The Bar Against Challenges to Employment Discrimination Consent Decrees: A Public Choice Perspective

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I. INTRODUCTION

One of the traditional hallmarks of the procedural protections afforded by Anglo-American jurisprudence is that a person is not legally bound by an in personam judgment in litigation to which he is a stranger. In other words, "you get your day in court" to vindicate your personal individual rights and cannot be bound by the litigation decisions of those with whom you have no preexisting relation.¹ In Martin v. Wilks,² the Supreme Court reaffirmed this principle by rejecting the collateral attack bar that many lower courts had applied to preclude challenges to consent decrees entered in employment discrimination cases.³ Such challenges were brought by employees who were not parties to the original discrimination suit and were adversely affected by racial or gender preferences required by settlement agreements.⁴

The Leadership Conference for Civil Rights and other civil rights groups criticized and sought legislation to overturn entirely the Wilks decision.⁵ After much debate, the Civil Rights Act of 1991 included as Section 108 a compromise provision establishing a bar in two circumstances: (1) when the challenger to the consent decree had both "sufficient notice" that the decree adversely

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¹ For possible qualifications of this principle that may have recently arisen in the context of class actions, see infra notes 64-67 and accompanying text.
³ Wilks did not reject the collateral bar on constitutional grounds, but on the basis of the Federal Rules of Civil Procedure. The Court held that joinder as a party was the method by which the Rules subjected individuals to the jurisdiction of the courts and bound them to a judgment or decree. Id. at 765, 109 S. Ct. at 2186. The content of the Rules themselves were influenced by due process concepts, of course, and the Wilks Court cited constitutional due process cases in its decision, see id. at 761-762, 109 S. Ct. at 2184, thus leaving open the question of whether the collateral attack bar also violated the Constitution.
⁴ For discussion of such cases, see infra notes 36-43 and accompanying text.
affected his rights and an "opportunity" to present his "objections" to the decree; or (2) when the challenger's interests had been "adequately represented" in the litigation resulting in the consent decree. No court has yet interpreted the scope of such amorphous terms as "sufficient notice" or "adequate representation" in this statutorily created collateral bar or considered whether the provisions, properly interpreted, are consistent with the Due Process Clause of the Constitution.

This article has two objectives. First, it will seek to understand the litigation dynamics that generated the collateral bar, the political dynamics that gave rise to attempts to sustain it, and what this course of history predicts for the future development of Section 108. The article suggests that the collateral attack bar facilitates settlements by permitting the plaintiffs and defendants to shift costs to individuals not represented in the underlying litigation. At least in the public employment context, it has operated as a mechanism for the production of racial and gender preferences in favor of minorities and women by tending to preclude those with the most to lose from such preferences from exercising substantial influence over the shape of the consent decrees. The regime of consent decree cum collateral attack bar also serves the interest of the lower courts themselves, including their interest in rapid disposition of employment discrimination cases of the scope that give rise to consent decrees. Accordingly, the article contends that the lower courts cannot generally be expected on their own initiative to encourage collateral attacks or to police seriously the content of employment discrimination consent decrees for fairness to nonparties who are adversely affected.

Second, this article compares the consent decree cum collateral bar regime to principles of administrative law. The consent decree regime can be understood as providing the plaintiffs and defendants in Title VII and constitutional employment discrimination cases with the authority to negotiate a rule that will govern the future course of the defendants' hiring and promotion. While this rule affects not only the rights of the litigants but also the rights and interests of third parties not represented in the proceeding, it need not be supported by findings of fact or conclusions of law contested in an adversary proceeding. Moreover, the remedy provided by the rule is not precisely determined by law but represents a choice among the many kinds and degrees of remedies that will

8. Racial and gender preferences are defined here to include any legal requirement that an employer take race or gender into account in its employment practices. Thus, the term encompasses race and gender conscious remedies in general and is not limited to numerical quotas.
put an end to the litigation. Thus, the regime of the civil rights consent decree cum collateral bar invests the litigants in a civil rights suit with discretion similar to that of an administrative agency, but gives others with legal interests in the outcome few, if any, of the basic protections afforded by the administrative process—such as an expert and impartial agency responsible for promulgating the rule, and a formal opportunity for all interested parties to participate equally in its promulgation.

Viewed from this perspective, combining a consent decree regime with a collateral attack bar seems anomalous, because the combination concentrates power in certain interested persons without providing the kind of procedural protections for persons without providing the procedural protections for the legal rights of others that have become the norm in the modern administrative state. Providing fewer procedural protections, however, may be justified on the assumption that nonminority employees disadvantaged by the collateral attack do not in fact possess substantial rights against discrimination in favor of minorities. Accordingly, the article suggests that creating a collateral attack bar can be understood as a rational strategy on the part of those who advocate racial and gender preferences that disadvantage nonminority employees. A procedural regime that on a case-by-case basis disproportionately disadvantages nonminorities will be less transparent to those disadvantaged than a substantive declaration that nonminorities enjoy less substantial nondiscrimination rights. The collateral attack bar thus functions as a means of operating implicitly on the assumption of disparate nondiscrimination rights while avoiding the substantial political costs of making the assumption explicit.10

9. By nonminority groups I mean groups defined by race, ethnicity, or gender other than groups, such as African-Americans, Hispanics, and women, that traditionally are plaintiffs in employment discrimination suits settled by consent decrees. Of course, some of these latter groups may occasionally be adversely affected by a collateral bar as well. See, e.g., United States v. City of Chicago, 870 F.2d 1256 (7th Cir. 1989) (city suggested that a group of white women sergeants would be collaterally barred from challenging consent decree raising test scores of Blacks and Hispanics). The vast majority of those barred from collaterally challenging consent decrees, however, have been white males.

10. This article takes no position on whether or to what extent racial preferences are legally or morally justified or whether nonminorities should have less substantial rights to nondiscrimination than minorities. Instead, this article is an exercise in “public choice” analysis rather than moral or legal argument. Like other public choice analyses, it emphasizes such matters as “the rent-seeking nature of interest group activity, the incentives of political entrepreneurs to supply such groups, the collective action problems which prevent the effective organization of the public at large, and the capture of legislatures and administrative agencies by organized, concentrated constituencies . . . .” See Edward A. Zelinsky, James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions, 102 Yale L.J. 1165, 1172 (1993) (describing public choice analysis). Like other public choice analysts, I do not offer it as a complete explanation of the legislative and judicial behavior. See Dwight R. Lee, Politics, Ideology, and the Power of Public Choice, 74 Va. L. Rev. 191, 198 (1988) (“Public choice provides only one window through which to view the political process. Any serious attempt to understand political phenomena requires the view from many windows.”).
II. THE INCENTIVE STRUCTURES OF THE COLLATERAL ATTACK BAR

A. Development of the Bar

1. The Bar and Civil Rights Principles

Without deeper reflection on the political dynamics of the collateral attack bar, the fierce opposition to *Martin v. Wilks* by the Leadership Conference on Civil Rights would seem inexplicable. The right to one's day in court rests on important notions of what it means to have civil rights in a democratic society. Legal judgments require the application of law to facts, and the identity and personal circumstances of a particular litigant may affect the outcome. The right to a personal opportunity to be heard recognizes the individuality of each litigant and the principle that he will do the best job of representing his personal unique interests. Even assuming one could find two litigants with precisely identical circumstances and interests, however, the right to litigate one's personal claims also furthers the democratic value of permitting each individual to participate in and influence decisions that will affect his life and position within the community.

Indeed, *Hansberry v. Lee*, the Supreme Court decision which most firmly established the proposition that an individual is not bound by a judgment to which he was not a party, was itself a decision that vindicated the civil rights of racial minorities. *Hansberry* involved an attempt by residents of a Chicago neighborhood to enforce a racially restrictive covenant after a black family acquired a neighborhood home. The terms of the covenant specified that it would become effective only when signed by owners of ninety-five percent of the neighborhood frontage. The black home purchasers and other defendants argued that the covenant had never become effective, since owners of a sufficient percentage of frontage had not signed. The Illinois Supreme Court, however, held that this issue was res judicata because of an earlier suit involving the same covenant in which the parties had stipulated (incorrectly) that owners of the requisite percent had signed the covenant. The Supreme Court reversed the Illinois decision as a violation of the Due Process Clause, finding that the home buyers and other defendants could not be bound by the judgment in the earlier suit where they were neither parties nor in privity with any parties to that suit.

Thus, *Martin v. Wilks* on its face is difficult to characterize as an anti-civil rights decision, rooted, as it is, in the basic procedural civil right which was historically a critical component of the judicial vindication of substantive civil rights. The key to understanding the fierce opposition to the decision lies not in the doctrinal pedigree of the case but in the substantive effects of the collateral attack bar in the civil rights context.

2. The Litigants' Incentives

In settling a Title VII or constitutional employment discrimination claim, the plaintiffs' and defendants' interests are opposed only insofar as the benefits the plaintiffs receive from the settlement adversely affect the interests, monetary or otherwise, of the defendants. Insofar as the defendants can shift any costs of the settlement to third parties, the defendants will be more willing to settle in the first place and the settlement may be more generous to the plaintiffs. As Charles Cooper has pointedly stated, an employer who does not have to take into account the interests of adversely affected employees "is much like a gambler wagering with someone else's money: he can afford to be extravagant until he gets to his own stake." Accordingly, the incentive structure resulting from the exclusion of third parties' interests will both encourage settlements and profoundly shape the content of such settlements. Consider, in particular, a public employer who is sued for racial discrimination. The city or state agency faces the issue of whether to settle the suit and, if so, on what terms. It would, of course, be naive to believe that only a defendant guilty of discrimination would want to settle a discrimination suit. The monetary litigation costs of defending a lawsuit may be skewed by the nature of the parties who strike the bargain. For instance, consent decrees involving prisons may focus less on the cost of the decrees than the public or even the legislature would wish because such decrees are negotiated by correctional officials who are not directly responsible for raising the money to pay for the costs of consent decrees. The structural difficulties addressed in the context of employment discrimination consent decrees, however, may be considered more serious because they tend to sacrifice the rights of individuals rather than simply impede the realization of the public's preferences.

13. Of course, this problem is not by its nature limited to consent decrees in civil rights cases, but may occur whenever plaintiffs and defendants negotiate a decree which may affect the legal rights of absent individuals. For instance, the collateral attack bar has also been addressed in cases in which environmental plaintiffs have sought to set aside consent decrees between public entities and property owners. See, e.g., National Wildlife Fed'n v. Gorsuch, 744 F.2d 963 (3d Cir. 1984) (barring collateral attack to environmental consent decree). Nonetheless, the majority of such collateral attacks on consent decrees by third parties with legally cognizable interests have occurred in the civil rights area, and it seems fair to conclude that it is the incentive structures in this area that have primarily shaped lower court doctrines developed in the 1970s and 1980s to bar attacks against consent decrees by nonparties. In any event, some basic incentive structures influencing the behavior of the lower courts will be similar for any consent decree that affects the legal rights of absent individuals; for example, settlements will be facilitated insofar as costs can be shifted to those without procedural rights to protect their substantive rights, and the judiciary will be interested in sustaining such settlements to dispose of cases.

Even consent decrees that do not directly affect the rights of unrepresented individuals may be skewed by the nature of the parties who strike the bargain. For instance, consent decrees involving prisons may focus less on the cost of the decrees than the public or even the legislature would wish because such decrees are negotiated by correctional officials who are not directly responsible for raising the money to pay for the costs of consent decrees. The structural difficulties addressed in the context of employment discrimination consent decrees, however, may be considered more serious because they tend to sacrifice the rights of individuals rather than simply impede the realization of the public's preferences.

14. Cooper, supra note 7, at 156. See also Samuel Issacharoff, When Substance Mandates Procedure: Martin v. Wilks and the Rights of Vested Incumbents in Civil Rights Consent Decrees, 77 Cornell L. Rev. 189, 241-47 (1992) (suggesting that parties negotiating consent decrees will have an incentive to shift costs to absent third parties).

15. The vast majority of these lawsuits are filed by minority or female plaintiffs. Thus, the benefits of the incentive structure will largely fall on these groups.
very substantial, and the nonmonetary costs, including the political costs, for a public entity to defend a discrimination suit can be even more onerous. It must be borne in mind that the political calculus of those charged with defending or settling the law suit has no necessary relation to the facts about past discrimination. In fact, admitting past discrimination, regardless of the facts, can be a positive political good if such leaders were allied with current opponents. Indeed, for the current political leader, the overwhelming political cost may well be the cost of denying a group of aggrieved constituents relief.

The incentive structure is also likely to skew the content of the consent decree. One remedy for discrimination is the award of back pay. Such awards, however, impose a highly visible cost on the political entity and, particularly in a time of tight budgets, are likely to be a source of discussion and unfavorable comment. The alternative of goals or racial preferences in promotion and hiring is less expensive and any monetary costs are imposed on a small number of the citizens. Moreover, future applicants to these positions will likely not realize, if they ever realize, the adverse effect on their interests until they actually apply for jobs, by which time the politicians responsible for imposing these costs may well have moved on to other positions. Like deficit spending, racial preferences to be implemented in the future have the advantage of shifting the potential political costs of intragroup conflict to one’s successors.

The advantages of shifting costs to the classes of nonminorities who may have an interest in applying for certain public sector positions will be greater insofar as the groups adversely affected are not part of the governing coalition of those responsible for imposing them. In many urban areas, this is the case. For instance, in New York City there is no residency requirement for policemen and thus many policemen and some potential applicants for positions in the police force are not even constituents of those responsible for settling an employment discrimination claim. Even if those responsible do depend on the votes of demographically similar classes to those adversely affected, imposition will have fewer political consequences if the media is relatively uninterested in the problems of those adversely affected.

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16. See Aiken v. City of Memphis, 9 F.3d 461, 474 (6th Cir. 1993) ("In light of the acute stigma attached to governmental units engaged in highly publicized trials involving violations of Title VII, agencies frequently elected to employ consent decrees when resolving disputes.").

17. The parties have substantial discretion in formulating a remedy in a consent decree. Under current Supreme Court doctrine, while the decree "must further the objectives of the law upon which the complaint was based," the parties may decide to award "broader relief than the court could have awarded" after trial. Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525, 106 S. Ct. 3063, 3077 (1986).

18. Birmingham, the city whose consent decree was at issue in Martin v. Wilks, had a black mayor, Richard Arrington, and a plurality of black citizens at the time it entered the consent decree. See Peter Applebome, In the 80's, Birmingham Is Still a Racial Barometer, N.Y. Times, Aug. 28, 1989, at A12.

19. If, as most commentators agree, the members of the media elite are generally "liberal" and progressive, see, e.g., S. Robert Lichter et al., The Media Elite 20-53 (1986), they are hardly likely
Moreover, in the public sector there is little connection between a decline in outputs of an agency affected by a consent decree and political costs. It is very difficult for the public to measure and monitor the output of public sector employees such as firefighters and policemen. Any decline in efficiency that is difficult to measure is unlikely to be remarked upon, and there will be little or no resulting political cost. Thus, even if as racial and gender preferences introduce a factor unrelated to merit into the selection criteria for a position and lead to a less productive work force, public sector defendants may tend not to care.

By contrast, in the private sector the costs of any loss in productivity that a racial or gender preference imposes will put a company at a competitive disadvantage. Thus, the interests of the employees adversely affected by the consent decree will tend to coincide more with the interests of the corporate defendant. To be sure, there will not be a perfect correlation of interests. For instance, fighting a civil rights suit entails litigation costs as well as distinct reputational costs that fall only on the defendant. Moreover, the short-term
to be concerned about the problems of lower middle-class and middle-class white males who are disadvantaged by consent decrees in public employment.

In his dissent in Johnson v. Transportation Agency, 480 U.S. 616, 107 S. Ct. 1442 (1987), Justice Scalia observed that interpreting Title VII to permit a degree of reverse discrimination harms relatively voiceless nonminorities to the benefit of elected officials and other organized groups:

It is unlikely that today’s result will be displeasing to politically elected officials, to whom it provides the means of quickly accommodating the demands of organized groups to achieve concrete, numerical improvement in the economic status of particular constituencies. Nor will it displease the world of corporate and governmental employers (many of whom have filed briefs as amici in the present case, all on the side of Santa Clara) for whom the cost of hiring less qualified workers is often substantially less—and infinitely more predictable—than the cost of litigating Title VII cases and of seeking to convince federal agencies by nonnumerical means that no discrimination exists. In fact, the only losers in the process are the Johnsons of the country, for whom Title VII has been not merely repealed but actually inverted. The irony is that these individuals—predominantly unknown, unaffluent, unorganized—suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent.

Id. at 676-77, 107 S. Ct. at 1475 (Scalia, J., dissenting).

20. For a discussion of why it is hard to monitor such public agency outputs, see James Q. Wilson, Bureaucracy: What Government Agencies Do and Why They Do It 154-57 (1989).

21. This article takes no position on the extent of such productivity losses, but suggests merely that to the extent they exist, they are more likely to restrain the racial and gender preferences in consent decrees in the private rather than the public sector. There has been very little empirical research on the costs, if any, to productivity of racial and gender preferences. Some estimates are offered in Peter Brimelow & Leslie Spencer, When Quotas Replace Merit, Everybody Suffers, Forbes, Feb. 15, 1993, at 80.


23. Companies are likely to be differentially affected depending on how much such reputational costs will affect their position in the market place. We can predict that such reputational costs would be highest when a company deals with state and local governments because politicians, for reasons
interests of those who actually manage corporations may tend to weaken the identity between the interests of nonminority groups and the corporate defendant because managers are likely to prefer to suffer the long-term and difficult-to-measure costs of racial and gender preferences to the immediate bottom-line costs of a back pay award.\textsuperscript{24} Thus, because of the lack of perfect identity between the interests of the defendants and nonminorities, the incentive structure created by the collateral attack bar may still encourage settlements that shift costs to nonparties.

Nevertheless, while we can expect consent decrees that shift the costs from the employer to third parties in the private sector, we would predict more such consent decrees in public sector litigation because the interests of the public sector defendant and those adversely affected by the consent decree are less likely to be closely aligned than the interests of the corporate defendant and its employees. Consistent with this expectation, the vast majority of suits that attempt to collaterally attack consent decrees have been in the public sector.\textsuperscript{25}

Another reason the collateral attack bar will have more effect in the public sector is the state of substantive civil rights law. Under the Equal Protection Clause, which affects only the public sector, discrimination against racial nonminorities may be justified only on the basis of proven past discrimination against minorities by the public employer in the relevant job category.\textsuperscript{26} Moreover, even when past discrimination has been proved, the remedy must be "narrowly tailored" to correct the past discrimination.\textsuperscript{27} In contrast, under Title VII of the Civil Rights Act of 1964—which applies to both the public and private sector—race-conscious remedies are permitted to correct a "conspicuous discussed earlier, are particularly sensitive to such divisive issues. On the other hand, if a company, like an office supplier, dealt only with other businessmen, such reputational costs may be less of an issue.

\textsuperscript{24} By the time the effects of a less productive work force are felt, the manager may have moved onto another position or indeed another corporation. The effect of the short-term/long-term dichotomy between managers and owners of corporations is frequently discussed in corporate law. See generally Thomas L. Hazen, \textit{The Short-Term/Long-Term Dichotomy and Investment Theory: Implications for Securities Market Regulation and for Corporate Law}, 70 N.C. L. Rev. 137 (1991).


\textsuperscript{27} \textit{Id.} at 507, 109 S. Ct. at 729.
imbalance in traditionally segregated job categories.\textsuperscript{28} Although this standard is not pellucid, it does not expressly require a finding of past discrimination by the defendant before a race-conscious remedy can be imposed. Similarly, the "narrow tailoring" requirement may be looser under Title VII law, which, as interpreted by the courts, merely requires that the remedy not "unnecessarily trammel the interests" of racial nonminority employees.\textsuperscript{29} Thus, although nonminorities have substantive rights against discriminatory race-conscious remedies in both the private and public sectors, their rights seem more substantial against race-conscious remedies in the public sector. Accordingly, the collateral attack bar will be more valuable to public sector defendants and the plaintiffs who sue them because the rights it tends to discount are more substantial in the public sector context.

3. The Courts' Incentives

Given that the structure of incentives created by a consent decree cum collateral bar can be predicted to encroach on legal rights, one might suppose that courts would be reluctant to impose a collateral bar, particularly in light of the general explosion of due process rights which the judiciary abetted in the 1970s.\textsuperscript{30} The judiciary, however, no less than plaintiffs and defendants, faces a structure of incentives. At the district court and the appellate court levels, this structure of incentives strongly militates against relaxing the collateral attack bar.\textsuperscript{31}

A court favors settlements because settlements reduce the court's docket and the jury's workload. Moreover, the cases settled under an employment discrimination consent decree are not just any cases, but cases charging racial or gender discrimination against powerful political or corporate entities in communities that may be close to the residence of the judge. A trial or appeal focusing on such


\textsuperscript{29} Id. at 630, 107 S. Ct. at 1451 (quoting Weber, 443 U.S. at 208, 99 S. Ct. at 2730).


\textsuperscript{31} The incentives favoring a collateral attack bar should weaken at the Supreme Court level. The Justices possess control over their docket through certiorari, are not situated in proximity to the affected communities, and can be expected to understand that they have reached the last position of their career. I have previously explored the idea that the distinctive institutional positions of different courts may shape their substantive doctrines. See John O. McGinnis, \textit{Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers}, 56 Law & Contemp. Probs. 293, 307 n.68 (1993) (suggesting that for institutional reasons the District of Columbia Circuit may review the actions of the executive branch more aggressively than the Supreme Court). See generally Richard A. Posner, \textit{What Do Judges and Justices Maximize? The Same Thing Everybody Else Does}, 3 Sup. Ct. Econ. Rev. 1 (1993) (discussing the manner in which judges respond to incentives).
explosive charges can divide the community and make the judge the focus of intense scrutiny and unfavorable evaluation by partisans of both sides. While surely there are judges who might relish the prospect of taking center stage in such a drama, the typical judge would prefer to avoid such a media circus.\(^{32}\) Besides a judge's interest in avoiding any long and complicated trial, he may also wish to avoid civil rights issues in particular because partisans of different approaches to civil rights—probably the most contentious issue of our time—may use his rulings in this area to endanger his prospects of promotion to a higher court.\(^{33}\) The collateral attack bar permits the judge to avoid protracted civil rights litigation on a ground that appears technical and procedural, thus giving him a substantial amount of political cover.\(^{34}\)

Moreover, at the time of a collateral challenge, the district judge has naturally acquired a psychological identification with the consent decree. Indeed, Professor Silver has commented that a judge would be disinclined, even before entry, to allow individuals besides the plaintiffs and defendants to intervene as parties in the dispute:

\[\text{It was hardly surprising that a district court, close to resolution of a major employment discrimination case, would be less than eager to}\]

\(^{32}\) Another incentive that should be considered is the possibility that judges would be interested in aiding members of their own race or gender. Although there are a substantial number of female and minority judges, most federal judges are still white males and thus such an incentive would militate in favor of the nonminorities adversely affected by the collateral bar. Public choice theory, like rational choice theory, generally operates on the hypothesis that public actors, including judges, "tend to behave as rational utility maximizers in an environment characterized by limited resources." See Nelson Lund, Guardians of the Presidency: The Office of Counsel to the President and the Office of Legal Counsel, printed in Politics and the Legal Bureaucracy: Government Attorneys as Policymakers (Cornell W. Clayton ed., forthcoming 1995) (describing premises of rational choice theory). Thus, under this view judges will favor their race and gender only insofar as such favoritism offers personal benefits, although such benefits are defined broadly to include such factors as status and standing in their community. It does not, however, seem likely that favoring the class of nonminorities adversely affected by the typical employment consent decree will offer lower court judges the prospect of enhancing their job satisfaction or status. As Justice Scalia has pointed out, this class is likely to "be predominantly unknown, unaffluent and unorganized," see Johnson v. Transportation Agency, 480 U.S. 616, 677, 107 S. Ct. 1442, 1475 (1987) (Scalia, J., dissenting), and thus will have little leverage to affect the judge's life in the courtroom or in the community. (For Scalia's full discussion of this point, see supra note 19). In any event, as discussed below, see infra notes 36-43 and accompanying text, lower courts were in fact sympathetic to the collateral attack bar although it generally disfavored the interests of individuals of the race and gender of which the federal judiciary is predominantly composed.

\(^{33}\) Such dangers are not merely conceivable. The nomination of Charles J. Cooper to become Assistant Attorney General for the Office of Legal Counsel was opposed by the Mayor of Birmingham because of his decision as a Justice Department official to support the white firefighters who wanted to collaterally challenge the decree. See Confirmation Hearings on the Appointments to the Federal Judiciary and the Department of Justice Before the Comm. on the Judiciary, 99th Cong., 1st Sess. 547-48 (1986) (statement of Sen. Thurmond).

\(^{34}\) The advantage of a procedural as opposed to a substantive bar is that it offers a seemingly neutral reason for an adverse decision. Of course, the neutrality of the reason may be impeached, but that requires explanation and education, raising the costs of ideological mobilization against the decision.
allow some outsiders to upset the remedy the parties (and possibly the court as well) had carefully crafted through negotiations. Understandably, a court would be loathe to allow participation by a third party, if the end result of such participation was likely to be a lengthy, sprawling trial rather than a neatly packaged settlement.35

The combination of these factors helps explain why the near majority of district and appellate court decisions before Martin v. Wilks rejected collateral attacks on consent decrees.36 A confirmation of the fact that these courts were, in effect, prisoners of their incentive structure is that they failed even to address the substantial doctrinal arguments against the bar under the Federal Rules of Civil Procedure and the Due Process Clause. The former became the basis of the Supreme Court’s decision in Wilks,37 but the latter were hardly obscure. As discussed above, in Hansberry v. Lee,38 the Supreme Court established the proposition that a person’s legal interest cannot generally be cut off by a judgment to which he is not a party.39 Moreover, the Supreme Court has repeatedly held that a cause of action is a form of property entitled to due process protection.40 While, as discussed below,41 the principle that one


36. The circuits were nearly unanimous that collateral attacks on consent decrees entered into to resolve Title VII litigation were impermissible. See Martin v. Wilks, 490 U.S. 755, 762-63 n.3, 109 S. Ct. 2180, 2185 n.3 (1989), listing cases and noting that the only circuit court decision, besides the Eleventh Circuit’s in Wilks itself, of which the Court was aware that would generally allow collateral attacks on consent decrees by nonparties was Dunn v. Carey, 808 F.2d 555 (7th Cir. 1986). For examples of circuit court decisions denying collateral attacks, see, e.g., Marino v. Ortiz, 806 F.2d 1144 (2d Cir. 1986), aff’d sub nom. 484 U.S. 301, 108 S. Ct. 586 (1987), reh’g denied, 484 U.S. 1082, 108 S. Ct. 1064 (1988); Deveraux v. Geary, 765 F.2d 268 (1st Cir. 1985); Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982), cert. denied, 464 U.S. 900, 104 S. Ct. 255 (1983); Dennison v. City of Los Angeles, 658 F.2d 694, 696 (9th Cir. 1981); Goins v. Bethlehem Steel Corp., 657 F.2d 62 (4th Cir. 1981), cert. denied 455 U.S. 940, 102 S. Ct. 1431 (1982); EEOC v. Safeway Stores, Inc., 611 F.2d 795 (10th Cir. 1979), cert. denied, 446 U.S. 952, 100 S. Ct. 2918 (1980); Black & White Children of the Pontiac Sch. Sys. v. School Dist. of the City of Pontiac, 464 F.2d 1030 (6th Cir. 1972).

37. These arguments are described supra note 3.


39. See supra note 12 and accompanying text. In the late 1970s, the Supreme Court reiterated this principle in the context of a civil rights consent decree. See Broadcast Music Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 13, 99 S. Ct. 1551, 1559 (1979) ("Of course, a consent judgment... does not immunize the defendant from liability for actions, including those contemplated by the decree, that violate the rights of nonparties.").


41. See infra notes 64-67 and accompanying text.
cannot be bound by a judgment to which one is not a party may be subject to
certain limited exceptions, what is striking about the pre-Wilks cases is that for
the most part they did not rely on exceptions but summarily dismissed the
collateral challenge without any serious consideration at all of the Due Process
Clause.\footnote{42}

As early as 1983, the due process principle had been laid out by Justice
Rehnquist, joined by Justice Brennan,\footnote{43} when they dissented from the denial of
certiorari in a case challenging the constitutionality of the impermissible
collateral attack doctrine. The opinion stated:

I find myself at a loss to understand the origins of the doctrine of
"collateral attack" employed by the lower courts in this case to preclude
a suit brought by parties who had no connection with the prior
litigation. Their causes of action did not even accrue until at least a
year after the entry of the consent decrees. And their attempt to
intervene in those suits, more than three years after the entry of the
consent decrees, was denied as untimely.\footnote{44}

Nevertheless, even after this reminder of the importance of due process in this
context from the recognized leaders of both the liberal and conservative wings
of the Court, courts routinely rejected collateral challenges without even citing
any due process cases.\footnote{45}

Given the incentive structure for the lower judiciary and the distortions it
created in legal analysis before Martin v. Wilks, there was reason to believe that
even after Wilks lower courts would still attempt to dispose of challenges to
consent decrees without full-scale litigation on the merits and without requiring
an actual trial on whether there had been past discrimination by the public
employer justifying the consent decree. This prediction seems to be borne out
by the evidence, as the lower courts have seized on two principal avenues to
avoid full-scale review. The first is to give very substantial deference to the

\footnote{42. For cases dismissing due process challenges, see \textit{supra} note 36.}
\footnote{43. Given the fact that Justice Brennan joined in Justice Rehnquist's dissent in the denial of
certiorari in this case, it is somewhat puzzling that he later joined in Justice Stevens' vigorous dissent
that given the full briefing and many amici in Wilks, he came to understand the real world effect of
the collateral attack bar and—as perhaps the Court's most effective exponent of race-conscious
remedies, see United Steelworkers v. Weber, 443 U.S. 193, 99 S. Ct. 2721 (1979)—approved of the
effect.}
\footnote{44. Ashley v. City of Jackson, 464 U.S. 900, 901-02, 104 S. Ct. 255, 255-57 (1983) (Rehnquist,
J., dissenting).}
\footnote{45. \textit{See, e.g.}, Marino v. Ortiz, 806 F.2d 1144, 1146 (2d. Cir. 1986) (stating that it is well settled
that collateral attacks under Title VII are not permitted), \textit{aff'd by an equally divided court}, 484 U.S.
301, 108 S. Ct. 586 (1988).}
factual stipulations of the consent decree in which the local public entity admits discrimination. This deference essentially revives the collateral attack bar, because those challenging the decree were not parties to these findings of fact and the very same incentive structure described above may lead to findings that do not accord with the actual facts.\textsuperscript{46} Second, other courts simply confuse Title VII with equal protection standards, suggesting that public entities have to show only "an imbalance in traditionally segregated job categories" rather than proof of actual discrimination as required by \textit{Croson}. By pretermitting a factual inquiry into the issue of past discrimination, such a stance makes the consent decree more secure.\textsuperscript{47}

\section*{B. Likely Development of Section 108}

Since the incentive structure has pervasively affected the manner in which the lower courts have addressed collateral challenges both before and after \textit{Martin v. Wilks}, it is safe to predict that the same incentive structure will likely influence both the interpretation and the operative effect of Section 108—the section by which Congress sought in the Civil Rights Act of 1991 to codify exceptions to the Supreme Court’s decision to permit collateral attacks.

\subsection*{1. The First Exception}

The statute’s first exception precludes collateral attacks by those who had:

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

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\textsuperscript{47} See, e.g., Henry v. City of Gadsden, 715 F. Supp. 1065 (N.D. Ala. 1989), \textit{aff'd in part and rev'd in part by mem.}, 909 F.2d 1491 (11th Cir. 1990). The district court in Alabama stated:

To overcome a "reverse discrimination" challenge to a consent decree which embodies race-conscious selection criteria, the proponents of the decree must prove that (1) consideration of the race of the applicant is "justified by the existence of a 'manifest imbalance' that reflected underrepresentation" of blacks in traditionally segregated jobs, and (2) the decree must not "unnecessarily trammel" the rights of white employees or "create an absolute bar to their advancement."

\textit{Id.} at 1068; Howard v. McLucas, 871 F.2d 1000 (11th Cir.) (also using manifest imbalance standard), \textit{cert. denied}, 493 U.S. 1002, 110 S. Ct. 560 (1989). The difference between equal protection and Title VII standards is discussed at \textit{supra} notes 26-29 and accompanying text.

On its face, this section might seem to resolve the collateral attack problem because it would encourage plaintiffs to provide notice of any proposed settlement to interested persons (such as current nonminority employees) who would then be at liberty to challenge the settlement at the time of its entry. This resolution is illusory, however, because even if all relevant individuals with legal interests affected by the consent decree could be notified—an assumption which, as we will see, is false—notice by itself does not give the parties any substantial legal power to affect the settlement.

Section 108, by its terms, merely gives notified individuals the right to present objections to the settlement. Of course, if the court permits such groups to intervene as parties in the lawsuit, they would acquire substantial procedural rights. In the event of intervention, however, much of the impetus for the settlement would be lost: should the proposed settlement seek to shift costs to intervenors, they would have the right as parties to refuse to agree to it and would have the full panoply of civil procedure rights to litigate the factual and legal basis of the underlying suit. Thus, given the incentive for sustaining settlements in this area, we can predict that lower courts will generally be loath to grant intervenor status, particularly if—as is the case—they have any discretion to refuse to do so.

If the notified groups are not permitted to intervene as parties, the incentive structure described above suggests that notification and the opportunity merely to object may not secure the substantive rights of those adversely affected by a consent decree. The plaintiffs and defendants—the only litigants with procedural rights and access to the facts—will have a vested interest in sustaining the settlement, and the lower court will also wish to preserve the settlement. While a fairness hearing may precede entry of the consent decree, there is thus little incentive for either the parties or the courts to modify the decree substantially in


49. Even if individuals do not have a property right in being promoted or being hired, they may have a sufficient legal interest in protecting those possibilities to permit intervention. See, e.g., United States v. City of Chicago, 870 F.2d 1256 (7th Cir. 1989) (Posner, J.).

50. For instance, under Federal Rule of Civil Procedure 24(a) and (b), applications for both Intervention of Right and Permissive Intervention must be "timely." Fed. R. Civ. P. 24(a) & (b). In deciding whether a motion for intervention is timely, the court may take account of progress toward settlement. 7C Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, § 1916, at 437-38 n.12 (1986) (citing Stotts v. Memphis Fire Dep't., 679 F.2d 579 (6th Cir. 1982)). Moreover, the judgment of the district court as to intervention will typically not be disturbed unless the denial is an abuse of discretion. See, e.g., 7C Wright & Miller, supra, § 1916, at 422-23.

51. There is no requirement that a court hold a fairness hearing except in class action suits and no requirement, even in class action suits, that the fairness hearing include participants other than the class action members. See Silver, supra note 35, at 373. There is evidence that courts routinely hold fairness hearings before entering consent decrees. See Larry Kramer, Consent Decrees and the Rights of Third Parties, 87 Mich. L. Rev. 321, 358 (1988). It would appear to be in the courts' interests to provide fairness hearings because they promote the appearance of giving the identified groups their day in court without giving them any substantial power to frustrate the settlement or affect the contours of the decree.
light of the objections of nonparties. Indeed, since it is precisely the shifting of costs to nonparties that as a general matter facilitates settlement, both the court and the litigants can be expected to minimize the opportunity for nonparties to prevent cost shifting.

In response to nonparties’ lack of leverage at a fairness hearing, some commentators have suggested strengthening the procedural rights of third parties to object to the settlement without giving them the full right to intervention. For instance, one commentator has suggested that a limited right of intervention be given allowing the notified groups to appeal the denial of their objections to the fairness of the consent decree.52 This limited right, however, will change the incentive structure of district courts only insofar as the appellate court reverses district court decisions that deny objections to the consent decrees. There is no reason to believe that appellate courts will engage in many reversals of this kind. First, their incentive structure is similar to that of the district courts. While they will not have the same psychological identification with the consent decree at issue and will be less likely to live in immediate proximity to the affected community, they are unlikely to have any substantially greater appetite for reopening such divisive issues. Even more fundamentally, if the notified groups are not provided the right to full intervention, they will not be able to produce a complete record with which they can impeach the district courts’ decision. The appellate court will thus have no choice but to defer heavily to the decisions of the district courts.

Commentators have also suggested importing into the civil rights settlement process a requirement of notice and comment procedures similar to those developed by courts under the Administrative Procedure Act. For instance, affected individuals would be given the right to comment; those proposing the consent decree would have an obligation to respond to comments; and judges would be required to give reasons for denying the objections that affected individuals raise to the consent decrees.53 Despite such suggestions, judges, in the almost two decades of approving civil rights consent decrees, have not developed such formal procedures. It would not seem to be in their interest to formalize and thus extend the acrimony of a fairness hearing. In any event, even if courts were to adopt such notice and comment procedures, affected individuals, other than the parties, would gain only modest leverage since they could not litigate the underlying facts of the case and the interested parties drawing up the consent decree would still have every incentive to shift costs onto others. Thus, the reforms suggested for fairness hearings are mere palliatives that do not change an underlying incentive structure that leads to the systematic deprivation of rights of affected individuals who are not parties to the lawsuit.54

53. See Kramer, supra note 7, at 358-59; Silver, supra note 35, at 374.
54. While Schwarzschild asserts that “[i]n numerous cases, the comments and objections of third parties have in fact evoked modifications of consent decrees,” see Schwarzschild, supra note 52, at
These systematic effects will thus form the nub of any due process challenge to this provision of Section 108 by supporting the argument that notice without intervention offers insufficient procedural protection for substantive rights. Indeed, these effects could also be urged as a reason to construe the section narrowly by suggesting that only the right of full intervention fulfills that section's requirement of a "reasonable opportunity" for those notified to present their objections. The argument for construing the statute narrowly could be strengthened by noting that Congress itself showed particular concern about the due process problems by providing: "Nothing in this subsection shall be construed to . . . authorize or permit the denial to any person of the due process of law required by the Constitution." Finally, there remains the possibility that the judges' incentive structure may change if they are made to understand the structure and react against the notion that they are prisoners of it.

2. The Second Exception

Of course, not all those potentially aggrieved by the consent decree will receive notice that their rights are at risk. For instance, some future applicants for the position may not even reside in the jurisdiction where the consent decree will apply. For such individuals, the relevant provision of Section 108 bars challenges: "(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact." The central issue for this provision is whether the lower courts will seize upon it to bar challengers who were not in privity with a previous challenger.

933 (footnote omitted), the case he cites for this proposition addresses the comments of party intervenors, who, of course, have far more substantial leverage to make the court pay attention to their objections.


56. See John O. McGinnis, Models of the Opinion Function of the Attorney General: A Normative, Descriptive and Historical Prolegomenon, 15 Cardozo L. Rev. 375, 435 (1993) (suggesting that once actors in a legal institution understand that they are operating under a particular set of incentives that is at odds with their normative ideals, their self-understanding may act as a kind of catharsis for reforming the institution).


58. One interesting issue is whether those who were notified of the consent decree and presented objections to it in the context of a fairness hearing under the first provision of Section 108, see supra notes 51-54 and accompanying text, can constitute those challenging a decree for the purposes of the second section and thus bar those whom they "adequately represent." As a matter of statutory construction, the notion of "challenging" a consent decree seems to be more substantial than merely presenting objections to it.
Barring individuals on the basis of representation of others reflects a controversial legal theory known as "virtual representation," a form of issue preclusion which, in its broadest form, "would preclude relitigation of any issue that had once been adequately tried by a person sharing a substantial identity of interests with a nonparty." While the theory has been discussed in treatises and law review articles, it does not appear (with the possible exception of certain class action suits, discussed below) to have been systematically applied by a court in the broad form that may be contemplated by Section 108—where a nonparty is precluded from bringing a claim solely on the ground of "adequate representation" by another.

The Supreme Court's opinion in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation casts doubt on the constitutionality of a rule permitting issue preclusion solely on the ground of adequate representation. The issue in Blonder-Tongue was whether a plaintiff could sue for patent infringement where a court had determined in a previous case against a different defendant that the patent was invalid. Thus, the question was whether the defendant in the second suit could benefit from a judgment in a suit to which he had not been a party. Prior to arriving at that question, the Court indicated that:

Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

Thus, the Court appeared to indicate that due process requires an opportunity to litigate one's own claim even if prior litigants, presumably possessing the same interests, have repeatedly and unsuccessfully litigated "the identical issue."

In Martin v. Wilks, the Supreme Court acknowledged that a nonparty may be bound by a judgment, "in certain limited circumstances," where the nonparty's

59. 18 Wright & Miller, supra note 50, § 4457, at 494.
60. All of the cases that in fact preclude relitigation by a nonparty (under the "virtual representation" theory) have involved several factors in addition to apparently adequate litigation by a party holding parallel interests . . . . Thus the nonparty has often participated in the prior action in some way, or seems to have consented to treat it as a test case, or has engaged in deliberate tactical jockeying, or has some close relationship to a party.
Id. at 495-96. See also Mann v. City of Albany, 883 F.2d 999, 1003 (11th Cir. 1989) ("A prior litigant's effort to champion the position asserted by another in a subsequent action is a factor to consider . . . . but this factor alone has never been considered sufficient to warrant denying the later party his day in court."); Terrell v. DeConna, 877 F.2d 1267, 1271 (5th Cir. 1989) (virtual representation theory requires the existence of an express or implied legal relationship making the parties to first suit accountable to nonparties).
62. Id. at 329, 91 S. Ct. at 1443.
interests were "adequately represented" by a party with the same interests. It is not at all clear, however, that the language in Wilks can be read to indicate that adequate representation, as provided by the text of the second exception of Section 108, would alone satisfy the requirements of due process in all cases. Indeed, the Court's qualification that the exception applies only "in certain limited circumstances" may imply that something beyond mere "adequate representation" is required to bind a nonparty.

The Wilks Court listed class action suits as a principal example of the "adequate representation" exception. The breadth of this exception in class actions is itself unclear. The Supreme Court has never squarely addressed, in the context of a federal class action, the issue of whether adequate representation alone is sufficient to satisfy due process in the absence of notice. This is open to doubt given the Court's statement in Mullane v. Central Hanover Bank & Trust Co. that notice is an "elementary and fundamental requirement of due process" in actions intended to determine with finality the rights of those not present.

Despite these difficult due process issues, the incentive structure described above would suggest that lower courts will tend to expand the concept of "adequate representation" beyond privity so as to preclude collateral challenges. Indeed, the legislative history concerning this provision in Congress seems to confirm these expectations, because those who wanted a strictly limited interpretation for adequate representation wrote in specific language suggesting

64. Id. at 762 n.2, 109 S. Ct. at 2184 n.2.
65. See Civil Rights Act of 1990 (the predecessor to the 1991 Act): Hearings on H.R. 4000 Before the Subcomm. on Civil and Constitutional Rights, House Education and Labor Comm., 101st Cong. 2d Sess. 471 (1990) (testimony of Professor Larry Kramer) (while the Supreme Court has never considered the constitutionality of the provisions of the Federal Rules that makejudgements binding on class members whose interests have been adequately represented, it has not disturbed the decisions upholding their constitutionality). Federal Rule of Civil Procedure 23 makes notice to class members and an opportunity to opt out of the class mandatory only for class actions maintained under Subsection (b)(3). See Fed. R. Civ. P. 23(c)(2).

As to class actions maintained under Subsections (b)(1) and (b)(2), notice to class members is mandatory only prior to dismissal or compromise of the action, see Fed. R. Civ. P. 23(e), but may be required by the district court at other times as appropriate "for the protection of the members of the class or otherwise for the fair conduct of the action." Fed. R. Civ. P. 23(d)(2).

67. In any event, the class action rules directly address the propriety of certifying a class without requiring notice rather than the effect of judgment in a class action. As the Supreme Court noted in Hansberry v. Lee, 311 U.S. 32, 42, 61 S. Ct. 115, 118 (1940):

[The consideration[s] which may induce a court thus to proceed to judgment in a class action, despite a technical defect of parties, may differ from those which must be taken into account in determining whether the absent parties are bound by the decree or, if it is adjudged that they are, in ascertaining whether such an adjudication satisfies the requirements of due process . . . .]

Therefore, any holding that class certification may proceed without notice to absent class members cannot be equated with a holding that any particular class member will be bound by the judgment.
that the section should be limited to barring those who were in privity.\textsuperscript{68} On the other hand, those who wanted a broader interpretation were content to speak in general terms about the meaning of adequate representation.\textsuperscript{69} This suggests the latter group was more confident the incentive structure would lead to a broader interpretation of the somewhat amorphous concept of adequate representation.

This provision is unlikely to affect employees represented by unions. Unions can be readily notified and given whatever "reasonable opportunity" to object to the decree that courts determine is required by the first provision of Section 108.\textsuperscript{70} Because the union is the legal representative of its members, under traditional principles of res judicata they may be bound by its litigation decisions.\textsuperscript{71} In contrast, Section 108's apparent expansion of the concept of adequate representation may have substantial affect on unrepresented individuals adversely affected by a consent decree, such as nonunionized employees or future job applicants. Such individuals are, of course, by definition, not organized and thus in a poorer position to protect their interests through collective action. The predictable effect of a regime of consent decree cum collateral bar will be to increase further the incentive to shift the costs of settlement onto these individuals.\textsuperscript{72} In particular, future settlements are thus more likely to protect the promotional rights of union members and less likely to protect the rights of nonunion, nonminority applicants.

3. The "Same Judge" Provision

A third provision of Section 108 provides:

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order.\textsuperscript{73}


\textsuperscript{70} For a discussion of this aspect of section 108, see supra notes 48-56 and accompanying text.

\textsuperscript{71} See United Automobile, Aeromechanics, and Agricultural Implement Workers v. Brock, 477 U.S. 274, 290, 106 S. Ct. 2523, 2533 (1986) (upholding doctrine of associational standing and suggesting that unions can bind members so long as there is adequate representation).

\textsuperscript{72} The implementation of Professor Issacharoff's notion that incumbent employees with vested rights to seniority and promotion should receive procedural protections, but that applicants and those without vested rights should not, see Issacharoff, supra note 14, would also result in cost-shifting to the latter group.

Because of a district judge's identification with a consent decree formalized under his aegis, this requirement that any challenges be tried before him will encourage the post-Wilks phenomenon by which courts, in any collateral challenge, give very substantial deference to the factual stipulations underlying the consent decree and even misapplied equal protection law to dispose of the challenge without a full scale trial on the issue of past discrimination. 74

Thus, this provision, which seems clearly constitutional, may make the ultimate interpretations of the other, more controversial provisions of Section 108 relatively less important, because even in the absence of a formal collateral attack bar, the district court that entered the consent decree can be expected to use ingenuity in disposing of collateral attacks in fairly short order. 75

III. DECODING THE COLLATERAL ATTACK BAR

The authority to fashion a consent decree is akin to the authority to fashion a rule through administrative rulemaking because both embody discretionary decisions affecting the future exercise of rights. 76 The consent decree also is like an administrative rule because it emerges not from a contested formal hearing (e.g., a trial) where there are findings of fact based on evidence, but instead from untested assertions about the state of the world (e.g., about the extent to which the public entity actually discriminated) and fairly open-ended judgments about the public interest embodied in the choice of remedy.

If the similarities of civil rights consent decrees to administrative rulemakings are striking, the differences are no less revealing. Unlike administrative proceedings, which are conducted by an agency with some claim to expertise and at least formal neutrality in the subject matter area, 77 the rule embodied in a consent decree will be drawn up by two interested parties—the entity charged with discrimination and those charging discrimination. 78 As we have seen, there is every incentive for these parties to shift costs to those not represented in the proceedings. Employment discrimination consent decrees thus function a little like the industrial codes under the New Deal’s National Industrial Recovery

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74. See supra notes 45-47 and accompanying text.
75. The other provisions in Section 108, of course, serve as additional insurance against the success of collateral challenges and may be important in the long run because the methods by which district courts dispose of collateral challenges ultimately run the risk of being reversed by the Supreme Court. In addition, at the time of the Civil Rights Act of 1991, there were few cases available demonstrating the tendency of lower courts to deny challenges to consent decrees, even in the absence of a formal bar, and no literature remarking upon this tendency. Thus, it was rational for those who were adverse to such challenges to attempt to reinstate the bar by statute.
76. As discussed above, there is substantial discretion in deciding what kind of remedy to choose in a civil rights consent decree. See supra text accompanying notes 13-14 and note 17.
77. The potential for agency capture, of course, always exists even with neutral agencies, but administrative law is designed in part to make such capture more difficult.
78. The consent decree is formally entered by the district court, but, as we have seen, the court has little incentive to disturb the parties’ agreement.
Under this act, labor and business were to come together to write codes of conduct ameliorating the supposed effects of ruinous competition. The predictable result was that consumers who were not involved in the formulation of the code would pay higher prices as a result of collusive deals between management and labor. In an analogous fashion the regime of civil rights decrees cum collateral attack bar gives plaintiffs and public employers the power to shrink the rights of those who are not parties to the litigation.

It is not controverted in the literature that civil rights consent decrees together with the collateral bar resemble administrative proceedings or public law cases more than merely the resolution of individual antidiscrimination complaints. As Maimon Schwarzschild candidly states:

Title VII consent decrees are thus a double anomaly. Any Title VII remedy with elaborate “affirmative action” provisions is “political” because it embodies discretionary policy decisions about the future operations of an institution. This anomaly is compounded when the injunction has been written by the parties themselves, without adversarial presentation of issues to the court, without trial, without findings of fact, and without conclusions of law.

Other commentators understand, at least to some degree, that the collateral bar systematically disadvantages those who are not on the inside of this quasi-administrative process.

Despite their understanding of the anomaly of Title VII consent decrees and the abridgements of rights they encourage, academic commentators generally do not advocate the abolition of the collateral bar or mandatory joinder of a representative of workers who are not parties to the litigation. Instead, as we have seen, they propose procedural innovations that would do little to alter the incentive structures that will inexorably create rules unfavorable to the interests of nonminority employees. Such academic commentary at first also seems anomalous in light of the consensus propelled by the academy itself that administrative law should be structured both to prevent even an ostensibly neutral

79. The Supreme Court invalidated these provisions of the National Industrial Recovery Act in Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S. Ct. 837 (1935), on the ground that Congress is not permitted by the Constitution to abdicate or transfer to others the essential legislative functions with which it is vested.

80. For reasons discussed above, in the private sector, competition raises barriers to consent decrees that trench on the rights of nonminority groups and thus the collateral attack bar may tend to have less effect on the nondiscrimination rights of employees in the private sector. Yet there will still be some adverse effects of this quasi-administrative process to nonminority group interests in the private sector as long as there is not a complete identity of interests between a corporate defendant and its nonminority employees. For a discussion of these points see supra notes 20-25 and accompanying text.

81. Schwarzschild, supra note 52, at 907.
82. See Silver, supra note 35, at 346.
83. For discussions of such suggestions, see supra notes 52-53 and accompanying text.
or expert administrative body from being captured by particular interests and to encourage the broadest representation of all those with a legal interest in the formulation of a rule.84 The regime of consent decree cum collateral bar, however, institutionalizes capture and systematically precludes equal representation of the legal rights of nonparties.

Sometimes the need for finality is offered as a justification for some form of collateral attack bar.85 But this explanation is difficult to accept because proponents of a collateral attack bar also reject procedural structures that would ensure the more vigorous representation of nonparties even at the time of settlement.86 For instance, proponents of Section 108 rejected the mandatory joinder of nonminority employees.87 Proponents also failed to ensure expressly any right of intervention for those notified under Section 108 although, as we have seen, without a right of intervention mere notice does not substantially protect interests of nonparties.88 Moreover, finality is, of course, only one consideration among many in the legal system,89 and the value attached to finality in any context is an inverse measure of the value attached to competing considerations—in this case, the protection of interests of those adversely affected by employment consent decrees.

Thus, a more fundamental and persuasive explanation for this anomaly is that those who have advocated a collateral bar do not believe that nonminority individuals—the group primarily affected by the collateral bar—have as substantial a legal right as minority groups to be free from racial or gender discrimination.90 Some commentators who address the collateral attack bar are

84. For a discussion of these trends in administrative law, see Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667 (1975).
85. See 100 Cong. Rec. S 15489 (daily ed. Oct. 30, 1991) (remark of Sen. Patrick Leahy) ("By overturning Martin versus Wilks and by limiting challenges to consent decrees, the act also creates incentives to settle civil rights cases and provides a measure of finality to complicated litigation."). Senator Leahy is, of course, right that the collateral attack bar creates incentives for settlement. See supra note 14 and accompanying text.
86. Indeed, the original version of the Civil Rights Act of 1990 would have imposed an even harsher collateral attack bar than that contained in the compromise represented by section 108. It would have barred a challenge to a consent decree by any person "if the court that entered the judgment or order determines that reasonable efforts were made to provide notice to interested persons." See Civil Rights Act of 1990, S. 2104, 101st Cong. 2d Sess. § 6 (1990). Therefore, if the opponents of Wilks had prevailed entirely, even individuals without actual notice or surrogate representation would have been denied the opportunity to challenge an employment consent decree that adversely affected their interests.
88. For discussion of the reasons that notice does not provide substantial protection, see supra notes 48-55 and accompanying text.
90. This explanation is also supported by the voting alignment in Wilks itself. The Justices in dissent (Blackmun, Marshall, Brennan, and Stevens) have generally been far more sympathetic to race
candid in suggesting that, contrary to the current state of the law, the nonminority groups should have only limited rights to nondiscrimination in employment. If nonminority groups have little or no substantial right to be free from discrimination, an administrative process in which nonminority groups are excluded becomes more readily justified. It is as if nonminority groups do not have a legal interest sufficient to confer on them the standing to challenge an administrative action in court.

Among the general population, the view that nonminorities enjoy less substantial nondiscrimination rights is less popular than in the academy. Precisely because of the unpopularity of this substantive position, the procedural case-by-case regime for encouraging racial and gender preferences has advantages in the political realm for the proponents of racial and gender preferences over a flat declaration that nonminorities do not enjoy the same nondiscrimination rights as minorities. One advantage is that individual consent decrees that adversely affect the interests of relatively few workers are less likely to mobilize opposition than a declaration with wider sweep. Another advantage for such advocates is that a procedural, as opposed to a substantive, regime makes the structure for imposing racial and gender preferences more opaque to the body politic. The collateral attack bar is facially neutral with respect to race and gender and can be presented as a matter of good administration. The obfuscation of an unpopular policy has substantial advantages, because it raises the education costs of those who seek to mobilize opposition to the policy. Indeed, this may explain why Section 108’s attempt to revive the collateral attack bar, albeit in modest form, is contained in a civil rights bill that, in response to popular demand, banned so-called “race norming”—a more explicit form of implementing racial preferences.

IV. CONCLUSION

This analysis of the collateral attack bar may have larger implications for practices relating to civil rights. It suggests that in a body politic where racial and gender conscious remedies that adversely affect nonminorities than the Justices in the majority (Rehnquist, White, O'Connor, Scalia, and Kennedy).

91. See, e.g., Silver, supra note 35, at 378.
93. For a discussion of the substantial degree to which the legal academy is farther left on the political spectrum than the general body politic, see Michael DeBow & Roger Clegg, Pre-Law Prerequisites: A Guide to the Post-Socialist World, Pol'y Rev., Winter 1994, at 76.
and gender preferences are generally opposed by a substantial majority of citizens, those who advocate such preferences will attempt to have them enacted through indirection. Despite the opposition of the majority, disguised methods of encouraging such preferences have some chance of success for two reasons. First, the educational costs of penetrating the disguise and mobilizing opposition may be substantial. Second, because of the divisiveness of the issues of race and gender, many institutional actors, like the lower courts, may have their own incentives that militate against revealing the substantive effects of the policy.

The discussion of the collateral attack bar thus also raises some general issues that deserve fuller discussion in public choice analysis of legislation. If the two proposals will achieve the same end, but one can be defeated only if its opponents are willing to spend a great deal of money to educate voters, we should expect that proposal to be the chosen vehicle. More broadly, insofar as differently structured legislation can achieve similar objectives while imposing widely different information costs on the opponents of the policy, we should expect that the structure of the policy enacted may depend heavily on those information costs. The recent trend toward substitution of employer mandates for direct taxes in light of increasing opposition to taxes may be, in part, another example of this phenomenon. Further consideration should thus be given to

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95. Both opponents and advocates of racial and gender preferences have agreed that their political viability is enhanced if they are not disclosed. See Lino A. Graglia, Killing the Politically Incorrect Messenger, Legal Times, July 29, 1991, at 25 (describing law schools' attempt to hide the reality of racial preferences in law school admissions). See also David A. Strauss, The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards, 79 Geo. L.J. 1619, 1653 (1991) (“There is reason to think that a program emphasizing numerical standards [for hiring racial minorities] can be politically acceptable so long as it does not become highly visible, and so long as political figures do not find it advantageous to raise the issue.”).

96. The best specific discussion of how the opacity of legislation to voters may affect legislative outputs is found in Edward A. Zelinsky, Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services, 46 Vand. L. Rev. 1355, 1374-75 (1993) (arguing that “[u]nfunded mandates thus present legislators with the political temptation to levy hidden municipal taxes” because “constituents do not appreciate the link between their municipal tax bills and their legislators’ adoption of unfunded mandates”).

97. Cf. Philip Nelson, Political Information, 19 J.L. & Econ. 315, 323 (1976) (suggesting that rent seekers who lack a political majority have an incentive to take their “gain in a form where the issue can be easily obscured”). Methods for quantifying information costs require fuller exploration.

98. See also Zelinsky, supra note 96, at 1374 (contending that unfunded mandates requiring localities to implement costly services are adopted instead of direct provisions of services together with the taxation to pay for them, because the costs of unfunded mandates are relatively hidden).

Another example of opaque legislation may be fast track procedures for trade legislation. In endorsing the fast track, legislators created a procedural framework that makes the passage of free trade agreements more likely, but because the vote is about procedure, it is less transparent to opponents of free trade. See Harold Hongju Koh, The Fast Track and United States Trade Policy, 18 Brook. J. Int’l L. 143, 166 (1992) (discussing the legislative transparency of free trade procedures).
the manner in which the nature of legislative proposals made by politicians are a function not only of satisfying members of their coalitions but of raising the information costs of potential opposition. 99

99. This function may be quite complicated! For instance, political entrepreneurs would have to be careful not to deceive their own supporters about the effects of the legislation or they would risk failing to obtain credit for its passage. Perhaps their general reputation with their supporters helps them obtain credit for legislation that would yet remain opaque to the general public. Moreover, it may be more important for an entrepreneur to disguise legislation that adversely affects some members of his political coalition than to disguise legislation that affects implacable opponents, because coalition members are more valuable to the entrepreneur's political future. Finally, of course, since most voters will not read the bill that is passed, a politician can eat his cake and have it too if the bill is labeled correctly in the media. A "civil rights bill" will please many and displease few; a "quota bill" will anger many and please few, if any.