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THE SILENCED MAJORITY: *MARTIN V. WILKS* AND THE LEGISLATIVE RESPONSE

Susan S. Grover*

An American worker finds himself disadvantaged by an employer's affirmative action program. The worker heads for the courthouse, reverse discrimination complaint in hand. Will he be allowed to sue? Prior to the Supreme Court's 1989 Martin v. Wilks decision, the answer to that question tended to be "no." Wilks changed the answer to an emphatic "yes." With the 1991 Civil Rights Act, the answer has become "probably not." This article discusses the bar against such challenges as developed through case law and recent congressional action. It addresses the implications that the new statutory bar will have for the structure of discrimination suits. The article also advocates measures that will both enhance the prospects for consent decree finality and preserve the legal rights of the American working majority.

I. INTRODUCTION

Imagine that a group of minority employees file suit alleging that their employer has discriminated against them because of their race. The employees and their employer agree to settle the case, with the employer undertaking affirmative action measures designed to enhance employment opportunities for minorities. As usually happens, the parties ask the court to enter the agreement as a consent decree.¹ The employer fulfills its affirmative action promises, and that ends the matter—until a

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1. A consent decree is a hybrid combining qualities of both contracts and judgments. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-37 (1975). The substance of the decree is arrived at contractually, by mutual agreement of the parties seeking to settle the case. *Id.* at 234-35. As one author defined it, "[a] consent decree is a settlement agreement among the parties to a lawsuit, signed by the court and entered as a judgment in the case." Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 894. Violation of the decree, like violation of a judgment, is punishable by contempt. *ITT Continental Baking Co.*, 420 U.S. at 226; *Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1097-98 (3d Cir. 1987); *United States v. City of Miami*, 664 F.2d 435, 439-40 (5th Cir. 1981). Consent decrees are very popular vehicles for the resolution of Title VII and other public law cases. Schwarzschild, *supra*, at 899. Such decrees serve the shared interest of the court and the parties in avoiding the expense and burdens of trial and the plaintiff's interest in obtaining a settle-

group of white employees² learns that minority employees are securing employment opportunities that traditionally would have been theirs. When the white employees make this discovery, they file suit against the employer, alleging that the employer is discriminating against them on the basis of their race by preferring minority employees.³

In recent years, there has been great controversy over whether white employees should be permitted to bring reverse discrimination suits challenging affirmative action taken pursuant to consent decrees. The federal courts initially barred such challenges as "impermissible collateral attacks."⁴ That doctrine precluded challenges to consent decrees unless intervenors raised the challenges in the decree suit itself. The Supreme Court rejected the collateral attack doctrine in 1989 in *Martin v. Wilks*,⁵ according majority employees carte blanche to challenge affirmative action consent decrees. Congress's 1990 attempt⁶ to overrule *Wilks* legislatively met with a presidential veto.⁷ In 1991, however, Congress successfully enacted legislation that partially overruled *Wilks*.⁸ As the

ment enforceable by the court's contempt power. See Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 326-27 (1988).

The Supreme Court has stated that "federal courts should act only after hearing 'a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests.'" Schwarzschild, *supra*, at 903 (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1967) (citing *United States v. Freuhauf*, 365 U.S. 146, 157 (1961))). Nevertheless, the federal courts today are deemed empowered to enter consent decrees arising precisely from the absence of controversy. *ITT Continental Baking Co.*, 420 U.S. at 243; *United States v. Swift & Co.*, 286 U.S. 106, 119 (1931).

2. This article speaks of "white" or "majority" employees to refer to any group that might file a challenge to actions taken pursuant to a consent decree. Such employees could, in fact, conceivably be members of a minority group not benefited by the decree.

3. The Supreme Court has recognized that such claims of "reverse discrimination" state causes of action under Title VII of the Civil Rights Act of 1964. See *McDonald v. Sante Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

4. The doctrine arguably is misnamed because a "collateral" attack often is thought of as an attack on a judgment by a party to the judgment. See *United States v. City of Chicago*, 870 F.2d 1256, 1262 (7th Cir. 1989). The majority challengers contemplated here are, by definition, not parties. Nevertheless, the term "collateral" does serve to emphasize the crucial distinction between separate suits brought to challenge a decree "collaterally" and direct challenges mounted by majority employers who have intervened in the decree suit itself.

5. 490 U.S. 755 (1989).

6. S. 2104, 101st Cong., 2d Sess. § 6 (1989); H.R. 4000, 101st Cong., 2d Sess. § 6 (1989) [hereinafter collectively cited as Civil Rights Act of 1990].

7. The number of votes garnered to override that veto fell just short of the required two-thirds majority. 136 CONG. REC. S. 16589 (daily ed. Oct. 24, 1990).

8. Section 108 of the 1991 Act provides:

Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had—

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

law now stands, then, the majority employees in our hypothetical probably are barred from bringing a subsequent reverse discrimination suit when they feel the effects of the consent decree that resolved the earlier case.⁹ Whether they *should* be barred from bringing such a suit is a complex question.

The tension between the need to allow collateral challenges and the need to immunize decrees from such challenges arises from the conflict between the goal of assuring that majority employees receive their day in court and the goal of assuring the finality of settlements that have been long and costly in the making. The bar, whether common law or statutory, diminishes the whites' day in court. It effectively relegates them to intervention in the original minority suit against the employer or forces them to rely on representation provided by a similarly situated person who did, in fact, present objections in the decree suit. This gives the white would-be plaintiffs legitimate cause for concern. Even if they have had an opportunity to intervene in the original suit, they are losing the right to pursue independently any valid claims they may have. On the other hand, proponents of the bar argue that both the judiciary and employment discrimination litigants would face very practical difficulties if majority employees could challenge consent decrees collaterally.

Most importantly, the prospect of collateral attacks significantly diminishes the incentive to settle. This is especially true for employers who expend resources to implement the required affirmative action, only to be forced then to litigate the decree's legality and perhaps dismantle any affirmative action undertaken. To the extent that the bar decreases settlement potential, it also burdens the courts, because settlements are by far the most common and efficient way to terminate employment discrimination suits. Diminishing settlement prospects also reduces the

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to—

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

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

Civil Rights Act of 1991, sec. 108, Pub. L. No. 102-166, 105 Stat. 1071, 1076-77 (Nov. 21, 1991) (to be codified at 42 U.S.C. § 2000e-2).

9. *Id.* The Act's effective date is November 21, 1991. *Id.* sec. 402, 105 Stat. at 1099.

sum total of affirmative action ultimately accomplished as a result of employment discrimination litigation because courts scrutinize affirmative action in a consent decree less closely than affirmative action contained in a court order following full adjudication.

Issues of how and when collateral attacks on consent decrees should be barred raise due process concerns, involve problems of judicial economy for already overburdened courts, and implicate the commitment to reducing employment discrimination through affirmative action. Therefore, resolving the problems that the collateral attack bar presents is important. This article undertakes that resolution.

Properly applied, the legislative bar can protect majority employees and, simultaneously, assure the finality of consent decrees. Although alternatives considered in the legislative process might have caused due process concerns, the bar finally enacted is free of constitutional infirmities.¹⁰ In particular, the legislative bar of suits by majority employees who have had notice and an opportunity to be heard and of people whose interests have been adequately represented adequately protects the interests of the bound absentees. This article therefore focuses more on proper implementation of the bar than on the propriety of the bar itself.

This article considers a major change in the legislation effectuated between the time the legislation was vetoed in 1990 and the time it was enacted in 1991. This change, deletion of a category of individuals to whom constitutionally adequate efforts at notice have been made, will have both positive and negative implications for the Act's effectiveness. On the positive side, the deletion virtually eliminates the potential that accomplishment of the Act's goals will be thwarted by lawsuits challenging the Act's constitutionality. The deletion effectively rids the Act of the only constitutionally troubling provision. On the negative side, the deletion leaves the door open to a vast number of challenges that would have been impermissible under the vetoed 1990 version. This article recommends mechanisms that, by partially closing the gap, will permit an expansive construction of the remaining categories of preclusion to compensate for the deletion.

This article also considers the structure of litigation in which the bar may operate. Specifically, the article proposes three ways in which courts should adjust decision making in light of the bar adopted. It argues that judges should rarely use Rule 19 of the *Federal Rules of Civil Procedure*—requiring parties to join additional "necessary parties"—in original suits. Courts should, by contrast, apply Rule 24 liberally to permit majority employee intervention in such cases. Courts also should scrutinize proposed consent decrees more closely than in the past and, in

10. A bar, proposed but ultimately rejected, relied on adequacy of efforts to notify majority employees, even though those bound would receive no actual notice. This bar might have been sufficiently protective if courts had implemented proper precautionary measures.

the course of that scrutiny, should apply standards that have been established in cases of postentry review.

II. JUDICIAL GROUNDWORK FOR CONGRESSIONAL ENACTMENT OF THE COLLATERAL ATTACK BAR

Two judicial trends precipitated Congress's enactment of the 1991 Civil Rights Act's section 108, which bars collateral challenges to consent decrees. One trend was the development among lower federal courts of a common law doctrine barring such challenges. The other was a countervailing trend in the Supreme Court to shift protections from minority victims of discrimination to majority employees who might be injured by consent decrees to which the majority employees were not party.

A. *The Judicially-Created Impermissible Collateral Attack Doctrine*

At its inception, the bar against attacks on consent decrees was a creature of the common law. By 1988, most federal circuits had rejected attempts by majority employees to use "reverse discrimination" suits to attack consent decrees settling earlier employment discrimination suits.¹¹ The courts rejecting these suits characterized the suits as "impermissible collateral attacks."¹² Instead of allowing such independent law suits, courts limited the majority employees to pressing their challenges as intervenors in the original suit that produced the consent decree.¹³

Courts differed on a number of the doctrine's elements. Some courts imposed an absolute bar on all lawsuits that challenged action taken pur-

11. See *Ashley v. City of Jackson*, 464 U.S. 900, 902 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from denial of certiorari); *Marino v. Ortiz*, 806 F.2d 1144, 1146 (2d Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 301 (1988); *Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 558 (6th Cir. 1982), *rev'd on other grounds sub nom. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); Mark E. Recktenwald, Comment, *Collateral Attacks on Employment Discrimination Consent Decrees*, 53 U. CHI. L. REV. 147, 172 (1986). See generally *Kramer*, *supra* note 1. Some courts and commentators questioned whether the doctrine should apply to judgments as well as to consent decrees. One view was that judgments could be applied more fairly to bind nonparties because judgments result from adjudication, whereas consent decrees merely result from private contractual agreements. *Ashley*, 464 U.S. at 902. Another view was that the congressional preference for Title VII settlements spawned the impermissible collateral attack doctrine, see *Thaggard v. City of Jackson*, 687 F.2d 66, 69 (5th Cir. 1982), *cert. denied*, 464 U.S. 900 (1983), so that it logically should not extend to judgments. It also has been argued that, if the preference for settlement was the only ground for the doctrine, then the doctrine was an unfounded and improper piece of judicial legislation. *Kramer*, *supra* note 1, at 335, 339.

12. *Marino*, 806 F.2d 1144; *Devereaux v. Geary*, 765 F.2d 268 (1st Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986); *Thaggard*, 687 F.2d at 69; *Stotts*, 679 F.2d 541; *Dennison v. City of Los Angeles Dep't of Water & Power*, 658 F.2d 694 (9th Cir. 1981); *Society Hill Civic Ass'n v. Harris*, 632 F.2d 1045 (3d Cir. 1980); *Burns v. Board of School Comm'rs*, 437 F.2d 1143 (7th Cir. 1971). The Eleventh Circuit, however, persisted in allowing white employees to bring collateral attacks against affirmative action consent decrees when it had occasion to consider the issue in the case of *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987), known in its Supreme Court posture as *Martin v. Wilks*.

13. By limiting the majority employees, the courts superimposed on the majority employees' right to challenge the time limitations contained in Rule 24 of the *Federal Rules of Civil Procedure*, pertaining to intervention. *Kramer*, *supra* note 1, at 332.

suant to a decree,¹⁴ whereas others barred only challengers who had had an opportunity to intervene in the original suit.¹⁵ Some courts barred only those seeking modification of the decree, whereas others forbade any collateral suit, whether seeking to affect the decree's terms or simply seeking damages for injuries resulting from implementation of the decree.¹⁶

The common law bar did not wholly eliminate challenges to consent decrees, but simply restricted the form and timing of those challenges. It barred only challenges raised in suits collateral to the original minority law suit, leaving the majority employees free to intervene in the original suit and to raise their challenges there.¹⁷ Thus, the bar did not necessarily deprive majority employees of their day in court, but instead limited the timing and venue of their challenge.

The courts adopted the collateral attack doctrine in order to further the goal of finality,¹⁸ to avoid inconsistent judgments,¹⁹ and to encourage consent decree resolutions to litigation.²⁰ The special need to bind non-party majority employees by precluding their challenges to consent decrees grew out of the very nature of consent decrees and of the discrimination suits that they resolve.²¹ Settlement of this type of case is very likely to give rise to third-party challenges; third-party challenges can, in turn, be particularly devastating for the parties in this type of case.

14. *Thaggard*, 687 F.2d at 69.

15. Observers and courts disagree on whether foregoing an opportunity to intervene in the original suit was a prerequisite to the doctrine's application. Compare *Martin v. Wilks*, 490 U.S. 755, 762-66 (1989) and *Kramer*, *supra* note 1, at 322 (suggesting opportunity to intervene is a prerequisite) with U.S. COMM'N ON CIVIL RIGHTS, REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS ON THE CIVIL RIGHTS ACT OF 1990 58 (July 1990) (suggesting bar was absolute regardless of opportunity to intervene). Chief Justice Rehnquist, in *Wilks*, treated the doctrine as barring only those employees who had had an opportunity to intervene. *Wilks*, 490 U.S. at 762-66; see also *Marino*, 806 F.2d at 1146; *Dennison*, 658 F.2d at 696; *Prate v. Freedman*, 430 F. Supp. 1373, 1375 (W.D.N.Y.), *aff'd sub nom. Zavaglia v. Freedman*, 573 F.2d 1300 (2d Cir. 1977). Commentators have questioned the constitutionality of binding those who have not had such an opportunity. See, e.g., *Recktenwald*, *supra* note 11, at 163-64.

16. See *Dennison*, 658 F.2d at 694-95; *Kramer*, *supra* note 1, at 333.

17. For the sake of consistency of judgments, it is crucial that challenges do take place in the decree suit, rather than in an independent suit. The court in the decree suit can modify the decree to obviate any legal infirmity the majority employees have disclosed, whereas a court managing a separate lawsuit could do little more than order the employer to violate the decree or pay damages to the majority employees—not always an adequate remedy. See *United States v. City of Chicago*, 870 F.2d 1256, 1262 (7th Cir. 1989).

18. *Marino*, 806 F.2d at 1146; *Thaggard*, 687 F.2d at 69. The doctrine did not infringe upon the right of parties and absentees to seek modification of consent decrees pursuant to changed conditions. See *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932).

19. *Marino*, 806 F.2d at 1146.

20. *In re Birmingham Reverse Discrimination Employment Litig.*, 833 F.2d 1492, 1498 (11th Cir. 1987); *Marino*, 806 F.2d at 1146; *Thaggard*, 687 F.2d at 69. Courts have recognized a strong preference for voluntary settlement of Title VII cases. See *Firefighters v. Cleveland*, 478 U.S. 501, 515 (1986); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *Thaggard*, 687 F.2d at 69; see also *Schwarzschild*, *supra* note 1, at 894-95; *Recktenwald*, *supra* note 11, at 148-51.

21. See Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. CHI. LEGAL F. 103, 105-10.

Any time affirmative action comes into play, there is a chance that majority employees will be disadvantaged: affirmative action plans often take away from the majority whatever advantages the plans are reserving for the minority.²² Reverse discrimination lawsuits, therefore, are always a possibility.²³ At the same time, much employment discrimination litigation entails broad institutional challenges, resulting in affirmative action plans that are, in turn, also broad and institutionwide. Implementation of such plans involves tremendous institutional adjustment and expense.²⁴ Thus, when the majority employees bring a suit to challenge a plan so costly to put into place, courts and employers—to say nothing of the benefited minorities—may have good reason to balk at the idea of having to dismantle their affirmative action handiwork.

These considerations explain why a majority of circuit courts approved the impermissible collateral attack doctrine. The same considerations did not persuade the Supreme Court, however, which invalidated the doctrine in 1989 in *Martin v. Wilks*. In that case, the Court held that majority employees indeed may bring a subsequent collateral suit to challenge an affirmative action consent decree.²⁵

B. *Martin v. Wilks*

In *Martin v. Wilks*, minority employees of the city of Birmingham, Alabama, brought suit against Birmingham, alleging Title VII violations with respect to that city's hiring and promotion practices.²⁶ To resolve this litigation, the parties proposed two consent decrees, each including affirmative action goals for the hiring and promotion of black firefighters. The district court scheduled fairness hearings²⁷ and gave public notice regarding the consent decrees. At the fairness hearings, the Birmingham Firefighters Association (BFA), a union that was not a party to the suit, filed objections to the decrees. After the conclusion of the hearings, but before approval of the decrees, the BFA and two individual firefighters moved to intervene, contending that the decrees would affect their rights adversely. The district court rejected these motions as untimely²⁸ and gave final approval of the decrees. Additional firefighters subsequently sued for preliminary injunctive relief to forestall implementation of the

22. See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398-99 (1982).

23. It is, by now, well established that Title VII permits race discrimination suits by whites. See *McDonald v. Sante Fe Trail Transp. Co.*, 427 U.S. 273, 286-87 (1976).

24. See, e.g., Cindy Vreeland, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHI. L. REV. 279, 280 (1990) (citing William Burnham, *Aspirational and Existential Interests of Social Reform Organizations: A New Role for the Ideological Plaintiff*, 20 HARV. C.R.-C.L. L. REV. 153, 153 (1985)).

25. *Martin v. Wilks*, 490 U.S. 755, 762-63 (1989).

26. The Jefferson County Personnel Board was joined as a defendant. *Id.* at 758. The joint defendants are hereinafter referred to as "the City."

27. See *infra* notes 214-70 and accompanying text for a discussion of the role of the fairness hearing in courts' consideration of consent decrees.

28. See discussion *infra* notes 123-65 and accompanying text (intervention timeliness requirements).

consent decrees, but the district court denied the relief requested.²⁹

After the Eleventh Circuit affirmed these rulings, several white employees, including Robert Wilks, brought a separate reverse discrimination suit against the city, claiming that the consent decrees discriminated against them in violation of federal law.³⁰ The district court rejected these arguments, applying what was in essence the impermissible collateral attack doctrine. Although the city admitted making race-conscious decisions, the district court ruled that the consent decrees were an absolute defense to the white employees' challenges as long as the consent decrees truly required the city's actions.³¹ The trial court found that the decrees indeed did require the city's actions and dismissed the majority employees' suit. The Eleventh Circuit reversed, holding that the consent decrees did not preclude Wilks's claim because he was neither a party to the suit in which the decrees were entered nor in privity with a party to that suit. Rejecting the impermissible collateral attack doctrine, the court of appeals concluded that the public policy encouraging voluntary affirmative action programs had to "yield to the policy against requiring third parties to submit to bargains in which their interests were either ignored or sacrificed."³²

The Supreme Court affirmed the Eleventh Circuit. Like the Eleventh Circuit, the Supreme Court rejected the collateral attack doctrine, finding that it impermissibly bound nonparties to the suit.³³ Writing for the Court,³⁴ Chief Justice Rehnquist specifically rejected what he called the "linchpin" of the doctrine: the idea that, by failing to intervene in the first suit, the white employees had rendered themselves bound by the consent decree.³⁵ Instead, Chief Justice Rehnquist wrote, in cases in which the minority employees hope to bind absentees, such as the whites there in question, the absentees do not have the burden of seeking intervention in the original suit.³⁶ Rather, those already parties to the suit

29. Both the two individual firefighters who protested at the fairness hearing and these plaintiffs in the second suit were members of the Birmingham Firefighters Association.

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

31. *Id.* at 1496-97. The primary issue in an intentional race discrimination suit is whether the employment decision at issue was based on race, rather than on some other factor. See *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 664-65 (1987). This issue clearly had to be resolved in favor of the majority employees in *Wilks* because it was entirely due to the employees' races that some were advantaged and some disadvantaged by the affirmative action plan. The court treated the affirmative action plan as an affirmative defense, available to a defendant who admittedly had discriminated. The Court then held a trial to resolve the issue of whether the decrees required the City's actions.

32. *Birmingham*, 833 F.2d at 1498.

33. This *res judicata* aspect of the court's opinion actually forms only a very small part of the court's rationale. Assessing to what extent *res judicata* principles are intended to form a major premise of the opinion is difficult. In this brief part of his opinion, Chief Justice Rehnquist did echo the position he had taken in *Ashley v. City of Jackson*, 464 U.S. 900 (1983), in which he argued that the collateral attack doctrine violated due process. See *id.* at 901-02.

34. Justices White, O'Connor, Scalia, and Kennedy joined in Chief Justice Rehnquist's opinion. Justices Brennan, Marshall, and Blackmun joined in Justice Stevens's dissenting opinion.

35. *Martin v. Wilks*, 490 U.S. 755, 765 (1989).

36. Part of Chief Justice Rehnquist's rationale on this point was that those present in the suit

must invoke Rule 19 of the *Federal Rules of Civil Procedure* to obtain joinder of the absentees as necessary parties.³⁷

There is a certain irony to the *Wilks* rationale. In the process of striking down the collateral attack bar, the opinion suggests that joinder under Rule 19 will accomplish the ends previously achieved by the impermissible collateral attack doctrine's mandatory intervention system. Yet, Rule 19 does not achieve that doctrine's objectives of finality and completeness of judgments in cases such as *Wilks*, where the minorities' suit ends in a consent decree. On the contrary, even if the majority employees in *Wilks* had been joined under Rule 19, as the Chief Justice's opinion advocates, they would not have been bound by any resultant consent decree³⁸ because of the Supreme Court's 1986 holding in *Local 93, International Association of Firefighters v. City of Cleveland* (hereinafter *Firefighters*).³⁹

C. Firefighters v. City of Cleveland

The import of *Wilks* can be understood only in the light of *Firefighters*. *Firefighters* places *Wilks* in important historical context, for *Firefighters* thematically foreshadows the *Wilks* decision. *Firefighters*, in effect, demonstrates that *Wilks* forms part of a trend in Supreme Court doctrine and is not an isolated event.

In *Firefighters*, majority employees successfully intervened in a suit

are in a better position to predict likely consequences of the suit, and thus to know whose interests are most likely to be affected. *Id.* It has been argued in response to this position that, if indeed the parties are in a position to know better than the absentees whose interests will be affected, then the parties may supply the benefit of that knowledge by being required to provide notice to the absentees, rather than by having to join them. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 15, at 61.

37. *Wilks*, 490 U.S. at 765. Chief Justice Rehnquist wrote: "Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree." *Id.* The Court found the mandatory intervention aspect of the impermissible collateral attack doctrine to be inconsistent with the *Federal Rules of Civil Procedure* scheme, which permits, but does not require, intervention. *Id.* at 765-66. As is discussed *infra* at note 166, Rule 19 envisions two categories of absentees who must be joined: "necessary" and "indispensable" parties. One does not always know (at what is usually thought of as the joinder stage of litigation) whether a case will be resolved by consent decree or by trial. Because Rule 19 is available as a joinder mechanism up until, and even during, trial, thinking about cases as "consent decree cases" for purposes of this joinder mechanism is possible. See FED. R. CIV. P. 19 advisory committee's notes, 1966 amends.

38. Of course, the majority employees would not be bound if joined as intervenors either. The difference between intervention and Rule 19 in this context lies in what results if there is a *failure* to join the majority employees under the two regimes. Under the impermissible collateral attack doctrine, if the majority employees fail to intervene, they are bound. Under the Rule 19 joinder rule, the parties' failure to join the majority employees renders those employees *not* bound by the consent decree. Chief Justice Rehnquist's decision does not propose to decide what result application of the Rule 19 criteria should yield. Rather, he decides only that the parties to the case bear the burden of seeking the absentees' joinder. But see George M. Strickler, *Martin v. Wilks*, 64 TUL. L. REV. 1557, 1605 (1990). The decree would bind these joined majority employees only if they decided they wanted to be bound by the decree and actually joined in requesting the decree. There is often no reason to believe that majority employees with nothing to gain would gratuitously relinquish their employment rights by joining in a consent decree.

39. 478 U.S. 501 (1986).

brought by minority employees charging Title VII violations.⁴⁰ When the minority employees and their employer repeatedly sought to resolve their dispute with a consent decree, the intervenors adamantly objected to the court's entry of the decree.⁴¹ The trial court became extensively involved in the settlement process. The court held two fairness hearings, proposed its own alternative plans, and sponsored extensive negotiations by the parties under the supervision of a federal magistrate.⁴² The intervenors persisted in their objections, however, and, when the court entered the decree over those objections, appealed entry of the decree.⁴³

The intervenors based their appeal in large part on the argument that the trial court was without power to enter the decree over the intervenors' objections.⁴⁴ On this issue, the Supreme Court affirmed the lower court's holding: the intervenors were powerless to prevent the district court from entering an affirmative action consent decree agreed to by the other two parties in the case.⁴⁵ By the same token, however, the Court stated that the consent decree entered by the district court could not dispose of the nonconsenting intervenors' claims that the decree was unlawful.⁴⁶ The majority employees could not be bound by the decree, and their claims remained to be litigated fully. *Firefighters* thus established a theme and premise upon which the Court acted again in *Wilks* two years later: the interests of finality and certainty in the consent decree context

40. *Id.*

41. *Id.* at 509.

42. *Id.* at 508-11.

43. The majority employees' primary objection centered on the fact that the court's *approval* of that agreement—in the form of a decree—would have had the effect of ordering relief to nonvictims of discrimination. The majority employees argued that award of relief to nonvictims would violate § 706(g) of Title VII. *Id.* at 513-14. Section 706(g) forbids courts from ordering reinstatement and other relief if the adverse employment action is due to something other than discrimination. On the same day the Court decided *Firefighters*, but in a different case, the Supreme Court rejected the premise that courts may never award Title VII relief that benefits individuals who were not actual victims of discrimination. *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986). The Court did not need to decide whether *Firefighters* was an appropriate case for the award of such relief, however, because it found that a consent decree does not constitute an "order" for purposes of § 706(g). *Firefighters*, 478 U.S. at 521. In order to conclude that a consent decree is not a § 706(g) order, the Court had to consider how consent decrees differ from adjudicated orders in the Title VII context. Most importantly, the Court found that consent decrees are voluntary and § 706(g) orders are coercive. *Id.* at 519-23. The Court found that whatever limits § 706(g) imposes on affirmative relief are entirely inapplicable to consent decrees. The decision in *Firefighters* signifies that a federal court may enter an affirmative action consent decree regardless of the fact that the same court would be powerless under Title VII to order the particular affirmative action upon adjudication of the Title VII claim.

44. *Id.* at 528.

45. *Id.* at 529 (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392, 400 (1982); *Kirkland v. New York State Dep't of Correctional Serv.*, 711 F.2d 1117, 1126 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984)). The intervenors, of course, might have *persuaded* the Court that it should not enter the decree. They, in fact, attempted to do so at the fairness hearing, but failed. Once they had failed in their efforts to persuade the Court, the intervenors could not then assert a veto power over the entry of the decree despite that failure.

46. *Id.* The Court expressed the view, however, that it may have been too late, by the time the case reached the Supreme Court, for the whites to raise any substantive challenges to the decree. This view must have depended largely on the fact that the intervenors failed to assert any claim or defense in their "Complaint of Applicant for Intervention." *Id.* at 507.

must bow to the interests of majority employees in having their day in court.⁴⁷ The demise of the impermissible collateral attack doctrine in *Wilks* came as no surprise, for in *Firefighters* the Court already had made inroads into the doctrine. In *Firefighters*, the majority employees protected from preclusion by the Court were actual parties to the suit, for they had intervened and thus had some opportunity to present their views.⁴⁸ If the Supreme Court was unwilling to bind those present in the *Firefighters* suit, who had an opportunity to be heard, it was even less likely that they would bind the *Wilks* absentees, who had not even joined in the first suit.

Moreover, *Firefighters* makes it clear that the *Wilks* Rule 19 solution is a hollow one. Because of *Firefighters*, joinder of the majority employees in *Wilks* could not have supplanted the impermissible collateral attack doctrine as a way to achieve finality of the *Wilks* decrees.⁴⁹ Even after these majority employees had been joined, they would have remained free, under *Firefighters*, to reject any decree proposed by the principal parties to the case. Having rejected such proposals, the joined majority employees would have remained free under *Firefighters* to litigate in that or a subsequent suit their claim that the adopted consent decree was unlawful.⁵⁰

Because of *Firefighters*, then, joinder of the majority employees under Rule 19 does not solve the problem.⁵¹ No joinder provision can bind majority employees to a consent decree to which they do not consent. Rule 19 thus could not solve the finality problems that previously had been solved by a doctrine which—rightly or wrongly—bound all those who had *failed to intervene* in the case.

III. A STATUTORY BAR TO UNRAVEL *WILKS* AND *FIREFIGHTERS*

A. Section 108

Like so many of the Supreme Court's civil rights decisions of the past decade, the *Wilks* and *Firefighters* cases met with a chilly reception

47. *Firefighters* also presented general guidelines for when courts presented with proposed consent decrees may enter them as court decrees. Such decrees must:

- 1) "spring from and serve to resolve a dispute within the court's subject-matter jurisdiction";
- 2) fall "within the general scope of the case made by the pleadings"; and
- 3) "further the objectives of the law upon which the complaint was based."

Id. at 525 (quoting *Pacific R.R. v. Ketchum*, 101 U.S. 289, 297 (1880) and citing *EEOC v. Safeway Stores, Inc.*, 611 F.2d 795, 799 (10th Cir. 1979), *cert. denied*, 446 U.S. 952 (1980)).

48. See discussion *infra* note 162 and accompanying text (limited intervention).

49. The Court in *Wilks* acknowledged at the end of its opinion that *Firefighters* precludes binding those who do not join in consent decrees. *Martin v. Wilks*, 490 U.S. 755, 768 (1989).

50. Built-in protection against collateral challenges sometimes exists in such cases because some courts retain jurisdiction over consent decrees by orders requiring that all parties' challenges to the decree be brought to that court. Intervenor thus may be forced to litigate their claims in the original suit, rather than in an independent reverse discrimination suit. Principles of *res judicata*, moreover, might require that the intervenor raise its claim in the original suit or lose it.

51. Intervention, of course, would not bind the unconsenting absentees to the terms of the decree either. Only their failure to seek intervention would bind them.

in Congress. In both the 101st and 102d Congresses, Congress responded with legislation. In the vetoed Civil Rights Act of 1990,⁵² Congress made its first attempt to reactivate the employment rights recently curtailed by the Supreme Court. Congress sought in section 6 of the 1990 Act to revive the impermissible collateral attack doctrine by enacting it as statutory law.⁵³ Following a veto of the 1990 Act, Congress succeeded, in the Civil Rights Act of 1991, in overruling *Wilks* legislatively. The 1991 version of the legislation is similar, but not identical, to the pertinent provision in the 1990 version.⁵⁴

Section 108 of the 1991 Act bars two categories of employees from bringing separate reverse-discrimination suits to challenge affirmative action plans arising out of employment discrimination cases:

Category 1 bars those with sufficient notice and an opportunity to object at the time the decree or judgment was entered; and

Category 2 bars those whose interests were sufficiently represented in the original suit by a person who challenged the decree or judgment.⁵⁵

By barring collateral attacks, section 108 amounts to a complete reversal of the *Wilks* case. For those courts that, prior to *Wilks*, would

52. Civil Rights Act of 1990, *supra* note 6. Section 6 of the vetoed bill reads:

(1) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements a litigated or consent judgment or order resolving a claim of employment discrimination under the United States Constitution or Federal civil rights laws may not be challenged in a claim under the United States Constitution or Federal civil rights laws—

(A) by a person who, prior to the entry of such judgement or order, had—

(i) notice from any source of the proposed judgment or order sufficient to apprise such person that such judgment or order might affect the interests of such person; and

(ii) a reasonable opportunity to present objections to such judgment or order;

(B) by a person with respect to whom the requirements of subparagraph (A) are not satisfied, if the court determines that the interests of such person were adequately represented by another person who challenged such judgment or order prior to or after the entry of such judgment or order; or

(C) if the court that entered the judgment or order determines that reasonable efforts were made to provide notice to interested persons.

53. As an amendment to Title VII of the Civil Rights Act of 1964, the statutory rescission of *Wilks* (both the 1990 attempt and the 1991 enactment) revises the bar only in the employment discrimination context. It does not affect the broader implications of *Martin v. Wilks* for institutional-reform litigation outside the Title VII context. See Strickler, *supra* note 38, at 1605.

54. Compare Civil Rights Act of 1990, *supra* note 6 (binding those persons without actual notice when court found reasonable efforts to give notice had been made) with Pub. L. No. 102-166, sec. 108, 105 Stat. 1071, 1076-77 (Nov. 21, 1991) (to be codified at 42 U.S.C. § 2000e-2) (omitting the bar of persons without actual notice).

55. A third category under the 1990 Act would have included those without actual notice of the suit if the court determined before entering the decree or judgment that reasonable efforts had been made to give notice to interested people.

(C) if the court that entered the judgment or order determines that reasonable efforts were made to provide notice to interested persons. A determination under subparagraph (C) shall be made prior to the entry of the judgment or order, except that if the judgment or order was entered prior to the date of the enactment of this subsection, the determination may be made at any reasonable time.

With regard to this third category, the 1990 Act stated without specifying procedures, that the notice should be consistent with the "constitutional requirements" of due process. Civil Rights Act of 1990, *supra* note 6.

have barred only majority employees who had declined an opportunity to intervene,⁵⁶ section 108 expands the doctrine. Under section 108, employees who received no notice of the original suit, and thus had no opportunity to intervene, but whose interests were adequately represented by people in the first suit are barred under Category 2.⁵⁷

The Act also expands the bar to judgments, in addition to consent decrees. Section 108 states that "an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged" by the two categories of potential plaintiffs described above. Thus, employees cannot collaterally challenge any employment practice put in place as a result of litigation, whether the practice was agreed to in a consent decree or ordered by the court pursuant to a trial. The expansion of the doctrine to encompass judgments may have no effect on analysis of the doctrine's constitutionality. In his dissent to denial of certiorari in *Ashley v. City of Jackson*, then Associate Justice Rehnquist suggested that binding an absentee by a judgment is less harmful than binding by a decree, because the former is at least based upon objective adjudication by the court, while the latter "is little more than a contract between the parties."⁵⁸

There is reason to believe that section 108 would pass muster with the Chief Justice, who drafted the *Wilks* opinion, in which the common law version of the bar failed. The *Wilks* decision rested principally upon an apparent conflict between the collateral attack bar and the *Federal Rules of Civil Procedure*, rather than upon any conflict between the bar and the Due Process Clause. Although the Chief Justice began the *Wilks* discussion with a due process reference, he devoted most of his opinion to arguing that the impermissible collateral attack doctrine was inconsistent with *Federal Rule of Civil Procedure* 24, governing intervention, because the judicial doctrine required intervention, whereas the rule rendered intervention voluntary.⁵⁹ In fact, because the *Wilks* opinion actually finds significance in the absence of a legislative scheme to bind absentees, the opinion appears to invite the adoption of such a scheme in this context. Yet, the absence of any thorough due process analysis of the bar in *Wilks* leaves open the threat that the Supreme Court is reserving its due process arsenal for review of the statutory bar that was likely to be, and has now been, enacted in the wake of *Wilks*.⁶⁰ If the Court had fully addressed due process problems in the judicial bar, Congress

56. See *supra* notes 14-16 and accompanying text.

57. In addition, majority employees who received no notice and whose interests were not represented are barred under Category 3 as long as constitutionally sufficient, albeit unsuccessful, efforts at notice had been made.

58. *Ashley v. City of Jackson*, 464 U.S. 900, 902 (1983) (Rehnquist, J., dissenting).

59. See *Martin v. Wilks*, 490 U.S. 755, 763-67 (1989).

60. Chief Justice Rehnquist, in proffering the idea that a legislatively enacted bar would comport with the *Federal Rules of Civil Procedure*, cautioned that such a legislative scheme would come under the Court's due process scrutiny. *Wilks*, 490 U.S. at 762 n.2. The issue received more thor-

might have tailored any responsive legislation to avoid the identified due process pitfalls. As it is, the Supreme Court left itself a broad berth in this area when it decided *Wilks*.

B. *The Statutory Bar's Constitutionality*

If the statutory bar is unconstitutional, it is because those who were neither parties to a lawsuit nor in privity with the parties to the suit cannot as a rule be bound by the resulting judgment consistently with due process.⁶¹ There are, however, notable exceptions to this fundamental res judicata principle.⁶² These exceptions come into play when factors other than the nonparties' presence and participation in the lawsuit assuage due process concerns and when interests in finality surmount the interest in guarding against any remaining threats to due process.⁶³ Of the exceptions recognized at common law, the one relevant here is the exception for absentees who were adequately represented by a party.⁶⁴

ough treatment in Justice Rehnquist's 1983 opinion dissenting from denial of certiorari in *Ashley*, 464 U.S. at 900 (Rehnquist, J., dissenting).

61. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979); see also *Mann v. City of Albany*, 883 F.2d 999, 1003 (11th Cir. 1989); *United States v. City of Chicago*, 870 F.2d 1256, 1260 (7th Cir. 1989) (citing *Kalb v. Feuerstein*, 308 U.S. 433, 438 (1940)); *Insurance Co. of North Am. v. Bay*, 784 F.2d 869, 873 (8th Cir. 1986); *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 738 F.2d 209, 213 (7th Cir. 1984). Res judicata—consisting of claim preclusion and issue preclusion—does preclude those who are parties to the consent decree from challenging the decree. *Firefighters v. City of Cleveland*, 478 U.S. 501, 522 (1986); *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971). As a general principle, "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Wilks*, 490 U.S. at 761 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)); see, e.g., *Parklane Hosiery Co.*, 439 U.S. at 327 n.7. The crucial underpinning for the Court's decision in *Wilks* was that "a judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Wilks*, 490 U.S. at 762. This principle derives from the due process requirement that a person subjected to a threat of loss be given notice of the case against him and a meaningful opportunity to present his position. See *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goss v. Lopez*, 419 U.S. 565 (1975).

62. Sometimes due process is deemed satisfied even when the minimums of notice and opportunity to be heard are not met. "Because protection of this opportunity [to litigate] is a matter of Constitutional right, [see, e.g., *Blonder-Tongue Lab., Inc. v. University of Ill. Found.*, 402 U.S. 313 (1971); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), *rev'd*, 401 U.S. 321 (1971)], the exceptions to the general rule are carefully defined." FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., *CIVIL PROCEDURE* § 11.22, at 629 (3d ed. 1985). See *infra* note 64 for a listing of these exceptions.

63. See *Thaggard v. City of Jackson*, 687 F.2d 66, 69 (5th Cir. 1982), *cert. denied*, 464 U.S. 1003 (1983).

64. The common law recognizes three broad categories of persons who are excepted from the rule against binding absentees. The first category consists of those who have been represented by a party to the suit. This exception "has its roots in a few limited classes of relationships, involving, for example, '[t]rustees, executors, statutory representatives in death and survival actions, and guardians.'" 18 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4448, at 408 (2d ed. 1987). The Court has extended this category of exceptions to apply to class actions, see *Hansberry v. Lee*, 311 U.S. 32 (1940), and litigation undertaken by collective bargaining representatives. See *RESTATEMENT (SECOND) OF JUDGMENTS* § 61, at 117-18 (1980). The second category encompasses those standing in a legal relationship with a party such that it is fair to bind the absentee. *Id.* § 62, at 125. This category includes those in privity with a party. The third category of nonparties who may be bound includes nonparties who controlled a party's conduct in the original litigation to such an extent that it is fair to treat the nonparty as if he had been a party. 18 WRIGHT ET AL.,

The inquiry with respect to the section 108 bar is whether it fits within this exception to due process limitations on preclusion. It might be asked at the outset why due process protections are even necessary when courts preclude white employees from challenging consent decrees. The argument has been made that what is happening here is not truly "preclusion" anyway. Rather, it is argued, a judgment or decree can have a practical effect on one's interests without having a *res judicata* effect on any legal claim.⁶⁵ This was, in fact, one of the premises underlying Justice Stevens's dissent in *Martin v. Wilks*. Justice Stevens concluded that no *res judicata* effect was occurring in *Wilks* because there was only an *indirect* effect on the interests of majority employees.⁶⁶ Justice Stevens

supra, § 4451, at 427-28. Only the first of these three exceptions (encompassing those whose interests were adequately represented in the original suit) is relevant to sec. 108, and then only relevant to Category 2. In addition, courts make exceptions for certain absentees as to whom "reasonable" efforts at notice have been made under the *Mullane v. Central Hanover Trust* principle. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (notice by publication to unknown beneficiaries is sufficient).

65. *JAMES & HAZARD, supra* note 62, § 11.22, at 630. This means that absentees, though not legally bound by the consent decree, may be affected by the decree by, for example, practical changes at the workplace that may have the effect of eliminating or altering their prospects for promotions, hiring, pay raises, etc. In his dissent in *Wilks*, Justice Stevens made reference to the "practical effect" of judgments, stating, "[t]he fact that one of the effects of a decree is to curtail the job opportunities of nonparties does not mean that the nonparties have been deprived of legal rights or that they have standing to appeal from that [consent] decree without becoming parties." *Martin v. Wilks*, 490 U.S. 755, 771 (1989) (Stevens, J., dissenting). These effects on the nonparty are not the result of *res judicata* rules as such. They are the result of the fact that a judgment not only determines issues and claims but also may redefine the relationships of the parties to the litigation with respect to each other, with respect to property, and with respect to their future courses of conduct. It is suggested that the judgment thus operates much like a privately negotiated contract or conveyance as far as nonparties are concerned. *JAMES & HAZARD, supra* note 62, § 11.23, at 631.

The *Mullane* case discussed below, see *infra* notes 79-82 and accompanying text, actually distinguishes between those who are named parties to the suit, thus requiring personal notice, and those whose interests are impaired though they are not named as parties. The level of notice required for these two categories may differ, but both groups deserve some protection under the Due Process Clause.

66. Justice Stevens states that the decree does not bind absentees but only affects them, and draws analogy to the issuance of a valid search warrant serving as evidence of good faith. Thus, Justice Stevens equates the decree's effect in the *Wilks* case to a "good faith" argument. In fact, however, all the "good faith" in the world will not excuse an employer who is choosing people for promotions based on their races. The very fact that race is the characteristic used to select a promotee is enough to amount to a Title VII violation. And the presence of benign motives normally will not take such an employer decision outside the reach of Title VII. 42 U.S.C. § 2000 (1988). See *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987). Defenses are available to employers who are caught basing decisions on race, but "good faith" is not one of them. Nevertheless, Justice Stevens writes that what matters here is that the employer had good reason for its decision—the consent decree. To have a "good reason" in the disparate treatment context means to have a reason *other* than race, not an excuse for using race as the reason.

Justice Stevens found that the true basis for the lower court's opinion was that the court had found the City guilty of discrimination, establishing the *Weber* predicates for affirmative action. At the close of the opinion, he actually wrote that, by virtue of the trial on discrimination issues, the whites had had their day in court. It is difficult to understand why this should make any difference. Even if the court had made a finding of fact that discrimination had occurred, that finding should not have any impact on an absentee who is bringing a suit that puts that fact at issue. Only if it is recognized that a collateral attack bar precludes the absentee's independent suit will the result of the first suit have an impact on the absentee's suit. The idea that one cannot attack a consent decree, Justice Stevens writes, was only an alternative holding: Justice Stevens writes that "[n]owhere in the

actually agreed with Chief Justice Rehnquist that it would not be permissible to bind an absentee in the *res judicata* sense, but argued that what was happening in *Wilks* was not preclusion. As discussed below, however, and despite Justice Stevens's protestations to the contrary, the effect of barring a subsequent majority suit is preclusive in nature, requiring due process protections.

Justice Stevens suggested that "[t]he fact that one of the effects of a decree is to curtail the job opportunities of nonparties does not mean that the nonparties have been deprived of legal rights."⁶⁷ This is correct because curtailment of majority employees' job opportunities is an inevitable and legitimate result of many affirmative action consent decrees.⁶⁸ What the majority employees sought to challenge in *Wilks*, however, was not the legitimate "curtailment of job opportunities," but rather an allegedly unlawful consent decree so violative of majority rights that the majority possessed a legal cause of action to challenge it. In Justice Stevens's view, the consent decree could serve as a complete defense to an action properly brought by majority employees to challenge the decree as unlawful.⁶⁹ If a decree can so thwart a subsequent majority employee suit, surely its effect must be termed "preclusive."⁷⁰ If a bar is required, then there must be a legal claim to bar. Barring those majority employees who possess causes of action constitutes real preclusion and an exception to the usual rule against precluding nonparties. Because the bar's effect is indeed preclusive, it must be encompassed in an exception⁷¹ to

District Court's lengthy findings of fact and conclusions of law is there a single word suggesting that respondents were bound by the consent decree." *Wilks*, 490 U.S. at 782 (Stevens, J., dissenting). The effect of the lower court's decision was to preclude challenges to actions taken under the decree, regardless of whether that was called "*res judicata*," "binding," or by some other designation.

67. *Wilks*, 490 U.S. at 771 (Stevens, J., dissenting). In cases in which the nonparty has a claim, the nonparty simply may bring the claim in a second suit and avoid the first judgment by asserting that *res judicata* cannot bind a nonparty. Only when the nonparty lacks an assertible claim, experiencing only a practical impairment of interest, is he limited, as Justice Stevens argues, to asserting fraud or lack of jurisdiction in challenging the decree. *Id.* at 771-72 (Stevens, J., dissenting); see JAMES & HAZARD, *supra* note 62, § 12.15, at 681. It has been argued that limitations on collateral attacks do not apply in these situations because "[a]n attack by a nonparty is not collateral; the nonparty did not have his day in court." *United States v. City of Chicago*, 870 F.2d 1256, 1262 (7th Cir. 1989); see also Kramer, *supra* note 1, at 332 (term "collateral attack" ordinarily refers to party's attempt to avoid judgment rendered against that party in different action).

68. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

69. In fact, the nonparty majority employees in *Wilks* and similar cases do have a colorable cause of action, which is to say the employees have alleged that their legal rights have been violated. Specifically, the majority employees would allege, for example, that the employer promoted Jones instead of Smith because Jones was black and Smith was white. This states a cause of action under Title VII and the Constitution. See *McDonald v. Santa Fe Trail Transp.*, 427 U.S. 273 (1976). In this context, then, the binding effect of the decree is not only practical, it is also legal.

70. George M. Strickler, Jr., in an article entitled "*Martin v. Wilks*," has reached a similar conclusion. Strickler, *supra* note 38, at 1575.

71. It may be argued that such exceptions to the rules of *res judicata* are strictly an area for legislative prerogative. The judicial collateral attack bar has been criticized as judicial legislating. See *Wilks*, 490 U.S. at 762 n.2 (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529-30 n.10 (1984)). It has also been argued that any scheme designed to bind absentees by giving them notice consistent with *Mullane* need not necessarily be enacted legislatively, but may instead be created as judicial doctrine. Strickler, *supra* note 38, at 1604-05. But see Kramer, *supra* note 1, at 335. In

the res judicata principle that protects the due process rights of those barred. Under such due process scrutiny, the preclusion in section 108 is straightforward and fair.⁷²

The first section 108 category embodies the old judicial collateral attack bar in its purest form. Notice has been given to the absentee majority employees in such a way that they have had a meaningful opportunity to intervene or otherwise present their objections.⁷³ Given that the bar here is limited to those afforded these protections, this portion of section 108 should easily pass constitutional muster.⁷⁴ The bar does not keep the majority employees from having their day in court, but only sets the date for their appearance. As one commentator has stated, "allowing a party to be heard on the merits only if he satisfies [the Rule 24 intervention] requirements does not deprive that party of due process" any more than imposition of a statute of limitations does.⁷⁵

The second section 108 category, which binds absentees whose interests were adequately represented by those present in the suit, reflects an area of constitutionally permissible preclusion under the Supreme Court case of *Hansberry v. Lee*.⁷⁶ Category 2 preclusion has the same effect as

Mullane, the reasonable notice attempts, which the Court deemed capable under due process of binding absentees, were made pursuant to statutory authorization. This factor may well have significance, for states' interests, expressed legislatively, have, over the years, played an increasing role in due process analysis in related areas. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984). But see *Shaffer v. Heitner*, 433 U.S. 186 (1977). Professor Strickler cites the case of *Hoffman-La Roche v. Sperling*, 493 U.S. 165 (1989), for the contrary proposition. Although it is true that the Supreme Court, in *Sperling*, upheld the power of federal courts to authorize notice to absent class members, *Sperling* was not a case in which a court sought to bind such absentees solely by virtue of the court-directed notice. *Id.* Thus, despite *Sperling*, fashioning a bar predicated upon *Mullane* notice may be beyond the power of the courts. The Supreme Court has struck down the judicial collateral attack bar as beyond the scope of permissible preclusion, so any judicial activity to recreate the bar would need to emanate from the Supreme Court.

72. The third category under the vetoed 1990 Act, persons without notice, but as to whom notice efforts were made, was more troubling, but courts could have construed it to achieve due process as well.

73. See *Marino v. Ortiz*, 806 F.2d 1144, 1146 (2d Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 301 (1988). The constitutionality of binding absentees based on their receipt of notice and an unexercised opportunity to intervene has been the subject of discussion by commentators. Charles J. Cooper, *The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process*, 1987 U. CHI. LEGAL F. 155, 171 (presuming consistency with due process by analogy to statutes of limitation); see also *Civil Rights Act of 1990: Hearings on S. 2104 Before the Senate Comm. on Labor and Human Resources*, 101st Cong., 2d Sess. 553-54 (1990) [hereinafter *Senate Hearings*] (statement of Prof. Laurence H. Tribe, Tyler Professor of Constitutional Law, Harvard University Law School).

74. "[T]here is no fundamental unfairness in precluding post-hoc challenges by individuals who had actual notice that their interests might be adversely affected and an opportunity to make those challenges at the time of the litigation." *Senate Hearings*, *supra* note 73, at 554 (statement of Prof. Laurence Tribe); see *Kramer*, *supra* note 1, at 340-41 (opportunity to intervene is constitutionally sufficient "opportunity to be heard").

75. *Kramer*, *supra* note 1, at 339. But see *Recktenwald*, *supra* note 11, at 179. "[T]he only prerequisite of estopping someone in this situation is the existence of procedures comporting with due process—that is actual notice and an opportunity to be heard." *Senate Hearings*, *supra* note 73, at 556 (statement of Prof. Laurence Tribe).

76. 311 U.S. 32 (1940). Courts already have treated adequate representation as an adequate ground to bar absentees from raising challenges to a decree. In *Bolden v. Pennsylvania State Police*,

that of Rules 23(b)(1) and 23(b)(2) of the *Federal Rules of Civil Procedure*, which bind absent, unnotified class members whose interests have been protected by a class representative. If these portions of Rule 23 are constitutional, then so is the Category 2 bar.⁷⁷ The courts have been deemed qualified to assess adequacy of representation in the Rule 23 context and should be equally competent in the section 108 context.⁷⁸

Drafters of the 1991 Act succeeded in ridding the legislation of a 1990 provision that most likely would have subjected the legislation to constitutional challenge. The third category of preclusion under the 1990 Act would have bound employees who neither received notice nor (presumably) were adequately represented, but as to whom adequate efforts at notice had been made. To read the category as it was written, however, to bind those who neither received notice nor were adequately represented, might have violated the constitutional principles set forth in *Mullane v. Central Hanover Bank & Trust*.⁷⁹

In *Mullane*, the Supreme Court set forth the constitutional standard for binding persons who had not received actual notice of a suit. The Court indicated that a "reasonable-under-the-circumstances" test should govern the notice issue. The *Mullane* Court went on to hold that notice by publication represented a constitutionally sufficient *effort* at notice even to bind unidentified absentees not actually reached by the notice in that case. So far, this sounds consistent with the Category 3 scenario. One part of the *Mullane* Court's rationale, however, was that a trustee had appeared in the suit on behalf of the unidentified absentees in that case and had adequately represented their interests.⁸⁰ Thus, the *Mullane*

578 F.2d 912 (3d Cir. 1978), the court looked at the question of whether some majority employees could intervene to challenge a consent decree. Separate suits already had been rejected as impermissible collateral challenges. *Id.* at 917. The court looked at the question of whether the absentees had been represented adequately separately from the Rule 24 issue of adequacy of representation. *Id.* at 918-19. The court apparently viewed the absentees as bound in the res judicata sense solely because their interests had been adequately represented. The fact that a party has

champion[ed] the position asserted by another in a subsequent action is a factor to consider in determining whether the later party is a privy of the earlier party, *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975), but this factor alone has never been considered sufficient to warrant denying the later party his day in court [under res judicata principles] . . .

Mann v. City of Albany, 883 F.2d 999, 1003 (11th Cir. 1989) (citing 18 WRIGHT ET AL., *supra* note 64, § 4457, at 495).

77. See *Senate Hearings*, *supra* note 73, at 558-59 (statement of Prof. Laurence Tribe).

78. See FED. R. CIV. P. 23 advisory committee's notes, 1966 amends.

79. 339 U.S. 306 (1950). *Mullane* concerned the constitutional sufficiency of notice given to trust beneficiaries in a case involving an accounting of trust assets. The Court held that what the reasonableness standard requires depends on the facts. Of the three categories of interest in the litigation, the Court held that

- 1) those whose names and addresses were known should be mailed notice, and not simply given notice by publication;
- 2) those whose names and addresses were not known could be notified by publication; and
- 3) those who could not be identified but who potentially were interested could be notified by publication—if even that was required.

Id. at 317-18.

80. *Id.* at 318-19.

test may require both that reasonable effort has been made to notify the absentees *and* that the interests of the absentees somehow have been protected in the original litigation.⁸¹

If Category 3's reference to "constitutional requirements" incorporated this construction of the *Mullane* standard, then Category 3 amounted to little more than a restatement and expansion of Category 2, which requires adequate representation of the absentees in order for them to be bound. If Category 3 had covered situations beyond those covered by Category 2, then Category 3 would have reached unnotified persons whose interests had not been represented adequately by parties in the first suit. Such a result would have violated the construction of *Mullane* described above by binding absentees who had absolutely no idea nor reason to know that the original suit was under way and whose interests were not represented before the court in that suit.⁸² By barring these would-be challengers who lacked notice and were unrepresented,⁸³ then, the 1990 Act would have provided a ready target for constitutional challenge.

81. In a statement to the Senate Committee considering § 6 of the 1990 bill, Professor Tribe stated:

Where any efforts at notice would almost certainly be futile, *Mullane* may mean *either* that those who could not possibly have been notified—e.g., generations yet unborn—cannot possibly be bound by the judgment *or*, far more plausibly, that such individuals may be bound so long as it would not be fundamentally unfair to treat them as "represented" *de facto* by those who did receive notice and made the relevant challenges.

Senate Hearings, supra note 73, at 557 (statement of Prof. Laurence Tribe).

Other aspects of *Mullane* appear to comport with the employment discrimination scenario under discussion. For example, *Mullane* entailed special circumstances in which the state had an interest in resolving certain trust matters with finality. Similarly, here, the federal interest in finality of decrees and judgments effectuating Title VII is strong.

82. Such absentees might include individuals who were not employees at the time of the suit.

It may sometimes make sense to notify persons with pending job applications, and to certify representatives of the class of all present and future job applicants who might be affected by the quota. But status as an applicant for work with a particular employer is often short-lived, and an applicant's stake with any particular employer is often small. The court can notify current applicants, but it certainly cannot rely on them to represent a class. Current applicants arguably, and future applicants certainly, are like the remaindermen in *Mullane*. They do not have to be notified individually, but if they are to be bound, the court must appoint a guardian ad litem to represent their interests.

Laycock, *supra* note 21, at 148-49 (citing *In re Century Brass Prods., Inc.*, 795 F.2d 265, 275 (2d Cir.), *cert. denied*, 479 U.S. 949 (1986); *In re Amatex Corp.*, 755 F.2d 1034, 1043 (3d Cir. 1985), *aff'd*, 908 F.2d 961 (3d Cir. 1990)).

83. When the 1990 Act was pending before Congress, efforts to ameliorate these perceived threats to due process resulted in a final hour amendment to § 6 of the 1990 bill. This amendment preserved the Category 1-3 preclusion, but limited such preclusion to those who seek to challenge decrees entered before enactment of the 1990 Act and up to 30 days after its passage. The bar on challenges to post-Act decrees would have been more limited. With one exception, the amendment precluded challenges on post-Act decrees only by individuals who, prior to entry of the decree, were employees, former employees, or applicants. For these categories of individuals, the prerequisites for preclusion largely duplicated two of the three categories of preclusion for pre-Act decree challenges. Thus, an employee with adequate notice of the decree could have been precluded, as could employees who received no notice where adequate efforts at notice had been made. The amendment actually would have enhanced protections for these challengers, for it specified the quality of notice the would-be challenger had to have received.

IV. WHAT IS A COURT TO DO? PROTECTING THE INTERESTS OF MAJORITY EMPLOYEES

As enacted, the collateral attack bar seldom should operate to the detriment of majority employees. By its terms, the Act limits the bar to those majority employees whose interests are protected. Courts may, with good reason, therefore find themselves focusing more on the problem of gaps in the statutory bar that will permit ongoing majority challenges to entered decrees than on any problems of fairness to the narrow class of majority employees actually barred by the enacted provision. The remainder of this article considers two very different types of mechanisms that can operate together to assure the finality of consent decrees by safeguarding majority employees' interests. The first type includes mechanisms that allow majority employees to become involved in the original discrimination suit between the minority employees and the employer. These mechanisms—intervention and Rule 19 joinder—are both governed by existing federal rules of civil procedure. Because of the Category 1 bar against those who have had an opportunity to be heard, the article advocates a liberal interpretation of the intervention rules, consistent with existing precedent, to ease and encourage majority employee involvement. By easing the majority employees' involvement in the first suit, courts subsequently confronted with collateral challenges to the decree that resolves that suit can, in good conscience, impose the bar because those barred have had "a reasonable opportunity to present objections to such judgment or order."⁸⁴ The article goes on to suggest that application of Rule 19, by contrast, usually should result in nonjoinder. The second type of mechanism proposed in the article seeks to assure consent decree finality through modifications of the fairness hearing preceding the court's entry of the decree. These modifications would ensure such careful scrutiny that majority employees not barred by section 108 will lack grounds to challenge the decree.

A. *Easing Majority Involvement in the Original Suit*

The best way to avert collateral challenges to consent decrees is to protect majority employees' interests by involving them or their representatives in the original suit. Two mechanisms for involving majority employees are viable: one is intervention of right⁸⁵ under Rule 24, and

84. Pub. L. No. 102-166, sec. 108, 105 Stat. 1071, 1076 (Nov. 21, 1991) (amending the Civil Rights Act of 1964 § 703(n)(1)(B)(i)(II), 42 U.S.C. §§ 2000e-2000h (1988)).

85. Rule 24(a) provides as follows:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (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). Rule 24(b) of the *Federal Rules of Civil Procedure* provides for permissive intervention when the criteria for intervention of right are not met. FED. R. CIV. P. 24(b). The

the other is joinder as necessary or indispensable parties under Rule 19.⁸⁶ By cutting off certain subsequent challenges to a decree, the statutory bar presents potential for impact on the availability of both of these mechanisms. By making collateral challenges available to those not protected in the decree suit, the bar also increases the importance of joining the majority employees.

1. *Intervention Prospects Under Section 108*

Category 1 of section 108 precludes challenges by employees who have had notice and "a reasonable opportunity to present objections."⁸⁷ Nonparties may receive such an opportunity by petitioning for intervention. Intervention is a procedural device that permits an outsider to seek

court has the power to grant permissive intervention as long as the applicant's claim or defense has a question of law or fact in common with the main action. *Id.* The decision of whether to grant permissive intervention is within the court's discretion. Because the majority employees appear to have a clear right to intervene, this article does not consider application of Rule 24(b). If a court were to find no intervention right, it should grant permissive intervention because of the likelihood that prejudice to the majority employees will result in challenges to the decree. *Cf. Ionian Shipping Co. v. British Law Ins. Co.*, 426 F.2d 186, 191 (2d Cir. 1970).

86. Rule 19 provides in pertinent part as follows:

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

(b) *Determination by Court Whenever Joinder Not Feasible.* If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

FED. R. CIV. P. 19. Joinder under either Rule 19 or Rule 24 would qualify as an "opportunity to be heard" under Category 1 of sec. 108. *See supra* text accompanying note 52. Professor Kramer has argued that an appropriate mechanism for joining the absentees would be to permit them to file suits and transfer those suits to the judge presiding over the minority suit, who could then consolidate the cases. Kramer, *supra* note 1, at 335. When the bar against collateral attacks in the 1990 legislation would have foreclosed this possibility, Professor Kramer advocated enactment of a provision of § 6 (now contained in sec. 108 of the enacted statute) requiring that any collateral attacks permitted be brought in front of the judge handling the minority suit and that such challenges be consolidated with the minority suit to avoid duplication of effort. *Joint Hearings on H.R. 4000, The Civil Rights Act of 1990 Before the House Comm. on Educ. and Labor and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 474-75 (1990) [hereinafter *House Hearings*] (statement of Prof. Larry Kramer).

87. Courts may decide that the mere opportunity to petition for intervention constitutes "a reasonable opportunity to present objections" or may instead require that the majority employees either appear informally at a fairness hearing or actually become parties.

permission to join a lawsuit.⁸⁸ This device leaves the burden on the outsider to recognize that the suit may impair his interests. Once the outsider succeeds in intervening, he has the full rights and obligations of any other party.⁸⁹

Absent the statutory bar, employees who could be affected adversely by an affirmative action consent decree either may try to intervene or may lodge a separate challenge in court after the decree is entered.⁹⁰ Under the pre-*Wilks* judicial bar, courts frequently dismissed these post hoc challenges as impermissible collateral attacks on the consent decree. Courts rejecting such challenges often remarked that the challenger's "proper course . . . would have been to intervene in the lawsuit from which the consent decree issued."⁹¹ Such statements may seem to suggest that intervention was a reliable method for obtaining access to the proceedings leading up to a consent decree. Motions to intervene in such cases, however, often were unsuccessful for failure to meet particular requirements imposed by Rule 24.⁹² Despite the failures of some majority employees' efforts to intervene in the original minority suits, there were times when the potential for imposition of the judicial collateral attack bar itself enabled the majority employees to meet the Rule 24 require-

88. FED. R. CIV. P. 24. Many consider intervention to be the better route for joinder of majority employees in employment discrimination suits. See Strickler, *supra* note 38, at 1592-98.

89. *Kirkland v. New York Dep't of Correctional Servs.*, 711 F.2d 1117 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); 3B JAMES MOORE & JOHN E. KENNEDY, *MOORE'S FEDERAL PRACTICE* ¶ 24.16[1], at 24-155 (2d ed. 1991). Thus, if majority employees intervene (or are otherwise joined) in a case that concludes in an adjudicated judgment, principles of res judicata will estop them to the same extent as any other party. See Vreeland, *supra* note 24, at 308 n.151. Recall, however, that a party (whether joined by intervention or otherwise) who does not join in a consent decree cannot be bound thereby. *Firefighters v. Cleveland*, 478 U.S. 501 (1986).

90. Because decree-entering courts often retain jurisdiction to enforce compliance with the decree, *see, e.g.*, *United States v. City of Chicago*, 870 F.2d 1256, 1257 (7th Cir. 1989), employees seeking to alter or enjoin the decree should seek intervention, and those seeking damages can obtain what they want as easily through a separate suit. *Id.* at 1258.

91. *Marino v. Ortiz*, 806 F.2d 1144, 1146 (2d Cir. 1986) (citing *Dennison v. City of Los Angeles Dep't of Water & Power*, 658 F.2d 694, 696 (9th Cir. 1981)), *aff'd by an equally divided court*, 484 U.S. 301 (1988); *see also* *Thaggard v. City of Jackson*, 687 F.2d 66, 68 (5th Cir. 1982), *cert. denied*, 464 U.S. 900 (1983); *Black & White Children of the Pontiac Sch. Sys. v. School Dist.*, 464 F.2d 1030 (6th Cir. 1972). *Cf.* *Striff v. Mason*, 849 F.2d 240, 245 (6th Cir. 1988) (district court should have permitted Striff to intervene to present his claim).

92. *Jones v. Caddo Parish Sch. Bd.*, 704 F.2d 206 (5th Cir. 1983); *EEOC v. Westinghouse Elec. Corp.*, 675 F.2d 164 (8th Cir. 1982); *Culbreath v. Dukakis*, 630 F.2d 15 (1st Cir. 1980); *United States v. Allegheny-Ludlum Indus.*, 553 F.2d 451 (5th Cir. 1977), *cert. denied*, 435 U.S. 914 (1978). In *Ashley v. City of Jackson*, 464 U.S. 900 (1983), Justice Rehnquist discussed the unfairness of denying intervention on timeliness grounds when, as in that case, the parties' cause of action arose from the consent decree, yet did not accrue until one year after entry of the decree. *Id.* at 902 (Rehnquist, J., joined by Brennan, J., dissenting from denial of certiorari). Rehnquist went on to draw a parallel with consent decrees entered between private corporations and the Government to resolve antitrust violations:

Surely, the existence of that decree does not preclude a future suit by another corporation alleging that the defendant company's conduct, even if authorized by the decree, constitutes an antitrust violation. The nonparty has an independent right to bring his own private antitrust action for treble damages or injunctive relief.

Id. at 902.

ments.⁹³ With the advent of the mandatory statutory bar in section 108, courts should more readily, and perhaps presumptively, allow intervention in cases seeking institutional affirmative action. This section analyzes how the Rule 24 intervention criteria should apply when section 108 bars collateral attacks on consent decrees.⁹⁴

Rule 24 provides four criteria for analyzing a petition to intervene as of right.⁹⁵ The applicant must show that: (1) the applicant has a qualifying interest; (2) disposition of the action may impair or impede the applicant's ability to protect that interest; (3) existing parties do not represent the interest adequately; and (4) the application is timely.⁹⁶ The first three of these criteria clearly point to the intervention of majority employees who will be barred from filing an independent suit to challenge an affirmative action consent decree. The fourth criterion is more troublesome, but, as discussed below, usually should favor intervention as well.

a. Qualifying Interest Requirement

Courts construe the interest requirement of Rule 24(a) expansively in order to achieve judicial economy and afford due process.⁹⁷ Thus, the District of Columbia Circuit has characterized "the 'interest' test [as] primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due

93. See *infra* note 110.

94. At first blush, sec. 108 may appear itself to answer the question of how Rule 24 should apply in these cases. Section 108 provides that nothing in sec. 108 should "be construed to alter the standards for intervention under Rule 24 of the Federal Rules of Civil Procedure." See *supra* note 8 (text of statute). The Act might, therefore, be deemed to "freeze" the intervention scenario as that scenario stood before passage of the Act. One must distinguish, however, between preserving the standards for intervention and preserving the end result of application of those standards. The Act requires the former and not the latter. By barring collateral attacks, sec. 108 alters the factual situation upon which Rule 24 operates, and thus will certainly affect the outcome resulting from application of the preserved Rule 24 standards. Section 108 does not, however, resolve the vital inquiry of what impact the collateral attack bar should have on the outcome of Rule 24 analysis.

95. This article considers the problem of intervention as of right, though a court has considerable discretion to permit intervention if it chooses. See FED. R. CIV. P. 24(b); *supra* note 85. Unlike permissive intervention under Rule 24(b), intervention of right does not require the court to consider the extent to which those already parties may be prejudiced by the intervention or the extent to which intervention would delay the proceedings. FED. R. CIV. P. 24(b). In the employment discrimination consent decree context, this is significant because intervention by a majority employee whose only interest was in forestalling settlement would severely prejudice the interests of those already parties in settling the suit.

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

97. *Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969); see also *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967). But see *Donaldson v. United States*, 400 U.S. 517, 531 (1971). The effect of the employer's alleged discrimination need not rise to the level of depriving the petitioner of a constitutionally cognizable property right. *United States v. City of Chicago*, 870 F.2d 1256, 1260 (7th Cir. 1989) (citing *Cascade Natural Gas Corp.*, 386 U.S. at 135-36); *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 530 (7th Cir. 1988); *Harris v. Pernsley*, 820 F.2d 592, 600-01 (3d Cir. 1987); *Howard v. McLucas*, 782 F.2d 956, 958-59 (11th Cir. 1986), *cert. denied*, 110 S. Ct. 560 (1989); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 738 F.2d 82 (8th Cir. 1984) (*per curiam*); *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 578 F.2d 1341 (10th Cir. 1978); *EEOC v. AT&T*, 506 F.2d 735, 741-42 (3d Cir. 1974). See generally Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415.

process.'"⁹⁸ There are, however, some limits on what qualifies as an "interest" for purposes of Rule 24(a). The Supreme Court in *Donaldson v. United States* specified that, to qualify, an interest must be "significantly protectable."⁹⁹ By "significantly protectable," the *Donaldson* Court apparently meant two things: (1) that the interest should be one that courts properly would recognize as worthy of the court's protection; and (2) that the appropriate occasion for that protection is the time of the law suit in which intervention is sought, rather than in some future case.¹⁰⁰ One problem with the *Donaldson* discussion is that it confuses impairment of the intervenor's interest (the first Rule 24 criterion) with impairment of the intervenor's ability to protect that interest (the second Rule 24 criterion). In fact, the impairment concept forms part of the "interest" analysis of the first prong, as well as constituting the second prong. What is being impaired under each prong, however, is different. Under the first criterion—"interest"—the impairment in question is the infringement of the majority employees' substantive right not to be victims of unlawful discrimination.¹⁰¹ The impairment at issue under the second Rule 24 criterion is not infringement of the intervenors' substantive legal rights. Rather, assuming that their substantive interests are indeed threatened, prong two asks whether the intervenors will be able to sue or otherwise take action to protect against the threatened infringement. The two aspects of the first Rule 24 criterion under the *Donaldson* "interest" inquiry, then, should be (1) whether the interest is a legal interest—one the infringement of which is likely to give rise to a cause of action; and (2) whether it appears likely that the original suit will indeed infringe that interest.

The outcome of a court's applying *Donaldson* to ascertain whether majority employees have an adequate interest in the case is not clear. Applying the first part of the *Donaldson* rule to the would-be majority employee intervenors, it should be beyond argument that the interest of employees who expect to be treated illegally pursuant to a consent decree qualifies for court protection.¹⁰² In the consent decree context, the second aspect of the interest requirement asks whether the would-be inter-

98. *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981) (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)); see also *Cascade Natural Gas Corp.*, 386 U.S. at 129.

99. *Donaldson*, 400 U.S. at 531.

100. See *id.*

101. This requirement that the interest be threatened actually has two aspects itself: is the decree likely to infringe the interest, and is the interest a real one in that the benefit of which the decree will deprive the plaintiff is a benefit that plaintiff would be likely to enjoy absent the decree. See *United States v. City of Chicago*, 870 F.2d 1256, 1260 (7th Cir. 1989). See generally Tobias, *supra* note 97.

102. Cf. *Martin v. Wilks*, 490 U.S. 755, 770-71 (1989) (Stevens, J., dissenting) (consent decree cannot deprive majority of their right not to be victims of discrimination). Where this is the same interest that gave rise to the suit initially, albeit based on different acts of discrimination from the original claim, permitting the majority employees to intervene is especially in keeping with the rule's goal of efficiency. Cf. *Foster*, 655 F.2d at 1324-25. Of course, varying forms of affirmative action intrude on the interests of the majority to varying degrees. See Schwarzschild, *supra* note 1, at 909-10.

venor will be likely to or actually will suffer unlawful discrimination as a result of the decree. Some courts have gone so far as to require that the would-be intervenor actually become a victim of discrimination pursuant to the decree in order to establish an adequate interest for purposes of Rule 24.¹⁰³ In *Howard v. McLucas*,¹⁰⁴ for example, the Eleventh Circuit permitted intervention only conditionally, pending the intervenors' showing that they indeed were denied promotions unlawfully as a result of the decree; a potentially injured interest was deemed insufficient to support intervention to challenge the decree.¹⁰⁵ Other circuits similarly have specified that the would-be intervenor must, when he seeks intervention, have such an interest as to give him standing to bring an action of his own.¹⁰⁶ The question, then, is how certain injury to the interest must be in order to qualify the majority employees as having an interest at all. An interest in not being a victim of unlawful reverse discrimination carries little weight under Rule 24 if the pertinent consent decree is unlikely to infringe that interest.¹⁰⁷

Courts entering consent decrees are unlikely to enter decrees deliberately in derogation of the legal rights of nonparty majority employees.¹⁰⁸ Thus, any district court that enters a decree does so believing that a subsequent suit to challenge the decree's legality would fail because no infringement of the absentee's interest will result from the decree. Such courts may be inclined, therefore, not to recognize the majority employees' interest as one adequately threatened to meet the interest requirement of Rule 24. Precisely because courts are likely to view a decision in

103. Some courts have held that "claims that a consent decree resulted in reverse discrimination could not accrue until those seeking redress were denied promotions." *Howard v. McLucas*, 871 F.2d 1000, 1005 (11th Cir.), *cert. denied*, 110 S. Ct. 560 (1989). As discussed below, to delay availability of intervention until the promotions are actually denied could nullify Rule 24's opportunities, especially combined with a strict reading of Rule 24's timeliness requirement.

104. 871 F.2d 1000 (11th Cir.), *cert. denied*, 110 S. Ct. 560 (1989). The court cited *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1498-99 (11th Cir. 1987), *aff'd sub nom. Martin v. Wilks*, 490 U.S. 755 (1989), for the proposition that an action does not accrue until the white employee has actually been denied a promotion. *Howard*, 871 F.2d at 1005. The *In re Birmingham* court had announced that proposition to demonstrate that the white employees in that case could not be bound by a consent decree in an earlier case to which the whites had not been party, particularly in light of the fact that the whites' action had not even accrued at the time of the earlier decree. *In re Birmingham*, 833 F.2d at 1499.

105. *Howard*, 871 F.2d at 1003.

106. *Southern Christian Leadership v. Kelley*, 747 F.2d 777, 780-81 (D.C. Cir. 1984); *United States v. AT&T*, 642 F.2d 1285, 1291 (D.C. Cir. 1980); *Francis v. Chamber of Commerce*, 481 F.2d 192, 195 n.7 (4th Cir. 1973); *Wilderness Soc'y v. Morton*, 463 F.2d 1261, 1262 (D.C. Cir. 1972).

107. In the analogous case of *Culbreath v. Dukakis*, 630 F.2d 15 (1st Cir. 1989), the First Circuit placed heavy weight on the fact that the would-be intervenors would not be prejudiced by their exclusion from the suit, even given the judicial collateral attack bar, because the court believed the would-be intervenors were unlikely to win a subsequent suit, even if collateral attack were available. *Id.* at 22-23. The *Culbreath* discussion was in connection with the prejudice prong of Rule 24's timeliness requirement, but reflects the same concern that the interest under Rule 24 must truly be threatened.

108. It is permissible for consent decrees to deprive majority employees of employment advantages. The majority has a cause of action only if the decree violates the governing doctrine. See *infra* note 209 and accompanying text.

the making as correct, courts should hesitate to rely on the unlikelihood that the majority employee's interest will be infringed by the decree as a ground for finding that the majority employee has not met the interest requirement. In this context, courts should instead presume that the decision will be wrong and find that the interest requirement is met.¹⁰⁹

b. The Impair or Impede Requirement

Under the second Rule 24(a) criterion, the applicant for intervention must show that resolution of questions of fact or law in the case may affect the applicant's position either legally or practically. Because of the collateral attack bar, the applicant may meet this impairment requirement, even though the resolution does not threaten to bind the applicant in a formal *res judicata* sense.¹¹⁰ The case of the majority employees who will be barred from bringing an independent law suit thus should be easy—something *equivalent* to *res judicata* will bar these people. Clearly, if the interest itself qualifies, the majority employees' ability to protect that interest is impaired by a collateral attack bar.

c. Inadequate Representation Requirement

The third Rule 24(a) criterion requires the applicant for intervention to show that the applicant's interests are not represented adequately by those who already are party to the suit. The applicant need show only that "representation of his interest may be inadequate; and the burden of making that showing should be treated as minimal."¹¹¹ To demonstrate

109. Such early intervention, moreover, need not force those already parties to litigate their entire case when all they want is to settle. The scope of the intervenor's interest should define the scope of his challenge. Thus, the successful intervenor can litigate the legality of the consent decree, but cannot force litigation of whether the plaintiff in the case should prevail in the cause of action. As will be explained, the issues in the plaintiff's case and the issues in the intervenor's case are two very different things. See *infra* note 219 and accompanying text.

110. See *United States v. City of Chicago*, 870 F.2d 1256, 1262 (7th Cir. 1989) (citing *Marino v. Ortiz*, 806 F.2d 1144, 1146 (2d Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 301, 304 (1988); *Striff v. Mason*, 849 F.2d 240, 245 (6th Cir. 1988)); *Foster v. Gueory*, 655 F.2d 1319, 1325 (D.C. Cir. 1981) (citing *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)); *Bolden v. Pennsylvania State Police*, 578 F.2d 912, 922 (3d Cir. 1978) (Garth, J., concurring in part and dissenting in part); *Kramer*, *supra* note 1, at 340; *cf.* *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983) (denial of intervention because reverse discrimination suit available); *FED. R. CIV. P.* 24 advisory committee notes to 1966 amends. Some courts have recognized an adequate impediment from the mere stare decisis effect of a court's resolution of a novel question of law. See *United States v. Oregon*, 839 F.2d 635, 638 (9th Cir. 1988); *National Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978); *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 826 (5th Cir. 1967); *cf.* *Ionian Shipping Co. v. British Laws Ins. Co.*, 426 F.2d 186, 190 (2d Cir. 1970).

111. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *Foster*, 655 F.2d at 1325 (citing *Trbovich*, 404 U.S. 528; *Natural Resources Defense Council v. Costle*, 561 F.2d 904, 911 (D.C. Cir. 1977)). Courts disagree on who should bear the burden of showing adequacy or inadequacy of representation. See John E. Kennedy, *Let's All Join In: Intervention Under Federal Rule 24*, 57 Ky. L.J. 329, 353-54 (1969); *Kramer*, *supra* note 1, at 351 (citing 7 WRIGHT ET AL., *supra* note 64, § 1909, at 314-15 & nn.5-6 (citing cases)); 3B MOORE & KENNEDY, *supra* note 89, ¶ 24.07[4], at 24-72 to -73 & nn.9-11. Some courts have suggested that, under the 1966 amendments to Rule 24, the burden is on the party opposing intervention to show that representation is adequate

inadequacy of representation, the applicant need show merely that the applicant's interests differ from those of the parties.¹¹² Even minor differences between the applicant's interest and the putative representatives' interest are adequate to support intervention under Rule 24. Thus, if the petitioner can show that the employer does not represent its "distinct viewpoint," the petitioner should prevail on this criterion.¹¹³

At the outset of an employment discrimination institutional reform case, the majority employees' interests are likely to be identical to the defendant/employer's interests: both want to show that the challenged act is lawful and that affirmative action is therefore inappropriate.¹¹⁴ If negotiations toward settlement between the employer and the minority employees are promising, however, the employer's interest frequently shifts from an interest in defeating the minority employees' claim to a superseding interest in settling the immediate case and minimizing financial liability.¹¹⁵ When an employer agrees to undertake affirmative action in exchange for dismissal of the suit, the employer, in essence, is willing to assume—for the sake of argument—that it has discriminated.¹¹⁶ The majority employee, by contrast, always remains interested in demonstrating that no discrimination has occurred in order to show that affirmative action is unwarranted. Once it is shown that the employer is interested in settling, the discrepancy between the majority interest and the employer's interest generally should pass muster on this requirement of Rule 24.¹¹⁷

in cases where the petitioner has succeeded in demonstrating interest and impairment. See *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969); *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967); cf. *Bolden v. Pennsylvania State Police*, 578 F.2d 912 (3d Cir. 1978); 7A *WRIGHT ET AL.*, *supra* note 64, § 1909, at 521. Some courts require a greater showing of inadequate representation when the government is a party because the government is presumed to represent the public interest. See *United States v. Hooker Chem. & Plastics*, 749 F.2d 968 (2d Cir. 1984); *Commonwealth v. Rizzo*, 530 F.2d 501, 505 (3d Cir.), *cert. denied*, 426 U.S. 921 (1976); *Illinois v. Bristol-Myers Co.*, 470 F.2d 1276 (D.C. Cir. 1972). This presumption may be rebutted by showing that the petitioner presently has an interest adverse to the government's. *Bolden*, 578 F.2d at 923 (Garth, J., concurring in part and dissenting in part). If the court denies a majority employee intervention because the employee's interests are "adequately represented" by parties, the representation provided by present parties must be sufficient to bind the absentee under the Due Process Clause. See *Kramer*, *supra* note 1, at 350 (citing 3B *MOORE & KENNEDY*, *supra* note 89, ¶ 24.07[4], at 24-68); 7 *WRIGHT ET AL.*, *supra* note 64, § 1909, at 313.

112. *Foster*, 655 F.2d at 1325.

113. *Johnson v. San Francisco Unified Sch. Dist.*, 500 F.2d 349, 354 (9th Cir. 1974).

114. The statement in text assumes that the parties go into the case expecting to have to litigate. In fact, parties to the suit sometimes negotiate the settlement before the suit begins and file a complaint together with a proposed consent decree that the court may approve immediately. *Schwarzschild*, *supra* note 1, at 913.

115. The time for measuring adequacy of representation in decree negotiations is the time when the employee files the petition for intervention. *Bolden*, 578 F.2d at 924 (Garth, J., concurring in part and dissenting in part).

116. *Id.* at 923 (Garth, J., concurring in part and dissenting in part). See *Smuck v. Hobson*, 408 F.2d 175, 181-82 (D.C. Cir. 1969).

117. See *Bolden*, 578 F.2d at 923 (Garth, J., concurring in part and dissenting in part); *Kramer*, *supra* note 1, at 352. Absentees who have been adequately represented at the consent decree negotiation stage may succeed in showing that their "representative" presently does not represent their interests in modifying a consent decree. Cf. *United Airlines v. McDonald*, 432 U.S. 385, 395 (1977).

There may be concern that delaying the inadequacy determination until the employer undertakes settlement negotiations will render the intervention too late to be timely under the fourth Rule 24 criterion. In fact, as discussed below, the timeliness requirement imposes upon the petitioner an obligation to seek intervention only when it becomes evident that available representation is inadequate. Thus, if it is the commencement of settlement negotiations that terminates adequacy of representation, the majority employees' waiting for settlement negotiations to commence should not render the petition to intervene untimely.¹¹⁸

Some argue that the employer's interests are actually at odds with the majority employees' interests from the beginning because the employer, from the beginning, has "different cost-benefit settlement interests, and incentives, from those of the [majority employees]."¹¹⁹ Courts thus might consider differences between the absentee's interest and the employer's *potential* interest in settling.¹²⁰ Acting on the assumption that the employer ultimately will desire to settle would be reasonable inasmuch as most Title VII cases are resolved through settlement.¹²¹ Nevertheless, recognizing inadequacy of representation based solely on potential for the employer's settlement interests would result in a finding that majority employees are inadequately represented in every minority suit seeking affirmative action. Prior to initiation of settlement talks, there would be no way to distinguish cases in which the interests of the majority would ultimately be adequately represented at trial. Thus, if mere potential for settlement rendered the employer's representation inadequate, majority employees either would unnecessarily intervene or, if they waited to see whether settlement became likely, might be deemed to have petitioned for intervention too late. As a rule, then, courts should deem representation inadequate only upon commencement of settlement negotiations.¹²²

118. See *United States v. City of Chicago*, 870 F.2d 1256, 1263 (7th Cir. 1989).

119. *United States v. Jefferson County*, 720 F.2d 1511, 1516 (11th Cir. 1983). It has been suggested that any time two parties have the power to settle their law suit at the expense of a third party, the representation is per se inadequate. See *Kramer*, *supra* note 1, at 352.

120. See *Jefferson County*, 720 F.2d at 1516.

121. *Schwarzschild*, *supra* note 1, at 893-94; see also *EEOC v. Sage Realty Corp.*, 521 F. Supp. 263 (S.D.N.Y. 1981).

122. The goals of Title VII and Rule 24 can best be effectuated if courts aim to achieve majority employee intervention immediately preceding or shortly after entry of the decree. If a majority employee cannot reasonably understand the decree's ramifications until after its implementation, then postimplementation intervention must be permitted as timely. See *City of Chicago*, 870 F.2d at 1263. Courts should construe the timeliness requirement accordingly. The danger with employees making earlier predictions about whether their interests are at stake is that the employees may come to an incorrect conclusion and intervene unnecessarily. One court has suggested, moreover, that intervention shortly after initiation of the suit to defend an unlawful employment practice that benefits the majority is improper. *Id.* If majority employees intervene early as a protective measure, they later may find that the defendant prevails at trial and they are unharmed, or that the ultimate consent decree would have had no impact on their interests even if they had not intervened, and that they have wasted time, money, and judicial resources. *Cf. McDonald v. Lavino Co.*, 430 F.2d 1065 (5th Cir. 1970). Similarly, if the court denies such an early petition for intervention, "purposeless

d. The Timeliness Requirement

Timeliness is perhaps the most difficult of the Rule 24 requirements to apply in these cases; it is also the requirement on which majority employees' applications for intervention most often flounder.¹²³ As articulated by one court, "the purpose of the requirement is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal."¹²⁴ Whether a petition to intervene is timely is a question committed to judicial discretion.¹²⁵ Courts have developed criteria to guide the exercise of that discretion, and the process of deciding the petition involves a balancing of these criteria:¹²⁶ "Whether a motion to intervene is timely made is 'to be determined from all the circumstances, including the purpose for which intervention is sought . . . and the improbability of prejudice to those already in the case.'"¹²⁷

A petition is timely if it is made soon enough after the petitioner learns of his interest, and "soon enough" is measured by comparing any prejudice to the parties that the delay causes against prejudice inuring to the petitioner if he is excluded from the suit, in light of any special circumstances. In *Stallworth v. Monsanto*,¹²⁸ the Fifth Circuit reduced the timeliness analysis to four factors:

- (1) the length of delay between when petitioner learned or should have learned of his interest in the suit and when he petitioned to intervene;

appeals" may result. *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977). Conversely, majority employees may be unable to appreciate the significance of the suit at an early date, and the court should not deny intervention once the terms of the decree become evident. Moreover, an early intervention petition based on projections about what relief will result from a suit may fail simply because the tenuous information available to majority employees at this early date does not permit the employees to show that they risk impairment of a "significantly protectable interest." *Donaldson v. United States*, 400 U.S. 517, 531 (1971). Negotiations may not have reached an advanced enough stage to permit protectable interests to be articulated. It is thus important that the timeliness clock not to begin ticking until the threat to the intervenors' interest is somewhat concrete.

123. See Schwarzschild, *supra* note 1, at 920. A court may encourage early intervention by having the plaintiffs specify whether they will seek classwide injunctive relief, and then may formulate notice to nonparty majority employees that includes notice of the probable impact on various nonparties. See Strickler, *supra* note 38, at 1590-91. Because the petitioner stands to lose more when intervention would be of right, rather than permissive, courts should be reluctant to deny intervention as of right on timeliness grounds. *McDonald*, 430 F.2d at 1073.

124. *United States v. South Bend Community Sch. Corp.*, 710 F.2d 394, 396 (7th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984). Exactly what constitutes the "terminal" when a court enters a consent decree is open to question. Once the decree is entered, the court may retain jurisdiction indefinitely over the decree to hear disputes about the decree. *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932).

125. *NAACP v. New York*, 413 U.S. 345, 365-66 (1973); *United States v. Jefferson County*, 720 F.2d 1511, 1516 (11th Cir. 1983); *Howse v. S/V "Canada Goose I,"* 641 F.2d 317, 320 (5th Cir. 1981); *Stallworth*, 558 F.2d at 263; *McClain v. Wagner Elec. Corp.*, 550 F.2d 1115, 1120 (8th Cir. 1977).

126. See *McDonald*, 430 F.2d at 1071-74.

127. *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981) (quoting *Natural Resources Defense Council v. Costle*, 561 F.2d 904, 907 (D.C. Cir. 1977) (citing *Hodgson v. United Mine Workers*, 473 F.2d 118, 129 (D.C. Cir. 1972))); see also *NAACP v. New York*, 413 U.S. at 365-66.

128. 558 F.2d 257 (5th Cir. 1977). Courts from a variety of circuits have subsequently relied upon the *Stallworth* analysis. See *Kramer*, *supra* note 1, at 341 & n.87.

- (2) the extent of prejudice resulting to the existing parties caused by petitioner's delay;
- (3) the prejudice that would accrue to the petitioner if his petition were denied; and
- (4) the existence of any unusual circumstances militating either for or against a conclusion that the application is timely.¹²⁹

The first of the *Stallworth* factors focuses on "[t]he length of time during which the would-be intervenor actually knew or reasonably should have known of [his] interest in the case before [he] petitioned for leave to intervene."¹³⁰ The *Stallworth* court cautioned that absolute measures of timeliness, such as the amount of time that may have elapsed since initiation of the action, should not be dispositive.¹³¹ Rather than calculating the time expired since the filing of the complaint, the task for the judge deciding whether to permit majority employee intervention is to determine when the majority employees should have realized that the suit would jeopardize their ability to protect their interests. As stated above, courts generally agree that no duty to intervene arises until the intervenor knows or should know that his interests may be affected by the suit.¹³² The answer to the question of when the intervenor "should know" that his interests are threatened depends largely on who the

129. *Stallworth*, 558 F.2d at 264-66; see *United States v. City of Chicago*, 798 F.2d 969, 975 (7th Cir. 1986), cert. denied, 484 U.S. 1041 (1988).

130. *Stallworth*, 558 F.2d at 264. If the petitioner has known of his interest all along, but has understood his interests to have been adequately represented, then the time is measured from the time at which the petitioner learns the representation is inadequate. *United Air Lines Inc. v. McDonald*, 432 U.S. 385 (1977). If the petitioner never had actual knowledge of the suit, courts may shift the burden to prove that intervention should be denied to the party opposing intervention. See *McClain v. Wagner Elec. Corp.*, 550 F.2d 1115, 1120 (8th Cir. 1977).

131. Although the Supreme Court's decision in *NAACP v. New York*, 413 U.S. 345 (1973), relies upon knowledge of the suit's pendency to calculate untimeliness, the *Stallworth* court rejected arguments that such reliance means that learning of the lawsuit should start the clock for purposes of determining whether the applicant acted promptly. *Stallworth*, 558 F.2d at 264. The *Stallworth* court rejected such a construction for three reasons: (1) in the *NAACP* case, circumstances were such that notice of the suit was the equivalent of notice that the applicant's interests were involved, so the court had no occasion to address the question of whether knowledge of the suit alone would have been enough; (2) in the more recent Supreme Court case of *United Air Lines v. McDonald*, 432 U.S. 385 (1977), the Court had gauged timeliness from the date when the applicant learned its interests were no longer adequately represented; and (3) a rule making knowledge of the suit's pendency the trigger would result in applications from people without a need to intervene and a bar of applicants with a need to intervene whose need was unrecognized when interventions would have been timely. *Stallworth*, 558 F.2d at 264-65. Judge Garth took a similar stance in his dissenting opinion in *Bolden v. Pennsylvania State Police*, 578 F.2d 912, 926 (3d Cir. 1978) (measuring timeliness of petition from date on which events occurred that gave rise to applicants' claims for relief). Subsequent cases have followed suit. In *United States v. South Bend Community School Corp.*, 710 F.2d 394, 396 (7th Cir. 1983), cert. denied, 466 U.S. 926 (1984), for example, the Seventh Circuit specified that petitioner for intervention "must move promptly to intervene" as soon as he "knows or has reason to know that [his] interests might be adversely affected by the outcome of the litigation." *Id.* at 396; see also *Kramer*, *supra* note 1, at 341 & n.87. But see *United States v. AT&T*, 642 F.2d 1285, 1295 (D.C. Cir. 1980). This rule is consistent with the rule that statutory periods for cutting off the right to bring a claim may not be permitted to run before the plaintiff should know of this claim. See *Kramer*, *supra* note 1, at 341 n.86 (citing *Wilson v. Iseminger*, 185 U.S. 55, 62 (1902)).

132. To require intervention at any stage when the intervenor neither knows nor reasonably should know might violate due process. Cf. *Kramer*, *supra* note 1, at 344 & n.98. How much time

would-be intervenor is.¹³³

The *Stallworth* court refused to require the particular intervenors in that case to "fathom[] the potential impact of [an] admittedly complex case on their seniority rights" prior to the date on which the applicants actually knew for a fact that their contractual rights were in jeopardy, that is, when the consent decree actually was entered.¹³⁴ In *Culbreath v. Dukakis*,¹³⁵ by contrast, the court required that would-be intervenors act shortly after they gained knowledge of the suit itself.¹³⁶ In the view of the *Culbreath* court, the complaint and the front-page newspaper reports indicating that the plaintiff was seeking an affirmative action remedy were adequate to apprise the applicants that affirmative action measures would result in nonminorities' being passed over in favor of minorities.¹³⁷

The major difference between *Stallworth* and *Culbreath* was in how the courts viewed the petitioners for intervention. The *Culbreath* court deemed the notice of the suit to be adequate notice of potential harm because the intervenors in *Culbreath* were sophisticated unions capable of translating newspaper accounts, and the relief sought in the complaint, into threats to their interests.¹³⁸ Therefore, the court was willing to impute knowledge of the union's interest in the suits from knowledge of the suits themselves. In *Stallworth*, by contrast, because the would-be intervenors were the individual employees themselves, and thus presumably less sophisticated than the unions in *Culbreath*, the court looked to the date when the intervenors subjectively understood the suit's threat to their interest. Other courts agree that simple knowledge of the suit does not necessarily trigger the time, absent some reason such as that in *Culbreath*, to impute knowledge that the intervenor's interests may be affected.¹³⁹

the court permits to elapse between the intervenor's learning he should intervene and the petition for intervention depends on the circumstances of each case. *Id.* at 344-45.

133. The court has several possible choices on when the would-be intervenor "should know" his interests are threatened:

- (1) when the law suit commences or the intervenor has notice of the suit;
- (2) when the decree is entered or the intervenor has notice of the decree; or
- (3) when action is taken pursuant to the decree which harms the intervenor.

Once the intervenor should know of the threat to his interest, courts allow a reasonable time for the intervenor to investigate the facts and law and to prepare a petition for intervention. *See United States v. City of Chicago*, 870 F.2d 1256, 1263 (7th Cir. 1989) (six weeks not excessive delay).

134. *Stallworth*, 558 F.2d at 267; *see Corley v. Jackson Police Dep't*, 755 F.2d 1207, 1210 (5th Cir. 1985).

135. 630 F.2d 15 (1st Cir. 1980).

136. *Id.* at 21.

137. The *Culbreath* court, moreover, found that knowledge that the petitioner had a legal interest in the suit would suffice to establish the date of knowledge, even though subsequently (too late) the petitioner developed a much greater interest. *Id.* at 21.

138. *Id.*

139. *Jones v. Caddo Parish Sch. Bd.*, 735 F.2d 923, 934 & n.14 (5th Cir. 1984); *Stallworth*, 558 F.2d at 267; *id.* at 946 (Rubin, J., dissenting). *But see Schultz v. Connery*, 863 F.2d 551, 553-55 (7th Cir. 1988); *EEOC v. Westinghouse Elec. Corp.*, 675 F.2d 164, 166 (8th Cir. 1982). In *United Airlines v. McDonald*, 432 U.S. 385 (1977), the Supreme Court held that the time for intervening should be deemed to commence only when the petitioner realizes that a party to the suit is no longer representing the petitioner's interests. *Id.* at 395. This decision confirms a pragmatic, reasonable

Questions of timeliness are complicated when the absentee has not even applied yet for a position with the defendant or otherwise could not possibly know even with notice of the decree that his interests will be affected.¹⁴⁰ Courts in these circumstances should remain faithful to the rule that an intervenor cannot be expected to petition for intervention prior to actual or imputed knowledge of the threat. For people who are not employees or applicants at the time the decree is entered, and whose interests were not represented, petitions to intervene should be deemed timely if filed when the petitioners learn of the decree's effects on them, although that may be long after entry of the decree.¹⁴¹

Ascertaining the time at which the petitioner should be deemed to know of the threat to his interests is only the beginning of the analysis under *Stallworth's* first criterion, because this criterion requires the court to look at the length of delay between when the petitioner knows of the threat to his interest and when the petitioner seeks intervention. Once the court determines when the petitioner had knowledge, however, it is only by looking at the second *Stallworth* criterion that the court can assess the significance of any delay between knowledge and filing of the petition. Whether the delay is two weeks or two years, a delay is too long only if it causes prejudice to those who already are parties to the decree.¹⁴²

Courts differ about what sort of prejudice qualifies under this criterion. According to *Stallworth*, the court should measure only that prejudice resulting from the applicant's delay, not prejudice that would result from the very fact of intervention regardless of timing.¹⁴³ The *Culbreath* court, by contrast, modified *Stallworth* and required that prejudice to the parties caused by the intervention itself, rather than by the delay, should

person approach to the question of when the responsibility to intervene begins. See also *Bolden v. Pennsylvania State Police*, 578 F.2d 912, 919 (3d Cir. 1978) (timeliness of application for intervention determined by reference to time elapsed since conflict arose between petitioner's and representative's interests); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 289, 294-95 (N.D. Cal. 1976). In *NAACP v. New York*, 413 U.S. 345 (1973), the Supreme Court found untimeliness because it should have been evident to the would-be intervenors that the parties were about to settle the case to the intervenors' detriment. *Id.* at 367; see also *Caddo*, 735 F.2d 923.

If timeliness is gauged from the time the petitioner knows of the suit, rather than when he knows his interests may be impaired, the effect of this requirement would be that the petitioner for intervention would have to file his petition *before* he could qualify under the other Rule 24 criteria, and thus lose the opportunity to intervene at all. As stated earlier, the interests of the majority employees are likely to become visibly adverse to the interests of their employer only when the employer is eyeing settlement possibilities. See *supra* note 122 and accompanying text. Thus the petitioner may be incapable of showing that his interests are inadequately represented at the time when he first learns of the suit. Such early petitions for intervention may meet with the further challenge that the petitioner lacks standing to raise a claim so speculative.

140. Under sec. 108, such unknown future applicants are not barred unless their interests are adequately represented. An expansive construction of Rule 24 will help to assure that their interests are, in fact, protected, and that postdecree intervention by such absentees will not become necessary.

141. If courts insist on deeming untimely petitions to intervene filed after entry of the decree, such petitioners cannot be said to have had a reasonable opportunity to be heard under sec. 108.

142. *Stallworth*, 558 F.2d at 265; *Nevilles v. EEOC*, 511 F.2d 303 (8th Cir. 1975).

143. *Stallworth*, 558 F.2d at 265.

be measured under this factor.¹⁴⁴ The *Culbreath* court acknowledged that the delay in intervention in that case had caused no prejudice.¹⁴⁵ The court instead looked at whether the intervention itself caused the parties any prejudice. The *Culbreath* court identified as "prejudice" the fact that the unions were "likely to oppose the goal provisions of the consent decree," opposition which might have the effect of delaying or denying the relief to which the parties had agreed.¹⁴⁶ The *Culbreath* "any prejudice" doctrine thus would have significant implications for those who seek intervention in employment discrimination consent decree cases: under the *Culbreath* view, the desire of any majority employee to challenge the consent decree would qualify as "prejudice" to the parties. The *Culbreath* prejudice analysis would preclude intervention in *every* consent decree case. If it properly may be assumed that intervention should occur in at least some consent decree cases, then *Culbreath* provides no guidance on when. "Prejudice," then, should be measured according to the *Stallworth* rule that only prejudice resulting from the delay is relevant.

Although absolute measures of timeliness should not be dispositive of the timeliness issue, courts seem to treat entry of the judgment in the case as a demarcation for purposes of prejudice: cases suggest that those petitions for intervention filed before judgment are more likely to be granted than those filed after judgment.¹⁴⁷ The rationale for the demarcation is that if intervention is sought before the decree, then prejudice to existing parties is less likely to result from the delay because the existing parties will not have invested time and energy in negotiating and implementing the decree.¹⁴⁸ Some courts view "[i]ntervention after entry of a

144. *Culbreath v. Dukakis*, 630 F.2d 15, 21-22 (1st Cir. 1980).

145. The *Culbreath* opinion states:

We see little prejudice to the parties caused by the failure of the unions to intervene more promptly. In fact, we note that, had any such prejudice been apparent, it could have been remedied by joinder of the unions. We do, however, perceive real prejudice to the parties if the unions are allowed to intervene.

Id. at 22 (citation omitted).

The *Culbreath* court thus apparently took the *Stallworth* party-prejudice from delay factor to mean that the court should look at whether the intervenors' absence from the case in the past had been prejudicial to the parties, rather than whether the staleness of the intervenors' claim would prejudice the parties.

146. Admittedly there is also language in *Culbreath* about the "delayed intervention of the unions [having caused] several of the target dates in the consent decree [to be] nullified," but the court does not distinguish the issue of what difference it made prejudice-wise that the intervenors petitioned so late in the game and what prejudice was caused by the mere fact of intervention, regardless of its timing. *Id.* at 22.

147. See 7C WRIGHT ET AL., *supra* note 64, § 1916, at 444; cf. *McClain v. Wagner Elec. Co.*, 550 F.2d 1115 (8th Cir. 1976); *McDonald & E.J. Lavino, Co.*, 430 F.2d 1065 (5th Cir. 1970). The Supreme Court has upheld postjudgment intervention in appropriate cases. *United Airlines Inc. v. McDonald*, 432 U.S. 385 (1977); see also *Stallworth*, 558 F.2d at 267.

148. Note, however, that the court can enter the decree *over* the intervenor's objections, and the intervenor can then keep the suit alive to contest the legality of the decree. *Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986). The other parties at least will be forewarned of this possibility though. According to the court in *Jones v. Caddo Parish School Board*, the particular prejudice following entry of a consent decree may be that "positions have hardened, concessions here have

consent decree [as] reserved for exceptional cases."¹⁴⁹ Thus, if the parties have completed extensive discovery, and the petitioner's untimely entry into the suit would force revisitation of many of the discovery issues, prejudice would weigh against granting the petition.¹⁵⁰ While such a demarcation may hold sway in some circumstances, it is especially inappropriate in the consent decree context. Strict implementation of such a cut-off would increase the number of majority employees not represented in the earlier suit, and thus increase the number of collateral challenges. To the extent that a judgment day cut-off is based on a desire not to waste the judicial and parties' resources expended in reaching the judgment, that basis is less fitting in the present context because majority employees not represented or permitted to intervene may bring entirely separate suits.

The third *Stallworth* timeliness factor also concerns prejudice. Here the inquiry pertains not to prejudice to the parties, but rather to the amount of prejudice that the would-be intervenor may suffer if the court denies his petition for leave to intervene. The threat to the would-be intervenor of being permanently foreclosed from bringing a later challenge to the consent decree should qualify as such prejudice.¹⁵¹ Barring unusual circumstances militating against intervention, this prejudice to the would-be intervenor who may be collaterally estopped seemingly should outweigh all other considerations. Nevertheless, courts may sometimes take a contrary position. In *Culbreath*, the court acknowledged that unavailability of the opportunity for collateral attack placed the applicants in the difficult position of having no opportunity to challenge the decree.¹⁵² The *Culbreath* court discounted this prejudice, however, because it believed that the would-be intervenors would have had only a very weak chance of prevailing in a subsequent attack, had one

been traded for those there, persons, groups, and institutions have gone on the line publicly, and months of effort and mobilization of community and citizen involvement have been expended." *Jones v. Caddo Parish Sch. Bd.*, 735 F.2d 923, 935 (5th Cir. 1984). In *Caddo*, the court noted that permitting the intervenors into the case after entry of the consent decree would render "all the time, effort and meetings" wasted. *Id.*

149. *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 837 (1978) (quoted in *Caddo*, 735 F.2d at 935).

150. *Commonwealth v. Rizzo*, 530 F.2d 501 (3d Cir.) *cert. denied*, 426 U.S. 921 (1975). In such cases, leave to intervene may be made subject to the intervenor's accepting discovery that has taken place. *Boldon v. Pennsylvania State Police*, 578 F.2d 912, 927 (3d Cir. 1978) (Garth, J., concurring in part and dissenting in part).

151. See *Caddo*, 735 F.2d at 936-37; *Foster v. Gueory*, 655 F.2d 1319, 1325 (D.C. Cir. 1981); *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065 (5th Cir. 1970); *cf. United States v. Jefferson County*, 720 F.2d 1511, 1519 (11th Cir. 1983); *United States v. City of Jackson*, 519 F.2d 1147 (5th Cir. 1975). See Schwarzschild, *supra* note 1, at 922.

152. Surprisingly, the court added that "[i]ntervention to modify the decree, the proper procedural recourse under the circumstances, [would] be barred by the doctrine of res judicata." *Culbreath v. Dukakis*, 630 F.2d 15, 22-23 (1st Cir. 1980) (citing *O'Burn v. Shapp*, 70 F.R.D. 549 (E.D. Pa.), *aff'd*, 546 F.2d 418 (3d Cir. 1976), *cert. denied*, 430 U.S. 968 (1977)); *Construction Indus. Combined Comm. v. Operating Eng'rs, Local 513*, 67 F.R.D. 664, 666 (E.D. Mo. 1975) (intervention would be the proper recourse).

been permitted.¹⁵³ This was because the court viewed the entry of a consent decree as a determination by the court that the plaintiff was likely to succeed on the merits. The plaintiff's probability of success, of course, demonstrated the defendant's and intervenor's probability of failure in a subsequent challenge, if one had been available.¹⁵⁴

What the *Culbreath* court suggests, then, is that refusing to permit majority employees to intervene does not prejudice these employees because the court probably made a good decision to enter the decree, and thus any challenge to that decision would have failed anyway. This suggestion seems to mean that *any* time a consent decree is or will be entered, the intervenors cannot satisfy the prejudice prong. If we may properly assume that there are some consent decree cases in which intervention by majority employees is appropriate, then the *Culbreath* decision cannot help us distinguish between those who should intervene and those who should not.¹⁵⁵

The fourth *Stallworth* factor questions whether any unusual circumstances militate either for or against a determination that the application is timely.¹⁵⁶ Such factors may be that the would-be intervenor was unable to intervene earlier or, as in *Stallworth*, that the district court refused to permit the employer to give notice to its white employees of the potential import of the suit.¹⁵⁷ There are two unusual circumstances in consent decree cases, both pointing to timeliness. One is the peculiar circumstances of the majority employees who seek admittance to the suit.

153. *Culbreath*, 630 F.2d at 23.

154. *Id.* The *Culbreath* court measured prejudice to the unions from denial of intervention "to be as slight as the unions' probability of success on the merits of the issues they would raise upon intervention." *Id.* The court derived its authority to gauge the union's probability of success on the merits on the court's "extensive exposure to the Massachusetts civil service system," rather than on evidence in the case. *Id.* This exposure led the court to conclude that the unions had little chance of success on the merits of their complaints and that, therefore, the prejudice to the union would be slight if the court did not permit them to intervene. In his concurring opinion in *Culbreath*, Senior Circuit Judge Aldrich took issue with the majority's passing on the merits of the unions' case when the unions had yet to receive an opportunity to present their case. *Id.* at 25.

It is interesting to note in this connection that most employers who settle via consent decree specify in the decree that they admit no liability. Schwarzschild, *supra* note 1, at 895 (citing *United States v. Swift & Co.*, 286 U.S. 106, 111 (1931); *EEOC v. AT&T*, 556 F.2d 167, 176 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978)).

155. Whereas *Stallworth* suggests that leniency should be given when courts are considering prejudice to the would-be intervenor seeking intervention as of right, *Culbreath* affords no leniency. Each circuit has company in these views. Cases following *Stallworth* include: *Sanguine, Ltd. v. United States Dep't of Interior*, 736 F.2d 1416 (10th Cir. 1984), *cert. denied*, 479 U.S. 1054 (1987); *Lelsz v. Kavanagh*, 710 F.2d 1040 (5th Cir. 1983). Cases following *Culbreath* include: *Garrity v. Gallen*, 697 F.2d 452 (1st Cir. 1983); *United Nuclear Corp. v. Cannon*, 696 F.2d 141 (1st Cir. 1982). See *Jones v. Caddo Parish Sch. Bd.*, 704 F.2d 206 (5th Cir. 1983); *EEOC v. Westinghouse Elec. Corp.*, 675 F.2d 164 (8th Cir. 1982).

156. *Stallworth*, 558 F.2d at 266. The *Stallworth* court found it unnecessary to consider this factor because the other three factors pointed to intervention. *Id.* at 267.

157. *Id.* at 266. The *Culbreath* court found unusual circumstances militating against intervention in the fact that the affirmative action at issue did not violate certain collective bargaining agreements. *Culbreath*, 630 F.2d at 24. Courts may also consider as a factor militating in favor of intervention the fact that no party to the decree represented the would-be intervenor's interests.

The other is the availability of limited purpose intervention and the protection such intervention affords those already party to the suit.

The peculiar circumstances of majority employees seeking intervention in the minority suit may count as "an unusual circumstance militating in favor of a determination that the application is timely."¹⁵⁸ The collateral attack bar should weigh in favor of a timeliness finding because a finding of untimeliness would have the extreme consequence of permanently barring intervention. This position finds support in the Supreme Court's *NAACP v. New York*¹⁵⁹ opinion. In denying intervention in that case, the Supreme Court relied upon the unusual circumstance that the would-be intervenors would not be foreclosed from direct and collateral challenges of the redistricting plans that concerned the would-be intervenors.¹⁶⁰ If availability of collateral challenge weighed against timeliness in *NAACP*, then presumably unavailability of such a challenge should weigh in favor of a finding of timeliness. On the other hand, the potential need to avoid multitudinous collateral challenges to consent decrees if intervention is denied may cause courts to find the circumstances counsel in favor of intervention in the instant suit. Because section 108 forecloses suits only by those whose interests have been adequately represented,¹⁶¹ the court may find that permitting intervention in the minority suit is by far the most efficient way to proceed for those whose interests are not represented.

The court also may consider the fact that the would-be intervenor seeks "limited purpose" intervention as an unusual circumstance militating in favor of intervention.¹⁶² "Limited purpose" intervention means that the intervenor will not force the other parties to relitigate their entire case or unnecessarily litigate portions of the case that have been settled. As is discussed below, this is an appropriate option for the majority employee who intervenes in the minority employees' suit.

Not only do the standards of Rule 24, strictly applied, dictate that courts generally should permit majority employee intervention in these employment discrimination cases, but the policies underlying the rule

158. As suggested above, courts may deem the mere opportunity to seek intervention to be an adequate "opportunity to be heard" for purposes of sec. 108.

159. 413 U.S. 345 (1973).

160. *Id.* at 368. The Court also found that a grant of intervention in that case would have "seriously disrupt[ed] the State's electoral process." *Id.* at 369. Courts should not consider here the disruption that invariably occurs as a result of intervention in a consent decree suit. Such disruption has already been considered as a form of prejudice resulting from the applicant's delay in intervening. See *supra* notes 142-50 and accompanying text.

161. Section 108 defines the class of adequately represented people as persons "whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact." Pub. L. No. 102-166, sec. 108, 105 Stat. 1071, 1076 (Nov. 21, 1991) (amending Civil Rights Act of 1964 § 703(n)(1)(B)(ii), 42 U.S.C. §§ 2000e-2000h (1988)).

162. *Jones v. Caddo Parish Sch. Bd.*, 735 F.2d 923, 938 (5th Cir. 1984); cf. *Kirkland v. New York State Dep't of Correctional Servs.*, 711 F.2d 1117 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

also support intervention. A major purpose of Rule 24 is "to protect non-parties from having their interests adversely affected by litigation conducted without their participation."¹⁶³ Permitting intervention will assure due process and will avoid unfairness in the event the section 108 collateral bar is construed to apply to majority employees who have had an opportunity to petition for intervention, but whose petitions have been denied. Courts must construe the intervention rule carefully and consistently with the liberal joinder policies underlying it to ensure fairness to the parties and to majority employees seeking intervention.¹⁶⁴ In short, courts should encourage joinder by intervention. By contrast, courts should view joinder under Rule 19 less favorably in these circumstances.¹⁶⁵

2. Joinder of Necessary and Indispensable Parties

a. What Rule 19 Is

Unlike intervention, which is a mechanism for absentees to interject themselves into a suit, Rule 19 permits a party to the suit (usually the defendant) to force joinder of someone the plaintiff initially elected not to sue. Suppose that a group of majority employees receives notice of a discrimination suit that seeks affirmative action, but chooses not to intervene. The defendant in the suit, concerned that any settlement of the suit may ultimately meet with opposition from these absent employees, brings the problem of their absence to the court's attention. To raise this issue, the defendant must invoke Rule 19 of the *Federal Rules of Civil Procedure*, governing joinder of necessary and indispensable parties.¹⁶⁶

163. *Caddo*, 735 F.2d at 935. Although the timing of intervention may cause the court some inconvenience, "mere inconvenience is not in itself a sufficient reason to reject as untimely a motion to intervene as of right." *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1073 (5th Cir. 1970).

164. The same factors that point to intervention of right under Rule 24(a) would argue for permissive intervention under Rule 24(b) in the event that the court finds that petitioners for intervention have not met the Rule 24(a) requirements. In fact, in most of the employment discrimination cases at issue, whether the majority employees gained admittance to the suit via Rule 24(a) (of right) or Rule 24(b) (permissive) would not matter. One distinction between the two parts of the rule is that intervenors of right under part (a) of the rule may acquire the federal court's ancillary subject matter jurisdiction over their claims, whereas permissive intervenors' claims must have an independent basis of federal subject matter jurisdiction. See 7A CHARLES A. WRIGHT & ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1923 (1986); see also Judicial Improvements Act of 1990, 104 Stat. 5089 (Dec. 1, 1990) (to be codified at 28 U.S.C. § 1367). Because this article envisions petitioners for intervention whose claims arise under Title VII, the federal court has jurisdiction over the claim without resort to principles of ancillary jurisdiction. An additional difference between intervention of right and permissive intervention is that an order denying the former is appealable and an order denying the latter is not. See also JAMES & HAZARD, *supra* note 62, § 10.17, at 553 n.22.

165. "[O]nly the absent parties can accurately measure the . . . interests that they now hold and the extent to which [those interests] could be impaired." *National Wildlife Fed'n v. Burford*, 676 F. Supp. 271, 275 (D.D.C. 1985).

166. FED. R. CIV. P. 19. Unlike most of the federal joinder rules, which permit the plaintiff to elect whether or not to join new parties, Rule 19 empowers the defendant to compel joinder of a party. Rule 19 is sometimes used by defendants who legitimately believe that someone needed for the lawsuit is missing and should be joined before things go any further. Rule 19 is also frequently used by defendants who hope to have the case dismissed by convincing the court that a nonparty

b. How Rule 19 Works

The application of Rule 19 requires a two-step process.¹⁶⁷ In the first step, the court must determine whether the absentee is a person needed for just adjudication of the action, thus "necessary" under the standards of Rule 19(a).¹⁶⁸ If the absentee is necessary, the court must order the plaintiff to join the absentee in the lawsuit.¹⁶⁹ The second step of the process is triggered if joinder of this "necessary" absentee is impossible. Such impossibility may result from rules of venue and personal or subject matter jurisdiction.¹⁷⁰ In this second step, the court must determine whether the case should go forward despite the unfeasibility of joining the necessary absentee. If the absentee is so essential to the suit that the suit should not, "in equity and good conscience," proceed in his absence, the absentee is deemed "indispensable," and the court must dismiss the suit.¹⁷¹ If the absentee is not so crucial to the suit, he is deemed merely necessary, but not indispensable, and the suit may proceed without him.¹⁷²

c. Rule 19(a): Majority Employees As Necessary Parties

Under Rule 19(a), an absentee is necessary if he has an interest relating to the subject matter of the suit and if either (1) the disposition of the

who cannot be joined is crucial to the suit. If the defendant fails to invoke Rule 19 where appropriate, the rule requires the court to apply the rule *sua sponte*. *Provident Tradesmens Bank & Trust v. Patterson*, 390 U.S. 102, 111 (1968).

167. *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 819 (9th Cir. 1985); *Pasco Int'l (London) Ltd. v. Stenograph Corp.*, 637 F.2d 496, 500 (7th Cir. 1980); *Le Beau v. Libby-Owens-Ford Co.*, 484 F.2d 798, 800 (7th Cir. 1973); *Freeman v. Liu*, 112 F.R.D. 35, 40 (N.D. Ill. 1986); *Bedel v. Thompson*, 103 F.R.D. 78, 80 (S.D. Ohio 1984).

168. 7 WRIGHT ET AL., *supra* note 164, § 1611, at 161.

169. If the absentee is someone who should be a third-party defendant, thus joinable by the defendant under Rule 14 of the *Federal Rules of Civil Procedure*, then a Rule 19 motion for joinder is, of course, unnecessary. The defendant may, however, move for Rule 19 dismissal of the suit because of the defendant's inability to join the third-party defendants. See *infra* note 171 and accompanying text.

170. *Macklin v. Butler*, 553 F.2d 525, 531 (7th Cir. 1977). The Rule contemplates that joinder of the nonparty will be impossible (1) where the nonparty's joinder would destroy subject matter jurisdiction; or (2) when the court cannot obtain personal jurisdiction over the nonparty; and (3) when the nonparty, once joined, objects to venue. FED. R. CIV. P. 19(a). If a nonparty is not deemed "necessary" under section (a), then the court need never reach the Rule 19(b) issues pertaining to "indispensability," that is, whether the action should go forward in the absence of an admittedly necessary party who cannot be joined. FED. R. CIV. P. 19.

171. Prior to the 1966 amendments to the *Federal Rules of Civil Procedure*, the term "indispensable" meant, among other things, that the absentee's interests were not severable from those of one of the parties. *Washington v. United States*, 87 F.2d 421, 426 (9th Cir. 1936) (quoting *Shields v. Barrow*, 58 U.S. 130, 139 (1854)). Such "wooden" decision making has given way to consideration of practical matters under the amended rule. 7 WRIGHT & MILLER, *supra* note 164, § 1607, at 86. "The reference in revised Rule 19 to this conclusory label was not intended to codify the pre-1966 body of precedent in which particular parties were categorized as 'indispensable.'" *Id.* at 85. "According to the present language of Rule 19(b) the court is to invoke this label only after an evaluation of the relevant considerations presented by the case, particularly those enumerated in the rule itself, makes it clear that in 'equity and good conscience' the action should not proceed in his absence." *Id.*

172. FED. R. CIV. P. 19(b).

suit may keep the absentee from being able to protect this interest;¹⁷³ or (2) the defendant in the suit may be subjected to inconsistent obligations as a result of the absentee's attempts to protect the absentee's interest in a subsequent lawsuit.¹⁷⁴ Given a collateral attack bar, majority employees typically are necessary parties by virtue of the first of these conditions; absent such a bar, they are necessary by virtue of the second.¹⁷⁵

Under either of the Rule 19(a)(2) provisions, the first inquiry is the same as the first Rule 24 intervention inquiry—whether the absentee's interest is cognizable under the rule.¹⁷⁶ Like the would-be intervenors under Rule 24, the majority employees who are considered for Rule 19 joinder in employment discrimination cases have an interest in not being victims of "reverse" discrimination.¹⁷⁷ Also as with Rule 24, some courts incorporate into the interest requirement a requirement that the interest be one that is truly threatened. Thus, some courts recognize a Rule 19 interest only when a subsequent suit by the absentee to enforce the interest is likely to succeed.¹⁷⁸ Courts requiring likelihood of success

173. FED. R. CIV. P. 19(a)(2)(i).

174. FED. R. CIV. P. 19(a)(2)(ii). One commentator has suggested that "a successful third-party attack will necessarily result in conflicting injunctions, since the judgment in the second action will enjoin compliance with the consent decree." Kramer, *supra* note 1, at 333. In fact, a court may order relief in the second suit that is logically inconsistent with the consent decrees (back wages for example), but which does not actually require disobedience to the decree. It is unlikely that a court would grant relief literally requiring the employer to violate the terms of another court's order or its own order in an earlier case.

A nonparty also may be necessary if his absence makes it impossible for those present to resolve their conflict completely. FED. R. CIV. P. 19(a)(1). In fact, the first of the Rule 19(a) situations, in which the parties cannot resolve matters in the nonparty's absence, is not called into play at all by the type of employment discrimination lawsuit this article considers. This is because this portion of Rule 19(a) contemplates a situation in which somehow the defendant literally does not possess the means to give the plaintiff redress without the nonparty's participation. *Id.* 19 advisory committee comment to 1966 amends. Usually the employment discrimination defendant can pay over to the minority plaintiff appropriate relief, affirmative or otherwise, without the participation of the white employees. The whites' absence does not tie the hands of the employer or the strings on the employer's pocketbook. It is thus the second subparagraph of section (a) that governs the question of when majority employers must be deemed necessary in discrimination lawsuits.

Although the rule states generally "a party to the suit," it protects only the defendant. The danger to the plaintiff of subsequent action by the absentee is not of concern here because the plaintiff, as the master of his suit, may unilaterally join any parties whose absence would prejudice him. Simply put, the plaintiff is in a position to sue whomever she wishes. It is the defendant who, involuntarily hailed into court, needs the protection of Rule 19. See, e.g., *Provident Tradesmens Bank & Trust v. Patterson*, 390 U.S. 102, 110 (1968).

175. This generalization is offered to assist in the analysis of Rule 19 in the instant context, but with the caveat that the inquiry under Rule 19(a) is normally a practical inquiry based on the specific facts of each case. "Th[e] rule does not set forth a rigid or mechanical formula for decision." *JTG of Nashville v. Rhythm Band*, 693 F. Supp. 623, 625 (M.D. Tenn. 1988); see also *Provident Tradesmens Bank & Trust*, 390 U.S. at 116 n.12. Rather, the rule was "designed to encourage courts to appraise themselves of the 'practical considerations' of each individual case in light of the policies underlying the rule." *Rhythm Band*, 693 F. Supp. at 625. In the specific language of another court, "the rule emphasizes practical consequences and its application depends on the circumstances of each case." *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 819 (9th Cir. 1985).

176. See *supra* note 101 and accompanying text.

177. But see *English v. Seaboard Coast Line R.R. Co.*, 465 F.2d 43 (5th Cir. 1972).

178. One scholar has argued that "[i]t is impossible to imagine an affirmative action case in which other employees do not have a strong interest and an arguable legal theory. They should be

in the future suit have held that "[s]peculation about the occurrence of a future event ordinarily does not render all parties potentially affected by that future event necessary or indispensable parties under Rule 19."¹⁷⁹ In the view of these courts, "it is clear that Rule 19(a) has never required joinder in every case in which 'interests' of white persons may be adversely affected by a court decree terminating racially discriminatory practices."¹⁸⁰ These courts suggest that a "substantial likelihood" of prejudice is required to justify Rule 19 joinder of absentees.¹⁸¹ Other courts are more lenient. The more lenient courts that require less than a likelihood of prevailing in the subsequent suit have relied on the language of the rule, which speaks in terms of "possibilities."¹⁸²

As with Rule 24, courts should be reluctant to find that the interest requirement is not met on the sole ground that the court believes that its own decision should be upheld if the absentees challenge the decree in a subsequent suit. Because courts invariably hope that all their orders, if appealed, will be found to be lawful, a court's expectation that a subsequent challenge to its order would fail should not defeat the interest requirement.

Instead, what should defeat the motion to join majority employees is

joined in every case in which plaintiffs seek more than make-whole relief for identifiable victims." Laycock, *supra* note 21, at 124.

179. *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1046 (9th Cir.), *cert. denied*, 464 U.S. 849 (1983); *Le Beau v. Libby-Owens-Ford Co.*, 484 F.2d 798, 802 (7th Cir. 1973) ("too speculative to justify dismissal"). Even for those courts that permit uncertainty of success in the majority's future suit, however, those majority employees whose suits are barred by sec. 108, Category 2 should be found not to have cognizable interests. This is because these people have, by definition, been adequately represented in the first suit; thus, they have already had their challenges raised and considered.

180. *English*, 465 F.2d at 46. This was applied to joinder of male employees in *Spirit v. Teachers Insurance & Annuity Association*, 416 F. Supp. 1019, 1022 (S.D.N.Y. 1976), a sex discrimination case.

181. *Coastal Modular Corp.*, 635 F.2d at 1108. Rule 19(a) actually speaks in terms of practical impairment, rather than legal impairment. FED. R. CIV. P. 19(a). It might, therefore, be argued that even those majority employees who never would have a viable cause of action—because the decree was verifiably lawful—should be deemed interest-impaired. That is, the decree indeed will harm them, by taking job advantages away, but will do so only in a way consistent with governing precedent. Nevertheless, some courts require not only that the absentee have a future suit, but that the suit be likely to succeed. *See supra* note 179.

182. In fact, the term "may" in Rule 19 refers to the possibility that the absentee's ability to protect his interest may be impaired, not to the question whether the interest at stake is threatened enough. Under *Firefighters* it no longer should be possible for the intervenor to force the other parties to adjudicate fully their own dispute. Under *Firefighters*, the intervenor has no power to block settlement by withholding his consent. A number of cases before *Firefighters* had reached a contrary result. *See United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981) (en banc); *Culbreath v. Dukakis*, 630 F.2d 15, 22 (1st Cir. 1980); *United States v. Simmonds Precision Prods., Inc.*, 319 F. Supp. 620, 621 (S.D.N.Y. 1970); *Kramer*, *supra* note 1, at 353 n.135 (citing *Sanguine, Ltd. v. United States Dep't of Interior*, 798 F.2d 389, 390-91 (10th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987)). In the words of one court, judges "need not conclusively determine how collateral estoppel would operate in future litigation. 'Rule 19 speaks to possible harm, not only to certain harm.'" *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 821 (9th Cir. 1985) (citations omitted) (quoting *Aguilar v. Los Angeles County*, 751 F.2d 1089, 1094 (9th Cir. 1985)). Several courts have used this language to support joinder of absentees based in part upon a "significant possibility" of prejudice. *See Takeda*, 765 F.2d at 821.

the Rule 19(a) impairment requirement. Once it is established that the absentee has a cognizable, adequately threatened interest in the suit, the defendant must further establish under the remaining portion of Rule 19(a) either that the absentee's ability to protect that interest may be impaired by disposition of the suit or that the absentee is likely to bring a subsequent action that will subject the defendant to inconsistent obligations. It is these aspects of Rule 19(a) that will cause the failure of a Rule 19 motion to join absent majority employees.

(i) Rule 19(a)(2)(i)

Rule 19(a)(2)(i) is virtually identical to Rule 24(a)(2). Both require joinder if the absentee claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may "as a practical matter impair or impede his ability to protect that interest."¹⁸³ Unlike Rule 24 intervention, however, the goal of this portion of Rule 19 is to obligate those present in the suit to protect the absentee.¹⁸⁴

The leading case on the application of Rule 19, *Provident Tradesmens Bank & Trust v. Patterson*,¹⁸⁵ suggests that the obligation of courts to use Rule 19 to protect against such prejudice is of due process dimensions.¹⁸⁶ As a lower court has stated, "[a] court must protect the inter-

183. FED. R. CIV. P. 19(a)(2)(i). See *supra* note 176 and accompanying text. Prejudice to the nonparty and prejudice to the defendant may appear at first glance to amount to one and the same thing. That is, one may expect that if prejudice to the nonparty results from judgment in the suit, then the nonparty is likely to bring a suit against the defendant. That suit, in turn, may result in an inconsistent obligation being imposed upon the defendant; thus prejudicing the defendant. Prejudice to the nonparty does not, however, equal prejudice to the defendant. The rule speaks, not of impairment of the absentee's interest, but rather of impairment of his ability to protect his interest. FED. R. CIV. P. 19(a)(2)(i). The rule envisions and protects against a situation in which the nonparty will not be able to succeed in a subsequent suit to recover whatever that first suit irretrievably took from him. The nonparty envisioned by the rule thus poses *no* threat of inconsistent obligations to the defendant, for the rule protects the nonparty only if he *cannot* prevail in the second suit. Conversely, a nonparty who can succeed in imposing inconsistent obligations upon the defendant via a subsequent lawsuit (our concern in the prejudice to defendant prong of this provision) is not a nonparty whose ability to protect his own interest is impaired, inasmuch as he *can* succeed in the subsequent suit.

184. Those nonparties whose interests arguably are affected are in a better position to know whether any potential effects of the decree are important enough to warrant filing suit. See *House Hearings*, *supra* note 86, at 464 (statement of Prof. Larry Kramer) (stressing that traditional route in Anglo-American litigation system is to leave burden of filing claim with nonparty). As one court has stated, "the interests of an unjoined party are especially vulnerable in that they are not vigorously asserted by counsel before the court. As a result, it is possible that the true nature and extent of those interests may not be explored until after they are irreparably prejudiced." *Boles v. Greenville Housing Auth.*, 468 F.2d 476, 478 n.3 (6th Cir. 1972).

185. 390 U.S. 102 (1968).

186. *Id.* at 123. The *Provident* Court stated: "Neither Rule 19, nor we, today, mean to foreclose an examination in future cases to see whether an injustice is being, or might be, done to the substantive, or, for that matter, constitutional rights of an outsider by proceeding with a particular case." *Id.*

The burdens of joining all "necessary" parties in these cases might be alleviated by joining several majority employees as representatives of a defendant class under Rule 23 of the *Federal Rules of Civil Procedure*, although use of this device may be so fraught with difficulties as to be unwork-

ests of the parties not before it to avoid possible prejudicial effect; failure of a court to protect those interests by joinder may amount to a violation of due process."¹⁸⁷

Like Rule 24, Rule 19(a)(2)(i) does not, by its terms, require legal impairment of the interest, but only practical impairment. Some courts have emphasized that "it is not necessary, under Rule 19, that [the absentee] would be bound by the judgment in a technical sense, but is enough that as a practical matter [his] rights will be affected."¹⁸⁸ Nevertheless, other courts have relied on the fact that the absentee is not legally bound by a particular decision to support the conclusion that the absentee is not a necessary or indispensable party.¹⁸⁹ Under either approach, courts would see an absolute collateral attack bar as impairment of the majority employees' ability to protect their interest. Such a bar, in effect, would render the absent majority employees bound by the decree, and this binding effect entirely eliminates the absentees' ability to protect their interest if they are not joined. The protections built into both categories of section 108, however, suggest that courts should not deem such barred majority employees to have met the impairment requirement.

Those who fall within the first section 108 category do not meet the impaired ability requirement because they have, by definition, had and declined the requisite opportunity to protect their interests. Majority employees are not barred by the first category of section 108 unless they have been given notice and an opportunity to object.¹⁹⁰ A number of courts have recognized that denying joinder does not impair an absentee's interest if the absentee failed to take advantage of an opportunity to intervene.¹⁹¹ Because anyone who qualifies as a necessary party under the Rule 19(a) criteria also would qualify as an intervenor of right under Rule 24,¹⁹² we may assume that any Category 1 absentee has forgone an opportunity to petition for intervention by the time the court applies Rule 19.¹⁹³ Thus, the absentees' ability to protect their interests is not impaired.

With regard to the Category 2 bar, there is similar reason to find

able. Laycock, *supra* note 21, at 147-48 n.39; Strickler, *supra* note 38, at 1596-98; Recktenwald, *supra* note 11, at 175-76.

187. *R.J. Williams Co. v. Fort Belknap Housing Auth.*, 92 F.R.D. 17, 21 (D. Mont. 1981).

188. *JTG of Nashville v. Rhythm Band*, 693 F. Supp. 623, 627 (M.D. Tenn. 1988); 3A MOORE & KENNEDY, *supra* note 89, ¶ 19.07[2.-1], at 19-103; *see also* *NLRB v. Doug Neal Management Co.*, 620 F.2d 1133, 1139 (6th Cir. 1980).

189. *Munoz v. Prudential Ins. Co. of Am.*, 633 F. Supp. 564, 566 (D. Colo. 1986); *see also* *Shelton v. Exxon Corp.*, 843 F.2d 212, 218 (5th Cir. 1988).

190. As discussed earlier, the terms of sec. 108 describe an "opportunity to object," rather than "an opportunity to intervene," *see supra* notes 54-55 and accompanying text, but this article argues that intervention is the only proper mechanism for them to be heard.

191. If courts treat the opportunity to petition for intervention as equivalent to an opportunity to present objections, the result might be different.

192. *See* FED. R. CIV. P. 24 advisory committee's note to 1966 amends.

193. There may be some exceptions to this proposition when a majority employee has learned so recently that his interests are impaired that he has not yet had an opportunity to intervene.

that the majority employees' ability to protect their interests is not impaired for purposes of Rule 19. Category 2 bars only absentees whose interests have been represented adequately by another party who challenged the decree.¹⁹⁴ Rather than being impaired, then, the ability of this category of barred employees to protect their interests has, by definition, become a moot issue because their interests already are protected adequately. Accordingly, Category 2 absentees also should not be necessary under Rule 19(a).

By contrast, the third category of majority employees, who would have been barred under the 1990 version of the Act, but are not barred under the 1991 Act, would have met the Rule 19(a) impairment requirement. This category includes absentees as to whom constitutionally adequate efforts at notice had been made but who had not received actual notice and an opportunity to be heard.¹⁹⁵ With regard to these people, joinder under Rule 19(a) would have been appropriate if possible, but it probably would not have been possible.

Those who would have been barred under Category 3 of the 1990 Act would never have received notice, though efforts at notice had been made. This category would have included people whom the parties to the suit were unable to find. Presumably, the bound absentees would have included those who had not applied yet for positions or begun working as employees of the defendant. Because these people could not have been identified, they could not have been joined under Rule 19(a). For absentees such as these, who were necessary but could not be joined, the 1990 version of the rule would have required determination of whether they were so important as to be indispensable, requiring dismissal of the suit in their absence under Rule 19(b). This issue is discussed below in subpart d.

(ii) Rule 19(a)(2)(ii)

The other relevant portion of Rule 19(a)(2) also would counsel against joinder of the majority employees who may be affected by section 108 of the 1991 Act. This subsection concerns prejudice to the defendant, rather than to the absentee. Rule 19(a)(2)(ii) requires that the absentees be joined if they "claim[] an interest relating to the subject matter of the action and [are] so situated that the disposition of the action in [their] absence may . . . leave [the employer] subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the absentees' claimed interest."¹⁹⁶ In situations where collateral

194. See *supra* note 55 and accompanying text.

195. See *supra* note 55.

196. The prospect of "multiple" suits against the employer *not accompanied by a probability of success* does not bring Rule 19(a) into play. The same trial judge who considers the Rule 19 motion will usually conduct the fairness hearing. If the judge expects the fairness hearing to permit the judge to ascertain whether government legal standards are violated, see *infra* note 219, the judge logically would expect any subsequent suit challenging the decree as unlawful to fail. The prospect

attack is available, the employer is at risk for inconsistent judgments. The absentees could bring a suit to challenge the decree, and that second suit could result in a conflicting judgment to the effect that the decree in the first suit was unlawful. Rule 19, however, does not require joinder to avoid inconsistent obligations when joinder would not eliminate the problem anyway. Because the majority employees, if they were joined, could not, under *Firefighters*, be forced to concur in any consent decree, their joinder technically would not eliminate the possibility of inconsistent results, and thus would not be required by Rule 19.¹⁹⁷ Majority employees who are barred by section 108, however, generally would be bound by any judgment or order resolving a claim of employment discrimination, regardless of their objections to it, and consequently could not subsequently subject the employer to inconsistent obligations. This prong of Rule 19, then, would not render the majority employees necessary.

d. Rule 19(b)

If the court nevertheless determines that the majority employees are necessary under Rule 19(a), then the court must order the plaintiff to join

of majority employees who can present substantial new facts or new arguments in the second suit does not undermine this premise. Even if the majority employees are able to bring new evidence to bear in the second court, the majority employees are limited to challenging the adequacy of the evidentiary foundation for the first trial court's approval of the decree or for the defendant's acceptance of the decree. See *infra* note 219.

Our scenario should not fall automatically within the ambit of the "inconsistent obligation" prong because the term "inconsistent obligation" has a narrow definition, requiring more than simple *logical* inconsistency. Rather, the results of the two cases must be *practically* inconsistent or mutually exclusive. In short, the employer literally must be incapable of complying with both at the same time. In the employment discrimination context, it is probable that any inconsistent judgment in the second case is merely logically inconsistent, but not practically inconsistent, with the consent decree. Assume that the second court finds that the affirmative action plan embodied in the consent decree does *not* comply with *Weber*. Its holding is thus logically inconsistent with the consent decree that, ideally, the entering court deemed consistent with *Weber*. If the court does find a violation of *Weber*, it nevertheless may grant appropriate *relief* not inconsistent with the decree. The employer may be doubly *liable*. Cf. *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers*, 461 U.S. 757, 767 (1983). For example, it now may have to promote all the whites who would have received promotions absent the affirmative action plan. This does not mean that the employer must *demote* the minority employees who benefited from the plan, but rather that the employer must promote more people than it had intended to promote.

Absentee majority employees were much more likely to meet the requirements of Rule 19(a)(2)(ii) under *Martin v. Wilks* than under the 1991 Act. The provisions of sec. 108 should prohibit most absentee challenges to a judgment or order resolving an employment discrimination claim. Because the barred absentees never could challenge the resolution of the claim in subsequent litigation, there is virtually no risk that persons already parties could incur double, multiple, or inconsistent obligations. As a result, sec. 108 will eliminate almost completely this prong of Rule 19(a) from the equation in employment discrimination actions.

197. *Dyke v. Gulf Oil Corp.*, 601 F.2d 557 (Temp. Emer. Ct. App. 1979), *rev'd*, 734 F.2d 797 (Temp. Emer. Ct. App.), *cert. denied*, 469 U.S. 852 (1984); see also *Rochester Methodist Hosp. v. Travelers Ins. Co.*, 728 F.2d 1006 (8th Cir. 1984); 3A MOORE & KENNEDY, *supra* note 89, ¶ 19.07, at 19-123. Nevertheless, because, by the terms of sec. 108, majority employees joined under Rule 19 would be before the judge who entered the decree, the chance of consistency between the results of the consent decree negotiations and the subsequent adjudication of the majority employees' claim is enhanced.

them.¹⁹⁸ In some instances, however, the nonparties' joinder cannot be accomplished. The reason for this may be that the court lacks personal jurisdiction over the nonparties, that their joinder would destroy diversity jurisdiction, or that, once joined, the nonparties raise a valid objection to venue.¹⁹⁹ The reason also may be, as suggested above, that the absentees in question cannot be found or even identified. When joinder is thus impossible, Rule 19 directs the court to decide whether to proceed without the absentees by exercising its discretion guided by the criteria set forth in part (b) of Rule 19.

Rule 19(b) sets forth four criteria pertaining to the future of the suit and requires the court to consider whether these and other "interests" dictate that the case should go forward in the necessary party's absence.²⁰⁰ In the alternative, the rule permits the court to decide that, "in equity and good conscience," the case should be dismissed so that it can be brought where all necessary parties can be joined properly.²⁰¹ Thus, "Rule 19(b) is to be applied pragmatically, with a focus on a realistic analysis of the facts of each case."²⁰² Under Rule 19, the interests to be weighed are as follows:

- (1) the extent of prejudice to the absentee or parties that will occur as a result of the court's rendering a judgment without the absentee;
- (2) the extent to which protective provisions in the judgment can lessen such prejudice;
- (3) whether the court will be able truly to resolve the matter without the absentee; and
- (4) whether the plaintiff will have a forum if the action is dismissed for nonjoinder.²⁰³

The first of the four criteria, prejudice, incorporates a reconsideration of the Rule 19(a) criteria: prejudice to the absentee or to the defendant from inconsistent judgments.²⁰⁴ Upon Rule 19(b) analysis, the district court again weighs these Rule 19(a) factors with greater discre-

198. Joinder in this circumstance is mandatory, not discretionary. FED. R. CIV. P. 19(a); *Macklin v. Butler*, 553 F.2d 525, 531 (7th Cir. 1977); Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C. L. REV. 745, 771 (1987).

199. 7 WRIGHT & MILLER, *supra* note 164, § 1607, at 84.

200. FED. R. CIV. P. 19(b).

The plaintiff has the right to "control" his own litigation and to choose his own forum. This "right" is, however, like all other rights, "defined" by the rights of others. Thus, the defendant has the right to be safe from needless multiple litigation and from incurring avoidable inconsistent obligations. Likewise the interests of the outsider who cannot be joined must be considered. Finally there is the public interest and the interest the court has in seeing that insofar as possible the litigation will be both effective and expeditious.

Lamar Haddox Contractor, Inc. v. Potashnick, 552 F. Supp. 11, 14 (M.D. La. 1982) (quoting *Schutten v. Shell Oil Co.*, 421 F.2d 869, 873 (5th Cir. 1970)).

201. FED. R. CIV. P. 19(b).

202. *Schmidt v. E.N. Maisel & Assocs.*, 105 F.R.D. 157, 159 (N.D. Ill. 1985) (citing *Provident Tradesmens Bank & Trust v. Patterson*, 390 U.S. 102 (1968)).

203. FED. R. CIV. P. 19(b).

204. As discussed above, the Supreme Court in *Provident* stated that prejudice to the plaintiff is not an issue. If it were, the plaintiff would have joined the absentee herself. *Provident Tradesmens Bank & Trust v. Patterson*, 390 U.S. 102, 111 (1968).

tion, and may throw additional considerations into the balance. For the same reasons that the collateral attack bar rendered the majority employees unable to protect their interests under Rule 19(a), they here may be deemed prejudiced for purposes of Rule 19(b). Likewise, for the same reason that safeguards in the second category of section 108 provided protection against such impairment for purposes of Rule 19(a), they do so for purposes of Rule 19(b) as well. Under the vetoed 1990 legislation, by contrast, the Category 3 absentees would have met the Rule 19(b) prejudice criterion. Absentees who received no notice and whose interests were not represented would have been indispensable; and the inability to join them would have required dismissal of the case.

The second Rule 19(b) criterion, by contrast, favors proceeding in the absence of majority employees. This criterion effectively provides that any prejudice found under Rule 19(b) may be discounted to the extent that it can be lessened by protective provisions in the judgment. Rule 19(b), then, goes much further than Rule 24(a) in the leeway it gives the court to decide for itself whether its own decision will be adequate to protect the interests of the absentee. This is a key consideration for our purposes. As discussed below, the judge presiding over the consent decree process has an opportunity to consider precisely the question of how to tailor the decree so that it does not prejudice absentees.²⁰⁵ This judge has the latitude to approve only those portions of the parties' agreement that comport with governing legal standards.²⁰⁶ If a consent decree is legal, then the employer would win in any subsequent suit, if subsequent suits to challenge the decree were permitted. Proceeding with the suit in his absence thus would not prejudice the absentee who will not be allowed a collateral challenge because the foreclosed challenge would not meet with success if it were available.²⁰⁷ The process proposed below to be followed at the fairness hearing, therefore, is im-

205. Adequate protection of [minority] rights under Title VII may necessitate . . . some adjustment of the rights of [majority] employees. The Court must be free to deal equitably with conflicting interests of [majority] employees in order to shape remedies that will most effectively protect and redress the rights of [minority] victims of discrimination.

Vogler v. McCarty, Inc., 451 F.2d 1236, 1238-39 (5th Cir. 1971) (entering remedial order, rather than consent decree).

206. Courts need not fear challenges to legal affirmative action:

[T]he courts cannot be deterred by fears of potential adverse impact upon beneficiaries of a discriminatory *status quo*. There can be no vested interest in an unlawful practice.

Since the [majority] cannot legitimately assert a protectable interest, they need not be joined pursuant to Rule 19(a) If the challenged . . . program is found to violate the laws prohibiting . . . discrimination and defendants are ordered to alter its operation, the affected [majority] could not succeed in a claim asserted against good faith compliance with such a decree. Accordingly, the [majority] need not be joined.

Spirit v. Teachers Ins. & Annuity Ass'n of Am., 416 F. Supp. 1019, 1023 (S.D.N.Y. 1976). Moreover, because any subsequent challenge would, under the terms of sec. 108, be brought in the decree-entering court, the judge in that court is in a particularly good position to assure that no prejudice accrues. Cf. Western Md. Ry. Co. v. Harbor Ins. Co., 910 F.2d 960 (D.C. Cir. 1990).

207. Admittedly, there may be a gap between what is legal and what the absentee could achieve if he were joined in the suit. Perhaps the absentee could convince the court to approve a less drastic plan.

portant not only to protect majority employees and consequently the finality of the decree, but also to protect the original suit from dismissal if necessary absentees cannot be joined. Absent such protection, the original suit and the resultant consent decree, which the bar is designed to protect, are threatened by the bar itself.

The third Rule 19(b) criterion is the "adequacy of a judgment rendered without the absentee."²⁰⁸ This refers to the public's interest in having the whole dispute resolved at once, rather than to the plaintiff's interest in receiving complete relief.²⁰⁹ When collateral attack is available, this factor points to joinder to protect the courts against additional lawsuits. If the section 108 bar criteria are met, so that subsequent suits are barred, the objective of having the whole dispute resolved at once is automatically met without joinder of the majority employees because the bar renders the first suit the only suit.²¹⁰ The first suit will, by definition under section 108, resolve the whole dispute at once.²¹¹ Given a collateral attack bar, application of this part of Rule 19(b) invariably should favor proceeding without the majority employee absentees.

The fourth Rule 19(b) criterion is "inadequacy of alternative fora."²¹² In applying this criterion, the judge considers whether this is the only forum available to the plaintiff so that dismissal of the suit for want of the missing party effectively will deprive the plaintiff of any forum at all. This would be the case where, for example, jurisdiction over the named defendants could not be obtained in any court other than the forum court. It also would be the case where the necessary parties could not be joined because they could not be identified or located. A ruling that these unidentifiable absentees were indispensable, requiring dismissal of the suit, would mean that the plaintiff would have no forum, because the absentees would not suddenly become identifiable when the plaintiff sought to file the suit in a different forum. With respect to any majority employees found necessary under Rule 19(a), this aspect of Rule 19(b) counsels against dismissal. This criterion of Rule 19, moreover, comes into play only to save a case when other Rule 19(b) factors have pointed to dismissal.²¹³ It never can weigh in favor of dismissal.

208. FED. R. CIV. P. 19(b).

209. *Provident Tradesmens Bank & Trust v. Patterson*, 390 U.S. 102, 111 (1968).

210. This will occur when other majority employees in the suit adequately represent the interests of the absentees or else the absentees have, without being joined, already had a "reasonable opportunity to present objections."

211. One might argue that the majority's piece of the suit is being left out, so that there is not a complete resolution of the case. But, the majority interest is considered as a question of prejudice under the first Rule 19(b) criterion. This third criterion has to do with efficiency, not fairness.

212. FED. R. CIV. P. 19(b).

213. *Pasco Int'l (London) Ltd. v. Stenograph Corp.*, 637 F.2d 496, 501 (7th Cir. 1980). The court in *Pasco* notes that "the availability of an alternative forum is primarily of negative significance" (absence weighs heavily, if not conclusively, against dismissal, while presence does not weigh so heavily). *Id.* at 501 n.9. Some cases show that unavailability of an alternative forum will cause a court not to join an otherwise indispensable party. If there is no alternative, the party is not indispensable and the inquiry ends—if there is an alternative, this fact is not determinative and the inquiry continues. "[T]he availability of an alternative forum, standing alone, [is not] a sufficient

Only if other factors point to dismissal must the court consider whether dismissal would have the effect of putting the plaintiff out of court entirely. If the court has found that it can tailor a consent decree to avoid prejudice to the absentee, then application of this last criterion serves only to reinforce that decision.

Rule 19 analysis thus should yield a decision not to join absent majority employees under 19(a) and not to dismiss a suit for the inability to join them under 19(b). Section 108 provides protections that render the absentees unprejudiced by the case's proceeding in their absence. If the majority employees are deemed necessary, the fact that the identity of the absentees is unknown makes them unjoinable. Rule 19(b) analysis then must be undertaken, and the outcome should turn primarily on analysis under the first two Rule 19(b) criteria. If majority employee collateral challenges are barred, the court's ability to design a decree that curtails any prejudice to the absentee should resolve the Rule 19(b) inquiry. The outcome of this prejudice curtailment analysis in turn hinges largely on what can be expected to happen in the fairness hearing. Because the fairness hearing provides an ideal opportunity for implementing protections, indispensability findings can be averted by routine proper structuring of that hearing. The next section discusses mechanisms to achieve that end.

B. Approval of the Decree

1. Wilks: Two Bites at the Apple

Pursuant to Rule 24 or, perhaps Rule 19, our hypothetical majority employees now have been joined as parties in the original minority suit against the employer. There is some room for doubt about what, exactly, they should do once joined. Part of the answer to this question traditionally has turned on the timing of the majority employees' joinder.²¹⁴ If they came into the suit prior to entry of the decree, they might be permitted to present their objections to the proposed decree at a "fairness hearing." Traditionally, the fairness hearing provides merely an informal opportunity for nonparties to the decree to be heard on the question of whether the decree treats them fairly.²¹⁵ If permitted to intervene after the entry of the decree, they might mount a challenge comparable to what could be brought in a collateral lawsuit, with the court fully adjudi-

reason for deciding that the action should not proceed among the parties before the court." *Id.* at 501 (citing *Bio-Analytical Servs., Inc. v. Edgewater Hosp., Inc.*, 565 F.2d 450, 453 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978) (citing *Bonnet v. Trustees of Sch. of Township 41 N.*, 563 F.2d 831, 833 (7th Cir. 1977))).

214. "Joinder" refers to both Rule 19 joinder and Rule 24 intervention.

215. See *Martin v. Wilks*, 490 U.S. 755, 775 (1989); *Firefighters v. Cleveland*, 478 U.S. 501, 529 (1986). Some judges delve into the question of whether the decree comports with substantive law. See, e.g., *Firefighters*, 478 U.S. at 511-12. Although judges need not adjudicate the claims in order to enter a consent decree, they usually do more than merely rubber stamp the decree. Kramer, *supra* note 1, at 333, n.53 (citing Judith Resnick, *Judging Consent*, 1987 U. CHI. LEGAL F. 43, 93-96).

cating the question of whether the decree complies with the law.²¹⁶

Under the regime of *Wilks*, majority employees enjoyed two bites at the apple. Such employees first could attempt informally at the fairness hearing to avoid entry of the consent decree. If they were unsuccessful at that hearing, no binding effect on them resulted. They then could litigate formally, in the first suit or in an independent suit, the question of whether the consent decree entered over their objections violated the law.²¹⁷ This two-bite-at-the-apple scheme resulted from the quasi-adjudicative, nonbinding nature of the fairness hearing.²¹⁸ If the fairness hearing had been a full adjudication to which the majority employees were party, they would have been bound to its outcome by *res judicata*. Because of the informal nature of the fairness hearing, however, majority employees were not bound and were free to challenge the decree a second time.

Section 108 precludes the majority employees' second bite at the apple only to the extent that the second bite takes place in an independent lawsuit. If the majority employees' challenge occurs as a continuation of the original minority suit, then the majority employees retain their two bites.²¹⁹ This is because the court may hold a traditional informal fairness hearing before entering the decree and still fully adjudicate the majority employees' claim after entry of the decree. Although the current structure of consent decree cases may permit these two opportunities, considerations of efficiency and fairness to other interested parties suggest that courts should afford only one hearing. A single fairness hearing can serve as the vehicle not only for airing general fairness arguments but

216. This article refers to the court's treatment of challenges raised prior to entry of the decree as "preview" of the decree and to the court's treatment of challenges raised after entry as "review" of the decree.

217. Under *Firefighters*, once the original plaintiff and defendant have resolved their dispute, an intervenor who does not join in the consent decree remains in the case. *Firefighters*, 478 U.S. at 529. The intervenor can press its challenge, possibly following amendment of its complaint, and receive a full adjudication on the intervenor's claims. As discussed above, the *Firefighters* Court questioned whether it might have been too late by the time that case reached the Supreme Court for the intervenors to receive full adjudication on the merits. *Id.* at 530. Once the dispute between the original parties has been resolved, however, there is a potential argument that the intervenor's claim does not meet the Article III case or controversy requirement. See *Diamond v. Charles*, 476 U.S. 54, 63-65 (1986); Strickler, *supra* note 38, at 1588 n.136. But see Cooper, *supra* note 73, at 172. See generally Tobias, *supra* note 97. Once the consent decree is entered, and the minority plaintiffs drop from the case, a case or controversy arises precisely because of the consent decree's terms that create a case between the intervenors and the employer.

218. For those majority employees who intervened in the original suit, some courts have assumed that, in addition to raising claims that the settlement violated the majority employees' rights, the intervenors also could force an adjudication of the plaintiff's claim against the defendant. See Kramer, *supra* note 1, at 353 n.135. As discussed below, there may be a significant difference between what the majority employees litigate as their claim and what the plaintiff would litigate in his claim. See *supra* note 213 and accompanying text; *infra* notes 248-50 and accompanying text.

219. The only restriction that sec. 108 imposes is that the challenge must come in the decree suit, rather than collaterally, and the normal Rule 24 intervention requirements must be met. The *Firefighters* ruling, then, that the intervenors or other parties are free to protest consent decrees, continues to mean that majority intervenors in the first suit are free to mount challenges *in that suit* to any decree, even after the decree is entered.

also for fully adjudicating the legality of the proposed decree. Such adjudication would resolve the majority's claims and would create a *res judicata* effect once and for all.

This proposal inspires the question: what is gained by settlement of the case if prior to entry of the consent decree the whole matter must be adjudicated anyway? The answer depends on one's definition of "the whole matter" and changes depending on whether one means the plaintiff's case or the majority employees' case. The plaintiff's case consists of proof that the defendant has discriminated and the plaintiff thereby has been injured. As explained below, the majority employees' case consists, at most, of proof that the plaintiff does not have adequate evidence to make a *prima facie* case or else that any proposed affirmative action unnecessarily trammels the rights of the majority.²²⁰

This article does not advocate that the fairness hearing should entail full adjudication of the merits of plaintiffs' claims. That would defeat the entire concept of consent decrees, which are by definition based upon consent instead of adjudication.²²¹ Rather, it advocates that courts should employ in preview of the decree the same principles the Supreme Court has already developed for post hoc challenges to consent decrees. This would provide essentially the protections that were heretofore provided by collateral attack and would assure a single court proceeding for consideration of the consent decree.²²²

The envisioned fairness hearing thus only faintly resembles the fairness hearing of the past. The hearing contemplated would provide joined majority employees a full and fair opportunity to be heard on their claims and would result in the same *res judicata* effect that would bind a postdecree intervenor or collateral attacker of the decree who litigated the decree's lawfulness.²²³ How such a hearing might operate is dis-

220. Compare *Johnson v. Transportation Agency*, 480 U.S. 616, 632 (1987) (imbalance in treatment need not be sufficient to support *prima facie* case) with *id.* at 653 (O'Connor, J., concurring) (*prima facie* evidence suggests need for remedial action).

221. A hybrid scheme in which the court would adjudicate the prior discrimination predicate and the parties would consent to the affirmative action plan as a remedy is a possibility. This would not work, however, when the most burdensome part of employment discrimination litigation is the ascertainment of the employer's past behavior. But see *Teamsters v. United States*, 431 U.S. 324, 371-72 (1977). By contrast, assessing possible alternative remedies and their impact on third parties is a simpler matter for adjudication. *Id.*

222. This single hearing would be a solution to both the problem of how to protect majority employees who are not permitted to attack decrees collaterally under sec. 108 and to the current interminability of litigation that would be spawned by the availability of collateral attack to those not barred by sec. 108. See *In re Birmingham Reverse Discrimination Employment Litig.*, 833 F.2d 1492, 1494-95 (11th Cir. 1987), *aff'd sub nom. Martin v. Wilks*, 490 U.S. 755 (1989); *Ibarra v. Texas Employment Comm'n*, 823 F.2d 873, 878-79 (5th Cir. 1987); *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 484 (6th Cir. 1985), *aff'd*, 478 U.S. 501 (1986); *Culbreath v. Dukakis*, 630 F.2d 15, 23 (1st Cir. 1980).

223. To say that the majority employees could press their claims at this predecree stage presupposes that the court would deem them to *have* claims at that juncture. As stated above, some courts presently would not permit the majority employees to press a claim that the decree was unlawful until such time as these employees were actually denied promotions or otherwise injured by the decree. See *supra* note 103 and accompanying text. A court that will not permit such predecree

cussed in subpart 2 below. The question of how to protect the unidentified, unrepresented majority who are not barred by section 108 in order to avert subsequent challenges to the decree is discussed in subpart 3 below.

2. *Expand the Fairness Hearing—One Bite Retained*

Traditionally, fairness hearings preceding the entry of a consent decree are advisory, rather than adjudicative. The court may, but need not, consider some or all of the substantive factors that the court would review if the consent decree were challenged subsequently by majority employees ultimately injured by the affirmative action adopted in the decree.²²⁴ If the fairness hearing convinces the court that the decree does not comport with applicable law or notions of fairness, then the court either modifies or does not enter the decree.²²⁵ If majority employees do not succeed in persuading the court not to enter the decree, they are powerless, under *Firefighters*, to forestall entry of the decree. Under section 108, they should be permitted to litigate subsequently the decree's legality.

a. *Firefighters* Guidance on Consent Decree Review and Preview

In addition to having established that the majority employees cannot block the decree, *Firefighters* also is noteworthy for having identified what substantive standards should govern a court's post hoc review of a consent decree that is challenged collaterally. These are precisely the same standards that govern voluntary employer affirmative action plans in which the court has played no role at all: the *United Steelworkers v. Weber* standards.²²⁶ The *Weber* standards focus on whether the affected job categories in which advantages are being given to minorities tradi-

claims to be asserted will, of course, be unable to meet the goal of predecree adjudication of the majority's claim.

224. See *Firefighters v. Cleveland*, 478 U.S. 501, 508 (1986) (at two-day hearing Court considered intervenors' objections to use of minority promotional goals, to nine-year life of decree, and to exclusion of union from negotiations).

225. See generally *id.*

226. *Id.* at 517-18 (citing *United Steelworkers v. Weber*, 443 U.S. 193 (1979)). As will be discussed below, *Weber* has evolved into the standard for reviewing voluntary affirmative action plans adopted by private employers, and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), subsequently established the standards for review of such plans adopted by public (government) employers. For simplicity's sake, the standards are referred to together as the *Weber* standards, although as this article elucidates later there are differences between the two standards. See *infra* notes 226-47 and accompanying text.

Applying *Weber* to consent decree affirmative action is entirely consistent with the *Weber* case itself, which involved a "voluntary" plan only inasmuch as it involved a plan not ordered expressly by a court. The defendant in *Weber* adopted an affirmative action plan only when confronted with legal pressure from the Department of Labor and possible Title VII liability to blacks. See PAUL COX, EMPLOYMENT DISCRIMINATION 13-2 (1987) (citing *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting), *rev'd sub nom.* *United Steelworkers v. Weber*, 443 U.S. 193 (1979), and *Weber v. Kaiser Aluminum & Chem. Corp.*, 415 F. Supp. 761, 765 (E.D. La. 1976), *aff'd*, 563 F.2d 216 (5th Cir. 1977), *rev'd sub nom.* *United Steelworkers v. Weber*, 443 U.S. 193, 209 n.9 (1979)).

tionally have been racially imbalanced and segregated and whether the affirmative action plan is, in effect, narrowly tailored.²²⁷

In establishing that *Weber* provides the guiding principles for review of consent decree affirmative action plans, *Firefighters* also illuminates the framework for application of those principles. *Firefighters* does not contemplate that the court will apply the *Weber* standards at the time it enters the consent decree. The parties advocating entry of the decree need not at that time affirmatively demonstrate the decree's compliance with *Weber* in order to acquire the court's approval. Only when the decree is challenged must the court apply *Weber*, and when that occurs it is the challenger of the decree who bears the burden of showing the decree to be unlawful under *Weber*.²²⁸

In her concurrence in *Firefighters*, however, Justice O'Connor argued that the *Weber* analysis should play some role when the decree is entered, and not just when it is attacked subsequently.²²⁹ In her view, when a court is deciding at a fairness hearing whether to enter a consent decree, the proper standards under which to challenge it are those of *Weber*.²³⁰ Justice O'Connor explained that any pre-entry majority challengers should seek to prove noncompliance with *Weber* and that, even if no majority employees challenged the decree, "a court should not approve a consent decree that on its face provides for racially preferential treatment that would clearly violate" *Weber* and other governing precedent.²³¹

Thus, *Firefighters* has several significant implications for the review and preview of employment discrimination consent decrees. It makes clear that a trial court does not need to *adjudicate* fully the question of whether a consent decree comports with *Weber* before the trial court enters the decree. It further confirms that *Weber* is, indeed, the standard that governs review of consent decree affirmative action plans, and, in Justice O'Connor's concurrence, suggests that *Weber* applies before entry of the decree as well. The next two subparts of this article discuss what a court should do—*short* of full adjudication of the plaintiff's case against the defendant—when it is deciding whether to enter a decree, and what, exactly, *Weber* and related cases require of affirmative action resolutions.

b. Post Hoc Review Standards

As O'Connor's concurrence in *Firefighters* explains, and as some

227. See *Weber*, 443 U.S. at 208-09.

228. *Johnson v. Transportation Agency*, 480 U.S. 616, 626 (1987) (citing *Wygant*, 476 U.S. at 272-78) (burden of proof on party who challenges affirmative action plan); *Firefighters*, 478 U.S. at 522-23 (affirmative action plan's compliance with *Weber* to be assessed when the plan is challenged); *id.* at 531 (O'Connor, J., concurring) (agreeing with the Court that decision on whether plan violates *Weber* may be reserved until such time as plan is challenged).

229. *Firefighters*, 478 U.S. at 531 (O'Connor, J., concurring).

230. *Id.*

231. *Id.*

courts already have agreed,²³² the concepts that traditionally govern post hoc review of affirmative action plans may and should be implemented at the fairness hearing to achieve more efficiently the same just ends.²³³ What standards govern the review—and here the preview—of affirmative action plans turns to some extent on who adopted the plan: a government employer or a private employer. Both the Equal Protection Clause and Title VII govern government employers; private employers are governed only by Title VII (and any applicable state law).

The standards for judging private employers' voluntary affirmative action plans were first set forth by the United States Supreme Court in 1979 in *United Steelworkers v. Weber*²³⁴ referred to above. In *Weber*, a white employee challenged an affirmative action plan for basing employment preferences on race.²³⁵ The Supreme Court established that affirmative action plans, although facially contravening the Title VII prohibition against basing employment decisions on race, do not necessarily violate Title VII.²³⁶ The *Weber* Court held that voluntary affirmative action is permissible when undertaken to "eliminate conspicuous racial imbalance in traditionally segregated job categories."²³⁷ According to *Weber*, the plan must be tailored to this remedial purpose and must not needlessly "trammel" the rights of majority employees.²³⁸

In a concurring opinion, Justice Blackmun emphasized that the Court's decision permits affirmative action under Title VII, even when the employer itself has not even arguably violated Title VII.²³⁹ Rather,

232. *Kirkland v. New York State Dep't of Correctional Servs.*, 711 F.2d 1117 (2d Cir. 1983); *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (en banc).

233. *Firefighters*, 478 U.S. at 531 (O'Connor, J., concurring).

234. 443 U.S. 193 (1979).

235. The preferences at issue in *Weber* were places in a newly established craft training program. *Id.* at 197.

236. The Supreme Court stated that

[i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Id. at 204 (quoting 110 CONG. REC. 6552 (1964) (remarks of Sen. Humphrey)).

237. *Id.* at 209.

238. *Id.* at 208. The *Weber* Court catalogued the circumstances that rendered lawful the affirmative action plan in that case:

- (1) that the plan's purposes mirrored the goals of Title VII, i.e., they sought to alleviate or eliminate discrimination;
- (2) that the plan was designed to break down old patterns of racial segregation;
- (3) that the plan did not unnecessarily trammel the interests of whites by
 - (a) forcing their discharge, or
 - (b) completely barring their employment or participation in the program there at issue;
- (4) that the plan was temporary, a one-time correction of imbalance, rather than a plan to maintain racial balance (the plan was designed to end when a proper percentage of blacks in the employer's work force was reached).

See *id.*

239. *Id.* at 211 (Blackmun, J., concurring); see also *Johnson v. Transportation Agency*, 480 U.S. 616, 630 (1986). A number of Justices have disagreed with the view that the employer adopting the plan need not have discriminated. See *id.* at 652-53 (O'Connor, J., concurring); *id.* at 657 (White, J., dissenting); *id.* at 664-68 (Scalia, J., dissenting).

he wrote, the *Weber* Court would deem a job category "traditionally segregated" if there had been a "societal history of purposeful exclusion of blacks from the job category, resulting in a persistent disparity between the proportion of blacks in the labor force and the proportion of blacks among those who hold jobs within the category."²⁴⁰ Thus, under *Weber*, societal discrimination, rather than discrimination by the employer, suffices for purposes of the requirement that the affirmative action plan be designed to remedy racial imbalance resulting from segregation.²⁴¹

The standard for voluntary affirmative action by government employers is different. Cases subsequent to *Weber* have demonstrated that voluntary plans adopted by government employers must be designed to correct racial imbalance resulting from past segregation just as private employers' plans must. In *Wygant v. Jackson Board of Education*,²⁴² however, the Supreme Court held that a public employer's voluntary affirmative action plan must be predicated on a manifest imbalance in the employer's work force resulting from that particular employer's own past discrimination, rather than from discrimination perpetrated by society as a whole.²⁴³ The *Wygant* court did not actually require the employer to

240. *Weber*, 443 U.S. at 212 (Blackmun, J., concurring). Justice Blackmun explained this view in order to set forth his own disagreement with it. Blackmun's own view was that the Court should adopt Judge Wisdom's position permitting voluntary affirmative action only by those employers and unions that had committed "arguable violations" of Title VII. *Id.* at 213-14.

241. In Justice White's view, permitting "traditionally segregated job categories" to mean nothing more than societal discrimination, rather than employer discrimination, collapses the tests, so that all that is truly required is "a manifest imbalance between one identifiable group and another in an employer's labor force." *Johnson*, 480 U.S. at 657 (White, J., dissenting). On the question of whether an employer had met the traditionally segregated criterion, Justice Scalia wrote, in *Johnson*, that the criterion had not been met because the trial court had found expressly that the employer had not discriminated. *Id.* at 659 (Scalia, J., dissenting). Justice O'Connor, by contrast, was not so interested in the factual question of whether prior discrimination had occurred, but rather in the decisionmaker's state of mind when adopting the decree. Despite the trial court's finding of no discrimination, she was satisfied that the criterion was met where a prima facie case of discrimination existed in the record. *Id.* at 652-53 (O'Connor, J., concurring). There are thus three tiers of what might be required of voluntary affirmative action under Title VII:

- Scalia: Proof of egregious past discrimination by the employer (would prefer doing away with affirmative action entirely). *See id.* at 670-71 (Scalia, J., dissenting).
- O'Connor: evidence in the record to permit the decisionmaker to believe that the employer's discrimination resulted in statistical disparity. *See id.* at 650-51 (O'Connor, J., concurring).
- Brennan: evidence in the record that women or minorities are underrepresented in the employer's work force compared with the relevant external population. *See id.* at 631-32 (Brennan, J.).

Justice O'Connor's position does not call for analysis of the decisionmaker's subjective state of mind, but only of the quantum of facts before the decisionmaker.

242. 476 U.S. 267 (1986).

243. *Id.* at 274. This requirement essentially was reaffirmed when the Supreme Court, in *City of Richmond v. Croson*, predicted that the city could have met the strict scrutiny test for public sector affirmative action if the city had been remedying the present effects of its own past discrimination. *City of Richmond v. Croson*, 488 U.S. 469, 492 (1989) (plurality). Scholars disagree about the extent to which the *Croson* case, which struck down Richmond's minority contract set-aside program under an equal protection strict scrutiny test, is a harbinger of the demise of affirmative action. *See* David S. Cohen, *The Evidentiary Predicate for Affirmative Action after Croson: A Proposal for Shifting the Burden of Proof*, 7 YALE L. & POL'Y REV. 489 (1989).

prove its own past discrimination, but did require the employer to have a "strong basis" for believing that remedial efforts were necessary, that is, that its own discrimination had resulted in the imbalance.²⁴⁴

In the case of *Johnson v. Transportation Agency*,²⁴⁵ the Supreme Court confirmed this distinction between the standards governing equal protection challenges to government affirmative action and standards governing Title VII challenges to public and private employer affirmative action.²⁴⁶ The *Johnson* Court explained that the issue in a Title VII challenge to an employer's affirmative action plan is whether the affirmative action plan is designed to remedy underrepresentation due to past *societal* discrimination; whereas, the issue in cases of government employer affirmative action is whether the plan is designed to remedy imbalance resulting from the employer's own past discrimination.²⁴⁷ The Court explained the disparity between standards for judging public and private plans by the fact that government employers may be challenged under the Equal Protection Clause, whereas private employers are subject only to Title VII challenge.²⁴⁸

The first prong of both *Weber* and *Wygant* requires not only that past discrimination (societal or employer) occurred, but also that such discrimination has resulted in a "conspicuous racial imbalance in traditionally segregated job categories."²⁴⁹ This imbalance is established through statistics. To show that an imbalance exists, it is appropriate to compare

the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population . . . in analyzing jobs that require no special expertise . . . or training programs designed to provide expertise, Where a job requires special training, however, the comparison should be with those in

244. *Wygant*, 476 U.S. at 277. Justice O'Connor in a concurring opinion stated that the employer should not be required to make any formal findings of its own past discrimination, but should have a firm basis for its position that the plan's purpose was truly to remedy the employer's past discrimination. *Id.* at 286.

245. 480 U.S. 616, 620 (1987). *Wygant* and *Johnson* are not consent decree cases, but are directly on point by virtue of the *Firefighters* holding that affirmative action plans embodied in consent decrees are to be judged according to the standards governing voluntary affirmative action adopted extrajudicially.

246. See Ronald W. Adelman, *Voluntary Affirmative Action Plans by Public Employers: The Disparity in Standards Between Title VII and the Equal Protection Clause*, 56 FORDHAM L. REV. 403 (1987). In fact, the *Johnson* case did involve a government plan, but the only challenge brought was under Title VII, so there was no need to consider whether the plan violated the Constitution. *Johnson*, 480 U.S. at 620 n.2.

247. *Johnson*, 480 U.S. at 632; *id.* at 659 (Scalia, J., dissenting). But see *id.* at 652 (O'Connor, J., concurring). Apparently the societal discrimination that would suffice is the very generalized societal discrimination that everyone agrees has taken place in this country. See *Wygant*, 476 U.S. at 278 n.5.

248. *Johnson*, 480 U.S. at 631. Justice O'Connor concurred in the *Johnson* decision, but stated in her separate opinion that the *Johnson* facts had met the heightened standard set forth in *Wygant*. *Id.* at 653 (O'Connor, J., concurring).

249. *United Steelworkers v. Weber*, 443 U.S. 193, 209 (1979); see *Wygant*, 476 U.S. at 274-78.

the labor force who possess the relevant qualifications.²⁵⁰

As discussed below, the quantity of statistical disparity necessary to demonstrate manifest imbalance falls something short of what would be required to support a *prima facie* pattern and practice case of institutional discrimination.²⁵¹

In addition to the first *Weber* predicate, which requires that the affirmative action plan be designed to remedy imbalance resulting from discrimination, the plan, whether adopted by a government or private employer, must not "unnecessarily trammel" the rights of majority employees.²⁵² Thus in *Weber*, an affirmative action plan was permissible because it did not result in the replacement of majority employees with minority employees.²⁵³ In fact, the Court noted, fifty percent of the individuals who could enter the apprenticeship program that was at issue in *Weber* were white.²⁵⁴ Similarly, in *Johnson*, the Court found that the plan did not trammel the majority's rights unnecessarily. There, the male plaintiff who was denied a promotion did not lose "firmly rooted expectation[s]" in as much as he retained his position. Gender, moreover, was only one factor considered by the decisionmaker, rather than being the sole criterion applied, which is to say the defendant adopted no quotas.²⁵⁵ To be deemed not to trammel the rights of the majority employees unnecessarily, the plan also must be designed to *attain*, rather than maintain, a balanced work force.²⁵⁶

These, then, are the substantive standards that have guided the courts' post hoc review of affirmative action consent decrees and that should be adopted for preview of such decrees. Knowledge of the substance of the standards, however, does not answer the question of how those standards should apply in the context of a predecree fairness hearing. The question of who should bear what evidentiary burdens remains.

250. *Johnson*, 480 U.S. at 632.

251. *Id.* But see *id.* at 654 (O'Connor, J., concurring). In a Title VII "pattern and practice" case, the plaintiff makes a *prima facie* case by showing a statistical disparity between the percentage of defendant's work force composed of minorities and the percentage of the population composed of minorities. An adequate statistical disparity, combined with evidence of examples of situations where employees were victims of intentional discrimination, creates the plaintiff's *prima facie* case. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

252. *Weber*, 443 U.S. at 208.

253. *Id.* (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976)).

254. *Id.*

255. *Johnson*, 480 U.S. at 631-36, 637-42.

256. *Id.* at 639-40. Whether because of the potential for prejudice created by sec. 108 or because of simple notions of efficiency, courts should apply these substantive doctrines to the decree at the time of the fairness hearing. This discussion focuses on enhancement of proceedings at the fairness hearing stage with the hope that resolution of matters at that stage will enhance efficiency. Increasing efforts to resolve disputes as early as possible does not mean that majority employees cannot challenge the decree after it has been entered. If an application to intervene meets the timeliness and other criteria discussed above, it should be granted. The standards discussed herein as applicable to fairness hearing consideration of decrees similarly should continue to govern post hoc review.

As with substantive standards, the procedures for post hoc review should be transplanted to the preview stage.

c. Applying Post Hoc Review Standards to Preview of the Decree

When a consent decree is challenged after adoption, the challengers have two options. They may prove by a preponderance of the evidence that the decisionmaker in the first suit did not have a strong basis in evidence to believe that remedial action was necessary, or they may prove by a preponderance of the evidence that the decree is unnecessarily broad.²⁵⁷ To succeed in showing the lack of a strong basis in evidence to support remedial action, the challengers of a private or government plan must prove that the affirmative action program is not warranted by evidence of past societal discrimination or, in the case of a government plan challenged under the Equal Protection Clause, that the employer's purpose was *not*, in fact, to remedy its own prior discrimination.²⁵⁸ If a challenge relies on the inadequacy of evidence, the court reviewing the consent decree need consider only whether there was adequate evidence in the first suit indicating that the predicates for affirmative action existed, and need not decide as a factual matter whether such predicates in fact ever existed.²⁵⁹ Rather, the challenger must demonstrate to the reviewing court that the information available to the decisionmaker did not constitute an adequate predicate.

The decisionmaker for purposes of adopting the decree could be deemed either the parties to the decree or the court or both. If the decisionmaker includes the court entering the decree, then the challenger's task is to point to the record that was before the district court at the time that court approved the decree. If the decisionmaker is deemed to be the employer alone, then it becomes incumbent upon the employer to get the evidence of such predicates into the record only if and when the decree is challenged. In the latter case, whether that evidence had been in the record of the decree-entering district court would not matter. For pur-

257. See *supra* note 256 and accompanying text.

258. The heightened scrutiny required for equal protection challenges to affirmative action was recently explained in *City of Richmond v. J.A. Croson Co.*, a minority set-aside case, rather than an employment case. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). There, the Supreme Court held that Richmond's programs for encouraging minority subcontractor participation in contracts let by the city were not defensible under an Equal Protection Clause challenge brought by white subcontractors. *Id.* at 498-506. The Court subjected the plan to strict scrutiny review and struck the plan down as neither responsive to past discrimination by the City of Richmond nor narrowly tailored to meet the city's ends. *Croson* similarly requires an evidentiary predicate to support a legislature's decision to adopt affirmative action. The Court struck down the "set-aside" program in *Croson* because the City of Richmond produced no direct evidence that either the city or its primary contractors had discriminated against minority-owned subcontractors. *Id.*

259. See *Johnson*, 480 U.S. at 634-36 (relying on agency plan findings of underrepresentation of women to support conclusion that *Weber* requirements had been met). Thus the majority employees' challenge may be limited to the existent record, rather than requiring new evidence. *But see Firefighters v. Cleveland*, 478 U.S. 501, 538 (1986) (Rehnquist, C.J., dissenting).

poses of post hoc review, then, the question of whether the decisionmaker should be deemed to be the parties or the court will decide whether evidence of the predicates must be in front of the decree-entering court or only in the employer's possession at the time the court enters an unchallenged decree.

The *Firefighters* case suggests that the employer, rather than the court, should be treated as the decisionmaker. In *Firefighters*, the Supreme Court ruled that Title VII limitations on courts' powers to *order* affirmative action do not apply to their powers to *approve* consent decrees between parties.²⁶⁰ Courts thus can approve consent decrees containing provisions they could not themselves order. This suggests that the decree-entering court is not the decisionmaker and need not itself be persuaded that the predicates are in place. O'Connor's concurrence in *Firefighters* confirms this, for it suggests that the parties bear no duty to establish to the decree-entering court's satisfaction the decree's legality. She would limit the court's duty of scrutiny merely to refraining from entering an unopposed decree if the decree is *facially* illegal.²⁶¹ It thus appears that it is the employer, rather than the court, that must have an affirmative reason to believe the predicates are met. For cases of post hoc review, then, whether in a collateral suit or in a post hoc challenge by intervenors in the decree suit, the record of the decree-entering court need not contain evidence of the *Weber* predicates, as long as the employer can produce such evidence in response to a challenge.

For preview of consent decrees, what should happen depends on who is present. Assuming that majority employees have intervened or otherwise have been joined in the suit, the court should permit the majority employees to proffer evidence on the absence of the evidentiary predicates (whether employer or societal discrimination) and on the unnecessary breadth of the proposed decree.²⁶² The burden of persuasion on these issues is upon the challengers.²⁶³ Because the issue is whether the record contains certain evidence, however, there is essentially a burden upon the employer or the plaintiff to get such evidence

260. *Firefighters*, 478 U.S. at 526.

261. *Id.* at 531 (O'Connor, J., concurring). *But see id.* at 538 (Rehnquist, C.J., dissenting) (adjudication required before entry of decree).

Interestingly, in *Firefighters* the intervenors had raised no legal claims pertaining to the lawfulness of the decree. *Id.* at 511. As a result, no occasion arose to consider the substantive legality of the decree.

262. There is some support for the notion that courts are capable of insuring that a consent decree comports with *Weber*, even absent the benefit of adversarial argument. *See Culbreath v. Dukakis*, 630 F.2d 15 (1st Cir. 1980).

263. In *Wygant*, the Supreme Court stated that the district court reviewing such measures must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary. The ultimate burden remains with the [majority] employees to demonstrate the unconstitutionality of an affirmative-action program. But unless such a determination is made, an appellate court reviewing a challenge by nonminority employees to remedial action cannot determine whether the race-based action is justified as a remedy for prior discrimination.

Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277-78 (1986).

into the record so that the challenger will not be able to point to its absence.²⁶⁴ Although an employer presently bears no burden to get evidence of such predicates into the record at the fairness hearing, this is bound to change if the court is to determine the decree's lawfulness before its entry. When majority employees intervene in order to mount a predecree challenge, the employer or minority employee must be in a position to proffer evidence so that the majority employees may challenge its sufficiency. As stated above, this evidence must be enough to support the conclusion that remediation is indicated, but need not be enough to establish a *prima facie* case. If no majority employees become party to the decree suit, the threat to the interests of absentees and to the decree's finality is far greater. Perhaps the parties to such unchallenged decrees should *acquire* the burden of establishing that the *Weber* predicates are met.²⁶⁵ The next subpart contains a proposal for these cases.

3. *Protecting Absentees to Preserve Decrees*

This subpart addresses the question of what evidentiary predicates a court should require when no majority employees show up to challenge the decree. If the proposals on intervention timeliness issues discussed earlier in this article are adopted,²⁶⁶ the absentees will be free to intervene when they learn of the detriment to their interests, even though that discovery takes place long after entry of the decree. In order to avoid having to dismantle the consent decree, the decree-entering court should safeguard the interests of these absentees at the time it enters the decree.²⁶⁷

To do this, courts need to employ mechanisms that ensure elicitation of sufficient information from the parties to the decree to demonstrate that the predicates are in place and that the decree is not overly broad. Courts can avoid subsequent challenges by employing mechanisms that protect the interests of nonparties who are, by definition, not only absent, but also unnotified and unrepresented by anyone present in

264. The burden, then, is not upon the employer that adopted the plan to prove that the *Weber/Wygant* predicates are in place. See *Johnson v. Transportation Agency*, 480 U.S. 616, 653 (1986). It may sound strange to say that the burden of proof is on the challenger when, in fact, it is the defending employer that must supply the evidence. The employer must supply the evidence, not because it technically bears an evidentiary burden, but rather because the issue in dispute is whether the court (or the parties) did indeed have before it (or them) evidence of a manifest imbalance related to traditionally segregated job categories. Thus the employer, or sometimes the court, must have evidence suggesting the manifest imbalance. It is only by proving that such evidence is wanting that the challenger can win. See also *Janowlak v. Corporate City of South Bend*, 836 F.2d 1034, 1039-40 (7th Cir. 1984).

265. See *supra* note 251. The decree may, of course, receive appellate review, but appellate courts apply a mere abuse of discretion standard. *Firefighters* was itself a collateral attack, so it does not necessarily resolve the issue of what should happen at the fairness hearing to protect the interests of unrepresented majority employees, who may otherwise subject the decree to collateral attack.

266. See *supra* notes 123-65 and accompanying text.

267. Cf. *United States v. City of Chicago*, 870 F.2d 1256, 1259 (7th Cir. 1989) (intervention 13 years after conclusion of suit too late; collateral attack available).

the suit.²⁶⁸ Such mechanisms might be either intrinsic or extrinsic to the decree suit.

Intrinsic mechanisms are those that operate within the parameters of the decree suit. They might be either human or structural. A human mechanism could be in the form of an amicus, a guardian ad litem,²⁶⁹ or an organization such as the Equal Employment Opportunity Commission (EEOC) (when the EEOC is not a party) appointed by the court to argue on behalf of unnamed people potentially affected. A major question whenever human resources are tapped is who would pay. Structural protection, because it involves protective *procedures* rather than human labor, might save expense. Two possible structural protective devices are guidelines and presumptions. Judges might follow specific guidelines crafted by an entity like the EEOC, an independent commission, or an office within the judiciary. One problem with this alternative is that the guidelines would be static, unable to respond to the idiosyncrasies of particular cases the way an advocate could. For this reason, the guidelines would have to reflect the results of careful study of a broad range of real cases, so that the court would be alerted to arguments that might have been made if an interested party had been there to make them. The other structural protection would involve a legal presumption. A presumption against approval of the consent decree could become part of the fairness hearing. The prime difficulty with use of a presumption against approval of the decree is that it would undermine a heretofore clearly expressed congressional preference for settlements and would thwart the rule of *Wygant* and *Johnson* that the burden be placed upon those challenging the legality of an affirmative action plan.²⁷⁰

An extrinsic protection is one that operates outside the suit itself to protect the interests of absentees from the suit. The judiciary could employ a centralized system for expert review of consent decrees. The EEOC, when not a party, might serve in this capacity or might coordinate such a system. Problems with such extrinsic protection would be the complexity and time-consumption that referral to the outside agency would entail and the diminishment in trial court autonomy that would result. Another problem with this alternative is expense, although money could be saved if unbiased think tanks and academic institutions could be signed up to provide expertise on a *pro bono* basis.

Use of these types of mechanisms, whether intrinsic or extrinsic,

268. The argument was made earlier that courts should assume they are making decisions contrary to law when deciding whether the interests of absentees in a lawful decision are threatened. See *supra* note 109 and accompanying text. That argument should not be taken to imply that courts can never be trusted to see that the interests of absentees are protected. The fact that, for effective operation of Rules 19 and 24, courts should assume their decisions are wrong does not mean that they cannot, with precautions, assure right decisions.

269. See Thomas H. Odom, *When Consent Decrees are Lacking Consent*, LEGAL TIMES, July 30, 1990, at 20.

270. See *Johnson v. Transportation Agency*, 480 U.S. 616, 626 (1987) (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986)).

would give courts a substitute for adversarial argument on the legality of the decree. The interests of absentee employees would, in effect, be represented artificially, with the result that post hoc challenges would be destined to fail and become unattractive alternatives. To assure representation of absentees' interests in the predecree stage would assure decree finality because the decree would have survived the type of *Weber* challenge the majority employees would raise upon a subsequent collateral challenge.

V. CONCLUSION

Martin v. Wilks left an open invitation for majority employees to mount collateral challenges to consent decrees resolving suits by minority employees against their employer. The 1991 Civil Rights Act will limit most challenges to the decree suit itself, thereby serving the ends of both Title VII and judicial economy. This statutory bar against collateral attacks will adequately protect the interests of majority employees and the finality of consent decrees if courts take appropriate precautions in construing the joinder rules and in considering proposed consent decrees.

Two joinder rules are relevant. The majority employees may intervene in the minorities' suit against the employer. If the majority employees do not seek intervention, then a party to the suit, or the court sua sponte, may seek their joinder as necessary or indispensable parties. Analysis of Rule 24, governing intervention, suggests that intervention should be allowed freely in these cases. Analysis of Rule 19, governing necessary and indispensable parties, suggests that majority employees usually should be deemed neither necessary nor indispensable in these circumstances. However they become parties to the decree suit, majority employees are in a position to participate in negotiations and help shape any ensuing consent decree, and their interests are thus adequately protected, without resort to collateral challenges.

Regardless of whether majority employees actually join in the decree suit, the court should take the opportunity of the fairness hearing to assure that the *Weber* predicates are in place. When the majority is not represented, courts may protect majority employee interests even in the absence of anyone challenging the decree. Mechanisms extrinsic and intrinsic to the suit can supply the guidance and perspective needed to assure that the consent decree comports with *Weber* standards, and thus does not violate majority rights. By protecting majority employee interests, use of such mechanisms will insure the finality of consent decrees.