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

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I. Introduction

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

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

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


stantive fields; substantive specialists are uncomfortable with procedural niceties.

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

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

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1 Subrin, Federal Rules, supra note 7, at 2002-06.
15 Subrin, Federal Rules, supra note 7, at 1974-79. When talking about law, the normative "should be" is treated sometimes like a realistic description of what it is. Professor Carrington treats the current Federal Rules as both aspiring to and achieving such political neutrality. He acknowledges, however, that we are not any more likely to perfect neutrality in the rulemaking process or in the rulemaking procedures themselves than in other human institutions, and that there should not be a pretense that we have. Id. at 1974. For criticism of Professor Carrington's views, see Burbank, Transformation, supra note 14, at 1953-41; Benjamin Kaplan, Comments on Carrington, 137 U. PA. L. REV. 2125, 2126-67 (1989). For evidence of the political nature of procedural rule-making in the United States, see Peter G. Fish, William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers, 1975 SUP. CT. REV. 123 passim (twentieth century procedural reform); Subrin, Equity, supra note 6, at 945-73 (twentieth century procedural reform); Subrin, Field, supra note 6, at 319-27.
16 Justice Sutherland, in testifying in favor of a rules enabling act, answered a question from Senator Albert B. Cummins on the "proper construction of the words 'practice and procedure.'" Justice Sutherland stated: "Well, I don't know that I can give any precise definition. They apply, of course, wholly to the adjective law. They could not involve the making of any substantive law, because the Congress would be powerless to delegate such
reformers viewed procedural law as non-political and less essential than substantive law, which was understood to be the province of the legislature.17

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

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

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

In practical terms, substantive law largely affects behavior through procedure. It is true that the mere existence of substantive law will alter some behavior. Equally important, however, are the procedural incidents. A good example is the heated debate over the proposed Civil Rights Acts of 1990 and 1991.19 Although the drafts dealt largely with technical aspects of the burdens of proof, President Bush claimed that the bill would materially change employer behavior, leading to quotas.20 The proponents of the bills insisted

power to the courts.7 Burbank, Enabling Act, supra note 10, at 1078 (citing Procedure in Federal Courts, Hearing on S. 2060 and S. 2061 Before a Subcommittee of the House Judiciary Comm., 68th Cong., 1st Sess. 56 (1924)).

17 For instance, Thomas Shelton, who spearheaded the American Bar Association movement for uniform federal procedural rules, wrote of “jurisdictional and fundamental matters and general procedure,” which were the province of the legislature, and the “rules of practice directing the manner of bringing parties into court and the course of the court thereafter,” which should be the province of the judiciary. Thomas Shelton, Spirit of the Courts at xiv–xxv (1918). For a description of Shelton’s part in the movement, see Subrin, Equities, supra note 6, at 948–61. For a comprehensive study of the history and background of the distinction between the terms “substantive” and “procedural” within the meaning of the Enabling Act of 1934, see Burbank, Enabling Act, supra note 10.


20 See infra text accompanying notes 415–17. Note the length of time—nearly two years—that President Bush effectively blocked passage of the civil rights acts by relying on this overlap of substance and procedure. It was not until a compromise was reached on the highly technical burden-shifting language that the substantive effects of the legislation were realized with its passage in November, 1991. Telephone interviews with Barbara Arrowine, Executive Director, Lawyer’s Committees for Civil Rights Under Law, Washington, D.C. (Oct. 19). Ms. Arrowine participated extensively in the negotiations with the White House.

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

22 See infra text accompanying notes 137–80.

23 See infra text accompanying notes 156–80.


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

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

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

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

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

Id. at 473, 506.


37 See infra text accompanying notes 362–403.

38 See Burbank, Complexity, supra note 25, at 1474.


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

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

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


32 The Civil Rights Act of 1991 added some procedural incidents to title VII in order
procedure to change the substance of the statute. As Justice Marshall recently observed, the Supreme Court has "imposed new and stringent procedural requirements that make it more and more difficult for civil rights plaintiffs to gain vindication."

The judiciary has redefined basic civil rights and has resolved major social issues by manipulating process. Procedure now defines unlawful discrimination and determines the outcome of title VII cases. Thus, without grappling with the nature of discrimination, theories of equality, or the historical and sociological complexity of employment disparities between African-Americans and whites, the courts have rewritten the law and changed workplace behavior using the language of procedure. In the antithesis of Dean Clark's phrase, procedure is now the master, not the handmaid, of substance.

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

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

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

II. THE STATUTORY MANDATE

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

(1968). This article will not explore EEOC procedure. For an exhaustive treatment of this topic, see Barbara L. Schlei & Paul Grossman, Employment Discrimination Law 933-43 (2d ed. 1985).


There are, of course, some hazards in ascribing uniform purpose to a group. See Shapiro, supra note 12, at 72.

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

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


110 Cong. Rec. 7241 (1964). The House Judiciary Committee Report states with reference to title VII:

In other titles of this bill we have endeavored to protect the Negro's right to first-class citizenship. Through voting, education, equal protection of the laws, and free access to places of public accommodations, means have been fashioned to eliminate racial discrimination.

The right to vote, however, does not have much meaning on an empty stomach. The impetus for a constantly expanding America is lacking if general employment is closed to the graduate. The opportunity to enter a restaurant or hotel is a shallow victory where one's pockets are empty. The principle of equal treatment under law can have little meaning if in practice its benefits are denied to the citizen.


Job discrimination because of one's race is an evil which affects not only the individual, but also the future of a constantly expanding America. . . . The Committee concluded that if the Negro labor force at its present level of educational attainment were fairly and fully utilized, then the gain in our gross national product would reach $15 billion.


In 1963, the median income of African-Americans was barely 60% that of whites.

110 Cong. Rec. 7204 (1964). The unemployment rate among blacks was more than twice that of whites. Id. Only 17% of non-white workers had white collar jobs, compared to 47% of white workers. Cong. Rec. 18091 (1964) (citing U.S. Department of Labor statistics). A black college graduate could expect to earn less in his lifetime than a white man who quit school after the eighth grade. 110 Cong. Rec. 7204. While only 2% of white female high school graduates were domestic workers, 20% of black female high school graduates could find only domestic work. Id. at 7205. By 1969, the median income of African-Americans had risen to only 70% that of whites and the unemployment rate among African-Americans was more than twice as high as among whites. Although unemployment rates among African-American college graduates are now equivalent to white college graduates, African-Americans continue to be concentrated in laborer and service jobs and to be underrepresented in white collar jobs. U.S. DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 78, 138–40, 231 (1989).

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

The statute reads: It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment on the basis of race, color, religion, sex, or national origin.


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

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

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

50 This issue was discussed exhaustively. Senators Clark (D-Pa.) and Case (R-N.J.), as Senate floor managers of the House-approved bill, submitted an interpretive memorandum which stated that title VII as proposed “expressly protects the employer’s right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications.” 110 Cong. Rec. 17 (1964). The Clark-Case memorandum states: “An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications and he may hire, assign, and promote on the basis of test performance.” Id. The Supreme Court has frequently deferred to the authoritative nature of this memorandum.

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

52 In 1964, it seemed that the congressional command to eliminate race as a factor in employment decisions would rectify past discrimination and achieve racial equality in the workplace. Arguing for a “more robust” strategy, Professor Fiss noted in 1971 that “a law that does no more than prohibit discrimination on the basis of race will leave that desire, in large part, unfulfilled.” Owen M. Fiss, A Theory of Fair Employment Laws, 58 U. Chi. L. Rev. 235, 314 (1971). Today, we recognize the naivete of the notion that statutory language, without more, can resolve the intractable issues of institutionalized racism.

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


55 See infra text accompanying notes 60-70.


57 Only recently has the Supreme Court recognized the substantive content of its procedural decisions. In Wards Cove, the Court acknowledged that it was redefining the prima facie case and reallocating burdens of proof to protect business operations from judicial interference. 109 S. Ct. at 1217.
corresponding belief that the prima facie case and defenses should reflect this), to the idea that discrimination is an aberrant, transient and isolated phenomenon\(^\text{58}\) (and that title VII cases should therefore be difficult to prove and easy to defend).\(^\text{59}\)

A. Disparate Impact

We begin our review of the transformation of discrimination law with *Griggs v. Duke Power Co.*\(^\text{60}\) The original model of the prima facie case formulated in *Griggs* closely followed the language of title VII and reflected the congressional goal of eradicating the pernicious effects of historically entrenched racism. In *Griggs*, plaintiffs argued that the facially race-neutral requirement of a high school diploma or a general intelligence test as a condition of employment violated title VII because it impacted more severely on African-Americans than whites.\(^\text{61}\) Defendants maintained that there could be no discrimination because they had no specific invidious racial purpose; they suggested that the diploma requirement would raise the level of the work force.\(^\text{62}\) The Court disagreed, holding that "Congress directed the thrust of... [title VII] to the consequences of employment practices, not simply the motivation."\(^\text{63}\) More broadly, "good intent or absence of discriminatory intent does not relieve employers of their responsibility to demonstrate that their employment practices are job-related to the performance of the job in question."\(^\text{64}\) *Griggs* stands for a clear recognition that courts should consider whether the parties had a "natural, and unnecessary barriers to employment" that were the legacy of slavery.\(^\text{65}\)

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

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

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\(^\text{58}\) See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989); see also *Brown & Baumann, Nostalgia*, supra note 3, at 31–34.

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

\(^\text{60}\) *401 U.S. 424* (1971).

\(^\text{61}\) Id. at 427–28.

\(^\text{62}\) Id. at 451.

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

\(^\text{64}\) Id. at 432.
may not be able to persuade the factfinder that such a facially race-neutral nepotism policy is related to patient care or other legitimate hospital concerns.69

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

B. Disparate Treatment

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

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

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


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

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

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

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

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

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


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

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

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

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

83 The motivation-driven notion of discrimination originated in *Washington v. Davis*, 426 U.S. 229 (1976), where the Supreme Court reworded the plaintiff's prima facie case for equal protection claims by requiring plaintiffs to persuade the factfinder that defendant's conduct was motivated by racial hatred. See id. at 240–41. The disparate treatment cases breach the Court's promise in *Davis* that the motivation requirement would be limited to constitutional claims. In addition to title VII, the Court has extended the intent requirement to other civil rights statutes. See, e.g., *General Bldg. Contractors Assn. Inc. v. Pennsylvania*, 468 U.S. 375, 388-89 (1982) (42 U.S.C. § 1981 requires proof of defendant's state of mind because that statute is the "legislative cousin" of the Fourteenth Amendment). And the Court has acknowledged that the state of mind required in title VII disparate treatment cases is identical to that required for constitutional claims. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 355 n.15 (1977). Notice that the Civil Rights Act of 1991 does not address the disparate treatment model; that judicial reconstruction of title VII remains good law. See *Civil Rights Act of 1991*, Pub. L. No. 102–66, 1992 U.S.C.C.A.N. (105 Stat.) 1071.


85 The Court did not discuss inferences in *Watson*. It seems clear from that silence, however, that the Court was unwilling to allow plaintiff to use those words to support an inference of discriminatory intent. It is possible to read *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in which the plurality opinion condemned stereotypes, as relevant to proving discriminatory intent. In our view, *Hopkins* does not significantly help plaintiffs. *Hopkins*
Requiring plaintiffs to prove defendant's subjective racist intent rewrites the statute and makes it virtually impossible for plaintiffs to prevail. Obviously, plaintiffs do not have access to evidence of defendant's state of mind. Indeed, sophisticated, yet discriminatory, defendants will make sure that this evidence does not exist. Liberal discovery rules notwithstanding, requiring plaintiffs to obtain evidence of defendant's mental state imposes an enormous burden on plaintiffs. Broad discovery rules are merely a formal response to the issue of access to evidence. They do not balance the financial and practical inequities between defendant employers and plaintiff employees, who typically are less able to bear the economic burden of discovery. Often, plaintiff's primary source of income is the job that is the subject of the litigation.

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

requires an unrealistic and unworkably tight causal link. Plaintiff must prove that gender was a motivating force in the employer's decision; defendant may prevail if it can prove it would have made the same decision in the absence of gender bias. See id. at 250, 258. In other words, plaintiff must reconstruct defendant's decision-making process. If that were not difficult enough, plaintiff at all times bears the burden of persuasion that the same result would not have occurred but for gender. See id. at 240. The impact of section 107 of the Civil Rights Act of 1991 on Hopkins is uncertain. See sec. 107, § 705 1992 U.S.C.A.N. (105 Stat.) 1071, 1075–76 (to be codified at 42 U.S.C. § 2000e–2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that ... sex ... was a motivating factor for any employment practice, even though other factors also motivated by that reason.

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

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

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

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

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


71 Id. at 570.

72 See id. at 576.

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

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

75 This slant has not been limited to title VII cases. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (applying strict scrutiny to affirmative action programs);
model of Griggs the requirement that plaintiff prove the absence of any justifications for defendant’s conduct. This new disparate impact theory bears almost no resemblance to the understanding of discrimination embodied in Griggs; indeed, it is precisely the opposite. For example, in Watson v. Fort Worth Bank and Trust, the defendant bank four times refused to promote Clara Watson, an African-American woman. The bank had relied on the subjective judgment of supervisors, and each promotion was given to a white person. Although the plurality used the disparate impact model, they drastically modified the prima facie case, reduced the defendant’s burden of proof from affirmative defense to rebuttal, and lowered the standard of proof from necessity to convenience. Under Watson, defendant only needed to “produce[] evidence of ‘legitimate business reasons.’” Production is less than persuasion, and legitimacy is far short of necessity. After Watson, once defendant came forward with evidence of business legitimacy, plaintiff had the ultimate risk of nonpersuasion that this evidence was pretextual. Plaintiff had to prove the nonexistence of the asserted legitimate reason. In the words of Justice Blackmun, this reallocation of the burdens of proof was “flatly contradicted” by the Court’s own case law and forced every title VII case into the proof allocations of the disparate treatment construct.

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

It is the rare plaintiff who would be able to perform the Herculean tasks of disproving the employer’s assertion that it runs its business according to legitimate business considerations and of...
fashioning a less discriminatory but equally cost-effective operation. The message of *Wards Cove* was clear: the issue is not discrimination but the financial or other burdens defendant will incur if it stops its discriminatory practice.\textsuperscript{111}

**D. The Paths Not Taken**

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

The Court could have held that defendant had an affirmative defense of persuading the factfinder of non-discriminatory motive, or persuading the factfinder of legitimate business purpose. Instead, the Court, pursuing its pro-defendant vision of title VII, placed only a minimum production burden on the defendant. In other words, using the language of presumptions, the Court relieved the defendant of any burden of persuasion. This is both regrettable and aberrant, given the fact that virtually all of the evidence of business purpose and racial animus is in the files and minds of the defendant.\textsuperscript{114} Moreover, if there is a strong policy to hire qualified minorities and to eliminate practices that result in a racially disparate impact, it makes more sense to require the employer to persuade the factfinder of the non-discriminatory reason for its action.\textsuperscript{115}

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

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

\textsuperscript{111} Together, *Watson* and *Wards Cove* redrafted title VII as if it read as follows: It shall be an unlawful employment practice for an employer to engage in a practice that disparately impacts women or racial minorities only if plaintiff can prove (1) that such employment practice serves no legitimate business goal and (2) that no other practice exists that less adversely affects women and minorities and that is equally cost effective or no more burdensome to the employer.

\textsuperscript{112} See supra text accompanying notes 60–70.

\textsuperscript{113} See supra text accompanying notes 71–88.

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

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


\textsuperscript{117} See WRIGHT & GRAHAM, supra note 114, § 5122, at 564, 566; McCormick, supra note 116, § 344, at 975–76.

\textsuperscript{118} See McCormick, supra note 116, § 344, at 976 & nn.22–23.
but that shift applies to non-B, not to a different fact altogether.119 Again, note that the employer's burden is not to produce a sufficiency of evidence to permit a finding of no racial animus, but only to produce evidence of some legitimate business purpose that may not have even activated the employer's failure to hire. Moreover, the Court could have said that the strong policy of title VII, backed by the decision in Griggs, requires the defendant to establish an affirmative defense. This would have rendered Rule 301 either irrelevant or subservient to the title VII policy already announced in Griggs.120

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

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

119 Fed. R. Evid. 301. As the conference report suggests, the issue is whether the adverse party offers evidence "contradicting the presumed fact." H.R. Rep. No. 1597, 93d Cong., 2d Sess. 7 (1974).

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

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

122 See W. Barton Leach & Paul J. Lacombe, Handbook of Massachusetts Evidence 56-57 (4th ed. 1987); see also, Wright & Graham, supra note 114, at 608-11. There are several additional alternatives. The Court could have kept the more stringent definition of business "necessity" from Griggs, instead of adopting the new term "legitimate business reason" or "convenience." Also, it could have assigned plaintiff less than the virtually impossible burden of persuading that another business practice was less expensive or as practical. Indeed, this is the import of Section 105 of the Civil Rights Act of 1991, which purports to restore Griggs. Sec. 105, § 703, 105 Stat. 1071, 1074-75 (to be codified at 42 U.S.C. § 2000e-2(f)(1)(A)); see also Civil Rights Act of 1991, sec. 3(2).

119 Most of this evidence pertains to defendant's business practices.

120 490 U.S. 642, 657 (1989). The Court also referred to the Uniform Guidelines on Employment Selection Procedure, 29 C.F.R. § 1607.1 et seq. (1988), which require some employers to maintain records on the impact of certain procedures. 490 U.S. at 658 (quoting 29 C.F.R. § 1607.4). But of course, as the Court also recognized, employers' obligations under these guidelines are limited. See id. at 658 n.10. For a practical critique of this issue, see ACLU Report, supra note 110, at 7-10, 16-17. Wards Cove created additional discovery problems by creating the disparate impact plaintiff to show an extremely close causal link between a specific employment practice and racial imbalance in the work force. 490 U.S. at 658. Under Wards Cove, plaintiffs who allege some violations, such as segregation, separate hiring channels and subjective decisionmaking, had to "demonstrate that the disparity . . . is the result of one or more of the employment practices . . . specifically showing that each challenged practice has a significantly disparate impact . . . ." Id. at 657-58.

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

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

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

(to avoid burdening the defendant, the court limited title VII plaintiff’s discovery pertaining to defendant’s affiliated stores to “relevant documents for inspection at the respective branch stores”). See generally Mark J. Jacoby, Motion Practice and Discovery in Age Discrimination Cases, reprinted in Advanced Strategies Employment Law 1988, at 405, 417–26 (Practising Law Institute, 1988).

See, e.g., Grigsby v. North Miss. Medical Ctr., 586 F.2d 457, 460 (5th Cir. 1979) (discovery restricted to limits of medical center where plaintiff worked); Hinton v. Kosex Inc., 93 F.R.D. 356, 357 (E.D. Tex. 1981) (discovery restricted to one facility because plaintiff was responsible for most employment decisions); McClain v. Mack Trucks, Inc., 85 F.R.D. 55, 62 (E.D. Pa. 1979) (where defendant’s plants functioned independently of each other with facility at which plaintiff worked); cf. Trevino v. Celanese Corp., 791 F.2d 397, 406 (5th Cir. 1983) (trial judge exceeded discretion in issuing protective order that restricted discovery to one plant in light of plaintiff’s allegations of a pattern of discrimination in a consolidated enterprise’s promotion and transfer system).

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

25. Interrogatories may be a less expensive form of discovery for companies with large litigations. In 1979, Judge Walter R. Mansfield, then Chairman of the Committee on Rules of Practice and Advisory Committee withdrew a proposal that would have specifically authorized federal courts to adopt local rules limiting the number of interrogatories. "[I]n many commentators have stated that interrogatories are the only form of discovery available to ordinary litigants and to the poor." 512 F.R.D. 521, 541–44 (1980) (letter from Mansfield to Judge Roszel C. Thomsen, dated June 14, 1979).

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

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

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

135 What troubled the Court in both Watson and Wards Cove was its speculation that any plaintiff may encourage an employer to hire minorities on a preferential basis, in violation Trust, 487 U.S. 977, 993 (1988). It has been well settled for some years that section 703(j) means only that as between two equally well-qualified applicants, title VII does not require See, e.g., Texas Dept of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981) (title VII qualified applicants). Ignoring its own jurisprudence, the Court used the narrow exception of 703(j) to swallow the anti-discrimination rule of title VII.

136 See 490 U.S. at 646-48. It appears that even the Griggs plaintiffs would lose under Wards Cove. See ACLU REPORT, supra note 9, at 26-31. As we have observed elsewhere, disparate treatment and its emphasis on defendant's subjective racial motivation redefines equality in terms of narrow conduct performed for the specific purposes of violating precisely defined rights. Looking to the subjective race-specific

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

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

IV. HOW SUBSTANCE AND PROCEDURE INTERSECT AT THE COMMENCEMENT OF A CASE: PUNISHING PLAINTIFFS WITH NEW PLEADING REQUIREMENTS

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

137 The objectives of Rule 8(a)'s drafters were to get away from the exacting requirements of the Field Code, "to avoid technicalities and to require that the pleading . . . [give] the opposing party fair notice of the nature and basis of the claim." 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1215-1216 (1990). These heightened pleading requirements have combined with the more onerous prima facie case rules, discussed earlier, to increase plaintiffs' discovery burdens. Stricter pleading and proof rules significantly impact discovery; moreover, plaintiff must be able to discover enough information to avoid Rule 11 sanctions.


139 Indeed, this trend is true of civil rights cases generally. See Hobson v. Wilson, 737 F.2d 1, 30 & n.87 (D.C. Cir. 1984) ("Every other circuit has articulated a requirement of particularity in pleading for civil rights complaints"); Trader v. Fiat Distrib., Inc., 470 F.
Federal courts in several circuits now routinely require title VII plaintiffs to plead specific facts in their complaints. Abandoning the liberal "notice pleading" requirements championed by Charles Clark and acknowledged with approval by the Supreme Court in Conley v. Gibson, the federal courts have largely revived fact pleading, requiring that title VII claimants not only state their claims, but also support them with specific facts. The courts have used Rule 8(a) as a sifting device to delay or dismiss meritless claims on the grounds of lack of factual specificity in complaints.


See infra notes 156–57 and accompanying text. Although some federal courts have held that the pleader must set forth the prima facie elements of a claim in order to meet the requirements of Rule 8, see, e.g., Local 1852 Waterfront Guard Ass’n v. Amstar Corp., 563 F. Supp. 1026, 1030 (D. Md. 1973), the cases taken as a whole indicate that each and every element need not be stated specifically as long as it can be inferred that the evidence regarding the missing element will be presented at trial.

In his earlier writings, Clark was more willing to embrace the term "notice pleading." Charles E. Clark, Comments: Pleading Negligently, 32 Yale L.J. 483, 484 (1923) and E. Clark, The Federal Rules of Civil Procedure: 1938–1939, 58 Colum. L. Rev. 435, 450–51 (1958) ("Perhaps the confusion over the term "notice pleading" has in part been caused by the two ways in which Clark used it. Sometimes he distinguished between two types of notice functions. On occasion, he wrote about "notice of each material fact of the pleader's case, rather than merely general notice of the case, as in the so-called 'notice pleading.'" Charles E. Clark, History, Systems and Functions of Pleading, 11 Va. L. Rev. 517, 542–44 (1915)). But this distinction is also confusing because Clark and the other drafters of the Federal Rules James & Hazard, supra note 67, at 151. For discussion of the "ambiguity of the Federal Rules' purposes with respect to the degree of specificity required in complaints, see James & Hazard, supra note 67, at 152–54.

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


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

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

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

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

145 For broader applications of the standard, see, e.g., EEOC v. Reichhold Chemicals, Inc., 700 F. Supp. 524, 525–27 (N.D. Fla. 1988) (granting leave to amend to add charge of retaliation for exercise of title VII rights in sex discrimination case where discovery grew out of investigation and conciliation efforts had failed); Ehrlich v. Bethlehem Steel Corp., 539 F. Supp. 653, 655 (E.D. Pa. 1982) (charges of sex discrimination with respect to hiring, seniority, compensation, promotion, transfer, and terms and conditions of employment could "reasonably be expected to grow out of the charge of discrimination" with respect to termination filed with the EEOC). The Reichhold Chemicals court applied a somewhat more restrictive standard, defining the permissible scope of the complaint by the scope of the EEOC inves-
when it will not.\textsuperscript{149} It seems particularly unfair to punish a plaintiff for drafting a less than comprehensive EEOC charge, which is often done without the advice of counsel, because she did not consider or anticipate certain discriminatory practices, perhaps relying on the EEOC's discovery efforts to unearth facts to support her claim. Furthermore, such a limitation violates the transactional approach of the Federal Rules and contravenes its liberal amendment policy.\textsuperscript{150} Notice that there is no language in title VII that supports the imposition of this limitation.

Another rule that may adversely affect plaintiffs requires the pleading with specificity of jurisdictional prerequisites or conditions precedent to suit.\textsuperscript{151} This requirement is not universally applied; indeed, some courts allow general statements that plaintiff has met the conditions. But there is such wide judicial variation that a plaintiff cannot be sure what to anticipate. Thus, while a federal district court in Pennsylvania found plaintiff's allegation that administrative remedies had been sufficiently exhausted to withstand a Rule 12(b)(6) motion,\textsuperscript{152} the Fifth Circuit Court of Appeals affirmed a
tigation "as long as the investigation reasonably grew out of the discrimination charge." 700 F. Supp. at 592 (emphasis added).

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

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


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

The First Circuit requires some of the most exacting pleading standards. In Johnson v. General Electric, an African-American set forth facts to make out a claim under title VII; Johnson v. New York City Transit Auth., 659 F. Supp. 887, 893 (E.D.N.Y. 1986) (district court dismissed plaintiff’s title VII claim under Rule 12(b)(6) as “conclusory” where plaintiff did not allege with particularity that he was qualified for position when denied him or that he was discharged from a position due to discrimination, and where plaintiff failed to demonstrate with any specificity that similarly situated individuals were treated differently), aff’d, 825 F.2d 31, 32 (2d Cir. 1987). For a case applying a specificity standard to other than a Rule 12(b)(6) motion, see Nash v. City of Oakland, 90 F.R.D. 633, 635–36 (S.D. Ohio 1981) (court denied plaintiff’s motion to compel production of documents on title VII racial discrimination claim where complaint contained only conclusory allegations of broad-based discrimination; court claimed to apply liberal “notice pleading” standard).

158 See, e.g., Emkay v. Bethlehem Steel Corp., 539 F. Supp. 653, 656–57 (E.D. Pa. 1982) (allegations that plaintiffs entered defendant’s apprenticeship program and that they were subject to several long-term layoffs on the basis of sex, read in conjunction with rest of complaint, were sufficiently specific to survive motion to dismiss; court granted motion for more specific statement); Rarcliffe v. Insurance Co. of N. Am., 482 F. Supp. 759, 765 (E.D. Pa. 1980) (amended sex discrimination complaint, much of which was cast in conclusory language, “barely” satisfied rule of factual specificity in civil rights cases); see also Iriarritu v. brush discharge under title VII, though “somewhat unacceptably drafted,” contained sufficient allegation of intentionally discriminatory animus to survive motion to dismiss.

159 Fed. R. Civ. P. 9(b). Professor Marcus objects to the insistence on detailed pleading regarding the defendant’s state of mind, as it contradicts the express language of Federal Rule of Civil Procedure 9(b). See Marcus, supra note 30, at 409.

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

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

161 840 F.2d 132 (1st Cir. 1988).

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

163 Id. at 154.

164 Id. at 154, 159.

165 The court stated:

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

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


168 Id. at 1199 (quoting Ogletree v. McNamara, 449 F.2d 93, 98 (6th Cir. 1971)). Ogletree
In particular, the *Trader* court deemed the following allegations "broad and conclusory," and thus improper under Rule 8(a)(2):

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

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

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

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

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*NOTE:* The document provided appears to be a section of a broader work, possibly a law review or academic journal, discussing legal principles related to employment discrimination and title VII cases. The text is a detailed analysis of a specific decision, *Trader v. Air Force*, and its implications for future cases. The text references other cases, such as *Talley v. Leo J. Shapiro & Associates, Inc.*, *American Nurses' Ass'n v. Illinois*, and *Hawkins v. Fulton County*, and discusses the specificity requirement under Federal Rules of Civil Procedure. The excerpt ends with a statement on the importance of notice pleading in title VII cases, citing *American Nurses' Ass'n v. Illinois*. The text is a scholarly discussion aimed at legal professionals and students.
comparable worth claims were not actionable, it alleged other kinds of intentional sex discrimination that were. The court suggested that a complaint that does not allege facts may still satisfy Rule 8(a)(2). But the Seventh Circuit's approach is not typical. The majority of courts now impose stringent pleading requirements. Of course, a plaintiff cannot use the discovery process before she files her complaint to learn the facts she must specifically plead. As one judge has observed: "no information until litigation: no litigation without information." The revival of fact pleading thus frustrates actionable claims and, ultimately, the opportunity to be heard.

V. REDEFINING THE PARTIES: EITHER TOO MANY OR TOO FEW

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

Falcon and Wilks demonstrate again the political nature of procedural choices. Falcon made it much harder for plaintiffs with a common injury—discrimination—to join together to achieve relief. At the same time, under Wilks, plaintiffs had to join many more defendants. Thus, plaintiffs' rights were constricted while the rights of nonplaintiffs—other (white) employees—were enlarged. The expansion of the number of parties who must be joined as defendants also extends the vulnerability of any judgment won by plaintiffs.

A. Restricting Class Actions: Atomizing Plaintiffs

1. Before Falcon: Title VII and Class Action Congeniality

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


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

exposure;\textsuperscript{189} consequently, the realistic threat of certifying a class adds to the settlement value of a case.\textsuperscript{190}

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

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

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

\textsuperscript{189} Class actions are also more likely than individual suits to efficaciously systems reform.\textsuperscript{189} Settlement is particularly relevant in this context, as the length and complexity of civil rights litigation especially disadvantages plaintiffs.

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

\textsuperscript{191} See Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (9th Cir. 1968); see also Bowie v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969) (“A suit for violation of title VII is a class characteristic, i.e., race, sex, religion or national origin.”).

\textsuperscript{192} See, e.g., Senter v. General Motors Corp., 532 F.2d 511 (6th Cir. 1976), and cases cited in Schlissel & Grossman, supra note 35, at 1217 n.10.

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

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

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

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

\textsuperscript{195} 532 F.2d at 524 (emphasis added). The "across the board" theory was also consistent with the paradigm of group injunctive or declaratory relief under Rule 23(b)(2). The drafters of that Rule noted that it was "intended to reach situations where a party has taken action ... with respect to a class, and [injunctive or declaratory relief] with respect to the class as a whole, is appropriate." Fed. R. Civ. P. 23(b)(2) advisory committee's note to 1966 amendments. As the advisory committee pointed out, Congress particularly intended this rule to serve discrimination cases: "Illustrative are various actions in the civil rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration."

\textsuperscript{196} Senter, 532 F.2d at 524.

\textsuperscript{197} See Fed. R. Civ. P. 28(a)(2), 23(a)(4), 23(b)(2). These values ostensibly inspired Congress to create the Rule 23(b)(2) class action in the first place. See Fed. R. Civ. P. 23(b)(2) advisory committee's notes to 1966 amendments. The only other questions were whether the plaintiff had demonstrated numerosity and adequacy of representation. Schlissel & Grossman, supra note 35, at 1218.

\textsuperscript{198} These courts were neither skewing title VII nor ignoring the requisites of Rule 25. Discrimination based on race or sex is still widespread in America, making it unlikely that any act of discrimination is isolated. In the constitutional context, the Supreme Court has recognized that discrimination is more like a spreading cancer than an isolated wound. This is the theory behind the so-called "germ theory" presumption in school desegregation cases. See, e.g., Reves v. School Dist. No. 1, 415 U.S. 189, 201 n.12 (1974) ("Infection at one school infects all schools.") (quoting Judge Wisdom in United States v. Texas Educ. Agency, 467 F.2d 848, 888 (5th Cir. 1972)). An employer that discriminates against an employee is apt to discriminate against other employees of the same group; this attitudinal malignancy tends to spread throughout the organization. Less metaphorically, discrimination by high level supervisors often represents at least the appearance of corporate acquiescence, thereby condoning similar behavior by lower level employees. Thus allegations of discrimination almost always raise workplace-wide issues of law and fact.
Class actions also foster the judiciary’s efficiency interest in not repeatedly litigating the same facts. For example, plaintiffs who must prove racial animus often will call upon evidence of repeated discrimination against a number of employees in order to show intent. Class actions also reduce the problem of inconsistent results in the same or similar cases.199

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

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

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

199 “The class action is a powerful procedural device, offering enormous savings in time and judicial resources over individual trial of each class member’s case while opening up opportunities for both new forms of litigation and potential abuse by litigants.” Marcus & Serman, supra note 187, at 233.

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

201 457 U.S. 147, 161 (1982). This holding strengthened the rule first announced in East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405–06 (1977). Reversing a broad class certification, the Rodrigues Court stated: “We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present. But careful attention to the requirements of Rule 23 remains nonetheless indispensable. The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination.” Id. at 405–06.

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

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

The Supreme Court reversed.206 Although the Court acknowledged that “racial discrimination is by definition class discrimination,” it insisted that the mere allegation of racial discrimination does not necessarily respond to Rule 25(a)’s requirements, or define a class suitable for certification:

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

Rather, “actual, not presumed, conformance with Rule 23(a) [is] indispensable.”208 Thus, a private title VII class action may be certified only if the trial court is satisfied “after a rigorous analysis”209 that the prerequisites of Rule 23(a) have been met.210
The named plaintiff’s complaint in *Falcon* failed to demonstrate a close nexus between his individual claims and the class claims because the complaint did not provide a sufficient basis to conclude that his claim of discrimination in promotion “would require the decision of any common question [about defendant’s] failure to hire more Mexican-Americans.”211 The *Falcon* Court also suggested that district courts should carefully scrutinize the merits of the named plaintiff’s individual claim at the class certification stage,212 notwithstanding the absence of any statutory rule requiring or permitting this inquiry.

In sum, *Falcon* triggered three major shifts in the application of Rule 23 to Title VII class actions: first, Title VII plaintiffs now must satisfy Rule 23(a)’s requirements under a standard of “rigorous analysis;” second, the nexus213 between the named plaintiff’s claims and those of the class the plaintiff seeks to represent must be “close;” and last, the Title VII plaintiff may be required to plead specific facts and argue the merits of her claim before certification will be approved.214

Just as the more permissive view of the symbiosis between Rule 23 and Title VII reflects a particular understanding of discrimination,215 the shift accomplished by *Falcon* makes sense only in the context of the Supreme Court’s current understanding of the nature of discrimination. *Falcon* embodies a belief that discriminatory employment practices are no longer prevalent in America216 and

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

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

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

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


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


217 We have written elsewhere about the impact of this new definition upon women. See Brown et al., *Constitutional Dissonance*, supra note 8; Brown & Baumann, *Nostalgia*, supra note 5.

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

Over-technical limitation of classes by the district courts will drain the life out of Title VII, as will unduly narrow scope of relief once discriminatory acts are found. But without reasonable specificity the court cannot define the class, cannot determine whether the representation is adequate, and the employer does not know how to defend. And, what may be most significant, the overbroad framing of the class may be so unfair to the absent members as to approach, if not amount to, deprivation of due process. Envision the hypothetical attorney with a single client, filing a class action to halt all racial discrimination in all the numerous plants and facilities of one of America’s mammoth corporations. One act, or a few acts, at one time or a few places, can be charged to be part of a practice or policy quickening an injunction against all racial discrimination by the employer at all places. It is tidy, convenient for the courts fearing a flood of Title VII cases, and dandy for the employees if their champion wins. But what of the catastrophic consequences if the plaintiff loses and carries the class down with him, or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class? Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, C.J., specially concurring).

219 That the number of civil rights class actions filed in federal courts is progressively decreasing is beyond dispute. Judge Robert L. Carter of the United States District Court for the Southern District of New York has demonstrated this statistically. See Carter, supra note 186, at 2183. Carter shows that, in 1977, 8.67% of all federal court filings were civil rights cases, whereas, by 1985, civil rights filings had plummeted to a mere 6.4%. Id. Nationally, civil rights class action filings have dramatically decreased from 1,174 filed in the judicial reporting year ending June 30, 1976, to 48 filed in the reporting year ending June 30, 1987. See Lawyers’ Committee for Civil Rights Under Law, Submission to the Senate Committee on the Judiciary on the Nomination of Judge Clarence Thomas as an Associate Justice of the United States Supreme Court 53 (Sept. 11, 1991).
a. "Rigorous Analysis" and "Close Nexus"

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

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

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

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

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


222 After the prerequisites are met under Rule 23(a), the class action must also meet the requirements of one of four specific types of class action, enumerated in Rule 23(b). The four types of class action are described in: (b)(1)(A), relating to the risk of inconsistent or varying adjudications; (b)(1)(B), relating to the risks of being double counted, or impairing the interests of, absentees; (b)(2), when final injunctive relief or declaratory relief is appropriate for the whole class because of the defendant's act or refusal to act; and (b)(3), when there are common and predominating questions of law or fact, and the class action is superior to other methods for fair and efficient adjudication. F.R. Civ. P. 23.
Railway Co. held that African-American railroad employees who had been discharged for failure to follow proper procedures to protect their seniority after being furloughed did not share a sufficiently close nexus with other minority employees discharged for a violation of company rules.

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

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

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." This rule has two parts. First, the class representative must be competent; that is, the representative party's counsel must prosecute the class claims "vigorously" and "competently." Second, the interests of the class representative must be co-extensive with the interests of the class; that is, the representative and the class should not have any conflicts of interest. This inquiry is closely linked with the commonality/
which forbids certification where joinder is practicable,\(^\text{244}\) and the manageability requirement, which forbids certification where the claims of a class and its representatives are too heterogeneous for one suit, aim at the economy and feasibility of class actions. But the two prerequisites, applied simultaneously, are a Catch-22: the named plaintiff must show that there are too many claimants to join for the court to require individual actions to be brought and yet not too many distinct claimants to raise any serious manageability issues.\(^\text{245}\)

b. Pre-Certification Inquiries into the Merits

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

\(^{238}\) See, e.g., *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 131–32 (1st Cir. 1985) (joinder practicable and numerosity requirement not fulfilled where class of forty-nine black employees resided in same geographic area).

\(^{244}\) At least one court has refused to certify a class where the court viewed the class, defined in one manner, as being too small—violating Rule 23(a)(1)'s numerosity requirement—and yet, defined in another manner, as being too large—and thus "unnecessary".

\(^{245}\) The propriety of a class action, the question is not whether the plaintiff or plaintiffs have sufficient cause of action or will prevail on the merits, but rather whether the requirements of rule 23 are met.'

\(^{246}\) Under the language of Rule 23(c)(1) compels such a result. That rule states:

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

**FED. R. CIV. P. 23(c)(1).** This rule, according to some courts, represented Congress's intent to see certification issues resolved quickly and economically. For instance, in *Avagliano v. Sumitomo Shoji America, Inc.*, 103 F.R.D. 562 (S.D.N.Y. 1984), the court noted that "it is often proper . . . for a district court to view a class action liberally in the early stages of litigation, since the class can always be modified or subdivided as issues are refined for trial." *Id.* at 573 (citations omitted). The court also pointed to Rule 23(c)(4)(B) ("a class may be divided into subclasses and each subclass treated as a class") and implied that the proper time for a district court to focus on the merits and shape group relief is after certification. *Id.* ["[A] motion for class certification," the court concluded, "is not the occasion for a mini-hearing on the merits."]
action.247 There is language in *Falcon* that the lower courts have used to justify pre-certification examination of the merits.248 In *Falcon*, the Supreme Court reiterated the well-established notion that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'"249 The Court then advised plaintiffs to provide a "specific presentation identifying the questions of law or fact that [are] common to the claims of [plaintiffs] and of the members of the class [they seek] to represent."250 Once the *Falcon* Court ordered that there be a close nexus between the claim of the class representative and every member of the class, it was inequitable that the lower courts would take a closer look at the facts and the law, that is, at the merits of the claim.

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

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

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


250 Id. at 158 (emphasis added).

251 Id. at 159 n.15.

252 In Martin v. City of Beaumont, 125 F.R.D. 435 (E.D. Tex. 1989), the court found,
discovery, in the event that the case would not be certified as a class action, judges have limited an initial round of discovery to the alleged discrimination against the named plaintiff. This is particularly harmful to plaintiffs seeking to prove racial animus. One way to do that is to show repetitive negative treatment against a number of employees in the minority group; another is to use statistics that simultaneously show discrimination against the individual and the group. Such evidence is expensive to accumulate and is therefore itself a deterrent in the individual case. When some judges forbid any evidence or discovery of class-wide discrimination during the first look at the individual case, deterrence becomes prohibition.

Some courts have gone further, holding that failure to certify a class showed a lack of "across-the-board" discrimination and therefore evidence at trial of other acts of discrimination was irrelevant. But absent the "smoking gun" of racist remarks directed at a plaintiff, how does one show racial animus absent a pattern of discriminatory behavior?

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

B. Creating New Rights for Whites: Aggregating Defendants

At the same time that it has taken a microscopic view of plaintiffs’ interests, the Supreme Court, contrary to the prior holdings of all but one circuit, magnified the interests of white employees by turning them into necessary parties to a title VII suit. The creation of a new group of necessary parties had several results. It became virtually impossible to bring title VII cases in a manner that was not subject to dismissal for failure to join Rule 19 parties. This in turn undermined the finality of title VII decrees. Employers had a strong disincentive to settle, for they no longer had an "impermissible collateral attack" defense against any white who claimed reverse discrimination resulting from the settlement agreement. Once again, the Court bid these substantive changes under procedural language.

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

259 The initial complaint was filed on January 7, 1974. See Lawyers' Committee for Civil Rights Under Law, Impact of the Supreme Court Decision in Martin v. Wilks 2 (1990) [hereinafter Lawyers' Committee].
260 Wilks, 490 U.S. at 759.
261 Id.
262 Id. The BFA and two of its individual members brought the motions to intervene after the fairness hearing (and after seven years of litigation between the original parties). See id. The district court denied the motions as untimely and was upheld by the Eleventh Circuit on appeal. Id. Subsequently, seven white firefighters, all of whom were members of the BFA at the time of the fairness hearing, sought injunctive relief against enforcement of the decree. Id. at 759–60. On appeal, the Eleventh Circuit affirmed the denial of that relief, holding that petitioners had not adequately shown irreparable harm. Id. at 760. The Court of Appeals noted that the white firefighters could "institute[] an independent Title VII suit, asserting specific violations of their rights." Id.
before the decree was entered.\textsuperscript{265} Wilke, therefore, taught title VII plaintiffs that joinder of all third parties potentially affected by their claims was mandatory.\textsuperscript{264}

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

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

\textsuperscript{265} Id. at 761-63.

\textsuperscript{264} Alternatively, Wilke allowed collateral attack by non-parties whom the original parties failed to join. See id. at 762-63. At section 108, the Civil Rights Act of 1991 appears to overturn \textit{Marlin v. Wilke} by limiting permissible challenges to title VII consent degrees. Sec. 108, § 705, 1992 U.S.C.C.A.N. (105 Stat.) 1071, 1076-77 (to be codified at 42 U.S.C. § 2000e-2(o)(13)(A)). Note, however, that parties to a decree carry the potentially significant burden of showing that the challenger had 1) actual notice of the proposed judgment and 2) an opportunity to present objections to the proposed judgment. Id. The Supreme Court will ultimately decide the weight of this burden.

\textsuperscript{266} See, e.g., \textit{Franks v. Bowman}, 424 U.S. 747, 778 (1976) (identifiable victims of post-Act hiring discrimination may be awarded seniority retroactive to the dates of their employment applications: "[employer] expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest").

\textsuperscript{267} This shift in focus has appeared in civil rights cases generally, most noticeably in connection with affirmative action issues. See, e.g., \textit{City of Richmond v. J.A. Croson Co.}, 488 U.S. 469, 493-94 (1989) (applying strict scrutiny to local ordinance setting aside thirty percent of city construction contracts for minority-owned businesses because any lesser limitation would not protect innocent white contractors); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (non-minority medical school applicants are "innocent persons" who should not be forced to bear the burdens of redressing grievances not of their making); see also \textit{Brown et al. v. Board of Education}, 914 F.2d 225 (7th Cir. 1990), rev'd on other grounds, \textit{Board of Education v. Brown}, 479 U.S. 1 (1986).

\textsuperscript{268} 431 U.S. 324 (1977).

\textsuperscript{269} Id. at 356. Section 703(b) provides in pertinent part: Notwithstanding any other provision of this subchapter, it shall not be unlawful for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system... provided that such differences did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminants.\textsuperscript{269} Any other result, said the Court, would make plaintiffs eligible for retroactive seniority, which might "water down" the seniority rights of "innocent" employees and interfere with the "delicate task" of balancing the "legitimate expectations" of non-victim employees against the remedial rights of minority victims.\textsuperscript{270} Teamsters implies that these "innocent victims," whose rights can trump plaintiffs' rights, might be necessary parties to the initial litigation.

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

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

\textsuperscript{270} 42 U.S.C. § 2000e-2(h) (1988). In this paper we do not discuss the other seniority system cases following \textit{Teamsters}, such as \textit{American Tobacco Co. v. Patterson}, 456 U.S. 63 (1982).

\textsuperscript{271} Id. at 354; accord \textit{Ford Motor Co. v. EEOC}, 458 U.S. 219, 239 (1982) (employer can toll accrual of back pay liability to successful plaintiffs by offering jobs previously denied, without retroactive seniority; requiring employer to offer seniority would place "particularly onerous burden" on innocent employees who had accrued seniority while the case was litigated).

\textsuperscript{272} Teamsters, 431 U.S. at 356.


\textsuperscript{274} See id. at 576, 583.

\textsuperscript{275} Id. at 565.

\textsuperscript{276} Id. at 575.

\textsuperscript{277} Id. at 588 (O'Connor, J., concurring).

\textsuperscript{278} Id.
must be represented and must participate fully in the negotiation process. 277 This concern with third party, or non-party, rights suggests that if non-minority employees are not made parties to a title VII suit they must be allowed to attack the judgment later. Stotts thus foreshadowed the holding of Martin v. Wilks that non-parties affected by court-approved consent decrees containing race-conscious relief could challenge those decrees in a collateral lawsuit. 278 Wilks invalidated the "impermissible collateral attack" doctrine that had been followed by most federal courts. 279 The Court held that joinder pursuant to Federal Rule 19.280 rather than knowledge

277 Id. at 588 n.3 (O'Connor, J., concurring). Justice Stevens, concurring separately, considered the consent decree a final judgment binding upon the petitioners. Id. at 590-91 (Stevens, J., concurring). Nevertheless, he found the injunction invalid because it could not support modification were not present. Id. at 592 (Stevens, J., concurring).

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

279 Id. at 2185. Indeed, the Court acknowledged that its position contradicted the majority of the courts of appeals. Id. at 765 n.3. The Court listed the following "sampling of circuit cases that support the "impermissible collateral attack" doctrine: Striff v. Mason, 849 F.2d 1144 (5th Cir. 1988); Martin v. Ortiz, 880 F.2d 47 (1st Cir. 1989); aff'd, 484 U.S. 301 (1988); Thaggard v. City of Jackson, 687 F.2d 66, 68-69 (5th Cir. 1982), cert. denied sub nom. Ashley v. City of Jackson, 464 U.S. 900 (1983); Stotts v. Memphis Fire Dep't, 679 F.2d 541, 558 (6th Cir. 1982), rev'd on other grounds sub nom. Firefighters Local Union 1784 v. Stotts, 467 U.S. 561 (1984); Dennisen v. City of Los Angeles Dep't of Water & Power, 654 F.2d 694, 696 (9th Cir. 1981); Goins v. Bethlehem Steel Corp., 657 F.2d 62, 64 (4th Cir. 1981), cert. denied, 455 U.S. 940 (1982); Society Hill Civic Ass'n v. Harris, 632 F.2d 1045, 1052 (3d Cir. 1980). It is telling that the majority could only come up with one circuit court decision other than Wilks itself that would generally allow collateral attacks on consent decrees by non-parties. See Dunn v. Carey, 808 F.2d 555, 559-60 (7th Cir. 1986).

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

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

FED. R. CIV. P. 19(a).

Section (c) of Rule 19 requires a party to state in its pleadings the names, if known, of any persons as described in (a)(1)-(2) who are not joined and the reasons for not joining them. FED. R. CIV. P. 19(c).

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

The implications of Wilks were thoroughly explored by the parties and amici in their briefs. The minority employee petitioners made cogent arguments about the chilling effect on title VII, pointing out that mandatory joinder would be unworkable and would impose unnecessary burdens on both plaintiffs and joined parties. Furthermore, they demonstrated the risk that non-parties would contest joinder, effectively defeating the purpose of Rule 19.284 But the Court denied that these difficulties resulted from the choice

of a substantive and procedural law.
between mandatory intervention and mandatory joinder, and claimed that the problem arose from the nature of title VII remedies.\textsuperscript{285}

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

\textsuperscript{285} Wilks, 490 U.S. at 767.
\textsuperscript{288} Id.
\textsuperscript{289} Id.
\textsuperscript{290} See Fed. R. Civ. P. 24 advisory committee's note to 1966 Amendments.
\textsuperscript{291} See id. Significantly, the majority in Wilks omitted any mention of the advisory committee's note. The majority focused only on the language of Rules 19 and 24 to support its conclusion that joinder is mandatory and intervention is permissive. See 490 U.S. at 765–66. It is true that Rule 24(a)(2) states that applicants who show prejudice to their ability to protect their interests "shall be permitted to intervene," while Rule 19 states plainly that persons whose absence will either prejudice their own or the parties' interests "shall be joined." Fed. R. Civ. P. 19, 24. Statutory language, however, cannot properly be interpreted without reference to the drafters' intent, and the petitioners' arguments make clear that the drafters' intent, as expressed in the advisory committee's note, substantially weakens the Court's conclusion. See Reply Brief of Petitioners John W. Martin \textit{et al}. at 6–7, Martin v. Wilks, 490 U.S. 755 (1989) (Nos. 87–1614, 87–1639, 87–1668). Section 108 of the Civil Rights Act of 1991 renews the prudence standards that prevailed in most circuits before Wilks. See Civil Rights Act of 1991, sec. 108, § 703, 1992 U.S.C.C.A.N. (105 Stat.) 1071, 1076–77 (to be codified at 42 U.S.C. § 2000e–2(a)(1)(A)).

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

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

\textsuperscript{292} For examples of litigation filed after Wilks, see LAWYERS' COMMITTEE, supra note 259; Robert Pear, 1989 Ruling Spurs New Tack in Civil Rights Suits, N.Y. TIMES, Oct. 15, 1990, at A1.
\textsuperscript{294} Mandatory joinder also imposes significant financial burdens on the involuntarily joined parties. See Brief Amicus Curiae of the American Civil Liberties Union \textit{et al}. at 41, Martin v. Wilks, 490 U.S. 755 (1989) (Nos. 87–1614, 87–1639, 87–1668). Even if the plaintiffs know the case will not settle, it appears they will still have to try to join the same people otherwise they will not be bound. For instance, post-trial injunctive relief giving a promotion might later be attacked by those not named.
\textsuperscript{295} Title VII specifies as proper respondents employers, labor unions, agencies and joint apprenticeships. See 42 U.S.C. § 2000e–5(b) (1988).
\textsuperscript{296} Id. § 2000e–5(f) (1988).
It is ironic that, while essentially eliminating the plaintiff class action in *Falcon*, the Court mandated unattainable defendant classes in *Wilks*. The "spectre" of defendant classes is likely to remain just that because of the procedural difficulties of certifying defendant classes. Even assuming that Rule 23(b)(2) permits defendant classes, a point still in question, there are significant obstacles to certification.

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

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

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

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

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

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

*See* *Wilks*, 490 U.S. at 767-68.

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

*See* 490 U.S. at 702-63.

*Id.* at 2187.
who would argue that they were not bound by the earlier litigation due to inadequate representation.307

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

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

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


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

309 See 490 U.S. at 785.

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

311 Id.

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

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

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

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

316 Wilks, 490 U.S. at 709-70 (Stevens, J., dissenting).
their jobs. The truck that comes each morning to sell doughnuts and coffee will lose substantial business. Customers of the plant may have to seek a more distant source. If the offending defendant is a disposal site, adjoining towns may have to create a new site or ship their trash great distances at increased expense. All these people have interests that will be impaired by the decision, but it is highly unlikely that courts would dismiss the suit if they were not joined as Rule 19 necessary parties. To put it another way, nuisance law itself takes into account the interests of affected people, while not making them parties. Indeed, virtually all litigation affects many others who are not necessary parties.

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

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

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

519 For some of the constitutional problems this may raise, see City of Philadelphia v. New Jersey, 457 U.S. 617 (1989).

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

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

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

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821 See Wilks, 490 U.S. at 769. The doctrine and its exceptions are explained in Justice Stevens's dissent. See id. at 771-72 & n.6 (Stevens, J., dissenting).
823 See, e.g., Natural Resources Defense Council, Inc. v. Tennessee Valley Auth., 340 F. Supp. 400 (S.D.N.Y. 1971). In this case, the court held that coal producers who had contracts with the T.V.A. did not have to be joined in a case brought to enjoin the T.V.A. from purchasing and using strip-mined coal because, among other reasons, their participation from purchasing and using strip-mined coal because, among other reasons, their participation from purchasing and using strip-mined coal would not "help much to elucidate the issue in the case: whether TVA followed the dictates of NEPA," Id. at 408. Although this statement was made as part of an application of Rule 19(b), it applies equally to the question under 19(a)(2) as to whether a non-party "claims an interest relating to the subject of the action." Id.; Fed. R. Civ. P. 19(a); see also Jeffries v. Georgia Residential Fin. Auth., 678 F.2d 919, 928-29 (11th Cir. 1982) (court treats the rights of former employees in a collective bargaining dispute as secondary to the dispute over the sale of the plant). Absent the discrimination, perhaps the white employees might not have been as successful in their careers. See Brown & Baumann, supra note 5, at 54.
union), if mandatory joinder would be unwieldy or impossible, and if there was a strong public interest in that the case proceed. In an environmental suit brought by the Sierra Club, for example, the District Court for the Eastern District of California held that although miners' property rights would be affected, the miners were not necessary parties: "where what is at stake are essentially issues of public concern and the nature of the case would require joinder of a large number of persons, Rule 19's joinder requirements need not be satisfied." Also citing Federal Rule 1, the district court reasoned that "[u]nly justice cannot be done if public interest litigation is precluded by virtue of the requirements of joinder." The Supreme Court might have deemed eliminating the pollution to our country from employment discrimination as being as much in the public interest as protecting the physical environment.

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

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

VI. HOW FEE ALLOCATIONS PENALIZE PLAINTIFFS

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

We have just seen how the Supreme Court used Rule 19 to create substantive rights for white employees at the expense of title VII plaintiffs. Having done so, the Court then found a way, in Independent Federation of Flight Attendants v. Zipes, to insulate the white employees from liability for legal fees. We also saw how the Court undermined the feasibility of title VII class actions. At the same time, the Court has jeopardized the fees of the attorneys who rep-
resent plaintiffs in class actions. The holding of *Evans v. Jeff D.* invites an adversarial relationship between title VII plaintiffs and their lawyers in class actions. In *Marek v. Chesny*, the Court's interpretation of a procedural rule jeopardizes fee awards to plaintiffs' lawyers. *Zipes, Jeff D.* and *Marek* have undermined the congressional policy of awarding attorneys fees to victorious title VII plaintiffs, thus making it far less likely that attorneys will take title VII cases.

A. Intervenors Get a Free Ride

In *Zipes*, the Court refused to allow prevailing plaintiffs to collect legal fees from unsuccessful intervenors. It held that a plaintiff will only be entitled to fees against an intervenor when the intervenor's action was "frivolous, unreasonable, or without foundation." Reasoning that intervenors are not wrongdoers but merely innocent parties protecting their interests, the Court characterized intervenors as "particularly welcome, since we have stressed the necessity of protecting, in Title VII litigation, 'the legitimate expectations of ... employees innocent of any wrongdoing.'"

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

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

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335 In an early civil rights case, *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), the Supreme Court recognized that Congress intended to encourage plaintiffs to act as "private attorney[s] general" and to promote private enforcement of civil rights through the fee shifting provisions of title II of the 1964 Civil Rights Act. *Id.* at 402. *Piggie Park* established that prevailing plaintiffs in civil rights cases are entitled to an award of attorney's fees unless "special circumstances" would render an award unjust. The Court saw the fee shifting provision as furthering a congressional intent to encourage private attorneys general to "vindicate[e] a policy that Congress considered of the highest priority." *Id.* (footnote omitted).

336 The Court recognized that if plaintiffs were routinely forced to pay their attorney's fees, few plaintiffs would be able to vindicate their rights. In *Albrecht Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court held that the *Piggie Park* standard for awarding attorney's fees to a successful plaintiff was applicable to title VII actions. *See id.* at 415. But three years later, in *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the Court held that "prevailing party" included a prevailing defendant. *See id.* at 417. In *Christianburg Garment*, the Court created a different standard for prevailing defendants that permits the award of attorney's fees when the plaintiff's action is frivolous, unreasonable or without foundation, even though not motivated by subjective bad faith. *Id.* The Court rejected the EEOC's argument that prevailing defendants should be awarded attorney's fees only when plaintiff's suit was brought in bad faith, concluding that "in enacting § 706(e)(3) Congress did not intend to permit the award of attorney's fees to a prevailing defendant only in a situation where the plaintiff was motivated by bad faith in bringing the action." *Id.* at 418-22.

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

338 *Id.* In *Zipes, female flight attendants brought an action against TWA alleging that the airline's policy of discharging employees who became mothers violated title VII. *Id.* at 755. In the original action, the plaintiffs were represented by the Airline Stewards and Stewardesses Association ("ALSSA"), a union that preceded the Independent Federation of Flight Attendants ("IFFA"). *Id.* at 755-56. After the suit was filed, the defendant changed its policy and settled with the ALSSA. *Id.* at 756. After the settlement, the IFFA sought permission to intervene in the lawsuit on behalf of incumbent flight attendants not affected by the challenged policy. *Id.* at 757. The IFFA objected to the settlement on two grounds: first, the district court lacked jurisdiction, and second, the relief the court had approved would violate the collective bargaining agreement between the IFFA and TWA. *Id.* The Supreme Court rejected both claims. *Id.*

339 *Id.* at 764.
340 *Id.* at 774-75 (Marshall, J., dissenting).
341 *Id.* at 763 n.4. The majority also reasoned that those who collaterally attack title VII settlements as permitted by *Martin v. Wilks* are not liable for attorney's fees, and thus concluded that plaintiffs still face the prospect of attorney's fees in defending their victories. *Id.* at 762.

342 See supra note 335.
343 *Id.* at 779 (Marshall, J., dissenting).
344 *Id.*
345 In dissent, Justice Marshall suggested that many defendants will minimize fee exposure by relying on intervenors to raise many of the defenses. *Id.* at 779-80 (Marshall, J., dissenting).
On the other hand, making a defendant liable for the plaintiff’s fees in an intervenor’s case would be in keeping with the philosophy of title VII. As Justice Blackmun pointed out in his concurring opinion:

Such a rule would safeguard the plaintiff’s incentive to enforce Title VII by assuring that the costs of defending against an unsuccessful intervention will be recouped, and would give a plaintiff added incentive to invite intervention by interested third parties, whose concerns can be addressed most fairly and efficiently in the original Title VII proceedings.546

This observation was particularly cogent given the perpetual right to intervene created by Martin v. Wilks.547

B. Plaintiffs at War with Their Own Lawyers

The defendant-oriented title VII doctrine created by the Supreme Court seems to make settlement a particularly attractive option for a plaintiff. Read together, however, Marek v. Chesny and Evans v. Jeff D. force a plaintiff’s attorney to choose between settling the case and receiving a fee, thus creating an adversary relationship between plaintiff and lawyer. In Marek v. Chesny, the Court held that prevailing civil rights litigants who were entitled to fees may be barred from recovering any fees for work performed after rejecting a settlement offer made under Rule 68 when the ultimate recovery is less than the amount offered at settlement.552 The Court construed the word “costs” in Rule 68 to include attorney’s fees, and ruled that any time a damage award at trial is less than the settlement offered by the defendant, the plaintiff may not recover fees.553

Justice Brennan demonstrated in dissent that, because Marek forces pretrial settlement, the Court’s holding is inconsistent with the congressional policy behind the post-trial fee shifting provisions of civil rights statutes.554 Marek works against plaintiffs by forcing attorneys to choose between seeking more favorable judgments and risking their fees if they fail to win those judgments.555 This is a perfect example of a court using a procedural rule to destroy a statutorily created right.556


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


551 Federal Rule of Civil Procedure 68 provides in relevant part:

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

552 473 U.S. at 10–11. In Marek, the plaintiff brought a wrongful death action against three police officers under 42 U.S.C. § 1983. Before trial, defendants made an offer of settlement under Rule 68 of $10,000, a sum specifically including costs and attorney’s fees. Plaintiff rejected the offer. At trial, the plaintiff was awarded damages, not including costs, of $60,000. The plaintiff then filed for attorney’s fees under section 1988. See 473 U.S. at 4.

553 Id. Rule 68 has been construed to apply only when the plaintiff obtains a judgment, and not when plaintiff loses. See Delta Airlines, Inc. v. August, 430 U.S. 546 (1981).

554 Marek, 473 U.S. at 31 (Brennan, J., dissenting). As Justice Brennan points out, Rule 68 is a “one way street,” available to defendants and not to plaintiffs. Id. (citation omitted).


556 As Professor Burbank has repeatedly and eloquently explained, the Enabling Act of 1984, and subsequent versions, should be interpreted as written so that the command that the Federal Rules of Civil Procedure should “not abridge, enlarge, or modify any substantive right” is taken seriously and given meaning. See Burbank, Enabling Act, supra note 10, at 1025–26; Steven B. Burbank, Hold the Corsets: A Comment on Paul Caron’s “Comment on the Civil Rights Attorney’s Fees Act of 1976,” 39 VILL. L. REV. 507 (1984).
While Marek creates an enormous incentive for the plaintiff to settle, the title VII attorneys who do settle risk their fees. In Evans v. Jeff D., plaintiff's counsel was instructed by his client to waive his fees as part of the settlement. The Supreme Court held that under Rule 23(e), a district court has discretion to approve a settlement conditioned on such a forced fee waiver. Jeff D. intensifies lawyers' dilemmas in class actions, that of choosing between favorable settlements and their own fees. Marek and Jeff D. place attorneys in an excruciating ethical dilemma; attorneys may agree to premature settlements and avoid risk to their fees, or they may follow their clients' wishes in favor of settlement, thus foregoing their fees.

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


526 475 U.S. 717 (1986). In Jeff D., the plaintiffs were a class of emotionally handicapped children who sought damages for alleged deficiencies in state-provided education and health services. The plaintiffs' counsel was a legal aid attorney who agreed to settlement one week before trial.

527 Id. at 742-43.

528 Since Rule 23(e) and Jeff D. apply to class actions, there is a potential conflict between the named plaintiffs and other class members if they refuse the waiver of the fee. The proposed Civil Rights Act of 1990 included a requirement that courts entering consent decrees settling discrimination cases first obtain an attestation that a waiver of attorney's fees was not compelled as a condition of settlement. See S. 2104, 101st Cong., 2d Sess. (1990). This provision was also included in earlier drafts of the Civil Rights Act of 1991, but it does not appear in the final version. See H.R. Rep. No. 102-40(i), 102d Cong., 1st Sess. 83-85 (1991) (seeking to overturn Jeff D.), reprinted in 1992 U.S.C.C.A.N. 549, 621-23; see also Civil Rights Act of 1991, Pub. L. No. 102-166, 1992 U.S.C.C.A.N. (105 Stat.) 1071.

529 Since Jeff D., the lower courts have been unwilling to interfere with settlement waivers in individual civil rights cases which, unlike settlements in class actions under Rule 23(e), do not require approval of the court. See, e.g., Panola Land Buying Ass'n v. Clark, 844 F.2d 1506, 1508 (11th Cir. 1988) (courts need not and should not get involved in fee waivers in settlements); Willard v. City of Los Angeles, 803 F.2d 526, 527 (9th Cir. 1986) (plaintiff's attorney has no right to intervene to object to settlement waiving his fees). Commentators have criticized these cases. See Margaret A. de Lisser, Giving Substance to the Bad Faith Exception of Evans v. Jeff D.: A Reconciliation of Evans with the Civil Rights Attorney's Fees Awarded, Act of 1976, 136 U. Pa. L. Rev. 553, 581-82 (1987). See generally, Steven M. Goldstein, Settlement Offers Contingent Upon Waiver of Attorney's Fees: A Continuing Dilemma After Evans, 20 Clearinghouse Rev. 695, 694 (1986); Note, Fees as the Wind Blows: Watters of Attorney's Fees in Individual Civil Rights Actions Since Evans v. Jeff D., 102 Harv. L. Rev. 1278, 1292 (1989); Peter H. Woodin, Note, Fee Waivers and Civil Rights Settlement Offers: State Ethics Prohibitions After Evans v. Jeff D., 87 Colum. L. Rev. 1214, 1230-37 (1987).

526 Rule 11 requires a party or attorney to sign all pleadings, motions or other papers. This signature constitutes certification that the signer has read the document and that [T]o the best of the signer's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a representative, or both, an appropriate sanction, which may include an order to pay to the other party or parties the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.


83 For a history of the enforcement problems inherent in the old Rule 11, see D. Michael Riesinger, Honesty in Pleadings and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11, 61 Minn. L. Rev. 1 (1976). The advisory committee notes to the amended Rule 11 speak directly and repeatedly to the problem of judicial discretion in the imposition of sanctions. The advisory committee reaches the unmistakable conclusion that if a court is forced to impose sanctions when the rule is violated, the court will be forced to meet its responsibilities under the rule. Fed. R. Civ. P. 11 advisory committee's note; see also Stephen B. Burbank, American Judicature Soc'y, Studies of the Justice System, Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11, at xii (1989) [hereinafter Task Force Report].


86 See supra text accompanying notes 71-111.
doctrine is in flux, and the facts are largely inferential and in defendants' hands. Sanctions for the failure sufficiently to investigate facts and law chill valid claims while encouraging a proliferation of sanction-oriented litigation.\(^{567}\) Indeed, commentators and judges have become increasingly concerned with Rule 11's potential to wreak havoc with civil rights cases.\(^{568}\)

Envision the classic employment discrimination case: a person on the job notices, overhears or suspects that she is being discriminated against—perhaps passed over for promotion—on the basis of her race. With only this information, plaintiff's lawyer must draft pleadings to meet Rule 11's strictures that all pleadings be "well grounded in fact" and "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."\(^{569}\) In our hypothetical about African-American doctors challenging a hospital hiring policy requiring the personal recommendation of physicians already on the staff, plaintiff's counsel will not have much of the information critical to the plaintiff's prima facie case: the subjective discriminatory intent of the hospital,\(^{570}\) the justifications for the hospital's policy, the cost of the existing policy and of alternatives, and/or the effectiveness of those alternatives to the hospital's performance of its functions.\(^{571}\) Plaintiff's counsel probably will not know the number and qualifications of African-American physicians rejected; certainly, she will not know about those who did not apply because of the policy. She will not know the qualifications of white doctors accepted on the staff. She may not even be certain of the elements of her prima facie case. Moreover, plaintiff's attorney will inevitably have far fewer resources, financial and otherwise, than attorneys representing the hospital.\(^{572}\)

Defendants now reflexively use Rule 11 motions in response to the filing of civil rights claims.\(^{573}\) This means that even those plaintiffs and their lawyers who have brought title VII cases in good faith may have to squander precious resources defending against Rule 11 motions. The threat of Rule 11 may compel plaintiff and counsel to refrain from initiating a meritorious title VII claim. As Judge Cudahy recently observed, in dissent from a decision to remand a case for further fact finding, his colleagues were "almost at the point of saying the main question before the court is not—'Are you right?' but 'Are you sanctionable?'"\(^{574}\) In his view, Rule 11 tends to encourage serial litigation and to chill both the most and least legitimate civil rights lawsuits, turning "a protection against frivolous litigation" into "a fomenter of derivative litigation, a mine for unwary parties and overzealous courts."\(^{575}\) In short, the "Rule 11 tail is wagging the substantive law dog."\(^{576}\)

Much title VII litigation gives the appearance of a Rule 11 violation. For example, Rule 11 requires that all pleadings and papers be "well grounded in fact."\(^{577}\) Strict construction of this language is a serious hurdle to title VII plaintiffs, who often must

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


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


571 Moreover, defendant may well have experienced and expert in-house counsel.


574 Id. at 1085. While some Rule 11 cases do get reported, hundreds more do not. Professor Tobias warns that "relying on reported decisions warrants considerable caution [as] . . . much judicial activity involving Rule 11, even orders imposing sanctions, has not been reported." Tobias, supra note 350, at 302. He suggests that a published opinion in and of itself can serve as a deterrent. Id. at 302. Moreover, the lack of reported cases hides another aspect of the Rule 11 problem; many cases are not brought because of the imminent threat of sanctions. As the Task Force Report notes, "no statistics on reported decisions can reflect private resolution of Rule 11 motions" and "reported decisions are unlikely to give a clear picture of the role that warnings about the requirements of Rule 11 play." Task Force Report, supra note 365, at 57, 58.

575 Yancey v. Carroll County, 574 F. Supp. 572, 575 (E.D. Ky. 1987). Some commentators have suggested that Rule 11 has helped to resurrect the antiquated notion of the "disfavored claim" despite Congress's clear intent to the contrary. See Tobias, supra note 364, at 502.

rely heavily on the discovery process to obtain information.\textsuperscript{578} Recall our hypothetical doctors and the information they lacked, all of which is in the hands, files or minds of the defendants. Although discovery might elicit some of the information, a Rule 12(b)(6) motion might be allowed prior to the completion of discovery. The motion for Rule 11 sanctions will inevitably follow.

In one recent and particularly troubling case, a plaintiff’s counsel was subject to Rule 11 sanctions where the good faith of the discovery requests was challenged in light of the plaintiff’s failure to retain an expert.\textsuperscript{579} Plaintiff’s lawyer had made a discovery request for statistical data in the defendant’s possession. The court held that the party seeking the data must make it’s intentions clear with regard to subsequent professional analysis of that data “so the adversary can select the most economical means of compliance.”\textsuperscript{580} Besides protecting the defendant’s files, and complicating the production of the evidence needed by plaintiff to form a well-grounded factual background, such a rule completely ignores plaintiff’s lack of resources. Should plaintiff be required to hire an expert statistician to evaluate data that may or may not lead to support of the claim? Should a defendant be excused from full compliance with discovery requests on the basis of the plaintiff’s attorney’s lack of demonstrated ability to interpret the documents without expert assistance? Is a plaintiff’s ability to hire an expert relevant to defendant’s duty to respond to discovery? The use of Rule 11 sanctions to penalize the wrong answer to these questions subverts the discovery process.

Rule 11’s requirement that a pleading be “warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law” is similarly fraught with problems for the title VII plaintiff, particularly in its deleterious effect on the advancement of novel legal theories.\textsuperscript{581} Shrock v. Altru Nurses Registry\textsuperscript{582} is illustrative. Shrock, a male nurse, filed charges with the EEOC in 1979 alleging that his employer refused to refer male nurses to female patients.\textsuperscript{583} He later filed a pro se title VII action that was dismissed in 1983 pursuant to a settlement that put him back on Altru’s registry of nurses.\textsuperscript{584} Two weeks after the settlement, Shrock filed new charges with the EEOC and another suit in which he alleged that Altru had discriminated against him again.\textsuperscript{585} Shrock’s case was dismissed on Altru’s motion for summary judgment and Altru’s motion for attorney’s fees was denied.\textsuperscript{586} Both parties appealed. On appeal, Judge Posner held that the suit was “not frivolous in the traditional sense of making an utterly groundless claim. Maybe Altru did discriminate against Shrock . . . .”\textsuperscript{587} Still, Judge Posner was “puzzled” at the district court’s refusal to grant Altru’s attorney’s fees, and despite the fact that Altru’s request for fees was not made pursuant to Rule 11, the case was remanded for reconsideration of that issue.\textsuperscript{588}

If ever there was a case that argued for a modification or extension of existing legal theories, it is Altru. Altru Nurses Registry was a nurse referral agency, and as such was in a gray area of employer status under title VII. Shrock did not technologically work for the agency; he worked for the patients to whom Altru referred him.\textsuperscript{589} On appeal, Judge Posner found Shrock to be an independent contractor, thus removing Altru from the coverage of title VII.\textsuperscript{590} Although the court did not “need to decide when, if ever, an employer covered by the statute can be held liable for conduct toward someone who is not its employee,” Judge Posner cited two cases supporting that proposition and further noted that “[those cases] gave [Shrock] a shot at bringing Altru within the jurisdiction of the statute as an employer if Altru turned out to have enough employees.”\textsuperscript{591} Because there was support for plaintiff’s position, it is peculiar that Altru was remanded for further determination of

\textsuperscript{578} An objective standard is used in evaluating the factual inquiry. In the employment discrimination context, see Thomas v. Capital Security Services, Inc., 836 F.2d 866, 873 (5th Cir. 1988) (and cases cited therein).
\textsuperscript{580} Id. at 40 n.1.
\textsuperscript{581} Professor Tobias notes that “[t]his concept is at the cutting edge of legal development, which means that they are difficult to conceptualize and substantiate . . . [and] once formulated, look non-traditional and even implausible.” Tobias, supra note 364, at 497. He suggests consideration of the implications of Rule 11’s rigorous enforcement in a case like Brown v. Board of Education, 347 U.S. 483 (1954). Tobias, supra note 364, at 497.
\textsuperscript{582}boss (7th Cir. 1987).
\textsuperscript{583} Id. at 660.
\textsuperscript{584} Id.
\textsuperscript{585} Id.
\textsuperscript{586} Id.
\textsuperscript{587} Id. at 661.
\textsuperscript{588} Id. Judge Posner noted that “[w]e are given pause . . . that Altru’s motion for attorney’s fees did not mention Rule 11; it relied solely on 42 U.S.C. section 2000e-1 (that was wrong, too, as we said) . . . . [I]t is true that a request for sanctions under Rule 11 is not a prerequisite to their imposition . . . Therefore we do not treat Altru’s motion to continue Rule 11 in the district court . . . as a waiver of Rule 11 sanctions.” Id. at 662.
\textsuperscript{589} See id. at 660–61.
\textsuperscript{590} Id. at 660.
\textsuperscript{591} Id. at 661.
Rule 11 sanctions. The remand was nominally based on Shrock’s poor investigation of the factual basis of the suit. Judge Posner implied, however, that Rule 11 sanctions are awarded only where the plaintiff’s suit is “frivolous, unreasonable, or without foundation,” which Shrock’s case admittedly was not. Altru also implicates Rule 11’s requirement that the pleadings be factually well-grounded. The court’s choice of words—whether Altru “turned out” to have enough employees—and its reference to other facts the panel found lacking is disturbing because it precludes the availability of information to the plaintiff. This would hardly be the case in instances where the employee had not previously filed suit against his employer. For a plaintiff in Shrock’s position, such information, absent discovery, would not likely be forthcoming.

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

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

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

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90 Altru, 810 F.2d at 661 (citing Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978)).
903 Id. For instance, the court alluded to issues surrounding how Altru referred nurses to its clients, whether hospitals as well as doctors and patients were part of Altru’s client base, and how many inquiries from female patients Altru had in a given period of time. Id. It is significant that Shrock attempted to provide such additional evidence on appeal when he apparently had engaged an attorney, but the court held that evidence had come too late, as it had not been raised in district court. See Altru, 810 F.2d at 661–62. The court was apparently applying a “product test” in judging lawyer-activity under Rule 11 rather than the “conduct test” suggested by the very language of the Rule. See Burbank, Transformation, supra note 14, at 1933–34.
904 The Altru case does not directly address other troubling aspects of Rule 11, such as its mandatory imposition of sanctions upon a finding of a violation, its seemingly automatic use by defense counsel or its potential for resurrecting the archaic notion of “dual-authorized claims” in the civil rights context. See Tobias, supra note 364.
905 We shall explore the separation of powers implications of such “restoration” acts in a subsequent article. Once again, we appreciate the generosity of the Fund for Labor Relations Studies which has partially supported this research.

906 Task Force Report, supra note 363, at 68 (parentheses in original). Some courts view Rule 11 as a fee shifting statute rather than a deterrent statute. This interpretation is not only counter to the Rule’s intent, see id. at 10–13, but also particularly harmful to plaintiffs.
908 Nelken, supra note 397, at 1327.
909 Civil rights plaintiffs were sanctioned 47.1% of the time while all others were sanctioned 8.45% of the time. Task Force Report, supra note 363, at 69.
911 Vairo, supra note 373, at 200–201.
11 burden and the threat of Rule 11 sanctions has been predictably chilling to plaintiffs. The use of Rule 11 in title VII cases is a good example of a facially transsubstantive rule that has a starkly non-transsubstantive effect.

VIII. Epilogue: Substance in the Shadow of Procedure

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

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

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

A. On Losing Causes: A Fable for Lawyers

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

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463 Commentators and courts have noted that only a small percentage of Rule 11 cases are reported. See Task Force Report, supra note 363, at 59 (and citations therein).
And if you are foolhardy enough to go forward nonetheless, how will you ever get paid? Your client doesn’t want to pay you to tilt at windmills, particularly if a “victory” will put him in a job where he rightfully suspects he will be despised. Moreover, he fears that if he is known as a troublemaker he will be unable to work at any hospital in the community. You ponder the possibility of a class action for all African-Americans who have lacked a white sponsor. But the hospital has no written policy against interviewing minorities, and, indeed, its informal, non-written policy is neutral on its face. *Falcon* teaches that racial discrimination is no longer by definition class discrimination, and instead, essentially forces each plaintiff to bring his or her own case. You do not have enough information to satisfy *Falcon’s* nexus requirement, and you may be subject to Rule 11 sanctions before you can attempt to get that data through discovery.

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

Your client is a single plaintiff who probably cannot plead, yet alone prove or afford the discovery costs of, a prima facie title VII case against an all-white hospital that has discriminated against minorities for a century. You are compelled to think about settlement. What if the hospital offers to settle, you refuse, and five years later you win one dollar less than the offer? Or what if your client wants to settle, but the hospital is unwilling to pay your fee? How comfortable will you be telling your own client not to settle, even though he is better off with the settlement? Will your client want to go forward when you explain that he may have to pay the hospital’s fee if he loses or your fee if others intervene and prolong the litigation? And never forget that throughout this process, you and your client may be sanctioned under Rule 11. Will you ever consider representing another title VII plaintiff?

B. On Procedural Myths

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

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

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

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

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407 In our hypothetical, there is no “racially biased testing procedure” applied to both employees and applicants that might trigger the footnote 15 exception to the close nexus rule. See General Tel. Co. v. Falcon, 457 U.S. 147, 159 n.15 (1982). See also supra note 211 and accompanying text for a discussion of footnote 15.
classes of cases in different ways. Procedure has deep political overtones. It is not a neutral procedure separate from substantive law.

C. Looking Forward by Looking Backwards

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

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

We are not advocating a return to the hypertechnical procedure of the common law. Rather, our point is the need to recognize that courts, without legislative guidance, have begun to read procedural specificity into title VII. It is clear that this jurisprudence involves a good deal more than "mere" procedure. The decision that white "victims" must be heard before minority plaintiffs can prevail, although disguised in rulings on intervention in consent decrees, is a percolation of the substantive law. More subtly, the decisions to require stricter pleading for title VII cases, or to apply Rule 11 to these cases in the same manner as in other cases, have redefined plaintiffs' title VII rights. Obviously, allocations of burdens of proof have an even more direct impact.

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

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

413 "So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the veil of its technical forms." Henry S. Maine, Dissertations on Early Law and Custom 389 (1883); see also S.F.C. Milson, Historical Foundations of the Common Law 30-32 (1969); cf. Alan Watson, The Law of Actions and the Development of Substantive Law in the Early Roman Republic, 89 Law Q. Rev. 387 (1973) (on the evolution from a pleading system to rational substantive law).

414 For many, if not most matters, the general, flexible Federal Rules of Civil Procedure may work fine. Our point is that Congress would be well-advised to consider when deviations are needed to increase the likelihood that the rights meant to be granted by a specific statute will in fact and by the courts. See Burbank, Preclusion, supra note 5, at 831, 852 and 851, n.402; Stephen B. Burbank, Of Rules and Discretion: the Supreme Court, Federal Rules and Common Law, 63 Notre Dame L. Rev. 693, 716-17 (1988); Burbank, Transformation, supra note 14, at 1940; Subrin, Equity, supra note 6, at 985; Subrin, Federal Rules, supra note 7, at 2041-43, 2048-51.

415 In his two terms in office, President Reagan appointed "more than half" of the federal judiciary, including three members of the Supreme Court: Laurence H. Tribe, abortion: The Clash of Absolutes 17, 167 (1990) (citing H. Schwartz, Packing the Courts (1988)). President Bush has made two Supreme Court appointments. The Washington Post has predicted that by 1994, three quarters of the 752 federal trial and appeals court judges will have been appointed by Reagan and Bush. Al Karmen & Ruth Marcus, A Chance to Deepen Stamp on Courts, WASHINGTON POST, Jan. 29, 1989, at A1.

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

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

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


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

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

\textsuperscript{419} Statutes are not regulations, nor should they be. See *Parmet: Discrimination and Disability: The Challenges of the ADA*, 18 Law Med. & Health Care 331 (1990) (criticizing the new statute for including too many overly specific code-like provisions).