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# FAIRNESS AND FINALITY: THIRD-PARTY CHALLENGES TO EMPLOYMENT DISCRIMINATION CONSENT DECREES AFTER THE 1991 CIVIL RIGHTS ACT

MARJORIE A. SILVER\*

*In this Article, Professor Silver examines Section 108 of the Civil Rights Act of 1991, which limits challenges to employment practices taken pursuant to employment discrimination consent decrees. The Article traces the development of the impermissible collateral attack doctrine, that doctrine's demise in *Martin v. Wilks*, and Congress' response to *Martin* as embodied in Section 108. Professor Silver also suggests ways in which Section 108 should be administered to comply with the Due Process Clause and argues for specific additional federal legislation to protect non-litigants or potential third-party challengers as well as to foster the utility and finality of legitimate consent decrees. In addition to arguing for procedural reforms, Professor Silver urges the Supreme Court to acknowledge the relevance of race and to release benign racial distinctions from strict scrutiny analysis.*

## INTRODUCTION

A consent decree between two parties cannot bind a nonparty.<sup>1</sup> Nonetheless, that nonparty's lot in life may be adversely affected by the agreement. Other kinds of external happenings may have similar effects. Suppose Clark covets Bob's house, but Bob contracts to sell his house to Alex. Despite Clark's desire to be the purchaser, he has no legal claim to invalidate the contract between Alex and Bob.<sup>2</sup>

Suppose instead that Alex applies for a job with Bob, an employer. Clark also applies for that job, but for whatever reason, Bob prefers Alex and hires her. Clark may be disgruntled by the result but has no lawful grounds for complaint—unless Bob preferred Alex over Clark for a statutorily proscribed reason, for example because Alex was white, like Bob, and Clark was black. Then Title VII and its state and local counterparts

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1. See *Martin v. Wilks*, 490 U.S. 755, 768 (1989); *Local Number 93 v. City of Cleveland*, 478 U.S. 501, 529 (1986); Richard A. Epstein, *Wilder v. Bernstein: Squeeze Play by Consent Decree*, 1987 U. Chi. Legal F. 209, 209.

2. For similar examples, see Andrea Catania & Charles A. Sullivan, *Judging Judgments: The 1991 Civil Rights Act and the Lingering Ghost of Martin v. Wilks*, 57 Brook. L. Rev. 995, 1012-13 (1992).

would give Clark legal grounds for complaint.<sup>3</sup> Moreover, as interpreted by the Supreme Court, even if Alex were black and Clark white, Bob may not make a race-based decision,<sup>4</sup> unless Bob has a bona fide reason for doing so.

These examples illustrate a question often raised explicitly or implicitly in Title VII reverse discrimination cases: does the existence of a consent decree resulting from litigation in which Clark was not a party create a lawful reason for hiring Alex over Clark on the basis of race alone? Furthermore, does Clark have a procedural right to gain a court's ear on that question?

In 1989, the Supreme Court, in *Martin v. Wilks*,<sup>5</sup> rejected the widespread practice among lower courts of disallowing third-party collateral attacks on Title VII consent decrees. Invoking traditional preclusion doctrine, a majority of the Court affirmed the right of white fire fighters to have their day in court on the legitimacy of a consent decree under which minority employees received certain preferences in promotion.<sup>6</sup> In response to this decision, Congress circumscribed the opportunities for third-party challenges to Title VII consent decrees in section 108 of the Civil Rights Act of 1991.<sup>7</sup>

This Article describes what led to the enactment of section 108, explores its legitimacy, and suggests methods for administering the statute that should fend off constitutional attack. Part I explores the important role consent decrees have played in the resolution of employment discrimination class litigation.<sup>8</sup> It describes the emergence<sup>9</sup> of the impermissible collateral attack doctrine and its subsequent demise<sup>10</sup> in *Martin v. Wilks*.<sup>11</sup> *Wilks* threatened to jettison the consent decree as a useful tool in the resolution of employment discrimination litigation by undermining its finality and increasing the litigation costs surrounding such decrees.<sup>12</sup> In section 108, Congress endeavored to meet the Court's constitutional concerns while maintaining the utility of the consent decree to

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3. See Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. Chi. Legal F. 103, 129-30. In addition, Clark may have a claim under 42 U.S.C. § 1981. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 176 (1989).

4. See, e.g., *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 n.8 (1976) (holding that Title VII protects whites as well as blacks from racial discrimination). If Bob were a public employer, then a race-based choice would be proscribed by the federal Constitution as well. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (holding that the Equal Protection Clause prohibited the Board of Education from extending preferential protection against layoffs to certain employees based on race).

5. 490 U.S. 755 (1989).

6. See *id.* at 761-63.

7. Pub. L. No. 102-166, § 108, 105 Stat. 1071, 1076 (1991) (codified at 42 U.S.C. § 2000e-2(n) (Supp. III 1991)).

8. See *infra* notes 36-54 and accompanying text.

9. See *infra* notes 64-83 and accompanying text.

10. See *infra* notes 86-125 and accompanying text.

11. 490 U.S. 755 (1989).

12. See *infra* notes 126-31 and accompanying text.

resolve employment discrimination litigation. Section 108 limits the circumstances under which a nonparty can challenge a decree and precludes subsequent challenges to consent decrees by those who have received notice and an opportunity to present objections, or whose interests were adequately represented by another in the original litigation.<sup>13</sup>

Part II argues that section 108 has the potential to succeed both in ensuring constitutional fairness to nonparties and in salvaging the consent decree as a useful tool in the struggle against employment discrimination.<sup>14</sup> The majority's opinion in *Wilks* suffers from a deficiency common to much of the Supreme Court's jurisprudence under both Title VII and the Equal Protection Clause: it ignores the context in which these third-party challenges have arisen, a context pervaded by the historical exclusion of racial minorities from employment opportunities traditionally available only to white males.<sup>15</sup> While it is inequitable that majority employees should shoulder the entire burden of this historical exclusion, their claims to fair treatment cannot trump the competing claims of those previously disadvantaged.<sup>16</sup> The balance that must be struck is one of procedure as well as substance. The Court has created a substantive test that attempts to strike such a balance for consent decrees: is there a sound basis for believing discrimination has occurred? Is the proposed decree an appropriate method for addressing the perceived problem, one that does not unnecessarily trammel the rights of majority employees?<sup>17</sup> *Wilks*, however, fails to strike a similarly appropriate balance for procedural fairness. Section 108 endeavors to provide that balance.

*Wilks* suggests that only through the joinder provisions of the Federal Rules of Civil Procedure can parties to the underlying litigation hope to fend off subsequent attack, invoking the talismanic principle that one who never had a day in court cannot be precluded.<sup>18</sup> Yet there is significant precedent for precluding persons who have never had their own day in court, manifest in class actions and other representational litigation.<sup>19</sup> Furthermore, even without legal preclusion, external events may affect inchoate legal "rights," effecting "practical preclusion."<sup>20</sup>

By limiting challenges to employment discrimination consent decrees to those who never had notice or an opportunity to be heard and who were not adequately represented by others who did, section 108 will undoubtedly face due process challenges. But courts can avoid successful challenges by overseeing employment discrimination litigation in a manner that is sensitive to the underlying purpose of section 108: the facilita-

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13. See *infra* notes 132-38 and accompanying text.

14. See *infra* notes 139-304 and accompanying text.

15. See *infra* notes 139-55 and accompanying text.

16. See *infra* notes 158-64 and accompanying text.

17. See *infra* notes 165-74 and accompanying text.

18. See *infra* notes 180-95 and accompanying text.

19. See *infra* notes 199-225 and accompanying text.

20. See *infra* notes 226-39 and accompanying text.

tion of early and meaningful opportunities for challenges to employment discrimination decrees in order to ensure their fairness and avoid subsequent litigation.<sup>21</sup> Notice should effectively apprise its recipients of their rights and opportunities, and the opportunities to participate should be real, not symbolic.<sup>22</sup> Courts should facilitate intervention through liberalization of timeliness requirements.<sup>23</sup> Furthermore, courts must endeavor to ensure that adequacy of representation is real, not apparent, to protect the interests of those who never receive adequate notice.<sup>24</sup>

Although there is much that the lower courts can do to enhance both the fairness and the finality of consent decrees, Part III argues that it behooves Congress to legislate additional procedural protections for would-be challengers.<sup>25</sup> Courts should be required to hold fairness hearings before approving decrees or rendering final judgments in employment discrimination litigation that is likely to affect significantly the lives of persons not directly participating in the litigation.<sup>26</sup> The greater the institutional nature of the litigation, the greater the need to ensure that competing voices are heard.<sup>27</sup>

Similarly, intervention rights should be enhanced legislatively to facilitate appellate review of consent decrees in employment discrimination litigation.<sup>28</sup> Finally, because procedural reforms are inevitably intertwined with substantive rights and obligations, this Article urges both Congress and the Court to acknowledge the relevance of race, and free benign racial classifications from the shackles of strict scrutiny.<sup>29</sup>

## I. CONSENT DECREES AND NONPARTIES

The consent decree<sup>30</sup> in controversy in *Martin v. Wilks*<sup>31</sup> exemplified, in relevant respects, a favored approach for resolving Title VII class litigation.<sup>32</sup> In this instance, the district court had made some initial find-

21. See *infra* notes 240-49 and accompanying text.

22. See *infra* notes 251-60 and accompanying text.

23. See *infra* notes 261-71 and accompanying text.

24. See *infra* notes 272-304 and accompanying text.

25. See *infra* notes 305-30 and accompanying text.

26. See *infra* notes 305-20 and accompanying text.

27. See *infra* notes 313-20 and accompanying text.

28. See *infra* notes 321-30 and accompanying text. This recommendation applies to litigated decrees as well. See *id.*

29. See *infra* notes 331-41 and accompanying text.

30. I use the terms "consent decree" and "consent judgment" interchangeably. The distinctions between them, for all practical purposes, have been obliterated by the merger of law and equity. See Judith Resnik, *Judging Consent*, 1987 U. Chi. Legal F. 43, 45.

31. 490 U.S. 755 (1989).

32. See *infra* text accompanying notes 86-114. Federal government figures indicate that between 1972 and 1983, of 106 Title VII suits brought by the Justice Department against state and local government employers, 93 were settled by consent decree. See Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 Duke L.J. 887, 893-94. Consent decrees are frequently used to resolve other kinds of class litigation as well. See, e.g., Laycock, *supra* note 3, at 105-07 (discussing Harrisburg Chapter of the Am. Civil Liber-

ings of discrimination, but before any final resolution on the merits, the plaintiff class and the City of Birmingham negotiated a remedial plan.<sup>33</sup> They presented the plan to the district court, which held a fairness hearing<sup>34</sup> and ultimately entered the negotiated agreement as a judgment.<sup>35</sup> These facts eventually presented the Supreme Court with the opportunity to address the competing interests between a decree's goals and the interests of nonparties.

### A. *The Role of Consent Decrees in Redressing Discrimination*

Much has been written about the consent decree.<sup>36</sup> Is it merely an officially recorded private agreement, or does it have more weight by virtue of the judicial endorsement it carries? The answers suggested often depend on the reason the question is asked. In *Local Number 93 v. City of Cleveland*,<sup>37</sup> and more recently in *Rufo v. Inmates of Suffolk County Jail*,<sup>38</sup> the Supreme Court acknowledged the hybrid nature of consent decrees: they partake of aspects of both judgments<sup>39</sup> and contracts, depending on the purpose of the analysis.<sup>40</sup> Unlike ordinary settlement agreements, they are directly enforceable by contempt sanctions,<sup>41</sup> and the court retains the power to modify them in certain circumstances, even over the objection of a signatory.<sup>42</sup> But this power is seldom exer-

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ties Union v. Scanlon, 458 A.2d 1352 (Pa. 1983) and Wilder v. Bernstein, 645 F. Supp. 1292 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988)).

33. See *Wilks*, 490 U.S. at 759.

34. "A fairness hearing is a forum in which the participants can make suggestions about the settlement or object to its provisions, without enjoying the right to litigate the underlying liability of the defendant." Schwarzschild, *supra* note 32, at 911.

35. See *Wilks*, 490 U.S. at 760.

36. See, e.g., Lloyd C. Anderson, *The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation*, 1983 U. Ill. L. Rev. 579 (discussing consent decrees in class actions); Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. Chi. Legal F. 19 (discussing consent decrees as alternatives to litigation); Epstein, *supra* note 1 (noting the differences between contract law and consent decrees); Owen M. Fiss, *Justice Chicago Style*, 1987 U. Chi. Legal F. 1 (expressing reservations about consent decrees' exercise of unlimited public power); Samuel Issacharoff, *When Substance Mandates Procedure: Martin v. Wilks and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 Cornell L. Rev. 189 (1992) (discussing consent decrees and reverse discrimination); Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. 321 (1988) (discussing reverse discrimination and "fairness hearings"); Laycock, *supra* note 3 (discussing the effect of consent decrees on third parties); Resnik, *supra* note 30 (discussing the legal ramifications of entering into a consent decree versus other types of settlements); Schwarzschild, *supra* note 32 (suggesting the creation of a framework for assuring that third party interests are considered when analyzing public law consent decrees).

37. 478 U.S. 501 (1986).

38. 112 S. Ct. 748 (1992).

39. See *Rufo*, 112 S. Ct. at 757; *Local Number 93*, 478 U.S. at 518-19. As with other judgments, consent decrees have claim preclusive (*res judicata*) effect. See *United States v. City of Miami*, 664 F.2d 435, 439 (5th Cir. 1981) (*per curiam*) (*en banc*).

40. See *Local Number 93*, 478 U.S. at 519.

41. See *id.* at 518 (citing *City of Miami*, 664 F.2d at 440 & n.8).

42. See *id.* at 518 (citing *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932)). In *Rufo*, the Court held that "a party seeking modification of a consent decree must estab-

cised, and whether a settlement will be purely private or judicially recorded as a consent decree is usually within the complete discretion of the parties to the agreement.<sup>43</sup> For these reasons, the Supreme Court concluded in *Local Number 93* that a remedial scheme, which might have violated Title VII had it been entered as a litigated judgment, remained outside Title VII's proscriptions when entered as a consent decree.<sup>44</sup>

Desire by one or both parties to implicate the court in their otherwise private agreement drives the choice to proceed by consent decree.<sup>45</sup> For the party who fears noncompliance by its adversary, a consent decree guarantees an expedited path to the court for enforcement of the decree's terms.<sup>46</sup> The contempt sanction creates additional disincentives for non-compliance,<sup>47</sup> and certain kinds of institutional relief are impractical, if not impossible, without judicial involvement.<sup>48</sup> For example, a government defendant may require the judge's signature to force legislative appropriation of funds needed for compliance with the agreement's terms. Also, plaintiffs cannot preclusively represent the interests of an entire class of people without judicial imprimatur.<sup>49</sup> Furthermore, the inherently complicated nature of most public law settlements would be handicapped without continuing judicial oversight.<sup>50</sup>

But why not litigate? Why is the consent decree such a popular and prevalent approach, especially in Title VII class litigation?<sup>51</sup> In part for the reasons parties generally choose to settle rather than proceed to judg-

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lish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance." 112 S. Ct. at 765.

43. See *Local Number 93*, 478 U.S. at 523.

44. See *id.* at 526. See also *Dunn v. Carey*, 808 F.2d 555, 559 (7th Cir. 1986) (holding that a consent decree is more like a contract than a litigated judgment for purposes of anti-injunction statute). But see *Local Number 93*, 478 U.S. at 538 (Rehnquist, J., dissenting) ("But the fact remains that the judgment is not an *inter partes* contract; the Court is not properly a recorder of contracts, but is an organ of government constituted to make judicial decisions and when it has rendered a consent judgment it has made an adjudication.") (quoting 1B James W. Moore et al., *Moore's Federal Practice* ¶ 0.409[5], at 330-31 (1984)); *Dunn*, 808 F.2d at 561 (Swygert, J., concurring) (arguing that a consent decree is equivalent to a litigated judgment for purposes of anti-injunction statute).

45. As to the prevalence and popularity of consent decrees in litigation, see Resnik, *supra* note 30, at 46 (noting that in 1985, of 269,848 dispositions in federal court, 15,661 were consent judgments and 127,919 were dismissals including, but not limited to, dismissals based upon consent).

46. See *Kramer*, *supra* note 36, at 325; Resnik, *supra* note 30, at 64-65.

47. See Schwarzschild, *supra* note 32, at 899.

48. See Resnik, *supra* note 30, at 101. But see *id.* at 102 ("The utility and legitimacy of consent decrees must come from explanations other than the quality of judicial involvement with consent decrees at the time of their entry.").

49. Cf. *id.* at 82-83 (discussing the adjudicatory role of judges with respect to the acceptance of plea bargains and the enforcement of consent decrees).

50. See Schwarzschild, *supra* note 32, at 899.

51. See, e.g., Charles J. Cooper, *The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process*, 1987 U. Chi. Legal F. 155 (noting the prevalence of consent decrees in resolving employment discrimination cases).

ment: reduced transactional costs, less risk, and increased control over the outcome. Title VII provides additional reasons.<sup>52</sup> The statutory scheme encourages eradication of discrimination through voluntary means, at least in part to diffuse confrontation while promoting integration.<sup>53</sup> The Supreme Court has explicitly endorsed the use of consent decrees to resolve Title VII litigation.<sup>54</sup>

But consent decrees bear hidden costs that often fall on persons not parties to the litigation that gave rise to the decree.<sup>55</sup> The typical Title VII class lawsuit is brought on behalf of one or more classes of minority or women employees against various public or private bodies who have allegedly denied them employment opportunities on the basis of race or gender.<sup>56</sup> Frequently white male employees in competition for the same opportunities are not joined as parties,<sup>57</sup> and often are heard by the

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52. For any litigants, a negotiated solution avoids the winner-takes-all characteristics of litigation. Many have also argued that in employment discrimination cases the employer is able to shift most of its costs to innocent third parties.

[I]f part of the cost can be shifted to C, the settlement becomes a bargain. If enough of the cost can be shifted to C, the bargain may be irresistible. A settlement in these circumstances shows only that the residual settlement costs borne by B are less than the risks B faces in litigation. A rational B might generously settle even a frivolous claim if C will bear the cost.

Laycock, *supra* note 3, at 113. For further discussion of cost-shifting in Title VII litigation, see *infra* notes 157-64 and accompanying text.

53. See, e.g., *United Steelworkers of America v. Weber*, 443 U.S. 193, 201-04 (1979) (discussing the importance of voluntary compliance in Title VII's scheme); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) ("Cooperation and voluntary compliance were selected [by Congress] as the preferred means for achieving" the elimination of employment discrimination). See also Schwarzschild, *supra* note 32, at 900 (suggesting affirmative action remedies may be viewed as more acceptable if accomplished through negotiation rather than litigated judgment).

54. See, e.g., *Carson v. American Brands, Inc.*, 450 U.S. 79, 81-83, 88 n.14 (1981) (holding that court's refusal to approve Title VII consent decree is an appealable order and discussing the importance of voluntary resolution of Title VII cases). See also *United States v. City of Miami*, 664 F.2d 435, 442 (5th Cir. 1981) (per curiam) (en banc) (discussing *Carson* and the importance of consent decrees in Title VII's scheme); Schwarzschild, *supra* note 32, at 904 n.92 (discussing *Carson*); *id.* at 901 (observing that, for some judges, consent decrees are "an opportunity to avoid grappling with the policy dilemmas and moral ambiguities lurking about 'affirmative action'").

55. See, e.g., Laycock, *supra* note 3, at 132 ("All the reasons why plaintiffs prefer consent decrees to simple contracts are reasons why consent decrees more effectively limit [third party's] rights.").

56. Throughout this Article, I refer to white male employees and majority employees interchangeably. It should be understood that, theoretically, the arguments made on behalf of these employees could be made by other "strangers" to the original litigation as well. I refer to them as "white" or "majority" because they typically are the challengers of such consent decrees. Similarly, most of the references to racial discrimination and challenges based on race should be deemed to apply to gender as well, except in certain instances where the differences may have legal importance—for example, where strict scrutiny is required under the Equal Protection Clause. See *infra* notes 144-55 and accompanying text.

57. Even if white male employees are joined as parties or allowed to intervene, consent decrees may be approved without their assent. See, e.g., *Local Number 93 v. City of Cleveland*, 478 U.S. 501, 528-30 (1986) (one party cannot prevent others from settling their differences by consent decree). But see *City of Miami*, 664 F.2d at 436 (where union



court, if at all,<sup>58</sup> only when the parties have submitted an agreement to the court for approval.<sup>59</sup> These employees, or organizations on their behalf, often have challenged such consent decrees in collateral litigation, arguing that the application of the decrees has adversely affected them in violation of Title VII's prohibition against employment discrimination based on race, and—in the case of public employers—in violation of the Equal Protection Clause.<sup>60</sup>

Although the resultant jurisprudence is far from a paradigm of consistency, a substantive standard for judging the legitimacy of such consent

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that objected to consent decree was not dismissed as a party, the portion of the consent decree purportedly affecting union members' rights was invalidated, and remanded for trial). Seven of the *City of Miami* judges who heard the case en banc argued that the union's consent was not required because none of its rights were abridged by the decree, although the district court should have dismissed the union from the case once it approved the decree. See *id.* at 462 (Johnson, J., concurring in part and dissenting in part).

58. See, e.g., Schwarzschild, *supra* note 32, at 919 ("Only in a few cases have courts permitted white third parties to participate in fairness hearings[.]"). It would appear from reported decisions that such participation has become more frequent since Professor Schwarzschild's study. See, e.g., *San Francisco Police Officers' Ass'n v. City & County of San Francisco*, 812 F.2d 1125, 1128 (9th Cir. 1987) (voluntarily holding a fairness hearing); *Dennison v. City of Los Angeles Dep't of Water & Power*, 658 F.2d 694, 695 (9th Cir. 1981) (conducting a fairness hearing for persons who had previously submitted written objections to the consent decree).

59. See Schwarzschild, *supra* note 32, at 913. Professor Schwarzschild analogizes the opportunity to present objections at "fairness hearings" held prior to judicial approval of consent decrees, and the judge's explanation for accepting or rejecting objections, to administrative notice and comment proceedings. See *id.* at 911-12.

Professor Schwarzschild describes, from his own experiences as an attorney with the Civil Rights Division of the United States Justice Department, the lack of opportunity for meaningful scrutiny of many employment discrimination consent decrees approved by the federal courts between 1972 and 1983:

[I]n many instances the parties negotiate a consent decree before a complaint is even filed; the parties submit their decree simultaneously with the filing of the complaint and the court promptly enters judgment without formal proceedings of any kind. . . . [T]he judge relies on the assurances of the parties, especially the government agencies involved, that the consent decree is a Good Thing.

. . . Of the ninety-three Title VII consent decrees entered between the Justice Department and "public" employers—state or local governments—between 1972 and 1983, nearly a third were submitted together with the complaint and promptly signed by the court, usually on the same day. In a fairly typical instance, *United States v. City of Jackson*, a decree with "wide-ranging injunctive relief"—including a fifty percent hiring "goal" for blacks, a thirty-three and one-third percent hiring "goal" for women, and accelerated promotions for black employees—was filed together with the complaint on a Friday and signed by the district judge the following Monday.

*Id.* at 913 (footnotes omitted). But see *City of Miami*, 664 F.2d at 441 ("If the decree also affects third parties, the court must be satisfied that the effect on them is neither unreasonable nor proscribed.").

60. Such challenges may be brought under 42 U.S.C. § 1981 as well. See, e.g., *O'Shea v. City of San Francisco*, 966 F.2d 503 (9th Cir. 1992) (majority firefighters brought suit under California's Fair Employment and Housing Act, the California Constitution, and 42 U.S.C. §§ 1981 and 1983 for denial of promotions resulting from a consent decree), *appeal dismissed sub nom.* *United States v. City of San Francisco*, 979 F.2d 169 (9th Cir. 1992).

decrees has emerged that basically asks two questions: is there a valid basis for believing that the alleged discrimination has occurred? If so, is the consent decree narrowly tailored to achieve the goals of redressing such discrimination?<sup>61</sup> To answer the latter question, the court examines whether the decree completely forecloses advancement opportunities for white males, and whether it is designed to operate for a limited period of time.<sup>62</sup> The status of the nonparty white males affected by the decree—whether they are *applicants* for employment or *incumbents* seeking promotion or protection from lay-off—will bear on both the legitimacy of their expectations and the amount of protection the courts afford them from adverse impact.<sup>63</sup>

But whether white male challengers will be afforded an *opportunity* to challenge the terms of a consent decree is an entirely different question from the merits of any such challenge. Before *Wilks*, lower courts created substantial procedural obstacles, which effectively foreclosed inquiry into the merits of such challenges.

### B. *The Rise and Fall of the Impermissible Collateral Attack Doctrine*

White male challengers found themselves between a rock and a hard place. In the typical case, they might have sought to intervene as soon as they became aware of the proposed consent decree and its likely impact upon them.<sup>64</sup> While the court might have afforded them an opportunity

61. See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616, 631, 638-40 (1987) (upholding gender-based voluntary affirmative action plan by public employer); *United Steelworkers of America v. Weber*, 443 U.S. 193, 208-09 (1979) (upholding Kaiser Aluminum's voluntary affirmative action plan). The standard for consent decrees largely mirrors that of voluntary affirmative action plans. See, e.g., *Donaghy v. City of Omaha*, 933 F.2d 1448, 1459 (8th Cir. 1991) (affirming the validity of Omaha's promotion of a black police officer pursuant to a consent decree), *cert. denied*, 112 S. Ct. 938 (1992); *In re Birmingham Reverse Discrimination Employment Litig.*, 833 F.2d 1492, 1501 (11th Cir. 1987) (consent decree must meet the same standards as a voluntary affirmative action plan), *aff'd sub nom. Martin v. Wilks*, 490 U.S. 755 (1989); *City of Miami*, 664 F.2d at 461 & n.16 (5th Cir. 1981) (consent decree that meets *Weber* standard passes constitutional muster) (Johnson, J., concurring in part and dissenting in part).

62. See *Johnson*, 480 U.S. at 638-40; *Weber*, 443 U.S. at 208.

63. See, e.g., Issacharoff, *supra* note 36, at 238 & n.230 (arguing that the legitimacy of an affirmative action program is enhanced by the diffusion of its effect among non-minorities). See also *People Who Care v. Rockford Bd. of Educ.*, Sch. Dist. No. 205, 961 F.2d 1335, 1339 (7th Cir. 1992) (holding that a school board cannot alter contractual rights of incumbent employees without determining whether such action is necessary to remedy a legal wrong). In *People Who Care*, Judge Easterbrook lists the Supreme Court cases that "have been reluctant to conclude that seniority systems are discriminatory or interfere with remedies for violations." *Id.* at 1338 (citing *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), *International Bd. of Teamsters v. United States*, 431 U.S. 324 (1977), and *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976)).

64. See, e.g., *Howard v. McLucas*, 782 F.2d 956, 958 (11th Cir. 1986) (white Air Force employees attempted to intervene in a Title VII class action brought by black Air Force employees), *cert. denied*, 493 U.S. 1002 (1989); *Stotts v. Memphis Fire Dep't*, 679

to present objections at a fairness hearing,<sup>65</sup> it generally denied intervention under Rule 24 of the Federal Rules of Civil Procedure as untimely. The underlying litigation often had been in progress for years before this stage, and the court, applying the timeliness test, would conclude that the balance tipped against allowing intervention, either permissively or as of right.<sup>66</sup>

At the same time, courts rebuffed those who attempted to attack the impact of the consent decrees in separate litigation by charging that the decree independently violated their legal rights. No matter how such challenges were couched, courts dismissed them as impermissible collateral attacks on the underlying decree.<sup>67</sup> Arguably, these refusals to entertain challenges to the decrees lacked integrity. Litigants who brought separate suits were told their remedy was to seek intervention in the original litigation.<sup>68</sup> Litigants who sought to intervene at the time they be-

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F.2d 541, 547 (6th Cir. 1982) (attempted intervention by eleven non-minority fire fighters), *rev'd sub nom.* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984).

65. In fact, notice of opportunity to appear at the fairness hearing to present comments generally accompanied notice of the proposed consent decree. See, e.g., Schwarzschild, *supra* note 32, at 911 (suggesting an analogy between notice and comment rulemaking proceedings).

66. See, e.g., *Culbreath v. Dukakis*, 630 F.2d 15, 24 (1st Cir. 1980) (upholding district court's rejection of petitions of four unions to intervene two months before the submission of a consent decree based on untimeliness). Professor Schwarzschild aptly points out the problem with the court's approach to intervention in *Culbreath*:

At the outset of a Title VII suit, white employees have no way of knowing whether their employer will decide to settle after several years instead of continuing to litigate. . . . The variety of remedial possibilities in any given case makes it difficult to foresee which remedies the court or the parties will actually select.

Schwarzschild, *supra* note 32, at 921.

67. See, e.g., *Thaggard v. City of Jackson*, 687 F.2d 66, 68-69 (5th Cir. 1982) (affirming that the district court lacked subject matter jurisdiction under the impermissible collateral attack doctrine and rejecting plaintiffs' argument that plaintiffs were not challenging the consent decree itself, but only defendants' allegedly discriminatory activities that were not required by the consent decree); *Dennison v. City of Los Angeles Dep't of Water and Power*, 658 F.2d 694, 695 (9th Cir. 1981) (rejecting a claim for compensatory damages as an impermissible collateral attack).

68. See, e.g., *Striff v. Mason*, 849 F.2d 240, 245 (6th Cir. 1988) (observing that a challenger should seek post hoc intervention in an underlying suit); *Thaggard*, 687 F.2d at 68 (holding that challenges must be brought to attention of court that issued decree); *Black and White Children of the Pontiac Sch. Sys. v. School Dist. of Pontiac*, 464 F.2d 1030, 1030 (6th Cir. 1972) (per curiam) (holding that the proper procedure for attacking a consent decree is to seek intervention in the principal suit).

Assistant Attorney General Charles Cooper describes the incongruity of suggesting that intervention was the appropriate remedy for parties whose claims had not yet accrued at the time the consent decree was entered:

[I]t is unreasonable to require any such person (1) to be aware of the lawsuit and the decree imposing a hiring quota, (2) to predict his interest in someday seeking a job with the defendant employer, (3) to assess the likely effect of the hiring quota on that interest, and (4) to make the host of other speculative judgments about future events required under current rules governing the timeliness of intervention.

Cooper, *supra* note 51, at 163.

came aware of the consent decree were turned away for untimeliness.<sup>69</sup> The courts played a shell game: although they never suggested that the challengers lacked *any* right to question the legitimacy of the decree's provisions, they always hid the appropriate procedural opportunity in a different forum or at a different point in time. Any meaningful opportunity to challenge such decrees remained elusive.

On the one hand, it was hardly surprising that a district court, close to resolution of a major employment discrimination case, would be less than eager to allow some outsiders to upset the remedy the parties (and possibly the court as well<sup>70</sup>) had carefully crafted through negotiations. Understandably, a court would be loathe to allow participation by a third party, if the end result of such participation was likely to be a lengthy, sprawling trial rather than a neatly packaged settlement.<sup>71</sup> And despite third-party allegations that the consent decrees themselves violated Title VII,<sup>72</sup> Title VII also provided comfort to the courts that they were "doing the right thing." By rejecting untimely intervention, or collateral attacks, courts assured themselves that they were appropriately furthering the voluntary resolution of disputes, and thus fulfilling Congress' plan for how employment discrimination might best be eradicated.<sup>73</sup> On the

69. See, e.g., *Ashley v. City of Jackson*, 464 U.S. 900, 901 (1983) (Rehnquist, J. dissenting from denial of certiorari) (pointing out that motions for leave to intervene in suits that involved consent decrees were denied by lower court on grounds that they were untimely and that defendant already adequately represented the asserted interests); *United States v. Jefferson County*, 720 F.2d 1511, 1519 (11th Cir. 1983) (finding ample justification for a trial court's denial of intervention as untimely). But see *Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't*, 780 F.2d 5, 6-7 (1st Cir. 1985) (denying white police officer organization's motion to intervene based on the lack of merit of the challenge), *cert. denied*, 478 U.S. 1020 (1986).

70. See, e.g., Resnik, *supra* note 30, at 97 ("How can we expect a judge who helps fashion a settlement to be open to the possibility that the bargain made is not a good one . . . ?").

71. For example, in *United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981) (en banc) (per curiam), plaintiffs had joined the Fraternal Order of Police (FOP) as a party defendant. After the district court approved a consent decree between plaintiffs and the City, the FOP successfully challenged a portion of the decree that allegedly affected their promotion rights, thus forcing litigation on the underlying discrimination issues. See *id.* at 447. See also Schwarzschild, *supra* note 32, at 921 ("Indeed, if giving the objectors a hearing means letting them intervene, and if intervention means the right to veto the settlement, then the courts have a tremendous incentive not to give the objectors a hearing.").

72. See, e.g., *Davis v. City of San Francisco*, 890 F.2d 1438, 1442 (9th Cir. 1989) (plaintiff contended that the decree's "affirmative relief violate[d] the equal protection provisions of the fourteenth amendment and Title VII"), *cert. denied*, 498 U.S. 897 (1990); *Williams v. City of New Orleans*, 729 F.2d 1554, 1557 (5th Cir. 1984) ("Since the one-to-one quota system in the proposed consent decree was designed to benefit all blacks in the plaintiff class, . . . the government urges us to find that the quota provision violated Title VII."). See also *Jansen v. City of Cincinnati*, 904 F.2d 336, 339 (6th Cir. 1990) (plaintiffs argued that the City's use of separate race-based eligibility lists and a predetermined 40 percent minority quota violated both the consent decree and 42 U.S.C. §§ 1981, 1983, and 1988).

73. See, e.g., *Thaggard v. City of Jackson*, 687 F.2d 66, 69 (5th Cir. 1982) ("To permit this collateral challenge of the decrees 'would clearly violate the policy under Title

other hand, the lack of any meaningful input by affected third parties raised serious due process concerns.

Criticism of the courts' approach came from many quarters.<sup>74</sup> Momentum for action built in the Supreme Court. In 1983, an unlikely alliance formed as Justice Brennan joined in Justice Rehnquist's dissent from the Court's refusal to review a denial, based on the impermissible collateral attack doctrine, of a challenge by white employees to a consent decree in *Thaggard v. City of Jackson*.<sup>75</sup> Justice Rehnquist wrote:

I find myself at a loss to understand the origins of the doctrine of "collateral attack" employed by the lower courts in this case to preclude a suit brought by parties who had no connection with the prior litigation. Their cause of action did not even accrue until at least a year after the entry of the consent decrees. And their attempt to intervene in those suits, more than three years after entry of the consent decrees, was denied as untimely.<sup>76</sup>

Three years later, the Court's decision in *Local Number 93 v. City of Cleveland*,<sup>77</sup> without directly addressing the impermissible collateral attack doctrine, fueled concern over its application. At issue was the intervening union's claim that the terms of the consent decree negotiated between the plaintiffs, an organization of black and Hispanic fire fighters, and the City violated section 706(g) of Title VII by providing relief benefiting minorities who were not actual victims of the employer's discrimi-

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VII to promote settlement.'") (citations omitted); *Dennison v. City of Los Angeles Dep't of Water and Power*, 658 F.2d 694, 696 (9th Cir. 1981) (holding that to allow compensatory damages to white employees denied promotion pursuant to a consent decree would be inimical to Title VII's policy of promoting consent decrees); *Culbreath v. Dukakis*, 630 F.2d 15, 22 (1st Cir. 1980) ("The courts strongly favor resolution of suits such as this one by voluntary agreement, and there is a distinct probability that the intervention of the unions will destroy the consent decree and force a trial on the merits.").

74. See, e.g., *Cooper*, *supra* note 51, at 157 (arguing that timely intervention rules and the impermissible collateral attack doctrine combine to deprive non-parties of their due process right to a day in court); *Easterbrook*, *supra* note 36, at 34 (asserting that many courts put hurdles in the path of collateral attack by third parties); *Kramer*, *supra* note 36, generally and at 336 (suggesting, with Laycock and Cooper, "that the real agenda behind the collateral attack doctrine [may be] to enable some parties to settle by bargaining away third-party interests."); *Laycock*, *supra* note 3, generally and at 107-09 (arguing that nonconsenting third parties often have a far greater stake in litigation than parties to consent decrees); *Schwarzschild*, *supra* note 32, at 934 (recommending fairness hearings before the approval of consent decrees); William T. Matlack, Note, *Voluntary Public Employer Affirmative Action: Reconciling Title VII Consent Decrees with the Equal Protection Claims of Majority Employees*, 28 B.C. L. Rev. 1007, 1035 (1987) ("When courts limit their understanding of who is to participate in the voluntary agreement to minority plaintiffs and their employers, however, the judicial emphasis on conciliation abrogates the due process rights of nonminority workers who make the employment sacrifices for affirmative action.").

75. 687 F.2d 66 (5th Cir. 1982); *cert. denied*, 464 U.S. 900 (1983). See also *supra* note 63 (describing the consent decree entered in *Thaggard*). Professor Schwarzschild appropriately refers to the union of Justices Rehnquist and Brennan as "an odd couple." See *Schwarzschild*, *supra* note 32, at 889.

76. *Thaggard*, 464 U.S. at 901-02 (1983) (Rehnquist, J., dissenting).

77. 478 U.S. 501 (1986).

nation.<sup>78</sup> The Court rejected the substantive claim and held section 706(g) inapplicable to voluntarily negotiated relief entered as a consent decree.<sup>79</sup> In affirming the rights of parties to that litigation to enter into a binding consent decree absent the agreement of the intervening union, the Court cautioned that the consenting parties could not dispose of the legal rights of nonconsenting third parties.<sup>80</sup> Having lost the argument that the decree violated Title VII *per se*, however, it remained unclear whether the union (or its white members) would have any other opportunity to argue that its rights—either statutory or constitutional—were in fact violated by the decree. The majority insisted that the union had failed to raise any substantive claims under the Fourteenth Amendment, and deferred to the district court's determination whether it was now too late to do so or, if not, whether such claims would have legal merit.<sup>81</sup> Justice White disagreed not only with the Court's understanding of section 706(g)'s application to consent decrees,<sup>82</sup> but also with the Court's view of the nature of the claims raised by the union.<sup>83</sup>

The Court inched closer to reviewing the impermissible collateral attack doctrine in 1988. An equally divided Court affirmed the dismissal of a collateral attack on a consent decree that provided for preferences in promotional opportunities for New York City's minority police officers.<sup>84</sup> In the same year that this case reached the Supreme Court, the Eleventh

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78. See *id.* at 513-14. Section 706(g) of the Civil Rights Act of 1964 provides as follows:

No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

42 U.S.C. § 2000e-5(g) (1988 & Supp. III 1991).

The consent decree at issue provided, *inter alia*, for 66 initial promotions to be split evenly between minority and non-minority firefighters, new promotional examinations to help qualify additional minorities and an expiration of the decree after four years. The decree as approved had been twice amended. Extensive negotiations among the parties, including the union, had resulted in a decree designed to have less adverse impact on non-minority firefighters. See *Local Number 93*, 478 U.S. at 510.

79. See *Local Number 93*, 478 U.S. at 515.

80. See *id.* at 528-30. The Court further found that the decree did not bind the union "to do or not do anything." *Id.* at 530. See also Laycock, *supra* note 3, at 112 (criticizing the majority's insistence that the decree was effective, but that the union was not bound).

81. See *Local Number 93*, 478 U.S. at 530.

82. See *id.* at 531-35 (White, J., dissenting).

83. See *id.* at 532 (White, J., dissenting).

84. See *Marino v. Ortiz*, 484 U.S. 301 (1988) (*per curiam*). In its brief *per curiam* decision, without any passionate dissent as in *Thaggard*, the Court stated simply that it was "equally divided, and therefore affirm[ing] the judgment of the Court of Appeals." *Id.* at 304. That the challengers in this case had in fact failed the qualifying exam and therefore were not in the category of persons who, but for the consent decree, would have been promoted, see *Marino v. Ortiz*, 806 F.2d 1144, 1146 (2d Cir. 1986), might have contributed to the absence of any vociferous dissent from the decision.

Circuit broke from the pack and declared the impermissible collateral attack doctrine to be a violation of due process of law.<sup>85</sup>

### C. *The Birmingham Litigation and Martin v. Wilks*

In 1974 and 1975, the NAACP, seven black individuals, and the United States filed three separate actions against the City of Birmingham and the Jefferson County Personnel Board<sup>86</sup> alleging racially discriminatory hiring and promotion practices in violation of Title VII and other federal statutes.<sup>87</sup> The district court consolidated the three cases and held a trial in December of 1976 limited to the validity of entry-level tests administered to applicants for employment as police officers and fire fighters. It found the tests discriminatory in violation of Title VII.<sup>88</sup> In 1979, the district court held a second trial on the validity of other testing and screening devices used by the Board.<sup>89</sup> After trial, but before any decision, the parties' settlement discussions produced two proposed consent decrees: one between all plaintiffs and the City, the other between all plaintiffs and the Board.<sup>90</sup> The decrees provided for extensive remedial relief, including interim and long-term goals for the hiring and promotion of blacks in the fire department.<sup>91</sup>

After the district court provisionally approved the consent decrees, it scheduled a fairness hearing to entertain the objections of interested parties.<sup>92</sup> At the hearing, the Birmingham Firefighters Association 117 (BFA) filed objections, and the next day, before the court's final decision, moved to intervene under Rule 24(a)<sup>93</sup> in each of the three cases.<sup>94</sup> The district court denied these motions as untimely and issued an order approving the decrees.<sup>95</sup> The court analyzed the decrees under standards articulated in *United Steelworkers of America v. Weber*<sup>96</sup> and concluded that there was reason to believe that the City and Board would eventually be found guilty of racial discrimination, that the decree did not foreclose the promotion of whites even temporarily, that it was for a limited period of time, and that its terms were " 'reasonably commensurate with

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85. See *In re Birmingham Reverse Discrimination Employment Litig.*, 833 F.2d 1492, 1498-99 (11th Cir. 1987), *aff'd sub nom. Martin v. Wilks*, 490 U.S. 755 (1989).

86. Although there were some other individual defendants, the court referred to all respondents collectively as the City and the Board. See *Birmingham Litigation*, 833 F.2d at 1494 n.2.

87. See *id.* at 1494.

88. See *id.*

89. See *id.*

90. See *id.*

91. See *id.*

92. See *id.*

93. Fed. R. Civ. P. 24(a).

94. See *United States v. Jefferson County*, 720 F.2d 1511, 1515 (11th Cir. 1983).

95. See *Birmingham Litigation*, 833 F.2d at 1494-95.

96. 443 U.S. 193 (1979). For a discussion of these standards, see *infra* notes 166-68 and accompanying text.

the nature and extent of the indicated discrimination.' ”<sup>97</sup>

Pursuant to the decree, the Board certified to the City five black and eight white fire fighters to fill six vacancies for lieutenant.<sup>98</sup> Several white fire fighters then filed a separate suit charging that certification on the basis of race discriminated against them in violation of Title VII, and sought a preliminary injunction against the enforcement of the consent decrees.<sup>99</sup> The challengers failed “and, for the first time in its history, the City had a black lieutenant in its fire department.”<sup>100</sup>

The Eleventh Circuit consolidated appeals from both the denial to intervene in the original litigation and the denial of a preliminary injunction in the reverse discrimination suit.<sup>101</sup> In *United States v. Jefferson County*,<sup>102</sup> the court agreed that the white fire fighters’ motion to intervene was untimely and that they were not prejudiced by the denial to intervene, as they retained the right to file a separate, independent action alleging that their own Title VII rights were violated by the City.<sup>103</sup>

Various white City employees then brought actions against the City and the Board alleging violations of Title VII and the Fourteenth Amendment.<sup>104</sup> The suits were consolidated in *In re Birmingham Reverse Discrimination Employment Litigation*.<sup>105</sup> The district court refused to dismiss the cases as impermissible collateral attacks on the consent decrees, but ruled that if the decrees mandated the challenged employment practices, the decrees would provide a defense to the plaintiffs’ action.<sup>106</sup> After trial, the district court rejected the plaintiffs’ claims.<sup>107</sup> On appeal, the Eleventh Circuit reversed.<sup>108</sup> It explicitly denounced the impermissible collateral attack doctrine as depriving a non-

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97. *Martin v. Wilks*, 490 U.S. 755, 775-77 (1989) (Stevens, J., dissenting) (quoting *United States v. Jefferson County*, 28 Fair Empl. Prac. Cas. (BNA) 1834, 1838 (N.D. Ala. 1981)).

98. *See id.* at 777.

99. *See Birmingham Litigation*, 833 F.2d at 1495.

100. *Wilks*, 490 U.S. at 777 (Stevens, J., dissenting).

101. *See Birmingham Litigation*, 833 F.2d at 1495.

102. 720 F.2d 1511 (11th Cir. 1983).

103. *See id.* at 1518-19. The court rejected the appeal from the denial of the preliminary injunction as well, concluding that the appellants had failed to carry their burden to demonstrate irreparable harm. *See id.* at 1519-20.

104. *See Birmingham Litigation*, 833 F.2d at 1495-96. The United States, although a signatory to the two consent decrees, also brought suit, making substantially the same allegations of discrimination as those of the individual plaintiffs. *See id.* at 1496. The circuit court affirmed the district court’s decision that the United States, as a party to the decrees, was collaterally estopped from attacking them. *See id.* at 1501.

105. *See id.* at 1494.

106. *See Martin v. Wilks*, 490 U.S. 755, 760 (1989).

107. *See Birmingham Litigation*, 833 F.2d at 1497. There is some dispute about exactly what issues were tried by the district court. According to the Eleventh Circuit, the district judge treated the plaintiffs as if they were contending that the City had violated paragraph 2 of the City decree, which provides as follows: Nothing herein shall be interpreted as requiring the City to hire unnecessary personnel, or to hire, transfer, or promote a person who is not qualified, or to hire, transfer, or promote a less qualified person, in preference to a person who



party to a consent decree of his day in court, in violation of due process of law.<sup>109</sup> Finding that the City<sup>110</sup> clearly had not adequately represented the interests of the white fire fighters in negotiating the consent decree,<sup>111</sup> it remanded to the district court<sup>112</sup> to afford plaintiffs an opportunity to litigate whether the decrees met the substantive standards articulated in *United Steelworkers of America v. Weber*<sup>113</sup> and, more recently, in *Johnson v. Transportation Agency*.<sup>114</sup>

The Supreme Court granted certiorari and, in a 5-4 opinion in *Martin v. Wilks*,<sup>115</sup> affirmed the circuit court's decision. The majority rejected the argument that respondents' independent suit constituted an impermissible collateral attack on the consent decree because they had failed to

is demonstrably better qualified based upon the results of a job related selection procedure.

*Id.* at 1496-97. According to Justice Stevens, both the court of appeals and the majority of the Supreme Court misunderstood the district court's rulings. *See Wilks*, 490 U.S. at 773 (Stevens, J., dissenting). Rather, the trial court held, in its oral opinion, "'that the promotions of the black individuals in this case were in fact required by the terms of the consent decree,'" *id.* at 781 (quoting the trial court's oral opinion dictated from the bench), but the court's written conclusions of law stated that the "'plaintiffs [could not] collaterally attack the Decree's validity.'" *Id.* at 782 (quoting the trial court's written opinion). Justice Stevens suggests that the latter was merely the district court's alternative holding. *See id.* at 782. The district court's decision is anything but a paradigm of clarity on this point. *See* George M. Strickler, Jr., *Martin v. Wilks*, 64 Tulane L. Rev. 1557, 1572 n.73 (1990).

108. *See Birmingham Litigation*, 833 F.2d at 1501-02.

109. *See id.* at 1498.

110. Because the paragraph of the decree that was the focus of the trial referred only to the obligations of the City, the Board became a nominal party to the appeal. *See id.* at 1497 n.17.

111. *See id.* at 1499.

112. *See id.* at 1501-02.

113. 443 U.S. 193 (1979).

114. 480 U.S. 616 (1987). *Johnson*, unlike *Weber*, involved a voluntary affirmative action plan implemented by a public, rather than a private, employer. *See Birmingham Litigation*, 833 F.2d at 1501. The circuit court in *Birmingham Litigation* rejected any notion that the standards for legality and constitutionality of a consent decree were any different from those for a voluntary affirmative action plan:

[W]e reject any notion that the memorialization of that voluntary undertaking in the form of a consent decree somehow provides the employer with extra protection against charges of illegal discrimination. A contrary conclusion would fly in the face of our earlier observations about the preclusive effect of such decrees.

*Id.* at 1501.

In addition, the appellate court articulated some discomfort with the terms of the decree, suggesting that it might not pass muster under *Johnson*:

The district court's interpretation of the City decree permits the City to make race conscious promotions without using *any* job-related selection procedure. Given the natural potential that such an arrangement will trammel the interests of nonminority employees, we are compelled to the conclusion that the district court should subject the consent decrees to heightened scrutiny under the second prong of the *Johnson* analysis when it tries the individual plaintiffs' claims.

*Id.*

115. 490 U.S. 755 (1989).

timely intervene in the initial proceedings.<sup>116</sup> The Court concluded that nothing in the Federal Rules of Civil Procedure *requires* a third person to intervene in order to avoid the preclusive effect of litigation in which it is neither a party nor in privity with a party,<sup>117</sup> and that if the parties to that litigation wished to foreclose challenges by third persons, joinder under Rule 19<sup>118</sup> was the proper procedure.<sup>119</sup> Inasmuch as none of the parties to the initial litigation joined the BFA or any white fire fighters, the City could not insulate itself from Title VII liability to those adversely affected solely by relying on the consent decrees.<sup>120</sup> Furthermore, even if plaintiffs had been a party to the earlier suit, a consent decree agreed to by the other parties to the litigation could not settle any conflicting claims that plaintiffs might have had.<sup>121</sup>

The dissenters did not view the consent decree as purporting to legally bind the white fire fighters.<sup>122</sup> In the original litigation, the district court had determined that the decree was warranted by facts likely to be found after trial, and was narrowly tailored to accomplish its goals of eradicating discrimination in the Birmingham fire department.<sup>123</sup> This finding might have been subject to attack on direct review had the BFA timely intervened in that litigation. But to allow plaintiffs in the second suit to *relitigate* this question—absent any evidence that the decree was collusive or fraudulent—was inconsistent with any notion of the finality of judgments.<sup>124</sup> Thus, because the legitimacy of the decree's terms were not at issue in the instant litigation, the dissenters agreed that the City would be immunized from liability under Title VII for employment actions taken pursuant to the decree.<sup>125</sup>

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116. *See id.* at 762-63.

117. *See* Fed. R. Civ. P. 24 (governing rules for mandatory and permissive intervention).

118. Fed. R. Civ. P. 19.

119. *See Wilks*, 490 U.S. at 763-65. The majority rejected the dissent's suggestion that plaintiffs were not legally bound by the decrees, but rather that the employment decisions made did not violate Title VII because they were required by the consent decrees:

[E]ither the fact that the disputed employment decisions are being made pursuant to a consent decree is a defense to respondents' Title VII claims or it is not. If it is a defense to challenges to employment practices which would otherwise violate Title VII, it is very difficult to see why respondents are not being "bound" by the decree.

*Id.* at 765 n.6.

120. *See id.* at 767.

121. *See id.* at 768.

122. *See id.* at 782 (Stevens, J., dissenting).

123. *See id.* at 775-77 (Stevens, J., dissenting).

124. *See id.* at 783 (Stevens, J., dissenting) ("Such a broad allowance of collateral review would destroy the integrity of litigated judgments, would lead to an abundance of vexatious litigation, and would subvert the interest in comity between courts.").

125. *See id.* at 789 (Stevens, J., dissenting). The question of whether the district court's factual findings were clearly erroneous was not before the Court. *See id.* at 791.

D. *The Response to Martin v. Wilks*

The civil rights community responded to *Wilks* with grave concern that the decision would wreak havoc with Title VII enforcement by obviating the utility of consent decrees, and this response fueled the momentum for a legislative solution.<sup>126</sup> However, with some exceptions—mostly from the Eleventh Circuit that produced the decision affirmed by the Court in *Wilks*<sup>127</sup>—courts continued to reject efforts by white challengers to upset Title VII consent decrees. Although after *Wilks* such challenges were not barred *ab initio* as impermissible collateral attacks, the courts have nonetheless shown substantial deference to the validity of the challenged decrees.<sup>128</sup>

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126. See, e.g., *The Civil Rights Act of 1991: Hearings on H.R. 1 Before the Comm. on Education and Labor*, 102d Cong., 1st Sess. 565, 566 (1991) (Leadership Conference on Civil Rights, *Analysis of Justice Department February 7, 1991 Memorandum on the Impact of the Supreme Court's 1989 Fair Employment Decisions*) (stating that "the harmful impact of *Wilks*" includes the unlimited filing of challenges to consent decrees, "potentially endless litigation and re-litigation," and the discouraging of settlements) [hereinafter *Leadership Conference Analysis*]; *The Civil Rights Act of 1991: Hearings on H.R. 1 Before the Comm. on Education and Labor*, 102d Cong., 1st Sess. 681, 685 (1991) (Lawyers' Committee for Civil Rights Under Law, *Martin v. Wilks and the Attempted Unraveling of Affirmative Action*) (warning that *Wilks* and its progeny formed a "body of case law that plaintiffs' lawyers can use in ever more free-ranging efforts to overturn or at least derail established affirmative action plans and consent decrees") [hereinafter *Lawyers' Committee Report*]; *The Civil Rights Act of 1990: Joint Hearings on H.R. 4000 Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 101st Cong., 2d Sess. 457, 460 (1990) (Statement of Professor Larry Kramer) (listing several problems created by third-party lawsuits such as the lawsuit in *Wilks*) [hereinafter *Kramer Testimony*]; *The Civil Rights Act of 1990: Hearing on S. 2104 Before the Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 820, 832 (1989) (People for the American Way, *Justice Denied: The Human Impact of the Supreme Court's Civil Rights Retreat*) (predicting that *Wilks* would "discourage employers from reaching civil rights settlements, because of the open-ended prospect of endless litigation").

127. See, e.g., *Barfus v. City of Miami*, 936 F.2d 1182, 1188 (11th Cir. 1991) (holding that white police officers who were parties in an earlier litigation were not barred from pursuing a Title VII claim, because denial of their promotions was not an issue resolved in prior litigation); *Mann v. City of Albany*, 883 F.2d 999, 1003-05 (11th Cir. 1989) (reversing the district court's dismissal of a white applicant's challenge to a consent decree because the City did not virtually represent the white applicant's interest in the earlier litigation). While the court in *Mann* did not reach the merits of the challenge, it suggested that plaintiff might have had a valid claim, given the rigid quotas contained in the consent decree. See *id.* at 1006. But see *Howard v. McLucas*, 871 F.2d 1000 (11th Cir.) (upholding a consent decree under *Wygant* analysis), *cert. denied*, 493 U.S. 1002 (1989).

128. In *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir.), *cert. denied*, 113 S. Ct. 86 (1992), the court held that plaintiff, a white police recruit, lacked standing to challenge the City's interpretation of its consent decree, relying on cases, such as *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975), that held that a consent decree is not enforceable by non-parties. See *Vogel*, 959 F.2d at 597-98. Although the court entertained the suit to the extent that it challenged the validity of the consent decree (holding that section 108 was not retroactive, see *id.* at 598), it readily affirmed the consent decree as conforming to the *Croson* test. See *id.* at 599-601. Other cases upholding consent decrees in the face of reverse discrimination challenges include *Stuart v. Roache*, 951 F.2d 446, 447 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1948 (1992); *Tucker v. City of*

But this success does not reveal the transactional costs nonetheless involved in litigating challenges to Title VII consent decrees after *Wilks*.<sup>129</sup> Nor could these few reported successes necessarily thwart continued attacks, even on consent decrees previously upheld. Moreover, they do not tell us whether the enhanced procedural rights of affirmative action challengers have discouraged defendants from agreeing to judgment by consent in the first place.<sup>130</sup> Although the need for a legislated remedy may not have been as dire as some of its advocates proclaimed, its utility was not as irrelevant as the outcome of some of these challenges superficially suggested. If anything, that most courts have upheld challenged decrees speaks to the soundness of the Title VII decrees formulated in the pre-*Wilks* world under the standards articulated by the Supreme Court in its affirmative action cases.<sup>131</sup> That such challenges tend to lack merit supports the need for limiting their repetition.

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Charleston, 946 F.2d 887 (4th Cir. 1991) (text available in No. 90-1872, 1991 U.S. App. LEXIS 24886, at \*8); *Donaghy v. City of Omaha*, 933 F.2d 1448 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 938 (1992); and the *Wilks* case on remand, *Bennett v. Arrington (In re Birmingham Reverse Discrimination Employment Litig.)*, 806 F. Supp. 926 (N.D. Ala. 1992). See also *U.S. Judge Rejects F.B.I. Agents' Suit*, N.Y. Times, Sept. 19, 1993, at A43 (reporting a Federal District Court's ruling that rejected a challenge to the F.B.I.'s employment practices agreement with black agents by an association representing mostly white agents because a "manifest imbalance" in F.B.I. promotions had worked to the advantage of white agents). But see *Henry v. City of Gadsden*, 715 F. Supp. 1065, 1066 (N.D. Ala. 1989) ("Since the challenged consent decree passes the two-prong test of [*Birmingham Litigation*] . . . with flying colors, the attack fails—and it fails miserably."), *aff'd in part and rev'd in part without published opinion*, 909 F.2d 1491 (11th Cir. 1990). Professor Laycock suggests that judges who have previously approved consent decrees have a natural inclination to reject any challenges to them on the merits. See Laycock, *supra* note 3, at 132.

Preclusion did continue to operate after *Wilks* in at least one case where the court determined that the third party's interest had been adequately represented by the union in the original litigation. See *Van Pool v. City of San Francisco*, 752 F. Supp. 915, 923 (N.D. Cal. 1990), *aff'd*, 966 F.2d 503 (9th Cir. 1992).

Courts have also acted to protect the intervention rights of minorities in these reverse discrimination suits. See, e.g., *Jansen v. City of Cincinnati*, 904 F.2d 336, 340-42 (6th Cir. 1990) (reversing district court's denial of minority class' intervention motion); cf. *Davis v. City of San Francisco*, 890 F.2d 1438, 1448-49 (9th Cir. 1989) (upholding the validity of a consent decree under *Johnson* standards in a suit brought to enforce its provisions against resisting City officers), *cert. denied*, 498 U.S. 897 (1990).

129. See, e.g., *Leadership Conference Analysis*, *supra* note 126, at 578 (arguing that the problem is not that challengers will prevail on the merits, but the costs involved in repeated challenges); *The Civil Rights Act of 1990: Joint Hearings on H.R. 4000 Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 101st Cong., 2d Sess. 272, 289 (1990) (statement of Hon. Richard Arrington, Jr., Mayor of Birmingham, Ala.) ("Over the course of these eight years, the City has paid in excess of a million dollars in attorneys' fees to defend the [consent] Decree . . .").

130. See, e.g., *Kramer Testimony*, *supra* note 126, at 461 ("[T]he potential for separate third party lawsuits years down the line makes settlements less likely . . ."); Lawyer's Committee Report, *supra* note 126, at 698 ("The likely effect of [*Wilks*] include an increased reluctance by both plaintiffs and defendants to settle cases . . .").

131. See *infra* notes 144-55 and accompanying text.

## E. Section 108

After several unsuccessful attempts to pass corrective legislation,<sup>132</sup> Congress responded to *Martin v. Wilks*<sup>133</sup> by promulgating section 108 of the Civil Rights Act of 1991.<sup>134</sup> It endeavors to promote the finality of

132. H.R. 4000 was introduced by Mr. Hawkins on Feb. 7, 1990 and had 178 co-sponsors, *see* H.R. 4000, 101st Cong., 2d Sess. (1990) (the Civil Rights Act of 1990), but Congress failed to enact it. *See* Lex K. Larson, Civil Rights Act of 1991, at 6 (1992). S. 2104 was introduced by Mr. Riegle and had 50 co-sponsors. *See* 136 Cong. Rec. S991 (daily ed. Feb. 7, 1990). The bill was debated before the Congress and before the Judiciary Subcommittee on Civil and Constitutional Rights and the Committee on Education & Labor. It was passed by the House and the Senate, but vetoed by President Bush. *See* 136 Cong. Rec. S16562 (daily ed. Oct. 24, 1990) (President's veto message on S. 2104). The Senate failed to override his veto. *See* 136 Cong. Rec. S16589 (daily ed. Oct. 24, 1990) (the final vote 66 for and 34 against). Mr. Edwards introduced H.R. 1 (The Civil Rights Act of 1991) on January 3, 1991. *See* H.R. Rep. No. 40 (I), 102d Cong., 1st Sess. 16 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 554. The Committee on the Judiciary recommended the bill's passage, *see* H.R. Rep. No. 40 (II), 102d Cong., 1st Sess. 1, 1, *reprinted in* 1991 U.S.C.C.A.N. 694, 694, but the Senate failed to pass it. The Bush Administration subsequently introduced H.R. 1375, but it also failed enactment. *See* 137 Cong. Rec. H9505, 9535 (daily ed. Nov. 7, 1991) (comments of Rep. Ford). Finally, S. 1745 was passed by the Senate and signed into law by the President on Nov. 21, 1991. *See* Statement of President George Bush upon Signing S. 1745, 27 Weekly Comp. Pres. Doc. 1701 (Nov. 25, 1991), *reprinted in* 1991 U.S.C.C.A.N. 768, 768-69.

133. 490 U.S. 755 (1989).

134. Pub. L. No. 102-166, § 108, 105 Stat. 1071, 1076 (1991) (codified at 42 U.S.C. § 2000e-2(n) (Supp. III 1991)). The text of section 108 is as follows:

Sec. 108.

FACILITATING PROMPT AND ORDERLY RESOLUTION OF CHALLENGES TO EMPLOYMENT PRACTICES IMPLEMENTING LITIGATED OR CONSENT JUDGMENTS OR ORDERS.

“(n)(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had—

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

“(2) Nothing in this subsection shall be construed to—

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully

consent judgments by providing limited opportunity for challenges to their legitimacy. Specifically, an employment practice implemented pursuant to a litigated or consent judgment cannot be challenged by anyone who had notice and an opportunity to present objections to the proposed order, or whose interests were adequately represented in an earlier challenge.<sup>135</sup> The amendment explicitly states that it does not alter the standards of intervention under Rule 24, affect any rights of the parties to the original litigation, affect challenges alleging collusion, fraud, transparent invalidity or lack of subject matter jurisdiction, "or authorize or permit the denial to any person of the due process of law required by the Constitution."<sup>136</sup>

The new legislation raises several important questions. What changes is it likely to make in the status quo before, and after, *Martin v. Wilks*? What changes was it *intended* to effect?<sup>137</sup> Will the caveat that nothing

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intervened pursuant to such rule in the proceeding in which the parties intervened;

- (B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;
- (C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or
- (D) authorize or permit the denial to any person of the due process of law required by the Constitution.

"(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code."

§ 108, 105 Stat. at 1076-77.

Where possible, and for the sake of clarity, I support all subsequent references to § 108 with citations to 42 U.S.C. § 2000e-2(n) (Supp. III 1991).

135. An earlier version of what became section 108 would have provided that, even in the absence of actual notice or adequate representation, a challenge would not be allowed "(C) if the court that entered the judgment or order determines that reasonable efforts were made to provide notice to interested persons" and such determination was made "prior to the entry of the judgment or order, except that if the judgment or order was entered prior to the date of the enactment of this subsection, the determination may be made at any reasonable time." S. 2104, 101st Cong., 2d Sess. § 6 (1990). Although nothing in the legislative history discusses the reasons for dropping this provision, arguably it was more constitutionally suspect than the provisions that remained.

136. 42 U.S.C. § 2000e-2(n)(2) (Supp. III 1991). Subsection (n)(2)(D) was a late amendment to the bill, and had no predecessor in the 1990 proposed legislation. See S. 2104, 101st Cong., 2d Sess. § 6 (1990).

137. Compare H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 60 (1991), *reprinted in* 1991 U.S.C.A.N. 549, 598 ("[T]he rules set forth in section 204 [predecessor to § 108] are far less stringent than the pre-*Wilks* collateral bar rule.") with 137 Cong. Rec. H9526 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards) ("[S]ection 108 codifies the rule . . . barring subsequent collateral attacks in reverse-discrimination challenges, in all situations in which the conditions of § 108 are met.").

therein should be construed to deny any person due process of law—surplusage in any legislation surely—vitate any innovations attempted by the legislation? Will the limited opportunities it affords for third-party challenges to decrees withstand constitutional challenge? Is the “adequacy of representation” substitute for actual notice and an opportunity to participate consistent with due process of law? And what effect, if any, does it have on the rights of unions or other intervenors who, as in *Local Number 93*, refuse to ratify consent decrees?<sup>138</sup>

To answer these questions, we must examine the context in which we analyze questions of the legitimacy of consent decrees affected by section 108. That is, what, if anything, distinguishes employment discrimination cases, and reverse discrimination challenges, from other kinds of litigation? How much of a departure from traditional doctrine does section 108 attempt? Is it a constitutionally tolerable departure, given the context in which it arises?

## II. FAIRNESS, FINALITY, AND THE ERADICATION OF EMPLOYMENT DISCRIMINATION

*Martin v. Wilks*<sup>139</sup> went too far in ignoring the importance and utility of consent decrees in resolving employment discrimination claims, just as the impermissible collateral attack doctrine had gone too far in sacrificing the interests of third parties in order to preserve the effectiveness of consent decrees. Section 108 attempts a compromise among the competing interests. Sensitively applied, it can achieve fairness without sacrificing the utility of employment discrimination consent decrees.

### A. Redressing Discrimination

The majority opinion in *Martin v. Wilks*<sup>140</sup> is striking in its acontextuality. One might easily miss that the consent decrees at issue resulted from attempts to redress a lengthy, painful history of exclusion of blacks from public life in Birmingham, Alabama.<sup>141</sup> It was in Birmingham, on May 2, 1963, that the nation watched Bull Connor and other police officers descend with billy clubs, police dogs, and fire hoses on the marchers led by Martin Luther King, Jr.<sup>142</sup> The *Wilks* opinion all but ignores the tension between the competing claims of people who, because of their

138. Does 42 U.S.C. § 2000e-2(n)(2)(A)-(B) mean that parties or intervenors who are not parties to the consent decree may subsequently assert that their rights have been violated by employment practices taken pursuant to the decree?

139. 490 U.S. 755 (1989).

140. *Id.*

141. See, e.g., Martin Luther King, Jr., *Letter From Birmingham City Jail* (1963), reprinted in *Civil Disobedience: Theory and Practice* 72, 73-74 (Hugo A. Bedau, ed., 1969) (“Birmingham is probably the most thoroughly segregated city in the United States.”); Hugo A. Bedau, *id.* at 53 (“In the early 1960’s, it was often said of Birmingham, Alabama, that it was the most segregated city in the nation and had the most disgraceful record on race relations of any major urban area.”).

142. See Charles W. Whalen & Barbara Whalen, *The Longest Debate* xviii-xix (1985).

skin color, had long suffered public and private exclusion from employment opportunities enjoyed by whites and people who, by virtue of their skin color, are now asked to pay some of the costs. The majority addresses *Wilks* as a case about procedure and procedural due process but ignores that the process is entangled in the stories and the substance of the law.<sup>143</sup>

### 1. The Equal Protection Clause, Title VII, and Benign Racial Classifications

The development of equal protection doctrine, however, has often departed from the context of the stories in which it is grounded. Although there is no disagreement that the Fourteenth Amendment was a response to our nation's history of enslavement of people of color, its protection extends to *all* people, regardless of race. The Court has held that it is no more permissible under the Equal Protection Clause to discriminate without justification against a white person than it is to discriminate against a black person. As Justice Powell wrote in *University of California Regents v. Bakke*,<sup>144</sup> and as Justice O'Connor reiterated in *City of Richmond v. J.A. Croson*,<sup>145</sup> "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."<sup>146</sup>

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143. One might go further and suggest that the Court's approach in *Wilks*, viewed in the context of other contemporaneous action by the Supreme Court, suggests actual hostility to substantive civil rights doctrine. The Supreme Court decided a spate of employment discrimination cases during the 1989 term assaulting formerly settled civil rights law. These included *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989), *Martin v. Wilks*, 490 U.S. 755 (1989), and *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). As one author observed,

With remarkable candor, Attorney General Richard Thornburgh has described *Martin v. Wilks* as "rooted in the Court's opposition to racial quotas." The Attorney General has understated the case. The answer to the question [of why *Wilks* was decided in the way it was] lies in the conservative majority's antipathy, not just to affirmative action relief, but to the kind of litigation typified by [*Wilks*]-large-scale institutional-reform litigation to enforce federal rights of minorities and the disadvantaged.

Strickler, *supra* note 107, at 1606 (footnote omitted). See also Pamela J. Stephens, *Manipulation of Procedural Rules in Pursuit of Substantive Goals: A Reconsideration of the Impermissible Collateral Attack Doctrine*, 24 Ariz. St. L.J. 1109, 1140-43 (1992) (arguing that the Supreme Court's purported neutral procedural approach countermands the Civil Rights Act's substantive goals).

Professor Fiss argues that due process requirements in employment discrimination class litigation like *Wilks* should reflect the compelling civil rights policies at issue, by emphasizing adequacy of representation rather than "day in court." See Owen M. Fiss, *The Allure of Individualism*, 78 Iowa L. Rev. (forthcoming 1993). See generally Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev. 193 (1992) (arguing that the "day in court" approach to nonparty preclusion is too restrictive).

144. 438 U.S. 265 (1978).

145. 488 U.S. 469 (1989).

146. *Id.* at 494 (quoting *Bakke*, 438 U.S. at 289-90).



This, in itself, is not problematic. What is problematic is that the Court has often approached the question of *justification*—what constitutes adequate justification for taking certain race-conscious actions—in a color-blind manner as well.<sup>147</sup> The state is not permitted to develop a program which advantages blacks merely because that would be a “good thing,”<sup>148</sup> or even because blacks have historically been excluded from equality of opportunity. Rather, a voluntary program aimed at benefiting blacks (and thus necessarily disadvantaging non-blacks) must respond to the state’s own past failures and must be narrowly tailored to address those failures.<sup>149</sup> Similarly, the state may enter into a consent decree that benefits blacks to the detriment of whites only for strictly remedial purposes. In other words, any racial classification—whether favoring the previously advantaged or the previously disadvantaged group—requires the strictest of scrutiny to pass constitutional muster.<sup>150</sup>

Much of the Court’s Title VII jurisprudence has mirrored the development of equal protection doctrine. In *United Steelworkers of America v. Weber*,<sup>151</sup> however, the Court refused to interpret Title VII’s provisions so narrowly as to prohibit all voluntary affirmative action plans.<sup>152</sup> In

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147. See *Croson*, 488 U.S. at 551-52 (Marshall, J., dissenting).

Today, for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures . . . . A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism.

*Id.*

148. See e.g., Kathleen M. Sullivan, Comment, *Sins of Discrimination: Last Term’s Affirmative Action Cases*, 100 Harv. L. Rev. 78, 80 (1986) (stating that the Court has never accepted a rationale for affirmative action that looks forward rather than backwards).

149. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274, 280 (1986).

150. See, e.g., *Shaw v. Reno*, 113 S. Ct. 2816, 2825 (1993) (holding that race-based redistricting is subject to strict scrutiny regardless of which racial group benefitted or was burdened); *Croson*, 488 U.S. at 494 (“We thus reaffirm the view expressed by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.”).

Contrast the view of Justices Marshall, Brennan and Blackmun: “My view has long been that race-conscious classifications designed to further remedial goals ‘must serve important governmental objectives and must be substantially related to achievement of those objectives’ in order to withstand constitutional scrutiny . . . .” *Id.* at 535 (Marshall, J., dissenting).

The dissent’s test carried the day in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), in which the Court held that *Croson* is not the appropriate test for evaluating benign racial classifications enacted by Congress. See *id.* at 564-65.

151. 443 U.S. 193 (1979).

152. See *id.* at 201-02. The Court acknowledged that Title VII prohibited discrimination against whites as well as blacks, citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (holding that Title VII protects whites as well as blacks from racial discrimination), but nonetheless refused to give a literal reading to § 703(a), (d) of Title VII, which would have invalidated the Kaiser Aluminum plan and gutted Title VII’s purpose of eliminating vestiges of discrimination against minorities. See *Weber*, 443 U.S. at 201-04. Similarly, in *Local Number 93 v. City of Cleveland*, 478 U.S. 501 (1986), the

*Johnson v. Transportation Agency*,<sup>153</sup> the Court upheld a gender-based voluntary affirmative action plan by a public employer. Citing Justice Blackmun's concurrence in *Weber*, the Court held that to pass muster under Title VII, a plan need not address the employer's own discriminatory practices: it is enough if there is a "conspicuous . . . imbalance in traditionally segregated job categories."<sup>154</sup>

Throughout these cases, the Justices have struggled with the tension between the purported neutrality of Title VII's prohibitions on the one hand, and the favored status of voluntary compliance with its provisions on the other. Neutrality would prohibit an employer from favoring one racial group over another without compelling justification. Yet the desire to avoid contentious litigation suggests that employers should be allowed to adopt measures that satisfy Title VII—either by voluntarily following affirmative action plans or by agreeing to a consent decree that resolves discrimination litigation—without confessing to the guilt of prior discrimination.<sup>155</sup> The competing claims to just treatment by those who have not traditionally been the subjects of discrimination must of necessity inform the inquiry into how that balance should be struck.

## 2. Evaluating the Claims of the Majority

[T]he collateral attack bar is a procedural rule that furthers the goal of facilitating settlement. But one can have too much of a good thing. Settlement is not the ultimate end of the legal process; the ultimate end is the just disposition of parties' claims. Settlement is merely a means to this end.<sup>156</sup>

The city of Birmingham, Alabama spent over one million dollars in legal fees defending against attacks on the 1981 consent decree at issue in *Wilks*.<sup>157</sup> Is it possible to maintain settlement as a relatively inexpensive and efficient device for achieving nondiscrimination in employment,

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Court held that § 706(g) does not apply to consent decrees. See *id.* at 515. Justice Rehnquist disagreed. In his view, § 706(g) was intended to protect "innocent nonminority employees from the evil of court-sanctioned racial quotas." *Id.* at 540-41 (Rehnquist, J., dissenting).

153. 480 U.S. 616 (1987).

154. *Id.* at 630. In his *Weber* dissent, Justice Rehnquist makes a rather convincing case that a majority of the legislators who voted for Title VII probably believed that the legislation would prohibit the kinds of plan the Court sanctioned in *Weber* and *Johnson*. See *Weber*, 443 U.S. at 230-53 (Rehnquist, J., dissenting). One may speculate whether his views will command a majority of the Court in the future.

Also, inasmuch as this case is about gender, not race, it sheds no light on whether such a plan, if adopted by a public employer and based on race, would pass strict scrutiny under the standards articulated by the Court in cases such as *Croson*. Without specific evidence that the employer, if challenged, might be found to have previously discriminated against racial minorities, I suspect not.

155. See Sullivan, *supra* note 148, at 80 ("[P]ublic and private employers often adopt affirmative action less to purge their past than to build their future.").

156. Kramer, *supra* note 36, at 333.

157. See S. Rep. No. 315, 101st Cong., 2d Sess. 27 (1990). This figure predates the cost of litigation on remand from the Supreme Court's decision upholding the consent decree.

without sacrificing the legitimate expectations and legal rights of affected third parties? In addressing this question, we must appreciate what is legitimately at issue for white male employees and applicants for employment with employers who, as defendants, have settled discrimination suits. Have the answers changed after *Wilks*, and again upon promulgation of section 108?

There is substantial disagreement about the legitimacy of forcing white males to shoulder the burden of an employer's prior discrimination. On the one hand, because white males have been the beneficiaries of prior discriminatory policies, it is equitable that they bear at least some of the costs of rectifying that discrimination. The playing field was not even before, and until blacks are brought to the point where they should have been but for prior discrimination, the playing field cannot be even now.<sup>158</sup> On the other hand, the major offenders—at least as far as employment opportunities are concerned—were not the employees, but rather the employers who committed the discrimination. Many have been critical of the willingness of these employers to enter into consent decrees that compromise the benefits and opportunities of their majority employees. They argue that employers readily sacrifice employment opportunities of white employees so as to avoid shouldering substantial back-pay awards that might well be the cost of litigated judgments.<sup>159</sup> In his defense of the Court's decision in *Wilks*, Professor Issacharoff notes

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See *Bennett v. Arrington (In re Birmingham Reverse Discrimination Employment Litig.)*, 806 F. Supp. 926 (N.D. Ala. 1992).

158. See *Martin v. Wilks*, 490 U.S. 755, 791-92 (1989) (Stevens, J., dissenting).

The predecessor to this litigation was brought to change a pattern of hiring and promotion practices that had discriminated against black citizens in Birmingham for decades. The white respondents in these cases are not responsible for that history of discrimination, but they are nevertheless beneficiaries of the discriminatory practices that the litigation was designed to correct. Any remedy that seeks to create employment conditions that would have obtained if there had been no violations of law will necessarily have an adverse impact on whites, who must now share their job and promotion opportunities with blacks. Just as white employees in the past were innocent beneficiaries of illegal discriminatory practices, so is it inevitable that some of the same white employees will be innocent victims who must share some of the burdens resulting from the redress of the past wrongs.

*Id.* (footnote omitted).

Professor Sullivan notes that the Court continues to struggle with the question of how much of a burden on "innocent" whites is too much. See Sullivan, *supra* note 148, at 88.

159. See, e.g., Cooper, *supra* note 51, at 156 ("An employer negotiating a settlement in such a case is thus much like a gambler wagering with someone else's money: he can afford to be extravagant until he gets to his own stake.").

Judge Easterbrook suggests that the case is overstated, at least as to private employers who, if they fail to pay a white employee the market value of his work, whether in the form of salary, promotion, or seniority rights, will lose that employee. See Easterbrook, *supra* note 36, at 32-33. Professor Laycock's response is that productivity may suffer if the employer is forced to hire less qualified applicants, but "compared to the alternative of actually paying the victims of discrimination, a quota remedy is an enormous bargain for the employer." Laycock, *supra* note 3, at 114. Both would agree that as to the public employer, the market forces otherwise operative are distorted. "The concern about the

that the plaintiffs in the original Title VII suit sacrificed millions in back pay in exchange for preferences in hiring and promotion.<sup>160</sup>

The true basis of this criticism must be the concern that employers are folding too easily in cases that, if litigated to judgment, they might win.<sup>161</sup> If they lost, the likely remedy would be one that cost *both* the employer and the majority employees—back pay plus preferences for the members of the class who previously suffered the discrimination.<sup>162</sup> If *Wilks* had been successfully litigated through to judgment and remedy, plaintiffs would have still pressed for and likely obtained the preferable future benefits as part of a make-whole remedy. Granted the City may have saved a good deal of money that would have gone towards back pay, and yes, the remedy thus hurt the individual white fire fighters with vested interests more than it hurt the City. But if the case had gone to judgment, would the white fire fighters have been hurt less? Probably not, and if this is accurate, it tells us very little about the legitimacy of the settlement reached. Whether the case is resolved through a litigated judgment or through a consent decree, the remedies will likely deprive majority employees of some opportunities or benefits that they would have enjoyed but for the remedies.<sup>163</sup> So the focus of concern should not be on whether a case is resolved by consent decree, but rather whether there existed a sufficient legal basis for the remedies provided. This legal

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use of consent decrees should be greatest when the devices that cause parties to take account of third party effects are weakest." Easterbrook, *supra* note 36, at 33.

160. See Issacharoff, *supra* note 36, at 244. Professor Issacharoff notes that the City traded a potential back pay liability of five million dollars for \$265,000 plus hiring quotas, and that then Birmingham Mayor Arrington characterized this as "the 'best business deal' the City ever made." *Id.* Professor Strickler identifies similar, though not identical, data. See Strickler, *supra* note 107, at 1580 n.103.

161. See *In re Birmingham Reverse Discrimination Employment Litig.*, 833 F.2d 1492, 1499 (1987), *aff'd sub nom. Martin v. Wilks*, 490 U.S. 755 (1989).

[T]he record fails to indicate that the City mounted a vigorous defense to the allegations leveled against it before entering into settlement negotiations. . . . In real terms, the relief contemplated by the decrees was to come not from the hands of the City, but from the hands of the employees who would have otherwise received the promotions.

*Id.*

162. Remedies may reach more broadly than the specific victims of discrimination—and this is true whether pursuant to (i) a voluntary affirmative action plan, see *Johnson v. Transportation Agency*, 480 U.S. 616, 630 (1987) and *United Steelworkers of America v. Weber*, 443 U.S. 193, 208-09 (1979), (ii) a consent decree, see *Williams v. City of New Orleans*, 729 F.2d 1554, 1557 (1984), or (iii) a litigated judgment, see *United States v. Paradise*, 480 U.S. 149, 166 (1987); *Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 480 (1986).

163. Although an employer might be forced to pay money damages to white employees who are disadvantaged because of a consent decree, see, e.g., *W.R. Grace & Co. v. Local 759, Int'l Union of Rubber Workers*, 461 U.S. 757 (1983) (upholding an arbitrator's award of back pay to male workers laid off pursuant to an EEOC conciliation agreement with employer that violated seniority provisions of a collective bargaining agreement), it is not possible for those employees to obtain equitable relief inconsistent with relief ordered by the court in the underlying litigation, or which was provided for by an enforceable consent decree. See Laycock, *supra* note 3, at 120, 125-27.

basis must exist whether the case is resolved by consent decree or by litigated judgment.<sup>164</sup> Additionally, we want to assure that majority employees are afforded reasonable opportunities to participate in discrimination litigation, so that their participation may inform any decision as to whether the applicable legal standards have been met.

The standards for Title VII consent decrees that will survive attack, as discussed previously,<sup>165</sup> are basically the criteria developed by the Court in the *Weber/Johnson* line of cases: (1) is there a sufficient evidentiary basis for believing that a racially imbalanced workforce exists? and (2) are the remedies provided for in the decree narrowly tailored to address that harm, so as to not " 'unnecessarily trammel[]' the rights of nonminority employees or 'create[] an absolute bar to their advancement.' " <sup>166</sup> Except for those who, like Justices Rehnquist and Scalia, insist that Title VII prohibits such consent decrees entirely,<sup>167</sup> the bulk of the criticism has been levelled not at these substantive standards,<sup>168</sup> but rather at the procedural opportunities afforded third parties to challenge the legitimacy of the decrees.<sup>169</sup> The procedural questions are: (1) whether white employees have any legal rights to participate in the underlying litigation; (2) whether they will subsequently have opportunities to challenge the legitimacy of the consent decree; and (3) whether they should be afforded rights not currently provided by law to challenge the decrees.<sup>170</sup>

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164. See, e.g., *Paradise*, 480 U.S. at 166-67 (upholding a litigated judgment imposing narrowly-tailored race-conscious relief, which was justified by a compelling governmental interest to eradicate pervasive employment discrimination); *Donaghy v. City of Omaha*, 933 F.2d 1448, 1458 (8th Cir. 1991) (applying *Wygant* standards to uphold the validity of a consent decree), *cert. denied*, 112 S. Ct. 938 (1992).

165. See *supra* notes 61-63 and accompanying text.

166. *In re Birmingham Reverse Discrimination Employment Litig.*, 833 F.2d 1492, 1500 (1987) (quoting *Johnson v. Transportation Agency*, 480 U.S. 616, 630 (1987)).

167. See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616, 664-65 (1987) (Scalia, J., dissenting) (arguing that the objective of remedying societal discrimination cannot prevent remedial affirmative action from violating the Equal Protection Clause); *United Steelworkers v. Weber*, 443 U.S. 193, 254 (1979) (Rehnquist, J., dissenting) ("In passing Title VII, Congress outlawed *all* racial discrimination, recognizing that no action dis-advantaging a person because of his color is affirmative.").

168. Not that these substantive standards might not benefit from improvement, but it is beyond the scope of this Article to suggest any substantive changes.

169. See generally Laycock, *supra* note 3 (proposing that courts refuse to approve any consent decree that limits the arguable legal rights of a third party whose existence is known or foreseeable to the court); Issacharoff, *supra* note 36 (arguing that parties to consent decrees should be required to join all persons whose settled, legally sanctioned expectations will be disrupted). But see *In re Birmingham Reverse Discrimination Employment Litig.*, 833 F.2d 1492, 1501 (1987) (admonishing a district court to give "heightened scrutiny" to the second prong of the *Johnson* analysis, "[g]iven the natural potential that such an arrangement will trammel the interests of nonminority employees"), *aff'd sub nom. Martin v. Wilks*, 490 U.S. 755 (1989).

170. The questions might be recast: Do white employees have any legal rights to challenge the creation of, or provisions set forth in, a consent decree entered into between plaintiffs and the defendant employer to resolve employment discrimination allegations? If so, when may those rights must be asserted? When must they be asserted so as not to be waived? In what ways might the substantive and procedural opportunities of white employees be improved so as to maximize fairness to them, while minimizing damage to

The first procedural question is governed largely by the federal intervention rules, and, except for questions of timeliness of intervention, has produced the least controversy. Courts will allow timely motions to intervene by those whose rights may be affected if not as of right, then permissively.<sup>171</sup> The Court, in *Wilks*, answered the second question when it rejected the impermissible collateral attack doctrine to bar persons who were neither parties nor privies to parties in the original litigation.<sup>172</sup> Section 108 also addresses this question: in certain circumstances as defined by section 108 persons who were neither parties nor privies will be precluded from challenging the legitimacy of a consent decree. The third question has yet to be adequately addressed, and deserves attention now with the enactment of section 108.<sup>173</sup> As discussed in detail below,<sup>174</sup> although not required by any law, a court considering approval of an employment discrimination consent decree should afford an early, meaningful opportunity for third parties to challenge the legitimacy of the decree under the standards laid down by the Court in *Weber* and *Johnson*. If such an opportunity is afforded, then any subsequent due process challenges to the application of section 108 should have little chance of success. No less important, the value of consent decrees in providing less expensive, less divisive approaches for redressing and eradicating discrimination against minorities will be preserved without sacrificing the legitimate interests of majority employees.

### B. Due Process and the Rules of Preclusion

Preclusion rules operate to preserve judicial resources and lessen the transactional costs of litigation by prohibiting repeated opportunities to relitigate claims and issues already resolved, and to preserve as well the integrity of judicial pronouncements.<sup>175</sup> Preclusion rules are constrained, however, by the dictates of procedural justice embodied in the Due Process Clause.<sup>176</sup> In *Martin v. Wilks*,<sup>177</sup> the Supreme Court struck

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the utility of the consent decree in redressing and eliminating employment discrimination?

171. See Fed. R. Civ. P. 24; *Wilson v. Bailey*, 934 F.2d 301, 303 (11th Cir. 1991); see also *United States v. City of Chicago*, 798 F.2d 969, 975 n.9 (7th Cir. 1986) (suggesting that intervention would have been allowed had the applicants sought to intervene when the hiring quota started), *cert. denied*, 484 U.S. 1041 (1988).

172. See *Martin v. Wilks*, 490 U.S. 755, 762-63 (1989).

173. Professor Schwarzschild's 1984 article addresses many of the same concerns about providing a meaningful opportunity for third party challenges to consent decrees. See generally Schwarzschild, *supra* note 32 (suggesting a systematic procedure for approving Title VII consent decrees that would allow settlement while ensuring that courts act on the basis of fair hearings). But he goes too far in immunizing the underlying factual predicate for the settlement from challenge. See *id.* at 923. For further discussion of this, see *infra* notes 305-12 and accompanying text.

174. See *infra* text accompanying notes 261-71.

175. See *Federated Dep't Stores, Inc., v. Moitie*, 452 U.S. 394, 400 (1981) (citing *Reed v. Allen*, 286 U.S. 191, 198 (1932)).

176. See *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940).

177. 490 U.S. 755 (1989).

down the impermissible collateral attack doctrine because it was a rule of preclusion that violated due process.<sup>178</sup> *Wilks* suggested profound limitations on the ability of parties to employment consent decrees to limit third party challenges.<sup>179</sup> Section 108 attempts to serve preclusion's goal of finality without sacrificing the due process guarantee of fairness.

### 1. Preclusion in *Wilks*

What are the due process rights of white employees seeking to challenge consent decrees to which they are not a party? The *Wilks* majority's rejection of the impermissible collateral attack doctrine was premised on the interplay of the Federal Rules of Civil Procedure and due process. The majority reiterated the fundamental precept of due process that "one is not bound by a judgment . . . in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."<sup>180</sup> Petitioners had argued that respondents' failure to intervene timely in the earlier proceeding precluded them from later attacking the validity of the consent decree. The majority rejected this argument, finding that both pre- and post-Federal Rules of Civil Procedure jurisprudence commanded:

The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.<sup>181</sup>

Rule 24, governing intervention, creates no affirmative obligation on a person. Although the rule governs the conditions under which a person must be allowed to intervene,<sup>182</sup> or may be allowed to intervene,<sup>183</sup> it does not require a person to intervene in order to protect her legal interests. If parties to a matter in litigation wish the outcome of that litigation to bind a stranger, they must employ Rule 19 joinder provisions to bring

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178. See *id.* at 769.

179. See *id.* at 767-68.

180. *Id.* at 761 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)).

181. *Id.* at 763 (quoting *Chase Nat'l Bank v. Norwalk*, 291 U.S. 431, 441 (1934) (Brandeis, J.)).

182. Federal Rule of Civil Procedure 24(a) provides:

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

183. Federal Rule of Civil Procedure 24(b) provides, in part:

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . .

that stranger into the litigation.<sup>184</sup> Because petitioners failed to join the respondents in the consent decree litigation, respondents were yet entitled to their day in court to challenge the decree.<sup>185</sup>

While the members of the Court agreed that respondents were not *legally bound* by the consent decree because they lacked their day in court, they profoundly disagreed on the impact of the consent decree on respondents' resultant *legal rights*. The dissent viewed the consent decree as an external event that inevitably impacted on the respondents.<sup>186</sup> It was not that the dissent—or the district court—embraced the impermissible collateral attack doctrine. Rather the dissent opined that the district court, in considering respondents' challenge, had provided respondents with all the process they were due. In approving the consent decree, the district court had originally conducted a *Weber/Johnson* analysis, concluding that there was reason to believe the City would eventually be found liable for racial discrimination,<sup>187</sup> that the decree did not foreclose the promotion of whites even temporarily,<sup>188</sup> that it was for a limited period of time,<sup>189</sup> and that its terms were "reasonably commensurate with the nature and extent of the indicated discrimination."<sup>190</sup> Based on this analysis, the district court viewed the legitimacy of the decree as beyond challenge in the reverse discrimination litigation and confined its factual inquiry to whether the challenged employment decisions were required by the consent decree.<sup>191</sup> The Eleventh Circuit and the *Wilks* majority, in contrast, granted the respondents an opportunity to relitigate the substantive legitimacy of the decree in their reverse discrimination action.<sup>192</sup>

The implications of *Wilks* were that such challenges could be repeated forever. Even if the City won on remand—as it did<sup>193</sup>—a new group of white fire fighters who were neither parties to the initial litigation that led

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184. See *Wilks*, 490 U.S. at 765. Rule 19(a) provides, in part:

(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. . . .

185. See *Wilks*, 490 U.S. at 761-62.

186. See *Wilks*, 490 U.S. at 772-73 (Stevens, J., dissenting).

187. See *id.* at 776.

188. See *id.* at 775.

189. See *id.*

190. *Id.* at 777 (Stevens, J., dissenting) (quoting *United States v. Jefferson County*, 28 Fed. Empl. Prac. (CCH) Cases 1834, 1838 (N.D. Ala. 1981)).

191. See *id.* at 760.

192. See *id.* at 761.

193. See *Bennett v. Arrington (In re Birmingham Reverse Discrimination Employment Litig.)*, 806 F. Supp. 926 (N.D. Ala. 1992).



to the consent decree nor to the *Wilks* case could later sue for reverse discrimination and again attack the legitimacy of the decree.<sup>194</sup> Of course, some other rule of law<sup>195</sup> might prevent the subsequent challenge. Section 108 purports to be such a rule of law. It requires one who receives notice and is afforded an opportunity to be heard, to assert his rights at that time, or waive any opportunity to challenge the consent decree subsequently. It also provides that someone who *never* received notice or an opportunity to be heard, but whose interests were *adequately represented* by someone else, will be precluded from subsequently challenging the legitimacy of the decree. While both of these provisions deviate substantially from *Wilks*, they build on established exceptions to traditional preclusion doctrine predating section 108's enactment.

## 2. Class Actions and Other Representative Litigation

One of the hardest principles to impress upon first year law students is the concept of entitlement to one's day in court.<sup>196</sup> They have no problem with the idea in the abstract. Suppose, however, that Alex and Bob are in a car accident with Clark, Alex sues Clark, and Alex loses because the jury finds that Clark was not negligent. It is not intuitive for newcomers to the law that if Bob has no relationship of privity to Alex, he can bring a subsequent suit and force Clark once again to litigate the question of Clark's negligence. It is even harder for students to accept that if ninety-nine people in a train wreck unsuccessfully sue the railroad in ninety-nine separate actions, number 100 still is entitled to try, and may prove successful.<sup>197</sup> Eventually, most get it. Then we teach them the exceptions, and they have to unlearn much of what has just been drummed into their heads. Sometimes courts have similar difficulties in understanding both the rule and the justifications for exceptions to it.<sup>198</sup>

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194. The doctrine of offensive collateral estoppel might preclude the City from relitigating the validity of the decree if it lost the *Wilks* case on remand. See, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331-32 (1979) (discussing when offensive collateral estoppel is appropriate).

195. For an unduly broad reading of *Wilks* that suggests that the Due Process Clause alone, and not its relationship to Rules 19 and 24, compelled the majority's result, see *RSH Constructors, Inc. v. United States*, 20 Cl. Ct. 1, 5 (1990) (stating that *Wilks* "is part of our 'deep rooted historic tradition that everyone should have his own day in court.'" (quoting *Wilks*, 490 U.S. at 762).

196. See, e.g., *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) ("[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."). This due process right to a hearing promotes autonomy, parties' acceptance of the outcome, and minimizes collateral challenges.

197. See Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 Stan. L. Rev. 281, 304 (1957).

198. See, e.g., *Cauefield v. Fidelity & Casualty Co. of New York*, 378 F.2d 876, 878-79 (5th Cir.) (precluding strangers to a prior suit from relitigating issues previously litigated and lost where they purport to have no new evidence or testimony to introduce), *cert. denied*, 389 U.S. 1009 (1967). As one district court observed in *In re Air Crash Disaster near Dayton, Ohio*, 350 F. Supp. 757, 768 (S.D. Ohio 1972),

Even before Rule 23, one might have been bound by an action to which he was neither a party nor in privity with a party, so long as his interests were adequately represented and the litigation was in the nature of a class action.<sup>199</sup> Rule 23 provides the procedural mechanisms to ensure adequate representation. Regardless of whether an action is brought under Rule 23(b)(1)(A) or (b)(1)(B),<sup>200</sup> (b)(2),<sup>201</sup> or (b)(3),<sup>202</sup> the court must, as early as practicable, assure that the purported representatives "will fairly and adequately protect the interests of the class."<sup>203</sup> Notice, however, is only mandatory for actions maintained under 23(b)(3), as provided by 23(c)(2).<sup>204</sup> For other types of class actions, 23(d) provides that the court shall make appropriate orders, including, where necessary to protect

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[I]n view of the great increase in the number of civil actions commenced in the federal district courts in recent years, the Court believes that the federal trial courts should not hesitate to adopt new approaches designed to terminate needless and futile litigation where identical liability issues have been fairly and truly tried in a prior action.

199. See *Hansberry*, 311 U.S. at 41-42; 7B Charles A. Wright et al., *Federal Practice and Procedure* § 1789, at 238 (2d ed. 1986). See also Allan D. Vestal, *Res Judicata/Preclusion: Expansion*, 47 S. Cal. L. Rev. 357, 377 (1974) (arguing that the requirement that one have one's day in court is not a constitutional absolute).

200. Federal Rule of Civil Procedure 23(b) provides:

(b) *Class Actions Maintainable*. An action may be maintained as a class action if the prerequisites of subdivision (a) [numerosity, commonality, typicality and adequacy of representation] are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests . . . .

201. Federal Rule of Civil Procedure 23(b)(2) provides:

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . .

202. Federal Rule of Civil Procedure 23(b)(3), in part, provides:

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . .

203. Fed. R. Civ. P. 23(a)(4).

204. Federal Rule of Civil Procedure 23(c)(2) provides:

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of . . . the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action . . . .<sup>205</sup>

It is settled that in a (b)(3) class action, a member of the class who has received notice and has not opted out of the class is bound by the judgment or settlement rendered therein.<sup>206</sup> Less settled is the preclusive effect of (b)(1) and (b)(2) class actions as to persons who never received notice.<sup>207</sup> The majority view is that because of the nature of (b)(1) and (b)(2) litigation, notice is not required, and there is no right to opt out of the litigation.<sup>208</sup> Yet some have opined that this violates basic tenets of due process,<sup>209</sup> and the Supreme Court has never directly considered these questions.<sup>210</sup>

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205. Fed. R. Civ. P. 23(d)(2).

206. Charles Wright observes:

It is well settled that the court adjudicating a dispute cannot predetermine the res judicata effect of its own judgment; that can be tested only in a subsequent suit . . . .

. . . .

. . . [However,] if an action satisfies all the requirements in Rule 23(a), the parties comply with the notice provisions in the rule, and the court properly exercises its powers under subdivisions (c) and (d) so that the case is handled in a fair and efficient manner, it is highly likely that all the prerequisites for giving the decree binding effect are present.

Wright et al., *supra* note 199, § 1789, at 245-46 (footnotes omitted).

207. See *id.* § 1793, at 299-301.

208. See, e.g., *Fontana v. Elrod*, 826 F.2d 729, 732 (7th Cir. 1987) (holding that class actions under (b)(2) require neither notice nor an opportunity to opt out); *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981) (holding that unnamed (b)(2) plaintiffs need not be afforded opportunity to opt out); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 254 (3d Cir.) (holding that no notice is required for (b)(2) actions to be binding), *cert. denied*, 421 U.S. 1011 (1975).

209. See, e.g., *Schrader v. Selective Serv. Sys. Local Bd. No. 76*, 470 F.2d 73, 75 (7th Cir.) (holding that notice is required by due process for (b)(1) and (b)(2) actions to be afforded binding effect), *cert. denied*, 409 U.S. 1085 (1972); *Pasquier v. Tarr*, 318 F. Supp. 1350, 1354 (E.D. La. 1970) (holding that the absolute failure to give notice of any kind to absent (b)(1) or (b)(2) class members violates due process), *aff'd*, 444 F.2d 116 (5th Cir. 1971). See also *Johnson v. General Motors Corp.*, 598 F.2d 432, 433 (5th Cir. 1979) (holding that notice is required in (b)(2) actions only when monetary damages are sought). For general criticism of the majority rule, see Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. Mich. J.L. Ref. 347 (1988).

210. *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853), the precursor to *Hansberry v. Lee*, 311 U.S. 32 (1940), spoke generally to the preclusive effect of class litigation:

Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court.

*Swormstedt*, 57 U.S. (16 How.) at 302.

Class actions are one type of representative action, but not the only type that will result in preclusion of the interests of strangers.<sup>211</sup> *Hansberry v. Lee*<sup>212</sup> itself distinguished between "class" and "representative" suits, although without clarifying the distinction.<sup>213</sup> An example of a non-class action representative suit is one brought by a municipality. Its outcome will bind citizens of that municipality with similar interests, under the doctrine of *virtual representation*.<sup>214</sup> Some have characterized this as an example of privity.<sup>215</sup> Others have deemed the representational action not an example of privity, but an exception to its requirement.<sup>216</sup> Whatever the label, the result is that one may be bound by certain types of litigation of which he had no notice, as long as his interests in that litigation were adequately represented.<sup>217</sup>

Less clear is what other types of litigation fall into this category, and

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211. See Restatement (Second) of Judgments §§ 41-42 (1980). See also Kramer, *supra* note 36, at 352 ("There is no reason to think that current class action practice establishes the outer limits of representational litigation . . ."); *The Civil Rights Act of 1990: Hearing on S. 2104 Before the Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 543, 547 (1989) (statement of Professor Laurence H. Tribe) ("[N]othing about that principle turns on the technical difference of whether it is a class action or not a certified class action. . . . There is nothing magical or talismanic about the phrase 'class action' that would suddenly make due process irrelevant.") [hereinafter Tribe Testimony].

212. 311 U.S. 32 (1940).

213. See *id.* at 41.

To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative" suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.

*Id.* See also Bone, *supra* note 143, at 214 ("Conventional wisdom has it that *Hansberry v. Lee* constitutionalized interest representation by holding that adequate representation of interests can satisfy due process requirements for binding an absentee to a judgment. The Court's opinion is far from clear on this point, however.") (footnote omitted).

214. See, e.g., *Southwest Airlines Co. v. Texas Int'l Airlines, Inc.*, 546 F.2d 84, 97-102 (5th Cir.) (holding that a challenge by airline carriers to Southwest's right to operate out of Love Field in Dallas, Texas was precluded by Dallas's prior unsuccessful challenge), *cert. denied*, 434 U.S. 832 (1977); *Rynsbarger v. Dairymen's Fertilizer Coop., Inc.*, 72 Cal. Rptr. 102, 107 (Cal. Ct. App. 1968) (holding that landowners were precluded from litigating a nuisance action similar to one prosecuted by public authorities). See also *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719-20 (5th Cir. 1975) (holding that a county's interests were so closely aligned with those of the state board's as to bind the county by the board's failure to raise a claim in the earlier litigation).

215. See, e.g., John C. McCoid, *A Single Package for Multiparty Disputes*, 28 Stan. L. Rev. 707, 710 (1976) ("Like 'indispensability,' privity is a label for a result rather than its rationale. That label comprehends a variety of relationships that have sustained subsequent preclusion of nonparties to the first action. One of these is representation."); Wright, et al., *supra* note 190, § 4449, at 418 ("As the preclusive effects of judgments have expanded to include nonparties in more and more situations, however, it has come to be recognized that the privity label simply expresses a conclusion that preclusion is proper.").

216. See Vestal, *supra* note 199, at 380.

217. See, e.g., Bone, *supra* note 143, at 203-32 (relating the history and contemporary applications of the virtual preclusion doctrine); *id.* at 199 ("challeng[ing] the standard assumption that the day in court ideal gives individuals a strong right to participate personally in all forms of litigation that concern them."); McCoid, *supra* note 215, at 714

what will constitute adequacy of representation. The cases are sporadic, and the doctrine often idiosyncratic.<sup>218</sup> In *General Foods Corp. v. Massachusetts Department of Public Health*,<sup>219</sup> the agency successfully asserted *res judicata* before the trial court based on the agency's success in prior litigation addressing the same challenge brought by a trade association. The circuit court affirmed as to the plaintiff corporation that helped finance the trade association's litigation.<sup>220</sup> However, based on its interpretation of Massachusetts preclusion law, as well as skepticism about extension of preclusion, the court refused to extend preclusion so as to fend off the litigation altogether. Thus it allowed a corporation whose common stock was owned by the bound corporation to pursue the challenge.<sup>221</sup>

While the First Circuit, interpreting Massachusetts law, may not have embraced an expansive interpretation of the doctrine of virtual representation, the Ninth Circuit, interpreting California law, has. In *Los Angeles Branch NAACP v. Los Angeles Unified School District*,<sup>222</sup> the court extended the doctrine to desegregation litigation, holding that school children who were not part of an earlier class in previous litigation were nonetheless bound:

California has expanded the traditional rule, however, to apply the

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("The most widely discussed possibility for reducing multiplicity is to enlarge the range of collateral estoppel by expanding privity on a theory of adequate representation.").

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) is an example of actual notice not being a prerequisite to satisfying the dictates of due process, even as to actual parties to the litigation. That notice was formalized in New York's statutory scheme in *Mullane* may distinguish it from § 108 notice, but the decision nonetheless supports the conclusion that as to certain persons who never receive notice, adequacy of representation is independently sufficient. See *Mullane*, 339 U.S. at 317-20. "Society allows a reasonable adjustment of the demands of due process." Vestal, *supra* note 199, at 378.

218. See, e.g., *Morris County Fair Hous. Council v. Boonton Township*, 484 A.2d 1302, 1305 (N.J. Super. Ct. Law Div. 1984) (embracing the doctrine of representative litigation to bar a second developer from challenging a settlement agreement to resolve zoning discrimination claim between the municipality, the Public Advocate, and another developer), *aff'd*, 506 A.2d 1284 (N.J. Super. Ct. App. Div. 1986). Although Professor Bone's article contends that virtual representation remains a "vital doctrine today," Bone, *supra* note 143, at 220, he, too, concedes that courts have failed to articulate a principled approach to its use. "The result is a collection of seemingly ad hoc decisions with no clear organizing framework." *Id.*

219. 648 F.2d 784 (1st Cir. 1981).

220. It reached this result despite the rule that merely paying expenses of another's litigation is insufficient to bind a nonparty. See *id.* at 787-88.

221. "If the doctrine of virtual representation as enunciated in cases [cited by the agency] goes beyond [Restatement (Second) of Judgments § 40 (1980)], we are of the opinion that it does not state the law of Massachusetts and, like Judge Wisdom . . . we doubt its soundness." *Id.* at 790 (referring to Judge Wisdom's opinion in *Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F.2d 84, 97 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977), which in turn marked a retrenchment from that court's earlier decision applying virtual representation in *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975)).

222. 750 F.2d 731 (9th Cir. 1984) (en banc), *cert. denied*, 474 U.S. 919 (1985).

preclusive effect of a prior judgment to nonparties whose interests were 'virtually represented' by one of the parties to the litigation . . . . The nonparty is bound under the rule if he was 'so far represented by others that his interest received actual and efficient protection . . . .' The application of this doctrine to desegregation cases is particularly appropriate. It has been recognized that unless subsequent generations of school children are bound by preclusion rules from relitigating identical claims of unlawful segregation, those claims would assume immortality.<sup>223</sup>

While the attraction of the doctrine of virtual representation is apparent, so are its risks. Judges might too readily welcome the opportunity to alleviate the burdens on their dockets at the expense of litigants who have

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223. *Id.* at 741. The court relied on *Rynsbarger v. Dairymen's Fertilizer Coop., Inc.*, 72 Cal. Rptr. 102 (Cal. Ct. App. 1968), a case in which a private nuisance suit was precluded because plaintiffs were deemed to have been virtually represented by government officials who brought a public nuisance suit making substantially identical allegations. In *Rynsbarger*, the court stated that "[i]f it appears that a particular party, although not before the court in person, is so far represented by others that his interest received actual and efficient protection, the decree will be held to be binding upon him." *Id.* at 107.

An example of what little consensus exists in this area of the law is *Bronson v. Board of Educ. of Cincinnati*, 525 F.2d 344 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976), another school desegregation case. Similar to the Los Angeles case, the question in *Bronson* was whether, after a class of black schoolchildren had failed to obtain a finding of *de jure* segregation, a somewhat reconstituted class of black parents and children were barred from pursuing a second action making substantially the same allegations. *See id.* at 346. The first case, *Deal v. Cincinnati Bd. of Educ.*, 244 F. Supp. 572 (S.D. Ohio 1965), *aff'd* 369 F.2d 55 (6th Cir. 1966), *cert. denied* 389 U.S. 847 (1967), was brought by 96 named "minor citizens of the State of Ohio" on behalf of thousands of other similarly situated "Negro minors within the school district of Cincinnati." *Deal*, 244 F. Supp. at 573. The *Bronson* suit was brought by "'parents of minor children . . . attending schools in the public school system of the State of Ohio and in the City of Cincinnati[.]' . . . by each plaintiff on behalf of himself and his minor children 'and on behalf of all persons in the State of Ohio similarly situated.'" *Bronson*, 525 F.2d at 346. Defendants asserted *res judicata* with respect to all issues raised and adjudicated in the *Deal* litigation. *See id.*

Each member of the panel of the circuit court expressed a different view on the limitations of what the *Bronson* plaintiffs could litigate in the second suit. Judge Lively's position was that "a public body should not be required to defend repeatedly against the same charge of improper conduct if it has been vindicated in an action brought by a person or group who validly and fairly represent those whose rights are alleged to have been infringed." *Id.* at 349. He concluded that persons who because of their age or otherwise were not members of the first class could not have their *claims* extinguished, but the doctrine of "virtual representation" precluded them from relitigating issues resolved in the earlier litigation. *Id.* at 349-50. Judge Philips viewed the operative preclusion more narrowly. He allowed that the surviving *Bronson* plaintiffs could introduce any new evidence not introduced in the prior litigation and, if it tended to disprove the prior findings, then the district court was to reconsider those findings. *See id.* at 350-51. "They are precluded only from relying on the evidence presented in [the prior case] to support findings different from or inconsistent with those actually made in that case." *Id.* at 351. The third member of the panel, Judge Weick, would have precluded the second suit altogether. He protested that the reasoning of his brothers would lead to the unacceptable result that each year, a new crop of students could bring the same case. *See id.* at 352.

never had an opportunity to press their claims.<sup>224</sup> Thus any new applications of preclusion based on adequacy of representation must ensure that legitimate interests are not sacrificed to the cause of expediency.<sup>225</sup>

224. *Ragsdale v. Turnock*, 941 F.2d 501 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 879 (1992), a case challenging Illinois' abortion regulations, addressed the need to check this tendency. The district court denied motions to intervene to challenge the proposed consent decree filed by fathers of unborn fetuses and two members of the plaintiff class on the last day to object to a settlement of the litigation. *See id.* at 502. The district court denied them, *inter alia*, on the basis that the state of Illinois adequately represented the interests of the unborn fetuses. *See id.* at 502-03. Although Judge Posner affirmed the district court on other grounds, he wrote:

The proposition that the attorney general is an adequate representative of the fetuses that will be aborted if the consent decree is approved fictionalizes the notion of 'adequacy' of representation, and I am not a fan of legal fictions.

....  
I know the government is presumed to be an adequate representative of a proposed intervenor when it is 'charged by law with representing [the proposed intervenor's] interests.' " [citations omitted] . . . But a real presumption is rebuttable. . . . In negotiating the consent decree in the present case, the attorney general pretty much abandoned the fetuses to the abortionist's knife.

....  
Judges have a natural inclination to fictionalize 'adequacy' of representation in order to prevent the courts from being swamped by multiparty litigation.

*Id.* at 507-08.

One commentator warns of the need to preserve the tradition against preclusion of nonparties.

The bare fact that one plaintiff is joined with others who were parties and who can properly be bound by a prior proceeding does not justify preclusion of the nonparty plaintiff as well. It is conceivable that some day this basic postulate may be eroded by courts that believe that one full and fair litigation of an issue is sufficient without regard to the identity of the parties. It is much better, however, to resist any such erosion. Our deep-rooted historic tradition that everyone should have his own day in court draws from clear experience with the general fallibility of litigation and with the specific distortions of judgment that arise from the very identity of the parties.

18 Wright, et al., *supra* note 199, § 4449, at 411. Other commentators have observed the tendency of some courts to expand preclusion. *See, e.g., Vestal, supra* note 199, at 373 (noting that some courts afforded preclusion where the "point of view" had been litigated); Note, *Collateral Estoppel of Nonparties*, 87 Harv. L. Rev. 1485, 1485-86 (1974) (arguing that a movement toward collateral estoppel of nonparties lacks doctrinal underpinnings).

225. For a most problematic and radical argument for the extension of preclusion to all subsequent parties who are juridically similarly-situated based on a notion of estoppel classes, see generally Lawrence C. George, *Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action*, 32 Stan. L. Rev. 655 (1980). In a similar vein, see Michael A. Berch, *A Proposal to Permit Collateral Estoppel of Nonparties Seeking Affirmative Relief*, 1979 Ariz. St. L.J. 511. More recently, Professor Bone has proposed a new theoretical framework for reinvigorating the doctrine of virtual representation in appropriate cases. *See generally* Bone, *supra* note 143.

Accepting some extension of representative actions still leaves open the question of when the adequacy of representation determination should be made. *See, e.g.,* Restatement (Second) of Judgments § 42 (1980) ("It must be recognized . . . that the adequacy of the representation can be established in the action itself only with respect to such of the represented persons who have had opportunity to be heard on the representation question. As to others, the question can be concluded only if and when a person allegedly

### 3. Practical Preclusion

On the other hand, in analyzing the impact of consent decrees on strangers to those decrees, one must not lose sight of the distinction between legally *precluding* third parties from litigating issues that they have had no prior opportunity to litigate, and the *practical* effect such consent decrees may have on their lives. This question, after all, divided the Court in *Wilks*. It is interesting to contrast the majority's opinion in *Wilks* with the Court's decision in *GTE Sylvania, Inc. v. Consumers Union*<sup>226</sup> nine years earlier.

Consumers Union, Ralph Nader's organization, sought television-related safety information from the Consumer Products Safety Commission (the "Commission") under the Freedom of Information Act ("FOIA").<sup>227</sup> The information had been furnished to the Commission by various manufacturers, including GTE Sylvania.<sup>228</sup> After the Commission notified the manufacturers that it intended to release the requested information, the manufacturers brought several reverse-FOIA actions against the Commission, claiming the information was protected from disclosure by various laws. The manufacturers' cases were consolidated in the Delaware District Court, which ultimately entered a preliminary injunction prohibiting release of the documents.<sup>229</sup> Neither Consumers Union, nor any other party seeking release of the information, was a party to the reverse-FOIA suit. Instead, Consumers Union filed suit seeking the information in the Federal District Court for the District of Columbia.<sup>230</sup> That court denied Consumers Union the information, citing the Delaware court's injunction against its release.<sup>231</sup>

Much of the circuit court's opinion reads like the majority's *Wilks* decision, with one difference: at issue in this case was the preclusive effect of a litigated judgment, not a consent decree.<sup>232</sup> The court said that if the agency or the manufacturer wanted to bind potential FOIA requesters, then it was incumbent upon them to utilize one of the available procedural devices to join would-be requesters or to designate a defendant class of such persons.<sup>233</sup> In the absence of having done so, an injunction that endeavored to cut off the rights of strangers to the litigation was invalid.<sup>234</sup>

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represented challenges the judgment's effect on him."'). Section 108 would be strengthened were the court to make that determination in the course of the initial proceeding.

226. 445 U.S. 375 (1980).

227. 5 U.S.C. § 552 (1988).

228. See *Consumers Union*, 445 U.S. at 377.

229. See *id.* at 377-78.

230. See *id.* at 378.

231. See *id.* at 379.

232. See *Consumers Union v. Consumer Prod. Safety Comm'n*, 590 F.2d 1209, 1217 (D.C. Cir. 1978), *rev'd sub nom.* *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375 (1980).

233. See *id.* at 1220.

234. The court said that without having joined would-be requesters, the injunction should have prohibited only voluntary disclosure by the agency. See *id.* at 1221.



The Supreme Court reversed.<sup>235</sup> Without addressing the question of preclusion, it interpreted the FOIA so as to render Consumers Union's suit moot. Because the Commission was withholding documents under a court order, it was not "improperly withholding" them within the meaning of the FOIA.<sup>236</sup> Therefore, there was no basis for a FOIA claim. "There is nothing in the legislative history to suggest that in adopting the [FOIA] to curb agency discretion to conceal information, Congress intended to require an agency to commit contempt of court in order to release documents."<sup>237</sup>

Thus the Court did not hold that Consumers Union was legally bound by the decision in the reverse-FOIA case. Rather, it held that the legal rights Consumers Union would have had but for the litigation to which it was a stranger were altered although Consumers Union had no voice in that other litigation, and no opportunity to convince the court that issued the injunction that it should have done otherwise.

Ironically, none of the *Wilks* opinions mention *Consumers Union*.<sup>238</sup> This is significant not because *Consumers Union* was right and *Wilks* was wrong. In fact, *Consumers Union*'s result is quite troubling. Taken together, these two cases demonstrate the weakness of the Supreme Court's attempts to moderate the inevitable tension between the need for finality in adjudication, on the one hand, and for meaningful participation by those whose interests are affected by litigation in which they have not participated, on the other.<sup>239</sup> These interests transcend whether a case is resolved by litigated or consent judgment. And while a balancing of these interests may inform any due process analysis of rights, drawing constitutional lines will not vitiate the importance of either interest. Section 108 endeavors to resolve these conflicting interests of finality and fairness, within the limits imposed by due process.

### C. Interpreting Section 108

It is difficult to tell at this early stage what impact section 108's enactment has had on the formation of, and challenges to, consent decrees. As yet, no reported opinions interpret its provisions.<sup>240</sup> Given its potential

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235. See *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375 (1980).

236. See *id.* at 386-87.

237. *Id.* at 387.

238. *Consumers Union* may be distinguished from *Martin v. Wilks*, 490 U.S. 755 (1989), because only *Wilks* was resolved by consent decree. Nothing in the majority's *Wilks* decision, however, suggests that the outcome would have been different had the district court rendered a litigated judgment rather than a consent decree.

239. Although the Court may have been able to justify the outcomes of the two cases based on distinctions between FOIA and Title VII, it would have behooved it to have done so explicitly. Rather, the two cases exemplify how, in the past decade, the Court has more often upheld established interests over those of minority interests.

240. The Court of Appeals for the Sixth Circuit avoided interpreting section 108 by holding that the provisions of the 1991 Act do not apply retroactively. See *Vogel v. City of Cincinnati*, 959 F.2d 594, 598 (6th Cir.), *cert. denied*, 113 S. Ct. 86 (1992). But see *Estate of Reynolds v. Martin*, 985 F.2d 470, 474 n.1 (9th Cir. 1993) (suggesting that the

pitfalls, courts should welcome guidance on how to understand and apply section 108.

Section 108 amends Title VII. Thus it redefines the rights and remedies created by Title VII.<sup>241</sup> In the private sphere, where state action and the Fourteenth Amendment are not an issue, it supersedes any other rights or remedies enacted by Congress, whether arising under Title VII or elsewhere.<sup>242</sup> In the public sphere, section 108 attempts to limit remedies as well.<sup>243</sup> The legitimacy of section 108's provisions demands examination, however, because Congress cannot create substantive rights and unconstitutionally limit process adequate to protect those rights.<sup>244</sup>

The legislation's most significant provisions attempt to limit the right of litigants to challenge employment practices that are the result of consent decrees or litigated judgments where (1) the specific challenger had actual notice and an opportunity to present challenges to the order or decree, or (2) although the specific challenger lacked that opportunity, someone adequately representing the same interests already challenged the judgment or decree.

Section 108 would affect the result in cases like the Eleventh Circuit's

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second clause of subsection 108(n)(2)(A)—that section 108 does not apply to the rights of parties who had successfully intervened in a case prior to the Act's effective date—supports the court's conclusion that the Act be applied retroactively).

241. See, e.g., *Catania & Sullivan*, *supra* note 2, at 1034, n.118 (agreeing that § 108 amends the substantive law).

242. United States Code, Title 42, § 2000e-2(n)(1)(A)-(B) provides specifically, "Notwithstanding any other provision of law . . . [a] practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws [except as therein provided]." 42 U.S.C. § 2000e-2(n)(1)(A)-(B) (Supp. III 1991). Title VII contains other limitations on rights otherwise available as well. For example, the decision of the EEOC or the Attorney General to bring suit pursuant to a complaint filed with the EEOC terminates all rights of the complainant to bring an individual action. See 42 U.S.C. § 2000e-6. See also *EEOC v. Pan Am. World Airways, Inc.*, 897 F.2d 1499, 1509, n.12 (9th Cir.) (noting that ADEA complainants had no right to bring private ADEA actions after the EEOC filed suit), *cert. denied*, 498 U.S. 815 (1990).

243. Recent cases such as *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (refusing to create a *Bivens* cause of action for recovery of money damages arising from an alleged violation of due process rights, which resulted from a denial of Social Security benefits), *Bush v. Lucas*, 462 U.S. 367, 368 (1983) (refusing to create a *Bivens* remedy to redress alleged First Amendment violations against the United States in its capacity as employer), and *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (refusing to create a *Bivens* action to redress alleged constitutional violations against enlisted military personnel) suggest that the Court is likely to defer to Congress' expression in section 108 of what it considers "adequate remedial mechanisms for constitutional violations." *Schweiker*, 487 U.S. at 423. See also *Smith v. Robinson*, 468 U.S. 992, 1009 (1984) (deferring to Congress' establishment in the Education of the Handicapped Act of an exclusive remedy for equal protection violations by publicly-financed schools based on handicap); *Brown v. General Servs. Admin.*, 425 U.S. 820, 835 (1976) (upholding congressional establishment of Title VII as the exclusive remedy for federal employment discrimination claims).

244. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("While the legislature may elect not to confer a property interest . . . , it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.") (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974)), *cert. denied*, 488 U.S. 941 (1988).

*Barfus v. City of Miami*,<sup>245</sup> a case decided only months before section 108 was promulgated. In *Barfus*, the Fraternal Order of Police (FOP) had been a defendant in the earlier action that resulted in a consent decree affecting promotional rights.<sup>246</sup> The court held that because the eight individual non-minority plaintiffs in *Barfus* had never been heard on their own Title VII claims, they were not precluded from pursuing their claims that the City was violating Title VII by denying them promotions in favor of lesser qualified minority employees.<sup>247</sup> The court held that whether the consent decree constituted a defense to their claims was a separate issue.<sup>248</sup> Section 108, however, would bar their claim under Title VII to the extent it challenged employment practices that "implement[ed] and [were] within the scope of . . . [the] consent judgment . . . ."<sup>249</sup> These plaintiffs were persons who either had notice and an opportunity to present objections to the proposed consent decree, or were persons whose interests were adequately represented by the FOP, a party to the earlier action.

What is potentially most controversial about these provisions is whether they will generally satisfy due process constraints.<sup>250</sup> Is section 108's provision for notice and opportunity for participation constitutionally adequate? Is adequacy of representation a constitutionally sufficient substitute for having one's own day in court?

### 1. The Adequacy of Notice and Opportunity to Present Objections

The "actual notice" required by subsection (n)(1)(B)(i)(I) is constitutionally unobjectionable, regardless of the source of that notice. The notice is aimed not at *parties* to the underlying litigation<sup>251</sup> but at persons with some potential interest in the outcome of that litigation, and its purpose is to make them aware that litigation is proceeding that may affect their interests in the future.<sup>252</sup> Thus, as a matter of due process, it does

245. 936 F.2d 1182 (11th Cir. 1991).

246. *See id.* at 1184.

247. *See id.* at 1185.

248. *See id.* at 1189.

We merely hold that the complaint is not an attack upon the consent decree and that the plaintiffs do not seek relief pursuant to the decree. They seek relief under Title VII. Whether the consent decree provides a defense to plaintiffs' allegations of reverse discrimination is for the defendant to establish.

*Id.*

249. 42 U.S.C. § 2000e-2(n)(1)(A) (Supp. III 1991).

250. Although 42 U.S.C. § 2000e-2(n)(2)(D) explicitly states that nothing in that subsection is to be construed to "authorize or permit the denial to any person of the due process of law required by the Constitution," that caveat is not only superfluous, it does nothing but beg the question. *But see* 137 Cong. Rec. H9529 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards) (stating that the purpose of § (n)(2)(D) is to allow for a flexible case-by-case examination of whether due process rights of nonparties are protected).

251. This is made explicit in 42 U.S.C. § 2000e-2(n)(2)(B).

252. As aptly described by Professor Kramer, "[t]he consent decree gives rise to C's claim in the first place." Kramer, *supra* note 36, at 346.

not matter what the source of that notice is.<sup>253</sup> Subsection (n)(1)(B)(i)(I) governs only persons who *actually* receive notice, and does not present the question of the adequacy of notice that was sent but never received.<sup>254</sup>

Probably the aspect of subsection (n)(1)(B)(i)(I) that will generate the most litigation is the question of whether the notice received was "suffi-

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253. See, e.g., *EEOC v. Pan Am. World Airways*, 897 F.2d 1499, 1507-08 (9th Cir.) (finding that notice provided by the EEOC was constitutionally sufficient to apprise potential class members of ADEA class litigation), *cert. denied*, 498 U.S. 815 (1990); *Catania & Sullivan*, *supra* note 2, at 1037 n.127 (agreeing that "it is hard to see how a person who received actual notice could claim a denial of due process even if the system for providing notice were somehow deficient").

Several commentators read *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) as holding that due process requires formal notice to bind parties to a litigated judgment. See, e.g., *Kramer*, *supra* note 36, at 345 (reading *Mullane* to require formal notice, as opposed to notice by newspaper publication, to trust beneficiaries whose identities and whereabouts are known); *Issacharoff*, *supra* note 36, at 227 ("When the affected individuals are readily identifiable, actual notice served personally on the affected individuals is required."); *Strickler*, *supra* note 107, at 1604 ("[N]otice of the decree from any source is insufficient for due process protection under *Mullane* . . ."). I do not read *Mullane* or its progeny to so hold. The issue of whether the trust beneficiaries actually received notice was not addressed in *Mullane*. Rather, their court-appointed representative argued that notice by publication, as authorized by the New York statute and as issued by Central Hanover, did not comport with due process. The Court agreed, not because only formal notice would suffice, but because notice by publication was not reasonably calculated to apprise *anyone* of the pendency of the action. As Professor Bone has written, "publication notice did not satisfy process-oriented values because it did not reflect a sincere effort by the state legislature to reach as many individuals as possible." Bone, *supra* note 143, at 218. Generally, cases striking down notice-by-publication provisions are brought by persons who claim to never have received any notice at all. See, e.g., *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798-800 (1983) (holding that notice by publication and posting are constitutionally deficient to apprise a mortgagee of a pending proceeding to sell mortgaged property for nonpayment of taxes).

Even if *Mullane* had held that formal, as opposed to alternative, sources of *actual* notice was constitutionally mandated to apprise parties of litigation that would legally preclude their interests, it is inapposite in the context of section 108's notice to nonparties. See, e.g., *Kramer*, *supra* note 36, at 346 (arguing that any notice would be sufficient to third parties who are not being legally precluded, but merely practically impacted by decree); *Kramer Testimony*, *supra* note 126, at 465 (analogizing § 6's notice requirements to the commencement of the running of a statute of limitations); *McCoid*, *supra* note 215, at 721 (noting that beneficiaries in *Mullane* were deemed parties to the litigation).

254. Until shortly before its enactment, section 6(m)(1) of the bill contained a subsection (C) that would have precluded challenges to a consent decree or litigated judgment "if the court that entered the judgment or order determine[d] that reasonable efforts were made to provide notice to interested persons." H.R. Conf. Rep. No. 856, 101st Cong., 2d Sess. 5 (1990). This provision was of dubious constitutionality. Its supporters argued that *Mullane* supported its constitutionality, because that case required not *actual* notice, but rather "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. However, the Court relied heavily in *Mullane* on the fact that notice would be received by persons who would adequately represent the interest of others who failed to receive notice. See *id.* at 319. Nonetheless, similar provisions have been upheld in probate or bankruptcy proceedings, justified by the need for finality. See *Kramer Testimony*, *supra* note 126, at 473; see also Susan S. Grover, *The Silenced Majority: Martin v. Wilks and the Legislative Response*, 1992 U. Ill. L. Rev. 43, 60-61 (discussing constitutional issues raised by omitted provision).

cient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person . . . ."<sup>255</sup> The Bush Administration sought to put a spin on this language that would substantially limit its impact, claiming that the

notice itself must make clear that potential adverse effect. . . . Thus, where it is only by later judicial gloss or by the earlier parties' implementation of the judgment or order that the allegedly discriminatory practice becomes clear, Section 11 would not bar a subsequent challenge. Moreover, the adverse effect on the person barred must be a likely or probable one, not a mere possibility. . . . Finally, the notice must include notice of the fact that the person must assert his or her rights or lose them. Otherwise, it will be insufficient to apprise the individual "that such judgment or order might adversely affect" his or her interests.<sup>256</sup>

While all might agree that subsection (n)(1)(B)(i)(I) would not bar a claim by a Birmingham fire department applicant who had read about the consent decree in the newspaper when he was a senior in high school,<sup>257</sup> it is less clear whether it would apply to someone who read the same article while in the process of applying to the fire department. That may depend on how specific the article was about the terms of the proposal. If it explained the affirmative action implications of the decree and how the provisions would operate, that should be sufficient to comply with subsection (n)(1)(B)(i)(I).

As to the ability of the applicant to process that information so as to understand its implications for him personally, a reasonable person standard is appropriate. In the absence of a complete bar to the promotion of non-minorities—which itself would likely render the consent decree invalid<sup>258</sup>—whether the decree would in fact foreclose employment opportunities for our hypothetical newspaper reader would be impossible to determine at this stage. Therefore, the Administration's assertion that the adverse impact must be probable, not merely possible, would largely gut the import of the notice provision and could hardly have been what the majority of legislators who voted for the Civil Rights Act of 1991 intended. Thus the courts should interpret this requirement as the language requires. If the notice apprises the reasonable reader that the decree *might* affect his employment opportunities because he is either an applicant for a position with, or a current employee of, the defendant, and because the decree creates preferential opportunities for others, then the requirements of subsection (n)(1)(B)(i)(I) are satisfied.

Notwithstanding the above, courts should encourage parties to use no-

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255. 42 U.S.C. § 2000e-2(n)(1)(B)(i)(I) (Supp. III 1991).

256. 137 Cong. Rec. S15477 (daily ed. Oct. 30, 1991) (Sen. Dole's section-by-section analysis representing the Bush Administration's views on the Civil Rights Act of 1991) [hereinafter "Dole Analysis"].

257. He might well be barred, however, by subsection (n)(1)(B)(ii).

258. See *supra* notes 61-63 and accompanying text.

tice that is reasonably calculated to reach and inform persons likely to be affected by the decree. If not necessary as a matter of due process, it is nonetheless prudent. The goal of section 108 should be to encourage non-frivolous objections to the proposed decree before the defendant begins its implementation.<sup>259</sup> Although the *Mullane* standards for notice are not constitutionally required for purposes of notifying nonparties to the litigation, they nonetheless provide sound guidance on how to provide notice that is both reasonable and feasible.<sup>260</sup>

More troublesome than the adequacy of notice is evaluating the opportunity to present objections to the judgment or decree. Section 108 explicitly does not affect rules and rights regarding intervention.<sup>261</sup> Thus, whether a party apprised of the decree will be able to intervene in the underlying litigation may be governed by the same standards applied by courts prior to section 108's enactment. Often it has been determinations of untimeliness that have foreclosed third party attempts to intervene at the stage when courts are considering proposed decrees.<sup>262</sup> Such was the case in the Birmingham litigation. Non-minority employees sought to intervene only after their appearance at a fairness hearing.<sup>263</sup> *Wilks* did not suggest that timeliness is an illegitimate or unnecessary requirement for allowing intervention. But *Wilks* did hold that third parties who were not allowed to intervene were subsequently able to challenge the legitimacy of Birmingham's employment discrimination remedies.<sup>264</sup>

Both *Wilks* and section 108 should give courts pause before barring intervention attempts, especially when vested rights are implicated.<sup>265</sup>

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259. See *infra* notes 305-20 and accompanying text.

260. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-17 (1950).

261. See 42 U.S.C. § 2000e-2(n)(B)(2)(A) (Supp. III 1992).

262. See *supra* notes 64-69 and accompanying text.

263. See *Martin v. Wilks*, 490 U.S. 755, 760 (1989).

264. *Id.* at 763-65.

265. Other commentators agree. See Catania & Sullivan, *supra* note 2, at 1044-45 (arguing that § 108 requires rethinking of the timeliness rule); Grover, *supra* note 254, at 71-79 (suggesting revised standards for judging timeliness). A more expansive approach to timeliness was suggested before *Wilks* and § 108 as well. See Kramer, *supra* note 36, at 342-45 (proposing changes for assessing timeliness in attempted intervention in employment discrimination litigation); George Rutherglen, *Procedures and Preferences: Remedies for Employment Discrimination*, 5 Rev. Litig. 73, 111-15 (1986) (discussing *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977) and *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977) and the criteria for assessing timeliness that would support late intervention by challengers).

For an analysis of the other factors that courts might use to assess intervention applications by challengers after section 108, see Grover, *supra* note 254, at 63-70.

Professor Kramer persuasively refutes arguments by some commentators that challengers should only be bound if they are joined in the original litigation under Rule 19. See, e.g., Laycock, *supra* note 3, at 121 ("C should be joined if A or B or the court know or should know . . . that C will be significantly affected by the proposed decree and that he has an arguable legal claim that he cannot be so affected."); Issacharoff, *supra* note 36, at 251-52 (arguing that persons with vested rights must be joined). He argues that it is inefficient to require persons to participate under Rule 19 who have received notice but are not interested in joining in litigation to do so. See Kramer Testimony, *supra* note 126, at 464.

Section 108's acknowledgment that its provisions may not deprive a person of due process of law<sup>266</sup> should be read in conjunction with its provision that it does not affect intervention standards,<sup>267</sup> especially insofar as timeliness determinations are concerned. For if intervention is not an option, there is legitimate concern about whether those notified will have any meaningful opportunity to influence the substance of the decree. A token appearance at a fairness hearing is no substitute for the rights of a party to take discovery, to cross-examine witnesses, to force other litigants to respond to articulated objections and concerns, and to appeal.<sup>268</sup> For persons whose legally vested rights may be affected by the decrees, denial of intervention rights might well raise due process questions.<sup>269</sup> Courts have substantial discretion in making the timeliness determination, and such discretion should be exercised so as to minimize subsequent litigation.

To thwart due process challenges, courts must ensure that objectors have an opportunity to voice their objections commensurate with the implications of the decree for their own employment and promotional prospects.<sup>270</sup> But whether the objectors are employees or only aspirants to employment, and whether or not they are afforded the status of parties, it is imperative that courts take their objections seriously.<sup>271</sup>

## 2. The Adequacy of Representation

Section 108 precludes multiple challenges to employment practices pursuant to consent decrees. According to subsection (n)(1)(B)(ii), B will not be able to challenge the effect of the decree on his employment opportunities if A has already brought such a challenge, and the interests of A and B are substantially the same.<sup>272</sup> Even if A and B are strangers to one another, as long as their challenges present substantially similar facts and are based on the same argument, B is precluded, unless there has been "an intervening change in law or fact."<sup>273</sup> In its section-by-section analysis of what later became section 108, the Administration argued that privity between A and B was required for B to be precluded:

This is because in Section 11 both "(n)(1)(B)(i)" and "(n)(1)(B)(ii)"

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266. See 42 U.S.C. § 2000e-2(n)(2)(D) (Supp. III 1991).

267. See 42 U.S.C. § 2000e-2(n)(2)(A).

268. See, e.g., Issacharoff, *supra* note 36, at 230 ("The right to protest is not an adequate substitute for the right to process."); Weber, *supra* note 209, at 389 (arguing that fairness hearings afford minimal protection to class members); S. Rep. No. 315, 101st Cong., 2d Sess., 115, 116 (1990) (testimony of Glen Nager, Appendix B to minority views in opposition to § 6 of S. 2104) (arguing that the bill's provisions for presenting objections at a hearing fail to provide constitutionally required due process of law).

269. See Issacharoff, *supra* note 36, at 214-36 (arguing for recognition in consent decree litigation of the due process rights of employees who are not covered by the consent decree).

270. See *id.* at 228.

271. See *infra* notes 321-30 and accompanying text.

272. See 42 U.S.C. § 2000e-2(n)(1)(B)(ii) (Supp. III 1991).

273. *Id.*

must be construed with "(n)(2)(D)" so that people's due process rights are not jeopardized. And the Supreme Court has stated clearly: "It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore never had an opportunity to be heard."<sup>274</sup>

If this were what was intended, there would be no reason to have such a provision; obviously a party or a party's privy would be bound, and legislation to this effect would be superfluous. The quoted language ignores the exception to the general rule, articulated in *Hansberry v. Lee*,<sup>275</sup> of representational suits and class actions. Unless privity is used in its conclusory meaning (that is, if there is adequate representation then there is privity), this statement is just plain wrong.

Perhaps the most controversial aspect of subsection (n)(1)(B)(ii) is that persons who never had notice of the consent decree litigation may be precluded. Although controversial,<sup>276</sup> this provision is certainly not unprecedented. As with the question of opportunity to be heard, the due process concerns weigh more heavily on those persons whose legally vested seniority rights are altered by the decree or judgment than on those who suffer only frustrated employment aspirations.<sup>277</sup> Yet even as to those with vested interests, adequacy of representation may well be a constitutionally sufficient substitute for notice and an opportunity to be heard.

As discussed above,<sup>278</sup> adequacy of representation, not notice, is the touchstone of due process for class actions. Under the majority view, persons may be bound by the judgments in class actions of which they had no individual notice as long as their interests received adequate representation.<sup>279</sup> If adequacy of representation without notice to affected class members is constitutionally sufficient for actions arising under Rule

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274. Dole Analysis, *supra* note 256, at S15477 (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979)).

275. 311 U.S. 32 (1940).

276. See generally Laycock, *supra* note 3, at 147-48 (stating that the lesson of *Mullane* is that "when the number of defendants is very large, due process is not satisfied by appointing a representative who proceeds without the knowledge of identifiable individuals among the represented."); Weber, *supra* note 209, (arguing that to bind class members who never had notice of litigation violates due process).

277. Cf. Issacharoff, *supra* note 36, at 228 ("[P]roperty interests in vested employment benefits are considered even more weighty than such fundamental government entitlements as social security and are afforded a strong dose of procedural due process.").

278. See *supra* notes 199-225 and accompanying text.

279. See *supra* note 207 and accompanying text. But see Laycock, *supra* note 3, at 148 ("A number of lower court cases hold that *Mullane* is inapplicable to class actions for injunctive relief. I find these opinions unpersuasive, but I assume they will be followed."); Weber, *supra* note 209, at 380 ("Self-appointed binding representation without mandatory notice and consent is found nowhere but in Rule 23(b)(2) class actions."); *id.* at 384 (arguing that while *Hansberry v. Lee*, 311 U.S. 32 (1940), never addressed constitutional necessity of notice, the Court's opinion in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) stands for the proposition that "[r]epresentative adequacy, notice, and the right to opt out are separate, minimum requirements").



23, then it is constitutionally sufficient to bar subsequent challenges in other kinds of actions as well, especially when legislated as part of a statutory scheme like Title VII.<sup>280</sup>

An appropriate analogy to representative actions is the legislative due process analysis presented in cases such as *Bi-Metallic Investment Co. v. State Board of Equalization*<sup>281</sup> and, more recently, in Justice Blackmun's concurrence in *O'Bannon v. Town Court Nursing Center*.<sup>282</sup> In *Londoner v. City and County of Denver*,<sup>283</sup> the Court had held that Denver property owners whose property fronted on a particular street were entitled to individual hearings before the City Council levied individual tax assessments against them for street repaving.<sup>284</sup> In *Bi-Metallic*, the State Board of Equalization and the Colorado Tax Commission sought to levy a forty percent across-the-board property valuation increase applicable to all taxable property in Denver.<sup>285</sup> The Court distinguished *Londoner* as a case pertaining to only a few people, thus entitling them to individual hearings:

Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. . . . There must be a limit to individual argument in such matters if government is to go on.<sup>286</sup>

Similarly, there must be a limit to challenges to employment discrimination consent decrees if they are to do the work they are intended to do. According to the *Bi-Metallic* Court, the electoral process exists to protect the interests of those who may be injured by legislative enactments.<sup>287</sup> Duly-delegated agencies are deemed to protect those interests as well.<sup>288</sup>

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280. See e.g., *Tribe Testimony*, *supra* note 211, at 558-59 (analogizing § 108's adequacy of representation provision with that of Fed. R. Civ. P. 23 (b)(1) & (b)(2)). In *Martin v. Wilks*, 490 U.S. 755 (1989), the majority noted that "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate pre-existing rights if the scheme is otherwise consistent with due process." *Id.* at 762 n.2. But see S. Rep. 315, 101st Cong., 2d Sess. 90 (1990) (minority view in opposition to S. 2104) ("[T]hese cases involve a great deal more than who gets a bankrupt company's widgets or assets from a common trust fund. This involves equal protection of the laws and freedom from racial discrimination—the most personal of rights.").

281. 239 U.S. 441 (1915).

282. 447 U.S. 773, 799-801 (1980) (Blackmun, J., concurring).

283. 210 U.S. 373 (1908).

284. See *id.* at 385-86.

285. See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 443 (1915).

286. *Id.* at 445.

287. See *id.*

288. See *id.*

Often, that protection is so diluted through our political representational and appointive processes as to be more apparent than real. The kind of representation contemplated in section 108, in contrast, is quite real. Only if a party's interests were *actually*, not merely theoretically, represented will section 108 preclusion apply.<sup>289</sup>

For class actions under Rule 23, the determination of adequacy of representation is made at the outset of the litigation. In other kinds of representational actions, where no such procedural mechanism exists, this determination will be made by the court in which the later litigation is brought, when it considers a defensive argument that preclusion should bar all or part of the subsequent action.<sup>290</sup> Section 108 has created no mechanism for making the adequacy of representation determination at the outset.<sup>291</sup> Furthermore, it is silent as to which party has the burden of proof on the question of adequacy of representation. Normally, when the issue arises for the first time in a subsequent lawsuit, the party seeking to take advantage of preclusion bears the burden of establishing that the party she seeks to preclude was adequately represented in the prior action.<sup>292</sup> However, when a class member seeks to avoid preclusion by challenging the adequacy of representation in an earlier action certified under Rule 23, the dissatisfied class member bears the burden.<sup>293</sup> This makes good sense, given that the class representatives have already assumed the burden of establishing adequacy of representation as part of the class certification process.<sup>294</sup> Although section 108 does not provide

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289. Justice Blackmun's argument in his *O'Bannon v. Town Court Nursing Ctr.* concurrence utilizes this analogy. See 447 U.S. 773, 799-801 (1980) (Blackmun, J., concurring). That case involved an attempt by some nursing home residents to obtain individual hearings on the question of the home's decertification for Medicaid and Medicare reimbursement. The majority found no liberty or property interests entitling the residents to due process. See *id.* at 785. Justice Blackmun disagreed as to the lack of any due process interest, but found that the property interests of the residents had received adequate protection through affording the nursing home a right to challenge the decertification. See *id.* at 797-99. See also Weber, *supra* note 209, at 378-79 (1988) (noting, without embracing, the analogy made by some commentators between due process issues raised by class actions and due process issues as part of the legislative process).

As in *O'Bannon*, there is little or nothing that could be added by any given individual challenger, assuming, as section 108 does, adequacy of representation. Professor Issacharoff's argument that due process requires a full evidentiary hearing for the deprivation of a vested right fails to address this. See Issacharoff, *supra* note 36, at 226-30.

290. See, e.g., McCoid, *supra* note 215, at 716 (noting that, unlike class actions, where adequacy of representation determinations are made at the outset and continually monitored, when made collaterally, "[p]erceived inadequacies in representation cannot be corrected; they can only defeat privacy").

291. One approach currently available, at least theoretically, is designation of a class of intervenors to challenge the decree. See Rutherglen, *supra* note 265, at 117. See also Laycock, *supra* note 3, at 149-52 (suggesting a procedure for joinder of potential challengers as a defendant class). Congress should amend § 108 to provide for an adequacy of representation determination during the underlying proceedings.

292. See Kramer, *supra* note 36, at 351.

293. See *id.*

294. See Fed. R. Civ. P. 23(a)(4), (c)(1); see also Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) ("[T]he Due Process Clause . . . requires that the named plaintiff at

for an adequacy of representation determination to be made in the course of the underlying litigation, it still reflects a legislative judgment favoring representational challenges.

One approach might be to allocate the burden according to the interests affected. Thus, when vested rights under a collective bargaining agreement or other employment contract are affected by a consent decree, the traditional rule would apply. That is, in a subsequent challenge to the consent decree, the burden would be on the employer to establish adequacy of representation. If the later challenge is brought by an applicant or employee with no vested rights, then the burden would be on that person to establish the lack of adequacy of representation.<sup>295</sup> If, however, a determination of adequacy of representation had in fact been made at an appropriate time during the underlying litigation, then the burden should be on the challenger to establish lack of adequate representation in both instances.

Regardless of when made, or who has the burden of proof, courts must ensure the integrity of the adequacy of representation determination. A desire to fend off repeated, protracted litigation must not cloud the court's assessment of whether the issues B raises have in fact been adequately aired by A.<sup>296</sup> Courts must resist the temptation to fictionalize adequacy of representation determinations in furtherance of other agendas.<sup>297</sup>

In issuing orders and approving consent decrees in Title VII systemic employment discrimination litigation, courts should use section 108 as a road map to steer a fair and efficient course that not only protects the interests of the parties before it, but endeavors to safeguard the interests of other persons who may be adversely affected by the decree.<sup>298</sup> Not only will this enable the court to avoid offending due process, it will help ensure a process that, even if not constitutionally mandated, best protects the legitimate interests of all concerned. Courts can do this by facilitat-

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all times adequately represent the interests of the absent class members."); *Hansberry v. Lee*, 311 U.S. 32, 42-43, 45 (1940) (holding that due process demands that class representatives adequately represent absent class members).

295. Professor Kramer argues that the allocation of the burden is not critical, because the reported cases in which third parties have been precluded from challenging consent decrees based on adequacy of representation have not been close on this issue. *See* Kramer, *supra* note 36, at 351-52. While that may be so as a matter of historical fact, the creation of a statutory bar based on adequacy of representation may generate not only more litigation on this question, but more close cases.

296. *See, e.g., Laycock, supra* note 3, at 147 (analogizing to the *Hansberry* problem and arguing that a union is not an adequate representative because it is charged with representing all employees within it).

297. *See, e.g., McCoid, supra* note 215, at 716 (discussing the assessment of adequacy of representation).

298. *See* S. Rep. No. 315, 101st Cong., 2d Sess. 50 (1990). "Subsection 703(m)(1) does not require a court, *sua sponte*, to use any of the procedures set forth therein before adopting a decree resolving a Title VII case. But where the requirements of subsection 703(m)(1) have been met, the provision bars subsequent challenges to the decree, except under certain circumstances." *Id.*

ing the dissemination of notice to all persons who have potentially legitimate interests in questioning the provisions of the decree. Further, the notice should be reasonably calculated to reach such persons and should afford a meaningful opportunity to challenge the decree's provisions. This opportunity may be provided either by liberally allowing party-status intervention<sup>299</sup> or by holding fairness hearings that are genuinely fair.<sup>300</sup>

With section 108 and common sense as guidance, courts overseeing the adjudication of systemic employment discrimination litigation can do a great deal to discourage unnecessary, repetitive litigation, and provide a reasonable degree of certainty for employers and employees to structure their relationships. But they cannot, and should not, foreclose the possibility of all subsequent challenges. When such cases are brought, as inevitably they will be, due process requires that the second court<sup>301</sup> take a hard look, not only to determine whether changed circumstances or changed laws warrant entertaining the challenge, but also to ensure that the critical elements for due process have been satisfied by the prior litigation. This need not, and in most instances, should not, mean additional full-blown litigation and evidentiary hearings. When the original court has conducted a proceeding in conformity with the requirements of subsection (n)(1)(B), the burden should be on the plaintiff in the second litigation to establish why he is entitled to go forward.<sup>302</sup> Hopefully, when the earlier court has endeavored to ensure adequacy of notice and representation, most challenges will be disposed of through some kind of summary proceeding.<sup>303</sup> But whether the requirements of due process have been satisfied must ultimately be determined case-by-case.<sup>304</sup>

### III. WHERE WE GO FROM HERE

Section 108 has made important strides toward maximizing the efficiency and fairness of employment discrimination consent decrees. Courts have substantial discretion to implement section 108 in ways

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299. See *infra* notes 321-30 and accompanying text.

300. See *infra* notes 305-20 and accompanying text.

301. Section 108 provides that "[a]ny action not precluded under this subsection" relating to an employment discrimination judgment or consent decree "shall be brought in the court, and if possible before the judge, that entered such judgment or order." 42 U.S.C. § 2000e-2(n)(3) (Supp. III 1991). Although having the judge who originally heard the case certainly makes sense from an efficiency perspective, there is substantial doubt as to whether a judge so vested in the original resolution reached can be objective in assessing the legitimacy of the challenge. Compare Kramer, *supra* note 36, at 333-34 (arguing that the same judge should hear the second challenge) with Resnik, *supra* note 30, at 97 (questioning the objectivity of a judge who helped fashion the settlement to entertain criticisms).

302. See *supra* notes 292-95 and accompanying text.

303. See Laycock, *supra* note 3, at 134 (arguing that allowing third party challenges to consent decrees may not necessitate trials).

304. Cf. Weber, *supra* note 209, at 401 nn.214-15 (citing several cases that have refused to apply preclusion in 23(b)(2) class actions).

more or less sensitive to these interests. Congress should have gone further, however, to help direct and limit the exercise of this discretion. First, Congress ought to require courts to hold meaningful fairness hearings. Second, Congress should encourage expansive use of intervention. These are procedural improvements. Substantively, Congress and the Court should remove their colorblindness in formulating reasonable standards for affirmative action plans.

### A. *Requiring Fairness Hearings*

Professor Maimon Schwarzschild has argued persuasively in favor of requiring courts to hold fairness hearings prior to approval of public law consent decrees.<sup>305</sup> Although courts will hold such hearings before approving class action settlements,<sup>306</sup> there is no requirement that they invite participants other than class members, and there is no requirement that they hold them at all in non-class action litigation.<sup>307</sup> I endorse Professor Schwarzschild's basic thesis, but would go further. Courts should hold such open hearings prior to rendering judgments in litigated cases, as well as in cases headed towards consent decrees, where their orders are likely to have a substantial impact on the lives of persons not parties to the litigation. Despite concern that this blurs the distinction between the judicial and legislative process, the benefits warrant this hybrid procedure. When courts act in ways that have ongoing impact on the lives of people and institutions, then they are acting like legislatures and would benefit by increasing the information available to them before rendering such decisions. Judges presiding over systemic employment discrimination litigation should have an opportunity to hear the stories of the people their decisions will affect,<sup>308</sup> and these people include nonparties. Assuming good judges operating in good faith, this should enhance the likelihood of just decision making.

As to those cases moving towards consent decrees, I disagree with what Professor Schwarzschild views as fair game at the fairness hearing.

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305. See Schwarzschild, *supra* note 32. But see Kramer, *supra* note 36, at 359-64 (arguing against the utility of fairness hearings).

306. See Schwarzschild, *supra* note 32, at 914 (arguing that class members should be given the right to present views on remedies, but not on the underlying merits of the case).

307. Professor Kramer states that "[p]resently, all courts hold a fairness hearing before entering a consent decree," Kramer, *supra* note 36, at 358, but offers indeterminate evidence to support his assertion. See *id.* at 358 n.154.

308. There is a growing literature about the value of empathy and "storytelling" in litigation. See, e.g., Patricia A. Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. Cal. L. Rev. 1945, 1954 (1988) ("[W]e want . . . lawyers who can tell their clients' stories, . . . help judges to see the parties as human beings, and who can help remove the separation between judge and litigant. And . . . what we want from our judges is a special ability to listen with connection before engaging in the separation that accompanies judgment."); Martha L. Minow and Elizabeth V. Spelman, *Passion for Justice*, 10 Cardozo L. Rev. 37, 50-51 (1988) (suggesting multiple criteria for empathetic judging, including the attempt to "take the perspective of all parties before the court prior to reaching a decision").

He would limit the discourse to the appropriateness of the remedy, keeping the issue of underlying violations out of bounds for discussion.<sup>309</sup> I think this is problematic. Participants should be allowed to present evidence on the questions appropriate to the ultimate substantive standards for review of the consent decree. Currently, that is whether a problem in significant underrepresentation exists and whether the decree is narrowly drawn to address that problem.<sup>310</sup> If a principal concern is collusive consent decrees, or decrees rendered in the absence of a problem requiring a remedy, then it makes no sense to consider the alleged discriminatory practices out of bounds.<sup>311</sup> While nonparty participants should not be able to force the court or the parties to litigate the underlying violation, an exploration of the reasonableness of the basis for the consent decree is nonetheless appropriate.<sup>312</sup>

Courts have long supported participation rights of interested parties in agency adjudication. They countered concern over an opening of the floodgates with the admonition that agencies might reasonably limit participation so as to avoid unmanageability and redundancy of evidence and argument.<sup>313</sup> Similarly, courts can manage participation at fairness hearings, especially given section 108's representational action provisions. The ultimate goal is that competing, non-frivolous viewpoints and visions receive adequate consideration, not that everyone have an opportunity to participate personally.

It is unlikely that a court supportive of resolving an employment discrimination case will change its position merely because some angry citizens have voiced their outrage.<sup>314</sup> But constructive suggestions by those citizens as to how the needs of all affected persons might be met better

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309. See Schwarzschild, *supra* note 32, at 923, 932-33. Professor Strickler has also observed:

In the *Martin v. Wilks* situation, it would not seem proper for the intervenor to be allowed to contend that the employer had not discriminated in the past if the employer wished to settle on the merits of the plaintiffs' claims. At a minimum, however, the intervenor must be able to claim that the settlement struck by the original parties is not necessary to cure past discrimination or that implementation of the settlement would violate the intervenor's legal rights.

Strickler, *supra* note 107, at 1589, n.138.

310. See *supra* notes 61-63 and accompanying text.

311. See, e.g., Laycock, *supra* note 3, at 107-08 (arguing that fairness hearings that give substantial weight to the consent of A and B do not provide adequate protection of C's rights).

312. Other commentators agree. See Rutherglen, *supra* note 265, at 104, 114-15 n.170; Grover, *supra* note 254, at 92, 98 n.256.

313. See, e.g., National Welfare Rights Org. v. Finch, 429 F.2d 725, 738 (D.C. Cir. 1970) ("Efficient and expeditious hearings should be achieved, not by excluding parties who have a right to participate, but by controlling the proceeding so that all participants are required to adhere to the issues and to refrain from introducing cumulative or irrelevant evidence.") (citing Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 265 F.2d 364, 367 n.1 (1959)).

314. See, e.g., Resnik, *supra* note 30, at 97 (questioning judges' ability to assess the adequacy of settlement at all given their investments in the settlement process).

might help the court and the parties formulate a more just plan,<sup>315</sup> and decrease the likelihood that the plan will be overturned on appeal. Thus it is in a trial court's interest to have its plans carefully and thoroughly critiqued before finalization.<sup>316</sup> Perhaps this is a dominant reason why some judges will hold fairness hearings even when not required by rule or statute to do so.<sup>317</sup>

But ensuring that a fairness hearing is held does not ensure that it will in fact be fair. Professor Schwarzschild has offered a number of valuable suggestions toward this end as well. These include (1) published notice prior to approval of decrees; (2) hearings that are open to nonparties and class members, and that afford third parties the right to limited intervention to afford participation and a basis for appeal; (3) a right to comment by affected unions; (4) hearings that are sufficiently detailed, but not so as to delay or allow retrial of the underlying allegations of discrimination; and (5) explanations by the courts for their decisions and reasons that respond to the objections raised.<sup>318</sup> Any concerns that formalizing the process to this degree will scare off would-be conciliators is more than offset by the enhanced legitimacy that consent decrees will garner, a le-

315. See *id.* at 98.

Judges are in the business of pressing litigants to compromise, not of assessing—based upon probing inquiries—the quality of the bargains made. The fact of judicial involvement in negotiations, in and of itself, provides no particular information about the quality of the settlements reached.

*Id.* See also Kramer, *supra* note 36, at 364 (arguing that there is no judicial stake in consent decrees; they are just another way courts facilitate settlement).

Professor Schwarzschild presents an alternative vision, contrasting the value of the judge's input in the consent decree in a case with which she has had little or no experience with a case where the trial judge had had several years experience with the case and had issued a series of preliminary orders. See Schwarzschild, *supra* note 32, at 912-13 (citing *Officers for Justice v. Civil Serv. Comm'n*, 473 F. Supp. 801 (N.D. Cal. 1979), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983)).

In a sense, a case like *Officers for Justice* has the best of all worlds: the judge is well informed about all the circumstances and he has a good basis for weighing the costs and benefits of various remedial measures, yet it is the parties who formulate the decree; the federal judge need not unilaterally tell the City of San Francisco how to run its police department. The trouble is that *Officers for Justice* required six years from the filing of the complaint to the entry of the consent decree.

*Id.*

When the judge had not had such extensive experience with the case, see *id.* at 913, the need for input from alternative sources is even stronger than in a case like *Officers for Justice*.

316. See, e.g., Grover, *supra* note 254, at 101-03 (suggesting how the trial court should attempt to safeguard the interests of absentees before approving a consent decree).

317. See, e.g., *San Francisco Police Officers' Ass'n v. City of San Francisco*, 812 F.2d 1125, 1128 (9th Cir. 1987) (voluntarily holding a fairness hearing); *Dennison v. City of Los Angeles Dep't of Water & Power*, 658 F.2d 694, 695 (9th Cir. 1981) (conducting a "Fairness Hearing to allow persons who had previously submitted written objections to the consent decree the opportunity to present orally their objections to the court").

318. See Schwarzschild, *supra* note 32, at 929-30. Professor Schwarzschild envisions a proceeding not unlike notice and comment rulemaking under the federal Administrative Procedure Act, 5 U.S.C. § 553(b). See *id.* at 930-31.

gitimacy needing revitalization in the post-*Wilks* world.<sup>319</sup> The goal, after all, is not settlement but justice.<sup>320</sup>

### B. *Facilitating Intervention and the Right to Appeal*

Appellate review provides a critical check on the fairness of employment discrimination cases resolved by consent decree. In cases resolved by litigated judgment, we can count on the aggrieved party to appeal. There is no similarly aggrieved party in cases resolved by consent.<sup>321</sup> As suggested above,<sup>322</sup> intervention ought to be freely allowed to protect the interests of third parties. The section 108 procedures are an alternative to mandatory joinder.<sup>323</sup> Mandatory joinder would give the affected persons status to appeal; section 108 should, too. Whether or not constitutionally compelled, doing so would be sound policy and would avoid the constitutional confrontation that otherwise would likely result. It behooves Congress to amend section 108 to facilitate intervention, even at the fairness hearing stage, in order to afford appellate review of consent decrees.<sup>324</sup>

By barring challenges to employment practices pursuant to decrees by those who have received notice and an opportunity to present objections, section 108 obliquely creates an *obligation* to intervene, where none existed before. But in order to avoid resurrection of the *Wilks* argument that the failure to intervene does not preclude a third party from having his due process right to a day in court,<sup>325</sup> section 108 should explicitly state that failure to intervene upon receipt of subsection (n)(1)(B)(i) notice constitutes a waiver of one's right to challenge later the employment practices described in (n)(1)(A).<sup>326</sup>

319. See, e.g., *id.* at 932 (acknowledging as risks of formalization that proceedings will become more adversarial, less conciliatory, and may diminish parties' desire to settle).

320. See *supra* text accompanying note 156. See also Schwarzschild, *supra* note 32, at 935 ("Greater procedural openness and more judicial oversight might . . . lead to a better focused view of which minority groups should receive preferences, for what kinds of jobs, and with what objectives in mind. It might also help reconcile whites and other objectors to the propriety of the remedies the courts approve.") (footnote omitted).

321. See, e.g., *Marino v. Ortiz*, 484 U.S. 301 (1988) (holding that nonparties may not appeal a consent decree and must seek to intervene in order to appeal), *cert. denied*, 495 U.S. 931 (1990).

322. See *supra* notes 261-71 and accompanying text.

323. See, e.g., *Martin v. Wilks*, 490 U.S. 755, 765 (1989) ("Joinder as a party [under Fed.R. Civ. P. 19], rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree.").

324. See, e.g., Laycock, *supra* note 3, at 112 (criticizing *Local Number 93* as countermanding the purpose of revised Rule 24(a), intervention as of right); Issacharoff, *supra* note 36, at 250 (arguing that incumbent employees must be afforded full participation rights if they are to be subsequently precluded from challenging consent decree provisions).

325. See 42 U.S.C. § 2000e-2(n)(2)(D) (Supp. III 1991).

326. Despite Justice Brandeis' statement in *Chase Nat'l Bank v. City of Norwalk*, 291 U.S. 431, 441 (1934), cited in *Martin*, 490 U.S. at 763, that "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a



In addition, intervention must not be used to frustrate the formation of consent decrees. Despite concern that allowing intervention by third parties might do just that, *Local Number 93* made clear that an intervenor cannot prevent other consenting parties from resolving their differences.<sup>327</sup> The goal of intervention should be to ensure that the trial court fully considers the fairness of the decree<sup>328</sup> and to afford expedient appellate review of the trial court's determination,<sup>329</sup> not to subvert the utility of consent decrees in eradicating employment discrimination.<sup>330</sup>

### C. *Recognizing The Substance of Color*

Beyond these procedural improvements, Congress and the Supreme Court must acknowledge the relevance of race.<sup>331</sup> Discrimination against white majority employees is *not* the same as discrimination against their minority counterparts.<sup>332</sup> What is striking in so many em-

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suit to which he is a stranger," there is widespread agreement that such an obligation can be created by law or rule. See, e.g., Cooper, *supra* note 51, at 171-72 (acknowledging the constitutionality of mandatory intervention); McCoid, *supra* note 215, at 718-19 (noting recent cases upholding mandatory intervention); Strickler, *supra* note 107, at 1582 ("there is no constitutional barrier to a rule of preclusion that effectively mandates intervention in order to protect one's rights . . ."). It is hard to see why requiring intervention to protect one's legal rights is any more constitutionally problematic than requiring the assertion of a compulsory counterclaim under Fed. R. Civ. P. 13(a). For a discussion of this "preclusion by rule," see Gene R. Shreve & Peter Raven-Hansen, Understanding Civil Procedure § 108[C] (1989).

327. See *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 528-29 (1986).

328. See Kramer, *supra* note 36, at 355.

The right to intervene may prove valuable if *A* and *B* do not settle, as the intervenor's right to put in evidence, cross-examine witnesses and generally make its concerns known to the court may influence the shape of any remedy finally awarded. If *A* and *B* wish to settle, however, *C* cannot prevent them from doing so; *C* can only force an adjudication of claims that *C* could have raised in a separate lawsuit.

*Id.* I would add that even if *A* and *B* do settle, *C* has a better chance of influencing the shape of the consent decree if he participates with the rights of a party than if he merely makes his voice heard at a fairness hearing held late in the negotiation process.

329. Cf. *Ragsdale v. Turnock*, 941 F.2d 501, 512 (7th Cir. 1991) (Flaum, J., concurring in part and dissenting in part) (arguing in favor of allowing class members to appeal the settlement of a class action because the trial court's inquiry into the settlement's fairness was inadequate, in order to expedite an inquiry into the validity of the consent decree), *cert. denied*, 112 S. Ct. 879 (1992).

330. See, e.g., Schwarzschild, *supra* note 32, at 923 (arguing for a limited right of intervention on the reasonableness of a consent decree's provisions only). But see Laycock, *supra* note 3, at 131 (arguing against the approval of consent decrees without the affected third parties' consent).

331. I cannot claim to do justice to this issue in this Article. Nevertheless, the integral relationship between procedure and substance compels me to mention, albeit briefly, the substantive issues of racial discrimination raised by third party challenges to employment discrimination consent decrees.

332. Changes in the membership of the Court have resulted in decisions of diminishing sensitivity to this fact. Compare *United Steelworkers of America v. Weber*, 443 U.S. 193, 201 (1979) (refusing to give a literal reading to §§ 703(a) and (d), which would have invalidated the Kaiser Aluminum plan, and frustrated the purpose of Title VII) with *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (striking down a collective bargain-

ployment discrimination cases allegedly involving procedural rights is the gross underrepresentation of minority employees in the ranks of police and fire departments, especially at higher levels.<sup>333</sup> This underrepresentation is largely inexplicable other than as the legacy of a history of exclusion on the basis of skin color. The malignancy and pervasiveness of this phenomenon frequently eludes notice when the Court focuses only on process issues in a particular case involving a single municipality.<sup>334</sup>

A decree that seeks to even the playing field by reversing that exclu-

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ing agreement provision designed to afford some protection against lay-offs to newly-hired minorities) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (striking down a government set-aside program for minority contractors). See also Sullivan, *supra* note 148, at 93 ("[The Court] might have held that because American racism has left blacks an underclass, still systematically disadvantaged as a group compared with whites, no black is not a 'victim' of past discrimination. Under such an approach, all blacks are appropriate beneficiaries of affirmative action's 'compensation.' No opinion [in the 1986] Term, however, chose such a route.").

333. See, e.g., *Billish v. City of Chicago*, 962 F.2d 1269, 1273 (7th Cir. 1992) (finding that, at the time the complaint was filed, minorities comprised less than 5% of the department's fire fighters); *Stuart v. Roache*, 951 F.2d 446, 450 (1st Cir. 1991) (noting that, at the time the original complaint was filed, only one of 222 sergeants in the Boston Police Department were black, despite the fact that 72 were eligible for promotion), *cert. denied* 112 S. Ct. 1448 (1992); *Davis v. City & County of San Francisco*, 890 F.2d 1438, 1442 (9th Cir. 1989) (noting that, until 1955, department hired no black fire fighters), *cert. denied*, 498 U.S. 897 (1990); *Henry v. City of Gadsden*, 715 F. Supp. 1065, 1066 (N.D. Ala. 1989) (finding that, prior to consent decree, there had never been a black fire fighter in Gadsden), *aff'd in part and rev'd in part without published opinion*, 909 F.2d 1491 (11th Cir. 1990). See also *The Civil Rights Act of 1990: Hearing on S. 2104 Before the Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 712-15 (1989) (written statement of the Lawyers' Committee for Civil Rights Under Law) (describing the egregious nature of discriminatory practices in Birmingham).

334. The majority opinion *Martin v. Wilks*, 490 U.S. 755 (1989), barely acknowledged that the Birmingham consent decree was aimed at addressing a history of discrimination against minorities. In support of barring consent decrees that lack the consent of affected third parties, Professor Laycock argues:

[F]ew defendants will consent to the maximum liability that might be imposed if they go to trial. There is nothing illegitimate, racist, or selfish about white employees negotiating the same way. If plaintiffs want the full [potential recovery], they should prove their case and bear the risks of trial like any other litigant.

Laycock, *supra* note 3, at 145.

But a settlement in a run of the mill case is *not* the same as a settlement in an employment discrimination case, and there are numerous reasons to argue that plaintiffs should *not* necessarily settle for less just because the case is not headed towards a litigated judgment. The value of settlement in such cases must be measured in terms other than dollars. See *supra* text accompanying notes 52-54. Professor Laycock's analysis suffers from the same problem as the majority's opinion in *Wilks*. It removes all context, color, and nuance from the problem. It is a colorblind, value-blind analysis. Professor Issacharoff, on the other hand, succeeds both in acknowledging the history of discrimination against minorities in Birmingham that formed the predicate for the litigation, see Issacharoff, *supra* note 36, at 195, 219-20, and in capturing the stories of the white firefighters in his defense of *Wilks*, see *id.* at 220. But he fails to distinguish between the quality of different treatment suffered by the incumbent and aspiring minority firefighters, compared to that experienced by the majority employees.

sion is entitled to a presumption of regularity, a presumption that it was executed in good faith, for good reasons. The burden must be on the majority challenger to prove the invalidity of such a program.<sup>335</sup> We have inherited an unfortunate view of race. Distinctions based on race should only be seen as invidious if the reasons for the distinction are invidious under contemporary moral standards. There is nothing immoral, and therefore nothing invidious, in government programs aimed at compensating for a national history of discrimination.<sup>336</sup> While it is appropriate that our laws prohibit wrongful discrimination against white people, as well as black,<sup>337</sup> the level of scrutiny as to what is wrongful should relate to the actual, not theoretical, invidiousness of the discrimination.<sup>338</sup>

Enhanced procedural opportunities for third party challengers must *not* result in substantive regression in the protection of minority rights.<sup>339</sup> I suggest that the greater the procedural protections for non-minorities, the greater the deference courts should give to state and local programs

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335. See, e.g., *Wygant*, 476 U.S. at 277-78 (holding that the ultimate burden to challenge a voluntary affirmative action plan rests with challengers); *id.* at 292-93 (O'Connor, J., concurring in part) (arguing that challengers bear the burden of proving that an affirmative action plan fails constitutional standards).

336. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 561 (1989) (Blackmun, J., dissenting).

I never thought that I would live to see the day when the city of Richmond, Virginia, the cradle of the Old Confederacy, sought on its own, within a narrow confine, to lessen the stark impact of persistent discrimination. But Richmond, to its great credit, acted. Yet this Court, the supposed bastion of equality, strikes down Richmond's efforts as though discrimination had never existed or was not demonstrated in this particular litigation.

*Id.* See also Sullivan, *supra* note 148, at 96 (stating that there are many reasons why public and private employers may choose to implement affirmative action plans, other than as remedies for past discrimination, such as to improve the quality of education, services to minority constituents, ameliorate or avert racial tension over allocation of jobs, or eliminate a de facto racial caste system. "All of these reasons aspire to a racially integrated future, but none reduces to 'racial balancing for its own sake.'").

337. See, e.g., *United Steelworkers of America v. Weber*, 443 U.S. 193, 200-01 (1979) (holding that Title VII prohibits discrimination against whites as well as blacks).

338. See, e.g., John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 727 (1974) ("'[S]pecial scrutiny' is not appropriate when White people have decided to favor Black people at the expense of White people. . . . [I]t is not 'suspect' in a constitutional sense for a majority, any majority, to discriminate against itself."). See also Laurence H. Tribe, "In What Vision of the Constitution Must the Law be Color-Blind?", 20 J. Marshall L. Rev. 201 (1986) (arguing precedential justification for lesser scrutiny of affirmative action plans). Such assumptions are valid at least as long as previously oppressed groups retain minority political power. When those who previously were in the minority become the majority, distinctions based on race become more complicated. See, e.g., *Croson*, 488 U.S. at 495 (plurality opinion) (stating that the fact that blacks occupied a political majority at time of the City's implementation of a minority set-aside plan benefiting non-whites argued in favor of heightened judicial scrutiny). It is beyond the scope of this Article to resolve such complications.

339. A number of excellent commentators on the procedural problems involving consent decrees avoid addressing the substantive doctrinal considerations at all. See e.g., Kramer, *supra* note 36.

designed to eradicate discrimination.<sup>340</sup> The success of such programs should be measured by whether they ultimately achieve equality of opportunity and effect. As the procedural rules change, so should the standards for assessing the lawfulness of consent decrees and voluntary affirmative action plans.<sup>341</sup>

### CONCLUSION

In *Martin v. Wilks*,<sup>342</sup> the Supreme Court responded to pervasive criticism that in their zealotry to resolve systemic employment discrimination cases by consent decrees, lower courts ignored the legitimate concerns of nonparty, white employees. But the *Wilks* decision suffered from an insensitivity to the pervasive problems of discrimination against minorities that formed the context for the challenged consent decrees. In addressing procedure, it lost sight of substance. Congress responded appropriately by enacting legislation aimed at maximizing the utility of consent decrees in resolving employment discrimination litigation, while simultaneously protecting the reasonable interests of third parties. Section 108, however, is not without its own hazards. Judges who preside over employment discrimination litigation, and judges faced with subsequent challenges to such litigation, must strive to interpret section 108 in a manner that is sensitive both to the history of discrimination against minorities, as well as to the rightful interests of majority employees and aspirants to employment. If used well, this discretion can maximize the utility and minimize the burdens of consent decrees. Congress, however, should enrich section 108 to achieve these twin goals, both by requiring that courts contemplating consent decrees in employment litigation hold meaningful fairness hearings, and by liberalizing opportunities for intervention by interested third parties.

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340. Cf. Schwarzschild, *supra* note 32, at 893 (acknowledging the discretionary nature of choices among the range of possible remedial plans "because no particular policy choice for the future follows automatically from the employer's past violation of Title VII").

341. Neither *Martin v. Wilks*, 490 U.S. 755 (1989) nor § 108 addresses the substantive standards to be applied. While it is beyond the scope of this Article to formulate such standards, many others have attempted to do so. See, e.g., Sullivan, *supra* note 148, at 96-97 (arguing in favor of forward-looking, rather than remedial, rationales for affirmative action plans).

342. 490 U.S. 755 (1989).

