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SUBSTANCE IN THE SHADOW OF PROCEDURE: THE INTEGRATION OF SUBSTANTIVE AND PROCEDURAL LAW IN TITLE VII CASES†

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I. Introduction

Employment discrimination literature is filled with analysis of the Supreme Court decisions constricting plaintiffs' rights under title VII of the Civil Rights Act of 1964.[1] Both pro-plaintiff[2] and pro-defendant commentators[3] agree that in the last few years the

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[1] 42 U.S.C. §§ 2000e–2000e–7 (1988).

[2] *See* Mark S. Brodin, *Reflections on the Supreme Court's 1988 Term: The Employment Discrimination Decisions and the Abandonment of the Second Reconstruction*, 31 B.C. L. Rev. 1 (1989).

[3] *See* Francis T. Coleman, *New Rules for Civil Rights*, A.B.A. J., Oct. 1989, at 78. The pro-defendant bar characterizes the shift as the restoration of a "level playing field in employment discrimination . . . . The Court has made it clear that the adjudication of the civil-rights controversies in the workplace will now be governed by the same legal principles that apply to every other kind of litigation." *Id.* at 80. We have characterized this shift as the jurisprudence of nostalgia. *See* Judith Olans Brown & Phyllis Tropper Baumann, *Nostalgia as Constitutional Doctrine: Legalizing Norman Rockwell's America*, 15 Vt. L. Rev. 49 (1990) [hereinafter Brown & Baumann, *Nostalgia*].

Court has dramatically reoriented title VII jurisprudence to favor the employer.[4] Nevertheless, remarkably little scholarship explores what these opinions teach about the complex and subtle interrelationships between procedural and substantive law.[5] The dearth of literature may be partially attributable to the tendency in our jurisprudence to treat procedure and substance as discrete and distinct.[6] Moreover, academic proceduralists lack expertise in particular sub-

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[4] *See, e.g.*, Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. 754 (1989) (forbidding fee shifting against losing but non-frivolous intervenors); Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989) (commencing the running of the statute of limitations prior to plaintiff's knowledge of the injury); Martin v. Wilks, 490 U.S. 755 (1989) (permitting non-parties unlimited time to reopen consent decrees); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (transforming an affirmative defense into an additional element of the prima facie case). This pro-defendant trend in civil rights cases has not been limited to title VII. *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (limiting 42 U.S.C. § 1981 to the formation of an employment contract); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (applying strict scrutiny to affirmative action programs). The Civil Rights Act of 1991 appears to overturn several of the title VII cases discussed in this article. *See* Pub. L. No. 102–66, 1991 U.S.C.C.A.N. (105 Stat.) 1071. The primary change wrought by the new act was to "codify," § 3(2), the affirmative defenses established in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and to restore the protections against employment discrimination "weakened," § 2(2), by *Wards Cove*. We will discuss the specific provisions of the Act throughout this article. The enactment of this legislation strengthens our thesis that procedure cannot be divorced from substance and, indeed, that the reality of legal practice belies the sterility of separating substance from procedure.

[5] Indeed, few scholars have studied these relationships in the context of a specific substantive field. Notable exceptions are Edward Brunet & David J. Sweeney, *Integrating Antitrust Procedure and Substance After* Northwest Wholesale Stationers: *Evolving Antitrust Approaches to Pleadings, Burden of Proof and Boycotts*, 72 VA. L. REV. 1015 (1986); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975); Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842 (1974); George Rutherglen, *Notice, Scope, and Preclusion in Title VII Class Actions*, 69 VA. L. REV. 11 (1983) [hereinafter Rutherglen, *Preclusion*]; George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688 (1980) [hereinafter Rutherglen, *Class Actions*]. *See also* Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986) [hereinafter Burbank, *Preclusion*]; William C. Baskin, Note, *Using Rule 9(b) to Reduce Nuisance Securities Litigation*, 99 YALE L.J. 1591 (1990). The lack of scholarship integrating substance, procedure and practice in given fields is ironic because practitioners internalize these relationships and understand their impact on critical questions such as which cases to take and settlement value. *See* Judith Olans Brown et al., *There are No Good Advocates in Cubbyholes*, Learning & L., Winter 1975, at 54 (published by the A.B.A. Section of Legal Education and Admissions to the Bar).

[6] For treatment of the separation of procedure and substance historically, see Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) [hereinafter Subrin, *Equity*]; Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311 (1988) [hereinafter Subrin, *Field*]; Laurens Walker, *Criteria For Adoption or Retention of Federal Civil Rules* (April 5, 1991) (unpublished manuscript on file with the BOSTON COLLEGE LAW REVIEW) (subsection titled "The 1938 Civil Rules").

stantive fields; substantive specialists are uncomfortable with procedural niceties.

During the first fifty years of this century, several suppositions developed about the ideal civil procedure and its appropriate relationship to substantive law.[7] This article questions those suppositions with respect to cases arising under title VII of the Civil Rights Act of 1964.[8] Perhaps the primary supposition is that procedure and substantive law should be separate categories, and that the former must remain subservient to the latter. In the first half of the century, many sophisticated scholars understood the difficulty of delineating a firm boundary between substance and procedure;[9] even so, they preferred to treat procedure as separate from substantive law.[10] Recall the creed of Charles Clark, the drafter of much of the Federal Rules of Civil Procedure: procedure was to be the handmaid rather than the mistress of justice.[11]

A second supposition is that this subservient procedure should be non-technical,[12] or "simple." In other words, procedural rules should be flexible and accommodating, rather than rigid, definitional and confining. Third, and corollary, is that procedural rules should be uniform: that is, they should apply in all courts (federal

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[7] Subrin, *Equity*, *supra* note 6, at 943–73; Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2001 (1989) [hereinafter Subrin, *Federal Rules*]; Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648 (1981) [hereinafter Subrin, *New Era*].

[8] Although we primarily discuss race-based discrimination in this essay, our observations apply with equal force to title VII sex discrimination cases. For a fuller discussion of the gender issues, see Judith Olans Brown et al., *The Failure of Gender Equality: An Essay in Constitutional Dissonance*, 36 BUFF. L. REV. 573 (1987) [hereinafter Brown, et al., *Constitutional Dissonance*].

[9] *See, e.g.*, D. Michael Risinger, *"Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions,"* 30 UCLA L. REV. 189, 199–202 (1982) (citing, *inter alia*, Walter W. Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 336–37, 341, 345 (1933)); *see also* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 88–89, 96, 98 (1989).

[10] *See, e.g.*, Risinger, *supra* note 9, at 202. As Professor Risinger points out, the Rules Enabling Act of 1934 granted the Supreme Court "the power to prescribe by general rules, the . . . procedure . . . [which] shall not abridge, enlarge or modify any substantive right . . ." *Id.* at 202 n.51. For the historical background of the procedural/substantive distinction in the Rules Enabling Act, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982). *See also* Walker, *supra* note 6.

[11] Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297 (1938) (quoting *In re Coles*, [1907] 1 K.B. 4); Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 542 (1925) (same).

[12] *See* David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1975 (1989); Subrin, *Equity*, *supra* note 6, at 939–73.

and state) and to all cases, regardless of their substance.[13] The latter is the notion of transsubstantive procedure.[14] There is one final premise: procedural rules should be politically neutral, neither favoring nor disfavoring certain categories of cases or litigants.[15] The twentieth century procedural reformers had convinced federal and state legislators to cede procedural rule-making power to the judiciary, arguing that "mere procedure"[16] was only adjective law. These

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[13] Subrin, *Federal Rules*, *supra* note 7, at 2002–06.

[14] Robert Cover used the term "transsubstantive" when discussing the benefits of and problems with applying a single set of procedural rules to a myriad of substantive claims. *See* Cover, *supra* note 5, at 718–40. We do not recall seeing the term previously used. For a description of the current debate over the desirability of transsubstantive procedure, see Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1939–40 (1989) [hereinafter Burbank, *Transformation*]; Stephen N. Subrin, *Fireworks on the 50th Anniversary of the Federal Rules of Civil Procedure*, JUDICATURE, June/July 1989 at 4 [hereinafter Subrin, *Fireworks*]. See the March 2, 1967 letter from Benjamin Kaplan to Dean Acheson, in which Professor Kaplan, then Reporter to the Advisory Committee, suggests a study to determine "whether the unitary court procedures now in vogue could be deliberately altered to accommodate better to the several types." Burbank, *Transformation*, *supra*, at 1966; *see also* Subrin, *Federal Rules*, *supra* note 7, at 2025–26, 2038–43, 2048–51; Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2067–69, 2113–15 (1989); Geoffrey C. Hazard, *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244–47 (1989); Maurice Rosenberg, *The Federal Civil Rules After Half a Century*, 36 ME. L. REV. 2343 (1984). Professor Rosenberg suggests that cases may be better served by differentiated procedural treatments, but that the integration need not be along substantive lines. For instance, one might want "simple" cases to have different procedural treatment from "complex" ones, without regard to the substance of the case. Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2211–12 (1989). A bill introduced by Senator Joseph Biden and others encourages federal district courts to experiment with providing different procedural tracks for different types of civil cases. S. 2648, 101st Cong., 2d Sess. § 473(a) (1990).

[15] *See* Carrington, *supra* note 14, at 2074–79. When talking about law, the normative "should be" is treated sometimes like a realistic description of what "is." Professor Carrington treats the current Federal Rules as both aspiring to and achieving such political neutrality. He acknowledges, however, that we are not any more likely to perfect neutrality in the rulemaking process or in the procedure rules themselves than in other human institutions, and that there should not be a pretense that we have. *Id.* at 2074. For critiques of Professor Carrington's views, see Burbank, *Transformation*, *supra* note 14, at 1935–41; Benjamin Kaplan, *Comments on Carrington*, 137 U. PA. L. REV. 2125, 2126–67 (1989). For evidence of the political nature of procedural rule-making in the United States, see Peter G. Fish, *William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers*, 1975 SUP. CT. REV. 123 *passim* (twentieth century procedural reform); Subrin, *Equity*, *supra* note 6, at 943–73 (twentieth century procedural reform); Subrin, *Field*, *supra* note 6, at 319–27.

[16] Justice Sutherland, in testifying in favor of a rules enabling act, answered a question from Senator Albert B. Cummins on the "proper construction of the words 'practice and procedure.'" Justice Sutherland stated: "Well, I don't know that I can give any precise definition. They apply, of course, wholly to the adjective law. They could not involve the making of any substantive law, because the Congress would be powerless to delegate such

reformers viewed procedural law as non-political and less essential than substantive law, which was understood to be the province of the legislature.[17]

Of course, there is some truth behind all of these suppositions. For example, no one denies the gross distinction between substantive and procedural law. As a typical civil procedure casebook begins:

> Law can be conveniently divided into two categories, substance and procedure. Substantive law defines legal rights and duties in everyday conduct . . . . Procedural law sets out the rules for enforcing substantive rights in the courts . . . . The line between substance and procedure is sometimes difficult to draw, but the basic distinction is central to the theory of procedure.[18]

But procedural separateness makes little sense in the real world. Procedure is the language substance frequently must speak. Substance tends to be a museum piece—admired, but not used—unless it is delivered by the procedure.

In practical terms, substantive law largely affects behavior through procedure. It is true that the mere existence of substantive law will alter some behavior. Equally important, however, are the procedural incidents. A good example is the heated debate over the proposed Civil Rights Acts of 1990 and 1991.[19] Although the drafts dealt largely with technical aspects of the burdens of proof, President Bush claimed that the bill would materially change employer behavior, leading to quotas.[20] The proponents of the bills insisted

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power to the courts." Burbank, *Enabling Act*, *supra* note 10, at 1078 (citing *Procedure in Federal Courts, Hearing on S. 2060 and S. 2061 Before a Subcomm. of the House Judiciary Comm.*, 68th Cong., 1st Sess. 56 (1924)).

[17] For instance, Thomas Shelton, who spearheaded the American Bar Association movement for uniform federal procedural rules, wrote of "jurisdictional and fundamental matters and general procedure," which were the province of the legislature, and the "rules of practice directing the manner of bringing parties into court and the course of the court thereafter," which should be the province of the judiciary. THOMAS SHELTON, SPIRIT OF THE COURTS at xxiv–xxv (1918). For a description of Shelton's part in the movement, see Subrin, *Equity*, *supra* note 6, at 948–61. For a comprehensive study of the history and background of the distinction between the terms "substantive" and "procedural" within the meaning of the Enabling Act of 1934, see Burbank, *Enabling Act*, *supra* note 10.

[18] RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 1 (1989).

[19] For a good discussion of both positions, see Elizabeth Drew, *Letter From Washington*, THE NEW YORKER, June 17, 1991, at 102.

[20] *See infra* text accompanying notes 415–17. Note the length of time—nearly two years—that President Bush effectively blocked passage of the civil rights acts by relying on this overlap of substance and procedure. It was not until a compromise was reached on the highly

that the legislation was necessary to effectuate the substantive provisions of title VII.[21] The point is this: both sides agreed that burdens of proof will alter behavior outside the courtroom. And indeed, in enacting the Civil Rights Act of 1991, Congress has recognized our point that the effectiveness of a law is largely determined by the intersection of substance and procedure.

The relationships between substance and process are not limited to the trial. As pleading requirements stiffen,[22] the threshold need to establish the prima facie case increasingly dictates the contents of complaints. Parsing substance into the elements of the prima facie case and allocating burdens of proof directly affect the amount of discovery needed. This is also true for the factual investigation required under Federal Rule 11; the more elements the plaintiff must prove, the more topics the lawyer must investigate before filing a complaint. Finally, the delineation of the proper elements of the prima facie case is crucial to survive a motion to dismiss for failure to state a claim, if, as has become more common, the judge requires a specific fact-based complaint.[23]

Today we realize as well the fallacy behind the second assumption, which posits that all procedural rules should be or can be kept flexible. In response to the need to clarify and to draw lines, courts, treatise writers and legislators soon made the original general rules of the Field Code and the Federal Rules of Civil Procedure significantly more definitional.[24] Without such definition, procedure cannot facilitate uniform results. To the extent that substantive law and procedural rules remain open-textured, judicial decision-making must be ad hoc. The result is that two similarly situated parties suffering similar harms may be treated quite differently by different judges.[25]

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technical burden-shifting language that the substantive effects of the the legislation were realized with its passage in November, 1991. Telephone interviews with Barbara Arnwine, Executive Director, Lawyer's Committees for Civil Rights Under Law, Washington, D.C. (Oct. 1991). Ms. Arnwine participated extensively in the negotiations with the White House.

[21] *See infra* notes 415–17 and accompanying text; *see also* Drew, *supra* note 19.

[22] *See infra* text accompanying notes 137–80.

[23] *See infra* text accompanying notes 156–80.

[24] *See* Subrin, *Equity*, *supra* note 6, at 939–42, 982–86; Subrin, *Federal Rules*, *supra* note 7, at 2018–26, 2045–46.

[25] *See, e.g.*, P.S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249, 1271 (1980); Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1468–70, 1474 (1987) [hereinafter Burbank, *Complexity*] (book review). See also SAUL M. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS (Fed. Jud. Center 1985), *reprinted in* RULE 11 AND OTHER SANCTIONS—NEW ISSUES IN FEDERAL LITIGATION (Practicing Law Institute, 1987), in which 292 federal district judges were given

Moreover, we now question the supposedly transsubstantive nature of procedural rules. Although the same rule may apply to all categories of cases or all types of litigants, the impact on each type of case or litigant will perforce be different. Unlimited discovery helps some parties more than others; for example, it has a palpably different impact on the affluent than on the less affluent litigant.[26] So too, the threat of Rule 11 sanctions has a far greater chilling effect on civil rights plaintiffs and their lawyers than on economically secure defendants.[27]

In addition, the very generality of transsubstantive procedural rules has two opposite effects, each resulting in a lack of uniformity. If the rules remain general, they are, as Professor Burbank has taught, uniform in name only, for they mask discretionary decision-making.[28] Moreover, some judges are justifiably nervous that general rules not only are inefficient, but also do not serve all cases equally well.[29] Thus, for example, the courts have developed different pleading requirements for different types of cases.[30]

Transsubstantive procedure can become non-transsubstantive in a variety of ways. The legislature can make specific procedural rules for a class of cases. Alternatively, the rules can remain the same, and be applied uniformly to all cases, but the results will differ. Also, the general rules can be interpreted judicially in a unique way for one class of cases. Regardless of the method used, it becomes clear that procedure is not politically neutral in its effects. Hence, the fourth supposition is also incorrect.

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ten case summaries, adapted from published opinions that included Rule 11 motions for sanctions. The judges filled in questionnaires on how they would rule. The investigator concluded:

> Of specific concern are the findings that there is a good deal of interjudge disagreement over what actions constitute a violation of the rule, only partial compliance with the desired objective standard, inaccurate and systematically biased normative assumptions about other judges' willingness to impose sanctions, and a continued neglect of alternative, nonmonetary means of response.

Id. at 473, 526.

[26] *See, e.g.*, Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 2 REV. LITIG. 71, 74 (1981). For a graphic description on how discovery can burden the poor, see Philip G. Schrag, *Bleak House 1968: A Report on Consumer Test Litigation*, 44 N.Y.U. L. REV. 115, 124–28, 132–33 (1969). Of course, virtually any procedural rule can have a disparate impact on those who can least afford lawyers or who have less relevant information at their disposal.

[27] *See infra* text accompanying notes 362–403.

[28] *See* Burbank, *Complexity*, *supra* note 25, at 1474.

[29] *See* Subrin, *Federal Rules*, *supra* note 7, at 2018–25.

[30] *See id.*, at 2025–26, 2038–43, 2048–51; Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 447–51 (1986).

Substance and procedure are inseparable in the context of title VII. Our study suggests that the interaction of substance and procedure ultimately decides which cases are brought and which are won. If we are correct, and to the extent that our title VII analysis is replicable in other fields of law, we must reexamine our approach to legal thinking. Law schools typically divorce substantive law courses from procedural issues, teaching procedure as a distinct body of knowledge. While this undoubtedly serves pedagogical purposes, it overlooks the interaction between substance and procedure, the very interplay that determines the outcome of cases. Therefore, legislators must look beyond abstract statutory language to the actual implementation of the law. When a general procedural rule does not serve the ends of a particular substantive law, legislators must consider including substance-specific procedures to effectuate the statute.[31]

For purposes of this article, it is unimportant whether a particular incident is classified as substantive or procedural. To illustrate, the federal courts, particularly the Supreme Court, often use burdens of proof, pleading requirements, rulings on class certification and necessary party motions, and Rule 11 determinations in much the same way. Although one might argue that defining the prima facie case and allocating burdens of proof are substantive tasks, the effect of these decisions is determined by such "procedural" factors as the stringency of the pleading requirements and the availability of discovery. Moreover, judges address prima facie case and burden issues in (often procedural) technical language. Throughout this article, we explore the interrelations among elements of the prima facie case, burdens of proof, pleading, discovery, joinder and sanctions. Our point is that substantive law, procedural law and the legal culture in which they exist combine to vindicate or defeat rights, and, in so doing, to interpret and define the rights themselves. It is the reciprocity of substance and procedure, regardless of labels, that we will examine.

In addition to our interest in the field, we chose title VII for two reasons. First, the statute on its face lacked most of the typical procedural incidents, thus leaving the procedure-substance integration to the discretion of the judiciary.[32] Second, the courts have used

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[31] Professor Stephen Burbank has suggested on several occasions the need for Congress to consider specialized procedure to accompany substantive acts. *See, e.g.*, Burbank, *Preclusion*, *supra* note 5, at 831, 832. And see the Civil Rights Act of 1991, Pub. L. No. 102-66, 1992 U.S.C.C.A.N. (105 Stat.) 1071.

[32] The Civil Rights Act of 1991 added some procedural incidents to title VII in order

procedure to change the substance of the statute. As Justice Marshall recently observed, the Supreme Court has "imposed new and stringent procedural requirements that make it more and more difficult for civil rights plaintiffs to gain vindication."[33] The judiciary has redefined basic civil rights and has resolved major social issues by manipulating process. Procedure now defines unlawful discrimination and determines the outcome of title VII cases.[34] Thus, without grappling with the nature of discrimination, theories of equality, or the historical and sociological complexity of employment disparities between African-Americans and whites, the courts have rewritten the law and changed workplace behavior using the language of procedure. In the antithesis of Dean Clark's phrase, procedure is now the master, not the handmaid, of substance.

Whether one agrees with our reading of legislative intent, the critical point is that in title VII cases courts often decide outcomes using procedural devices, without struggling with the complexity of congressional purpose or of substantive issues. Nor do the courts acknowledge that their procedural decisions define substantive rights. One's perception of discrimination may lead to widely divergent conclusions about the appropriate stringency of procedural requirements. But this is all the more reason for Congress and the courts to develop fully the interplay among the statute's goals, substantive language and applicable procedures. Whether the courts apply general rules transsubstantively, in a way that adversely impacts legislative goals, or whether the courts invent non-transsubstantive procedures to interfere with those goals, the points remain the same: substance and procedure are intimately intertwined, the results are frequently non-transsubstantive and highly political, and procedural rules and their intersection with substance are far from simple.

We begin Section II with a brief overview of the purpose and legislative history of title VII. Sections III and IV examine the structure of title VII and the claims brought under it, and discuss the prima facie case, burdens of proof, pleadings and discovery.[35]

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to restore some of the substantive rights eroded by the "procedural" decisions of the Supreme Court. *See infra* notes 105–11, 279–330, 337–47 and accompanying text.

[33] Proceedings of the Judicial Conference–Second Circuit, 130 F.R.D. 161, 166 (1989).

[34] This we believe, remains the case despite passage of the Civil Rights Act of 1991. At any rate, the substantive effect of that statute upon title VII plaintiffs will not be certain, despite congressional intent, until the courts interpret its somewhat unclear language.

[35] Title VII plaintiffs are required to exhaust their administrative remedies by filing first with the Equal Employment Opportunity Commission ("EEOC"). 42 U.S.C. § 2000e–5

Section V addresses the Supreme Court's redefinition of the parties to title VII litigation and the Court's analysis of class actions, indispensable parties and preclusion. Thereafter, we scrutinize the effect of the cases on legal practice, discussing attorney's fees and Rule 11 sanctions.[36] We conclude with an epilogue that questions the compartmentalization of twentieth century legal thinking, and challenges Congress to recognize the significance of the interplay of procedure and substance in creating new rights.

II. The Statutory Mandate

The Civil Rights Act of 1964 was the first broad-based congressional attempt to address race discrimination in almost one hundred years.[37] Its language reflected an emerging national awareness of race discrimination and a consensus, at least among its proponents,[38] that African-Americans could no longer be denied access to the benefits of full participation in society.[39] Indeed, the rhetoric of equality permeates the legislative history.[40]

(1988). This article will not explore EEOC procedure. For an exhaustive treatment of this topic, see Barbara L. Schlei & Paul Grossman, Employment Discrimination Law 933–83 (2d ed. 1983).

[36] In this article we do not attempt to review how every federal rule or procedural doctrine intersects with title VII. One could write a treatise on the bizarre statute of limitations rules, see Charles A. Sullivan et al., Employment Discrimination 423–537 (2d ed. 1988), or the impact of emerging Supreme Court summary judgment law, see Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elect. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

[37] Earlier civil rights acts were less ambitious. Compare the Civil Rights Act of 1957, Pub. L. No. 85–315, 71 Stat. 634 (codified in various sections of titles 5, 28, and 43 U.S.C.) and the Civil Rights Act of 1960, Pub. L. No. 86–449, 74 Stat. 86 (1960) (codified in various sections of titles 18, 20 and 42 U.S.C.). *See* David L. Rose, *Twenty-five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 Vand. L. Rev. 1121, 1124 (1989).

[38] There are, of course, some hazards in ascribing uniform purpose to a group. *See* Shapiro, *supra* note 12, at 1972.

[39] "All vestiges of inequality . . . must be removed in order to preserve our democratic society, to maintain our country's leadership and to enhance mankind." H.R. Rep. No. 914, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2517 (1964) (additional views on H.R. 7152 of the Honorable William M. McCulloch et al.). The Supreme Court echoed these sentiments in Griggs v. Duke Power Co., 400 U.S. 424, 429–30 (1971): "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees, over other employees."

[40]

> [N]ational legislation is required to meet a national need which becomes ever more obvious. That need is evidenced, on the one hand, by a growing impatience by victims of discrimination with its continuance and, on the other hand, by a growing recognition on the part of all of our people of the incompatibility

The new law addressed many segments of American life,[41] recognizing, in Senator Case's words, that discrimination in employment was "the culmination of a whole set of discriminatory forces—forces which start even before birth . . . . A whole complex of social institutions has effectively isolated the Negro community from the mainstream of American life . . . ."[42] By 1964, it had become clear that society could no longer tolerate the lack of equal employment opportunity suffered by racial minorities.[43] The work force was segregated both by job categories and by rates of compensation. Unemployment was rampant in the African-American community; those minorities who did work were concentrated in unskilled and low paying occupations that had no job security and no chance for advancement.[44] Title VII is a straightforward attempt

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> of such discrimination with our ideals and the principles to which this country is dedicated.

H.R. REP. No. 914, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2393.

[41] Among other things, the Civil Rights Act of 1964 prohibited segregated public accommodations, title II, 42 U.S.C. § 2000a (1988), and forbade recipients of federal funds from discriminating on the basis of race, title VI, 42 U.S.C. § 2000d (1988).

[42] 110 CONG. REC. 7241 (1964). The House Judiciary Committee Report states with reference to title VII:

> In other titles of this bill we have endeavored to protect the Negro's right to first-class citizenship. Through voting, education, equal protection of the laws, and free access to places of public accommodations, means have been fashioned to eliminate racial discrimination.
>
> The right to vote, however, does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed to the graduate. The opportunity to enter a restaurant or hotel is a shallow victory where one's pockets are empty. The principle of equal treatment under law can have little meaning if in practice its benefits are denied the citizen.

H.R. REP. No. 914, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2513 (additional views on H.R. 7152 of the Honorable William M. McCulloch et al.).

[43]

> Job discrimination because of one's race is an evil which affects not only the individual, but also the future of a constantly expanding America . . . . The Committee concluded that if the Negro labor force at its present level of educational attainment were fairly and fully utilized, then the gain in our gross national product would reach $13 billion.

110 CONG. REC. 6562 (1964) (statement of Senator Kuchel).

[44] In 1963, the median income of African- Americans was barely 60% that of whites. 110 CONG. REC. 7204 (1964). The unemployment rate among blacks was more than twice that of whites. *Id.* Only 17% of non-white workers had white collar jobs, compared to 47% of white workers. CONG. REC. 13091 (1964) (citing U.S. Department of Labor statistics). A black college graduate could expect to earn less in his lifetime than a white man who quit school after the eighth grade. 110 CONG. REC. 7204. While only 2% of white female high school graduates were domestic workers, 20% of black female high school graduates could find only domestic work. *Id.* at 7205. By 1989, the median income of African-Americans had risen to only 70% that of whites and the unemployment rate among African-Americans was

to correct the racially biased labor market[45] by a comprehensive prohibition of employment discrimination on the basis of race.[46] The primary injustices Congress sought to enjoin were the payment of lower wages and the denial to minorities of access to the workplace "because of race."[47] Title VII suggests that adverse consideration of one's race in an employment decision is inherently unfair. After title VII, the race of an applicant can no longer be the cause of an adverse employment decision.[48] The theory was that once race was no longer a factor, African-Americans would have the same job opportunities as whites, and would thus begin to enjoy their full rights as citizens.[49]

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more than twice as high as among whites. Although unemployment rates among African-American college graduates are now equivalent to white college graduates, African-Americans continue to be concentrated in laborer and service jobs and to be underrepresented in white collar jobs. U.S. DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 78, 138–40, 231 (1989).

[45] *See* United Steelworkers of America v. Weber, 443 U.S. 193, 202–03 (1979) (noting the congressional concern with the "plight of the Negro in our economy").

[46] The statute reads:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e–2(a) (1988). Some supporters of title VII feared that the amendment introduced by Rep. Smith adding "sex" to the statute was an effort to defeat the bill. Rep. Green of Oregon argued on the floor of the House that:

> [A]s opponents of the legislation in a beguiling way make a good piece of legislation carry all of the piggyback amendments, we may find that the whole proposal will sink in midstream. Of course, it is to the advantage of the opponents of this legislation to add additional burdens—to water it down—to weaken it—to divert attention from the primary objective of providing basic constitutional rights.

110 CONG. REC. 2721 (1964) (statement of Rep. Green).

[47] We have elsewhere suggested an analysis for other anti-discrimination statutes. *See* Judith Olans Brown, et al., *Treating Blacks As If They Were White: Problems of Definition and Proof in Section 1982 Cases*, 124 U. PA. L. REV. 1 (1975) [hereinafter Brown et al., *Section 1982 Cases*].

[48] As Justice Brennan recently observed, "[i]n passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees." Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989).

[49] "The rights of citizenship mean little if an individual is unable to gain the economic wherewithal to enjoy . . . them." H.R. REP. No. 914, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2516 (additional views on H.R. 7152 of the Honorable William M. McCulloch et al.).

Title VII, of course, does not prohibit employment decisions based on considerations of ability or qualification. Congress was well aware of the legitimate needs of employers to hire qualified employees,[50] and title VII reflects a legislative reconciliation of employer prerogatives with the anti-discrimination principle.[51] It does not prohibit arbitrary or idiosyncratic employment decisions, so long as those decisions are not made for a reason attributable to race. For example, title VII allows a hospital to require that all its doctors have surnames beginning with the letters "A," "R," and "V." But it does not countenance a hospital policy that refuses to hire physicians because they are African-American.

Hence, the statutory scheme: (1) delineates the specific components of the employer/employee relationship (hiring, promotion, etc.); and (2) makes it illegal to use the employee's race as a factor in decisions that implement that relationship; while (3) recognizing the employer's legitimate business needs. Said another way, Congress intended that title VII invalidate employment decisions informed by race that were neither within specific statutory exceptions nor otherwise impelled by the necessities of business.[52] But the statute did not confront the difficult procedural issues the courts would face in implementing the prohibition against discrimination.

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[50] This issue was discussed exhaustively. Senators Clark (D–Pa.) and Case (R–N.J.), as Senate floor managers of the House-approved bill, submitted an interpretive memorandum which stated that title VII as proposed "expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications." 110 CONG. REC. 7247 (1964). The Clark-Case memorandum states: "An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications and he may hire, assign, and promote on the basis of test performance." *Id.* The Supreme Court has frequently deferred to the authoritativeness of this memorandum. *See, e.g.*, Firefighters v. Stotts, 467 U.S. 561, 581 (1984). The Supreme Court has also repeatedly recognized that title VII does not interfere with nondiscriminatory job qualifications. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. at 239; Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971).

[51] For example, section 703(h) lists certain employment practices that are made specifically lawful, such as the use of race-neutral job related ability tests. 42 U.S.C. § 2000e–2(h) (1988). That section also makes otherwise prohibited employment practices lawful in specific circumscribed situations, such as bona fide seniority systems, 42 U.S.C. § 2000e–2(h), and bona fide occupational qualifications, 42 U.S.C. § 2000e–2(e) (1988).

[52] In 1964, it seemed that the congressional command to eliminate race as a factor in employment decisions would rectify past discrimination and achieve racial equality in the workplace. Arguing for a "more robust" strategy, Professor Fiss noted in 1971 that "a law that does no more than prohibit discrimination on the basis of race will leave that desire, in large part, unfulfilled." Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 314 (1971). Today, we recognize the naivete of the notion that statutory language, without more, can resolve the intractable issues of institutionalized racism.

III. Protecting Defendants: Redefining Elements, Reallocating Burdens of Proof and Increasing Discovery Costs

In evaluating and litigating claims, American lawyers break down general statutory language into specific variables or elements. The choices made in the delineation of the elements of the prima facie case and in the assignment of the burden of proof have a profound impact not only on the nature of a plaintiff's claim but also on the contours of the entire litigation, from the pleadings to discovery, the possibility of Rule 11 sanctions, the outcome and the finality of the decision. This observation is particularly compelling in the civil rights context. Discrimination is an elusive concept, and, unless one adheres to objective criteria, it is difficult to prove. Thus, the definition of the elements of discrimination and the allocation of burdens of proof are often outcome-determinative.[53]

Although Congress had never amended the relevant language of title VII or the Federal Rules of Civil Procedure,[54] the courts dramatically diluted the statutory rights that Congress created and that early judicial opinions had recognized.[55] By imposing a greater burden on title VII plaintiffs and by virtually eliminating defendant's burden of persuasion,[56] the courts made it much more difficult for plaintiffs to prevail. For the most part, the authors of these opinions do not discuss the nature of discrimination, but limit themselves to the technical language of allocating burdens of proof.[57] The cases reflect an ideological shift from the notion of discrimination as an historically entrenched, pervasive social evil (and the

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[53] Moreover, the parties to a civil rights case typically have vastly disparate bargaining power and resources. *See* Brown et al., *Section 1982 Cases*, *supra* note 47, at 21–24.

[54] Rule 11 was amended in 1983, Order Amending Federal Rules of Civil Procedure, 461 U.S. 1097 (1983), but the amendment was not for the purpose of altering the results in title VII cases. Congress has recently responded to this dilution of statutory rights in the Civil Rights Act of 1991, Pub. L. No. 102–66, 1992 U.S.C.C.A.N. (105 Stat.) 1071.

[55] *See infra* text accompanying notes 60–70.

[56] *See* Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 181–82 (1989) (noting that the several cases construing section 703(h) of title VII had made the bona fide seniority system defense into an element of plaintiff's case); Wards Cove Packing Co. v. Atonio, 490 U.S. 462, 659–60 (1989) (transforming the affirmative defense of business necessity into an element of the prima facie case). Section 105 of the Civil Rights Act of 1991 ostensibly returned the business necessity claim to its position as an affirmative defense. 42 U.S.C. § 2000e–2(k)(1)(A).

[57] Only recently has the Supreme Court recognized the substantive content of its procedural decisions. In *Wards Cove*, the Court acknowledged that it was redefining the prima facie case and reallocating burdens of proof to protect business operations from judicial interference. 109 S. Ct. at 2127.

corresponding belief that the prima facie case and defenses should reflect this), to the idea that discrimination is an aberrant, transient and isolated phenomenon[58] (and that title VII cases should therefore be difficult to prove and easy to defend).[59]

A. *Disparate Impact*

We begin our review of the transformation of discrimination law with *Griggs v. Duke Power Co.*[60] The original model of the prima facie case formulated in *Griggs* closely followed the language of title VII and reflected the congressional goal of eradicating the pernicious effects of historically entrenched racism. In *Griggs*, plaintiffs argued that the facially race-neutral requirement of a high school diploma or a general intelligence test as a condition of employment violated title VII because it impacted more severely on African-Americans than whites.[61] Defendants maintained that there could be no discrimination because they had no specific invidious racial purpose; they suggested that the diploma requirement would raise the level of the work force.[62] The Court disagreed, holding that "Congress directed the thrust of . . . [title VII] to the *consequences* of employment practices, not simply the motivation."[63] More broadly, "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups."[64] *Griggs* stands for a clear judicial understanding that Congress meant title VII to provide plaintiffs with a straightforward way to attack those "artificial,

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[58] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989); *see also* Brown & Baumann, *Nostalgia*, *supra* note 3, at 51–54.

[59] Race prejudice and discrimination remain an enduring national tragedy. A recent report prepared by the Urban Institute demonstrates that "unequal treatment of black jobseekers is entrenched and widespread." TURNER ET AL., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: DISCRIMINATION IN HIRING 31 (1991). The Urban Institute's study of Washington, D.C. and Chicago found that "if equally qualified black and white candidates are in competition for a job when differential treatment occurs it is three times more likely to favor the white applicant than to favor the black." *Id.* at 32. The study also found that blacks received unfavorable differential treatment twenty percent of the time they compete against comparable whites for entry level positions. *Id.* at 31. Whites receive unfavorable differential treatment seven percent of the time they compete with comparably qualified blacks. *Id.* at 31; *see also* J.A. Croson Co., 488 U.S. at 530–35 (1989) (Marshall, J., dissenting).

[60] 401 U.S. 424 (1971).

[61] *Id.* at 427–28.

[62] *Id.* at 431.

[63] *Id.* at 432 (emphasis in original). Title VII forbids those facially neutral employment practices that are not job-related and that operate "to exclude Negroes." *Id.* at 431.

[64] *Id.* at 432.

arbitrary, and unnecessary barriers to employment" that were the legacy of slavery.[65]

The Court implemented this understanding through its definition of the prima facie case, and by making the explanation of what has been called "disparate impact" an affirmative defense, with the burden of proof totally on the defendant. *Griggs* explicitly acknowledged that employers can establish legitimate qualifications for jobs. But an employer must legitimize its use of a selection procedure that excludes more minorities than whites. As stated by the *Griggs* Court, "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."[66] Thus, pursuant to *Griggs*, once the plaintiff shows that an employment practice has a racially disparate impact, defendant has the obligation to justify that impact by persuading the factfinder that the practice is required for its business. What is critical is that defendant's explanation is an affirmative defense; the burdens of production and persuasion are on the defendant at all times.[67]

Hence, a hospital requirement that all staff physicians must possess a medical degree does not violate title VII even if the facts showed that only two out of every three hundred doctors in the relevant labor pool were African-American. On the other hand, a hospital rule that allows the hiring of only those physicians whose fathers are physicians may well be a violation.[68] A defendant hospital

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[65] *Id.* at 430–31. In the Court's words:

> In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Id.

[66] *Id.* at 432. Congressional debate had focused on claims that title VII would require the hiring of unqualified employees. The proponents of the statute insisted that title VII "expressly protects the employer's rights to insist that any prospective applicant, Negro or white, *must meet the applicable job qualifications.*" *Id.* at 434 (quoting 110 CONG. REC. 7247 (1964)) (emphasis in original).

[67] For a description of the different concepts of "production burden" and "persuasion burden" that are both embraced by the term "burden of proof," see FLEMING JAMES, JR. & GEOFFREY C. HAZARD, CIVIL PROCEDURE 313–21 (3d ed. 1985). James and Hazard state that "[t]he party that carries the burden of pleading usually also carries the burden of proof." *Id.* at 196–97.

[68] *See infra* text accompanying notes 90–94. *Cf.* Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978).

may not be able to persuade the factfinder that such a facially race-neutral nepotism policy is related to patient care or other legitimate hospital concerns.[69]

Griggs adopted the commonly perceived notion of Congress's reconciliation of plaintiff's rights and defendant's needs; plaintiff must show only that he or she was a member of a protected class, and that the employment practice in question disparately burdened the members of that class. Defendants must justify the discriminatory impact of their policies by persuading the factfinder of the business necessity of its policies. This allocation of proof, which has become known as the disparate impact theory, recognizes both the statutory mandate to eliminate the consequences of discriminatory employment practices, as well as the legitimacy of the employer's need for qualified employees. It also recognizes the unequal posture of the litigants in a discrimination case. Disparate impact makes sense because the defendant is in a better position than the plaintiff to justify the validity of its business practices.[70] The *Griggs* model thus defines unlawful discrimination through allocations of burdens of proof.

B. *Disparate Treatment*

The Court, however, soon departed from the interpretation of title VII adopted in *Griggs*. In a line of cases beginning with *McDonnell Douglas Corp. v. Green*,[71] the Court created another model of the prima facie case, now known as the disparate treatment theory, which requires plaintiff to prove defendant's subjective discriminatory intent.[72] Green, an African-American civil rights activ-

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[69] Such a rule has a greater adverse impact on blacks than whites because of the historic denial to African-Americans of the opportunity to become physicians. The crux of this hypothetical, however, is not this unfortunate fact but rather title VII's recognition of an employer's need for qualified employees.

[70] The holding of *Griggs* follows from those Fourteenth Amendment cases that looked to the consequences or impact of discriminatory behavior and ignored the motivation behind that behavior. The classic case is Yick Wo v. Hopkins, 118 U.S. 356 (1886), where the Court held unconstitutional the administration of a facially neutral laundry licensing law that resulted in the denial of licenses to Chinese applicants and the granting of licenses to nearly all Caucasian applicants. *Id.* At least until Washington v. Davis, 426 U.S. 229 (1976), which required plaintiff to prove defendant's racist animus, the Court understood that racism often masquerades behind neutral language. *See* Brown et al., *Constitutional Dissonance*, *supra* note 8, at 593–601.

[71] 411 U.S. 792 (1973).

[72] This involves subjective motivation and not objective intent. *See infra* notes 77–83 and accompanying text.

ist, had argued that defendant refused to rehire him because of his race and because of his participation in illegal civil rights demonstrations that had blocked access to defendant's plant.[73] At the same time that these civil rights activities were going on, the company was also the target of union demonstrations.[74] The crux of plaintiff's complaint was that although the white pro-union demonstrators were not discharged,[75] he, an African-American, was.

If one were to read only the Supreme Court opinion, it would be difficult to identify any facts that demonstrate that plaintiff was treated differently because of his race. The opinion is technical and formal, and omits most of the critical facts set forth above. It is devoted to the design of a new prima facie case, with the following elements: (1) plaintiff belongs to a racial minority; (2) he applies and was qualified for a job for which applicants were sought; (3) despite his qualifications, he was rejected, and (4) after his rejection, the position remained open and the employer continued to seek applicants with plaintiff's qualifications.[76]

But the *McDonnell Douglas* Court also held that once plaintiff introduces credible evidence of the four factors, all defendant need do is "articulate"[77] a legitimate race-neutral reason for its rejection of the applicant. Thereafter, plaintiff can prevail only if he or she shows that the reason offered by the defendant was false or pretextual: that is, that the defendant was subjectively motivated by racial animus, not by a race-neutral reason.[78] The effect of not requiring defendant to bear the burden of persuading the factfinder that the reasons for its behavior were race-neutral, and of requiring the plaintiff to prove that defendant's explanation was pretextual (or racially motivated), was the addition of a new element to plaintiff's

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[73] 411 U.S. at 796.

[74] Green v. McDonnell Douglas Corp. 528 F.2d 1102, 1104–05 (8th Cir. 1976).

[75] *Id.* The whites were rehired pursuant to an amnesty agreement with the union. *Id.*

[76] *McDonnell Douglas*, 411 U.S. at 802. At first, it seems that the Court was simply adapting *Griggs* to the case of an individual plaintiff. On their face, the four elements of the prima facie case in *McDonnell Douglas* do not necessarily seem inconsistent with *Griggs*. *Griggs* involved the legitimacy of a facially race-neutral job qualification that applied to an entire job category throughout defendant's plant, and that impacted a large number of African-Americans. *See* 401 U.S. 424, 427–28, 432 (1971). *McDonnell Douglas*, on the other hand, involved the claim of one individual who argued that the treatment given him violated title VII because, although facially neutral (demonstrations), it was based upon race (he was treated differently from white labor organizers). 411 U.S. at 796. Unlike *Griggs*, there was no evidence in *McDonnell Douglas* that the treatment of plaintiff impacted other African-American employees.

[77] 411 U.S. at 802.

[78] *Id.* at 804–05.

prima facie case: proof of defendant's invidious, subjective discriminatory intent.

The cases that have followed *McDonnell Douglas* squarely allocate to plaintiff the burden of proving defendant's state of mind. As the Court explained in *International Brotherhood of Teamsters v. United States*, proof of discriminatory motive is critical in disparate treatment cases but not required under the disparate impact theory.[79] And in *Texas Department of Community Affairs v. Burdine*, the Court held that the defendant has the burden of production to show through admissible evidence a legitimate non-discriminatory reason for plaintiff's rejection.[80] Although the defendant must suggest a legitimate reason, it need not persuade the factfinder of anything. Most importantly, it has no burden either to produce evidence or to "persuade the court that it was actually motivated" by that reason.[81] If the employer merely testifies that it found the employee disagreeable, it does not matter whether the Court believes the employer, or whether that reason motivated the decision not to hire. Under disparate treatment, therefore, once the assertion of a legitimate reason is given under oath, it is plaintiff's ultimate responsibility to persuade the factfinder of defendant's impermissible state of mind. Moreover, the critical mental element is subjective motivation—that the defendant was impelled by racial hatred.

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[79] 431 U.S. 324, 335–36 n.15 (1977). *McDonnell Douglas* required defendant to "articulate" some legitimate reason for its employment practice. 411 U.S. at 802. It took several opinions before the Court explained what it meant by "articulate." In *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), the Court referred to the employer's burden of "proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race." *Id.* at 577. In the very same paragraph, however, the Court cited the *McDonnell Douglas* language that all the defendant need do is "articulate" some legitimate nondiscriminatory reason. *Id.* at 578. Thus, not surprisingly, the lower courts read *Furnco* as teaching that "articulate" and "prove" mean the same thing. For example, in Board of Trustees of Keene State College v. Sweeney, 579 F.2d 169 (1st Cir. 1978), the First Circuit interpreted the critical paragraph in *Furnco* as requiring defendant to persuade the factfinder of its absence of discriminatory motive because defendant had greater access to the relevant evidence. *Id.* at 177. In a rare opinion handed down in connection with the grant of certiorari, the Supreme Court chastised the First Circuit for allocating the burden of persuasion to defendant: "We think that there is a significant distinction between merely 'articulat[ing] some legitimate, nondiscriminatory reason' and 'prov[ing] absence of discriminatory motive.'" 439 U.S. 24, 25 (1978). Over a vigorous dissent, the Court held that the proper verb was "articulate" and not "prove," and that defendant has no burden of proving the legitimate reasons for its behavior. *Id.*

[80] 450 U.S. 248, 254 (1981).

[81] *Id.* In order to survive a Rule 41(b) motion under the disparate treatment formulation, plaintiff has the total burden (both production and persuasion) of proving that the defendant was motivated by racial animus. Title VII cases typically are tried before a judge. Thus, we refer to Rule 41(b) motions instead of directed verdicts.

It is not sufficient for plaintiff to introduce evidence of objective intent, that is, that the factual and foreseeable consequences of defendant's behavior would result in less favorable treatment of minorities.[82] To return to our hospital, under disparate treatment, a refusal to hire an African-American physician because her father was not a physician would not violate title VII unless plaintiff could persuade the factfinder that the hospital's refusal was specifically motivated by hatred of African-American doctors.[83]

Furthermore, even dramatic evidence of racism may not be sufficient to support an inference of racist intent. In *Watson v. Fort Worth Bank & Trust*, plaintiff was told that the bank teller position she sought was "a big responsibility with a lot of money . . . for blacks to have to count."[84] The Supreme Court did not find these blatantly racist remarks sufficient to permit a finding of discriminatory intent.[85] Judicial denial that this conduct evidences discrimination permits the very behavior title VII was enacted to prevent.

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[82] Personnel Adm'r v. Feeney, 442 U.S. 256 (1979), is illustrative. In *Feeney*, plaintiff failed to persuade the factfinder that the purpose of the Massachusetts statute that created an absolute lifetime civil service preference for veterans was to discriminate against women. *Id.* at 281. The district court had found that this preference impacted so inevitably and severely on women that its discriminatory effect could not be unintended. *Id.* at 260. Although conceding that the foreseeability of the consequences has some "bearing" upon the existence of discriminatory intent, *id.* at 279 n.25, the Supreme Court held that plaintiffs failed to prove the requisite state of mind of the Massachusetts legislature. *See id.* at 280. In so holding, the Court refused to infer the legislature's sexist motivation from the district court's finding that the absolute preference had a "devastating impact" on women's employment opportunities. *Id.* at 260.

[83] The motivation-driven notion of discrimination originated in Washington v. Davis, 426 U.S. 229 (1976), where the Supreme Court rewrote the plaintiff's prima facie case for equal protection claims by requiring plaintiffs to persuade the factfinder that defendant's conduct was motivated by racial hatred. *See id.* at 240–41. The disparate treatment cases breach the Court's promise in *Davis* that the motivation requirement would be limited to constitutional claims. In addition to title VII, the Court has extended the intent requirement to other civil rights statutes. *See, e.g.*, General Bldg. Contractors Ass'n. v. Pennsylvania, 458 U.S. 375, 388–89 (1982) (42 U.S.C. § 1981 requires proof of defendant's state of mind because that statute is the "legislative cousin" of the Fourteenth Amendment). And the Court has acknowledged that the state of mind required in title VII disparate treatment cases is identical to that required for constitutional claims. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). Notice that the Civil Rights Act of 1991 does not address the disparate treatment model; that judicial reconstruction of title VII remains good law. *See* Civil Rights Act of 1991, Pub. L. No. 102–66, 1992 U.S.C.C.A.N. (105 Stat.) 1071.

[84] 487 U.S. 977, 990 (1988).

[85] The Court did not discuss inferences in *Watson*. It seems clear from that silence, however, that the Court was unwilling to allow plaintiff to use those words to support an inference of discriminatory intent. It is possible to read Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), in which the plurality opinion condemned stereotypes, as relevant to proving discriminatory intent. In our view, *Hopkins* does not significantly help plaintiffs. *Hopkins*

Requiring plaintiffs to prove defendant's subjective racist intent rewrites the statute[86] and makes it virtually impossible for plaintiffs to prevail.[87] Obviously, plaintiffs do not have access to evidence of defendant's state of mind.[88] Indeed, sophisticated, yet discriminatory, defendants will make sure that this evidence does not exist. Liberal discovery rules notwithstanding, requiring plaintiffs to obtain evidence of defendant's mental state imposes an enormous burden on plaintiffs. Broad discovery rules are merely a formal response to the issue of access to evidence. They do not balance the financial and practical inequities between defendant employers and plaintiff employees, who typically are less able to bear the economic burden of discovery. Often, plaintiff's primary source of income is the job that is the subject of the litigation.

Despite its drastic consequences for plaintiffs, disparate treatment has been a seductive construct.[89] The Court has applied it to

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requires an unrealistic and unworkably tight causal link. Plaintiff must prove that gender was a motivating force in the employer's decision; defendant may prevail if it can prove it would have made the same decision in the absence of gender bias. *See id.* at 250, 258. In other words, plaintiff must reconstruct defendant's decision-making process. If that were not difficult enough, plaintiff at all times bears the burden of persuasion that the same result would not have occurred but for gender. *See id.* at 240. The impact of section 107 of the Civil Rights Act of 1991 on *Hopkins* is uncertain. *See* sec. 107, § 703 1992 U.S.C.C.A.N. (105 Stat.) 1071, 1075–76 (to be codified at 42 U.S.C. § 2000e–2(m)) ("[A]n unlawful employment practice is established when the complaining party demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice.").

[86] The disparate treatment construct redrafts title VII as if it read as follows:

> It shall be an unlawful employment practice to discriminate in any incident of employment because of race. "Because of race" means that the employer was subjectively motivated to create or continue the practice because of racial hatred. It does not constitute an unlawful employment practice if the consequence of the practice is to deny minorities and women the benefits of participating in the employer's paid work force so long as the employer suggests a plausible reason for the practice, even though the employer was not actually motivated by that reason.

[87] This difficulty has been extensively delineated both by the commentators and by the Court. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 71–73 (1986); Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 321–23 (1982); Brown & Baumann, *Nostalgia*, *supra* note 3, at 593–94.

[88] Without discovery, plaintiffs can never obtain the facts about defendants' state of mind critical to their disparate treatment cases. And this data, of course, is within the defendants' control. For further discussion of the discovery implications of requiring plaintiffs to provide such evidence, see *infra* text accompanying notes 123–31.

[89] The need for two separate constructs of discrimination remains obscure. Disparate impact applies equally well to individual plaintiffs and class actions and to work forces that are racially balanced or imbalanced. *See* Connecticut v. Teal, 457 U.S. 440, 456 (1982) (even if the work force is racially balanced, specific acts of discrimination remain actionable). The critical issue is whether a given employment practice deprives or tends to deprive plaintiff

an ever expanding group of cases, many of which clearly warranted application of disparate impact. In *Furnco Construction Corp. v. Waters*,[90] for example, the employer refused to hire at the job site and hired only those applicants known to the supervisor or recommended to him.[91] The defendant conceded that, under this system, well-qualified African-American applicants were rejected.[92] Thus, *Furnco* involved the discriminatory impact of a facially neutral rule, the paradigm *Griggs* case.[93] But the Court insisted—albeit without explanation—that the appropriate model was disparate treatment, thereby changing the focus from defendant's discriminatory conduct to plaintiff's failure to prove that the exclusion of qualified minority workers was motivated by racial animus.[94]

The two-construct system belies the concept that procedural rules are simple and readily accessible. *Furnco* teaches the impossibility of predicting which prima facie case model the courts will use and that the choice of model is often outcome-determinative. Had the Court applied the *Griggs* model in *Furnco*, all plaintiff would have had to introduce was the statistical impact of Furnco's hiring practice. Defendant would then have had to persuade the court that its practice was justified by business necessity.

C. *Impact Redux*

In the past few terms, the Court intensified its pro-defendant orientation.[95] The Court added to the original disparate impact

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of equal employment opportunities and whether the employer offers a legitimate justification for that practice. *See id.* at 448.

[90] 438 U.S. 567 (1978).

[91] *Id.* at 570.

[92] *See id.* at 576.

[93] Although the *Furnco* Court stated that a racially balanced workplace does not affect an employer's obligation not to discriminate against individual job applicants, the Court held that evidence of the racial mix of the work force was relevant to motivation. *Id.* at 580–81. In other words, the presence of some minority employee might negate an employer's discriminatory intent. The *Furnco* Court seems to confuse the discriminatory effect of a particular hiring practice with minority representation in the work force. *See id.*

[94] *See id.* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), is another example of disparate impact facts forced into the disparate treatment model. That case was brought by the United States against an employer's system-wide discriminatory hiring, assignment, seniority and promotion policies. *Id.* at 328–29. The comparable worth cases also exemplify the misapplication of the disparate treatment model to classic disparate impact cases. *See* Judith Olans Brown et al., *Equal Pay for Jobs of Comparable Worth: An Analysis of the Rhetoric*, 21 HARV. C.R.-C.L. L. REV. 127 (1986) [hereinafter Brown et al., *Comparable Worth*].

[95] This slant has not been limited to title VII cases. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (applying strict scrutiny to affirmative action programs);

model of *Griggs* the requirement that plaintiff prove the absence of any justifications for defendant's conduct.[96] This new disparate impact theory bears almost no resemblance to the understanding of discrimination embodied in *Griggs*; indeed, it is precisely the opposite.[97]

For example, in *Watson v. Fort Worth Bank and Trust*,[98] the defendant bank four times refused to promote Clara Watson, an African-American woman.[99] The bank had relied on the subjective judgment of supervisors, and each promotion was given to a white person.[100] Although the plurality[101] used the disparate impact model, they drastically modified the prima facie case, reduced the defendant's burden of proof from affirmative defense to rebuttal, and lowered the standard of proof from necessity to convenience.[102] Under *Watson*, defendant only needed to "*produc*[*e*]" evidence of "legitimate business *reasons*."[103] Production is less than persuasion, and legitimacy is far short of necessity. After *Watson*, once defendant came forward with evidence of business legitimacy, plaintiff had the

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Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (drastically limiting the coverage of 42 U.S.C. § 1981); Brown & Baumann, *Nostalgia*, *supra* note 3.

[96] *See infra* notes 98–111 and accompanying text. The seniority system cases have evolved similarly. Originally an affirmative defense, see 42 U.S.C. § 2000e–2(h) (1988), it is now clear that plaintiff must prove the negative, that is, that the seniority system was not bona fide. As Justice Kennedy observed in Public Employees Retirement Sys. v. Betts, 492 U.S. 158 (1989), the bona fide seniority system proviso *itself* delineates which practices are illegal and which are not. *See id.* at 181. In other words, the Court has fully transformed an affirmative defense into an element of plaintiff's case.

[97] *See infra* notes 105–11 and accompanying text. Nevertheless, in what appears to be a return to *Griggs*, section 105 of the Civil Rights Act of 1991 provides: "disparate impact is established under this title only if (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact . . . and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." Sec. 105, § 703, 1992 U.S.C.C.A.N (105 Stat.) 1071, 1074–75 (to be codified at 42 U.S.C. § 2000e–2(k)(1)(A)). Section 104 of the Act defines "demonstrates" to include both the burden of production and persuasion. Sec. 104 (to be codified at 42 U.S.C. § 2000e–(m)). The Supreme Court will ultimately decipher the parameters of an employee's burden in disparate impact cases.

[98] 487 U.S. 977 (1988).

[99] *Id.* at 982.

[100] *Id.*

[101] The division in *Watson* was four to four, as Justice Kennedy had not yet taken his seat.

[102] *See id.* at 997–99.

[103] 487 U.S. 998 (emphasis added). Recall that under *Griggs*, once plaintiff established the racially disparate impact of a practice, the burden shifted to defendant to persuade the factfinder of its business necessity. Section 105 of the Civil Rights Act of 1991, although specifically addressed to *Wards Cove*, see §§ 2(2), 105, also applies, of course, to *Watson*, see *supra* note 97.

ultimate risk of nonpersuasion that this evidence was pretextual. Plaintiff had to prove the nonexistence of the asserted legitimate reason. In the words of Justice Blackmun, this reallocation of the burdens of proof was "flatly contradicted" by the Court's own case law and forced every title VII case into the proof allocations of the disparate treatment construct.[104]

In *Wards Cove Packing Co. v. Atonio*,[105] a majority of the Court abandoned *Griggs* and embraced *Watson*.[106] *Wards Cove* clearly allocated the burden of proving the employer's lack of business justification to the employee; the plaintiff was forced to prove that the defendant's employment practices did not serve any legitimate business goal.[107] The *Wards Cove* defendants operated a segregated workplace that Justice Blackmun described as "a kind of overt and institutionalized discrimination we have not dealt with in years: a total residential and work environment organized on principles of racial stratification and segregation, which . . . resembles a plantation economy."[108] Yet the Court refused to find a title VII violation because, among other things, plaintiffs had failed to meet their newly assigned burden of proving that there was no better or more cost-effective way for defendant to run its operation.[109] This failure shielded the blatantly discriminatory workplace from judicial scrutiny.

It is the rare plaintiff who would be able to perform the herculean tasks of disproving the employer's assertion that it runs its business according to legitimate business considerations[110] and of

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[104] *Watson*, 487 U.S. 1000–01 (Blackmun, J., concurring in part).

[105] 490 U.S. 642 (1989). Professor Brodin sees *Wards Cove* as a "clear break" even from *Watson*. Brodin, *supra* note 2, at 10.

[106] 490 U.S. at 659.

[107] *Id.* at 659–60.

[108] 490 U.S. at 662 (1989) (citations omitted).

[109] Sections 2 and 3 of the Civil Rights Act of 1991 make it clear that Congress intended to overrule *Wards Cove*'s allocation of this burden to plaintiff. §§ 2, 3, 1992 U.S.C.C.A.N. (105 Stat.) 1071, 1071. *Wards Cove* also required plaintiff to show the discrete discriminatory impact of each employment practice. *Id.* at 2124–25. This echoes Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977), which requires that plaintiff prove the "incremental segregative effect" of each school board policy. *Id.* at 419–21. Section 105 of the 1991 Civil Rights Act attempts to soften, but not overrule, this requirement. The new Act exempts the plaintiff from having to show that a particular practice has a particular impact only if the plaintiff can demonstrate "that the elements of a respondent's decisionmaking process are not capable of separation for analysis." Sec. 105 (to be codified at 42 U.S.C. § 2000e–2(k)(1)(B)(i)). Moreover, even after the 1991 Act, the plaintiff may still have to prove that there are less discriminatory alternatives to the challenged practice. *See* sec. 105 (to be codified at 42 U.S.C. § 2000e–2(k)(1)(A)(ii), (k)(1)(c)).

[110] *See* AMERICAN CIVIL LIBERTIES UNION, IMPACT OF THE SUPREME COURT DECISION IN *WARDS COVE V. ATONIO*, 15–31 (1990) [hereinafter ACLU REPORT].

fashioning a less discriminatory but equally cost-effective operation. The message of *Wards Cove* was clear: the issue is not discrimination but the financial or other burdens defendant will incur if it stops its discriminatory practice.[111]

D. *The Paths Not Taken*

It is useful to think about the other reasonable choices available to the Court that would have been consonant with the language and policy of title VII. Recall that prior to *Watson* and *Wards Cove* there were two clear lines of cases. Under disparate impact, as initially defined in *Griggs*, plaintiff won if a neutral policy caused discriminatory impact, unless the defendant prevailed on the affirmative defense of persuading the factfinder of business necessity.[112] The disparate treatment construct, beginning with *McDonnell Douglas* and clarified by *Burdine*, removed the affirmative defense. If a qualified minority was denied a job which then remained open, there was a presumption of racial animus, which the employer could dissipate by producing evidence of a legitimate race-neutral reason. Then plaintiff would have to prove racial animus, both through production and persuasion.[113] The disparate treatment cases require plaintiffs to prove racial animus because an employer meets its burden merely by testifying to a legitimate reason for its action, and need not produce evidence that the proferred reason actually motivated that action. This effectively eliminates the affirmative defense for defendants, turning all cases into presumption cases.

The Court could have held that defendant had an affirmative defense of persuading the factfinder of non-discriminatory motive, or persuading the factfinder of legitimate business purpose. Instead, the Court, pursuing its pro-defendant vision of title VII, placed only a minimum production burden on the defendant. In other words, using the language of presumptions, the Court relieved the defendant of any burden of persuasion. This is both regrettable and aberrant, given the fact that virtually all of the

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[111] Together, *Watson* and *Wards Cove* redrafted title VII as if it read as follows:

> It shall be an unlawful employment practice for an employer to engage in a practice that disparately impacts women or racial minorities only if plaintiff can prove (1) that such employment practice serves no legitimate business goal and (2) that no other practice exists that less adversely affects women and minorities and that is equally cost effective or no more burdensome to the employer.

[112] *See supra* text accompanying notes 60–70.

[113] *See supra* text accompanying notes 71–83.

evidence of business purpose and racial animus is in the files and minds of the defendant.[114] Moreover, if there is a strong policy to hire qualified minorities and to eliminate practices that result in a racially disparate impact, it makes more sense to require the employer to persuade the factfinder of the non-discriminatory reason for its action.[115]

But even using presumptions rather than affirmative defenses, the Court could have rationally taken a more neutral, less pro-defendant position. In presumptions, there are usually triggering facts (*A*) and the presumed fact (*B*).[116] In title VII cases, the triggering facts could have been failure to hire a qualified minority and leaving the job open, or hiring a non-minority employee, or having some other practice that resulted in a disparate impact. Any of these facts could have led to the presumption of racial animus, unless the employer convinced the factfinder of non-*B*, a lack of racial animus. There is a good deal of scholarly literature (and case law) suggesting that when the evidence of non-*B* resides with the side against whom the presumption should operate and/or when there is a strong policy, then the side against whom the presumption operates should have the burden of production and persuasion on non-*B*.[117] Notice how oddly the Supreme Court has treated this issue. First, it ignored that non-*B* is a lack of racial animus, and instead referred to legitimate business purpose. Second, it required only the meeting of the production burden, and frequently suggested the smallest amount of production—"articulation"—is satisfactory. Instead, the Court could have required, as some courts do with certain presumptions, clear and convincing evidence.[118] This would still have been less than a total burden-shift to defendant.

It is true that Federal Rule of Evidence 301, the normal presumption rule in federal court, shifts only the burden of production,

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[114] For a discussion of reasons for presumptions including, *inter alia*, which party has "peculiar access" to evidence, and "to make a result deemed socially desirable," see 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5122, at 569, 570 (1977); *see also* Brown et al., *Section 1982 Cases*, *supra* note 47, at 36.

[115] The strength of the policy, however, was diluted by Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1980), where the Court held that title VII does not obligate an employer to select a woman or minority from among equally well-qualified candidates. *Id.* at 259; *see also* Brown et al., *Constitutional Dissonance*, *supra* note 8, at 615–18.

[116] CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 342, at 965 (Edward W. Cleary ed., 3d student ed. 1984); Brown et al., *Section 1982 Cases*, *supra* note 47, at 36.

[117] *See* WRIGHT & GRAHAM, *supra* note 114, § 5122, at 564, 566; MCCORMICK, *supra* note 116, § 344, at 975–76.

[118] *See* MCCORMICK, *supra* note 116, § 344, at 976 & nn.22–23.

but that shift applies to non-*B*, not to a different fact altogether.[119] Again, note that the employer's burden is not to produce a sufficiency of evidence to permit a finding of no racial animus, but only to produce evidence of some legitimate business purpose that may not have even activated the employer's failure to hire. Moreover, the Court could have said that the strong policy of title VII, backed by the decision in *Griggs*, requires the defendant to establish an affirmative defense. This would have rendered Rule 301 either irrelevant or subservient to the title VII policy already announced in *Griggs*.[120]

If the Supreme Court insisted on using presumption language, and wanted to give the defendant a production burden only, it still could have held that there is sufficient evidence to permit (not require) a finding of racial animus whenever a qualified minority is not hired or there is disparate impact.[121] In other words, the fact-finder could use the triggering facts plus other evidence, such as the racist statement made to the plaintiff in *Watson* or the segregated workplace in *Wards Cove*, to make the inference of racial animus, if the defendant's evidence was not compelling. In some states this is referred to as giving the plaintiff's triggering facts, if believed, the power of always making a prima facie case.[122]

It is not important for our purposes whether you agree with us that, given the purpose of title VII, employees should have a lesser burden and employers a greater one. It *is* important to notice the range of omitted, logical procedural choices and to recognize that the choices made were pro-defendant.

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[119] FED. R. EVID. 301. As the conference report suggests, the issue is whether the adverse party offers evidence "contradicting the presumed fact." H.R. REP. No. 1597, 93d Cong., 2d Sess. 5 (1974).

[120] Rule 301 specifically begins, "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules . . . ." FED. R. EVID. 301. *But see* Brown et al., *Section 1982 Cases*, *supra* note 47, at 41–42.

[121] For example, the Conference Report on Federal Rule of Evidence 301 states that even after a presumption disappears, "[t]he court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts." H.R. REP. No. 1597, 93d Cong., 2d Sess. 5 (1974).

[122] *See* W. BARTON LEACH & PAUL J. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE 56–57 (4th ed. 1967); *see also*, WRIGHT & GRAHAM, *supra* note 114, at 608–11. There are several additional alternatives. The Court could have kept the more stringent definition of business "necessity" from *Griggs*, instead of adopting the new terms "legitimate business reason" or "convenience." Also, it could have assigned plaintiff less than the virtually impossible burden of persuading that another business practice was less expensive or as practical. Indeed, this is the import of Section 105 of the Civil Rights Act of 1991, which purports to restore *Griggs*. Sec. 105, § 703, 1992 U.S.C.C.A.N. (105 Stat.) 1071, 1074–75 (to be codified at 42 U.S.C. § 2000e–(k)(1)(A)); *see also* Civil Rights Act of 1991, sec. 3(2).

E. *Discovery Implications*

The judicial redraft of title VII enormously increased plaintiff's discovery burden. After the past three Supreme Court Terms, plaintiffs had to discover much more information, almost all of it solely within defendant's control.[123] In *Wards Cove*, the Court downplayed this concern by pointing to the liberal discovery rules that give plaintiff broad access to defendant's records.[124] This, however, ignored the reality of the litigation process. Each new element of the prima facie case imposes additional discovery burdens on plaintiff. Discovery is expensive, particularly where the evidence is within defendant's control. Thus, the Court's cavalier reference to liberal discovery rules ignored the significant economic disparity between the plaintiffs—who are typically litigating about their major source of income, their jobs—and corporate defendants.[125]

In addition, the federal courts have responded to the sheer volume of potentially relevant, and thus discoverable, information by curbing discovery in title VII cases.[126] For example, courts have often been sympathetic to defendants' claim that certain discovery is irrelevant or unduly burdensome.[127] Defendants have been suc-

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[123] Most of this evidence pertains to defendant's business practices.

[124] 490 U.S. 642, 657 (1989). The Court also referred to the Uniform Guidelines on Employee Selection Procedure, 29 C.F.R. § 1607.1 *et seq.* (1988), which require some employers to maintain records on the impact of certain procedures. 490 U.S at 658 (quoting 29 C.F.R. § 1607.4). But of course, as the Court also recognized, employers' obligations under these guidelines are limited. *See id.* at 658 n.10. For a practical critique of this issue, see ACLU REPORT, *supra* note 110, at 7–10, 16–17. *Wards Cove* created additional discovery problems by requiring the disparate impact plaintiff to show an extremely close causal link between a specific employment practice and racial imbalance in the work force. 490 U.S. at 658. Under *Wards Cove*, plaintiffs who allege several violations, such as nepotism, separate hiring channels and subjective decisionmaking, had to "demonstrate that the disparity . . . is the result of one or more of the employment practices . . . specifically showing that each challenged practice has a significantly disparate impact . . . ." *Id.* at 657–58.

[125] Ironically, the Court has heralded the accessibility of the title VII process to "laymen." Love v. Pullman, 404 U.S. 522, 527 (1972).

[126] At least theoretically, plaintiff may benefit from the broad subpoena powers of the Equal Employment Opportunity Commission. *See* 42 U.S.C. § 2000e–9 (1988). Once plaintiff files a complaint with the EEOC, that agency has broad access to the defendant's records. EEOC v. Shell Oil Co., 466 U.S. 54, 68–69, 72 (1984). The Supreme Court has held that once the EEOC makes a valid charge, the EEOC can use its subpoena power to obtain any information relevant and material to the filed charge. *Id.* The EEOC need not have reasonable cause to believe that the charge is true, and a valid charge, although a jurisdictional prerequisite, need only be a clear and concise statement of facts, including pertinent dates. *Id.* at 67, 72–73. During the Reagan administration, however, the EEOC did not facilitate the enforcement of plaintiffs' rights. Bill McAllister, *EEOC Chief Faces Scrutiny as Court Nominee*, WASHINGTON POST, Feb. 5, 1990, at A1.

[127] *See, e.g.*, Haykel v. G.F.L. Furniture Leasing Co., 76 F.R.D. 386, 391 (N.D. Ga. 1976)

cessful in limiting discovery to the particular department and/or facility within the defendant's business in which plaintiff worked.[128] Courts also have been willing to restrict the time period for which discovery may be obtained.[129] Further, local rules in many jurisdictions limit the number of interrogatories available to plaintiffs.[130] Finally, courts have created privileges unique to title VII cases to protect employment records from disclosure.[131]

(to avoid burdening the defendant, the court limited title VII plaintiff's discovery pertaining to defendant's affiliated stores to "relevant documents for inspection at the respective branch locations"). *See generally* Mark J. Jacoby, *Motion Practice and Discovery in Age Discrimination Cases, reprinted* in *Advanced Strategies* EMPLOYMENT LAW 1988, at 403, 417–26 (Practicing Law Institute, 1988).

[128] *See, e.g.*, Grigsby v. North Miss. Medical Ctr., 586 F.2d 457, 460 (5th Cir. 1978) (discovery restricted to limits of medical center where plaintiff worked); Hinton v. Entex Inc., 93 F.R.D. 336, 337 (E.D. Tex. 1981) (discovery restricted to one facility because plaintiff made no allegations pertaining to any other facility of defendant and local facility was responsible for most employment decisions); McClain v. Mack Trucks, Inc., 85 F.R.D. 53, 62 (E.D. Pa. 1979) (where defendant's plants functioned independently of each other with respect to hiring decisions defendant was justified in limiting its interrogatory answers to facility at which plaintiff worked); *cf.* Trevino v. Celanese Corp., 701 F.2d 397, 406 (5th Cir. 1983) (trial judge exceeded discretion in issuing protective order that restricted discovery to one plant in light of plaintiff's allegations of a pattern of discrimination in a consolidated enterprise's promotion and transfer system).

[129] *See, e.g.*, James v. Newspaper Agency Corp., 591 F.2d 579 (10th Cir. 1979) (trial court that limited discovery to four-year period had not unreasonably restricted plaintiff in her pretrial discovery); Zahorik v. Cornell Univ., 98 F.R.D. 27 (N.D.N.Y. 1983) (appropriate cut-off date for discovery was two years prior to the earliest date of filing of an EEOC charge by a plaintiff because back pay awards may be retroactive for two years), *aff'd*, 729 F.2d 85 (1984); Williams v. United Parcel Service, 34 Fair Empl. Prac. Cas. (BNA) 1655 (N.D. Ohio 1982) (discovery limited to three years prior to last allegedly discriminatory act because permitting discovery beyond that period would be unduly burdensome and probably irrelevant); *cf.* Flanagan v. Travelers Ins. Co., 111 F.R.D. 42 (W.D.N.Y. 1986) (back pay liability provision of title VII could not be used by employer to restrict plaintiff's discovery to events that occurred two years prior to date of filing complaints).

[130] *See* ACLU REPORT, *supra* note 110, at 10; Subrin, *Federal Rules*, *supra* note 7, at 2024 - 25. Interrogatories may be a less expensive form of discovery for poorer litigants. In 1979, Judge Walter R. Mansfield, then Chairman of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, explained one reason why the Advisory Committee withdrew a proposal that would have specifically authorized federal district courts to adopt local rules limiting the number of interrogatories: "[m]any commentators stated that interrogatories are the only form of discovery available to ordinary litigants and to the poor." 85 F.R.D. 521, 543–44 (1980) (letter from Mansfield to Judge Roszel C. Thomsen, dated June 14, 1979).

[131] Several federal courts have deemed affirmative action reports and other self-evaluative documents prepared by title VII defendants to be privileged and thus not discoverable. In Banks v. Lockheed-Georgia, 53 F.R.D. 283, 285 (N.D. Ga. 1971), the court held that disclosure of an affirmative action report prepared pursuant to mandatory government order would be against public policy because disclosure would stifle frank subjective analysis and would discourage companies from making investigations that are calculated to have a positive effect on equalizing employment opportunities. *Id.* at 285. Many courts have adopted this

Consider the hypothetical hospital that hires only those physicians who have received a personal recommendation from staff physicians. There currently are no African-American physicians on staff, and none of the white doctors have recommended a black colleague. The hospital has asserted that requiring personal recommendations from physicians whose qualifications are familiar to the hospital assures good patient care, a collegial atmosphere and trust among its medical staff. While these reasons may not have amounted to business necessity under *Griggs*, they were "legitimate" under *Watson* and *Wards Cove*. Assume that an African-American doctor applies for a staff position and is rejected. In addition to the discriminatory impact of the recommendation rule, plaintiff had to prove the availability of alternate, non-discriminatory staffing methods that imposed no additional burden on the hospital. This created nightmarish discovery problems.

There are at least two obvious alternate selection methods: the establishment of a qualifications committee to review medical school and residency records, and the use of written evaluations and recommendations from non-staff physicians. As each alternative clearly imposes additional administrative and financial costs on the hospital, and neither may be as effective in assuring staff collegiality, trust and confidence, plaintiff loses. Thus, *Wards Cove* reified the historic patterns of exclusion that were precisely the type of artificial barriers to employment Congress sought to eliminate through title VII.

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reasoning, thereby denying title VII plaintiffs information otherwise clearly discoverable under Federal Rule of Civil Procedure 26. *See, e.g.*, Jamison v. Storer Broadcasting Co., 511 F. Supp. 1286, 1296–97 (E.D. Mich. 1981) (broadcasting company not required to disclose affirmative action plans and subjective data compiled in compliance with affirmative action requirements); Rosario v. New York Times Co., 84 F.R.D. 626, 631 (S.D.N.Y. 1979) (newspaper entitled to assert qualified privilege of "self examination" for material pertaining to affirmative action taken to eliminate employment discrimination). Some courts recognize a limited privilege laid out in Webb v. Westinghouse Elec. Corp., 81 F.R.D. 431, 434–35 (E.D. Pa. 1978); others review the material in chambers to determine which parts should be deleted or summarized for the plaintiff. *See* O'Connor v. Chrysler Corp., 86 F.R.D. 211, 218 (D. Mass. 1980). Still other courts have modified and confined the application of the privilege. *See* Siskonen v. Stanadyne, Inc., 124 F.R.D. 610, 610–12 (W.D. Mich. 1989); Hardy v. New York News, Inc., 114 F.R.D. 633, 641–42 (S.D.N.Y. 1987); Witten v. A.H. Smith & Co., 100 F.R.D. 446, 452–54 (D. Md. 1984) (evaluating privilege under Wigmore's four-prong test, the court refused to bar discovery of affirmative action reports), *aff'd*, 785 F.2d 306 (4th Cir. 1986); Zahorik v. Cornell Univ., 98 F.R.D. 27, 33 (N.D.N.Y. 1983) (production ordered subject to a protective order preventing disclosure), *aff'd*, 729 F.2d 85 (1984). Although the federal courts are "in disarray" on the self-analysis privilege, the trend does not favor plaintiffs. *See, e.g.*, Coates v. Johnson & Johnson, 756 F.2d 524, 552 (7th Cir. 1985) (although district court abused discretion in denying plaintiffs' request for discovery of defendant's affirmative action plans, plaintiffs were not "substantially prejudiced" and not entitled to the plans).

The *Wards Cove* majority was untroubled by its perpetuation of the status quo. Indeed, Justice White reiterated the proposition that it is neither the concern of the judiciary nor within its competence to "restructure business practices."[132] It is hard to fathom how the purpose of title VII can be effectuated if business practices are not changed. Yet without any direction from Congress, the Court changed plaintiff's title VII case to include a requirement that balanced the employer's convenience against the alleged discrimination. In making this substantive change, the Court did not openly analyze the nature of racism in the workplace;[133] instead, the Court insisted in *Wards Cove* that its only concern was the appropriate allocations of proof. Yet, until the Court reallocated the burdens of proof in *Watson* and *Wards Cove*, the facts in *Wards Cove* would have established a classic title VII violation.[134] Surely Congress intended in 1964 that title VII apply to racially segregated workplaces. The Court's stylized preoccupation with the burden of proof is little more than a subterfuge for promoting its laissez-faire approach to business, albeit at the expense of the continued existence of discriminatory practices.

Less harshly, the Court decided that discrimination was no longer a serious problem and that any requirement that business justify its practices was too onerous. In so doing, the Court effectively rejected the congressional mandate to eliminate unjustifiable workplace discrimination,[135] thus permitting discriminatory prac-

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[132] Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 661 (1989). "[C]onsequently the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternate . . . practice in response to a Title VII suit." *Id. Wards Cove* also perpetuated the economic disparities between plaintiff and defendant; clearly, employers have vastly greater resources than plaintiffs to explore alternative business practices.

[133] What troubled the Court in both *Watson* and *Wards Cove* was its speculation that any interpretation of title VII that gives too much weight to the discrimination established by plaintiff may encourage an employer to hire minorities on a preferential basis, in violation of 42 U.S.C. § 2000e–2 (1988). *Wards Cove*, 490 U.S. at 652; Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 993 (1988). It has been well settled for some years that section 703(j) means only that as between two equally well-qualified applicants, title VII does not require or impose an affirmative duty upon the employer to hire the minority or female applicant. *See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981) (title VII does not obligate an employer to select a woman or a minority from among equally well-qualified applicants). Ignoring its own jurisprudence, the Court used the narrow exception of 703(j) to swallow the anti-discrimination rule of title VII.

[134] *See* 490 U.S. at 646–48. It appears that even the *Griggs* plaintiffs would lose under *Wards Cove*. *See* ACLU REPORT, *supra* note 110, at 26–31.

[135] As we have observed elsewhere, disparate treatment and its emphasis on defendant's subjective racist motivation redefines equality in terms of narrow conduct performed for the specific purposes of violating precisely defined rights. Looking to the subjective race-specific

tices that were cheaper than nondiscriminatory practices. The Court's new disparate impact rules redefined equality in terms of economic efficiency; if a plaintiff could not prove the equivalent cost-effectiveness of a non-discriminatory practice, the plaintiff could not prevail.[136] Under the guise of clarifying evidentiary concerns and allocating and ordering burdens of proof, the Court undermined congressional intent and legitimated business as usual.

Decisions about burdens of proof that have little regard for the underlying procedural issues about who has the evidence, who can get it, and the cost of obtaining it, obviously belie the notion that procedure is distinct from substance. Moreover, they make a mockery of procedure's supposed political neutrality.

IV. How Substance and Procedure Intersect at the Commencement of a Case: Punishing Plaintiffs with New Pleading Requirements

In this section, we examine the impact of the cases mandating greater specificity in title VII complaints. The Federal Rules of Civil Procedure promised a liberal pleading regime,[137] envisioning a simple narrative that would let plaintiffs use discovery to establish the specific details of their cases.[138] Thus, Federal Rule 8(a)(2) compels only "a short and plain statement of the claim showing that the pleader is entitled to relief."[139] But despite this promise, the courts have imposed stricter pleading requirements in title VII cases.[140]

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motivation of individual defendants conceptualizes discrimination as aberrant acts of isolated individuals, thereby absolving the community of any responsibility for this behavior. Brown et al., *Constitutional Dissonance*, *supra* note 8, at 590–98.

[136] For a discussion of the Court's economic analysis of constitutional rights, see Brown & Baumann, *Nostalgia*, *supra* note 3. *Compare* Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. Chi. L. Rev. 1311 (1989) (title VII interferes with economically efficient behavior) *with* John J. Donohue, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 U. Chi. L. Rev. 1337 (1989) (discrimination not attributable to efficiency but "misogyny").

[137] The objectives of Rule 8(a)'s drafters were to get away from the exacting requirements of the Field Code, "to avoid technicalities and to require that the pleading . . . [give] the opposing party fair notice of the nature and basis or grounds of the claim." 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §§ 1215–1216 (1990).

[138] These heightened pleading requirements have combined with the more onerous prima facie case rules, discussed earlier, to increase plaintiffs' discovery burdens. Stricter pleading and proof rules significantly impact discovery; moreover, plaintiff must be able to discover enough information to avoid Rule 11 sanctions.

[139] Fed. R. Civ. P. 8(a)(2).

[140] Indeed, this trend is true of civil rights cases generally. *See* Hobson v. Wilson, 737 F.2d 1, 30 & n.87 (D.C. Cir. 1984) ("[E]very other circuit has articulated a requirement of particularity in pleading for civil rights complaints."); Trader v. Fiat Distribs., Inc., 476 F.

Federal courts in several circuits now routinely require title VII plaintiffs to plead specific facts in their complaints.[141] Abandoning the liberal "notice pleading" requirements championed by Charles Clark[142] and acknowledged with approval by the Supreme Court in *Conley v. Gibson*,[143] the federal courts have largely revived fact pleading, requiring that title VII claimants not only state their claims, but also support them with specific facts.[144] The courts have used Rule 8(a) as a sifting device to delay or dismiss meritorious claims on the grounds of lack of factual specificity in complaints.[145]

Supp. 1194, 1197–1202 (D. Del. 1979) (claims under 42 U.S.C. § 1981 as well as title VII); Marcus, *supra* note 30, at 449–50.

[141] *See infra* notes 156–57 and accompanying text. Although some federal courts have held that the pleader must set forth the prima facie elements of a claim in order to meet the requirements of Rule 8, *see, e.g.*, Local 1852 Waterfront Guard Ass'n v. Amstar Corp., 363 F. Supp. 1026, 1030 (D. Md. 1973), the cases taken as a whole indicate that each and every element need not be stated specifically as long as it can be inferred that the evidence regarding the missing element will be presented at trial.

[142] In his earlier writings, Clark was more willing to embrace the term "notice pleading." *Compare* Charles E. Clark, *Comments: Pleading Negligence*, 32 YALE L.J. 483, 484 (1923) *and* Charles E. Clark, *The Complaint in Code Pleading*, 35 YALE L.J. 259, 264 (1926) *with* Charles E. Clark, *The Federal Rules of Civil Procedure: 1938–1958*, 58 COLUM. L. REV. 435, 450–51 (1958). Perhaps the confusion over the term "notice pleading" has in part been caused by the two ways in which Clark used it. Sometimes he distinguished between two types of notice functions. On occasion, he wrote about "notice of each material fact of the pleader's cause, rather than merely general notice of the case, as in the so-called 'notice pleading.'" Charles E. Clark, *The Complaint in Code Pleading*, 35 YALE L.J. 260, 265 n.30 (1926) (citing Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 542–44 (1915)). But this distinction is also confusing because Clark and the other drafters of the Federal Rules assiduously avoided the words "facts" and "causes of action" in the pleading requirements. JAMES & HAZARD, *supra* note 67, at 151. For discussion of the "ambiguity" of the Federal Rules' purposes with respect to the degree of specificity required in complaints, see JAMES & HAZARD, *supra* note 67, at 152–54.

[143] *See* 355 U.S. 41, 45–46 (1957) ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

[144] For a discussion of the revival of fact pleading in the federal courts generally, see Marcus, *supra* note 30, at 447–51. *See also* David M. Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390, 408–21 (1980); C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677, 678–88 (1984).

[145] Professor Marcus suggests several motives for applying a specificity requirement: a desire to protect defendants from discovery that becomes the principal objective of a lawsuit (rather than a device to aid in its resolution), general disapproval of civil rights claims, and fear of groundless suits being brought by indigents under the liberal federal rules. Marcus, *supra* note 30, at 441, 471, 477. The fear of frivolous complaints is misplaced. In our view, if a qualified African-American applicant is denied a job that is given to a white, that should be enough to shift the burden to the defendant to explain its behavior. Similarly, racially disparate impact should shift the burden because by definition defendant's conduct has hurt minorities more than whites.

More stringent pleading requirements may well be part of a broader trend that affects a larger group of cases.[146] Nevertheless, imposing different pleading rules on title VII cases undercuts the myth that pleading standards are transsubstantive. Stricter pleading requirements have a particularly harsh effect on title VII plaintiffs and ignore the very nature of discrimination claims. Title VII plaintiffs are less able to obtain specific facts at the pleading stage. First, the resources of title VII plaintiffs are limited. Second, much of the information necessary to establish plaintiff's case is in defendant's hands. Certainly, evidence of the critical issue of defendant's state of mind is not easily available to plaintiff. Even with respect to statistical evidence of racial disparities, plaintiff will need to obtain evidence from defendant on the racial composition of the work force, and will require the assistance of expert statisticians. Evidence of the employer's justification for its allegedly discriminatory practices, as well as the alternative ways of doing business required by *Wards Cove*, were similarly inaccessible. In other words, the extensive and costly discovery plaintiff needs to establish her case is not available unless she survives the pleading stage.

Heightened specificity requirements further disadvantage a title VII plaintiff by limiting the permissible scope of her complaint. As a general proposition, the scope of a title VII complaint must relate to the charge filed with the EEOC. Although there are various formulations of the rule, the generally accepted standard appears to be that "the 'scope' of the judicial complaint is limited to the 'scope' of the EEOC investigation that can reasonably be expected to grow out of the charge of discrimination"[147] initially filed with that agency. This standard has been applied with varying degrees of strictness, making it difficult for a plaintiff to discern when a court will broadly construe the potential EEOC investigation[148] and

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[146] Marcus, *supra* note 30, at 435–36, 491–92. Professor Marcus identifies securities fraud, civil rights and conspiracy as types of cases in which the courts have required more specificity in complaints. *Id.* at 447–50.

[147] Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970).

[148] For broader applications of the standard, *see, e.g.*, EEOC v. Reichhold Chemicals, Inc., 700 F. Supp. 524, 526–27 (N.D. Fla. 1988) (granting leave to amend to add charge of retaliation for exercise of title VII rights in sex discrimination case where discovery grew out of investigation and conciliation efforts had failed); Emrick v. Bethlehem Steel Corp., 539 F. Supp. 653, 655 (E.D. Pa. 1982) (charges of sex discrimination with respect to hiring, seniority, compensation, promotion, transfer, and terms and conditions of employment could "reasonably be expected to grow out of the charge of discrimination" with respect to termination filed with the EEOC). The *Reichhold Chemicals* court applied a somewhat more restrictive standard, defining the permissible scope of the complaint by the scope of the EEOC inves-

when it will not.[149] It seems particularly unfair to punish a plaintiff for drafting a less than comprehensive EEOC charge, which is often done without the advice of counsel, because she did not consider or anticipate certain discriminatory practices, perhaps relying on the EEOC's discovery efforts to unearth facts to support her claim. Furthermore, such a limitation violates the transactional approach of the Federal Rules and contravenes its liberal amendment policy.[150] Notice that there is no language in title VII that supports the imposition of this limitation.

Another rule that may adversely affect plaintiffs requires the pleading with specificity of jurisdictional prerequisites or conditions precedent to suit.[151] This requirement is not universally applied; indeed, some courts allow general statements that plaintiff has met the conditions. But there is such wide judicial variation that a plaintiff cannot be sure what to anticipate. Thus, while a federal district court in Pennsylvania found plaintiff's allegation that administrative remedies had been sufficiently exhausted to withstand a Rule 12(b)(6) motion,[152] the Fifth Circuit Court of Appeals affirmed a

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tigation "as long as the investigation reasonably *grew out of* the discrimination charge." 700 F. Supp. at 526 (emphasis added).

[149] *See, e.g.*, Torriero v. Olin Corp., 684 F. Supp. 1165, 1170 (S.D.N.Y. 1988) (granting summary judgment for defendant on plaintiff's sexual harassment claim where EEOC charge alleged that, because of her sex, plaintiff's calls and times of arrival were monitored, she was denied transfer or promotion, and was placed on probation and terminated; sexual harassment could not reasonably have been expected to be revealed by investigation of EEOC charge); Jackson v. Ohio Bell Tel. Co., 555 F. Supp. 80, 83 (S.D. Ohio 1982) (granting defendant's motion to dismiss claims alleging racial discrimination in maintenance of "separate" lines of seniority and standards of conduct, harassment, and assignment of "menial work" where EEOC charge only referred to "termination" and "disciplinary action").

[150] Several of the Federal Rules look at whether the claims or events that are sought to be joined arise out of the "same transaction or occurrence," e.g., FED. R. CIV. P. 13(a), or the "same transaction, occurrence or series of transactions or occurrences," e.g., FED. R. CIV. P. 20(a). *See also* FED. R. CIV. P. 13(g), 14(a), 15(c), 15(d). Although the courts do not offer a precise test for what constitutes sufficient transactional unity to permit joinder, such unity is aided by a "common scheme, or design, or conspiracy to defraud or to violate the law," the "fact that all the acts or the conduct are more or less consciously directed toward or connected with some common core such as a common purpose or a common event or a single claim or item of property," or "the fact that completely independent acts converge to cause an injury for all or for some part of which the actors have a common liability under substantive law." JAMES & HAZARD, *supra* note 67, at 478–79. Federal Rule of Civil Procedure 18(a) even permits unrelated claims to be joined against an opposing party and Rule 15(a) states that leave to amend "shall be freely given when justice so requires." For an explanation of the transactional approach, see Charles E. Clark & James W. Moore, *A New Federal Civil Procedure II: Pleadings and Parties*, 44 YALE L.J. 1291, 1298–1301, 1319 (1935).

[151] FED. R. CIV. P. 9(c).

[152] *See* Spidle v. Pennsylvania Office of Budget, 660 F. Supp. 941, 943–45 (M.D. Pa. 1987).

district court opinion requiring plaintiff specifically to plead receipt of an EEOC right-to-sue letter in order to satisfy title VII's exhaustion requirement.[153] In the Seventh Circuit, it appears that a plaintiff's title VII claim was dismissed for pleading conditions precedent too specifically.[154] But another panel within the same circuit, referring to the "relative quagmire of Title VII procedure," applied a more liberal standard to the pleading of conditions precedent in upholding plaintiff's title VII claim.[155]

Courts have also required that title VII plaintiffs plead specific facts to support their claims.[156] Several courts have used a specificity requirement to dismiss title VII complaints under Rule 8(a)(2),[157]

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[153] *See* Pinson v. Hendrix, 493 F. Supp. 772, 776 n.1 (N.D. Miss. 1980), *aff'd without published opinion*, 660 F.2d 495 (5th Cir. 1981).

[154] *See* Sanders v. A.J. Canfield Co., 635 F. Supp. 85, 87 (N.D. Ill. 1986). Despite the fact that time limitation is not a jurisdictional prerequisite, the court dismissed a title VII claim where plaintiff alleged only that the complaint was timely filed, holding that pursuant to Federal Rule of Civil Procedure 9(c), plaintiff must at least allege that "all conditions precedent to the institution of the lawsuit have been fulfilled." *Id.* This misreads Rule 9(c), which states only that "it is sufficient" to make a general averment regarding conditions precedent but does not in any way prohibit a more specific statement. FED. R. CIV. P. 9(c).

[155] *See* Brown v. Reliable Sheet Metal Works, Inc., 852 F.2d 932, 933 (7th Cir. 1988) (plaintiff's complaint indicating only that EEOC charge had been made and that complaint was filed within 90 days of receiving EEOC right-to-sue letter was adequate to give employers notice that plaintiff was pursuing title VII action; complaint dismissed on other grounds). Echoing the writ system and the Field Code, the federal courts have also developed specific elements for different types of title VII claims. Sexual harassment and sex discrimination are pleaded differently. *Compare* Cummings v. Walsh Constr. Co., 561 F. Supp. 872, 877–78 (S.D. Ga. 1983) *with* Haag v. Board of Educ., 655 F. Supp. 1267, 1272 (N.D. Ill. 1987). Sex discrimination is defined in title VII; the specific elements of sexual harassment are listed only in section 1604.11 of the EEOC Guidelines. Religious discrimination has its own prima facie case. *See* McCrory v. Rapides Regional Medical Ctr., 635 F. Supp. 975, 978–79 (W.D. La. 1986), *aff'd*, 801 F.2d 396 (5th Cir. 1986).

[156] The Supreme Court has not yet directly addressed whether title VII plaintiffs should be subjected to a specificity requirement pursuant to Rule 8(a)(2). In Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 149, 150 (1984), however, the majority refused to construe a *pro se* plaintiff's right-to-sue letter as a properly pleaded complaint under Rule 8(a)(2) and stated that it could "find no satisfactory basis for giving Title VII actions a special status under the Rules of Civil Procedure." *Id.* at 150; *cf.* Nielsen v. Flower Hosp., 639 F. Supp. 738, 744–45, 749 (S.D.N.Y. 1986) (in *pro se* title VII action, court refused to extend *Baldwin* beyond its facts, holding that the form complaint filed by plaintiff, though general, was sufficient to commence an action).

[157] *See, e.g.*, Fisher v. Flynn, 598 F.2d 663, 666 (1st Cir. 1979) (dismissing complaint without leave to amend for failure to state a title VII claim where female employee, who alleged sex discrimination in termination of her employment at college, did not allege facts showing that department chairman who made sexual advances to her played role in the termination decision); Martin v. New York State Dep't of Mental Hygiene, 588 F.2d 371, 372 (2d Cir. 1978) (court dismissed with leave to amend complaint of black employee who alleged that employer denied him authority, salary and privileges commensurate with his position on the basis of his race, stating that complaint consisted of "naked assertions" and did not

while other panels have found similar title VII pleadings sufficiently specific to withstand a motion to dismiss.[158] The point is this: while the courts speak in similar language, their actual expectations about exactly what facts and what degree of specificity is necessary are often unclear and seem to vary from case to case. For example, Rule 9(b) specifically permits intent to be "averred generally."[159] Although some courts accept a general averment of discriminatory motivation, others require the allegation of specific facts about defendant's improper state of mind.[160] Thus, a complaint that one court views as containing all the requisite facts might be dismissed by another for mere conclusory allegations.[161] At least with respect to these cases, the pleading rules are neither simple nor predictable.

The First Circuit requires some of the most exacting pleading standards. In *Johnson v. General Electric*,[162] an African-American

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set forth facts to make out a claim under title VII); Johnson v. New York City Transit Auth., 639 F. Supp. 887, 893 (E.D.N.Y. 1986) (district court dismissed plaintiff's title VII claim under Rule 12(b)(6) as "conclusory" where plaintiff did not allege with particularity that he was qualified for position denied him or that he was discharged from a position due to discrimination, and where plaintiff failed to demonstrate with any specificity that similarly situated individuals were treated differently), *aff'd*, 823 F.2d 31, 32 (2d Cir. 1987). For a case applying a specificity standard to other than a Rule 12(b)(6) motion, see Nash v. City of Oakwood, 90 F.R.D. 633, 635–36 (S.D. Ohio 1981) (court denied plaintiff's motion to compel production of documents on title VII racial discrimination claim where complaint contained only conclusory allegations of broad-based discrimination; court claimed to apply liberal "notice pleading" standard).

[158] *See, e.g.*, Emrick v. Bethlehem Steel Corp., 539 F. Supp. 653, 656–57 (E.D. Pa. 1982) (allegations that plaintiffs entered defendant's apprenticeship program and that they were subject to several long-term layoffs on the basis of sex, read in conjunction with rest of complaint, were sufficiently specific to survive motion to dismiss; court granted motion for more specific statement); Ratcliffe v. Insurance Co. of N. Am., 482 F. Supp. 759, 765 (E.D. Pa. 1980) (amended sex discrimination complaint, much of which was cast in conclusory language, "barely" satisfied rule of factual specificity in civil rights cases); *see also* Irizarry v. Palm Springs Gen. Hosp., 657 F. Supp. 739, 740–41 (S.D. Fla. 1986) (claim of unlawful discharge under title VII, though "somewhat unartfully drafted," contained sufficient allegation of intentionally discriminatory animus to survive motion to dismiss).

[159] FED. R. CIV. P. 9(b). Professor Marcus objects to the insistence on detailed pleading regarding the defendant's state of mind, as it contradicts the express language of Federal Rule of Civil Procedure 9(b). *See* Marcus, *supra* note 30, at 469.

[160] *See, e.g.*, Brown v. City of Miami Beach, 684 F. Supp. 1081, 1083 (S.D. Fla. 1988) (upholding disparate treatment complaint alleging rejection from various positions applied for, because complaint identified several particular requests that were denied); Afro-American Police League v. Fraternal Order of Police, 553 F. Supp. 664, 668 (N.D. Ill. 1982) (dismissing minority police officers organization's title VII claim alleging discriminatory implementation of seniority system where no facts of intentional discrimination were alleged).

[161] The complex prima facie case required by *Wards Cove* would no doubt exacerbate the specificity problem.

[162] 840 F.2d 132 (1st Cir. 1988).

employee alleged that, because of his race, he was not promoted.[163] Counts I and III of plaintiff's complaint were time-barred.[164] The court held that count II, in which plaintiff alleged that General Electric had adopted a racially discriminatory review process in response to plaintiff's grievance for failure to promote, should be dismissed without leave to amend because it was not pleaded with requisite specificity.[165] In essence, a title VII plaintiff in the First Circuit must plead particular facts establishing racial discrimination, either by alleging in the complaint that non-minority employees similarly situated or qualified were granted favorable treatment or benefits or by introducing unspecified "other evidence of racial bias."[166]

District courts in the Third Circuit also demand that title VII plaintiffs plead specific facts. For example, in *Trader v. Fiat Distributors*, where minority plaintiffs alleged that both their employer and their union were engaging in discriminatory employment practices, the court dismissed under Rules 12(b)(6) and 8(a) various counts of the complaint as too vague to support a cause of action under title VII: "a civil rights complaint must specify, with a sufficient degree of particularity, the unlawful conduct allegedly committed by each defendant and the time and place of that conduct."[167] The court admonished the plaintiffs, when preparing their amended complaint, to include "facts as to when, how, to whom, and with what results such discrimination has been applied."[168]

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[163] *Id.* at 133.

[164] *Id.* at 134, 139.

[165] The court stated:

> Appellant has alleged facts which, if proven, might sustain a claim of an *unfair* review process. But that alone does not establish a title VII violation. The element of racial discrimination must also be alleged with sufficient particularity. Plaintiff does not contend that any white employees were promoted without the qualifications for which the review process tested. Nor does he allege any other evidence of racial bias in the nature of the review. Appellant has not asserted facts sufficient to create inferences that would support a finding that he would have been treated differently had he not been black.

Id. at 138 (emphasis in original). The court acknowledged, however, that count I, in which the plaintiff alleged that he had qualifications equal to or better than the white employees promoted ahead of him, would have been sufficiently pleaded had it been timely filed. *Id.*

[166] Dismissal of a complaint without leave to amend conflicts with the liberal amendment policy of the Federal Rules. *See, e.g.*, 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216 (1990) ("[I]f the requisite allegations are not in the complaint and a motion to dismiss for failure to state a claim upon which relief may be granted is made, the pleader should be given the opportunity to amend his complaint, if he can, to show the existence of the missing elements.").

[167] 476 F. Supp. 1194, 1198 (D. Del. 1979).

[168] *Id.* at 1199 (quoting Ogletree v. McNamara, 449 F.2d 93, 98 (6th Cir. 1971)). *Ogletree*

In particular, the *Trader* court deemed the following allegations "broad and conclusory," and thus improper under Rule 8(a)(2):

> The Plaintiff was retaliated against for opposing Defendant's employment practices by written warnings, reprimands and other forms of harassment. Further, Plaintiff was discriminated against, and Blacks as a class have been discriminated against, in the hiring and promotion policies of the Defendant in that the Defendant maintained preferential job assignments for whites over Blacks and segregated job classifications.[169]

The court found that plaintiff's complaint contained "no specific factual allegations supporting his claim of retaliation" and was "devoid of facts supporting [the] broad allegations of employment discrimination" in hiring and promotion.[170] Although plaintiff had stated a claim and informed both the court and defendants of the nature of his grievance, the court wanted more. Because the plaintiff did not recite specific facts about when the discriminatory acts occurred, who performed them, and what the results of the acts were, the court dismissed the complaint.[171]

Courts are not unanimous in advocating the revival of fact pleading in title VII cases. Some courts have criticized the specificity requirement and remained faithful to the Federal Rules.[172] For

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is a frequently cited decision in which a class of African-American employees alleged that their employer, an Air Force base, had engaged in racially motivated employment discrimination. The Court of Appeals affirmed summary judgment for defendants based in part on the complaint's "notable" lack of specificity. *Ogletree*, 449 F.2d at 95. Under the *Ogletree* standard, a title VII plaintiff must provide "evidentiary" facts demonstrating the veracity of the claim. *Id.* at 98.

[169] *Trader*, 476 F. Supp. at 1199–1200.

[170] *Id.*

[171] *Id.* at 1199. Plaintiff was given 20 days to remedy the "defective" pleadings. The *Trader* court upheld several other counts. The court emphasized the requirement of specific pleading in civil rights cases when drafted by "experienced counsel," suggesting more leniency for the *pro se* plaintiff. *Id.* at 1197. In support of this proposition, see McClelland v. Herlitz, Inc., 704 F. Supp. 749, 750–51 (N.D. Tex. 1989) (handwritten *pro se* complaint reciting grounds for title VII race discrimination claims sufficient to comply with Rule 8(a)(2)'s requirement of "a short and plain statement").

[172] *See, e.g.*, Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, 611 F. Supp. 344, 350 (S.D.N.Y. 1984) (African-American employee, who was discharged by brokerage firm while employed as administrative assistant, alleged facts sufficient to support claim even though she alleged no facts regarding fourth element of prima facie case; plaintiff's statement in complaint made clear the nature of her charge was sufficient under Rule 8(a)(2)). It is indicative of the general confusion in this area that, even within circuits that have adopted a specificity requirement, some courts have refused to apply it or have denied its applicability to title VII cases. Two separate decisions of district courts in the Eleventh Circuit refused to

example, in *Talley v. Leo J. Shapiro & Associates, Inc.*, several employees brought a title VII action against their former employer, alleging it had denied qualified minorities equal opportunity in all positions and had maintained a promotion system that locked African-Americans into discriminatory assignments.[173] The court easily rejected the defendants' Rule 12(b)(6) argument that the complaint did not contain a sufficient factual foundation for the title VII claims. Stating that the allegations were "sufficient to put defendants on notice of the basis for plaintiff's claims and to permit defendants to submit adequate responsive pleadings," the court found that the complaint met the liberal "notice pleading" standards of the Federal Rules.[174]

The Seventh Circuit Court of Appeals restated the importance of notice pleading in *American Nurses' Ass'n v. Illinois*,[175] a class action alleging sex discrimination in wages in violation of title VII and the Equal Protection Clause of the Fourteenth Amendment. The district court dismissed the plaintiffs' lengthy and detailed complaint under Rule 12(b)(6) on the ground that it pleaded a comparable worth case, a theory that was not actionable under title VII.[176] The Seventh Circuit, in reversing the lower court, extolled the virtues of using notice pleading and discovery, instead of fact pleading, to uncover the facts underlying plaintiffs' claim.[177] Thus, the complaint should not have been dismissed because, even though the

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apply a heightened specificity requirement to title VII cases. In Hawkins v. Fulton County, 95 F.R.D. 88 (N.D. Ga. 1982), the court granted plaintiffs' motion to add parties-plaintiff pursuant to Federal Rule of Civil Procedure 21, finding that plaintiffs' complaint was sufficient to put defendants on notice of a possible claim regarding their hiring practice even though the complaint only specifically listed allegations of discrimination in transfer and promotion. *Id.* at 90–91. Rejecting the greater specificity standard, the court asserted that complaints in civil rights and employment discrimination actions must be read in a "broad and expansive manner." *Id.* at 91. A more recent decision, EEOC v. Jacksonville Shipyards, Inc., 696 F. Supp. 1438 (M.D. Fla. 1988), holding that defendant bore the burden of failing to seek clarification of a phrase—"unequal terms and conditions of employment"—in plaintiff's complaint at an earlier stage of the proceedings, expressly found that the requirement of greater specificity in civil rights pleadings did not apply to title VII suits. *Id.* at 1443.

[173] 713 F. Supp. 254, 257 (N.D. Ill. 1989).

[174] *Id.*

[175] 783 F.2d 716, 723–25 (7th Cir. 1986). *But cf.* Sutliff, Inc. v. Donovan Companies, Inc., 727 F.2d 648, 654 (7th Cir. 1984) (in a case brought under RICO and the Sherman Antitrust Act, Judge Posner said that *Conley v. Gibson* "has never been taken literally" and interpreted Federal Rule of Civil Procedure 8(a) to require greater factual specificity).

[176] *American Nurses' Ass'n*, 783 F.2d at 719, 724. For the problems of comparable worth cases, see Brown et al., *Comparable Worth*, *supra* note 94.

[177] *American Nurses' Ass'n*, 783 F.2d at 723–24. The court warned of the risks of overly specific pleading, stating that "[a] plaintiff who files a long and detailed complaint may plead himself out of court by including factual allegations which if true show that his legal rights were not invaded." *Id.* at 724 (citations omitted).

comparable worth claims were not actionable, it alleged other kinds of intentional sex discrimination that were.[178] The court suggested that a complaint that does not allege facts may still satisfy Rule 8(a)(2).[179]

But the Seventh Circuit's approach is not typical. The majority of courts now impose stringent pleading requirements. Of course, a plaintiff cannot use the discovery process before she files her complaint to learn the facts she must specifically plead. As one judge has observed: "no information until litigation: no litigation without information."[180] The revival of fact pleading thus frustrates actionable claims and, ultimately, the opportunity to be heard.

V. Redefining the Parties: Either Too Many or Too Few

From 1938 until 1980, the earmarks of American procedure were permissive pleading, ease of joinder of claims and parties, and liberal discovery.[181] In previous sections, we saw how the interplay of an expanded prima facie case, reallocated burdens of proof, stricter pleading requirements, and enlarged discovery dramatically increased the burdens of title VII plaintiffs. In this section, we review the injury to plaintiffs caused by the federal judiciary's rewriting of joinder of party doctrine. During the 1980s, the Supreme Court used two cases, *General Telephone Co. of the Southwest v. Falcon*[182] and *Martin v. Wilks*,[183] as vehicles to change title VII joinder rules. These cases made title VII procedure vastly more technical and complex. In so doing, they redefined the concept of discrimination.

Falcon and *Wilks* demonstrate again the political nature of procedural choices. *Falcon* made it much harder for plaintiffs with a

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[178] *Id.* at 728–29.

[179] *Id.* at 727. The court stated:

> [A] complaint is not required to allege all, or any, of the facts logically entailed by the claim . . . . A plaintiff does not have to plead evidence . . . . [A] complaint does not fail to state a claim merely because it does not set forth a complete and convincing picture of the alleged wrongdoing.

Id.

[180] Johnson *ex rel* Johnson v. United States, 788 F.2d 845, 856 (2d Cir.) (Pratt, J., dissenting), *cert. denied*, 479 U.S. 914 (1986).

[181] *See, e.g.*, James & Hazard, *supra* note 67, at 21. Another characteristic was the merger of law and equity. For the procedural viewpoints and debate evolving after 1980, see Subrin, *Fireworks*, *supra* note 14; Subrin, *New Era*, *supra* note 7; Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. Pa. L. Rev. 1901, 1902–03, 1907, 1913–17 (1989).

[182] 457 U.S. 147 (1982).

[183] 490 U.S. 755 (1989).

common injury—discrimination—to join together to achieve relief. At the same time, under *Wilks*, plaintiffs had to join many more defendants. Thus, plaintiffs' rights were constricted while the rights of nonplaintiffs—other (white) employees—were enlarged. The expansion of the number of parties who must be joined as defendants also extends the vulnerability of any judgment won by plaintiffs.[184]

A. *Restricting Class Actions: Atomizing Plaintiffs*

1. Before *Falcon*: Title VII and Class Action Congeniality

Early Supreme Court civil rights cases recognized the financial and political powerlessness of individual victims of discrimination.[185] Class actions provide a more level litigation playing field by permitting the sharing of legal resources and expenses. Indeed, one of the purposes of Federal Rule 23 was to empower the weak or vulnerable members of society.[186] Special rules in class actions for statutes of limitations, mootness and settlement can strengthen individual plaintiffs.[187] For example, people who believe they have been discriminated against can gain enormous settlement leverage by bringing a class action. Class actions also magnify defendants'

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[184] Section 108 of the Civil Rights Act of 1991 changes the holding of *Martin v. Wilks*. Sec. 108, § 703, 1992 U.S.C.C.A.N. (105 Stat.) 1071, 1076–77 (to be codified at 42 U.S.C. § 2000e–2(n)(1)(A)). For a full discussion, see *infra* notes 264, 291. Notice, however, that the new Act does not address *Falcon*.

[185] Brown v. Board of Educ., 347 U.S. 483 (1954) is perhaps the most famous early judicial recognition of institutionalized discrimination.

[186] FED. R. CIV. P. 23. For the importance of the class action to such litigants, see Jack B. Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299, 300, 304 (1973); Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2184–90 (1989). The advisory committee's notes to the 1966 amendments to the class action rule state: "[i]llustrative 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." FED. R. CIV. P. 23 advisory committee's notes; *see also* Kaplan, *supra* note 15, at 2126–27. A class action can also protect anonymous class members from reprisals.

[187] *See, e.g.*, Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983) (filing of class action tolls applicable statute of limitations); United States Parole Comm'r v. Geraghty, 445 U.S. 388 (1980) ("mootness" of plaintiff's personal claims does not prevent appeal of denial of certification); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980) (satisfaction of named class members' private substantive claims does not prevent their appealing denial of class certification); RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE 469–98 (1985) (on judicial control of settlement in class actions); Stephen N. Subrin & John Sutton, *Welfare Class Actions in Federal Court: A Procedural Analysis*, 8 HARV. C.R.-C.L. L. REV. 21, 54 (1973) (on using class actions to prevent defendants from making cases moot); *see also* FED. R. CIV. P. 23(e).

exposure;[188] consequently, the realistic threat of certifying a class adds to the settlement value of a case.[189]

The compatibility of title VII and class actions is not limited to redressing power imbalances. The very nature of discrimination is its commonality to a group, whether racial, religious or gender-based. The essence of discrimination is often the hatred of the group to which an individual belongs. Thus, it is particularly sensible to read Rule 23 in a pro-plaintiff way when an alleged title VII violation is involved.

Before *Falcon*, many courts determined that title VII cases were inherently class actions[190] because racial discrimination is, by definition, class discrimination.[191] Some courts spoke of "across-the-board" discrimination to denote the inherent class nature of discrimination; they presumed that a victim of discrimination could represent other victims of the same group as to a variety of discriminatory practices.[192] Discrimination was the common denominator.[193]

These cases reflect both a commitment to judicial implementation of the policy of title VII and an understanding of workplace discrimination. For example, in *Senter v. General Motors Corp.* the Sixth Circuit Court of Appeals stated: "It is manifest that every decision to hire, fire or discharge an employee may involve individual considerations. Yet when that decision is made as part of class-wide discriminatory practices, courts bear a special responsibility to vindicate the policies of the Act regardless of the position of the

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[188] Class actions are also more likely than individual suits to effectuate systemic reform.

[189] Settlement is particularly relevant in this context, as the length and complexity of civil rights litigation especially disadvantages plaintiffs.

[190] In this section, we refer to private class actions initiated under Rule 23. Pattern or practice cases brought by the EEOC or the Department of Justice under section 707(a) of title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–6(a)(1982), provide another vehicle for classwide relief, but those cases are not governed by Rule 23 and are thus not germane to this article.

[191] *See* Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968); *see also* Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969) ("A suit for violation of title VII is necessarily a class action as the evil sought to be ended is discrimination on the basis of a class characteristic, i.e., race, sex, religion or national origin.").

[192] *See, e.g.*, Senter v. General Motors Corp., 532 F.2d 511 (6th Cir. 1976), and cases cited in SCHLEI & GROSSMAN, *supra* note 35, at 1217 n.10.

[193] *See* SCHLEI & GROSSMAN, *supra* note 35, at 1217. Indeed, many courts found it an abuse of the district court's discretion not to permit a plaintiff to represent a broad class of individuals who had been subjected to discrimination, even if the injuries of other class members arose out of distinct practices or issues. *Id.* at 1217 and cases cited therein. For a contrary view, that racial discrimination is not inherently class-wide, see Rutherglen, *Class Actions*, *supra* note 5, at 707–08.

individual plaintiff."[194] Employment discrimination ordinarily affects all or most members of identifiable oppressed groups. "The operative fact in an action under Title VII," stressed the *Senter* court, "is that an individual has been discriminated against because he was a *member* of a class."[195] In other words, discrimination is "peculiarly class discrimination."[196]

This understanding enabled plaintiffs more readily to satisfy the prerequisites of Rule 23(a)(2) (common questions of fact and law), (a)(3) (typicality), and (a)(4) (representativeness), as well as Rule 23(b)(2), which states that grounds generally applicable to the class make appropriate final injunctive relief for the class as a whole.[197] Moreover, making it easier to show commonality and typicality automatically made it easier to achieve sufficient "numerosity" under 23(a)(1), since the affected group was itself inherently larger.[198]

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[194] 532 F.2d 511, 524 (6th Cir. 1976); *see also* Barnett v. W.T. Grant Co., 518 F.2d 543, 547–48 (4th Cir. 1975) ("[A]n 'across the board' attack on all discriminatory actions by defendants on the ground of race . . . is . . . consonant with the broad remedial purpose of Title VII.").

[195] 532 F.2d at 524 (emphasis added). The "across the board" theory was also consistent with the paradigm of group injunctive or declaratory relief under Rule 23(b)(2). The drafters of that Rule noted that it was "intended to reach situations where a party has taken action . . . with respect to a class, and [injunctive or declaratory relief] with respect to the class as a whole, is appropriate." FED. R. CIV. P. 23(b)(2) advisory committee's notes to 1966 amendments. As the advisory committee pointed out, Congress particularly intended this rule to serve discrimination cases: "[i]llustrative 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." *Id.*

[196] *Senter*, 532 F.2d at 524.

[197] *See* FED. R. CIV. P. 28(a)(2), 23(a)(4), 23(b)(2). These values ostensibly inspired Congress to create the Rule 23(b)(2) class action in the first place. *See* FED. R. CIV. P. 23(b)(2) advisory committee's notes to 1966 amendments. The only other questions were whether the plaintiff had demonstrated numerosity and adequacy of representation. SCHLEI & GROSSMAN, *supra* note 35, at 1218.

[198] These courts were neither skewing title VII nor ignoring the requisites of Rule 23. Discrimination based on race or sex is still widespread in America, making it unlikely that any act of discrimination is isolated. In the constitutional context, the Supreme Court has recognized that discrimination is more like a spreading cancer than an isolated wound. This is the theory behind the so-called "germ theory" presumption in school desegregation cases. *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189, 201 n.12 (1979) ("'Infection at one school infects all schools.'" (quoting Judge Wisdom in United States v. Texas Educ. Agency, 467 F.2d 848, 888 (5th Cir. 1972))). An employer that discriminates against an employee is apt to discriminate against other employees of the same group; this attitudinal malignancy tends to spread throughout the organization. Less metaphorically, discrimination by high level supervisors often represents at least the appearance of corporate acquiescence, thereby condoning similar behavior by lower level employees. Thus allegations of discrimination almost always raise workplace-wide issues of law and fact.

Class actions also foster the judiciary's efficiency interest in not repeatedly litigating the same facts. For example, plaintiffs who must prove racial animus often will call upon evidence of repeated discrimination against a number of employees in order to show intent. Class actions also reduce the problem of inconsistent results in the same or similar cases.[199]

It is not important whether you agree with us that title VII cases are peculiarly appropriate for class actions. What is not controversial is that both the pre- and post-*Falcon* cases demonstrate the entanglement of process and substance, the impact of process on the value of cases, and the political nature of the judicial interpretation and application of a given procedure. Before *Falcon*, the courts tried to mesh their understanding of employment discrimination and the plight of powerless title VII plaintiffs with the meaning of typicality and commonality and the efficiencies of the class action. They purposely made it easier to bring a title VII case as a class action, because that is what they thought an accurate reading of the goals of title VII and Rule 23 required.[200] When the Supreme Court altered this view in *Falcon*, it forged a new substantive-procedural accommodation.

2. *Falcon* and Its Aftermath: A Defendant-Oriented Integration of Substance and Procedure

In *General Telephone Co. of the Southwest v. Falcon*, the Supreme Court rejected the notion that title VII cases were uniquely suitable for class treatment and held that the discrete requirements of Rule 23(a) must be subjected to "rigorous analysis."[201] In so doing, the

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[199] "The class action is a powerful procedural device, offering enormous savings in time and judicial resources over individual trial of each class member's case while opening up opportunities for both new forms of litigation and potential abuse by litigants." MARCUS & SHERMAN, *supra* note 187, at 233.

[200] Perhaps they acted in a non-transubstantive manner, molding the procedure for a particular field of law. But title VII was by no means the only substantive field that received such sympathetic class action treatment. For example, fraud cases received similar treatment. *See, e.g.*, Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975).

[201] 457 U.S. 147, 161 (1982). This holding strengthened the rule first announced in East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405–06 (1977). Reversing a broad class certification, the *Rodriguez* Court stated:

> We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present. But careful attention to the requirements of [Rule 23] remains nonetheless indispensable. The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination.

Id. at 405–06.

Court eliminated Rule 23 as an accessible vehicle for title VII plaintiffs, and detracted from the policy of collective relief that impelled the enactment of Rule 23.

The named plaintiff in *Falcon* claimed his employer had not promoted him because he was Mexican-American.[202] He also set forth class claims on behalf of all unpromoted Mexican-American employees of the company and all Mexican-American applicants who had not been hired.[203] The district court certified a class that included employees and applicants at one of the company's facilities,[204] and the Fifth Circuit Court of Appeals affirmed.[205]

The Supreme Court reversed.[206] Although the Court acknowledged that "racial discrimination is by definition class discrimination," it insisted that the mere allegation of racial discrimination does not necessarily respond to Rule 23(a)'s requirements, or define a class suitable for certification:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.[207]

Rather, "actual, not presumed, conformance with Rule 23(a) [is] indispensable."[208] Thus, a private title VII class action may be certified only if the trial court is satisfied "after a rigorous analysis"[209] that the prerequisites of Rule 23(a) have been met.[210]

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[202] 457 U.S. at 149.

[203] *Id.* at 150–51.

[204] After trial, the Court found discrimination against the class representative in promotions only, not in hiring. With respect to the class claims, the Court found no discrimination in promotions but found discriminatory hiring practices. *Falcon*, 457 U.S. at 153.

[205] The Fifth Circuit applied the "across-the-board" rule, which "permits an employee complaining of one employment practice to represent another complaining of another practice, if the plaintiff and the members of the class suffer from essentially the same injury. In this case, all of the claims are based on discrimination because of national origin." Falcon v. General Tel. Co., 626 F.2d 369, 375 (5th Cir. 1980).

[206] *Falcon*, 457 U.S. at 161.

[207] *Id.* at 157 (footnote omitted).

[208] *Id.* at 160.

[209] *Id.* at 161.

[210] In footnote 13, the Court stated that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge" and that these two requirements "also tend to merge with the adequacy of representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest." *Id.* at 157 n.13.

The named plaintiff's complaint in *Falcon* failed to demonstrate a close nexus between his individual claims and the class claims because the complaint did not provide a sufficient basis to conclude that his claim of discrimination in *promotion* "would require the decision of any common question [about defendant's] failure to *hire* more Mexican-Americans."[211] The *Falcon* Court also suggested that district courts should carefully scrutinize the merits of the named plaintiff's individual claim at the class certification stage,[212] notwithstanding the absence of any statutory rule requiring or permitting this inquiry.

In sum, *Falcon* triggered three major shifts in the application of Rule 23 to title VII class actions: first, title VII plaintiffs now must satisfy Rule 23(a)'s requirements under a standard of "rigorous analysis;" second, the nexus[213] between the named plaintiff's claims and those of the class the plaintiff seeks to represent must be "close;" and last, the title VII plaintiff may be required to plead specific facts and argue the merits of her claim before certification will be approved.[214]

Just as the more permissive view of the symbiosis between Rule 23 and title VII reflects a particular understanding of discrimination,[215] the shift accomplished by *Falcon* makes sense only in the context of the Supreme Court's current understanding of the nature of discrimination. *Falcon* embodies a belief that discriminatory employment practices are no longer prevalent in America[216] and

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[211] *Id.* at 158 (emphasis added). In footnote 15, however, the Supreme Court set forth some infrequently applied exceptions. *Id.* at 159 n. 15. First, an employee who asserts that she was a victim of specific discriminatory employment practices may properly represent an applicant when the employer used a biased testing procedure to assess both applicants and incumbent employees. *Id.* Second, a general policy of discrimination could justify a class including both applicants and employees "if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision-making processes." *Id.*

[212] *See Falcon*, 457 U.S. at 160.

[213] We use the term "nexus" broadly, as do the courts, to include both the "typicality" and "commonality" requirements of Rule 23(a). After *Falcon*, the federal courts tend to merge the two. *See, e.g.*, Meiresonne v. Marriott Corp., 124 F.R.D. 619, 622 n.7 (N.D. Ill. 1989) ("Typicality most often subsumes commonality, for a plaintiff's claim must necessarily share at least some characteristics of the other class members' claims to be 'typical' of them."). Accordingly, in the cases we cite in this section, we do not specify whether it was a lack of "typicality" or of "commonality" that led the courts to find an insufficient nexus between the named plaintiffs and their classes.

[214] *See Falcon*, 457 U.S. at 158.

[215] *See* Bryant G. Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective*, 77 Nw. U. L. Rev. 492 (1982).

[216] The evidence is clearly to the contrary. *See, e.g.*, Turner et al., *supra* note 59, at 4,

that discrimination is simply an isolated transgression by individual supervisors against individual employees.[217] Thus, to the *Falcon* Court, plaintiffs with limited facts and losing cases are likely to use class actions to harass employers and clog up the courts.[218] The *Falcon* Court's view of discrimination has made it increasingly difficult for plaintiffs to use Rule 23 to consolidate claims and obtain collective relief.[219] Ironically, this restrictive trend has also prejudiced plaintiffs' ability to bring and win individual title VII suits.

9, 12. Moreover, people of color constitute a disproportionate percentage of the American poor. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, P–60, NO. 161, MONEY, INCOME AND POVERTY STATUS IN THE UNITED STATES: 1987, at 8 (Aug. 1988); Walter L. Updegrave, *Race and Money*, MONEY, Dec. 1989, at 152; *see also* Kimberlé W. Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.3 (1988). The racial disparity is continuing. *See* Michael K. Frisby, *The Economics of Disparity; Gap Among Blacks Widening, Study Says*, BOSTON GLOBE, Aug. 9, 1991, at 1.

[217] We have written elsewhere about the impact of this new definition upon women. *See* Brown et al., *Constitutional Dissonance*, *supra* note 8; Brown & Baumann, *Nostalgia*, *supra* note 3.

[218] Twenty-three years ago, Judge Godbold of the Fifth Circuit predicted the respective risks to plaintiffs, defendants and the courts of too lenient or too strict a view of the efficacy of class actions in title VII cases:

> Over-technical limitation of classes by the district courts will drain the life out of Title VII, as will unduly narrow scope of relief once discriminatory acts are found. But without reasonable specificity the court cannot define the class, cannot determine whether the representation is adequate, and the employer does not know how to defend. And, what may be most significant, an overbroad framing of the class may be so unfair to the absent members as to approach, if not amount to, deprivation of due process. Envision the hypothetical attorney with a single client, filing a class action to halt all racial discrimination in all the numerous plants and facilities of one of America's mammoth corporations. One act, or a few acts, at one or a few places, can be charged to be part of a practice or policy quickening an injunction against all racial discrimination by the employer at all places. It is tidy, convenient for the courts fearing a flood of Title VII cases, and dandy for the employees if their champion wins. But what of the catastrophic consequences if the plaintiff loses and carries the class down with him, or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class?

Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, C.J., specially concurring).

[219] That the number of civil rights class actions filed in federal courts is progressively decreasing is beyond dispute. Judge Robert L. Carter of the United States District Court for the Southern District of New York has demonstrated this statistically. *See* Carter, *supra* note 186, at 2183. Carter shows that, in 1977, 8.67% of all federal court filings were civil rights cases, whereas, by 1985, civil rights filings had plummeted to a mere 6.4%. *Id.* Nationally, civil rights class action filings have dramatically decreased from 1,174 filed in the judicial reporting year ending June 30, 1976, to 48 filed in the reporting year ending June 30, 1987. *See* Lawyers' Committee for Civil Rights Under Law, Submission to the Senate Committee on the Judiciary on the Nomination of Judge Clarence Thomas as an Associate Justice of the United States Supreme Court 33 (Sept. 11, 1991).

a. *"Rigorous Analysis" and "Close Nexus"*

Rule 23 lists four prerequisites for any class action: typicality, commonality, representativeness and numerosity.[220] The theory is that before one or more people can, through their lawsuit, bind others by preclusion law, due process requires that their circumstances be sufficiently similar so that the unnamed members will be protected by the diligence and similarity of the named members.[221] Therefore, courts inquire whether the named parties are "typical," and whether their cases have common questions of law or fact with the unnamed class members. Moreover, the named parties must not have conflicts of interest with the unnamed members, and must be able to represent them diligently.[222] Post-*Falcon*, these inquiries are first to be analyzed "rigorously" (that is, formally) and, in a sense, abstractly (that is, acontextually). Discriminatory behavior, the underlying subject of the lawsuit, is not relevant.

The next requirement, "close nexus," means that the circumstances of one named party must be almost identical to the circumstances of the unnamed members of the class.[223] Having defined the class by virtue of these requirements, the court then must decide whether the class as a whole is so numerous that a class action makes sense.

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[220] FED. R. CIV. P. 23. Rule 23(a) lists them in a different order. In order to bring a class action, the plaintiff must first satisfy all the requirements of Rule 23, that is, the plaintiff must be a proper class representative pursuant to the four prerequisites of Rule 23(a). Federal Rule of Civil Procedure 23(a) states:

> (a) 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.

Id.

[221] *See* Hansberry v. Lee, 311 U.S. 32, 42–43 (1940). Professor Rutherglen teaches that "[a]s with other problems in class action practice, the fundamental issue is adequacy of representation." Rutherglen, *Preclusion*, *supra* note 5, at 44.

[222] *See, e.g.*, Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247 (3rd Cir. 1975).

[223] After the prerequisites are met under Rule 23(a), the class action must also meet the requirements of one of four specific types of class action, enumerated in Rule 23(b). The four types of class action are described in: (b)(1)(A), relating to the risk of inconsistent or varying adjudications; (b)(1)(B), relating to the risks of being dispositive of, or impairing the interests of, absentees; (b)(2), when final injunctive relief or declaratory relief is appropriate for the whole class because of the defendant's act or refusal to act; and (b)(3), when there are common and predominate questions of law or fact, and the class action is superior to other methods for fair and efficient adjudication. FED. R. CIV. P. 23.

After *Falcon*, almost every court has made it difficult for plaintiffs to meet the "typicality" and "commonality" requirements.[224] For example, plaintiffs who assert that one employment practice is discriminatory may not represent others who claim discrimination by another practice.[225] Courts have held that present employees may not represent unsuccessful applicants,[226] that terminated employees may not represent rejected applicants,[227] and that an employee who has never tried to obtain a promotion cannot represent employees denied promotions.[228]

Similarly, post-*Falcon* courts have refused to certify classes describing injuries resulting from several discriminatory policies. For example, the Eleventh Circuit Court of Appeals refused to permit an incumbent employee to represent a class that included applicants.[229] Similarly, the Eighth Circuit, in *Roby v. St. Louis Southwestern*

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[224] Most of the courts have directed their post-*Falcon* analysis to Rule 23(a) requirements, which are therefore the primary focus of our discussion. *See, e.g.*, Sheehan v. Purolator, Inc., 839 F.2d 99, 103 (2d Cir. 1988) ("In the wake of *Falcon*, courts have generally been strict in their application of the Rule 23(a) criteria."). Ironically, at least one circuit has refused to give title VII plaintiffs access to the discovery they ostensibly required to demonstrate a nexus between their claims and those of the class they sought to represent. *See* Ardrey v. United Parcel Serv., 798 F.2d 679, 682–85 (4th Cir. 1986).

[225] *See, e.g.*, Coon v. Georgia Pacific Corp., 829 F.2d 1563, 1566 (11th Cir. 1987) ("[O]ther than the fact that all are women, plaintiff has not identified the required nexus between herself and the class."); Merrill v. Southern Methodist Univ., 806 F.2d 600, 608 (5th Cir. 1986) (in university setting, one woman's sex discrimination claim "may be markedly different from another's"); Walker v. Jim Dandy Co., 747 F.2d 1360, 1364–65 (11th Cir. 1984) (plaintiff with sex discrimination hiring claim lacked sufficiently close nexus to represent applicants and employees with claims arising out of recruitment, job assignment, transfer and promotion practices); Gilchrist v. Bolger, 733 F.2d 1551, 1554–55 (11th Cir. 1984) (denial of certification appropriate where there was an insufficient nexus between nonsupervisory employee and class comprising supervisory employees and applicants).

[226] *See, e.g.*, Wagner v. Taylor, 836 F.2d 578, 593 (D.C. Cir. 1987) (employee could not represent unsuccessful applicants); Freeman v. Motor Convoy, Inc., 700 F.2d 1339, 1345–47 (11th Cir. 1983) (same).

[227] *See, e.g.*, O'Neal v. Riceland Foods, 684 F.2d 577, 581 n.2 (8th Cir. 1982).

[228] *See, e.g.*, Lilly v. Harris-Teeter Supermarket, 720 F.2d 326, 333–34 (4th Cir. 1983) (named plaintiff deemed improper representative for persons discriminated against with respect to promotions); *cf.* Rosario v. Cook County, 101 F.R.D. 659, 662–64 (N.D. Ill. 1983) (named plaintiff could not represent persons who had not applied for promotions).

[229] Griffin v. Dugger, 823 F.2d 1476, 1486–87 (11th Cir. 1987). The Eleventh Circuit stated:

> No longer will one allegation of specific discriminatory treatment be sufficient to sustain a company-wide class action. No longer will an employee complaining of racial discrimination, for example, in one employment practice necessarily be permitted to represent other employees complaining of racial discrimination in other practices . . . . In practical terms, this means that . . . incumbent employees cannot represent a class that includes applicants and that even a

Railway Co.,[230] held that African-American railroad employees who had been discharged for failure to follow proper procedures to protect their seniority after being furloughed did not share a sufficiently close nexus with other minority employees discharged for a violation of company rules.[231]

Post-*Falcon* courts have also refused to allow plaintiffs employed in one organizational unit or geographical facility to represent a company-wide class.[232] These courts demand that plaintiffs not only show that each of them suffered discrimination by the same employer, but also show that each of them was injured in the identical location.[233] This forces victims of discrimination who happen to work for a large employer with numerous or scattered offices to bring their actions individually.[234]

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general policy of discrimination will not justify a class of both applicants and employees.

Id.

[230] 775 F.2d 959 (8th Cir. 1985).

[231] *Id.* at 961–63.

[232] *See, e.g.*, Nation v. Winn-Dixie Stores, 95 F.R.D. 82, 86 (N.D. Ga. 1982) (class certification refused because named plaintiff only worked in a few among several of defendant's "territories" where independent promotion decisions were made). *But see* Kilgo v. Bowman Transp. Inc., 789 F.2d 859, 875–78 (11th Cir. 1986) (permitting certification of class containing all female plaintiffs from nationwide units whose applications at several terminals would have been processed through a central terminal). Compare cases cited *supra* note 128 (restricting discovery to individual facilities within defendant's organization).

[233] As if the difficulties in certifying a class under Rule 23(a) were not enough, courts also have invoked the notion of standing to restrict further the named plaintiff's capacity to represent absent class members. *See, e.g.*, Vuyanich v. Republic Nat'l Bank, 723 F.2d 1195, 1200 (5th Cir.) ("Because Johnson and Vuyanich can allege injuries only as a result of the Bank's hiring and termination practices, respectively, they lack standing to assert class claims arising from the bank's other employment practices—compensation, promotion, placement, and maternity practices."), *cert. denied*, 469 U.S. 1073 (1984); *see also* Bernard v. Gulf Oil Corp., 841 F.2d 547, 550 (5th Cir. 1988) (black employees who had not signed releases did not "possess the same interest and suffer the same injury" as those who had signed releases; thus, the first group lacked standing to represent the second).

[234] As noted above, *Falcon* left open—as an "exception"—the possibility that class treatment might be available for some disparate treatment claims where there is significant proof that the several forms of alleged disparate treatment resulted from a defendant's general policy. A few courts have certified classes under this "loophole." *See, e.g.*, Wynn v. Dixieland Food Stores, Inc., 125 F.R.D. 696, 700–01 (M.D. Ala. 1989) (in view of defendant's entirely subjective system for all selection decisions, named plaintiffs permitted to represent class with promotion, termination and hiring claims); Johnson v. Montgomery County Sheriff's Dep't, 99 F.R.D. 562, 566 (M.D. Ala. 1983) (employee allowed to represent applicants since evidence showed "an overarching subjective decisionmaking process affecting both applicants and employees"). But Wards Cove Packing Co. v. Atonio seemed to foreclose this line of analysis. *See* 490 U.S. 642 (1989). In that case, the Supreme Court held that the disparate impact plaintiff had the burden of isolating a specific practice in order to prove that a selection process had a disparate impact. The cumulative effects of an employer's practices were no longer relevant. *Wards Cove*, 490 U.S. at 657.

The "rigorous analysis" standard has had a domino effect. Sorting out discrimination plaintiffs according to their location, job classification, failure to receive a specific benefit, or the exact time period in which the discrimination took place, tends to make any named plaintiff atypical of other employees. This in turn makes the named plaintiff less likely to be representative of anybody else. Moreover, the heightened pressure to be more typical leads to smaller potential classes. Smaller classes decrease the chances of meeting the numerosity requirement of Rule 23(a)(1).[235]

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." This rule has two parts. First, the class representative must be competent; that is, the representative party's counsel must prosecute the class claims "vigorously" and "competently."[236] Second, the interests of the class representative must be co-extensive with the interests of the class; that is, the representative and the class should not have any conflicts of interest.[237] This inquiry is closely linked with the commonality/

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[235] By definition, the smaller the class, the fewer its members, and the less likely that "the class is so numerous that joinder of all members is impracticable." *See* FED. R. CIV. P. 23(a)(1). "Several factors are relevant to the Court's determination that the joinder of all the members is impracticable. The most obvious consideration is the size of the class itself." CHARLES A. WRIGHT ET AL., 7A FEDERAL PRACTICE AND PROCEDURE, § 1762, at 160 (2d ed. 1986).

[236] *See* Hervey v. City of Little Rock, 787 F.2d 1223, 1227–30 (8th Cir. 1986) (antagonism between named plaintiff and class, and inadequacy of representative's counsel, justified decertification). Several courts have decertified classes on this ground alone. *See, e.g.*, Key v. Gillette Co., 782 F.2d 5, 7 (1st Cir. 1986) (decertification upheld where counsel displayed inadequacy by using seriously inappropriate expert testimony and by intentionally omitting to provide evidence explaining regression analysis used by plaintiff's expert); Lusted v. San Antonio Indep. Sch. Dist., 741 F.2d 817, 820–21 (5th Cir. 1984) (denial of certification upheld where plaintiff moved for certification for first time after trial and decision, and complaint contained no class allegations); Davis v. Buffalo Psychiatric Ctr., 613 F. Supp. 462, 464 (W.D.N.Y. 1985) (certification motion denied where untimely under local rules); Dunn v. Midwest Buslines, Inc., 94 F.R.D. 170, 172–73 (E.D. Ark. 1982) (representative's counsel's inability to state proper class action complaint, errors in brief, and his conduct during deposition led to denial of class certification). *But see* Avagliano v. Sumitomo Shoji America, Inc., 103 F.R.D. 562, 583 (S.D.N.Y. 1984) ("[T]he class representative need not be the best of all representatives.").

[237] *See, e.g.*, Wagner v. Taylor, 836 F.2d 578, 595–96 (D.C. Cir. 1987) (named plaintiff, a supervisory employee, had interests clashing with those of nonsupervisory employees and with those of his own supervisor, who was also a potential class member); Goodman v. Lukens Steel Co., 777 F.2d 113, 124 (3rd Cir. 1985) (no named plaintiff had viable claim of racial discrimination in initial assignment of newly hired employees and therefore there was no adequate representative of class); Sheehan v. Purolator, Inc., 103 F.R.D. 641, 650–55 (E.D.N.Y. 1984) (high level employee not adequate representative of low level employees because of distinct interests; likewise, employee in charge of promotion decisions could not represent employees seeking promotions). There is the additional question of what happens

typicality nexus test.[238] In effect, courts will not permit a class representative to represent a class whose members have interests that are not co-extensive with respect to the claims set forth or the jobs involved.[239]

The manageability requirement appears in Rule 23(b)(3).[240] In employment discrimination cases, however, the courts have read it into Rule 23(b)(2)—the subsection of Rule 23(b) under which most title VII classes have any chance of being certified.[241] The more divided a class, that is, the less obvious the nexus between named representatives and class members, the more difficult the manageability problems become.[242] Both the numerosity requirement,[243]

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if a particular named plaintiff is held to be an inadequate representative. In cases where the plaintiff's individual claims are dismissed and no class representatives with valid claims remain, the court may decertify the class. *See* O'Brien v. Sky Chefs, Inc., 670 F.2d 864, 869 (9th Cir. 1982). However, if the class prevails but the named representative does not, the class is not decertified. *See* Scott v. City of Anniston, 682 F.2d 1353, 1356–57 (11th Cir. 1982). Instead the court will appoint a new class representative. *See* Carpenter v. Stephen F. Austin State Univ., 706 F.2d 608, 617–18 (5th Cir. 1983).

[238] In *Falcon*, the Court not only stated that the typicality and commonality requirements are essentially the same inquiries, but also that they "tend to merge with the adequacy-of-representation requirement." General Tel. Co. v. Falcon, 457 U.S. 147, 157 n.13 (1982).

[239] *See, e.g.*, cases cited *supra* note 237.

[240] FED. R. CIV. P. 23(b)(3).

[241] This is because a 23(b)(2) class by definition deals with action or inaction "on grounds generally applicable to the class, thereby making appropriate injunctive relief . . . with respect to the class as a whole." FED. R. CIV. P. 23(b)(2). The advisory committee notes to (b)(2) specifically say that "various actions in the civil-rights field" are "illustrative." *See also* SCHLEI & GROSSMAN, *supra* note 35, at 1259–60.

[242] *See* SCHLEI & GROSSMAN, *supra* note 35, at 1244. Manageability issues often arise in bifurcated trials, where stage 1 is devoted to proof of a violation of the rights of a group of plaintiffs and stage 2 involves whether individual group members are entitled to relief. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

[243] Federal Rule of Civil Procedure 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." The case law of impracticability is open-ended. *See, e.g.*, Holsey v. Armour & Co., 743 F.2d 199, 217 (4th Cir. 1984) (rejecting attempts to assess numerosity solely by looking at number of available promotions and instead concluding that it is the number of persons "possibly" affected that controls), *cert. denied*, 470 U.S. 1028 (1985); Frazier v. Southeastern Pa. Transp. Auth., 123 F.R.D. 195, 196–97 (E.D. Pa. 1988) (numerosity satisfied by "factors such as the fear of retaliation against individual plaintiffs," but there is "no magic number" that will satisfy the numerosity requirement). In close cases, the practicability rule has been used to block certification. *See* Emanuel v. Marsh, 828 F.2d 438, 444 (8th Cir. 1987) (affirming district court opinion that refused to certify 200-member class of black workers and instead certified only class of 78 black employees denied promotions; after 29 complaints were withdrawn following negotiation and 20 settled without admission of discrimination, 11 remaining employees failed to meet numerosity requirement); Martin v. City of Beaumont, 125 F.R.D. 435, 436–38 (E.D. Tex. 1989) (ignoring significant evidence that past employees had been terminated or left job because of racial discrimination, court only included 25 present employees in count; numerosity not found).

which forbids certification where joinder is practicable,[244] and the manageability requirement, which forbids certification where the claims of a class and its representatives are too heterogeneous for one suit, aim at the economy and feasibility of class actions. But the two prerequisites, applied simultaneously, are a Catch-22: the named plaintiff must show that there are too many claimants to join for the court to require individual actions to be brought and yet not too many distinct claims to raise any serious manageability issues.[245]

b. *Pre-Certification Inquiries into the Merits*

In *Eisen v. Carlisle & Jacquelin*, the Supreme Court held that federal courts have no authority to scrutinize the merits of a class action before certifying the class.[246] Despite this ruling, some courts have explored, during the certification phase, the merits of a class

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[244] *See, e.g.*, Andrews v. Bechtel Power Corp., 780 F.2d 124, 131–32 (1st Cir. 1985) (joinder practicable and numerosity requirement not fulfilled where class of forty-nine black employees resided in same geographic area).

[245] At least one court has refused to certify a class where the court viewed the class, defined in one manner, as being too small—violating Rule 23(a)(1)'s numerosity requirement—and yet, defined in another manner, as being too large—and thus "unmanageable"). *See* Hill v. American Airlines, Inc., 479 F.2d 1057 (5th Cir. 1973).

[246] The Court stated:

> 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 . . . . 'In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of rule 23 are met.'

417 U.S. 156, 177–78 (1974) (quoting Miller v. Mackey Int'l, 452 F.2d 424, 427 (5th Cir. 1971)) (plaintiff alleged defendants conspired to fix commissions in violation of antitrust and securities laws). Indeed, for many courts the language of Rule 23(c)(1) compels such a result. That rule states:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

FED. R. CIV. P. 23(c)(1). This rule, according to some courts, represented Congress's intent to see certification issues resolved quickly and economically. For instance, in Avagliano v. Sumitomo Shoji America, Inc., 103 F.R.D. 562 (S.D.N.Y. 1984), the court noted that "it is often proper . . . for a district court to view a class action liberally in the early states of litigation, since the class can always be modified or subdivided as issues are refined for trial." *Id.* at 573 (citations omitted). The court also pointed to Rule 23(c)(4)(B) ("a class may be divided into subclasses and each subclass treated as a class") and implied that the proper time for a district court to focus on the merits and shape group relief is after certification. *Id.* "[A] motion for class certification," the court concluded, "is not the occasion for a mini-hearing on the merits." *Id.* (citations omitted).

action.[247] There is language in *Falcon* that the lower courts have used to justify pre-certification examination of the merits.[248] In *Falcon*, the Supreme Court reiterated the well-established notion that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'"[249] The Court then advised plaintiffs to provide a "*specific presentation* identifying the questions of law or fact that [are] common to the claims of [plaintiffs] and of the members of the class [they seek] to represent."[250] Once the *Falcon* Court ordered that there be a close nexus between the claim of the class representative and every member of the class, it was inevitable that the lower courts would take a closer look at the facts and the law, that is, at the merits of the claim.

Moreover, with respect to those few across-the-board certifications exempted in footnote 15 of *Falcon*, the Court directed the district courts to require significant proof that an employer acted pursuant to a general policy of discrimination before certifying the class.[251] Thus, after *Falcon*, it is logical to conclude that the proper time for courts to look at the merits of title VII class suits is *before* certifying a class.[252] This teaches the title VII plaintiff seeking cer-

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[247] *See, e.g.*, Wagner v. Taylor, 836 F.2d 578, 587 (D.C. Cir. 1987) ("While, of course, a court does not possess 'any authority to conduct a preliminary inquiry into the merits' . . . it is evident that some inspection of the *circumstances of the case* is essential to determine whether the prerequisites of . . . Rule 23 have been met." (emphasis added)). Pre-certification inquiries implicate discovery because pre-certification discovery may be insufficient to furnish plaintiffs with the information they require to prove the merits of their claims. Arguments in favor of examining the merits before certification presume that by the time the court addresses certification, plaintiffs will have had access to the same discovery they would have obtained by the time of the trial. This is probably wrong. In fact, title VII plaintiffs may be powerless to compel sufficient pre-certification discovery. Requests for discovery pertaining to class certification issues are governed by Rule 23 rather than by the discovery rules; accordingly, pursuant to Rule 23(d), the district courts have complete discretion to compel or relax compliance with such pre-certification discovery requests. *See* JAMES W. MOORE & JOHN E. KENNEDY, 3B MOORE'S FEDERAL PRACTICE § 23.85 (2d ed. 1991). A court that permits only limited pre-certification discovery but that looks carefully into the merits during the certification phase can, at its sole discretion, prevent a viable class action from moving forward. For an early civil rights case arguing that courts must provide access to adequate discovery before considering certification issues and concluding that under no circumstances should courts decertify a civil rights class action based on "speculation as to the merits," see Yaffe v. Powers, 454 F.2d 1362, 1365 (1st Cir. 1972).

[248] *See, e.g.*, Nelson v. United States Steel Corp., 709 F.2d 675, 679–80 (11th Cir. 1983) ("We reject [the] argument that evidence relating to discrimination allegedly suffered by other class members is properly reserved for trial on the merits.").

[249] General Tel. Co. v. Falcon, 457 U.S. 147, 160 (1982).

[250] *Id.* at 158 (emphasis added).

[251] *Id.* at 159 n.15.

[252] In Martin v. City of Beaumont, 125 F.R.D. 435 (E.D. Tex. 1989), the court found,

tification that if her case is not a winning case from the start, the court will not certify her class.[253]

c. *Isolating the Individual*

Prior to *Falcon*, the federal courts had a clear sense that class actions were an important instrument for eliminating systemic discrimination in the labor market. While the liberal view of the title VII class action visualizes an empowered plaintiff, the "Falconization" of the process has demoralized and disempowered the plaintiff. Today, individual employees are left to challenge employers alone, without the emotional and economic support gained by aggregating their claims, thus making it far less likely that title VII will achieve the national goal of eliminating workplace discrimination.

Falcon also announced that an individual plaintiff would have to reveal the extent and strength of his or her individual case at the certification stage. In order to show the nexus between the individual claim and the class claim, one must carefully scrutinize the individual claim. This means that a lawyer has to undertake discovery on the individual claim before knowing whether the case will be certified as a class action, thereby economically justifying the discovery. After convincing the court of the strength of the individual claim and defining its contours, the plaintiff's lawyer must begin discovery on the class action aspects of the case. Then, the lawyer must convince the court, through "rigorous analysis," of the "close nexus" of the individual claim to that of all class members.

Post-*Falcon*, a certain stultifying and inflexible illogic has crept into the case law. In order to protect defendants from excessive

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among other things, that the commonality requirement had not been fulfilled. *Id.* at 437–38. Notwithstanding the plaintiffs' claims that they suffered race discrimination in promotions because of the defendant's "pervasive attitude" and notwithstanding evidence showing many black employees had resigned or been terminated in the relevant period, the court, looking directly at the merits of the plaintiffs' case, stated that "complaints of racial epithets in a police station locker room are not such as to purely constitute discriminatory hiring practices or discriminatory promotion practices." *Id.* Moreover, the notion that Rule 23(c) enables district courts to correct overly broad classes after certification, thus making preliminary inquiries into the merits inappropriate, see Avagliano v. Sumitomo Shoji America, Inc. 103 F.R.D. 562 (S.D.N.Y. 1984), has lost out to the theory in *Falcon* that "actual, not presumed conformance with Rule 23(a) remains . . . indispensable." Nelson v. United States Steel Corp., 709 F.2d 675, 680, (11th Cir. 1983) (citing *Falcon*, 457 U.S. at 160).

[253] *See* Kim v. Commandant, Defense Language Inst., 772 F.2d 521, 524 (9th Cir. 1985) (it was not improper for district court in title VII case to decide merits prior to ruling on class certification where "early resolution of the motion for summary judgment seemed likely to protect both the parties and the court from needless and costly further litigation").

discovery, in the event that the case would not be certified as a class action, judges have limited an initial round of discovery to the alleged discrimination against the named plaintiff.[254] This is particularly harmful to plaintiffs seeking to prove racial animus. One way to do that is to show repetitive negative treatment against a number of employees in the minority group; another is to use statistics that simultaneously show discrimination against the individual and the group. Such evidence is expensive to accumulate and is therefore itself a deterrent in the individual case. When some judges forbid any evidence or discovery of class-wide discrimination during the first look at the individual case, deterrence becomes prohibition.[255] Some courts have gone further, holding that failure to certify a class showed a lack of "across-the-board" discrimination and therefore evidence at trial of other acts of discrimination was irrelevant.[256] But absent the "smoking gun" of racist remarks directed at a plaintiff, how does one show racial animus absent a pattern of discriminatory behavior?

By rejecting the theory that discrimination is either present or absent, and substituting the notion that people experience discrimination individually and must seek relief for their suffering independently, the *Falcon* Court was not merely reinterpreting the procedural technicalities of Rule 23. Heightening the scrutiny applied to class certification repudiated the notion that victims of sex and race discrimination often share membership in disadvantaged or powerless groups whose claims should be jointly vindicated, notwithstanding some differences between the named plaintiff's claims and those of class members. *Falcon* thus rejects the concept of discrimination as an institutionalized historic and social problem. Instead, it reinforces the Court's idea that discrimination is an isolated aberrant action in a nondiscriminatory world.

B. *Creating New Rights for Whites: Aggregating Defendants*

At the same time that it has taken a microscopic view of plaintiffs' interests, the Supreme Court, contrary to the prior holdings of all but one circuit, magnified the interests of white employees by

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[254] *See, e.g.*, Ardrey v. United Parcel Serv., 798 F.2d 679 (4th Cir. 1986).

[255] *See id.*

[256] *See* Sheehan v. Purolater, Inc., 839 F.2d 99, 105 (2d Cir. 1988). In dissent, Judge Kearse explained the relevance of a co-worker's excluded testimony that the company's senior vice president had made a blatantly discriminatory statement to her that "no one would be respectful of a woman in that position." *Id.* at 106 (Kearse, J., dissenting).

turning them into necessary parties to a title VII suit. The creation of a new group of necessary parties had several results. It became virtually impossible to bring title VII cases in a manner that was not subject to dismissal for failure to join Rule 19 parties.[257] This in turn undermined the finality of title VII decrees. Employers had a strong disincentive to settle, for they no longer had an "impermissible collateral attack" defense against any white who claimed reverse discrimination resulting from the settlement agreement. Once again, the Court bid these substantive changes under procedural language.

In *Martin v. Wilks*,[258] a case involving the propriety of a collateral attack on a consent decree, the Supreme Court ended the finality of title VII judgments. The consent decree, which included goals for hiring and promoting minorities, had been entered into after protracted litigation between African-American firefighters and the city of Birmingham, Alabama.[259] The defendants had been found in violation of title VII for using a racially-biased test to screen applicants.[260] A fairness hearing was held prior to the entry of the consent decree at which the all-white Birmingham Firefighters Association ("BFA") appeared and filed objections as *amicus curiae* on behalf of non-minority firefighters.[261] After the failure of their efforts to intervene and to seek injunctive relief, individual BFA members sued, alleging race discrimination in promotions pursuant to the consent decree.[262] The issue that ultimately reached the Supreme Court was the right of non-parties affected by a consent decree in title VII cases to attack the decree collaterally. The Court held that the BFA members could attack the consent decree, even though they had had notice and the opportunity to be heard

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[257] *See* FED. R. CIV. P. 19.

[258] 490 U.S. 755 (1989).

[259] The initial complaint was filed on January 7, 1974. *See* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, IMPACT OF THE SUPREME COURT DECISION IN MARTIN V. WILKS 2 (1990) [hereinafter LAWYERS' COMMITTEE].

[260] *Wilks*, 490 U.S. at 759.

[261] *Id.*

[262] *Id.* The BFA and two of its individual members brought the motions to intervene after the fairness hearing (and after seven years of litigation between the original parties). *See id.* The district court denied the motions as untimely and was upheld by the Eleventh Circuit on appeal. *Id.* Subsequently, seven white firefighters, all of whom were members of the BFA at the time of the fairness hearing, sought injunctive relief against enforcement of the decrees. *Id.* at 759–60. On appeal, the Eleventh Circuit affirmed the denial of that relief, holding that petitioners had not adequately shown irreparable harm. *Id.* at 760. The Court of Appeals noted that the white firefighters could "institut[e] an independent Title VII suit, asserting specific violations of their rights." *Id.*

before the decree was entered.[263] *Wilks*, therefore, taught title VII plaintiffs that joinder of all third parties potentially affected by their claims was mandatory.[264]

The Supreme Court has long recognized the potential effect of title VII remedies on the expectations of non-discriminatees, holding in an early case that it was presumptively necessary for such "innocent" parties to share the burden of past discrimination with injured discriminatee plaintiffs.[265] But the Court's initial concern with eradicating the effects of past discrimination soon was submerged in its solicitude for the non-minority "innocent victims" of race and gender conscious remedies.[266] Ironically, these white workers have been the beneficiaries of the racist workplace title VII was enacted to restructure.

International Brotherhood of Teamsters v. United States marked the beginning of the Court's preference for white workers over successful title VII plaintiffs.[267] In *Teamsters*, the Court held that a seniority system does not violate title VII simply because it may perpetuate past discrimination.[268] The Court stated that "Congress

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[263] *Id.* at 761–63.

[264] Alternatively, *Wilks* allowed collateral attack by non-parties whom the original parties failed to join. *See id.* at 762–63. At section 108, the Civil Rights Act of 1991 appears to overturn *Martin v. Wilks* by limiting permissible challenges to title VII consent degrees. Sec. 108, § 703, 1992 U.S.C.C.A.N. (105 Stat.) 1071, 1076–77 (to be codified at 42 U.S.C. § 2000e–2(n)(1)(A)). Note, however, that parties to a decree carry the potentially significant burden of showing that the challenger had 1) actual notice of the proposed judgment and 2) an opportunity to present objections to the proposed judgment. *Id.* The Supreme Court will ultimately decide the weight of this burden.

[265] *See, e.g.*, Franks v. Bowman, 424 U.S. 747, 778 (1976) (identifiable victims of post-Act hiring discrimination may be awarded seniority retroactive to the dates of their employment applications: "[e]mployee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest").

[266] This shift in focus has appeared in civil rights cases generally, most noticeably in connection with affirmative action issues. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (applying strict scrutiny to local ordinance setting aside thirty per cent of city construction contracts for minority-owned businesses because any lesser standard would not protect innocent white contractors); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (non-minority medical school applicants are "innocent persons" who should not be forced to bear the burdens of redressing grievances not of their making); *see also* Brown et al., *Constitutional Dissonance*, *supra* note 8, at 607–12; Kathleen M. Sullivan, Comment, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 *passim* (1986).

[267] 431 U.S. 324 (1977).

[268] *Id.* at 356. Section 703(h) provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a *bona fide* seniority or merit system . . . provided that such differences

did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees."[269] Any other result, said the Court, would make plaintiffs eligible for retroactive seniority, which might "water down" the seniority rights of "innocent" employees and interfere with the "delicate task" of balancing the "legitimate expectations" of non-victim employees against the remedial rights of minority victims.[270] *Teamsters* implies that these "innocent victims," whose rights can trump plaintiffs' rights, might be necessary parties to the initial litigation.

Another important decision in the movement toward mandatory joinder was *Firefighters Local Union No. 1784 v. Stotts*.[271] In that case, the Court invalidated a preliminary injunction that prevented the Memphis Fire Department from making layoffs under the established seniority system because it would alter the percentage of African-American employees who had been hired or promoted pursuant to a consent decree.[272] The Court held that the injunction was not necessary either to enforce or to modify the decree.[273] The majority noted that neither the union nor the "innocent" non-minority employees were parties to the suit when the consent decree was entered, and thus, could not be said to have agreed to its terms.[274]

Concurring, Justice O'Connor emphasized the need for a careful balancing of the competing interests of discriminatees, "innocent" employees and the employer,[275] and pointed out that the minority firefighters could have sought the participation of the union in negotiating the consent decree.[276] In her view, "innocent" employees whose status may be affected by the final consent decree

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are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

42 U.S.C. § 2000e–2(h) (1988). In this paper we do not discuss the other seniority system cases following *Teamsters*, such as American Tobacco Co. v. Patterson, 456 U.S. 63 (1982).

[269] *Teamsters*, 431 U.S. at 354; *accord* Ford Motor Co. v. EEOC, 458 U.S. 219, 239 (1982) (employer can toll accrual of back pay liability to successful plaintiffs by offering jobs previously denied, without retroactive seniority; requiring employer to offer seniority would place "particularly onerous burden" on innocent employees who had accrued seniority while the case was litigated).

[270] *Teamsters*, 431 U.S. at 356.

[271] 467 U.S. 561 (1984).

[272] *See id.* at 576, 583.

[273] *Id.* at 565.

[274] *Id.* at 575.

[275] *Id.* at 588 (O'Connor, J., concurring).

[276] *Id.*

must be represented and must participate fully in the negotiation process.[277] This concern with third party, or non-party, rights suggests that if non-minority employees are not made parties to a title VII suit they must be allowed to attack the judgment later. *Stotts* thus foreshadowed the holding of *Martin v. Wilks* that non-parties affected by court-approved consent decrees containing race-conscious relief could challenge those decrees in a collateral lawsuit.[278]

Wilks invalidated the "impermissible collateral attack" doctrine that had been followed by most federal courts.[279] The Court held that joinder pursuant to Federal Rule 19,[280] rather than knowledge

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[277] *Id.* at 588 n.3 (O'Connor, J., concurring). Justice Stevens, concurring separately, considered the consent decree a final judgment binding upon the petitioners. *Id.* at 590–91 (Stevens, J., concurring). Nevertheless, he found the injunction invalid because it could not reasonably be based on the consent decree, and the changed circumstances necessary to support modification were not present. *Id.* at 592 (Stevens, J., concurring).

[278] *See Wilks*, 490 U.S. 755, 762–63. (1989). *Wilks* required joinder regardless of whether the non-party had knowledge of the suit and an opportunity to intervene. *Id.* at 765.

[279] *Id.* at 2185. Indeed, the Court acknowledged that its position contradicted the majority of the courts of appeals. *Id.* at 765 n.3. The Court listed the following "sampling" of circuit cases that support the "impermissible collateral attack" doctrine: Striff v. Mason, 849 F.2d 240, 245 (6th Cir. 1988); Marino v. Ortiz, 806 F.2d 1144, 1146–47 (2d Cir. 1986), *aff'd*, 484 U.S. 301 (1988); Thaggard v. City of Jackson, 687 F.2d 66, 68–69 (5th Cir. 1982), *cert. denied sub nom.* Ashley v. City of Jackson, 464 U.S. 900 (1983); Stotts v. Memphis Fire Dep't, 679 F.2d 541, 558 (6th Cir. 1982), *rev'd on other grounds sub nom.* Firefighters Local Union 1784 v. Stotts, 467 U.S. 561 (1984); Dennison v. City of Los Angeles Dep't of Water & Power, 658 F.2d 694, 696 (9th Cir. 1981); Goins v. Bethlehem Steel Corp., 657 F.2d 62, 64 (4th Cir. 1981), *cert. denied*, 455 U.S. 940 (1982); Society Hill Civic Ass'n v. Harris, 632 F.2d 1045, 1052 (3d Cir. 1980). *Id.* It is telling that the majority could only come up with *one* circuit court decision other than *Wilks* itself that would generally allow collateral attacks on consent decrees by non-parties. *See* Dunn v. Carey, 808 F.2d 555, 559–60 (7th Cir. 1986).

[280] Rule 19(a), "Joinder of Persons Needed for Just Adjudication," states that:

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

FED. R. CIV. P. 19(a). If the person or persons cannot be joined because of jurisdictional or venue reasons, Rule 19(b) lists factors to be balanced in determining whether the case should proceed in those persons' absence. Of course, if necessary parties cannot be added, and the court proceeds without them, the necessary parties will not be bound.

Section (c) of Rule 19 requires a party to state in its pleadings the names, if known, of any persons as described in (a)(1)–(2) who are not joined and the reasons for not joining them. FED. R. CIV. P. 19(c). Applying this subsection in title VII cases would be a gargantuan

of a lawsuit and an opportunity to intervene under Rule 24,[281] was the proper method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree.[282] The Court contrasted the mandatory nature of joinder with the permissive terms governing intervention.[283]

The implications of *Wilks* were thoroughly explored by the parties and *amici* in their briefs. The minority employee petitioners made cogent arguments about the chilling effect on title VII, pointing out that mandatory joinder would be unworkable and would impose unnecessary burdens on both plaintiffs and joined parties. Furthermore, they demonstrated the risk that non-parties would contest joinder, effectively defeating the purpose of Rule 19.[284] But the Court denied that these difficulties resulted from the choice

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task for plaintiffs. Section (d) makes this Rule subject to the provisions of Rule 23 governing class actions. For a discussion of class actions under the *Wilks* ruling, see *infra* notes 297–310 and accompanying text.

[281] For purposes of *Wilks*, the relevant portion of Rule 24, "Intervention," is the following:

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

FED. R. CIV. P. 24(a).

Section (b)(2) of Rule 24 allows permissive intervention upon timely application when an applicant's claim, or defense, and the main action have a question of law or fact in common. This section does not seem to apply to the *Wilks* scenario. The non-minority workers' claim of discrimination arose only *after* the settlement of the prior litigation and thus did not involve any question of law or fact regarding discriminatory practices existing at the time the original suit was brought by minority plaintiffs.

[282] *See* 490 U.S. at 765. Although *Wilks* involved a consent decree, the Court's decision, by its terms, applied equally to litigated judgments. The Pacific Legal Foundation, as *amicus curiae* on behalf of respondents, stressed the difference between a consent decree and a litigated judgment, arguing that a consent decree should be given limited preclusive effect because it is not an adjudication on the merits. *See* Brief Amicus Curiae of Pacific Legal Foundation in Support of Respondents at 11–12, Martin v. Wilks, 490 U.S. 755 (1989) (Nos. 87–1614, 87–1639, 87–1688). The Court's ruling, making joinder of third parties mandatory where their rights may be affected, affects the parties' behavior at the *outset* of the litigation, regardless of whether the suit ultimately results in a consent decree or in a judgment. Moreover, the Rule 19(b) possibility that the trial court could proceed without the absent "innocent" employees does not solve the problem, because according to *Wilks*, they would not be bound.

[283] *Wilks*, 490 U.S. at 763–64.

[284] *See* Brief for petitioners John W. Martin *et al.* at 31, Martin v. Wilks, 490 U.S. 755 (1989) (Nos. 87–1614, 87–1639, 87–1668). The briefs also showed that defendant class actions under Federal Rule 23 would not solve the problems created by mandatory joinder, but instead would further complicate matters.

between mandatory intervention and mandatory joinder, and claimed that the problem arose from the nature of title VII remedies.[285]

In holding that joinder under Rule 19 was mandatory to bind non-parties, *Wilks* found compulsory intervention incompatible with the Federal Rules. This was the interpretation suggested by the United States in its *amicus* brief for the white firefighters.[286] The United States had argued that the drafters of the Federal Rules drew intervention in permissive terms, as distinguished from mandatory joinder under Rule 19. Citing the advisory committee notes to the 1966 amendments of the Federal Rules, minority petitioners responded that the drafters intended that there be no preference for joinder over intervention.[287] In particular, petitioners noted comments to revised Rule 19 that suggest intervention by an affected non-party as an alternative to joinder.[288] Petitioners also referred to comments to revised Rule 24 that indicate the drafters' intention to make the position of an intervenor of right under section (a)(2) comparable to that of a party under Rule 19(a)(2)(i).[289] The comments depict intervention of right under Rule 24(a)(2) as a kind of counterpart to Rule 19(a)(2)(i) in that a party susceptible to involuntary joinder under the latter rule should have a right to intervene on its own motion under the former.[290] Thus, the advisory committee notes establish a clear equation between the two rules rather than the hierarchy adopted by the *Wilks* majority.[291]

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[285] *Wilks*, 490 U.S. at 767.

[286] *See* Brief for the United States at 18, Martin v. Wilks, 490 U.S. 755 (1989) (Nos. 87–1614, 87–1639, 87–1668).

[287] *See* Reply Brief for Petitioners John W. Martin *et al.* at 6–7, Martin v. Wilks, 490 U.S. 755 (1989) (Nos. 87–1614, 87–1639, 87–1668).

[288] *Id.*

[289] *Id.*

[290] *See* FED. R. CIV. P. 24 advisory committee's note to 1966 Amendments.

[291] *See id.* Significantly, the majority in *Wilks* omitted any mention of the advisory committee's notes. The majority focused only on the language of Rules 19 and 24 to support its conclusion that joinder is mandatory and intervention is permissive. *See* 490 U.S. at 763–64. It is true that Rule 24(a)(2) states that applicants who show prejudice to their ability to protect their interests "shall be *permitted* to intervene," while Rule 19 states plainly that persons whose absence will either prejudice their own or the parties' interests "*shall* be joined." FED. R. CIV. P. 19, 24. Statutory language, however, cannot properly be interpreted without reference to the drafters' intent, and the petitioners' arguments make clear that the drafters' intent, as expressed in the advisory committee's notes, substantially weakens the Court's conclusion. *See* Reply Brief of Petitioners John W. Martin et al. at 6–7, Martin v. Wilks, 490 U.S. 755 (1989) (Nos. 87–1614, 87–1639, 87–1668). Section 108 of the Civil Rights Act of 1991 reaffirms the Rule 24 standards that prevailed in most circuits before *Wilks*. *See* Civil Rights Act of 1991, sec. 108, § 703, 1992 U.S.C.C.A.N. (105 Stat.) 1071, 1076–77 (to be codified at 42 U.S.C. § 2000e–2(n)(1)(A)).

The central concern of the *Wilks* petitioners was that compulsory joinder would make title VII actions unworkable, ultimately chilling the filing of employment discrimination claims. These fears were justified.[292] The threshold question of whom to sue had become exceedingly complex. *Wilks* effectively required plaintiffs to join at the outset every person whose interest might be impaired by the outcome of the litigation. This was so even though the plaintiffs could not reasonably discern which members of this potentially enormous group had a sufficient interest to mandate their being joined.[293] Since title VII plaintiffs do not know in advance whether the case can be settled through a consent decree, they would have had to try to join all employees or potential employees whose rights could have been impaired.[294]

In effect, *Wilks* used Rule 19 to create a no-win situation for title VII plaintiffs. It is likely that the non-parties whom plaintiffs seek to join would oppose joinder. These non-parties, generally white workers, had an incentive to contest being joined, as they would have been free to attack any decree or judgment issued, apparently whenever and for as long as they wished to do so. The non-minority workers also have viable legal arguments against joinder. They cannot be joined as *defendants* because they do not meet the statutory definition of proper title VII respondents.[295] Alternatively, they cannot be joined as *plaintiffs* because they have not filed title VII charges, as required by the statute.[296] Finally, in a class action under Rule 23(a)(2), non-minority workers can argue—quite successfully after *Falcon*—that their claims are legally and factually distinct from those of the existing plaintiff class and hence cannot properly be included in the certified class.[297]

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[292] For examples of litigation filed after *Wilks*, see LAWYERS' COMMITTEE, *supra* note 259; Robert Pear, *1989 Ruling Spurs New Tack in Civil Rights Suits*, N.Y. TIMES, Oct. 15, 1990, at A1.

[293] *See, e.g.*, Brief of the National League of Cities *et al.* as Amici Curiae in Support of Petitioners at 24–25, Martin v. Wilks, 490 U.S. 755 (1989) (Nos. 87–1614, 87–1639, 87–1668).

[294] Mandatory joinder also imposes significant financial burdens on the involuntarily joined parties. *See* Brief Amicus Curiae of the American Civil Liberties Union *et al.* at 41, Martin v. Wilks, 490 U.S. 755 (1989) (Nos. 87–1614, 87–1639, 87–1668). Even if the plaintiffs know the case will not settle, it appears they will still have to try to join the same people because otherwise they will not be bound. For instance, post-trial injunctive relief giving a promotion might later be attacked by those not named.

[295] Title VII specifies as proper respondents employers, labor unions, agencies and joint apprenticeships. *See* 42 U.S.C. § 2000e–5(b) (1988).

[296] *Id.* § 2000e–5(f) (1988).

[297] *See* Brief Amicus Curiae of the American Civil Liberties Union *et al.* at 46, Martin v. Wilks, 490 U.S. 755 (1989) (Nos. 87–1614, 87–1639, 87–1668).

It is ironic that, while essentially eliminating the plaintiff class action in *Falcon*, the Court mandated unattainable defendant classes in *Wilks*. The "spectre" of defendant classes is likely to remain just that because of the procedural difficulties of certifying defendant classes. Even assuming that Rule 23(b)(2) permits defendant classes, a point still in question,[298] there are significant obstacles to certification.

These obstacles largely parallel the obstacles to certification of plaintiff classes discussed earlier;[299] nothing in *Falcon* indicates that it does not apply equally to defendant class actions.[300] There will undoubtedly be problems in defining the scope of a defendant class under Rule 23, in identifying a class representative, and in ensuring a representative's ability to fairly and adequately represent the class.[301] The number of non-minority employees potentially "impaired or impeded" by the outcome of a given title VII suit could be enormous. Such a large group would present a wide range of claims, many of which might not have a sufficiently close nexus to satisfy *Falcon*. For example, the claim of a non-minority applicant who complains of a hiring practice pursuant to a consent decree might not sufficiently typify a claim about promotion practices under the same decree. These problems could well arise where, as in *Wilks*, non-minority employees claim reverse discrimination arising from a consent decree that covers a variety of employment practices.[302]

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[298] *See* Brief Amici Curiae of NAACP Legal Defense & Educ. Fund, Inc. at 21, Martin v. Wilks, 490 U.S. 755 (1989) (Nos. 87–1614, 87–1639, 87–1668). In 1987, the Court granted certiorari in Henson v. East Lincoln Township, to decide this very question. *See* 484 U.S. 923 (1987). However, the case is still pending, the court having granted a motion to defer further proceedings. 484 U.S. 1057 (1988). The Court has not yet heard arguments in the case.

[299] *See supra* notes 201–53 and accompanying text.

[300] Furthermore, the language of Rule 23(a) itself ("one or more members of a class may sue or *be sued* as representative parties on behalf of all . . ." (emphasis added)) indicates that the drafters intended defendant classes to be encompassed by judicial interpretations of the Rule. FED. R. CIV. P. 23(a).

[301] These problems were set forth and thoroughly explored in several *amicus* briefs submitted in support of petitioners. The brief of the states' attorneys general was especially thorough. *See* Brief of Alabama et al. as Amici Curiae in Support of Petitioners at 57–59, Martin v. Wilks, 490 U.S. 755 (1989) (Nos. 87–1614, 87–1639, 87–1668).

[302] The United States downplayed the difficulties of defendant class actions under Rule 23. Brief for the United States at 18, Martin v. Wilks, 490 U.S. 755 (1989) (Nos. 87–1614, 87–1639, 87–1668). First, the United States asserted that non-minority employees likely to be affected by title VII litigation would be joined under Rule 23(b)(1)(A), not under 23(b)(2), as petitioners suggested. *Id.* at 21–22. The United States further contended that the "opt out" provision under Rule 23(c) would be unavailable to Rule 23(b)(1) defendant class members, thus ensuring binding judgments. *Id.* at 22. In addition, the United States empha-

Narrowing the scope of a defendant class under Rule 23 would be critical to making mandatory joinder workable. Yet *Wilks*, by its terms, compelled the original parties to join *all* potentially affected non-parties, however remote their interest in the litigation.[303] Thus, narrowing the scope of the defendant class would run the risk of inviting later collateral attacks on the judgment.

The named representative must fairly and adequately protect the interests of the class. The adequacy of the representation is particularly critical, as it would determine the binding effect of any judgment on the unnamed class members. Fair and adequate representation would be difficult to ensure in defendant class actions because of the probable divergence of interests within the class, as well as the existence of an incentive for later collateral attacks.

Class members' interests likely will vary depending on such differences as seniority, rank, department and whether the members are employees or applicants. Some will favor settlement, while others will want to pursue a litigated judgment. Unless proper subclasses are designated, representation is likely to be inadequate, making later attack probable.[304]

Wilks gave the named representative of an involuntary defendant class an incentive to provide inadequate representation. *Wilks* held that collateral attack on title VII consent decrees is permissible where affected non-parties have not been adequately represented in the litigation leading to the decree.[305] To be adequately represented, these persons must first be joined as parties.[306] However, *Wilks* did not preclude the possibility that the actual representation of such joined parties may be inadequate, thus allowing them collaterally to attack the decree. Hence, the unwilling representative of a defendant class might have provided weak representation in order to open the door for later collateral attacks by class members,

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sized the availability of transfer and consolidation under the Federal Rules to prevent unmanageable litigation and ensure a single binding judgment. *Id.* at 23. Finally, the United States stressed reliance on principles of stare decisis and comity to minimize inconsistent judgments where joinder, transfer and consolidation devices fail. *Id.* at 24. This effort to minimize the unmanageability of defendant class actions fails, however, as it does not address many of petitioners' central arguments and relies too heavily on the smooth workings of the overburdened federal judiciary.

[303] *See Wilks*, 490 U.S. at 767–68.

[304] However, the defendant class members will have little incentive to sort themselves into adequately representative subclasses, as failing to do so will allow them later to attack the judgment or settlement.

[305] *See* 490 U.S. at 762–63.

[306] *Id.* at 2187.

who would argue that they were not bound by the earlier litigation due to inadequate representation.[307]

Nor would joinder of unions solve these problems. The adequacy of representation of class members by the union is a real concern, as the facts of *Wilks* demonstrated.[308] Moreover, the interests of the union and its members might have diverged. In some cases, this divergence might have caused the union to favor settlement to avoid certain litigation costs, while the union members might have favored litigation to avoid any prospective relief.

Post-*Wilks* defendant class actions illustrate the Court's Catch-22: *Falcon* made it nearly impossible to maintain a *plaintiff* class action; *Wilks* appeared to mandate *defendant* class actions by requiring joinder. The *Falcon* requirements, however, as well as the practical difficulties of managing such massive joinder and the potential conflict of interests of the class representative, made defendant class actions virtually impossible to maintain.

Respondents in *Wilks* argued, and the Court apparently agreed, that prohibiting collateral attacks on title VII consent decrees would alter non-minority workers' substantive rights.[309] As the *Wilks* dissenters contended, however, giving preclusive effect to the consent decree did not deprive non-minority workers of any *legal* rights.[310] The consent decree did not and could not deprive these workers of their independent right to intervene or bring title VII claims.[311] Thus, it is only to the extent that their claims concern the legality of the affirmative action plan embodied in the consent decree that non-minority workers should be estopped from relitigating the validity of that plan.[312] The non-minority challengers should have to

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[307] *See* Brief of Alabama *et al.* as Amici Curiae in Support of Petitioners at 60, Martin v. Wilks, 490 U.S. 755 (1989) (Nos. 87–1614, 87–1639, 87–1668). Despite the Civil Rights Act of 1991's attempt to address this issue, such a strategy may remain viable. Section 108 of the Act bars attacks on consent decrees by parties whose interests were "adequately represented by another person who had previously challenged the judgment." *See* Civil Rights Act of 1991, sec. 108, § 703, 1992 U.S.C.C.A.N. (105 Stat.) 1071, 1076–77 (to be codified at 42 U.S.C. § 2000e–2(n)(1)(A)).

[308] The Birmingham Firefighters' Association ("BFA"), the firefighters' union, appeared at the fairness hearing and entered objections to the consent decree, supposedly on behalf of white firefighters. *Wilks*, 490 U.S. at 759. Nevertheless, the *Wilks* respondents maintain that the BFA did not and could not adequately represent their interests and thus, that they should be allowed to attack the consent decree collaterally. Brief of Respondents Robert K. Wilks *et al.*, Martin v. Wilks, 490 U.S. 755 (1989) (Nos. 87–1614, 87–1639, 87–1668).

[309] *See* 490 U.S. at 763.

[310] *See id.* at 770 (Stevens, J., dissenting).

[311] *Id.*

[312] This raises another example of the Court's pro-defendant bias in title VII cases. On

establish the same prima facie case of discrimination under title VII as the original minority plaintiffs.[313] To allow them to skip this step by directly challenging the decree is to award them substantive rights not given to the minority plaintiffs.

The majority in *Wilks* wrote as if it were merely following the dictates of due process and Federal Rule 19 in holding that joinder is mandatory, and in invalidating the "impermissible collateral attack" doctrine.[314] But the issue is considerably more complex, and there is a good deal more flexibility in the doctrine than the Court acknowledged. Once again, procedure and substance are inextricable. By saying that the white firefighters must be notified and made parties before they are bound, the Court created substantive rights through procedure.[315]

As the dissenters in *Wilks* explained, one can be impacted by a decision and still not have a right or protectable legal interest that requires mandatory joinder.[316] Think about the polluting facility that must be shut down until the abatement of the nuisance; if the defendant cannot abate or chooses not to expend the funds necessary to do so, the facility may be closed forever. Employees will lose

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one hand, time limits are now very strict for initiating suit, and the statute of limitations commences as soon as the initial decision is made which later results in the individual instance of discrimination. *See* Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989). Yet *Wilks* held that for non-minorities claiming to be adversely affected by the original litigation, the statute of limitations does not begin until the individual claimant is passed up for a promotion, not at the time the decree or judgment is entered. And this rule applies even where, as in *Wilks*, the non-minority claimant had notice of the decree and an opportunity to enter objections at a fairness hearing prior to its entry.

[313] Clearly, this prima facie case should include proving purposeful discrimination as is now required of minority plaintiffs. The affirmative action cases, however, teach that although minority plaintiffs must prove discriminatory intent, white plaintiffs need not do so. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1979).

[314] As the dissent pointed out, a third party could collaterally attack "a judgment if the original judgment was obtained through fraud or collusion." *Wilks*, 490 U.S. at 771 n.5 (Stevens, J., dissenting). But this consent decree was entered in a "genuine adversary proceeding," and there was no contention of fraudulent or collusive settlement. *Id.* at 774–75 (Stevens, J., dissenting). Thus, according to the dissenters, this was an impermissible collateral attack. *Id.*

[315] When a court says there is something to be lost if someone is not first notified and given the right to be heard, the court is creating a new right. This is how welfare benefits evolved into an entitlement. *See* Goldberg v. Kelly, 397 U.S. 254 (1970). Our legal system signals the creation of a new right by announcing that procedural due process prohibits deprivation without notice and the right to be heard. *See* Stephen N. Subrin & A. Richard Dykstra, *Notice and the Right to Be Heard: The Significance of Old Friends*, 9 HARV. C.R.-C.L. L. REV. 449, 467–68 (1974).

[316] *Wilks*, 490 U.S. at 769–70 (Stevens, J., dissenting).

their jobs. The truck that comes each morning to sell doughnuts and coffee will lose substantial business. Customers of the plant may have to seek a more distant source. If the offending defendant is a disposal site, adjoining towns may have to create a new site or ship their trash great distances at increased expense. All these people have interests that will be impaired by the decision, but it is highly unlikely that courts would dismiss the suit if they were not joined as Rule 19 necessary parties.[317] To put it another way, nuisance law itself takes into account the interests of affected people, while not making them parties.[318] Indeed, virtually all litigation affects many others who are not necessary parties.[319]

Consider the numerous alternatives the Court could have adopted had it wished to emphasize title VII's policy of eliminating discrimination. It could have concluded that Congress did not intend to make bringing and settling title VII actions impossible; therefore, absent white employees either had to intervene or be bound by the decree. The Court also could have required title VII plaintiffs to notify any absent employee they wished to bind so that such person could intervene.[320] Last, the Court could have followed

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[317] There are numerous cases in which non-parties have an interest that will be affected by the decision in a lawsuit, but the courts do not treat them as indispensable or Rule 19 parties. *See, e.g.*, Jeffries v. Georgia Residential Fin. Auth., 678 F.2d 919, 927–29 (11th Cir. 1982) (tenants not indispensable to suit against Georgia Residential Finance Authority to disallow an expedited eviction process for low income housing that would affect the interest of the private owners); Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420, 424 (2d Cir. 1975) (in a civil rights class action by minority applicants complaining of the disproportionately large number of blacks and Hispanics who failed the exam, white guards who passed were not indispensable); Sansom Comm. v. Lynn, 366 F. Supp. 1271, 1280–81 (E.D. Pa. 1973) (University of Pennsylvania not indispensable in suit brought by neighbors to enjoin HUD from putting up new buildings, even though the new buildings would be used by the university and an injunction would prohibit the university from demolishing buildings it owned). Such cases frequently cite Natural Resources Defense Council, Inc. v. Tennessee Valley Auth., 340 F. Supp. 400 (S.D.N.Y. 1971) (described in note 292 *infra*), which illustrates the similarity between discrimination, environmental and other Rule 19 cases. Moreover, creditors of parties are also not normally held to be Rule 19 parties. JAMES & HAZARD, *supra* note 67, at 430. Other relevant cases are cited *infra* note 325.

[318] Affected parties may be able to intervene if they choose, but if they do not, they cannot later attack a decree or settlement.

[319] For some of the constitutional problems this may raise, see City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

[320] This is not dissimilar from the historic vouching in when a secondarily responsible guarantor wished to bind the primarily responsible debtor, although in that case the guarantor and debtor normally may have a greater identity of interest than the African-American and white employees. *See, e.g.*, First Nat'l Bank v. City Nat'l Bank, 65 N.E. 24 (Mass. 1902); Ronan E. Degnan & Alan J. Barton, *Vouching to Quality Warranty: Case Law and Commercial Code*, 51 CAL. L. REV. 471 (1963); *see also Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 907 (1958).

the circuit courts and applied the "impermissible collateral attack doctrine."[321]

Rule 19 itself provides additional ways to comply with its clear meaning, without the draconian result of mandatory joinder. The Court could have concluded that whatever interests white employees had with respect to promotion were not "related to the subject of the action" as required by Rule 19.[322] The "subject of the action" is, after all, alleged discrimination by the employer, not the employment rights of current white employees.[323] Or the Court could have reasoned that it was not the "disposition of the action" that would deprive the white employees of rights, but rather the previous discrimination of the employer that permitted white employees to get jobs and seniority in disproportionate and distorted numbers. The Court could have found that, in enacting title VII, Congress had already decided that victims of discrimination have rights that trump the interests of those white employees who benefitted from that discrimination; that is, that those white employees' positions would have been different but for the distortion caused by the employer's discrimination.[324] By using Rule 19 to develop legal rights of white employees that transcend the rights of discriminatees, the Court rewrote title VII through joinder doctrine. Its new version of title VII was contrary to Congress's intent to create new rights for the minority victims of discrimination.

Finally, the Court could have relied on the "public rights" exception to Rule 19. In some cases, the courts have not insisted on Rule 19 joinder of those whose interests will be "impaired or impeded" by a litigation if their position is already advanced by another party (in *Wilks*, by the city, personnel board and firefighters

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[321] *See Wilks*, 490 U.S. at 762. The doctrine and its exceptions are explained in Justice Stevens's dissent. *See id.* at 771–72 & n.6 (Stevens, J., dissenting).

[322] *See* FED. R. CIV. P. 19.

[323] *See, e.g.*, Natural Resources Defense Council, Inc. v. Tennessee Valley Auth., 340 F. Supp. 400, 408 (S.D.N.Y. 1971). In this case, the court held that coal producers who had contracts with the T.V.A. did not have to be joined in a case brought to enjoin the T.V.A. from purchasing and using strip-mined coal because, among other reasons, their participation would not "help much to elucidate the issue in the case: whether TVA followed the dictates of NEPA." *Id.* at 408. Although this statement was made as part of an application of Rule 19(b), it applies equally to the question under 19(a)(2) as to whether a non-party "claims an interest relating to the subject of the action." *Id.*; FED. R. CIV. P. 19(a); *see also* Jeffries v. Georgia Residential Fin. Auth., 678 F.2d 919, 928–29 (11th Cir. 1982) (court treats the rights and conduct of private owners as a distinct matter from the tenants' attack on an expedited eviction process for low-income housing).

[324] Absent the discrimination, perhaps the white employees might not have been as successful in their careers. *See* Brown & Baumann, *Nostalgia*, *supra* note 3, at 54.

union), if mandatory joinder would be unwieldy or impossible, and if there was a strong public interest that the case proceed. In an environmental suit brought by the Sierra Club, for example, the District Court for the Eastern District of California held that although miners' property rights would be affected, the miners were not necessary parties: "where what is at stake are essentially issues of public concern and the nature of the case would require joinder of a large number of persons, Rule 19's joinder requirements need not be satisfied."[325] Also citing Federal Rule 1, the district court reasoned that "[s]urely justice cannot be done if public interest litigation is precluded by virtue of the requirements of joinder."[326] The Supreme Court might have deemed eliminating the pollution to our country from employment discrimination as being as much in the public interest as protecting the physical environment.

None of this is to say that the white firefighters of Birmingham, who might otherwise have been promoted faster, would not lose something from a decree to cure previous discrimination.[327] The majority of federal courts, however, had protected *Wilks*-like consent decrees from collateral attacks by white employees. Thus, there is good reason to question the Supreme Court's political neutrality in using joinder principles to erect yet another barrier to title VII litigation.[328] After *Wilks*, title VII consent decrees were attacked throughout the country, and dormant cases were reopened, making

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[325] Sierra Club v. Watt, 608 F. Supp. 305, 321–24 (E.D. Cal. 1985). The "public rights" or "public interest" exception to necessary joinder was articulated in National Licorice Co. v. NLRB, 309 U.S. 350 (1940); *see also* Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 552 (1937). For application of the concept in suits filed by private parties, see Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420, 424 (2d Cir. 1975) (white applicants who had passed a civil service examination held not indispensable parties to suit brought by plaintiffs alleging discrimination under 42 U.S.C. §§ 1981, 1983); Natural Resources Defense Council, Inc. v. Berklund, 458 F. Supp. 925, 933 (D.D.C. 1978) (applicants for leases held not indispensable in suit brought under the National Environmental Protection Act to enjoin federal officials from issuing "preference right coal leases"); *see also* National Wildlife Fed'n v. Burford, 835 F.2d 305, 326 (D.C. Cir. 1987).

[326] *Sierra Club*, 608 F. Supp. at 325.

[327] *See, e.g.*, Stuart Taylor, *Second-Class Citizens*, AM. LAW., Sept. 1989, at 42 (describing the situations and feelings of white firefighters, members of the same fire department whose policies were contested in *Wilks*, who had higher test scores than the African-Americans who had been hired pursuant to the consent decree). But the dissent in *Wilks* pointed out that the district court found that no black officers had been promoted who were "not qualified or who were demonstrably less qualified than whites who were not promoted." 490 U.S. at 781 (Stevens, J., dissenting).

[328] *See Wilks*, 490 U.S. at 762 n.3 (listing six cases in five circuits as a "sampling of cases from the Circuits applying the 'impermissible collateral attack' rule or its functional equivalent," and one circuit court decision deciding the opposite). See *supra* note 279 for more discussion of this footnote.

a mockery of the concept of finality.[329] In *Wilks*, as in so many recent title VII cases, the Court downplayed the serious repercussions of its jurisprudence for minority plaintiffs,[330] and used "neutral" procedure in a far from simple or transsubstantive manner to advance its ideological agenda.

VI. How Fee Allocations Penalize Plaintiffs

Civil rights plaintiffs are typically unable to pursue their claims without legal representation. Much of the civil rights plaintiffs' bar, including pro bono organizations, depends on the fee shifting provisions of civil rights statutes.[331] Thus, the rules about fees significantly impact plaintiffs' access to the courts, and the cases imparting a pro-defendant slant to these rules have discouraged the filing of title VII suits.

We have just seen how the Supreme Court used Rule 19 to create substantive rights for white employees at the expense of title VII plaintiffs. Having done so, the Court then found a way, in *Independent Federation of Flight Attendants v. Zipes*, to insulate the white employees from liability for legal fees.[332] We also saw how the Court undermined the feasibility of title VII class actions. At the same time, the Court has jeopardized the fees of the attorneys who rep-

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[329] Lawyers' Committee, *supra* note 259, at 1, 14–28. It is unclear whether the Civil Rights Act of 1991 applies to cases like these that were pending at the time of its enactment. *See, e.g., The Civil Rights Act of 1991*, Res Ipsa (Lawyers' Comm. for Civil Rights Under Law, Washington, D.C.), Nov. 1991. The case law is in disarray. *See, e.g.*, Mojica v. Gannett Co., 779 F. Supp. 94 (N.D. Ill. 1991) (Act is retroactive); Hansel v. Public Serv. Co. of Colorado, 778 F. Supp. 1126 (D. Colo. 1991) (Act is not retroactive to pending cases).

[330] *See* 490 U.S. at 767.

[331] Title VII provides for the award of attorney's fees in section 706(k):

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e–5(k) (1982). The standards for awarding fees are generally the same under both title VII and section 1988 of the Civil Rights Attorney's Fees Act of 1976. This latter statute provides that "[i]n any action or proceeding to enforce a provision of 42 U.S.C. Sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1982). *See generally* S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908. Section 113 of the Civil Rights Act of 1991 makes expert witness fees available to prevailing parties in title VII cases, 42 U.S.C. § 2000e–5(k), and in section 1981 cases, 42 U.S.C. § 1988(c). Attorney's fees are also available under the Equal Access to Justice Act, which provides attorney's fees to plaintiffs who prevail against the United States. *See* 28 U.S.C. § 2412 (1982).

[332] 491 U.S. 754 (1989).

resent plaintiffs in class actions. The holding of *Evans v. Jeff D.*[333] invites an adversarial relationship between title VII plaintiffs and their lawyers in class actions. In *Marek v. Chesny*,[334] the Court's interpretation of a procedural rule jeopardizes fee awards to plaintiffs' lawyers. *Zipes*, *Jeff D.* and *Marek* have undermined the congressional policy of awarding attorneys fees to victorious title VII plaintiffs,[335] thus making it far less likely that attorneys will take title VII cases.[336]

A. *Intervenors Get a Free Ride*

In *Zipes*, the Court refused to allow prevailing plaintiffs to collect legal fees from unsuccessful intervenors.[337] It held that a plaintiff will only be entitled to fees against an intervenor when the intervenor's action was "frivolous, unreasonable, or without foundation."[338] Reasoning that intervenors are not wrongdoers but

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[333] 475 U.S. 717 (1986).

[334] 473 U.S. 1 (1985).

[335] In an early civil rights case, Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968), the Supreme Court recognized that Congress intended to encourage plaintiffs to act as "private attorney[s] general" and to promote private enforcement of civil rights through the fee shifting provisions of title II of the 1964 Civil Rights Act. *Id.* at 402. *Piggie Park* established that prevailing plaintiffs in civil rights cases are entitled to an award of attorney's fees unless "special circumstances" would render an award unjust. The Court saw the fee shifting provision as furthering a congressional intent to encourage private attorneys general to "vindicat[e] a policy that Congress considered of the highest priority." *Id.* (footnote omitted). The Court recognized that if plaintiffs were routinely forced to pay their attorney's fees, few plaintiffs would be able to vindicate their rights. In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Court held that the *Piggie Park* standard for awarding attorney's fees to a successful plaintiff was applicable to title VII actions. *See id.* at 415. But three years later, in Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978), the Court held that "prevailing party" included a prevailing defendant. *See id.* at 417. In *Christianburg Garment*, the Court created a different standard for prevailing defendants that permits the award of attorney's fees when the plaintiff's action is frivolous, unreasonable or without foundation, even though not motivated by subjective bad faith. *Id.* The Court rejected the EEOC's argument that prevailing defendants should be awarded attorney's fees only when plaintiff's suit was brought in bad faith, concluding that "in enacting § 706(k) Congress did not intend to permit the award of attorney's fees to a prevailing defendant only in a situation where the plaintiff was motivated by bad faith in bringing the action." *Id.* at 418–22.

[336] Although corporate defendants often have in-house counsel whom they routinely consult on personnel questions, plaintiffs do not have regular counsel available for consultation on recurring discrimination claims.

[337] Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 766 (1989).

[338] *Id.* In *Zipes*, female flight attendants brought an action against TWA alleging that the airline's policy of discharging employees who became mothers violated title VII. *Id.* at 755. In the original action, the plaintiffs were represented by the Airline Stewards and Stewardesses Association ("ALSSA"), a union that preceded the Independent Federation of Flight Attendants ("IFFA"). *Id.* at 755–56. After the suit was filed, the defendant changed

merely innocent parties protecting their interests, the Court characterized intervenors as "particularly welcome, since we have stressed the necessity of protecting, in Title VII litigation, 'the legitimate expectations of . . . employees innocent of any wrongdoing.'"[339]

As Justice Marshall pointed out in dissent, the majority "breaks the congressional promise that prevailing plaintiffs will be made whole for efforts to vindicate their civil rights" and elevates intervenors to the same plane as title VII plaintiffs.[340] The majority explicitly refused to respect the substantive goals of title VII, stating that these objectives do not have "hegemony over all the other rights and equities."[341] *Zipes* effectively nullifies the congressional policy that title VII plaintiffs act as private attorneys general.[342] Abandoning the focus of earlier cases that encouraged plaintiffs to enforce title VII, *Zipes* is concerned with the possibility that an award of fees against an intervenor would provide a disincentive to those with interest in the litigation from raising their claims. And litigating intervenors' claims is expensive; the plaintiffs in *Zipes* spent three years and $200,000 successfully defending the settlement against the intervenor's claims in the district court, the Seventh Circuit Court of Appeals, and the Supreme Court.[343]

Zipes creates yet another hazard for title VII plaintiffs, who may succeed in their claims against intervenors yet be forced to bear the cost of litigating the intervenors' suits, even after the defendant has been found liable for violating title VII.[344] *Zipes* encourages a title VII defendant to shield itself from liability for legal fees by encouraging its arguments to be made by the intervenor.[345]

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its policy and settled with the ALSSA. *Id.* at 756. After the settlement, the IFFA sought permission to intervene in the lawsuit on behalf of incumbent flight attendants not affected by the challenged policy. *Id.* at 757. The IFFA objected to the settlement on two grounds: first, the district court lacked jurisdiction, and second, the relief the court had approved would violate the collective bargaining agreement between the IFFA and TWA. *Id.* The Supreme Court rejected both claims. *Id.*

[339] *Id.* at 764.

[340] *Id.* at 774–75 (Marshall, J., dissenting).

[341] *Id.* at 763 n.4. The majority also reasoned that those who collaterally attack title VII settlements as permitted by *Martin v. Wilks* are not liable for attorney's fees, and thus concluded that plaintiffs still face the prospect of attorney's fees in defending their victories. *Id.* at 762.

[342] *See supra* note 335.

[343] *Id.* at 779 (Marshall, J., dissenting).

[344] *See id.*

[345] In dissent, Justice Marshall suggested that many defendants will minimize fee exposure by relying on intervenors to raise many of the defenses. *Id.* at 779–80 (Marshall, J., dissenting).

On the other hand, making a defendant liable for the plaintiff's fees in an intervenor's case would be in keeping with the philosophy of title VII. As Justice Blackmun pointed out in his concurring opinion:

> Such a rule would safeguard the plaintiff's incentive to enforce Title VII by assuring that the costs of defending against an unsuccessful intervention will be recouped, and would give a plaintiff added incentive to invite intervention by interested third parties, whose concerns can be addressed most fairly and efficiently in the original Title VII proceedings.[346]

This observation was particularly cogent given the perpetual right to intervene created by *Martin v. Wilks*.[347]

B. *Plaintiffs at War with Their Own Lawyers*

The defendant-oriented title VII doctrine created by the Supreme Court seems to make settlement a particularly attractive option for a plaintiff. Read together, however, *Marek v. Chesny*[348] and *Evans v. Jeff D.*[349] force a plaintiff's attorney to choose between settling the case and receiving a fee,[350] thus creating an adversary relationship between plaintiff and lawyer.

In *Marek v. Chesny*, the Court held that prevailing civil rights litigants who were entitled to fees may be barred from recovering any fees for work performed after rejecting a settlement offer made under Rule 68[351] when the ultimate recovery is less than the amount

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[346] *Zipes*, 491 U.S. at 768 (Blackmun, J., concurring) (citation omitted). The chilling effect of *Zipes* was at issue in the proposed Civil Rights Act of 1990, which provided that "parties who prevail in employment discrimination cases may recover fees expended in defending their court decrees against subsequent challenges." S. Res. 2104, 101st Cong., 2d Sess., 136 CONG. REC. 1019 (1990). Similar language addressing *Zipes* was included in earlier drafts of the 1991 Act but does not appear in the final draft of the legislation. *See* H.R. REP. No. 102–40(I), 102d Cong., 1st Sess. 79–81 (1991), *reprinted in* 1992 U.S.C.C.A.N. 549, 617–19; *see also* Civil Rights Act of 1991, Pub. L. No. 102–66, 1992 U.S.C.C.A.N. (105 Stat.) 1071.

[347] Justice Marshall's *Zipes* dissent is illustrative; in his view, *Zipes* and *Wilks* combine to force many victims of discrimination "to forego remedial litigation for lack of financial resources. As a result, injuries will go unredressed and the national policy against discrimination will go unredeemed." 491 U.S. at 780 (Marshall, J., dissenting).

[348] 473 U.S. 1 (1985).

[349] 475 U.S. 717 (1986).

[350] *See generally*, Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270 (1989).

[351] Federal Rule of Civil Procedure 68 provides in relevant part:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be

offered at settlement.[352] The Court construed the word "costs" in Rule 68 to include attorney's fees, and ruled that any time a damage award at trial is less than the settlement offered by the defendant, the plaintiff may not recover fees.[353]

Justice Brennan demonstrated in dissent that, because *Marek* forces pretrial settlement, the Court's holding is inconsistent with the congressional policy behind the post-trial fee shifting provisions of civil rights statutes.[354] *Marek* works against plaintiffs by forcing attorneys to choose between seeking more favorable judgments and risking their fees if they fail to win those judgments.[355] This is a perfect example of a court using a procedural rule to destroy a statutorily created right.[356]

> taken against the defending party for the money or property or to the effects specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offered is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

[352] 473 U.S. at 10–11. In *Marek*, the plaintiff brought a wrongful death action against three police officers under 42 U.S.C. § 1983. Before trial, defendants made an offer of settlement under Rule 68 of $10,000, a sum specifically including costs and attorney's fees. Plaintiff rejected the offer. At trial, the plaintiff was awarded damages, not including costs, of $60,000. The plaintiff then filed for attorney's fees under section 1988. *See* 473 U.S. at 4.

[353] *Id.* Rule 68 has been construed to apply only when the plaintiff obtains a judgment, and not when plaintiff loses. *See* Delta Airlines, Inc. v. August, 450 U.S. 346 (1981).

[354] *Marek*, 473 U.S. at 31 (Brennan, J., dissenting). As Justice Brennan points out, Rule 68 is a "one way street," available to defendants and not to plaintiffs. *Id.* (citation omitted). Apparently, a substantial portion of Congress agrees. A provision to preclude *Marek* from application to title VII cases was included in a final House version of the Civil Rights Act of 1991 but did not survive the final draft of the legislation. *See* H.R. REP. No. 102–40(I), 102 Cong., 1st Sess. 82–83 (1991), *reprinted in* 1992 U.S.C.C.A.N. 549, 620–21; *see also* Civil Rights Act of 1991, Pub. L. No. 102–66, 1992 U.S.C.C.A.N. (105 Stat.) 1071.

[355] *See generally*, Emily M. Calhoun, *Attorney Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards in 42 U.S.C. § 1988*, 55 U. COLO. L. REV. 341 (1984); James Kraus, *Ethical and Legal Concerns in Compelling the Waiver of Attorney's Fees by Civil Rights Litigants in Exchange for Favorable Settlement of Cases Under the Civil Rights Attorney's Fees Act of 1976*, 29 VILL. L. REV. 597 (1984).

[356] As Professor Burbank has repeatedly and eloquently explained, the Enabling Act of 1934, and subsequent versions, should be interpreted as written so that the command that the Federal Rules of Civil Procedure should "not abridge, enlarge, or modify any substantive right" is taken seriously and given meaning. *See* Burbank, *Enabling Act*, *supra* note 10, at 1025–26; Steven B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1016–20, 1033, 1046; Stephen B. Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J.L. REF. 425, 428, 430–33 (1986).

While *Marek* creates an enormous incentive for the plaintiff to settle,[357] the title VII attorneys who do settle risk their fees. In *Evans v. Jeff D.*, plaintiff's counsel was instructed by his client to waive his fee as part of the settlement.[358] The Supreme Court held that under Rule 23(e), a district court has discretion to approve a settlement conditioned on such a forced fee waiver.[359] *Jeff D.* intensifies lawyers' dilemmas in class actions, that of choosing between favorable settlements and their own fees.[360] *Marek* and *Jeff D.* place attorneys in an excruciating ethical dilemma; attorneys may agree to premature settlements and avoid risk to their fees, or they may follow their clients' wishes in favor of settlement, thus foregoing their fees.[361]

Marek and *Jeff D.* have created enormous barriers for civil rights plaintiffs, as well as significant financial quandaries. Perhaps most seriously, they have divorced the interests of plaintiffs from their lawyers, thus subverting the attorney-client relationship.

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[357] *See generally*, Roy D. Simon, *The New Meaning of Rule 68:* Marek v. Chesny *and Beyond*, 14 N.Y.U. REV. L. & SOC. CHANGE 475 (1986); Roger Platt, Note, *Settle or Else: Federal Rule 68 Makes Civil Rights Litigation a Risky Business:* Marek v. Chesny, 21 U.S.F. L. REV. 535 (1987).

[358] 475 U.S. 717 (1986). In *Jeff D.*, the plaintiffs were a class of emotionally handicapped children who sought damages for alleged deficiencies in state-provided education and health services. The plaintiffs' counsel was a legal aid attorney who agreed to settlement one week before trial.

[359] *Id.* at 742–43.

[360] Since Rule 23(e) and *Jeff D.* apply to class actions, there is a potential conflict between the named plaintiffs and other class members if they refuse the waiver of the fee. The proposed Civil Rights Act of 1990 included a requirement that courts entering consent decrees settling discrimination cases first obtain an attestation that a waiver of attorney's fees was not compelled as a condition of settlement. *See* S. 2104, 101st Cong., 2d Sess. (1990). This provision was also included in earlier drafts of the Civil Rights Act of 1991, but it does not appear in the final version. *See* H.R. REP. No. 102–40(I), 102d Cong., 1st Sess. 83–85 (1991) (seeking to overturn *Jeff D.*), *reprinted in* 1992 U.S.C.C.A.N. 549, 621–23; *see also* Civil Rights Act of 1991, Pub. L. No. 102–66, 1992 U.S.C.C.A.N. (105 Stat.) 1071.

[361] Since *Jeff D.*, the lower courts have been unwilling to interfere with settlement waivers in individual civil rights cases which, unlike settlements in class actions under Rule 23(e), do not require approval of the court. *See, e.g.*, Panola Land Buying Ass'n v. Clark, 844 F.2d 1506, 1508 (11th Cir. 1988) (courts "need not and should not get involved" in fee waivers in settlements); Willard v. City of Los Angeles, 803 F.2d 526, 527 (4th Cir. 1986) (plaintiff's attorney has no right to intervene to object to settlement waiving his fees). Commentators have criticized these cases. *See* Margaret A. de Lisser, *Giving Substance to the Bad Faith Exception of* Evans v. Jeff D.*: A Reconciliation of* Evans *with the Civil Rights Attorney's Fees Awards Act of 1976*, 136 U. PA. L. REV. 553, 581–82 (1987). *See generally*, Steven M. Goldstein, *Settlement Offers Contingent Upon Waiver of Attorney's Fees: A Continuing Dilemma After* Evans, 20 CLEARINGHOUSE REV. 693, 694 (1986); Note, *Fees as the Wind Blows: Waivers of Attorney's Fees in Individual Civil Rights Actions Since* Evans v. Jeff D., 102 HARV. L. REV. 1278, 1292 (1989); Peter H. Woodin, Note, *Fee Waivers and Civil Rights Settlement Offers: State Ethics Prohibitions After* Evans v. Jeff D., 87 COLUM. L. REV. 1214, 1230–37 (1987).

VII. How Rule 11 Intersects with Title VII: The Last Straw

The complexities of pleading a title VII case and the stringent requirements for establishing a prima facie case present a Rule 11 dilemma for plaintiff's counsel: certifying a complaint containing specific allegations where all or most of the information is unverifiable because it is within defendant's control.[362] Rule 11 was amended in 1983 as a result of a widespread feeling that the old rule was a rarely invoked, ineffective tool for preventing abuses in the pleading process.[363] The new rule sought to address a perceived "litigation explosion" of meritless claims filed and pursued with near impunity.[364] While the goal of preventing litigation abuse is certainly valid,[365] strict application of Rule 11 to the new formulations of the title VII prima facie case is difficult to justify.[366] Title VII plaintiffs' lawyers usually practice alone or in small firms, and title VII plaintiffs typically are economically insecure. As we have seen, title VII

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[362] Rule 11 requires a party or attorney to sign all pleadings, motions or other papers. This signature constitutes certification that the signer has read the document and that:

> [T]o the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FED. R. CIV. P. 11.

[363] For a history of the enforcement problems inherent in the old Rule 11, see D. Michael Risinger, *Honesty in Pleadings and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976). The advisory committee notes to the amended Rule 11 speak directly and repeatedly to the problem of judicial discretion in the imposition of sanctions. The advisory committee reaches the unmistakable conclusion that if a court is forced to impose sanctions when the rule is violated, attorneys will be forced to meet their responsibilities under the rule. FED. R. CIV. P. 11 advisory committee's note; *see also* STEPHEN B. BURBANK, AMERICAN JUDICATURE SOC'Y, STUDIES OF THE JUSTICE SYSTEM, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, at xix (1989) [hereinafter TASK FORCE REPORT].

[364] Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 485 (1989).

[365] Among the most outspoken supporters of the amended Rule 11 is Judge Schwarzer, who has written in support of its continued vigorous application. William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181 (1985); William W. Schwarzer, Commentary, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988).

[366] See *supra* text accompanying notes 71–111.

doctrine is in flux, and the facts are largely inferential and in defendants' hands. Sanctions for the failure sufficiently to investigate facts and law chill valid claims while encouraging a proliferation of sanction-oriented litigation.[367] Indeed, commentators and judges have become increasingly concerned with Rule 11's potential to wreak havoc with civil rights cases.[368]

Envision the classic employment discrimination case: a person on the job notices, overhears or suspects that she is being discriminated against—perhaps passed over for promotion—on the basis of her race. With only this information, plaintiff's lawyer must draft pleadings to meet Rule 11's strictures that all pleadings be "well grounded in fact" and "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."[369] In our hypothetical about African-American doctors challenging a hospital hiring policy requiring the personal recommendation of physicians already on the staff, plaintiff's counsel will not have much of the information critical to the plaintiff's prima facie case: the subjective discriminatory intent of the hospital,[370] the justifications for the hospital's policy, the cost of the existing policy and of alternatives, and/or the effectiveness of those alternatives to the hospital's performance of its functions.[371] Plaintiff's counsel probably will not know the number and qualifications of African-American physicians rejected; certainly, she will not know about

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[367] *See, e.g.*, Tobias, *supra* note 364, at 486–88, expressing concern that Judge Schwarzer's suggestions do not address the unique problems Rule 11 created for civil rights plaintiffs and their attorneys.

[368] *See* TASK FORCE REPORT, *supra* note 363, at 68–72; Burbank, *Transformation*, *supra* note 14, at 1938, 1961; Carter, *supra* note 186, at 2191–95; Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1913–14 n.52 (1989).

[369] FED. R. CIV. P. 11. Lawyers and individual plaintiffs alike are subject to the Rule's commands upon the signing of a "pleading, motion, or other paper." *Id. See* Business Guides, Inc. v. Chromatic Communications Enters., Inc., 111 S. Ct. 922 (1991), in which even a represented party whose officer signed a court document was sanctioned for violating Rule 11. *Id.* at 935.

[370] The 1991 Civil Rights Act does not affect disparate treatment subjective motivation cases. *See* Pub. L. No. 102–66, 1992 U.S.C.C.A.N. (105 Stat.) 1071.

[371] Section 105 of the Civil Rights Act of 1991 purports to overrule *Wards Cove* by restoring the *Griggs* allocation of proof in disparate impact cases. *See* sec. 105, § 703, 1992 U.S.C.C.A.N. (105 Stat.) 1071, 1074–75 (to be codified at 42 U.S.C. § 2000e–2(k)(1); *see also* § 3(2) ("The purposes of this Act are . . . to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in Griggs v. Duke Power Co. . . . and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio.") (citations omitted). However, the data about the hospital remains critical to plaintiff. *See* Civil Rights Act of 1991, sec. 105.

those who did not apply because of the policy. She will not know the qualifications of white doctors accepted on the staff. She may not even be certain of the elements of her prima facie case. Moreover, plaintiff's attorney will inevitably have far fewer resources, financial and otherwise, than attorneys representing the hospital.[372]

Defendants now reflexively use Rule 11 motions in response to the filing of civil rights claims.[373] This means that even those plaintiffs and their lawyers who have brought title VII cases in good faith may have to squander precious resources defending against Rule 11 motions. The threat of Rule 11 may compel plaintiff and counsel to refrain from initiating a meritorious title VII claim. As Judge Cudahy recently observed, in dissent from a decision to remand a case for further fact finding, his colleagues were "almost at the point of saying the main question before the court is not—'Are you right?' but 'Are you sanctionable?'"[374] In his view, Rule 11 tends to encourage satellite litigation and to chill both the most and least legitimate civil rights lawsuits, turning "a protection against frivolous litigation" into "a fomenter of derivative litigation, a mire for unwary parties and overzealous courts."[375] In short, the "Rule 11 tail [is] wagging the substantive law dog."[376]

Much title VII litigation gives the appearance of a Rule 11 violation. For example, Rule 11 requires that all pleadings and papers be "well grounded in fact."[377] Strict construction of this language is a serious hurdle to title VII plaintiffs, who often must

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[372] Moreover, defendant may well have experienced and expert in-house counsel.

[373] The very nature of civil rights claims tends to invite Rule 11 motions from defendants. *See, e.g.*, Arthur B. LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 VAL. U. L. REV. 331 (1988); Tobias, *supra* note 350; Tobias, *supra* note 364; Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988).

[374] Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1085–86 (7th Cir. 1987) (Cudahy, J., concurring in part and dissenting in part), *cert. denied*, 485 U.S. 901 (1988).

[375] *Id.* at 1085. While some Rule 11 cases do get reported, hundreds more do not. Professor Tobias warns that "relying on reported decisions warrants considerable caution [,as] . . . much judicial activity involving Rule 11, even orders imposing sanctions, has not been reported." Tobias, *supra* note 350, at 302. He suggests that a published opinion in and of itself can serve as a deterrent. Id. at 302. Moreover, the lack of reported cases hides another aspect of the Rule 11 problem; many cases are not brought because of the imminent threat of sanctions. As the *Task Force Report* notes, "no statistics on reported decisions can reflect private resolution of Rule 11 motions" and "reported decisions are unlikely to give a clear picture of the role that warnings about the requirements of Rule 11 play." TASK FORCE REPORT, *supra* note 363, at 57, 58.

[376] Yancey v. Carroll County, 674 F. Supp. 572, 575 (E.D. Ky. 1987). Some commentators have suggested that Rule 11 has helped to resurrect the antiquated notion of the "disfavored claim" despite Congress's clear intent to the contrary. *See* Tobias, *supra* note 364, at 502.

[377] FED. R. CIV. P. 11.

rely heavily on the discovery process to obtain information.[378] Recall our hypothetical doctors and the information they lacked, all of which is in the hands, files or minds of the defendants. Although discovery might elicit some of the information, a Rule 12(b)(6) motion might be allowed prior to the completion of discovery. The motion for Rule 11 sanctions will inevitably follow.

In one recent and particularly troubling case, a plaintiff's counsel was subject to Rule 11 sanctions where the good faith of the discovery requests was challenged in light of the plaintiff's failure to retain an expert.[379] Plaintiff's lawyer had made a discovery request for statistical data in the defendant's possession. The court held that the party seeking the data must make its intentions clear with regard to subsequent professional analysis of that data "so the adversary can select the most economical means of compliance."[380] Besides protecting the defendant's files, and complicating the production of the evidence needed by plaintiff to form a well-grounded factual background, such a rule completely ignores plaintiff's lack of resources. Should plaintiff be required to hire an expert statistician to evaluate data that may or may not lead to support of the claim? Should a defendant be excused from full compliance with discovery requests on the basis of the plaintiff's attorney's lack of demonstrated ability to interpret the documents without expert assistance? Is a plaintiff's ability to hire an expert relevant to defendant's duty to respond to discovery? The use of Rule 11 sanctions to penalize the wrong answer to these questions subverts the discovery process.

Rule 11's requirement that a pleading be "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law" is similarly fraught with problems for the title VII plaintiff, particularly in its deleterious effect on the advancement of novel legal theories.[381] *Shrock v. Altru Nurses Registry*[382] is illustrative. Shrock, a male nurse, filed charges with the EEOC in

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[378] An objective standard is used in evaluating the factual inquiry. In the employment discrimination context, see Thomas v. Capital Security Services, Inc., 836 F.2d 866, 873 (5th Cir. 1988) (and cases cited therein).

[379] *See* Greenberg v. Hilton Int'l Co., 875 F.2d 39, 41 (2d Cir. 1989).

[380] *Id.* at 40 n.1.

[381] Professor Tobias notes that "[t]hese concepts are at the cutting edge of legal development, which means that they are difficult to conceptualize and substantiate . . . [and] once formulated, look non-traditional and even implausible." Tobias, *supra* note 364, at 497. He suggests consideration of the implications of Rule 11's rigorous enforcement in a case like Brown v. Board of Education, 347 U.S. 483 (1954). Tobias, *supra* note 364, at 497.

[382] 810 F.2d 658 (7th Cir. 1987).

1979 alleging that his employer refused to refer male nurses to female patients.[383] He later filed a *pro se* title VII action that was dismissed in 1983 pursuant to a settlement that put him back on Altru's registry of nurses.[384] Two weeks after the settlement, Shrock filed new charges with the EEOC and another suit in which he alleged that Altru had discriminated against him again.[385] Shrock's case was dismissed on Altru's motion for summary judgment and Altru's motion for attorney's fees was denied.[386] Both parties appealed. On appeal, Judge Posner held that the suit was "not frivolous in the traditional sense of making an utterly groundless claim. Maybe Altru did discriminate against Shrock . . . ."[387] Still, Judge Posner was "puzzled" at the district court's refusal to grant Altru's attorney's fees, and despite the fact that Altru's request for fees was not made pursuant to Rule 11, the case was remanded for consideration of that issue.[388]

If ever there was a case that argued for a modification or extension of existing legal theories, it is *Altru*. Altru Nurses Registry was a nurse referral agency, and as such was in a gray area of employer status under title VII. Shrock did not technically work for the agency; he worked for the patients to whom Altru referred him.[389] On appeal, Judge Posner found Shrock to be an independent contractor, thus removing Altru from the coverage of title VII.[390] Although the court did not "need [to] decide when, if ever, an employer covered by the statute can be held liable for conduct toward someone who is not its employee," Judge Posner cited two cases supporting that proposition and further noted that "[those cases] gave [Shrock] a shot at bringing Altru within the jurisdiction of the statute as an employer if Altru turned out to have enough employees."[391] Because there was support for plaintiff's position, it is peculiar that *Altru* was remanded for further determination of

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[383] *Id.* at 660.

[384] *Id.*

[385] *Id.*

[386] *Id.*

[387] *Id.* at 661.

[388] *Id.* Judge Posner noted that "[w]e are given pause . . . that Altru's motion for attorney's fees did not mention Rule 11; it relied solely on 42 U.S.C. section 1988 (that was wrong, too, as we said) . . . [I]t is true that a request for sanctions under Rule 11 is not a prerequisite to their imposition . . . . Therefore we do not treat Altru's failure to mention Rule 11 in the district court . . . as a waiver of Rule 11 sanctions." *Id.* at 662.

[389] *See id.* at 660–61.

[390] *Id.* at 660.

[391] *Id.* at 661.

Rule 11 sanctions. The remand was nominally based on Shrock's poor investigation of the factual basis of the suit. Judge Posner implied, however, that Rule 11 sanctions are awarded only where the plaintiff's suit is "frivolous, unreasonable, or without foundation," which Shrock's case admittedly was not.[392] This use of Rule 11, especially in a case that does not show even a hint of bad faith, confirms many of the worst fears about the rule's application against title VII plaintiffs. Regardless of the outcome on the merits of the Rule 11 issue, such unwarranted and expensive satellite litigation exacts a heavy price in terms of plaintiff's time, money and anxiety.

Altru also implicates Rule 11's requirement that the pleadings be factually well-grounded. The court's choice of words—whether Altru "turned out" to have enough employees—and its reference to other facts the panel found lacking[393] is disturbing because it presumes the availability of information to the plaintiff. This would hardly be the case in instances where the employee had not previously filed suit against his employer. For a plaintiff in Shrock's position, such information, absent discovery, would not likely be forthcoming.[394]

Rule 11 is particularly harsh in an area like title VII, where the Supreme Court has regularly reformulated the prima facie case. Indeed, the Civil Rights Act of 1991, which purports to restore some of the provisions of title VII to their original meaning,[395] although meant to assist plaintiffs, may well exacerbate the Rule 11 problems, at least until the Court has definitively interpreted the new statute. The point is clear: Rule 11 sanctions are especially inappropriate in times of doctrinal upheaval.

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[392] *Altru*, 810 F.2d at 661 (citing Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978)).

[393] *Id.* For instance, the court alluded to issues surrounding how Altru referred nurses to its clients, whether hospitals as well as doctors and patients were part of Altru's client base, and how many inquiries from female patients Altru had in a given period of time. *Id.* It is significant that Shrock attempted to provide such additional evidence on appeal when he apparently had engaged an attorney, but the court held that evidence had come too late, as it had not been raised in district court. *See Altru*, 810 F.2d at 661–62. The court was apparently applying a "product" test in judging lawyer-activity under Rule 11 rather than the "conduct" test suggested by the very language of the Rule. *See* Burbank, *Transformation*, *supra* note 14, at 1933–34.

[394] The *Altru* case does not directly address other troubling aspects of Rule 11, such as its mandatory imposition of sanctions upon a finding of a violation, its seemingly automatic use by defense counsel or its potential for resurrecting the archaic notion of "disfavored claims" in the civil rights context. *See* Tobias, *supra* note 364.

[395] We shall explore the separation of powers implications of such "restoration" acts in a subsequent article. Once again, we appreciate the generosity of the Fund for Labor Relations Studies which has partially supported this research.

As Professor Burbank has pointed out, "no group of lawyers . . . [is] more concerned about the impact of amended Rule 11 on their clients and their practice than lawyers who specialize in plaintiff's civil rights (including employment discrimination) law."[396] The data supports many of the fears of the civil rights bar.[397] Although the statistics vary, the commentators agree that a greater proportion of Rule 11 sanctions has been brought in civil rights cases than in other categories of federal civil litigation. Moreover, many more sanctions have been granted against plaintiffs than defendants.

While varying in degree, the three major studies of the effect of Rule 11 on the legal system all point to the rule's disproportionate burden on civil rights cases in general, and civil rights plaintiffs, including employment discrimination plaintiffs, in particular. Professor Nelken wrote that while civil rights claims in 1983–1985 represented only 7.6% of all civil actions, Rule 11 motions appeared in over 22% of those cases.[398] Professor Burbank reported that in the Third Circuit, civil rights plaintiffs were sanctioned over five and a half times more frequently than all other plaintiffs combined.[399] Professor Vairo's results told much the same story, but on a larger scale: civil rights and employment discrimination cases were the subject of 28.1% of all Rule 11 cases, plaintiffs were targeted 86.4% of the time, and sanctions were granted in 71.5% of those cases in which plaintiffs were the targets.[400] Other plaintiffs were sanctioned in only 54.2% of all other cases, perhaps suggesting that civil rights plaintiffs are subject to a more stringent Rule 11 standard than other plaintiffs.[401] Defendants, targeted in a mere 13.6% of all cases, were sanctioned only 50% of the time.[402] The title VII plaintiff has ultimately borne a disproportionate share of the Rule

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[396] TASK FORCE REPORT, *supra* note 363, at 68 (parentheses in original). Some courts view Rule 11 as a fee shifting statute rather than a deterrent statute. This interpretation is not only counter to the Rule's intent, see *id.* at 10–13, but also particularly harmful to plaintiffs.

[397] *See also* Vairo, *supra* note 373, at 200–201. *Compare* TASK FORCE REPORT, *supra* note 363, at 68–69 *with* Melissa L. Nelken, *Sanctions under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1327, 1338–53 (1986).

[398] Nelken, *supra* note 397, at 1327.

[399] Civil rights plaintiffs were sanctioned 47.1% of the time while all others were sanctioned 8.45% of the time. TASK FORCE REPORT, *supra* note 363, at 69.

[400] Vairo, *supra* note 373, at 200–01. The *Task Force Report* generally questioned Professor Vairo's methodology, raising concerns of underinclusiveness and double counting. *See* TASK FORCE REPORT, *supra* note 363, at 56.

[401] Vairo, *supra* note 373, at 200–01.

[402] *Id.*

11 burden and the threat of Rule 11 sanctions has been predictably chilling to plaintiffs.[403] The use of Rule 11 in title VII cases is a good example of a facially transsubstantive rule that has a starkly non-transsubstantive effect.

VIII. Epilogue: Substance in the Shadow of Procedure

We set out in this article to explore the relationship between substance and procedure in the context of a discrete statute. It is profitable to look back upon our enterprise in three different ways. Most obviously, the web of interrelationships between substantive and procedural law determines the behavior of lawyers: what cases they accept, what settlements can be achieved and what cases will be lost and won.

Second, we have shown that the four suppositions underlying modern procedure are suspect in title VII cases. We argue that the division between substance and procedure makes little sense if one wants to understand how laws actually operate. Procedural rules are not flexible and simple. In operation, lawyers and judges define the general substantive law and general procedural rules. Our examination of title VII also erodes the myth of transsubstantive procedure. The courts have crafted unique procedural rules for title VII. Even if the procedure has not been specifically designed for title VII, across the board procedural rules have a distinct, unique impact in any given field. Finally, the application of procedural rules to title VII has not been, and indeed cannot be, value-neutral. The process of defining general law, be it procedural or substantive, is inherently political, for the definitions normally favor one side or the other.

Third, our analysis has implications for considering classic separation of powers issues and for legal reasoning generally. If procedure and substance are as intertwined as this article suggests, laws passed to achieve given ends must frequently provide specific procedural and evidentiary rules. Furthermore, the legal culture needs to reconsider the tendency to examine substantive law, civil procedure and evidence as discrete fields of learning.

A. *On Losing Causes: A Fable for Lawyers*

Recall the hospital whose practice is to hire only doctors who have been recommended by staff members. As no African-Ameri-

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[403] Commentators and courts have noted that only a small percentage of Rule 11 cases are reported. *See* Task Force Report, *supra* note 363, at 59 (and citations therein).

can doctors have ever been recommended, the staff remains all white. Assume that the hospital originally adopted this rule in the nineteenth century because of racial hatred, which continues to this day. The hospital has always explained its rule in terms of good patient care and staff collegiality.

You, an experienced civil rights lawyer, are consulted by an African-American surgeon, who, lacking an appropriate recommendation, will not be considered by the hospital. You think first about the theory of your claim. You have two choices, disparate treatment or disparate impact. If the former, the burden is on the doctor to meet pleading, production and persuasion burdens with respect to the hospital's racial animus. For disparate impact, you will have easily accessible statistical evidence: the all-white staff. But the doctor may still have the burden of pleading, production and persuasion regarding the availability of alternative non-discriminatory staffing methods. After the 1991 Civil Rights Act, the doctor's burdens with respect to hospital practices remain unclear.[404]

How will you plead your case? Remember that you must plead it with some specificity, and that Rule 11 sanctions threaten if you begin a case with what later proves to be insufficient facts. Remember, too, that your case is still at the pre-discovery stage. You have no direct or even inferential evidence about defendant's state of mind; after all, how can you ever know the state of mind of the defendant, absent a "smoking gun?" You are not safe inferring racial animus from the statistic of the all-white medical staff. So much for disparate treatment. As for disparate impact, you can plead the racially disparate effect, but you have no way of knowing if there is a way for the hospital to hire doctors, that will have a less discriminatory impact. In short, even though we have posited a violation that title VII clearly was passed to rectify, you cannot even plead your case in a way that would permit discovery, without subjecting yourself to Rule 11 sanctions.

Have you considered the massive, and expensive, discovery you will have to conduct in order to try to get evidence of the hospital's real motive? What administrator will admit racial prejudice? Think about the discovery you will need in order to develop alternative hiring practices that will be equally effective in serving the hospital's goals? If courts are "less competent than employers to restructure business practices,"[405] how will you be able to attempt that task?

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[404] *See supra* note 109.

[405] Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 661 (1989) (citation omitted). The 1991 Civil Rights Act does not affect this institutional competence issue. *See* Civil Rights Act of 1991, Pub. L. No. 102–66, 1992 U.S.C.C.A.N. (105 Stat.) 1071.

And if you are foolhardy enough to go forward nonetheless, how will you ever get paid? Your client doesn't want to pay you to tilt at windmills, particularly if a "victory" will put him in a job where he rightfully suspects he will be despised. Moreover, he fears that if he is known as a troublemaker he will be unable to work at any hospital in the community.[406] You ponder the possibility of a class action for all African-Americans who have lacked a white sponsor. But the hospital has no written policy against interviewing minorities, and, indeed, its informal, non-written policy is neutral on its face. *Falcon* teaches that racial discrimination is no longer by definition class discrimination, and instead, essentially forces each plaintiff to bring his or her own case.[407] You do not have enough information to satisfy *Falcon*'s nexus requirement, and you may be subject to Rule 11 sanctions before you can attempt to get that data through discovery.

Must you now bring a defendant's class action? After all, if your doctor gets hired, some white surgeon may not get hired, or some white doctor currently on staff may have reduced use of the operating rooms. The rights of these white "innocent victims" might take precedence over your client. White non-parties whose interests may be impacted by a decree in a title VII case would not have been bound after *Martin v. Wilks*. You may find yourself with an unenforceable decree unless you provide the current and future white doctors, whoever they might be, a reasonable opportunity to object.[408]

Your client is a single plaintiff who probably cannot plead, yet alone prove or afford the discovery costs of, a prima facie title VII case against an all-white hospital that has discriminated against minorities for a century. You are compelled to think about settlement. What if the hospital offers to settle, you refuse, and five years later you win one dollar less than the offer?[409] Or what if your client wants to settle, but the hospital is unwilling to pay your fee?[410] How comfortable will you be telling your own client not to settle, even

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[406] *See* KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS 26 (1988).

[407] In our hypothetical, there is no "racially biased testing procedure" applied to both employees and applicants that might trigger the footnote 15 exception to the close nexus rule. *See* General Tel. Co. v. Falcon, 457 U.S. 147, 159 n.15 (1982). See also *supra* note 211 and accompanying text for a discussion of footnote 15.

[408] The 1991 Civil Rights Act appears to require this opportunity. *See* sec. 108, § 703, 1992 U.S.C.C.A.N. (105 Stat.) 1071, 1076–77 (to be codified at 42 U.S.C. § 2000e–2(n)(1)).

[409] *See* Marek v. Chesny, 473 U.S. 1 (1985).

[410] *See* Evans v. Jeff D., 475 U.S. 717 (1986).

though he is better off with the settlement? Will your client want to go forward when you explain that he may have to pay the hospital's fee if he loses or your fee if others intervene and prolong the litigation? And never forget that throughout this process, you and your client may be sanctioned under Rule 11. Will you ever consider representing another title VII plaintiff?[411]

B. *On Procedural Myths*

It is our job as lawyers, teachers and scholars to consider how laws actually work. After this exercise, we can no longer support the artificial bifurcation of procedure and substance that has informed our legal education and our jurisprudence. The interplay of elements of the prima facie case, burdens of proof, pleading requirements, discovery, rules of party-joinder, Rule 11 sanctions and fees dictate the effectiveness of title VII. Laws, after all, are not self-applying; what lawyers predict about this mixture determines what cases they take. Over time, one would expect the same mixture to influence the behavior of those subject to the law. If lawyers cannot readily bring title VII cases, potential title VII defendants can act with impunity.

Lawyers would know very little if they limited their reading to title VII and the Federal Rules. They would have to learn how the courts have interwoven procedure and substance into a complex, frustrating fabric. In other words, procedure is not transsubstantive. There are special rules for title VII cases. Nor is procedure simple; as we have seen, the procedure for title VII cases is often complex.

We are not criticizing the idea of integrating substance and procedure. Indeed, it is probably inevitable. For a law to be applied, it must be broken down into elements, and decisions have to be made with respect to pleading, parties and sanctions. But this integration is necessarily value-laden. It can expand plaintiffs' rights or contract them, it can implement or thwart the purpose of the statute. In our view, the restrictive interpretation of title VII is regrettable, but that is not our point. All statutes take on meaning through the unique mixture of their words and their procedure, and the impact of this mixture on the legal profession.

This conclusion explodes the final myth: the political neutrality of procedure. Procedure will help or hinder certain parties and

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[411] *See* Steven A. Holmes, *Workers Find It Tough Going Filing Lawsuits Over Job Bias*, N.Y. TIMES, July 24, 1991, at A1.

classes of cases in different ways. Procedure has deep political overtones. It is not a neutral procedure separate from substantive law.

C. *Looking Forward by Looking Backwards*

Since the mid-nineteenth century, procedural reformers in the United States have been fond of deprecating common law procedures that utilized discrete writs, each of which had its own procedures. As legal historians have explained, the substance was secreted within procedure.[412] Both the Field Code and the Federal Rules of Civil Procedure consciously departed from this model; for the most part, the procedural rules were drafted as an independent body of law to be available for all cases in like manner. Legal thinking and teaching kept apace. For a brief period, around 1880, courses were given and treatises were written that joined substance and process in given fields such as insurance, bailments and common carriers. But this was a short-lived development. Who of us learned tort law or contract law or constitutional law simultaneously with the relevant procedural attributes?

This article questions the appropriateness of thinking about law in a compartmentalized way. We must examine substantive doctrine, procedural rules, sanctions and fees in an integrated manner, along with the social, economic and professional milieu of the combined substantive-procedural regime. Otherwise, the inquiry is empty and stylized.

We are not advocating a return to the hypertechnical procedure of the common law.[413] Rather, our point is the need to recognize

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[412] "So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms." HENRY S. MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389 (1883); *see also* S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 30–32 (1969); *cf.* Alan Watson, *The Law of Actions and the Development of Substantive Law in the Early Roman Republic*, 89 LAW Q. REV. 387 (1973) (on the evolution from a pleading system to rational substantive law).

[413] For many, if not most matters, the general, flexible Federal Rules of Civil Procedure may work fine. Our point is that Congress would be well-advised to consider when deviations are needed to increase the likelihood that the rights meant to be granted by a specific statute will in fact be vindicated by the courts. *See* Burbank, *Preclusion*, *supra* note 5, at 831, 832 and 831, n.462; Stephen B. Burbank, *Of Rules and Discretion: the Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 716–17 (1988); Burbank, *Transformation*, *supra* note 14, at 1940; Subrin, *Equity*, *supra* note 6, at 985; Subrin, *Federal Rules*, *supra* note 7, at 2041–43, 2048–51.

that courts, without legislative guidance, have begun to read procedural specificity into title VII. It is clear that this jurisprudence involves a good deal more than "mere" procedure. The decision that white "victims" must be heard before minority plaintiffs can prevail, although disguised in rulings on intervention in consent decrees, is perforce a transformation of the substantive law. More subtly, the decisions to require stricter pleading for title VII cases, or to apply Rule 11 to these cases in the same manner as in other cases, have redefined plaintiffs' title VII rights. Obviously, allocations of burdens of proof have an even more direct impact.

That judges have political views that influence their decisions, particularly when they are not constrained by precise statutory language, is as inevitable as the interplay of substance and procedure. The critical questions are who will hone the procedures for particular statutes, and whether the substance/process integration will hinder or further the statutory goals. Almost all of the title VII integration has been defendant-oriented, fulfilling the ideology of a majority of the Supreme Court, and implemented by the predominantly conservative federal judiciary.[414]

Because, at least theoretically, legislatures create new rights so that citizens will have those rights vindicated, legislators must pay close attention to how the substantive law will in fact interact with procedure. At a minimum, this requires more precision in the statutes themselves. Indeed, the legislature is aware of this necessity. The concept of "restoration acts," attempting more precisely to define the elements of causes of action and burdens of proof, has become increasingly common.[415] The recent controversy over the

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[414] In his two terms in office, President Reagan appointed "more than half" of the federal judiciary, including three members of the Supreme Court. LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 17, 167 (1990) (citing H. SCHWARTZ, PACKING THE COURTS (1988)). President Bush has made two Supreme Court appointments. The *Washington Post* has predicted that by 1994, three quarters of the 752 federal trial and appeals court judges will have been appointed by Reagan and Bush. Al Karmen & Ruth Marcus, *A Chance to Deepen Stamp on Courts*, WASHINGTON POST, Jan. 29, 1989, at A1.

[415] *See, e.g.*, Civil Rights Restoration Act of 1987, Pub. L. No. 100–259, 102 Stat. 28 (1988) (overruling Grove City College v. Bell, 965 U.S. 555 (1984)); Voting Rights Act Amendments of 1982, Pub. L. No. 97–205, 96 Stat. 131 (1982) (overruling City of Mobile v. Bolden, 446 U.S. 55 (1980)); Pregnancy Discrimination Act, Pub. L. No. 94–555, 92 Stat. 2076 (1976) (overruling General Elec. Co. v. Gilbert, 429 U.S. 125 (1976)); Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94–559, 90 Stat. 2641, 42 U.S.C. § 1988 (overturning Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, (1975)); Handicapped Children's Protection Act of 1986, Pub. L. No. 99–372, 100 Stat. 796, 20 U.S.C. § 1415(e)(4)(B)–(G) (1982 Supp. V) (overturning Smith v. Robinson, 468 U.S. 992, (1984)).

proposed Civil Rights Act of 1990 and the Civil Rights Act of 1991 demonstrates both presidential and congressional consciousness that procedure defines substance. The Civil Rights Act of 1991 appears to have restored much of title VII law to where it was before the Supreme Court used procedural mechanisms to redefine discrimination and equality.[416] The controversy over legislation that reads so technically reveals a growing awareness of the integral nature of procedure and substance.[417]

The trend toward legislative integration is not a bad one. It requires legislative oversight, hearings and debate to craft statutes that will combine substance and process to make rights more readily vindicated.[418] But more legislative specificity is not a panacea. Specificity can lead to underinclusiveness just as vagueness can invite too much judicial discretion.[419]

One thing is clear from our study: synthesis will take place. Those who favor the goal of eliminating discrimination in our society had best attempt the integration on their own terms. Procedure cannot be a junior partner; as much as the substance, it will fre-

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Some states have already passed statutes to rebut Supreme Court employment discrimination cases. William E. Schmidt, *Minnesota Widens Rights to Counter High Court Move*, N.Y. TIMES, May 12, 1990, at 1, 10; *see also* Massachusetts Equal Rights Act, MASS. GEN. L. ch. 93, § 102 (Supp. 1991).

[416] After vetoing the Civil Rights Act of 1990, President Bush signed the Civil Rights Act of 1991 on November 21, 1991. That Act purports to overrule key aspects of *Wards Cove* and *Martin v. Wilks*. *See* Civil Rights Act of 1991, secs. 105, 108, § 703, 1992 U.S.C.C.A.N. (105 Stat.) 1071, 1074–77 (to be codified at 42 U.S.C. § 2000e–2(n)(1)(A), (k)(1)).

[417] President Bush recognized that a change in burden of proof is not just lawyer's talk. He vetoed the Civil Rights Act of 1990 because, in his view, the changes sought by Congress would upset business practices by imposing heavier burdens on employers. In one respect, the President was right. The corrections enacted by Congress would have changed results. Despite the specific language in the Act to the contrary, the President's veto message claimed that the bill would require quotas and restrict legitimate employment practices by making it too difficult for employers to defend them. Civil Rights Act of 1990-Veto, 101st Cong., 2d Sess., 136 CONG. REC. S16562 (1990).

[418] This is not always an easy task. Title VII has concrete statute of limitations requirements that have thwarted plaintiffs not because of their specificity but because of their extreme complexity, and because of the questions Congress left unanswered. Title VII mentions no less than fifteen discrete time periods, and the Supreme Court has added a sixteenth in Mohasco Corp. v. Silver, 447 U.S. 807 (1980). *See* 42 U.S.C. § 2000e–5. In this instance, the attempt at integration worked poorly. Congress addressed one of these situations, the applicable limitations period for challenges to seniority systems, in section 112 of the Civil Rights Act of 1991. *See* sec. 112, § 706(e), 1992 U.S.C.C.A.N. (105 Stat.) 1071, 1078–79.(to be codified at 42 U.S.C. § 2000e–(5)(e)).

[419] Statutes are not regulations, nor should they be. *See* Parmet, *Discrimination and Disability: The Challenges of the ADA*, 18 LAW MED. & HEALTH CARE 331 (1990) (criticizing the new statute for including too many overly specific code-like provisions).

quently require definition. This means that some procedural incidents will have to accompany the substantive law in a more precise and integrated fashion. In law, as in other disciplines, form and substance are integrally related. In our democratic regime, it is particularly appropriate that the legislature actively participate in the synthesis.