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Nonparties to Employment Discrimination Consent Decrees May Attack, in a Collateral Lawsuit, Decisions Made Pursuant to the Decrees.

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CIVIL RIGHTS—Consent Decrees—Nonparties to Employment Discrimination Consent Decrees May Attack, in a Collateral Lawsuit, Decisions Made Pursuant to the Decrees.

Martin v. Wilks,
__ U.S. __, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989).

In 1984, Robert Wilks and six white employees of the Birmingham Fire Department sued the city of Birmingham, Alabama and the Jefferson County Personnel Board in a reverse discrimination lawsuit.[1] Wilks alleged

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1. *In re* Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1496 (11th Cir. 1987), *aff'd sub nom.* Martin v. Wilks, __ U.S. __, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989). For a report of the district court opinion, see *id.*, 39 Fair Empl. Prac. Cas. (BNA) 1431 (N.D. Ala. Dec. 20, 1985), *rev'd*, 833 F.2d 1492 (11th Cir. 1987), *aff'd sub nom.* Martin v. Wilks, __ U.S. __, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989). The impetus for Wilks' reverse discrimination lawsuit was a 1974 lawsuit brought by John W. Martin and the Ensley Branch of the NAACP against the city of Birmingham and the Jefferson County Personnel Board alleging discriminatory hiring and promotion practices. *See* Martin v. Wilks, __ U.S. __, __, 109 S. Ct. 2180, 2183, 104 L. Ed. 2d 835, 842-43 (1989). Martin claimed the city violated title VII of the Civil Rights Act of 1964 and other federal laws. *Id.* The United States sued the city and the board one year later, also alleging civil rights violations in the employment process. The United States District Court for the Northern District of Alabama consolidated the cases and held a trial in 1976. *Id.* at __, 109 S. Ct. at 2191, 104 L. Ed. 2d at 835 (Stevens, J., dissenting). The district court held employment examinations used by the city in the hiring process were racially discriminatory. *Id.* Subsequently, in August 1979, Martin brought another lawsuit contesting the allegedly discriminatory promotion practices in the city fire and engineering departments. Just prior to the trial court judgment, the parties proposed to settle the lawsuit with two consent decrees. Prior to approving of the consent decrees, the court held a fairness hearing at which anyone interested in the outcome of the decree could voice objections or intervene in the consent decree litigation. Martin placed notice of the hearing in two Birmingham newspapers and mailed information about the hearings to minority employees. Following the hearing, but before final court approval of the consent decrees, the Birmingham Firefighters Association (BFA), a union representing most of the employees of the city fire department, moved to intervene in the litigation. *Id.* The district court denied the BFA's motion to intervene because it was untimely filed. The court also rejected the BFA's request for injunction to cease enforcement of the consent decrees, and subsequently entered the consent decrees in August 1981. The court of appeals affirmed the decision, asserting that denying the injunction would not harm the members of the BFA because the individual members could still bring a title VII action against the city. When the city attempted to make its first minority promotion pursuant to the consent decree, Wilks and several white employees sued, claiming the preferential promotions under the decree violated their title VII rights and the equal protection clause of the United States Constitution. *Id.* The district court consolidated the cases and held a trial in 1985. *Id.* at __, 109 S. Ct. at 2194, 104 L. Ed. 2d at 855 (Steven, J., dissenting). The United States attempted to intervene as a party for Wilks and the other re-

he was denied a promotion while less qualified blacks were promoted instead.[2] The fire department promoted the black firefighters pursuant to two consent decrees.[3] The decrees were entered in 1974 to settle litigation brought by John W. Martin[4] against the city for alleged violations of title VII of the 1964 Civil Rights Act.[5] Although Wilks was not a party to the decrees,[6] the district court ruled he could not challenge employment decisions made pursuant to them because the challenge constituted an impermissible collateral attack upon a settled civil action.[7] On appeal, the Eleventh

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verse discrimination plaintiffs. Brief for Petitioner at 10, Martin v. Wilks, __ U.S. __, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1985)(Nos. 87-1614, 87-1639, 87-1668). However, the United States was a party to the original consent decrees and was estopped from intervention by the district court. *Id.* Martin and five other blacks intervened to defend the city against the reverse discrimination charges. *Martin*, __ U.S. at __, 109 S. Ct. at 2183, 104 L. Ed. 2d at 839. Martin argued that the consent decrees were justified because by 1981 only 9.3 percent of the firefighters were black compared with nearly 50 percent of the Birmingham population being black. *Employment Litigation*, 833 F.2d at 1495 n.7. Furthermore, Martin contended that blacks occupied none of the 140 supervisory positions of lieutenant, captain, or battalion chief. *Id.*

2. *Id.* Wilks based his reverse discrimination claims on title VII of the 1964 Civil Rights Act and the equal protection clause of the fourteenth amendment. *Martin*, __ U.S. at __, 109 S. Ct. at 2183, 104 L. Ed. 2d at 838. Title VII specifically prohibits an employer from refusing to hire or promote an individual because of his race. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1982).

3. *Martin*, __ U.S. at __, 109 S. Ct. at 2183, 104 L. Ed. 2d at 842-43. Before the trial court rendered its final judgment in the *Martin* litigation, the parties entered into two consent decrees: one between the black firefighters and the city, and the other between the black firefighters and the Jefferson County Personnel Board. *Id.*; *see also Employment Litigation*, 833 F.2d at 1494 n.5 (decree between black firefighters and city of Birmingham required city to grant preferential treatment to blacks and women). The city consent decree specified a goal of 50 percent annual minority employment for firefighter and fire lieutenant positions. *Martin*, __ U.S. at __, 109 S. Ct. at 2183, 104 L. Ed. 2d at 842-43. The consent decree between the black firefighters and the Jefferson County Personnel Board also required a goal of 50 percent annual minority employment. *Id.*

4. *Id.* John W. Martin was a black representative of the minority employees of the city of Birmingham, Alabama. Brief for Petitioner at 2.

5. *Martin*, __ U.S. at __, 109 S. Ct. at 2183, 104 L. Ed. 2d at 842.

6. *Id.* Although not formally a party, Wilks was a member of the BFA. *Id.* The BFA kept members apprised of consent decree litigation and local newspapers wrote stories on consent decree litigation. Thus, Wilks apparently had some notice of the consent decrees prior to court approval. Reply Brief for Petitioners at 15-19, Martin v. Wilks, __ U.S. __, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989)(Nos. 87-1614, 87-1639, 87-1668).

7. *See In re* Birmingham Reverse Discrimination Employment Litig., 39 Fair Empl. Prac. Cas. 1431, 1446 (N.D. Ala. Dec. 20, 1985)(challenge to consent decree was collateral attack and therefore dismissed), *rev'd*, 833 F.2d 1492 (11th Cir. 1987), *aff'd sub nom.* Martin v. Wilks, __ U.S. __, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989). Judge Pointer, in the oral part of his district court opinion, held the terms of the consent decrees mandated the preferential promotion of blacks and females. *Id.* at 1432. Because the city followed the decree, the consent decree acted as an absolute defense to title VII liability. *Id.* However, in the written part

Circuit Court of Appeals remanded the reverse discrimination claims to the district court for adjudication on the merits.[8] Martin contended the doctrine of impermissible collateral attack precluded Wilks' claim,[9] and the United States Supreme Court granted certiorari to consider whether a nonparty can challenge a consent decree entered to settle civil rights litigation.[10] Held—*Affirmed*. Nonparties to employment discrimination consent decrees may attack, in a collateral lawsuit, decisions made pursuant to the decrees.[11]

Congress passed title VII of the Civil Rights Act of 1964 to eliminate racially discriminatory employment practices.[12] In a civil lawsuit pursuant to title VII, aggrieved parties may sue employers who violate the provisions of the Act.[13] However, most federal courts prefer voluntary settlement of title VII claims instead of litigation.[14] The consent decree is the preferred method of title VII settlement.[15]

A consent decree is a voluntary judgment between parties[16] which facilitates settlement of litigation by providing one party with equitable relief.[17]

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of his opinion, Judge Pointer ruled the doctrine of impermissible collateral attack precluded the white firefighters from challenging the decisions made pursuant to the consent decree. *Id.* at 1446.

8. *In re* Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1501-02 (11th Cir. 1987), *aff'd sub nom.* Martin v. Wilks, __ U.S. __, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989).

9. Martin v. Wilks, __ U.S. __, __, 109 S. Ct. 2180, 2183, 104 L. Ed. 2d 835, 842 (1989).

10. *Id.*, __ U.S. __, 108 S. Ct. 2843, 101 L. Ed. 2d 881 (1988).

11. *Martin*, __ U.S. at __, 109 S. Ct. at 2184, 104 L. Ed. 2d at 844.

12. 42 U.S.C. § 2000e (1982).

13. *Id.* § 2000e-5(f), (g).

14. Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 515 (1986); W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 770-71 (1983); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); *see also* 29 C.F.R. § 1608.1(c) (1988)(voluntary measures should be taken to comply with title VII); *id.* § 1608.8 (consent decree example of voluntary settlement). *See generally* Walthew, *Affirmative Action and the Remedial Scope of Title VII: Procedural Answers to Substantive Questions*, 136 U. PA. L. REV. 625 *passim* (1987)(voluntary compliance with title VII favored).

15. *See* Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 894-95 (1984)(88 percent of all title VII claims brought by Justice Department result in consent decrees).

16. *See Local No. 93*, 478 U.S. at 522 (voluntary agreement is dispositive characteristic of consent decrees); United States v. Armour & Co., 402 U.S. 673, 681-82 (1971)(parties voluntarily agree to settle their legal rights in consent decrees); United States v. Ward Baking Co., 376 U.S. 327, 330 (1964)(both parties must voluntarily agree on terms to have valid consent decree); *see also* Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 328 (1988); Schwarzschild, *Public Law By Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 888 (1984).

17. *See* Cooper, *The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process*, 1987 U. CHI. LEGAL FORUM 155, 155 (1987)(most consent decrees contain equitable relief in form of quota remedies); Laycock, *Consent Decrees Without*

Courts retain jurisdiction over parties to a consent decree, and they can issue contempt orders to parties violating the terms of the decree.[18] Unlike judgments, the parties cannot challenge the consent decrees, except in limited circumstances.[19] Occasionally, courts allow parties to modify a consent de-

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Consent: the Rights of Non Consenting Third Parties, 1987 U. CHI. LEGAL FORUM 103, 103 (1987)(consent decrees may contain injunction). The legal effect of judgments and consent decrees differ. *See* United States v. ITT Continental Baking Co., 420 U.S. 223, 235-37 (1975)(consent decree hybrid of judgment and contract); *Armour*, 402 U.S. at 681-82 (consent decree like contract and judgment); Mann v. City of Albany, 687 F. Supp. 583, 586 (M.D. Ga. 1988)(consent decree legally binding upon parties), *rev'd*, 833 F.2d 999 (11th Cir. 1989); *see also* Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 324 (1988)(consent decree is like contract and judgment). *But see Local No. 93*, 478 U.S. at 525 (consent decree similar to judgment).

18. Apex Fountain Sales, Inc. v. Kleinfeld, 818 F.2d 1089, 1097-98 (3d Cir. 1987); United States v. City of Miami, 664 F.2d 435, 439-40 (5th Cir. 1981); United States v. Barco Corp., 430 F.2d 998, 999 (8th Cir. 1970); *see also* 18 U.S.C. § 401 (1982)(violation of consent decree results in contempt of court); *id.* § 402 (contempt results in fines or imprisonment); Resnik, *Judging Consent*, 1987 U. CHI. LEGAL FORUM 43, 47 (1987)(violation of consent decree results in contempt). The consent decree does have limits. *See Local No. 93*, 478 U.S. at 525 (giving limits of consent decrees). The consent decree must be within the court's subject matter jurisdiction, as well as "within the scope of the case," as provided by the complaint and answer. *Id.* Furthermore, the consent decree should promote the objectives of the complaint, and voluntary consent should be determinative. However, the consent decree may provide one of the parties with more beneficial remedies than would be available at trial. *Id.*

19. *See* Taft v. Taft, 172 So. 2d 403, 406 (Miss. 1965)(consent decree will not be set aside unless fraud or mutual mistake); International Org. Masters, Mates & Pilots, Local No. 2 v. International Org. Masters, Mates, & Pilots, 318 A.2d 918, 920-21 (Pa. 1974)(party cannot attack decree but for fraud or mutual mistake); Colvin v. Goldenberg, 273 A.2d 663, 669 (R.I. 1971)(parties to consent decree may challenge it only if fraud or new evidence found). Judgments are subject to attack in some cases. *See* Cohen v. Beneficial Indus. Loan, 337 U.S. 541, 545 (1949)(appeals by parties only on final judgments); Cobbledick v. United States, 309 U.S. 323, 324 (1940)(party may appeal judgment); *see also* 28 U.S.C. § 1291 (1982)(party may appeal final judgment); F. JAMES & G. HAZARD, CIVIL PROCEDURE 657-58 (3d ed. 1985)(party may appeal final judgment); Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 351-52 (1961)(finality favored therefore no appeals by parties before final judgment). Judgments may be directly attacked. *See* Albers v. Gant, 435 F.2d 146, 147 (5th Cir. 1970)(party must file for new trial within ten days following judgment for valid motion); Turner v. Ohman House Corp., 376 F.2d 347, 350 (6th Cir. 1967)(motion to amend judgment not to exceed ten days following judgment); *see also* FED. R. CIV. P. 59 (party may request new trial or move to amend judgment); FED. R. CIV. P. 50 (motion n.o.v. allowed by parties to final judgment so long as within ten days). *See generally* J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 540-78 (1985)(discussion of direct attacks available to parties of judgment). A party to a judgment may avoid its effect by means of a collateral attack. *See* Burlington Data Processing, Inc. v. Automated Medical Sys., Inc., 492 F. Supp. 821, 822 (D. Vt. 1980)(collateral attack avoids effect of judgment rather than enjoining or changing it); A.D. Julliard & Co. v. Johnson, 166 F. Supp. 577, 586 (S.D.N.Y. 1957)(collateral attack not same as direct attack or appeal), *aff'd*, 529 F.2d 837 (1958), *cert. denied*, 359 U.S. 942 (1959); *see also* FED. R. CIV. P. 60 (party to judgment may seek relief after time has lapsed for appeals and direct attack; attack may succeed provided party able to show clerical errors, mistake or fraud in judgment);

cree if its terms later become inequitable.[20] To broaden the scope of those who may become parties to consent decrees, federal courts apply the procedural rules regarding joinder and intervention.[21] Because in practice identifying individuals for joinder or intervention is difficult,[22] most courts hold a fairness hearing prior to entering the consent decree to promote consolidation of all interested parties.[23]

1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE & PROCEDURE ¶ 0.407 (1988)(collateral attack by party questions validity of judgment, not effort to enjoin or directly attack judgment); Comment, *The Value of The Distinction Between Direct and Collateral Attacks on Judgments*, 66 YALE L.J. 526, 533-34 (1957)(collateral attack brought by party to contest validity or avoid judgment). A collateral lawsuit by a nonparty contesting the merits of a consent decree is distinct from a collateral attack of a settled judgment by a party to that judgment. *See* Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 332 (1988)(collateral lawsuit by nonparty to consent decree challenges merits of decree while collateral attack by party of a settled judgment is limited).

20. *See* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 572 (1984)(consent decree may be modified by court); Chrysler Corp. v. United States, 316 U.S. 556, 562 (1942)(court may modify consent decree); *Armour*, 402 U.S. at 674-75 & n.2 (modification of consent decrees valid so long as follows *Chrysler*). *See generally* Jost, *From* Swift *to* Stotts *and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1105-06 (1986)(modification of consent decrees allowed in some cases); Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C.L. REV. 291, 344-45 (1988)(courts use *Chrysler* test to modify consent decrees).

21. *See* FED. R. CIV. P. 19 (joinder of individuals); FED. R. CIV. P. 24 (intervention); FED. R. CIV. P. 23 (class action); *see also* Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C.L. REV. 291, 292 (1988)(no Federal Rules of Civil Procedure specifically apply to consent decrees).

22. *See* FED. R. CIV. P. 19(a) (must be able to identify interested parties to compel joinder). It is particularly difficult to identify interested nonparties in consent decrees designed to remedy public law litigation, where many different individual interests are affected. *See* Provident Tradesmens Bank & Trust v. Patterson, 390 U.S. 102, 108-10 (1968)(determining interested nonparties for joinder problematic in complex litigation); *see also* McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707, 724 (1976)(mandatory joinder requires identifying those nonparties interested in litigation); Note, *Preclusion of Absent Disputants to Compel Intervention*, 79 COLUM. L. REV. 1551, 1554 (1976)(mandatory joinder difficult to apply in litigation where many interests affected); *cf.* Dennison v. City of Los Angeles Dep't of Water & Power, 658 F.2d 694, 696 (1981)(intervention preferred in consent decree litigation). In addition, intervention may be difficult if interests are hard to identify. *See* FED. R. CIV. P. 24 (intervention); *see also* McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707, 718-24 (1976)(mandatory intervention advocated to prevent absentees relitigating settled claims); Note, *Preclusion of Absent Disputants to Compel Intervention*, 79 COLUM. L. REV. 1551, 1556 (1979)(intervention rules may not accomplish objectives of finality because nonparties may avoid initial litigation).

23. *See* Ibarra v. Texas Employment Comm'n, 823 F.2d 873, 878-79 (5th Cir. 1987)(hearing prior to consent decree approval); Vanguards v. City of Cleveland, 753 F.2d 479, 484 (6th Cir. 1985)(hearing required), *aff'd sub nom.* Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986); Culbreath v. Dukakis, 630 F.2d 15, 23 (1st Cir. 1980)(hearing required in consent decree litigation); Mendoza v. United States, 623 F.2d 1338, 1348 n.8 (9th Cir. 1980)(failure to hold fairness hearing may be abuse of court's power), *cert. denied sub*

An individual who is a party or privy to a consent decree is foreclosed from challenging the decree by the doctrines of res judicata and collateral estoppel.[24] Res judicata[25] and collateral estoppel[26] preclude relitigation of settled claims and issues. These common law rules bring finality to litigation,[27] thereby promoting consistency in judgments[28] and conserving scarce

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nom. Sanchez v. Tucson Unified School Dist. No. 1, 450 U.S. 912 (1981). The consent decree is an extra form of protection for absentees' interests. *See* Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 358 (1988)(fairness hearing favored by courts but questionable whether constitutionally required). The policy advanced for fairness hearings in public law litigation is that the fairness hearing provides the best forum to consolidate the interests of the vast number of individuals affected. *Id.* at 359. The nonparty can voice support, object to the decree, or intervene as a party. *Compare* Epstein, Wilder v. Bernstein: *Squeeze Play By Consent Decree*, 1987 U. CHI. LEGAL FORUM 209, 216 n.20 (1987)(fairness hearings help court determine if consent decree is fair) *with* Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 358 (1988)(nonparties can object and request court to amend consent decree).

24. Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 522 (1986); United States v. Armour & Co., 402 U.S. 673, 681-82 (1971); Hartley v. Mentor Corp., 869 F.2d 1469, 1471 (Fed. Cir. 1989); Siegel v. National Periodical Publications, Inc., 508 F.2d 909, 913 (2d Cir. 1974); *see also* 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.409[5] (2d ed. 1988).

25. *See* Brown v. Felsen, 442 U.S. 127, 138 n.10 (1979)(res judicata precludes relitigation of same claim); Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326 (1955)(res judicata precludes second suit by parties on same cause of action); Commissioner v. Sunnen, 333 U.S. 591, 597 (1948)(final valid judgment precludes relitigation of same cause of action between parties unless fraud existed); Fayerweather v. Ritch, 195 U.S. 276, 300 (1904)(judgment on merits res judicata to subsequent litigation); *see also* Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 820 (1952)(res judicata prevents relitigation of same cause of action and serves to promote efficiency, cost savings and reliance on adjudication); Moschzisker, *Res Judicata*, 38 YALE L.J. 299, 300 (1948)(res judicata promotes efficiency in the courts).

26. *See* United Shoe Machinery Corp. v. United States, 258 U.S. 451, 459 (1922)(collateral estoppel is issue preclusion); Cromwell v. County of Sac, 94 U.S. 351, 359-60 (1877)(estoppel precludes relitigation only upon previously adjudicated facts and issues); Irving Nat'l Bank v. Law, 10 F.2d 721, 724 (2d Cir. 1926)(Hand, J.)(collateral estoppel precludes litigation of new cause of action on facts and issues settled in prior judgment); *see also* 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.441[1] (1988)(collateral estoppel precludes litigant from bringing different cause of action on settled facts); McGlinchey, *Collateral Estoppel in Texas*, 4 HOUS. L. REV. 73, 75 (1966)(collateral estoppel promotes convenience and stability in judgments).

27. *See* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466 n.6 (1982)(resolution of litigation one of main policies of preclusion law); Robi v. Five Platters, Inc., 838 F.2d 318, 328 (9th Cir. 1988)(finality is determinative issue regarding application of res judicata); Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074, 1079 (D.C. Cir. 1987)(resolving litigation important), *cert. denied*, 485 U.S. 913 (1988). Commentators agree finality is an important judicial objective. *See, e.g.*, 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE 19 (Supp. 1989); 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.405[3] (1988).

28. Smith v. Updegraff, 744 F.2d 1354, 1362 (8th Cir. 1984); United States v. Truckee-Carson Irr. Dist., 649 F.2d 1286, 1308 (9th Cir. 1981), *aff'd in part, rev'd in part sub nom.*

judicial resources.[29] Recently, federal courts have widened the scope of preclusion law by defining the term "claim" broadly.[30] Furthermore, the modern procedural rules of joinder,[31] intervention[32] and class action[33] have also

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Nevada v. United States, 463 U.S. 110 (1983); State v. Ellis, 497 A.2d 974, 990 (Conn. 1985); *see also* J. WELLS, A TREATISE ON THE DOCTRINES OF RES ADJUDICATA AND STARE DECISIS 4 (1879); Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 345 (1948).

29. *Kramer*, 456 U.S. at 466 n.6; McLaughlin v. Bradlee, 803 F.2d 1197, 1202 (D.C. Cir. 1986); *Ellis*, 497 A.2d at 990; *see also* 2 A. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS § 626, at 1318 (5th ed. 1925)(rules of preclusion based on public policy of order in society, structure in court system, and preventing excessive litigation); 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4452 (1981)(efficiency justifies preclusion law).

30. *See* James v. Gerber Prods., Co., 587 F.2d 324, 328 (5th Cir. 1978); Kilgoar v. Colbert County Bd. of Educ., 578 F.2d 1033, 1035 (5th Cir. 1978); Dore v. Kleppe, 522 F.2d 1369, 1374 (5th Cir. 1975); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1980)(broad interpretation of res judicata); F. JAMES & G. HAZARD, CIVIL PROCEDURE 590 (1985)(breadth of res judicata wider than original interpretations).

31. FED. R. CIV. P. 19. Rule 19 provides:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party to 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 double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been joined, the court shall order that person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

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

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any person as described in subdivision (a)(1)-(2) hereof who are not joined, and the reason why they are not joined.

(d) Exception of Class Action. This rule is subject to the provisions of Rule 23.

Id. See generally Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 331-32 (1957)(courts should balance rights of nonparties to not be legally bound with need to end litigation before compelling joinder).

broadened preclusion law by increasing the number of parties to litigation.

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32. *See* FED. R. CIV. P. 24. Rule 24 provides:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefore and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn into question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403.

Id.

33. *See* FED R. CIV. P. 23. Rule 23 provides, in pertinent part:

(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.

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

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

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

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

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

(3) the court finds that the questions of law or fact common to the members of the

Conversely, nonparties to a consent decree are not bound by its terms.[34] A few federal courts in title VII litigation, however, preclude nonparties who

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

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) 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.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that

(A) the court will exclude the member from the class if the member so requests by a specified date;

(B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel . . . .

Id. To bring litigation on behalf of a class, the movant must adequately represent a numerous class with common and typical interests. *See* Clark v. South Cent. Bell Tel. Co., 419 F. Supp. 697, 701 (W.D. La. 1976)(discussing threshold requirements of FED. R. CIV. P. 23(a)). If the class is one specified in 23(b), the rules governing class action apply. Buford v. American Fin. Co., 333 F. Supp. 1243, 1249 (N.D. Ga. 1971).

34. Mann v. City of Albany, 883 F.2d 999, 1003 (11th Cir. 1989); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979); Blonder-Tongue Lab. v. University of Ill. Found., 402 U.S. 313, 329 (1971); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110 (1969); Chase Nat'l Bank v. Norwalk, 291 U.S. 431, 441 (1934); *see also* 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4449 (1981)(nonparties not legally bound by judgment). *But see* Tulsa Professional Collection Servs. v. Pope, __ U.S. __, __, 108 S. Ct. 1340, 1347, 99 L. Ed. 2d 565, 578 (1988)(nonparty bound by judgment in probate proceedings because of statute); NLRB v. Bildisco & Bildisco, 465 U.S. 513, 529-30 n.10 (1984)(bankruptcy reorganization plan binds nonparty creditors); Hansberry v. Lee, 311 U.S. 32, 41-44 (1940)(nonparty adequately represented by class is legally bound); *see also* FED. R. CIV. P. 23 (person adequately represented by member of class bound by its judgment); F. JAMES & G. HAZARD, CIVIL PROCEDURE 638 (3d ed. 1985)(nonparties adequately represented by class are legally bound); *cf.* Montana v. United States, 440 U.S. 147, 154-55 (1979)(nonparty exercised control over litigation and therefore subject to res judicata and collateral estoppel). If a person is a party to litigation, he is legally bound to its judgment by res judicata and collateral estoppel; however, he may also directly attack the judgment, conduct a collateral attack on the judgment, or even directly appeal the judgment. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE 653-77 (3d ed. 1985).

fail to timely intervene in the initial consent decree proceedings from later challenging the consent decrees.[35] This method of nonparty preclusion is known as the doctrine of impermissible collateral attack, and it effectively imposes mandatory intervention.[36] Courts justify nonparty preclusion with

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35. *See* Penn-Central Merger and N&W Inclusion Cases, 389 U.S. 486, 505-06 (1968)(individuals' failure to intervene in original litigation precludes collateral lawsuit); Marino v. Ortiz, 806 F.2d 1144, 1146 (2nd Cir. 1986)(nonparties precluded from challenging consent decree), *aff'd by an equally divided Court*, 484 U.S. 301 (1988).

36. *See Marino*, 806 F.2d at 1146 (doctrine of impermissible collateral attack precludes nonparty challenge to consent decree); Stotts v. Memphis Fire Dep't, 679 F.2d 541, 558 (6th Cir. 1982)(no collateral lawsuits on consent decrees), *rev'd on other grounds sub nom.* Firefighters Local 1784 v. Stotts, 467 U.S. 561 (1984); Goins v. Bethlehem Steel Corp., 657 F.2d 62, 64 (4th Cir. 1981)(comity justifies collateral attack bar), *cert. denied*, 455 U.S. 940 (1982); Dennison v. City of Los Angeles, 658 F.2d 694, 696 (9th Cir. 1981)(challenges to consent decrees not allowed because they contravene voluntary settlement policies of title VII); Society Hill Civic Ass'n v. Harris, 632 F.2d 1045, 1050-52 (3d Cir. 1980)(failure to timely intervene precludes collateral lawsuit); *see also* Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 332 (1988)(failure to timely intervene raises collateral attack bar); Comment, *Collateral Attacks on Employment Discrimination Consent Decrees*, 53 U. CHI. L. REV. 147, 148 (1986)(some courts preclude substantive challenges to consent decrees by nonparties). Both the Fifth and the Seventh Circuits are unclear as to their current position on the doctrine of impermissible collateral attack. *Compare* Thaggard v. City of Jackson, 687 F.2d 66, 68-9 (5th Cir. 1982)(nonparty cannot challenge consent decree because of failure to timely intervene at hearing), *cert. denied sub nom.* Ashley v. City of Jackson, 464 U.S. 900 (1983) *and* Grann v. City of Madison, 738 F.2d 786, 796 (7th Cir.)(collateral attack on agency order or consent decree prohibited), *cert. denied*, 469 U.S. 918 (1984) *with* Corley v. Jackson Police Dep't, 755 F.2d 1207, 1210 (5th Cir. 1985)(court reluctantly follows *Thaggard*, in dicta argues against collateral attack bar) *and* Dunn v. Carey, 808 F.2d 555, 559 (7th Cir. 1986)(court allows collateral lawsuit in context of public taxation plan). The nonparty does not lose all challenges to the consent decree under the doctrine of impermissible collateral attack. *See* Massachusetts v. Morash, __ U.S. __, 109 S. Ct. 1668, 1675-76, 104 L. Ed. 2d 98, 111-12 (1989)(cannot abridge right to accrued vacation pay of nonparty); W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757, 771-72 (1983)(cannot breach nonparty's contractual right in collective bargaining agreement); *see also* Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 332 (1988)(collateral attack bar does not preclude nonparty from challenging on breach of contract). Some commentators believe the doctrine of impermissible collateral attack was inspired by the *Penn-Central Merger and N&W Inclusion Cases*. *See* 18 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4452 (1981)(*Penn-Central* arguably inspiration for nonparty preclusion and duty to intervene movement); Comment, *Collateral Attacks on Employment Discrimination Consent Decrees*, 53 U. CHI. L. REV. 147, 157-58 (1986)(*Penn-Central* may be foundation for collateral attack bar). *But cf.* Morris v. Gressette, 425 F. Supp. 331, 337 (D.S.C. 1976)(*Penn-Central* limited to its facts therefore no general duty to intervene should be implied from case), *aff'd*, 432 U.S. 491 (1977). Several district courts, however, were persuaded by *Penn-Central* and developed the collateral attack bar. *See* Prate v. Freedman, 430 F. Supp. 1373, 1375 (W.D.N.Y.)(white police officers may not collaterally attack consent decrees designed to remedy public employment discrimination), *aff'd*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978); O'Burn v. Shapp, 70 F.R.D. 549, 552 (E.D. Pa.)(court dismissed challenge to consent decree because

the same finality, efficiency, and consistency considerations which underlie the preclusionary rules for parties.[37] In addition, courts justify dismissal of nonparty attacks based on the principle of comity.[38] Courts also justify this system of mandatory intervention on the policy ground of promoting the voluntary settlement of title VII lawsuits.[39] The courts reason there would be little incentive for parties to settle a title VII claim with a consent decree if they knew the decree could later be attacked in a collateral lawsuit.[40] Advocates of the collateral attack bar also contend mandatory intervention should be preferred because it is too burdensome to make parties identify and join interested nonparties.[41] Presently, two federal courts of appeal, the

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police officers failed to timely intervene), *aff'd*, 546 F.2d 418 (3d Cir. 1976), *cert. denied*, 430 U.S. 968 (1977); *see also* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281 (1976)(judges should take more active role in public law litigation).

37. *See Corley*, 755 F.2d at 1210 (policies of impermissible collateral attack bar same as those justifying res judicata); *Thaggard*, 687 F.2d at 69 (finality, efficiency, and consistency justify doctrine of impermissible collateral attack); *O'Burn*, 70 F.R.D. at 552-53 (court dismissed challenge to consent decree to promote consistency and eliminate multiple litigation on same claim); *see also* Schwarzschild, *Public Law By Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 922 (*Thaggard* held collateral attack bar justified because it promotes finality and efficiency); Comment, *Collateral Attacks on Employment Discrimination Consent Decrees*, 53 U. CHI. L. REV. 147, 153-54 (1986)(collateral attack bar based on same principles underlying res judicata: finality, consistency, and avoiding extra litigation).

38. *See* Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16 (1923)(comity problems occur when two district courts get concurrent jurisdiction on similar lawsuits); *see also* Comment, *Collateral Attacks on Employment Discrimination Consent Decrees*, 53 U. CHI. L. REV. 147, 165-67 (1986)(federal district court may dismiss action if another district is trying similar claim).

39. *See* Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 515 (1986)(voluntary compliance with title VII was intent of Congress); W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 770-71 (1983)(voluntary compliance preferred); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974)(title VII favors voluntary settlements).

40. *See Local No. 93*, 478 U.S. at 515 (voluntary compliance with title VII was intent of Congress); *W.R. Grace*, 461 U.S. at 770-71 (voluntary compliance preferred); *Alexander*, 415 U.S. at 44 (1974)(title VII favors voluntary settlements); *see also* 29 C.F.R. § 1608.1(c) (1988)(voluntary measures should be taken to eliminate past discrimination and comply with title VII); *id.* § 1608.8 (consent decrees example of voluntary settlement); Walthew, *Affirmative Action and the Remedial Scope of Title VII: Procedural Answers to Substantive Questions*, 136 U. PA. L. REV. 625 *passim* (1987)(voluntary compliance with title VII is favored). *But see* Rutherglen & Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 U.C.L.A. L. REV. 467, 478 n.41 (1988)(CFR ineffective in promoting voluntary compliance with title VII).

41. *See* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 108-10 (1968)(determining interested nonparties for joinder problematic in complex litigation); *see also* Note, *Preclusion of Absent Disputants to Compel Intervention*, 79 COLUM. L. REV. 1551, 1552-54 (1979)(mandatory joinder difficult to apply in litigation where many interests affected); McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707, 724

eleventh and seventh circuits, reject the doctrine of impermissible collateral attack, favoring collateral estoppel and res judicata as the only rules of preclusion that should be applicable to consent decrees.[42] In one decision, the Eleventh Circuit Court of Appeals stated that nonparty preclusion constitutes an untenable violation of due process.[43]

In *Martin v. Wilks*,[44] the United States Supreme Court allowed employees who were not parties to employment discrimination consent decrees to contest an employment decision made pursuant to the decrees.[45] Chief Justice Rehnquist, writing for the majority, rejected the doctrine of impermissible collateral attack.[46] The majority stated that the doctrine of impermissible collateral attack imposed mandatory intervention, which conflicted with the intended system of permissive intervention embodied in the Federal Rules of Civil Procedure.[47] The majority favored permissive intervention,[48] rejected

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(1976)(mandatory joinder requires identifying nonparties with interests in litigation); *cf.* Dennison v. City of Los Angeles, 658 F.2d 694, 696 (1981)(intervention preferred over joinder in consent decree litigation).

42. *See In re* Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1498 (11th Cir. 1987)(res judicata and collateral estoppel preclude parties from challenging consent decrees; nonparty preclusion through doctrine of impermissible collateral attack rejected), *aff'd sub nom.* Martin v. Wilks, __ U.S. __, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989); United States v. Jefferson County, 720 F.2d 1511, 1518-19 (11th Cir. 1983)(court allowed nonparties to contest merits of consent decree in collateral lawsuit yet dismissed union request for injunction as untimely); Reeves v. Wilks, 754 F.2d 965, 969-71 (11th Cir. 1985)(court would allow lawsuit on merits of decree); *see also* Comment, *Collateral Attacks on Employment Discrimination Consent Decrees*, 53 U. CHI. L. REV. 147, 151, n.22 (1986)(eleventh circuit rejects collateral attack bar); Cooper, *The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process*, 1987 U. CHI. LEGAL FORUM 155, 176 (1987)(eleventh circuit rejects collateral attack bar). *Compare* Grann v. City of Madison, 738 F.2d 786, 796 (7th Cir.)(collateral attack on consent decree prohibited), *cert. denied*, 469 U.S. 918 (1984) *with* Dunn v. Carey, 808 F.2d 555, 559 (7th Cir. 1986)(court allows collateral lawsuit in context of public taxation plan).

43. *See Employment Litigation*, 833 F.2d at 1498 (rejects doctrine of impermissible collateral attack); *see also Jefferson County*, 720 F.2d at 1518 (court allowed individual nonparties to bring independent title VII lawsuit at later date); *Reeves*, 754 F.2d at 969-71 (court allowed collateral lawsuit). *See generally* Cooper, *The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process*, 1987 U. CHI. LEGAL FORUM 155, 176 (1987)(eleventh circuit rejects collateral attack bar); Comment, *Collateral Attacks on Employment Discrimination Consent Decrees*, 53 U. CHI. L. REV. 147, 152 (1986)(collateral attack bar violates due process).

44. __ U.S. __, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989).

45. *Id.* at __, 109 S. Ct. at 2188, 104 L. Ed. 2d at 848-49.

46. *Id.* at __, 109 S. Ct. at 2184, 104 L. Ed. 2d at 842. Justices Scalia, O'Connor, White, and Kennedy joined the Chief Justice in the majority opinion. *Id.* at __, 109 S. Ct. at 2182, 104 L. Ed. 2d at 842.

47. *Id.* at __, 109 S. Ct. at 2185-86, 104 L. Ed. 2d at 845-46.

48. *Id.*

efficiency and consistency arguments favoring the collateral attack bar,[49] and dismissed policies advocating voluntary settlement of title VII claims.[50] The majority observed that a nonparty has no duty to enter litigation unless compelled to join and, consequently, is not legally bound by a judgment to which he is not party.[51] It is also held that finality, efficiency and consistency were insufficient to justify the judicially created rule of mandatory intervention.[52] Furthermore, mandatory intervention would not necessarily result in more economy and efficiency than the system of permissive intervention and mandatory joinder provided in the federal rules.[53] The majority further reasoned that the policy of voluntary settlement of title VII claims is insufficient to abrogate the intended system of permissive intervention which would abridge the legal rights of nonparties.[54] Finally, the majority remanded the case because the district court opinion was ambiguous about whether the merits of the reverse discrimination claims were tried.[55]

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49. *Id.* at __, 109 S. Ct. at 2187, 104 L. Ed. 2d at 847-48.

50. *See id.* at __, 109 S. Ct. at 2187-88, 104 L. Ed. 2d at 848-49 (policy favoring voluntary settlement of title VII litigation does not justify foreclosing nonparty rights).

51. *Id.* at __, 109 S. Ct. at 2185, 104 L. Ed. 2d at 845. The majority attacked the dissent's argument that the impermissible collateral attack doctrine did not legally bind Wilks. *Id.* at __, 109 S. Ct. at 2186 n.6, 104 L. Ed. 2d at 846 n.6. Specifically, the majority wrote that if Wilks was not legally bound by the doctrine, then he should be able to challenge the consent decree. *Id.* If Wilks were precluded from challenging the consent decree, he would be effectively legally bound by its terms. Consequently, the majority wrote it was illogical to reason that Wilks could be precluded from challenging the decree, but not be legally bound by its terms. Therefore, nonparties, like Wilks, would not be precluded from later challenging a consent decree and the decisions made pursuant to it. *Id.* at __, 109 S. Ct. at 2188, 104 L. Ed. 2d at 848-49. The Chief Justice also wrote that case law prohibits nonparty preclusion. *Id.* at __, 109 S. Ct. at 2185-86, 104 L. Ed. 2d at 845-47. The *Martin* Court distinguished prior decisions that precluded nonparties from collaterally attacking a settled judgment, reasoning the decisions were fact specific decisions. *Id.* at __, 109 S. Ct. at 2186-87, 104 L. Ed. 2d at 847. In addition, the Chief Justice wrote that rule 24 is permissive. *Id.* at __, 109 S. Ct. at 2185, 104 L. Ed. 2d at 845; *see also* FED. R. CIV. P. 24 (intervention as party allowed, provided interest requirements satisfied and no adequate representation). The Chief Justice concluded by writing that the parties should have the burden of joinder. *Martin*, __ U.S. at __, 109 S. Ct. at 2186, 104 L. Ed. 2d at 846.

52. Martin v. Wilks, __ U.S. __, __, 109 S. Ct. 2180, 2187, 104 L. Ed. 2d 835, 847-48 (1989).

53. *Id.* at __, 109 S. Ct. at 2187, 104 L. Ed. 2d at 848. The majority concluded that the impermissible collateral attack bar contravened the federal rules. *Id.* at __, 109 S. Ct. at 2187, 104 L. Ed. 2d at 847-48.

54. *Id.* at __, 109 S. Ct. at 2188, 104 L. Ed. 2d at 848. The majority also reasoned that legal rights of nonparties should not be settled by others. *Id.* Mandatory joinder provided in the federal rules accomplishes the goal of reducing duplicity of litigation as easily as a judge made system of mandatory intervention. *Id.* at __, 109 S. Ct. at 2187, 104 L. Ed. 2d at 848.

55. *Id.* at __, 109 S. Ct. at 2188, 104 L. Ed. 2d at 849. Chief Justice Rehnquist suggested that a system of mandatory joinder, as envisioned by advocates of the doctrine of impermissible collateral attack, could lead to problems with timeliness of intervention as well as inade-

Justice Stevens, writing for the dissent, agreed with the majority that Wilks' legal rights were not settled because he was not a party to the consent decrees.[56] The dissent reasoned, however, that Wilks, a nonparty, had no right to appeal the consent decrees,[57] yet he could litigate either contractual rights or the right to compel the city to obey federal law in a collateral lawsuit.[58] The dissent determined no title VII violation occurred and the district court correctly dismissed Wilks' lawsuit.[59] The dissent did not reach the issue of whether the doctrine of impermissible collateral attack is a viable bar to collateral lawsuits attacking consent decrees.[60] Because the dissent did not address the doctrine of impermissible collateral attack, it did not consider whether the doctrine violated Wilks' due process right.[61] The dissent suggests, however, the consent decrees affected Wilks in a practical manner.[62] Consequently, Wilks' attack, in order to promote finality, efficiency and consistency in judgments, would be a collateral attack, and should be limited to instances of fraud, mutual mistake, duress, or lack of subject matter jurisdiction.[63] None of these were present in this case.[64]

The majority opinion in *Martin* is correct because nonparty intervention in lawsuits is properly interpreted as permissive.[65] The preferred method of

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quate notice to nonparties of the consent decree proceeding. *Id.* at __, 109 S. Ct. at 2187, 104 L. Ed. 2d at 848.

56. *Id.* at __, 109 S. Ct. at 2188, 104 L. Ed. 2d at 849 (Stevens, J., dissenting). Justice Stevens relied on the identical case law the majority used in writing that res judicata does not apply to the nonparty. *Id.*

57. *Id.* Justice Stevens wrote that the consent decree did not legally affect Wilks, but rather, it practically affected him, a distinction that limited the extent of Wilks' collateral lawsuit. *Id.*

58. *Id.* at __, 109 S. Ct. at 2189, 104 L. Ed. 2d at 850 (Stevens, J., dissenting).

59. *Id.* at __, 109 S. Ct. at 2193-94, 104 L. Ed. 2d at 855-56 (Stevens, J., dissenting).

60. *Id.* at __, 109 S. Ct. at 2195 n.20, 104 L. Ed. 2d at 857 n.20 (Stevens, J., dissenting).

61. *See id.* at __, 109 S. Ct. at 2187, 104 L. Ed. 2d at 848 (timeliness may be problem in mandatory intervention, although not necessary to reach this issue because joinder preferred method); *see also id.* at __, 109 S. Ct. at 2195 n.20, 104 L. Ed. 2d at 857 n.20 (Stevens, J., dissenting)(dissent did not address timeliness issues of rule 24 intervention). Particularly compelling in due process analysis is that the nonparty has no cause of action until the consent decree is entered. Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 346 (1988). Professor Kramer, however, contends the fairness hearing, conducted before the consent decree is entered, protects nonparty due process. *Id.* at 358-64.

62. Martin v. Wilks, __ U.S. __, __, 109 S. Ct. 2180, 2189, 104 L. Ed. 2d 835, 850 (1989)(Stevens, J., dissenting).

63. *Id.*; *see also* Griffith v. Bank of New York, 147 F.2d 899, 903 (2d Cir. 1945)(nonparty may collaterally attack probate judgment on grounds of fraud), *cert. denied*, 325 U.S. 874 (1945); Shapiro v. Diguilio, 237 N.E.2d 771, 774 (Ill. App. Ct. 1968)(third party may collaterally attack fraudulent judgment).

64. *Martin*, __ U.S. at __, 109 S. Ct. at 2198, 104 L. Ed. 2d at 860 (Stevens, J., dissenting).

65. *See* FED. R. CIV. P. 24(a)(2) (nonparty *may* intervene provided interest affected).

expanding the litigation under the Federal Rules of Civil Procedure is mandatory joinder of nonparties needed for just adjudication by a party.[66] A literal interpretation of these rules renders the doctrine of impermissible collateral attack a nullity because the nonparty who has no duty to intervene cannot be precluded from subsequent litigation.[67] A literal reading makes collateral lawsuits possible because the interested nonparty who escapes joinder and class action may later bring a lawsuit challenging the merits of the consent decree.[68] No consent decrees would be safe because it would always be subject to collateral attack by an interested nonparty.[69] Chief Justice Rehnquist's reading of the rules is consistent with his theory of justice, which proposes uniformity in the application of laws.[70] If stability, uniformity, and finality are indeed the foundations of justice,[71] then collateral lawsuits which result in different outcomes destroy these foundations and lead to injustice.[72]

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66. FED. R. CIV. P. 19(a) (party or court *shall* join nonparty who has interest in lawsuit).

67. *See* Martin v. Wilks, __ U.S. __, __, 109 S. Ct. 2180, 2188, 104 L. Ed. 2d 835, 848-49 (1989). *But see* Thaggard v. City of Jackson, 687 F.2d 66, 68-69 (5th Cir. 1982)(nonparty cannot challenge consent decree because failed to timely intervene at hearing), *cert. denied sub. nom.* Ashley v. City of Jackson, 464 U.S. 900 (1983).

68. Blumrosen, *The 1989 Supreme Court Rulings Concerning Employment Discrimination and Affirmative Action: A Minefield for Employers and a Gold Mine for Their Lawyers*, 15 EMPLOYEE REL. L.J. 175, 179 (1989).

69. *Id.* In response, Congress has proposed two bills which, if passed, would overrule *Martin*. *See* H.R. 4000, 101st Cong., 2d Sess. § 6 (1990); S. 2104, 101st Cong., 2d Sess. § 6 (1990). If passed, the proposed bills would prohibit an interested nonparty, such as Wilks, from waging a collateral lawsuit challenging an employment discrimination consent decree. *Id.*

70. *See* W. Rehnquist, Remarks at the Department of Justice Trial Advocacy Course 2-3 (Sept. 8, 1975)(available in St. Mary's Law School Library). He recounted a conversation between Learned Hand and Oliver Wendell Holmes, Jr., while Holmes was on the Supreme Court, which exemplifies Rehnquist's idea of what constitutes justice. *Id.* When told by Judge Hand to "do justice," Holmes replied, "That is not my job. My job is to play the game according to the rules." *Id.* at 2; *see also* W. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 313-14 (1987)(duty of Court is to interpret laws, not to legislate).

71. *See* W. Rehnquist, Remarks at the Department of Justice Trial Advocacy Course 2-3 (Sept. 8, 1975)(available in St. Mary's Law School Library)(Justice Rehnquist favored uniform application of rules in order to promote justice). The Chief Justice dislikes broad discretion by the judiciary. *Id.* at 3 (judges should avoid subjective interpretation of rules, which contravenes principles of justice).

72. *See* Thaggard v. City of Jackson, 687 F.2d 66, 69 (5th Cir. 1982)(finality, efficiency, and consistency justify doctrine of impermissible collateral attack), *cert. denied sub nom.* Ashley v. City of Jackson, 464 U.S. 900 (1983); O'Burn v. Shapp, 70 F.R.D. 549, 552-53 (E.D. Pa.)(court dismissed challenge to consent decree to promote consistency and eliminate multiple litigation on same claim), *aff'd*, 546 F.2d 418 (3d Cir. 1976), *cert. denied*, 430 U.S. 968 (1977). *But see In re* Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1498 (11th Cir. 1987)(rejects doctrine of impermissible collateral attack; favors traditional preclusion rules of res judicata and collateral estoppel), *aff'd sub nom.* Martin v. Wilks, __ U.S.

The dissent's analysis is inconsistent with the Court's support of affirmative action plans.[73] The dissent stopped short of agreeing that the doctrine of impermissible collateral attack should be abandoned.[74] On the one hand, the dissent appeared to favor the bar, reasoning that, while Wilks was not legally bound by the consent decrees, he was nevertheless bound as a practical matter.[75] Consequently, Wilks' untimely challenge was a collateral attack, and should have been limited to issues of fraud, mistake, or lack of subject matter jurisdiction.[76] On the other hand, the dissent recognized that a nonparty should also be able to challenge a consent decree if it violated a contractual right or federal law.[77] Justice Stevens avoided this dilemma when he posited that Wilks' claim was adjudicated on its merits by the district court.[78]

The majority properly held that Wilks' reverse discrimination claims should be litigated because nonparties should not be precluded from litigation except under limited circumstances. Congress' original intent in promulgating the Federal Rules of Civil Procedure was to prefer a system of permissive intervention coupled with mandatory joinder. Congress' original intent should not be vitiated because it is unclear whether mandatory intervention will promote more settlements of title VII claims than the intended system of permissive intervention and mandatory joinder. Neither the majority nor the dissent presented any system that would advance the goals of finality, consistency and efficiency. Mandatory joinder does not necessarily mean that all interested nonparties will be joined. Similarly, the dissent chose to avoid the issue of whether a nonparty should be precluded from subsequent litigation for failing to intervene. The majority correctly remanded Wilks' claim to the district court to adjudicate the legality of the

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__, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989); United States v. Jefferson County, 720 F.2d 1511, 1518 (11th Cir. 1983)(court allowed individual nonparties to contest merits of consent decree in collateral lawsuit; dismissed union request for injunction as untimely); Reeves v. Wilks, 754 F.2d 965, 969-71 (11th Cir. 1985)(court allowed collateral lawsuit on merits of decree).

73. *See* Johnson v. Transportation Agency, 480 U.S. 616, 640 (1987); United Steelworkers v. Weber, 443 U.S. 193, 208 (1979).

74. *See* Martin v. Wilks, __ U.S. __, __, 109 S. Ct. 2180, 2195 n.20, 104 L. Ed. 2d 835, 857 n.20 (1989)(Stevens, J., dissenting)(not necessary to adopt mandatory intervention).

75. *Id.* at __, 109 S. Ct. at 2189, 104 L. Ed. 2d at 850.

76. *Id.*; *see also* Griffith v. Bank of New York, 147 F.2d 899, 903 (2d Cir. 1945)(nonparty may collaterally attack probate judgment on grounds of fraud), *cert. denied*, 325 U.S. 874; Shapiro v. Diguilio, 237 N.E.2d 771, 774 (Ill. App. Ct. 1968)(third party may collaterally attack fraudulent judgment); *cf.* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 12.15 (3d ed. 1985)(nonparty may collaterally attack judgment if practically impaired, but grounds for attack are limited).

77. *Martin*, __ U.S. at __, 109 S. Ct. at 2189, 104 L. Ed. 2d at 850 (Stevens, J., dissenting).

78. *See id.* at __, 109 S. Ct. at 2190 n.7, 104 L. Ed. 2d at 851 n.7 (Stevens, J., dissenting).

consent decree and properly overruled the doctrine of impermissible collateral attack. If a system of mandatory intervention is indeed the desired result, then Congress, not the courts, should rewrite the rules.

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