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When Substance Mandates Procedure: Martin v. Wilks and the Rights of Vested Incumbents in Civil Rights Consent Decrees

Samuel Issacharoff

WHEN SUBSTANCE MANDATES PROCEDURE: *MARTIN v. WILKS* AND THE RIGHTS OF VESTED INCUMBENTS IN CIVIL RIGHTS CONSENT DECREES

Samuel Issacharoff †

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† Assistant Professor, The University of Texas School of Law. B.A. 1975, SUNY at Binghamton; J.D. 1983, Yale Law School. I am thankful for the comments of Alexander Aleinikoff, Jack Balkin, Cynthia Estlund, Jack Getman, Larry Kramer, Douglas Laycock, Sanford Levinson, Geoffrey Miller, Scot Powe, David Rabban, Charles Silver, Jordan Steiker, Louise Weinberg, and Jay Westbrook; for the research assistance of Cynthia Dooley, Shawn Fitzpatrick, and Noel Plummer; and for the library assistance of David Gunn. The views expressed are mine and should not necessarily be attributed to anyone whose help I acknowledge.

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I
INTRODUCTION

The 1988 Term of the Supreme Court marked a watershed event in the development of civil rights law,[1] particularly as it applies to employment discrimination.[2] In a series of cases that assertively introduced the new jurisprudence of the Rehnquist-Scalia era, the Supreme Court decisively recast the burdens of proof upon civil rights plaintiffs;[3] the scope of statutory protections against racial harassment;[4] the procedural hurdles to the vindication of civil rights claims;[5] and most notably, the permissible limits of local governmental efforts to benefit minority opportunity.[6]

These developments brought to a close the emergence of a doctrine that sought to balance the claims of civil rights plaintiffs for equality and desegregation against the claims of those dispreferred individuals who would not benefit under remedial schemes and who would, to some extent, be forced to bear the cost for redressing past discrimination.[7] In place of the balance that characterized the Supreme Court's difficult and divided holdings in the affirmative action cases of the past decade, the Rehnquist-Scalia wing of the Court recast remedial race-conscious programs into the mold of increas-

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1 As Julius Chambers, the Director-Counsel of the NAACP Legal Defense and Education Fund, cogently expressed, "This was one of the worst terms of Court that we have experienced in our lifetime and it has been and will be devastating to victims of employment discrimination." Julius L. Chambers, *Twenty-Five Years of the Civil Rights Act: History and Promise*, 25 WAKE FOREST L. REV. 159, 173 (1990).

2 In the words of the defeated Civil Rights Act of 1990, "Congress finds that . . . in a series of recent decisions addressing employment discrimination claims under Federal law, the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protections . . . ." H.R. 4000, S. 2104, 101st Cong., 2d Sess. § 2(a)(1) (1990). *See* Charles S. Ralston, *Court v. Congress: Judicial Interpretation of the Civil Rights Acts and Congressional Response*, 8 YALE L. & POL'Y REV. 205, 205 (1990) (attributing civil rights reverses to seven decisions handed down over an eight-week period in the summer of 1989). Despite the defeat of the 1990 Act, the same need "to provide additional protections against unlawful discrimination in employment" was echoed in the 1991 Act. Civil Rights Act of 1991, Pub. L. No. 102-166, § 2(3) (1991).

3 *See* Wards Cove Packing v. Atonio, 490 U.S. 642 (1989); *see generally* Kenni F. Judd, *Burdens of Proof Under Title VII in the 90's:* Wards Cove *vs. the Civil Rights Act of 1990*, 15 NOVA L. REV. 67 (1991).

4 *See* Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Jett v. Dallas Indep. Sch. Dist., 491 U.S. 201 (1989).

5 *See* Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989).

6 *See* City of Richmond v. J.A. Croson Co., 490 U.S. 469 (1989).

7 *See* Richard H. Fallon & Paul C. Weiler, Firefighters v. Stotts: *Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1, 58; *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 (1986) (citing Fallon & Weiler for this proposition); Joel L. Selig, *Affirmative Action in Employment: The Legacy of a Supreme Court Majority*, 63 IND. L.J. 301, 306 (1988) (referring to this doctrinal balance as the Brennan-Powell legacy).

ingly impermissible quotas and rejected the claims of groups that had been victims of past discrimination.[8]

The Supreme Court's turnaround on civil rights has provoked the greatest disjuncture between contemporary practices and doctrinal law since *Brown v. Board of Education*.[9] Innumerable everyday practices designed to advance minorities and women in the workforce are now subject to challenge on the grounds of claimed reverse discrimination or impermissible use of racial or gender classifications.[10] The disjuncture came to an early head with the vetoed Civil Rights Act of 1990,[11] and the ultimately successful Civil

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8 *See, e.g.*, Johnson v. Transportation Agency, 480 U.S. 616, 658 (1987) (Scalia, J., dissenting).

9 347 U.S. 483 (1954). For discussions of "massive resistance" to desegregation, see J. HARVIE WILKINSON III, FROM BROWN TO BAKKE 61-127 (1978); Charles L. Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 22 (1970).

10 Affirmative steps to integrate the workforce have increasingly become the norm in institutional employment, both public and private. Measures range from directed recruitment programs such as IBM's collaboration with local Urban League chapters in order to specially tailor minority recruitment efforts, *see* HUDSON INSTITUTE, OPPORTUNITY 2000: CREATIVE AFFIRMATIVE ACTION STRATEGIES FOR A CHANGING WORKFORCE 88 (1988), to formalized preferences for candidates from underrepresented groups in the workforce like those applied by Santa Clara County, California, *see Johnson*, 480 U.S. at 616-17, to the maintenance of separate pools of applicants or "race-norming" or "within-group scoring" applicant credentials in order to draw a diverse workforce, *see* Linda S. Blits & Jan H. Gottfredson, *Employment Testing and Job Performance*, PUB. INTEREST, Winter 1990, at 18, 20. The latter practice has now come under attack in proposed regulations of the Department of Labor aimed at scrapping the General Aptitude Test Battery (GATB), the Labor Department's 1981 test that first gave rise to formal within-group scoring mechanisms. *See* 55 Fed. Reg. 30162 (1990) (proposed July 18, 1990) (proposing withdrawal of GATB testing system); Timothy Noah, *Job Tests Scored on Racial Curve Stir Controversy*, WALL ST. J., Apr. 26, 1991, at B1. *See generally* Phyllis A. Wallace, *Affirmative Action from a Labor Market Perspective*, Testimony before the Committee on the Judiciary, House of Representatives, 101st Cong., 2d. Sess. 756 (March 20, 1990); Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1158, 1204-22 (1991); Alan Farnham, *Holding Firm on Affirmative Action*, FORTUNE, Mar. 13, 1989, at 87-88; Anne B. Fisher, *Businessmen Like to Hire by the Numbers*, FORTUNE, Sept. 16, 1985, at 26. The Civil Rights Act of 1991 now forbids employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin." Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 106, § 703(l) (1991).

The disjuncture extends far beyond the employment arena. To take one example, the Department of Education recently decided that antidiscrimination principles require that institutions of higher education not use race-specific scholarship or financial assistance programs for minorities. *See* Michel Marriott, *Colleges Basing Aid on Race Risk Loss of Federal Funds*, N.Y. TIMES, Dec. 12, 1990, at 1. Following an uproar over the impact that this ruling would have on affirmative action policies, the Department of Education subsequently revised its position and advised that colleges and universities continue to use minority and race-based scholarships while the Department re-evaluates its position on the issue. *See* Karen De Witt, *Minority Scholarships Get Tentative Approval*, N.Y. TIMES, Mar. 21, 1991, at 16.

11 Civil Rights Act of 1990, S. 2104, 101st Cong., 2d Sess. (1990) (unenacted).

Rights Act of 1991 which specifically targets the leading cases of the 1988 Term for legislative repudiation.[12]

Deep within the skirmishes that currently engage all branches of the federal government lies the troubling case of *Martin v. Wilks*,[13] in which the Supreme Court sustained the claim of white firefighters in Birmingham, Alabama, that a civil rights consent decree unfairly trampled their rights.[14] Two important issues converged in *Martin*. First, *Martin* raised a critical procedural question of whether white incumbents not preferred by an affirmative action remedy are barred by the collateral attack doctrine from challenging the terms of a civil rights consent decree to which they are not a party.[15] Second, and intrinsically related, *Martin* raised the question of the nature of the substantive rights claimed by white incumbents in the public sector even if they are not procedurally barred from asserting those rights.[16] In ruling that the collateral attack doctrine does not preclude challenge by nonparties to a civil rights consent decree, a divided Supreme Court gave new vitality to the substantive claims of dispreferred whites which invited a new wave of "reverse discrimination" litigation.[17]

Not surprisingly, *Martin* was quickly joined with the principal culprits of the Supreme Court's civil rights retreat. Because it was decided in the same term of the Supreme Court and subsequently singled out for statutory amendment, *Martin* appeared of a piece with the more prominent civil rights reverses. Moreover, the fears of the civil rights community were not unfounded. *Martin* has indeed prompted dozens of challenges to longstanding consent decrees that had presumably concluded what was often first-generation litigation over the purposeful bar to black employment.[18] As expressed by the Senate Report accompanying the Civil Rights Act

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12 *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 105-108, § 703, sec. 112, § 706(e) (1991). This Article refers to the legislative history of the defeated 1990 Act, which was incorporated into the final 1991 Act. No new hearings were held in 1991, and in terms of the scope of this Article, the two bills are identical in their rejection of Martin v. Wilks, 490 U.S. 755 (1989).

13 490 U.S. 755 (1989).

14 *See* Ralston, *supra* note 2, at 217 (predicting attempt to statutorily overturn *Martin* "may become the most controversial provision" of the Civil Rights Act of 1990).

15 490 U.S. at 758.

16 490 U.S. at 771-73 (Stevens, J., dissenting).

17 490 U.S. at 791 (Stevens, J., dissenting).

18 *See* STEPHEN L. SPITZ, IMPACT OF THE SUPREME COURT DECISION IN MARTIN V. WILKS, PUBLICATION OF THE LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW 14-28 (Feb. 20, 1990) (detailing 11 post-*Martin* "reverse discrimination" challenges to affirmative action plans).

of 1990, *Martin* stands accused of being an obstacle to "the speedy and final resolution of employment discrimination cases."[19]

This Article examines the validity of the charges laid at *Martin*'s door. This Article first addresses the actual issues in the *Martin* litigation and contrasts the doctrinal analysis with the Court's prior rulings on affirmative action consent decrees. Next, the Article examines the substantive claims advanced by the dispreferred incumbents and the procedural rights that follow from those claims. By examining the competing interests in civil rights settlements, this Article considers whether *Martin* was really cut from the same cloth as the more prominent civil rights cases of the 1988 Term.

With some hesitation stemming from the author's background as a civil rights lawyer,[20] this Article concludes that the outcome in *Martin* was inescapable, not because of the use of racial preferences in remedying discrimination but because of the substantive constitutional protections that must be afforded to the established expectation interests of incumbent, tenured public employees. These substantive protections require an opportunity to be heard commensurate with the protected interests, which for tenured public employees is a constitutionally recognized property right. At the level of doctrine, this Article shows that *Martin* is not simply different from the cases signalling the retrenchment from civil rights but, when analyzed from the vantage point of the rights of the dispreferred, is constitutionally mandated.

At a fundamental level, the issue raised in *Martin* is how to equitably distribute the social cost of remedying discrimination. As structured in Birmingham, the cost of integrating the admittedly discriminatory uniformed services was highly localized on an identifiable group of incumbent employees. When asked to bear the cost of remedying their employer's discrimination—to give up or defer promotional opportunities and other job-related benefits—this

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19 S. REP. No. 315, 101st Cong., 2d Sess. 49 (1990). Congress has reiterated its longstanding policy of encouraging voluntary settlement of employment discrimination disputes in the Civil Rights Act of 1991: "[T]he use of alternative means of dispute resolution, including settlement negotiations, conciliation, [etc.], is encouraged . . . ." Civil Rights Act of 1991, Pub. L. No. 102-166, § 118 (1991).

20 The author was formerly a staff attorney with the Lawyers' Committee for Civil Rights Under Law, the organization that served as counsel to the black firefighters of Birmingham. The author did not, however, have any participation in *Martin v. Wilks* or any of the related litigation. For a similar viewpoint on *Martin*, see the shift in views of Professor Joel Selig, a strong supporter of the Supreme Court's pre-1988 affirmative action jurisprudence. *See* Selig, *supra* note 7. Professor Selig notes of *Martin*, "It is unusual for a person of my background and views to find himself in agreement with both the holding and the opinion of Chief Justice Rehnquist in a controversial civil rights case when Justices Brennan, Marshall, Blackmun and Stevens are in dissent." Joel Selig, *Affirmative Action in Employment After* Croson *and* Martin*: The Legacy Remains Intact*, 63 TEMPLE L. REV. 1, 22 (1990).

group angrily, and predictably, recoiled. The more difficult, and perhaps more controversial, conclusion is that this rebellion of the incumbents was not simply a foreseeable response, but also an appropriate response to the failure of the active discriminator, the City of Birmingham, to distribute the costs of remedying discrimination more equitably.

Ultimately, *Martin* is about the failure of procedural mechanisms to circumvent the basic political and moral problem of how to distribute the costs of remedying a history of discrimination. This Article urges that parties to consent decrees be required to join all persons whose settled, legally sanctioned expectations will be disrupted. Absent such joinder, courts should bar the parties to the consent decree from claiming any preclusive effect of the decree for nonjoined third parties, and should prevent these parties from relying on the collateral attack doctrine to immunize the effects of the consent decree from plenary review. Although reached from an analysis that focuses on the substantive claims of the dispreferred, this conclusion is in essence what *Martin* resolves. Insofar as the Birmingham decision forces courts to openly address the cost calculus of remedying discrimination as part of the consent decree process, it may allow for settlements of discrimination claims on a more lasting and equitable basis.

II
CIVIL RIGHTS CONSENT DECREES

The Birmingham litigation, culminating in *Martin*, embodies all the tragic conflicts endemic to the attempt to remedy racial discrimination. It begins with a virulent history of officially directed segregation, continues through long and arduous litigation to end this discrimination, and ultimately winds up in a rather naked battle over how to distribute the costs of remedying past discrimination. But the customary conflict between claims of discrimination in the past and reverse discrimination present in future remedies was played out, by virtue of the convoluted history of the Birmingham litigation, as rather arcane procedural debates. The doctrines of preclusion and finality served as the proxies for the more basic issues of rights to jobs and equality of employment opportunity. It is therefore necessary to turn our attention briefly both to the history of the *Martin* litigation, and to the doctrinal battles played out in Supreme Court cases and in the statutory response to *Martin*.

A. Birmingham's Segregated Workforce Under Challenge

The desegregation of the Birmingham municipal workforce, and particularly its uniformed services, holds special symbolic sig-

nificance to the struggle for black equality. Among the most riveting images of the civil rights movement are the dramatic news photos of early 1963 showing the fire department's high-power water hoses and the police department's attack dogs being turned on protesters who demanded an end to the segregation of the downtown Birmingham commercial district.[21] Under the leadership of the notorious Public Safety Commissioner, Eugene "Bull" Connor, the Birmingham police and fire departments became synonymous with the use of official lawlessness against the civil rights movement.[22]

The attempt to desegregate the uniformed services of Birmingham must be viewed against the background of persistent discriminatory hiring practices that remained largely unaffected by *Brown v. Board of Education* and subsequent attempts to dismantle de jure segregation. Even after *Brown*, official, city job announcements still required that applicants be white for the more favorable positions, including those in the uniformed services. Birmingham did not hire its first black police officer until 1966, its first black firefighter until 1968, nor its second black firefighter until 1974—when the suit resulting in *Martin* was originally filed.[23] Between the time the first and second black firefighters were hired, 170 whites were hired in a city that was approaching a black population majority.[24]

Little changed until 1974, when two groups of black plaintiffs filed suit claiming discriminatory hiring practices by the City of Birmingham, the surrounding Jefferson County, and their personnel boards.[25] The following year, the United States Department of Justice filed suit as well.[26] In 1981, after plaintiffs prevailed on liability,[27] but prior to the entry of any remedial orders, the parties reached a negotiated settlement on remedy. Thus, the decision of the City of Birmingham and its administrative personnel board on

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21 *See* DAVID J. GARROW, BEARING THE CROSS 231-63 (1986) (discussing the drive led by Dr. Martin Luther King, Jr., to defeat official segregation in Birmingham).

22 *See* WILLIAM A. NUNNELLEY, BULL CONNOR 86-128 (1991).

23 *Civil Rights Act of 1990: Hearings on S. 2104 Before the Committee on Labor and Human Resources*, 101st Cong., 1st Sess. 367-68 (1990) [hereinafter *Hearings*] (testimony of Mayor Richard Arrington of Birmingham).

24 *Id. See also* Nunnelley, *supra* note 22, at 75-76 (reporting that in 1953 Birmingham was the only city of more than 50,000 in the South that had an all-white police force and that this continued into the 1960s).

25 *See Hearings*, *supra* note 23, at 367-68 (testimony of Major Richard Arrington of Birmingham).

26 United States v. Jefferson County, 720 F.2d 1511, 1514 (11th Cir. 1983) (recounting procedural history of the litigation).

27 *Id.* at 1514-15. The finding of liability had already been upheld on appeal. Ensley Branch of the NAACP v. Seibels, 616 F.2d 812 (5th Cir.), *cert. denied*, Personnel Bd. v. United States, 449 U.S. 1061 (1980). The court predicated its finding of liability on the use of unvalidated tests to screen police and firefighter applicants.

May 19, 1981 to abandon a seven-year fight against challenges to its hiring and promotional practices marked a watershed event in the struggle for black equality.

Under the terms of the consent decree, the defendants agreed to alter their hiring practices in order to facilitate black employment and to adopt affirmative action programs at both the hiring and promotional stages. As part of the decree, Birmingham was enjoined from engaging in any acts or practices having either the purpose or effect of discriminating on the basis of race.[28] The decree was intended to move forcibly the still overwhelmingly white uniformed services of Birmingham, inherited from the reign of Bull Connor, toward a more equitable reflection of the City's half-black labor force. As with numerous consent decrees entered into by the Justice Department, the decree set forth a hiring and promotional goal of achieving a workforce composition representative of the local labor force.[29]

Instead of resolving the conflict and setting a smooth course for desegregation of the City's workforce, however, the consent decree triggered a new spate of litigation, this time by incumbent white firefighters.[30] The new controversy began with the August 1981 fairness hearings, at which the district court was to consider the objections of all interested parties. Representatives of white firefighters filed objections as amicus curiae at the fairness hearing and sought to intervene on the grounds that the proposed decree would adversely affect their rights. The district court denied the motion, noting that "[t]his litigation has been pending for over five years and has been vigorously contested by the existing parties through two trials and one appeal . . . . [I]ntervention at this time as parties to the litigation is clearly untimely and must be denied."[31] A group of white firefighters then filed an independent action,[32] seeking in-

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28 United States v. Jefferson County, 28 Fair Empl. Prac. Cases (BNA) 1834 (N.D. Ala. 1981).

29 *See* Martin v. Wilks, 490 U.S. 755, 758 (1989); *Hearings*, *supra* note 23, at 370 (testimony of Mayor Richard Arrington of Birmingham).

30 United States v. Jefferson County, 720 F.2d 1511, 1515 (11th Cir. 1983) (setting forth procedural history of case).

31 United States v. Jefferson County, 28 Fair Empl. Prac. Cas. (BNA) 1834, 1839 (N.D. Ala. 1981). For other cases in which courts have denied intervention when incumbents or their unions have sought to challenge a consent decree, see Dennison v. City of Los Angeles, 658 F.2d 694 (9th Cir. 1981); Culbreath v. Dukakis, 630 F.2d 15 (1st Cir. 1980); Alaniz v. Tillie Lewis Foods, 572 F.2d 657 (9th Cir.), *cert. denied*, Beaver v. Alaniz, 439 U.S. 837 (1978); Pennsylvania v. Rizzo, 530 F.2d 501 (3d Cir.), *cert. denied*, Fire Officers Union v. Pennsylvania, 426 U.S. 921 (1976); EEOC v. ET & WNC Transp. Co., 81 F.R.D. 371 (W.D. Tenn. 1978); Firebird Soc'y, Inc. v. New Haven Bd. of Fire Comm'rs. 66 F.R.D. 457 (D. Conn.), *aff'd*, 515 F.2d 504 (2d Cir.), *cert. denied*, 423 U.S. 867 (1975).

32 *Jefferson County*, 720 F.2d at 1515.

junctive relief against the operation of the consent decrees; the plaintiffs claimed that the decrees affected the incumbents' promotional opportunities which arose from pre-existing promotional practices.[33] The district court denied this relief as well.[34] The court of appeals affirmed both the denial of intervention and the denial of injunctive relief.[35]

In 1983, a separate group of white firefighters filed suit,[36] claiming that they were entitled to promotions under the pre-existing promotional system and would have obtained those promotions but for the City's reliance on the consent decrees to alter the system of promotions. The new action sought to enjoin the implementation of the terms of the consent decrees insofar as it denied incumbents the promotions that, the plaintiffs claimed, the City was obligated to provide them. The district court dismissed this action, finding that the white challengers were procedurally precluded, under the collateral attack rule, from attacking the terms of a court-approved consent decree.[37] The Eleventh Circuit then reversed on

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33 Prior to the 1981 consent decrees, promotion in the Birmingham uniformed services required seniority-based eligibility for promotional examinations. As of 1980, immediately prior to the consent decrees that gave rise to *Martin*, 490 U.S. 755 (1989), the requirement for eligibility to take the fire department lieutenant examination was five years of service and satisfactory efficiency ratings. Pursuant to state law, the Jefferson County Personnel Board administered and certified the results of promotional examinations that were given to firefighters who had sufficient seniority with the Birmingham Fire Department. Individuals were referred to the Fire Department in the order of their scores on the examination. Three eligible candidates were referred at a time, plus one additional candidate for each available position. Thus, if there were five slots open, the Board would refer the top seven exam scorers from which the fire department would select five. Telephone Interview with Diane Clark, Director of Personnel Bd., Jefferson County, Alabama (Mar. 13, 1991). *See also* Ensley Branch of the NAACP v. Jefferson County, 14 Fair Empl. Prac. Cas. (BNA) 670 (N.D. Ala. 1977). Although examinations for entry-level positions were struck down as having an adverse impact and as not having been properly validated, Ensley Branch of the NAACP v. Seibels, 616 F.2d 812 (5th Cir.), *cert. denied*, Personnel Bd. v. United States, 449 U.S. 1061 (1980), no litigated resolution of the status of the promotional examinations had emerged. *See In re* Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492 (11th Cir. 1987), *aff'd sub nom. Martin*, 490 U.S. 755 (1989). Thus, at the time of the consent decrees, the established promotional system was based on seniority-eligibility for a promotional examination, followed by the "group of three" system for actual promotion. That remained in effect until the parties agreed to the consent decree, which required one-for-one black-white promotions and an expansion of the group of three in order to assnre a sufficient black applicant pool from which to draw eligible blacks for promotion. United States v. Jefferson County, 28 Fair Empl. Prac. Cas. (BNA) 1834, 1837 (N.D. Ala. 1981). The "reverse discrimination" charges leading up to *Martin* were brought by groups of white firefighters who claimed they would have been promoted based on the pre-existing system but for the City's compliance with the consent decrees. *In re Birmingham*, 833 F.2d at 1495.

34 *Jefferson County*, 720 F.2d at 1515.

35 *Id.*

36 *See In re Birmingham*, 833 F.2d at 1495.

37 *Id.*

the ground that, since the white firefighters were not parties to the original consent decrees, their claims of unlawful discrimination were not precluded.[38] In 1989, a narrowly divided Supreme Court held in *Martin v. Wilks*[39] that Birmingham's white firefighters were not procedurally barred from attacking the terms of the consent decree as it pertained to their promotional expectations.

Writing for the five-justice majority, Justice Rehnquist rejected the argument that the white firefighters, as potentially affected parties, had a duty to come forward to protect their interests, as through intervention under Rule 24 of the Federal Rules of Civil Procedure, or else risk foreclosure of future claims.[40] Instead, Justice Rehnquist urged that the joinder procedures under Rule 19 of the Federal Rules be utilized to allow the parties to the proceeding to join any third parties whom they desired be bound by the litigation.[41] Under pressure from the dissent, the Court acknowledged the potential burdens of identifying all parties who might conceivably be adversely affected by a decree. Nonetheless, the Court held, the fundamentals of "anglo-American jurisprudence" dictate "that one is not bound by a judgment *in personam* in which he is not designated as a party or to which he has not been made a party by service of process."[42]

Writing for the dissent, Justice Stevens rejected an immunity from the effects of a judgment for persons "who merely have the kind of interest that may as a practical matter be impaired by the outcome of a case" and who choose to sit on the sidelines.[43] The dissent offered two primary justifications for binding the white firefighters to the terms of the consent decrees. First, according to Justice Stevens, the consent decrees were unobjectionable because they did not deprive the dispreferred white firefighters of any contractual rights, such as seniority, or of any other legal claims.[44] Second, even if the decree affected some rights of the incumbents as a practical matter, some limited grounds for collateral attack remained if overriding new evidence or evidence of collusion or fraud were discovered.[45] Since the white challengers failed to present evi-

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38 *Id.*

39 490 U.S. 755, 769 (1989).

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

41 *Id.* at 764-68.

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

43 *Id.* at 769 (Stevens, J., dissenting).

44 *Id.* at 770.

45 *Id.* at 783-87.

dence calling into question the validity of the consent decrees, they should be bound by the legal consequences of their decision not to participate more actively in the early stages of the litigation.

B. Procedural Bars to Third-Party Challenges

In affirming the Eleventh Circuit, the Supreme Court significantly retreated from its three-year-old decision in *Local No. 93, International Ass'n of Firefighters v. City of Cleveland*.[46] In the *Cleveland Firefighters* case, the Court held that similarly affected incumbent white firefighters were foreclosed from challenging a Cleveland consent decree. The underlying facts of the Cleveland and Birmingham litigations are unfortunately both similar and familiar. After a long-standing history of racial discrimination in municipal employment, which had led to litigated decrees against hiring and promotional practices in the police department[47] and hiring practices in the fire department,[48] the City of Cleveland finally attempted to settle a challenge by black firefighters to its promotional policies. During settlement negotiations, the union representing incumbent employees intervened, seeking to defend established promotional practices.[49]

The critical difference between the Birmingham and Cleveland litigations lies in the Cleveland white firefighters' successful motion to intervene. Once made party to the lawsuit, the firefighters' union unwaveringly opposed any settlement of the litigation that would alter established promotional practices, and at one point even submitted the matter to the vote of its membership.[50] Despite the opposition of the intervenors, the district court approved a consent decree between the City of Cleveland and the black firefighters group that significantly altered the promotional practices of the fire department to allow for affirmative action-based promotions.[51] Once approved, however, the critical question remained: whether the decree would bind all parties to the litigation, including the intervenors who had opposed its entry. This was precisely the result the *Martin* Court refused to reach regarding nonparty opposition.

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46 478 U.S. 501 (1986).

47 *See* Shield Club v. City of Cleveland, 370 F. Supp. 251 (N.D. Ohio 1972).

48 *See* Headen v. City of Cleveland, No. C73-330 (N.D. Ohio Apr. 25, 1975), *quoted in Cleveland Firefighters*, 478 U.S. at 506.

49 *Cleveland Firefighters*, 478 U.S. at 506-07.

50 *Id.* at 509 (union members overwhelmingly voted down terms of proposed consent decree).

51 *Id.* at 512.

Although the litigation was framed in terms of the permissibility of affirmative action remedies under Title VII,[52] the Supreme Court in *Cleveland Firefighters* had to confront the possibility that the entry of the decree might yield the apparently unseemly result of a party's being bound by a nonadjudicated decree entered over its objection. The Court evaded this problem by appearing to limit both the interests of the intervenors and the scope of the decree:

> Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor. . . . However, the consent decree entered here does not bind [the intervenor firefighters' union] to do or not to do anything. It imposes no legal duties on the Union at all; only the parties to the decree can be held in contempt of court for failure to comply with its terms.[53]

Despite the Court's disclaimer, a consent decree governing promotional activities, in practice, will either affect the rights of all employees who are in line for promotions with the consenting employer,[54] or be worthless. Unless a decree can serve as a defense to liability for any claimed breach of contract brought against the consenting employer by dispreferred employees, the decree provides no protection to the settling parties from subsequent challenge. Despite the Court's avoidance of the preclusion issue in *Cleveland Firefighters*,

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52 Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2005g (1988). The sole issue presented in the petition for certiorari was whether the consent decree was a permissible remedy under Title VII, 42 U.S.C. § 706(g) (discrimination in employment on account of race). *Cleveland Firefighters*, 478 U.S. at 513.

53 *Cleveland Firefighters*, 478 U.S. at 529.

54 The Court's opinion must be read against the backdrop of the 1966 Amendment to Federal Rule of Civil Procedure 24(a), which allows intervention of right when "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." This Amendment rejected a strict interpretation of Rule 24 which required the applicant to have a direct legal interest in the litigation. Advisory Committee's Note to Amendments to Rule 24, 39 F.R.D. 69, 109-11 (1966).

So long as the intervenor is not estopped from independently litigating any legal claims it may have against either of the parties, the narrow holding of the Court is correct. For example, if the white firefighters in subsequent proceedings were able to raise independent arguments, such as the property-based due process claims suggested in this Article, then the inability to pursue these claims in the initial litigation between the City of Cleveland and black aspirants would be of no concern to the incumbent firefighters. As Professor Larry Kramer notes, the firefighters would not be parties to the underlying dispute between the City and the alleged discriminatees and should not be able to assume defenses for the City *jus tertii*. Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 353-54 (1988).

in practice the entry of the decree would likely have concrete effects on third parties. It is doubtful that courts, having stamped their approval on a prior resolution of the dispute, would entertain de novo challenges brought by third parties without reference to the consent decree as the legal baseline.[55] Of necessity, the potential preclusive effect of the consent decree in *Cleveland Firefighters* is what rose to the fore.

Prior to *Cleveland Firefighters*, courts were divided on how to assess the third-party effects of bipolar civil rights consent decrees; these decrees are settlements between institutional defendants and minority claimants. The strongest resistance to precluding independent challenges by the dispreferred emerged when the affected rights were secured by a collective bargaining agreement, rather than by civil service regulations as in Birmingham. In *United States v. City of Miami*,[56] for example, the Fifth Circuit sitting en banc rejected a proposed settlement between the United States and the City that was opposed by two police organizations which were also named as defendants. The court held that since parts of the decree would alter entrenched seniority rights that had been secured under a collective bargaining agreement, the court could not enter those parts of the decree over the objection of the certified bargaining representative, the Fraternal Order of Police.[57] A similar result was reached in *United States v. Allegheny-Ludlum Industries, Inc.*,[58] in which the Fifth Circuit directly addressed the traditional role of unions in securing seniority rights as part of the process of collective bargaining. The court concluded that it could not deny participation as intervenors to the designated representative of the affected employees since "it would be anomalous to assume in such cases that the employees' bargaining representative's interest is adequately served by the government or the employer."[59]

Nonetheless, the bulk of doctrinal authority prior to *Martin* assigned to bipolar consent decrees precisely the preclusive effect that

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55 *See, e.g.*, Pulitzer-Polster v. Pulitzer, 784 F.2d 1305 (5th Cir. 1986) (finding that similarity of issues presented between state and federal litigation requires nondiverse parties to be joined in federal action because of practical impact of one adjudication on the other). *See also* Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. CHI. LEGAL F. 103, 120 (evaluating likelihood of court antagonism to third parties that force a reopening of case in which consent decree already entered).

56 664 F.2d 435 (5th Cir. 1981).

57 664 F.2d at 445-47. *See also* EEOC v. AT&T, 365 F. Supp. 1105, *aff'd in part, appeal dismissed in part*, 506 F.2d 735 (3d Cir. 1974) (upholding right of intervention of a labor union as a defendant because of effect of proposed decree on collective bargaining rights), *consent decrees upheld*, 556 F.2d 167 (3d Cir. 1977).

58 517 F.2d 826 (5th Cir. 1975), *cert. denied*, Harris v. Allegheny-Ludlum Indus., 425 U.S. 944 (1976).

59 *Id.* at 845.

the Court tried to sidestep in *Cleveland Firefighters*. Thus, the Eleventh Circuit's square rejection of the collateral attack rule in the *Martin* litigation[60] represented the minority view on procedural bars. In virtually all other courts, once a consent decree received a judicial imprimatur, no further challenge to its terms would be brooked.[61] That rule was terminated by the clear holding of *Martin*: "A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings."[62]

Had *Martin* come out the other way, with the burden of intervening on the incumbents who were seeking to preserve their seniority-based claims, the results would have been truly striking. The *Martin* dissent would have allowed the incumbent white firefighters the right of intervention to oppose the terms of the consent decree. Under *Cleveland Firefighters*, however, the district court would have retained the authority to enter the decree regardless of the opposition of the white incumbents. The collateral attack rule would in turn extinguish the incumbents' legal claims, making their participation as intervenors essentially worthless.

C. The Statutory Response of the Civil Rights Act of 1991

According to civil rights advocates, *Martin* as presently construed is an obstacle to any kind of finality in civil rights cases, since individuals adversely affected by a consent decree may present themselves at any time in the future.[63] Hence, section 108 of the

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60 *See In re* Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1498 (11th Cir. 1987) (because the white firefighters "were neither parties nor privies to the consent decrees . . . their independent claims of unlawful discrimination are not precluded"), *aff'd sub nom.* Martin v. Wilks, 490 U.S. 755 (1989).

61 For cases from various circuits applying the collateral attack rule, see, e.g., Striff v. Mason, 849 F.2d 240, 245 (6th Cir. 1988); Marino v. Ortiz, 806 F.2d 1144, 1146-47 (2d Cir. 1986), *aff'd by an equally divided Court*, 484 U.S. 301 (1988); Devereaux v. Geary, 765 F.2d 268 (1st Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986); Thaggard v. City of Jackson, 687 F.2d 66, 68-69 (5th Cir. 1982), *cert. denied*, Ashley v. City of Jackson, 464 U.S. 900 (1983); Stotts v. Memphis Fire Dep't, 679 F.2d 541, 558 (6th Cir. 1982), *rev'd on other grounds sub nom.* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); Dennison v. City of Los Angeles Dep't of Water & Power, 658 F.2d 694, 696 (9th Cir. 1981); Goins v. Bethlehem Steel Corp., 657 F.2d 62, 64 (4th Cir. 1981), *cert. denied*, 455 U.S. 940 (1982); Society Hill Civic Ass'n v. Harris, 632 F.2d 1045, 1052 (3d Cir. 1980); Culbreath v. Dukakis, 630 F.2d 15 (1st Cir. 1980). *But see* Dunn v. Carey, 808 F.2d 555, 559-60 (7th Cir. 1986) (declining to adopt collateral attack bar).

62 Martin v. Wilks, 490 U.S. 755, 762 (1989).

63 *See Hearings*, *supra* note 23, at 566 (testimony of Laurence Tribe) (there could never be finality because some 19-year-old could come forward at any time to claim denial of lifelong dream of being a firefighter); *id.* at 569 (finality impossible without collateral bar); *id.* at 539 (testimony of Mayor Arrington of Birmingham) (same). *See also* Frank E. Deale, Martin v. Wilks, 7 N.Y.L. SCH. J. HUM. RTS. 83, 90 (1990) ("It will be virtually impossible to identify all individuals who might seek to relitigate the issues that have been resolved by the consent decree.").

Civil Rights Act of 1991 attempts legislatively to overturn *Martin* and to reintroduce prohibitions against third-party attacks on consent decrees that are similar to those in place under the case law prior to *Martin*. This statutory provision attempts to insulate court-approved consent decrees in employment discrimination cases from third-party challenge by reintroducing a modified form of the collateral attack doctrine.

Under new section 108, collateral challenges to consent decrees would be precluded under two circumstances: First, when a third party had actual notice of the proposed judgment "sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person" and when such person was afforded "a reasonable opportunity to present objections to such judgment or order";[64] and second, when a third party without such notice and opportunity to present objections was nonetheless adequately represented by another third-party challenger.[65] The congressional intent as expressed by the 1990 version of the Act, was to find a "middle ground between the strict rule barring collateral attacks, and the unacceptable approach taken by the Supreme Court in [*Martin v.*] *Wilks*."[66]

The new statute leaves two critical issues untouched. The first concerns the rights affected by the "middle ground" approach; the statute fails to distinguish among types of affected interests held by the third parties to whom notice must be provided. As this Article demonstrates, the adequacy of procedural protections to potentially affected third parties cannot be analyzed independent of the substantive rights claimed by the third parties. The second issue concerns the extent of the process due to third parties. The statute fails to address the adequacy of judicial review afforded to the claims of affected third parties, as governed by the underlying rights claimed, when these parties are given a "reasonable opportunity to present objections."[67] Instead, the legislation focuses exclusively on the obstacles to the resolution of the dispute between the primary litigants. The legislative history repeatedly targets the "inefficiency and unfairness of the [*Martin v.*] *Wilks* rule"[68] in obligating parties to

64 Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 108, § 703(n)(1)(B)(i)(I) & (II) (1991) (to be codified at 42 U.S.C. 2000e-2).

65 *Id.* sec. 108, § 703(n)(1)(B)(ii).

66 H.R. REP. No. 644, 101st Cong., 2d Sess. 35 (1990).

67 The sole exception is the rather bizarre limitation in § 108(n)(2)(D) which expressly restricts interpretation of the statute to not "authorize or permit the denial to any person of the due process of law required by the Constitution." Since the denial of constitutional rights is not a power ordinarily committed to congressional acts, it is not clear what this section means.

68 S. REP. No. 315, 101st Cong., 2d Sess. 27 (1990).

a consent decree to join as additional parties all nonparties who are to be bound by the terms of the decree. "Without remedial legislation," the Senate Report on the 1990 Act concludes, "Congress's intent in adopting Title VII of 'encouraging voluntary settlements of employment discrimination claims' will be frustrated."[69]

III
THE SUBSTANTIVE CLAIMS OF INCUMBENTS

The Cleveland and Birmingham cases present starkly contrasting views of the effect of settlements between public bodies and minority challengers on the entrenched rights of the predominantly white incumbents. This issue is particularly striking in the restructuring of promotional opportunities for incumbents under the terms of an affirmative action decree. In such circumstances, the costs of disrupting settled expectations are easily defined, the cost bearers are easily identified, and the combination of these two factors is likely to prompt relitigation of the initial claims under the new guise of reverse discrimination.

These cases reveal a disturbing tendency on the part of state entities to attempt to evade the consequences of unlawful discrimination by passing the costs of remedial action onto unrepresented third parties,[70] a pattern well within the ambit of protection of the procedural due process case law.

The visibility and emotional nature of the reverse discrimination label masks the presence of independent substantive rights meriting careful legal evaluation in the approval and enforcement of consent decrees. It is far too late to contend that tenured, seniority-protected public employees have no legally cognizable interests in decrees which require a reordering of seniority rights. Decades of affirmative action and procedural due process cases recoguize that incumbent employees have a substantial property interest in their jobs.[71] The property interests in employment are accompanied by elaborate procedural protections to protect incumbents from loss of their employment benefits to the vagaries of political expediency.

A. Beyond the "Reverse Discrimination" Label

The Supreme Court confronted the effects of affirmative action on the employment rights of the dispreferred in seven cases prior to

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69 *Id.* (footnote omitted) (quoting Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14 (1981)).

70 *See* Laycock, *supra* note 55, at 114-17 (describing incentives to pass costs at settlement onto unrepresented parties).

71 *See* text accompanying notes 130-49.

Martin.[72] Each of these cases involved challenges brought by affected incumbent employees concerning the permissibility of racial or sexual preferences that were granted as a remedy to perceived or established patterns of discrimination. Thus, the cases give the initial appearance of attempting to define an uneasy boundary between the permissible margins of remedial affirmative action programs and the impermissible emergence of "reverse discrimination."[73]

The focus on a model based upon the discrimination-reverse discrimination duality is readily explained by the most visible divisions on the Court. Between the poles of Marshall and Brennan on one end[74] and Rehnquist and Scalia on the other,[75] the most visible—and vituperative—division of the Court on affirmative action has turned on the use of racial or sexual classifications in setting hiring or promotional preferences. The Court has repeatedly divided between the competing views that affirmative action is necessarily a form of reverse discrimination at one extreme,[76] and that

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72 Johnson v. Transportation Agency, 480 U.S. 616 (1987); United States v. Paradise, 480 U.S. 149 (1987); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986); Local 28 of the Sheetmetal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); United Steelworkers v. Weber, 442 U.S. 193 (1979).

73 Although the Court's affirmative action jurisprudence arises under both the Constitution and Title VII, it is difficult to discern any meaningful difference between the standards applied. *See* George Rutherglen & Daniel R. Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 UCLA L. REV. 467 (1988). Some early opinions tried to distinguish the parameters of discretionary affirmative action based on whether or not state action was involved. *See Weber*, 442 U.S. 193 (majority opinion of Brennan, J.). No basis for any distinction was ever articulated by the Court and, by the later cases of the 1980s, the occasional references to distinct statutory or constitutional standards were reserved for polemical asides. *See Johnson*, 480 U.S. at 627 n.6. Nor does such a distinction appear particularly availing in light of the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e-2005g (1988), which extended Title VII to reach state governmental employers on the same basis as private sector employers. *See generally* STAFF OF SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT ACT OF 1972 (Comm. Print 1972).

74 Of the seven significant affirmative action cases on employment decided before the 1988 Term, Marshall and Brennan voted to uphold the affirmative action program in all seven. Justice Blackmun voted in favor all seven times as well, *see* Selig, *supra* note 7, at 305 n.32, although his views in *Weber* were more nuanced than those of Brennan and Marshall. *See Weber*, 443 U.S. at 211-14 (Blackmun, J., concurring) (advocating an arguable violation standard as the predicate for voluntary affirmative action programs).

75 In the seven principal affirmative action cases on employment prior to the 1988 Term, Justice Rehnquist voted against the preferences in all seven. Selig, *supra* note 7, at 305 n.32. Justice Scalia voted against the preferences in *Paradise* and *Johnson*, the two cases in which he participated. *Id.*

76 *See, e.g.*, *Cleveland Firefighters*, 478 U.S. at 533 (White, J., dissenting) (use of racial classifications to disadvantage whites makes Title VII "a one-way racial street, thus disserving the goal of ending racial discrimination in this country").

preferences designed to remedy the effects of past societal discrimination are legally benign at the other.[77]

For the Brennan-Marshall wing of the Court, Title VII and the Equal Protection Clause of the Fourteenth Amendment[78] provide a remedial tool for ameliorating the conditions of historically disadvantaged groups. As expressed by Justice Blackmun, "In order to get beyond racism, we must first take account of race .... [I]n order to treat some persons equally, we must treat them differently."[79]

The Rehnquist-Scalia wing, on the other hand, takes both the statutory and constitutional commands of nondiscrimination as a sweeping prohibition on the use of race- or sex-based classifications: "There is perhaps no device more destructive to the notion of equality than the *numerus clausus*—the quota. Whether described as 'benign discrimination' or 'affirmative action,' the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another."[80] Under this view, the sole permissible reference to racial classifications comes in the process of remedying proven discrimination against discrete, identifiable individuals.[81] In such a situation, restoring individuals to the positions they would have held absent discrimination is in fact a make-whole remedy that does not rest on racial classifications at all. For this wing of the Court, the affirmative use of classifications "effectively replace[s] the goal of a discrimination-free society with the quite incompatible goal of proportionate representation by race and by sex in the workplace."[82] In such circumstances, runs the argument, the "fundamental principle" that "discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society" is replaced by the uncompelling credo that discrimination becomes "only a matter of whose ox is gored."[83]

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77 *See, e.g., Johnson*, 480 U.S. at 637 (affirmative action plan permissible when aimed at eliminating "work force imbalances").

78 U.S. CONST. amend. XIV, § 1. By the time of *Wygant* and *Johnson*, the Court's occasional distinctions between the treatment of Title VII and Fourteenth Amendment equal protection claims lacked any doctrinal content. *See* Rutherglen & Ortiz, *supra* note 73, at 503 (discussing fundamental similarity of Title VII and constitutional standards).

79 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., separate opinion).

80 United Steelworkers v. Weber, 443 U.S. 193, 254 (Rehnquist, J., dissenting).

81 *See* Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 539-43 (1986) (Rehnquist, J., dissenting) (court-sanctioned racial quotas "evil" unless aimed at providing "make-whole relief only to those who have been actual victims of illegal discrimination" (478 U.S. at 540 (quoting Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 579 (1984)))).

82 Johnson v. Transportation Agency, 480 U.S. 616, 658 (1987) (Scalia, J., dissenting).

83 ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 133 (1975).

The controversy in *Martin* thus seems to fit into a neat model of competing claims of discrimination and reverse discrimination. On this view, the claims of the incumbent Birmingham firefighters simply represent the typical reverse discrimination claim that accompanies the typical remedial affirmative action decree. This anticipates that the courts will restrict the claims of the dispreferred (the initial nonparties) to the same cause of action that would have been brought if the discrimination initially had been directed at the dispreferred group. Certainly this was the understanding of the court of appeals in *Martin* when it affirmed the denial of the white firefighters' motion to intervene; the court of appeals reasoned that the firefighters were free to "institut[e] an independent Title VII suit, asserting . . . specific violations of their rights."[84] This was also the understanding of the white firefighters who then accepted the invitation and filed their independent Title VII claim charging the Birmingham authorities with impermissible use of racial classifications in implementing the consent decree.[85]

This view of the merits of the litigation actually lends some support to the use of the collateral attack bar. If the incumbents' claim was simply that of reverse discrimination, no different from that of any other dispreferred group, the adjudicated history of racial discrimination and the demonstrated need for a remedy might well be dispositive of the merits of all discrimination claims. So framed, there is a stronger argument for binding all potentially affected parties to the outcome of the initial case. Under such circumstances, a district court passing on the propriety of a consent decree could at least have the full parameters of all potential issues available from the records of the discrimination claim. The resulting resolution of the discrimination-reverse discrimination claims would exhaust the universe of possible interests in dispute.

This view misconceives the stakes in the Birmingham litigation in two fundamental ways. First, it misses the key doctrinal step in the pre-1988 Supreme Court jurisprudence: the focus on the magnitude of the cost to the dispreferred. Second, it does not distinguish the substantive claims to entitlement of incumbent employees from those of mere aspirants to positions whose prospects for any given job might be adversely affected by an affirmative action decree.

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84 United States v. Jefferson County, 720 F.2d 1511, 1518 (11th Cir. 1983).

85 Martin v. Wilks, 490 U.S. 755, 758 (1989). *See also Cleveland Firefighters*, 478 U.S. at 512-13 (similar understanding of the contours of the Cleveland litigation by the white firefighters).

B. The Burdens of Remedies

The focus on discrimination-reverse discrimination ignores the critical inquiry that defined the Supreme Court's affirmative action jurisprudence throughout the 1980s. Between the Brennan-Marshall and Rehnquist-Scalia wings of the Court stood the deciding swing votes of Justices Powell and O'Connor.[86] For the middle of the Court, two issues determined the propriety of remedial racial or sexual preferences. The first was the extent of the compelling interest in desegregating the workforce or, as it appeared in the cases, the extent to which the parties could create a record justifying the employer's interest in resorting to remedial measures without recourse to litigation.[87] The second and perhaps most important factor was the cost to the dispreferred in terms of disrupting settled expectations.

This understanding of the issue is evident in Justice Powell's plurality opinion in *Wygant v. Jackson Board of Education*.[88] In *Wygant*, the Court struck down an affirmative action plan for schoolteachers in Jackson, Michigan, which would have resulted in the layoff of white teachers in favor of less senior black teachers. Justice Powell freely conceded that "[a]s part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy."[89] However, that recognition opened up the critical issues: how great are the burdens, and how broadly or narrowly are they spread? In other words, the critical questions are how localized those costs are to be in terms of the number of individuals forced to bear those costs, and how exacting those costs would be for the affected individuals.

From this perspective, the Court's jurisprudence through the 1980s divides along a continuum with surprisingly well-defined contours. At one end are the hiring cases in which "the burden to be borne by innocent individuals is diffused to a considerable extent

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86 Justice Powell voted against the proposed preferences twice and in favor four times, while Justice O'Connor voted in favor twice and against four times. Selig, *supra* note 7, at 305 n.32.

87 The best example is the discussion by Justice O'Connor in *Wygant*:

> [P]ublic employers are trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action *is* taken. Where the employers . . . act on the basis of information which gives them a sufficient basis for concluding that remedial action is necessary, a contemporaneous findings [of liability] requirement should not be necessary.

Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 291 (1986) (O'Connor, J., concurring in part and concurring in the judgment).

88 476 U.S. 267 (1986).

89 *Id.* at 280-81; *see also* Franks v. Bowman Transp. Co., 424 U.S. 747, 777 (1976) (in remedying discrimination, "sharing of the burden" not impermissible).

among society generally."[90] At the other extreme are the layoff cases, in which the costs are more direct and dramatic. According to Justice Powell, "While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. The burden is too intrusive."[91] Thus, according to this view, "[d]enial of a future employment opportunity is not as intrusive as loss of an existing job."[92] Not only are the costs highly localized in the affected employees, but the cost to each employee is overwhelming. For a senior, tenured employee, "the rights and expectations surrounding seniority make up what is probably the most valuable capital asset that the worker 'owns,' worth even more than the current equity in his home."[93]

Throughout the 1980s, the Supreme Court approved of no affirmative action plan in which the result of a racial or sexual classification would have "unsettled [a] legitimate firmly rooted expectation"[94] of the dispreferred employee;[95] such an expectation is most clearly distilled in cases in which the affirmative action plan would have cost the dispreferred employees their jobs. Until the 1988 Term, the Supreme Court departed from its relatively tolerant view of affirmative action only "when an issue of cost allocation to innocents [lies] on the surface of a lawsuit."[96]

As developed below, the focus on the costs to the dispreferred, particularly in cases affecting public employees, dovetails with an independent body of case law that assures due process protection of property-based entitlements to employment. Although the parallels to the due process employment case law go unmentioned in the affirmative action jurisprudence, the Court's attentiveness to the impact of preferences on the rights of the dispreferred is nonetheless consistent with a respect for the security of individual claims against

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90 *Wygant*, 476 U.S. at 282.

91 *Id.* at 283 (footnote omitted).

92 *Id.* at 282-83; *see also id.* at 295 (White, J., concurring in the judgment) ("Whatever the legitimacy of hiring goals or quotas may be, the discharge of white teachers to make room for blacks, none of whom has been shown to be a victim of any racial discrimination, is quite a different matter.").

93 Fallon & Weiler, *supra* note 7, at 58. *See also Wygant*, 476 U.S. at 283 (citing Fallon & Weiler for this proposition).

94 Johnson v. Transportation Agency, 480 U.S. 616, 638 (1987).

95 *See* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 567-68 n.2 (1984) (lower court's injunction against seniority-based layoffs "direct[ly]" resulted in three layoffs of white employees with more seniority than blacks who retained their jobs); *Wygant*, 476 U.S. at 270-72 (collective bargaining agreement provided for a freeze in minority layoffs so that nonminority teachers were laid off before minority teachers with less seniority).

96 Fallon & Weiler, *supra* note 7, at 29.

majoritarian intervention.[97] Despite the fact that preferences are being afforded to historically disadvantaged groups, when the burden falls on a discrete, identifiable group, the issue of state-directed capture of private entitlements is squarely posed.[98] It is, after all, the "State [that] implements a race-based plan that requires such a sharing of the burden."[99] In such circumstances, a constitutional vision protecting individually held "moral rights against the state"[100] comes to the fore.[101]

The promotion cases lie along the continuum between the extremes of hiring and discharge cases and incorporate features of each. In the promotional context the cost of granting a preference cannot be diffused across a broad pool of applicants as in the hiring context, nor can the identities of the preferred and dispreferred be kept from each other; both will continue to work in the same enterprise, in some instances with the preferred in a direct supervisory relationship to the dispreferred. Thus in the two major promotion cases prior to *Martin*, the Court took pains to carefully examine the expectation interests of the dispreferred to determine whether a vested entitlement existed.[102]

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97 Robin West, *The Supreme Court—Foreword, Taking Freedom Seriously*, 104 HARV. L. REV. 43, 52 (1990).

98 The status of the individual has been unclear throughout the development of antidiscrimination law under both the Constitution and Title VII. While the animating spirit of the case law is to provide relief to the historically disadvantaged groups in our society, *see* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978), the Court's opinions are nonetheless replete with claims that under the antidiscrimination principle, the "focus on the individual is unambiguous." Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978); *accord Furnco*, 438 U.S. at 579-80; Connecticut v. Teal, 457 U.S. 440, 453-55 (1982). *Cf.* Shelley v. Kraemer, 334 U.S. 1, 22 (1948) ("The rights established [under the Fourteenth Amendment] are personal rights.").

99 *Wygant*, 476 U.S. at 281 n.8 (plurality opinion of Justice Powell).

100 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 147 (1977). The strong form of this argument is found in ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 28-29 (1968), in which the rights of individuals are upheld as positive moral constraints on the goal-directed policies of society, whether these rights are justified on utilitarian or other grounds.

101 According to Justice Powell,

> *All* state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. . . . These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is . . . inspired by the supposedly benign purpose of aiding others.

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294 n.34 (1978) (Powell, J.).

102 *See* Johnson v. Transportation Agency, 480 U.S. 616, 638 (1987) (finding that dispreferred male employee had no firmly rooted expectation of promotion); United Steelworkers v. Weber, 443 U.S. 193, 208 (1979) (creation of new promotional opportunity with preferences aimed at integrating previously segregated craft positions did not trammel pre-existing interests of dispreferred white workers).

Perhaps the most difficult case to date for the Court, *Johnson v. Transportation Agency*,[103] arose in the promotional context. Although it involved sex rather than race discrimination, this case is instructive both because of its focus on the nature of the dispreferred's expectational interests and because it weighed those interests in the context of promotional opportunities, much like those at stake in *Martin*. In *Johnson*, a male applicant for a promotion to a road dispatcher position claimed that the Transportation Agency promoted a female applicant instead of him because of a county-assigned preference for women.[104] Johnson was deemed qualified for the position and had scored marginally better than the female applicant, Diana Joyce, on the promotional examination.[105] While no woman had ever served in the desired position, road crew dispatcher, the record was bereft of any evidence of employer discrimination toward women in promoting them to supervisory positions; indeed Joyce was the first woman ever to hold the lower position of road maintenance worker from which the promotion was sought.[106]

Johnson squarely posed the question of a preference without a putative history of discrimination, but in a singularly uncomfortable setting. The identities of the preferred and dispreferred were known, and the costs of the preference were fully localized on the one dispreferred individual. Nonetheless, the Court denied Johnson's claim of discrimination, in large part on the basis of the quality of Johnson's expectation. The Court examined the hiring practices of Santa Clara County and found that, despite his high score on the promotional examination, Johnson was only one of seven individuals eligible for promotion, and the employer retained discretion to promote any of the seven individuals.[107] Consequently Johnson "had no absolute entitlement to the road dispatcher position," and the denial accordingly "unsettled no legitimate, firmly rooted expectation."[108]

The Supreme Court's affirmative action jurisprudence prior to the 1988 Term can therefore be characterized as possessing a tolerant view of efforts to advantage historically disfavored groups. When affirmative action imposed direct burdens on legitimate expectations held by identifiable, incumbent employees, the Court's response was quite the contrary. Claims of incumbent employees were not procedurally barred by the unilateral action of an employer

103 480 U.S. 616 (1987).
104 *Id.* at 623-26.
105 *Id.* at 623-24.
106 *Id.* at 623.
107 *Id.* at 638.
108 *Id.*

promulgating new regulations, as in *Johnson*,[109] or even by an employer negotiating the terms of the affirmative action plan with a union or with underrepresented minorities, both of which occurred in *Wygant*.[110] Rather, localized costs imposed on the vested expectations of incumbent employees, particularly when the cost was loss of employment, were impermissible well before the 1988 Term. In sum, the pre-1988 affirmative action case law can be conceptualized as follows:

TABLE 1
PRE-1988 AFFIRMATIVE ACTION PERMISSIBILITY

	Preference Cost Bearer	
Preference Recipient	Individual White	Group White
Individual Black	Maybe[111]	Yes[112]
Group Black	No[113]	Yes[114]

It would be misleading to overstate the continued stability of the Supreme Court consensus on affirmative action remedies in the employment setting. That consensus has suffered serious disrepair in the past two terms of the Court, from surprisingly opposing

109 *Id.* at 619-20 (reviewing EEOC and district court jurisdiction to hear claim).

110 476 U.S. 267, 271-73 (1986) (reviewing procedural history).

111 The Court has not upheld the use of preferences when the preference given to a specific black employee disrupts the settled expectation of an individual white employee, absent an express finding of discrimination. *Compare* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (striking down of a consent decree-instituted preference not based on court findings of discrimination) *with* United States v. Paradise, 480 U.S. 149 (1987), *and* Local 28 of the Sheetmetal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) (both cases based upholding of use of preferences on judicial findings of discrimination). When no settled expectation is involved, the Court has allowed for the preferential treatment of one employee over another on the basis of race or sex. *See Johnson*, 480 U.S. 616.

112 Arguably this box does not represent affirmative action at all but rather make-whole relief aimed at restoring an individual to the position he or she would have occupied but for the discrimination. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 770-72 (1976).

113 Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986), exemplifies this situation: the Court held that historic discrimination against blacks as a group could not overcome the vested expectations of individual white employees.

114 The classic example continues to be United Steelworkers v. Weber, 443 U.S. 193, 208 (1979). In the absence of any pre-existing expectation of advancement to newly created craft positions, no individual white employee lost any secured right. Therefore, the Court upheld an affirmative action plan which was presented as a group preference for historically excluded blacks and as a plan which imposed the costs on whites as a group.

quarters. First, in *City of Richmond v. J.A. Croson Co.*,[115] the Court struck down a municipal ordinance setting aside thirty percent of the city contracts for minority business enterprises.[116] This marked the first time that the Court had struck down a minority preference that did not disrupt any pre-existing, entrenched expectations of dispreferred groups or individuals since the *Bakke*[117] case in 1978. While the Court's ruling was no doubt heavily influenced by the presence of a fixed quota at a relatively high level of opportunity,[118] the *Croson* Court was nonetheless strikingly more categorical in its denunciation of race-based classifications, regardless of their purpose or motivation.[119]

Second, and directly to the contrary, the Supreme Court affirmed the use of minority preferences in granting broadcast licenses in *Metro Broadcasting, Inc. v. FCC*.[120] In reaffirming the broader power of Congress to create racial remedies under Section 5 of the Fourteenth Amendment,[121] the Court once again failed to address the effects of preferences on the dispreferred. Instead, the Court, taking a tack 180 degrees to the contrary of *Croson*, declared that a relaxed standard of review should apply when congressional preferences are "benign" in that they aid disadvantaged groups, regardless of the use of racial classifications.[122]

An unstable legal regime that meets the description of " 'checkerboard' justice" may indeed result from these past two terms of the Court.[123] But the question is whether *Martin* properly belongs to the altered civil rights case law following the 1988 Term,[124] or

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115 488 U.S. 469 (1989).

116 *Id.* at 498-506.

117 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

118 *Croson*, 488 U.S. at 488-89, 499, 505-06.

119 *See id.* at 493-95; *id.* at 520-21, 527-28 (Scalia, J., concurring in the judgment).

120 110 S. Ct. 2997 (1990).

121 *Id.* at 3008. Fullilove v. Klutznick, 448 U.S. 448 (1980), established that courts should defer to the congressional power to enact appropriate legislation under Section 5 of the Fourteenth Amendment in order to remedy discrimination. In *Fullilove*, the Court upheld 10% minority set-asides in federally awarded contracts and based its opinion on a congressional finding that prior discrimination had impaired or foreclosed access by minority business enterprises to public contact opportunities. *See generally* Drew S. Days, III, Fullilove, 96 YALE L.J. 453, 474-76 (1987) (focusing on the congressional source of mandated set-asides as the key to the Court's ruling).

122 *Metro Broadcasting*, 110 S. Ct. at 3008-09.

123 Charles Fried, *The Supreme Court—Comment*, Metro Broadcasting, Inc. v. FCC: *Two Concepts of Equality*, 104 HARV. L. REV. 107, 117 (1990) (quoting RONALD DWORKIN, LAW'S EMPIRE 184 (1986)).

124 *See* Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 51-56 (1989). For contrasting views of how the pre-1988 jurisprudence differed from the Court's approach during the 1988 Term, compare West, *supra* note 97, at 53 (finding Court to have departed from "the substantive and jurisprudential implications of liberal legalism" in a decisively conservative direction), with Fried, *supra* note 123, at 110 (arguing that the Court abandoned liberal individual-

whether it fits into the more coherent scheme that governed remedial classifications through the earlier part of the 1980s. Can *Martin* be reconciled with a vision of civil rights that allows for nonmalevolent uses of racial or sexual classifications so long as the costs to the dispreferred are diffused across a broad pool and no individual is made to suffer unduly? If so, then the Supreme Court's decision in that case does not mark the radical departure from prior law that its critics have claimed. To examine *Martin* in this light requires that we turn our attention to the interests of the dispreferred white firefighters and the costs imposed upon them.

C. Property Rights and Procedural Due Process

As Professor Randall Kennedy reminds us, the moral justification for affirmative action must be that affirmative action is a form of "social justice" given "as rather modest compensation for the long period of racial subordination suffered by blacks as a group."[125] This remedial objective, broadly conceived, is the moral foundation for granting racial preferences[126] in the face of claims of "affirmative discrimination" or "reverse discrimination."[127] However, even if the argument in favor of affirmative action were accepted uncritically, a crucial question would remain concerning how to distribute the social cost of granting such preferences. Clearly, in the absence of an across-the-board expansion of opportunity for all, preferences

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ism in *Metro Broadcasting* in favor of a "collectivist, group-rights conception of equal protection"). Needless to add, both Professors West and Fried were commenting on the same Term of the Supreme Court.

125 Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1332 (1986). For discussions of group-based theories of rights favoring affirmative action, see Robert Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C. L. REV. 531 (1981); Alfred W. Blumrosen, *The Group Interest Concept, Employment Discrimination and Legislative Intent: The Fallacy of* Connecticut v. Teal, 20 HARV. J. ON LEGIS. 99 (1983); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

126 A bountiful literature was sparked by the debate over affirmative action, even a summary of which would be beyond the scope of this Article. For useful recent contributions, see, e.g., HERMAN BELZ, EQUALITY TRANSFORMED (1991) (attacking Supreme Court jurisprudence for move from protection of individual opportunity to institution of group-based preferences); MICHEL ROSENFELD, AFFIRMATIVE ACTION AND JUSTICE 283-336 (1991) (reviewing philosophical and jurisprudential literature on affirmative action and proposing a defense of affirmative action based on "justice as reversible reciprocity"); LEE SIGELMAN & SUSAN WELCH, BLACK AMERICANS' VIEWS OF RACIAL INEQUALITY 119-45 (1991) (compiling survey data broken down by race of respondent on attitudes toward remedies for racial discrimination); THOMAS SOWELL, PREFERENTIAL POLITICS (1990) (providing examples of failures of preferential policies in heterogeneous societies around the world); PETER WESTEN, SPEAKING OF EQUALITY 131-45 (1990) (describing the philosophical inability to establish non-normative first principles of equality).

127 The term "affirmative discrimination" is drawn from NATHAN GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY (1975).

for one group impose costs that groups or individuals outside the preferred classification will have to absorb.

Cost allocation concerns have raised independent issues of social justice in treating the dispreferred,[128] particularly when the costs are localized on an identifiable individual or group. In reponse some commentators have called for a system of compensation for the "victims of preferential employment discrimination remedies."[129] While these approaches are consistent with the broad theme of this Article, they nonetheless address the problem from a different vantage point. A more careful examination of the rights implicated by a case such as *Martin* reveals that tenured, career-term public employees already have a legal basis for protection from the adverse impact of employer agreements to resolve workforce imbalances.

In a series of cases involving the job tenure of public employees dating from the 1960s, the Supreme Court has attempted to clarify the conditions under which state employers may compromise the employment expectations of their employees. In *Board of Regents v. Roth*,[130] a challenge to the nonretention of an untenured professor at a Wisconsin state university, the Court formally supplanted the view that state employment was a privilege that conferred no substantive rights or entitlements to the jobholders.[131] In its place the

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128 *See* Fallon & Weiler, *supra* note 7, at 28-45.

129 J. Hoult Verkerke, Note, *Compensating Victims of Preferential Employment Discrimination Remedies*, 98 YALE L.J. 1479 (1989) (advocating a theory of systematic compensation for the dispreferred under Title VII). *See also* Iris A. Burke & Oscar G. Chase, *Resolving the Seniority/Minority Layoffs Conflict: An Employer Targeted Approach*, 13 HARV. C.R.-C.L. L. REV. 81, 83 (1978) (advocating "full payroll" remedy to shift impact of dispreferred onto employer wrongdoer). *Cf.* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 605-06 (1984) (Blackmun, J., dissenting) (advocating treating employer as having entered two binding contracts: one to desegregate and one to respect seniority); W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers, 461 U.S. 757, 767 (1983) (company desiring to reduce workforce, constrained by both collective bargaining agreement and Title VII consent decree, faces dilemma "of the Company's own making. The Company committed itself voluntarily to two conflicting contractual obligations").

In a unique case subsequently vacated in light of *Stotts*, a district court ordered the State of New Jersey to pay compensation to incumbent whites for employment opportunities lost as a result of affirmative action; the court reasoned that this would be the only fair solution because the cost of remedial affirmative action is properly chargeable to society as a whole. Vulcan Pioneers v. New Jersey Dep't of Civil Serv., 588 F. Supp. 716, *vacated*, 588 F. Supp. 732 (D.N.J. 1984), *aff'd*, 770 F.2d 1077 (3d Cir. 1985).

130 408 U.S. 564 (1972).

131 *Id.* at 571. The courts had long held that public employment was a "privilege," not a "right," and accordingly that public employees faced with adverse employment decisions were not owed any due process protections. *See* Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951). The Court expressly repudiated this doctrine five years before *Roth*: "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." Keyishian v. Board of Regents,

Court found an affirmative right to continued employment—a right characterized as a property interest[132]—when there is "a legitimate claim of entitlement" based on "more than a unilateral expectation" of the jobholder.[133]

The Court in *Roth* focused on the terms under which the state had offered employment in order to define the "interests encompassed by the Fourteenth Amendment's protection of liberty and property."[134] In order for employment expectations to rise to the level of a cognizable property interest, the Court found, there must be a clear creation of entitlement under the governing state regulations: "Just as the welfare recipients' 'property' interest in welfare payments was created and defined by statutory terms, so [Roth's] 'property' interest in employment at Wisconsin State University-Oshkosh was created and defined by the terms of his appointment."[135] After *Roth*, the Court looked to whether the employer had implemented a formal or informal tenure policy that created cognizable legal expectations in continued employment.

Equally significant, for purposes of this Article, are the approaches that the Court considered and rejected in *Roth*. The strong dissents of Justices Douglas and Marshall invited the Court to extend due process protection to all state employees. They would deny the power of the state to create or withhold property rights. For Justices Douglas and Marshall, the power of state employers either to chill the speech of their employees[136] or to impermissibly discriminate among them[137] rendered the exclusive conferral of due process protection to tenured employees insufficient, if not downright arbitrary. This is most clearly expressed in Justice Marshall's view that "every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment. This is the 'property' right that I believe is protected by the Fourteenth Amendment and that cannot be denied 'without due process of law.' "[138]

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385 U.S. 589, 605-06 (1967). *See also* Goldberg v. Kelly, 397 U.S. 254 (1970) (discussing demise of rights-privileges jurisprudence); Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1047-65 (1984) (describing emergence and fall of rights-privileges distinction).

132 *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (applying real property analogy to state entitlement programs upon which individuals rely for sustenance); *Goldberg*, 397 U.S. at 263 (granting full due process protection to property interests created by state entitlement programs in the context of welfare benefits).

133 *Roth*, 408 U.S. at 577.

134 *Id.* at 569.

135 *Id.* at 578. The Court's reliance on welfare-based property rights is based on the line of due process cases commencing with *Goldberg*, 397 U.S. 254.

136 *Id.* at 585 (Douglas, J., dissenting).

137 *Id.* at 587-89 (Marshall, J., dissenting).

138 *Id.* at 588 (Marshall, J., dissenting).

The Court rejected the freedom of speech and equal protection approaches of Justices Douglas and Marshall. Instead the Court bifurcated the constitutional inquiry, asking first whether the state had created an entitlement to continued employment by, for example, providing for discharge only for certain enumerated reasons. The state's creation of an entitlement of this nature gives rise to a property interest that triggers the protections of due process. Having found a state-created property interest, the second question concerned the actual process due under the Due Process Clause. After a decade of meandering on the precise contours of property-based due process in employment,[139] the Court in *Cleveland Board of Education v. Loudermill*[140] finally arrived at a consensus view of the procedural protections owing to the newly recognized property rights in state employment. The Court in *Loudermill* defined independent procedural rights for all public employees who met the *Roth* standard of vested employment rights.[141] In the context of termination of vested employment, the Court identified three competing factors that must govern the due process inquiry: "the severity of depriving a person of the means of livelihood";[142] "the governmental interest in the expeditious removal of unsatisfactory employ-

139 *See* Arnett v. Kennedy, 416 U.S. 134 (1974); Bishop v. Wood, 426 U.S. 341 (1976). In *Arnett*, a deeply divided Court held that a nonevidentiary, nontrial-type predeprivation hearing was constitutionally sufficient despite the fact that the pretermination hearing would, under the facts of the case, be held before the same person who was the subject of the employee's critical speech that gave rise to the discharge. The plurality opinion by Justice Rehnquist asserts that property rights created by statute warrant procedural protection only to the extent prescribed by the statute itself, so that employees "must take the bitter with the sweet." *Arnett*, 416 U.S. at 154. In *Bishop*, the Court found no property interest in continued employment under the facts of the case but explicitly rejected Justice Rehnquist's "bitter with the sweet" approach to assessing the extent of procedural protection owing to statutorily conferred property rights. *Bishop*, 426 U.S. at 345 n.8.

Academic commentators were as divided as the Court on whether constitutional due process requirements could exist independent of the state law entitlements that created the underlying rights. The most direct support for the "bitter with the sweet" rationale is found in Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85. *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-12, at 706-14 (2d ed. 1988) (having reservation about independent procedural requirements but seeking protection for individuals' perceptions of self-worth); William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 462-65 (1977) (viewing power to create procedural requirements as flowing from power to create substantive entitlements, but arguing for the virtue of being treated fairly as an independent good). For defenses of constitutional procedural protections, see Douglas Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clauses Nonjusticiable*, 60 TEX. L. REV. 875, 882-95 (1982) (responding to Easterbrook); Peter N. Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 CAL. L. REV. 146 (1983).

140 470 U.S. 532 (1985).

141 *Id.* at 539-42.

142 *Id.* at 543.

ees and the avoidance of administrative burdens";[143] and "the risk of erroneous termination."[144]

Balancing these factors, the Court identified "notice and an opportunity to respond"[145] as the essential features of due process. Accordingly, public employers were obliged to provide individual notice of proposed adverse action and the basis therefore to their tenured employees, and to provide them an opportunity to contest the adverse action, either personally or in writing, prior to its execution.[146]

The Court was fully aware that it was sanctioning the deprivation of a property interest with "something less" than a full evidentiary hearing.[147] In deference to the interest of governmental employers in expeditious action, the pretermination right afforded under *Loudermill* did not grant the affected employee the right to "test the strength of the evidence 'by confronting and cross-examining adverse witnesses and by presenting witnesses on [the employee's] own behalf. . . .' "[148] Thus, the Court insisted that part of the due process protection consisted of the guarantee that under state law a full postdeprivation hearing would be held in which the employee could defend her entitlement with undiminished legal rights.[149]

IV

THE INDEPENDENT COMMANDS OF DUE PROCESS

In examining the issues in *Martin* under a property-based due process inquiry, three questions arise. The first is whether the concept of a protectable property interest can extend beyond the discharge context to incorporate lesser adverse impacts on employment, such as the denial of a promotion. If so, the next question concerns the adequacy of the procedural protections afforded such a property interest. Does the opportunity of affected third parties to raise objections at a fairness hearing under Rule 23(e) of the Federal Rules of Civil Procedure satisfy their due process rights? Put differently, are the due process commands of notice and an adequate

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143 *Id.*

144 *Id.*

145 *Id.* at 546.

146 *Id. See also* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1281 (1975) (setting forth due process requirement of opportunity to respond prior to adverse governmental action).

147 *Loudermill*, 470 U.S. at 545 (quoting Mathews v. Eldridge, 424 U.S. 319, 343 (1976)).

148 *Id.* at 548 (Marshall, J., concurring in part and concurring in the judgment) (quoting Arnett v. Kennedy, 416 U.S. 134, 214 (1974) (Marshall, J., dissenting)).

149 *Id.* at 546.

hearing as articulated by the Court in *Loudermill* satisfied when third parties are given the opportunity to raise objections to a consent decree to which they were not a party? Finally, our inquiry must turn to the scope of the rights for which the due process protections are claimed. Clearly, in the context of a systematic pattern of denial of employment opportunity to minorities, the whites who as a group benefitted from the expansion of job opportunities at the expense of minorities cannot claim an inviolate right to a continued monopoly on employment opportunities.

A. Vested Expectations in Promotional Opportunities

The tragedy of the Birmingham litigation is that a noble struggle to rid the City of invidious discrimination has evolved into an irreconcilable confrontation between legitimate aspirations. On the one hand are the black citizens of Birmingham, long denied the basic human claim to self-esteem[150] by segregation of opportunity, and denied the more specific capacity to achieve self-respect through work.[151] The absence of prospects for advancement that defined black life in Birmingham, a "kind of moral exile from society,"[152] cried out for redress. The courts became the locus of a worthy crusade to open the avenues of integration and self-realization through employment opportunity.[153]

Unfortunately for blacks aspiring to equal employment opportunities, the period in which the legal prohibitions against formal discrimination finally met legal condemnation was one of decreased economic opportunity and increased unemployment.[154] In particular, a contraction of employment in manufacturing and municipal service closed to blacks a preferred path of integration that had

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150 *See* WORK IN AMERICA, REPORT OF A SPECIAL TASK FORCE TO THE SECRETARY OF HEALTH, EDUCATION AND WELFARE 3-7 (1973) (describing employment as key source of self-esteem), *reprinted in* PAUL W. ROTHSTEIN ET AL., CASES AND MATERIALS ON EMPLOYMENT LAW 4-6 (1987); JOHN RAWLS, A THEORY OF JUSTICE 440 (1976) (describing the desire for achievement of self-esteem as one of the principal tenets which persons in the Rawlsian original position would agree is the basis for structuring society).

151 J. Donald Moon, *The Moral Basis of the Democratic Welfare State*, *in* DEMOCRACY AND THE WELFARE STATE 47 (Amy Gutmann ed., 1987).

152 *Id.* at 41.

153 *See* Jon Elster, *Is There (or Should There Be) a Right To Work?*, *in* DEMOCRACY AND THE WELFARE STATE, *supra* note 151, at 53, 74-76 (reporting Western European workers' preference for payment of capital subsidies to industry in order to create jobs over wage or income subsidies directed to unemployed employees).

154 *See* Michael J. Piore, *Historical Perspectives and the Interpretation of Unemployment*, 25 J. ECON. LIT. 1834, 1834 (1987) (unemployment rates from the 1970s to the 1980s are persistently three to four times those prevailing in the 1960s through the 1970s).

been exploited by previous generations of immigrants as a stepping stone to collective advancement.[155]

At the same time, the white incumbents in Birmingham were acquiring vested rights in their employment. Under a seniority system established by civil service regulations, incumbent employees acquired increased job protections, promotional eligibility, wages, and benefits with each passing year.[156] These employment rights that were grounded in the continued service of incumbent employees existed independent of any discrimination or antidiscrimination claim. Moreover, although not recognized as a matter of formal constitutional law, the reliance interests of the individual firefighters in their ongoing employment steadily increased with the passage of time.[157]

Recognition of such seniority-based expectations, whether formalized by collective bargaining agreements or civil service regulations, represents an effort to protect an aging generation, particularly after individual competitive primes have passed, from competitive pressures of younger employees. Accordingly, economists treat seniority systems as "a redistribution from young to old, maintained as an equilibrium to effect the smoothing of intertemporal consumption."[158] For long-term individual employees under

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155 The Irish . . . still offer the clearest example of the intergenerational dynamics at work within the immigrant-ethnic working class. During the Famine immigration, the Irish tended to cluster in the commercial-manufacturing ports and factory towns and occupied the bottom of the occupational scale, in domestic service, day labor, and the most debased, sweated branches of manufacturing and the building trades. A less spectacular but still formidable Irish migration replenished the ranks of domestic servant girls and laborers in the 1860s and 1870s. At the same time, however, a significant portion of the Irish-American working class, especially of the second-generation "natives," began moving incrementally into skilled and semiskilled positions (iron molding, steamfitting, masonry) as well as into petty retailing. From their ranks would come politicians, editors, trade unionists, and informal community leaders . . . .

Sean Wilentz, *The Rise of the American Working Class*, *in* PERSPECTIVES ON AMERICAN LABOR HISTORY: THE PROBLEMS OF SYNTHESIS 83, 119 (J. Caroll Moody & Alice Kessler-Harris eds., 1989). *See also* THOMAS SOWELL, RACE AND ECONOMICS 59-156 (1975).

156 In Birmingham, for example, white employees who were next in line for promotions to fire department lieutenant positions filed the reverse discrimination charges. They claimed that they had settled entitlements to the next promotional positions pursuant to the existing state regulations but that the Fire Department's compliance with the consent decrees caused them to lose these promotions. *See supra* note 33 (discussing state law basis of firefighters' expectation interests).

157 *See* Samuel Issacharoff, *Reconstructing Employment*, 104 HARV. L. REV. 607, 621-24 (1990) (book review) (discussing reliance-based interests of incumbent employees in their employment and the difficulty senior employees have in replacing job status in open market).

158 Kenneth Schepsle & Barry Nalebuff, *The Commitment to Seniority in Self-Governing Groups*, 6 J.L. ECON. & ORG. 45, 48 (footnote omitted) (1990) (surveying economic literature on role and development of seniority-based preferences).

a seniority system, loss of seniority-based expectations not only represents a defeat of anticipated economic protections but may impose independent "demoralization costs" from the loss of what was thought to be a secure entitlement.[159] In the union setting, seniority is afforded tremendous legal protection because of a recognition that " '[m]ore than any other provision of the collective[-bargaining] agreement . . . seniority affects the economic security of the individual employee covered by its terms.' "[160]

It is therefore not surprising that job expectations based on seniority are perceived to be the most critical of employment rights.[161] Nor is it surprising that employment expectations triggered by seniority rights occupy a uniquely protected niche in both labor law and employment discrimination law, as evidenced by the special protections afforded bona fide seniority systems under Title VII.[162]

Thus, when the City of Birmingham revised its promotional processes without any form of compensation or other adjustment to incumbent firefighters, the incumbents properly perceived this as a loss, particularly for the individual firefighters who claimed they would have secured promotions but for the consent decrees. The perception of loss does not in itself trigger a property interest protectable by the Due Process Clause. Rather, claims of entitlement in employment must, in the langnage of *Roth*, be based on "more than a unilateral expectation" of entitlement to the employment benefit.[163] Nonetheless, at least as alleged in the complaints consolidated before the Eleventh Circuit,[164] the individual white firefighters claimed "more than a unilateral expectation" that pro-

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159 JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 122 (1985).

160 Franks v. Bowman Transp. Co., 424 U.S. 747, 766 (1976) (quoting Benjamin Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1535 (1962)).

161 *See* RICHARD B. FREEDMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 123 (1984) (seniority rights are critical component of unionized workforces; most American production workers covered by seniority protections).

162 *See* Section 703(h) of Title VII, 42 U.S.C. §§ 2000e-2002(h) (1988), which provides that "[i]t shall not he an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . ." *See also* Brotherhood of Teamsters v. United States, 431 U.S. 324, 350-54 (1977) (reviewing special protections of seniority expectations in Title VII legislative history).

163 Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

164 *See* Complaint for Wilks, Wilks v. Arrington, No. CV 83-AR-2116-S (N.D. Ala. 1983), *reprinted in* 1 JOINT APPENDIX at 130, 131-33, Martin v. Wilks, 490 U.S. 755 (1989) (No. 87-1614) (alleging that plaintiffs were among top-ranked candidates from prior administration of promotional examination and that the City had failed to issue promotions in conformity with the governing Civil Service Act); *In re* Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492 (11th Cir. 1987), *aff'd sub nom.* Martin v. Wilks, 490 U.S. 755 (1989).

motions would be granted to them based on their seniority and performance on promotional examinations.

Employee discharge cases present the clearest findings of property-based rights to employment.[165] When an employee stands to lose employment altogether, the issue of the existence of a legal entitlement is most directly drawn, and, in light of the magnitude of the loss,[166] the employee is most likely to pursue avenues of legal redress. Despite the prevalence of discharge cases, it would be a mistake to narrow the legal protections of employment to the question of having a job alone. Rather, the case law supports a broader conception of legally protected entitlements that encompasses a broad swath of terms and conditions of employment to which an employee may lay contractual or statutory claim.

The concept of property in the due process case law is extremely flexible. Property interests have been found not only for formally tenured employees, but also for the employee who expected continued employment because of "custom or policy" rather than formal regulation. In *Perry v. Sindermann*,[167] one of the landmark Supreme Court cases on property rights of public employees, the Court held that an untenured professor at a state college which lacked a formal tenure policy could nonetheless claim an abridgment of property rights based on a "feel[ing] that he ha[d] permanent tenure as long as his teaching services [were] satisfactory."[168] Similarly, courts have found that untenured, even probationary, employees who were given assurances of continued employment absent performance failures could claim a breach of due process-protected property rights.[169]

Courts have also applied the *Loudermill* due process analysis to protect against loss of employment opportunity or income that may result from claimed arbitrary discipline, suspension, or censure.[170]

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165 *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

166 Labor arbitrators routinely refer to discharges as the "capital punishment" of the employment setting. Foster v. Bowman Transp. Co., 562 F. Supp. 806, 817 (N.D. Ala. 1983).

167 408 U.S. 593 (1972).

168 *Id.* at 600. *See also* Colburn v. Trustees of Indiana Univ., 739 F. Supp. 1268 (S.D. Ind. 1990) (holding that property rights in promotions under *Loudermill* can be created either by state statute or regulations that substantively limit decision-makers' discretion or by customs or policies that create "mutually explicit understandings" about promotion entitlements and criteria).

169 *See, e.g.*, Perri v. Aytch, 724 F.2d 362 (3d Cir. 1983) (probationer dischargeable only for cause had protectable property interest); Marvin v. King, 734 F. Supp. 346 (S.D. Ind. 1990) (probationary firefighter dischargeable only for unsatisfactory performance had property interest); Lewis v. Hayes, 505 N.E.2d 408 (Ill. App. Ct. 1987) (probationer dischargeable only for incompetence or disqualification has property interest).

170 *See, e.g.*, Newman v. Massachusetts, 884 F.2d 19 (1st Cir. 1989) (professor disciplined for alleged plagiarism has due process procedural rights), *cert. denied*, 493 U.S.

Similarly, courts have found protectable property interests in claims of tenure in a particular position,[171] in accrued benefits,[172] and in access to workers' compensation benefits.[173]

Although less robust than the case law involving discharge and complete loss of benefits, the courts have assigned property rights to employees seeking a promotion in numerous circumstances "where a promotion would be virtually a matter of right—for example, where it was solely a function of seniority or tied to other objective criteria."[174] The Eighth Circuit applied property analysis to seniority-based promotions in finding that government employees had a property interest in a detailed promotion system:

> [A]bsent statutes, regulations, or some other basis for such a legitimate claim of entitlement, government employment and promo-

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1078 (1990); Narumanchi v. Board of Trustees, 850 F.2d 70 (2d Cir. 1988) (suspension of professor requires due process); Doe v. Bowen, 682 F. Supp. 637 (D. Mass. 1987) (hospital must provide due process to physician threatened with suspension for alleged Medicare and Medicaid fraud); Garraghty v. Jordan, 830 F.2d 1295 (4th Cir. 1987) (suspension of prison warden requires due process). *But see* Gillard v. Norris, 857 F.2d 1095 (6th Cir. 1988) (three-day suspension is de minimis harm not implicating due process); Angell v. Leslie, 832 F.2d 817, 832 n.6 (4th Cir. 1987) (property right implicated by one-day suspension is probably de minimis and not deserving of due process protection).

171 *See, e.g.*, Collins v. Marina-Martinez, 894 F.2d 474 (1st Cir. 1990) (property interest violated when professor removed from tenured position to untenured position, despite no discharge); Rathjen v. Litchfield, 878 F.2d 836 (5th Cir. 1989) (demoted employee has property interest in her former position but must exhaust administrative remedies prior to federal suit). *But see* Sewell v. Jefferson County Fiscal Court, 863 F.2d 461 (6th Cir. 1988) (harm caused by wrongful demotion de minimis because reinstatement to prior position with backpay occurred prior to litigation), *cert. denied*, 493 U.S. 820 (1989); Jimenez-Torres de Panepinto v. Saldana, 834 F.2d 25 (1st Cir. 1987) (finding no property right in library director position even though property right exists in job within less advanced library classification); Baden v. Koch, 799 F.2d 825 (2d Cir. 1986) (no property interest in appointed Chief Medical Examiner position).

172 *See, e.g.*, Knudson v. City of Ellensburg, 832 F.2d 1142 (9th Cir. 1987) (police officer has vested property interest in disability medical benefits despite postretirement narcotics felony conviction); Germano v. City of Mayfield Heights, 648 F. Supp. 984 (N.D. Ohio 1986) (property interest of police officer in accrued sick leave and clothing allowance; because of small amounts at stake, court held plaintiff should pursue state court remedies), *aff'd*, 833 F.2d 1012 (6th Cir. 1987); *see also* Jones & Laughlin Hourly Pension Plan v. LTV Corp., 824 F.2d 197, 201 (2d Cir. 1987) (in private sector, finding that "[w]e and other courts have suggested that pension plan members have a cognizable interest in receiving their contractually defined benefits"). *But see* Ramsey v. Board of Educ., 844 F.2d 1268, 1274-75 (6th Cir. 1988): despite a property interest in accrued sick leave,

> an interference with a property interest in a pure benefit of employment, as opposed to an interest in the tenured nature of the employment itself, is an interest that can be and should be redressed by a state breach of contract action and not by a federal action under section 1983.

173 *See* Cholewin v. City of Evanston, 899 F.2d 687 (7th Cir. 1990) (City's revocation of "injured-on-duty" benefits to police officer implicates property interest protected by due process).

174 Schwartz v. Thompson, 497 F.2d 430, 433 (2d Cir. 1974) (finding no such property right under facts presented).

> tion decisions are normally not subject to procedural due-process protections . . . . Here, however, extensive OPM [Office of Personnel Management], Army and ALMSA [Automated Logistics Management Systems Activity] regulations . . . were in effect [and] . . . provided the plaintiffs with a substantial, legitimate expectation by establishing that applications for competitive placement . . . were to be evaluated in accord with specified criteria and procedures . . . . We therefore hold that the plaintiffs had a property interest in ALMSA's merit-promotion system. . . .[175]

A similar result obtained in a case involving Alabama firefighters working under a civil service statute that said positions "shall be filled . . . by promotion following competitive tests,"[176] a provision applicable under the same substantive state law entitlement as in *Martin*. When that procedure was unilaterally abrogated by a fire chief seeking to promote personal favorites, the court held, "[t]he probability that one of the class [of nonpromoted employees] would have been promoted if proper procedures were followed is substantial and protectable and thereby rises out of the realm of unilateral expectancy and into that of property right."[177]

That the property-based analysis of the employment termination cases can be applied to the promotional setting is not surprising. An examination of the mechanism for administering reductions in force in the civil service context—or, for that matter, the unionized private sector—reveals that the distinction between promotion and termination is one of degree, not of kind. At stake in either promotion or layoff cases is the position that an incumbent employee should hold on the seniority roster, since it is that position which will determine either promotional eligibility or the inverse order of layoffs.

The Supreme Court's affirmative action cases provide an illustration. In neither *Firefighters Local Union No. 1784 v. Stotts*[178] nor

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175 McIntosh v. Weinberger, 810 F.2d 1411, 1433-34 (8th Cir. 1987), *vacated on other grounds sub nom.* Turner v. McIntosh, 487 U.S. 1212 (1988).

176 International Ass'n of Firefighters, Local 2069 v. City of Sylacauga, 436 F. Supp. 482, 487 (N.D. Ala. 1977) (quoting Rule 8A of the Civil Service Board of Sylacauga).

177 *Id.* at 490. *See also* Chopp v. Independent Sch. Dist. 706, Nos. C7-90-2068, C8-90-1351, 1991 WL 10213 (Minn. App. Feb. 5, 1991) (finding teacher had legitimate claim of entitlement to seniority rights which is a protectable property interest); Martin v. Itasca County, 448 N.W.2d 368 (Minn. 1989) (loss of seniority accrual implicates property right protected by due process); City of Riviera Beach v. Fitzgerald, 492 So.2d 1382 (Fla. Dist. Ct. App. 1986) (loss of seniority-based promotion to which police officer had reasonable expectation is deprivation of property interest). *But see* Koscherak v. Schmeller, 363 F. Supp. 932, 936 (S.D.N.Y. 1973) (distinguishing deprivation of promotion from discharge and holding only discharge actionable under due process on grounds that "[p]laintiffs are not being deprived of something they now enjoy"), *aff'd*, 415 U.S. 943 (1974).

178 467 U.S. 561 (1984).

Wygant v. Jackson Board of Education,[179] for example, did the dispreferred white employees claim that they were immune from layoffs. Rather, they sought to protect themselves against future or threatened loss of work by securing rights inuring to their relative positions on the seniority roster. In *Stotts*, the Court focused on the dispreferred employees' loss of a place on the seniority roster in the face of a reduction in force. The Court did not distinguish that loss as either a bump-down demotion or a layoff that depended on the relative seniority of the affected employee, because the employee's position on the seniority roster controlled the adverse effect in either instance.[180] Moreover, the recall of the affected employees did not moot the case because the layoff period affected the employees' accumulation of seniority credit. So great is the importance given to seniority ranking that the *Stotts* Court enforced the seniority-based claims of white dispreferred firefighters who were hired on the same day as the preferred blacks; the claimed deprivation amounted to losing the preference against layoffs because the white employees' names were higher in alphabetical order than those of the same-date-of-hire black employees.[181]

The due process case law is moving beyond the discharge context to encompass all significant terms and conditions of employment in which there is "more than a unilateral expectation" of tenured entitlement. This trend has an analogue in a distinct realm of constitutional employment law that does not depend on property-based rights: the expansion of First Amendment protections of public employees. Beginning with *Elrod v. Burns*,[182] the Court extended constitutional protection to public employees who were threatened with patronage-based dismissal—discharge for reasons of partisan political affiliation or nonaffiliation. Rather than draw a sharp line to distinguish discharge from other untoward effects on employment, however, the Court proceeded to take the rationale of *Elrod* and expand it to all phases of the employment relationship in which employers could threaten employee rights for impermissible partisan purposes. Thus, in *Rutan v. Republican Party of Illinois*,[183] the Court expressly rejected the Seventh Circuit's decision that only actions that are the "substantial equivalent of a dismissal"[184] could implicate constitutionally protected rights. Instead, the Court extended *Elrod* to apply to all facets of the em-

179 476 U.S. 267 (1986).
180 *Stotts*, 467 U.S. at 571.
181 Fallon & Weiler, *supra* note 7, at 5.
182 427 U.S. 347 (1976).
183 110 S. Ct. 2729 (1990).
184 868 F.2d 943, 955 (7th Cir. 1989) (en banc), *aff'd in part and rev'd in part*, 110 S. Ct. 2729 (1990).

ployment relationship, including "promotions, transfers, and recalls after layoffs";[185] this extension is similar to the extended application of the *Roth-Loudermill* due process analysis beyond the discharge situation. The Court thereby recognized that public employees could have protectable employment rights not only in continued employment, but in various incidents of the employment relationship. That recognition parallels the extension of due process protections to the broad spectrum of well-founded employee expectations related to the terms and conditions of public employment.

B. Procedural Due Process

Because of the exclusive focus on the reverse discrimination claim, no court in the extensive litigation leading up to *Martin* made any dispositive findings of fact concerning the expectational interests of the white firefighters in the promotions affected by the consent decrees. While the promotional system in Birmingham did not have a collective bargaining base,[186] were the incumbents able to show, as alleged in their complaints, reliance on a well-established promotional system under which they would have had a reasonable expectation of the next promotions, that should have sufficed to establish property interests protected by procedural due process. The difference between the facts in *Martin* and *Johnson* is that, in the latter case, Paul Johnson was afforded full hearing rights to determine the validity of his claim to the promotion given to Diana Joyce.[187] In tbe Birmingham case, however, the district court's reliance on the collateral attack rule would have denied the affected white firefighters any judicial review of their claimed expectations, other than objections raised during the approval of the consent decrees.

If the claims of incumbents to property interests in the terms and conditions of their employment are accepted, the next step in the inquiry is to define the proper procedural protections owed to those claiming abridgment of these property interests. The primary requirements of due process are notice and the opportunity to be heard. Notice has traditionally been characterized, under the Court's formulation in *Mullane v. Central Hanover Bank & Trust Co.*,[188] as satisfying due process if it is "reasonably calculated, under all the

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185 *Rutan*, 110 S. Ct. at 2737.

186 *See* United States v. Jefferson County, 28 Fair Empl. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981) (contrasting Alabama prohibitions on public sector collective bargaining agreements with United States v. City of Miami, 664 F.2d 435 (5th Cir. 1981), which refused to approve consent decree altering collectively bargained rights without approval of unions).

187 Johnson v. Transportation Agency, 480 U.S. 616 (1987) (discussed *supra* text accompanying notes 103-09).

188 339 U.S. 306 (1950).

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[189] The reaction to *Martin*, both in the academic literature and in the legislative debates concerning the Civil Rights Act of 1990, has focused overwhelmingly on the notice issue under *Mullane* as the critical constitutional inquiry. The legislative history reveals that proponents of the Civil Rights Act of 1990 believed that the sole constitutional constraint was the notice required by *Mullane* and its progeny.[190]

Mullane guides the due process inquiry only so long as no attempt is made to distinguish between the types of interests affected by consent decrees. If we focus on the impact of consent decrees on the rights of vested incumbents, two separate problems emerge more clearly. First, the *Mullane* balance of hardships in providing individual notice disappears, since the vested incumbents are readily identifiable from the employment rolls of one of the parties to the litigation—the employer. When the affected individuals are readily identifiable, actual notice served personally on the affected individuals is required.[191] Under such circumstances, newspaper publication of vaguely worded legal announcements, as was done in *Martin*, is inexcusable.[192] Directly worded notice could easily be provided through employee paychecks or by letters mailed to the home ad-

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189 *Id.* at 314.

190 *See* HOUSE COMM. ON EDUC. AND LABOR, REPORT OF COMMITTEE ON EDUCATION AND LABOR, H.R. REP. NO. 644, 101st Cong., 2d Sess., pt. 1, at 69 (1990) ("In *Mullane*, the Court specifically recognized that due process may be satisfied so long as reasonable efforts are made to give notice to interested persons."). *See also Hearings*, *supra* note 23, at 546 (testimony of Prof. Laurence H. Tribe) (due process requirements defined by *Mullane*); George M. Strickler, Martin v. Wilks, 64 TULANE L. REV. 1557, 1576-81 (1990) (focusing on *Mullane* to define constitutional due process issues in *Martin*). The focus on *Mullane* originated with Professor Larry Kramer, a defender of the *Cleveland Firefighters* decision and of the constitutionality of the collateral attack rule if sufficient procedural protections are incorporated into its use. *See* Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 345-49 (1988).

The defeated Civil Rights Act of 1990, therefore, would have forbidden collateral attacks on consent decrees when reasonable efforts were made to provide notice to third parties prior to the entry of the decree. H.R. 4000, S. 2104, 101st Cong., 2d Sess. § 2(a)(1) (1990). The 1991 Act rejected this approach in favor of an actual notice standard. Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 108, § 703(n)(B)(i)(I) (1991).

191 *See* Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798-800 (1983) (requiring more than publication notice when affected individnals could be identified through "reasonably diligent efforts").

192 In *Martin*, the notice consisted of ads in local newspapers stating that "Consent Decrees . . . designed to correct for the effects of any alleged past discrimination and to insure equal employment opportunities for all applicants and employees" were to be entered. Petitioner's Application at 174a, Martin v. Wilks, 490 U.S. 755 (1989) (No. 87-1614).

dresses maintained by the employer.[193] Even under *Mullane*, therefore, there is no reason for anything less than individual notice for tenured employees.

Nevertheless, the focus on notice obscures the fact that the critical due process issue is not so much the form of the notice, but its substance. Notice provides the means by which the party notified can take advantage of the required opportunity to be heard, and it is precisely on the question of the type of hearing afforded that the pre-*Martin* collateral attack doctrine falls short.

The opportunity to be heard must be commensurate to the rights at stake.[194] As developed in the preceding discussion of the due process case law culminating in *Loudermill*, property 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.[195]

An examination of the critical cases applying due process rights to vested employees reveals that although less than full adversarial hearings are permitted prior to the decision to deprive an employee of job rights, courts have granted that permission only for temporary deprivations (e.g., suspension from the workforce). To satisfy due process, however, a temporary deprivation must be followed by a full adversarial hearing at which the burden of proof rests with the employer, and at which the employee has the right to conduct discovery and cross-examine witnesses.

The issue in the highly disputed pre-*Loudermill* case law turns on what constitutes a sufficient opportunity to be heard prior to the termination.[196] In *Loudermill*, the Court reached a consensus on

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193 *See* Tulsa Professional Collection Serv. v. Pope, 485 U.S. 478, 489 (1988) (requiring actual notice when party has possession of names of potentially affected individuals).

194 *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (establishing balancing test between private interest in property right, governmental interest in expeditious termination of right, and the risks associated with erroneous decisions); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542-44 (1985) (applying *Mathews* balancing test to employment rights of tenured public employees).

195 *See supra* notes 158-66 and accompanying text.

196 The clearest example is drawn from the five separate opinions filed in Arnett v. Kennedy, 416 U.S. 134 (1974), a case involving the discharge of an employee whose only pretermination hearing consisted of the right to present his claim to the supervisor he had accused of corruption. *Id.* at 137-38. The division at the center of the Court in *Arnett* was between Justice Powell, who found informal predeprivation procedures sufficient, *id.* at 171 (Powell, J., concurring in part and concurring in the result in part), and Justice White, who argued for a full evidentiary hearing before termination. *Id.* at 185 (White, J., concurring in part and dissenting in part). Even under Justice Powell's view of limited pretermination hearing opportunities, the discharged employee must be afforded a full evidentiary hearing after the removal. *Id.* at 170. *See also* Brock v. Roadway Express, 481 U.S. 252 (1987) (plurality opinion) (Court again dividing over adequacy of predeprivation procedures, but agreeing that at some point full evidentiary hearing must be afforded to terminate property rights).

allowing a deprivation without a full evidentiary hearing in the public employment context, so long as the affected employee is allowed some opportunity to present her side of the story *and* so long as a full evidentiary hearing will follow.[197] In each case where the Court upheld a deprivation without a full evidentiary hearing, the Court was careful to indicate that the employer had made only an interim decision. Thus, a typical case would involve the type of hearing required for a preliminary decision regarding the removal of an employee from the worksite.[198]

By contrast, claim preclusion under the pre-*Martin* collateral attack doctrine would deny vested public employees precisely that opportunity to be heard subsequent to the initial deprivation. The collateral attack doctrine is troubling in that it denies to employees who have property interests in the terms and conditions of their employment a full evidentiary hearing at which to defend against a proposed denial of those interests. A tenured employee's opposition to a consent decree would constitute the entirety of the procedural protections owing to her employment and would permanently foreclose challenge by affected incumbents.[199] Half-measures, such as the right to articulate objections at a fairness hearing, would be offered in place of the developed hearing. Rather than placing the burden of proof on the party wishing to deny such employees their property interests, the fairness hearing would require that affected employees establish their continued entitlement to employment.

Moreover, fairness hearings do not guarantee potentially displaced employees the right to have their case argued by counsel, the right to subpoena witnesses or conduct discovery, or the right to subject adverse witnesses to cross-examination by counsel of their

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197 *Loudermill*, 470 U.S. at 545.

198 *See, e.g.*, Brewer v. Parkman, 918 F.2d 1336, 1339-40 (8th Cir. 1990) (dismissal of deputy sheriff without pretermination hearing a violation of due process); Kercado-Melendez v. Aponte-Roque, 829 F.2d 255, 262-63 (1st Cir. 1987) (school superintendent deprived of her due process rights when she was dismissed for political reasons without a pretermination hearing), *cert. denied*, 486 U.S. 1044 (1988); Duck v. Jacobs, 739 F. Supp. 1545, 1549-50 (S.D. Ga. 1990) (discharge of two police officers without pretermination hearing violates due process); Barkley v. City of Jackson, 705 F. Supp. 390, 394-95 (W.D. Tenn. 1988) (discharge of policeman without opportunity to respond to charges prior to termination violates due process).

This principle is not limited to employment cases. In Carey v. Piphus, 435 U.S. 247, 251 (1978), the Court found that the suspension of public high school students violated procedural due process when the students were not afforded an opportunity to present their side of the story prior to disciplinary action.

199 Professor Laycock was the first to focus on the nature of the legal claims of affected third parties. *See* Laycock, *supra* note 55, at 122 (addressing foreseeable legal claims of third parties) and 148-49 (acknowledging difficulty of relatively little investment in claim for applicants).

choice.[200] The Eleventh Circuit drew the proper procedural conclusion from the substantive entitlements of the incumbent employees: "If the plan affects promotion practice so as to alter or abolish the promotion opportunities of existing employees, these employees must be represented as parties to the decree if they are to be bound by it."[201]

Consequently, two constitutional possibilities remain. First, bilateral consent decrees may be given no binding effect as to third parties. This is the formal holding of *Cleveland Firefighters* and was the view that dispositively claimed the majority of the Court in *Martin*.[202] Alternatively, any procedural modifications altering the manner in which vested employees could assert their rights, such as those in the Civil Rights Act of 1991, may be narrowly construed to govern only the forum in which incumbents could protect their rights (the court in which the discrimination claims were filed)[203] and to set a statute of limitations for the filing of those claims that runs from the time the incumbent employees' received individual notice of the proposed alteration of their seniority rights.[204]

Permitting incumbent employees to register objections at a fairness hearing before a court that is resolving an employment discrimination claim between the employer and minority challengers would not meet the due process requirements owing to the property rights of incumbent employees. The right to protest is not an adequate substitute for the right to process. Rather, there must be the opportunity for a full hearing on any substantive claim raised by incumbents, including the property-based rights identified in this Article. The opportunity for a hearing must then include the right to discovery, to subpoena witnesses, and to appeal an adverse ruling.

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200 *See* Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47, 47-48 (1971) (per curiam) (no case or controversy when court confronted with "anomaly that both litigants desire precisely the same result"); Flast v. Cohen, 392 U.S. 83, 97 (1968) (holding that federal courts should act only after hearing "clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests").

201 *In re* Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1500 (11th Cir. 1987), *aff'd sub nom.* Martin v. Wilks, 490 U.S. 755 (1989).

202 Ironically, the earliest exposition of this view comes from Justice Stevens, author of the dissent in *Martin*, in his concurring opinion in Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984). In *Stotts*, the Court reviewed the authority of a district court to modify an affirmative-action consent decree so as to alter the seniority claims of white firefighters who were not party to the original consent decree. Justice Stevens objected to the Court entertaining any discussion of the permissibility of the affirmative action plan under Title VII. He argued that the district court lacked all authority to issue orders beyond the four corners of the decree that would reach nonparties to the decree. *Id.* at 590-91 (Stevens, J., concurring).

203 *See* Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 108, § 703(n)(3) (1991) (to be codified at 42 U.S.C. 2000e-2).

204 *See id.* sec. 108, § 703(n)(1)(B)(i).

C. Legitimate and Illegitimate Expectations

Incumbents may well have a property interest in their employment, and the property interest may indeed trigger procedural protections, but that cannot end the inquiry. No property rights are absolute; the purpose of the hearing in the due process line of cases certainly is not to foreclose an employer from denying property interests, particularly when layoffs are economically mandated or when social welfare benefits are terminated after eligibility expires. The hearing instead imposes a check on the arhitrary or erroneous deprivation of property rights. The purpose served by a due process hearing is to insure the protection of the incumbents' rightful expectations. This is so even in a case such as *Martin* in which the fact of prior discrimination against blacks is conclusively established and in which the corresponding need for a remedy is also established.

Nevertheless, this question of purpose is particularly troubling if the incumbents base their claims on the fact that they got the jobs first and have held them longer. Seniority as an intergenerational wealth transfer poses difficult problems when the prior assignment of opportunity was based in part on a now-impermissible denial of opportunity to racial or ethnic minorities. In such circumstances, the redistribution of wealth to the older generation locks in, well into the future, the past discriminatory practices, and rewards those groups that had previously benefitted from increased opportunity. Respecting seniority-based expectations thus restricts retrospective remedies and limits employment discrimination remedies to the realm of the prospective.

While this Article reviews the legitimacy of protecting established employment expectations, it must be recognized that, at least in the statutory Title VII context, this trade-off between future integration and respect for pre-existing employment is precisely what Congress intended. The legislative history reveals quite unambiguously that one of the political compromises which eased the passage of Title VII was precisely the promise to organized labor that "Title VII would have no effect on seniority rights existing at the time it takes effect."[205] More directly, the legislative history commanded that even a discriminatory employer "would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or . . . once Negroes are hired, to give them special seniority rights at the expense of white workers hired earlier."[206] While the legislative his-

205 110 CONG. REC. 7207 (1964) (statement of Senator Clark, one of the "bipartisan captains" responsible for the Senate debate of Title VII).

206 110 CONG. REC. 7213 (1964) (memorandum by Senators Clark and Case, the two "bipartisan captains" for the bill in the Senate).

tory primarily addresses the prospective effects of prestatute discrimination, the privileged position of seniority expectations is nonetheless apparent.

The early remedy cases under Title VII found that while plaintiffs may establish liability on a class-wide basis, individual plaintiffs had to establish claims to noninjunctive relief such as reinstatement and backpay.[207] These cases assumed that the primary issue at the remedy stage would be the employer's backpay liability and therefore created a burden-shifting mechanism for establishing the scope of retrospective relief. Plaintiffs would have the burden of creating a prima facie case of entitlement to retrospective relief, and once the prima facie case was made, the burden would shift to the employer—the party with the best access to information concerning the actual employment decisions[208]—to come forward to defeat the presumptive entitlement to relief.[209]

When relief involves reinstatement, or even "instatement" in a job, the primary cost-bearer for the discrimination remedy may not be the employer-discriminator but instead the incumbent employees. In this context, the case law is far more nuanced. Although the legal protections of seniority are not absolute, they are significant. The case law developing the substantive property rights of tenured incumbents requires that the burden of proof fall on parties seeking to strip incumbents of these rights. Thus the Supreme Court speaks of litigation taking as its "starting point the presumption in favor of rightful-place seniority"[210] to confine employment discrimination remedies to members of a plaintiff class who can "demonstrate that they have been actual victims of the discriminatory practice [who should] be awarded competitive seniority and given their rightful place on the seniority roster."[211] Absent proof sufficient to defeat the seniority-based claims of the incumbents, no antidiscrimination remedy altering seniority-based rights can stand.[212]

On the other hand, when incumbents' expectational rights are illegitimately obtained, legal procedures to defeat those rights are well established. Proof that entrenched rights stem directly from unlawful discrimination is sufficient to defeat the expectations of in-

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207 *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 770-72 (1976); International Bhd. of Teamsters v. United States, 431 U.S. 324, 359-61 (1977).

208 *Teamsters*, 431 U.S. at 360 n.45.

209 *Franks*, 424 U.S. at 772; *Teamsters*, 431 U.S. at 360.

210 *Franks*, 424 U.S. at 779 n.41.

211 Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 578-79 (1984).

212 The best examples are found in the court cases striking down the race-based abrogation of seniority expectations when plaintiffs have failed to show individual-specific make-whole remedies. *See, e.g.*, *Stotts*, 467 U.S. 561; Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

cumbents. This is clearest when the hiring or opportunity for advancement is the proven result of an unlawful refusal to consider minority or female candidates. A classic example is the white job applicant who applies on the same day as a black and is chosen for the position because of racial animus.[213] In such circumstances, courts would deny the subsequent claim of the white employee to seniority entitlements vis-á-vis the black challenger.[214] The make-whole remedy would place the black challenger ahead of the white employee on the seniority roster, because the white employee's claim to seniority preferences is illegitimate.[215] The white employee in such a case may be "innocent" of discrimination but has nonetheless benefitted directly from unlawful discrimination. Accordingly, the white employee's expectations, while not unreasonable, are tainted by the discriminatory setting in which they were acquired and can fairly be compromised as necessary to remedy the underlying discrimination.

Any attempt, though, to reconstruct hiring patterns in the absence of discrimination would show that some, perhaps most, of the hirees would still have been white. Even in the absence of discrimination, many of the white incumbents would still have been hired, would have worked about the same number of years, and would have come into all the entitlements to job security and benefits in which they are currently claiming a property interest.

Thus the case law offers specific mechanisms for defeating seniority claims that stem from unlawful exclusion by restoring proven victims to the positions on the seniority roster they would have occupied but for the discrimination.[216] It does not, however, allow the

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213 *See, e.g.*, Association Against Discrimination in Employment, Inc. v. City of Bridgeport, 647 F.2d 256, 266 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); Ingram v. Madison Square Garden Ctr., Inc., 482 F. Supp. 414, 418-21 (S.D.N.Y. 1979), *modified*, 709 F.2d 807 (2d Cir. 1983), *cert. denied*, 464 U.S. 937 (1983).

214 *See* United States v. Paradise, 480 U.S. 149, 193 n.3 (1987):

> The law violator who would oppose a remedy imposed against him as itself a violation of the law does not stand in the same position as an innocent party; those whom the court has found in the wrong may not oppose a remedy on the ground that it would constitute a wrong if leveled at a non-participant in the litigation.

(Stevens, J., concurring in the judgment). *See also* Patterson v. Newspaper & Mail Deliverers' Union, 514 F.2d 767, 775 (2d Cir. 1975) (acknowledging that, but for racial discrimination, whites would not have had the seniority they enjoyed), *cert. denied*, 427 U.S. 911 (1976).

215 *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 774 (1976) ("[D]enial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, *arguably* innocent, employees would if applied generally frustrate the central make whole objective of Title VII.") (emphasis added).

216 *See, e.g.*, United States v. East Tex. Motor Freight Sys., 32 Fair Empl. Prac. Cas. (BNA) 560 (N.D. Tex. 1979) (where 38 victorious plaintiffs claimed entitlements to ret-

wholesale elimination or diminution of established seniority rights for the benefit of the preferred group as a class.[217] It also places the burden of proving the lack of entitlement on the party seeking relief, both at the liability and the remedy stages of litigation.[218]

The purpose of the due process hearing, therefore, is to insure that the rightful expectations of the incumbents are protected. The hearing must provide process commensurate with the substantive legal entitlements applicable in the seniority context. First, the hearing must determine whether the incumbent employees have sufficiently realized expectation interests in their positions to create a cognizable property right. Absent this right, incumbent employees are in the weaker position evident in *Weber* and *Johnson*.[219] Second, the hearing must determine whether the individuals being given preferences are within the make-whole remedial scheme of employment discrimination claims. Specifically, the hearing should determine whether individuals granted super-seniority are identifiable victims of prior discrimination for whom the award of retroactive seniority is a return to a position that they would have occupied but for the discrimination. Third, the hearing must determine whether the seniority-based expectations of the incumbent employees are tarnished by the prior practice of discrimination so as to justify legally defeating those expectations.[220]

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roactive seniority, 22 individual claims were resolved by pre-existing union grievance procedures, and 16 were resolved by the court after hearings at which all parties were represented), *aff'd*, 643 F.2d 304 (5th Cir. 1981).

217 *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) ("No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and overexpansive."). *Cf.* Romasanta v. United Air Lines, 717 F.2d 1140 (7th Cir. 1983) (exceptional holding that reinstatement of 1400 flight attendants who had been the victims of sex discrimination would so devastate the rights of incumbents that the "presumption in favor of rightful place seniority relief," *Franks*, 424 U.S. at 779 n.41, was defeated), *cert. denied*, 466 U.S. 944 (1984).

218 *Wygant*, 476 U.S. at 292 ("In 'reverse discrimination' suits, as in any other suit, it is the plaintiffs who must bear the burden of demonstrating that their rights have been violated.") (O'Connor, J., concurring in part and concurring in the judgment).

219 The key finding in United Steelworkers v. Weber, 443 U.S. 193 (1979), was that the employer's creation of a new craft training program created a new area of promotional opportunity so that no pre-existing expectation of the dispreferred white employees was affected. Prior to the creation of this new promotional ladder, white production employees such as the claimant Brian Weber had no means of securing a promotion within the Kaiser Aluminum plant. *Id.* at 208. Similarly, in Johnson v. Transportation Agency, 480 U.S. 616 (1987), the Court expressly found that the dispreferred employee, Paul Johnson, did not have a realized expectation interest in the promotion at stake. *Id.* at 638; *see supra* text accompanying notes 104-08.

220 There are tremendous costs to the "bumping" of incumbent employees who have not achieved their positions or advanced on the seniority roster as a result of discrimination against other applicants. The problems were cogently captured by William L. Robinson, the former Executive Director of the Lawyers' Committee for Civil Rights

The Birmingham decree did not follow these procedures. By discarding seniority expectations without either evaluating the incumbent employees' claims of entitlement or engaging in individual-specific claims for restoration to the seniority roster, the consent decree in Birmingham attempted a result that may have been unavailable had the case been fully litigated. To then claim the power of the court to foreclose subsequent challenge by the affected incumbents creates the collateral attack dilemma finally rejected by the Court in *Martin*.

In place of the due process protections owed to seniority-based property rights, the pre-*Martin* collateral attack doctrine only offered incumbents the opportunity to raise objections at a settlement fairness hearing. Under Federal Rule of Civil Procedure 23(e), however, the orientation of the fairness hearing is to the best interests of the plaintiff class.[221] The rights of affected incumbents are at best swept under the rubric of the public interest, a decidedly secondary concern for the court.[222] Instead of benefitting from a presumed entitlement to their positions, incumbent employees must instead shoulder the burden of challenging the propriety of the settlement terms. Moreover, to the extent that focusing on seniority-based expectations takes the issues beyond the discrimination-reverse discrimination model, it becomes clear that the rights implicated are not defined within the original cause of action. A court passing upon the merits of a bipolar settlement is left at the mercy of liti-

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Under Law, in response to the proposal that the Equal Employment Opportunity Commission utilize such remedies:

> If such relief were ever put into effect, it would predictably result in enormous dissension in the workplace, pitting white employees against black employees, and male employees against female employees.
>
> It is difficult to imagine the EEOC's rationale for junking the tried, effective, and—most importantly—widely accepted remedy of goals and timetables for filling future vacancies, in favor of an unrealistic form of relief benefitting far fewer victims of discrimination and causing so much practical difficulty.

Equal Employment Opportunity Commission Update: Policies on Pay Equity and Title VII Enforcement Before a Subcomm. of the House Comm. on Government Operations, 99th Cong., Ist Sess. 59-60 (June 21, 1985) (testimony of William L. Robinson).

221 7B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1797.1, at 392-93 (1986).

222 Indeed one of the leading commentators on class actions does not even list the "public interest" as within the proper concerns of a court approving a consent decree. Instead the listed concerns are:

1. Likelihood of recovery, or likelihood of success
2. Amount and nature of discovery or evidence
3. Settlement terms and conditions
4. Recommendation and experience of counsel
5. Future expense and likely duration of litigation
6. Recommendation of neutral parties, if any
7. Number of objectors and nature of objections

2 HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 11.42 (2d ed. 1985).

gants, who have every incentive to obtain a judicial imprimatur, to advise it of whatever third-party claims may be implicated.[223] At the very least, *Martin*, by securing access to a hearing for affected incumbents, brought the procedural law into conformity with the substantive doctrines.[224]

No doubt part of the civil rights attack on *Martin* is motivated by the fact that the white firefighters have not only enjoyed the benefits of Birmingham's segregated past, but have also resisted attempts to change it. Perhaps because of shared barracks, firefighters' unions have unfortunately been at the forefront of attempts to keep minorities, women, and homosexuals from securing equal employment rights. But in the civil context no less than in the criminal context, the enjoyment of rights secured by due process cannot be made to turn on the enlightened or benevolent nature of the rights-holder. The firefighters of Birmingham, whatever their beliefs or values, are working people fearfully clinging to what little economic security this society has offered them.[225] Their expectations should be afforded the legal protections due, regardless whether their views on matters of racial equality are enlightened or not.[226]

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223 Nor is it clear that courts will as a general matter even expand the scope of the fairness hearing to third parties. *See* Maimon Schwarzchild, *Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 919-29.

224 The appropriate match between the nature of the substantive claims and the process that the judicial system must provide is the key to the methodology of this Article. Several commentators have framed the procedural limitations on consent decrees in terms of the substantive claims that all parties to the litigation might advance. *See, e.g.*, Laycock, *supra* note 55, at 124-28 (analyzing consent decrees in terms of third-party interests); Kramer, *supra* note 190, at 341 (analyzing procedural objections that third parties might interpose to a consent decree in terms of substantive claims available to third parties). However, the inquiry into the specific claims of incumbent employees in employment discrimination consent decrees has only been touched on in the commentary to date. *See, e.g.*, T. Alexander Aleinikoff, *A Case for Race Consciousness*, 91 COLUM. L. REV. 1060, 1098 n.180 (1991) (entertaining possibility that harm occasioned by affirmative action plan might rise to the level of a constitutional injury).

225 A particularly unbecoming view of the claims of incumbent firefighters emerges from Robert Joffe, a partner at Cravath, Swaine & Moore and attorney for the black challengers in Birmingham. When asked to explain the apparent disparity between the disruptions to the interests of incumbents in Birmingham and Cravath's record of no black partners and only five black associates, Joffe replied that Cravath took a meritocratic view of hiring that placed a premium on "hiring from among the most qualified." *Second-Class Citizens*, AMERICAN LAWYER, Sept. 1989, at 97. Should Joffe ever have occasion to be pulled from a burning building, perhaps his views of merit in the blue-collar world will be enlightened. Nonetheless, the refusal to afford the same respect for the expectations of the blue-collar workforce as professionals is consistent with an unfortunate pattern in antidiscrimination law. *See* Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945 (1982) (addressing disparity in treatment of blue- and white-collar jobs under Title VII).

226 Even the focus on the racial attitudes of the white incumbents underestimates the dynamics at play when incumbents fear the loss of opportunity. As noted by sociologist William Julius Wilson:

V

CONSENT DECREES AND SUBSTANTIVE RIGHTS

The approach delineated in this Article is premised on a critical distinction between vested rights and lesser claims for the protection of interests or aspirations. While incumbents might claim vested rights outside the context of public employment, it is only in the public employment context, by virtue of the state action doctrine, that the positive constitutional case law has recognized such rights and elevated them to the status of property. In the legal shorthand, vested rights in public employment are a sufficient but perhaps not necessary condition for the analysis developed in this Article. Thus, whether incumbent, nonpublic employees may claim similar substantive entitlements is beyond the scope of this Article.

Property rights in public employment were defined in the *Roth-Loudermill* line of cases by the type of hearing required before an employer might make an adverse decision concerning employment.[227] For those with property rights in public employment, the commands of due process must be satisfied commensurate with the privileged position given to employment in the government benefits case law. Thus, the analytic framework of this Article does not reach claims made by entry-level aspirants who lack any substantive entitlement. While this analysis does not address the extent of protection under the due process framework required for those claiming mere interests or aspirations, it does suggest an answer: the negative implication of the *Roth-Loudermill* case law indicates that there is no due process claim for those who cannot claim a pre-existing substantive entitlement to the job in question. Under the *Mathews v. Eldridge* line of cases, procedural protections flow from the underlying substantive rights, and the absence of a substantive claim dooms the procedural claim.[228]

This Article has sought to establish the overlap between the due process cases and the substantive law of affirmative action. Although the two are not matched up in either the Court's decisions

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> As the industries in which they are employed become suburbanized, a growing number of inner-city white ethnics find that not only are they trapped in the inner city because of the high cost of suburban housing, but they are physically removed from job opportunities. This situation increases the potential for racial tensions as white European ethnics compete with blacks and the rapidly growing Hispanic population for access to and control of the remaining decent schools, housing, and neighborhoods. And explanations that their negative response to minority encroachment is due to racial prejudice hardly capture the dynamic factors of societal organization that channel racial antagonisms.

WILLIAM J. WILSON, THE TRULY DISADVANTAGED 136 (1990).

227 *See supra* notes 113-77 and accompanying text.

228 *See supra* note 174 and accompanying text.

or the commentary,[229] the focus on the nature of the substantive claims of the adversely affected dispreferred defines the permissible boundaries of affirmative action in much the same way as these substantive claims define due process protections. When discrete numbers of identifiable individuals were forced to shoulder the cost of remedies at the expense of pre-existing vested expectations, the Court has struck down affirmative action programs. When the impact of affirmative action programs was spread among a broad pool and did not directly compromise the rights of the dispreferred, the Court generally upheld such remedial endeavors.[230] Thus, the affirmative action case law parallels the due process cases in its concern for the vested rights of incumbents. Although this Article is primarily concerned with the treatment of such vested rights, this analysis suggests that neither the due process nor the affirmative action case law would be an obstacle to liberal, entry-level affirmative action.

The narrow procedural issue of *Martin v. Wilks* addressed whether the process of court-approved consent decrees may be substituted for the full due process protections normally owed to vested public employees who claim a diminution of their right to employment opportunity. More than a matter of procedural formalism, this issue involves the incentives at play in bipolar settlements to shift costs onto unrepresented third parties and to enforce that cost-shifting through judicial decree.

A. The Problem of Public Issue Litigation

Consent decrees in public litigation[231] are inherently troublesome. Such decrees permit private parties to invoke the judiciary's enforcement authority to define rights that are consistent with what the parties believe would be the litigated outcome. These decrees avoid the mediating lens of the court and the accompanying public scrutiny, and avoid the "procedural limitations on the exercise" of

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229 *See supra* notes 150-224 and accompanying text.

230 This point was succinctly expressed by David S. Tatel, former Director of the Office of Civil Rights of the Department of Education and current Co-Chair of the Lawyers' Committee for Civil Rights Under Law:

> [T]o determine whether a race-conscious program is acceptable, you look to the impact it has on non-minorities. And the Court has said that innocent whites—innocent non-minorities—may need to accept some burden in our society, and that you measure the extent of that burden by how diffuse the impact is. If it is a diffuse impact, if it is a nonintrusive impact, if it is not an undue impact, then it's constitutionally tolerable.

Lloyd N. Cutler & David S. Tatel, *Minority Scholarship Policy*, 5 COMMITTEE REPORT 12, 13 (1991).

231 *See* Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

the court's power that are inherent in adjudication.[232] The very concept of public litigation implies that more is at stake in the litigation than just the resolution of a dispute between two parties. Not only does the diffuse impact[233] or externalities of public litigation extend beyond the actual litigants, it also compromises the parties' claims to control the litigation as they see fit.[234] Moreover, even without the externalities, settlements in public litigation resolve the immediate dispute between the litigants at the expense of clarifying and reinforcing legal principles for future claims.[235]

The effect of consent decrees on third parties has prompted a large body of commentary in both the academic literature and the legislative records accompanying the Civil Rights Act of 1991. In dispute in this body of work is the precise nature of the consent decree. The views range from one extreme that views the decree as "a contract all the same"[236] to another that purports to entrust the judicial approval of the decree with the full and fair review of the rights of all affected third parties.[237] Some see consent decrees as

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232 Owen M. Fiss, *Justice Chicago Style*, 1987 U. CHI. LEGAL F. 1, 4.

233 *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978) (exploring the inherent tensions in affording all affected parties meaningful participation in polycentric litigation); Schwarzchild, *supra* note 223, at 901-08 (describing inherent tensions in public law consent decrees).

234 *See* Chayes, *supra* note 231, at 5; Fiss, *supra* note 231, at 17-28.

235 *See* Jules Coleman & Charles Silver, *Justice in Settlements*, SOC. PHIL. & POL'Y, Autumn 1986, at 103; Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

236 Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 20. The lines in the case law are by no means clear. Even in *Cleveland Firefighters*, for example, which gave significant legal force to the consent of the primary parties to the litigation, one can still find references to the contractual nature of consent decrees since, according to the Court, "the parties' consent animates the legal force of a consent decree." Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1989).

237 *See Hearings*, *supra* note 23, at 572 (comments of Thomas D. Barr) (courts do not enter consent decrees unless "thoroughly convinced that all aspects have been explored carefully and thoroughly by parties adverse as well as parties in favor"). Mr. Barr's views may be somewhat hyperbolic given his firm's representation of the black plaintiffs in the Birmingham firefighters dispute. One would hardly expect that Cravath, Swaine & Moore, Mr. Barr's law firm, would accept disposition of their clients' rights except by full and vigorous litigation. *See generally* RENATA ADLER, RECKLESS DISREGARD (1986) (describing aggressive litigation of Cravath lawyers Barr and Boies on behalf of institutional clients).

By and large, courts have been sensitive to the fact that nonparties in fairness hearings have no right of discovery, no capacity to depose adverse witnesses, no ability to compel testimony of adverse or hostile witnesses under subpoena, and no right of appeal. Accordingly, courts have been leery of foreclosing legal rights based upon the ability to raise objections at a fairness hearing. *See* Mark Recktenwald, Comment, *Collateral Attacks on Employment Discrimination Consent Decrees*, 53 U. CHI. L. REV. 147, 181 n.139 (1986) (few courts have approved use of fairness hearing to dispose of nonminority claims). *But see* Dennison v. Los Angeles Dep't of Water & Power, 658 F.2d 694 (9th Cir. 1981) (fairness hearing is sufficient opportunity to present incumbent employee claims); Kramer, *supra* note 190, at 358-60 (arguing that opportunity to be heard at fairness hear-

necessary hybrids between contract and adjudication,[238] while others are skeptical about any claims to meaningful judicial oversight of the settlement process.[239] There are also more instrumental concerns about the needs of the judicial system to allow for the settlement of claims, including those that implicate public issues.[240]

The consent as contract argument views the consent decree as little more than a registration with the court of the understanding of the parties to the dispute.[241] Under this view, the purpose of the court's imprimatur under a consent decree as opposed to a private contract is threefold: First, in class actions, the consent decree provides protection to nonparticipating class members; second, the decree binds all members of the plaintiff class without their having been signatories to the actual decree; and third, the decree allows for court enforcement, particularly if the decree envisions long-term structural changes likely to give rise to disputes as to their administration.

Thus envisioned, the consent decree does not and cannot dispose of the rights of nonsignatories. As Professor Laycock argues, consent decrees provide no basis for a presumption of validity for an assertion of the rights of the parties to the disputes as opposed to nonparticipating third parties.[242] Not only is there no adjudication or determination of the defendant's liability in the action-in-chief, but there is also no meaningful judicial declaration of the illegitimacy or invalidity of rights claimed by third parties.[243]

This view has support in cases that reject the contention that the interests of unionized incumbents are protected by governmental employers or enforcement agencies.[244] This is also the view ultimately adopted by the Court in *Martin*: "A judgment or decree among parties to a lawsuit resolves issues as among them, but it

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ing is critical to due process protections and is necessary for collateral attack rule to be constitutional).

238 *See* Kramer, *supra* note 190, at 324.

239 *See* Judith Resnick, *Judging Consent*, 1987 U. CHI. LEGAL F. 43, 101-02.

240 *See* Burt Neuborne & Frederick A.O. Schwarz, Jr., *A Prelude to the Settlement of* Wilder, 1987 U. CHI. LEGAL F. 177, 180-83.

241 *See, e.g.*, United States v. Armour & Co., 402 U.S. 673, 681-82 (1971); 3 A.C. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS § 1350, at 2773 (5th ed. 1925).

242 Laycock, *supra* note 55, at 104.

243 *Id.* at 110-17. *See also* Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291, 332 (1988) (failure to consider "third parties' claim on clean slate . . . violates due process"). *Cf.* W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 770 (1977) (holding that inconsistent employer obligations arising out of settlement of discrimination claim did not extinguish contract-based claims of incumbent employees).

244 *See, e.g.*, United States v. U.S. Steel Corp., 548 F.2d 1232, 1235 (5th Cir. 1977); Pennsylvania v. Rizzo, 530 F.2d 501 (3d Cir.), *cert. denied*, 426 U.S. 921 (1976).

does not conclude the rights of strangers to those proceedings."[245] The *Martin* Court held that in order to be bound in personam, the process must comport with "our 'deep-rooted historic tradition that everyone should have his own day in court.' "[246] Accordingly, not even the possibility of the entry of a consent decree triggers an affirmative duty on the part of third parties to seek intervention to protect their erstwhile legal rights.

The contrary view dominates the Court's opinion in *Cleveland Firefighters* and underlies the dissent in *Martin*. For Justice Brennan in *Cleveland Firefighters*, although consent decrees arise out of a contractual understanding between the parties, they nonetheless "bear some of the earmarks of judgments entered after litigation."[247] The decree represents a quasi-judgment of the court reflecting a judicial determination that the "decree must spring forth from and serve to resolve a dispute within the court's subject-matter jurisdiction . . . and must further the objectives of the law upon which the complaint was based."[248] Paradoxically, the Court in *Cleveland Firefighters* went on to confer upon courts the authority to give consent decrees with "broader relief than the court could have awarded after a trial."[249] Although the Court in *Cleveland Firefighters* expressly stopped short of giving a consent decree the preclusive effects of other court determinations, the Court's dicta imply that such decrees merit protection from collateral attack as would other judicial decrees.

B. Incentives and Collusion

The dissent in *Martin* is handicapped by an incomplete understanding of the incentives at work in the remedial stage of litigation. While recognizing that judicial decrees could effectively bind third parties and that, consequently, parties to litigation could have joint incentives to secure a judicial imprimatur on their contractual arrangements, the dissent did not inquire further. Rather, the dissent did not look beyond century-old case law which allowed for third-party challenge to a judgment secured through corruption, duress, fraud, collusion, or mistake.[250] As the classic formulation would have it:

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245 Martin v. Wilks, 490 U.S. 755, 762 (1989).

246 *Id.* (quoting 18 WRIGHT ET AL., *supra* note 221, § 4449, at 417 (1981)).

247 Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1989). *See also* Railway Employees v. Wright, 364 U.S. 642, 650-52 (1961); United States v. Swift & Co., 286 U.S. 106, 115 (1932).

248 *Cleveland Firefighters*, 478 U.S. at 525.

249 *Id.*

250 *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 69-72 (1982); Martin v. Wilks, 490 U.S. 755 (1989). The Civil Rights Act of 1991 has provided a statutory exception to the collateral attack bar when a consent decree "was obtained through collusion or fraud." Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 108, § 703(n)(2)(c) (1991).

> [W]henever a judgment or decree is procured through the fraud of either of the parties, or by the collusion of both, for the purpose of defrauding some third person, such third person may escape from the injury thus attempted by showing, even in a collateral proceeding, the fraud or collusion by which the judgment was obtained.[251]

Accordingly, since "[t]he litigation in which the consent decrees were entered was a genuine adversary proceeding,"[252] there could be no issue of fraud or collusion, and as a result, the decrees became unassailable in the eyes of the dissenters.[253]

Although it is true that the underlying lawsuits in cases such as *Martin* and *Cleveland Firefighters* are not collusive, as articulated by Justice Stevens in *Martin*,[254] this question is miscast for purposes of examining the incentive structures in settlements. The *Martin* dissenters overlook the decisive shift in incentives as the lawsuit moves from the determination of liability to the structuring of a remedy.[255] In the early stages of litigation, an institutional defendant such as the City of Birmingham has every reason to defend against liability until either liability has been determined by the court or the plaintiffs' likelihood of success becomes manifest.[256] Until that time, the interests of all individuals with a preference for the status quo, including potentially affected incumbents, are fully aligned with the governmental defendant.

Once the inquiry moves beyond the determination of liability, however, the calculus is radically altered, as is apparent in the facts of the Birmingham case. As a result of years of unlawful discrimination, the City faced substantial exposure under Title VII. Although part of the remedy would consist of the award of retroactive seniority to individual discriminatees,[257] the exposure would not be lim-

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251 Michaels v. Post, 88 U.S. (21 Wall.) 398, 426-27 (1874) (footnote omitted).

252 *Martin*, 490 U.S. at 762 (Stevens, J., dissenting).

253 *Id.* at 775-77.

254 *Id.*

255 The realignment of parties once litigation passes from liability to remedy is by no means confined to the consent decree process. An interesting example is provided by the Agent Orange litigation in which, as recounted by Professor Peter Schuck, in the period after a settlement was reached on liability, "the struggle was no longer primarily between the plaintiffs and the defendants, for the latter had . . . 'bought their peace.' It was a conflict among the veterans, and between them and their lawyers." PETER H. SCHUCK, AGENT ORANGE ON TRIAL 168 (1987).

256 This contrasts with the normal pattern of determining litigation settlement zones by the sum of the anticipated expenses of both parties, assuming a shared assumption about the likelihood of plaintiffs' prevailing and the size of the likely judgment. *See* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 101 (1990). The settlement dynamics are harder to calibrate in cases that raise volatile political issues and in which the decisionmakers, corporate political bodies, are basically litigating with public rather than personal funds.

257 *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 774 (1976).

ited to such injunctive relief. The major remedy, from the City's vantage point, would he backpay for those unlawfully excluded black applicants—a figure that was calculated to be roughly five million dollars.[258]

What then becomes of the incentive to litigate to preserve the status quo? Clearly, the greater the backpay liability, the greater the incentive to offer plaintiffs an exchange in which backpay is waived in favor of hiring and promotional preferences.[259] For plaintiffs, such an exchange is beneficial for two separate reasons. First, the prevailing law on the question of specific, make-whole remedies is onerous.[260] Only previously denied applicants who would have been entitled to positions but for the discrimination are entitled to reinstatement to those positions.[261] Second, the aim of civil rights litigation is generally prospective, particularly when plaintiffs are represented by the institutional civil rights bar.[262]

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258 *Hearings, supra* note 23, at 388 (testimony of Raymond Fitzpatrick, counsel for nonminority firefighters in *Martin*, that potential backpay liability of Birmingham in 1975 (at time of initial suit filed by U.S. Department of Justice) was $5 million).

259 The Court has recognized this practice. *See* United Steelworkers v. Weber, 443 U.S. 193, 211 (1979) ("Preferential hiring . . . is a reasonable response for the employer, whether or not a court, on [the same] facts, could order the same step as a remedy. The company is able to avoid identifying victims of past discrimination, and so avoids claims for backpay that would inevitably follow . . . .") (Blackmun, J., concurring).

260 For a cogent critique of the "victims-only" standard of relief, see Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 91-98 (1986). Professor Sullivan criticizes the Court for resisting categorical statements of how much "punishment" of the dispreferred may be exacted within tolerable affirmative action programs. She views the requirement that compensation be given only to identifiable victims as overly restrictive and politically unnecessary in a white-dominated society. As developed in this Article, the author is far less comfortable with political institutions deciding to remedy their past sins by passing the costs on to relatively powerless subgroups of the population, even when those subgroups are of the same race as the political powers that be.

261 *See* Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986).

> [T]he language of [Title VII § 706(g)] is clear. *No order of the Court* shall require promotion of an individual whose failure to receive promotion was for a reason other than discrimination prohibited by the statute. Here the failure of the District Court to make any finding that the minority firefighters who will receive preferential promotions were the victims of racial discrimination requires us to conclude on this record that the City's failure to advance them was *not* "on account of race, color, religion, sex, or national origin."

Id. at 544 (Rehnquist, J., dissenting). *See also* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 579 (1984) ("mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him" (citing International Bhd. of Teamsters v. United States, 431 U.S. 324, 367-71 (1977))); BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 11-14 (1983-85 Cum. Supp. to 2d ed. 1987).

262 *See* Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 146-58 (1987).

Again this incentive scheme is borne out in the facts of Birmingham. While the City faced potential backpay liability of five million dollars in 1975, it ultimately settled six years later for only $265,000 in back pay, accompanied by a fifty percent hiring quota for promotions to lieutenant in the fire department.[263] In the candid words of Birmingham Mayor Richard Arrington at his deposition, this was the "best business deal" the City ever made.[264]

This type of tradeoff raises the specter of cost-shifting to facilitate settlement. An institutional defendant is allowed to escape direct sanction by avoiding the greatest economic consequences of its unlawful conduct—an award of backpay. The defendant does so by consenting to entry-level affirmative action and a reordering of promotional opportunity. The first does not disrupt any settled expectations and, so long as not encumbered by fixed quotas or excessive attributions,[265] has generally been upheld. The second, however, directly defeats the settled expectations of incumbents to advance as a reward for loyal and capable service. Once the apparent cost of liability defeats the institutional defendant's "taste for discrimination,"[266] the logical desire to avoid the economic consequences of a determination of liability provides every incentive to settle if settlement avoids at least a significant portion of the potential liability.[267] The prospects for avoiding defendant's liability are dramatically im-

263 *Hearings, supra* note 23, at 388 (testimony of Raymond Fitzpatrick, counsel for nonminority firefighters in *Martin*).

264 Quoted in Joint Appendix, Martin v. Wilks, 490 U.S. 755 (1989), at 520-27.

265 *See* United Steelworkers v. Weber, 443 U.S. 193, 208-09 (1979) (setting forth requirements for permissible affirmative action as: not unnecessarily trammeling interests of dispreferred, no absolute bar to white advancement, time limits on effect of affirmative action plan, goal of eliminating racial imbalance rather than maintaining racial balance, and a foreseeable end date for the plan).

266 *See* GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 14 (2d ed. 1971) ("If an individual has a 'taste for discrimination,' he must act *as if* he were willing to pay something, either directly or in the form of a reduced income, to be associated with some persons instead of others."). *See also* John J. Donahue, *Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner*, 136 U. PA. L. REV. 523 (1987); Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513 (1987); John J. Donahue, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986).

267 An unscientific example from teaching employment law helps illustrate this point. I ask students to devise a legal strategy for a large corporate employer in a small town (based in part on Kaiser Aluminum in Gramercy, Louisiana—the fact pattern in *Weber*) faced with a provable history of discrimination and informed of the likelihood of suit from an NAACP chapter. After exploring the exposure of the employer to various types of court-ordered remedies, the students invariably advise their client to attempt to avoid backpay liability by settling on the basis of future employment opportunity for the discriminatees. The student-counselors advise their client to willingly give away promotional rights of present employees as a means of avoiding a backpay award which entails out-of-pocket payment by the employer.

proved if a third party can be forced to absorb a significant share of the costs.[268]

From an economic vantage point, settlements are facilitated if significant benefits to plaintiffs are available without the risk of trial *and* those benefits may be had at low cost to defendants.[269] Again this is evident from the *Martin* litigation, in which the Equal Employment Advisory Council, a nationwide association of private employers, filed an amicus brief with the Supreme Court cautioning that failure to overturn *Martin* would

> seriously affect the utility of consent decrees as a means of resolving class claims of discrimination in employment, since much of the incentive to an employer to enter into such a decree would be destroyed if the employer were left vulnerable to subsequent lawsuits by persons or groups claiming that the employer's compliance with the consent decree constituted discrimination against them.[270]

But ease of settlement cannot justify this outcome if the affected third parties, in this case incumbent employees, are not the proper cost-bearers, in effect, to subsidize the settlement.[271]

Although courts have been attentive to the importance of settlement under Title VII,[272] the ease of settlement cannot of its own accord justify imposing costs on the dispreferred incumbents. Litigants cannot dangle the benefits of settlement before a court in order to secure judicial authority forcing third-party subsidies of the settlement. This is particularly apparent when, as in Birmingham, the subject of attack is the municipality itself—the perfect symbol and cost-bearer for the systemic, broad-scale discrimination that characterized the societal norms of that city. The City is not merely

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268 *See* Laycock, *supra* note 55, at 116 (reviewing social science literature on incentives for parties in trilateral disputes to form coalitions in which two adverse parties join forces against a third party).

269 For an overview of the economic literature on the economic incentives for settlement, see Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LIT. 1067, 1075-78 (1989). The early works in this field were John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973); and Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973); William M. Landes, *An Economic Analysis of the Courts*, 14 J. LAW. ECON. 61 (1971).

270 Brief, *Amicus Curiae* of the Equal Employment Advisory Council in Support of Petitioners at 3, Martin v. Wilks, 490 U.S. 755 (1989), *quoted in* H.R. REP. No. 644, 101st Cong., 2d Sess. 33-34 (1990).

271 *See* Kramer, *supra* note 190, at 333. Although Professor Kramer does not address the issue of incentives to pass costs onto unrepresented third parties, he reaches a similar conclusion from a narrower procedural argument that settlement per se cannot be the ultimate end in the litigation process and, a fortiori, that it cannot be the justification for the diminution of procedural rights of third parties. *Id.*

272 *See* Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14 (1981). *See also* Schwarzchild, *supra* note 223, at 899.

a "stakeholder"[273] in possession of a finite resource for which two distinct groups are competing, but is instead the culpable party, in both a moral and legal sense, for the unlawful discrimination giving rise to the litigation. Far from being an episodic occurrence, the segregation of municipal employment in Birmingham was of a piece with an unyielding societal devotion to racial discrimination that stretched from cradle to grave. Allowing the City, the perfect proxy for a generalized pattern of official discrimination, to pass off a significant part of the costs of remedy onto a discrete, finite group is inherently troublesome.

The inequities are further revealed by examining the relative weight of the costs among the alternative cost-bearers. The cost to the City of a backpay award, even in the case of a substantial judgment, is relatively low and can be spread among a broad tax base. Although the absolute value of a settlement based on voiding seniority expectations may be lower than one based on full backpay, the costs to the affected incumbent individuals are both extremely localized and extraordinarily high in terms of disrupting their most significant lifeholding—their job and its attendant privileges and conditions. By allowing the City to redirect the costs of settlement to a narrower and more vulnerable class of cost-bearers, the legitimacy of the settlement is fundamentally compromised.

The neat dichotomy between collusive and fully litigated lawsuits therefore unravels as the issue of distributing the costs of the settlement outside the parties to the litigation is introduced. Nor is this problem confined to the affirmative action remedy situation. Professors Laycock[274] and Epstein[275] have applied a similar analysis to institutional litigation between the City of New York and the American Civil Liberties Union over access to social services provided by denominational social service agencies.[276] Despite a genuine contest over the merits of the case, the remedy, binding on Catholic and Jewish relief agencies, was jointly desired by the original parties to the lawsuit.[277] What had begun as adverse litiga-

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273 The "stakeholder" analogy is used by the Eleventh Circuit in the *Martin* litigation to describe the situation of the City in negotiating the consent decrees. *See In re* Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1499 (11th Cir. 1987), *aff'd sub nom.* Martin v. Wilks, 490 U.S. 755 (1989). The City may be thought of as simply a "stakeholder" only in the sense that once a remedy is limited to reassignment of a finite number of jobs, the City has no direct interest in how those jobs are distributed among competing groups. This argument overlooks the role of the City in creating the unlawful conditions giving rise to the complex remedy issues.

274 Laycock, *supra* note 55, at 106.

275 Richard A. Epstein, Wilder v. Bernstein: *Squeeze Play by Consent Decree*, 1987 U. CHI. LEGAL F. 209, 224.

276 Wilder v. Bernstein, 645 F. Supp. 1292 (S.D.N.Y. 1986).

277 *See* Neuborne & Schwarz, *supra* note 238, at 206.

tion between a municipal defender of the status quo and an organizational reformer became decisively nonadversarial as soon as remedial obligations could be shifted to nonparticipating third parties.

There is, moreover, the inescapable issue of shifting political tides. One of the central premises of the affirmative action jurisprudence is that the majority community in implementing affirmative action programs, was acting through the political processes to assume a burden that the majority community would ultimately bear[278] in order to benefit tbe classically vulnerable "discrete and insular minorities"[279]; thus the distinction between benign and stigmatizing preferences.[280] However, when such a preference is enacted to benefit the group attaining political power, as was the case in Birmingham after the first capture of local power by blacks in the election of Mayor Richard Arrington, the presumption of benign purpose is eroded. Simply put, "it works both ways: a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature."[281]

C. Rethinking Consent Decrees in Light of Their Effect on Substantive Rights

Out of the academic debate over the role of consent decrees emerged a strong set of views, encompassing a surprisingly broad swath of political currents, that rejected any claim to parties' being

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278 *See* John H. Ely, *The Constitutionality of Reverse Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974) ("When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review are lacking").

279 United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

280 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 170 (1980) (concerns for misuse of political power not present when "white majority" burdens itself); *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 295 (1986) (Marshall, J., dissenting); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 324 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment and dissenting in part); *id.* at 400 (separate opinion of Marshall, J.).

281 Ely, *supra* note 278, at 739 n.58. *See also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495-96 (1989) (noting that political power in Richmond, Virginia, had shifted to a majority black city council in striking down fixed minority set-asides for municipal contracts); Aleinikoff, *supra* note 221, at 1102-05 (describing Court's view that "raw political power" exercised by black elected officials to pay back constituents). The recognition that shifting political tides might affect equal protection claims has roots going back at least a century. *See* Strauder v. West Virginia, 100 U.S. 303 (1879)

> If in those states where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend that no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws.

Id. at 308.

able to achieve by consent decree any more than they could by contract.[282] These arguments, from the vantage point of this Article, are generally correct in linking procedural rights to the underlying substantive claims but are imprecise because they do not distinguish among the types of externalities that consent decrees impose. Once one accepts that the quality of "adjudication" is poor when a court reviews a consent decree,[283] it follows that little weight should be given to the ruling of a court that is left in the unenviable position of relying on parties who are jointly interested in securing judicial approval.[284]

The problem with this approach, however, is that it does not identify any stopping point short of repudiating settlement of public litigation altogether.[285] Indeed, the dissent in *Martin* offers a more coherent, albeit incorrect, answer to this problem by simply denying any legal significance to the external impact of a bilateral consent decree: "The fact that one of the effects of a decree is to curtail the job opportunities of nonparties does not mean that the nonparties have been deprived of legal rights or that they have standing to appeal from that decree without becoming parties."[286] As developed above, the argument that adversely affected incumbents are not deprived of vested employment rights must fail. What remains, however, is the need for a differentiation between types of rights or, more precisely, between those claims that have secured the legal status of property and those that lie in the more nebulous area of hope and desire. The legal protections of employment reflect both settled expectations of job tenure and the reliance of employees who

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282 *See* Fiss, *supra* note 235, at 1078-82; 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, 155-57; Easterbrook, *supra* note 236, at 30-41; Laycock, *supra* note 55, at 104; Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295, 303-04; Resnick, *supra* note 239, at 70-71; Kramer, *supra* note 190, at 364 (arguing that transfer and consolidation can avoid problems associated with collateral attack rule while leaving freedom for original parties to conclusively settle original litigation through bipolar consent decree).

283 *See In re* Warner Communications Sec. Litig., 618 F. Supp. 735, 740 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) ("In deciding whether to approve this settlement proposal, the court starts from the familiar axiom that a bad settlement is almost always better than a good trial.").

284 *See* Alleghany Corp. v. Kirby, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting) (once the erstwhile adversaries approach court jointly, "all the dynamics conduce to judicial approval of [settlement]"), *cert. dismissed*, 394 U.S. 28 (1965).

285 *See, e.g.*, Laycock, *supra* note 55, at 128-29 (advocating that courts refuse to enter consent decrees where "arguable rights" of known or foreseeable third parties might be affected).

286 Martin v. Wilks, 490 U.S. 755, 771 (1989) (Stevens, J., dissenting). *See also* Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 511 (1989) (consent decree altering pre-existing seniority-based standards for promotion "imposed no legal duties or obligations" on white incumbents or on union representative).

have devoted their working lives to the potential for advancement through their employment.[287] In the words of Professor Atiyah, "[t]o deprive somebody of something which he merely expects to receive is a less serious wrong, deserving less protection, than to deprive somebody of the expectation of continuing to hold something which he already possesses."[288] When the desired employment opportunity is even less than an "expect[ation] to receive," it follows that the amount of legal protection owing is still more attenuated. As expressed by Oliver Wendell Holmes,

> It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.[289]

The legal rule of protecting entitlements over aspirations conforms to the real-world pattern of individuals, valuing their holdings as worth more than their anticipated rewards, even if their monetary value is equivalent.[290] While the conventional economic literature assumes the equivalence of gains and losses from the transfer of a good or entitlement,[291] a more compelling economic model recognizes that the loss of present holdings or endowments[292] is valued more than the prospect of acquiring a gain of the same magnitude.[293] The labor economics literature refers to this phenomenon as "hysteresis," a term from physics that has been generalized to

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287 *See* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 64-68 (1990) (describing reliance interest of employees in continued employment and job advancement); Issacharoff, *supra* note 157, at 621-24 (same).

288 P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 428 (1979). Professor Atiyah derives this principle not simply from case law but from the writings of Hume, Adam Smith, and Bentham. *Id.* at 428 & n.24.

289 Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

290 *See* David Cohen & Jack L. Knetsch, Judicial Choice and Disparities Between Measures of Economic Values 14-15 (1990) (unpublished manuscript) (reviewing treatment of endowed holdings in British and Canadian law).

291 *See, e.g.*, RICHARD A. POSNER, AN ECONOMIC ANALYSIS OF LAW 11 (3d ed. 1986).

292 The term "endowment effect" refers to the disparities between the values assigned to marketable commodities by parties based upon the prior entitlement or reference point of the parties. *See* Richard H. Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAVIOR & ORG. 39 (1980) (coining term "endowment effect"). This approach describes the persistent pattern of owners of goods demanding more for the sale of the good than they would offer to acquire the good in the first place. *See* Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 35-43 (1989) (applying psychological insights to legal problems); Daniel Kahneman et al., *Experimental Test of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990) (describing experimental research on endowment effects).

293 *See generally* Daniel Kahneman & Amos Tvesrky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 279 (1979). The legal implications of this issue

refer to "any dependence of the value of a property on the past history of the system to which it pertains."[294] The concept of attachment to present holdings in employment has been applied to explain wage "stickiness"[295]—the failure of wages to decline substantially in economic downturns—and the impact of unemployment on human capital accumulation.[296]

A mechanism for resolving the problem of externalities in the settlement of public issue litigation is therefore suggested by an examination of whose rights are settled. When limiting or restricting entitlements of nonlitigants who merit independent substantive protections, a court should reject any settlement that purports to settle such third-party rights without the participation of all affected parties. When, however, the rights affected are those falling within the realm of hopes or aspirations, courts have far more latitude.

The case law is replete with challenges to affirmative action decrees that alter pre-existing expectations of the dispreferred, such as Wendy Wygant and the numerous parties challenging consent decrees in the aftermath of *Martin*.[297] But the case law has seen very few plaintiffs like Allan Bakke[298] or Marco DeFunis,[299] individuals so incensed by the denial of an unsecured aspiration that they undertook the rigors of litigation to challenge a modicum of remedial policy aimed at historically disadvantaged groups. So long as the

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are more fully developed in Herbert Hovenkamp, *Legal Policy and the Endowment Effect*, 20 J. LEGAL STUD. 225 (1991).

294 OXFORD ENGLISH DICTIONARY 585 (2d ed. 1989).

295 *See* OLIVER J. BLANCHARD & LAWRENCE H. SUMMERS, HYSTERESIS AND THE EUROPEAN UNEMPLOYMENT PROBLEM 13-18 (National Bureau of Economic Research Working Paper No. 1950, 1986); Kahneman et al., *supra* note 292, at 1345.

296 *See* S.P. Hargreaves Heap, *Choosing the Wrong Natural Rate, Accelerating Inflation or Decelerating Unemployment and Growth*, 90 ECON. J. 611 (1980).

297 This pattern is by no means limited to white incumbents. A recent major study has shown that the vast majority of contemporary employment discrimination suits concern allegations of wrongful termination of employment rather than wrongful refusal to hire. *See* John J. Donoghue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015, 1027 (1991) (estimating that a minority worker who is discharged is 30 times more likely to initiate an employment discrimination lawsuit than one rejected at the hiring stage). This study is fully consistent with the view that working people attach a premium value to their current employment. Consequently, workers subject to loss of a job actually held will readily resort to the travails of litigation, in contrast to the job aspirants who will rarely sue. This turns out to be the case regardless of the status of the employee as a member of a protected class under the various antidiscrimination statutes and, as best one can generalize from the existing information, regardless of the actual charge of discriminatory conduct: The same quantum of discriminatory animus is far more likely to provoke a legal challenge in the discharge as opposed to the hiring setting.

298 *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (striking down University of California at Davis medical school admissions policy under challenge from dispreferred white applicant).

299 Defunis v. Odegaard, 416 U.S. 312 (1974) (challenging use of racial preferences in University of Washington Law School admissions).

preferences were not too naked and did not command a disproportionate share of available resources,[300] the pre-1988 case law treated affirmative action with relative tolerance.

Martin did not change that.

VI

PLACING THE BURDEN OF PRECLUSION ON THE LITIGANTS

Finally, the procedural issues remain. The altered views of the civil rights consent decree from *Cleveland Firefighters* to *Martin* have their procedural counterparts in the uses of intervention under Rule 24 or mandatory joinder under Rule 19. If applied, the practical consequences of the two Rules appear identical. A party joined under Rule 19 or intervening under Rule 24 would appear in the case in the same posture. The difference, however, lies in the party who will bear the burden of inclusion. Fundamentally, the issue is whether potentially affected parties should be required to inform themselves of possible consequences and initiate procedures to intervene. Under Rule 24 intervention, the burden remains with potentially affected parties to claim their rights or be foreclosed from asserting them in the future.[301] Rule 19, however, places the burden upon parties to the litigation to affirmatively seek out any third parties[302] they wish to bind by the decree.[303]

Once the issue is focused on vested incumbents, the arguments in favor of forcing the parties to the litigation to bear the burden of preclusion seem inescapable. The original litigants, particularly the defendant employer, have full knowledge of the affected group and have ready means to join them, either individually, as a class, or jointly through a collective bargaining representative. The realm of affected incumbents is not open-ended, as would be the case if all future aspirants were granted the same rights as incumbents.

At bottom, the tension between the procedural approaches of *Cleveland Firefighters* and *Martin* turns on the need to establish a prudential rnle consistent with the substantive rights involved. As set forth in *Martin*

> Joinder as a party, 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. The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the ac-

300 *See* United Steelworkers v. Weber, 443 U.S. 193, 208 (1979).

301 *See* 7C WRIGHT ET AL., *supra* note 221, § 1923, at 518.

302 *See id.* §§ 1609, 1611.

303 *But see* Strickler, *supra* note 190, at 1574 (arguing that joinder under neither Rule 19 nor Rule 24 should have preclusive effect).

> tion, and at whose expense such relief might be granted. It makes sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit.[304]

This procedural rule is most consistent with the substantive rights of incumbent employees.

VII
CONCLUSION

The debate over affirmative action is caustic and draining. Of necessity, issues are framed in the mold of group entitlements, which is the precise framework of discussion that readily coexisted with centuries of disadvantaged status for blacks and, to a lesser extent, other racial and ethnic minorities. But at bottom the debate is one of politics, one of the extent to which a political resolution of the second-class status of minorities can and will be found. It is this fundamental political quality that gives rise to the "bitterness and desperation" with which the "affirmative action struggle" is waged.[305]

Beyond the procedural and legal issues in this Article is also a question of politics. The elections of 1990 witnessed the crystallization of a disturbing trend in the body politic. The denial of employment opportunities to whites emerged as a rallying theme in the rise of David Duke as a Republican leader in Louisiana and the reelection of Jesse Helms as a senator from North Carolina.[306] The issues surrounding employment grew to have the same riveting impact as evidenced in George Wallace's invocation of the school bus's symbolic role in desegregation remedies during his presidential race of 1972.[307] Many will no doubt argue that Duke and Helms play merely to racist backlash, with the issues of employment serving as a

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304 Martin v. Wilks, 490 U.S. 755, 765 (1989); *see also* Chase Nat'l Bank v. Norwalk, 291 U.S. 431 (1934).

> 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.

Id. at 441.

305 Kennedy, *supra* note 125, at 1338.

306 Peter Applebome, *Racial Politics in South's Contests: Hot Wind of Hate or a Last Gasp?*, N.Y. TIMES, Nov. 5, 1990, at A1.

307 *See generally* THEODORE H. WHITE, THE MAKING OF THE PRESIDENT 1972, at 94 (1973) (busing, Wallace said during the campaign, was "the most atrocious, callous, cruel, asinine thing you can do for little children .... [T]hese pluperfect hypocrites who live over in Maryland or Virginia and they've got their children in a private school .... [T]omorrow [on primary day] the chickens are coming home to roost").

smokescreen for resurgent racial animus.[308] But people rally most convincingly around such appeals when the stakes involved are their possessions rather than abstract desires.[309]

The analysis in this Article accomplishes two things. First, it demonstrates that the invocation of legal protections for entrenched employment rights is not only to be expected, but should be respected as consistent with the expansion of legal protections of individual claims to security. Second, it shows that attention to the disruption of settled individual expectations places political resolutions of historic discrimination back in the hands of the institutional actors that are morally and legally the culprits in promoting and practicing racial inequality.

Forcing institutional actors to absorb the costs of remedying their own discriminatory practices will eliminate neither racial animus nor opposition to affirmative action. It may, however, undercut some of the urgency and fear of individual employees faced with the uncertainty of losing the benefits of years or even decades of steady employment.[310] That in itself may facilitate the process of pushing on with the quest for equality.

308 *See, e.g.*, Kennedy, *supra* note 125, at 1337-41 (arguing that racism is a critical element of opposition to affirmative action).

309 *See* Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 35-39 (1990) (arguing in First Amendment context that personal stake is the wellspring of expressed political views).

310 *See* WILSON, *supra* note 224, at 123 (employer resistance to minority preferences during "slack labor" markets "exacerbated by increased hostility to affirmative action by dominant-group workers who fear the loss of their own jobs to minority competition").