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Andrea Catania and Charles A. Sullivan***

INTRODUCTION

Among the principles essential for orderly adjudication is the ability of parties to litigation to rely on the finality of judgments. A dispute resolution mechanism that does not provide for a high degree of finality would have little practical utility, either to the parties or to society. As important as finality, however, is the basic notion that due process protects those who were not participants or in privity with participants in prior litigation from being bound by any judgment entered. The rights of nonparties who did not have their day in court should not be prejudiced.[1]

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[1] There is a strong societal interest in finality insofar as public resources are ex-

These two principles—the finality of judgments and the nonbinding nature of judgments on nonparties—came into sharp conflict in the 1989 Supreme Court decision of *Martin v. Wilks*.[2] The Court basically subordinated the finality of judgments to the rights of nonparties by holding that failure to intervene in the original suit did not affect the right of nonparties to challenge in another action the changes mandated by the prior decree. While the Court indicated that both sets of concerns could be accommodated by aggressive use of Rule 19 joinder by the original parties,[3] many commentators expressed doubt about the practicality of the Court's suggestion.[4]

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pended in the resolution of disputes. This societal interest in finality is paralleled by the interests of at least some of the parties to the dispute; but fairness to outsiders requires limiting the effects of any resolution to those who participated in the proceeding.

[2] 490 U.S. 755 (1989). The problem raised in *Martin* has been discussed in a number of law review articles, mostly focusing on the effect of consent decrees on the rights of nonparties. *See* Charles J. Cooper, *The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process*, 1987 U. CHI. LEGAL F. 155; Richard A. Epstein, Wilder v. Bernstein: *Squeeze Play by Consent Decree*, 1987 U. CHI. LEGAL F. 209; Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321 (1988); Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. CHI. LEGAL F. 103; Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291 (1988); Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 897; Mark E. Rectenwald, Comment, *Collateral Attacks on Employment Discrimination Consent Decrees*, 53 U. CHI. L. REV. 147 (1986).

[3] FED. R. CIV. P. 19(a):

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

[4] There will be difficulties identifying parties to be joined, and when they are identified, heavy costs of service as well as complications in case management will result. *See, e.g.*, George M. Strickler, Martin v. Wilks, 64 TUL. L. REV. 1557 (1990). Focusing on the case before the Court, Professor Strickler wrote that, although the employer in *Martin* was not extremely large, the number of

These doubts found official expression in the Civil Rights Act of 1991[5] in which Congress attempted to strike a substantially different balance between finality of judgments and the rights of nonparties.[6] Essentially, the Act provides that nonparties are barred from attacking employment practices mandated by a prior order when (1) they were either adequately represented by a party to the proceeding or when (2) they had actual notice of the threat to their interest and an opportunity to protect themselves.[7] This Article considers both *Martin v. Wilks* and the changes wrought by the new Civil Rights Act.

By way of preface, it is important to note that *Martin*, although decided in the context of a consent decree resolving an employment discrimination suit, is not limited to such actions.

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white incumbent employees potentially affected by the affirmative relief at issue . . . was well over 1100. . . . The cost of personal service of the complaint alone in such a case would discourage all but the wealthiest of litigants. The expense and administrative difficulty of such a case would, of course, only begin with service of the complaint.

Id. at 1593-94. Other commentators stressed the difficulties of even identifying parties to be joined in many cases. *See, e.g.*, Matthew J. Fairless, Martin v. Wilks: *Playing by the Rules in Employment Discrimination Litigation*, 55 Mo. L. REV. 703 (1990).

[5] Pub. L. No. 102-166, 105 Stat. 1071.

[6] H.R. REP. No. 40, 102d Cong., 1st Sess., pt. 1, at 53 (1991) (it would be "extremely impracticable" and "prohibitively expensive" to require the named parties to join every potentially interested person). The report cites with approval Professor Larry Kramer's view on joinder:

> Opponents of [section 108 of the new Civil Rights Act] do not argue that it is undesirable to settle third party claims contemporaneously with the original lawsuit. They argue that . . . the parties to the original lawsuit . . . should bear the burden of identifying affected third parties and joining them. . . . But are [these parties] really in the best position to judge who should be joined? After all, who knows better than the affected [third] parties themselves whether a proposed consent decree affects them in ways they deem important enough to litigate about?

Id. at 54.

The Senate Committee on Labor and Human Resources stressed the difficulties facing the *Martin* parties in identifying parties to be joined. *See* S. REP No. 315, 101st Cong., 2d Sess. 27 (1991):

> Thus, if the city of Birmingham and the original black plaintiffs wanted to obtain a court decree finally determining how the fire department would make hiring and promotion decisions, they must join as parties to the litigation not only every person currently employed by the department, but also *every person* who might seek to be hired or promoted by the department during the pendency of the decree.

In the Committee's view, the decision on whether to participate in ongoing litigation should be left to the nonparty.

[7] Pub L. No. 102-166, Sec. 108, § 703(n)(1)(B)(i)&(ii), 105 Stat. 1071, 1076 (1991).

Theoretically, *Martin* establishes principles governing all federal judgments,[8] whether fully litigated or a product of settlement.[9]

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[8] *Martin v. Wilks* dealt with successive federal claims in federal court. The principles of preclusion applicable were those of federal common law. But what law governs when the first litigation is in a state court and the second in a federal court, or vice versa? Further, does it matter if the earlier decision is rendered on the basis of state or federal law?

The answer is clearest where the prior suit is in state court, regardless of what law the state court applies. Federal courts are directed to accord previously rendered state judgments the same preclusive effect the rendering state would as long as consistent with the Due Process Clause. 28 U.S.C. § 1738 (1988). This rule applies to state judgments resolving federal claims as well as those resolving state claims. *See* Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982); Allen v. McCurry, 449 U.S. 90 (1980); RESTATEMENT (SECOND) OF JUDGMENTS § 86 (1982); Andrea Catania, *Access to the Federal Courts for Title VII Claimants in the Post-*Kremer *Era: Keeping the Doors Open*, 16 LOY. U. CHI. L.J. 209 (1985). While a congressional remedial scheme may modify this general rule and thereby allow relitigation of a claim or issue that would not be permitted under state preclusion rules, any intent to give state judgments less preclusive effect than section 1738 mandates must be clearly shown. Astoria Fed. Sav. & Loan Ass'n v. Solimino, 111 S. Ct. 2166 (1991); University of Tenn. v. Elliot, 478 U.S. 788 (1986).

Whether federal courts can give state judgments greater preclusive effect than the rendering state is doubtful. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 86 cmt. g (1982) (In general, section 1738 requires federal courts to give "the same" preclusive effect as under the law of the rendering state.) It has been argued, however, that, since preclusion governs the decision-making process, the federal courts should be able to give greater preclusive effect to state judgments as a matter of federal law. *See generally* Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976); Allan D. Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723 (1968). *But see* Marrese v. American Academy of Orthopedic Surgeons, 470 U.S. 373 (1985); 1B JAMES W. MOORE, ET. AL., MOORE'S FEDERAL PRACTICE ¶ 0.406[1], at 270 nn.16 & 18 (2d ed. 1992).

Suppose, however, the prior litigation is in federal court. Such a situation could arise where the federal court was exercising either diversity or federal question jurisdiction. While there is obviously a greater interest in protecting judgments on federal question grounds, Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach [Part I of II]*, 71 CORNELL L. REV. 733 (1986), *federal* preclusion principles should apply to federal judgments even where the federal court was exercising diversity jurisdiction. *See In re* Air Crash at Dallas/Fort Worth Airport, 861 F.2d 814, 816 (5th Cir. 1988); RESTATEMENT (SECOND) OF JUDGMENTS § 87 (1982); 1B MOORE ET. AL, *supra*, ¶ 0.406[1], at 272. *But see* Answering Serv. Inc. v. Egan, 728 F.2d 1500, 1505-06 (D.C. Cir. 1984); Costantini v. TWA, 681 F.2d 1199 (9th Cir.), *cert. denied*, 459 U.S. 1087 (1982) (applying preclusion rules of the forum state in a diversity action).

The application of federal preclusion principles, regardless of the jurisdictional basis of the underlying claim, reflects the notion that to maintain the integrity of its judicial process each system should determine the scope of its judgment. In some instances, though, preclusion principles touch on substantive policy concerns, such as when persons should be considered in privity. Arguably, state law, not federal law, should apply in determining whether privity applies to a federal judgment resolving a state claim. *See generally* RESTATEMENT (SECOND) OF JUDGMENTS § 87 cmt. b (1982).

[9] As a practical matter, however, the *Martin* problem is likely to arise most often in

Further, while the Civil Rights Act of 1991 clearly specifies different principles applicable to employment discrimination cases, the effectiveness of the Act even in this limited sphere is questionable.[10] Instead of barring all subsequent challenges to court ordered remedial schemes, Congress barred only narrowly defined classes of persons from challenging decreed employment practices. Moreover, it offered no clear road map as to how the parties should proceed under the statute to insulate the employment practice from attack. As a result, Congress may not have achieved the finality it sought.

This Article proceeds, first, by relating the controversy that led to the *Martin* opinion; second, by examining the problems generated by that opinion and how the opinion should be interpreted; and, third, by considering the effectiveness of the recent congressional action addressing these problems in one context—employment discrimination. While there has been much discussion concerning the significance of the changes worked by the Civil Rights Act of 1991,[11] few have observed that the new

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what has been called "public law" or "institutional reform" litigation. *See generally* Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270 (1989). Professor Tobias describes such reform litigation as having

> "sprawling and amorphous" party structure. Plaintiffs typically pursue relief that could affect numerous people not before the court as well as institutional, political, and economic structures. Individuals frequently attempt to litigate their cases as class actions. . . . Defendants generally are large bureaucratic institutions or agencies of the federal, state, or local government, such as prisons or schools. The subject matter of these lawsuits usually is the policy, practice, operation, or decisionmaking of those entities—in essence, a dispute over the conduct or content of public policy. . . . Plaintiffs often seek non-monetary, "prospective injunctive relief to prevent continued wrongdoing . . . ." These remedies frequently affect many persons and entities not involved in the suit, require ongoing judicial participation, and are meant to reform the offending institution.

Id. at 280-81. *See also* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION (1978); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Abram Chayes, *The Supreme Court, 1981 Term Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Richard Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984); Owen M. Fiss, *Comment, Against Settlement*, 93 YALE L.J. 1073 (1984); Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121 (1982); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982).

[10] *See* text accompanying notes 111-62 *infra*.

[11] Cynthia L. Alexander, *The Defeat of the Civil Rights Act of 1990: Wading Through the Rhetoric in Search of Compromise*, 44 VAND. L. REV. 595 (1991) (discussing both the vetoed 1990 bill and the proposed 1991 bill); Niall A. Paul, *The Civil Rights Act*

statute leaves *Martin* entirely intact outside the employment area. The courts, therefore, will have to continue to struggle with the meaning of that decision. This Article argues that in such cases, or when the immunity requirements of the new statute are not satisfied, courts can still reach sensible results by properly construing *Martin v. Wilks*. They can do so by preserving prior decrees from attack while ensuring that nonparties who are affected by such decrees have a cause of action for damages. The authors' reading of *Martin* would maximize finality and still protect the rights of nonparties who failed to intervene in the prior proceeding.

I. SHAPING THE CONTROVERSY

Since the early days of Title VII discrimination suits, the courts have been vexed by the effect of decrees on nonparties. Perhaps the most visible, though not the only, problem was posed when black plaintiffs obtained injunctive relief, either after litigation or by virtue of a consent decree, requiring the employer to prefer blacks to whites in hiring or promotion.[12] The

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of 1991: What Does It Really Accomplish?, 17 EMPLOYEE RELATIONS L.J. 567 (1992); *Ambiguities in Civil Rights Law Still Must Be Resolved by Courts*, Daily Labor Rep. No. 238 C-1 (Dec. 11, 1991).

[12] In the early days of Title VII, the focus tended to be on whether a decree might somehow limit the rights of other potential victims of discrimination. For example, would a successful government suit prevent private black plaintiffs from obtaining further or inconsistent relief? *See generally* Michael J. Zimmer & Charles A. Sullivan, *Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination: Optimizing Public and Private Interests*, 1976 DUKE L.J. 163. *See also* CHARLES A. SULLIVAN, MICHAEL J. ZIMMER & RICHARD F. RICHARDS, EMPLOYMENT DISCRIMINATION, chs. 30 & 35 (1988). Alternatively, restructuring employment practices to resolve a claim of race discrimination could raise questions about the significance of the prior decree when female plaintiffs brought sex discrimination suits.

Courts have shown concern for other potential victims of discrimination in fashioning relief for prevailing plaintiffs. In Romasanta v. United Air Lines, Inc., 717 F.2d 1140 (7th Cir. 1983), *cert. denied*, 466 U.S. 944 (1984), the court denied immediate reinstatement to class members who had been discharged on the basis of their sex, in part basing its decision on the impact on minority flight attendants:

> Pursuant to a consent decree entered in 1976, United has hired an increasing number of flight attendants who are members of minority groups in recent years. Accordingly, these persons have relatively low seniority. They would, therefore, be more affected as a group by the immediate reinstatement of the class than the other incumbent flight attendants. Evidence in the record suggests that immediate rehiring of all class members would decrease the percentage of minority flight attendants from fifteen to ten percent. Further, because of the many furloughs that would result from implementation of this remedy,

whites who were adversely affected by the resulting preferences would then sue the employer, claiming reverse discrimination.

Obviously, there is an important substantive issue of the extent to which "affirmative action" or "reverse discrimination" is permitted by Title VII or the Constitution.[13] But hidden behind this issue is a procedural one: to what extent, if at all, could the employer shelter its practices behind the decree ordering it to engage in the challenged conduct? Further, does it matter whether the decree in question is one entered by consent or after vigorous litigation?

To appreciate the problem, consider a case in which a single black plaintiff litigates to judgment a claim of hiring discrimination, obtaining an order of instatement with seniority back to the date she originally applied for employment. There is no doubt that such relief is appropriate, indeed preferred, under Title VII.[14] Further, because the relief is keyed to remedying discrimination against the actual victim, there is no question about the constitutionality of such an order. Indeed, it is hard to describe such relief as a racial preference at all. Nevertheless, the effect of granting the black plaintiff seniority is to disadvantage all employees (white and black) who are moved down one rung on the seniority ladder.[15] Could one or more of these indi-

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there would be less or no hiring by United in the next several years and the number of minority members working as United flight attendants would not be increased by new hires.

Id. at 1152 (citations omitted).

[13] *See generally* KATHANNE W. GREENE, AFFIRMATIVE ACTION AND PRINCIPLES OF JUSTICE (1989); MICHAEL ROSENFELD, AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY (1991); SULLIVAN, ZIMMER & RICHARDS, *supra* note 12, §§ 3.7.1 & 3.7.2; G. Sidney Buchanan, Johnson v. Transportation Agency, Santa Clara County: *A Paradigm of Affirmative Action*, 26 HOUS. L. REV. 229 (1989); Samuel Issacharoff, *When Substance Mandates Procedure:* Martin v. Wilks *and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 CORNELL L. REV. 189 (1992); George Rutherglen & Daniel R. Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 UCLA L. REV. 467 (1988); Joel L. Selig, *Affirmative Action in Employment After* Croson *and* Martin: *The Legacy Remains Intact*, 63 TEMP. L.Q. 1 (1990); Marshall J. Walthew, *Affirmative Action and the Remedial Scope of Title VII: Procedural Answers to Substantive Questions*, 136 U. PA. L. REV. 625 (1987).

[14] International Bhd. of Teamsters v. United States, 431 U.S. 324, 347-48 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747, 762-70 (1976).

[15] It is true that courts often order remedies amounting to "jump" not "bump," that is, requiring the first opening to be given to the plaintiff, not ordering her to displace the incumbent. *See generally* Dale Carpenter, *Bumping the Status Quo: Actual Relief for Actual Victims of Discrimination*, 58 U. CHI. L. REV. 703 (1991). This, however, merely blunts the effect of the court order on nonparties; it in no way eliminates it.

viduals (or their union, acting on their behalf) sue the employer for any resulting harm?

For a number of years before *Martin*, the circuit courts overwhelmingly held that the entry of a decree precluded any collateral attack on the decree.[16] Under this approach, to challenge the employer's actions implementing the decree, an opponent had to intervene in the suit in which the decree was entered rather than commence a separate suit. In short, the rule against "collateral attacks"[17] created a judicially imposed "mandatory intervention" rule[18] as the only means to attack remedial employment schemes.

Although mandatory intervention may appear a rather innocuous procedural mechanism to join all claims in a single proceeding, this requirement often was outcome-determinative. While some courts adopting the requirement of mandatory intervention in fact seemed to favor intervention, others were more hostile, frequently finding that the petition to intervene was untimely.[19] Where intervention was untimely, the effect of barring collateral attack was to immunize the practices ordered. The effect of this was heightened because the notion of collateral attack was itself broad: any challenge to those practices that were implemented to comply with the order were barred. As we will see, it is often possible both to comply literally with the decree and to compensate third parties injured by such compliance. Nevertheless, the broadest definitions of the rule required

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[16] *See, e.g.*, Marino v. Ortiz, 806 F.2d 1144 (2d Cir. 1986), *aff'd by an equally divided Court*, 484 U.S. 301 (1988); Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982), *cert. denied*, 464 U.S. 900 (1983).

[17] The term "collateral attack" is a misnomer since the plaintiff in the second action is not attacking the validity of the prior judgment; rather, she is challenging the legality of an employment practice implemented by virtue of the order or judgment. The underlying court order may still be binding on the parties to the first suit.

[18] The doctrine of mandatory intervention is somewhat misnamed, like the "duty" to mitigate in contract law. There is no requirement that anyone intervene, but the doctrine would treat failure to do so by a nonparty with notice as a bar to an otherwise valid claim. *See generally* Note, *Preclusion of Absent Disputants to Compel Intervention*, 79 COLUM. L. REV. 1551 (1979).

[19] *See, e.g.*, Culbreath v. Dukakis, 630 F.2d 15 (1st Cir. 1980); Hefner v. New Orleans Pub. Serv., Inc., 605 F.2d 893, 897 n.12 (5th Cir. 1979), *cert. denied*, 455 U.S. 955 (1980) (whether viewed as a motion to intervene after judgment, an independent action seeking relief from the judgment, or an independent action seeking relief inconsistent with the judgment, laches bars suit when there has been a two-year unexcused delay from entry of the consent decree).

intervention to raise any challenge. Further, although some decisions permitted separate suits that did not directly conflict with a decree's provisions, others held that any suit requiring any interpretation of the decree constituted à collateral attack because the common party (typically, the employer) might be bound by inconsistent decisions.[20]

In any event, the requirement of mandatory intervention was definitively rejected by the Supreme Court in *Martin v. Wilks*.[21] The case arose from consent decrees resolving challenges to hiring and promotion discrimination against blacks by the city of Birmingham and the Jefferson County Personnel Board. After a bench trial, but before decision, proposed consent decrees were agreed to by the parties. The district court approved them provisionally but gave notice to the community that it would hold a hearing on the fairness of the decrees.[22] At that hearing, the Birmingham Firefighters Association objected as amicus curiae. Even before the fairness decision, the Association and two of its white members sought to make their status more formal by petitioning to intervene. Although they asserted that the decrees would adversely affect their rights, the district court denied their intervention motions as untimely and entered the decrees. The denial was affirmed by the Eleventh Circuit, which reasoned that the would-be intervenors could challenge any adverse results in a direct Title VII suit.[23]

With the first promotion of a black firefighter in 1982, a different group of white firefighters brought suit against the city and the board, claiming that they were being denied promotions on racial grounds in violation of Title VII. While the white plaintiffs in essence accepted the Eleventh Circuit's invitation to bring a direct Title VII suit, the district court ultimately dismissed their action, holding that any promotions "mandated" by the consent decrees could not constitute a violation of Title

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[20] *See, e.g., Thaggard*, 687 F.2d at 66.

[21] 490 U.S. 755 (1989).

[22] Notice of the proposed order consisted of advertisements in local papers stating that "Consent Decrees . . . designed to correct for the effects of any alleged past discrimination and to insure equal employment opportunities for all applicants and employees" were to be entered. Issacharoff, *supra* note 13, at 227 n.192.

[23] United States v. Jefferson County, 720 F.2d 1511, 1518 (11th Cir. 1983). That decision also affirmed the district court's denial of a Title VII injunction because there was no showing of irreparable harm.

VII.[24] In short, the district court was willing to inquire into the employers' restructuring practices to see whether they were within the decrees, but once the court found that the practices were mandated by the decrees it found them automatically sheltered from collateral attack. The Eleventh Circuit reversed, viewing this approach as essentially denying what its earlier decision had promised.[25]

At the Supreme Court, a majority affirmed. Five Justices joined in a comparatively short opinion authored by Chief Justice Rehnquist who viewed the issue as one of basic preclusion law. Under traditional principles, those who were not parties, nor in privity with parties, could not be bound by a judgment.[26] Thus, the white employees were free to attack conduct that, but for the decree, would be a violation of Title VII. That challenge may be mounted in a separate suit in which the decree itself offers no protection to the employer. Presumably, however, in this second suit the employer can justify the decree's terms as proper under Title VII.

While the Court recognized certain exceptions to this limitation on the effect of judgments—class actions and "a special remedial scheme foreclosing nonlitigants, as for example in bankruptcy and probate"—the present case did not fit within them, and the majority was unwilling to fashion a separate rule for discrimination proceedings.[27]

As for barring plaintiffs from suit because of their failure to intervene, the Court recognized that the white firefighters had notice of the earlier litigation and its potential effect on their

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[24] 490 U.S. at 760.

[25] 490 U.S. at 761; *In re* Birmingham Reverse Discrimination Litig., 833 F.2d 1492 (11th Cir. 1988).

[26] The significance of this statement depends in large part on the scope of the concept of "privies" and the extent to which the earlier litigation would be held to be binding in any event. In Detroit Police Officers Ass'n v. Young, 824 F.2d 512 (6th Cir. 1987), for example, the court of appeals approved of preclusion by a prior determination that Detroit had intentionally discriminated against blacks in police hiring. Although the prior suit had involved white sergeants, the court found it proper to preclude relitigation by white patrolmen of that issue given the "strong community of interest" between the two classes and the substantial overlap in class membership. However, the court found that the prior litigation had not decided the question of the appropriate remedy—quota or otherwise—for the discrimination found; accordingly, plaintiffs in the second suit were free to litigate that issue. *See also* NAACP v. Detroit Police Officers Ass'n, 821 F.2d 328 (6th Cir. 1987).

[27] 490 U.S. at 762 n.2.

interests. Nevertheless, the Court observed that Rule 24(a) of the Federal Rules simply did not impose any requirement to intervene.[28] Absent a rule of mandatory intervention, failure to intervene could not adversely affect nonparties' rights. The Court (unlike most circuit courts that had faced the issue previously) was unwilling to engraft any requirement to intervene on the Rule as written. In short, the Court expressly rejected "mandatory intervention" as a means of funneling all challenges into one proceeding. Although it recognized the desirability of resolving all claims together, the majority believed the better way to achieve this goal was to place the onus on the original parties to join affected nonparties under Rule 19,[29] rather than require nonparties to seek intervention under Rule 24(a).[30]

The *Martin* majority recognized certain practical problems with Rule 19 joinder which might suggest that intervention under Rule 24 was preferable: "Potential adverse claimants may be numerous and difficult to identify; if they are not joined, the possibility for inconsistent judgments exists. Judicial resources will be needlessly consumed in relitigation of the same question."[31] But the Court believed that accepting these arguments "would require a rewriting rather than an interpretation of the relevant Rules."[32] Further, it saw the problem as more substantive than procedural in the context of Title VII suits. "Affirmative action" or "reverse discrimination" is sometimes permissible and sometimes not, depending on its justifications.[33] Therefore,

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[28] FED. R. CIV. P. 24(a):

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

[29] FED. R. CIV. P. 19(a). *See* note 3 *supra*. Rule 19 is in many respects simply the flip side of Rule 24. *See* notes 47-51 and accompanying text *infra*.

[30] For present purposes, it is sufficient to note that (assuming timely application) an individual may intervene as of right when her employment is threatened, regardless of whether any legal right is altered, provided that the existing parties do not adequately represent the interests of the would-be intervenor. For example, while an employee-at-will has no "right" to continued employment, she nevertheless may have an expectation-in-fact that will justify intervention to protect her against adverse consequences of a judgment.

[31] 490 U.S. at 766-67.

[32] *Id.* at 767.

[33] The Supreme Court has upheld affirmative action plans against Title VII claims

accommodating the rights of black plaintiffs and their white competitors would generate difficulties regardless of whether Rule 19 or Rule 24 was the procedural mechanism used to bring all interested parties together in one action. Further, the Court believed that the primary parties—plaintiff and defendant—were the ones best able to assess the possible adverse impact on strangers to the litigation and bring such persons in by Rule 19 joinder.[34]

Finally, the Court rejected the argument that the Title VII policy favoring voluntary resolution cut against its holding: a true *settlement* would resolve the claims of all interested parties. The majority reiterated a point made in an earlier case: a consent decree does not bind anyone who has not in fact consented, even if he is a party to the litigation.[35]

Martin triggered a strong dissent by Justice Stevens, who was joined by Justices Brennan, Marshall and Blackmun. The dissenters, however, did not confine themselves to the question of mandatory intervention, which could be defended merely as a device for channeling all related claims into one lawsuit. Rather, they asserted a greater role for the original decree.

Essentially, the dissent agreed that nonparties could not be "bound" by a consent decree in a legal sense, but rejected the majority's notion of what constitutes being bound. For Justice Stevens, the white firefighters might have their opportunities for employment affected in a practical sense while not being legally bound. To avoid these consequences, these persons should intervene. Failing that, and subject to certain narrow exceptions permitting "collateral attack" on court judgments,[36] the judgment

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of reverse discrimination in both the racial and gender contexts. *See* Johnson v. Transportation Agency, 480 U.S. 616 (1987); United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979). The Court has been less hospitable to such plans where the attack is predicated on the Constitution. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986). The principles governing affirmative action are discussed in SULLIVAN, ZIMMER & RICHARDS, *supra* note 12, § 3.7.

[34] 490 U.S. at 765. There is no reason to limit the case to reverse discrimination suits. Presumably, the holding in *Martin* also means that other persons claiming discrimination—for example, women claiming sex discrimination in an effort to restructure employment systems that have been modified in a prior race suit—are not bound by a judgment.

[35] *Id.* at 768 (citing Firefighters v. Cleveland, 478 U.S. 501, 529 (1986)).

[36] Justice Stevens acknowledged that in certain limited circumstances nonparties could collaterally attack prior judgments. But none of these permissible grounds existed in *Martin*. 490 U.S. at 862. There was no showing that the decree was a product of fraud

becomes a fact of life with which the nonparty must live. So far, the dissent may be read as merely defending the innovation of mandatory intervention. But Justice Stevens goes further to argue that the employer's motivation to comply with a decree negates the requisite intent to discriminate necessary for a Title VII disparate treatment violation.[37] Thus, he would presumably immunize employers from liability, at least until a decree was properly vacated as a result of intervention.[38]

Understandably, the civil rights bar was critical of the decision.[39] They read this message in *Martin:* plaintiffs could either join all potentially affected nonparties or scale back affirmative action remedial schemes to avoid impact on nonparties.[40] But

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or collusion between the parties. Nor was the relief outlined in the decree transparently invalid or the decree itself approved by a court lacking subject matter jurisdiction. According to the dissent, then, the white firefighters should lose on two counts: first, they were not bound by the decree (in the sense that they had no rights or obligations under the decree itself); and, second, they had not established any ground upon which they, as nonparties, could collaterally attack the prior judgment. *Id.*

[37] The dissent quoted an earlier opinion of Justice Rehnquist which suggests that, while a decree may not bar a suit by a nonparty altogether, it may affect that nonparty's rights by perhaps giving rise to good faith immunity to damage actions for the party which implements the decree's terms. 490 U.S. at 770-71 n.4. *See also* Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 13 (1979) (although third party not "bound" by the prior decree, it is a "fact of economic and legal life"; existence of the decree supported a finding that the per se rule should not be applied to defendant's marketing practice).

[38] For Chief Justice Rehnquist, if the decree becomes a defense to the employer—presumably, whether an absolute defense or merely one to monetary liability—"it is very difficult to see why respondents are not being 'bound' by the decree." *Id.* at 765 n.6.

[39] *See* Stephen L. Spitz, Impact of the Supreme Court Decision in *Martin v. Wilks,* Publication of the Lawyers Committee For Civil Rights Under Law 14-28 (Feb. 20, 1990) (detailing 11 post-*Martin* "reverse discrimination" suits challenging affirmative action plans); S. REP. No. 315, 101st Cong., 2d Sess. 26 (1990) ("Under the *Wilks* decision, a new employment discrimination suit may be filed against an employer whenever that employer hires or promotes an individual pursuant to a court decree."); Frank E. Deale, Martin v. Wilks, 7 N.Y.L. SCH. J. HUM. RTS. 83, 90 (1990) ("It will be virtually impossible to identify all individuals who might seek to relitigate the issues that have been resolved by the consent decree."); *but see* Issacharoff, *supra* note 13, at 193, 236 ("At the very least, *Martin,* by securing access to a hearing for affected incumbents, brought the procedural law into conformity with the substantive doctrines."); Selig, *supra* note 13, at 22.

[40] Professor Strickler wrote:

> The import of the majority opinion is clear. A person whose interests may be impaired by litigation, and who has not voluntarily become or been made a party, may attack a prior decree at any time and without any limitation. Nothing in the majority opinion limits its reach to consent decrees. If an outsider who should have been joined under Rule 19 was not so joined that person may collaterally attack any judgment in that proceeding. If this rule makes certain

employers also had reservations about *Martin* since security in the permanence of judgments serves their interests as well.[41] Absent some protection under the umbrella of a decree, employers face at worst double liability and at best repetitive litigation. Another clear employer interest put at risk by *Martin* is the ability of employers to shift some of the costs of redressing past discrimination to white workers,[42] although that interest is of debatable legitimacy.[43]

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litigation difficult or impossible, that fact simply results from the drafting of the Federal Rules of Civil Procedure. Although stated in elusive terms, the majority's message is that civil rights plaintiffs have no one to blame but themselves for difficulties caused by Rule 19. They can avoid the hardship by limiting the "breadth" of their cases and the nature of the relief that they seek.

Strickler, *supra* note 4, at 1567-68 (footnotes omitted).

[41] The Equal Employment Advisory Council (a national organization of private employers) stated in its amicus brief to the Supreme Court in *Martin*:

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

Quoted in H.R. REP. No. 40, *supra* note 6, at 51-52.

[42] For example, before *Martin* the employer could reduce the cost of redressing past discrimination by agreeing to an affirmative action program limiting the opportunities of the majority employees. From the employer's perspective, such relief was virtually cost-free. *Martin* was a perfect case in point. At the outset of the litigation, it was estimated that the cost in backpay to redress the complainants' grievances would be in excess of five million dollars. The city was ultimately able to reduce the backpay award to $265,000 by agreeing to a preferential promotion scheme. Issacharoff, *supra* note 13, at 243-44. Of course, the cost of deferred white promotions would be borne by individual incumbent employees who never agreed to entry of the consent order. Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43.

In the wake of *Martin*, such remedial plans are subject to attack exposing the employer, at the very least, to a monetary claim by the adversely affected majority employees. Success by the majority workers in the subsequent suit, however, merely forces the employer to pay the full cost of its discrimination: either the black employee will retain the position obtained under the affirmative action plan, with the white employee getting compensation for a deferred promotion, or, in the alternative, the majority worker will bump the recently promoted black, with the black worker getting front pay until she comes up for promotion. *See generally* SULLIVAN, ZIMMER & RICHARDS, *supra* note 12, ch. 14.

If the employer were to resist such affirmative action plans in the post-*Martin* era, the result will depend on the employer's success in avoiding a finding of discrimination. If it prevails in the black plaintiffs' suit, its only cost will be those of defense. But if it loses, it will still have to bear the full cost of its discrimination. This time, however, it will be liable to the minority workers in the form of front pay until they acquire the position they would have had but for the discrimination.

[43] If the employer is in fact guilty of discrimination against blacks, it is troublesome

From both parties' perspectives then, the lesson of *Martin* is the need to ascertain all persons whose rights may be affected by any court order. Such a determination is not only cumbersome but is also ongoing throughout the litigation. Indeed, only as a remedy is being finalized will the parties be in a position to appreciate fully the potential impact on nonparties and act accordingly. Moreover, the parties may never be able to identify all the possibly affected nonparties.[44] In *Martin* itself, while the parties could scarcely have had the prescience to predict which particular employees would be hired in the future, the rights of those future employees would be affected by the court's order. As nonparties, they would not be bound by the prior judgment.

Nor would the holding in *Martin* have been any different if the parties had litigated the matter to judgment instead of consenting to entry of a decree. As the Court made clear, its reasoning applies to fully litigated judgments as well as to consent decrees. Notice of ongoing litigation is simply not sufficient to bind nonparties.

In short, *Martin* seemed to threaten public rights litigation in general by presenting litigants with a Hobson's choice—burdensome joinder or limiting the scope of equitable relief.[45] In focusing on the rights of the nonparty, the Court also

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for the employer to be permitted to shift some of the costs to white workers. Indeed, it would not take much creativity to view such white workers as indirect, but real, victims of violations of Title VII. *See* People Who Care v. Rockford Bd. of Educ., School Dist. No. 205, No. 91-2438, 1992 WL 80137 (7th Cir. Apr. 22, 1992) (Board of Education had consented to scheme requiring teacher reassignment in violation of teachers' union contract rights. Court viewed Board's agreement with plaintiff as improperly eliminating the nonparties teachers' rights "for free" instead of buying out the rights); Laycock, *supra* note 2; Issacharoff, *supra* note 13, at 241-47 (discussing the economic incentive for litigants to pass the costs of a settlement to third parties). *See generally* Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1075-78 (1989).

[44] There has been some speculation as to whether joinder problems could not be resolved by defendant class actions. This solution is extremely problematic, and the viability of defendant class actions is beyond the scope of this Article. *See generally* 1 HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 4.46 (2d ed. 1985); Strickler, *supra* note 4, at 1596-98; Angelo N. Ancheta, Comment, *Defendant Class Actions and Federal Civil Rights Litigation*, 33 UCLA L. REV. 283 (1985) (discussion of viability and requirements of defendant classes and the role of Rule 23); Thomas D. Stoddard, Comment, *Compulsory Joinder of Classes Under Rule 19*, 58 U. CHI. L. REV. 1453 (1991). *See also* Shimkus v. Gersten Co., 816 F.2d 1318, 1321-22 (9th Cir. 1987).

[45] Justice Rehnquist alluded to the effect *Martin* would have on the scope of remedies sought. In addressing the concern over unmanageable joinder, the Chief Justice's response was:

apparently gave short shrift to the need for integrity and consistency in judgments or to the peculiar nature of public rights litigation. Moreover, it ignored the fact that, in many other contexts, the interests of nonparties are often affected by prior judgments and yet, because of countervailing considerations, courts preserve the integrity of the original judgment.[46]

II. THE PROBLEM OF "CONFLICTING" JUDGMENTS

The Federal Rules of Civil Procedure provide two mechanisms for avoiding conflicting judgments, both of which were raised in *Martin:* Rule 19 puts the onus on the original parties to bring new parties into the action by joinder,[47] while

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> The difficulties petitioners foresee in identifying those who could be adversely affected by a decree granting broad remedial relief are undoubtedly present, but they arise from the nature of the relief sought and not because of any choice between mandatory intervention and joinder.

490 U.S. at 767. Any joinder problems, according to the Chief Justice, are a function of the relief sought by the original complainant. If the complainant seeks structural changes in the workplace that may affect nonparties, it must choose between broad joinder or a vulnerable judgment. The way to escape this dilemma is to shape the remedial relief to avoid the *Martin* problem, that is, limit the remedy to damages. *Id.*

A third equally unappealing option is for the parties to simply settle and take their chances that adversely affected nonparties will not be motivated to launch a subsequent attack on the decreed employment practice.

[46] *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (contractual right for assigning teachers to schools may be altered by remedial scheme in school desegregation suit). *See also* text accompanying notes 68-100 *infra.*

[47] *See generally* Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit,* 50 U. PITT. L. REV. 809 (1989); Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19,* 60 N.Y.U. L. REV. 1061 (1985); John C. McCoid, *A Single Package for Multiparty Disputes,* 28 STAN. L. REV. 707 (1976); Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder,* 65 N.C. L. REV. 745 (1987).

One source provides a thumbnail sketch of the analysis under Rule 19:

> Rule 19 governs compulsory joinder of parties. The Rule asks whether absentees—individuals or entities not initially made parties to the litigation—should be added to ensure a fair resolution of the case. Absentees are needed for just adjudication when the entities have an interest in the suit that could be adversely affected by resolution without them or when continuing without them could detrimentally affect those already parties. When a court determines that an absentee is needed for just adjudication, the judge must ascertain whether joinder is feasible, an inquiry which entails consideration of subject matter jurisdiction, service of process and venue. If the court finds joinder feasible, the absentee "shall be joined as a party in the action." When joinder is infeasible, the court must decide whether in "equity and good conscience" the plaintiff's case should proceed without absentees or should be dismissed. The considerations explicitly provided in Rule 19(b) guide this determination: the plaintiff's

Rule 24[48] permits strangers to the litigation to become parties by intervention.[49] To the extent that these devices are successful, conflicts of judgment will not occur.[50] But when neither device is employed, judgments entered in different actions may be inconsistent with one another.[51]

Martin v. Wilks clearly rejects mandatory intervention as a way of avoiding such conflicts and suggests the use of Rule 19

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need for a forum in which to pursue relief, the potential for prejudice to absentees' interests if the litigation continues without them, the defendant's concern that it not be exposed to multiple or inconsistent suits or responsibilities, and the interest of the public in efficacious resolution of controversies as well as additional factors that may be relevant to equity and good conscience.

Tobias, *supra* note 9, at 319-20.

[48] *See* note 28 *supra.*

[49] *See generally* Emma C. Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action*, 14 HARV. C.R.-C.L. L. REV. 31 (1979); John E. Kennedy, *Let's All Join In: Intervention Under Rule 24*, 57 KY. L.J. 329 (1969); David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721 (1968); Gene R. Shreve, *Questioning Intervention of Right—Toward a New Methodology of Decisionmaking*, 74 NW. U. L. REV. 894 (1980); Charles A. Sullivan, *Enforcement of Government Antitrust Consent Decrees by Private Parties: Third Party Beneficiary Rights and Intervenor Status*, 123 U. PA. L. REV. 822 (1975). *See also* Cindy Vreeland, Comment, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHI. L. REV. 279 (1990).

[50] Tripartite litigation should be more efficient than separate actions by *A* and *C* against *B*. But in many cases, *C*'s prospective suit may be no more than a chimera. That is, there may be little prospect that *C* will sue, and little chance of success if he does. In such cases, the use of Rule 19 joinder may prolong or complicate litigation because of a phantom adversary. Further, *B* may actually employ the phantom strategically, resisting settlement because of professed fears of *C*'s rights or urging a court to limit equitable relief in order to limit any impact on *C* (and therefore reduce *B*'s potential liability to *C*).

A complicating factor is that *C*'s identity and interests may emerge clearly only after the fact. When the suit is commenced by *A* against *B*, the possibility of affecting *C* depends not only on *A*'s success, but also on the way in which equitable relief is structured. The scope of relief, in effect, defines *C*: in the employment discrimination area, for example, relief ordering 10 years remedial seniority for *A* could affect C_1, C_2, and C_3, while 5 years seniority might affect only C_3.

[51] This views Rule 19 in its "offensive" role as a means of bringing new parties into the action. Rule 19, however, also has a defensive aspect: dismissal of the action where an "indispensable party" cannot be joined. Rule 19 may be used legitimately to guarantee a comprehensive and consistent adjudication of the rights of all persons interested in the subject matter of the action. It may also be used as a tactical device by the defendant to thwart, or at least delay the vindication of plaintiffs' legal rights. This may be done either by identifying such a multitude of "necessary" persons that the litigation gets bogged down or by moving to dismiss the action because the court cannot obtain jurisdiction over alleged nonparties. In the employment context, the first tactic can easily be used by defendants. In the post-*Martin* era, the second is less feasible since the interested nonparties will probably be subject to the court's jurisdiction.

joinder.[52] But it does not provide the courts with any guidance about dealing with such conflicts when they arise. To approach that issue, consider the extent to which a judgment (whether by consent or after litigation) between *A* and *B* affects *C* in various cases, both within and outside of the employment discrimination context.

Suppose *A* sues *B*, obtaining relief only in the form of a money judgment requiring B to pay A $1,000,000. This will not be viewed as affecting *C*'s right to a judgment against *B*. However, *C* does not care about a judgment in the abstract—*C* wants to collect. *A*'s execution on his judgment against *B* might, in effect, prevent *C* from ever recovering. Nevertheless, the law does not generally view this as sufficient to cast doubt on the first judgment: the first creditor to obtain a judgment is generally free to execute on it. To the extent that the debtor's assets may not be sufficient to satisfy all present and potential judgments, federal bankruptcy may protect the interests of *C*.[53] Absent bankruptcy, however, a money judgment for *A* may adversely affect *C*'s rights against *B* (at least in the sense that her remedy is likely in practice to be less efficacious than it is in theory).[54]

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[52] Indeed, one commentator criticizes *Martin* as focusing on Rules 19 and 24 when neither was in issue:

> The majority's exclusive reliance on the Rules as a basis for the decision is curious for several reasons. First, this appeal was not from a denial of intervention, nor had the defendants in the original proceeding raised the defense of nonjoinder under Rule 19. The Eleventh Circuit had resolved the case without any reference to these Rules. More importantly, Rules 19 and 24 are no more than mechanisms for joinder. Neither Rule addresses the preclusive effect of litigation in which outsiders have not intervened or been joined. . . . Thus, an unstated premise of the majority's holding is that the due process rights of the white firefighters necessarily would be violated by giving binding effect to a judgment in a proceeding in which they had not been joined formally as parties either under Rule 19 or 24.

Strickler, *supra* note 4, at 1574-75. Professor Strickler concludes, "That premise, however, has never been the law." *Id.* at 1575.

[53] *See generally* Susan Block-Lieb, Muddy Waters: A Clarification of the Common Pool Analogy as Applied to the Standard for Commencement of a Bankruptcy Case (copy available from the authors). Even in this situation there may be an effect of the prior judgment. It is true that a creditor with a mere judgment has no priority in bankruptcy. But a creditor who has executed on the judgment by obtaining a lien does have priority. *See* 11 U.S.C. §§ 101(36) & 506 (1988); 3 LAWRENCE P. KING ET AL., COLLIER ON BANKRUPTCY ¶ 506.4 (15th ed. 1991).

[54] Justice Stevens would view this as a case where the subsequent plaintiff is affected but not bound by the prior judgment. *See* 490 U.S. at 862 (Stevens, J., dissenting).

The *Martin* problem is more severe when the judgment in the *A-B* suit requires *B* to perform acts that are likely or even certain to affect *C*. While *C* is not bound after *Martin*, the resulting situation creates two problems: first, *B* is subject to some form of additional liability to *C*; second, *B* may conceivably be subject to conflicting court orders. These problems are at times alternatives in that the conflict may sometimes be avoided by double liability. For example, suppose *B* contracts to sell Blackacre to *A* but had previously contracted to sell it to *C*. If *A* sues *B* and obtains a decree of specific performance, *Martin* would suggest that *C* is not bound. Therefore, *C* could later sue *B*. The prior judgment has no effect on *C*'s suit in the sense that it is no defense, and *C* may relitigate any disputed issues (such as whether the *A-B* contract was signed prior to the *A-C* contract).[55] On the other hand, if the judgment has been implemented, then *B* no longer has title and therefore cannot give title to *C*. *C* can, at most, get damages. This is true, even if under the law of the jurisdiction in question, *C* would have priority over *A* in obtaining specific performance, as when her contract was earlier in time.[56] While there may be different formulations of this result,[57] the fact remains that a nonparty's options are effectively limited by a prior judgment.

The Supreme Court has actually intimated a similar analysis in the employment discrimination context. In *W.R. Grace & Co. v. Local 759, Rubber Workers*,[58] the employer entered into a conciliation agreement with the EEOC. That agreement was, however, inconsistent with the governing collective bargaining agreement, and the union, although invited to participate in the settlement negotiations, refused to do so. Ultimately, the company laid off certain workers in order to comply with the EEOC

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[55] RESTATEMENT (SECOND) OF JUDGMENTS § 34(3) (1982).

[56] This example ignores the effect of recording statutes which could alter the result if either *A* or *C* recorded the contract with *B*. However, land sale contracts are not normally recorded, and the principle stated would apply when neither was recorded and both *A* and *C* were good faith purchasers (that is, neither contracted with knowledge of the other's contract).

[57] One way to rationalize the result is to say that the first decree effectively divests *B* of ownership, thus leaving him unable to deed over the property to *C*. Another is to speak in terms of in rem proceedings. Neither formulation, however, changes the reality that a prior judgment can affect a nonparty in significant ways.

[58] W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757 (1983).

conciliation agreements requiring maintenance of the existing proportion of women in the relevant bargaining unit. Those workers, on the basis of the collective bargaining agreement alone, would have retained their jobs. The union filed grievances under the governing arbitration clause and ultimately was awarded backpay for the workers whose rights under the collective bargaining agreement had been violated.[59]

The Supreme Court, although recognizing that the award was valid under normal labor arbitration principles, also acknowledged that courts could not enforce an agreement violating public policy. But the Court found no contrary public policy, either in an interim order of the district court that the employer not violate the EEOC conciliation agreement or in the conciliation agreement itself. As for the court order, the Court recognized the company's dilemma in being subject to conflicting obligations regarding layoffs. But the dilemma "was of the Company's own making. The Company committed itself voluntarily to two conflicting contractual obligations."[60] The existence of one contract could not exonerate the company of liability for breach of the other. Further, while the court order might have required the actual layoffs to occur pursuant to the conciliation agreement, "nothing in the collective-bargaining agreement as interpreted by [the arbitrator] required the Company to violate that order."[61] As for the argument that the EEOC conciliation agreement itself evidenced a public policy that barred the enforcement of the arbitration award, the Court used much the same analysis.[62]

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[59] The company sought a court order barring the prosecution of such grievances. Although the company was successful at the district court, the Fifth Circuit refused to uphold the injunction. As a result, the arbitration was completed. *Id.* at 763-64.

[60] *Id.* at 767.

[61] *Id.* at 768. The award did not require layoffs nor require that any layoffs be in accordance with the collective bargaining agreement; it merely granted backpay for layoffs in violation of the labor agreement. The award, then, could not be struck down as "creat[ing] intolerable incentives to disobey court orders." *Id.* at 769. The Court did suggest obliquely that an award requiring layoffs might be invalid because it would conflict with a court order. *Id.* at 769 n.13.

[62] The Court noted that there was no showing that the collective bargaining agreement itself violated Title VII; it therefore explicitly refrained from addressing whether public policy would be violated by enforcing an arbitration award for breach of provisions ultimately found to violate Title VII. What was at issue, then, was whether a conciliation agreement could supersede another contract in the absence of any showing that that contract violated the law.

In short, both the sale of real estate to two parties and the *Grace* case demonstrate that a court decree—litigated or by consent—can coexist with other rights. It will neither be binding on nonparties in any technical sense nor necessarily affect their rights adversely in a practical sense. While it is true that the employer may be subject to double liability, that will simply be the consequence of the employer assuming (by consent or court order) two separate obligations.[63]

In *Grace*, however, the absence of a direct conflict between two mandates resulted from the arbitrator's limiting relief to backpay. Had he ordered reinstatement,[64] the potential conflict would have been greater.[65] But perhaps the arbitrator limited the relief to backpay precisely because of the prior court order that the conciliation agreement be followed. Indeed, the real estate sale example suggests that a prior decree can affect a subsequent litigant. Under this view, *C*'s rights may be affected by the prior decree, even though *C* is not "bound" by it.[66] This, of course, sounds like Justice Stevens's dissent in *Martin*.

Another way of saying the same thing is that the prior judg-

While recognizing the strong Title VII policy in favor of voluntary compliance, *Grace* stressed that the union had never consented to any modification of its collective bargaining agreement, and "[a]bsent a judicial determination, the Commission, not to mention the company, cannot alter the collective-bargaining agreement without the Union's consent." *Id.* at 771. Such a result would undermine federal labor policy designed to encourage collective bargaining.

[63] *See also* Communications Workers of Am. v. Mountain States Tel. & Tel. Co., 21 Empl. Prac. Dec. (CCH) ¶ 30,329 (10th Cir. 1978) (action to enforce an arbitration award permitted despite defendant's claim that the award was inconsistent with a consent decree; the court found the two were not incompatible); Helzberg's Diamond Shops, Inc. v. Valley West Des Moines Shopping Ctr., Inc., 564 F.2d 816 (8th Cir. 1977) (court could enjoin defendant shopping mall from carrying out contract with prospective tenant where the contract violated terms of agreement between plaintiff, a jewelry store occupant of the mall, and defendant; prospective tenant was not an indispensable party and presumably could maintain a subsequent damage action against the mall owner for breach of contract).

[64] It might be argued that the arbitration award is somehow subordinate to a court order. But courts may order enforcement of an award, and, in any event, the message of *Martin v. Wilks* is that a prior proceeding cannot bind nonparties: it would seem irrelevant that the subsequent proceeding was an arbitration rather than a court suit.

[65] Note, however, that even here there is no logical inconsistency: the game is a zero sum one only because the employer chose to reduce its workforce. If the employer's promises require it to employ a certain number of minority workers and white workers, it can do so by expanding its workforce.

[66] While the word "bound" is sometimes used to apply to stare decisis, in the sense of "binding law," that is not the way in which "bound" is used for preclusion purposes.

ment affects the remedy, not the right. In the real estate sale case, *C* has as much right after *A*'s judgment to sue *B* as *C* had before; only when the restriction on possible remedies effectively destroys any means of vindicating that right would it be fair to say that the right itself is destroyed.

Further, the word "right" must be stressed. In the contract example, *C* has a right in the narrowest meaning of that term: the law will provide a remedy to *C* for *B*'s breach of the contract, regardless of whether *B* has also breached any obligations to *A*. In many cases, however, *C* will not have a right, but only an expectation: if *B* will not contract with *C* because of a preexisting contract with *A*, *C* has no legal claim. We would not speak of *C* being bound by the contract (or by a judgment entered enforcing it specifically) even though the judgment prevents *C* from pursuing her interests.

While these problems have been most prominent in the employment discrimination area, they have arisen elsewhere. Although there are cases consistent with the stringent approach of *Martin* to the effect of judgments on nonparties,[67] there are sev-

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[67] One of the strongest Supreme Court precedents for *Martin*, is Chase Nat'l Bank v. City of Norwalk, 291 U.S. 431 (1934). There, the Norwalk City Council passed a resolution requiring the Ohio Electric Power Company to remove electrical equipment which served the city's residents under a franchise which, the city claimed, had expired. At the city's request, the state prosecuting attorney brought a quo warranto proceeding to oust the company from its use of city streets. The state courts entered a judgment of ouster. The city, however, was not a party to these proceedings. Further, before these actions, the Power Company had mortgaged the property in question to certain bondholders, but neither party sought to join the bondholders in the ouster proceedings, and the bondholders did not seek to intervene.

After the state court judgment, a trustee for the bondholders brought a diversity suit in the federal court against the city, claiming that the city's enforcement of the ouster would irreparably harm its interests. The federal court, to preserve the bondholders' lien, "enjoined the City, its officers, agents and employees, 'and all persons whomsoever to whom notice of this order shall come,' " from interfering with the continuing operations of the Power Company and " 'from taking any steps or action of any kind whatever to cause the enforcement or carrying out' " of the ouster judgment. *Id.* at 434-35.

In a doublebarreled vindication of the rights of nonparties, Justice Brandeis first held this injunction erroneous insofar as it purported to enjoin nonparties from enforcing the ouster: "The City alone was named as defendant. No person other than the City was served with process. None came otherwise before the court." *Id.* at 436. Second, Brandeis approved the decree's enjoining of the city:

> Neither the trustee nor the City had been a party, or privy, to the litigation in the state courts. These courts did not purport to pass upon the validity of the trustee's claim; and in no state court was that claim in litigation. However

eral areas where, on one ground or another, the courts have in effect bound nonparties to judgments. Since most of these areas were discussed in pre-*Martin* lower federal court decisions, it is conceivable that they do not survive *Martin*. But it is doubtful that the *Martin* Court truly intended to have spoken so broadly.

There are three main areas for the operation of court decrees against nonparties: first, judicial power to enforce its own judgments through the contempt power; second, in rem orders; and, third, the so-called "public rights" exception. *United States v. Hall*[68] epitomizes the first area.[69] *Hall* upheld the power of a district court to punish by criminal contempt "a person who, though neither a party nor bearing any legal relationship to a party, violates a court order designed to protect the court's judgment in a school desegregation case."[70] Racial violence erupted in a Florida high school after a desegregation order was put into effect causing a temporary closing. The school district then obtained a federal court order barring interference with the orderly operation of the school. The order provided

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broad the scope of the prohibition prescribed by Judicial Code, § 265, it could not preclude the federal court from protecting the trustee's alleged property from wanton destruction by one not a party or privy to the judgment of ouster.

Id. at 437-38. This result seems unobjectionable, provided that the trustee was not considered in privity with the Power Company, a position Brandeis thought (in these pre-*Erie* days) established "under well settled principles of jurisdiction, governing all courts," federal and state. *Id.* at 438.

Presaging *Martin*'s rejection of mandatory intervention, Brandeis directly rebuffed the argument that the trustee's suit should be dismissed because it had neither intervened in the state proceeding nor justified its failure to intervene (as by lack of notice). Brandeis wrote:

> The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. Whether under the Ohio practice it would have been possible for the trustee to intervene, we have no occasion to determine. Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.

Id. at 441.

Finally, since the decree against the city did not interfere with the state court proceedings, since it left the plaintiff there free to act, there was no violation of the Anti-Injunction Act, 28 U.S.C. § 265.

[68] 472 F.2d 261 (5th Cir. 1973).

[69] *See also* Quinter v. Volkswagen of Am., Inc., 676 F.2d 969 (3d Cir. 1982) (expert witness held in contempt for violating a discovery protective order despite not being a party to the suit, nor named in the order); Nancy L. Krzton, Note, *Due Process Concerns in Discovery: Who May Protective Orders Bind?*, 44 U. PITT. L. REV. 1031 (1983).

[70] 472 F.2d at 262.

that anyone having notice of it was subject to its terms. Eric Hall was named in the petition as one responsible for the unrest but was neither a party to the underlying litigation nor joined as a party before the order was entered.

Hall's conviction of criminal contempt was challenged on two grounds. First, he claimed that the court had no power to punish a nonparty acting solely in pursuit of his own interests. He relied on prior cases which had drawn precisely this distinction, seeming to say that a nonparty could not be held in contempt unless it were an agent of a party (obviously, the analog of privies under the law of judgments) or "aided and abetted" contempt by parties.[71] But the Fifth Circuit distinguished those cases:

> [There] the activities of third parties, however harmful they might have been to the plaintiffs' interests, would not have disturbed in any way the adjudication of rights and obligations as between the original plaintiffs and defendants. . . . The activities of Hall, however, threatened both the plaintiffs' right and the defendant's duty as adjudicated in the [earlier] litigation.[72]

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[71] In Alemite Mfg. Corp. v. Staff, 42 F.2d 832 (2d Cir. 1930), a decree was entered against John Staff, " 'his agents, employees, associates and confederates,' enjoining them from infringing, or 'aiding or abetting or in any way contributing to the infringement,' " of a patent. *Id.* at 832. When enforcement was later sought against John's brother Joseph, Judge Learned Hand wrote:

> We agree that a person who knowingly assists a defendant in violating an injunction subjects himself to civil as well as criminal proceedings for contempt. This is well settled law. On the other hand no court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen, and the persons enjoined are free to ignore it.

Id. (citations omitted). To be bound by the decree, Hand believed that a nonparty "must either abet the defendant, or must be legally identified with him." *Id.* at 833.

In Chase Nat'l Bank v. City of Norwalk, 291 U.S. 431 (1934), discussed in note 67 *supra*, the Court cited *Alemite* approvingly. While conceding that nonparties may be enjoined "from knowingly aiding a defendant in performing a prohibited act if their relation is that of associate or confederate," Justice Brandeis disapproved the district court's injunction insofar as it purported to reach any person having notice, and thus threatened with "contempt the conduct of persons who act independently and whose rights have not been adjudged according to law." *Id. See also* Regal Knitwear Co. v. NLRB, 324 U.S. 9 (1945). *See generally* Doug Rendleman, *Beyond Contempt: Obligors to Injunctions*, 53 TEX. L. REV. 873 (1975).

[72] *Hall*, 472 F.2d at 265:

> Infringement of the *Alemite* plaintiff's patent by a third party would not have upset the defendant's duty to refrain from infringing or rendered it more difficult for the defendant to perform that duty. Similarly, the defendant's duty in

The court went on to stress that, by preventing the desegregation order from being effective, activities of persons such as Hall "imperiled the court's fundamental power to make a binding adjudication between the parties properly before it."[73] The courts, therefore, have inherent power to bind nonparties to the extent necessary to protect their judgments. Having dispensed with the common law question, the *Hall* court had little difficulty with whether Rule 65(d) of the Federal Rules of Civil Procedure limited judicial power. Although that Rule seems to explicitly limit an injunction's effect,[74] it could not be read literally. Rather, Rule 65(d) was "a codification rather than a limitation of courts' common-law powers, [and] cannot be read to restrict the inherent power of a court to protect its ability to render a binding judgment."[75]

The persuasiveness of this reasoning after *Martin* may be doubted: had Hall filed suit against the desegregation order instead of protesting it, the "plaintiffs' right and the defendant's duty" would also be threatened, and "the court's fundamental power to make a binding adjudication between the parties properly before it" would be equally "imperiled." *Martin* implies that Hall could bring a second action though the case does not disclose what effect the first decree might have on Hall's remedy.

The second area in which a judgment can affect the rights of nonparties is in rem injunctions. Indeed, *Hall* relied strongly on this point in support of its decision.[76] In rem proceedings

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Chase National Bank to refrain from removing the plaintiff's equipment would remain undisturbed regardless of the activities of third parties, as would the plaintiff's right not to have its equipment removed by the defendant.

[73] *Id.* at 265.

[74] Rule 65(d) provides that an injunction "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

[75] *Id.* at 267. For a critical analysis of *Hall* prior to *Martin*, see Rendelman, *supra* note 71.

[76] "Federal courts have issued injunctions binding on all persons, regardless of notice, who come into contact with property which is the subject of a judicial decree." *Id.* at 266. School desegregation orders, which are often controversial, "are, like in rem orders, particularly vulnerable to disruption by an undefinable class of persons who are neither parties nor acting at the instigation of parties. In such cases, as in voting rights cases, courts must have the power to issue orders similar to that issued in this case, tailored to the exigencies of the situation and directed to protecting the court's judg-

"presuppose the existence of a legal relationship which is conceived of as property."[77] Where such property exists, courts may "exercise jurisdiction to determine interests" in that property; it is not necessary that persons claiming such interests be parties to be bound. All that is necessary, as a matter of due process, is that adequate notice of the pending proceeding be provided to those who may have such an interest. Assuming such notice, the jurisdiction of the court binds the nonparties, but only so far as the property in question is concerned.[78]

In some sense, in rem proceedings are like mandatory intervention: a person with notice of the proceeding is bound even if she does not participate. Thus, there is an incentive for an outsider to participate, although initiating such participation is not denominated intervention. The limits of in rem are unclear, largely because there have been extensions of this jurisdiction beyond what is intuitively viewed as property.[79] But the Court in *Martin* was unwilling to view the employment relationship at issue there as a property claim.[80]

The third area is what has been called the "public rights exception," which has less-than-definitive origins. It was apparently first raised in 1940 in a labor law case *National Licorice Co. v. NLRB,*[81] in which the NLRB set aside contracts that the company had procured from its employees by means of unfair labor practices. When the company challenged the NLRB's or-

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ment." *Id.*

[77] RESTATEMENT (SECOND) OF JUDGMENTS § 6, cmt. c (1982).

[78] *See* Riley v. New York Trust Co., 315 U.S. 343 (1942).

[79] In Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979), discussed in text beginning at note 85 *infra*, the Court suggested in dicta that nonparties could be bound by a dispute over Indian fishing rights. Rather than view the rights as individual claims, the Court suggested that the issue could be viewed as an in rem proceeding allocating rights in fisheries. But, of course, "fisheries" do not exist as other than a legal way to control individual rights to fish.

[80] The Court may have wished to avoid the due process questions that would have arisen had the in rem analogy been used. By focusing only on the Federal Rules, the Court avoided addressing the outer limits of due process rights of nonparties. In *Washington State Fishing Vessel Ass'n*, the Court, although it suggested an in rem theory, ultimately refused to adopt it. This reluctance may have stemmed from uncertainties about the adequacy of the notice to the nonparties before in rem jurisdiction could be exercised.

[81] 309 U.S. 350 (1940). Under the public rights exception, when plaintiffs seek vindication of public rights, nonparties who could be adversely affected by a judgment are nonetheless not treated as indispensable parties. For a critical analysis urging the abandonment of the public rights exception, see Tobias, *supra* note 47.

der because of the absence of the employees, the Supreme Court affirmed. It compared the proceeding to the antitrust area where injunctions and orders of the Federal Trade Commission often affected nonparties by barring the defendant from meeting contractual obligations to those not before the court.[82] In either case, "the public right [is] vindicated by restraining the unlawful actions of the defendant even though the restraint prevent[s] his performance of the contracts."[83] The *National Licorice* Court found acceptable this burden on the contractual rights of nonparties because such adjudications do not destroy the legal entitlements of the absent parties: "In every case the third persons were left free to assert such legal rights as they might have acquired under their contracts."[84]

This formulation of a public rights exception seems consistent with our real estate sale example: the right remains unaffected, only the remedy is reduced. A broader view of a public rights exception, however, emerged in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*,[85] a complicated case involving disputes over the rights of various Indian tribes in the Northwest to take certain fish under treaties with the federal government. Different suits culminated in divergent decisions in the Ninth Circuit and the Washington Supreme Court. The federal litigation, brought by the United States, resulted in an injunction requiring the state's Department of Fisheries to adopt regulations protecting the Indians' treaty rights. These regulations, however, were challenged in state court suits, ending with the state supreme court holding that the Department of Fisheries could not comply with the federal injunction.[86] This state court action led the federal court to issue orders directly supervising Washington State's fisheries to preserve treaty fishing rights.

At the Supreme Court, Justice Stevens, writing for the ma-

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[82] *Id.* at 365.

[83] *Id.* at 366.

[84] *Id.* Similarly, to require joinder of employees covered by the subject labor contracts would undermine enforcement of the NLRA. Further, the NLRB's order, which was "directed solely to the employer," was "ineffective to determine any private rights of the employees and leaves them free to assert such legal rights as they may have acquired under their contracts, in any appropriate tribunal . . . ." *Id.* at 366.

[85] 443 U.S. 658 (1979).

[86] The state court essentially rejected the federal court's decision because of its divergent view of federal law.

jority, recognized "widespread defiance" of the district court's orders and noted that certiorari had been granted in both the state and federal cases in part "to remove any doubts about the federal court's power to enforce its orders."[87] After resolving the merits of the dispute, the Court turned to the procedural morass. One claim was that the federal district court lacked power to enjoin individual fishermen, who were not parties, from violating its fishing allocations.[88] Although individual fishermen had had some representation by commercial fishing organizations as amici in the federal suit, the Court did not rely on this point. Instead, it wrote:

> In our view, the commercial fishing associations and their members are probably subject to injunction under either the rule that nonparties who interfere with the implementation of court orders establishing public rights may be enjoined, e. g., United States v. Hall, 472 F.2d 261 (CA5 1972), cited approvingly in Golden State Bottling Co. v. NLRB, 414 U.S. 168, 180, or the rule that a court possessed of the res in a proceeding in rem, such as one to apportion a fishery, may enjoin those who would interfere with that custody. But in any case, these individuals and groups are citizens of the State of Washington, which was a party to the relevant proceedings, and "they, in their common public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment." Moreover, a court clearly may order them to obey that judgment.[89]

The notion that state citizens may be bound by litigation in which the state represents them has important implications for the view of representation taken by the new Civil Rights Act.[90] But for present purposes, the more interesting part of this passage is the formulation of a "public rights exception" to the notion that decrees cannot bind nonparties. This principle seems to be generalized from the narrower holding in *Hall.*

Of course, the authority of any public rights exception is

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[87] *Id.* at 674.

[88] The Court noted that this issue arose because

> state officials were either unwilling or unable to enforce the District Court's orders against nontreaty fishermen by way of state regulations and state law enforcement efforts. Accordingly, nontreaty fishermen were openly violating Indian fishing rights, and, in order to give federal law enforcement officials the power via contempt to end those violations, the District Court was forced to enjoin them.

Id. at 692 n.32.

[89] *Id.* (some citations omitted).

[90] *See* text accompanying notes 134-37 *infra.*

doubtful. On its face, the language in *Washington Fishing Vessel Ass'n* is dicta. Moreover, it was penned by Justice Stevens, who, after all, dissented in *Martin*.[91] Nevertheless, the notion of a public rights exception has gained support.

One of the more interesting lower court cases in this area played out in the environmental arena. *Conner v. Burford*[92] originated in a challenge to federal agencies' leasing of national forest land in Montana to certain oil and gas developers.[93] The Ninth Circuit upheld the district court's disapproval of those leases that lacked "no surface occupancy" clauses limiting development by the lessees until the lessees secured further approval by the Bureau of Land Management. Obviously, such action threatened the interests of the lessees, some of whom, after judgment was entered but before the federal defendants filed a notice of appeal, sought to intervene "as necessary and indispensable parties" under Rule 19. The lessees also asked for reconsideration on the ground that the decision deprived them of due process. The district court denied the intervenors' general application as untimely, although it permitted them to intervene for the purposes of appeal of the judgment.

At the Ninth Circuit, the lessees argued that they were indispensable in the action below and thus the district court should not have set aside the agency leases. While there was no dispute that the lessees were "necessary parties" (that is, they should have been joined if joinder were feasible), the plaintiffs contended that the leaseholders were not "indispensable parties" because of the public rights exception. The Ninth Circuit agreed, citing *National Licorice*.[94] As formulated by *Conner*, the public rights exception is of limited applicability. The court noted that the litigation against the federal agencies "does not purport to adjudicate the rights of current lessees; it merely

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[91] Interestingly, Stevens's dissent in *Martin* does not invoke any public rights exception.

[92] 848 F.2d 1441 (9th Cir. 1988).

[93] The claim was that the leases violated the National Environmental Policy Act of 1969, 42 U.S.C. § 4321-4361, and the Endangered Species Act of 1973, 16 U.S.C. § 1531-1543, because neither an environmental impact statement nor a biological opinion on the impact on endangered species was obtained.

[94] It also cited, inter alia, Jeffries v. Georgia Residential Fin. Auth., 678 F.2d 919 (11th Cir. 1982); Swomley v. Watt, 526 F. Supp. 1271 (D.D.C. 1981); National Resources Defense Council, Inc. v. Berklund, 458 F. Supp 925 (D.D.C. 1978), *aff'd*, 609 F.2d 553 (D.C. Cir. 1980).

seeks to enforce the public right to administrative compliance with the environmental protection standards of NEPA and the ESA."[95] While the district court purported to actually "set aside" the leases, the Ninth Circuit clarified the order to provide that "the contracts themselves were not invalidated and further actions construing rights under them are not precluded."[96] Rather, the court simply "enjoin[ed] the federal defendants from permitting any surface-disturbing activity to occur on any of the leases until they have fully complied" with the governing laws, that is, until the agencies conducted the required studies.[97]

At this point, the court seemed to be suggesting that the judgment against the government might at most affect the lessees' remedies, not their rights:

> The order as modified does not adjudicate or "prejudge" the rights of the lessees against the government. We enjoin only the actions of the government; the lessees remain free to assert whatever claims they may have against the government. Thus, the public right to compliance with environmental standards is vindicated with a minimum imposition on the rights of lessees.[98]

If the suggestion was that the decision only made the government liable on the ultra vires leases, the court immediately went on to indicate a broader effect:

> The order as modified will obviously preclude immediate government approval of surface-disturbing activity, but such foreclosure of the lessees' ability to get "specific performance" until the government complies with NEPA and the ESA is insufficient to make the lessees indispensable to this litigation. . . .[W]e retain in the leaseholders many of the fundamental attributes of their contracts. As strenuously argued by both the government and the lessees, significant economic value inheres in the exclusive right to engage in oil and gas activities, should any be allowed. Once the government complies with NEPA and the ESA, it is entirely possible that it will authorize surface-disturbing activities on many of the leased tracts. Thus, although development probably will be delayed, it is conceivable that it will occur on some of the leases already sold. The legally protected interests of the lessees are barely affected until the government decides that no development and production of the oil and gas reserves will be allowed, and even then they may have claims for damages against the

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[95] 848 F.2d at 1460.

[96] *Id.* at 1460-61 (quoting Brief for Plantiff-Appellees at 36).

[97] *Id.* at 1461.

[98] *Id.* (footnotes and citations omitted).

government.[99]

The startling conclusion of *Conner* appeared to be that, although not parties to the action, the lessees could be barred from working their leases without further governmental action. Since there was no guarantee that surface-disturbing activity would ever be authorized, the value of the leases was substantially affected. Further, while the contemplated impact statements might justify government approval of further activities, they also might preclude such approval. In that case, the leases would appear to be worthless. In short, the court seemed to be saying that since the leases were not technically invalidated, the lessees were not indispensable parties despite a contemplated adverse effect.[100]

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[99] *Id.* The *Conner* court also noted that the lessee-intervenors "have robustly represented the interests of the entire lessee class on appeal." *Id.* at 1462. Further, "the absent lessees were adequately represented by the government below [which] vigorously defended its leasing decisions under both NEPA and the ESA." *Id.* at 1462.

[100] See also National Wildlife Fed'n v. Burford, 835 F.2d 305 (D.C. Cir. 1987), where the court enjoined the Department of the Interior from lifting protective restrictions on 180 million acres of federal land. The district court's injunction was challenged on the basis, inter alia, that it "impermissibly affects the rights and interest of absent third parties." The court rejected this argument, although it recognized some effect on third parties:

> The injunction's only actual effect on third parties is lost or delayed opportunity to consummate transactions for the purchase or use of federal lands in the future. These interests, however, are not constitutionally protected property rights. The absent third parties to whom appellants refer stand in various stages in the process of perfecting their interests in the lands at issue. Some parties have staked initial claims, or taken other preliminary steps, but require [the Bureau of Land Management] BLM to take further action before they can complete their development projects. The injunction prohibits the BLM from acting to further these projects during the pendency of this litigation (presuming such action would conflict with the original classification or withdrawal). Thus, some third parties are delayed in obtaining certain interests—e.g., receiving approval to drill oil and gas wells on leases issued prior to the injunction, perfecting final entries, obtaining patents under the land laws—as a result of the injunction. But these absent parties have no contractual or legal right to additional BLM permits or approvals. They hold no more than an expectancy, the loss of which does not constitute a deprivation of property within the meaning of the due process clause of the Constitution. Their absence from the lawsuit does not preclude the district court from issuing the preliminary injunction.

Id. at 315-16 (citations omitted). Judge Williams, writing separately, agreed that the third parties were not indispensible within the meaning of Rule 19. But he noted that "under the Due Process clause of the Fifth Amendment persons normally cannot be bound by litigation to which they were not parties or privies." *Id.* at 333. Since the absentees were not legally bound,

Conner was decided before *Martin*. Had the lessees had the foresight to predict that decision, intervention was the last device they should have attempted.[101] *Martin* would suggest that the decision setting aside the leases did not bind the leaseholders who were not parties to the action against the federal agencies. But does that mean that the decree against the government cannot affect their rights? Suppose the leaseholders engage in development activity; at the extreme, when the government (pursuant to the *Conner* injunction) seeks to bar them, that judgment has no binding force (other than possible stare decisis effects), allowing them to relitigate the issue. More narrowly, a subsequent court might view the government as barred from allowing development of the leased tracts, but hold the government liable to the leaseholders for any damages that follow.

In short, the question is whether *Martin* should be read to eradicate, or alter, various doctrines permitting nonparties to be affected by court orders. The previous discussion suggests that the conventional wisdom—that *Martin* held that a prior judgment can never affect a nonparty's rights or interests—is incorrect. A more accurate statement of the holding is that a nonparty cannot be required to intervene in a prior suit in order to protect any interests that may be threatened by that litigation. While there is certainly dictum in Chief Justice Rehnquist's opinion which speaks in terms of the prior judgment not binding a nonparty, the Court did not purport to address the ways in which judgments can be reconciled.[102]

How then should a court address a suit by *C* in an action against *B* when there is a prior decree in *A*'s favor requiring certain conduct by *B* which injures *C*? There are several possibilities.

> I take it that, for example, a mineral lessee that was denied a drilling permit to which it would otherwise be entitled could seek judicial relief against the BLM. A federal court outside this district would not be bound by the decision in the trial court or here, and, if it viewed the law differently, might order relief.

Id.

[101] Successful intervention would make the leaseholders parties, and therefore bound, in a case where the presiding judge had already held against their interests. In fact, the leaseholders may have foreseen this problem: they did not seek to intervene individually; rather, their interests were urged by associations.

[102] Stated otherwise, the Court merely held that the prior decree was not a complete defense in the *C-B* suit. It did not consider the effect the first suit (*A-B*) might have on the remedies available in the second.

A. *Decree Immunization*

One possibility is that the decree somehow immunizes what would otherwise be illegal. This seems to be Justice Stevens's view, although he does not speak the language of immunity.[103] Justice Stevens's position seems weakest precisely at this point: he would apparently permit white workers to lose their right not to be subordinated to blacks in promotions. While the right of the white workers is conditional—it exists absent discrimination against blacks or the presence of a valid affirmative action plan—neither of these conditions has been determined to exist in a proceeding to which such persons are parties.[104] Is it not fair to say that, under the dissent's view, such persons *are* losing a legal right and are therefore "bound" by the decree?

One response is that the law simply does not view individuals as "bound" to acts to which they are not parties, even though such acts may radically affect them. To borrow an analogy from another area of Title VII, a disadvantaged employee is not viewed as legally "bound" by a seniority system agreed to by the union and the employer. Nevertheless, the system is a fact of life for her and in practice may substantially affect her interests.

This analysis, however, only takes us so far: the junior employee has no "right" to challenge the seniority system in the first place. But Justice Stevens would presumably have nonparties, who previously had a right not to be victims of discrimination because of their white race, barred precisely by the entry of a decree—typically, the function of preclusion "binding" principles.[105]

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[103] 490 U.S. at 788-91. *See also* Strickler, *supra* note 4, at 1569.

[104] Justice Stevens reviewed in detail the proceedings leading up to the consent decrees in question. The point of this review was to establish that the district court never treated the white firefighters as if they were "bound" in the technical sense. But the review does clearly indicate that the prior order affected the white firefighters' opportunity for promotion.

[105] Professor Strickler writes:

> The problem with the dissent's view is that it ignores the reality of what happened to the white firefighters. If the consent decree had not existed, race-conscious promotions by the City that favored black firefighters arguably would have violated the rights of white firefighters under Title VII and the fourteenth amendment. . . . But if the City could use the consent decree either as evidence of a lack of discriminatory intent or as providing an immunity from liability for actions consistent with the decree, the white firefighters' Title VII and fourteenth amendment claims would be rendered all but useless.

B. *Ignore the Decree*

Another possibility is that the court should decide *C*'s suit as if the prior decree did not exist. The decree would then be irrelevant. This seems to be the majority's rule in *Martin*, but is also inappropriate. The most obvious problem arises from the possibility that the court in the *C-B* suit will order relief directly contrary to a judgment in the *A-B* suit. *B* will then be subject to inconsistent obligations. No legal system can tolerate an equitable system in which *B* will be damned if he does, and damned if he doesn't—that is, subject to contempt no matter what *B* does.

Casting some light on this is the tendency of courts to take into account the interests of third parties in fashioning relief, even if they have no clearly defined "right."[106] It seems hardly unfair to require a court to also take into account the rights of the prior plaintiffs as reflected in a court order.[107]

Strickler, *supra* note 4, at 1572-73. Professor Strickler goes on to cite Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), as holding that the right to litigate a cause of action is protected by the Due Process Clause of the Fourteenth Amendment. "Thus, even if one takes the most generous possible construction of the district court's ruling, the consent decree deprived the white firefighters of their right to litigate the merits of their Title VII claim." Strickler, *supra*, at 1573.

[106] See Romasanta v. United Air Lines, Inc., 717 F.2d 1140 (7th Cir. 1983), where, with respect to competitive seniority (which determined such matters as layoffs) class members were granted seniority "equal only to the number of days the claimants had previously been employed as flight attendants by United." *Id.* at 1142. As a result, the class members would end up junior to flight attendants hired long after the class members were unlawfully discharged for getting married. The appellate court upheld the order, stressing that, in an economic climate of massive layoffs, to reinstate all 1400 would require that "all incumbent attendants hired by United since March 7, 1977, would be furloughed," and that the prospects were bleak enough that these individuals would not be recalled; they would, therefore, effectively be fired. *Id.* at 1151. *See generally* Carpenter, *supra* note 15.

[107] Arguably, the *Romasanta* court was wrong: it should have awarded the victims of discrimination full relief and let the affected nonparties vindicate their rights, if any, under the collective bargaining agreement.

Note that if the class members were truly the victims of illegal discrimination, giving them full seniority is unobjectionable. Further, in the case itself, the illegality of the airline's conduct was hardly arguable, and was in fact fully litigated. Even assuming that there was a dispute about this (or, at least, that some of the class members were not the victims of the clearly discriminatory policies), the rights of the co-workers seem problematic.

If *B* agrees to jump *A* over *C* in seniority, what claim does *C* have? If seniority is only a policy of *B* which is subject to change at *B*'s will, there can be no objection to *B*'s sacrificing *C*'s interests to *B*'s own interests. If, on the other hand, *C*'s rights derive from a contract (whether a collective bargaining agreement or a contract derived from a consistent policy), then the decree cannot affect *C*'s contract right. At most, the decree will

C. *"Reconcile" the Decrees*

A third possibility is that the prior decree should be considered by the court in the subsequent litigation in the sense that the court should modify the prior decree so that no inconsistency arises. This is at least conceivable when the two suits are brought before the same court; it is impossible, however, when the suits cannot be so joined. And, even when procedurally possible, there is an enormous conceptual problem: *C* is not bound to the *A-B* litigation because *C* is a nonparty. It follows that *A* cannot be bound in the *C-B* litigation, to which *A* is also a nonparty. The solution to possible unfairness to *C* is not to strip *A* of rights won through his suit.

Thus, the prior decree should be considered in either of two ways: first, as above, by modifying a prior decree entered by the same court where possible; second, by taking into account the prior order in fashioning the relief available in the second suit, that between *C* and *B*. Again, the absence of *A* from the *B-C* lawsuit will often, but not always, prevent modification of the prior decree.

The question, then, becomes which of the two methods should be selected. At this point, we leave the law of preclusion and consider the law of joinder and intervention. The court in the *B-C* suit cannot alter the *A-B* decree unless *A* is made a party to *C*'s suit: while *C*'s rights may or may not have been affected by the *A-B* decree, it is clear that any alteration to the *A-B* decree will affect *A's* rights.[103] One way to look at this is that *C* is put to a choice by the prior decree: *C* can sue in the original court and seek to join *A*, and thereby preserve the possibility of full relief. Alternatively, *C* can sue in any court, not join *A*, and settle for whatever relief the court can order consistent with the prior decree.

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bar one remedy that *C* might otherwise obtain: an order of reinstatement. *C* should still have a right to monetary relief.

One might suspect that *C* will fare less well after the *A-B* decree than before, but that prediction is by no means a certainty, and is one with which the law is normally unconcerned. Indeed, the more likely loser in this situation is *B*, who will be held to perform his obligations to *A* under the decree and his obligations to *C* under the contract.

[103] *A*'s rights, not merely *A*'s remedy, are affected. Whatever rights *A* may have had in his original cause of action are merged in the judgment. Therefore, reducing *A*'s rights by modifying the judgment is impermissible without *A* being made a party to the action.

This sounds something like "mandatory intervention," the rule almost unanimously applied by the circuit courts before *Martin*. It is, however, considerably different: there is no requirement that *C* intervene in the *A-B* litigation; *C* may do so (assuming *C* meets the requirements of rule 24) or *C* may bring a separate suit challenging the employment practice required by the *A-B* decree, joining *A* in that separate suit. If *C* fails to do either, *C* may still sue *B*, but *C*'s relief is limited to the extent that otherwise appropriate relief would violate the decree.[109] This is less than mandatory intervention in that the failure to intervene leaves *C* free to sue, subject to the prior decree only in the sense that the court will not enter a conflicting judgment.[110]

The most problematic aspect of this approach is the possibility that the decree is itself mandating violations of positive law. While that possibility is present for both litigated judgments and consent decrees, the absence of true adversarialness may mean that it is more likely to occur with consent decrees. This, of course, was the point of the white firefighters' attack in *Martin v. Wilks* itself: they claimed that the employer's practices would, but for the decree, violate at least the Equal Protection Clause, and that the decree could not immunize such a violation. While there is no constitutional principle giving public employees a right to employment opportunity, there are certain grounds upon which opportunities cannot be allocated. Most obviously, with the exception of those cases where there is a compelling state interest justifying it (such as remedying past dis-

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[109] *But see* United States v. City of Chicago, 870 F.2d 1256 (7th Cir. 1989) (white employees in second suit should not be limited to damage remedy). Whether the affected nonparty has an effective damage remedy is problematic. In some instances, the applicable federal law will not allow for a damage remedy, thereby implicating due process concerns.

[110] Professor Strickler, argues that, while the consent decree did not "bind the white firefighters in the sense of requiring any action or payment by them," the decree "certainly affected them in two ways: as a practical matter it reduced their promotional opportunities at work, and it changed the legal status of their Title VII claims, by significantly reducing their chances of success in that litigation." Strickler, *supra* note 4, at 1570-71. This is not self-evident. Promotional opportunities may practically be reduced, but this will survive legal challenge only if the reduction is permissible under Title VII and the Constitution. If it is permissible, no right has been infringed. *See* Donaghy v. City of Omaha, 933 F.2d 1448 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 938 (1992). The key question is whether the first decree will affect the subsequent court's assessment of the legality of the remedial employment practice, and it is not clear why the prior decree will reduce the chances of success in that litigation at all.

crimination), A cannot be preferred to C simply because A is black. Even here, however, a decree will rarely require unequal treatment: it will merely order benefits that, if they are unconstitutional, can be matched by according them to the white plaintiffs.

In short, much of the debate over *Martin v. Wilks* seems misconceived, at least when framed in the terms of the discussion as it has developed. The issue is not the applicability of Rule 19 or Rule 24 or even preclusion, but rather the correct way in which to treat potentially conflicting judgments. To that extent, *Martin* does not threaten any judgments already entered: at most it subjects employers to the possibility of double liability. Much the same is true outside the discrimination context. After a decree is entered, the case signifies little.

Martin v. Wilks, however, is a more serious problem for those contemplating settling pending litigation by a consent decree. While an employer who has a decree entered against it may simply view *Martin* as a piece of bad news, employers facing suits after that opinion was rendered must consider how to avoid potential double liability. Similarly, civil rights plaintiffs seeking broad relief can expect employers to be more resistant now that a possible "decree shield" has been stripped away.

Nevertheless, it is not clear how substantially the conduct of either side would have been altered. Because employers are no safer behind a litigated decree than one entered by consent, it is not clear that *Martin* has substantially reduced incentives to settle. In either case, true protection can be achieved under *Martin* only by joining all potentially affected third parties. Perhaps the most likely result of *Martin*, then, will be to reinforce a tendency of parties to litigation to frame relief in ways that would not affect nonparties, or would affect only those nonparties which could feasibly be joined. Of course, this brings us back to the original joinder problems generated by the *Martin* decision which Congress tried to ameliorate by passing the 1991 Civil Rights Act.

III. The 1991 Civil Rights Act

The Civil Rights Act of 1991 was intended to overrule *Martin v. Wilks* insofar as employment discrimination is con-

cerned.[111] The Act attempts this through a carefully integrated statutory amendment[112] designed to preserve and encourage decrees while at the same time ensuring that those affected by decrees have an adequate opportunity to protect their interests.[113] Section 703 of Title VII as amended by the new statute provides that:

> Notwithstanding any other provision of law. . . . an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).[114]

The circumstances requisite for immunizing the decree from challenge are specified in subparagraph (B):

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[111] Congress shunned a sweeping response to *Martin*. Instead of adopting a mandatory intervention rule for all federally litigated cases, Congress decided to insulate only employment practices implemented under a litigated or consent judgment from subsequent civil rights or constitutional claims. Given this piecemeal approach, *Martin* will continue to govern all other cases. *See* Laycock, *supra* note 2, at 105-10.

[112] The statute takes a far broader approach than earlier congressional efforts to minimize the prospect of inconsistent suits. For example, normally Title VII accords a right of private action to a victim of discrimination. But where the EEOC files suit on the basis of a charge lodged by the victim, the victim may not file a separate suit but is limited to intervention in the government's action. *See generally* SULLIVAN, ZIMMER & RICHARDS, *supra* note 12, § 30.8. Similarly, the Clean Air Act, which generally authorizes "Citizen suits," 42 U.S.C.A. § 7604 (West 1992), provides that "No action may be commenced . . . if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right." § 7604(b)(1)(B).

Of course, provisions such as this merely narrow, they do not eliminate, the possibility of inconsistent judgments. The basic thrust is to limit attacks by different plaintiffs; neither enactment would prevent third parties who may be affected by the decree's requirements of defendants from bringing an action.

[113] Pub. L. No. 102-166, 105 Stat. 1071. The new Act was preceded by the proposed Civil Rights Act of 1990, S. 2104, 101st Cong., 2d Sess. (1990): H.R. 4000, 101st Cong., 2d Sess. (1990). *See* S. REP. No. 315, 101st Cong., 2d Sess. 24-27 (1990).

In drafting the statute, Congress responded to the Supreme Court's observation that Congress had the power to change the result of *Martin* by devising a specific remedial scheme. The articulated purpose of the new statute was to steer a "middle course between *Martin*, which was considered overly expansive in permitting collateral challenges, and the majority of lower court decisions that precluded all collateral attacks." H.R. REP. No. 40, *supra* note 6, at 59-60.

[114] Pub. L. No. 102-166, Sec. 108, § 703(n)(1)(A), 105 Stat. 1071, 1075 (to be codified at 42 U.S.C. § 2000e-2). Section 108 is entitled "Facilitating Prompt and Orderly Resolution of Challenges to Employment Practices Implementing Litigated or Consent Judgments or Orders."

> A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—
> (i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had—
> (I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and
> (II) a reasonable opportunity to present objections to such judgment or order; or
> (ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.[115]

The most obvious significance of this provision is that, to the extent its requirements are satisfied, the employment practice is immunized from subsequent attack. Thus, regardless of the validity of the underlying practice in the abstract, it will be "legal" in the sense that it cannot be attacked either to change the actual practice or to obtain damages.[116] This immunity is the most radical change from prior law. *Martin*, read most broadly, left employment practices implementing consent or litigated decrees wholly subject to attack; even read most narrowly as we suggest, *Martin* would still permit attacks that do not require a direct conflict with the decree, as by awarding damages to persons displaced by decreed remedies.

Second, the statute applies not only to federal judgments, but also to state orders and judgments that resolve federal civil

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[115] § 703(n)(1)(B). This article does not address the retroactivity of the new statute. One district court recently summarized the confused state of the law on this question as follows:

> No clear trend has emerged. Although the three courts of appeals to consider the issue have ruled in favor of prospectively applying the 1991 Act, the Court of Appeals for the Third Circuit is not among them. See Mozee v. American Commercial Marine Service Company, 1992 WL 92511 (7th Cir. May 7, 1992); Fray v. Omaha World Herald Company, 1992 WL 65663 (8th Cir. Apr. 3, 1992); Vogel v. City of Cincinnati, 1992 WL 45451 (6th Cir. Mar. 13, 1992). District Courts are almost evenly divided.

Sanko v. Port Auth. of Allegheny County, No. Civ. A87-2390, 1992 WL 110466 (W.D. Pa. May 22, 1992).

[116] Should one of the parties to a consent decree seek to modify it, as to conform it to changes in the law or to deal with unforeseen hardships, Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748 (1992), the resulting change may generate new problems concerning the effectiveness of the decree in terms of this statute.

rights and constitutional claims.[117] Absent application of the statute to state judgments, a glaring gap would be created in the statute's protective shield. A growing number of federally based employment claims are being brought in state court. Unless the statute's provision were to apply to state judgments, state court ordered affirmative action schemes would only be protected if the states enacted statutes similar to the 1991 Act. Given the statute's directive, even if the rendering state would not, under its law, immunize the employment practice from attack, the state judgment now protects the employment practice from challenge as a violation of the Constitution or federal civil rights law. The statute thus modifies the general rule that federal courts must give state judgments the same preclusive effect as the rendering state would accord them.[118]

The immunity the statute provides is significant both retrospectively and prospectively. An employer, having entered a qualifying decree, can rely on not being second-guessed by a subsequent court. Perhaps even more important, parties considering a settlement via consent decree can be expected to structure their agreement to maximize the prospects of immunity.

In approaching the statute, two questions are important. First, the scope or extent of the immunity created and, second, the requirements for immunity to attach.

A. *Scope of Immunity*

The statute's grant of immunity is expressly limited. Under its terms, a qualifying employment practice "may not be challenged in a claim *under the Constitution or Federal civil rights laws.*"[119] This raises several issues. First, any challenge that is

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[117] In this regard, the statute immunizes employment practices more broadly than any change in the federal joinder and intervention rules could.

[118] There is little question that Congress has the power to give state judgments resolving federal claims less preclusive effect than the rendering state would. *See* note 8 *supra*. But does Congress have the power to give the state judgment greater effect? If one views the statute simply in preclusion terms, one may question the ability of Congress to modify state preclusion rules. On the other hand, one can view the statute substantively, as legalizing an employment practice that might otherwise be a violation of federal law. Apart from constitutional constraints, Congress has the power to shield employment practices under federal law.

[119] § 703(n)(1)(A)-(B) (emphasis added). A qualifying employment practice is one that is in accordance with a "litigated or consent judgment or order" following an employment discrimination claim brought under the Constitution or federal civil laws.

not predicated on a "federal civil rights law" or the Constitution is not barred by this provision. For example, if a consent order would require conduct contrary to the Fair Labor Standards Act, the practice could still be attacked.[120] Presumably, such federal claims would be treated under the *Martin v. Wilks* analysis.

Second, the immunity does not reach judgments, whether by state or federal court, resolving disputes on the basis of *state* law. Any employment practice implemented solely in response to state law claims may still be open to challenge under state preclusion principles.[121] Ironically, then, a defendant might insist on a complaint being amended to add a federal civil rights claim before agreeing to a consent order resolving it, or at least having the consent order recite that it also resolves federally based claims.

Third, the terms of this provision do not, expressly at least, immunize the employment practice against suits based on state law. If this language was chosen advisedly, Congress explicitly decided to leave potential state claims unaffected by the immunity created by the statute. Under such a view, there would be no Supremacy Clause issue because Congress would have permitted states to challenge practices mandated by federal decrees.[122]

Such a view, however, would tend to eviscerate the whole purpose of the new statute. Since most states have civil rights laws tracking the federal statute, to allow state-based attacks on employment practices mandated by federal decrees would effectively deprive the vast majority of federal judgments of meaningful immunizing effect. Accordingly, the drafters probably did not intend to allow state-based claims against court ordered restructuring in the workplace: in confining the newly created immunity they probably simply overlooked potential state-based claims.

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§ 703(n)(1)(A).

[120] 52 Stat. 106, 29 U.S.C. § 201. This law establishes minimum wage and maximum hour requirements for covered employers. A decree that established compensation in violation of FLSA commands would not immunize the implementing practices.

[121] The immunity created by a state judgment resolving state laws claims would turn on the particular state's procedural law.

[122] *Cf.* note 118 *supra.*

B. *Requirements for Immunity*

1. Persons Barred From Challenging the Decree

What, then, is necessary for a decree to immunize an employment practice? Two kinds of "persons" are barred from challenging such employment practices,[123] a phrasing that suggests that the ability of any subsequent plaintiff to attack an underlying practice must be assessed individually. As a result, practices will be completely immunized only if every possible plaintiff is barred.[124]

a. *Actual Notice*

The first category of persons barred are those who, before entry of the judgment, had "actual notice" that the judgment or order "might adversely affect [their] interests and legal rights" and a reasonable opportunity to present objections.[125] Actual notice clearly means that constructive notice, as by newspaper advertisements or notice to unions, will not suffice. Thus, an employer cannot rely on such devices as posting notices in the workplace. Nevertheless, should a potential plaintiff receive notice, even informally or by word of mouth, that person will be barred if the other requirements are satisfied.[126]

An employer agreeing to a remedial scheme affecting only identifiable employees could resort to the "actual notice" provision of the statute. The most effective and probably least expensive method of notifying current employees would be to include a notice along with employees' paychecks; retirees whose benefits might be affected could receive notice in a similar manner. In this way the employer could avoid factual disputes concern-

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[123] § 703(n)(1)(B)(i) & (ii).

[124] Both the 1990 Civil Rights Bill vetoed by the President and the 1991 version as reported by Committee and passed by the House on June 5, 1991, provided that the decreed practice would also, in some cases, be immune from attack "(3) where the court determines that reasonable efforts were made to provide notice to interested persons." H.R. REP. No. 40, *supra* note 6, at 55. The analog to this "reasonable notice" provision can be found in bankruptcy and probate practice which both foreclose subsequent claims by persons for whom reasonable efforts were made to notify before entry of judgment. *Id.* at 57-58

[125] § 703(n)(1)(B)(i). Contrary to *Martin* directive, Congress placed the onus on the interested third party to decide whether to enter the litigation rather than require the original parties to join potentially affected persons under Rule 19.

[126] H.R. REP. No. 40, *supra* note 6, at 51; *id.* at 20.

ing the receipt of actual notice.[127]

A remedial scheme affecting unidentifiable persons could not be sheltered by this provision. For example, the employer in *Martin* who agreed to a remedial *hiring* plan would be unable to actually notify all potential applicants. While a conspicuous notice in the newspapers might give actual notice to some adversely affected persons, the statute apparently contemplates notice to each and every person who might claim the hiring practice to be unlawful.[128] Thus, the insistence on actual notice, which is more than constitutionally required, may very well limit the remedial options available to *A* and *B*.[129]

In this regard, the 1991 Act is significantly different from the 1990 version vetoed by the President. That proposal immunized the ordered employment practices if it were determined that reasonable efforts had been made to notify interested persons prior to entry of the order.[130] Although this category of precluded persons was included in an earlier version of the 1991 bill,[131] Congress ultimately decided to give less sweeping protection to employment practices implementing litigated and consent judgments.[132]

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[127] Certain commentators have suggested that it is not actual notice that satisfies due process but rather a sufficient system for giving notice. *See* Strickler, *supra* note 4, at 1579 n.99. While it is true that an adequate system for providing notice will suffice, even if particular individuals do not get actual notice, it is hard to see how a person who received actual notice could claim a denial of due process even if the system for providing notice were somehow deficient. EEOC v. Pan Am. World Airways, Inc., 897 F.2d 1499, 1508 (9th Cir.) (actual notice of pending ADEA action sufficient), *cert. denied*, 111 S. Ct. 55 (1990). Kramer, *supra* note 2, at 347. *See* National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964).

[128] The notice provision ultimately enacted is inconsistent with relevant portions of the legislative history. The House report, citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), states that notice is to be given to "reasonably ascertainable" interested parties. H.R. REP. No. 40, *supra* note 6, at 594-96.

[129] For example, a remedial promotion scheme may be immunized by giving actual notice to all current employees. An affirmative action hiring scheme, however, would be virtually impossible to immunize under the first category of the statute. *But see* Issacharoff, *supra* note 13, at 238 (since applicants do not have a protectable interest, entry-level affirmative action plans pose no problem under *Martin*). As to whether it could be immunized under the second category, § 703(n)(1)(B)(ii); *see* notes 139-43 and accompanying text *infra*. Also, the statute does not address the case management issues that will undoubtedly arise once actual notice is given to all potentially affected persons.

[130] H.R. 4000, S. 2104, 101st Cong., 2d Sess. § 2(a)(1) (1990).

[131] *See* 137 CONG. REC. H3879 (daily ed. June 4, 1991) (reporting out H.R. 1 by the House Committee on Education and Labor).

[132] The President's Civil Rights bill would have left *Martin* untouched. As intro-

Finally, the statute does not specify what should be included in the notice. Clearly, the notice should set forth the proposed order, explain the impact the order may have on the persons affected, notify the nonparties of their right to object to the proposal, and that failure to object will bar future challenges to the proposed scheme.[133]

b. *Persons Adequately Represented*

Second, "a person whose interests were adequately represented by another person who had previously challenged the judgment" is also barred from suit. This second category does not require actual notice to each person potentially affected by the decree.[134] But while the notice burden is less, the level of protection is also reduced. The affected nonparties are barred from attacking the employment practice only if they were ade-

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duced by Senator Michel, the President's version provided:

> Sec. 5. FINALITY OF JUDGMENTS OR ORDERS
>
> For purposes of determining whether a litigated or consent judgment or order resolving a claim of employment discrimination because of race, color, religion, sex, national origin, or disability shall bind only those individuals who were parties to the judgment or order, the Federal Rules of Civil Procedure shall apply in the same manner as they apply with respect to other civil causes of action.

H.R. 1375, 102d Cong., 1st Sess. (1990), *reprinted in* 137 CONG. REC. H3897 (daily ed. June 4, 1991). The Administration's version submitted in the Senate was virtually identical. S. 611, 102d Cong., 1st Sess. (1990), *reprinted in* 137 CONG. REC. S3022-23 (Mar. 12, 1991). As stated in note 128 *supra*, the House version would have extended the immunity very broadly. The Danforth-Kennedy version passed on October 30, 1991, was a compromise which severely limits the proposed statute's effectiveness by making the immunity more difficult to achieve.

[133] The notice used in *Martin, see* note 22 *supra*, would be too vague to satisfy the statute.

[134] Assuming true adequacy of representation, there would seem to be no constitutional objection to the second criterion of the Act. *See* Strickler, *supra* note 4, at 1575 n.84. In addition to citing the class action example, Professor Strickler notes that: "Preclusion has been extended to nonparties who have had control over the actions of parties." *Id.* (citing Note, *Collateral estoppel of Nonparties*, 87 HARV. L. REV. 1485, 1497-98 (1974); Nina Cortell, Comment. *The Expanding Scope of the Res Judicata Bar*, 54 TEX. L. REV. 527, 529-33 (1976)). He also notes the doctrine of "virtual representation," that is, where an absentee's interests are closely aligned to those of a party. *Id.* (citing Allan D. Vestal, *Res Judicata/Preclusion: Expansion*, 47 S. CAL. L. REV. 357 (1974); Louis Touton, Note, *Preclusion of Absent Disputants to Compel Intervention*, 79 COLUM. L. REV. 1551, 1557-62 (1979)). See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979), discussed in text accompanying notes 85-91 *supra*.

quately represented by a party to the litigation.[135] Even then, there are limitations on the extent of the bar.[136]

Consider the case where the employer *B* vigorously litigates a case brought by *A*. Should *A* prevail, *C* would presumably be barred from suit on all issues actually litigated. Where a consent decree exists, however, *B*'s interest dramatically diverges from *C*'s. While *B* could theoretically continue to advance *C*'s interests (either out of conviction or for fear of the consequences of liability to *C* of not doing so), it is no longer clear that *B* is an adequate representative.[137] Indeed, determining this might well require a proceeding that would rival a trial itself. Perhaps the appropriate rule is simply to presume no adequacy of representation where there is a showing of diverse interests.

A closer case may arise where *A* sues not only the employer, B_1 but also the union, B_2. While the employer's interests may diverge from those of *C*, a white employee who is also a member of the union may be adequately represented by the union.[138] If so, any judgment is binding on all the union members and possibly on non-union employees.

In any event, the nonparty is barred from relitigating only those issues litigated by the representative. The effect is thus one of issue, not claim, preclusion. This appears to be the intention of the provision barring suit where the prior litigation was conducted "on the same legal grounds and with a similar factual situation."[139] Suppose women sue an employer for pregnancy discrimination and the employer defends vigorously, claiming that it did not discriminate on the basis of pregnancy. The re-

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[135] § 703(n)(1)(B)(ii). The concept of "adequate representation" appears at least twice in the Federal Rules. It is a requirement for certain class actions, FED. R. CIV. P. 23., and the lack of adequate representation is a criterion for intervention of right, under FED. R. CIV. P. 24(a). *See, e.g.*, Trbovich v. United Mine Workers, 404 U.S. 528 (1972). *See also* Vreeland, *supra* note 49.

[136] *See* note 115 *supra* (text of provision); notes 139-43 and accompanying text *infra*.

[137] *See* Jeffries v. Georgia Residential Fin. Auth., 678 F.2d 919, 928-29, *cert. denied*, 459 U.S. 971 (1982).

[138] *Compare* English v. Seaboard Coast Line R.R., 465 F.2d 43 (5th Cir. 1972) (union could not adequately represent the interests of both black and white members) *with* Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969) (union could seek to correct injustices to a substantial minority of its members). *Cf.* Detroit Police Officers Ass'n v. Young, 824 F.2d 512 (6th Cir. 1987); NAACP v. Detroit Police Officers Ass'n, 821 F.2d 328 (6th Cir. 1987) (discussed at note 26 *supra*).

[139] § 703(n)(1)(B)(ii).

sulting decree provides seniority relief to the successful plaintiffs, jumping them over male workers. The males then sue the employer, claiming discrimination in the "constructive seniority" for women. The issue of discrimination vel non has been litigated and cannot be relitigated. Could the males, however, claim that the discrimination was a bona fide occupational qualification (bfoq), an issue not raised by the employer? Of course, the male plaintiffs might also claim that the employer's failure to raise the bfoq defense in the earlier suit was evidence that the employer was not an adequate representative. In fact, the adequacy of representation may tend to merge with the question of what issues, factual or legal, are raised.[140]

Even when the common issue requirement is satisfied, there is an exception where "there has been an intervening change in law or fact."[141] An example of a change in the law might be the Supreme Court's tightening scrutiny of affirmative action plans of public employers.[142] Presumably, an employer's resistance to a court order under more permissive standards would not, even assuming the employer was an adequate representative, bar a white worker from challenging an affirmative action plan after the law changed.[143]

More difficult than the change of law notion is the exception for an "intervening change in . . . fact." This is especially perplexing given that the only time the immunity applies is when there is a "similar factual situation." The statute seems to suggest that *C* will not be barred when the facts have changed although the factual situation is similar. Perhaps Congress meant the rule to apply to the general facts in litigation, and the exception to apply when (although the general facts may stay the same) the facts relating to the particular plaintiff *C* are different. For example, suppose that the *A-B* suit results in giving *A*

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[140] An exception to this is where the employer intentionally foregoes an issue for strategic reasons only. This might make the employer an adequate representative, even though C would not be barred from suing on the issues not raised by the employer.

[141] § 703(n)(1)(B)(ii). These requirements are much more limiting than was true under the proposed Civil Rights Act of 1990. Under that bill, there was no limitation to issue preclusion, nor was there any provision for intervening change in law or fact. *See* H.R. 4000, S. 2104 *supra* note 130.

[142] *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

[143] It is not clear whether this is a meaningful provision since, under normal preclusion principles, a change in the law is a factor cutting against preclusion. At the least, however, the statute codifies that principle for cases within it.

remedial seniority, thereby moving *C* down relative to *A*. If it appeared that the effect of this change at the time it was made would be only to defer *C*'s promotion, it might be fair to immunize the decree; if, however, changing economic conditions later put *C*'s very job at risk, perhaps *B*'s immunity should be limited.

c. *Implementing the Opportunity to be Heard*

Those who have actual notice of the "proposed judgment or order" will be barred only if they had "a reasonable opportunity to present objections."[144] Of course, this provision makes sense with respect to a consent decree that, once it is agreed to between the parties, can be promulgated to affected persons before being actually entered by the court.[145] However, what this means for litigated decrees is uncertain: the judgment will not be entered until after trial, and at that point it is too late to allow nonparties to participate. Did Congress mean to include persons who had actual notice of the possibility of such a judgment, as by notice of a trial placing their interests at issue? If the phrasing of the statute is relied upon, notice must be "of the proposed judgment," not merely of the litigation or the possibility of an adverse judgment. Further, given the multiplicity of possible remedies even when discrimination is established, it does not follow that an individual who knows of the litigation, and even knows of the relief sought in the complaint, will have notice of the "proposed judgment" that eventuates. Finally, it is not clear what the legal system should do with respect to a fully tried case in which a person adversely affected seeks to derail an otherwise valid judgment.

As a practical matter, it may be that practices under litigated judgments will be immunized only if *C*'s interests were adequately represented, while consent decrees will be immunized if there was adequate representation or if there was notice and a reasonable opportunity to be heard.

Turning to the latter, the statute contemplates immunizing a practice from attack by *C* if *C*, in addition to actual notice, had an "opportunity . . . to *present objections* to such judg-

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[144] § 703(n)(1)(B)(i)(I)&(II).

[145] In fact, in the antitrust area, there is a specific statutory provision for notice and comment before the entry of a consent decree. 15 U.S.C. § 16(b) (1988).

ment."[146] This suggests that *C*'s opportunity for a full trial, or even an evidentiary hearing, is not critical to *B*'s immunity. The implication is that the kind of fairness hearing held in the *Martin* litigation, although not an evidentiary hearing, would suffice.

However, this does not necessarily mean that *C* can be deprived of a full trial. The necessity for full participation depends on constitutional issues of due process. The new amendment does provide that it shall *not* be construed to "authorize or permit the denial to any person of the due process of law required by the Constitution."[147] This last provision makes explicit what is implicit in the rest of the statute. While *Martin* was phrased in terms of a construction of the Federal Rules, there are clearly constitutional questions about subjecting individuals to decrees in actions to which they are not parties. The obvious theory of the Congress was that due process concerns are satisfied by either (1) notice and opportunity to be heard or (2) adequate representation by a party to the action. The former principle is, of course, the core due process requirement,[148] while the latter is the constitutional basis of class action law.[149]

At this level of generality, there can be no question about due process. Rather, the real questions will arise when the courts determine what constitutes actual notice and an opportunity to be heard. It is here that the statute's caution about due process may be helpful.[150] One reading of the statute is that the fairness hearing provided in *Martin* will be sufficient to bar *C* from attacking the employment practice: interested nonparties should not be allowed to intervene if their application is untimely or if they fail to meet the other standards for intervention. On the other hand, the interests of the nonparties may be so significant that nothing short of full participation in the litigation will satisfy the statute's requirement that nonparties be given an opportunity to be heard.

Although subparagraph (B)(i) is phrased in terms of a "reasonable opportunity to present objections" to the court, the reasonableness of the opportunity must be assessed in terms of the

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[146] § 703(n)(1)(B)(i)(II) (emphasis added).
[147] § 703(n)(2)(D).
[148] *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).
[149] *See* Hansberry v. Lee, 311 U.S. 32 (1940).
[150] § 703 (n)(2)(A), (D).

interests to be protected.[151] Some interests would seem to justify full participation. An example may make this clear. Suppose female plaintiffs and the employer agree that the employer has violated Title VII in its promotions. The agreed remedy is to give all current female employees a ten-point preference on the employer's rating system in future promotion decisions. Such a gender preference would undoubtedly violate Title VII were it not a remedy for past discrimination. Even as a remedy for proven discrimination, it may well go too far in favoring all women, even though probably not all of them were disadvantaged by prior promotion decisions. Simply offering male workers an opportunity to air their objections would not seem to satisfy due process—the appropriateness of the decree turns on disputed questions of fact and law: was there prior discrimination against females and, if so, how pervasive was it? Presumably, due process would accord the males the right to prove that the predicates of the decree are incorrect, at least if they could make a prima facie showing to that effect.[152]

Assuming that due process requires an opportunity for full participation in order to be bound, the statute's immunity provision may be in tension with Rule 24.[153] On the one hand, the statute itself purports not to affect Rule 24; the statute provides that it shall *not* be construed to "alter the standards for inter-

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[151] The drafters recognized that a case-by-case analysis would have to be made in accord with Boddie v. Connecticut, 401 U.S. 371, 378 (1971) (due process necessitates "an *opportunity* . . . granted at a meaningful time and in a meaningful manner for [a] hearing appropriate to the case"). *See* H.R. REP. No. 40, *supra* note 6, at 56; Mark E. Recktenwald, Comment, *Collateral Attacks on Employment Discrimination Consent Decrees*, 53 U. CHI. L. REV. 147, 181 n.139 (1986) (few courts have approved use of fairness hearings to dispose of nonminority claims).

[152] A contrary argument might be that due process is not implicated by the immunity scheme Congress created. By granting immunity from causes of action it created in the first place, Congress does not violate due process. The only question is whether Congress can limit the rights of potential Title VII plaintiffs by creating an immunity to what would otherwise be legitimate Title VII claims. Suppose Congress had barred discrimination only against minorities and women, not making discrimination against white males actionable. This would raise no due process questions, and would also be valid under the Equal Protection Clause. The immunity scheme created by the 1991 statute is less sweeping than that, and therefore would also be permissible.

[153] Under Rule 24, a nonparty must show that it has such an interest in the subject matter of the litigation, that the disposition of the litigation without its participation will impair or impede its ability to protect its interest, that the named parties do not adequately protect its interest, and that the application for intervention is timely. *See, e.g.*, Grubbs v. Norris, 870 F.2d 343 (6th Cir. 1989).

vention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened." On the other hand, Rule 24 will not always insure that *C* can intervene in a manner sufficient to protect its interests. For example, before *Martin*, the timeliness requirement of Rule 24 posed a serious obstacle to intervention, and the considerations leading to this result have not changed. Factors the court considers in determining whether intervention is timely include: the point to which the litigation has progressed; the purpose of the intervention; the extent to which the delay in seeking intervention is excusable; and the prejudice to the original parties caused by the intervenor's delay in seeking intervention.[154] In balancing these factors, many courts, including the district court in *Martin*, denied intervention.[155] This was particularly true if intervention were sought at the remedial stage. In the interest of judicial economy and the named parties, courts understandably were reluctant to permit intervention at such late stages of litigation.[156]

Notwithstanding the statute's directive on rule 24, the immunity provision may require a rethinking of the timeliness rule. Since *Martin* informs us that *C* can commence a separate suit against *B* to challenge the remedial scheme agreed to in prior litigation, the denial of intervention on timeliness grounds will not often be justified. Simply stated, the goal of judicial economy will not be served. *Martin* itself illustrates the problem. Having been denied intervention as untimely, other white firefighters just shifted the dispute to another forum. Accordingly, some courts in the post-*Martin* era recognized that strict application of the timeliness requirement was counterproductive and that practical considerations pointed to intervention as preferable to consecutive actions.[157] Nevertheless, in extreme sit-

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[154] *See, e.g.*, Culbreath v. Dukakis, 630 F.2d 15, 20 (1st Cir. 1980); Hefner v. New Orleans Pub. Serv., Inc., 605 F.2d 893 (5th Cir. 1979), *cert. denied*, 455 U.S. 955 (1980).

[155] *See* note 23 *supra*.

[156] The timeliness requirement put the *C*s of the world in a Catch-22 position. If they sought intervention at an early stage of litigation, their motion might be denied as premature since the harm to their interest was not apparent. Yet, if they waited until the remedial stage, their motion might be deemed untimely.

[157] *See, e.g.*, United States v. City of Chicago, 870 F.2d 1256 (7th Cir. 1989) (even though independent second action was permissible post-*Martin*, practical considerations pointed to intervention as a preferred procedural device). *But see* Dixon v. Margolis, No.

uations, some applications for intervention will continue to be untimely, raising the question of whether the statutory immunity is thereby unavailable because *C* did not have a reasonable opportunity to participate fully.

In short, to give full effect to the immunity envisioned by the statute, the courts may have to reinterpret the requirement of timeliness for intervention. Failing to do that may prevent the immunity from attaching because there was not a "reasonable opportunity" for *C* to protect its interests adequately.

d. *Miscellaneous Provisions*

Finally, another provision of new section 703(n) specifies that it shall *not* be construed to "apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government."[158] This "savings clause" seems designed to ensure that the rules governing litigation on behalf of plaintiffs continue unaffected. The first part of the provision, dealing with class actions, seems unobjectionable: the validity of the judgment in a class action vis-à-vis class members turns, inter alia, on the adequacy of representation of the class, therefore the new statute would not seem to change the law in any event.[159] As for federal government actions on behalf of individuals, Title VII elsewhere provides mechanisms for protecting individual rights in such actions.[160] Thus, this provision seems enacted out of a surplus of caution.

Further, the statute preserves traditional exceptions to the effect of judgments by providing that new section 703(n) shall *not* be construed to "prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction."[161]

89-C-5019, 1992 WL 80512 (N.D. Ill. April 14, 1992).

[158] § 703(n)(2)(B).

[159] FED. R. CIV. P. 23(i)(3).

[160] SULLIVAN, ZIMMER & RICHARDS, *supra* note 12, § 30.8.

[161] § 703(n)(2)(C).

Finally, the statute provides that, should a challenge be mounted to a decree, it is normally to be raised before the court that entered the decree:

> Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code.[162]

Presumably, this provision will allow all interested parties, (*A, B* and *C)* to resolve their disputes before the district court judge most familiar with the underlying litigation.

One noticeable omission from the statute is any reference to Rule 19. Congress intended to steer a middle course between *Martin v. Wilks*'s Rule 19 joinder requirement—that all adversely affected persons must be joined to insulate an employment practice—and the collateral bar rule that had been adopted by a majority of the circuit courts. Presumably persons who fall into either of the statute's categories of persons barred from challenging the decreed employment practice need not be joined under Rule 19. Otherwise section 108 would be of no import and *Martin v. Wilks* would be left entirely intact. For the sake of clarity Congress should have made reference to Rule 19. Still one should interpret the statute as a direct response to the Supreme Court's preference for mandatory Rule 19 joinder. If the statute's immunity provisions are satisfied, the parties need not be concerned with joining the nonparties under Rule 19.

CONCLUSION

The provision of the Civil Rights Act of 1991 designed to overrule *Martin v. Wilks* is very limited in its application: it protects only employment practices implemented by a litigated or consent judgment resolving federal civil rights disputes from subsequent federal civil rights and constitutional claims. Outside this prescribed area the principles of *Martin* still apply. Even for those claims within its ambit, the new law is likely to have considerably less effect than its sponsors may have anticipated. The requirements for sheltering employment practices within

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[162] § 703(n)(3).

the immunity of a decree are so stringent as not to offer flexibility in shaping remedial schemes, whether worked by the parties through a consent decree or the courts in structuring judgments after litigation. Presumably, where the requirements of the statute are not met, *Martin* still controls. In short, even in the employment area, *Martin v. Wilks* remains alive and well, if not quite as hale and hearty as when it was originally handed down in 1989.

Nevertheless, this conclusion is not as depressing for the proponents of civil rights as one might suppose. *Martin*, properly read, is not such a blow to decrees as was initially thought. Once a decree has been entered, and despite the tenor of the majority's opinion, courts should try to accommodate the decree when resolving subsequent suits. This can always be done where the interests of the plaintiffs in the subsequent suit can be fully satisfied by monetary remedies. Where that is not true, and the two interests are irreconcilable, it still does not follow that the prior judgment cannot be respected. Just as in the case of conflicting contract claims to real property, an earlier decree may be held to limit the remedies otherwise available to a subsequent plaintiff.

Since respect for the prior decree is still possible post-*Martin*, the real problem with that decision has less to do with the finality of judgments than it does with the effect on the parties' willingness to settle. Because a decree does not protect the employer from multiple liability, or at least multiple litigation, employers will be less likely to settle suits, or at least will try to in ways that limit their risks to third parties. Short of a statutory amendment that broadens the classes of persons barred from attacking decreed employment practices, consent decrees will not accord the immunity the drafters may have hoped.