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I. INTRODUCTION

In recent years, employment discrimination class actions have become well-publicized, high-stakes events.[1] Enormous monetary exposures, sensational allegations, and aggressive litigation tactics have brought these cases to prominence in legal circles, the business community, and the public eye. There are signs, however, that this trend could be slowed or even halted by a ten-year-old civil rights law whose implications in this area are just beginning to be felt in the federal courts.

Employment discrimination class actions are typically brought under Title VII of the Civil Rights Act of 1964. As initially passed, the 1964 Act provided only equitable relief to victims of employment discrimination. The Civil Rights Act of 1991 expanded these remedies by providing compensatory and punitive damages to victims of intentional discrimination in the workplace. The 1991 Act also bestowed the right to a jury trial on both parties in such cases.

Ironically, however, the same law that was designed to provide additional remedies to individuals may have made it more difficult for them to bring class claims. The availability of substantial monetary damages to Title VII plaintiffs may destroy the homogeneity of remedy required to maintain a class action under Federal Rule of Civil Procedure 23(b)(2), a concern that was not present when injunctive relief was the predominant remedy under the statute. The individualized issues of proof and liability raised by the availability of damages may destroy the commonality necessary to maintain a class

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1. *See* David McNaughton, *The Lawyer Taking on Coke: Cyrus Mehri Looks for a "Public Dimension," in This Case, Race Relations in the United States,* ATLANTA J. & CONST., May 2, 1999, at P-1.

action under Rule 23(b)(3) and may render other means of adjudication superior to a class action within the meaning of the Rule. And the availability of a jury trial under Title VII may raise Seventh Amendment bars to the bifurcation schemes that were traditionally used to manage class claims of discrimination. As one court has summarized, "Certification of many Title VII cases as class actions may no longer be appropriate, given the expanded damages now made available under Title VII by the Civil Rights Act of 1991."[2]

This Article will examine the ways in which the Civil Rights Act of 1991 has altered the landscape of Title VII class actions and will analyze the ways in which courts have attempted—with varying degrees of plausibility—to surmount the obstacles to class litigation raised by the 1991 Act. It will also suggest ways in which these obstacles might be avoided in the future, if, indeed, they should be avoided at all.

II. TITLE VII AND THE CIVIL RIGHTS ACT OF 1991

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, religion, sex, color, and national origin.[3] In the decades since 1964, Title VII cases have become a staple of the federal court system and a prominent means of addressing both real and perceived discrimination on the job.[4] As initially passed, Title VII provided only declaratory, injunctive, and other equitable relief (principally back and front pay) to victims of discrimination.[5] This remedial scheme was consistent with those in other fed-

2. Taylor v. Flagstar Bank, 181 F.R.D. 509, 519 n.4 (M.D. Ala. 1998) (citation omitted); *see also* Zachery v. Texaco Exploration and Prod., Inc., 185 F.R.D. 230, 237 (W.D. Tex. 1999) (noting that the class action "may no longer be a valid vehicle" for employment discrimination claims seeking money damages).

3. *See* 42 U.S.C. § 2000e–2 (1994).

4. In 1999, employment discrimination cases in general accounted for 8.6% of all federal civil filings. *See* Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts*, Table C-2A (1999).

5. 42 U.S.C. § 2000e–5(g) (1994). Back pay is compensation for past income lost as a result of discrimination. Front pay is compensation for lost future income (*i.e.*, money that the plaintiff would have made in the future absent unlawful discrimination). Front pay is considered a monetary substitute for the remedies of reinstatement or promotion and is typically awarded where hostility between the parties makes reinstatement infeasible or where no job openings are available at the time of judgment to enforce a remedial promotion. *See* Cassino v. Reichold Chems., Inc., 817 F.2d 1338, 1346 (9th Cir. 1987); Briseno v. Central Technical Community College Area, 739 F.2d 344, 348 (8th Cir. 1984). Both back pay and front pay are generally regarded as equitable remedies rather than money damages. *See* United States v.

eral workplace discrimination statutes before and since, which have frequently omitted compensatory or punitive damages provisions.[6]

The Civil Rights Act of 1991 strengthened Title VII's remedial scheme by authorizing compensatory and punitive damages in cases of intentional employment discrimination.[7] While understanding the damages provisions of the 1991 Act is essential to understanding its impact on Title VII class actions, there is no indication in the legislative history that Congress considered the effect these provisions might have on class litigation as opposed to individual claims.

The 1991 Act's enhanced damages provisions were designed to compensate victims of discrimination for humiliation, trauma, physical distress, medical expenses, and other economic and noneconomic harms caused by workplace discrimination. They were also intended to punish and deter employers who acted "with malice or with reckless indifference to the federally protected rights of an aggrieved [employee]."[8] In passing these provisions, Congress intended to "confirm that the principle of anti-discrimination is as important as the principle that prohibits assaults, batteries, and other intentional injuries to people"[9] and to "ensure compensation commensurate with the harms suffered by victims of intentional discrimination."[10]

Georgia Power Co., 474 F.2d 906, 921 (5th Cir. 1973) (back pay); Kramer v. Logan County Sch. Dist., 157 F.3d 620, 626 (8th Cir. 1998) (front pay).

6. *See, e.g.*, National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1994) (providing affirmative relief, including back pay, for victims of unfair labor practices); Fair Labor Standards Act § 16(b), 29 U.S.C. § 216(b) (1994) (providing back pay, affirmative relief, and liquidated damages for claimants); Age Discrimination in Employment Act § 7(b), 29 U.S.C. § 626(b) (1994) (adopting remedies provisions of Fair Labor Standards Act); Uniformed Services Employment and Reemployment Rights Act § 2(a), 38 U.S.C. § 4323(d) (1994) (providing injunctive relief and liquidated damages for victims of anti-military discrimination).

7. *See* 42 U.S.C. § 1981a (1994). Intentional discrimination cases are also known as "disparate treatment" cases. In cases of unintentional discrimination, or "disparate impact" cases, remedies remained equitable under the 1991 Act. *See* 42 U.S.C. § 1981a(a)(1) (1994).

8. 42 U.S.C. § 1981a(b)(1) (1994).

9. H.R. REP. NO. 102-40(I), at 15 (1991).

10. *Id.* at 18. Among the anecdotes included in the House report was that of a sexual harassment victim who endured sleeplessness, severe neck pain, and nausea at work but was awarded only one dollar in nominal damages under the pre-1991 remedial scheme. *Id.* at 66–67. Another harassment victim was fired for being pregnant, lost her insurance, and was shunned by her hospital, which threatened the seizure of her property to pay her medical bills. She prevailed in her discrimination case and was compensated for lost income and medical expenses but received nothing for her "years of stress and humiliation." H.R. REP. NO. 102-40(II), at 25–26 (1991).

The 1991 revisions also were motivated by a remedial anomaly in race discrimination cases. The Civil Rights Act of 1866,[11] which forbids racially motivated interference with the right to enter contracts, had long been held to confer a right of action for job discrimination on the theory that such discrimination constituted interference with the right to enter contracts of employment.[12] Because unlimited compensatory and punitive damages were available under § 1981,[13] plaintiffs claiming employment discrimination based on race could recover full damages, while those claiming other forms of discrimination could not. Congress therefore made damages available for all Title VII plaintiffs in part to address this perceived inconsistency.[14]

Finally, the 1991 amendments were seen as an enforcement mechanism: the House Report declares that the additional remedies are necessary to "encourage citizens to act as private attorneys general" in enforcing Title VII.[15] To protect the Seventh Amendment rights of parties involved in such claims, the Act made trial by jury available in cases seeking compensatory and punitive damages.[16] The sum of compensatory and punitive damages under the 1991 Act is capped on a sliding scale ranging from $50,000 to $300,000, depending on the size of the employer.[17]

The language of the House Report on the 1991 Act places great emphasis on the nature and extent of the harms suffered by some victims of discrimination.[18] It is clear that the House majority felt strongly that intentional discrimination should be redressed with both compensation and retribution where appropriate, and there is every indication that Congress viewed itself as the white knight of those whom the law protected. In subsequent litigation, however,

11. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (codified at 42 U.S.C. § 1981 (1994)).

12. *See, e.g.*, Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1975).

13. *See id.* at 459–60.

14. *See* H.R. REP. NO. 102-40(I), at 65 (1991).

15. *Id.* at 64–65. That effort has been successful. Employment discrimination filings, which as of 1990 had stabilized at approximately eight to nine thousand cases per year in the federal courts, increased to 12,962 filings in 1993, 19,059 in 1995, and 22,490 in 1999. *Compare* Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts*, Table C-2A (1997) *with* Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts*, Table C-2A (1999). While these are not all Title VII claims, Title VII remains the broadest and most widely used employment discrimination statute.

16. *See* H.R. REP. NO. 102-40(II), at 29 (1991).

17. *See* 42 U.S.C. § 1981a(b)(3) (1994).

18. *See* H.R. REP. NO. 102-40(I), at 66–69 (1991); H.R. REP. NO. 102-40(II), at 25–28 (1991).

both litigants and courts would wrestle with the potentially serious (and apparently unforeseen) restrictions imposed by these individual remedies on the maintenance of Title VII class actions.

III. THE RULE 23 REQUIREMENTS FOR CLASS ACTIONS

The original Title VII remedies fit neatly within the procedural scheme established for the certification and maintenance of class actions under Rule 23 of the Federal Rules of Civil Procedure.[19] A class must pass two major tests to be certified under Rule 23. First, it must possess the four attributes required by Rule 23(a): numerosity, typicality, commonality, and adequacy of representation. Specifically, (1) the class must be "so numerous that joinder of all members is impracticable" (numerosity); (2) there must be "questions of law or fact common to the class" (commonality); (3) the claims or defenses of the class representatives must be "typical of the claims or defenses of the class" (typicality); and (4) the representative parties must be able to "fairly and adequately protect the interests of the class" (adequacy of representation).[20]

Once these requirements are met, the class then must fit within one of the three categories established under Rule 23(b).[21]

19. *See* Jefferson v. Ingersoll Int'l, Inc., 195 F.3d 894, 896 (7th Cir. 1999).

20. FED. R. CIV. P. 23(a).

21. FED. R. CIV. P. 23(b) provides as follows:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
(1) the prosecution of separate actions by or against individual members of the class would create a risk of
(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or

Rule 23(b)(1) generally applies when individual adjudication would risk establishing inconsistent standards of behavior for the party opposing the class or when adjudication of the class representatives' claims would either dispose of the interests of other potential plaintiffs or impede their ability to recover. The textbook 23(b)(1) class involves a set of claims against a limited fund whose resources might be exhausted by initial plaintiffs to the detriment of subsequent claimants.[22] Rule 23(b)(1) typically does not apply in employment discrimination class actions. There is little risk of establishing inconsistent standards of behavior for a defendant employer, as the standards to be enforced are clear: do not discriminate. Similarly, class discrimination claims are not claims upon a limited fund as the Rule 23 Advisory Committee understood the concept but are efforts to remedy and deter certain types of harm by recovering equitable, compensatory, or punitive relief for persons who have been wronged.

Rule 23(b)(2) applies when a defendant has "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."[23] Under the original Title VII remedies, which were entirely equitable, Rule 23(b)(2) was the principal basis for certifying employment discrimination class actions.[24] Indeed, the 1966 Advisory Committee comments to Rule 23(b)(2) singled out civil rights classes as paradigmatic: "Illustrative [of 23(b)(2) classes] are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class . . . ."[25] Rule 23(b)(2) comes with an important caveat, according to the Advisory Committee: "The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."[26] While the Advisory Committee did not attempt to define the term "predominantly" (which appears nowhere in Rule 23(b)(2) itself), this "predominance" requirement has been

undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

22. *See* FED. R. CIV. P. 23 advisory committee's notes, 39 F.R.D. 69, 101 (1966).

23. FED. R. CIV. P. 23(b)(2).

24. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997); Jefferson v. Ingersoll Int'l, Inc., 195 F.3d 894, 896 (7th Cir. 1999).

25. FED. R. CIV. P. 23 advisory committee's notes, 39 F.R.D. 69, 102 (1966).

26. *Id.*

central to efforts to assess the impact of the 1991 Act on class litigation, as discussed below.

The final Rule 23(b) category is Rule 23(b)(3), which permits certification where a court finds that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[27] The "commonality" required by this section is a stricter test than that of commonality under Rule 23(a) and requires that the class members be "more bound together by a mutual interest in the settlement of common questions than . . . divided by the individual members' interest in the matters peculiar to them."[28] Rule 23(b)(3) also requires a finding that a class action is superior to other methods of adjudication, such as the prosecution of consolidated or individual claims. Rule 23(b)(3) permits courts to consider a variety of factors in deciding whether to certify a class, including the interests of class members in controlling their claims individually, the existence of individual litigation concerning the same claims, the desirability of concentrating class claims in the particular forum, the manageability of the class, and the desirability of certifying the class to avoid "negative value suits," in which the cost of individual litigation would outweigh the potential individual recovery.[29]

Rule 23(b)(3) classes are subject to an important "opt-out provision" imposed by Rule 23(c)(2). Under this provision, each potential member of a 23(b)(3) class is entitled to notice of the action, notice that all nonexcluded class members will be bound by the class judgment, and notice of the member's right to be excluded from the class upon request, leaving excluded members to a private right of action.[30] This provision exists as a hedge against the individual interests of potential 23(b)(3) class members, especially with respect to their right to pursue and recover individual monetary damages. As the Advisory Committee noted, in many Rule 23(b)(3) cases, the interests of individuals in pursuing their own claims "may be so strong

27. FED. R. CIV. P. 23(b)(3); *see also* Gorence v. Eagle Food Ctrs., Inc., No. 93 C 4862, 1994 WL 445149, at *7 (N.D. Ill., Aug. 16, 1994).

28. *Id.* at *11.

29. *See* FED. R. CIV. P. 23(b)(3)(A)–(D); *see also* Castano v. American Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996).

30. *See* FED. R. CIV. P. 23(c)(2).

here as to warrant denial of a class action altogether."[31] Even where those interests are not strong enough to bar a class action, Rule 23(b)(3) recognizes that individual interests may still exist and must be respected as a matter of due process by allowing potential class members to choose to pursue their own claims instead of joining in with the class.[32]

These Rule 23 requirements provide the procedural framework for class actions, and the interplay between those requirements, the remedies now afforded under Title VII, and the constitutional rights of the parties leads to the current uncertainties concerning the maintainability of Title VII class actions.

IV. TITLE VII CLASS ACTIONS BEFORE THE CIVIL RIGHTS ACT OF 1991

Before the passage of the 1991 Act, the courts had developed fairly well-defined procedures for certifying and managing Title VII class actions. These procedures were famously outlined and approved by the Supreme Court in *International Brotherhood of Teamsters v. United States.*[33] Title VII class actions before 1991 typically involved allegations that the employer had engaged in a pattern and practice of intentional discrimination, were typically certified under Rule 23(b)(2), and were typically handled in two phases. In the first, or liability phase, the plaintiffs had the burden of proving *prima facie* the existence of a pattern or practice of discrimination—in other words, that discrimination was the employer's "standard operating procedure."[34] This could be achieved through various combinations of statistical and anecdotal evidence.[35] The employer then could attempt to rebut the plaintiffs' showing by demonstrating that the plaintiffs' proof was "inaccurate or insignificant."[36] If the plaintiffs' proof withstood challenge, then the pattern and practice was consid-

31. FED. R. CIV. P. 23 advisory committee's notes, 39 F.R.D. 69, 104–05 (1966).

32. *See id.* at 104–05; *see also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 846–47 (1999).

33. 431 U.S. 324 (1977).

34. *Id.* at 336.

35. *See id* at 337. (statistical evidence); EEOC v. McDonnell Douglas Corp., 960 F. Supp. 203, 205 (E.D. Mo. 1996) (holding that liability phase can encompass "'direct statistical evidence, anecdotal evidence . . . and any other evidence that bears on the issue of whether a pattern of discrimination existed'" (quoting Sperling v. Hoffman-LaRoche, Inc., 924 F. Supp. 1346, 1352 (D.N.J. 1996))).

36. International Bd. of Teamsters v. United States, 431 U.S. 324, 360–62 (1977).

ered proven and the court could grant classwide prospective relief, including injunctions and other remedial orders.[37] To address individual claims, such as those for back pay or reinstatement, this initial phase was followed by a remedial phase in which the court (or, in some cases, a special master) would determine the appropriate remedies for the individual class members. In this second phase, each class member only had to show (1) that he experienced an adverse employment action and (2) the extent of any resulting loss. Because of the pattern and practice established in the first phase, each class member in the second phase enjoyed a rebuttable presumption that the adverse action and resulting loss were the product of discrimination. The employer then could attempt to rebut the presumption as to each class member and thereby avoid liability to that class member by proving that the disputed employment action had been taken for a nondiscriminatory reason.[38]

For the most part, this paradigm worked smoothly under the equitable remedy scheme of the original 1964 Act. Class certification was largely unproblematic under Rule 23(b)(2) because declaratory and injunctive relief could be held to predominate absent the availability of money damages. (While individual class members could recover money in the form of back or front pay, this was considered an equitable remedy that would not detract from the predominance of declaratory and injunctive relief.[39]) Moreover, the availability of only equitable remedies meant that there was no right to a jury trial, and thus courts were free to use devices such as special masters to handle individual claims as efficiently as possible in the second phase.[40] All of this would change dramatically with the advent of the damages and jury trial remedies afforded by the Civil Rights Act of 1991.

V. TITLE VII CLASS ACTIONS AFTER THE CIVIL RIGHTS ACT OF 1991

The damages remedies provided by the 1991 Act have introduced serious complications in the certification and management of

37. *See id.* at 361.

38. *See id.*; Allison v. Citgo Petroleum Corp., 151 F.3d 402, 409 (5th Cir. 1998).

39. *See supra* note 6; Jefferson v. Ingersoll Int'l, Inc., 195 F.3d 894, 896 (7th Cir. 1999).

40. *See* 42 U.S.C. § 2000e–5(f)(5) (1994 & Supp. III 1997) (authorizing use of special masters); Kraszewski v. State Farm Gen. Ins. Co., 912 F.2d 1182, 1183 (9th Cir. 1990).

Title VII class actions under Rule 23. While plaintiffs had typically sought and obtained certification under Rule 23(b)(2) in such cases, the availability of substantial and individualized money damages has raised difficult questions about the predominance of declaratory and injunctive relief required by Rule 23(b)(2). It has also raised procedural and constitutional questions about the need for or the availability of an opt-out procedure for 23(b)(2) cases in which individual claimants might want to reserve their monetary claims.

As to 23(b)(3) classes, the highly individualized nature of claims for compensatory and punitive damages has raised questions under the commonality requirement of that rule, while courts have struggled to determine whether a class of persons can be said to have sufficient matters in common when each of them seeks a personalized remedy. Similarly, the presence of scores, hundreds, or even thousands of unique claims for damages has greatly complicated the manageability of Title VII classes, especially where the relevant damages issues must be resolved by juries upon the demand of either party. The presence of such claims increases the risk that a class action will degenerate in practice into a series of minitrials, thereby becoming unmanageable and defeating the efficiencies that class actions were designed to realize. In addition, the very high limits on damages under the 1991 Act—up to $300,000 per plaintiff, depending on the size of the employer—may have eliminated the threat of negative value suits, which has been one of the primary bases for 23(b)(3) certification.

The 1991 changes have also raised questions about the availability of the *Teamsters*-style bifurcation that had been used in declaratory or injunctive-based class actions in the past. Attempts to apply such a process in light of the 1991 Act's jury trial right may violate the Seventh Amendment rights of the litigants. Because of the nature of proof in employment discrimination cases, multiple juries might be required to decide identical or substantially related issues of fact in evaluating the various phases of such trials.

Finally, the high damages limits under the 1991 Act have paved the way for "blackmail" class actions, in which a defendant's monetary exposure can be used by plaintiffs and their lawyers to force a settlement regardless of the merits of the case.

Trial courts have begun to address these issues with some regularity in Title VII cases, but these matters have only recently begun to make their way to the appellate courts. The varying approaches

taken by the courts—as well as their varying degrees of persuasiveness—indicate that these questions will continue to vex both litigants and judges for some time to come.

A. The 23(b)(2) Class—The Problems of Predominance and Opt-Out Rights

1. Rule 23(b)(2) and money damages

Rule 23(b)(2) was designed for classes in which declaratory or injunctive relief is the predominant remedial issue. As the Federal Rules Advisory Committee explained in its comments to Rule 23(b)(2), this section "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."[41] Thus, a key question in the post-1991 litigation of Title VII class actions has been whether the availability of money damages means that such damages "predominate" over injunctive relief to render Rule 23(b)(2) unsuitable as a means of certifying a class.

One difficulty in answering this question has been determining the definition of "predominantly." The language of Rule 23(b)(2) does not absolutely rule out money damages for a 23(b)(2) class, and the Advisory Committee comments would apparently allow 23(b)(2) certification in some circumstances where money damages are sought, so long as they are not the "exclusive" or "predominant" form of relief. On the other hand, the Supreme Court has stated in *dicta* that there is "at least a substantial possibility" that classes seeking money damages can never be certified under Rule 23(b)(2) due to the lack of an opt-out provision by which individual claimants can elect to pursue their remedies apart from the class.[42] Absent a more definitive holding, courts continue to be tasked with the job of determining when money damages "predominate" over other types of relief in considering 23(b)(2) certification.

41. FED. R. CIV. P. 23 advisory committee's notes, 39 F.R.D. 69, 102 (1966).

42. Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121 (1994). The lack of clear authority on this point was noted by the court in *Zachery v. Texaco Exploration and Production, Inc.*, 185 F.R.D. 230, 244 (W.D. Tex. 1999) ("[T]here is no clear cut decision as to whether Rule 23(b)(2) contains an opt-out procedure.").

2. The Allison v. Citgo *approach*

To date, the most thorough appellate analysis of this issue in the Title VII context is the Fifth Circuit's opinion in *Allison v. Citgo Petroleum Corp.*[43] *Allison* was an attempted Title VII race discrimination class action challenging hiring, promotion, training, and compensation practices at Citgo's Lake Charles, Louisiana, facility. The plaintiffs alleged both disparate impact and disparate treatment and sought declaratory, injunctive, and equitable relief as well as compensatory and punitive damages for a potential class of over one thousand members.[44] The district court denied class certification, and the ensuing appeal raised numerous issues about the applicability of Rule 23 in light of the Civil Rights Act of 1991.

Both the district court and the Fifth Circuit relied on the predominance requirement of Rule 23(b)(2) in denying the plaintiffs' request for 23(b)(2) certification.[45] Because of Rule 23(b)(2)'s emphasis on classwide declaratory and injunctive relief, the appeals court found that the rule was designed to "concentrat[e] the litigation on common questions of law and fact" in order to evaluate and impose "uniform group remedies."[46] In the court's view, this urge toward uniformity was demonstrated by the lack of an opt-out provision such as the one found under Rule 23(b)(3): 23(b)(2) class actions will bind class members without their consent precisely because all of them are affected in substantially the same way by the conduct complained of and will require substantially the same remedies to cure the problem.[47]

Based on this principle of uniformity, the panel concluded that monetary relief will be found to "predominate" in 23(b)(2) actions

43. 151 F.3d 402 (5th Cir. 1998).

44. *See id.* at 407.

45. *See id.* at 412–16; Celestine v. Citgo Petroleum Corp., 165 F.R.D. 463, 468–69 (W.D. La. 1995).

46. *Allison*, 151 F.3d at 414.

47. *See id.* at 413. Some courts have nonetheless imposed an opt-out requirement on 23(b)(2) classes. *See*, *e.g.*, Robinson v. Sears, Roebuck & Co., No. 4:98CV00739, 2000 WL 1036245 (E.D. Ark. 2000); Smith v. Texaco, Inc., 88 F. Supp. 2d 663, 680 (E.D. Tex. 2000) (extending opt-out rights to 23(b)(2) portion of hybrid Title VII class action); Martens v. Smith Barney, Inc., 181 F.R.D. 243, 260 (S.D.N.Y. 1998) (holding that courts have discretion to extend opt-out rights to 23(b)(1) and (b)(2) classes). It is not clear that this is proper, however, and the Supreme Court has recognized the "substantial possibility" that Rule 23(b)(2) cannot be used to certify a class where money damages are sought. Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121 (1994).

"unless it is incidental to requested injunctive or declaratory relief."[48] By "incidental," the court explained, it meant "damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief."[49] One index of the "incidental" character of damages is the ease with which they can be calculated. "Ideally, incidental damages should be only those to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established."[50] The determination of such "incidental" damages "should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations."[51]

Having determined the standard to be applied under Rule 23(b)(2), the *Allison* court then held that compensatory damages were neither uniform nor ministerial enough to avoid "predominating" under Rule 23(b)(2). Because compensatory and punitive damages are not presumed from the violation of a person's rights, even a plaintiff who could prove that he was discriminated against would be required to present "specific individualized" proof to establish his entitlement to damages. Damages for injuries stemming from discrimination—which may include compensation for emotional trauma, accompanying physical injury, and any other tangible or intangible consequences of discriminatory treatment—"cannot be calculated by objective standards" and would introduce "new and substantial legal and factual issues" beyond those required to make a liability determination.[52] Accordingly, such damages would not flow automatically from a finding of liability to the class, and such a class could not be certified under Rule 23(b)(2).

48. *Allison*, 151 F.3d at 415.

49. *Id.*

50. *Id.*

51. *Id.* The court noted that as a matter of precedent this was not inconsistent with cases allowing back pay under Rule 23(b)(2) because back pay is "an integral part of the statutory equitable remedy." *Id.* (quoting Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969)).

52. *Id.* at 417–18.

3. The Allison *dissent and the issue of back pay*

The *Allison* majority's view of Rule 23(b)(2) is not a novel one.[53] The dissent nonetheless attacked the holding, claiming that the majority had created a rule that would absolutely preclude class certification in 23(b)(2) cases seeking damages.[54] That misstates the holding of the majority, which noted that the Advisory Committee had apparently meant to leave open the possibility of damages recoveries in some circumstances under Rule 23(b)(2), subject to the "predominance" analysis.[55] More plausible was the dissent's argument that the disallowance of damages could not be squared with the routine certification under Rule 23(b)(2) of classes seeking to recover back pay: "Although back pay has often been characterized as an equitable remedy for practical purposes, functionally there is little to distinguish back pay awards from compensatory damages. Both require complex individualized determinations."[56] This argument has superficial appeal but is not altogether persuasive. It is arguable that back pay proceedings are qualitatively different from damages determinations. Back pay determinations typically do not require highly complex factual or legal adjudications. Instead, they involve only a determination of how much pay an employee lost and whether any offsets should be applied, for such things as interim earnings or failure to mitigate damages. While not entirely formulaic, such determinations are made according to methods of calculation that are well developed and can be applied with some degree of classwide efficiency, especially because they need not be determined by juries.[57] At

53. Other courts in non-Title VII cases have read Rule 23(b)(2) much as the *Allison* court did and have denied 23(b)(2) certification where individualized damages determinations would be required if liability were found. *See* Washington v. CSC Credit Servs. Inc., 199 F.3d 263 (5th Cir. 2000) (following *Allison* and holding that it would be error to certify 23(b)(2) class under Fair Credit Reporting Act where monetary damages would not flow from declaratory relief but would require separate adjudication); Boughton v. Cotter Corp., 65 F.3d 823, 827 (10th Cir. 1995) (holding that certification of 23(b)(2) class not required in environmental contamination case where relief sought was primarily individualized money damages); Marascalco v. International Computerized Orthokeratology Soc'y, Inc., 181 F.R.D. 331 (N.D. Miss. 1998) (denying 23(b)(2) certification in action for breach of warranty and fraud; plaintiffs each sought damages in excess of $5 million, and availability of individual relief would depend on varying individual circumstances going to elements of fraud).

54. *See Allison*, 151 F.3d at 426–27 (Dennis, J., dissenting).

55. *See id.* at 411.

56. *Id.* at 427 n.1 (Dennis, J., dissenting).

57. *See* BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1848–56 (3d ed. 1996). These calculations are perhaps most complex in cases involving

the least, one can plausibly argue that the calculation of such remedies is inherently more uniform than the assessment of compensatory or punitive damages, which might involve medical, psychiatric, and other types of tangible and intangible proof that could differ widely among class members.

Moreover, even assuming that back pay and damages are conceptually similar for purposes of Rule 23(b)(2), that does not mean that both should be available to a 23(b)(2) class. The monetary relief available to a 23(b)(2) Title VII class, in the majority's view, is equitable (*e.g.*, back pay). That relief is therefore determined by the court, without the additional procedural complications of a jury trial. Considering that the availability of equitable monetary remedies in class actions is entrenched as a matter of precedent, it would seem consistent with the homogeneity of fact and remedy contemplated by Rule 23(b)(2) to eschew the extra layer of fact finding and complication that would be imposed on such proceedings by jury damages determinations. In other words, the availability of some monetary recovery under Rule 23(b)(2) does not mean that there should be more, especially when that "more" is at odds with the homogeneity that Rule 23(b)(2) was supposed to represent.

4. Other appellate views—Jefferson v. Ingersoll International, Inc. *and* Lemon v. International Union of Operating Engineers

To date, only one other appellate court has considered the Rule 23(b)(2) issue in a post-1991 Title VII class action. In *Jefferson v. Ingersoll International, Inc.*, [58] the Seventh Circuit heard an interlocutory appeal from a Title VII class certification under Rule 23(b)(2). The appeals court reversed and remanded the case to the trial court with instructions to consider, among other things, whether the money damages sought by the class were "more than incidental" to the requested equitable relief, and, if not, whether 23(b)(2) certification is ever permissible when money damages are sought. In so doing, the court agreed with *Allison* that 23(b)(2) certification would be appropriate only where "monetary relief is incidental to the equitable remedy—so tangential . . . that the due proc-

claims of discriminatory failure to hire or failure to promote, in which there may be more class members than available positions, and some method must therefore be used for allocating limited back pay to the class. Nonetheless, these procedures are also fairly well-established. *See id.*

58. 195 F.3d 894, 897 (7th Cir. 1999).

ess clause does not require notice [and the opportunity to opt out]."[59] The Seventh Circuit therefore recognized that there are circumstances under Title VII in which the pursuit of money damages will prevent 23(b)(2) certification. The Seventh Circuit's opinion did not, however, purport to direct how this issue should be resolved on remand.

The Seventh Circuit later applied *Jefferson* to decertify another class in *Lemon v. International Union of Operating Engineers*,[60] while continuing to avoid deciding the Rule 23 issues. In *Lemon*, members of a local union filed a Title VII class action, alleging that the union discriminated against women and minorities in its hiring referral system. The district court certified the class under Rule 23(b)(2) without imposing an opt-out provision, but the appellate court reversed. Relying on *Jefferson*, the court held that the seeking of individual damages "jeopardizes [the] presumption of cohesion and homogeneity" by requiring "judicial inquiry into the particularized merits of each individual plaintiff's claim."[61] Further, it would violate due process to deprive individual class members of the chance to opt out of such a class where money damages were at issue, precisely because of this potential divergence of interests.[62] Accordingly, the court held that the trial judge had abused his discretion by certifying a 23(b)(2) class without giving the class members a chance to opt out.On remand, as it had in *Jefferson*, the court directed the trial judge to consider three options: (1) certifying the class under Rule 23(b)(3); (2) certifying the equitable issues under Rule 23(b)(2) and the legal issues under Rule 23(b)(3); or (3) certifying a Rule 23(b)(2) class but imposing an opt-out provision.[63] As in *Jefferson*, the appeals court did not consider whether any of the three options themselves might be improper (for example, whether a class seeking money damages can be certified under Rule 23(b)(2) at all), nor did it tell the lower court how the issue should be resolved.[64]

59. *Id.* at 898–99. The court also suggested (without deciding) that the injunctive aspects of the case could be severed from the other claims and certified separately under Rule 23(b)(2). The issue of bifurcation of class claims is discussed *infra* Part V.C.

60. 216 F.3d 577 (7th Cir. 2000).

61. *Id.* at 580.

62. *See id.*

63. *See id.* at 581–82.

64. The Eastern District of Arkansas relied upon *Jefferson* and *Lemon* and adopted their proposed third option, certifying a Title VII class under Rule 23(b)(2) and imposing an opt-out provision. *See* Robinson v. Sears, Roebuck & Co., No. 4:98CV00739, 2000 WL 1036245

5. Other post-1991 cases restricting 23(b)(2) certification

District courts that have considered 23(b)(2) certification under Title VII both before and after *Allison* have generally agreed that the predominance analysis is necessary, and a number of those courts have rejected attempts to certify employment discrimination classes under Rule 23(b)(2) where compensatory and punitive damages were sought.[65]

6. Post-1991 cases granting 23(b)(2) certification

Other courts have granted 23(b)(2) certifications under Title VII. In *Warnell v. Ford Motor Co.*,[66] the plaintiffs sought certification of a class of women alleging sexual harassment. The court certified the class under Rule 23(b)(2), noting that the plaintiffs sought a permanent injunction and a declaration of liability against Ford, and holding without further analysis that the accompanying claims for money damages were "incidental" to these equitable claims.[67] The Northern District of California certified a 23(b)(2) class in *Butler v. Home Depot, Inc.*[68] despite the plaintiffs' substantial claims for money damages. Relying primarily on an analogy to pre-1991 cases involv-

(E.D. Ark. July 3, 2000). The court went on to adopt a *Teamsters*-style approach to the adjudication of the case without addressing the consequent Seventh Amendment problems (discussed below) or the contradictions inherent in the adjudication of individualized damages claims under Rule 23(b)(2) for those class members who did not opt out.

65. *See* Adams v. Henderson, 197 F.R.D. 162, 171 (D. Md. 2000) (denying 23(b)(2) certification to Title VII class; money damages "predominate" under 23(b)(2) when presence of monetary claims suggests that notice and right to opt out are necessary); Zapata v. IBP, Inc., 167 F.R.D. 147, 162 (D. Kan. 1996) (finding that monetary relief therefore predominated although plaintiffs alleged that only monetary relief would make class members whole for racially hostile work environment and denying 23(b)(2) certification); Griffin v. Home Depot, Inc., 168 F.R.D. 187, 190–91 (E.D. La. 1996) (holding without analysis that predominant relief sought by sex discrimination class is "economic and not injunctive" and denying 23(b)(2) certification); Gorence v. Eagle Food Ctrs., Inc., No. 93 C 4862, 1994 WL 445149, at *7 (N.D. Ill. Aug. 16, 1994) (denying 23(b)(2) certification where complaint and class certification memorandum sought declaratory and injunctive relief but prayer for relief mentioned only compensatory, punitive and liquidated damages, and promotions and finding that plaintiffs' "primary motivation" deemed money damages); Faulk v. Home Oil, Inc., 184 F.R.D. 645 (M.D. Ala. 1999) (following *Allison* in denying 23(b)(2) certification in race discrimination case).

66. 189 F.R.D. 383 (N.D. Ill. 1999).

67. *See id.* at 389 (quoting Senn v. United Dominion Indus., Inc., 951 F.2d 806, 813 (7th Cir. 1992). The *Warnell* court rejected *Allison* in part based on the Fifth Circuit's published denial of petition for rehearing in that case. *See infra* Part V.C.2.

68. 70 Fair Empl. Prac. Cas. (BNA) 51 (N.D. Cal. 1996).

ing back pay awards, the court held that class certification under 23(b)(2) is not precluded where monetary relief is sought. The court then somewhat startlingly held that the mere allegation of a policy and practice of denying equal opportunities to women "is sufficient to satisfy the Rule 23(b)(2) requirement."[69] The court therefore severed and certified claims regarding liability, injunctive relief, and classwide punitive damages, deferring a ruling on class treatment of individual damages.[70] A similar approach was followed in *Shores v. Publix Super Markets, Inc.*[71] There the court certified a class under Rule 23(b)(2) based on its finding that the class had already satisfied the "commonality" requirement of Rule 23(a). The court then bifurcated the trial into a first phase covering liability and a second phase covering damages. The court acknowledged that it had "not determined what means it will employ to efficiently resolve Stage II damages claims. Nor has it determined how punitive damages will be handled."[72]

At least one of these cases is consistent with the holding of *Allison* despite coming out the opposite way on the facts. In *Arnold v. United Artists Theatre Circuit, Inc.*,[73] the court certified a 23(b)(2) class alleging disability discrimination in movie theater access under the Americans with Disabilities Act of 1990 and California state law. The California statute allowed compensatory damages for each violation, and the court considered whether such damages predominated over the requested injunctive relief. Significantly, each plaintiff

69. *Id.* at 55.

70. The problems raised by bifurcated trials under the Civil Rights Act of 1991 are discussed *infra* Part V.C. It should nonetheless be pointed out here that the *Butler* court's inclusion of "classwide" punitive damages in the phase-one determination may have been incorrect. Arguably, liability for punitive damages depends on individual circumstances. It cannot be imposed as a result of a classwide determination of pattern-and-practice liability, which does not purport to determine whether any single class member has been a victim of discrimination, much less whether each class member has been treated with "malice or with reckless indifference to the federally protected rights of an aggrieved individual" as required to justify a punitive award. Allison v. Citgo Petroleum Corp., 151 F.3d 402, 417–18 (5th Cir. 1998); *see also* 42 U.S.C. § 1981a(b)(1) (1994). The language of the 1991 Act seems to confirm this: the Act provides for punitive awards to "a complaining party," not to a class as a whole. 42 U.S.C. § 1981a(b)(1) (1994 & Supp. III 1997). If a class and a "party" were the same thing, then the damages caps imposed by 42 U.S.C. § 1981a(b)(3) would limit class recovery to $300,000 because that limit caps recovery for a "party." That clearly was not what Congress intended.

71. 69 Empl. Prac. Dec. (CCH), ¶ 44,477 (M.D. Fla. 1996).

72. *Id.* ¶ 87,689.

73. 158 F.R.D. 439 (N.D. Cal. 1994).

sought only the $250 statutory minimum damage award for each violation. Comparing such an award with cases in which back pay was permitted in 23(b)(2) class actions, and noting that 23(b)(2) was "specifically designed" for civil rights classes, the court concluded that the action was maintainable as a 23(b)(2) class because the damages assessment would not require "a complicated, individual-specific calculus."[74]

As discussed below, the named plaintiffs' forswearing of full money damages on behalf of a class raises important questions about the appropriateness of class certification that were not addressed in *Arnold*. Nonetheless, the *Arnold* decision is largely consistent with *Allison* and related cases. Because the amount of damages at issue was small, it is plausible to consider such damages as incidental to the more sweeping injunctive relief sought, which was the physical alteration of over seventy movie theaters to accommodate disabled patrons.[75] Further, because the amount of damages was fixed as to each plaintiff, the determination of damages would be a mechanical matter once liability was established and would not require additional fact finding or the analysis of complex issues of law.

7. Foregoing money damages—Zachery v. Texaco

The complications introduced by money damages in 23(b)(2) cases could be avoided if class members simply did not seek money damages at all in disparate treatment cases.[76] Such an attempt was rejected, however, in *Zachery v. Texaco Exploration and Production, Inc.*[77] The plaintiffs in *Zachery* sought certification of a class of alleged victims of intentional and unintentional race discrimination in pay, promotions, and hiring. As part of their litigation strategy, the named plaintiffs dropped their claims for compensatory and punitive damages and sought 23(b)(2) certification.[78] The court nonetheless denied class certification because of concerns that the unnamed plaintiffs might thereby be stripped involuntarily of their right to recover damages. Central to this holding was the apparent unavailabil-

74. *Id.* at 452.

75. *See id.* at 444, 445.

76. In a pure disparate impact case, only equitable relief is available, and damages are therefore not an issue.

77. 185 F.R.D. 230 (W.D. Tex. 1999).

78. *See id.* at 242.

ity of an opt-out procedure under 23(b)(2). The *Zachery* court noted that the Supreme Court had raised this issue in *Ticor Title Insurance Co. v. Brown*[79] but then had chosen not to decide it, meaning that there was "no clear cut decision" on the availability of an opt-out procedure in 23(b)(2) cases.[80] This meant that should relief be granted to a 23(b)(2) class that excluded money damages it would be possible that no class member would be able to recover such damages because the entire class would necessarily be bound by the judgment. A plaintiffs' victory in the class action might therefore stand as a bar to any subsequent actions by the class members to recover the money damages that their representatives had forsworn.[81] Thus, the court concluded that the decision to drop monetary damages could not be "imposed upon the absent class members without raising a very serious conflict of interest" and refused to certify the class.[82]

The *Zachery* decision encapsulates many of the problems inherent in trying to reconcile the damages provisions of the 1991 Act with 23(b)(2) class certification. The individualized nature of such relief is at odds with the homogeneity of harm and remedy presupposed by 23(b)(2) certification. At the same time, attempts to forego such relief may be barred by the lack of an opt-out provision—a provision that is not part of 23(b)(2) precisely because of the common interests and remedies of the archetypal 23(b)(2) class.

8. The end of the 23(b)(2) Title VII class?

For all of these reasons, it would appear that the more persuasive authority has denied 23(b)(2) certification in Title VII class actions. Because the 23(b)(2) class is a homogeneous class as to which homogeneous relief can be granted, the presence of individualized claims seems incompatible with that type of action. Those cases that

79. 511 U.S. 117, 120–21 (1994).

80. *See Zachery*, 185 F.R.D. at 244 (citing *Ticor Title Ins. Co.*, 511 U.S. at 120–21).

81. *See id.* at 243–44.

82. *Id.* at 244. Another court has characterized this problem as a "catch-22": if the plaintiffs do not seek full relief, they could be accused of being inadequate class representatives. If they do seek full relief, then under *Zachery* they may fail to meet the 23(b)(2) requirements for certification. Smith v. Texaco, Inc., 88 F. Supp. 2d 663, 679 (E.D. Tex. 2000). The *Smith* court sidestepped this dilemma by certifying only the equitable claims under Rule 23(b)(2) with an opt-out provision and certifying the damages claims under Rule 23(b)(3). *See infra* Part V.C (discussing this type of split certification).

have nonetheless certified 23(b)(2) classes have done so in express or implicit reliance on pre-1991 cases and their treatment of equitable back pay relief—a type of relief that is generally less complex and less individualized than compensatory or punitive damages and which is therefore less at odds with the fundamental purposes of Rule 23(b)(2).

In addition to the incompatibility of individualized damages with the 23(b)(2) model, the apparent or arguable lack of an opt-out procedure for 23(b)(2) classes should preclude attempts to bind class members to the adjudication of their monetary claims in a 23(b)(2) case. Unlike Rule 23(b)(3), which entitles potential class members to notice of the class action and the opportunity to "opt out" of the class to pursue their claims individually, Rule 23(b)(2) class actions bind all class members with or without their consent. This is consistent with the homogeneity of harm and remedy contemplated by Rule 23(b)(2): if all class members are harmed in a similar way and if that harm can be remedied through the same declaratory or injunctive relief, then it makes sense to apply that relief once to all class members rather than allowing individualized adjudication and risking inconsistent or inefficiently repetitive outcomes. Where damages claims are at issue, however, courts have been wary of the right to opt out as a matter of due process and have frequently looked to Rule 23(b)(3) rather than 23(b)(2) to address such claims.[83] If the 1991 remedies are a square peg, Rule 23(b)(2) is a round hole, and, as the two presently exist, they cannot be fitted without distorting them both.

B. 23(b)(3) Classes—Commonality, Manageability, and Negative Value

The certification of Title VII class actions under Rule 23(b)(3) has also become problematic in the wake of the 1991 Act's damages provisions. In particular, the 1991 remedies have raised questions concerning commonality, manageability, and negative value in adjudicating 23(b)(3) certification.

83. *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Jefferson v. Ingersoll Int'l, Inc., 195 F.3d 894, 897 (7th Cir. 1999). *See infra* Part V.B.

1. Commonality

A primary issue under Rule 23(b)(3) has been that of commonality: whether, when each plaintiff or class member seeks compensatory and punitive damages, "questions of law or fact common to the members of the class predominate over any questions affecting only individual members."[84] Under the 1991 Act, entitlement to compensatory and perhaps punitive damages will turn on each plaintiff's private experience of discrimination as well as on personal factors (such as psychiatric history, medical history, family situation, or other social particularities) that may influence the type or degree of emotional or other harm resulting from that discrimination. Accordingly, when such damages are sought, there is a strong possibility that questions affecting individual members will predominate, thereby precluding 23(b)(3) certification.

Nonetheless, it seems clear that a claim for damages will not inevitably preclude 23(b)(3) certification. The Advisory Committee appears to have taken a balanced view of this issue, with an eye toward promoting judicial efficiency. As the Committee explained, a primary purpose of the rule is the achievement of economies of scale for courts and litigants:

> The court is required to find, as a condition of holding that a class action may be maintained under this subdivision [23(b)(3)], that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device.[85]

Thus, the presence of individual damages claims would not necessarily bar 23(b)(3) certification, so long as the resulting class was an efficient collective means of disposing of those claims. The Committee continued:

> In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class

84. FED. R. CIV. P. 23(b)(3). This requirement of "commonality" under Rule 23(b)(3) should not be confused with the "commonality" requirement of Rule 23(a), which asks whether there are "questions of law or fact common to the class." The 23(a) "commonality" standard has generally been viewed as less rigorous than the one in Rule 23(b)(3). *See* Gorence v. Eagle Food Ctrs., Inc., No. 93 C 4862, 1994 WL 445149 at *11 (N.D. Ill. Aug. 16, 1994).

85. FED. R. CIV. P. 23, advisory committee's notes, 39 F.R.D. 69, 103 (1966).

> action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed.[86]

The availability of Rule 23(b)(3) certification will therefore turn less on the mere availability of money damages than on the possibility of achieving efficiency by the adjudication of common damages claims through use of the class device.

Courts confronting the 23(b)(3) commonality issue following the 1991 Act have reached mixed results. Here, too, *Allison* provides the only direct appellate authority to date under Title VII. The *Allison* court rejected 23(b)(3) certification of the class before it, holding that the individual-specific damages issues raised by the plaintiffs meant that a class action would likely degenerate into "multiple lawsuits separately tried."

> The plaintiffs' claims for compensatory and punitive damages must therefore focus almost entirely on facts and issues specific to individuals rather than the class as a whole: what kind of discrimination was each plaintiff subjected to; how did it affect each plaintiff emotionally and physically, at work and at home; what medical treatment did each plaintiff receive and at what expense; and so on and so on. Under such circumstances, an action conducted nominally as a class action would "degenerate in practice into multiple lawsuits separately tried."[87]

The Eleventh Circuit has also rejected 23(b)(3) certification in a discrimination case, *Rutstein v. Avis Rent-A-Car Systems, Inc.*[88] While *Rutstein* is not an employment discrimination case, it would

86. *Id.*

87. Allison v. Citgo Petroleum Corp., 151 F.3d 402, 419 (5th Cir. 1998) (quoting Castano v. American Tobacco Co., 84 F.3d 734, 745 n.19 (5th Cir. 1996) (citing FED. R. CIV. P. 23 advisory committee's notes)). The Seventh Circuit, in *Jefferson v. Ingersoll Int'l, Inc.*, appeared to hint that 23(b)(3) certification could be appropriate in Title VII class actions precisely *because* of the availability of money damages, which made 23(b)(3) a more suitable choice than 23(b)(2) due to the opt-out provision. 195 F.3d 894, 898 (7th Cir. 1999). The Seventh Circuit directed the district court on remand to consider 23(b)(3) certification as one possibility but stated in the same breath that it "did not broach" the question whether 23(b)(3) certification was "sound" in the case before it. *Id.* at 899.

88. 211 F.3d 1228 (11th Cir. 2000).

seem to leave little room for 23(b)(3) certification in any discrimination case in which individualized damages are sought.

The plaintiffs in *Rutstein* sued under 42 U.S.C. § 1981, alleging that Avis followed a "Yeshiva policy" designed to deny services to individuals and businesses with Jewish-sounding accents or Jewish-sounding names. The district court certified the case as a 23(b)(3) class action, but the Eleventh Circuit reversed based both on the elements of proof and the damages sought. As to proof, the court noted that each plaintiff, in order to prevail, would have to prove that he or she was intentionally discriminated against by the defendant. Thus, "[e]ach plaintiff will have to bring forth evidence demonstrating that the defendant had an intent to treat him or her less favorably because of the plaintiff's Jewish ethnicity."[89] Likewise, the fact that each plaintiff sought compensatory and punitive damages made the case inappropriate for class treatment.

> To establish that they are entitled to some compensation, plaintiffs will have to prove that they actually suffered some injury, whether it be emotional or otherwise. The idea that individual injury could be settled on a classwide basis is preposterous. Plaintiffs' claims for damages must "focus almost entirely on facts and issues specific to individuals rather than the class as a whole: what kind of discrimination was each plaintiff subjected to[, and] how did it affect each plaintiff emotionally and physically, at work and at home."[90]

This requirement meant that "most, if not all, of the plaintiffs' claims will stand or fall, not on the answer to the question whether [Avis] has a practice or policy of [ethnic] discrimination, but on the resolution of . . . highly case-specific factual issues."[91] This also made *Teamsters*-style adjudication inappropriate because "the establishment of a policy or practice of discrimination cannot trigger the defendant's liability for damages to all the plaintiffs in the putative class,"[92] which would still require individual determinations.

While the *Rutstein* court was careful to point out that "[t]his is not a case alleging employment discrimination," its holding would

89. *Id.* at 1235.

90. *Id.* at 1239–40 (quoting *Allison*, 151 F.3d at 419).

91. *Id.* at 1234 (quoting Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1006 (11th Cir. 1997) (decertifying class alleging discrimination in lodging where liability to class members would turn on individualized circumstances of denial of motel rooms to each class member)).

92. *Id.* at 1239.

seem to leave little room for the certification of any class—including a Title VII class—in which the plaintiffs or potential class members seek individualized damages.[93]

Some district courts have likewise rejected 23(b)(3) certification in Title VII cases on grounds of lack of commonality. In *Adams v. Henderson*, the court held that the presence of individual damages claims would require "individualized liability inquiries," thereby making it unsuitable for 23(b)(3) certification.[94] The court in *Zapata v. IBP, Inc.* denied such certification, noting that "claims for compensatory damages . . . greatly complicate the management of a class" and that the assessment of psychological damages "would necessarily require an individual, subjective analysis."[95] The court in *Gorence v. Eagle Food Centers, Inc.* noted that the assessment of discrimination and "individualized damages" would require it to "hold a series of mini-trials" and denied 23(b)(3) certification.[96] And in *Faulk v. Home Oil Co.*, the court adopted the reasoning of the *Allison* court to deny 23(b)(3) certification to a potential class of race discriminatees.[97]

By contrast, in *Griffin v. Home Depot, Inc.*, the court denied a motion to dismiss the class allegations in a sex discrimination complaint, holding that on the pleadings "one can postulate that there is sufficient commonality of facts to satisfy Rule 23(b)(3)."[98] This amounts to a holding that 23(b)(3) certification is not automatically precluded in Title VII class actions—a holding not at odds with the Advisory Committee's view of damages in 23(b)(3) cases but perhaps inconsistent with *Allison's* recognition that damages determinations arising out of employment discrimination tend, by definition, to be more individualized than typical.

2. Manageability

Hand-in-hand with the issue of commonality under Rule 23(b)(3) has gone the issue of manageability. One factor for consideration under Rule 23(b)(3) is "the difficulties likely to be encoun-

93. *See id.* at 1241.
94. 197 F.R.D. 162, 172 (D. Md. 2000).
95. 167 F.R.D. 147, 163 (D. Kan. 1996).
96. No. 93 C 4862, 1994 WL 445149 at *11 (N.D. Ill. Aug. 16, 1994).
97. 184 F.R.D. 645, 661–62 (M.D. Ala. 1999).
98. 168 F.R.D. 187, 191 (E.D. La. 1996).

tered in the management of a class action."[99] In the Title VII context, this has for the most part meant the logistical difficulties attendant to trying the individualized damages claims of hundreds or even thousands of class members. The *Allison* court sketched the problem concisely: "[T]his action must be tried to a jury and involves more than a thousand potential plaintiffs spread across two separate facilities, represented by six different unions, working in seven different departments, and alleging discrimination over a period of nearly twenty years."[100] While each party is entitled to trial by jury in such cases, it is unthinkable that a single jury could try this or even a much smaller class action in which individual issues must be resolved as to each plaintiff. Accordingly, courts in a variety of settings have rejected the class device where the need for individual jury fact finding would render class adjudication unmanageable.[101] At least one court, on the other hand, has expressed a preference for class adjudication over individual adjudication in the Title VII context. In *Smith v. Texaco, Inc.*,[102] the court certified a 23(b)(3) class of approximately 200 employees alleging race discrimination in employment. In doing so, the court noted that, should the claims be tried individually, "this one district court will be totally and fully occupied for the larger part of at least 200 weeks in the trial of these claims alone."[103] The court therefore concluded that "individual actions would take up far more judicial resources than a single class[,] . . . [and] a class action is a superior means for managing this case because of the efficiencies involved in addressing the claims of about 200 class persons."[104]

The distinction drawn by the *Smith* court between class and individual adjudication may be more rhetorical than actual: it is neither obvious nor inevitable that the litigation of hundreds or thousands of individual damages claims in a class action will be less time consuming than whatever individual lawsuits might be brought if class certi-

99. FED. R. CIV. P. 23(b)(3)(D).

100. Allison v. Citgo Petroleum Corp., 151 F.3d 402, 419 (5th Cir. 1998).

101. *See, e.g.*, Zimmerman v. Bell, 800 F.2d 386, 390 (4th Cir. 1986) (holding that it is proper to deny certification in securities fraud case due to "excessive managerial burden" imposed by individualized issues of knowledge and reliance); Alabama v. Blue Bird Body Co., 573 F.2d 309, 328 (5th Cir. 1978) (upholding denial of certification in antitrust case where, *inter alia*, certification might bring in "thousands of possible claimants," leading to a "multitude of mini-trials").

102. 88 F. Supp. 2d 663 (E.D. Tex. 2000).

103. *Id.* at 682.

104. *Id.* at 683.

fication were denied. In either scenario, individualized, jury-based fact finding must be undertaken as to each plaintiff or class member who seeks to recover compensatory or punitive damages. Left to their own devices, however, some members of a large group of individual plaintiffs might lose interest in pressing their claims, realize that they did not have claims and so not bring them, or be unable to find counsel to represent them should their case not be sufficiently strong. Accordingly, the denial of a certification to a class of two hundred members does not mean that two hundred individual lawsuits would be brought. This makes the rationale of the *Smith* court less persuasive than it might first appear.

3. Negative value

Finally, the damages afforded by the 1991 Act have diminished the force of another strong rationale for granting 23(b)(3) certification: the specter of the negative value lawsuit. One benefit of the class action device is that it permits plaintiffs to aggregate small claims. Although such claims individually may be worth less than the cost of litigation, when combined as a class they may be worth the efforts of an attorney, which grants the plaintiffs access to the courts that they might not otherwise have. In certifying 23(b)(3) classes in various settings, courts have sometimes relied on the fact that a denial of certification could effectively bar the bringing of such small-value individual claims. The danger of negative value suits has even been described as "[t]he most compelling rationale"[105] for granting 23(b)(3) certification in an appropriate case. The 1991 Act, however, has effectively removed this issue from the Title VII arena. Given the significant statutory damages available under the 1991 Act (ranging from $50,000 to $300,000 per plaintiff, depending on the size of the employer), as well as the availability of attorney's fees to the prevailing party,[106] the possibility of negative value suits is now virtually nonexistent in Title VII cases.[107]

105. Castano v. American Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996).

106. *See* 42 U.S.C. § 2000e–5(k) (1994).

107. *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 420 (5th Cir. 1998) ("The relatively substantial value of these claims (for the statutory maximum of $300,000 per plaintiff) and the availability of attorney's fees eliminate financial barriers that might make individual lawsuits unlikely or infeasible.").

C. Procedural and Constitutional Problems of Bifurcation and Partial Certification

Courts have attempted to circumvent Rule 23 concerns by applying various schemes of bifurcation or partial certification to Title VII classes after the 1991 Act. The most frequent scheme of this type is the certification of liability determinations and equitable relief under Rule 23(b)(2), with the court reserving judgment on how to handle damages claims or ordering their certification separately under Rule 23(b)(3).[108] Another option, and one raised by the plaintiffs in *Allison*, is to certify a class only as to the disparate impact claims, leaving the disparate treatment claims for individual trials or later class treatment.[109] Such schemes, however, pose serious problems under Rule 23 and the Seventh Amendment. In many cases, these difficulties have been ignored or minimized by the courts, and one suspects that in some cases courts are either unable or unwilling to confront the profound changes wrought in the class action landscape by the 1991 Act.

1. Procedural issues

Much of the current judicial approach to Title VII class actions has evolved from the class action management scheme approved in *International Brotherhood of Teamsters v. United States*[110] and discussed above. The difficulties with such bifurcated proceedings under the 1991 Act are both procedural and constitutional: procedural because of concerns about Rule 23(b)(3)'s commonality requirement and the misuse of Rule 23(c)(4) to evade that requirement and constitutional because of concerns about the Seventh Amendment rights of the parties in cases that could employ scores or even hundreds of juries under some circumstances.

The *Teamsters* paradigm was both sensible and effective when only equitable remedies were available. It allowed for focused resolution of the dominant equitable issues, and, while individual relief could be time consuming to administer, at least it was not complicated by individualized damages issues. The paradigm also worked

108. *See, e.g.*, Smith v. Texaco Inc., 88 F. Supp. 2d 667, 682 (E.D. Tex. 2000); Shores v. Publix, 69 Empl. Prac. Dec. (CCH), ¶ 44,477 (M.D. Fla. 1996); Butler v. Home Depot, Inc., 70 Fair Empl. Prac. Cas. (BNA) 51 (N.D. Cal. 1996).

109. *See Allison*, 151 F.3d at 422.

110. 431 U.S. 324 (1977).

when neither party had the right to a jury trial, as special masters could be used to streamline the proceedings in the damages phase. This paradigm appears to have become ingrained in the psyches of many litigants and judges, but its application is questionable in the wake of the 1991 Act.

The Fifth Circuit faced these issues squarely in *Allison* and rejected (though not categorically) the use of bifurcated or partial class proceedings in Title VII class actions. The *Allison* plaintiffs first suggested certifying all damages issues under Rule 23(b)(3) and the rest of the case under Rule 23(b)(2). This suggestion was rejected based on the Fifth Circuit's 23(b)(3) "commonality" analysis. The court noted that the case before it involved over one thousand potential class members at two facilities, represented by six unions, in seven departments, over a twenty-year period. Each of these thousand claimants sought compensatory and punitive damages, which would require individualized determination. The court therefore concluded that Rule 23(b)(3) certification would be inappropriate in light of this lack of commonality. The court also noted that the availability to each plaintiff of attorney's fees and up to $300,000 in damages eliminated the possibility of a "negative value suit," one of the most frequent rationales for certifying a 23(b)(3) class.[111] Thus, because 23(b)(3) certification was inappropriate, the attempt to "split" certification between Rules 23(b)(2) and 23(b)(3) was also improper.[112]

The *Allison* plaintiffs suggested a second bifurcation scheme: certifying both their disparate impact and pattern-and-practice claims under Rule 23(b)(2) or 23(b)(3), trying those issues to a jury, and allowing the court to rule on the certification of the remaining claims—such as those for damages—after the jury's findings on these initial issues.[113] The court rejected this proposal as well, stating that

111. *See Allison*, 151 F.3d at 419–20 (quoting Castano v. American Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996)). The court also noted that multiple juries would be needed to try the thousand or so damages claims, thereby raising Seventh Amendment issues. *See infra* Part V.C.3.

112. The Seventh Circuit in *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 898 (7th Cir. 1999), suggested, without deciding, that classes of this type could be handled by certifying the injunctive aspects under Rule 23(b)(2) and the damages aspects under Rule 23(b)(3). This suggestion was made as part of the court's discussion of how courts might preserve what it viewed as essential opt-out rights where money damages are sought. *See id.* The court also noted, however, that it expressed no view on whether Rule 23(b)(3) certification would be proper in Title VII class actions, which it would have to be for such a scheme to work. *See id.* at 899.

113. *See Allison*, 151 F.3d at 420–21.

there was no reason to believe that adjudication of the first phase—the pattern-and-practice and disparate impact issues—would make possible the class certification of damages issues in the second phase in light of its previous determination that the damages issues were uncertifiable because of their individualized nature. Noting that under *Teamsters* there are no common issues between a first-stage pattern and practice finding of liability (which merely creates a rebuttable presumption of discrimination against affected individuals) and the second remedial phase (which requires individuals to prove that the presumption should apply to them and that they suffered damages),[114] the court declined to certify the initial phase of the litigation "when there is no foreseeable likelihood that the claims for compensatory and punitive damages could be certified in the class action sought by the plaintiffs."[115]

The court pointed out that what the plaintiffs were suggesting was an end run around the commonality requirements of Rule 23(b)(3): by temporarily setting aside individual-specific damages issues (presumably by invoking Rule 23(c)(4)),[116] the plaintiffs could pretend for purposes of the first phase that common issues, rather than individual-specific issues, would predominate for purposes of 23(b)(3) certification. The *Allison* court refused to indulge this make-believe commonality based on Fifth Circuit precedent, which forbids attempts to "manufacture predominance through the nimble use of subdivision (c)(4)."[117] Otherwise, a court in any case could sever issues until only common issues remained, and "the result would be automatic certification in every case where there is a common issue, a result that could not have been intended."[118]

Other courts have not been so scrupulous. In *Butler v. Home Depot*, for instance, the court certified a class under Rule 23(b)(2) as to "liability and relief applicable to the class as a whole including declaratory and injunctive relief, and whether defendant is liable for punitive damages."[119] The court admitted, however, that it had not

114. *See* Cooper v. Federal Reserve Bank, 467 U.S. 867, 877–80 (1984).

115. *Allison*, 151 F.3d at 421.

116. See FED. R. CIV. P. 23(c)(4), which provides that "[w]hen appropriate . . . an action may be brought or maintained as a class action with respect to particular issues."

117. *Allison*, 151 F.3d at 422 (quoting Castano v. American Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996)).

118. *Id.*

119. Butler v. Home Depot, Inc., No. C-94-4335 SI, 1996 WL 421436 at *1 (N.D.

determined how to handle the phase-two damages determinations: "The precise procedures to be used during the second phase, if any, will be determined later in this litigation."[120] Similarly, in *Shores v. Publix* the court approved a "hybrid" class, relying on pre-1991 Eleventh Circuit precedent.[121] In the first phase, liability would be resolved under Rule 23(b)(2), while in the second phase, damages would be determined under a Rule 23(b)(3) opt-out procedure. Like the *Butler* court, the *Shores* court admitted that it "has not determined what means it will employ to efficiently resolve Stage II claims. Nor has it determined how claims for punitive damages will be handled."[122]

It is remarkable that at least these two courts have certified bifurcated Title VII classes while frankly acknowledging that they have no idea how to handle the damages issues. This may reflect a habit of *Teamsters*-style adjudication in Title VII class cases that has prevented some courts from grasping the implications of the 1991 Act. On a darker view, it may reflect a desire to set the class process in motion and force a settlement before thorny and time-consuming issues such as individual damages have to be addressed. In both *Butler* and *Shores*, the result of certification was an expensive settlement, and hence the strategy (if there was one) was successful.

2. The integrity of Rule 23

There are other sound reasons to prefer individual suits to class actions that would, in any event, degenerate into individual suits. Individual suits preserve the integrity of Rule 23 by not stretching it to cover classes that lack the required commonality and manageability. They also avoid the danger that sweeping issues of liability may turn on the whims of a single jury. In a bifurcated class action, one jury will decide the existence of a pattern and practice of discrimination.

Cal. Jan. 25, 1996). As noted above, the *Butler* court's apparent belief that there is such a thing as "classwide" punitive damages may be incorrect.

120. *Id.* The parties never reached this issue: in September 1997 the case was settled for $65 million. *See Home Depot Agrees to Pay $65 Million to Settle Sex Discrimination Class Action*, Daily Labor Report (BNA), Sept. 22, 1997, at A-11.

121. 69 Empl. Prac. Dec. (CCH) ¶ 44,477, 87,688 (citing Cox v. American Cast Iron Pipe Co., 784 F.2d 1546 (11th Cir. 1986)).

122. Shores v. Publix Super Markets, Inc., 69 Empl. Prac. Dec. (CCH), ¶ 44,477, 87,689 (M.D. Fla. 1996). As in *Butler*, the court never got that far. The case was settled in January 1997 for a total of $81.5 million. *See Publix Markets Agrees to Pay $81.5 Million to Settle Sex Bias Suit*, Daily Labor Report (BNA), Jan. 27, 1997, at AA-1.

If that jury decides against the employer, it then establishes a presumption of discrimination that applies to every member of the class who can prove an adverse job action in the individual adjudication phase. While the presumption is rebuttable, that presumption will have significantly heightened the burden on the employer and will increase the chance that it will be found liable to each of the individual plaintiffs. Depending on the size of the employer and the size of the class, a significant step will then have been taken toward the employer's being found liable for millions upon millions of dollars in individual liability (in *Allison*, up to $300 million).[123] Spreading this risk among multiple juries in individual cases will ensure that such momentous issues of liability are determined by a process involving the collective judgment of many juries, not the potential caprice of one.

Courts in other contexts have recognized the value of nonclass, case-by-case adjudication of matters that threaten defendants with massive liability. In *Matter of Rhone-Poulenc-Rorer, Inc.*,[124] the Seventh Circuit held that a case involving potentially bankrupting liability for manufacturers of antihemophiliac factor concentrate was unsuitable for class treatment, in part because trying the case as a class action would place the fate of the industry in the hands of six people:

> [I]f these [individual] trials are permitted to go forward . . . the pattern that results will reflect a consensus, or at least a pooling of judgment, of many different tribunals.
>
> For this consensus or maturing of judgment the district judge proposes to substitute a single trial before a single jury . . . . One jury . . . will hold the fate of an industry in the palm of its hand . . . . [This] need not be tolerated when the alternative exists of submitting an issue to multiple juries constituting in the aggregate a much larger and more diverse sample of decision-makers. That would not be a feasible option if the stakes to each class

123. Further, this risk is one-sided: should the phase-one jury rule against the plaintiffs, that decision has no *res judicata* effect as to the class members' individual claims of discrimination because all that the decision means is that the employer does not discriminate against employees as a matter of standard practice. *See* Cooper v. Federal Reserve Bank, 467 U.S. 867, 877–80 (1984). Each class member remains free to file his own lawsuit (if timely), and the employer may gain little peace of mind by prevailing in this phase of the class action. In essence, the plaintiffs have two chances instead of one to press their claims, and they and their lawyers have little incentive not to "shoot the moon" in seeking class certification.

124. 51 F.3d 1293 (7th Cir. 1995).

> member were too slight to repay the cost of suit, even though the aggregate stakes were very large and would repay the costs of a consolidated proceeding. But this is not the case . . . .[125]

A case like *Allison* is not so different from a case like *Rhone-Poulenc*. The total exposure in money damages alone in *Allison* was $300 million ($300,000 per class member times 1,000 potential members). It is a frightening prospect to place a small handful of jurors in charge of such potentially crippling liability, especially where there are sound reasons why such a thing would be a misuse of Rule 23. For this reason, the possibility of individual lawsuits rather then implausible *Teamsters*-style classes is to be preferred (or at least not bemoaned): plaintiffs who have colorable claims (and some who do not) will still get their day in court because their suits are potentially valuable, the judicial system will not necessarily be substantially more burdened, and defendants can have their potential liability determined by something more than a single set of jurors.

3. Constitutional issues

The issues raised by bifurcating class actions after 1991 are not only procedural but also constitutional. In a further effort to have their class certified, the *Allison* plaintiffs proposed certifying only their disparate impact claim, as to which money damages are not available, as a means of sidestepping the problems posed by their seeking individualized damages under their disparate treatment claim. While such a proposal presents far fewer Rule 23 problems than other attempts at certification, the availability of a jury trial under the 1991 Act also implicates the Seventh Amendment. This difficulty, the *Allison* court found, was insurmountable.

As the *Allison* court explained, the Seventh Amendment preserves the right to trial by jury in "suits at common law" where legal rights are to be determined.[126] Where the right to a jury exists, the Seventh Amendment prohibits the reexamination of one jury's findings by another fact finder.[127] Although a disparate impact claim does not implicate legal rights (the remedy being confined to equitable relief), the jury trial right conferred by the 1991 Act extends to "all

125. *Id.* at 1299–1300, *quoted with approval in* Castano v. American Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996).

126. U.S. CONST. amend. VII.

127. *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 423 (5th Cir. 1998).

factual issues necessary to determine liability" and damages under the companion disparate treatment claim.[128] Thus, where disparate impact and disparate treatment claims are joined (as they were in *Allison*), "the Seventh Amendment requires that all factual issues common to these claims be submitted to a jury for decision on the legal claims before final court determination of the equitable claims."[129]

The *Allison* court held that the certification of only the disparate impact claims would be barred by the Seventh Amendment because of the risk that subsequent fact finders in the disparate treatment litigation would be required to revisit the first jury's determinations both in determining liability toward individual plaintiffs and in determining their damages. This problem is a function of the particular nature of proof in Title VII cases. In a disparate impact case, the plaintiffs must first produce evidence that a challenged policy or practice of the employer adversely affects a protected group. The employer may rebut this evidence by showing "that the challenged practice is job related for the position in question and consistent with business necessity."[130] In a class disparate treatment case, the plaintiffs must first show *prima facie* that discrimination is the employer's standard practice, a showing that can be made by a combination of statistical and anecdotal evidence.[131] The employer then can attempt to rebut this evidence, in the course of which it would almost inevitably attempt to show that the actions that are the subject of the plaintiffs' illustrative anecdotes were taken for legitimate, nondiscriminatory reasons.

These methods of proof provide considerable potential for overlap between the fact finding in a disparate impact case and the fact finding in a disparate treatment case, especially where the same employer practices and policies are challenged under both theories of liability. As the *Allison* court explained:

> It is the rare case indeed in which a challenged practice is job-related and a business necessity, yet not a legitimate nondiscriminatory reason for an adverse employment action taken pursuant to that practice. Thus, a finding that a challenged practice is job re-

128. *Id.*

129. *Id.*

130. 42 U.S.C. § 2000e–2(k)(1)(A)(i) (1994).

131. *See* Int'l Bd. of Teamsters v. United States, 431 U.S. 324, 338–41 (1977); EEOC v. McDonnell Douglas Corp., 960 F. Supp. 203, 205 (E.D. Mo. 1996).

> lated and a business necessity in response to a disparate impact claim strongly, if not wholly, implicates a finding that the same practice is a legitimate nondiscriminatory reason for the employer's actions in a pattern or practice claim.[132]

Under the Title VII scheme of proof, then, "significant overlap of factual issues is almost inevitable whenever disparate impact and pattern or practice claims are joined in the same [class] action."[133] Because consideration of these overlapping issues by different juries would violate the Seventh Amendment, the *Allison* court declined to certify the class only as to disparate impact.[134]

Other courts have certified bifurcated classes in spite of these Seventh Amendment problems. Some courts have done so with little analysis, brushing aside the Seventh Amendment issues by declaring that the first- and second-phase determinations are legally distinct. For instance, in *Butler v. Home Depot*, the court certified a class under Rule 23(b)(2) as to "liability and relief applicable to the class as a whole, including declaratory and injunctive relief, and whether defendant is liable for punitive damages."[135] If liability were established, the second phase would decide "individual compensatory damages."[136] The only aspect of divided certification addressed by the court was the Seventh Amendment issue, which it disposed of by observing (based largely on pre-1991 cases) that courts have "routinely" adopted such a bifurcated approach. According to the *Butler* court, the mere fact that the second phase would involve "individual claims" meant that it would not involve the same issues as the first

132. *Allison*, 151 F.3d at 424.

133. *Id.* (citing Segar v. Smith, 738 F.2d 1249, 1268–70 (D.C. Cir. 1984)).

134. For another discussion of these Seventh Amendment issues, see Keith R. Fentonmiller, *Damages, Jury Trials and the Class Action under the Civil Rights Act of 1991*, 12 LAB. L. 421, 437–47 (1997). Had the *Allison* plaintiffs not joined disparate impact and disparate treatment claims in the same case, this issue would not have been present. It appears to be an open question what would happen if a class sued on a disparate impact theory and then tried to bring a separate disparate treatment case under the same facts. Most likely, the same Seventh Amendment issues would arise because there would still be factual overlap between these claims, whether or not they were joined. It is doubtful that a class disparate impact claim could be tried to judgment before the statute of limitations expired on disparate treatment claims under the same facts (unless the plaintiffs could rely on a theory of continuing violation); thus, the possibility of consecutive disparate impact and disparate treatment suits involving the same facts would seem remote.

135. Butler v. Home Depot, Inc., No. C-94-4335 SI 1996 WL 421436, at *1 (N.D. Cal. Jan. 25, 1996).

136. *Id.* at *6.

phase would.[137] The court did not, however, analyze the methods of proof under Title VII to the degree that *Allison* did and thus may not have considered the matter as thoroughly. In *EEOC v. McDonnell Douglas Corp.*,[138] a class action under the Age Discrimination in Employment Act, the court rejected Seventh Amendment concerns much as the *Butler* court did. Noting that the phase-one finding of liability did no more than establish a presumption of discrimination, the court held that phase-two issues of individual liability were therefore "separate and distinct" issues of fact.[139] As in *Butler*, the court did not address the details of the ADEA's proof scheme, which mirrors that of Title VII,[140] in making this holding.

Decisions like these appear questionable (or at least hasty) in light of the 1991 Act and the concerns raised by *Allison*. The *McDonnell Douglas* court undermined its own holding when it noted the various means of proof that an employer could use to rebut the plaintiffs' phase-one case:

> Although the Defendant will not be able to present evidence regarding each individual termination at the liability trial, it can "introduce direct statistical evidence, anecdotal evidence, illustrative evidence of individual dismissals and any other evidence that bears on the issue of whether a pattern of discrimination existed."[141]

This begs the question, however: if an employer introduces anecdotal evidence or "illustrative evidence of individual dismissals," then presumably, in determining the existence of a pattern of discrimination, a jury may find that there was discrimination behind those events. In the second phase, when the liability to the particular employees who were involved in these events is adjudicated, the liability jury would be free to decide that there was no discrimination present, thereby discounting evidence that the first jury found dispositive. Thus, while the questions of pattern and practice and individual liability are indeed separate issues in the sense that the answer to the first question (did the employer discriminate as a matter of practice?) does not resolve the second (was this particular class member

137. *Id.*

138. 960 F. Supp. 203 (E.D. Mo. 1996).

139. *See id.* at 205.

140. Brennan v. Metropolitan Opera Ass'n., Inc., 192 F.3d 310, 316 (2d Cir. 1999).

141. EEOC v. McDonnell Douglas Corp., 960 F. Supp. 203, 205 (E.D. Mo. 1996) (quoting Sperling v. Hoffmann-LaRoche, Inc., 924 F. Supp. 1346, 1353 (D.N.J. 1996)).

discriminated against?), the scheme of proof in employment discrimination cases raises the risk that different juries may make different findings based on the same facts—a situation that is prohibited under the Seventh Amendment.

It may be that the Seventh Amendment problems in *Allison* were simply ones of scale. The court appears to have assumed that multiple juries would be needed to resolve the individual claims—a safe assumption in a class covering one thousand potential members. It is conceivable, however, that a Title VII class could be small enough to have all of its claims heard by a single jury. Rule 23 requires no minimum number of class members for certification, and Rule 23 classes have been certified with as few as thirteen members.[142] While a small class may not solve the problems of predominance and commonality, it would at least avoid Seventh Amendment problems by making it possible to use a single fact finder throughout.

4. The Allison *denial of rehearing*

As a coda to the bifurcation issues raised by *Allison*, it is worth examining the court's somewhat cryptic denial of rehearing. The logic of *Allison* would seem to preclude most types of divided or partial certifications, but the *Allison* court apparently did not intend to prohibit such schemes absolutely. In denying rehearing, the court acknowledged that some forms of partial certification might survive.

> The trial court utilized consolidation under rule 42 rather than class certification under Rule 23 to manage this case . . . . We are not called upon to decide whether the district court would have abused its discretion if it had elected to bifurcate liability issues that are common to the class and to certify for class determination those discreet liability issues.[143]

142. *See, e.g.*, Dale Elec., Inc. v. R.C.L. Elec., Inc., 53 F.R.D. 531, 534–35 (D.N.H. 1971) (certifying class of thirteen members in patent infringement case); Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648, 653 (4th Cir. 1967) (certifying class of eighteen minority physicians in race discrimination case).

143. Allison v. Citgo Petroleum Corp., 151 F.3d 402, 434 (5th Cir. 1998). The trial court explained: "[I]n some instances it may be appropriate to consolidate cases with similar facts and issues under Fed. R. Civ. P. 42. However, it will be necessary for the unnamed potential class members to file their own lawsuits rather than intervene in the present action." Celestine v. Citgo Petroleum Corp., 165 F.R.D. 463, 471 (W.D. La. 1995). Examples of such consolidation might be trying simultaneously all promotion claims involving the same decisionmaker or all claims of discriminatory discipline involving the same supervisor and the same employee conduct.

This has the ring of a declaration that will become famously puzzled over in the years ahead. Some courts have taken it to undermine the main opinion's holdings entirely, reducing them to *dicta*.[144] Others have read it more narrowly as an acknowledgment that the principles discussed in the main opinion are not absolute.[145] The latter view appears more likely: had the Fifth Circuit wanted to nullify large portions of its opinion, it could simply have withdrawn them. Moreover, its holdings concerning the nature of Rule 23 were not *dicta* because the decision appealed from was a denial of Rule 23 certification. And the Fifth Circuit itself relied on *Allison* as precedent in a later case, following *Allison's* holdings as to Rule 23(b)(2) predominance in reversing certification of a class under the Fair Credit Reporting Act.[146]

Yet, if nullification is not what the statement means, determining what it does mean is still challenging. One possibility is that liability issues could be certified as "stand-alone" class claims only to the extent that they do not implicate the manageability and Seventh Amendment concerns addressed in the main opinion. But such "liability issues" virtually by definition (according to the *Allison* court) could not be issues that shared any facts in common with the determination of compensatory or punitive damages because of the constraints of Rule 23 and the Seventh Amendment. Thus, such issues would have to be either damages issues that were not individualized, such as liquidated damages claims, or equitable issues that did not implicate fact issues that could arise in evaluating the disparate treatment claims of the individual plaintiffs. Such claims, if they exist, would therefore be very narrow indeed. One possible example would be claims for relief from specific policies and procedures that were challenged only on a disparate impact theory. For these sorts of claims, damages would not be available, the facts necessary to prove such a claim would not be at issue in any individual's disparate treatment case (because there would be no such cases), and certification as to that discreet issue could proceed. Thus, the *Allison* plaintiffs may have hampered themselves by the breadth of their challenge: if class status is the goal, then *Allison* suggests that a narrower

144. *See, e.g.*, Warnell v. Ford Motor Co., 189 F.R.D. 383, 389 (N.D. Ill. 1999).

145. *See, e.g.*, Jefferson v. Ingersoll Int'l, Inc., 195 F.3d 894, 898 (7th Cir. 1999); Faulk v. Home Oil Co., 184 F.R.D. 645, 660–61 (M.D. Ala. 1999); Riley v. Compucom Sys., Inc., No. CIV. A398CV1876L, 2000 WL 343189, at *3 n.6 (N.D. Tex. March 31, 2000).

146. *See* Washington v. CSC Credit Servs., 199 F.3d 263, 269–70 (5th Cir. 2000).

focus may be a more sure road to success and a pure disparate impact case the safest route of all.

D. The Problem of the Blackmail Class

A final problem introduced by the 1991 Act is the problem of the blackmail class—the risk that the monetary exposure presented by the availability of compensatory and punitive damages to each class member will force defendants to settle regardless of any wrongdoing. The plaintiffs in *Allison* tried overtly to exploit this issue, arguing on appeal that partial certification would "facilitate" settlement. The *Allison* court rejected that argument: "[W]e should not condone a certification-at-all-costs approach to this case for the simple purpose of forcing a settlement. Settlements should reflect the relative merits of the parties' claims, not a surrender to the vagaries of an utterly unpredictable and burdensome litigation procedure."[147] These are laudable goals, but they are routinely trampled on in class litigation. Class actions are frequently settled for reasons having nothing to do with their merits: faced with potentially overwhelming liability, bad publicity, and enormous legal fees (even if it prevails), an employer may capitulate and settle the case even though it may lack merit and even though it ultimately may not be maintainable as a class action.[148] Nor are plaintiffs' lawyers shy about this goal. In the author's own experience, class plaintiffs' lawyers have been heard privately to say that their goal is to bankrupt the defendant or, more colorfully, to "blow them off the New York Stock Exchange." This approach has been recognized in class cases as the principle of "judicial blackmail."[149] While liability in Title VII cases does not always rise to the potentially crippling liability present in mass tort litigation,

147. *Allison*, 151 F.3d at 422 n.17.

148. As noted above, this problem is illustrated starkly by cases such as *Shores v. Publix Super Markets, Inc.*, 69 Empl. Prac. Dec. (CCH), ¶ 44,477 (M.D. Fla. 1996), and *Butler v. Home Depot, Inc.*, 70 Fair Empl. Prac. Cas. (BNA) 51 (N.D. Cal. 1996), in which courts certified portions of class actions while acknowledging that they did not know how to manage the remainder of the case. The class process with all of its risk and expense was set in motion; yet, it was by no means clear that the use of the class device was proper under the circumstances.

149. As the *Rutstein* court stated: "[T]here is nothing to be gained by certifying this case as a class action . . . except the blackmail value of a class certification that can aid the plaintiffs in coercing the defendant into a settlement." Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1240 n.21 (11th Cir. 2000). *See also* In Re Matter of Rhone-Poulenc-Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995); Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996).

the $300 million at stake in *Allison* is momentous, and, for any given employer, the prospect of a multimillion dollar legal bill or a nine-figure damages exposure is surely an incentive to settle regardless of the merits of the claims.[150] Indeed, settlements of class actions for millions, tens of millions, or hundreds of millions of dollars are becoming increasingly common[151] and are increasingly accompanied by employers' public statements that it was less expensive to settle the case than to litigate it with the attendant risks.[152] Careful attention to the requirements of Rule 23 and the Seventh Amendment is therefore desirable to police the class action scene and to protect against abuses of class proceedings by plaintiffs and their lawyers.

VI. FOR BETTER OR FOR WORSE?

Nearly ten years after the passage of the Civil Rights Act of 1991, its implications are just beginning to be felt in the area of Title VII class actions. While many lower courts have shown themselves willing to ignore or able to work around these implications, there is every indication that as more of these cases reach the appellate level more and more courts may adopt the kinds of restrictions recognized in *Allison*. Thus, there is a real possibility that a law that was passed in order to expand the relief available to individual victims of dis-

150. While it is probably impossible to quantify how many settled class actions have merit and how many do not, statistics concerning individual discrimination suits may be informative. Of the discrimination charges submitted to the mandatory pre-lawsuit administrative procedure before the United States Equal Employment Opportunity Commission, the agency in fiscal 1999 found probable cause to believe that discrimination had occurred in only 5.7% of charges. That was the highest rate in the last eight years, and "cause" findings have historically been as low as 1.6%. *See United States Equal Employment Opportunity Commission, Title VII of the Civil Rights Act of 1964: Changes FY 1992 – FY 1999* (visited Oct. 27, 2000) <http://www.eeoc.gov/stats/vii.html>. Of the employment discrimination lawsuits disposed of in federal court from October 1, 1998, through September 30, 1999, (both class actions and non-class actions) approximately 80% were dismissed by the courts before trial, while only 5.8% were eventually tried. It is difficult to escape an inference that a huge number of meritless cases are being brought, and there is no apparent reason why class actions should be any exception to the general rule.

151. In the author's city of Atlanta, for example, the past two years have brought the filing of race discrimination class actions against the Coca-Cola Company (twice), Lockheed Martin Corporation (one suit each on behalf of hourly and salaried employees), Waffle House (a prominent restaurant chain), and Georgia Power Company (the principal local utility).

152. *See Judge Approves $12.1 Million Settlement in Part-Time Workers' Lawsuit Against UPS*, Daily Labor Report (BNA), April 14, 1999, at A-6; *EEOC Says San Francisco Grocery Chain Agreed to Settle Bias Claims for $1.3 Million*, Daily Labor Report (BNA), Jan. 23, 1988, at A-11.

crimination may have the effect of restricting their ability to bring claims on behalf of those similarly situated.

It is a different question whether this irony is a problem that demands a solution. There are sound reasons to tolerate a rule that limits the maintenance of Title VII class actions. The problem of the "blackmail class" is not an academic one: the costs of such suits to employers are enormous and are unrelated to whether or not they have done anything wrong. Contrary to the Fifth Circuit's optimistic footnote in *Allison*, settlement of such cases often has nothing to do with the merits of the claims and everything to do with the financial and public relations risks presented by the overwhelming scale of such actions. The limits placed on class actions by the 1991 Act may in turn limit the ease with which corporations can be browbeaten by an aggressive set of plaintiffs and their equally aggressive attorneys.

This is not necessarily bad news for the cause of individual rights. While the 1991 Act may limit class actions, it arguably makes it easier for individual plaintiffs to get access to the courts. The availability of damages and attorney's fees provides incentives for plaintiffs' lawyers to take such cases on a contingent-fee basis, which means that plaintiffs can bring suit without spending their own money to do so.[153] In other words, employment discrimination suits are no longer negative value suits. While this diminishes their suitability for class treatment, it increases their odds of being brought individually, which for the individual is an equivalent opportunity for justice.

Further, class actions are not necessary for certain types of wide-ranging relief. Insofar as plaintiffs seek to end discriminatory practices in the workplace, such results are possible in individual suits. For example, a plaintiff who challenges a particular employment practice on his own behalf may succeed in having it declared invalid, to the benefit of both himself and all other current and future employees. Sweeping changes are therefore possible (though usually only prospectively) in nonclass cases. Moreover, the EEOC may file suit itself or intervene in a private suit to seek relief on behalf of others similarly situated to the plaintiff.[154] When the EEOC seeks such

153. And they have done so in increasing numbers. *See supra* note 15.

154. The EEOC has stated publicly that it intends to become more active in the pursuit of class-style claims. *See EEOC: Expanded Mediation, More Class Actions in Agency's Future, Officials Tell ABA Meeting*, Daily Labor Report (BNA), March 26, 1999, at C-1. It has also taken an active role in the maintenance and settlement of several highly publicized class actions in past few years. *See Mitsubishi Settles EEOC Suit for $34 Million, Agency Says Class, Amount*

relief, even for a large class of persons, it is not required to satisfy the provisions of Rule 23 with its attendant constraints.[155] Finally, in multiplaintiff cases, various efficiencies can be achieved through the use of Federal Rule of Civil Procedure 42, which permits the severance and consolidation of individual claims. While such plaintiffs could not represent others, they still could bring aggregated claims that could be dealt with on a mass scale and could result in equitable relief that would benefit similarly situated employees. All of this means that the constraints imposed on Title VII class actions by the law and the civil rules are entirely compatible with a balancing of the interests of employees and employers as participants in the federal antidiscrimination scheme. It also means that Title VII class actions might not be missed as much as one might think should the 1991 Act render them unsustainable in many cases, as seems likely.[156]

Because the trend, at least at the appellate level, is toward restricting Title VII class actions, it becomes a political question whether those restrictions should be eased or lifted. If Congress wanted to encourage or facilitate Title VII class actions, most, if not all, of the barriers to class certification could be obviated if the damages portions of the 1991 Act were modified or repealed. Many federal employment discrimination statutes lack a punitive or compensatory damages provision, or both. If only liquidated damages were available under Title VII (based, for instance, on a multiple of back pay or simply on a sliding scale like the damages caps already in place), then the individualized damages that make class certifications problematic would be significantly streamlined. This would not alleviate the Seventh Amendment problem in large cases involving multiple juries. Nonetheless, it would be a step toward minimizing Seventh Amendment issues, leaving more room for waivers and other devices that might facilitate a constitutional resolution of the issues.

Largest Ever, Daily Labor Report (BNA), June 12, 1998, at AA-1; *Publix Markets Agrees to Pay $81.5 Million to Settle Sex Bias Suit*, Daily Labor Report (BNA), Jan. 27. 1997, at AA-1; *EEOC, Texaco Settle Bias Charges with Plan for Monitoring Promotions*, Daily Labor Report (BNA), Jan. 6. 1997, at AA-1.

155. *See* General Tel. Co. v. EEOC, 446 U.S. 318 (1980).

156. For a contrary view, see Harvey S. Bartlett III, *Determining Whether a Title VII Plaintiff Class's "Aim Is True": The Legacy of* Allison v. Citgo Petroleum Corp. *for Employment Discrimination Class Certification Under Rule 23(b)(2)*, 74 TUL. L. REV. 2163 (2000).

VII. CONCLUSION

The Civil Rights Act of 1991 has raised complex questions in the field of Title VII class actions, and it will likely take years, if not decades, before these issues are fully resolved. Until they are, or until Congress takes action to counter the apparent trend, these types of cases appear to be on their way to becoming significantly curtailed, at least where individual money damages are sought. Whether these developments will slow the filing and settlement of such cases only time will tell, but litigants who wish to bring or oppose such cases can no longer afford to ignore the implications of the 1991 remedies for class litigation.