Title VII Class Actions

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Class actions under rule 23 of the Federal Rules of Civil Procedure[1] are a common means of enforcing Title VII of the Civil Rights Act of 1964,[2] which generally prohibits discrimination in employment on the basis of race, national origin, sex, or religion. Private plaintiffs in Title VII cases frequently seek relief on behalf of all past, present, and future victims of the defendant's allegedly discriminatory practices.[3] Indeed, boilerplate class action allegations have become so common that they have prompted repeated condemnation in judicial decisions.[4] Plaintiffs, or more plausibly their counsel,[5] have brought class actions in order to expand the scope of relief. In an individual action, a judgment against the defendant usually benefits only those who sue in their own names,[6] but in a class action it benefits the entire class. Plaintiffs may seek expanded relief to spread the cost of litigation[7] or to achieve broader goals of institutional reform.[8] Their lawyers have the added incentive in Title VII cases of increased awards of attorney's fees if judgment is rendered for the class.[9] Conversely, defendants

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[1] FED. R. CIV. P. 23.

[2] Civil Rights Act of 1964 §§ 701-718, 42 U.S.C. §§ 2000e-2000e-17 (1976 & Supp. II 1978).

[3] S. AGID, FAIR EMPLOYMENT LITIGATION MANUAL 116-17 (1975); 4 H. NEWBERG ON CLASS ACTIONS § 7985b, at 1316 (1977).

[4] The Fourth Circuit has been particularly insistent. Belcher v. Bassett Furniture Indus., Inc., 588 F.2d 904, 906 & n.2 (4th Cir. 1978); Shelton v. Pargo, Inc., 582 F.2d 1298, 1312 (4th Cir. 1978); *see* Doctor v. Seaboard Coast Line R.R., 540 F.2d 699, 706-07 (4th Cir. 1976).

[5] *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1578-80 (1976) [hereinafter cited as *Developments*].

[6] Some decisions, however, have held otherwise. *E.g.*, Gray v. IBEW, 73 F.R.D. 638, 640-41 (D.D.C. 1977). *See* text and note at note 76 *infra*.

[7] *Developments*, *supra* note 5, at 1353-54.

[8] Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 674-75 (1979).

[9] Civil Rights Act of 1964 § 706(k), 42 U.S.C. § 2000e-5(k) (1976).

almost invariably oppose certification in order to limit their exposure to monetary and injunctive relief.

Judges called upon to certify Title VII class actions have acted with less predictability than litigants and their counsel. The range of judicial attitudes is exemplified by two frequently repeated maxims: "Racial discrimination is by definition class discrimination . . . . ";[10] "But careful attention to the requirements of [rule 23] remains nonetheless indispensable."[11] Commentators also have reached varying conclusions, but one line of argument has been particularly influential. It contends that, in general, rule 23 should be molded to the substantive law under which particular claims are brought.[12] In Title VII cases, in particular, the rule should be interpreted liberally in favor of certification because of the substantive policy against discrimination.[13] But advocates of this view

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[10] Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968).

[11] East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 408 (1977).

[12] Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 738-39 (1975); *Developments*, *supra* note 5, at 1353-72; *see* 3B J. MOORE, FEDERAL PRACTICE ¶ 23.46, at 23-396 to -416 (2d ed. 1978).

[13] *See* Meyers, *Title VII Class Actions: Promises and Pitfalls*, 8 LOY. CHI. L.J. 767, 788 (1977); Peck, *The Equal Employment Opportunity Commission: Developments in the Administrative Process*, 51 WASH. L. REV. 831, 838-40 (1976); Smalls, *Class Actions Under Title VII: Some Current Procedural Problems*, 25 AM. U.L. REV. 821, 874 (1976); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1218-21 (1971); Comment, *The Proper Scope of Representation in Title VII Class Actions: A Comment on* East Texas Motor Freight System, Inc. v. Rodriguez, 13 HARV. C.R.-C.L. L. REV. 175, 197-99 (1978) [hereinafter cited as Comment, *The Proper Scope of Representation*]; Note, *Title VII and Postjudgment Class Actions*, 47 IND. L.J. 350, 364-65 (1972); Note, *Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2)*, 88 Yale L.J. 868, 884-91 (1979).

Other commentators have followed the courts in emphasizing that the requirements of rule 23 still must be satisfied. *See* Miller, *Class Actions and Employment Discrimination Under Title VII of the Civil Rights Act of 1964*, 43 MISS. L.J. 275, 280-85 (1972); Note, *The Class Action Device in Title VII Suits*, 28 S.C.L. REV. 639, 685-86 (1977); Comment, *Class Actions and Title VII of the Civil Rights Act of 1964: The Proper Class Representative and the Class Remedy*, 47 TUL. L. REV. 1005, 1016 (1973); Comment, *The Class Action and Title VII—An Overview*, 10 U. RICH. L. REV. 325, 338 (1976); *see* 3B J. MOORE, *supra* note 12, ¶ 23.02 [2.-7], at 23-52 to -53; 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1771, at 662-66 (1972).

Defense counsel understandably have opposed liberal certification of Title VII class actions. Ashe, *The Fair Employment Class Action: Taking a Closer Look*, 3 LITIGATION 29, 29-31 (1977); Connolly & Connolly, *Qualifying Title VII Class Action Discrimination Suits: A Defendant's Perspective*, 9 ST. MARY'S L.J. 181, 212-13 (1977); Gardner, *The Development of the Meaning of Title VII of the Civil Rights Act of 1964*, 23 ALA. L. REV. 451, 517-19 (1971); Shawe, *Processing the Explosion in Title VII Class Action Suits: Achieving Increased Compliance with Federal Rule of Civil Procedure 23(a)*, 19 WM. & MARY L. REV. 469, 517-18 (1978).

have failed to clarify the relationship between the substantive policy against discrimination and the requirements of rule 23. Which requirements of the rule are affected by the substantive policy against discrimination? Why are they made weaker instead of stronger? What basis is there in the statute or its legislative history for this modification of class action practice?

This article examines the development of the law of Title VII class actions in detail. I argue that the presumption in favor of certification, as it is usually formulated, is unsupported by rule 23 or Title VII. It has insufficient basis in congressional intent as revealed in Title VII and its legislative history, or in substantive policy as declared in subsequent judicial decisions. It may further the goal of eliminating discrimination, but only in a haphazard way and by ignoring some of the few accepted principles of class action practice. I argue that the presumption in favor of certification should be replaced by a limited precertification inquiry into the merits of the individual and class claims asserted by the named plaintiff. To the extent that substantive policies affect Title VII class actions, they are best taken into account by such an inquiry. An examination of the merits would also enable the district court to make a better determination whether the requirements of rule 23 have been met. This proposal is not a radical departure from existing practice. The federal courts often take account of the merits in one way or another before granting or denying certification, despite decisions seemingly disapproving this procedure, principally the Supreme Court's opinion in *Eisen v. Carlisle & Jacquelin.*[14] That decision, I argue, is concerned with a distinguishable issue, namely, whether the cost of notice may be shifted to the defendant after a preliminary finding of merit. The article concludes with the application of this proposal to some leading Title VII class action decisions.

I. Development of the Law of Title VII Class Actions

A. Enactment of Title VII

Title VII was enacted as part of the Civil Rights Act of 1964.[15] The Act was bitterly opposed, most effectively by a group of Southern senators who engaged in a filibuster to prevent the legis-

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[14] 417 U.S. 156 (1974).

[15] Pub. L. No. 88-352, §§ 701-716, 78 Stat. 253 (1964) (current version at 42 U.S.C. §§ 2000e-2000e-17 (1976 & Supp. II 1978)).

lation from coming to a vote.[16] The legislative maneuvers necessary to end debate in the Senate left their mark upon the Act.[17] Both procedural and substantive compromises were necessary to assure passage of Title VII. The procedural compromises were crucial to the development of class actions as a means of enforcing the statute.[18] They resulted in amendment of Title VII to deny administrative proceedings and public actions a central role in enforcing the statute, leaving private suits and class actions to fill the void.

As originally enacted, Title VII provided for private actions only after exhaustion of administrative remedies. Proceedings could be initiated either by "a person claiming to be aggrieved" or by a member of the Equal Employment Opportunity Commission ("EEOC").[19] After a charge was filed with the Commission, it conducted an investigation. If it found reasonable cause supporting the charge, it attempted to eliminate the alleged unlawful employment practice by conciliation.[20] If conciliation did not result in a settlement satisfactory to all parties, the Commission was required to notify the charging party of his right to sue, or if a charge was filed by a member of the Commission, to notify "any person whom the charge alleges was aggrieved by the alleged unlawful employment practice."[21] Suit could be brought in federal district court,[22]

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[16] *See generally* Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 443-46 (1966).

[17] *Id.* at 443-46, 457.

[18] The substantive compromises were an explicit refusal to require quotas and special protection for seniority, merit systems, and professionally developed ability tests. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(h), (j), 78 Stat. 256 (1964) (codified at 42 U.S.C. § 2000e-2(h), (j) (1976)). They are only marginally relevant to the availability of class actions, although the compromises on quotas and testing have some bearing on the theory of disproportionate adverse impact, which in turn is relevant to the availability of class actions. *See* text and notes at notes 141-144 *infra*.

[19] Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(a), 78 Stat. 259 (1964) (current version at 42 U.S.C. § 2000e-5(b) (1976)).

[20] *Id. See also id.* §§ 709, 710, 78 Stat. 262-64 (current versions at 42 U.S.C. §§ 2000e-8-2000e-9 (1976)). Exhaustion of available state or local remedies also was required. *Id.* § 706(a), (b), (e), 78 Stat. 259-60 (current version at 42 U.S.C. § 2000e-5(b), (c), (d) (1976)).

[21] *Id.* § 706(e), 78 Stat. 260 (current version at 42 U.S.C. § 2000e-5(f)(1) (1976)).

[22] *Id.* § 706(f), 78 Stat. 260-61 (current version at 42 U.S.C. § 2000e-5(f)(3) (1976)). Federal jurisdiction has sometimes been held to be exclusive, despite the absence of express statutory language to that effect. The issue, however, has arisen infrequently because few Title VII cases have been filed in state court. For surveys of the cases and the arguments, see Peterson v. Eastern Airlines, Inc., 20 Fair Empl. Prac. Cas. 1322 (W.D. Tex. 1979) (concurrent jurisdiction); Dickinson v. Chrysler Corp., 17 Fair Empl. Prac. Cas. 1393, 1394-96 (E.D. Mich. 1978) (exclusive jurisdiction); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 418-19 (2d ed. 1974).

and upon finding an intentional violation of Title VII, the court could "enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay."[23] The court could also award a reasonable attorney's fee to the prevailing party.[24] Before judgment, it could appoint an attorney for the plaintiff and allow the commencement of the action without payment of "fees, costs, or security."[25]

Public actions could be commenced by the Attorney General independently of administrative proceedings, or upon referral from the EEOC, but only if the Attorney General found reasonable cause to believe that the defendant was engaged in a "pattern or practice" of employment discrimination.[26] Jurisdiction over "pattern or practice" suits was granted to the federal district courts, and such actions were to be assigned for hearing "at the earliest practicable date" and "to be in every way expedited."[27] The Attorney General could also seek permissive intervention in private actions upon his certification "that the case is of general public importance."[28]

This allocation of enforcement powers among administrative proceedings, public actions, and private suits was the result of a series of compromises that steadily diluted the power of the EEOC to prosecute and decide cases, and steadily strengthened the power of private individuals to sue and of federal judges to adjudicate. The first version of the EEOC's enforcement authority considered in the House was approved by a subcommittee of the Committee on the Judiciary. It followed the model of the National Labor Relations Board.[29] The Commission was divided into an adjudicative board and a prosecutorial administrator.[30] A charge could be filed

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[23] Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(g), 78 Stat. 261 (1964) (current version at 42 U.S.C. § 2000e-5(g) (1976)). This broad authorization of equitable relief was qualified by provisions requiring mitigation of back pay liability and precluding affirmative relief if the respondent had acted for a nondiscriminatory reason. *Id.*

[24] *Id.* § 706(k), 78 Stat. 261 (codified at 42 U.S.C. § 2000e-5(k) (1976)).

[25] *Id.* § 706(e), 78 Stat. 260 (codified at 42 U.S.C. § 2000e-5(f)(1) (1976)).

[26] *Id.* § 707(a), 78 Stat. 261-62 (codified at 42 U.S.C. § 2000e-6(a) (1976)).

[27] *Id.* § 707(b), 78 Stat. 262 (codified at 42 U.S.C. § 2000e-6(b) (1976)).

[28] *Id.* § 706(e), 78 Stat. 260 (current version at 42 U.S.C. § 2000e-5(f)(1) (1976)).

[29] *See* National Labor Relations (Wagner) Act §§ 3-6, 9-11, 29 U.S.C. §§ 153-156, 159-161 (1976).

[30] H.R. 405, 88th Cong., 1st Sess. §§ 8, 9 (1963), *reprinted in Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United*

with the Commission "by or on behalf of any person claiming to be aggrieved" or by the administrator.[31] The board determined whether the statute had been violated, and had the power to issue cease-and-desist orders and to grant affirmative relief.[32] The administrator could petition the courts of appeals to enforce the board's orders and any person aggrieved by an order could petition for review in the courts of appeals.[33] The charging party possessed no right to a de novo judicial determination of his claim following a board decision, although he possessed a residual right to sue if proceedings before the board were not commenced within a reasonable time.[34]

The full Committee on the Judiciary, however, substituted provisions that deprived the Commission of enforcement powers but authorized it to sue in federal court upon a finding of reasonable cause.[35] If the Commission did not sue within 90 days of its finding of reasonable cause, the "person claiming to be aggrieved" could sue provided one member of the Commission agreed.[36] The Committee's shift toward judicial enforcement apparently was prompted by the belief that the EEOC would enforce the statute too harshly and that the federal courts would provide a fairer forum for those charged with discrimination.[37] The bill passed the

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States Before Subcomm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess. pt. 3, at 2331-32. The provisions of this bill were substituted for the employment discrimination provisions in the bill before the subcommittee, H.R. 7152, 88th Cong., 1st Sess. (1963), and approved by the subcommittee in that form. H.R. REP. No. 914, 88th Cong., 1st Sess. 17, 41, 57, 87, 117 (1963), *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2392-93, 2411, 2426, 2455, 2483; *see* Vaas, *supra* note 16, at 435 (1966).

[31] H.R. 405, 88th Cong., 1st Sess. § 10(b) (1963).

[32] *Id.* § 10(i).

[33] *Id.* § 11(a), (b).

[34] *Id.* §§ 10(c), 11(d).

[35] H.R. 7152, 88th Cong., 1st Sess. § 707(b) (1963), *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2404.

[36] *Id.* § 707(c), *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2405. The right to sue was further circumscribed by the Commission's duty to seek agreements with state or local agencies having "effective power to eliminate and prohibit discrimination in employment in cases covered by this title." *Id.* § 708(b), *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2405-06. In cases covered by such agreements, neither the Commission nor a private party possessed the power to sue. *Id.*

[37] The report of the Committee majority was noncommital. H.R. REP. No. 914, 88th Cong., 1st Sess. pt. 1, at 26, 28-30 (1963), *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2401, 2404-06. Supporters of the Committee bill took the view either that the change would produce greater efficiency and fairness, *id.* pt. 2, at 29, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS at 2515-16, or that it would delay enforcement proceedings but not unacceptably, *id.* at 41, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2411. Opponents either were indifferent to the change or considered it to be an insignificant moderation of

House in this form without significant debate on the allocation of enforcement powers.[38]

In the Senate, the bill was amended, weakening the enforcement powers of the EEOC even further, and it became law in this form.[39] The EEOC's power to sue was transferred to the Attorney General. Additionally, his power was restricted to "pattern or practice" cases and permissive intervention in private actions "of general public importance."[40] In addition to diluting public enforcement power, the Senate increased the attractiveness of private actions by adding provisions for appointment of an attorney for the plaintiff, waiver of fees, costs, and security, and an award of attorney's fees in the discretion of the district court.[41] The Senate diminished the scope of private remedies only by deleting the provision in the House bill allowing private persons to file charges "on behalf of" victims of discrimination.[42]

The removal of enforcement authority from the EEOC and the restrictions upon the Attorney General's power to sue inevitably left enforcement of the statute largely in the hands of private plaintiffs and federal judges. The Attorney General exercised his power to sue, as the statute seemed to command, only in a small number of relatively important cases.[43] By 1972, it had become clear that, due to inadequate funding, the Department of Justice

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the subcommittee's bill. *Id.* pt. 1, at 58, 75-76, 87, 118, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2427, 2444, 2455, 2484. *See* Vaas, *supra* note 16, at 36-37.

[38] Vaas, *supra* note 16, at 437-43. The debate in the House touched on the allocation of enforcement powers only indirectly, through expressions of concern that the EEOC's powers were too broad. *See* 110 CONG. REC. 1518, 1521 (1964) (remarks of Rep. Celler); *id.* at 2563-67 (remarks of Rep. Celler, Rep. O'Hara, Rep. McCulloch, Rep. Goodell, Rep. Lindsay, Rep. Cramer, Rep. Roosevelt, Rep. Pepper, Rep. Griffin & Rep. Poff); *id.* at 2715 (remarks of Rep. Goodell).

[39] Vass, *supra* note 16, at 446.

[40] Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 706(e), 707(a), 78 Stat. 260, 261 (1964) (current versions at 42 U.S.C. §§ 2000e-5(f)(1), 2000e-6(a) (1976)).

[41] *Id.* § 706(e), (k), 78 Stat. 260, 261 (codified at 42 U.S.C. § 2000e-5(f)(1), (k) (1976)). *See* text at note 89 *infra*.

[42] *Id.* § 706(a), 78 Stat. 259 (current version at 42 U.S.C. § 2000e-5(b) (1976)). Senator Dirksen sought this change in order to distinguish between "two types of court action, those brought by an individual to seek redress of a civil wrong or those brought by the Attorney General to correct a public wrong." 110 CONG. REC. 8193 (1964) (remarks of Sen. Dirksen); *see id.* at 7217 (remarks of Sen. Clark in response to questions by Sen. Dirksen); Vaas, *supra* note 16, at 446-47, 452-53.

[43] U.S. DEP'T OF JUSTICE, 1972 ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES 80-81 (1972). The Civil Rights Division of the Justice Department filed 26 cases concerned with employment in fiscal year 1968, 20 in fiscal year 1969, 10 in fiscal year 1970, 18 in fiscal year 1971, and 34 in fiscal year 1972. *Id.* at 86.

was unable to pursue a significant percentage of even these cases.[44] It also had become clear that the EEOC could not process the increasing number of charges that it received quickly enough to forestall private suits. The volume of charges greatly exceeded the expectations of the Commission and Congress, and as the backlog of pending charges increased,[45] it became apparent that the statutory time limits for processing charges could not be met; yet failure to meet those time limits was sufficient grounds for private litigation.[46] Both public enforcement actions and public administrative proceedings were eclipsed by private actions as the most effective means of enforcing the statute.

The prominent role of private actions was anticipated in part in the statutory language,[47] but the importance of class actions was not anticipated at all. Neither the statute nor its legislative history endorsed class actions as a favored means of private litigation. Class actions escaped congressional notice in part because they did not attain prominence until the 1966 revision of rule 23,[48] but more significantly, because Congress expressly dealt with the issue of classwide litigation by granting authority to the Attorney General

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[44] H.R. REP. No. 238, 92d Cong., 2d Sess. 122 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2149; 118 CONG. REC. 4080-82 (1972) (remarks of Sen. Javits & Sen. Williams).

[45] 118 CONG. REC. 4080 (1972) (remarks of Sen. Williams). The backlog of charges pending with the Commission for investigation or conciliation steadily increased, both in absolute terms and relative to the number of such charges finally disposed of each year. At the end of fiscal year 1969, 7,117 charges were pending for investigation or conciliation and 6,781 had been finally disposed of after investigation or conciliation; at the end of fiscal year 1970, the corresponding figures were 12,355 and 5,237; and at the end of fiscal year 1971, they were 22,026 and 6,977. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, FOURTH ANNUAL REPORT 34 (1970); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, FIFTH ANNUAL REPORT 64-65 (1971); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, SIXTH ANNUAL REPORT 55 (1972) (Calculations from figures for charges referred for investigation or conciliation. Charges finally disposed of consist of completed investigations not referred for conciliation plus completed conciliations.). *See also* Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 369 n.24 (1977) (giving higher figures).

[46] The statute originally provided that if the Commission was unable to obtain voluntary compliance after considering a charge for 30 days, or upon extension 60 days, it "shall so notify the person aggrieved." Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(e), 78 Stat. 260 (1964) (current version at 42 U.S.C. § 2000e-5(f)(1) (1976)).

[47] See the provisions for award of attorney's fees to the prevailing party, *id.* § 706(k), 78 Stat. 261 (codified at 42 U.S.C. § 2000e-5(k) (1976)), for appointment of an attorney for the charging party and waiver of fees, costs, and security, *id.* § 706(e), 78 Stat. 260 (current version at 42 U.S.C. § 2000e-5(f)(1) (1976)), and for broad judicial discretion to grant affirmative relief, *id.* § 706(g), 78 Stat. 261 (current version at 42 U.S.C. § 2000e-5(g) (1976)).

[48] *See* text and notes at notes 53-100 *infra*.

to bring pattern-or-practice actions.[49] Congress also denied authority to private persons to file administrative charges on behalf of others, suggesting that, far from endorsing class actions, it intended at that time to preclude private authority to litigate on behalf of others.[50]

Ironically, the fear that the EEOC would enforce the statute too vigorously led Congress to grant the power to interpret and apply the statute to the federal courts, which enforced it as vigorously as any administrative agency could, but with the greater prestige of the federal judiciary. The subsequently revised rule 23 was one device that enabled them to do so.

B. Revision of Rule 23

The 1966 revision of rule 23 has raised persistent questions about the meaning and validity of the rule. Doubts about meaning have arisen from the rule's vague and overlapping requirements and the great degree of discretion it vests in the district judge. Doubts about validity have arisen from the dramatic increase in private enforcement of federal law that followed revision of the rule. This effect on private actions has raised doubts whether the rule satisfies the requirement of the Rules Enabling Act[51] that the rules "shall not abridge, enlarge or modify any substantive right."[52] I argue in this and subsequent sections that these doubts can be partially resolved by closer examination of the effect of statutory law, and in particular Title VII, on the application of rule 23.

1. *The Structure of Rule 23.* In the 1966 revision of rule 23, the Advisory Committee sought to replace the overly conceptual structure and terminology of the original rule 23 with provisions that defined more clearly the requirements and consequences of certification of a class action.[53] The revisers dispensed with the original rule's division of class actions into "true," "hybrid," and

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[49] Civil Rights Act of 1964, Pub. L. No. 88-352, § 707, 78 Stat. 261-62 (1964) (current version at 42 U.S.C. § 2000e-6 (1976)).

[50] *Id.* § 706(a), 78 Stat. 259 (current version at 42 U.S.C. § 2000e-5(b) (1976)). *See* text and note at note 42 *supra*. The "on behalf of" language, however, was restored by the 1972 amendments to Title VII. *See* text and notes at notes 175-176 *infra*.

[51] 28 U.S.C. §§ 2071-2076 (1976 & Supp. II 1978).

[52] 28 U.S.C. § 2072 (1976).

[53] FED. R. CIV. P., Adv. Comm. Notes, 39 F.R.D. 98-99 (1966); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (pt. 1), 81 HARV. L. REV. 356, 380-84 (1967).

"spurious,"[54] and substituted subdivisions (a) and (b) of the present rule. These permit certification of a class action only if all of the requirements of subdivision (a) are met: numerosity, commonality, typicality, and adequacy of representation.[55] In addition, one of the requirements of subdivision (b) must be met: under subdivision (b)(1), there must be a risk that individual actions would impose incompatible standards of conduct on the party opposing the class or would result in practical harm to the interests of class members; under subdivision (b)(2), classwide injunctive or declaratory relief must be appropriate; under subdivision (b)(3), the legal or factual issues common to the class must predominate, and a class action must be superior to other means of adjudication.[56] These requirements were intended to implement two distinct and sometimes conflicting policies: to provide an efficient means for mass litigation, and, at the same time, to afford adequate protec-

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[54] FED. R. CIV. P. 23(a) (1938), *reprinted in* 39 F.R.D. 94-95 (1966).

[55] Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

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

[56] Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

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

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

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

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

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

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

tion to absent class members and to the party opposing the class.[57]

Although the revisers sought to provide clear guidance to district judges in achieving this goal,[58] the requirements of the rule are framed in broad and uncertain terms.[59] Furthermore, they overlap to such an extent that their meaning is often obscured. For instance, there have been continuing doubts whether the requirement of typicality in subdivision (a)(3) adds anything to the requirement of commonality in subdivision (a)(2) or to the requirement of adequacy of representation in subdivision (a)(4).[60] Similarly, the requirements of subdivision (b)(3) that common questions of law or fact predominate and that a class action be a superior device for fair and efficient adjudication[61] appear only to restate the general objectives that underlie the entire rule and that find expression in other provisions.[62] The effect of such vague, overlapping terms has been to confer upon the district judge broad power to decide whether a case should proceed as a class action. This tendency has been exaggerated by the holdings of some courts of appeals that the decision whether to certify a class action is re-

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[57] *See* Kaplan, *supra* note 53, at 387-92; *Developments, supra* note 5, at 1321-23.

[58] Kaplan, *supra* note 53, at 386.

[59] Representative reactions to rule 23 are that it "tends to ask more questions than it answers," Frankel, *Some Preliminary Observations Concerning Civil Rule 23,* 43 F.R.D. 39, 39 (1967), that it is "complicated" or "extremely complicated," 7 C. WRIGHT & A. MILLER, *supra* note 13, § 1753, at 540 & n.38, and that "[t]he result of the rulemakers' efforts is a hodgepodge of pragmatic and occasionally conflicting objectives." *Developments, supra* note 5, at 1323.

Others have expressed the view that only continued experience with the rule can give content to its requirements. Miller, *supra* note 8, at 669-82. *See* Frankel, *supra,* at 52 (full evaluation of rule 23 may require a generation of experience); Weinstein, *Some Reflections on the "Abusiveness" of Class Actions,* 58 F.R.D. 299, 305-06 (1973) (supporting changes in class action practice through modifications of Manual for Complex Litigation). The original version of rule 23 evoked a similar reaction. Z. CHAFEE, SOME PROBLEMS OF EQUITY 199-200 (1950).

[60] 3B J. MOORE, *supra* note 12, ¶ 23.06-2, at 23-185 to -198 (2d ed. 1978 & Supp. 1979-80); 7 C. WRIGHT & A. MILLER, *supra* note 13, § 1764, at 611-12 (1972 & Supp. 1978); *Developments, supra* note 5, at 1458-71, 1625.

[61] FED. R. CIV. P. 23(b)(3). *See* note 56 *supra.*

[62] *See* 3B J. MOORE, *supra* note 12, ¶ 23.45[2], at 23-324, 23-327 to -328 (subdivision (b)(3) goes beyond requirements of subdivision (a) but requirement of predominance implicit in subdivision (b)(1) and (b)(2)); *id.* ¶ 23.45[3], at 23-354 to -355 (absence of superiority may indicate inadequate fulfillment of requirements of subdivision (a)); 7A C. WRIGHT & A. MILLER, *supra* note 13, § 1780, at 64 (factors listed in subdivision (b)(3) overlap with each other and with requirements of subdivision (a)); *Developments, supra* note 5, at 1626-27 (requirement of predominance should apply to all class actions and requirement of superiority retained only as an aspect of predominance). *But see* 7A C. WRIGHT & A. MILLER, *supra* note 13, § 1778, at 50-52 (requirement of predominance unclear, but more than commonality requirement of subdivision (a)(2)).

viewable only for abuse of discretion.[63]

The rule further increases the power of the district judge by explicitly granting him discretion to protect class members from abuse, particularly by the named plaintiff and his attorney who might advance their own interests at the expense of the class.[64] Subdivision (d) grants the district judge plenary authority over the conduct of class actions, including the power to order notice to members of the class and to impose conditions on the class representatives.[65] Subdivisions (c)(1) and (c)(4) allow the district judge to vary the extent of the class and to create subclasses if appropriate.[66] Finally, subdivision (e) requires "the approval of the court" for all settlements, as well as notice to "all members of the class in such manner as the court directs."[67] The revisers' strategy is apparent, and perhaps inevitable. Because absent class members could not protect themselves, while the named plaintiff and the class attorney might favor their own interests over those of the class, great discretion had to be granted to the district judge. No one else present in court could be trusted to protect the class.[68]

As with most disputes over the revision of rule 23, concern over the divergent interests of the class and its representatives focused on class actions for damages under subdivision (b)(3). The perceived danger was that a recovery on behalf of innumerable holders of small claims could not be distributed efficiently and would end up in the hands of the class attorney.[69] To meet this danger, the revisers surrounded (b)(3) class actions with more elaborate procedural safeguards than (b)(1) or (b)(2) class actions.

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[63] 3B J. MOORE, *supra* note 12, ¶ 23.50, at 23-436 to -437; 7A C. WRIGHT & A. MILLER, *supra* note 13, § 1785, at 134-35, 135 n.69 (1972 & Supp. 1978).

[64] Dam, *Class Actions: Efficiency, Compensation, Deterrence and Conflict of Interest*, 4 J. LEGAL STUD. 47, 56-61 (1975).

[65] FED. R. CIV. P. 23(d). *See* FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION § 1.43, at 41-42 (4th ed. 1977) ("almost plenary authority"); 3B J. MOORE, *supra* note 12, ¶ 23.70, at 23-480; 7A C. WRIGHT & A. MILLER, *supra* note 13, § 1791, at 193-94.

[66] FED. R. CIV. P. 23(c)(1), (4). *See* FEDERAL JUDICIAL CENTER, *supra* note 65, § 1.42, at 31-33; 3B J. MOORE, *supra* note 12, ¶ 23.65, at 23-473 to -476; 7A C. WRIGHT & A. MILLER, *supra* note 13, § 1790, at 189-92 (1972 & Supp. 1978).

[67] FED. R. CIV. P. 23(e). For elaboration of these requirements, see FEDERAL JUDICIAL CENTER, *supra* note 65, § 1.46, at 53-65; 3B J. MOORE, *supra* note 12, ¶ 23.80, at 23-503 to -528; 7A C. WRIGHT & A. MILLER, *supra* note 13, § 1797, at 226-39 (1972 & Supp. 1978).

[68] Even so, the district judge may have interests in managing the docket that diverge from the interests of absent class members. *See* Dam, *supra* note 64, at 49-54; *Developments*, *supra* note 5, at 1500.

[69] H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 118-20 (1973); Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97, 97, 121-26; Kaplan, *supra* note 53, at 394-400. *See* note 85 *infra*.

Individual notice must be sent to all class members "who can be identified through reasonable effort,"[70] and the judgment binds only those members of the class who decide not to opt out after receiving notice.[71] Moreover, the general requirement that the district court rule upon certification "[a]s soon as practicable after the commencement of an action"[72] is particularly important in class actions for damages under subdivision (b)(3). The revisers intended to eliminate the practice, which had grown up in class actions for damages under the original rule, of "one-way intervention" by members of the class after judgment in their favor.[73] A necessary corollary is that certification be granted before determination of the merits, so that class members cannot evade an adverse judgment by subsequently seeking denial of certification or opting out.

The continuing controversy surrounding subdivision (b)(3) has obscured the breadth of subdivision (b)(2). A professional consensus has developed that the situations identified by subdivision (b)(2) " 'naturally' or 'necessarily' called for unitary adjudication."[74] The desirability of classwide injunctive or declaratory relief when "the party opposing the class has acted or refused to act on grounds generally applicable to the class"[75] has been taken for granted to such an extent that the need for invoking the special procedure of rule 23 has been called into question. Indeed, a line of decisions, commencing under the original version of rule 23, has held that certification of a class action is unnecessary when the plaintiff seeks injunctive or declaratory relief that extends to an

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[70] FED. R. CIV. P. 23(c)(2). This requirement was interpreted strictly in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

[71] FED. R. CIV. P. 23(c)(2), (3); *see* FED. R. CIV. P., Adv. Comm. Notes, 39 F.R.D. 104-106 (1966). The revisers' attitude toward preclusion is puzzling. One objective of the revision was to clarify the preclusive effect of class actions, and subdivisions (c)(2) and (c)(3) appear to resolve this issue. *See id.* at 98-99. But the revisers intended the language of subdivisions (c)(2) and (c)(3) to be only suggestive, because preclusion might be a matter of substantive law and so beyond the grant of rule making power, and because the preclusive effect of a judgment is better decided by the court before whom the claim of preclusion is made. *Id.* at 104; Kaplan, *supra* note 53, at 378 & nn.79-80, 393. *See* 3B J. MOORE, *supra* note 12, ¶ 23.60, at 23-469 to -470; 7A C. WRIGHT & A. MILLER, *supra* note 13, § 1789, at 176-78; Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589, 592-93 (1974).

[72] FED. R. CIV. P. 23(c)(1).

[73] *See* FED. R. CIV. P., Adv. Comm. Notes, 39 F.R.D. 99, 105-06 (1966).

[74] Kaplan, *supra* note 53, at 386.

[75] FED. R. CIV. P. 23(b)(2). *See* note 56 *supra*.

entire class.[76] The availability of classwide relief, even in the absence of certification, led the revisers to minimize the procedural safeguards surrounding class actions under subdivision (b)(2). Notice to class members was not required, and they had no right to opt out of the litigation to avoid being bound by the judgment.[77]

This difference between the procedural safeguards required in (b)(2) and (b)(3) class actions has become particularly important in Title VII litigation. The Advisory Committee on Civil Rules and its reporter, Professor Kaplan, singled out civil rights cases as an example of litigation appropriate for certification under subdivision (b)(2).[78] This suggestion, and the further suggestion that certification under subdivision (b)(2) should be preferred to certification under subdivision (b)(3),[79] were taken up by courts confronted with cases that satisfied the requirements of both subdivisions (b)(2) and (b)(3).[80] The effect of the Advisory Committee's comment was to permit liberal certification of class actions in Title VII cases without the safeguards of subdivision (b)(3).

These consequences were largely unwarranted. The Advisory Committee did not purport to select certain substantive claims for special treatment, and even if it had, such an attempt would have aggravated doubts about the validity of the rule under the Rules Enabling Act.[81] The Committee confined itself to the observation

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[76] O. FISS, INJUNCTIONS 484-88 (1972); 3B J. MOORE, *supra* note 12, ¶ 23.40[3], at 23-292 to -297 (2d ed. 1978 & Supp. 1979); 7A C. WRIGHT & A. MILLER, *supra* note 13, § 1785, at 67-70 (Supp. 1978). As Professor Chafee remarked of an earlier stage in the evolution of class actions: "The very identity of interests which made it easy to bring everybody in, also made it somewhat superfluous to do so." Z. CHAFEE, *supra* note 59, at 201.

[77] They were protected only by the discretion of the district judge to issue notice or to take other steps under subdivision (d), FED. R. CIV. P. 23(d).

[78] FED. R. CIV. P., Adv. Comm. Notes, 39 F.R.D. 102 (1966); Kaplan, *supra* note 53, at 389.

[79] Kaplan, *supra* note 53, at 390 n.130.

[80] *E.g.*, Bing v. Roadway Express, Inc., 485 F.2d 441, 447 (5th Cir. 1973). *See* 3B J. MOORE, *supra* note 12, ¶ 23.31, at 23-261 to -264; 7A C. WRIGHT & A. MILLER, *supra* note 13, § 1775, at 30-31 (1972 & Supp. 1978). Normally, class actions under subdivision (b)(2) are distinguished from those under (b)(3) by the type of relief sought. Predominantly injunctive or declaratory relief calls for certification under subdivision (b)(2). If monetary relief is sought, certification should be under subdivision (b)(3). 3B J. MOORE, *supra* note 12, ¶ 23.40[4] (2d ed. 1978 & Supp. 1979); 7A C. WRIGHT & A. MILLER, *supra* note 13, § 1775, at 21-24 (1972 & Supp. 1978). This distinction is obscured, however, when monetary relief is requested along with injunctive relief, as it is in most Title VII class actions, *see, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 413-23 (1975).

[81] For example, if the attempt had been motivated by reasons apart from procedure, such as the particular evil of discrimination or the particular need to grant relief to civil rights plaintiffs, it would have been of questionable validity. *See* note 86 *infra*.

that civil rights actions were "illustrative" of cases suitable for certification under subdivision (b)(2)[82] and it confined this observation to a nonbinding note.

2. *The Validity of Rule 23.* The debate over whether rule 23 affects substantive rights in violation of the Rules Enabling Act[83] has also focused on class actions under subdivision (b)(3).[84] Subdivision (b)(3), it was argued, transformed the small claims of individual class members, which could not support the cost of independent lawsuits, into an aggregate of claims on behalf of the class whose value could extend into the millions of dollars.[85] The small value of such claims also made it unlikely that any monetary relief would actually reach members of the class, so that no one other than the class attorney would benefit from the class action. Subdivision (b)(3) thus allowed the enforcement of claims that were not otherwise worth the cost of suit, putting defendants at a disadvantage not contemplated by the substantive law creating the cause of action, and shifting the control and benefit of the claim away from the person granted the claim by the substantive law.

These arguments should not be overstated, however. Rule 23 cannot be faulted simply because it alters the balance of tactical advantage among the parties. The very purpose of procedural rules is to provide a mechanism for enforcing substantive rights. Procedural rules therefore necessarily affect the enforcement of substantive law, and consequently the outcome of litigation and the balance of tactical advantage among the parties. It follows that rule 23 does not violate the Rules Enabling Act by allowing plaintiffs to pursue small claims more effectively, or by putting defendants at a

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[82] The full statement of the Advisory Committee, omitting citations, is:

> Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. . . . Subdivision (b)(2) is not limited to civil-rights cases.

FED. R. CIV. P. Adv. Comm. Notes, 39 F.R.D. 102 (1966). *Accord,* Kaplan, *supra* note 53, at 389 ("Next comes new subdivision (b)(2), building on experience mainly, but not exclusively, in the civil rights field").

[83] *See* text at note 52 *supra.*

[84] Miller, *supra* note 8, at 670.

[85] Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma,* 47 S. CAL. L. REV. 842, 855-61 (1974); Simon, *Class Actions—Useful Tool or Engine of Destruction,* 55 F.R.D. 375, 386 (1972); *see* Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review,* 71 COLUM. L. REV. 1, 9-11 (1971) (rule 23 should be limited to its intended purposes of economizing judicial resources and preventing inconsistent results); Weinstein, *Reform of Federal Court Rulemaking Procedures,* 76 COLUM. L. REV. 905, 930 n.168 (1976) (same).

tactical disadvantage. These consequences are the inevitable effects of increased procedural efficiency, and do not affect substantive rights in violation of the Rules Enabling Act.[86]

The emphasis on eliminating all effects on substantive rights is also misleading in another respect. It neglects the possibility that procedural, as well as substantive, provisions of federal statutory law override the provisions of rule 23.[87] The question is not whether rule 23 affects the enforcement of substantive rights, but whether it does so contrary to the provisions, whether substantive or procedural, of the statute that created those rights.

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[86] This conclusion follows easily from the definition of "procedure" offered in Hanna v. Plumer, 380 U.S. 460, 472 (1965): "matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." It also follows from the more exacting definition in Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 724-27 (1974): a "procedural rule" is "one designed to make the process of litigation a fair and efficient means for the resolution of disputes," *id.* at 724 (footnote omitted), and a "substantive right" is "a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of litigation," *id.* at 725 (footnote omitted).

By "procedural efficiency," I mean maximizing the accuracy and minimizing the cost with which substantive policies are implemented in settlement and adjudication. Rules justified on this basis are procedural under either of the above definitions of "procedure." Procedural efficiency favors plaintiffs with small claims just as much as procedural inefficiency favors defendants opposing such claims. Procedural efficiency favors plaintiffs by decreasing the cost of meeting the burdens of production and persuasion which are usually placed upon them. This, in turn, decreases the value that the claims must possess in order to be worth pursuing. *Cf.* Weinstein, *supra* note 59, at 300 ("Class actions favor plaintiffs. There is no doubt about it."). In cases in which the claim already exceeds the threshold value, increased efficiency might also favor the defendant. *See* Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 408-10, 428-41 (1973).

[87] A passage in the Rules Enabling Act might suggest that the rule overrides inconsistent statutes: "Nothing in this title [28 U.S.C.], anything therein to the contrary notwithstanding, shall in any way limit, supersede or repeal any such rules heretofore prescribed by the Supreme Court." 28 U.S.C. § 2072 (1976). But this passage was added to the Act only to avoid implicit repeal of the civil and admiralty rules by provisions in the 1948 revision of the Judicial Code. S. REP. No. 1559, 80th Cong., 2d Sess. 8 (1948).

Congress has exercised its power to modify rule 23 in several statutes. *E.g.*, Truth in Lending Act Amendments of 1974, 15 U.S.C. § 1640(a) (1976) (limitation upon total liability in class actions); Equal Credit Opportunity Act, 15 U.S.C. § 1691e(b) (1976) (same); Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(2)(B) (Supp. I 1977) (same); Magnuson-Moss Consumer Product Warranty Act, 15 U.S.C. § 2310(e) (1976) (class action allowed only if defendant granted reasonable opportunity to cure violation alleged); Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified in scattered sections of 19, 28 U.S.C.) (authorizing state attorney general to sue on behalf of state residents, displacing private class actions); Portal-to-Portal Act of 1947, 29 U.S.C. § 216(b) (1976) (consent to representation required from class members in actions under Fair Labor Standards Act, 29 U.S.C. §§ 201-262 (1976), and the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1976)); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b) (1976) (same).

3. *The Significance of Statutory Law.* An examination of Title VII reveals that the general arguments against the validity of rule 23, as reflected in the debate over subdivision (b)(3), are not readily applicable to Title VII class actions. Title VII class actions do not usually involve small claims that hardly justify the expense of administering relief. Individual claims for hiring, reinstatement, promotion, or back pay are often worth enough to be independently prosecuted,[88] particularly since the statute requires the award of attorney's fees to prevailing plaintiffs in most cases.[89] The award of attorney's fees also provides some assurance that the class attorney will not be compensated instead of the class by an award of damages.

On the other hand, claims for injunctions to restructure hiring and promotion policies, working conditions, and seniority systems can often be brought only as class actions. As to such claims, certification under subdivision (b)(1) is appropriate, because individual actions either would establish inconsistent standards of conduct for the employer or would inevitably affect the interests of an entire class of employees or applicants for employment.[90] The only fair remedy in such cases is one applied on a classwide basis. Class members excluded from the scope of an injunction would not remain at the prelitigation status quo but would be made worse off by the advantages granted to others. If the only fair means of litigation is on a classwide basis, then certification should be granted under subdivision (b)(1) on grounds of necessity.[91] Not all Title

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[88] Somewhat analogous recoveries of back pay under the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976), have averaged over $1,500 for the last three fiscal years. U.S. NATIONAL LABOR RELATIONS BOARD, FORTY-FIRST ANNUAL REPORT 214 (1977) (computations from first column of Table 4); U.S. NATIONAL LABOR RELATIONS BOARD, FORTY-SECOND ANNUAL REPORT 227, 275 (1978); U.S. NATIONAL LABOR RELATIONS BOARD, FORTY-THIRD ANNUAL REPORT 247 (1979). Other forms of relief are also available under Title VII, of course.

[89] Civil Rights Act of 1964 § 706(k), 42 U.S.C. § 2000e-5(k) (1976); *see* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 417 (1978).

[90] FED. R. CIV. P. 23(b)(1). *See* Pennsylvania v. Local 542, Int'l Union of Operating Eng'rs, 469 F. Supp. 329, 389-90 (E.D. Pa. 1978); Rendon v. Western Elec. Co., 21 Fair Empl. Prac. Cas. 400, 402 (W.D. Tex. 1978); Cullen v. New York State Civil Serv. Comm'n, 15 Empl. Prac. Dec. 6241, 6242 (E.D.N.Y. 1977); Grogg v. General Motors Corp., 72 F.R.D. 523, 530 (S.D.N.Y. 1976); James v. Stockham Valves & Fittings Co., 394 F. Supp. 434 (N.D. Ala. 1975), *rev'd on other grounds*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); Comment, *The Proper Scope of Representation*, *supra* note 13, at 194-97. *Contra*, Clark v. South Cent. Bell Tel. Co., 419 F. Supp. 697, 700 (W.D. La. 1976).

[91] The theory and terminology of subdivision (b)(1) were modeled on the provisions of FED. R. CIV. P. 19 concerning necessary and indispensable parties. FED. R. CIV. P., Adv. Comm. Notes, 39 F.R.D. 100 (1966); Kaplan, *supra* note 53, at 388-89. Rule 19 allows litigation to go forward in the absence of necessary parties if there is no alternative forum. FED.

VII actions for broad injunctive relief meet the stringent conditions of subdivision (b)(1), but a similar rationale applies to those that satisfy the requirements of subdivision (b)(2). If a classwide injunction is the most efficient means of enforcing substantive rights, then any other remedy allows some such rights to remain ineffective. Subdivision (b)(2) does not modify substantive rights by assuring that they are enforced.[92]

Apart from the general character of Title VII claims, two specific provisions of the statute as originally enacted arguably limited the availability of class actions: section 707, which authorized the Attorney General to bring pattern-or-practice actions,[93] and section 706, which restricted the ability of private parties to bring charges to those parties "claiming to be aggrieved."[94] Section 707 arguably granted exclusive authority to the Attorney General to bring actions requiring classwide relief, but neither the wording of the section nor its brief legislative history suggests that it was meant to preclude class actions.[95] If other areas of class action litigation are any guide, the coexistence of public and private remedies is the rule rather than the exception.[96] Section 706 appeared to limit class actions by allowing charges to be filed only by those "claiming to be aggrieved." This provision resulted from the Senate's deletion of a broader provision in the House bill, apparently at the request of Senator Dirksen, who sought to restrict the scope of private actions.[97] This evidence of legislative intent to limit class actions was mooted, however, by the 1972 amendments to Title

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R. CIV. P. 19(b); *see* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 109-10, 110 n.3 (1968). Analogously, a class should be certified if there is no alternative means of litigation.

[92] *See* text and note at note 86 *supra.*

[93] Civil Rights Act of 1964, Pub. L. No. 88-352, § 707, 78 Stat. 261-62 (1964) (current version at 42 U.S.C. § 2000e-6 (1976)). Authority to bring pattern-or-practice actions has now been extended to the EEOC. *See* note 177 *infra.*

[94] Civil Rights Act of 1964, Pub L. No. 88-352, § 706, 78 Stat. 259-61 (1964) (current version at 42 U.S.C. § 2000e-5(b) (1976)).

[95] Debate over the provision centered on whether it gave the Attorney General too much power to bring public actions, with sponsors of Title VII denying that it did. 110 CONG. REC. 14270 (1964) (remarks of Sen. Humphrey); *see id.* at 12819 (remarks of Sen. Dirksen); *id.* at 12722 (remarks of Sen. Humphrey). A restrictive view of public actions is consistent with the legislative compromise limiting enforcement of Title VII primarily to private actions. *See* text and notes at notes 29-46 *supra.*

[96] *See* DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience* (pt. 2), 1976 AM. B. FOUNDATION RESEARCH J. 1273, 1282-87. *Cf.* Dooley, *The Effects of Civil Liability on Investment Banking and the New Issues Market,* 58 VA. L. REV. 776, 810-12, 827-33 (1972) (public and private remedies under the securities laws).

[97] *See* note 42 *supra.*

VII, which restored the language in the original House bill authorizing charges to be filed "on behalf of a person claiming to be aggrieved."[98]

Although Title VII does not explicitly override rule 23, congressional inaction does not mean that the rule is to be applied without regard to the substantive and procedural provisions of the statute. The accommodation between rule 23 and Title VII must instead be worked out by the federal courts. Application of rule 23 to Title VII claims is part of the larger power of interpretation and enforcement which Congress conferred on the federal courts in the compromise over the enforcement provisions of the statute.[99] In particular, because the federal courts determine substantive law in interpreting Title VII, they must also determine how rule 23 is affected by substantive law. To the extent that substantive rules look to characteristics shared by an entire class, the greater the likelihood that certification should be granted; to the extent that they attach significance to the particular facts of each claim, the greater the likelihood that case-by-case litigation should be preferred. As I argue in subsequent sections,[100] an examination of substantive law would enable the federal courts both to give content to the uncertain requirements of rule 23 and to give effect to the substantive policy against discrimination.

C. Early Title VII Class Action Decisions

The early Title VII class action cases were concerned with extremes. The question usually presented was whether class actions ever were appropriate in Title VII cases. The answer usually given was that class actions were especially appropriate. The decisions that established this proposition came from the Fifth Circuit,[101] and created the background against which Congress considered

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[98] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 104 (1972) (codified at 42 U.S.C. § 2000e-5(b) (1976)). *See* text and notes at notes 175-176 *infra*.

[99] The other potential lawmaking bodies do not have the power to act. Title VII expressly authorizes the EEOC only to issue procedural rules. Civil Rights Act of 1964 § 713(a), 42 U.S.C. § 2000e-12(a) (1976); *see* Rutherglen, *Sexual Equality in Fringe-Benefit Plans*, 65 VA. L. REV. 199, 232 n.141 (1979). The contribution of state law has been foreclosed by the limited role assigned to state agencies in the enforcement of Title VII and the small number of Title VII cases that are brought in state court. *See* Rutherglen, *supra*, at 231 n.135; note 22 *supra*.

[100] *See* text and notes at notes 212-305 *infra*.

[101] *See* text and notes at notes 116-134 *infra*. This coincided with the Fifth Circuit's activist role in school desegretation litigation. J. WILKINSON, FROM BROWN TO BAKKE 111-18 (1979).

amendments to Title VII in the Equal Employment Opportunity Act of 1972.[102] A further development that affected the course of the 1972 amendments was the expansive interpretation that Title VII's substantive provisions received from the federal courts, particularly from the Supreme Court in *Griggs v. Duke Power Co.*[103]

The first reported Title VII class action decision was *Hall v. Werthan Bag Corp.*[104] Although it was decided under original rule 23, and rendered by a district court outside the Fifth Circuit, it influenced the seminal line of early Fifth Circuit decisions. The named plaintiff had sued on behalf of a class of "all other Negroes who are similarly situated and affected by the racially discriminatory and unlawful employment practices" of the defendant.[105] The defendant advanced two arguments against certification. First, only the named plaintiff's claim was properly before the court because no other member of the class had exhausted administrative remedies before the EEOC. Second, there was no common question as required by original rule 23(a)(3) because the plaintiff had not challenged an employment practice that expressly discriminated on the basis of race.[106] The first of these arguments raised the question whether a private person may file an administrative charge on behalf of another. The court in *Hall* held that exhaustion of administrative remedies by the named plaintiff alone, through a suitably broad administrative charge, was sufficient,[107] a result eventually accepted by Congress[108] and the Supreme Court.[109]

The second argument is not as easily dealt with, although the court in *Hall* had a ready answer, which has been endlessly repeated: "Racial discrimination is by definition a class discrimination. If it exists, it applies throughout the class."[110] This statement has the appearance of logical truth or common-sense inference, but the logical truth is more limited. At most, it is that an employer who has discriminated against one employee on the basis of race

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[102] Pub. L. No. 92-261, 86 Stat. 103 (1972) (amending 42 U.S.C. §§ 2000e-2000e-17 (1976)).

[103] 401 U.S. 424 (1971).

[104] 251 F. Supp. 184 (M.D. Tenn. 1966).

[105] *Id.* at 185.

[106] *Id.* at 186-87.

[107] *Id.* at 188.

[108] *See* text and notes at notes 175-176 *infra.*

[109] Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975).

[110] 251 F. Supp. at 186.

would have discriminated against other employees of the same race under the same conditions. This says nothing about the likelihood that such conditions will arise again or that the employer will continue to discriminate. The common-sense inference is that an employer who discriminates once is likely to do so again, but its relevance to certification of class actions varies from case to case. Despite the validity of this inference, the predominance of common issues necessary for certification may not exist for a variety of reasons. Employment decisions of a particular employer may not be made by a single individual; racist attitudes, although pervasive within an employer, may affect different minority employees in very different ways; the named plaintiff's claim may be unique or raise a conflict of interest with other members of the class. Discrimination claims are neither more nor less likely to be valid on a classwide basis than securities or antitrust claims.[111] Certification is appropriate only to the extent that claims of classwide discrimination are in fact asserted. Congress recognized the distinctive character of such claims when it limited the Attorney General's power to sue to pattern-or-practice actions.[112] If this limitation meant anything at all, it meant that some Title VII claims did not meet the requirement of classwide discrimination. Such claims would also fail to satisfy the comparable requirements of rule 23.

In cases such as *Hall*, in which the plaintiff alleges a general, but implicit, policy of discrimination, only this issue should be litigated on behalf of the class. Although examination of specific instances of discrimination might be necessary, the class action should not purport to resolve all such issues. Apart from named plaintiffs and other class members who actively participate in the litigation, class members should not be bound, either by the findings as to such incidents or by the failure to litigate them.[113] A claim of implicit discriminatory policies does not authorize the dis-

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[111] *See* 3B J. MOORE, *supra* note 12, ¶ 23.46, at 23-396 to -416; 7A C. WRIGHT & A. MILLER, *supra* note 13, § 1781, at 79-97. *Cf.* Dooley, *supra* note 96, at 827-33 (evaluating effects of trend towards liberal certification of securities fraud class actions); 62 CORNELL L. REV. 177, 195-200 (1976) (criticizing liberal certification of antitrust class actions).

[112] *See* text at note 26 *supra*. The significance of this limitation diminished after the Equal Employment Opportunity Act of 1972 granted the EEOC and the Attorney General authority to sue in individual cases. *See* text and note at note 177 *infra*.

[113] A judgment in a class action might not preclude all claims arising out of the same transaction or occurrence as the litigated claim because rule 23 might not be satisfied for all such claims. *Cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 61, Comment e (Tent. Draft No. 1 1973) ("same transaction" test "takes as its model a claim and action by a single plaintiff against a single defendant").

trict court to investigate and remedy all claims of discrimination against a particular defendant. Indeed, the court in *Hall* did not attempt such an extension of rule 23. The class was certified only "insofar as the complaint seeks the removal of the alleged discriminatory policies" and "insofar as it seeks a prohibitive injunction";[114] certification of a class for compensatory relief, as to which individual questions were likely to predominate, was denied.[115]

In a series of three cases, the Fifth Circuit transformed the reasoning of *Hall* into a doctrine supporting certification of "across-the-board" Title VII class actions. The first case, *Oatis v. Crown Zellerbach Corp.*,[116] followed the holding of *Hall* that only the named plaintiff need exhaust administrative remedies,[117] repeating the argument that "[r]acial discrimination is by definition class discrimination,"[118] and adding that a Title VII plaintiff acted as a " 'private attorney general.' "[119] The court's liberal attitude toward certification of Title VII class actions is most apparent in its conclusory assertion that the requirements of rule 23 had been met, qualified only by the suggestion that subclasses might be certified upon remand.[120] The second case, *Jenkins v. United Gas Corp.*,[121] added further arguments to support the same conclusion. Civil rights actions had been recognized by the Advisory Committee as particularly appropriate for certification under subdivision (b)(2);[122] school desegregation decisions of the Fifth Circuit had established a presumption in favor of classwide relief;[123] and partial settlement of the named plaintiff's claim was only " 'voluntary cessation of allegedly illegal conduct' " which did not moot the claims

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[114] 251 F. Supp. at 186, 188.

[115] The court's own reasoning was that the threat of racial discrimination was a common question of fact as to injunctive relief but not as to compensation for past discrimination. *Id.* at 186. Subsequent cases have distinguished between common questions of classwide violations and individual questions of liability to any particular individual for compensatory relief. The first is determined in the classwide stage of a bifurcated proceeding and the second in hearings on individual claims for relief. International Bhd. of Teamsters v. United States, 431 U.S. 324, 359-62 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747, 772-73 (1976).

[116] 398 F.2d 494 (5th Cir. 1968).

[117] *Id.* at 498.

[118] *Id.* at 499.

[119] *Id.* (quoting Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968) (per curiam)). *Newman* construed the attorney's fees provision of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) (1976), which is identical to the provision in Title VII.

[120] 398 F.2d at 499.

[121] 400 F.2d 28 (5th Cir. 1968).

[122] *Id.* at 34.

[123] *Id.* at 34 n.15.

for individual and classwide relief.[124] The district court's finding of no common question because class members worked in different jobs was quickly rejected; the plaintiff had alleged the existence of general discriminatory employment practices, and subclasses could be certified upon remand to take account of any variation in claims.[125]

Oatis and *Jenkins* expressed an attitude; the last case in the series, *Johnson v. Georgia Highway Express, Inc.*,[126] worked a significant extension of rule 23. *Johnson* applied the reasoning of *Hall* and *Jenkins* to allow a discharged black employee to represent a class that included present employees, despite his apparent failure to seek reinstatement for himself. Because the named plaintiff had alleged "across-the-board" discrimination in hiring, firing, promotion, and maintenance of facilities, the court held that the difference between his status as a discharged employee and that of present employees did not warrant denial of certification.[127] But as Judge Godbold noted in a cautious opinion concurring in the judgment, the plaintiff had alleged classwide discrimination only in the most general terms.[128] Certification of the class alleged in the complaint would have encompassed all blacks among the defendant's 1,100 employees at thirty-two different terminals. As Judge Godbold warned, class actions attacking employment practices throughout the many facilities of a large corporation could not be allowed simply on the basis of conclusory allegations of "across-the-board" discrimination. Instead, the narrow holding of the court was only that the named plaintiff could represent some present employees, not that he must be allowed to represent all present employees.[129]

Even this holding is questionable. The named plaintiff alleged that he had been unlawfully discharged, but he sought only back pay, not reinstatement.[130] Although the district court could have granted reinstatement despite the absence of a request in the com-

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[124] *Id.* at 33 n.11 (quoting United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953)).

[125] 400 F.2d at 35.

[126] 417 F.2d 1122 (5th Cir. 1969).

[127] *Id.* at 1124. The court also disapproved the district court's postponement of certification until the plaintiff had established his individual claim, *id.*, and suggested various devices to manage the class action on remand, such as subclasses, notice, and an evidentiary hearing on adequacy of representation, *id.* at 1124-25.

[128] *Id.* at 1125-26 (Godbold, J., specially concurring).

[129] *Id.* at 1126-27 (Godbold, J., specially concurring).

[130] Johnson v. Georgia Highway Express, Inc., 47 F.R.D. 327, 329 (N.D. Ga. 1968), *rev'd*, 417 F.2d 1122 (5th Cir. 1969).

plaint,[131] the plaintiff apparently did not intend to seek further employment with the defendant. If so, he lacked any personal interest in the employment conditions at the defendant's facilities, or at least one that would have differentiated him from the man in the street.[132] His avowed interest in obtaining back pay might have diverged significantly from the interest of present black employees in improved working conditions. Perhaps the court reasoned implicitly, as other courts have done explicitly,[133] that present employees would be unlikely to raise discrimination claims on their own behalf because they were intimidated by threats of retaliation. The difficulty with this argument is that the class action device does not eliminate the need for participation by present employees, who still must come forward to present evidence or at least to claim individual relief.[134] Perhaps the court did not address these issues becaue it assumed that the plaintiff sought reinstatement, but the failure to define the class by reference to the named plaintiff's individual claim is characteristic of the "across-the-board" approach to Title VII class actions. If a conclusory allegation of classwide discrimination is sufficient for certification, courts are naturally less inclined to examine the particulars of the named plaintiff's individual claim.

The decisions of the Fifth Circuit influenced early developments in other circuits, either on the question of certification or on related issues. In *Bowe v. Colgate-Palmolive Co.*,[135] the Seventh Circuit ordered certification of a plant-wide class of past and present female employees in an action attacking the employer's seniority and job classification systems. The court followed the Fifth Circuit in requiring exhaustion of administrative remedies only by the named plaintiff, not the class as a whole, and it expanded the class to include compensatory relief, rejecting the contrary holding

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[131] FED. R. CIV. P. 54(c).

[132] The plaintiff's failure to seek reinstatement deprived him of standing to challenge conditions of employment. The standing requirement of injury-in-fact presumes that the plaintiff actually seeks relief for the injury in fact alleged. Warth v. Seldin, 422 U.S. 490, 501 (1975). *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 22, at 184-91. Without standing, the employee cannot represent the class. *See* note 137 *infra*.

[133] *E.g.*, Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). The lower federal courts are divided on the question of representation of present and future employees by past employees. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1089 & n.25 (1976); *id.* at 277-78 & nn.13-14 (Supp. 1979).

[134] *See* note 115 *supra*.

[135] 416 F.2d 711 (7th Cir. 1969).

in *Hall.*[136] Early decisions of other circuits justified liberal certification of class actions with less discussion, either by reducing the requirements of rule 23 to the independent requirement of standing,[137] or by a conclusory assertion that the requirements of the rule had been satisfied.[138] Still other decisions applied the Fifth Circuit's reasoning to support broad investigations by the EEOC of individual charges, an issue related to exhaustion of administrative remedies on behalf of the class.[139] Only one early court of appeals decision affirmed a denial of class certification, and that was on a record showing that classwide relief would have been denied on the merits.[140]

Like the procedural law of employment discrimination, the substantive law also was liberally interpreted in favor of plaintiffs. The most important case was *Griggs v. Duke Power Co.*,[141] in which the Supreme Court held that Title VII prohibits neutral employment practices that are not intentionally discriminatory, but that have a disproportionate adverse impact upon a protected group, resulting in underrepresentation of that group in the employer's work force.[142] If the plaintiff carries the burden of showing that an employment practice has a disproportionate adverse impact, then the defendant must show that the practice is justified by "business necessity" or that it is "related to job perform-

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[136] *Id.* at 719-20. In Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1201-02 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), the court extended the reasoning of *Bowe* to permit consideration of classwide relief despite the absence of class certification before judgment on the merits. *But see id.* at 1207 (Stevens, J., dissenting).

[137] Hackett v. McGuire Bros., Inc., 445 F.2d 443, 445 (3d Cir. 1971) (discharged employees seeking reinstatement can represent present employees); Tipler v. E.I. duPont de Nemours & Co., 443 F.2d 125, 130 (6th Cir. 1971) (same but no class certification sought). Standing of the named plaintiff to raise claims asserted on behalf of the class is a further requirement, in addition to those listed in rule 23, for certification of a class action. 3B J. MOORE, *supra* note 12, ¶ 23.04[2], at 23-120 to -128, 23-137 to -147; 7 C. WRIGHT & A. MILLER, *supra* note 13, § 1761, at 584-92; 7A *id.* § 1775, at 38-41.

[138] Newman v. Avco Corp., 451 F.2d 743, 749 (6th Cir. 1971) (discharged employee seeking reinstatement can represent present employees); Arkansas Educ. Ass'n v. Board of Educ., 446 F.2d 763, 765-66 (8th Cir. 1971) (teachers' association could represent class of 20 teachers because of employees' reluctance to bring individual actions); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 428 (8th Cir 1970) (denial of relief to rejected applicant does not bar relief to class of employees and applicants).

[139] Graniteville Co. v. EEOC, 438 F.2d 32, 41-42 (4th Cir. 1971); Blue Bell Boots, Inc. v. EEOC, 418 F.2d 355, 358 (6th Cir. 1969).

[140] Williams v. American Saint Gobain Corp., 447 F.2d 561, 568 (10th Cir. 1971). Another decision vacated a classwide injunction because the plaintiff had not brought the case as a class action. Danner v. Phillips Petroleum Co., 447 F.2d 159, 164 (5th Cir. 1971).

[141] 401 U.S. 424 (1971).

[142] *Id.* at 430-32.

ance."[143] *Griggs* thus established a theory of liability designed for classwide application. Evidence of disproportionate impact inevitably is evidence that an entire class has suffered from a violation of Title VII.[144] The implications of these developments, both procedural and substantive, were taken up by Congress when it considered amendments to Title VII in the Equal Employment Opportunity Act of 1972.

D. The Equal Employment Opportunity Act of 1972

The debate over the Equal Employment Opportunity Act of 1972,[145] like the debate over the original procedural provisions of Title VII,[146] concentrated upon the powers of the EEOC. The role of class actions remained a secondary issue. Supporters of vigorous enforcement again sought to obtain authority for the EEOC to issue cease-and-desist orders, although without denying individuals a private right of action. Their opponents sought to preserve the original distribution of power, which vested adjudicative authority in the federal courts. They argued that the federal courts enforced the statute effectively enough, and indeed that the class action device enabled them to enforce it too effectively, by greatly increasing the exposure of employers to liability for back pay.

The House passed a bill that both denied cease-and-desist authority to the EEOC and eliminated the use of class actions in Title VII cases. The Senate bill also denied cease-and-desist authority to the EEOC, but it generally endorsed the status quo, including the existing use of class actions. The conference committee adopted the more liberal Senate legislation almost in its entirety, and it became law. The most important substantive amendments to be enacted were those extending coverage to the federal government, state and local governments, educational institutions, and smaller employers. Like the refusal to grant cease-and-desist authority to the EEOC, extension of the statute's coverage amounted to a broad endorsement of the procedures and decisions of the federal courts. The existing enforcement mechanism was

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[143] *Id.* at 431. For a more extensive account of *Griggs* and subsequent developments, see Rutherglen, *supra* note 99, at 233 & nn.144-146.

[144] *See* Rissetto, *Employment Discrimination Class Actions*, [1979] 1 LAB. REL. REP. (BNA) 101:250, 252. *See also* Connolly & Connolly, *supra* note 13, at 188-91.

[145] Pub. L. No. 92-261, 86 Stat. 103 (1972) (amending 42 U.S.C. §§ 2000e-2000e-17 (1976)).

[146] *See* text and notes at notes 29-42 *supra*.

preserved and its jurisdiction was enlarged.

Congressional consideration of cease-and-desist authority in the Equal Employment Opportunity Act of 1972 began favorably.[147] Committees in both the House and Senate reported bills granting such authority, but in both houses, these provisions were deleted by amendments on the floor. In the House, a bill sponsored by Representative Hawkins[148] was reported favorably by the Committee on Education and Labor.[149] It established an enforcement scheme that was a hybrid of administrative and judicial proceedings. In both individual and pattern-or-practice cases, the EEOC possessed the power to issue cease-and-desist orders, subject to enforcement and review in the courts of appeals.[150] Individuals retained the right to sue if the Commission found no reasonable cause to support a charge or failed to act within a specified period.[151] The Committee justified these provisions on the grounds of increasing caseload, inadequate enforcement by existing public authorities, and administrative expertise.[152] In both the majority and minority reports, classwide relief was mentioned only in connection with pattern-or-practice cases.[153]

When the Hawkins bill reached the floor of the House, it was replaced by a substitute offered by Representative Erlenborn,[154] a member of the Committee minority, and it passed the House in this form.[155] Like the minority report, the Erlenborn bill was generally hostile to expanding liability under Title VII.[156] The bill also

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[147] Several earlier attempts had failed. Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 829-36 (1972).

[148] H.R. 1746, 92d Cong., 1st Sess. (1971), *reprinted in* SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92d CONG., 2d SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 326-41 (1972) [hereinafter cited as LEGISLATIVE HISTORY].

[149] H.R. REP. No. 238, 92d Cong., 1st Sess. 1 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2137, *and in* LEGISLATIVE HISTORY, *supra* note 148, at 61.

[150] H.R. 1746, 92d Cong., 1st Sess. §§ 4, 5 (1971), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 33-46.

[151] *Id.* § 8(j), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 54-58.

[152] H.R. REP. No. 238, 92d Cong., 1st Sess. 8-14 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2143-50, *and in* LEGISLATIVE HISTORY, *supra* note 148, at 68-74.

[153] *Id.* at 13-14, 65-66, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2149-50, 2174, *and in* LEGISLATIVE HISTORY, *supra* note 148, at 73-74, 124-25.

[154] H.R. 9247, 92d Cong., 1st Sess. (1971), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 141-47; 117 CONG. REC. 31979-80 (1971), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 141-47.

[155] 117 CONG. REC. 32111-12 (1971), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 312-17.

[156] *See* H.R. REP. No. 238, 92d Cong., 1st Sess. 58-67 (1971) (minority views), *reprinted*

specifically restricted the use of class actions in Title VII litigation. It limited compensatory relief to persons named in charges filed with the Commission.[157] This provision would have overruled the holding in several cases that a private plaintiff could exhaust administrative remedies on behalf of a class, and it would have severely curtailed, if not entirely eliminated, class actions in Title VII cases.[158] The Erlenborn bill also reflected some compromises with the Hawkins bill. It increased the limitations period for filing administrative charges and for commencing judicial proceedings,[159] and it granted the EEOC the power to sue in individual cases.[160]

In the Senate, civil rights supporters obtained a more favorable bill. The Senate Committee on Labor and Public Welfare reported a bill, sponsored by Senator Williams, which authorized the EEOC to issue cease-and-desist orders.[161] The Senate commit-

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in [1972] U.S. CODE CONG. & AD. NEWS 2137, 2167-76, *and in* LEGISLATIVE HISTORY, *supra* note 148, at 118-27; 117 CONG. REC. 31963-64 (1971) (remarks of Rep. Hawkins & Rep. Reid); *id.* at 31972-74 (remarks of Rep. Erlenborn & Del. Fauntroy), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 202-06, 226-33; Sape & Hart, *supra* note 147, at 838-40.

[157] H.R. 9247, 92d Cong., 1st Sess. § 3(e) (1971), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 147. The provision limited the remedial powers of the district courts:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual . . . neither filed a charge nor was named in a charge or amendment thereto . . . .

Id. Since this provision applied only to actions under section 706 by individuals or the EEOC, it did not apply to pattern-or-practice actions by the Attorney General under section 707, which remained unaffected by the Erlenborn bill. *See id.*

[158] Classwide relief prohibiting future discrimination, and perhaps even classwide compensatory relief if sufficient class members had been named in the charge, might still have been available. Nevertheless, the provision was characterized repeatedly in the House debate and in the conference report as a complete bar to class actions. H.R. REP. No. 899, 92d Cong., 2d Sess. 18 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2179, 2183, *and in* LEGISLATIVE HISTORY, *supra* note 148, at 1838; S. REP. No. 681, 92d Cong., 2d Sess. 18 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2179, 2183, *and in* LEGISLATIVE HISTORY, *supra* note 148, at 1816; 117 CONG. REC. 31978 (1971) (remarks of Rep. Eckhardt), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 231; *id.* at 32097 (remarks of Rep. Abzug), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 243; *id.* at 32107 (remarks of Rep. Leggett), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 276. The provision also was tied to a further restriction limiting back pay to a two-year period before judicial proceedings were commenced. 117 CONG. REC. 31973 (1971) (remarks of Rep. Erlenborn), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 231.

[159] *Compare* H.R. 1746, 92d Cong., 1st Sess. §§ 4, 8(j) (1971), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 36-37, 55 *with* H.R. 9247, 92d Cong., 1st Sess. § 3(b), (c) (1971), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 144-45.

[160] H.R. 9247, 92d Cong., 1st Sess. § 3(c) (1971), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 144-45.

[161] S. 2515, 92d Cong., 1st Sess. § 4(a) (1971), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 377-93; S. REP. No. 415, 92d Cong., 1st Sess. 1 (1971), *reprinted in* LEGISLATIVE

tee offered the same reasons as the House committee in support of cease-and-desist authority: efficient enforcement, the growing backlog of charges at the EEOC, the crowded federal court docket, and administrative expertise.[162] The Williams bill also transferred authority over pattern-or-practice cases to the EEOC,[163] and preserved the private right of action.[164] In addition, the committee approved a provision allowing charges to be filed "by or on behalf of a person claiming to be aggrieved," or by an officer or employee of the Commission.[165] In doing so, it endorsed the use of class actions in the following terms: "This section is not intended in any way to restrict the filing of class complaints. The committee agrees with the courts that title VII actions are by their very nature class complaints, and that any restriction on such actions would greatly undermine the effectiveness of title VII."[166]

Senator Dominick was the only dissenting member of the committee.[167] When the Williams bill reached the floor of the Senate, he introduced a substitute that deprived the EEOC of cease-and-desist authority,[168] but which did not, as he emphasized, "limit class actions."[169] This departure from the conservative position in the House apparently resulted from a Justice Department memorandum supporting class actions.[170] After extensive parliamentary maneuvering, the sponsors of the Williams bill were eventually

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HISTORY, *supra* note 148, at 410.

[162] S. REP. No. 415, 92d Cong., 1st Sess. 17-19 (1971), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 426-28.

[163] S. 2515, 92d Cong., 1st Sess. § 5 (1971), *pertinent portion reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 393-95.

[164] *Id.* § 4(a), *pertinent portion reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 390-93.

[165] *Id., reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 377.

[166] S. REP. No. 415, 92d Cong., 1st Sess. 27 (1971) (footnote omitted), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 436. The footnote in this passage cited, among other cases, Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968), and Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968), *discussed in* text and notes at notes 116-125 *supra*.

[167] He offered the same arguments as the minority report in the House. S. REP. No. 415, 92d Cong., 1st Sess. 85-88 (1971) (views of Sen. Dominick), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 493-96.

[168] Amendment No. 611 to S. 2515, 92d Cong., 1st Sess. (1971), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 553-58; 118 CONG. REC. 39739-40 (1971), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 549.

[169] 117 CONG. REC. 39739 (1971), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 549; *accord*, 118 CONG. REC. 698 (1972), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 695. Senator Dominick had earlier offered a bill similar to the Erlenborn bill which restricted class actions. S. 2617, 92d Cong., 1st Sess. (1971), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 335-41.

[170] *See* Sape & Hart, *supra* note 147, at 841-42.

forced to accept a version of the Dominick amendment. As the bill passed the Senate, it denied cease-and-desist authority to the EEOC but provided for expedited judicial proceedings.[171]

The principal discussion of class actions on the floor of the Senate was in a section-by-section analysis prepared by Senator Williams. It repeated the Committee's view that private actions were expected to be the exception,[172] but also endorsed existing Title VII class action decisions:

> [I]t is not intended that any of the provisions contained therein are designed to affect the present use of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure. The courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any action under the Act involves considerations beyond those raised by the individual claimant. As a consequence, the leading cases in this area to date have recognized that Title VII claims are necessarily class action complaints and that, accordingly, it is not necessary that each individual entitled to relief under the claim be named in the original charge or in the claim for relief.[173]

The remaining references to class actions were made only in passing.[174]

In the conference committee, the Senate's position favoring existing class action decisions prevailed. The language in the House bill requiring exhaustion of administrative remedies for each class member was rejected as part of a compromise,[175] and the

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[171] Amendment No. 884 to S. 2515, 92d Cong., 2d Sess. (1972), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 1499-1504; 118 CONG. REC. 3978-80 (1972), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, 1556-61; *see* Sape & Hart, *supra* note 147, at 843-45.

[172] *Compare* 118 CONG. REC. 4942 (1972), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 1772 *with* S. REP. No. 415, 92d Cong., 1st Sess. 23 (1971), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 432.

[173] 118 CONG. REC. 4942 (1972), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 1772.

[174] *See* 117 CONG. REC. 39739 (1971) (Sen. Dominick's claim that his amendment had no effect on class actions), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 549; 118 *id.* at 698 (1972) (same), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 695; *id.* at 3369 (Sen. Hruska making the same claim for an amendment that he had offered), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 1398; *id.* at 3391, 4076, 4080, 4081-82 (Sens. Hruska & Javitz characterizing pattern-or-practice cases as class actions), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 1446, 1574, 1586, 1589.

[175] The compromise also authorized "any other equitable relief that the court deems

language in the Senate bill allowing charges to be filed "on behalf of a person claiming to be aggrieved" was retained.[176] On the remaining procedural issues, the House and Senate were already in agreement: authority to sue in individual and pattern-or-practice cases was transferred to the EEOC, but only in cases involving private employers.[177] Individuals retained the right to sue,[178] and the limitation periods for filing charges with the EEOC and commencing individual actions in court were extended.[179] In a section-by-section analysis of the conference committee bill, Senator Williams repeated his endorsement of class actions,[180] and after brief debate, the bill easily passed both houses.[181]

Apart from the extension of coverage to government, educa-

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appropriate" and dated the two-year limitation on back pay according to the more liberal Senate provision. It followed the House bill, however, in limiting remedies to intentional violations of the statute. H.R. REP. No. 899, 92d Cong., 2d Sess. 18-19 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2179, 2183, *and in* LEGISLATIVE HISTORY, *supra* note 148, at 1838-39; S. REP. No. 681, 92d Cong., 2d Sess. 18-19 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2179, 2183, *and in* LEGISLATIVE HISTORY, *supra* note 148, at 1816-17.

[176] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 104 (1972) (codified at 42 U.S.C. § 2000e-5(b) (1976)). The Senate provision for expedited court proceedings also was retained. *Id.*, 86 Stat. 107 (codified at 42 U.S.C. § 2000e-5(f)(5) (1976)).

[177] *Id.* §§ 4(a), 5, 86 Stat. 104, 107 (codified at 42 U.S.C. §§ 2000e-5(f)(1), 2000e-6(c) (1976)). Special procedures applied to charges of discrimination against the federal government, and the Attorney General was granted exclusive authority to commence actions against state and local governments. *Id.* §§ 4(a), 11, 86 Stat. 104-05, 111 (codified at 42 U.S.C. §§ 2000e-5(f)(1), 2000e-16 (1976)). The authority of the Attorney General to bring pattern-or-practice actions against state and local governments later was clarified by Reorganization Plan No. 1 of 1978 § 5, 3 C.F.R. 321, 322 (1978 Compilation), *reprinted in* 5 U.S.C. App. at 289-90 (Supp. II 1978). *See generally* Rosoff, *Reorganization Plan No. 1 Under Title VII*, 30 LAB. L.J. 268 (1979).

[178] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 106 (1972) (codified at 42 U.S.C. § 2000e-5(f)(1) (1976)).

[179] *Id.*, 86 Stat. 105 (codified at 42 U.S.C. § 2000e-5(e), (f)(1) (1976)).

[180] *See* text at note 173 *supra*. He added only that the provision in the Erlenborn bill restricting class actions had been rejected. 118 CONG. REC. 7168 (1972) (remarks of Sen. Williams); *id.* at 7565 (remarks of Rep. Perkins), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 1847. The section-by-section analysis was not part of the conference committee report, although it was distributed in both houses, and Senator Williams and Representative Perkins were chairmen of the conferees from each chamber.

[181] 118 CONG. REC. 7170, 7553 (1972), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 1853-54, 1872-75. In the House, Representative Erlenborn complained that the House conferees had given in on 18 out of the 21 major differences between his bill and the more liberal Senate bill, in effect partially reversing the House vote substituting the Erlenborn bill for the more liberal Hawkins bill. *See id.* at 7567, 7568, *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 1856, 1859.

tional institutions, and small employers,[182] the amendments to the substantive provisions of Title VII did little to change existing law.[183] Attempts to codify the theory of disproportionate adverse impact announced in *Griggs v. Duke Power Co.*[184] failed in both houses,[185] but in other places in the legislative history the decision was cited favorably[186] or fell within a general endorsement of existing case law.[187]

The overall effect of the Equal Employment Opportunity Act of 1972 was to leave Title VII intact but to expand the availability of judicial remedies, both procedurally by granting the EEOC the power to sue and easing the restrictions on individual suits, and substantively by expanding the coverage of the statute to reach more employers. Although civil rights supporters hoped that public enforcement by the EEOC would play a larger role, private actions and class actions were recognized as the next best alternative. A serious attempt to abolish the use of class actions was defeated.

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[182] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 2, 11, 86 Stat. 103, 111 (1972) (codified at 42 U.S.C. §§ 2000e, 2000e-16 (1976)); *see* Sape & Hart, *supra* note 147, at 847-62.

[183] *See* Sape & Hart, *supra* note 147, at 880-88.

[184] 401 U.S. 424 (1971).

[185] The Hawkins bill reported favorably by the House Committee on Education and Labor contained language enacting the theory into law. H.R. 1746, 92d Cong., 1st Sess. § 8(c) (1971), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 50-51; H.R. REP. No. 238, 92d Cong., 1st Sess. 20-22, 30 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2155-57, 2165, *and in* LEGISLATIVE HISTORY, *supra* note 148, at 80-82, 90; 117 CONG. REC. 31961 (1971) (remarks of Rep. Perkins), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 198. But this provision was deleted when the Erlenborn bill was substituted on the floor of the House. In the Senate a provision was passed deleting the requirement in Title VII that liability be imposed only for intentional violations of the statute, Civil Rights Act of 1964 § 706(g), 42 U.S.C. § 2000e-5(g) (1976), but it was rejected by the conference committee. S. 2515, 92d Cong., 1st Sess. § 4(a) (1972), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 1783; *see* 118 CONG. REC. 4942 (1972) (remarks of Sen. Williams), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 1773-74.

[186] H.R. REP. No. 238, 92d Cong., 1st Sess. 8, 21, 24 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2144, 2156, 2159, *and in* LEGISLATIVE HISTORY, *supra* note 148, at 68, 81, 84; S. REP. No. 415, 92d Cong., 1st Sess. 5 & n.1, 14 (1971), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 414 & n.1, 423; 118 CONG. REC. 697 (1972) (remarks of Sen. Dominick), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 692; *id.* at 3371 (remarks of Sen. Williams), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 1403. The only criticism of *Griggs* was indirect, through criticism of an EEOC staff memorandum arguing that relocation of businesses from cities to suburbs had a disproportionate adverse impact upon minority workers. 118 CONG. REC. 4924-29 (1972) (remarks of Sen. Allen), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 1731-43.

[187] 118 CONG. REC. 4940, 7166 (1972) (remarks of Sen. Williams), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 1769; *id.* at 7564 (remarks of Rep. Perkins), *reprinted in* LEGISLATIVE HISTORY, *supra* note 148, at 1844.

But if Congress did not overrule existing class action decisions, neither did it enact them into statutory law. Passages in the legislative history approved the reasoning of judicial decisions, but the only congressional action was refusal to overrule them. Such inaction reveals no intent to freeze existing law.[188] Congressional endorsement of judicial procedures and judicial decisions was equivalent not to enactment of past decisions into statutory law, but to endorsement of the evolutionary process by which case law is made. By approving judicial methods, Congress did not favor past decisions over future developments, especially in areas in which the Supreme Court had not yet spoken.[189] Subsequent developments confirm this conclusion.

E. Subsequent Title VII Class Action Decisions

The Equal Employment Opportunity Act of 1972 reinforced existing trends in favor of liberal certification of Title VII class actions. Several decisions relied explicitly on the legislative history of the Act.[190] Many others followed earlier decisions without referring to it,[191] which was not surprising, because the Act left the status quo undisturbed. Most of the courts of appeals that had not already endorsed the presumption in favor of certification of Title VII class actions did so, and in the other circuits, district courts accepted the presumption.[192] There were exceptions to this nationwide trend, but they remained in large part responses to the facts

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[188] *See* text and notes at notes 166, 173, 180 *supra*.

[189] *Accord,* International Bhd. of Teamsters v. United States, 431 U.S. 324, 346 & n.28, 354 & n.39 (1977).

[190] *E.g.,* Bauman v. United States Dist. Court, 557 F.2d 650, 662 n.1 (9th Cir. 1977); Williams v. TVA, 552 F.2d 691, 693-94 (6th Cir. 1976); Gilbert v. General Elec. Co., 519 F.2d 661, 663-64 & n.12 (4th Cir. 1975), *rev'd on other grounds,* 429 U.S. 125 (1976).

[191] *E.g.,* Donaldson v. Pillsbury Co., 554 F.2d 825, 829-32 (8th Cir.), *cert. denied,* 434 U.S. 896 (1977); Crockett v. Green, 534 F.2d 715, 717-18 (7th Cir. 1976); Senter v. General Motors Corp., 532 F.2d 511, 520-26 (6th Cir.), *cert. denied,* 429 U.S. 870 (1976); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247-57 (3d Cir.), *cert. denied,* 421 U.S. 1011 (1975); Franks v. Bowman Transp. Co., 495 F.2d 398, 409-14 (5th Cir. 1974), *rev'd on other grounds,* 424 U.S. 747 (1976).

[192] 1st Circuit: Brown Univ. v. Lamphere, 553 F.2d 714, 719 (1st Cir. 1977) (dictum); Beasley v. Griffin, 427 F. Supp. 801, 802-03 (D. Mass. 1977). 2d Circuit: Acha v. Beame, 438 F. Supp. 80 (S.D.N.Y. 1976), *aff'd on other grounds,* 570 F.2d 57 (2d Cir. 1978); Women's Comm. for Equal Opportunity v. NBC, Inc., 71 F.R.D. 666, 669 (S.D.N.Y. 1976); Grogg v. General Motors Corp., 72 F.R.D. 523, 530 (S.D.N.Y. 1976). 9th Circuit: Waters v. Heublein, Inc., 547 F.2d 466, 469-70 (9th Cir. 1976), *cert. denied,* 433 U.S. 915 (1977). 10th Circuit: Rich v. Martin Marietta Corp., 522 F.2d 333, 340-41 (10th Cir. 1975). D.C. Circuit: Hackley v. Roudebush, 520 F.2d 108, 151 n.177 (D.C. Cir. 1975).

of particular cases.[193] Only a few cases, all decided by district courts, offered general arguments against liberal certification.[194] The precedential effect of the early Title VII class action decisions and the legislative history of the Equal Employment Opportunity Act of 1972 were sufficient to assure continued momentum toward liberal certification.

This trend was halted, if not reversed, by the Supreme Court's decision in *East Texas Motor Freight System, Inc. v. Rodriguez*.[195] The plaintiffs in *Rodriguez* were three Mexican-American employees of East Texas Motor Freight who were city drivers at its San Antonio terminal. They had applied for transfers to jobs as line drivers, on routes between metropolitan areas, but their applications were denied. East Texas Motor Freight did not permit transfers from city driver to line driver positions, and the applicable collective bargaining agreement did not permit city drivers to use their seniority in city driver jobs to obtain line driver jobs. The plaintiffs then filed charges with the EEOC alleging that the no-transfer and seniority policies were discriminatory. After exhausting administrative remedies, they sued in federal district court. Their action was brought on behalf of all Mexican-American and black city drivers in Texas covered by the collective bargaining agreement and all Mexican-American and black applicants for jobs as line drivers with East Texas Motor Freight. The plaintiffs failed to move for certification of a class action, however, and stipulated that trial would be limited to their individual claims.[196] After trial of these claims, the district court dismissed the claims on behalf of the class, citing the plaintiffs' failure to pursue them. The district court also relied on the fact that a large majority of union members, most of whom were members of the proposed class, had re-

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[193] *E.g.*, Doctor v. Seaboard Coast Line R.R., 540 F.2d 699, 705-10 (4th Cir. 1976); Bailey v. Ryan Stevedoring Co., 528 F.2d 551, 553 (5th Cir. 1976), *cert. denied*, 429 U.S. 1052 (1977); Wright v. Stone Container Corp., 524 F.2d 1058, 1061-62 (8th Cir. 1975); Taylor v. Safeway Stores, Inc., 524 F.2d 263, 270-71 (10th Cir. 1975).

[194] *E.g.*, Harriss v. Pan Am. World Airways, 74 F.R.D. 24, 36-38 (N.D. Cal. 1977); Williams v. Wallace Silversmiths, Inc., 75 F.R.D. 633, 635-36 (D. Conn. 1976), *appeal dismissed*, 566 F.2d 364 (2d Cir. 1977); Marshall v. Target Stores, Inc., 11 Fair Empl. Prac. Cas. 775, 776 (E.D. Mo. 1975); Mason v. Calgon Corp., 63 F.R.D. 98, 103-08 (W.D. Pa. 1974); Kinsey v. Legg, Mason & Co., 60 F.R.D. 91, 98-100 (D.D.C. 1973); Blankenship v. Wometco Blue Circle, Inc., 59 F.R.D. 308, 309 (E.D. Tenn. 1972); White v. Gates Rubber Co., 53 F.R.D. 412, 413-15 (D. Colo. 1971); Gresham v. Ford Motor Co., 53 F.R.D. 105, 106-07 (N.D. Ga. 1970).

[195] 431 U.S. 395 (1977).

[196] *Id.* at 400. The district court's opinion is not reported.

jected a proposal to merge city driver and line driver seniority lists, one of the remedies sought by plaintiffs.[197]

The court of appeals reversed the district court in almost all respects.[198] It held that a class action should have been certified, relying almost entirely on the presumption in favor of certification. It relieved plaintiffs of the duty to move for certification by requiring the district court to raise the issue itself. The opinion minimized the conflict of interest between the plaintiffs and the members of the class, as revealed by the union vote rejecting merger of the seniority lists, by characterizing it as a disagreement only over the desired remedy.[199] The court of appeals went on to find that trial on the individual claims had implicitly included the classwide claims[200] and that these should have been resolved in favor of the class.[201]

Confronted with this extreme application of the presumption in favor of certification, the Supreme Court rejected the reasoning of the court of appeals and held that the district court had correctly denied certification. The Court cautiously acknowledged that "suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs,"[202] but it applied this presumption only to the requirement of commonality in rule 23(a)(2), not to the further, constitutionally based, requirement of adequacy of representation in rule 23(a)(4).[203] The plaintiffs' representation of the class was inadequate for the reasons pointed out by the district court. It was also inadequate for another reason: the named plaintiffs were not members of the class they sought to represent because their individual claims had failed on the merits.[204] This last reason was particularly powerful on the facts of *Rodriguez* itself, because the plaintiffs had neglected to raise the issue of certification in a timely fashion in the district

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[197] *Id.* The district court also found against the plaintiffs on their individual claims, holding that the defendant's no-transfer and seniority policies were not discriminatory and that the plaintiffs were not otherwise qualified to be line drivers.

[198] Rodriguez v. East Tex. Motor Freight Sys., Inc., 505 F.2d 40 (5th Cir. 1974).

[199] *Id.* at 50-52.

[200] *Id.* at 52.

[201] *Id.* at 52-61. It also held that the named plaintiffs were entitled to have their applications considered on the merits when vacancies arose. *Id.* at 63.

[202] 431 U.S. at 405.

[203] *Id.* at 405-06.

[204] *Id.* at 403-04. The plaintiffs also stipulated that they had not suffered from discrimination in hiring. *Id.* at 404.

court.[205] As the Supreme Court recognized at the time, and has emphasized more recently,[206] such reasoning cannot readily be extended to cases in which the certification ruling precedes a decision on the merits.

A common but hardly universal reaction to *Rodriguez* by the lower federal courts has been a reexamination of the presumption in favor of certification and revived caution in applying it to Title VII class actions.[207] The precedential significance of *Rodriguez* is limited, however. Its holding does no more than reject an extreme application of the presumption in favor of certification. The Supreme Court probably did not grant certiorari to lay down a general rule, since it considered *Rodriguez* as part of a group of cases principally concerned with the legality of hiring and seniority practices in the trucking industry.[208] The Court's opinion only corrected an egregious mistake.

Nevertheless, *Rodriguez* has caused some lower federal courts to depart from the trend toward liberal certification[209] while others have continued to adhere to it.[210] Post-*Rodriguez* decisions within the same circuit have applied inconsistent reasoning, even if they

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[205] *Id.* at 405.

[206] *Id.* at 406 n.12. The Fifth Circuit nevertheless has extended this reasoning to cases in which the district court denied certification with or without a hearing. Armour v. City of Anniston, 597 F.2d 46, 48-51 (5th Cir. 1979); Davis v. Roadway Express, Inc., 590 F.2d 140, 143 (5th Cir. 1979); Satterwhite v. City of Greenville, 578 F.2d 987, 991-96 (5th Cir. 1978) (en banc), *vacated,* 100 S. Ct. 1334 (1980).

The Supreme Court has cast doubt on these decisions in Deposit Guaranty Nat'l Bank v. Roper, 100 S. Ct. 1166 (1980), and United States Parole Comm'n v. Geraghty, 100 S. Ct. 1202 (1980), which held that mootness of the named plaintiff's individual claim does not preclude appellate review of the district court's denial of certification. *Accord,* Alexander v. Gino's, Inc., 621 F.2d 71, 73-74 (3d Cir. 1980).

[207] *E.g.,* Kelley v. Norfolk & W. Ry., 584 F.2d 34, 35 (4th Cir. 1978); Satterwhite v. City of Greenville, 578 F.2d 987, 991-94 & n.8 (5th Cir. 1978) (en banc), *vacated,* 100 S. Ct. 1334 (1980).

[208] On the same day that certiorari was granted in *Rodriguez,* it was also granted in International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). *See* 425 U.S. 990 (1976). The decision in *Teamsters* partially or wholly overruled over 30 decisions in six circuits, 431 U.S. at 378-79 & nn.2 & 3 (Marshall, J., concurring in part and dissenting in part), and the judgments against the union in *Rodriguez* were remanded for reconsideration in light of *Teamsters.* 431 U.S. at 406 n.13.

[209] *E.g.,* Davis v. Roadway Express Co., 590 F.2d 140, 143 (5th Cir. 1979); Shelton v. Pargo, Inc., 582 F.2d 1298, 1312-13 (4th Cir. 1978); Tuft v. McDonnell Douglas Corp., 581 F.2d 1304, 1307-08 (8th Cir. 1978); Shipp v. Memphis Area Office, Tenn. Dep't of Empl. Security, 581 F.2d 1167, 1170-72 (6th Cir. 1978), *cert. denied,* 440 U.S. 980 (1979); Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304, 1312 (9th Cir. 1977).

[210] *E.g.,* Scott v. University of Del., 601 F.2d 76, 92-95 (3d Cir.) (Adams, J., concurring), *cert. denied,* 444 U.S. 931 (1979); Payne v. Travenol Labs., Inc., 565 F.2d 895, 900 (5th Cir.), *cert. denied,* 439 U.S. 835 (1978).

have not reached inconsistent results.[211] Such coexisting lines of authority have aggravated the chronic uncertainty surrounding the application of rule 23. Whether any particular case will be certified as a class action depends less on rules of law than on the district judge's selection of precedent.

II. A General Method of Analysis

A. Replacing the Presumption in Favor of Certification

In the preceding sections, I have argued that the reasons advanced for liberal certification of Title VII class actions are inadequate. Allegations of employment discrimination are not "by definition" allegations of classwide discrimination in any sense relevant to class actions under rule 23. The connection between allegations of discrimination and certification of class actions is not logical, but empirical. It counsels not an inquiry into meaning, but an examination of evidence. Many Title VII claims appropriately seek "final injunctive or corresponding declaratory relief with respect to the class as a whole";[212] whether any particular claim does so depends on the facts of each case. The Advisory Committee note recommending the suitability of civil rights cases for certification under rule 23(b)(2) is not authoritative. Congressional policy, as expressed in Title VII and its legislative history, does not reflect a judgment of sufficient force and clarity to displace the usual operation of rule 23.

The substantive policies that favor liberal certification of class actions instead have been formulated by the judiciary. The legal and moral force of *Brown v. Board of Education*[213] has caused the federal courts to favor claims of racial discrimination, most significantly in Title VII cases through judicial creation of the theory of disproportionate adverse impact. The substantive policy favoring discrimination claims has also affected the procedural rules by which such claims are enforced, but often in a haphazard way, as the presumption in favor of certification illustrates. If the pre-

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[211] *Compare* Rossini v. Ogilvy & Mather, Inc., 80 F.R.D. 131, 135-36 (S.D.N.Y. 1978) *with* Rosario v. New York Times Co., 21 Fair Empl. Prac. Cas. 493, 495-96 (S.D.N.Y. 1979). For accounts of conflicting decisions, see I.M.A.G.E. v. Bailar, 78 F.R.D. 549, 554-55 (N.D. Cal. 1978); 10 U. Rich. L. Rev. 394, 400 & n.48 (1976). *See also* Comment, *The Proper Scope of Representation*, *supra* note 13, at 182; Comment, *Title VII Class Action Certification in Third Circuit District Courts*, 24 Vill. L. Rev. 295 (1978).

[212] Fed. R. Civ. P. 23(b)(2). *See* note 56 *supra*.

[213] 347 U.S. 483 (1954).

sumption applies regardless of the merits of the named plaintiff's claims, it permits abuse of the class action device as much as it furthers the substantive policy against discrimination.

It follows that the presumption in favor of certification must be tempered by closer examination of the character and merits of the named plaintiff's claims. The validity of the argument for liberal certification depends on the nature of the claims asserted by the named plaintiff on his own behalf and on behalf of the class. The existence of an empirical connection between claims of individual discrimination and claims of classwide discrimination must be determined on the facts of each case, as must the likelihood that the plaintiff will succeed in obtaining classwide injunctive or declaratory relief. Likewise, the relevance of the policy against discrimination depends on the nature and substantiality of the plaintiff's claims. To the extent that the policy against discrimination has given rise to identifiable substantive rules, like the doctrine of disproportionate adverse impact, its effect on certification depends on whether those rules have justifiably been invoked on behalf of the class. To the extent that substantive policy has given rise to a general judgment, not embodied in any particular substantive rule, that victims of discrimination deserve relief regardless of procedural obstacles, its application depends squarely on the merits of the claim asserted on behalf of the class. If the claim is frivolous, the policy has no force because the claim is not being made on behalf of genuine victims of discrimination. The policy presumes the substantiality of the claim asserted on behalf of the class.

Examination of the merits is also necessary to prevent abuse of the class action device by plaintiffs and their attorneys, who have incentives to add class action allegations in order to obtain settlement leverage. Plaintiffs may seek better settlement of their individual claims, and class attorneys increased attorney's fees, in exchange for concessions on the class claims.[214] Even weak class

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[214] Dam, *supra* note 64, at 56-61; Rosenfield, *An Empirical Test of Class-Action Settlement*, 5 J. LEGAL STUD. 113 (1976). For instances in which weak or frivolous claims have been buttressed with class action allegations, see note 257 *infra*. For examples of particularly egregious misuse of class actions by attorneys, see Munoz v. Arizona State Univ., 19 Empl. Prac. Dec. 6575 (D. Ariz. 1979) (class attorney's "production line" representation in this and other Title VII class actions); Smith v. Josten's Am. Yearbook Co., 78 F.R.D. 154, 163-68 (D. Kan. 1978) (same attorney had 27 Title VII class actions pending in district and submitted form papers with little variation in each case); Peak v. Topeka Hous. Auth., 78 F.R.D. 78, 80-85 (D. Kan. 1978) (general allegations and form complaint by same attorney as in *Smith*). *But cf.* Johnson v. Wentz Equip. Co., 18 Fair Empl. Prac. Cas. 1499 (D. Kan. 1977) (approving class action settlement negotiated by same attorney as in *Smith*).

claims may induce employers to settle. Although the chance of success is small, the employer's exposure to litigation expenses and a judgment in favor of the class may be so great that settlement may be the most rational course.[215] The cost of this strategy to plaintiffs and their attorneys is minimal. The liberal rules of pleading in the Federal Rules of Civil Procedure allow general allegations of classwide discrimination[216] while the presumption in favor of certification weakens the requirements of rule 23. Although some decisions impose a requirement of specific pleading of certain class action allegations,[217] rule 23 is not easily made to yield specific requirements.[218] In any event, pleadings that have been found to be inadequate remain open to amendment, subject only to the loose requirements of good faith pleading.[219] In theory, district judges could exercise their broad powers under rule 23 to prevent such abuse, but they remain unable to examine the many tactical judgments involved in a complicated case.[220] For the same reason, they are unable to impose defendant's attorney's fees upon many plaintiffs who bring meritless actions. District judges can impose attorney's fees on plaintiffs under Title VII only if they first find that the plaintiff's claim is "frivolous, unreasonable, or without foundation."[221] This requirement precludes liability for attorney's fees in

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[215] Class actions increase each element of the defendant's potential costs: litigation expenses, liability to plaintiffs for relief and for attorney's fees, and injury from adverse publicity. Even if the chance of success on the class claims is small, the increase in the defendant's potential costs may increase the risk of litigation sufficiently to make settlement attractive. *See* Dam, *supra* note 64, at 59.

Similar costs in derivative suits, and similar potential for abuse, have led state legislatures to impose restrictions upon such actions. *See, e.g.*, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 548-49, 555-56 (1949).

[216] Conley v. Gibson, 355 U.S. 41, 47 (1957); FED. R. CIV. P. 8. There is no explicit requirement for specific pleading of class action allegations. *See* FED. R. CIV. P. 9, 23.

[217] Even decisions which have insisted on specificity, however, have permitted plaintiffs to flesh out the general allegations of the complaint through discovery and other means. *See* note 255 *infra*.

[218] *See* text and notes at notes 58-63 *supra*.

[219] Foman v. Davis, 371 U.S. 178 (1962); FED. R. CIV. P. 7(b)(2), 11, 15(a); ABA Code of Professional Responsibility DR 7-102(A)(2).

[220] Posner, *supra* note 86, at 441; *Developments, supra* note 5, at 1538.

[221] Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978). Nonetheless, attorney's fees are awarded to prevailing plaintiffs as a matter of course. *Id.* at 417. This interpretation of section 706(k), 42 U.S.C. § 2000e-5(k) (1976), aggravates the problem of frivolous class action allegations. The size of attorney's fees awards usually increases with the extent of the remedy, Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 718 (5th Cir. 1974); Heinsz, *Attorney's Fees for Prevailing Title VII Defendants: Toward a Workable Standard*, 8 U. TOL. L. REV. 259, 265 (1977). Plaintiffs' attorneys thus have much to gain, but relatively little to lose, by alleging classwide discrimination. A one-sided interpretation

all but the weakest cases.

Instead of pursuing the elusive goal of reducing rule 23 to a series of specific pleading requirements, or taking the opposite course of relying ever more heavily on the discretion of the district judge, a more realistic alternative is to require the named plaintiff to reveal the merits of both the individual and class claims he asserts. Pretrial adjudication under the Federal Rules of Civil Procedure is not usually accomplished by specific pleading, but by examining the merits through discovery and summary judgment.[222] The same course should be followed with respect to certification of class actions. An extended inquiry into the issue of certification is more likely to be profitable if it parallels an inquiry into the merits. As the Federal Rules recognize,[223] litigation resources are better invested in deciding procedural issues related to the merits than in technicalities which require legal and factual research of no further utility. Rulings on issues unrelated to the merits may also disrupt the settlement process, even in the absence of abuse. If certification of a class action erodes the bargaining position of the defendant,[224] it should be preceded by a finding of some likelihood of success on the merits. Otherwise, the settlement process is skewed in favor of plaintiffs without any basis in the merits of the plaintiff's claims.

The underlying requirements of rule 23, that classwide adjudication would be more efficient than individual actions and that members of the class be treated fairly, are more easily applied after an examination of the merits. The determination whether the named plaintiff's claim has questions of law or fact in common with those of the class or whether it is typical of such claims requires an analysis of the legal theory and evidence that the plaintiff is likely to offer on the merits. An examination of the merits is

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of the statute's neutral provisions is not required by its brief legislative history. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 419-20 (1978); Heinsz, *supra*, at 262, 268-74. It neglects the desirability, ex ante, of deterring claims that are weak, but not frivolous or likely to be found frivolous, and the unfairness, ex post, of imposing the cost of litigation on successful defendants. Dam, *supra* note 64, at 71-72.

[222] C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 566-72 (2d ed. 1947); Roberts, *Fact Pleading, Notice Pleading and Standing*, 65 CORNELL L. REV. 390, 396-97 (1980). This is consistent with the general principle that federal pleading rules are designed to facilitate judgment on the merits rather than encourage resort to technicalities of procedure, Conley v. Gibson, 355 U.S. 41, 47-48 (1957).

[223] FED. R. CIV. P. 1; 2 J. MOORE, *supra* note 12, ¶ 1.13[1], at 281-86; 4 C. WRIGHT & A. MILLER, *supra* note 13, § 1029, at 129.

[224] *See* text and notes at notes 214-215 *supra*.

also likely to reveal whether the named plaintiff can forcefully present the class claims and whether his individual claim conflicts with the claims of the class. Indeed, after *East Texas Motor Freight System, Inc. v. Rodriguez*, a finding that the named plaintiff's individual claim lacks merit disqualifies him from subsequently obtaining certification of a class action.[225] Even application of the technical requirement of numerosity would be aided by an analysis of the merits, which would reveal the breadth of the class for which the claim might successfully be asserted.

The precertification inquiry into the merits should be accomplished by adapting the usual pretrial device of summary judgment.[226] The plaintiff should be required to present evidence and affidavits sufficient to withstand a motion for summary judgment by the defendant. The standard of sufficiency should be that normally used, but the burden of producing evidence should be reversed: the plaintiff should be required to present sufficient evidence and affidavits so that, resolving all questions of credibility and drawing all reasonable inferences in his favor, he would prevail as a matter of law on both the individual and class claims.[227] Certification should be denied if he failed to make a sufficient showing on either claim, or, of course, if he failed to satisfy the requirements of rule 23.

The plaintiff should bear the burden of production because he is more likely to produce information relevant to the certification decision. Defendants' motions for summary judgment are usually denied because the defendant has produced too little evidence, not because the plaintiff has produced enough.[228] But the defendant's failure to produce evidence reveals little about the nature or merits of the plaintiff's claims. Moreover, the existing burden of production on summary judgment does not alleviate the difficulties faced by class action defendants in the settlement process. It does not reduce litigation expense, as the defendant must still produce evidence to sustain a motion for summary judgment, and hence it does not offset the advantages gained by plaintiffs in alleging class-

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[225] *See* text and notes at notes 204-206 *supra*.

[226] FED. R. CIV. P. 56.

[227] The standard given in rule 56 is whether "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). *See also* 6 J. MOORE, *supra* note 12, ¶ 56.04[2], at 56-76; 10 C. WRIGHT & A. MILLER, *supra* note 13, § 2713, at 407.

[228] Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 751-52 (1974).

wide discrimination.[229]

This adaptation of summary judgment to the certification process would not greatly disrupt the normal use of summary judgment in class actions. The preliminary finding on the merits need be binding only on the issue of certification. If certification were denied because the plaintiff failed to make a sufficient showing of merit on his individual claim, the plaintiff could pursue the claim until the defendant made the showing usually required for summary judgment. If certification were granted, the defendant need not be precluded from subsequent motions for summary judgment. As a practical matter, however, it is doubtful that any such motion would succeed, at least as to issues on which the plaintiff had made a sufficient showing on the merits for certification.[230]

The advantage of adapting an existing device instead of creating a new one is familiarity. Summary judgment is the standard means of pretrial adjudication under the Federal Rules of Civil Procedure. Judges and lawyers are acquainted with its operation and with the standard of proof it requires.

Other proposals to evaluate the merits prior to certification also have adapted an existing device, although they have chosen the motion for preliminary injunction. The proposed showing required has varied from whether "there is a substantial possibility that [the plaintiffs] will prevail on the merits"[231] to whether "there are sufficiently serious questions going to the merits to make them fair grounds for litigation."[232] Such standards emphasize the serious consequences of certification, which, like issuance of a preliminary injunction, impose substantial burdens upon defendants. Other factors, however, that have no apparent analogue in the certification decision, such as the likelihood of irreparable injury to the plaintiff, also enter into the decision to grant preliminary relief.[233] Moreover, these factors have caused the standard for pre-

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[229] *See* text and notes at notes 215-216 *supra*.

[230] After the plaintiff has made a showing sufficient for certification, the defendant might move for summary judgment on the basis of newly discovered conflicting evidence, but because questions of credibility are not resolved on motions for summary judgment, it is doubtful that the motion would be granted. The defendant nevertheless should be allowed to make such motions because partial summary judgment might be warranted, particularly on issues not addressed on the merits in the certification decision. *See* FED. R. CIV. P. 56(d).

[231] Dolgow v. Anderson, 43 F.R.D 472, 501 (E.D.N.Y. 1968).

[232] H.R. 5103, 96th Cong., 1st Sess. § 101(a) (1979); Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 COLUM. L. REV. 299, 335 (1980).

[233] *See* O. FISS, *supra* note 76, at 168.

liminary injunctions to be applied in a narrower range of cases, and with greater discretion by the district judge, than the standard for summary judgment. The standard for preliminary injunctions also poses a greater risk of prejudgment of the merits because it requires a stronger showing that, if made, is more likely to influence the final decision on the merits. By contrast, denial of summary judgment for the defendant has never been thought to work to his prejudice at trial.[234] Finally, the standard for summary judgment, with the burden of production shifted to the plaintiff, is as strict as necessary. Summary judgment currently is granted to defendants in Title VII cases with sufficient frequency to indicate that placing the burden upon plaintiffs would require them to make a significant showing on the merits.[235]

B. Objections to Considering the Merits

Examination of the merits before certification is not a new idea. Indeed, it usually is regarded as an old idea that has already been proposed, considered, and rejected. It first gained prominence in *Dolgow v. Anderson*,[236] in which Judge Weinstein ordered a precertification hearing on the merits of a securities fraud class action. It was given a mixed reception in the lower federal courts[237] and apparently was rejected by the Supreme Court in *Eisen v. Carlisle & Jacquelin*.[238] The district court in *Eisen* imposed 90% of the cost of notice to the class upon the defendants after a preliminary showing that the class was "more than likely" to prevail on its

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[234] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974).

[235] *E.g.*, Espinoza v. Farah Mfg. Co., 414 U.S. 86, 87-88, 95-96 (1973) (reversing summary judgment for plaintiff and finding no violation by defendant); Munoz v. International Ass'n of Theatrical Stage Employees, 563 F.2d 205, 209-14 (5th Cir. 1977); Thompson v. Sun Oil Co., 523 F.2d 647, 649 (8th Cir. 1975); Patmon v. Van Dorn Co., 498 F.2d 544, 547 (6th Cir. 1974); Fagan v. National Cash Register Co., 481 F.2d 1119, 1126 & n.25 (D.C. Cir. 1973). *See also* 6 J. MOORE, *supra* note 12, ¶ 56.17[10] (2d ed. 1979 & Supp. 1979).

Some courts have cautioned against summary judgment in employment discrimination cases because such cases usually involve issues of intent that can only be resolved after a full hearing on the merits. *E.g.*, EEOC v. Southwest Tex. Methodist Hosp., 606 F.2d 63, 65 (5th Cir. 1979). To the extent that this caution is well founded, *see* 6 J. MOORE, *supra* note 12, ¶ 56.16, at 56-661 to -670; 10 C. WRIGHT & A. MILLER, *supra* note 13, § 2730, at 582-600, ¶ 2732, at 606-17, it applies to all forms of pretrial adjudication regardless of the standard employed. It does not favor the preliminary injunction standard over the summary judgment standard.

[236] 43 F.R.D. 472, 501 (E.D.N.Y. 1968).

[237] *See* 7A C. WRIGHT & A. MILLER, *supra* note 13, § 1785, at 135-36.

[238] 417 U.S. 156 (1974). *See* 3B J. MOORE, *supra* note 12, ¶ 23.45 [4.-4], at 23-376 to -386.

claims.[239] Both the court of appeals[240] and the Supreme Court[241] held this ruling to be erroneous, on the ground that rule 23 did not authorize an inquiry into the merits. The Supreme Court stated flatly: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[242] The Court reasoned that a preliminary hearing on the merits was inconsistent with the requirement of rule 23(c)(1) that the certification decision be made "[a]s soon as practicable after the commencement"[243] of the action.[244] The Court also feared that the preliminary determination would be made without procedural safeguards and that a finding adverse to the defendant would be prejudicial at trial.[245]

Despite the breadth of its language, the Court's immediate concern was with the cost of notice imposed on the defendants.[246] It expressly refused to reach other issues because it found the notice requirements of rule 23 to be dispositive.[247] The Court reasoned that the plaintiff should not obtain the benefit, and the defendants should not bear the burden, of certification of a class action until the plaintiff had shown that the requirements of rule 23 had been satisfied.[248] By contrast, preliminary examination of the merits without shifting the cost of notice would benefit defendants. If the plaintiff failed to make the necessary showing, the defendant would be relieved of the expense of litigation, the exposure to liability, and the pressure of settlement of a class action.[249] Unlike the procedure attempted in *Eisen*, a precertification show-

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[239] Eisen v. Carlisle & Jacquelin, 54 F.R.D. 565, 567 (S.D.N.Y. 1972), *rev'd*, 479 F.2d 1005 (2d Cir. 1973), *aff'd*, 417 U.S. 156 (1974).

[240] 479 F.2d at 1015-16.

[241] 417 U.S. at 177-79.

[242] *Id.* at 177.

[243] FED. R. CIV. P. 23(c)(1).

[244] 417 U.S. at 178.

[245] *Id. See* text at note 234 *supra.*

[246] That cost was more than $19,000. 417 U.S. at 168.

[247] *Id.* at 172 n.10.

[248] *Id.* at 177-79.

[249] The opportunity for defendants to obtain summary judgment binding on the class would be restricted, but the effect of this restriction would be minimal. For most defendants the enhanced preclusive effect of class actions is not worth the increased exposure to liability. Few defendants indeed have welcomed class actions because of their greater preclusive effect. Most have vigorously opposed certification because the statute of limitations offers similar preclusive effect without increased exposure to liability. Dam, *supra* note 69, at 120. As a practical matter, subsequent actions would also be deterred by denial of certification because of an insufficient showing on the merits of the class claims. *Id.*

ing of merit would not require defendants to assist plaintiffs in maintaining class actions. Instead, it would protect defendants from unwarranted certification of class actions.

Despite its pervasive influence on class action practice, the decision in *Eisen* has not prevented district courts from making or reexamining certification decisions after hearing motions for preliminary injunctions or for summary judgment, or even after trial on the merits.[250] This practice has been encouraged by the tendency of the courts of appeals, which usually review certification rulings only after final judgment on the merits,[251] to rely on the disposition on the merits in determining the appropriateness of certification.[252] The Supreme Court itself examined the merits in *East Texas Motor Freight System, Inc. v. Rodriguez*,[253] when it relied on the failure of the named plaintiffs' individual claims to

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[250] *E.g.*, Gore v. Turner, 563 F.2d 159, 166 (5th Cir. 1977) (after trial in nonemployment civil rights action); Roman v. ESB, Inc., 550 F.2d 1343, 1345 (4th Cir. 1976) (en banc) (decertification after trial); Senter v. General Motors Corp., 532 F.2d 511, 520-24 (6th Cir.) (after trial), *cert. denied*, 429 U.S. 870 (1976); Hernandez v. Gray, 530 F.2d 858, 859 (10th Cir.) (after trial), *cert. denied*, 425 U.S. 958 (1976); Reed v. Arlington Hotel Co., 476 F.2d 721, 723 (8th Cir.) (after trial), *cert. denied*, 414 U.S. 854 (1973); Harris v. White, 479 F. Supp. 996, 1012 (D. Mass. 1979) (motion to dismiss); Sobel v. Yeshiva Univ., 477 F. Supp. 1161 (S.D.N.Y. 1979) (summary judgment); Davis v. Bucher, 451 F. Supp. 791, 801 (E.D. Pa. 1978) (summary judgment in non-Title VII employment discrimination case); Garcia v. Rush-Presbyterian-St. Luke's Medical Center, 80 F.R.D. 254, 260 (N.D. Ill. 1978) (summary judgment); Lightfoot v. Gallo Sales Co., 15 Fair Empl. Prac. Cas. 619 (N.D. Cal. 1977) (preliminary injunction); Forst v. First Nat'l Bank, 5 Fair Empl. Prac. Cas. 609 (D.D.C. 1972) (partial summary judgment). *See* 3B J. MOORE, *supra* note 12, ¶ 23.50, at 23-425 to -433; 7A C. WRIGHT & A. MILLER, *supra* note 13, § 1785, at 87-89 (Supp. 1978); *Developments*, *supra* note 5, at 1418-27.

Some decisions have criticized the tendency to reach the merits before ruling on certification. *E.g.*, Horn v. Associated Wholesale Grocers, 555 F.2d 270, 273-75 (10th Cir. 1977); Huff v. N.D. Cass Co., 485 F.2d 710 (5th Cir. 1973) (en banc). *See Developments*, *supra* note 5, at 1419-20.

[251] Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978); Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 480-81 (1978).

[252] United Black Firefighters v. Hirst, 604 F.2d 844, 848 (4th Cir. 1979); Scott v. University of Del., 601 F.2d 76, 88-89 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979); Camper v. Calumet Petrochems., Inc., 584 F.2d 70, 71 (5th Cir. 1978) (per curiam); Shipp v. Memphis Area Office, Tenn. Dep't of Empl. Security, 581 F.2d 1167, 1171-72 (6th Cir. 1978), *cert. denied*, 440 U.S. 980 (1979); Walker v. World Tire Corp., 563 F.2d 918, 921 (8th Cir. 1977); Castro v. Beecher, 459 F.2d 725, 732 (1st Cir. 1972) (non-Title VII employment discrimination case).

The Supreme Court has also noted that certification rulings are " 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1972) (quoting Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963)).

[253] 431 U.S. 395, 403-04 (1977).

justify denial of certification.[254]

The widespread practice of conducting discovery and hearings on certification also has brought the parties and the district courts closer to an examination of the merits.[255] Decisions are not uncommon in which the district court analyzes evidence of disproportionate adverse impact in ruling upon certification,[256] or conversely, in which it denies certification, and dismisses the named plaintiff's claim with prejudice for closely related reasons.[257] In some respects, consideration whether class members will ultimately obtain relief has become so routine that it has escaped recognition. The most common example is exclusion of class members whose claims are barred by the statute of limitations.[258] Another is exclusion of those whose claims are precluded by related litigation.[259] Thus *Eisen* neither was intended to be, nor has been interpreted as, an absolute bar to precertification examination of the merits.

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[254] *But see* text and notes at notes 204-206 *supra.*

[255] Shelton v. Pargo, Inc., 582 F.2d 1298, 1312-14 (4th Cir. 1978) (discovery before certification encouraged); Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304, 1312-13 (9th Cir. 1977) (dictum) (encouraging discovery in most cases); Walker v. World Tire Corp., 563 F.2d 918, 921 (8th Cir. 1977) (discovery and evidentiary hearing); Huff v. N.D. Cass Co., 485 F.2d 710, 713 (5th Cir. 1973) (en banc) (discovery before certification encouraged); Harris v. White, 479 F. Supp. 996, 1009-10 (D. Mass. 1979) (certification hearing postponed for evidentiary hearing); Martinez v. Bethlehem Steel Corp., 78 F.R.D. 125, 128 (E.D. Pa. 1978) (certification denied after discovery); Solin v. State Univ., 416 F. Supp. 536, 541 (S.D.N.Y. 1976) (certification ruling postponed for discovery); Jiron v. Sperry Rand Corp., 423 F. Supp. 155, 167-68 (D. Utah 1975) (certification ruling postponed for specific pleading and discovery).

[256] Martin v. Arkansas Arts Center, 21 Fair Empl. Prac. Cas. 555, 559 n.6 (E.D. Ark. 1979); Roberts v. Marine Midland Bank, 20 Empl. Prac. Dec. 11,666, 11,668, 11,670 (S.D.N.Y. 1979); Rosendaul v. Garret Freight Lines, Inc., 19 Fair Empl. Prac. Cas. 881, 883-85 (D. Idaho 1979); Garrett v. R.J. Reynolds Indus., Inc., 81 F.R.D. 25, 32-40 (M.D.N.C. 1978); Hopewell v. University of Pittsburgh, 79 F.R.D. 689, 693-96 (W.D. Pa. 1978); Vuyanich v. Republic Nat'l Bank, 78 F.R.D. 352, 355-56 (N.D. Tex. 1978), *motion to decertify denied*, 82 F.R.D. 420, 430-32 (N.D. Tex. 1979).

[257] *E.g.*, King v. Gulf Oil Co., 581 F.2d 1184, 1186 (5th Cir. 1978); Golden v. Lascara, 17 Fair. Emp. Prac. Cas. 1129 (4th Cir. 1976) (per curiam).

[258] *E.g., In re* Consolidated Pretrail Proceedings in Airline Cases, 582 F.2d 1142, 1147-52 (7th Cir. 1978); Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 472-76 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 246 (3d Cir.), *cert. denied*, 421 U.S. 972 (1975); Beasley v. Griffin, 81 F.R.D. 114, 118 (D. Mass. 1979). *See* B. SCHLEI & P. GROSSMAN, *supra* note 133, at 290-91 (Supp. 1979). *Contra*, Lamphere v. Brown Univ., 71 F.R.D. 641, 648-49 (D.R.I. 1976) (limitations issue goes to the merits), *appeal dismissed*, 553 F.2d 714 (1st Cir. 1977).

[259] Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304, 1309-10 (9th Cir. 1977); Williams v. New Orleans Steamship Ass'n, 466 F. Supp. 662, 672 (E.D. La. 1979); Kuhn v. Philadelphia Elec. Co., 80 F.R.D. 681, 685-86 (E.D. Pa. 1978); Bishop v. United States Steel Corp., 76 F.R.D. 400, 402 (E.D. Mo. 1977); Garnett v. Mountain States Tel. & Tel. Co., 18 Fair Empl. Prac. Cas. 1773 (D. Colo. 1977).

The requirement of rule 23(c)(1) that the certification decision be made "as soon as practicable"[260] also does not preclude examination of the merits before certification. Subdivision (c)(1) itself provides that certification rulings "may be conditional, and may be altered or amended before the decision on the merits."[261] This practice has become widespread, if not routine, in Title VII litigation.[262] As Judge Weinstein argued in *Dolgow v. Anderson*,[263] conditional rulings that may be reconsidered after examination of the merits are little different from initial rulings preceded by examination of the merits. The issue is not whether subdivision (c)(1) precludes all inquiry into the merits,[264] but rather what kind of inquiry it precludes: in particular, what kind of inquiry is inconsistent with the reasons for requiring early rulings on certification.

Several of the reasons initially offered for the requirement have lost force. It was feared, for instance, that delayed denial of certification would prevent independent actions by class members because their claims would be barred by the statute of limitations.[265] The Supreme Court subsequently has held, however, that the statute of limitations is tolled from the filing of a class action until denial of certification.[266] Far from burdening class members, delayed rulings on certification lengthen the period during which they can obtain relief. The fear that delayed certification would impair the effectiveness of notice to class members[267] has also proved to be exaggerated. The length of time over which certified

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[260] FED. R. CIV. P. 23(c)(1).

[261] *Id.*

[262] *E.g.*, United States Fidelity & Guar. Co. v. Lord, 585 F.2d 860, 864 (8th Cir. 1978), *cert. denied*, 440 U.S. 913 (1979); Roman v. ESB, Inc., 550 F.2d 1343, 1346 (4th Cir. 1976) (en banc). *See* 4 H. NEWBERG, *supra* note 3, at 1330-31. The conditional nature of certification rulings was one reason that led the Supreme Court to hold that such rulings are not appealable orders. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 & n.11 (1978); Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 480-81 n.6 (1978).

[263] 43 F.R.D. 472, 502 (E.D.N.Y. 1968). *Accord*, 3B J. MOORE, *supra* note 12, ¶ 23.45 [4.-4], at 23-384 to -386.

[264] *See* B. SCHLEI & P. GROSSMAN, *supra* note 133, at 287-88 n.94 (Supp. 1979) (evidentiary showing of some kind required); 7 C. WRIGHT & A. MILLER, *supra* note 13, § 1759, at 577-79 (approving examination of merits to determine whether rule 23 is satisfied); Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123, 1143-45 (1974) (judges tend to examine the merits before certification).

[265] Frankel, *supra* note 59, at 40.

[266] American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974). *See* 3B J. MOORE, *supra* note 12, ¶ 23.90[3], at 23-551 to -557; 7A C. WRIGHT & A. MILLER, *supra* note 13, § 1800, at 171-72 (Supp. 1979).

[267] Frankel, *supra* note 59, at 40-41.

class actions remain pending[268] suggests that there is ample time for effective notice. The problem of settlements before certification has also been resolved by applying some, if not all, of the safeguards of subdivision (e) regardless of the timing of certification.[269]

The principal reason for early certification offered by the Advisory Committee was to prevent the practice of one-way intervention, allowing class members to wait until judgment had been rendered on the merits before deciding whether to intervene, and thus to take advantage of a favorable judgment without being bound by an adverse judgment.[270] But the weakening of mutuality as a prerequisite to collateral estoppel permits the equivalent of one-way intervention: a nonparty may obtain the benefit of a favorable judgment without being bound by an unfavorable judgment.[271] Of course, in some cases one-way intervention is unfair, but the reason for weakening the requirement of mutuality is to allow such cases to be identified more precisely,[272] so that preclusion will be applied only when it is fair to do so. The requirement of early certification of class actions should receive a similar interpretation. Prompt certification should be required only when delay gives rise to the dangers of one-way intervention.

Certification after a preliminary examination of the merits does not create such dangers. The defendant is not required to litigate every purported class action fully for fear of classwide liability if he loses, without any assurance of classwide preclusion if he wins. A preliminary showing of merit only establishes a necessary condition for certification; it does not result in a final adjudication. Even if the plaintiff carries his burden and establishes the existence of a class, all that he has accomplished is certification of a

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[268] *See* DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience* (pt. 1), 1976 AM. B. FOUNDATION RESEARCH J. 1023, 1056-63; Note, *supra* note 264, at 1139-45. Although these studies are not concerned with Title VII class actions, there is no evidence that Title VII class actions, if certified, are more quicky disposed of than class actions of other kinds. *See, e.g.*, Officers for Justice v. Civil Serv. Comm'n, 22 Fair Empl. Prac. Cas. 1704, 1705 (N.D. Cal. 1979) (settlement approved six years after lawsuit commenced); Coleman v. Seaboard Coast Line R.R., 22 Fair Empl. Prac. Cas. 1124, 1125 (E.D. Va. 1978) (settlement approved five years after lawsuit commenced).

[269] *See* 3B J. MOORE, *supra* note 12, ¶ 23.80[2], at 23-508 to -509; 7A C. WRIGHT & A. MILLER, *supra* note 13, § 1797, at 236-37 (1972 & Supp. 1978). *Compare* Shelton v. Pargo, Inc., 582 F.2d 1298 (4th Cir. 1978) *with* Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61 (S.D. Tex. 1977).

[270] *See* note 73 *supra*.

[271] *E.g.*, Dam, *supra* note 69, at 124; *Developments*, *supra* note 5, at 1395-96.

[272] Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-32 (1979); Hazard, *Res Nova in Res Judicata*, 44 S. CAL. L. REV. 1036, 1040-44 (1971).

class action. Class members must still await judgment in favor of the class.

In short, a limited examination of the merits before certification poses few of the problems recognized in *Eisen*. It is also consistent with the language and purposes of subdivision (c)(1) and with the practice of granting conditional certification, and indeed of examining the merits, in existing decisions. The only remaining argument against requiring a showing of merit before certification is that it has no explicit basis in rule 23. The same could be said, however, of the presumption in favor of certification of Title VII class actions. The broad judicial discretion granted by rule 23,[273] and the recognized need for judicial decisions to accommodate the rule to other sources of law, require procedures beyond those mentioned in the rule. The failure of more ambitious innovations, such as shifting the cost of notice to defendants before judgment and allowing intervention by class members after judgment, should not preclude any examination of the merits before certification.

C. Two Applications

Two of the leading Title VII class action decisions discussed earlier provide useful illustrations of the effect of examining the merits before certification. These cases, *Hall v. Werthan Bag Corp.*[274] and *Johnson v. Georgia Highway Express, Inc.*,[275] are both familiar and influential. If a preliminary inquiry into the merits would have altered their results or reasoning, such an inquiry would be likely to have a similar effect on many other decisions as well.

Hall v. Werthan Bag Corp. illustrates the conservative effect on existing law of a preliminary examination of the merits. Such an examination would have clarified the court's reasoning without altering its decision. The plaintiff claimed that he had been denied a promotion because he was black. He also sued on behalf of a class of all blacks similarly affected by the defendant's discriminatory employment practices.[276] He filed a charge with the EEOC alleging both individual and classwide discrimination, and the EEOC found reasonable cause to support both claims. This determination was

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[273] *See* text and notes at notes 65-67 *supra*.

[274] 251 F. Supp. 184 (M.D. Tenn. 1966).

[275] 417 F.2d 1122 (5th Cir. 1969).

[276] Specifically, those practices were segregated job classifications and discriminatory denial of training opportunities, wage increases and transfers. 251 F. Supp. at 185, 188.

not binding upon the district court,[277] but would now be admissible in evidence.[278] The district court could have found that the plaintiff's claims survived a motion for summary judgment for purposes of certification by relying either on the Commission's finding of reasonable cause or on the evidence supporting it.[279] Such a preliminary determination by the district court would have supported findings of commonality and typicality without reliance on the maxim, "Racial discrimination is by definition a class discrimination."[280] The remaining requirements of present rule 23(a) would have been satisfied by the district court's implicit findings of numerosity and adequacy of representation.[281] The substantial claim of classwide discrimination and the accompanying request for injunctive relief would have satisfied the requirements of present subdivision (b)(2).[282]

In *Johnson v. Georgia Highway Express, Inc.*, a preliminary examination of the merits would have revealed the excesses attributable to the presumption in favor of certification. The named plaintiff sought back pay on his own behalf, alleging that he had been discharged because he had acted as the spokesman for a group of black employees. He also sought relief on behalf of all past, present, and future black employees, alleging generalized discrimination.[283] One difficulty with certification of this class is that the named plaintiff did not seek reinstatement and so had no personal stake in the claims that he asserted on behalf of present and future employees.[284] Although his individual claim might have raised issues of classwide discrimination, the postcertification opinions in *Johnson* reveal that it did not. The gap between the individual claim and the class claim is most sharply revealed by the fact that the individual claim was settled before trial without any

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[277] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798-99 (1973).

[278] FED. R. EVID. 803(8)(C).

[279] The Commission may not disclose information obtained during conciliation efforts, but it may disclose information obtained from an investigation after an action has been commenced. Civil Rights Act of 1964 §§ 706(a), 709(e), 42 U.S.C. §§ 2000e-5(b), 2000e-8(e) (1976). Some courts have also allowed earlier disclosure to the charging party. *See generally* Comment, *Access to EEOC Files Concerning Private Employers*, 46 U. CHI. L. REV. 477 (1979).

[280] 251 F. Supp. at 186.

[281] The court found that the requirements of former rule 23(a), which included numerosity and adequacy of representation, were satisfied. *Id.* at 188.

[282] *Id.* at 185-86, 188. Contrary to the district court's ruling, *id.* at 188, certification as to compensatory relief might have been proper. *See* note 115 *supra*.

[283] 417 F.2d at 1123.

[284] *See* text and notes at notes 130-134 *supra*.

apparent effect on the class claims.[285]

Although the district court included claims of discriminatory discharge within the class claims, it expressly held that these could "only be determined on an individual basis."[286] The district court resolved an individual claim that had been consolidated with the class action in this fashion, and it invited class members to file claims of discriminatory discharge within a specific period.[287] Two such claims were filed, but neither raised any issues of classwide significance.[288] The class action, therefore, should not have encompassed claims of discriminatory discharge. Because this was the only claim advanced by the named plaintiff, the class action should not have been certified at all.

If a class action could have been properly certified in *Johnson* as to some claims, an examination of the merits would have provided a ready means for dealing with the concerns about overbroad, conclusory allegations of discrimination expressed by Judge Godbold in his concurring opinion.[289] If the named plaintiff had sought to represent a class composed of employees and applicants at all of the defendant's thirty-two truck terminals, he would have been required to present evidence applicable to each. As tried, however, the case was confined to the defendant's Atlanta terminal. Judging from the district court's ultimate findings on the merits, the class claims at trial were also limited to issues suited to class treatment. The claim that restrooms and lunchrooms were segregated clearly applied to the entire class. The claims of discriminatory hiring and transfers into previously all-white departments were supported by findings that the defendant had imposed job qualifications that resulted in the disproportionate disqualification of blacks but that had no relationship to job performance, and that previously all-white departments had few or no black employees.[290] Preliminary evidence on these issues could have been

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[285] Pretrial procedures had narrowed these class claims to segregation of restrooms, lunchrooms, and certain departments. Johnson v. Georgia Highway Express, Inc., 4 Fair Empl. Prac. Cas. 553 (N.D. Ga. 1972).

[286] *Id.* at 556.

[287] *Id.* at 556, 557-58. The other individual claimant did seek reinstatement, but there is no indication that he sought to represent the class. Even if he had, the individualized nature of his claim would have cast doubt on his ability to do so. *See id.*

[288] Johnson v. Georgia Highway Express, Inc., 5 Fair Empl. Prac. Cas. 776 (N.D. Ga. 1972).

[289] 417 F.2d at 1125-27 (Godbold, J., concurring). *See* text and notes at notes 128-129 *supra.*

[290] 4 Fair Empl. Prac. Cas. at 554-56.

presented before certification. Job qualifications and patterns of hiring can be proved with relative ease after discovery of the defendant's personnel records, which EEOC regulations require employers to retain after a charge has been filed with the Commission.[291] It would not have burdened the district court greatly to consider whether the class claims were sufficient to withstand summary judgment, and it would have greatly clarified the extent of the class and the claims asserted on its behalf.

Decisions subsequent to *Johnson* have continued to allow past employees not seeking reinstatement to represent present and future employees, on the ground that former employees are in a better position than present employees to protect the interests of the class.[292] The reason usually offered is that discharged employees are acquainted with the employer's operations but are no longer subject to the threat of retaliation.[293] Knowledge of the employer's business is addressed to the effectiveness of the named plaintiff's advocacy rather than to his interests in common with the class. A former employee's knowledge does nothing to differentiate him from a knowledgeable outsider. The risk of intimidation of present employees provides a stronger reason, particularly since it is frequently invoked in other areas of labor law.[294] In *Johnson* itself, the named plaintiff's complaint alleged retaliation,[295] and the district court made findings on the merits that black employees had been deterred from seeking transfers to better positions.[296] As with all substantive arguments for certification on grounds of assisting victims of discrimination, this argument is better evaluated after an examination of the merits[297] to determine the likelihood that class members were too intimidated to act on their own behalf.

In any event, some individual class members must participate in the proceedings if a class action is to be maintained at all. They must assist in pretrial investigation, give testimony during discov-

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[291] 29 C.F.R. § 1602.14 (1979). Additional record keeping requirements are imposed on employers by the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.15 (1979). Employers with 100 employees or more also are required to file regular reports with the EEOC, 29 C.F.R. § 1602.7 (1979), but disclosure of such reports by the EEOC is subject to restrictions. *See* B. SCHLEI & P. GROSSMAN, *supra* note 133, at 825.

[292] *See* note 133 *supra*.

[293] *See, e.g.*, Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975).

[294] *See, e.g.*, NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 239-42 (1978).

[295] 417 F.2d at 1123.

[296] 4 Fair Empl. Prac. Cas. at 555.

[297] *See* text at notes 213-214 *supra*.

ery and trial, and come forward to take advantage of any individual relief granted by the district court. Moreover, the degree of intimidation probably decreases as the likelihood of judicial relief and the intensity of judicial examination of the defendant's personnel decisions increase.[298]

To the extent that intimidation presents a serious problem, it can be dealt with by means less drastic than granting a nonmember of the class the right to sue on its behalf. Present employees should be allowed to sue anonymously.[299] Alternatively, if a past employee has already commenced an action on behalf of present employees, the court should determine whether he seeks reinstatement, and if not, whether the claim of intimidation is sufficient to withstand a motion for summary judgment by the defendant.[300] If it is, the district court should proceed to solicit intervention by present employees and to protect them explicitly from retaliation. These mechanisms protect the identity of present employees until the action has progressed far enough to reduce the threat of retaliation. They are less drastic innovations than allowing a nonmember to represent the class. Although they represent departures from orthodox judicial procedures, they are more overt than subtle expansion of the class action. Because they alter traditional practices more obviously, they also define the limits of the class action more effectively.

Conclusion

Class actions have given rise to many questions, few of which have been resolved, even in such a specialized area as Title VII

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[298] Title VII itself assumes some weakening of intimidation as enforcement proceedings progress. Charges may be filed with the EEOC "by or on behalf of a person claiming to be aggrieved, or by a member of the Commission," Civil Rights Act of 1964 § 706(b), 42 U.S.C. § 2000e-5(b) (1976), but only the actual victim of discrimination can receive a right-to-sue letter and file a private suit, *id.* § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (1976).

[299] The only decision to consider the issue has held that Title VII plaintiffs may not sue anonymously, Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707 (5th Cir. 1979), but the court restricted disclosure of the plaintiff's identities to defense counsel and two named partners in the defendant law firm, *id.* at 714. *See* Brinkerhoff v. Rockwell Int'l Corp., 83 F.R.D. 478, 481-82 (N.D. Tex. 1979) (denying discovery of class members' identities before certification).

[300] Although an unorthodox technique in ordinary litigation, solicited intervention is authorized in class actions, Fed. R. Civ. P. 23(d)(2), (3), and commonly used, *see* Cox v. Babcock & Wilcox Co., 471 F.2d 13, 16 (4th Cir. 1972) (district court to retain case on docket for intervention of appropriate class representative); *Developments*, *supra* note 5, at 1482-85.

litigation. In this article, I have proposed a partial answer to some of these questions. The presumption in favor of certification of Title VII class actions should be discarded. In addition to satisfying the requirements of rule 23, plaintiffs should be required to make a precertification showing on the merits sufficient to withstand a motion for summary judgment by the defendant. Such a preliminary examination of the merits would allow substantive law to give content to the general requirements of rule 23 and to shape class action practice into a more effective device for implementing substantive policy.[301] Unlike the presumption in favor of certification, a preliminary examination of the merits would have a dynamic influence on class action procedure. It would allow class action procedures to adapt to changes in substantive law, and more generally, to evolve with accumulated judicial experience into a more coherent body of procedural rules. Preliminary examination of the merits might also prove fruitful in other areas of substantive law, but always with the caveat that different statutes and different substantive policies are likely to require different procedures.

Other proposals for reform of class action law have been bolder; they have advocated returning to the original version of rule 23,[302] or replacing the rule in whole or in part by statute.[303] Arguments have been advanced, on the one hand, that the present rule exceeds the authority granted to the Supreme Court by the Rules Enabling Act,[304] and on the other, that the Supreme Court construed the rule too strictly in *Eisen v. Carlisle & Jacquelin*.[305] I have adopted a different course, not because I believe that the rule as currently construed is immune from criticism, but because I accept the truism that any reform of class action practice must take account of existing law. Legislative or judicial reform must begin with experience under the present rule, and arguments that existing law is in large part invalid or incorrect must begin with the precedential authority of the many decisions that have pursued the course set by the Supreme Court. Just as the trend toward increasing class action litigation is not likely to be reversed, so too the need to reconcile and understand existing law is not likely to diminish.

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[301] It would also permit development of specific rules applicable to Title VII class actions, a subject I intend to develop in a subsequent article.

[302] Dam, *supra* note 69, at 121-26.

[303] *See* Miller, *supra* note 8, at 682-93; *Developments*, *supra* note 5, at 1623-44.

[304] *See* text and notes at notes 83-87 *supra*.

[305] 417 U.S. 156 (1974). *See* Dam, *supra* note 69, at 109-16.