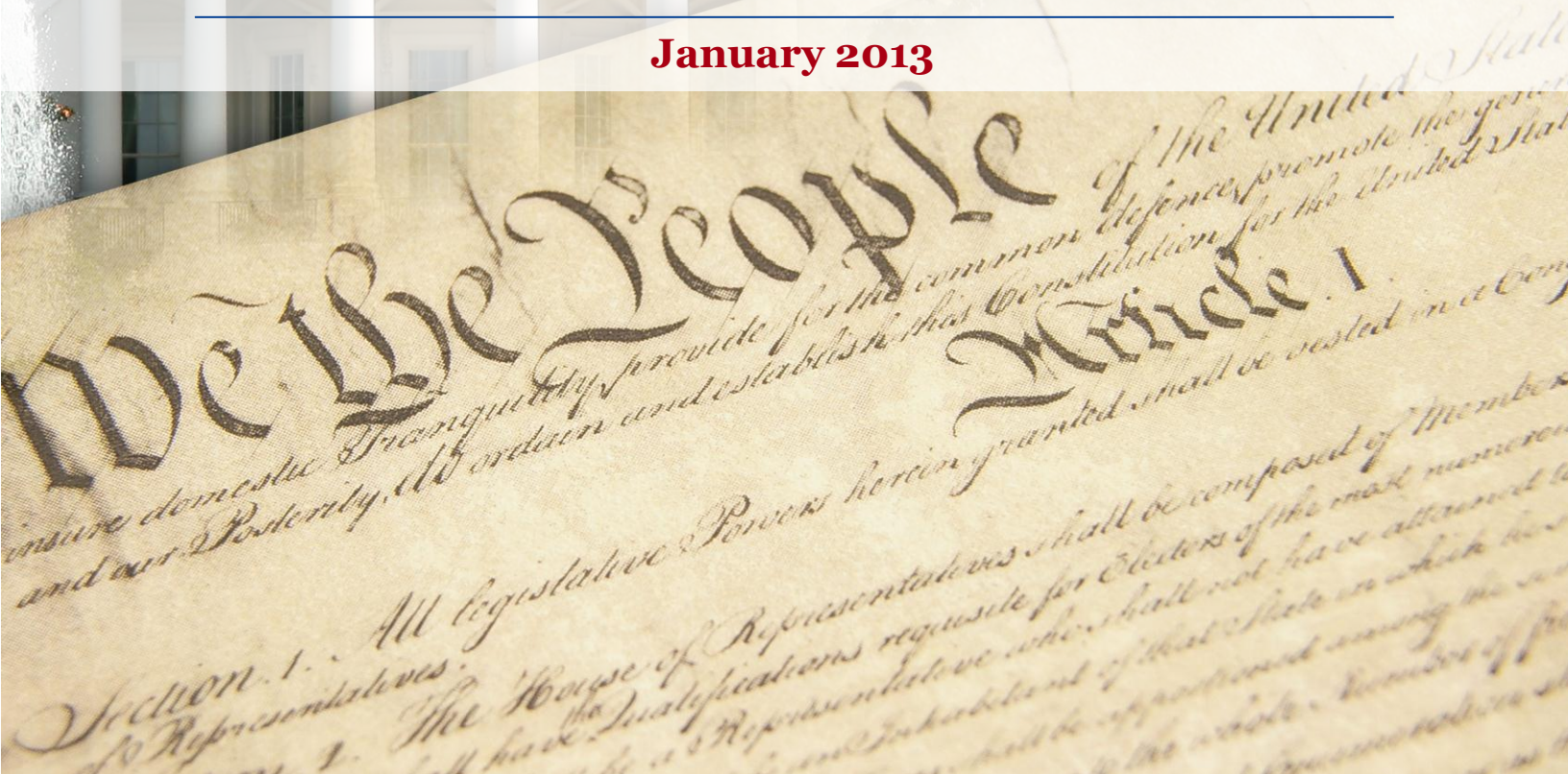




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Toward a More Perfect Union: *A Progressive Blueprint for the Second Term*

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**“Defending Twentieth Century Equal Employment
Reforms in the Twenty-First Century”**

by Ellen Eardley and Cyrus Mehri

Toward a More Perfect Union: *A Progressive Blueprint for the Second Term*

“Toward a More Perfect Union: A Progressive Blueprint for the Second Term” is a series of ACS Issue Briefs offering ideas and proposals that we hope the administration will consider in its second term to advance a vision consistent with the progressive themes President Obama raised in his second Inaugural Address. The series should also be useful for those in and outside the ACS network – to help inform and spark discussion and debate on an array of pressing public policy concerns. The series covers a wide range of issue areas, including immigration reform, campaign finance, climate change, criminal justice reform, and judicial nominations.

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Defending Twentieth Century Equal Employment Reforms in the Twenty-First Century

*Ellen Eardley and Cyrus Mehri**

Over several decades Americans fought—and in some instances gave their lives—in the battle for fair working conditions and non-discriminatory treatment in the workplace. Passage of key equal employment opportunity measures, such as Title VII of the Civil Rights Act of 1964 and President Johnson’s Executive Order banning discrimination in employment by federal contractors,¹ required enormous effort and political capital. Unfortunately, as the first African-American U.S. president begins his second term, these important twentieth century reforms are imperiled. Through incremental restrictions of procedural rights, and a narrowing of substantive law, the federal judiciary has restricted employees’ access to court and their ability to vindicate their equal employment rights. This crisis in the courts has received insufficient attention from the progressive legal community and President Obama’s Administration.

While it is important for President Obama during his second term to support progressive legislation that would advance equal employment opportunity such as the Paycheck Fairness Act² and the Employment Non-Discrimination Act,³ forward-looking measures may mean little without access to the courthouse door. This paper urges President Obama to protect equal employment opportunity rights by: (1) appointing federal judges with experience serving the public interest; (2) strengthening federal agencies’ systemic enforcement of equal employment rights; and (3) exposing ongoing discrimination through enhanced transparency so that the nation understands the importance of defending civil rights laws in the twenty-first century.

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¹ Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965) as amended by Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 13, 1967); Exec. Order No. 12,067, 43 Fed. Reg. 28,967 (June 30, 1978).

² S. 84, 113th Cong. (2013); H.R. 377, 113th Cong. (2013).

³ S. 811, 112th Cong. (2012); H.R. 1397, 112th Cong. (2012).

I. Twentieth Century Equal Employment Reforms Under Attack

The fight leading up to the passage of the Civil Rights Act of 1964 was long, contentious, and bloody. Through lunch counter sit-ins, freedom rides, and boycotts, those fighting for racial equality faced attack dogs, fire hoses, and brutal mistreatment by the police. Eight years after Rosa Parks refused to give up her seat on an Alabama bus, President John F. Kennedy addressed the nation and called for civil rights legislation, but faced strong political opposition.⁴ Alongside the civil rights movement, the feminist movement of the early 1960s fought for gender equality in the workplace and other arenas. In 1961 President Kennedy established the Presidential Commission on the Status of Women, which “brought together women leaders from throughout the country and created real forward momentum on women’s issues just as the second wave of the feminist movement began.”⁵ He later signed the Equal Pay Act of 1963 to address wage disparities based on gender.⁶

Days after President Kennedy’s assassination, President Johnson addressed Congress and urged it to pass the Civil Rights Act. Although the speech prompted action by Congress, many senators and representatives refused to support the legislation, leading to a filibuster. Finally, proponents of the bill gathered enough votes to defeat the filibuster, and on July 2, 1964, President Johnson signed the Civil Rights Act of 1964 into law.⁷

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.⁸ In 1965, President Johnson signed Executive Order 11246⁹ prohibiting federal contractors from discriminating in employment decisions based on the same factors. Together these measures constitute the foundation of equal employment rights in America. They were followed by the Age

⁴ Rosa Parks refused to give up her seat on a bus on December 1, 1955 in Montgomery, Alabama, spurring the Montgomery Bus Boycott. President Kennedy addressed the nation on June 11, 1963. His speech reacted in part to months of protests against segregation, unfair hiring practices in Birmingham, Alabama, and the subsequent violent response by the Birmingham police including bombings at a hotel where Martin Luther King had been staying and at the home of his brother.

⁵ Exec. Order No. 10,980, 26 Fed. Reg. 12,059 (Dec. 16, 1961); Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM & MARY L. REV. 209, 231 (1998). The commission, which may have been convened to stymie discussions of the Equal Rights Amendment, ultimately recommended that women pursue equality through the Fourteenth Amendment of the Constitution and that an Equal Rights Amendment “need not now be sought.” *Id.* at 230.

⁶ Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended in scattered sections of 29 U.S.C.).

⁷ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

⁸ 42 U.S.C.S. § 2000e-2(a)(1) (LexisNexis 2012).

⁹ Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965) as amended by Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 13, 1967).

Discrimination in Employment Act of 1967,¹⁰ and the Americans with Disabilities Act of 1990.¹¹ Disturbingly, as we begin 2013, the bedrock principles at the core of these statutes are slipping away.

A. Title VII Gutted

According to one scholar, the Supreme Court and lower federal courts have been “aggressively activist in narrowing, undermining, and effectively nullifying an array of progressive statutes,”¹² including statutes involving civil rights and affirmative action. Former federal judge Nancy Gertner recently declared that “changes in substantive discrimination law since the passage of the Civil Rights Act of 1964 [are] tantamount to a virtual repeal.”¹³ Judge Gertner does not blame Congress. She blames judges, and argues that, “judges have made rules that have effectively gutted Title VII. These rules are not required by the statute, its legislative history, or the purpose of the Act.”¹⁴

Some of these anti-employee, judge-created rules include: (1) the “stray remarks” doctrine, which allows judges to discount explicitly discriminatory statements; (2) extreme deference to business judgment or a refusal to second-guess an employer’s proffered reasons for taking an adverse employment action; and (3) the requirement that an employee identify a “nearly identical” comparator outside the protected class who received better treatment.¹⁵ These judge-made rules are often used to dismiss employees’ cases upon an employer’s motion for summary judgment.

Equal employment case law has developed asymmetrically. The one-sided precedent “fundamentally changes” the way judges view cases: “If case after case recites the facts that do not amount to discrimination, it is no surprise that the decision makers have a hard time envisioning the facts that may well comprise discrimination. Worse, they may come to believe that most claims are trivial.”¹⁶

Empirical studies of federal courts data bolster Judge Gertner’s observation that district court judges are unduly harsh against employees in discrimination cases. A

¹⁰ Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634 (2006)).

¹¹ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C. and 47 U.S.C.).

¹² Simon Lazarus, *Stripping the Gears of National Government: Justice Stevens’s Stand against Judicial Subversion of Progressive Laws and Lawmaking*, 106 NW. U. L. REV. 769, 771 (2012) (describing the techniques employed by the Supreme Court to dismantle progressive laws since William Rehnquist became Chief Justice in 1986).

¹³ Nancy Gertner, *Losers’ Rules*, 122 YALE L.J. ONLINE 109 (2012), available at <http://yalelawjournal.org/2012/10/16/gertner.html>.

¹⁴ *Id.* at 123.

¹⁵ *Id.* at 118–120.

¹⁶ *Id.* at 115.

relevant study compiles data from federal employment discrimination cases that was maintained by the Administrative Office of the United States Courts and assembled by the Federal Judicial Center covering the period from 1979 through 2007.¹⁷ The data show that cases identified by civil cover sheet category “Civil Rights: Jobs” fare significantly worse in bench trials than other cases. The hostility to equal employment opportunity cases is particularly evident when outcomes in judge trials are compared with jury trials. Juries rule in favor of plaintiffs in job cases 37.63 percent of the time,¹⁸ while district court judges rule in their favor less than 20 percent of the time.¹⁹

When employees overcome the one-sidedness of district courts’ adjudication of Title VII cases, they face appellate federal courts that are more likely to reverse employees’ victories than employers’ victories. When employers win at trial, they are reversed by the U.S. Courts of Appeals 8.72 percent of the time. In striking contrast, when employees win at trial, they are reversed 41.10 percent of the time.²⁰ In at least some of these cases, appeals courts change the rules of the game after employees have proven their cases to juries. For example, a jury sitting in the Northern District of Georgia awarded Lilly Ledbetter over \$3.5 million in damages in a pay discrimination case against her former employer.²¹ But, on appeal, the Eleventh Circuit set aside the jury’s verdict.²² The Eleventh Circuit’s decision and the subsequent Supreme Court decision affirming the Eleventh Circuit reversed a well-settled principle that every paycheck containing discriminatory pay resets the time period for filing a complaint of discrimination. As a result, despite the jury’s finding, Ms. Ledbetter recovered nothing.

While the Supreme Court decision in *Ledbetter* received national attention and led to Congressional action,²³ most appeals courts’ decisions overturning plaintiff-employee victories go unnoticed by the public. Again and again employees lose. Looking at appeal outcomes in the aggregate, Cornell Dean Stewart J. Schwab and Professor Kevin M. Clermont found the anti-plaintiff effect on appeal particularly disturbing because employment discrimination cases are fact-intensive and often turn on the credibility of witnesses:

The vulnerability on appeal of jobs plaintiffs’ relatively few trial victories is more startling in light of the nature of these

¹⁷ Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103 (2009).

¹⁸ *Id.* at 130.

¹⁹ *Id.*

²⁰ *Id.* at 110.

²¹ *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F. 3d 1169, 1176 (11th Cir. 2005), *aff’d*, 550 U.S. 618 (2007).

²² *Id.*

²³ The Lilly Ledbetter Fair Pay Act of 2009 was the first piece of legislation signed by President Obama. See Pub. L. No. 111-2, 123 Stat. 5 (2009).

cases and the applicable standard of review. The bulk of employment discrimination cases turn on intent, and not on disparate impact. The subtle question of the defendant's intent is likely to be the key issue in a nonfrivolous employment discrimination case that reaches trial, putting the credibility of the witness at play. When the plaintiff has convinced the factfinder of the defendants' wrongful intent, that finding should be largely immune from appellate reversal, just as defendants' trial victories are. Reversal of plaintiffs' trial victories in employment discrimination cases should be unusually uncommon. Yet we find the opposite.²⁴

The 8.72 percent reversal rate for employers compared to the 41.10 percent reversal rate for employees is a shocking five-to-one disparity. Some amount of disparity can be explained and even justified by multiple factors, such as the imbalance of litigation resources available to employers versus employees. However, an appeals disparity that is five-to-one is indefensible. It creates a crisis of confidence in the federal courts and debilitating consequences for civil rights litigants.

B. Judicially Created Procedural Roadblocks Hurt Employees

Federal courts have not only gutted Title VII substantively, they have created new procedural hurdles that make litigation particularly difficult for employees. Over the last two decades, federal courts have accelerated the use of summary judgment, imposed heightened pleading standards, and raised the showing required for class actions while simultaneously developing jurisprudence increasingly more tolerant of arbitration agreements that deny employees access to courts. Arthur R. Miller, the leading scholar on federal civil procedure, described this as a seismic "judicial piling on" that is contrary to the intent of the federal rules.²⁵

Miller condemned federal courts' willingness to prematurely dispose of litigation by inappropriately resolving disputed facts at summary judgment. Miller also criticized the new "plausibility" standard for deciding motions to dismiss set forth in the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*,²⁶ and expanded in *Ashcroft v. Iqbal*.²⁷ The new plausibility standard turns notice pleading on its head. It invites federal judges

²⁴ Clermont & Schwab, *supra* note 17, at 112.

²⁵ Arthur R. Miller, Awards Luncheon Speech at the American Association for Justice 2012 Annual Conference (July 31, 2012) [hereinafter Miller Speech], available at <http://www.milberg.com/files/News/b032014e-1dd5-4a1d-9341-01900abd2886/Presentation/NewsAttachment/b5c83910-65c1-4e3b-8a55-01c159689d59/ArthurMillerSpeech.pdf>.

²⁶ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

²⁷ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

to resolve questions of fact prior to discovery and “decide the merits of the plaintiff’s claims at the very beginning of the case.”²⁸

Miller warns that our justice system has become so unbalanced that plaintiffs will be discouraged from bringing meritorious cases:

What is happening jeopardizes this Nation’s longstanding legislative and judicial commitment to the private enforcement of its fundamental public policies and constitutional principles and to compensate victims. If the procedural rules are not receptive to lawsuits designed to vindicate those policies and principles or if cases pursuing that end cannot be lodged in a convenient forum or survive a motion to dismiss, they will not be instituted. That is not what our procedural system, as reflected in the words of Federal Rule 1, is designed to achieve.²⁹

According to Judge Gertner, the plausibility standard is particularly harmful to employee plaintiffs because it allows judges who already believe that most employment discrimination claims are meritless to dispose of employees’ cases without concern for false negatives. In *Twombly* and *Iqbal*, the Supreme Court told federal judges to focus “on the transaction costs for defendants that such claims engender, not the impact on the plaintiffs whose claims are given short shrift.”³⁰ In practice, the plausibility standard encourages federal judges to discount employment discrimination cases.

Federal courts’ recent restrictions on class actions also harm employees who do not have the resources to pursue systemic litigation on their own. Moreover, some employees may fear retaliation for speaking out against their employer and may be more willing to step forward as a group. The Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes*,³¹ increased the pre-trial burden for employees who wish to bring their case as a class action.³²

²⁸ See Miller Speech *supra* note 25, at 7.

²⁹ *Id.* at 12. Federal Rule 1, in relevant part, states that the rules “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” FED. R. CIV. P. 1.

³⁰ Gertner, *supra* note 13, at 117.

³¹ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

³² Shortly after the *Dukes* decision, Professor John C. Coffee Jr.—and other scholars and commentators—argued that *Dukes* closed the courthouse door to most employment discrimination collective actions for money damages. See, e.g., John C. Coffee Jr., “*You Just Can’t Get There From Here*”: A Primer on *Wal-Mart v. Dukes*, 12 CLASS ACTION LITIG. REP. 610 (BNA 2011). We believe, and subsequent litigation has shown, that properly developed class action cases can be brought. Although we are unaware of any empirical study of the effect of *Dukes*, we are confident based on our familiarity with this area of law that

Heightened pleading standards and class certification requirements are inherently anti-employee. They lead to cases not being filed at all or being resolved prior to discovery and ignore the reality that employees typically have far less information than their employers about acts of discrimination. But, as the plausibility standard evidences, the courts appear unconcerned that employers have greater access to information at the outset of a case.

Another line of Supreme Court decisions directly threatens employees' ability to pursue claims in federal court. In *AT&T Mobility, LLC v. Concepcion*,³³ the Supreme Court validated class action waivers in consumer arbitration agreements, further restricting the rights of individuals who have little bargaining power and who are already locked out of court. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,³⁴ the Court refused to compel class arbitration where the parties stipulated that the arbitration agreement was silent regarding class actions. Employee advocates are challenging the application of *Concepcion* and *Stolt-Nielsen* to employment cases by arguing that collective actions and pattern-and-practice claims by employees are substantive—not merely procedural—rights guaranteed by federal labor and employment laws.³⁵ But in the meantime, approximately one-fifth of all employees are subject to some kind of mandatory arbitration agreements,³⁶ and defendants have yet another anti-employee tool in their arsenal.³⁷

The procedural roadblocks over the last two decades coincide with a drop in the number of employment discrimination cases filed in federal courts. The number of employment discrimination cases filed dropped by 37 percent between 1999 and 2007. The number of such cases fell from 23,721 in 1999 to 15,007 in 2007, the last year of available data.³⁸ Some might say employment discrimination is waning; however, data from the Equal Employment Opportunity Commission (EEOC) for the same years show

the number of employment discrimination class actions filed since that ruling has plunged compared to the rate of filing class actions in prior years.

³³ *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

³⁴ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758 (2010).

³⁵ See Brief of Appellee, *D.R. Horton v. National Labor Relations Board*, No. 12-60031 (5th Cir. Sept. 4, 2011); Brief for Public Citizen, Inc. as Amicus Curiae Supporting Plaintiff-Appellants and Affirmance, *Parisi v. Goldman Sachs Grp., Inc.*, (2d Cir. 2012) (No. 11-5229).

³⁶ Suzette M. Malveaux, *Is it the "Real Thing"? How Coke's One-Way Binding Arbitration May Bridge the Divide between Litigation and Arbitration*, 2009 J. DISP. RESOL. 77, 80 (2009); THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW AND POLICY, FORCED ARBITRATION, <http://www.employeeightsadvocacy.org/article.php/binding> (last visited Feb. 7, 2013).

³⁷ According to Harvard Professor Elizabeth Bartholet, the most important step Congress could take to ensure employment anti-discrimination protections is to overturn the Supreme Court's expansive interpretations of the Federal Arbitration Act. See Lazarus, *supra* note 12, at 809–810.

³⁸ *Id.*

that EEOC charges increased from 80,680 to 82,792 charges.³⁹ EEOC charges, many of which are filed *pro se*, have continued to increase; nearly 100,000 charges were filed in fiscal year 2012.⁴⁰

We posit that federal courts' hostility to Title VII cases and the procedural roadblocks account for at least some of the decline in the number of Title VII cases filed each year. In our practice, we encounter many lawyers who are unwilling to take on the enhanced risks of litigation and judicially created roadblocks. Many of the top lawyers in the field have withdrawn from the practice of systemic Title VII enforcement. As Judge Gertner said, Title VII truly has been "guttled."⁴¹

II. Twenty-First Century Solutions

A. Appoint Judges With Public Interest Experience

As it is presumed to be the apolitical branch of government, the judiciary's attack on Title VII proceeds under the radar, without the scrutiny of the general public. President Obama must carry the torch to expose the simple truth that our courts have quietly achieved the unthinkable—effective repeal of Title VII and the other statutes protecting against invidious discrimination in the workplace. President Obama must appoint judges to the federal judiciary who understand the imbalance of power in the courts, the reasons for the asymmetry of decisions against employees, and the injustice of procedural roadblocks that deny employees their day in court. To start, the President should appoint judges from diverse backgrounds, focusing on diversity of life and work experiences. Lawyers who have devoted their careers to representing ordinary Americans are more likely to understand—and counteract—the crisis in the courts identified by Judge Gertner.

In 2008, our firm conducted an informal review of federal circuit court judges' careers prior to their appointment to the bench. We reviewed the biographies from the Almanac of the Federal Judiciary for 162 federal circuit court judges. Though further research is necessary, we found striking initial results that may explain why the courts have rolled back equal employment rights and constructed procedural roadblocks harming Title VII plaintiffs. The federal appellate bench is dominated by judges whose previous professional experience is generally corporate or prosecutorial.

³⁹ EQUAL EMPLOYMENT OPPORTUNITY COMMISSION CHARGE STATISTICS, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Feb. 7, 2013).

⁴⁰ *Id.*

⁴¹ Gertner, *supra* note 13, at 123.

Our informal analysis showed that while about 138 judges or 85.2 percent of those surveyed in 2008 had worked in private practice,⁴² only five judges or 3.1 percent had substantial prior legal experience working for public interest organizations.⁴³ Though the experience of these five judges is notable, none of these judges had worked for a public interest organization in more than 30 years. In other words, based on our 2008 review, the federal appellate bench is nearly devoid of judges with any full-time, non-profit experience during the most recent generation. Some of the most accomplished lawyers in the country are public interest lawyers with active appellate court and Supreme Court practices. Yet we found no U.S. circuit court judge who served in such a role since 1981. About 45 percent of those surveyed formerly worked as prosecutors, U.S. attorneys, state or city attorneys, attorneys general, or solicitors general, and only two of those surveyed worked as public defenders.

Further, according to our firm's 2008 review, only five federal appellate judges had worked for organizations that enforce traditional civil rights;⁴⁴ only three appellate

⁴² It was beyond the scope of our review to ascertain what each of the 138 out of 162 active appellate judges did in their private practices. It is clear from the judges' biographies that a sizable number of them worked for large, well-known firms that tend to represent corporations. We note, however, that the experience of two judges in private practice stood out as rare in our review. Prior to serving on the bench, Judge Rosemary Barkett had a general private practice where she "mostly represented middle class individuals with ordinary legal problems." *Almanac of the Fed. Judiciary*, Vol. 2, (11th Cir.) at 7 (Supp. 2008-2). Judge Marsha S. Berzon practiced union-side labor law at Altshuler Berzon LLP and represented the AFL-CIO.

⁴³ In our review of judges' backgrounds in private practice or non-profit organizations, we did not consider academic or government employment. Because we were interested in significant experience in non-profit work, we also did not include *pro bono* activities in our results for non-profit work. The appellate judges who have worked as lawyers for a non-profit organization include: Judge Deanell Reece Tacha who served both as the Director of Douglas County Legal Aid Clinic and the Director of the Legal Aid Clinic at the University of Kansas from 1974-77; Judge Richard A. Paez who worked as a Staff Attorney at California Rural Legal Assistance from 1972-74, as a Staff Attorney at Western Center on Law and Poverty from 1974-76, and as Senior Counsel, Director of Litigation, Acting Executive Director and Director of Litigation at the Legal Aid Foundation of Los Angeles from 1976-81; Judge Rosemary S. Pooler who worked at the New York Public Interest Research Group from 1974-76; Judge David S. Tatel who served as Executive Director for the Chicago Lawyers' Committee for Civil Rights Under Law from 1969-70, and the Director of the National Lawyers' Committee for Civil Rights Under Law from 1972-74; and finally, Judge Judith W. Rogers who served as a staff attorney at the San Francisco Neighborhood Legal Assistance Foundation from 1968-1969. In our list of judges with non-profit experience, we did not include Judge Robert A. Katzmann, who worked at the Brookings Institution from 1981-99, because we viewed his role at Brookings as akin to an academic position.

⁴⁴ Judge Tatel worked at the Chicago and National Lawyers' Committees for Civil Rights Under Law and served as Director of the Office for Civil Rights for the U.S. Department of Health, Education and Welfare from 1977-79; Judge Allyson Kay Duncan worked for the EEOC from 1978-86 as an appellate attorney and as executive assistant to Chair Clarence Thomas; Judge Sandra Lea Lynch served as General Counsel to the Massachusetts Dept. of Educ. from 1974-78 and represented the state in the Boston desegregation cases; Judge Milan Dale Smith, Jr. served on California's Fair Employment and Housing Commission from 1987-1991; Judge Harvie Wilkinson, III served as Deputy Assistant Attorney General for the Civil Rights

judges had worked for organizations that represented lower-income Americans;⁴⁵ and only one appellate judge appeared to have substantial experience advocating for consumer rights.⁴⁶

Though it is difficult to ascertain the experiences of judges during their private practices, our preliminary analysis shows that the federal appellate bench is largely detached from the day-to-day hardships and realities that American workers face in the workplace and in the courts.⁴⁷ Employment discrimination plaintiffs are rather unlikely to draw a panel of appellate judges that contains even one judge with experience advocating for civil rights, representing the poor or disadvantaged, or dealing with the information and resource asymmetry faced by employee litigants. We suspect that the professional background of judges on the federal district court bench is much the same.

During his first term, President Obama nominated a number of exceptional members of the bar to the district and circuit courts, but his nominees have largely corporate and prosecutorial experience. According to the Alliance for Justice, only two out of President Obama's 217 nominees to the federal bench have "non-government public interest" experience, and only nine nominees have served as legal aid attorneys. Yet, 192 of President Obama's nominees have experience in private practice.⁴⁸ The Alliance for Justice report shows that Obama also nominated 70 individuals with experience as government civil litigators or policy counsel. The report does not more specifically identify the particular types of government work conducted by these nominees. Similarly, a study of district court nominees from 2008 to 2011 by the Brookings Institute also concluded that President Obama nominated more individuals with professional backgrounds in private practice than in the public interest.⁴⁹

Division of the Reagan Dept. of Justice from 1982-83. Additionally, Judges Barkett and Berzon have civil rights experience from their private practices. *See supra* note 42.

⁴⁵ *See supra* note 43.

⁴⁶ Judge Pooler served as the Executive Director of the New York Consumer Protection Board from 1981 to 1986. We did not include Judge James B. Loken who briefly was General Counsel to President Nixon's Committee on Consumer Interests.

⁴⁷ Our conclusion that the professional history of federal appellate judges is imbalanced would be the same even assuming that our informal poll erroneously failed to identify some judges with significant prior legal experience serving the public interest. We identified a total of eleven judges who worked for non-profit organizations, advanced civil or consumer rights in private practice or on behalf of the government, or served low-income communities. Even if we doubled our figure, such individuals would comprise only 13.6 percent of the judges surveyed.

⁴⁸ ALLIANCE FOR JUSTICE, JUDICIAL SELECTION SNAPSHOT 8 (2012), *available at* <http://www.afj.org/judicial-selection/judicial-selection-snapshot.pdf>.

⁴⁹ From 2008-2011 Obama's district appointees were comprised of 51 percent sitting judges, 34 percent private sector, and 14 percent public interest (a definition that includes government attorneys). *See* RUSSELL WHEELER, BROOKINGS INST., JUDICIAL NOMINATIONS AND CONFIRMATIONS AFTER THREE YEARS—WHERE DO THINGS STAND? 13 (2012), *available at* <http://www.brookings.edu/~media/research/>

The professional background of a few Obama nominees is notable. For example, Judge Edward Chen was staff attorney for the American Civil Liberties Union (ACLU)⁵⁰ and Judge William Martinez was an employment lawyer for the Legal Assistance Foundation of Chicago, served as a regional attorney for the EEOC, and maintained a private civil rights and employment practice.⁵¹ But, contrary to Senator Jeff Sessions' perception that Obama nominees have a "common and concerning DNA—the ACLU chromosome,"⁵² the vast majority of Obama nominees have no such public interest experience. Indeed, President Obama has not appointed any judge with substantial public interest experience to a federal appellate court.

Packing the court with corporate lawyers does little to protect Title VII or employees' access to the courthouse door. President Obama must nominate judges with experience representing employees, advocating for civil rights, or working for non-profit organizations that promote the public interest. The nation needs judges who understand how Title VII and the rules of civil procedure have been manipulated. Nominees who have experience representing American workers are more likely to guard against premature disposition of employment discrimination cases and distortion of the rules of procedure.

B. Strengthen Systemic Enforcement of Equal Employment Rights by Federal Agencies

The Draconian view of Title VII, distortion of the basic principles of civil procedure, and the new hurdles to class certification adopted by the federal judiciary make it difficult for employees to vindicate their rights. Because many private attorneys are unwilling to take employment discrimination cases as the courts become more hostile, the administration's role in enforcing equal employment rights is even more important. To maximize its enforcement impact, the administration should continue to emphasize its systemic enforcement of Title VII and other equal employment opportunity laws.

files/papers/2012/1/13%20nominations%20wheeler/0113_nominations_wheeler.pdf (providing statistical summary, and brief explanation, of judicial nominees in President Obama's first three years).

⁵⁰ President Obama nominated Judge Chen to the U.S. District Court for the Northern District of California and the U.S. Senate confirmed him on May 10, 2011. He was a staff attorney from the ACLU from 1985 to 2001 and from 2001 to 2011 he was a magistrate judge for the U.S. District Court for the Northern District of California. *See* U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, DISTRICT JUDGE EDWARD M. CHEN, <http://www.cand.uscourts.gov/emc> (last visited Feb. 8, 2013).

⁵¹ President Obama nominated Judge William J. Martinez to the U.S. District Court for the District of Colorado on February 24, 2010. *See* Press Release, White House, President Obama Nominates Three for District Court Bench, (Feb. 24, 2010), <http://www.whitehouse.gov/the-press-office/president-obama-nominates-three-district-court-bench>.

⁵² Carl Tobias, *Justifying Diversity in the Judiciary*, 106 Nw. U. L. COLLOQUY 283, 289 (2011) (quoting U.S. S. Comm. on the Judiciary, Webcast of Executive Business Meeting (Oct. 15, 2009)).

President Obama took a number of important steps toward strengthening systemic enforcement during his first term. First, the EEOC sharpened its focus on systemic enforcement. The EEOC's Strategic Plan for Fiscal Years 2012-2016 promises to "use administrative and litigation mechanisms to identify and attack discriminatory policies and other instances of systemic discrimination."⁵³ The Strategic Plan sets a goal of increasing the number of systemic cases in the EEOC's litigation docket by the end of fiscal year 2016.⁵⁴ In December 2012, the EEOC adopted a Strategic Enforcement Plan that emphasizes systemic enforcement in the following areas: recruitment and hiring discrimination, discriminatory compensation systems and practices, and harassment among other strategic priorities.⁵⁵ Under the plan, the EEOC is required to give precedence to systemic charges that raise any of the EEOC's priority issues over individual charges.⁵⁶ The EEOC's systemic enforcement efforts are especially important because its systemic cases are not subject to federal courts' class certification requirements, which, as discussed above, may limit private class action enforcement.

Also during President Obama's first term, the administration created the Equal Pay Task Force to implement President Obama's pledge to crack down on equal pay violations. In July 2010, the task force—which is comprised of personnel from the EEOC, the Department of Labor, including the Office of Federal Contract Compliance Programs (OFCCP), the Department of Justice, and the Office of Personnel Management—identified the following action items for the administration: (1) improve interagency coordination and enforcement of anti-discrimination laws, including systemic enforcement of anti-wage discrimination laws by the EEOC; (2) collect data from the private workforce to better understand the pay gap; (3) undertake a public education campaign to educate employees about their rights and employers about their obligations; (4) make the federal government a role model employer; and (4) work with Congress to pass the Paycheck Fairness Act.⁵⁷

In April 2012, the Equal Pay Task Force published a report highlighting its accomplishments. According to the report, between January 2010 and April 2012, the EEOC recovered over \$62.5 million for victims of sex-based wage discrimination, obtained changes to workplace practices that will benefit over 250,000 workers, and filed five systemic cases that allege sex-based wage discrimination.⁵⁸ During the same time

⁵³ U.S. Equal Employment Opportunity Commission, Strategic Plan for Fiscal Years 2012-2016 11 (2012) http://www.eeoc.gov/eeoc/plan/upload/strategic_plan_12to16.pdf.

⁵⁴ *Id.* at 18.

⁵⁵ U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013-2015 9 (2012), <http://www.eeoc.gov/eeoc/plan/upload/sep.pdf>.

⁵⁶ *Id.* at 12–13.

⁵⁷ Equal Pay Task Force, White House Council on Women and Girls, Equal Pay Task Force Accomplishments: Fighting for Fair Pay in the Workplace, (2012), http://www.whitehouse.gov/sites/default/files/equal_pay_task_force.pdf.

⁵⁸ *Id.*

period, the OFCCP closed about 50 compliance evaluations with financial settlements remedying compensation discrimination on the basis of gender and race resulting in \$1.4 million back pay and salary adjustments for over 500 workers.⁵⁹ In addition to the compliance evaluations listed above, in September through December 2012, the OFCCP announced three settlements of systemic sex and race discrimination cases totaling over \$1 million for over 2,000 workers.⁶⁰ In total, the EEOC recovered \$364.6 million in 2011 and \$365.4 million in 2012—record-breaking amounts.⁶¹

The administration's civil rights enforcement efforts have already resulted in recoveries for injured employees and caught the attention of corporate counsel. For example, the headline of a recent article announced that "Litigators Fear Emboldened Obama Regulators in 2013." The article warned employers that EEOC would likely concentrate on systemic enforcement in 2013. Defense attorneys have recently published articles about the EEOC's systemic enforcement and strategic initiative⁶² that advise clients how to "stay out of the EEOC's sights."⁶³ This is a good indication that the administration's enforcement efforts have had a ripple effect and have encouraged employers to step up their own measures to ensure equal employment opportunity in the workplace.

President Obama renewed his commitment to equal pay during his second inaugural address:

⁵⁹ *Id.*

⁶⁰ DEPARTMENT OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, LATEST NEWS AND EVENTS, <http://www.dol.gov/ofccp/OFCCPNews/LatestNews.htm#news4> (last visited Feb. 8, 2013). Since the creation of the Equal Pay Task Force, the OFCCP "has recovered more than \$24 million in back wages and nearly 5,500 job opportunities on behalf of more than 50,000 victims of discrimination." DEPARTMENT OF LABOR, EQUAL PAY ENFORCEMENT FACT SHEET, http://www.dol.gov/equalpay/OFCCP_EqualPayEnforcementFactSheet.pdf (last visited Feb. 13, 2013).

⁶¹ Andrew Ramonas, *EEOC Breaks Record for Amount Won for Workplace Discrimination Victims*, NAT'L L. J., Jan. 28, 2013, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202586072158&EEOC_breaks_record_for_amount_won_for_workplace_discrimination_victims&slreturn=20130108200808; see also Press Release, EEOC, EEOC Reports Nearly 100,000 Job Bias Charges in Fiscal Year 2012 (Jan. 28, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/1-28-13.cfm>; Press Release, EEOC, Private Sector Bias Charges Hit All-Time High (Jan. 15, 2012), available at <http://www.eeoc.gov/eeoc/newsroom/release/1-24-12a.cfm>.

⁶² See, e.g., Matthew I. Bobb & Baker Hostetler, *EEOC Approves Strategic Enforcement Plan*, JD SUPRA L. NEWS (Dec. 24, 2012), <http://www.jdsupra.com/legalnews/eeoc-approves-strategic-enforcement-plan-69610/> (advising corporate clients to use the EEOC's priorities to audit their internal compliance systems and to address weaknesses in compliance).

⁶³ William Martucci & Kristen Page, *The EEOC's Systemic Initiative and High-Priority Enforcement Areas: Compliance Strategies for Employers*, METROPOLITAN CORP. COUNSEL (Aug. 20, 2012), <http://www.metrocorp counsel.com/articles/20191/eeoc%E2%80%99s-systemic-initiative-and-high-priority-enforcement-areas-compliance-strategies->.

We, the people, declare today that the most evident of truths—that all of us are created equal—is the star that guides us still; just as it guided our forebears through Seneca Falls, and Selma, and Stonewall; just as it guided all those men and women, sung and unsung, who left footprints along this great Mall, to hear a preacher say that we cannot walk alone; to hear a King proclaim that our individual freedom is inextricably bound to the freedom of every soul on Earth. It is now our generation’s task to carry on what those pioneers began. For our journey is not complete until our wives, our mothers and daughters can earn a living equal to their efforts.⁶⁴

Building on the success of the President’s first term, the EEOC, OFCCP, and the Equal Pay Task Force should continue their robust systemic enforcement efforts throughout the President’s second term, particularly in light of waning private enforcement.

C. Shine the Light on “Second Generation” Discrimination in Today’s America

The President can further advance equal employment opportunity by bringing insidious employment discrimination to the limelight.⁶⁵ Some argue that having an African-American president has made it more challenging for Americans to acknowledge ongoing race discrimination. For example, in an op-ed in *The Washington Post*, Reniqua Allen asked, “How do I articulate that it’s harder for me find jobs with a ‘ghetto sounding’ name, when a man with a ‘funny sounding’ name holds the highest office in the land?”⁶⁶ But, even before President Obama’s first election, employment discrimination on the whole had become subtler. Today, employees face discrimination in the form of in-group favoritism, out-group bias, and stereotyping, sometimes called

⁶⁴ President Obama, Inaugural Address (Jan. 21, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>.

⁶⁵ Numerous studies show evidence of discrimination in the workplace in the twenty-first century. See, e.g., Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 736–38 (2000) (finding that blind auditions of new hires led to a one-third increase in the proportion of new female hires in major symphony orchestras); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004) (discussing a study in which 5,000 identical resumes sent out to different employers, applicants with “Caucasian” names received 50 percent more callback interviews than those applicants with “African American” names).

⁶⁶ Reniqua Allen, *The First Black President Has Made it Harder to Talk about Race in America*, WASH. POST, Mar. 23, 2012, http://articles.washingtonpost.com/2012-03-23/opinions/35449838_1_trayvon-martin-president-obama-shirley-sherrod.

“second generation” discrimination.⁶⁷ This subtler discrimination creates significant harm when it is reinforced by corporate organizational structures and when corporations lack systemic efforts to reduce the impact of bias. Ultimately, people of color, women, and other “out-groups” lose employment opportunities and wages, and such harm goes largely unrecognized.

In an October 2008 report, “21st Century Tools for Advancing Equal Opportunity: Recommendations for the Next Administration,” we recommended several transparency measures that any administration could take to expose ongoing employment discrimination in America. We reiterate two of our recommendations here: (1) require diversity disclosures by publicly traded companies; and (2) enhance the information federal contractors must provide to the OFCCP. Exposing bias in the workplace heightens awareness of it and can reduce the problem. An employer whose inequitable hiring, promotion, or compensation patterns are disclosed for all to see is much more likely to take steps to reduce discriminatory impact.

1. Utilize the Transparency Tools of the SEC to Advance Equal Opportunity

The Obama Administration should issue regulations that require publicly traded companies to publicly file a Diversity Report Card along with the other information they submit to the Securities and Exchange Commission (SEC) pursuant to Section 13(a) and Section 14(a) of the Securities Exchange Act.⁶⁸ In addition to traditional financial disclosures mandated by the Securities and Exchange Act, the SEC already requires disclosure of information such as competitive conditions in the market,⁶⁹ expenditures on environmental protection compliance,⁷⁰ the number of company employees,⁷¹ and litigation the company faces.⁷² The SEC collects such non-financial information under its authority to ascertain material information for the benefit of investors. Adding diversity metrics to these disclosures is a low-cost way for the administration to shed

⁶⁷ Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 465–66 (2001). For a discussion of the biases that seep into decision making in the modern workplace, see Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 746 (2005). For a discussion of how workplace culture discriminates and reflect biases, see Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623 (2005).

⁶⁸ 15 U.S.C. § 78a *et seq.* (2007). For a more in-depth treatment of this proposal, see Cyrus Mehri & Ellen Eardley, *21st Century Tools for Advancing Equal Opportunity: Recommendations for the Next Administration*, 3 ADVANCE: J. AM. CONST. SOC’Y ISSUE GRPS. 149 (2009); Cyrus Mehri et al., *One Nation, Indivisible: The Use of Diversity Report Cards to Promote Transparency, Accountability and Workplace Fairness*, 9 FORDHAM J. CORP. & FIN. L. 395 (2004).

⁶⁹ 17 C.F.R. § 229.101(c)(x) (2008).

⁷⁰ *Id.* § 229.101(c)(xi).

⁷¹ *Id.* § 229.101(c)(xii).

⁷² *Id.* § 229.103.

light on discrimination in the workplace while simultaneously incentivizing employers to take steps to enhance compliance with equal employment opportunity laws.

Because “corporate social behavior can affect profitability,”⁷³ corporate diversity information can be seen as “material” to investment decisions. In addition to helping investors make sound decisions, mandatory disclosure of diversity data will create a marketplace in which companies will strive to improve compliance with equal employment opportunity laws. The Diversity Report Card should include the following information:

- *Key Glass Ceiling Indicators*, such as the race, ethnicity, and gender of the 200 highest paid employees based on *total* compensation;
- *Special Compensation Data*, including the distribution of stock options and other forms of compensation by race, ethnicity, and gender;
- *Pay Equity Data*, including the range, median, and mean salary by job function by race, ethnicity, and gender;
- *Applicants and New Hire Data*, including the race, ethnicity, and gender of applicants and those hired by job function; this data should include positions that are internal promotions; and
- *Diverse Candidate Slates for Boards of Directors*, including the race, ethnicity and gender of candidates interviewed in-person for Board Positions.⁷⁴

This data would reveal the impact of “second generation” discrimination in today’s workplace. Companies would be forced to both examine the ways in which structural systems support subtle discrimination and to embrace best practices to level the playing field.⁷⁵

⁷³ See Note, *Should the SEC Expand Nonfinancial Disclosure Requirements?*, 115 HARV. L. REV. 1433, 1436 (2002) (responding to a seminal article by Cynthia Williams that argues in favor of mandatory social disclosure by corporations); see also Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1266 (1999).

⁷⁴ We suggest that the diversity report card information be collected by race, ethnicity, and gender because information regarding the race, ethnicity, and gender of employees is already collected by many employers in order to comply with the EEOC’s EEO-1 Form requirements. See 29 C.F.R. §§ 1602.7–1602.14. It could be useful to collect the diversity report card data that we suggest for other protected categories as well.

⁷⁵ David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 J. CORP. L. 41 (1999) (arguing that “[I]f corporations were required to disclose information about their

2. Increase Transparency and Disclosures to the OFCCP

Another way to bring discrimination to the limelight is to require employers to share more information about their workforces with the federal government. In this vein, the OFCCP should issue regulations allowing it to collect data to more easily identify widespread wage inequalities. Currently, OFCCP does not systematically collect compensation data from federal contractors.⁷⁶ In August 2011, the OFCCP took a step in the right direction by issuing an advance notice of proposed rulemaking, inviting input on development of a compensation data collection tool.⁷⁷ The recent proposed rulemaking suggests that the OFCCP is considering a new system of collecting compensation data. The OFCCP suggested that it might use the new system as a screening tool to more efficiently select contractors in need of further compliance investigation. The system could also encourage federal contractor employers to self-police their own compliance with Executive Order 11246.

The OFCCP should make issuing a notice of proposed rulemaking and final rulemaking regarding the data collection tool a key priority during the President's second term.⁷⁸ The final regulations should include the following features at minimum: (1) to reduce the burden on employers and increase its utility for the OFCCP, the data collection tool should be electronic, such as an online form or e-mail submission; (2) to best expose the glass ceiling, the tool should collect data on all elements of compensation, including total W-2 earnings and stock options; and (3) to identify systemic discrimination, the tool should collect data on a nationwide basis across a federal contractor's various establishments. Armed with easily searchable and useable wage data, the OFCCP could focus its enforcement efforts on systemic violations that impact the largest number of American workers.

actions affecting [stakeholders], then pressure would mount to justify those acts; and justifying one's acts, most ethicists would grant, is the first step toward improving one's behavior." *Id.* at 41.

⁷⁶ In 2000, OFCCP implemented, on a pilot basis, an Equal Opportunity Survey to collect data along these lines, but discontinued the survey before it was seriously or consistently implemented. *See* Government Contractors, Affirmative Action Requirements, 65 Fed. Reg. 68,022 (Nov. 13, 2000) (codified at 41 C.F.R. pt. 60-2.18); Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors: Equal Opportunity Survey, 71 Fed. Reg. 53,032 (Sept. 8, 2006) (codified at 41 C.F.R. pt. 60-2.18) (rescinding the survey); MARC BENDICK, JR. ET AL., THE EQUAL OPPORTUNITY SURVEY: ANALYSIS OF THE FIRST WAVE OF SURVEY RESPONSES (Sept. 2000); Letter from Marc Bendick, Jr. to Director of Division of Policy, Planning and Program Development, OFCCP (Mar. 2, 2006) (including comments on proposed Equal Opportunity Survey) (on file with author).

⁷⁷ Nondiscrimination in Compensation; Compensation Data Collection Tool, 76 Fed. Reg. 49,398 (Advance Notice of Proposed Rule Making, Aug. 10, 2011).

⁷⁸ As of early January 2013, the Office of Information and Regulatory Affairs website suggested that OFCCP will issue a notice of proposed rulemaking in June 2013. The Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions displays information about pending regulations by agency. Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions, <http://www.reginfo.gov/public/do/eAgendaMain> (select "Department of Labor"; then follow "1250-AA03" link).

III. Conclusion

We applaud the equal employment opportunity efforts taken by President Obama's Administration during his first term, but the courts threaten to wipe away the progress made by his administration and others before him. It is time for the president to take his commitment to equal employment opportunity to the next level. To secure the hallmark civil rights laws of the twentieth century, President Obama must nominate federal judges who understand the realities faced by Americans in the workplace and at the courthouse. Then, to offset the anti-employee roadblocks created by the courts, the administration must concentrate on systemic enforcement of equal employment opportunity laws to protect as many American workers as possible. Finally, the administration should help the nation understand that employment discrimination continues to harm workers in the twenty-first century by increasing the information employers must share with the public and the government. Exposing the realities of ongoing discrimination will pressure employers to remedy discrimination, and, in turn, will create better workplaces for all Americans.