COMMENT

CONFUSING THE MEANS FOR THE ENDS: HOW A PRO-SETTLEMENT POLICY RISKS UNDERMINING THE AIMS OF TITLE VII

ROBERT D. FRIEDMAN†

INTRODUCTION 1362
I. THE SCOPE AND IMPACT OF SETTLEMENTS 1364
A. *The Conflict Between Settlements and the Aims of Title VII* 1365
B. *The Role of the EEOC* 1368
II. THE SPLIT ON SUBSTANTIVE LAW 1370
A. *A Source of Confusion:* Alexander v. Gardner-Denver Co. 1371
B. *Determining the Validity of Different Settlement Methods* 1371
1. *Fulgence* and the Adoption of Federal Law 1372
2. *Morgan* and the Use of State Law 1374
C. *The "Voluntary and Knowing" Requirement* 1375
1. *Pierce* and the Adoption of Federal Law 1376
2. *Makins* and the Application of State Law 1377
D. *The End Result: General Confusion* 1378
III. PROCEDURAL PROBLEMS IN SETTLEMENT ENFORCEMENT 1379
A. *Federal Court Jurisdiction* 1379
1. Requesting the Federal Court Retain Jurisdiction 1380
2. Establishing Diversity Jurisdiction 1381
3. Establishing Supplemental Jurisdiction 1381
4. General Federal Question Jurisdiction 1382
B. *State Sovereign Immunity* 1386

† J.D. Candidate, 2013, University of Pennsylvania Law School. I would like to thank Professor Serena Mayeri and Professor Catherine Struve for their help developing this Comment, the members of the *University of Pennsylvania Law Review* for their editing, and my parents for their continued support.

C. *The Counterintuitive Exhaustion Requirement* 1389
IV. USING FEDERAL LAW 1391
A. *Impact on the Consequences of Settlements and Doctrinal Confusion* 1392
B. *Impact on Jurisdictional Problems* 1393
C. *Impact on States' Ability to Assert Sovereign Immunity* 1395
D. *Can Federal Law Be Used?* 1400
1. Rules of Decision Act 1400
2. Creation of Federal Law Versus Absorption of State Law 1401
a. *The Uniformity Interest* 1402
b. *The Conflict Between State Law and a Uniquely Federal Interest* 1403
i. The Uniquely Federal Interest 1403
ii. The Existence of a Significant Conflict 1405
c. *The Effect on Commercial Relationships* 1406
CONCLUSION 1407

INTRODUCTION

When analyzing cases arising from disputes over Title VII[1] settlements, courts often begin with the proposition that Congress intended to encourage voluntary settlement of employment discrimination claims.[2] As a result, courts resolve many issues attendant to the settlement process with the aim of furthering this policy but without proper consideration of the policy's effect on the underlying goals of the statute. Although Title VII suits are not settled significantly more than are other claims,[3] approximately seventy percent of all employment discrimination claims end in settlement,[4] creating a potential for the settlement scheme to undermine or, if properly

1 Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (2006).

2 *See, e.g.*, Carson v. Am. Brands, Inc., 450 U.S. 79, 88 n.14 (1981) ("In enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims."); *see also* United States v. Brennan, 650 F.3d 65, 85 (2d Cir. 2011).

3 *See* Stewart J. Schwab & Michael Heise, *Splitting Logs: An Empirical Perspective on Employment Discrimination Settlements*, 96 CORNELL L. REV. 931, 933 (2011).

4 Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 440 (2004). Scholars continue to rely on this percentage. *See, e.g.*, Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 112-13 (2007); Schwab & Heise, *supra* note 3, at 932.

executed, enhance Title VII's substantive aims.[5] In addition, even before employees bring their claims to court, a significant number of Title VII complaints lodged with the Equal Employment Opportunity Commission (EEOC)[6] are resolved through the EEOC's mandatory "conciliation" process.[7] In this respect, the pro-settlement policy has yielded its intended result. However, simply counting the number of settlements masks the more complicated (and meaningful) question of whether the pro-settlement policy is truly facilitating compliance with the substantive goals of Title VII.[8]

The frequency of employment discrimination settlements has spawned a growing and scattered body of case law on the enforcement of settlement agreements.[9] Courts have long split on whether to apply federal or state law when considering the validity of a settlement,[10] but their analyses tend to address the issue of a settlement's validity somewhat narrowly. Courts rarely acknowledge the systemic impact of the push to settle. Similarly, their analyses frequently fail to take account of the considerable substantive and procedural obstacles facing employees who seek to enforce or, in some cases, avoid allegedly invalid settlements.

This Comment attempts to connect these two distinct but related problems—the frequency of settlements on the one hand, and the failure of the law governing settlements to account for Title VII's policy aims on the other—and argues that the adoption of federal common law would provide a mechanism for mitigating the current flaws in the administration of Title

---

5 Schwab & Heise, *supra* note 3, at 932.

6 The EEOC is an executive office, headed by five presidential appointees, and is the federal government's enforcement unit for Title VII. It receives complaints, investigates allegations, negotiates between employees and employers, and, when all else fails, brings enforcement actions. *See generally* 42 U.S.C. § 2000e-4 (creating the EEOC and outlining its roles and responsibilities); *About the EEOC: Overview*, EEOC, http://www.eeoc.gov/eeoc/index.cfm (last visited Mar. 15, 2013) (summarizing the EEOC's role at various stages of employment discrimination claims).

7 *See* 42 U.S.C. § 2000e-5 (outlining the conciliation process).

8 *Cf.* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (arguing against settlements on the theory that the duty of judges "is not to maximize the ends of private parties . . . but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes").

9 *See, e.g.*, Daniel P. O'Gorman, *A State of Disarray: The "Knowing and Voluntary" Standard for Releasing Claims Under Title VII of the Civil Rights Act of 1964*, 8 U. PA. J. LAB. & EMP. L. 73, 73-74, 85-108 (2005) (stating, with respect to the "knowing and voluntary" standard for entering into a settlement, that "the law governing when a court should enforce a person's purported waiver or release of claims under Title VII . . . is in disarray" and analyzing the confusion in the case law).

10 *Compare* Morgan v. S. Bend Cmty. Sch. Corp., 797 F.2d 471, 474-78 (7th Cir. 1986) (concluding that state law applies), *with* Fulgence v. J. Ray McDermott & Co., 662 F.2d 1207, 1209 (5th Cir. 1981) (concluding that federal law applies).

VII and connected settlements.[11] Part I of this Comment addresses the scope and impact of Title VII settlements and considers the particularly troubling proliferation of confidential settlements. Part II reviews the current split between courts that apply federal law and those that apply state law as the substantive rules of decision governing settlement-enforcement suits. Part III considers the procedural hurdles facing employees who attempt to enforce settlements. The current state of the law creates a number of difficulties for employees who seek to adjudicate their claims in federal court, creates unwarranted challenges for state employees, and imposes an unnecessary administrative exhaustion requirement.

Finally, Part IV argues that the myriad obstacles facing employees suggest that private settlement provides an insufficient remedy and that the current state of affairs creates a significant conflict with the strong federal interests that Title VII endeavors to promote. As a result, this Comment advocates an important but partial solution to this problem—courts should apply federal rules of decision to suits that attempt to enforce Title VII settlements. The suggestion to apply federal common law is made with full awareness of the strong trend against judicial lawmaking in federal courts. Indeed, the aim of Parts I–III is to convince the reader that it is worth waging that uphill battle. Ultimately, this Comment concludes that application of federal common law is justifiable, would help ensure access to federal courts, and would arm those courts with the tools necessary to begin mitigating the negative consequences of the current systemic push to settle.

I. THE SCOPE AND IMPACT OF SETTLEMENTS

The law governing Title VII settlements and the procedural hurdles it creates for parties to a settlement take on increased importance in light of the sheer volume of settlement agreements. A 2004 study of employment discrimination cases filed in federal court from 1979 through 2000 provides a glimpse of the role settlements play in effectuating Title VII.[12] During the twenty one–year period studied, over 185,000 employment discrimination cases (approximately seventy percent of all employment discrimination cases filed) ended in settlement.[13] Many of these settlements took place under conditions that suggest unequal bargaining power.

---

[11] Although settlements undoubtedly have an impact on the administration and effectiveness of other employment discrimination statutes, this Comment focuses exclusively on settlements of Title VII claims.

[12] *See* Clermont & Schwab, *supra* note 4, at 432-38.

[13] *Id.* at 440. The data mainly concerned Title VII claims, but § 1981, § 1983, Americans with Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA), and Family and

A. *The Conflict Between Settlements and the Aims of Title VII*

Though Congress encourages settlement of employment discrimination claims, settlements threaten Title VII's two substantive goals: compensating victims of employment discrimination and deterring future discrimination in the workplace.[14] The impact of settlements on Title VII's deterrence aim is largely a result of contract bargaining dynamics. An employer will offer only enough money or benefits to coax an employee into settling, and the employee is under no obligation to negotiate on behalf of other employees. Hence, the consideration the employee receives—and for which she bargains—is likely to advance the compensation, not the deterrence, goal.[15] Moreover, an employer who is willing to pay can essentially "deregulate by contract," choosing to continue a potentially unlawful practice in the hope that other employees are either willing to settle[16] or willing to refrain from raising complaints in the first place.[17] Employers successful in carrying out such a strategy can delay or entirely avoid true Title VII compliance.

The frequency of confidential settlements exacerbates the threat to the deterrence aim. One federal magistrate judge estimated that eighty-five to ninety percent of employment discrimination settlements include a confidentiality provision.[18] As the EEOC has argued, substantial public settlements at least signal to employers that they are subject to liability if they do not cease unlawful practices. Even if public settlements are not substantial, an individual employer still risks embarrassment and unfavorable publicity should the settlement be disclosed, as a settlement implies that unlawful

---

Medical Leave Act (FMLA) claims were included, as well. *Id.* at 431. In addition, plaintiffs proceeded pro se in just under twenty percent of all Title VII cases. *Id.* at 434 tbl.1. While pro se litigants did not necessarily occupy the same percentage in original Title VII suits as in settled claims, this statistic is at least suggestive of the possibility that settlements occur between parties with uneven bargaining power.

14 *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974); Indest v. Freeman Decorating, Inc., 164 F.3d 258, 266 (5th Cir. 1999).

15 *See* Eileen Silverstein, *From Statute to Contract: The Law of Employment Relationship Reconsidered*, 18 HOFSTRA LAB. & EMP. L.J. 479, 490-94 (2001) (arguing that deterrence aims are not served when employees settle). It is fair to assume, for example, that some plaintiffs given the choice between personal compensation and workplace-wide management adjustments would choose the former.

16 *Id.* at 493 ("Permitting employers to systematically purchase the right to discriminate—or to be free of the fear of being accused of discriminatory practices—wasn't part of the plan.").

17 *Id.* at 492 (suggesting that "practical" employees may choose not to sue to avoid any stigma when applying for new jobs).

18 Kotkin, *supra* note 4, at 113 n.4.

activity has occurred.[19] These public and defendant-specific deterrence benefits disappear when parties seal the terms of settlement.[20]

Settlements also undercut the compensatory aim. Confidential agreements make it more difficult for future plaintiffs to negotiate positive results.[21] Without being able to point to previous prevailing plaintiffs, an employee loses significant leverage when bargaining with her employer. Similarly, although all jury trials are subject to some uncertainty,[22] an employee reviewing a largely undeveloped case law will find it harder to assess the degree of risk involved when deciding whether to reject a settlement she views as offering inadequate compensation for her injuries.

Furthermore, the prevalence of secret settlements skews public perception and hampers the ability of legislatures and courts to react to the current state of Title VII compliance. As one commentator has bluntly stated, "Because of invisible settlements, no one knows—or has the capacity to determine—what really is going on with employment discrimination litigation."[23] Employers are likely to settle meritorious claims, ever cognizant of the cost and time-consuming nature of trials,[24] as well as the risk of facing a jury.[25] As a result, the less meritorious claims move forward, and plaintiffs' success rate at trial is significantly lower than it would be absent so many settlements.[26] This low success rate creates a perception that Title

---

19 *See* EEOC v. Rush Prudential Health Plans, No. 97-3823, 1998 WL 156718, at *4 (N.D. Ill. Mar. 31, 1998). Of course, some would argue that these settlements are simply a cost of doing business and should not be perceived to communicate wrongdoing.

20 *See* David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2658-59 (1995) (contending that prohibiting secrecy enables settlements "to fulfill at least some of the public values of adjudication").

21 *See* Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 930 (2006) ("[I]nvisible settlements hamper lawyers' efforts to evaluate cases, counsel clients, and negotiate effectively on clients' behalf.").

22 *See* Dru Stevenson, *The Function of Uncertainty Within Jury Systems*, 19 GEO. MASON L. REV. 513, 527-28 (2012) (discussing the "inherent unpredictability" of the jury system); *cf.* McDermott, Inc. v. AmClyde, 511 U.S. 202, 213 (1994) ("[S]ettlement reflects the uncertainty of trial . . . .").

23 Kotkin, *supra* note 21, at 961.

24 *See* Fiss, *supra* note 8, at 1075 (stating that the benefit of settlement is the avoidance of the costs and time of trial); Silverstein, *supra* note 15, at 492 (noting the preference of employers to avoid litigation that is "expensive, emotionally draining, and time-consuming—whether or not the underlying complaint has merit").

25 *Cf. generally* Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2094 (1998) (analyzing the unpredictability of punitive damage awards). *But see* Clermont & Schwab, *supra* note 4, at 443 ("In all likelihood juries and judges [in employment discrimination cases] are acting similarly . . . .").

26 *See* Kotkin, *supra* note 21, at 962 (noting that this phenomenon makes it appear as though "most employment discrimination plaintiffs have weak cases and lose at trial" because "employers are quick to settle any case where the plaintiff has a likelihood of success").

VII claims are often frivolous.[27] Special interest groups advocating against employment discrimination legislation have used these statistics as ammunition.[28] Moreover, some have argued this perception of frivolity can affect the beliefs of judges presiding over Title VII claims.[29]

Correcting flaws in employment discrimination legislation also requires significant political capital, and the suppression of meritorious claims caused by settlements makes any (already unlikely) legislative adjustments even more difficult.[30] The move toward settlement—especially secret settlements—hides "real life stories" from the public eye and stifles public awareness of current issues in employment discrimination.[31]

The frequency of settlements may also prevent Title VII case law from developing, thus leaving little precedent to hold employers liable for engaging in more subtle forms of discrimination.[32] This form of discrimination, coined "second generation employment discrimination," lacks the "smoking gun" element of earlier discrimination cases.[33] Settlements, which preclude full development of the facts of a case, may obscure "what employment discrimination looks like in this second generation era" and thereby complicate the task judges face when identifying discrimination in cases that are not resolved through settlement.[34] Lacking a robust body of precedent, judges may be more hesitant to conclude that an employer is liable for subtler forms of discrimination.[35]

---

27 *See id.*

28 *See id.* at 963 (contending that "conservative interest groups" have "fueled" the perception that employment discrimination claims are often unmeritorious).

29 *See id.* at 931-32 & nn.14-16 (declaring that "judicial hostility sometimes can be palpable" and "[j]udges do not hesitate to suggest that most plaintiffs are whiners").

30 *See* Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 838 (2011) (recounting the difficulty Congress faced in passing the 1991 amendments to Title VII in the face of an initial presidential veto).

31 Hila Shamir, *About Not Knowing—Thoughts on Schwab and Heise's* Splitting Logs: An Empirical Perspective on Employment Discrimination Settlements, 96 CORNELL L. REV. 957, 961 (2011).

32 *See id.* at 960-61.

33 *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459-61 (2001) (proposing a theory of employment discrimination that is based on "structural, relational, and situational" biases, as opposed to conscious biases).

34 *See* Shamir, *supra* note 31, at 960 (exploring the "sociocultural and legal effect[s]" of increased settlements in an employment discrimination context).

35 *See* Sturm, *supra* note 33, at 537-38 (discussing the negative effects of courts' failure to scrutinize discretion-based employment practices). *But cf.* Lemos, *supra* note 30, at 823 (arguing that "simply seeing case after case of the same type [may not] give judges the information they need in order to understand the legal claims involved" when "bias operate[s] wholly subconsciously").

Finally, the current literature fails to consider the effects of arbitration on Title VII in tandem with the information about settlements' effects.[36] Courts of appeals have consistently held that employment contracts can validly compel arbitration of Title VII claims.[37] Because of procedural hurdles in arbitration, such as the lack of a class action option, employees may feel even more pressure to settle meritorious claims.[38] For those who do not settle, the results of arbitration frequently remain confidential nonetheless.[39] Both settlements of claims sequestered to arbitration and claims that are fully arbitrated are left out of the data generally considered when assessing the impact of settlements. Arbitrations, as is the case with settlements, likely often miss the opportunity to advance Title VII's substantive aims. Instead, the goal is to quickly and confidentially resolve claims, not to tailor a remedy to Title VII's policy ends. A more complete understanding of the data on arbitration would clarify the extent to which both settlement and arbitration undercut Title VII.[40]

B. *The Role of the EEOC*

While the EEOC retains the ability to bring suits on its own,[41] complete reliance on the EEOC is an unrealistic and inadequate cure to the complications

---

36 The effect of arbitration on Title VII generally has been the subject of scholarly treatment. *See, e.g.*, Mary Rebecca Tyre, *Arbitration: An Employer's License to Steal Title VII Claims?*, 52 ALA. L. REV. 1359, 1371 (2001) (arguing that federal courts are a more appropriate forum for resolution of Title VII claims than are private arbitrations). It appears, however, that no study has taken an empirical approach to the combined effects of arbitration and settlement.

37 *See, e.g.*, EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 749 (9th Cir. 2003); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991); *see also* Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 203 (2d Cir. 1999) (collecting cases upholding mandatory arbitration agreements).

38 *Cf.* Steven S. Poindexter, *Pre-Dispute Mandatory Arbitration Agreements and Title VII: Promoting Efficiency While Protecting Employee Rights*, 2003 J. DISP. RESOL. 301, 311 (noting that arbitrations bar class actions and impose "potentially prohibitive costs"); Tyre, *supra* note 36, at 1363 (listing the deficiencies of private arbitration).

39 *See* Megan E. Wooster, Note, *Sexual Harassment Law—The Jury is Wrong as a Matter of Law*, 32 U. ARK. LITTLE ROCK L. REV. 215, 256 (2010) (noting the confidential nature of arbitration).

40 Such an understanding is beyond the scope of this Comment, however.

41 The EEOC possesses statutory authority to enforce Title VII. To protect the Commission from private efforts to stifle this power, courts generally invalidate settlements that bar cooperation with the EEOC. *See, e.g.*, EEOC v. Astra U.S.A., Inc., 94 F.3d 738, 744 n.5 (1st Cir. 1996) ("[A] waiver of the right to assist the EEOC offends public policy under . . . Title VII."); *see also* Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481, 529 nn.189-90 (2008) (collecting cases about settlement practices that are against public policy); *cf.* EEOC v. Morgan Stanley & Co., 132 F. Supp. 2d 146, 152-53 (S.D.N.Y. 2000) ("[I]f the EEOC were foreclosed from pursuing investigations whenever the charging party . . . wished to settle with his or her employer, employers would be able to forestall investigations into their

that settlements create. First, the EEOC will be unaware of the problems in cases settled before an employment discrimination charge is filed. Second, employees who have already been compensated via settlement may be hesitant to risk further tension with their employers to serve the greater public good by lobbying the EEOC to seek injunctive relief. As one current EEOC commissioner has acknowledged, "Title VII's enforcement mechanisms rely on private attorneys general," and "[d]efendants and courts . . . frustrate the need for public resolutions by requiring and supporting confidential settlements and mandatory arbitration agreements."[42] The EEOC simply lacks the resources to vindicate Title VII rights without the help of private plaintiffs.[43] Notably, when the agency chooses not to act, the public remains unaware because EEOC charges "shall not be made public."[44] Taken together, this demonstrates that the EEOC cannot be relied on to singlehandedly accomplish the goals of Title VII.

* * *

In essence, settlements and arbitration—especially when they contain confidentiality clauses—often hinder the realization of Title VII's substantive goals. While their full effects remain unknown, it is safe to assume that some employees are unduly pressured into settling their claims,[45] that private, alternative resolution of claims skews the public's understanding of the state

employment practices by 'buying off' any victim who had the temerity to complain." (internal quotation marks omitted)).

42 Stuart J. Ishimaru, *Fulfilling the Promise of Title VII of the Civil Rights Act of 1964*, 36 U. MEM. L. REV. 25, 30-31 (2005).

43 *See id.* at 31.

44 42 U.S.C. § 2000e-5(b) (2006).

45 *See, e.g.*, Livingston v. Adirondack Beverage Co., 141 F.3d 434, 437 (2d Cir. 1998) (reinstating the Title VII complaint of an employee who alleged that he was "forced" to sign an earlier settlement agreement); *cf.* Bergene v. Salt River Project Agric. Improvement & Power Dist., 272 F.3d 1136, 1141 (9th Cir. 2001) (discussing plaintiff's Pregnancy Discrimination Act claim that her employer withheld a promotion because she refused to settle an earlier claim); James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 91 n.203 (2006) (collecting cases in which plaintiffs alleged undue pressure to settle). Pressure to settle may also be more systematic. The combination of the EEOC requiring settlement discussions, courts encouraging settlements, and employees knowing that they may have to return to the workplace against which their claim is brought creates its own subtle form of pressure on employees to settle. *Cf.* Susan M. Mathews, *Title VII and Sexual Harassment: Beyond Damages Control*, 3 YALE J.L. & FEMINISM 299, 317 (1991) (arguing that a female Title VII plaintiff may feel pressure to settle a sexual harassment claim to avoid the risk of embarrassment that would result from trial testimony about her sexual history); Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 918 (positing that an overburdened EEOC will foster an attitude aimed at settling quickly to dispose of cases).

of discrimination in the workplace,[46] and that the policy of encouraging settlement works to undermine the goals of deterrence and compensation.

Though courts must consider Congress's encouragement of settlements, they need not do so indiscriminately. The serious shortcomings that settlement's current dominance creates are not irremediable. Courts should check for these undesirable consequences, and suits in which a previous settlement is at issue present a means with which to begin tackling the problem.

II. THE SPLIT ON SUBSTANTIVE LAW

Unsurprisingly, due to the large number of settlements, there is a significant number of cases in which enforcement is an issue, and the law that is applied in enforcing a settlement influences the pro-settlement regime's effectiveness in accomplishing the aims of Title VII. Generally, these cases take two forms: (1) an employer raises an earlier settlement agreement as an affirmative defense to preclude the employee's subsequent Title VII suit, or (2) an employee files suit claiming that the employer breached a settlement agreement. Collectively, these cases create opportunities for courts to monitor how Title VII is carried out through settlements, enabling them to ensure both that employees are not unduly pressured into settling and that employees actually receive the compensation for which they waived their claims. However, the law governing settlement agreements is in a state of confusion, and courts often miss the chance to protect the large number of employees who, essentially, allege that private settlement was an insufficient remedy.

The most common issue in Title VII settlement-enforcement suits is whether the parties initially reached a valid settlement. Obviously, if the employer and employee failed to reach a binding agreement, the inquiry ends there.[47] To resolve this initial question, some courts apply federal law; others insist that state law governs what is essentially an issue of contract—whether there is a binding agreement for which some of the consideration was waiver or release of a Title VII claim.

This Part recounts the differing views on the proper approach to the creation of federal rules in settlement-enforcement suits. While some courts reach the conclusion this Comment supports—that federal law should apply—their reasoning unduly focuses on choosing rules based on general contract principles without regard to the effect those rules have on Title

---

46 *See supra* notes 26-28.

47 *See, e.g.*, Heuser v. Kephart, 215 F.3d 1186, 1191-93 (10th Cir. 2000) (finding a settlement of a Title VII claim unenforceable for lack of consideration).

VII's aims. The current failure to tie these decisions to Title VII has resulted in conflict among the circuits.

A. *A Source of Confusion:* Alexander v. Gardner-Denver Co.

The Supreme Court briefly touched upon the rules governing Title VII settlements in one case, but it did so tangentially and in a manner that generated confusion about the applicability of federal law. In *Alexander v. Gardner-Denver Co.*, the Court considered the interplay between arbitration of claims arising from an employer-employee contract that forbade discrimination and judicial resolution of claims grounded in Title VII.[48] The Court held that Title VII supplements any rights obtained in a contract and that employees could, therefore, bring Title VII claims in federal or state court even if they arbitrated the contract claims.[49]

In so holding, the Court distinguished cases in which an employee settled an alleged violation of Title VII and declared such waivers acceptable if the employee's consent was "voluntary and knowing."[50] Some courts have used this distinction as the starting point for applying federal law to enforcement suits;[51] others have been quick to argue that the Supreme Court's statement constituted dicta and have applied state law instead.[52]

B. *Determining the Validity of Different Settlement Methods*

One recurring issue in Title VII settlement-enforcement suits is the validity of different means of settling. This Section considers two different issues: the validity of oral settlements and the issue of apparent authority.

The circuits are split over whether federal law or state law should apply to these questions.[53] I argue that courts should apply federal law and assess whether a settlement rule is valid based on the consequences it would have on Title VII's aims. Unfortunately, courts have instead determined whether

---

48 415 U.S. 36, 47-54 (1974).

49 *Id.* at 48.

50 *Id.* at 52 & n.15.

51 *See, e.g.*, Myricks v. Fed. Reserve Bank, 480 F.3d 1036, 1040 (11th Cir. 2007); Melanson v. Browning-Ferris Indus., Inc., 281 F.3d 272, 274 (1st Cir. 2002); Stroman v. W. Coast Grocery Co., 884 F.2d 458, 462 (9th Cir. 1989); Coventry v. U.S. Steel Corp., 856 F.2d 514, 522 (3d Cir. 1988).

52 *See, e.g.*, Morris v. City of Hobart, 39 F.3d 1105, 1112 (10th Cir. 1994); *see also* Makins v. District of Columbia, 277 F.3d 544, 547 (D.C. Cir. 2002); *cf.* Atkinson v. Sellers, 233 F. App'x 268, 273 (4th Cir. 2007) (applying state law without consideration of *Alexander*); Morgan v. S. Bend Cmty. Sch. Corp., 797 F.2d 471, 475 (7th Cir. 1986) (same). *See generally* O'Gorman, *supra* note 9, at 82 (noting the confusion *Alexander*'s statement created).

53 *See* Del Bosque v. AT&T Adver., L.P., 441 F. App'x 258, 260 n.3 (5th Cir. 2011) (noting the split).

state or federal law applies and then perfunctorily applied the relevant precedent without regard to the substantive goals of Title VII.

1. *Fulgence* and the Adoption of Federal Law

Fulgence v. J. Ray McDermott & Co.[54] was one of the first cases to apply federal law. But while the court reached the correct conclusion, it did not fully consider the appropriateness of developing federal common law with respect to employment discrimination claims brought pursuant to Title VII.

In *Fulgence*, an employer relied on a settlement reached with its employee to defend against the employee's discrimination claim.[55] The employee responded that the agreement was null because they had reached it orally.[56] Louisiana law required that all settlements be in writing; federal law recognized verbal agreements.[57] The Fifth Circuit determined that federal law applied and provided three reasons for its conclusion. First, the case dealt with the "operation of a Congressional statutory scheme."[58] Second, applying state law would not further any state interest, but it "might" undermine Congress's policy of encouraging settlements.[59] And third, the Supreme Court spoke to the issue in *Alexander* and "established prerequisites to the validity of settlement agreements in Title VII suits."[60]

None of these propositions was particularly fleshed out by the court. Federal courts frequently develop law in the interstices of federal statutes and look to various sources to define operative words within those statutes.[61] The Fifth Circuit, however, failed to acknowledge that settlement-enforcement suits are not obviously part of the "operation of a . . . statutory scheme" and thus are not analogous to the usual circumstances in which federal common law persists. Unlike, for example, the type of damages available in a suit

---

54 662 F.2d 1207 (5th Cir. 1981).

55 *Id.* at 1208.

56 *Id.* at 1209.

57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.* The court then proceeded to apply the "voluntary and knowing" standard to the oral agreement and concluded that the settlement was valid. *Id.* at 1209-10.

61 *See* Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425, 438 (3d Cir. 1993) (Greenberg, J., concurring) ("It has long been assumed that federal courts have the power to create so-called 'interstitial' federal common law to govern issues closely interwoven with a broad scheme of federal statutory regulation."). As one commentator explains, "[W]hen a federal statute refers to preexisting legal concepts that it does not itself define, or when its application requires answers to questions that written federal law does not resolve, courts often assume that Congress meant to incorporate uniform rules of general law." Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 519 (2006).

actually brought under Title VII—a gap in the statutory scheme that federal courts would clearly have the right to stray from state law to fill[62]—enforcement of a settlement is a different action from a Title VII claim. The plaintiff must prove different elements and counter different defenses.[63] The Fifth Circuit quickly passed over these meaningful distinctions.

The relatively hasty analysis extended to other parts of the Fifth Circuit's reasoning, as well. For example, in declaring the lack of any state interest, the court failed to consider that Louisiana may have preferred that businesses be subject to the same rules for all settlement agreements, regardless of the underlying claims.[64] But even if the court had addressed this, it would still have been one step short of confronting the more critical issue—that the "policy of encouraging voluntary settlement[s]"[65] to which the court referred is a means to an end. Crafting rules of decision in a manner that treated Title VII settlements no differently than any other contracts led the Fifth Circuit to prioritize the means—voluntary settlement—instead of the ends—deterring employment discrimination and compensating victims. The court should have considered that victims of employment discrimination—who likely lack bargaining power and are inexperienced negotiators—may hastily rush into unfavorable oral settlements; having to read and sign a written contract, in contrast, may send signals to the victim to be more hesitant.[66]

Though the Fifth Circuit arguably reached the correct conclusion in applying federal law (though not in the particular substantive rule of decision it chose),[67] its explanation for why it chose to apply federal law was underwhelming. The court's analysis leaves considerable doubt that suits to enforce Title VII settlements should be one of the "few and restricted" instances in which creation of federal common law is appropriate.[68] A more thorough consideration of the appropriateness of developing federal common

---

62 *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545-46 (1999) (articulating the standard for punitive damages in Title VII cases).

63 *See* Nelson, *supra* note 61, at 519-37 (distinguishing between areas widely accepted as allowing for federal common law and those, such as settlement enforcement claims, where application of federal common law is more controversial).

64 *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 728-29 (1979) (stating that the impact of application of federal law on commercial relationships should be considered before federal law is applied).

65 *Fulgence*, 662 F.2d at 1209.

66 *See* RESTATEMENT (SECOND) OF CONTRACTS § 72 cmt. c (1981) (explaining that written contracts provide a "cautionary function" that "guard[s] the promisor against ill-considered action" (emphasis omitted)).

67 *See infra* Part IV.

68 Atherton v. FDIC, 519 U.S. 213, 225-26 (1997) (rejecting the principle that federal common law should govern the corporate governance of federally chartered savings associations).

law, which requires courts to take into account the federal interests at hand,[69] would illuminate any conflict between the policy of encouraging settlements and the mission of Title VII and, in doing so, would potentially lead the court to craft a more beneficial rule of decision.

2. *Morgan* and the Use of State Law

The courts that apply state law rely (explicitly or implicitly) on federal courts' post–*Erie Railroad v. Tompkins*[70] reluctance to generate common law.[71] In *Morgan v. South Bend Community School Corp.*, the leading case in this school of thought, the Seventh Circuit rejected the plaintiff's claim that the superintendent of the defendant–school district had the authority to bind the school district and enter into an oral settlement.[72] The court at times wavered between applying state and federal law, but the overall message was that state law should govern such claims.

The *Morgan* court began its analysis with a discussion of whether "the existence of a settlement is governed by federal law."[73] The court reasoned that the Rules of Decision Act,[74] which requires state law to govern "except where . . . Acts of Congress otherwise require or provide," and 42 U.S.C. § 1988(a), which "has been understood to mean that state law applies to procedural matters in civil rights cases," militated in favor of applying state law.[75] The court left unaddressed whether Title VII's connection to the suit rendered the Rules of Decision Act inapplicable, or whether § 1988(a)—a statute understood to apply to "*procedural* matters"—has any bearing on what law applies to the formation and scope of contracts.[76]

Despite strongly suggesting that state law should apply, the court ultimately declined to "resolv[e] these tensions."[77] Instead, the court assumed

---

69 *See infra* Part IV.

70 304 U.S. 64 (1938).

71 *See, e.g.*, Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 772 (7th Cir. 2011).

72 797 F.2d 471, 473-78 (7th Cir. 1986).

73 *Id.* at 474.

74 28 U.S.C. § 1652 (2006).

75 *Morgan*, 797 F.2d at 474-75.

76 The *Morgan* court further noted that the Supreme Court has "declined to adopt federal common law for private disputes, however, even disputes that potentially affect federal interests." *Id.* at 475. However, the persuasive effect of that observation has waned over time because of the Court's decision in *Boyle v. United Technologies Corp. See* 487 U.S. 500, 507 (1988) (creating federal common law in a case between two private parties when a finding of liability would "directly affect the terms of Government contracts"). While *Boyle* concerned a connection to a fiscal interest of the federal government, subsection IV.D.2.b.ii argues that the ability to create federal common law in cases between private parties should be extended to other strong federal interests, specifically, to employment discrimination cases.

77 *Morgan*, 797 F.2d at 476.

arguendo that federal law should apply, with state law supplying the content of federal law.[78] While this approach edges closer to the analysis this Comment suggests, the court's decision to adopt state law rested largely on the ability of state law to supply consistency for the formation of contracts, regardless of the content of those contracts. While the court correctly realized that the application of state law generally facilitates the formation of contracts because it avoids the "bushwhack[ing]" of repeat players accustomed to certain rules under state contract law—such as the superintendent in *Morgan*[79]—this Comment urges that the analysis in Title VII settlement cases should take into account whether the aims of the employment discrimination statute require a rule that protects the non-repeat player—the employee—from being "bushwhacked."[80] In other words, the *Morgan* court would have done better had it considered whether the adoption of state rules facilitated the goals of Title VII.[81]

C. *The "Voluntary and Knowing" Requirement*

Alexander has also sparked a conflict among courts over whether settlements must be reached "voluntarily and knowingly."[82] A few courts have

---

78 *Id.* (citing United States v. Kimbell Foods, Inc., 440 U.S. 715, 728-29 (1979) ("When it is not necessary to have a national rule, it is necessary not to have one.")); *see also infra* subsection IV.D.2.

79 Similarly, the court asserted that allowing only written settlements—the state rule—would better further the aim of encouraging settlements by creating certainty. But this seems to be more of an argument for applying a certain substantive rule of decision, which federal common law would allow a court to choose, than blindly applying whatever state rule existed. *See* 797 F.2d at 475-76.

80 To its credit, the court also addressed whether Title VII conferred power on federal courts to craft federal common law concerning the power of an agent to bind the principal. The court ultimately concluded that it did not. *See id.* at 477 ("[I]f the national government possesses the authority to decide who shall speak for the state or a political subdivision, that power must be exercised by Congress, at least to the extent of authorizing the creation of a new branch of the common law.").

81 This criticism may be undermined by the *Morgan* court's observation that federal common law yielded the same result—namely, allowing invalidation of contracts entered into by an unauthorized agent. *See id.* at 477-78 (citing United States v. Beebe, 180 U.S. 343, 351-55 (1901), and Stone v. Bank of Commerce, 174 U.S. 412, 421 (1899) (finding that "even under principles of federal common law[,] compromise judgments depend on the actual authority of the person purporting to compromise the claim")). Once again, however, those cases addressed generally what rule should govern the formation of contracts. *See id.* This Comment encourages courts to consider what rules would best facilitate Title VII's aims, even if they end up reaching the same result.

82 Courts that impose a "voluntary and knowing" requirement articulate the test in different ways. For a discussion, see generally O'Gorman, *supra* note 9, at 85-99. Waiver of certain federal constitutional rights must be "intelligent and knowing." *See* Boykin v. Alabama, 395 U.S. 238, 242 (1969) (creating the standard in the context of a guilty plea), *superseded by statute*, FED. R. CRIM. P. 11, *as recognized in* United States v. Gomez-Cuevas, 917 F.3d 1521, 1524 n.2 (10th Cir. 1990); *see*

extended the federal "voluntary and knowing" standard to waiver of Title VII rights with only cursory analysis. For example, the First Circuit relied on precedent concerning waivers of other federal claims and *Alexander* when coming to this conclusion.[83] The Second[84] and Third[85] Circuits have applied the "knowing and voluntary" requirement without addressing the issue of whether state law or federal law applies. Courts that have more carefully considered the issues have reached varied conclusions; the best analyses are those that consider the impact the chosen rule will have on Title VII's substantive aims.

1. *Pierce* and the Adoption of Federal Law

Pierce v. Atchison, Topeka & Santa Fe Railway Co., a Seventh Circuit case, considered the appropriateness of applying a "voluntary and knowing" requirement and adopted a federal rule of decision.[86] In *Pierce*, an employer raised a previous settlement as an affirmative defense to the plaintiff's Age Discrimination in Employment Act (ADEA)[87] claim.[88] After determining that the employee's state law–based responses to the previous agreement failed, the Seventh Circuit stated that the "strong congressional purpose . . . to eradicate discrimination in employment" counseled in favor of looking beyond state law in certain circumstances.[89] The court concluded that because the employee proceeded without counsel, was of limited education, and had signed a boilerplate waiver, a totality-of-the-circumstances approach to determining whether consent was voluntary and knowing was more consistent with congressional purpose than a mere application of state contract law.[90] Accordingly, the court remanded for an application of the totality-of-the-circumstances approach. And, when the case reached the court a second

also Godinez v. Moran, 509 U.S. 389, 400 (1993) ("[A] trial court must satisfy itself that the waiver of . . . constitutional rights is knowing and voluntary."). The *Alexander* Court appeared to borrow from that standard.

83 *See* Melanson v. Browning-Ferris Indus., Inc., 281 F.3d 272, 274 (1st Cir. 2002) (finding that a waiver of Title VII rights, "like a release of other federal statutorily created rights, must be knowing and voluntary" (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974)).

84 *E.g.*, Livingston v. Adirondack Beverage Co., 141 F.3d 434, 438 (2d Cir. 1998).

85 *E.g.*, Henson-Miksic v. Potter, 250 F. App'x 509, 511 (3d Cir. 2007).

86 65 F.3d 562, 571-72 (7th Cir. 1995).

87 29 U.S.C. § 621 *et seq.* (2006).

88 65 F.3d at 567. While *Pierce* involved a claim under the ADEA, the court's analysis made clear that it was not distinguishing between the ADEA and Title VII, and the court relied on Title VII cases in reaching its conclusion. *See id.* at 570-71 (citing Riley v. Am. Family Mut. Ins. Co., 881 F.2d 368 (7th Cir. 1989), *superseded in part by statute*, Older Workers Benefit Protection Act, Pub. L. No. 101-443, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. § 626(f)).

89 *Id.* at 571.

90 *Id.*

time, it affirmed that the test barred enforcement of the employee's waiver.[91] In reaching this result, the court appropriately emphasized Congress's purpose to "eradicate discrimination in . . . employment" rather than the pro-settlement policy.[92]

2. *Makins* and the Application of State Law

The D.C. Circuit, in *Makins v. District of Columbia*, departed from the Seventh Circuit's approach by rejecting any role for federal law in enforcement suits.[93] In *Makins*, an employee alleged, in response to the employer's defense based on a previous settlement, that her attorney had entered into the settlement without her consent.[94] She argued that *Alexander* required the court to craft a federal rule because the settlement at issue concerned Title VII.[95] Specifically, the employee requested that the court stray from state agency law on the reach of an attorney's apparent authority in negotiating settlements, asserting that the scope of apparent authority in Title VII settlement negotiations must be narrow for the employee's waiver to truly be voluntary and knowing.[96]

To the employee's dismay, the court characterized *Alexander*'s "voluntary and knowing requirement" as mere dicta and therefore concluded that special federal rules for apparent authority would not be created to satisfy it.[97] The court reasoned that state law should generally be applied in contract cases unless the federal government is the defendant or a statute confers lawmaking power on federal courts,[98] which the court found that Title VII failed to do.[99] Moreover, the court noted that federal law was in "national disarray," so no uniformity interest would be served by creating federal law.[100] The court also contended that the District of Columbia

---

91 *See* Pierce v. Atchison, Topeka & Santa Fe Ry. Co., 110 F.3d 431, 437 (7th Cir. 1997).

92 *Id.*

93 277 F.3d 544 (D.C. Cir. 2002).

94 *Id.* at 545-46.

95 *Id.* at 547.

96 *Id.*

97 *Id.* at 547-48.

98 *See infra* subsection IV.D.1.

99 *Makins*, 277 F.3d at 548. The court, after determining that local law controlled, certified a question on the validity of the settlement to the D.C. Court of Appeals. *Id.* at 553.

100 *Id.* at 548. The court's assertion that no uniformity interest would be served because federal law differed from circuit to circuit is misguided. When federal law controls, the power rests with federal courts to bring the law into conformity with other federal courts or for the Supreme Court to do so on appeal. However, when state law applies, federal courts lack an independent means to create uniformity, and the lower courts must apply state law notwithstanding any discordant effect.

would benefit from lawyers and businesses knowing that the same rule applied in both federal and local courts.[101] The dissent, which agreed with the majority on the issue of which law to apply, summarized the court's conclusion: "[N]othing in the text of Title VII requires that settlement of a suit thereunder be entered 'voluntarily and knowingly.'"[102] Yet again, this analysis subordinates the underlying right to be free from discrimination and finds contract concerns to be of paramount importance.[103]

D. *The End Result: General Confusion*

These cases have generated confusion about which rules should govern Title VII settlements and have led to missed opportunities to cure the ailments that the pro-settlement trend has created. For example, *Morgan* and *Pierce* are both Seventh Circuit decisions; while they are not technically incompatible,[104] the two decisions are not models of clarity.[105] As a result of this confusion, resources are wasted and courts miss opportunities to create federal rules that respond to the needs of Title VII claimants.[106]

---

101 *See id.*

102 *Id.* at 554 (Henderson, J., dissenting). Although *Makins* dealt with a case in which the employee retained counsel, its reasoning suggests that the "knowing and voluntary" standard would not be applied even in the absence of counsel.

103 *Cf.* Horton v. Norfolk S. Corp., 102 F. Supp. 2d 330, 339 (M.D.N.C.) (applying ordinary contract principles as a matter of course, without considering whether the employee had representation or whether any other factor employed in a "knowing and voluntary" standard was present), *aff'd*, 199 F.3d 1327 (4th Cir. 1999).

104 State agency law can still apply to settlements while courts assess—under federal principles—the totality of the circumstances under which parties entered a contract.

105 *See, e.g.*, White v. Lowe's Home Ctrs., Inc., No. 12-001, 2012 WL 5497853, at *5 (N.D. Ind. Nov. 13, 2012) (noting that the Seventh Circuit applies state law to determine the validity of oral contracts but also looks to whether the contract was entered knowingly and voluntarily in the context of employment discrimination settlements). One district court has declared the Seventh Circuit's law on the issue "surprisingly unclear." DirecTV, Inc. v. Borst, No. 03-0274, 2006 WL 1308118, at *2 (W.D. Wis. May 9, 2006).

106 In *Snider v. Circle K Corp.*, the Tenth Circuit concluded that federal common law governed the resolution of a breach of settlement claim and held that the plaintiff was not entitled to a jury trial. 923 F.2d 1404, 1407-08 (10th Cir. 1991). However, the Tenth Circuit and its district courts have since strayed from this holding. *Compare* Fender v. Kan. Soc. & Rehab. Servs., 168 F. Supp. 2d 1216, 1221 (D. Kan. 2001) (applying state law), *with* Sump v. Pamida, Inc., No. 97-4085, 1998 WL 1054949, at *2 (D. Kan. Nov. 25, 1998) (applying federal law). The consequence of this ambiguity is illustrated in *Chavez v. New Mexico*, 397 F.3d 826 (10th Cir. 2005), in which the Tenth Circuit acknowledged that federal law "[g]enerally" applies, but proceeded to apply state law without considering the consequences, because neither party argued *against* the application of state law. *Id.* at 830-31.

III. PROCEDURAL PROBLEMS IN SETTLEMENT ENFORCEMENT

This Part considers the procedural obstacles facing enforcement of Title VII settlements in federal and state courts. Though an employer attempting to enforce a settlement can raise the existence of the previous agreement as a defense in any subsequent suit,[107] an employee attempting to enforce an agreement must clear additional hurdles. First, the employee must establish subject matter jurisdiction over the claim; second, if the employee works for a state, sovereign immunity may bar certain types of relief; and third, certain jurisdictions require that the employee receive a "right to sue" letter from the EEOC before she may file suit.

A. *Federal Court Jurisdiction*

An employee seeking to enforce a settlement agreement will encounter considerable difficulties in accessing the federal courts. Of course, state courts are courts of general jurisdiction and therefore always remain an option.[108] State courts, on the one hand, may offer lower filing fees, have lower pleadings standards, be more plaintiff-friendly, or provide other reasons for the plaintiff to prefer that forum.[109] On the other hand, plaintiffs may prefer federal procedural rules, federal discovery,[110] unelected judges,[111] and—in the case of Title VII claims specifically—jurors drawn from areas beyond where the local employer conducts its business.[112]

For those plaintiffs who prefer a federal forum, subject matter jurisdiction is often a bar. Federal courts are courts of limited jurisdiction,[113] and the plaintiff who sues bears the burden of establishing jurisdiction.[114] In *Kokkonen v. Guardian Life Insurance Co. of America*, the Supreme Court held that a suit to enforce a settlement falls outside of federal court jurisdiction

---

107 Complications similar to those an employee faces will arise in the less common case in which an employer sues because of an employee's alleged breach.

108 *E.g.*, *In re* Hyde, 255 P.3d 411, 414 (Okla. 2011); *see also* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953).

109 *See* Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 550 (2010).

110 *Cf.* Joan Steinman, *Removal, Remand, and Review in Pendent Claim and Pendent Party Cases*, 41 VAND. L. REV. 923, 939 (1988).

111 *See* Gordon N. Griffin, Note, *Reinventing Adequacy: The Need for Standardized Regulation*, 23 GEO. J. LEGAL ETHICS 603, 610 n.45 (2010).

112 *Cf.* Maggie McKinley, Note, *Plenary No Longer: How the Fourteenth Amendment "Amended" Congressional Jurisdiction-Stripping Power*, 63 STAN. L. REV. 1213, 1231 (2011).

113 *E.g.*, Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986).

114 *See* Gonzalez v. Thaler, 132 S. Ct. 641, 648 (2012).

unless there is an independent basis for jurisdiction.[115] The parties, in a state agency law case, originally made their way into federal court via diversity jurisdiction, settled, and requested a voluntary dismissal, which the district court granted.[116] The plaintiff in the original suit then sued to enforce the settlement.[117] The Supreme Court determined that the district court judge's "mere awareness and approval of the terms of the settlement agreement" were insufficient to create jurisdiction in the subsequent enforcement suit.[118]

The Court did note, though, that there are other ways to establish an "independent basis for federal jurisdiction."[119] Employees seeking to enforce Title VII settlements must rely on the following alternative routes.

1. Requesting the Federal Court Retain Jurisdiction

One method the Court proposed is for the parties to request that the original court retain jurisdiction over the settlement.[120] This solution, however, fails to address two problems in the Title VII context. First, a number of settlements occur before an initial suit is even filed in federal or state court; many claims settle after an EEOC charge is filed, after arbitration, or after independent negotiations between employer and employee.[121] An employee who waived her claim in such instances would have no opportunity to request that a court retain jurisdiction. Thus, if aware of this potential solution, she may be less willing to enter into a settlement until suit is filed, increasing costs and time as well as creating tension that will make it less likely that a favorable settlement will be reached. If unaware of her ability to request that a court retain jurisdiction, whether because she has no counsel or because she has inexperienced counsel, the employee may settle without doing so and potentially face unnecessary difficulty in a later attempt to enforce her rights.[122]

Defendants' strong preference for confidential settlements creates the second problem. A court weary of the consequences of secret settlements

---

115 *See* 511 U.S. 375, 382 (1994) (commenting that one such basis would be if the district court retained jurisdiction over the settlement agreement).

116 *Id.* at 377.

117 *Id.*

118 *Id.* at 381.

119 *Id.* at 382.

120 *Id.* at 381-82.

121 *Cf. Title VII of the Civil Rights Act of 1964 Charges*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm (last visited Mar. 15, 2013).

122 Moreover, even the process of ensuring that a court retains jurisdiction has created confusion. *See* Jeffrey A. Parness & Matthew R. Walker, *Enforcing Settlements in Federal Civil Actions*, 36 IND. L. REV. 33, 38-43 (2003) (describing inconsistency in lower courts' determinations of when jurisdiction is retained).

may take the initiative to make them public. In *Gambale v. Deutsche Bank AG*, the district court relied on its "inherent power to control access to [its] records" and ordered unsealed documents connected to a settlement over which the court had retained jurisdiction.[123] The Second Circuit affirmed the power of district courts to allow public access to previously confidential documents in certain circumstances.[124] After *Gambale*, no defendant insistent on maintaining confidentiality would risk filing settlement documents with the court and requesting that it retain jurisdiction.[125] Thus, a plaintiff will want the court to retain jurisdiction to be assured that the settlement's terms will materialize, and the defendant will want to avoid that occurrence to guarantee confidentiality. While a plaintiff might be able to leverage the defendant's desire to maintain confidentiality to demand increased consideration, the agreement would lack the protection of a federal court's jurisdiction.

2. Establishing Diversity Jurisdiction

Another independent basis for federal jurisdiction is diversity jurisdiction. Yet, as *Kokkonen* itself demonstrates, even if diversity jurisdiction existed at the outset of a suit, it may be unavailable for an action seeking enforcement of the settlement agreement.[126] A significant number of settlements fall below the $75,000 amount-in-controversy requirement for diversity jurisdiction.[127] One study found that the mean settlement for employment discrimination claims was $65,950,[128] and another found that the mean was $54,651 for single plaintiffs, with a median of $30,000.[129] In those cases, diversity jurisdiction is unavailable.

3. Establishing Supplemental Jurisdiction

Supplemental jurisdiction presents a third avenue into federal court. However, supplemental jurisdiction will require, first, that the plaintiff suffered additional discrimination and, second, that the subsequent discrimination was

123 No. 02-4791, 2003 WL 21511851, at *3 (S.D.N.Y. July 2, 2003) (footnote omitted), *aff'd*, 377 F.3d 133 (2d Cir. 2004).

124 *See Gambale*, 377 F.3d at 142.

125 Kotkin, *supra* note 21, at 958.

126 *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381-82 (1994) ("Absent [court action embodying the settlement contract in its dismissal order or retaining jurisdiction over the settlement agreement], enforcement of the settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction").

127 *See* 28 U.S.C. § 1332(a) (2006).

128 Schwab & Heise, *supra* note 3, at 942.

129 Kotkin, *supra* note 4, at 144.

sufficiently related to the settled claims.[130] The plaintiffs who lack an additional subsequent federal claim—and therefore cannot use supplemental jurisdiction—are also those for whom the statute of limitations for their original claims may present a substantial obstacle should they decide to bring a new Title VII suit based on the original claims once pre-litigation attempts to enforce the suit have faltered.[131]

4. General Federal Question Jurisdiction

A court could potentially determine that an enforcement suit arises under federal law because of its connection to the original Title VII claim.[132] However, in *Kokkonen*, the Court rejected the idea that there is federal question jurisdiction simply because dismissal of the earlier federal suit was part of the consideration for the settlement agreement: "No federal statute makes that connection (if it constitutionally could) the basis for federal-court jurisdiction over the contract dispute."[133] Importantly, the underlying federal suit in *Kokkonen* was a state law claim brought in diversity, not a federal cause of action.

Nonetheless, some courts have latched onto *Kokkonen*'s reasoning to declare that federal courts lack jurisdiction over Title VII settlement-enforcement suits. For example, in *Atkinson v. Sellers*, the Fourth Circuit dismissed a suit to enforce the settlement of a Title VII claim for lack of subject matter jurisdiction because it found that the plaintiff alleged "only a breach of contract," and *Kokkonen* directly controlled the case.[134] In so holding, the Fourth Circuit noted that the plaintiff "could obtain relief on his breach of contract claim without reference to federal law at all," and

---

130 *See* 28 U.S.C. § 1367. The doctrine of supplemental jurisdiction, codified by § 1367, allows federal courts to exercise jurisdiction over state law claims that share a "common nucleus of operative fact" with a federal question claim. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966), *superseded by statute*, Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5113 (codified as amended at 28 U.S.C. § 1367), *as recognized in* Whalen v. Carter, 954 F.2d 1087, 1097 n.10 (5th Cir. 1992). Thus, a plaintiff must already have an independent federal claim that opens the door to federal court.

131 *Cf.* Sherman v. Standard Rate Data Serv., Inc., 709 F. Supp. 1433, 1441 (N.D. Ill. 1989) (acknowledging that the doctrine of laches might ultimately bar the plaintiff's enforcement suit).

132 *See* 28 U.S.C. § 1331. Courts have found that Title VII's independent jurisdictional provision, which allows courts to hear claims "brought under" Title VII, *see* 42 U.S.C. § 2000e-5(f)(3), provides jurisdiction for settlement-enforcement suits, as well. *E.g.*, Eatmon v. Bristol Steel & Iron Works, Inc., 769 F.2d 1503, 1508 (11th Cir. 1985); *see also infra* notes 133-36 and accompanying text; *cf.* Arbaugh v. Y & H Corp., 546 U.S. 500, 503 (2006) (noting that federal courts may hear Title VII claims under general federal question jurisdiction as well as under 42 U.S.C. § 2000e-5(f)(3)).

133 Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381 (1994).

134 233 F. App'x 268, 272 (4th Cir. 2007).

recovery did not "depend on the resolution of a substantial question of federal law."[135] The Tenth Circuit took a similar approach in *Morris v. City of Hobart*, finding that there was no subject matter jurisdiction because state contract law governed the suit.[136] Implicit in the reasoning of both the *Morris* and *Atkinson* courts is that general federal question jurisdiction would be proper if federal common law governed the settlement claim.[137]

Other courts have relied on Title VII's specific jurisdictional grant, 42 U.S.C. § 2000e-5(f)(3),[138] to find jurisdiction when employees sue to enforce predetermination[139] and conciliation[140] agreements that the EEOC has the power to enforce.[141] In *Ruedlinger v. Jarrett*, the Seventh Circuit built on previous decisions that found that, despite the lack of explicit congressional authorization, federal courts have jurisdiction over EEOC enforcements of settlements.[142] The court reasoned that private enforcement actions[143] would further the policy of encouraging voluntary compliance with Title VII through

---

135 *Id.* at 272-73.

136 39 F.3d 1105, 1112 (10th Cir. 1994). In doing so, the court distinguished an earlier case in which it found that federal law governed certain issues in Title VII settlement enforcement suits, such as the availability of a jury. *See id.* at 1112 n.5 (distinguishing *Snider v. Circle K Corp.*, 923 F.2d 1404 (10th Cir. 1991), on the basis that *Snider* "did not purport to decide the question of subject matter jurisdiction").

137 For a helpful discussion of when enforcement creates a "substantial question of federal law," see Charles R. Calleros, *Reconciling the Goals of Federalism with the Policy of Title VII: Subject-Matter Jurisdiction in Judicial Enforcement of EEOC Conciliation Agreements*, 13 HOFSTRA L. REV. 257, 264-88 (1985). Calleros discusses the federal question doctrine and concludes that whether subject matter jurisdiction exists depends on the terms of the settlement agreement. *Id.*

138 *See supra* note 132.

139 Predetermination agreements are settlements entered into by parties before the EEOC makes a finding of reasonable cause to believe discrimination occurred. *See* EEOC v. Henry Beck Co., 729 F.2d 301, 303 (4th Cir. 1984) (discussing the EEOC's regulations, particularly 29 C.F.R. § 1601.20 (2012), which provides that the EEOC may encourage the parties to settle the charge on mutually agreeable terms prior to issuing a determination as to reasonable cause).

140 Conciliation agreements are settlement agreements negotiated and executed after the EEOC has found reasonable cause to believe that discrimination occurred but before either the EEOC or the employee files suit. *See* Calleros, *supra* note 137, at 258 n.6; *see also* EEOC v. Liberty Trucking Co., 695 F.2d 1038, 1041 (7th Cir. 1982) ("Conciliation agreements are voluntary contracts containing terms upon which the employer, the employee, and the EEOC agree.").

141 *See Henry Beck Co.*, 729 F.2d at 305-06 (holding that "where an employer allegedly breaches a predetermination settlement agreement after voluntarily entering into it, and the Commission seeks enforcement of that agreement only, . . . the suit is brought directly under Title VII, and the United States District Courts have jurisdiction").

142 106 F.3d 212, 214 (7th Cir. 1997) (citing *Liberty Trucking Co.*, 695 F.2d at 1040). In *Liberty Trucking*, the Seventh Circuit held that Congress "intended to provide the EEOC with a federal forum to enforce conciliation agreements," and the lack of explicit authorization did not prevent the court from exercising jurisdiction under 42 U.S.C. § 2000e-5(f)(3). *Id.*

143 *Ruedlinger* considered the enforcement suit to be a type of Title VII claim, not a contract claim. 106 F.3d at 214.

conciliation agreements in the same manner as EEOC enforcement actions.[144] Accordingly, it found jurisdiction under 42 U.S.C. § 2000e-5(f)(3).[145]

Though invoking § 2000e-5(f)(3) would appear to solve the jurisdiction problem, it is a limited solution. First, it is questionable whether the court's policy justifications for exercising jurisdiction—asserting that it will further voluntary compliance—would withstand scrutiny. In *Arbaugh v. Y & H Corp.*, the Supreme Court articulated a very narrow understanding of § 2000e-5(f)(3).[146] It stated that Congress included this section because, at the time Title VII was enacted, § 1331 had a $10,000 amount-in-controversy requirement and § 2000e-5(f)(3) contained no jurisdictional amount.[147] Since Congress amended § 1331 to eliminate that requirement, the Court explained that § 2000e-5(f)(3) "has served *simply to underscore* Congress' intention to provide a federal forum for the adjudication of Title VII claims."[148] Lower courts' reliance on § 2000e-5(f)(3) implies that they found § 1331 insufficient to justify jurisdiction; however, if the understanding articulated in *Arbaugh* is correct, § 2000e-5(f)(3) offers no more than does § 1331.

Second, even if *Arbaugh* does not undermine the basis for jurisdiction in some instances, no federal court has extended § 2000e-5(f)(3) to allow enforcement of a settlement in which the EEOC did not offer assistance. As one court stated to explain the reach of its holding, "enforcement of an EEOC predetermination settlement agreement is a civil action brought directly under Title VII."[149] This suggests that those employees who settle before EEOC involvement or after suit is filed and without the help of the EEOC are out of luck. Their suits may not be viewed as "brought directly under Title VII," and thus § 2000e-5(f)(3) will lend no help.

Of course, the EEOC can enforce certain breached agreements even when the employee is unable to do so.[150] As *Ruedlinger* and similar cases suggest, courts appear to accept that the EEOC may sue in federal court to

144 *Id.* at 215. The court noted that "[t]he congressional goal of enforcing Title VII through conciliation and voluntary compliance would be hampered if employees could not seek to enforce in federal courts conciliation agreements between themselves, their employers and the EEOC." *Id.* (citation and internal quotation marks omitted). This properly views settlements as a means to promote the goals of Title VII.

145 *Id.*; *see also* Owens v. West, 182 F. Supp. 2d 180, 187-90 (D. Mass. 2001) (finding jurisdiction over a predetermination-agreement-enforcement suit); Francisco v. West, No. 98-3007, 2001 WL 563793, at *3 (N.D. Ill. May 23, 2001) (same).

146 546 U.S. 500, 505-06 (2006).

147 *Id.*

148 *Id.* at 506 (emphasis added).

149 *Owens*, 182 F. Supp. at 190 (emphasis added).

150 *See supra* Section I.B.

enforce conciliation agreements[151] and predetermination agreements.[152] In addition, courts do not seem to distinguish EEOC enforcement of conciliation from predetermination agreements in cases where the EEOC is not a party, reasoning that the ultimate goal of furthering voluntary compliance is advanced in both instances.[153]

However, the dearth of case law on this issue and the unavoidable fact that the EEOC has limited resources[154] suggest that EEOC enforcement is not a viable answer to courts that narrowly construe jurisdiction. Moreover, the EEOC does not enforce agreements in which it was never involved.[155] Again, this means employees who negotiate without the help of the EEOC—and, therefore, plausibly the most vulnerable type of potential plaintiffs—may have the most difficulty enforcing settlement agreements in federal court.[156]

---

151 *See, e.g.*, EEOC v. Safeway Stores, 714 F.2d 567, 572 (5th Cir. 1983) ("Although Title VII does not explicitly provide the EEOC with the authority to seek enforcement of conciliation agreements in federal court, it would be antithetical to Congress' strong commitment to the conciliatory process if there were no federal forum in which the EEOC could enforce such agreements."); EEOC v. Liberty Trucking Co., 695 F.2d 1038, 1040 n.5 (7th Cir. 1982) ("[W]e conclude that Congress intended to provide the EEOC with a federal forum to enforce conciliation agreements."); *see also* Eatmon v. Bristol Steel & Iron Works, Inc., 769 F.2d 1503, 1508 (11th Cir. 1985) ("The EEOC can go directly to court to enforce . . . agreements [into which it entered], as soon as it believes the agreement has been breached.").

152 *See, e.g.*, EEOC v. Henry Beck Co., 729 F.2d 301, 305 (4th Cir. 1984) (treating predetermination agreements and conciliation agreements the same in situations where the EEOC "seeks enforcement of a specific agreement without any ruling on the underlying charge of intentional employment discrimination"). *But see* EEOC v. Pierce Packing Co., 669 F.2d 605, 608 (9th Cir. 1982) (holding that generally the EEOC may not sue to enforce predetermination agreements).

153 *See, e.g.*, EEOC v. Bay Ridge Toyota, Inc., 327 F. Supp. 2d 167, 172 (E.D.N.Y. 2004) (stating that it is "settled law" that the EEOC may enforce conciliation agreements regardless of whether the EEOC was party to the agreement).

154 *See supra* text accompanying notes 38-41.

155 *See, e.g.*, Tucker v. Astrue, 738 F. Supp. 2d 835, 837 (N.D. Ill. 2010) (dismissing the plaintiff's request to enforce a settlement agreement into which the plaintiff entered through a union grievance process).

156 *See* Berry v. Gutierrez, No. 08-459, 2008 WL 4572510, at *1 (E.D. Va. Oct. 8, 2008) (noting that the EEOC dismissed the plaintiff's request to enforce a settlement because "the EEOC cannot take jurisdiction over grievance settlement agreements outside the EEO process" (citation omitted)). Settlements that the EEOC helped negotiate, however, are treated differently. *See, e.g.*, EEOC v. Regal-Beloit Corp., No. 06-568, 2007 WL 5614093, at *1 (W.D. Wis. May 1, 2007) ("The EEOC is a federal agency and this Court has jurisdiction pursuant to 28 U.S.C. § 1345. This Court has jurisdiction to consider EEOC's motion to enforce the settlement."); *cf.* Morris v. City of Hobart, 39 F.3d 1105, 1111-12 n.4 (10th Cir. 1994) (distinguishing five cases in which federal courts found jurisdiction over a settlement enforcement suit as involving the EEOC and stating that "settlement contracts between private parties do not implicate the same degree of congressional concern").

B. *State Sovereign Immunity*

Whether federal or state law governs, settlement enforcement also has important implications for state employees, who face the additional obstacle of state sovereign immunity when attempting to enforce settlements against state employers.[157] In *Fitzpatrick v. Bitzer*, the Supreme Court held that Title VII validly abrogated state sovereign immunity as an exercise of Congress's power under Section Five of the Fourteenth Amendment.[158] Hence, any state employee may collect monetary damages and certain other relief, normally barred by sovereign immunity, in a Title VII suit against the state.[159] A private citizen suing for a breach of contract under state law is usually subject to the whim of the state, which may choose not to waive its immunity.[160] Therefore, when an employee engages in a settlement with her state employer, she risks being unable to enforce the agreement if the court finds that state law controls the suit.

However, if federal law governs the enforcement suit because the suit itself is a continued vindication of Title VII rights, then state sovereign immunity should remain abrogated. For example, in *Klein v. Board of Regents*, a female professor at the University of Wisconsin filed an enforcement suit after the University failed to assign her to a certain position, as agreed to in an earlier settlement of a gender discrimination claim mediated by the EEOC.[161] The Wisconsin Court of Appeals noted that sovereign immunity would normally bar a breach of contract suit against the state and declared

---

157 Federal sovereign immunity is not a bar. A number of federal courts have held that federal sovereign immunity precludes enforcement of Title VII settlements against the United States in the district courts. *See, e.g.*, Munoz v. Mabus, 630 F.3d 856, 860-61 (9th Cir. 2010). However, the Court of Federal Claims has jurisdiction to hear these enforcement suits. *See, e.g.*, Holmes v. United States, 657 F.3d 1303, 1312 (Fed. Cir. 2011). Moreover, 29 C.F.R. § 1614.504 (2012) provides procedures for federal employees who allege that the federal government has failed to comply with the terms of a settlement.

158 427 U.S. 445, 452-53, 456 (1976).

159 In federal court and in state court under federal causes of action, the Eleventh Amendment bars "retrospective relief" against a state. *See* Alden v. Maine, 527 U.S. 706, 712 (1999); Edelman v. Jordan, 415 U.S. 651, 670-71 (1974); *see also, e.g.*, Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 281-82 (1997) (holding that the Eleventh Amendment barred a suit to enjoin the state from enforcing certain land regulations because the suit amounted to a quiet title action).

160 *See, e.g.*, Tex. Natural Res. Conserv'n Comm'n v. IT-Davy, 74 S.W.3d 849, 851 (Tex. 2002).

161 666 N.W.2d 67, 69-70 (Wis. Ct. App. 2003). The record did not reveal whether the agreement was a predetermination agreement or a conciliation agreement, *see id.* at 69 n.2, and presumably the court found any distinction between the two irrelevant. Indeed, the court cited *Ruedlinger v. Jarrett* with approval, and that case expressly rejected any meaningful distinction between the two types of agreements for the purposes of determining the role of federal law. *See id.* (citing 106 F.3d 212, 215 (7th Cir. 1997) ("[W]e see no relevant distinction between conciliation agreements and pre-determination settlement agreements for purposes of jurisdiction under Title VII . . . .")).

that whether the suit was "part of [the plaintiff's] initial Title VII claim" "decides whether the [defendant's] assertion of sovereign immunity will hold."[162] The court ultimately found that the suit to enforce the settlement was brought under Title VII and sovereign immunity would not attach.[163]

The Supreme Court of Alabama reached a different result in *Smith v. Tillman*, a suit in which the EEOC had no connection to the underlying settlement.[164] There, an African American prison guard,[165] who had waived his Title VII claims in a previous settlement, sued to enforce the agreement.[166] The court, like the Wisconsin Court of Appeals, acknowledged that sovereign immunity would not be an issue if the suit arose under Title VII.[167] However, it concluded that because the EEOC was not involved in the agreement, *Klein* was distinguishable and the suit was brought solely under state law.[168] Therefore, the plaintiff could not use Title VII as a means to escape sovereign immunity.[169]

Ultimately, the *Smith* court found that the specifics of Alabama law allowed the plaintiff to bring suit, because the settlement agreement compelled the defendant to perform a "ministerial act,"[170] but this nuance highlights the troubling aspect of that court's preliminary finding. Courts that treat suits to enforce settlements as state law contract claims leave the employee in a bind: she is forced to rely on that state's specific sovereign immunity doctrine when suit is filed in state court or to rely on the narrow exceptions

---

162 *Id.* at 71 n.4, 72.

163 *See id.* at 72. ("Accordingly, we conclude that Klein's action is part of her initial Title VII claim, and as such, sovereign immunity does not lie.").

164 958 So. 2d 333 (Ala. 2006).

165 Brief of Appellant at 2, Smith v. Tillman, 958 So. 2d 333 (Ala. 2006) (No. 1051108), 2006 WL 5309646.

166 *Smith*, 958 So.2d at 335.

167 *Id.* at 337-38.

168 *Id.*

169 *Id.* at 337. Thus, the employee who navigates the Title VII landscape without help from the EEOC not only faces a more difficult time getting into federal court, but also encounters sovereign immunity obstacles in obtaining relief via settlement under state law. *See also* Ning v. Okla. Dep't of Env't Quality, No. 96-6372, 113 F.3d 1246, at *3 (10th Cir. May 30, 1997) (acknowledging, but not ruling on, the argument that a "[s]tate's Eleventh Amendment immunity was abrogated on the basis that an EEOC-brokered agreement arises under Title VII whereas a privately-settled Title VII action does not"); *cf.* Love v. Pullman Co., 404 U.S. 522, 526-27 (1972) (interpreting Title VII in light of the type of people who invoke the statute's protection and eschewing a proposed procedural "technicalit[y]" as "inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process").

170 958 So.2d at 338.

to the Eleventh Amendment when suit is filed in federal court (if there is federal court jurisdiction at all).[171]

The potential for injustice is illustrated in *Sharafeldin v. Maryland, Department of Safety and Correctional Services*.[172] There, a "black male of Sudanese origin [who was a] practicing Muslim" alleged that coworkers harassed him over a five-year period, and he filed "at least five" different charges with the EEOC before entering into a settlement without the assistance of a lawyer.[173] Harassment allegedly continued for three years after the settlement—in violation of the agreement—and the employee sued to enforce the settlement agreement.[174] The district court concluded that enforcement of the settlement arose under state contract law rather than under Title VII.[175] Accordingly, the court found that the Eleventh Amendment barred the suit, and the employee's waiver of his original claims was in vain.[176]

Congress created Title VII to allow employees a right to be free from discrimination regardless of where their employer is located or in what

---

171 *Cf.* Peery v. CSB Behavioral Health Sys., No. 106-172, 2008 WL 4425364, at *5-6 (S.D. Ga. Sept. 30, 2008) (finding that, in a suit alleging breach of an FMLA settlement, the state agency defendant lacked immunity from suit under Georgia law because the contract was written, but acknowledging that the plaintiff would be without a remedy were the settlement an oral one).

172 94 F. Supp. 2d 680 (D. Md. 2000).

173 *Id.* at 683.

174 *Id.* at 683-84.

175 *Id.* at 686.

176 *Id.* at 686-87; *see also* Chi v. Bd. of Educ., No. 93-3569, 1995 WL 131288, at *4 (D. Md. Feb. 6, 1995) (rejecting plaintiff-employee's retroactive claims arising from an allegedly breached settlement of a Title VII suit as barred by the Eleventh Amendment, but allowing plaintiff-employee's claims for prospective relief to proceed); *cf.* Kaahumanu v. Hawaii, 685 F. Supp. 2d 1140, 1156 (D. Haw. 2010) (holding that a non-Title VII settlement agreement arose under state contract law and the Eleventh Amendment therefore prevented the court from exercising jurisdiction over the claim), *rev'd in part on other grounds*, 682 F.3d 789 (9th Cir. 2012). *But cf.* Williams v. Lane, 818 F. Supp. 1212, 1213 (N.D. Ill. 1993) (finding that entry into a settlement agreement waived any future Eleventh Amendment defense in an enforcement action). One potential way to avoid this problem is to include a provision in the settlement agreement requiring that the state waive its sovereign immunity in any enforcement action. *Cf.* Alison Brill, Note, *Rights Without Remedy: The Myth of State Court Accessibility After the Prison Litigation Reform Act*, 30 CARDOZO L. REV. 645, 679 (2008) (suggesting that prisoners settling claims under the Prison Litigation Reform Act may avoid enforcement problems by including a provision waiving state sovereign immunity). However, as the above-referenced cases make clear, employees will not always have such foresight when settling. *Sharafeldin* illustrates this point, as well, as the settlement agreement there allowed for enforcement by "courts," but the district court rejected that this constituted a waiver of Eleventh Amendment immunity because it did not clearly allow for enforcement by "*federal* courts." *See* 94 F. Supp. 2d at 686-87 (emphasis added) (citing Edelman v. Jordan, 415 U.S. 651, 673 (1974) ("[A] state may waive its sovereign immunity, but only 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'"). Moreover, even if the state consented to be sued in federal court in a case like *Sharafeldin*, the plaintiff would be without an avenue into federal court, as subject matter jurisdiction cannot be waived. *E.g.*, Gonzalez v. Thaler, 132 S. Ct. 641, 648 (2012).

forum the employee sued. The absence of federal rules of decision governing enforcement suits undermines that aim. A plaintiff choosing to sue in state court is limited by that state's sovereign immunity doctrine, and a plaintiff suing in federal court is limited by the Eleventh Amendment. Even if the plaintiff could bring a new Title VII claim because of a breach,[177] the statute of limitations on the original injuries or similar procedural hurdles may pose difficulties;[178] additional expenses will accrue; she will have to wait longer to have her rights vindicated; and, as was the case with the employee in *Sharafeldin*, there is a risk of being subjected to continued discrimination.[179]

C. *The Counterintuitive Exhaustion Requirement*

Though less substantial than the two prior obstacles, the third roadblock for employees seeking to enforce settlement agreements is exhausting administrative requirements. Before an employee may sue under Title VII, she must file a charge with the EEOC, attempt conciliation, and obtain a "right to sue" letter.[180] Courts have reached different conclusions about whether employees must go through the same process before filing suit to enforce a settlement agreement. However, an examination of the purpose of filing charges demonstrates that no similar requirement should attach as a prerequisite to filing a settlement-enforcement suit.

Courts that require exhaustion appear confused about the purpose of the administrative requirements. In *Blank v. Donovan*, the Ninth Circuit held that exhaustion was a requirement before a plaintiff could bring his "breach

---

177 *See* Ruedlinger v. Jarrett, 106 F.3d 212, 215 (7th Cir. 1997); *cf.* Robles v. United States, No. 84-3635, 1990 WL 155545, at *6 (D.D.C. July 20, 1990) ("[E]ven those who view a right to enforce a settlement agreement as not presenting a question under Title VII or a federal question agree that such agreements create enforceable rights. The question is where to enforce them.").

178 *Cf.* Wiley v. Paulson, No. 05-724, 2008 WL 2845299, at *4 & n.3 (N.D. Tex. July 16, 2008) (holding that an allegation of a breach of settlement was insufficient to allow a plaintiff to revive the original Title VII claims, and refusing to allow the plaintiff to amend the complaint because the case was already three years old).

179 One could take issue with the analysis in this subsection by arguing that a majority of states voluntarily waive sovereign immunity for contract claims. *See* Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 419-20 (Tex. 1997) (Enoch, J., dissenting) (collecting cases and statutes). Such a counterargument overlooks three issues: (1) though some states waive immunity in certain instances, such as Alabama in the instance of ministerial acts, that does not equate to a blanket waiver of immunity; (2) that some states, or even most, waive immunity in some instances still leaves employees outside those states unaccounted for; and (3) a state's waiver of immunity in its own court does not translate to waiver in federal court. *See Edelman*, 415 U.S. at 677 n.19 (declaring that waiver in state court has no bearing on whether a state waived immunity in federal court as well).

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

of contract action."[181] The plaintiff sued to enforce a settlement agreement, to which the EEOC was a party, without exhausting administrative remedies.[182] The court reasoned that "[t]he purpose of Title VII is to provide an opportunity to reach a voluntary settlement of an employment discrimination dispute," and this aim would be better advanced if an employee had to attempt conciliation before suing for breach.[183] Accordingly, it dismissed the suit.[184] However, the court's articulation of Title VII's "purpose" overlooks its true aims—facilitating work environments in which employees are free from discrimination and compensating harmed employees.[185]

The exhaustion requirement creates two odd results. First, as noted by the dissent in *Chandler v. Vulcan Materials Co.*, in which the Sixth Circuit affirmed a district court's holding that exhaustion is required to enforce a settlement to which the EEOC is not a signatory,[186] the employer's alleged breach evidences that voluntary compliance will not work.[187] Requiring employees to go through the conciliation process a second time (and potentially more often if other breaches occur) places an unfair burden on the employee and enables the employer to delay compliance.[188]

Second, the exhaustion requirement risks that a federal court would also mandate exhaustion where the breach of a settlement agreement was governed by state law. For example, in *Hunter v. Ohio Veterans Home*, the U.S. District Court for the Northern District of Ohio, which sits in a circuit

---

181 780 F.2d 808, 809 (9th Cir. 1986).

182 *Id.*

183 *Id.*

184 *Id.* at 810; *see also* Parsons v. Yellow Freight Sys., Inc., 741 F.2d 871, 874 (6th Cir. 1984) (holding that exhaustion is required before an employee may enforce a settlement to which the EEOC was a party).

185 *See supra* note 14 and accompanying text.

186 81 F. App'x 538, 542 (6th Cir. 2003).

187 *See id.* at 543 (Clay, J., dissenting) ("The goal of voluntary compliance was met when [the employees'] initial claims about discrimination in training were resolved by conciliation.").

188 The Supreme Court refused to require a similar "procedural technicality" in *Love v. Pullman Co.*, 404 U.S. 522, 526 (1972). In *Love*, the plaintiff-employee sent the EEOC a "letter of inquiry." *Id.* at 523-24. Rather than formally filing the letter, the EEOC, in compliance with Title VII's procedural requirements, first notified a state agency that had the power to help the employee obtain relief. *Id.* at 524. When the state agency communicated that it had no intention to act on the complaint, the EEOC filed the letter as a charge, which eventually led to the employee filing suit. *Id.* The Tenth Circuit ruled that the employee should have refiled the charge with the EEOC after the state agency disclaimed interest and that his failure to do so warranted dismissal. *See id.* at 524-25. The Supreme Court reversed, finding that the purpose of the procedural requirements is "to give state agencies a prior opportunity to consider discrimination complaints" and the purpose "to ensure expedition in the filing and handling of those complaints" had both been met. *Id.* at 526. This same reasoning is applicable to the filing of a second charge after an employer has breached a settlement agreement. The purpose of allowing the parties a chance at voluntary compliance has already been satisfied.

that requires exhaustion, held that it lacked subject matter jurisdiction over a claim alleging breach of a settlement agreement because it found that the employee's complaint was "fundamentally based on a breach of contract, a state cause of action."[189] If the claim fell within the *Hunter* court's supplemental or diversity jurisdiction, it would presumably require federal exhaustion before the state claim could proceed. This would be an anomalous result that, as explained above, serves no useful purpose.[190]

In contrast, other courts have held that exhaustion of administrative remedies is unnecessary. For example, in *Cisneros v. ABC Rail Corp.*, the Tenth Circuit relied on the same reasoning as the *Chandler* dissent: "The goal of voluntary compliance with Title VII . . . was met when [the plaintiff's] discrimination claim was resolved by conciliation. What [the plaintiff] now seeks is compliance with that agreement."[191] Not only is this result more consistent with the justification for requiring an initial filing with the EEOC, but it also removes the abnormal imposition of a federal prerequisite in cases where state law governs.

In sum, the procedural laws governing breach of Title VII settlement agreements, much like the substantive law, is far from uniform. As a result, plaintiffs have difficulty getting their claims into federal court, are often subjected to unfriendly state sovereign immunity law, and may be forced to undertake unnecessary procedures.

IV. USING FEDERAL LAW

A number of the problems discussed above would be mitigated if federal law governed enforcement of Title VII settlements.[192] This Part addresses

---

189 272 F. Supp. 2d 692, 694-96 (N.D. Ohio 2003); *see also, e.g.*, Munoz v. Mabus, 630 F.3d 856, 864 (9th Cir. 2010) (stating that a settlement-enforcement suit is "essentially a contract action"); Cook v. City of Pomona, 884 F. Supp. 1457, 1462-63 (C.D. Cal. 1995) (finding no federal jurisdiction over a "private settlement agreement").

190 *But see* Calleros, *supra* note 137, at 288 (arguing that to not require exhaustion would "contravene federal statutory policy by circumventing congressionally mandated procedures and invoking the processes of the federal courts on a charge that might otherwise have been resolved prior to commencement of a suit brought directly under Title VII").

191 217 F.3d 1299, 1306 (10th Cir. 2000); *see also, e.g.*, Saksenasingh v. Sec'y of Educ., 126 F.3d 347, 351 (D.C. Cir. 1997); Sherman v. Standard Rate Data Serv., Inc., 709 F. Supp. 1433, 1441 (N.D. Ill. 1989) (same). The EEOC was not a party to the agreement at issue in *Cisneros*. Some courts have also held that exhaustion was not required even when the EEOC was party to the agreement. *See, e.g.*, Eatmon v. Bristol Steel & Iron Works, Inc., 769 F.2d 1503, 1508 (11th Cir. 1985).

192 Obviously, a federal statute addressing these problems would end the matter. *See* Parness & Walker, *supra* note 122, at 54 ("Many of the difficulties with federal settlement enforcement proceedings can be reduced by new written federal laws."). This Comment focuses on the appropriateness of courts taking steps to remedy the problems in the absence of congressional action.

the appropriateness of crafting federal common law, considering both its benefits and its compatibility with Supreme Court precedent. While acknowledging that the use of federal common law finds little support in the weight of authority, this Part nevertheless suggests that courts should begin to develop federal rules of decision tailored to Title VII's substantive aims. Indeed, it is important to remember that the policy of encouraging settlements is not an end in itself, but a means to ensure compliance with the antidiscrimination goals of Title VII.

A. *Impact on the Consequences of Settlements and Doctrinal Confusion*

If federal law governed breach-of-settlement claims, courts could create rules that account for the considerable impact that settlements—confidential or otherwise—have had on Title VII. For example, when employees are being unduly pressured into settlements or oral agreements to settle, it may be wise to construct a federal rule refusing to recognize such settlements, even when state law would do so.[193] Likewise, a totality-of-the-circumstances test for determining whether the employee entered into a settlement voluntarily and knowingly would help to ensure that the employee truly considers the settlement adequate compensation (or is actually willing to accept objectively inadequate compensation).

As *Pierce v. Atchison* demonstrates, the totality-of-the-circumstances test can serve an important role in ensuring that employees are on equal footing during settlements.[194] Application of federal law would enable federal courts to craft other rules as necessary;[195] for example, where the aims of Title VII do not require special rules, courts would not have to create contract principles from whole cloth but could apply already existing federal common law.[196]

---

193 *Cf.* Morgan v. S. Bend Cmty. Sch. Corp., 797 F.2d 471, 476 (7th Cir. 1986) ("It is ironic that most of the cases that apply federal law to declare oral settlements effective do so to the detriment of plaintiffs under Title VII.").

194 *See supra* text accompanying notes 86-92.

195 The precise substance of the many rules of decision involved in contract cases is beyond the scope of this Comment. It should be noted, though, that the rule created need not favor the employee in the case in which the rule is crafted. Instead, the rules should focus on furthering the aims of Title VII in the long term. *Cf. Morgan*, 797 F.2d at 476 ("If the success of the . . . action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule then would always be the one favoring the plaintiff, and its source would be essentially irrelevant." (quoting Robertson v. Wegmann, 436 U.S. 584, 593 (1978))).

196 *See, e.g.*, United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 40 n.9 (1987) (noting that the Labor Management Relations Act allows federal courts to develop federal common law for alleged contract violations between employers and unions); Sellers v. Zurich Am. Ins. Co., 627 F.3d 627, 632 (7th Cir. 2010) (stating that "federal common law principles of contract interpretation apply" to agreements made pursuant to ERISA).

B. *Impact on Jurisdictional Problems*

The use of federal contract principles to further the aims of Title VII would also address the jurisdictional problems facing plaintiffs in Title VII settlement-enforcement suits. Because application of federal principles would govern a plaintiff's claim, federal courts could exercise general federal question jurisdiction.[197] To prevail, the plaintiff would have to prove elements that arise under federal law[198] without reference to state law.[199] The claim would, therefore, fall within district courts' federal question jurisdiction under 28 U.S.C. § 1331,[200] because "[f]ederal common law articulated in rules fashioned by federal court decisions are also 'laws' under § 1331."[201]

This avenue would render the distinctions between predetermination agreements, conciliation agreements, and other settlements irrelevant, and make the level of the EEOC's involvement a nonissue.[202] Employees would not need to rely on the flimsy support offered by § 2000e-5(f)(3).[203] Moreover, the application of federal law would ensure that those employees who

---

197 In *Empire Healthchoice Assurance, Inc. v. McVeigh*, Justice Breyer argued in dissent that federal question jurisdiction existed as long as federal law applied, even if state law rules of decision were used in lieu of developing federal principles. 547 U.S. 677, 712-13 (2006) (Breyer, J. dissenting); *see also infra* Section IV.D. The majority, however, rejected the reasoning and held that "[u]nless and until" the party invoking federal jurisdiction demonstrates a "significant conflict between an identifiable federal policy or interest and the operation of state law," "there is no cause to displace state law, much less to lodge this case in federal court." *Empire*, 547 U.S. at 693 (majority opinion) (quoting Empire HealthChoice Assurance, Inc. v. McVeigh, 396 F.3d 136, 150 (2d Cir. 2005) (Sack, J., concurring) (alteration removed)).

198 *See* Lumen N. Mulligan, *A Unified Theory of 28 U.S.C. § 1331 Jurisdiction*, 61 VAND. L. REV. 1667, 1677 (2008) (stating that the two main theories for jurisdiction under § 1331 are when (1) federal law creates the cause of action and (2) "an element of the claim necessarily requires the construction of federal law").

199 One commentator has argued that jurisdiction over enforcement of conciliation agreements depends on the terms of the agreements. *See* Calleros, *supra* note 137, at 270-88. If the agreement required that the employer comply with Title VII, then "[a] federal question would arise" in determining whether the employer complied. *Id.* at 286 (emphasis omitted). However, if the agreement merely entitled the employee to some compensation or job placement, then compliance could be resolved "without reference to federal law." *Id.* at 270.

200 *See id.* at 297 ("[A]n action seeking . . . enforcement may yet 'arise under' federal law within the meaning of section 1331 if the action is governed by federal common law.").

201 City of Huntsville v. City of Madison, 24 F.3d 169, 172 n.3 (11th Cir. 1994) (citing Nat'l Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 850 (1985)); *see also* Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972) ("[Section] 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.").

202 *See supra* Section III.A.

203 *See* text accompanying notes 147-49.

negotiate without the EEOC's assistance are able to enforce their rights in federal court.[204]

Applying federal common law would also inhibit defendants' abilities to forum shop.[205] When a defendant is sued in federal court, settling and then breaching creates a means to confine the dispute to state court and defeat the plaintiff's choice of forum. In essence, the defendant conducts a two-step "reverse removal."[206] This tactic allows the employers to delay compensation, exploit favorable state defenses to settlements, and perhaps most importantly in the case of state defendants, assert sovereign immunity.[207]

Curing these problems would provide federal courts with the necessary tools to begin combating the problems fostered by the current push to settle. And a greater volume of meritorious claims would put the scope of current problems in the administration of Title VII into perspective. Moreover, it would ensure access to the federal forum, as Congress originally intended. In general, airing more settlement-enforcement cases in federal courts could begin to shift the public's view to a more accurate perception of the realities of employment discrimination and would facilitate the courts' ability to handle new developments in employment discrimination.[208]

---

204 *Cf.* Alden v. Maine, 527 U.S. 706, 749 (1999) ("In some ways, of course, a congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum.").

205 Of course, it is possible that the employee would prefer state court and federal common law would therefore provide an unwanted mechanism for the defendant to remove the case to federal court. However, if the employee desired to avoid federal court, she could initially bring suit under a state analogue to Title VII rather than under the federal statute, if the state law provided adequate coverage. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, STATE LAWS ON EMPLOYMENT-RELATED DISCRIMINATION, *available at* www.ncsl.org/documents/employ/DiscriminationChart-III.pdf (last visited Mar. 15, 2013) (compiling a list of employment discrimination statutes in all fifty states and the District of Columbia). A settlement of a state law claim would certainly fall under state law. *See, e.g.*, Fernandez v. City of New York, No. 12-1591, 2012 WL 5458029, at *2 (2d Cir. Nov. 9, 2012); Livingstone v. North Belle Vernon Borough, 12 F.3d 1205, 1209 n.6 (3d Cir. 1993).

206 First, the defendant settles the claim; second, the defendant breaches the settlement and thereby forces the employee (assuming no independent ground for federal court jurisdiction exists) to sue to enforce the settlement in state court.

The term "reverse removal" is taken from the abstention context. It is used there to describe states' ability to deprive a litigant of a federal forum by winning the race to the courthouse and instituting an enforcement action before the litigant can sue for prospective relief. *See* Joshua G. Urquhart, Younger *Abstention and Its Aftermath: An Empirical Perspective*, 12 NEV. L.J. 1, 11 n.70 (2011).

207 Applying federal law would also be consistent with any requirement that employees file a charge with the EEOC and go through the conciliation process before suing to enforce a settlement. While the argument was made above that exhaustion should not be required, it would at least be more satisfying if going through the steps gave the employee the right to get into federal court.

208 *See supra* text accompanying notes 36-38. An obvious response to this proposal is that federal courts are busy enough as it is: if anything is to be added to their docket, it should not be

C. *Impact on States' Ability to Assert Sovereign Immunity*

It is less likely that the development of federal common law principles would remedy the harm that accrues when the state breaches a settlement and then asserts sovereign immunity as a defense. As explained above, when enforcement suits are judged as arising under state contract law, the Eleventh Amendment prevents state employees from bringing their claims in federal court (should diversity or supplemental jurisdiction exist), and claims brought in state court are dependent on the specifics of that state's sovereign immunity doctrine.[209] This Section urges that a different result should attach if federal common law is applied, but fully recognizes that the Supreme Court's jurisprudence over the past two decades strongly suggests that state sovereign immunity will remain an obstacle in this area.[210]

The Eleventh Amendment's roots spring from concern about suits to compel states to pay debts. *Chisolm v. Georgia* allowed an action of assumpsit by an individual citizen to proceed against the state of Georgia,[211] and the Eleventh Amendment is designed, if for nothing else, to prohibit persons from recovering debts in a similar manner (at least, all commentators would agree, in diversity actions). As Justice Stevens explained in one of his many dissents attempting to limit the reach of the Eleventh Amendment, "Chief Justice Marshall understood the Eleventh Amendment's bar to have been designed primarily to protect States from being sued for their debts."[212] Accordingly, the Court's predilection for recognizing sovereign immunity is

---

more frivolous Title VII cases. However, that reaction overlooks the systemic change that would be possible with more federal enforcement of settlements. Bringing these cases to federal court likely means bringing more meritorious cases to federal court as the employer that settles may well have felt the charges against it were not entirely frivolous. And, once these more meritorious cases begin to create a record to which future plaintiffs can refer, second generation cases might be brought with more ease. *See supra* notes 33-35. Thus, while the absolute number of cases may increase, the percentage of those cases that are frivolous will theoretically decline.

209 *See supra* Section III.B.

210 *See, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 747 (2002) (holding that states possess sovereign immunity from suit in a federal agency); Alden v. Maine, 527 U.S. 706, 712 (1999) (holding that Congress cannot use its Article I powers to abrogate state sovereign immunity to suit in state court); Seminole Tribe v. Florida, 517 U.S. 44, 72 (1996) (holding that Congress cannot use its Article I powers to abrogate state sovereign immunity to suit in federal court).

211 2 U.S. (2 Dall.) 419, 428 (1793).

212 *Seminole Tribe*, 517 U.S. at 90 n.13 (Stevens, J., dissenting) (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821)); *see also, e.g.*, Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 228 (2006) (describing the Eleventh Amendment as having "sought to prevent suits against states based on broken executory contracts (most particularly, state defaults on its bonds)").

exacerbated here because, whether it arises under state or federal law, a settlement of a Title VII claim is, in essence, a contract to pay a sum of money.[213] Indeed, the foundation of the Court's current Eleventh Amendment doctrine, *Hans v. Louisiana*, rejected a suit "to recover the amount of certain coupons annexed to bonds of the State."[214] In *Hans*, a citizen of Louisiana attempted to sue directly under the Constitution's Contract Clause, and the Court's decision that the Eleventh Amendment precluded the action[215] necessarily went beyond the text of the Amendment, which only explicitly prohibits suits by "Citizens of another State, or by Citizens or Subjects of any Foreign State."[216] This extension of the Amendment's text reflects that "efforts to enforce contracts against [states] have historically been regarded as especially sensitive and problematic."[217] Therefore, any arguments in favor of finding a lack of immunity in contract actions should be cognizant of the uphill battle they face.[218]

If enforcement of a Title VII settlement is to be free from the Eleventh Amendment's constraints, it must first be distinguishable from *Hans*. The alleged cause of action in *Hans* also arose under federal common law, albeit directly under the Constitution.[219] Even Justice Stevens has therefore conceded that *Hans* "reflects, at the most, this Court's conclusion that, as a matter of federal common law, federal courts should decline to entertain suits against unconsenting States."[220]

Nonetheless, the circumstances in *Hans* and Title VII settlement-enforcement suits are distinguishable. *Hans* concerned a contract in the first instance, when the state presumably had always retained immunity; however,

---

213 *Cf.* Lapides v. Bd. of Regents, 535 U.S. 613, 620 (2002) (describing "suits for money damages against the State" as "the heart of the Eleventh Amendment's concern"). While some Title VII settlements do include promises to take prospective action to remedy discrimination, this subsection focuses on what the Court has termed "retrospective relief." *See, e.g.*, Green v. Mansour, 474 U.S. 64, 68 (1985) (citing *Ex parte* Young, 209 U.S. 123 (1908)).

214 134 U.S. 1, 1 (1890).

215 *Id.* at 1, 3.

216 U.S. CONST. amend. XI. Although the text of the Amendment does not distinguish between types of suits, many argue that the Amendment does not apply to federal question suits, regardless of whether they are brought by citizens or noncitizens. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 301 (1985) (Brennan, J., dissenting) (arguing that "the Eleventh Amendment has no relevance" to federal question jurisdiction).

217 RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 881 (6th ed. 2009).

218 Moreover, opponents of the creation of federal common law normally bristle at the alleged violation of separation of powers that common law facilitates. Such opponents would surely cry foul at the development of a rule that stifled sovereign immunity, which they would contend infringes on federalism concerns as well.

219 *See Hans*, 134 U.S. at 3.

220 Seminole Tribe v. Florida, 517 U.S. 44, 84 (1996) (Stevens, J., dissenting).

Title VII settlements involve contracts that release states from situations in which they lack immunity. Thus, the cause of action in *Hans* was independent of any federal statute, but the cause of action in a settlement-enforcement suit may be considered an outgrowth of Title VII.[221]

In addition, although it would go too far to suggest that different rules should apply to different types of debts, it should not be ignored that the underlying bonds at issue in *Hans* are of a different kind than the underlying potential liability in a Title VII case. As Justice Souter has argued, the decision in *Hans* may reflect the Court's maneuvering around the prospect that heavily indebted states in the postbellum era would simply ignore court orders to make good on their contracts.[222] The risk of a state going bankrupt because of violations of Title VII is, one hopes, nonexistent.

Even if one accepts that *Hans* does not directly control, it still must be established that the Eleventh Amendment would not otherwise apply. Generally, sovereign immunity precludes a suit for retrospective relief unless Congress validly and clearly abrogates the state's immunity or the state consents to suit.[223] The former seems inapposite to settlement-enforcement suits. Although Congress clearly abrogated sovereign immunity for Title VII actions,[224] the enforcement suit would be composed of judicially crafted federal common law, which would not satisfy the Court's *congressional* abrogation requirement.

As to state waiver, however, courts could develop a rule of federal common law to read consent into settlements of Title VII suits. There is modest support for this notion in the spirit, if not the precise holding, of the Court's decision in *Lapides v. Board of Regents*.[225] In *Lapides*, a state statute waived sovereign immunity in state court, so the state-defendant voluntarily

---

221 This is not meant to suggest that a contract claim governed by federal law would constitute an implied cause of action. *Cf.* Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (calling into question whether an implied cause of action, which is difficult enough to establish in the first place, could ever satisfy the Court's clear statement rule for abrogation).

222 *Seminole Tribe*, 517 U.S. at 122-23 n.17 (Souter, J., dissenting). The reaction to *Chisolm* sprung from a similar fear of having to make good on debts from the Revolutionary War. *See* Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 39 (1994) (suggesting that the Eleventh Amendment was adopted in part as a response to states' fears that federal courts would require them to pay their Revolutionary War debts).

223 *See* Va. Office for Prot. & Advocacy v. Stewart, 131 S. Ct. 1632, 1638 (2011) ("A State may waive its sovereign immunity at its pleasure, and in some circumstances Congress may abrogate it by appropriate legislation. But absent waiver or valid abrogation, federal courts may not entertain a private person's suit against a State." (citations and footnote omitted)).

224 *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 449 n.2 (1976) (describing how Congress specifically amended Title VII to include employees of "a State government, government agency or political subdivision").

225 535 U.S. 613 (2002).

removed the case to federal court and then moved to dismiss on Eleventh Amendment grounds.[226] The Supreme Court rejected the immunity defense and found that the act of removal had voluntarily and clearly waived it.[227] Before concluding, the Court cabined the reach of its holding to removal to federal court "of state-law claims, with respect to which the State has explicitly waived immunity from state-court proceedings."[228]

Despite this limitation, the principles underlying the decision in *Lapides* provide support for finding, as a principle of federal common law, consent to enforcement suits in federal court in Title VII settlements. The Court found that allowing a sovereign immunity defense in *Lapides* "would permit States to achieve unfair tactical advantages."[229] When a state breaches a Title VII settlement and follows up with a sovereign immunity defense, it attempts to exploit a comparable tactical advantage. That the state uses a more cumbersome process to bring about its sovereign immunity defense than did the *Lapides* defendant should not change the result. The decision to delay litigation and force the plaintiff to bring two suits should not be rewarded with acceptance of a sovereign immunity defense. Reading consent into settlements avoids this unfair result.[230]

While a state's consent to suit normally requires an unequivocal clear statement,[231] *Lapides* relaxed that standard for "litigation conduct."[232] *Lapides* distinguished between "constructive waivers" in federal legislation and "litigation conduct," such as removal to federal court.[233] The latter, the Court explained, need not be expressed in specific terms to be clear.[234] The

---

226 *Id.* at 616-17.

227 *Id.* at 620-21.

228 *Id.* at 617.

229 *Id.* at 621.

230 Fairness concerns are not unique to *Lapides*. In *Reich v. Collins*, the Court held that states could not prevent residents from challenging allegedly unlawful state taxes before collection and then assert sovereign immunity when the residents invoked a post-deprivation remedy after collection. 513 U.S. 106, 110-11 (1994). To withdraw the promised remedy by asserting an Eleventh Amendment defense, the Court explained, would be to pull an unfair "bait and switch." *Id.* at 111; *see also* Alden v. Maine, 527 U.S. 706, 740 (1999) (characterizing the holding in *Reich* as stemming from due process concerns because the state withdrew a proffered "clear and certain" remedy upon which citizens relied); *cf. generally* John Paul Stevens, *Is Justice Irrelevant?*, 87 NW. U. L. REV. 1121 (1993) (discussing the role of "justice" in sovereign immunity doctrine).

231 *See, e.g.*, Sossamon v. Texas, 131 S. Ct. 1651, 1658-59 (2011) (holding that consent to "appropriate relief" was not clear enough to constitute consent to damages actions).

232 *Lapides*, 535 U.S. at 620.

233 *Id.* (citing Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 681 n.3 (1999)).

234 *See id.* ("The relevant 'clarity' here must focus on the litigation act the State takes that creates the waiver. And that act—removal—is clear.").

difference stemmed from what the Court termed as the "judicial need to avoid inconsistency, anomaly, and unfairness."[235]

Although the Court limited its holding to removed state law claims for which immunity in state court was waived, the "inconsistency, anomaly, and unfairness" is heightened in the Title VII–settlement context. In the state-law context, the initial waiver can be viewed as the grace of the state and the revocation as a mere withdrawal of the benefit. However, in the Title VII context, the initial waiver is involuntary; the state lacks a right to withdraw the waiver even before suit is filed.[236] Therefore, the settle-then-breach litigation tactic allows the state to do what it cannot do directly—assert sovereign immunity—and, as litigation conduct, should be subjected to a lower standard of consent.

The creation of federal common law could protect employees from such an underhanded result by finding consent to suit in federal court in each settlement. Moreover, such a rule would provide proper incentives for state-defendants and would relieve employee-plaintiffs of a disincentive for taking an otherwise favorable settlement. For these reasons, federal common law would better serve the goals of Title VII. Undoubtedly, this rule would require an extension of current law,[237] but it is warranted.[238]

---

235 *Id.*

236 Indeed, this distinction provides a limiting principle that avoids the seemingly logical extension of this proposed rule to all settlement agreements. In the large majority of breached settlements, the state-defendant initially voluntarily consented to suit, making the settle-then-breach tactic, while still abrasive, somewhat more palatable.

237 *Lapides* has not been used outside of the removal context, and it has been construed narrowly even there. *See, e.g.*, Watters v. Wash. Metro. Area Transit Auth., 295 F.3d 36, 42 n.13 (D.C. Cir. 2002) (declining to apply "the narrow holding of *Lapides*" when the District of Columbia had not waived immunity in its own courts before removing to federal court). Moreover, the Courts of Appeals have required a clear expression of consent in settlement agreement terms outside of the Title VII context. *See, e.g.*, Ellis v. Univ. of Kan. Med. Ctr., 163 F.3d 1186, 1195 (10th Cir. 1998) ("[T]hat the defendants here entered into a settlement agreement . . . does not act as a waiver of the defendants' constitutionally protected immunity because the settlement agreement does not itself indicate, nor does the record otherwise reflect, an unequivocal intent to waive the immunity by the agreement."); Saahir v. Estelle, 47 F.3d 758, 762 (5th Cir. 1995) ("The State's consent . . . must be unequivocally expressed."), *abrogated by* Frew *ex rel.* Frew v. Hawkins, 540 U.S. 431, 438 (2004).

238 Finally, federal common law would allow access to the full remedy that Title VII creates. Congress vested state employees who are victims of employment discrimination with a right to seek redress against the state in a federal forum. Of course, the employee can choose to forego the federal forum and initiate litigation in state court (and it is unlikely—though, as *Lapides* illustrates, not impossible—that the state would remove to federal courts in such a situation), but the state should not be able to use the settle-then-breach tactic to make that decision for the employee.

D. *Can Federal Law Be Used?*

Simply declaring that federal law would clear up the confusion, remedy procedural hurdles, and address the systemic problems caused by settlements does not mean that courts have the authority to create federal law. As argued above, the courts that have addressed the propriety of applying federal law have done so inadequately. In reality, much of the case law and commentary support the application of state law.[239] Nevertheless, this Section argues that a shift to federal law in Title VII settlement-enforcement cases is warranted.

1. Rules of Decision Act

The Rules of Decision Act[240] states, "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[241] The question thus becomes whether Title VII "otherwise require[s] or provide[s]" application of federal law to settlement-enforcement suits. The Supreme Court's case law in analogous areas suggests that it does.

It is generally accepted that courts properly use federal law to fill the "interstices" of federal statutes.[242] Along these lines, courts have readily developed federal law in certain areas of Title VII, such as determining the meaning of individual statutory terms[243] and the viability of a claim after ownership of the employing company has changed hands.[244] However, as the discussion above[245] demonstrates, courts have been hesitant to dismiss the argument that the Rules of Decision Act requires that state law be used in Title VII settlement-enforcement suits.

---

239 *See infra* note 280.

240 The analysis in this subsection is heavily borrowed from O'Gorman, *supra* note 9, at 126-27.

241 28 U.S.C. § 1652 (2006).

242 *See* Nelson, *supra* note 61, at 503; *see also* DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 160 n.13 (1983) ("[N]o decision of this Court has held or suggested that the [Rules of Decision] Act requires borrowing state law to fill gaps in federal substantive statutes.").

243 *See, e.g.*, Papa v. Katy Indus., Inc., 166 F.3d 937, 939 (7th Cir. 1999) (declaring that the question of whether an employer has fewer than fifteen employees within the meaning of 42 U.S.C. § 2000e(b) is "one of federal common law").

244 *See, e.g.*, Brzozowski v. Corr. Physician Servs., Inc., 360 F.3d 173, 180 (3d Cir. 2004) (applying federal, not state, law to determine the scope of corporate successor liability with respect to Title VII claims); EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1089-90 (6th Cir. 1974) (same). *But see* Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 94-95 (1981) (holding that a right of contribution for defendants to Title VII claims should not be created in the absence of Congressional action).

245 *See supra* subsection II.B.2.

Nevertheless, Supreme Court precedent suggests that federal law applies to waiver of federal claims despite the Rules of Decision Act.[246] In *Town of Newton v. Rumery*, the Court addressed a waiver of a § 1983 claim and declared that the enforceability of the waiver constituted a question of federal law.[247] While *Rumery* could potentially be distinguished as involving the preliminary public policy question of the enforceability of a waiver in any instance, which necessarily requires considerations of federal policy, the Court has elsewhere held that federal common law applies to all aspects of a waiver of a federal claim. In *Dice v. Akron, Canton & Youngstown Railroad Co.*, the Court held that federal law would govern the defenses available in challenging the enforcement of a waiver of a claim under the Federal Employers' Liability Act because application of state rules could undermine the federal statute's aims.[248] Some lower courts have reached the same result in Title VII settlement cases.[249] Accordingly, the Rules of Decision Act likely does not decide the issue.[250]

2. Creation of Federal Law Versus Absorption of State Law

Even if the Rules of Decision Act does not control the issue and courts have the power to create federal common law, they need not exercise their discretion to do so.[251] The Supreme Court has, at times, decided that the

---

246 For a contrary conclusion, see Nelson, *supra* note 61, at 552-54, who argues that a traditional conflict-of-laws analysis calls for the application of state law.

247 *See* 480 U.S. 386, 392 (1987) (stating that resolution of the validity of the waiver requires "reference to traditional common-law principles").

248 342 U.S. 359, 361 (1952); *see also* O'Gorman, *supra* note 9, at 126-27 (arguing that the Rules of Decision Act does not mandate that state law govern the enforcement of Title VII settlements).

249 *See, e.g.*, Nilsson v. City of Mesa, 503 F.3d 947, 951 (9th Cir. 2007) (stating that federal law governs Title VII waivers).

250 Even if cases like *Rumery* and *Dice* mean that federal law controls when a settlement is raised as a defense to a new Title VII suit, it can be argued that state law still controls when the employee seeks to enforce the contract. It would be strange to condition the application of federal law on the identity of the plaintiff. *Cf.* Almond v. Capital Props., Inc., 212 F.3d 20, 23 (1st Cir. 2000) (stating that it would "defy common sense" for the same issue to turn on federal law when the federal government was party to a case, but on state law when the federal government was not joined); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 848 (1989) (asserting that it would be "counterintuitive" to apply stricter standards when developing federal common law for affirmative claims than when developing it for defenses).

251 In *Kamen v. Kemper Financial Services, Inc.*, the Supreme Court, considering the potential application of federal common law to the Investment Company Act (ICA), stated, "It is clear that the contours of the . . . ICA are governed by *federal* law . . . It does not follow, however, that the content of . . . a rule must be wholly the product of a federal court's own devising." 500 U.S. 90, 97-98 (1991); *see also* United States v. Kimbell Foods, Inc., 440 U.S. 715, 727-28 (1979)

use of federal rules is appropriate to govern settlements of federal statutory claims.[252] However, the Court has more recently expressed reluctance toward blanket applications of federal common law and has instead required absorption of state law in most circumstances.

United States v. Kimbell Foods, Inc. laid out three factors to consider when determining whether development of federal common law is justified. Courts must assess (1) the need for a uniform body of law, (2) whether application of state law would frustrate specific objectives of the federal statute, and (3) the extent to which applying a federal rule would disrupt commercial relationships predicated on state law.[253] In *O'Melveny & Meyers v. FDIC*, the Court emphasized the latter two factors.[254] It stated that "significant conflict between some federal policy or interest and the use of state law" is a "precondition for recognition of a federal rule of decision."[255] The Court also derided the need for uniformity as the "most generic (and lightly invoked)" federal interest.[256]

a. *The Uniformity Interest*

Despite the Supreme Court's treatment of uniformity in *O'Melveny & Meyers*, it remains a factor that courts consider and is presumably more persuasive when not merely "lightly invoked." The aims and importance of Title VII counsel in favor of uniformity. In providing employees a right to sue for employment discrimination, Title VII helps ensure that similarly situated persons are treated in a consistent manner. At least some justices have recognized, albeit in a different context, the "need for uniform interpretation" to avoid "the unfairness of treating similar employees differently."[257]

That concern is surely heightened when discrimination is at issue, as shown in Congress's decision to invoke its Section Five power and abrogate state sovereign immunity via Title VII.[258] Congress's abrogation of state sovereign immunity demonstrates its intent to make state interests secondary to federal interests with respect to securing the aims of Title VII. While

("Controversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules.").

252 *See Dice*, 342 U.S. at 361; *see also* O'Gorman, *supra* note 9, at 118-24.

253 440 U.S. at 728-29.

254 512 U.S. 79, 87-88 (1994).

255 *Id.* at 87 (quoting Wallis v. Pan Am. Petrol. Corp., 384 U.S. 63, 68 (1966)).

256 *Id.* at 88.

257 Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 709 (2006) (Breyer, J., dissenting).

258 It would be similarly unfair to apply one set of rules when an employee sues a state employer and another set of rules for all other employer-defendants.

Title VII's application to private employers is grounded in Congress's power under Article I, an employee's ability to enforce a settlement against an employer still should not depend on the state in which the employee worked. The federalism interests that normally counsel against displacement of state law are slighter in this context—a uniform rule is more appropriate.[259]

b. *The Conflict Between State Law and a Uniquely Federal Interest*

The second *Kimbell Foods* factor examines whether application of state law would significantly conflict with a uniquely federal policy or interest.[260] This prong is best treated in two steps: first, considering the existence of a uniquely federal interest, and second, determining the presence of a significant conflict between the application of state law and the federal interest.

i. The Uniquely Federal Interest

Consideration of Title VII's substantive goals reveals the presence of a uniquely federal interest. It is important to remember for whom Congress created Title VII; as the Supreme Court has noted, Title VII "concerns not majoritarian processes, but an individual's right to equal employment opportunities."[261] While it is true that employees may bring "reverse discrimination claims,"[262] members of protected classes initiate most Title VII claims. Congress's use of its Section Five power to abrogate state sovereign immunity underscores the importance of the federal interest. The rules governing contract disputes arising out of settlement breaches should therefore take into account this uniquely federal interest.[263]

---

259 In *O'Melveny & Myers*, the Supreme Court rejected the FDIC's contention that uniformity was necessary because it would ease the strain on resources the FDIC endured while researching each state's laws. *See* 512 U.S. at 88 ("[I]f the avoidance of those ordinary consequences qualified as an identifiable federal interest, we would be awash in 'federal common-law' rules."). By contrast, the call for uniformity here stems from a concern that an employee's ability to vindicate her Title VII rights may be impeded because of where she works; it is not motivated by a concern that employees or employers are operating in multiple states and will be better able to handle litigation if only one set of rules applies.

260 *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979) (describing the need to consider whether applying state law would frustrate federal objectives); *see also* Boyle v. United Techs. Corp., 487 U.S. 500, 507 (1988) (stating that a uniquely federal interest is necessary, though not sufficient, for displacing state law).

261 Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974).

262 A reverse discrimination claim occurs when a member of a majority group claims discrimination in favor of a minority group. *See, e.g.*, Plantan v. Harry S. Truman Coll., No. 10-108, 2011 WL 5122691, at *1 (N.D. Ill. Oct. 28, 2011).

263 *See* Sears, Roebuck, and Co. v. Sears Realty Co., 932 F. Supp. 392, 399 (N.D.N.Y. 1996) (declaring that development of federal common law is appropriate when "necessary to protect

Undoubtedly, opponents of the development of federal common law will point out that the Supreme Court has rarely held,[264] in the absence of a special jurisdictional provision,[265] that federal common law may be created to govern proceedings in which the federal government's fiscal interests are not implicated. Yet, the Court has developed federal common law in suits in which the federal government was not a party.[266] Moreover, lower courts have developed federal law to govern settlements of federal securities law claims for suits between private parties in which the federal government lacks a fiscal interest.[267]

More importantly, Title VII responded to pervasive employment discrimination that state law failed to remedy.[268] Congress's use of its Section Five power to complete the Title VII antidote highlights the importance of the scheme as a federal interest. The lack of a fiscal interest that matches

---

uniquely federal interests" (emphasis added) (citing Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981))); *cf. Kimbell Foods, Inc.*, 440 U.S. at 72 (stating that the creation of federal common law may be appropriate when state law would "frustrate specific objectives of the federal programs"). Most findings of "uniquely federal interests" deal with "the rights and obligations of the United States." *See* United States v. Crown Equip. Corp., 86 F.3d 700, 706 (7th Cir. 1996) (collecting cases).

264 *See* Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 361 (1952) (applying federal law to settlements of Federal Employers' Liability Act claims because "the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed").

265 In *Textile Workers Union of America v. Lincoln Mills*, the Court held that federal law governed suits for breaches of contracts arising out of the Labor Management Relations Act (LMRA). 353 U.S. 448, 457 (1957). Section 301 of the LMRA creates jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization." 29 U.S.C. § 185(a) (2006). In contrast, Title VII's special jurisdiction provision creates federal court jurisdiction in a more general manner, without reference to contracts between employees and employers. 42 U.S.C. § 2000e-5(f)(3). Thus, the Court has interpreted the provision to supply no more additional jurisdiction than § 1331 would provide on its own. *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 506 (2006) (noting that § 2000e-5(f)(3) serves to underscore Congress's intention to provide a federal forum under the full scope of § 1331). *But see* Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2059-60 (2008) (arguing that specialized jurisdictional provisions such as § 2000e-5(f)(3) should be interpreted to confer jurisdiction in a manner that enables "the full and comprehensive vindication of the statutory scheme of which they were a part").

266 *See* Boyle v. United Techs. Corp., 487 U.S. 500, 512 (1988) (creating a special defense to state law tort claims against military contractors when such liability conflicts with federal policy).

267 *See, e.g.*, Eichenholtz v. Brennan, 52 F.3d 478, 486 & n.14 (3d Cir. 1995) (creating a federal rule of decision for settlement contribution); *cf. In re* Consol. Freightways Corp., 443 F.3d 1160, 1163 (9th Cir. 2006) (considering the argument that the federal government's interest in regulating interstate transportation could be a uniquely federal interest but not finding sufficient conflict to justify the use of federal common law).

268 Jeffrey A. Mandell, Comment, *The Procedural Posture of Minimum Employee Thresholds in Federal Antidiscrimination Statutes*, 72 U. CHI. L. REV. 1047, 1075 (2006).

the Court's previous decisions should not be considered sufficient to bar courts from developing federal rules of decision. The eradication of discrimination should not be excluded from the category of uniquely important federal interests.

ii. The Existence of a Significant Conflict

The majority of this Comment has attempted to demonstrate the scope of the conflict between the current state of affairs and the aims of Title VII. The aggressive push to settle, the effects of confidential settlement, the untailored substantive law, and the procedural difficulties make it unnecessarily challenging for employees to vindicate their Title VII rights. It is true that no single aspect of state law generates the requisite "significant conflict" the Court requires. However, the overall use of state law clearly undermines federal efforts to accomplish the goals of Title VII.

With respect to procedural issues, use of state law (a) creates inconsistent rules as to whether a state is a viable defendant in an enforcement suit; and (b) renders an employee's ability to enforce a suit in federal court dependent on (1) the jurisdiction in which the employee works, (2) whether her claim falls under federal courts' supplemental or diversity jurisdiction, and (3) the EEOC's level of involvement. These factors, in combination, limit the power of federal courts to monitor settlements and to ensure that a policy of encouraging settlements as a means of voluntary compliance does not overshadow the twin aims of Title VII—deterring employment discrimination and compensating its victims. Application of federal rules would mitigate these conflicts.

The development of federal rules would also allow courts to remedy clashes between state substantive law and federal interests. In *United States v. Northrop Corp.*, the Ninth Circuit held that federal common law applied to the waiver of a claim under the False Claims Act.[269] The court reasoned that applying state law to such waivers would risk undermining the purposes of the False Claims Act and instead "favor[]ironclad and enforceable general releases."[270] The "voluntary and knowing" standard, as well as any rule developed to address the validity of oral settlements, combats this same problem. Furthermore, in *Kimbell Foods*, the Supreme Court rejected the argument that the application of state law would undermine the federal government's "ability to safeguard its interests in commercial dealings" because the federal agency at issue "carefully select[ed] loan recipients"

269 59 F.3d 953, 961 (9th Cir. 1995).
270 *Id.* (citation omitted).

"with detailed knowledge" and "tailor[ed] each transaction with state law in mind."[271] An employee who is discriminated against clearly does not choose to be discriminated against with any degree of consent, let alone "carefully" and with "detailed knowledge." Thus, she is unable to tailor the instances in which resorting to contractual settlements will be necessary and may not be readily able to "safeguard" her interests. The substance of federal common law could protect against this inability to anticipate workplace discrimination.

Application of federal common law would suppress the risk of conflicting state laws in other ways as well. It would allow courts specifically to enforce settlements that require employers to take actions other than providing monetary compensation—as Title VII settlements often do[272]—because state courts are often unreceptive to specific performance clauses.[273] Finally, use of federal common law rules would help combat the perception that Title VII claims are often meritless and help federal courts develop a better understanding of "second generation discrimination."[274]

c. *The Effect on Commercial Relationships*

The third *Kimbell Foods* factor considers the degree to which application of federal common law would "disrupt commercial relationships predicated on state law."[275] Settlement of a Title VII claim, however, likely fails to qualify as a "commercial relationship," and thus the third *Kimbell Foods* factor should not cause much concern.[276]

Even if these settlements are deemed commercial, this aspect of *Kimbell Foods* should not preclude the creation of federal common law. The Supreme Court instructs that the presumption that state law should be absorbed as federal law is "particularly strong" in areas where private parties transact

---

271 United States v. Kimbell Foods, Inc., 440 U.S. 715, 735-36 (1979).

272 *See, e.g.*, Greene v. Rumsfeld, 266 F. Supp. 2d 125, 132 (D.D.C. 2003) (exemplifying how settlement terms may require an employer to promote an employee).

273 *See* Eatmon v. Bristol Steel & Iron Works, Inc., 769 F.2d 1503, 1512 (11th Cir. 1985) ("[S]tate courts might be hostile to certain terms typically included in these agreements, such as specific performance clauses."); Owens v. West, 182 F. Supp. 2d 180, 189 (D. Mass. 2001) ("Some state courts, for example, might be wary of enforcing . . . specific performance clauses.").

274 *See supra* notes 33-38 and accompanying text. Professor Kotkin argues that federal courts could create rules to counter the effects of confidential settlements, mainly suggesting that settlements be made dependent on court approval and remain open to the public. *See* Kotkin, *supra* note 21, at 971-72 (citing D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 115-16 (1946)). While her recommendation would be addressed in an original suit, enforcement suits could develop a similar rule when the allegedly breached settlement contains a confidentiality clause.

275 *Kimbell Foods*, 440 U.S. at 728-29.

276 *See* O'Gorman, *supra* note 9, at 146 (arguing that settlements of Title VII claims are analogous to settlements of personal injury claims and are, therefore, not commercial transactions).

with the expectation that state law will govern.[277] While parties may normally assume that state law governs contracts,[278] settlements of Title VII claims operate in an area of less-than-normal clarity.[279] Moreover, settlements are meant to further voluntary compliance, and thus the rules governing settlements should not be tailored to those who consistently settle rather than prospectively comply. Doing so would put undue emphasis on the means of enforcing Title VII to the detriment of the aims of Title VII.

* * *

In sum, application of federal common law to Title VII settlement-enforcement suits is warranted,[280] even if the current trends in the case law cut in the opposite direction, rendering this proposal unlikely to gain traction. These settlements implicate a uniquely federal interest that federal rules would further and that application of state law undermines.

CONCLUSION

Congress's encouragement of settlements has engendered significant negative consequences. Too often, the focus has been on facilitating settlements when the primary goal should be preventing and compensating workplace discrimination. The volume of suits in which the validity of settlements arising from Title VII complaints is at issue strongly suggests that private settlement, as presently conducted, is an insufficient remedy. These complications, coupled with the negative consequences that settlements—and especially confidential settlements—may have, suggest that passive application of state law to enforcement suits produces a settlement regime in significant conflict with Title VII's aims. Though settlement will unavoidably play some role in combating employment discrimination, the current uninhibited push to resolve claims out of court puts too great a

277 Kamen v. Kemper Fin. Servs., 500 U.S. 90, 98 (1991).

278 *E.g.*, VKK Corp. v. NFL, 244 F.3d 114, 122 (2d Cir. 2001).

279 *See supra* Section II.D; *see also, e.g.*, DirecTV, Inc. v. Borst, No. 03-0274, 2006 WL 1308118, at *2 (W.D. Wis. May 9, 2006); Cornell v. Delco Elecs. Corp., 103 F. Supp. 2d 1116, 1120 (S.D. Ind. 2000).

280 Other commentators have come to contrary conclusions. *See* Calleros, *supra* note 137, at 297-306 (finding a lack of a sufficiently significant conflict or strong federal interest to justify creation of federal common law for suits enforcing EEOC conciliation agreements); O'Gorman, *supra* note 9, at 129-47 (applying the *Kimbell Foods* factors and concluding that the creation of federal common law is generally inappropriate but may at times require respect of certain state contract rules); Michael E. Solimine, *Enforcement and Interpretation of Settlements of Federal Civil Rights Actions*, 19 RUTGERS L.J. 295, 329 (1988) (rejecting the need for application of federal common law to civil rights settlements).

strain on, and risks undermining, Title VII's deterrent and compensatory goals. The development of federal common law would help address this problem and better effectuate the purpose of Title VII.