

## WILL EMPLOYMENT DISCRIMINATION CLASS ACTIONS SURVIVE?

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For more than 30 years, employment discrimination cases have typified the sort of civil rights action that courts and commentators describe as uniquely suited to resolution by class action litigation. As the Supreme Court recognized in 1977, “suits alleging racial or ethnic discrimination are often by their nature class suits, involving classwide wrongs.”<sup>1</sup> When Federal Rule of Civil Procedure 23, which governs private class litigation in federal court, was amended in 1966, the Federal Rules advisory committee observed that civil rights actions were particularly appropriate for resolution under one of its provisions.<sup>2</sup> Of course, support of the class action as a means for resolving employment discrimination disputes was never universal. But until the 1990s, critics of the class action were, by and large, overshadowed by its supporters in the context of employment disputes. That has started to change, however, and the increasing skepticism – particularly among members of the federal judiciary – toward the class action as an effective dispute-resolution mechanism in the employment context is beginning to take its toll.

Some of this increasing skepticism may be explained by significant changes in the law of employment discrimination. Specifically, when Congress amended Title VII of the Civil Rights Act of 1964 with its passage of the Civil Rights Act of 1991, it granted to litigants certain substantive rights that have had significant, most likely unintended, procedural consequences for litigants. By permitting victims of alleged intentional discrimination to seek compensatory and punitive damages

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1. *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977).

2. *See* FED. R. CIV. P. 23(b), Advisory Committee Notes (“Illustrative [of a (b)(2) class] are various actions in the civil rights field where a party is charged with discriminating unlawfully against a class . . .”).

and by granting a right to a jury trial,<sup>3</sup> Congress complicated the analysis of the appropriateness of class certification in the employment discrimination context. The combination of these doctrinal changes with shifting attitudes towards class action litigation more generally is casting serious doubt in some minds on the continued viability of the employment discrimination class action in federal court.<sup>4</sup>

This paper will argue that the changes wrought by the Civil Rights Act of 1991 do not in fact pose a barrier to resolution of employment discrimination claims through class litigation. The addition of compensatory and punitive damages and a jury-trial right in the Civil Rights Act of 1991 may increase the level of scrutiny and perhaps the level of judicial involvement necessary in an employment discrimination class action. But they do not render such a class action either impermissible under Rule 23 or violative of due process or Seventh Amendment jury trial rights. Courts and commentators who insist that these changes are fatal to certification of employment discrimination classes are incorrect. The strength of their conviction, however, raises the question whether other factors might be motivating the hostility confronting employment class certification.

Section I of this paper will consider the pre-1991 Title VII class action, and the main concerns that courts focused on in determining whether to certify these classes. Section II will describe the Civil Rights Act of 1991, the potential pitfalls this new law created for the Title VII class action, and how courts have responded to these concerns. This section will argue that neither the new remedies nor the jury trial right that Congress added to Title VII provides sufficient justification to deny certification in most employment discrimination class actions. Procedures that have long been available to judges under Rule 23 – particularly judicial oversight and management of the class proceedings as well as bifurcation of class-specific and individual liability issues – are appropriate to protect against potential constitutional violations. Section III will argue that courts now refusing to certify class actions in the employment context are motivated in substantial part by other concerns: a widely credited notion that class actions in general are

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3. See 42 U.S.C. § 1981a(a) – (c) (2000).

4. See, e.g., *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 407-410 (5th Cir. 1998); *Zachery v. Texaco Exploration & Prod. Inc.*, 185 F.R.D. 230, 237 (W.D. Tex. 1999); Harvey S. Bartlett III, *Determining Whether a Title VII Plaintiff Class's "Aim is True": The Legacy of Allison v. Citgo Petroleum Corp. for Employment Discrimination Class Certification Under Rule 23(b)(2)*, 74 TUL. L. REV. 2163, 2186 (2000); Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 LAB. LAW. 415, 454-55 (2000).

unfair; the perception that employment discrimination class actions are no longer necessary for full enforcement of civil rights; and a deep uncertainty about the merits of certain claims being pursued in employment discrimination suits today.

#### I. A SHORT HISTORY OF THE EMPLOYMENT DISCRIMINATION CLASS ACTION

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, sex, religion and national origin.<sup>5</sup> The Act prohibits discrimination in individual employment decisions as well as employer policies or patterns of conduct that discriminate broadly against members of protected groups.<sup>6</sup> And it gives employees two possible causes of action. The first is for disparate treatment claims, in which the plaintiffs allege that an employer intentionally discriminated against a member or members of a protected group. The second is for disparate impact claims, in which plaintiffs allege that an employer's facially neutral policies have a discriminatory effect on a protected group and the employer cannot justify the policies by business necessity.<sup>7</sup>

Just two years after the Civil Rights Act became law, the Federal Rules of Civil Procedure were amended. Perhaps the most important of the 1966 amendments was the creation of the modern Rule 23, which governs the certification of class actions in federal court. Rule 23 sets up a two-part certification inquiry. In order to bring a suit as a class action, plaintiffs must demonstrate first that they can meet the requirements of Rule 23(a). To meet this standard, plaintiffs must show that the number of class members is sufficient to render traditional joinder of the claims impracticable; that the claims of the putative class members share common legal or factual questions; that the claims of the named plaintiffs are typical of the claims of absent class members; and that the named plaintiffs and their attorneys are adequate representatives for the class.<sup>8</sup>

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5. Civil Rights Act of 1964, §§ 701–716, 78 Stat. 241, 253–66 (1964) (current version at 42 U.S.C. § 2000e-5 (2000)).

6. *See* *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 348 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (“We begin by repeating the observation of earlier decisions that in enacting Title VII of the Civil Rights Act of 1964 Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex or national origin.”).

7. *See* *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31 (1971).

8. FED. R. CIV. P. 23(a).

After a court has determined that a proposed class meets these threshold requirements, the class can only be certified if it fits one of the circumstances described in Rule 23(b): 1) prosecution of individual suits would create the risk of inconsistent or conflicting resolution; 2) the defendant has acted or failed to act on grounds applicable to the class as a whole, such that injunctive or declaratory relief is appropriate; or 3) common questions predominate over individual questions, and maintenance of the suit as a class is superior to other possible methods of adjudication.<sup>9</sup> Employment discrimination classes have traditionally been certified under 23(b)(2) because they typically involve a request by a group of plaintiffs that the defendant employer be enjoined from further discriminatory conduct.<sup>10</sup> Indeed, the advisory committee notes to Rule 23(b)(2) explicitly state that civil rights cases are particularly appropriate for resolution under that provision.<sup>11</sup> Employment classes have also been certified under 23(b)(3). This provision of Rule 23 is the most controversial, as it provides a mechanism for certifying classes that lack the clear cohesiveness of (b)(1) and (b)(2) classes. Because 23(b)(3) is a kind of “catch-all” for more ambiguous class claims, the Rule imposes a number of additional procedural hurdles on the 23(b)(3) class. In order to certify a (b)(3) class, a court must conclude that questions common to the class predominate over any individual questions and that class litigation would be the superior method for resolving the claim. In addition, the court must ensure that all members of a (b)(3) class receive notice and an opportunity to opt out of the class litigation.<sup>12</sup> Because of these additional hurdles, and because they have always been viewed as prototypical (b)(2) suits, employment claims under (b)(3) were traditionally more unusual.

The operation of Title VII and Rule 23 together has allowed large groups of employees to challenge broadly discriminatory employer policies. Indeed, since the late 1960s, private class action suits have been perhaps the most important means for challenging and eliminating systemic employment discrimination, one of the principal goals of Title VII. The framework for these systemic challenges is a two-step process most famously explained by the Supreme Court in *International*

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9. FED. R. CIV. P. 23(b).

10. See 8 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 24:81, at 315 (4th ed. 2003) (“The aptness of designating employment discrimination suits as class actions under Rule 23(b)(2) has been recognized repeatedly and definitively by the courts.”).

11. See FED. R. CIV. P. 23(b)(2) advisory committee’s note.

12. See FED. R. CIV. P. 23(c)(2)(B).

*Brotherhood of Teamsters v. United States*.<sup>13</sup> During the first phase – which the Court referred to as the “liability” phase – the plaintiffs have the initial burden of proving a *prima facie* case, which requires them to show “more than the mere occurrence of isolated or ‘accidental’ or sporadic discriminatory acts. [They must] establish by a preponderance of the evidence that racial discrimination was the company’s standard operating procedure, the regular rather than the unusual practice.”<sup>14</sup> Plaintiffs can use both statistical and anecdotal evidence to meet this burden. The defendant then can seek to rebut the *prima facie* case by demonstrating that the plaintiffs’ evidence is “inaccurate or insignificant,” such that it does not establish the existence of a pattern of discrimination.<sup>15</sup> If the fact-finder determines that the plaintiffs have made out a *prima facie* case and that their case has withstood the defendant’s challenge, “a trial court may then conclude that a violation has occurred and determine the appropriate remedy.”<sup>16</sup> At that point, without any further evidence from the plaintiffs, the finding of a pattern of discrimination will justify an award of prospective relief such as an injunction against further discrimination or other order necessary to ensure the protection of the plaintiffs’ rights under Title VII.<sup>17</sup>

The second phase of a *Teamsters*-style litigation will consider the scope of additional relief available to individual members of the class. This “remedial” stage of the trial addresses whether individual class members are entitled to back pay, front pay or reinstatement, depending on the evidence presented by each class member seeking these damages.<sup>18</sup> The *Teamsters* Court explained that a conclusion in the first phase of the litigation that the defendant had engaged in a pattern or practice of discrimination created a rebuttable presumption that discrimination had motivated the employment decision with regard to

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13. 431 U.S. 324, 360-62 (1977). *Teamsters* involved a pattern-or-practice suit filed by the Equal Employment Opportunity Commission, which does not have to comply with the requirements of Rule 23. See *Gen. Tel. Co. of the Northwest v. EEOC*, 446 U.S. 318, 324 (1980). However, *Teamsters* adopted the standard from *Franks v. Bowman*, 424 U.S. 751 (1976), which was a Rule 23 class action. *Teamsters*, 431 U.S. at 347. Moreover, the *Teamsters* framework has been applied in private class actions under Rule 23. See CONTE & NEWBERG, *supra* note 10, § 24:124, at 485 (“The majority of courts have held the bifurcation of class liability and relief phases of Title VII suits to be an appropriate means of litigating employment discrimination claims.”).

14. *Teamsters*, 431 U.S. at 336.

15. *Id.* at 360.

16. *Id.* at 361.

17. *Id.*

18. *Id.* at 361-62. As discussed *infra* note 33 and accompanying text, after the Civil Rights Act of 1991, it is also at this point that individual plaintiffs might address their entitlement to punitive or compensatory damages.

each individual plaintiff.<sup>19</sup> Thus, during this second phase, the defendant carries the burden of demonstrating that, in any individual case, the adverse employment action was not the result of discrimination.<sup>20</sup> Prior to 1991, no jury was required in Title VII litigation, so a court would serve as fact-finder in both the class-wide liability and the individualized remedial phases of the litigation.

When class actions first became a popular means for challenging employers' long-standing and deeply rooted discriminatory policies, many lower courts were flexible about their adherence to the strict requirements of Rule 23(a) in assessing whether to certify a class of employees.<sup>21</sup> During the 1960s and early 1970s, courts certified many so-called "across-the-board" class action suits.<sup>22</sup> In these suits, plaintiffs who were members of a protected class would seek to represent all members of that class in all of their various possible relationships with the employer. Thus, for example, a Mexican-American employee who had been denied a promotion, allegedly because of his race, would seek to represent not only a class of all Mexican-American employees who had been denied promotions, but also all Mexican-American employees who had not been hired at all.<sup>23</sup> The asserted rationale for certifying these claims was that all of the employer's policies were tainted by racism, and that any covered employee or group of employees might therefore challenge the full range of policies and practices.

But Rule 23(a)'s requirements of commonality, typicality and

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19. *Id.* at 362.

20. *Id.*

21. See Charles Mishkind, Alison Marshall & Walter Connolly, *The Big Risks: Class Actions and Pattern and Practice Cases*, 591 PUB. LAW INST. 329, 338 (1998) ("Prior to 1977, employment discrimination lawsuits were routinely certified as class actions based on the rationale that such claims were inherently of a class nature, and presumptively appropriate for class certification.").

22. See, e.g., *Johnson v. Ga. Highway Express*, 417 F.2d 1122, 1124 (5th Cir. 1969) ("While it is true, as the lower court points out, that there are different factual questions with regard to different employees, it is also true that the 'Damoclean threat of a racially discriminatory policy hangs over the racial class (and) is a question of fact common to all members of the class.'). This case is widely recognized as the first to discuss and sanction the "across-the-board" theory of class certification in an employment discrimination case. See, e.g., *Griffin v. Dugger*, 823 F.2d 1476, 1484 (11th Cir. 1987). Many other courts of appeals followed the Fifth Circuit's lead. See, e.g., *Gibson v. Local 40, International Longshoreman's and Warehouseman's Union*, 543 F.2d 1259, 1263-64 (9th Cir. 1976); *Crockett v. Green*, 534 F.2d 715, 717-18 (7th Cir. 1976); *Senter v. Gen. Motors Corp.*, 532 F.2d 511 (6th Cir. 1976), *cert. denied*, 429 U.S. 870 (1976); *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 340 (10th Cir. 1975); *Barnett v. W.T. Grant Co.*, 518 F.2d 543, 547 (4th Cir. 1975); *Reed v. Arlington Hotel, Co.*, 476 F.2d 721, 723 (8th Cir. 1973), *cert. denied*, 414 U.S. 854 (1973).

23. This is the fact pattern that the lower courts approved, but that the Supreme Court found insufficient to meet the requirements of Federal Rule of Civil Procedure 23(a), in *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982).

adequacy require a tighter connection between the claims of the named plaintiffs and those of the absent class members they seek to represent. In 1982, the Supreme Court reversed just such a broad class certification, sharply criticizing employment discrimination class actions charging employers with “across-the-board” discrimination. In *General Telephone Co. v. Falcon*,<sup>24</sup> the Supreme Court recognized “that racial discrimination is by definition class discrimination,” but held that this fact did not mean that an allegation of racial discrimination could in itself answer the questions posed by the requirements of Rule 23.

Conceptually there is a wide gap between (a) an individual’s claim that he has been denied a promotion on discriminatory grounds and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual’s claim and the class claims will share common questions of law or fact and that the individual’s claim will be typical of the class claims.<sup>25</sup>

The Court cautioned that the existence of a generalized claim of discrimination was insufficient to support certification under Rule 23(a) and that the named representatives would have to demonstrate that their claims were typical of the class claims in more than simply the allegation of discriminatory motivation. The Rule 23(a) requirements ensure that the named plaintiffs are truly representative – and truly representing – those absent class members whose rights would be resolved without their actual presence in the courtroom. Accordingly, the Court concluded that a private Title VII class action “may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.”<sup>26</sup>

Since *Falcon*, courts have been strict in requiring that named plaintiffs in an employment discrimination class action share certain relevant characteristics with absent class members in order to satisfy the requirements of Rule 23(a). For example, named plaintiffs who have suffered discrimination in hiring may not represent a class of individuals who claim discriminatory failure to promote or discriminatory discharge. Courts have reasoned that the differences between not being hired for a

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24. 457 U.S. 147 (1982).

25. *Id.* at 157. The court made a similar point in *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395, 405-06 (1977) (“We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present. But careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable.”).

26. *Falcon*, 457 U.S. at 161.

position and being fired or being passed over for promotion are substantial enough that the named plaintiff's claims in such a scenario would not be "typical" of other class members' claims.<sup>27</sup> The failure to meet Rule 23(a)'s "typicality" requirement would also call into question whether a named plaintiff could provide adequate representation for the class. For the same reasons, a class of plaintiffs composed of current employees of a company is unlikely to adequately represent unsuccessful applicants for employment. A possible exception to these general rules was recognized in *Falcon* itself, where the Court noted that "significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in the same general fashion, such as through entirely subjective decisionmaking processes."<sup>28</sup>

In the years after the Court emphasized the importance of adherence to the requirements of Rule 23, the number of class action suits filed in federal court decreased significantly. While 1174 class action employment discrimination cases were filed in federal court in 1976, only 32 such cases were filed in 1991.<sup>29</sup> That number slowly increased during the 1990s,<sup>30</sup> and in the late 1990s and early 2000s, the number of employment class actions filed annually ranged from a high of 85 (in 1997-98 and 1998-99) to a low of 73 (in 2000-2001 and 2001-2002).<sup>31</sup>

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27. See, e.g., *Griffin v. Dugger*, 823 F.2d 1476, 1486-87 (11th Cir. 1987); *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1035 (9th Cir. 1990). Of course a group of named plaintiffs might include one who was fired and one who was denied promotion, and the proposed class might include individuals subject to both adverse actions.

28. *Falcon*, 457 U.S. at 159 n.15.

29. Scotty Shively, *Resurgence of the Class Action Lawsuit in Employment Discrimination Cases: New Obstacles Presented by the 1991 Amendments to the Civil Rights Act*, 23 U. ARK. LITTLE ROCK L. REV. 925, 926 (2001).

30. See Richard T. Seymour, *Trends in Fair Employment Litigation, Midwinter Meeting of the Committee on Equal Employment Opportunity*, 1998 A.B.A. SEC. LAB. & EMP (Mar. 25, 1998).

31. See 2003 ADMIN. OFF. U.S. CTS ANN. REP., at tbl.X-5 at <http://www.uscourts.gov/judbus2003/appendices/x5.pdf>. These increasing numbers are widely thought to be a consequence at least in part of the enhanced remedies made available in the Civil Rights Act of 1991. See, e.g., Shively, *supra* note 29, at 926; Mishkind et al., *supra* note 21, at 411-412; Kramer, *supra* note 4, at 415 & n.1. The increasing number of class actions filed in the late 1990s and early 2000s may also be explained by the EEOC's decision to "[make] it a priority to route out systemic discrimination." Mishkind et al., *supra* note 21, at 412. In 1997, the EEOC General Counsel stated that "the Agency would be filing 'dramatically more class actions than in the past.'" *Id.* (quoting *General Counsel Stewart Predicts More Litigation, Class Cases from Agency*, 1997 EEOC DAILY LAB. REP. C-1 (April 1, 1997)).

## II. CLASS ACTION LITIGATION AFTER THE CIVIL RIGHTS ACT OF 1991

Prior to 1991, successful Title VII plaintiffs could recover back and front pay, but were not entitled to other money damages.<sup>32</sup> In 1991, finding that “additional remedies under Federal law are needed to deter . . . intentional discrimination in the workplace,” Congress made punitive and compensatory damages available to plaintiffs claiming intentional discrimination.<sup>33</sup> For these intentional discrimination claims, Congress also provided that either party was entitled to request a jury trial.<sup>34</sup> Both the additional damages provisions and the jury trial right have led courts and numerous commentators to debate about the continued viability of class litigation in claims alleging intentional discrimination. This Part will begin by exploring the arguments surrounding the impact of punitive and compensatory damages on class certification in employment cases, and will then briefly discuss the debate about the impact of the right to a jury trial on certification of a class. I conclude that in both instances the detractors of the continued potential for employment class litigation have dramatically overstated the effects of the changes wrought by the 1991 Civil Rights Act.

### A. *Compensatory and Punitive Damages*

Those who view the 1991 Civil Rights Act as dooming class litigation of cases alleging intentional discrimination argue that the addition of compensatory and punitive damages has diminished the group nature of these claims. These increased damages, argue some, make litigation of employment claims less about changing the behavior of the employer and more about compensating individual plaintiffs. By shifting the focus in this manner, the argument goes, the new remedies have made it difficult, if not impossible, for plaintiffs to fit their proposed class into any of the Rule 23(b) categories.

The best-known articulation of this view is the Fifth Circuit’s opinion in *Allison v. Citgo Petroleum Corp.*, in which the majority essentially concluded that the Civil Rights Act of 1991 had sufficiently

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32. See 42 U.S.C. § 2000e-5(g) (2000). Successful plaintiffs were also entitled to declaratory and injunctive relief, *id.*, and could recover attorney’s fees, see 42 U.S.C. § 1988 (2000).

33. See 42 U.S.C. § 1981a(a)(1) (2000). Plaintiffs challenging an employer’s facially neutral policy for its disparate impact are not entitled to these new damages. *Id.* The total amount of punitive and compensatory damages available to a plaintiff depends on the size of the employer, with the maximum combined damages set at \$300,000. See 42 U.S.C. § 1981a(b)(3)(A)-(D).

34. 42 U.S.C. § 1981a(c).

changed the landscape of Title VII so that claims under the Act could no longer be brought as class actions under the Federal Rules of Civil Procedure.<sup>35</sup> The focus on *Allison* derives in part from the fact that it was the first appellate decision on the relationship between Rule 23 and the Civil Rights Act of 1991, and in part from the starkness of the court's conclusions. The Fifth Circuit found that "[b]efore the passage of the Civil Rights Act of 1991, which for the first time provided plaintiffs with a right to compensatory and punitive damages as well as a jury trial (each demanded here), aspects of this case clearly would have qualified for class certification."<sup>36</sup> However, the court went on to conclude, the plaintiffs' newly earned civil rights "ultimately render this case unsuitable for class certification under Rule 23."<sup>37</sup>

The court in *Allison* was confronted with over 130 named plaintiffs and intervenors, filing suit on behalf of more than 1000 black employees and applicants for employment at Citgo. The plaintiffs alleged that the company had engaged in discrimination with respect to hiring, promotion, compensation and training policies at its two manufacturing facilities in Lake Charles, Louisiana.<sup>38</sup> The suit challenged a range of activities including failure to post or announce job vacancies, use of an informal, word-of-mouth process for filling job vacancies, use of racially biased tests to evaluate candidates for hire or promotion, and use of a subjective decision-making process by a predominantly white supervisory staff in reviewing applications for hire and employees for promotion.<sup>39</sup> Plaintiffs claimed both disparate impact and disparate treatment discrimination, and sought injunctive relief, including restructuring of the offending policies, installment of class members into existing positions, and retroactive seniority and benefits. In addition to this injunctive relief, plaintiffs sought back pay, front pay, compensatory and punitive damages, and attorney's fees. Plaintiffs also requested a jury trial on their claims of intentional discrimination.<sup>40</sup> Citgo opposed class certification and the district court declined to certify the class. The Fifth Circuit affirmed the denial of class certification.<sup>41</sup>

Although the reviewing judges agreed that the *Allison* class met all of the requirements of Rule 23(a), the Fifth Circuit concluded that the

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35. *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 407-10 (5th Cir. 1998).

36. *Id.* at 407.

37. *Id.*

38. *Id.* at 407-08.

39. *Id.*

40. *Id.*

41. *Id.* at 408.

class was not certifiable under any provision of 23(b). The court first addressed the possibility of certification under 23(b)(2), the provision traditionally used for employment discrimination class actions. In analyzing this question, the majority reached two conclusions: first, that “[t]he underlying premise of the (b)(2) class—that its members suffer from a common injury properly addressed by class-wide relief—‘begins to break down when the class seeks to recover back pay or other forms of monetary relief to be allocated based on individual injuries.’”<sup>42</sup> And second, that “actions for class-wide injunctive or declaratory relief are intended for (b)(2) certification precisely because they involve uniform group remedies.”<sup>43</sup>

As to the first point, the *Allison* majority argued that the caution in the Advisory Committee notes to Rule 23(b)(2) that “[t]he subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages”<sup>44</sup> should be understood as a concern about the cohesiveness of the class. Further, the court argued it is reasonable to apply a requirement that injunctive relief predominate over any requested monetary relief in a (b)(2) action because without this requirement the cohesiveness of the class must be questioned. Thus, “when the monetary relief being sought is less of a group remedy and instead depends on the varying circumstances and merits of each potential class member’s case,” then the monetary relief should be viewed as the predominant relief sought and, regardless of what other relief the plaintiffs seek, the class should not be certified under (b)(2).<sup>45</sup> The second major prong of the *Allison* majority’s logic – the notion that efficiency benefits derived from “uniform group remedies” are a primary rationale for the existence of the (b)(2) class – appears to be an entirely novel idea, but one that helped to support the court’s conclusion that “(b)(2)’s predominance requirements serves two basic purposes: first, it protects the legitimate interests of potential class members who might wish to pursue their monetary claims individually; and second, it preserves the legal system’s interest in judicial economy.”<sup>46</sup> In light of these two purposes, the majority concluded that district courts should refuse to certify classes under 23(b)(2),

unless [monetary relief] is incidental to requested injunctive or declaratory relief . . . . By incidental, we mean damages that flow

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42. *Id.* at 413 (quoting *Eubanks v. Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997)).

43. *Id.* at 414.

44. FED. R. CIV. P. 23(b)(2) advisory committee’s note.

45. *Allison*, 151 F.3d at 413.

46. *Id.* at 415.

directly from liability to the class as a whole . . . . Ideally, incidental damages should be only those to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established.<sup>47</sup>

In the *Allison* court's view, "[l]iability for incidental damages should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations. Thus, incidental damages will, by definition, be more in the nature of a group remedy."<sup>48</sup>

Applying this standard for evaluating the appropriateness of certification under 23(b)(2), the court of appeals concluded that the district court had appropriately declined to certify the proposed class under this provision. Compensatory and punitive damages, the court explained, both require "individualized proof of injury, including how each class member was personally affected by the discriminatory conduct," and therefore cannot be described as "incidental" to the requested injunctive relief.<sup>49</sup> Of course, individualized determinations are also necessary for back pay awards, which all of the federal circuit courts, including the Fifth, had long awarded in employment discrimination class suits certified under 23(b)(2). But the *Allison* majority sidestepped this issue without much discussion by noting that back pay is categorized as equitable relief, while punitive and compensatory damages are legal remedies.<sup>50</sup>

After disposing of the (b)(2) certification question, the Fifth Circuit went on to conclude that the district court appropriately declined to certify the class as a "hybrid" of 23(b)(2) and (b)(3), in which the claims for compensatory and punitive damages were certified under 23(b)(3) and the remainder of the plaintiffs' claims were certified under (b)(2).<sup>51</sup> The court of appeals explained that, for essentially the same reasons that certification under (b)(2) was not appropriate, hybrid certification was also correctly denied. The individualized determinations necessary for punitive and compensatory damages claims would "predominate" over the litigation of the common questions presented by the employer's allegedly discriminatory practices, and the need for this individualized assessment would render class litigation no more manageable than

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47. *Id.*

48. *Id.*

49. *Id.* at 416.

50. *Id.* at 415.

51. *Id.* at 418-19.

separate trials. Since 23(b)(3) requires that common issues predominate, and that class litigation be superior to other options for disposing of the claims, certification of the damages claims under (b)(3) would not be appropriate.<sup>52</sup>

The *Allison* court's approach to post-1991 certification of employment discrimination class actions represents a particularly extreme statement of the potential problems created by the interaction of Rule 23(b)'s requirements with the Civil Rights Act of 1991. But parts of the opinion have been endorsed by a number of courts and commentators. In particular, both the Seventh and the Eleventh Circuits have adopted *Allison*'s "incidental" damages approach to certification under 23(b)(2).<sup>53</sup> A growing number of district courts have also accepted this analysis of (b)(2) certification,<sup>54</sup> and the provision of Rule 23 that once was considered particularly appropriate for civil rights litigation is under attack.

But there is nothing in either Rule 23 or, certainly, in the civil rights laws, that mandates the *Allison* court's conclusions.<sup>55</sup> Indeed, it is quite odd to imagine that Congress, in expanding the remedies available to civil rights plaintiffs, intended to limit the avenues available to seek those remedies.<sup>56</sup> To the contrary, "the 1991 legislation was clearly conceived and passed as a pro-plaintiff measure."<sup>57</sup> The new law was passed explicitly in response to several 1989 Supreme Court decisions that were widely perceived as hostile to full enforcement of civil rights

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52. *Id.* at 419.

53. See *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 898 (7th Cir. 1999); *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001).

54. See, e.g., *Reap v. Continental Cas. Co.*, 199 F.R.D. 536, 546-48 (D.N.J. 2001); *George Lussier Enters., Inc. v. Subaru of New Eng., Inc.*, No. Civ. 99-109-B, 2001 WL 920060, at \*20 (D.N.H. Aug. 3, 2001); *Robertson v. Sikorsky Aircraft Corp.*, No. 397 CV1216, 2000WL 33381019, at \*7 (D. Conn. July 5, 2001).

55. There is no evidence, either in the statute itself, or anywhere in the legislative history, that Congress in any way considered the impact its expansion of available remedies might have on class action litigation. See, e.g., Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 BYU L. REV. 305, 307 (2001). In 1972, in the context of amending Title VII, the federal legislature emphasized that "[t]he committee agrees with the courts that title VII actions are by their very nature class compl[aints], and that any restriction on such actions would greatly undermine the effectiveness of title VII." S. REP. NO. 92-415, 92nd CONG., 1st Sess., at 27 (1972).

56. Indeed, some have argued that the approach taken by the court in *Allison* "undermines the goals of the Civil Rights Act of 1991." Bartlett, *supra* note 4, at 2186. See W. Lyle Stamps, *Getting Title VII Back on Track: Leaving Allison Behind for the Robinson Line*, 17 BYU J. PUB. L. 411, 444-45 (2003).

57. Lesley Frieder Wolf, *Evading Friendly Fire: Achieving Class Certification After the Civil Rights Act of 1991*, 100 COLUM. L. REV. 1847, 1849 (2000).

legislation.<sup>58</sup> Among the “findings” that precede the Act’s substantive provisions, Congress observes that “additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace, . . . and legislation is necessary to provide additional protections against unlawful discrimination in employment.”<sup>59</sup> Moreover, in providing victims of employment discrimination the right to compensatory and punitive damages under Title VII, Congress was simply offering remedies that had long been available under other civil rights laws. Specifically, the 1991 Act was intended to bring Title VII’s remedial provisions in line with those of Section 1981, a post-Civil War enactment that protects against race discrimination.<sup>60</sup> Plaintiffs had been successfully seeking compensatory and punitive damages in class action suits under Section 1981 for years,<sup>61</sup> so it seems at best unlikely that Congress perceived these awards as inconsistent with Rule 23.

Congressional intent to the side, the *Allison* court’s analysis of the reasons for and benefits of permitting certification of classes under 23(b)(2) is both stingy and without any considerable support. Courts have long struggled to interpret the advisory committee notes’ caution that (b)(2) is not to be used to certify classes that seek “predominantly or exclusively” money damages. Even before the addition of punitive and compensatory damage remedies to Title VII, questions were raised about the appropriateness of certifying an employment discrimination class under (b)(2) when each of the individual plaintiffs sought back and front pay – which, though classified as equitable relief, are nonetheless money damages – in addition to the injunctive and declaratory relief sought by the class as a whole.<sup>62</sup> Courts were conscious that a class seeking exclusively money damages could not be certified under (b)(2), but they regularly concluded that the goal of civil rights litigation – to alter discriminatory conduct – fell squarely within the purposes of (b)(2) class

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58. See 42 U.S.C. § 1981 note (listing among the purposes of the Act “to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination”). See also Roger M. Clegg, *Introduction: A Brief Legislative History of the Civil Rights Act of 1991*, 54 LA. L. REV. 1459, 1459 (1994) (noting that “[t]he impetus for the Civil Rights Act of 1991 was a series of six decisions handed down by the Supreme Court in May and June of 1989”).

59. 42 U.S.C. § 1981 note (Sec. 2, Findings).

60. See H.R. REP. NO. 102-40, pt. 1 (1991), reprinted in 1991 U.S.C.C.A.N. 603.

61. See, e.g., *Barefield v. Chevron*, No. C 86-2427 TEH, 1988 WL 188433, at \*3-4 (N.D. Cal. Dec. 6, 1998); *Boyd v. Bechtel*, 485 F. Supp. 610, 613 n.3 (N.D. Cal. 1979); *Edmondson v. Simon*, 86 F.R.D. 375, 383 (N.D. Ill. 1980).

62. See, e.g., Gerald E. Rosen, *Title VII Classes and Due Process: To (b)(2) or (b)(3)*, 26 WAYNE L. REV. 919 (1980).

actions in spite of any request for individual relief on top of the class-wide injunction.<sup>63</sup>

The majority in *Allison* rested its decision on an overly narrow view of cohesiveness. The court asserted that “[t]he underlying premise of the (b)(2) class – that its members suffer from a common injury properly addressed by classwide relief – begins to break down when the class seeks to recover back pay or other forms of monetary relief to be allocated based on individual injuries.”<sup>64</sup> This assertion cannot withstand analysis; the common injury suffered by victims of employment discrimination is no less “common” to the class because the specific consequences of the discriminatory policy vary for individual employees. If an employer has racially discriminatory policies in place, then harm does flow to all members of a class of black employees, regardless of the dollar amount of each individual damages claim. The cohesiveness of the class derives from its members’ survival under the common burden of that policy. The fact that individual members may also have individual damage claims against the employer does not necessarily diminish the significance of the shared burden. Nor does the existence of individual damages claims create intragroup conflict; one employee’s entitlement to back pay or to compensatory or punitive damages will not conflict with or call into question the damages claims of any other employee.

Perhaps not surprisingly in light of its weaknesses, the *Allison* opinion drew a strong dissent. The dissent first expressed concern over the majority’s bright-line rule on (b)(2) certification, which seems to remove from future courts looking at class action employment suits the responsibility to probe the facts of the particular case and exercise sound discretion as to certification.<sup>65</sup> The dissent further objected that the majority’s rule ignored the importance of Rule 23(b)(2) class actions in employment discrimination and other civil rights actions and threatened to render certification in these cases impossible.<sup>66</sup> And finally, the dissent observed that the majority ignored the goals and structure of Title VII class litigation:

After the 1991 Civil Rights Act the thrust of a Title VII action continues to be society’s interest in eliminating discrimination and the

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63 See, e.g., *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) (awarding back pay in (b)(2) employment class); *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 257-58 (5th Cir. 1974) (same).

64 *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 413 (5th Cir. 1998).

65 *Id.* at 426-31 (Dennis, J., dissenting).

66 *Id.* at 431-32.

individual's interest in being made whole. Title VII plaintiffs may still seek extensive and systematic injunctive relief for claims that arise from a system of employment action that has been uniformly imported based on a characteristic common to all class members, such as race. Therefore 'the conduct of the employer is still answerable on grounds generally applicable to the class, and the primary relief sought is still relief with respect to the class as a whole.'<sup>67</sup>

The dissent's approach to evaluating the (b)(2) certification question is very similar to that taken by the Second Circuit in *Robinson v. Metro-North Commuter Railroad*.<sup>68</sup> The plaintiffs in *Robinson* were African-American employees of Metro-North who claimed the commuter railroad's "company-wide policy of delegating to department supervisors discretionary authority to make employment decisions related to discipline and promotion" was "exercised in a racially discriminatory manner and [had] a disparate impact on African-American employees."<sup>69</sup> The representative plaintiffs sought injunctive and equitable relief, including back and front pay, for the class as a whole, as well as compensatory damages for members of the class who were victims of intentional discrimination.<sup>70</sup> The district court denied certification, relying substantially on *Allison* for its conclusion that "the multiple individual determinations of damages for the numerous members of the class . . . would overwhelm classwide injunctive issues, from both the standpoint of the individual plaintiffs and the standpoint of the Court."<sup>71</sup> The Second Circuit reversed, concluding that the district court had abused its discretion in refusing to certify the class and that "the changes made by the 1991 Act are not fatal to class treatment of employment discrimination claims."<sup>72</sup>

Like the Fifth Circuit and others, the Second Circuit focused its inquiry in part on whether monetary relief "predominates" over injunctive or declaratory relief. Unlike the *Allison* court, however, the Second Circuit concluded that the question of predominance was one that should be left to the discretion of the district court in the individual case. The predominance analysis, explained the Second Circuit, should focus on whether "the positive weight or value to the plaintiffs of the

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67. *Id.* at 432 (quoting *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 251 (3d Cir. 1975) (internal quotations omitted)).

68. *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 162-67 (2d Cir. 2001).

69. *Id.* at 155.

70. *Id.*

71. *Robinson v. Metro-North Commuter R.R.*, 197 F.R.D. 85, 85-88 (S.D.N.Y. 2000).

72. *Robinson*, 267 F.3d at 157.

injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed.”<sup>73</sup> The court explained that a judge evaluating the significance of the injunctive relief to the plaintiffs should examine whether a reasonable plaintiff would seek injunctive or declaratory relief on the particular claim even if the money damages were not available. Further, the court should inquire whether the injunctive or declaratory relief sought is a ‘sham’ – that is, if plaintiffs succeed, would the requested relief actually be necessary and appropriate.<sup>74</sup> If the answers to these two questions are affirmative, the court should certify under (b)(2). Other courts have taken an approach similar to the Second Circuit’s, urging that courts should not “read the Rules of Civil Procedure as eviscerating the substantive rights granted by Congress [in the 1991 Act].”<sup>75</sup>

Of course, the Second Circuit’s approach sacrifices simplicity for flexibility.<sup>76</sup> But many courts have declined to adopt a rule that any suit requesting compensatory and punitive damages is inappropriate for 23(b)(2) certification, and have decided, like the Second Circuit, that the benefits gained in flexibility and in ensuring full enforcement of civil rights laws outweigh the efficiency concerns that weighed so heavily in *Allison*.<sup>77</sup> A number of courts and commentators have responded to the perceived tension between the new rights granted in the Civil Rights Act of 1991 and the requirements of Rule 23(b) by arguing for different hybrid forms of class certification.<sup>78</sup> These hybrid classes take advantage of the well-established process for bifurcating employment

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73. *Id.* at 164 (remanding for certification of disparate impact claim under Rule 23(b)(2) and consideration of pattern or practice claim for certification under the same or bifurcation) (internal quotations and citations omitted).

74. *Id.*

75. *Reeb v. Ohio Dept. of Rehab. & Corr.*, 203 F.R.D. 315, 323 (S.D. Ohio 2001).

76. *See, e.g.,* Meghan E. Changelo, *Reconciling Class Action Certification with the Civil Rights Act of 1991*, 36 COLUM. J.L. & SOC. PROBS. 133, 151 (2003) (“While the *Robinson* court’s ‘ad hoc balancing’ test, with additional provisions for notice and the right to opt out, preserves the class action device for plaintiffs bringing a Title VII employment discrimination claim, it does so at the expense of simplicity.”).

77. *Reeb*, 203 F.R.D. at 323; *Miller v. Baltimore Gas & Elec. Co.*, 202 F.R.D. 195, 199 (D. Md. 2001); *Robinson v. Sears, Roebuck & Co.*, 111 F. Supp. 2d 1101 (E.D. Alaska 2000); *Hoffman v. Honda of Am.*, 191 F.R.D. 530, 537 (S.D. Ohio 1999); *Warnell v. Ford Motor Co.*, 189 F.R.D. 383, 389 (N.D. Ill. 1999); *Martens v. Smith Barney*, 181 F.R.D. 243, 259-61 (S.D.N.Y. 1998); *Orlowski v. Dominick’s Finer Foods*, 172 F.R.D. 370, 374 (N.D. Ill. 1997); *Butler v. Home Depot*, No. C-94-4335 SI, 1996 U.S. Dist. LEXIS 3370, at \*13-15 (N.D. Cal. 1996); *Arnold v. United Artists Theatre Circuit*, 158 F.R.D. 439, 464 (N.D. Cal. 1994).

78. *See* Changelo, *supra* note 72 at 152-162; Robert M. Brava-Partain, *Due Process, Rule 23 and Hybrid Classes: A Practical Solution*, 52 HASTINGS L.J. 1359, 1363-78 (2002) (discussing different forms of hybrid certification).

discrimination class litigation into a liability phase and a remedy phase.<sup>79</sup> They also have a solid basis in provisions of Rule 23 that provide courts with discretion to manage class litigation to ensure a balance between systemic efficiency concerns and fairness to all parties involved in the litigation. Rule 23(c)(4), for example, provides that “[w]hen appropriate . . . an action may be brought or maintained as a class action with respect to particular issues” or “may be divided into subclasses.”<sup>80</sup> And 23(d) gives courts broad authority to “make appropriate orders” to ensure efficiency, cohesiveness, and adequate representation of absent class members.<sup>81</sup>

Relying on this authority, courts have taken a variety of approaches. Some have concluded that the best approach in employment discrimination class actions seeking both significant injunctive relief and punitive and compensatory damages for individual class members is to certify the questions of class-wide liability under 23(b)(2), and the individual claims for relief under 23(b)(3).<sup>82</sup> Others have chosen to certify a class under (b)(2) or (b)(3) for liability, and to defer the question of how to handle the damages claims.<sup>83</sup> In each of these cases, courts have been attentive to the due process rights of absent class members, and many have required that plaintiffs receive notice and an opportunity to opt out of the class to pursue their own individual claims.<sup>84</sup>

Without endorsing one from among this variety of approaches to handling post-1991 certification of employment discrimination class

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79. See *supra* notes 13-20 and accompanying text.

80. FED. R. CIV. P. 23(c)(4). Also see the Manual of Complex Litigation, which notes that “the class certification may be limited to the [Rule 23](b)(2) issue (class-wide liability and injunctive relief), with all other claims proceeding as separate actions, but contingent on the outcome of the (b)(2) trial.” MANUAL OF COMPLEX LITIGATION, § 33.54 (3d ed. 1995).

81. FED. R. CIV. P. 23(d).

82. See, e.g., *Osgood v. Harah’s Entm’t, Inc.*, 202 F.R.D. 115, 128 (D.N.J. 2001).

83. See, e.g., *Morgan v. United Parcel Servs. of Am., Inc.*, 169 F.R.D. 349, 358 (E.D. Mo. 1996); *Butler*, 1996 U.S. Dist. LEXIS 3370, at \*13-15. A similar alternative would be to certify the liability question under 23(b)(2) and simply leave individual plaintiffs to pursue their own damages claims, but with the benefit of the liability finding, assuming the plaintiff class wins the class litigation on liability. See *Changelo*, *supra* note 72, at 159-161.

84. See *Williams v. Burlington N.*, 832 F.2d 100, 104 (7th Cir. 1987); *Fontana v. Elrod*, 826 F.2d 729, 732 (7th Cir. 1987). In *Ticor Title Insurance Co. v. Brown*, 511 U.S. 117, 122 (1994), the Supreme Court intimated that when individual plaintiffs have claims for money damages, they must be permitted to opt out of a class action and to pursue their own claim if they wish. Although many people read the Court’s decision in *Ticor Title* as suggesting that suits for money damages can only be certified under Rule 23(b)(3) because of that provision’s notice and opt-out safeguards, this argument goes too far. Because Rule 23(d) allows courts to require notice and opt-out provisions in the context of a particular class, it ensures that courts can protect individual rights in 23(b)(2) class actions as well.

actions, one can observe that the addition of compensatory and punitive damages to the range of remedies available to successful Title VII plaintiffs was not necessarily fatal to certification of a class.

*B. The Right to a Jury Trial*

A second problem that some have identified with certifying employment discrimination class actions in the wake of the Civil Rights Act of 1991 is the newly established right to a jury trial in cases of intentional discrimination. This argument has two different iterations: first that a class alleging intentional discrimination cannot be divided into a liability phase and a remedial phase, unless the same jury hears both;<sup>85</sup> and second, that disparate impact and disparate treatment claims cannot be brought together in the same case because the judge's findings on the disparate impact claims (for which there is no jury trial right) would inappropriately trample on the jury's authority to find facts in the context of the disparate treatment claim.<sup>86</sup> Neither of these arguments holds the power current detractors of employment discrimination classes have assigned it.

The Reexamination Clause of the Seventh Amendment provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States other than according to the rules of the common law."<sup>87</sup> Because either party in a Title VII suit claiming intentional discrimination may now request a jury, the requirements imposed by this Clause will almost certainly come in to play in a disparate treatment class action. The concern that this raises is what impact the Clause may have on bifurcation of the liability and damages phase of the litigation, typical for employment discrimination class litigation. Before 1991, bifurcation of liability and damages did not present any Seventh Amendment difficulties because Title VII suits were tried to the court, not to a jury. With the addition of a jury trial right, bifurcation becomes more complicated.

Some courts and commentators have argued that, in a Title VII case, the issues of liability and damages are not sufficiently "distinct and separable" that they can be tried to separate juries.<sup>88</sup> As one

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<sup>85</sup> See, e.g., Keith R. Fentonmiller, *Damages, Jury Trials and the Class Action Under the Civil Rights Act of 1991*, 12 LAB. LAW. 421, 438 (1997).

<sup>86</sup> See, e.g., Allison v. Citgo Petrol. Corp., 151 F.3d 402, 424-25 (5th Cir. 1998).

<sup>87</sup> U.S. CONST., amend. VII.

<sup>88</sup> See, e.g., Fentonmiller, *supra* note 85, at 437-39; Piar, *supra* note 55, at 337-341; Alabama v. Blue Bird Body Co., 573 F.2d 309, 318 (5th Cir. 1978) (holding that in order to bifurcate liability and damages proceedings, "the issue to be tried must be so distinct and separable

commentator has explained it: “liability and damages issues are only ‘distinct and separable’ when ‘the determination of the amount of damages in phase two becomes little more than an application of the formula found by the jury in phase one.’”<sup>89</sup> In the liability phase of a bifurcated employment class action, the individual claimants may present evidence that goes beyond formulaic application of any findings made by the first jury. Thus, this argument runs, in a bifurcated employment discrimination class action, the same jury would be required to hear not only the broad pattern-and-practice class claim, but also the evidentiary hearings that would resolve the question of each individual plaintiff’s entitlement to damages. This is an unworkable solution, as it could require exceptionally lengthy jury service, particularly in a class suit with hundreds, or even thousands, of plaintiffs.<sup>90</sup>

The Reexamination Clause does not, however, require that liability and damages be tried to the same jury. The Seventh Amendment does not prohibit separate juries from considering “overlapping” evidence, and it does not prohibit the same evidence from being presented to two different juries, so long as the two juries do not actually decide the same basic issues.<sup>91</sup> What the Seventh Amendment guarantees is that separate juries will not decide the same issue.<sup>92</sup> In the context of an employment discrimination class action, the question of whether an individual plaintiff has actually been injured does not require a jury to revisit the question of whether the defendant in fact has a discriminatory policy. In fact, several courts have approved the bifurcated approach.<sup>93</sup> If the jury in the liability phase of the proceedings finds no pattern or practice of intentional discrimination, the individual claimants are bound by that ruling and no jury can revisit the question. Of course, the plaintiffs can, as individuals, still bring claims alleging that they were themselves

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from the other that a trial of it alone may be had without injustice” because “inherent in the Seventh Amendment . . . is the general right of a litigant to have only one jury pass on a common issue of fact”). *But see* CHARLES A WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE*, § 1801, at 461 (2d ed. 1986) (“[A]lthough it is preferable that the issues [of damages and liability] be presented to the same jury, this does not seem to be constitutionally required.”).

89. Fentonmiller, *supra* note 85, at 439 (quoting *Greenhaw v. Lubbock County Beverage Ass’n*, 721 F.2d 1019, 1025 (5th Cir. 1983), overruled in part by *International Woodworkers of America v. Champion International Corp.*, 790 F.2d 1174, 1181 n.8 (5th Cir. 1986)).

90. *See* Wolf, *supra* note 57, at 1856 (noting the difficulty with extended juror service).

91. *See In re Paoli R.R. Yard*, 113 F.3d 444, 452-53 n.5 (3rd Cir. 1997); *In re Innotron Diagnostics*, 800 F.2d 1077, 1086 (Fed. Cir. 1986).

92. *See* *Houseman v. U.S. Aviation Underwriters*, 171 F.3d 1117, 1126 (7th Cir. 1999).

93. *See* *Butler v. Home Depot*, No. C-94-4335 SI, 1996 WL 421436, at \*6 (N.D. Cal. 1996); *EEOC v. McDonnell Douglas Corp.*, 960 F. Supp. 203, 205 (E.D. Mo. 1996).

discriminated against, not because of a pattern or practice of discrimination, but through particular behavior with regard to their employment.<sup>94</sup> But they cannot relitigate the question of whether the employer had a pattern of discrimination against the particular class of employees. Similarly, if an employer is found to have a policy or practice of intentional discrimination, that finding is binding on the employer in the subsequent litigation of the individual claims of employees. The employer cannot argue that such a policy does not exist, and therefore the second jury cannot be asked to re-investigate the issue decided by the first jury. Instead, the second jury will be asked to find facts about the individual employment decisions; accepting the pattern of discrimination as a proven fact, the second jury will inquire whether actions taken towards a particular plaintiff were the result of that policy or not. Given this structure for a bifurcated employment class, there is no reason a class suit alleging intentional discrimination should run afoul of the Seventh Amendment.<sup>95</sup>

The constitutional jury trial right presents a slightly different issue when a class alleges both disparate impact and disparate treatment discrimination. This was the situation the court faced in *Allison*, where the plaintiffs requested not a bifurcation of the liability and remedy phases of the proceedings, but a bifurcation in which their disparate impact claims were certified for class resolution, with the disparate treatment claims put to the side to be handled after resolution of the disparate impact case.<sup>96</sup> The Civil Rights Act of 1991 guarantees a jury trial for disparate treatment, but not for disparate impact claims.<sup>97</sup> The plaintiffs in *Allison* therefore argued that separating the proceedings and considering only the disparate impact claims without a jury would avoid any Seventh Amendment difficulty. The Fifth Circuit, however, disagreed. The reason for the court's disagreement can be found in the

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94. *Cooper v. Fed. Reserve Bank*, 467 U.S. 867, 880 (1984).

95. *See, e.g., McDonnell Douglas*, 960 F. Supp. at 205. The Court addressed this issue by stating:

[T]he issues to be decided at the separate trials are wholly distinct. At the liability trial, the question is whether the employer engaged in a pattern or practice of discrimination. The only fact issue for the jury to decide is whether unlawful discrimination was the employer's regular procedure or policy. Once that issue has been decided, it is conclusively established. At the damages trial, the question is whether the individual class members are entitled to relief. The fact issues for the jury to decide are whether the individual employment decisions were made pursuant to the previously established discriminatory policy.

*Id.*

96. *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 424-25 (5th Cir. 1998).

97. *See* 42 U.S.C. § 1981a.

proof structures of disparate impact and disparate treatment claims. In order to win a disparate impact claim, plaintiffs must demonstrate that the employer uses some policy or practice that has a negative impact on a protected class.<sup>98</sup> The employer can then avoid liability by demonstrating that the challenged practice is job related and reasonably necessary to the employer's business.<sup>99</sup> In a disparate treatment case, the employer, confronted with plaintiffs' prima facie case of discrimination, must articulate some legitimate non-discriminatory reason for the adverse employment action.<sup>100</sup> Considering these two proof structures, the Fifth Circuit concluded that:

It is the rare case indeed in which a challenged practice is job-related and a business necessity, yet not a legitimate non-discriminatory reason for an adverse employment action taken pursuant to that practice. Thus, a finding that a challenged practice is job-related and a business necessity in response to a disparate impact claim strongly, if not wholly, implicates a finding that the same practice is a legitimate non-discriminatory reason for the employer's actions in a pattern or practice claim.<sup>101</sup>

The court thus determined that "significant overlap of factual issues is almost inevitable whenever disparate impact and pattern or practice claims are joined in the same action."<sup>102</sup> The Fifth Circuit's concern, which has been echoed elsewhere, certainly raises a potential barrier to structuring class litigation in the manner proposed by the *Allison* plaintiffs. But it does not pose an impediment to class litigation of employment discrimination claims as a general matter. Moreover, the problem identified by the Fifth Circuit would be eliminated by allowing the jury to consider the disparate treatment claims before a judge considered the allegations of disparate impact discrimination. If the claims are pursued in that order, "a jury will resolve common factual disputes and its resolution will control when the judge takes up" the disparate impact claim.<sup>103</sup> As with the objections to consideration of punitive and compensatory damages in class litigation, the difficulties posed by the 1991 Act's jury trial provision are simply not sufficient to kill the employment discrimination class.

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98. See 42 U.S.C. § 2000e-2(k)(1)(a)(i).

99. *Id.*

100. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973) (setting forth proof structure in a disparate treatment case).

101. *Allison*, 151 F.3d at 424.

102. *Id.*

103. *Allen v. Int'l Truck and Engine Corp.*, 358 F.3d 469, 471-72 (7th Cir. 2004).

### III. WHAT IS GOING ON HERE?

Those courts and commentators who have concluded that employment discrimination class actions are essentially impossible in light of the 1991 Civil Rights Act are dramatically overstating the problems created by that law's added remedies. But the impulse to curtail the availability of employment discrimination class actions is obviously strong, and it is interesting to explore what might lie behind this impulse. I believe that a number of factors have contributed to the decline in popularity of the employment discrimination class: hostility to class litigation generally; a perception that class action suits are no longer needed in the employment context; and a deep anxiety about the substance of the claims being brought in these class suits.

#### *A. The Perception that Class Actions are Unfair*

Like the "trial lawyer," the class action is an unpopular creature right now. Although the number of class actions being filed around the country seems to be growing, the criticisms of class actions are growing even faster, and many commentators have observed "a significant and increasing hostility to the class action mechanism" as "a broad trend in American courts today."<sup>104</sup> Lawyers, judges, academics, and the media complain that class actions are used to force settlement of meritless claims; that they are primarily tools of collusion between defendants and plaintiffs' counsel; and that absent plaintiffs are not adequately represented by plaintiffs' counsel who seek only whatever resolution will maximize their attorney's fees.<sup>105</sup> As one lawyer has put it:

Class actions are supposed to be an efficient way to resolve in one lawsuit similar legal claims held by numerous people. Instead, class action litigation has become a money-making bonanza for plaintiffs'

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104. Stephen D. Susman, *Class Actions: Consumer Sword Turned Corporate Shield*, 2003 U. CHI. LEGAL F. 1, 2 (2003). See also Bruce Hay & David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1377 (2000) ("[C]lass actions are without doubt the most controversial subject in the civil process today.").

105. See, e.g., Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 77 (2003) ("Thus, what purports to be a class action, brought primarily to enforce private individuals' substantive rights to compensatory relief, in reality amounts to little more than private attorneys acting as bounty hunters . . ."); Piar, *supra* note 55, at 343-44 (arguing that the goals of class actions "are routinely trampled in class litigation. Class actions are frequently settled for reasons having nothing to do with their merits: faced with potentially overwhelming liability, bad publicity, and enormous legal fees (even if it prevails), an employer may capitulate and settle the case even though it may lack merit and even though it may ultimately not be maintainable as a class action.").

lawyers, who often persuade state courts to sanction sweetheart settlements that result in million-dollar fees for the lawyers but provide little or no actual benefit to their clients, the actual class members.<sup>106</sup>

At the heart of these complaints rest primarily two concerns: the first is a concern that the rights of plaintiffs – particularly unnamed plaintiffs – are not being protected, and especially that the class action device may be denying these plaintiffs their constitutionally protected right to due process.<sup>107</sup> The second is a concern that defendants are being coerced into large settlements in cases without any real merit.<sup>108</sup> These concerns have spawned various proposals for reform of Federal Rule of Civil Procedure 23 within the federal legislature.<sup>109</sup> And they have filled pages and pages of academic journals with criticism of every aspect of class litigation.<sup>110</sup> But, whatever the merits of these criticisms might be in the context of mass tort or other similar class litigation, they are largely inapt as applied to employment discrimination claims.

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106. *Civil Procedure – Class Actions, Fair Federal Forums Should Decide Interstate Class Actions*, U.S. LAW WK., Aug. 29, 2000.

107. *See, e.g.*, Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 163 (2003) (“A staple of the class action literature is the recognition that class counsel might embrace a settlement inadequate for all, many, or some class members.”).

108. As George Priest recently noted:

[A]ccording to common belief . . . there are no mass tort class actions that are ever litigated. They are all settled. There is no success rate one way or another for plaintiffs or defendants in mass tort class actions because, once a class action is certified, because of the assured destructive capability of that class action [in the mass tort context] the defendants always settle.

George Priest, *The Economics of Class Actions*, 9 KAN. J. LAW & PUB. POL. 481, 482 (2000). Priest observed that circumstances are “quite different in the context of civil rights class actions where damages are not at issue.” *Id.* If, however, the argument is that damages have become an issue post-1991, then his point regarding class certification and its effect on settlement may apply in employment cases.

109. Every year for the past several years, Congress has considered proposals to federalize class actions. The most recent such proposal was the Class Action Fairness Act. H.R. 1115, 108th Cong. (2003); S. 274, 108th Cong. (2003). The House and Senate bills are essentially the same. *See generally* David R. Clay, *Federal Attraction for the Interstate Class Action: The Effect on Devlin v. Scardelletti and the Amendments to Federal Rule of Civil Procedure 23(e) on Class Action “Minimal Diversity” Concerns*, 52 EMORY L. J. 1877, 1883-84 (2003) (providing a brief overview of legislative efforts to modify class action requirements). In addition, new provisions of Rule 23 took force in December 2003 that directly address attorney’s fees and appointment of class counsel. *See* FED. R. CIV. P. 23(e), (g).

110. The number of articles on class litigation is much too high to cite realistically. However, as Martin Redish recently noted, citing a few well-known articles: “Much of the scholarly commentary has been highly critical of the modern class action.” *See* Redish, *supra* note 105, at 73.

## 1. Blackmail Settlements

The perception that class actions are used to force defendants to settle meritless cases has led many courts to take a more dubious look at the class actions presented to them.<sup>111</sup> Courts themselves now refer to settlements in the class action context as “blackmail settlements,”<sup>112</sup> “legalized blackmail,”<sup>113</sup> and “judicial blackmail.”<sup>114</sup> As the Eleventh Circuit put it, reversing a grant of certification to a class of Jewish customers who alleged they had been denied corporate contracts by Avis Rent-a-Car, “there is nothing to be gained by certifying this case as a class action; nothing, that is except the blackmail value of a class certification that can aid the plaintiffs in coercing the defendant into a settlement.”<sup>115</sup> This perspective has become so pervasive that “[h]ydraulic pressure . . . to settle’ is now a recognized objection to class certification.”<sup>116</sup>

The impact of judicial hostility to class actions is exacerbated by the interlocutory review provisions of the relatively new Rule 26(f), which allows an appellate court to grant an immediate review of a district court’s certification decision.<sup>117</sup> The rule itself does not provide clear standards for when appellate courts should grant interlocutory review. However, a number of courts of appeals have concluded that

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111. In an exceptionally interesting article, Charles Silver, Codirector for the Center on Lawyers, Civil Justice and the Media at the University of Texas School of Law, has set forth a detailed evaluation of the different theories articulated by judges in support of the “blackmail” thesis. Charles Silver, “*We’re Scared to Death*”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1357 (2003).

112. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995), *cert. denied*, 516 U.S. 867 (1995).

113. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995).

114. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). *See In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002) (“Aggregating millions of claims on account of multiple products manufactured and sold across more than ten years makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims.”); *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002); *Parker v. Time Warner Entm’t Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (“We acknowledge Judge Glasser’s legitimate concern that the potential for a devastatingly large damages award, out of all reasonable proportion to the actual harm suffered by members of the plaintiff class . . . [may produce] an *in terrorem* effect on defendants, which may induce unfair settlements.”); *Newton v. Merrill Lynch*, 259 F.3d 154, 168 (3d Cir. 2001) (noting that “granting certification may generate unwarranted pressure to settle nonmeritorious or marginal claims”).

115. *Rutstein v. Avis Rent-a-Car Sys., Inc.*, 211 F.3d 1228, 1240 n.21 (11th Cir. 2000).

116. *See Silver, supra* note 111, at 1358 (quoting *Newton v. Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001)).

117. FED. R. CIV. P. 26(f).

such review would be appropriate when a district court's certification of the class would make settlement all but a certainty because the defendant would feel that settlement was its only option.<sup>118</sup> In fact, Judge Easterbrook has argued that "[p]ermitt[ing] appellate review before class certification can precipitate such a settlement is a principal function of Rule 23(f)."<sup>119</sup> Thus, Rule 23(f) gives appellate judges an opportunity to reverse the decisions of district courts where they perceive the class action as too costly to the defendant.<sup>120</sup> In practice, Rule 26(f) has become "a one-way ratchet for defendants."<sup>121</sup>

While these criticisms of class actions have traditionally been applied primarily to mass tort litigation and other similar suits, some commentators have argued that the changes wrought by the 1991 Civil Rights Act have created the same kinds of problems in the context of employment discrimination class litigation. The idea is that the increased damages available – up to \$300,000 for each plaintiff in a disparate treatment suit – has dramatically increased "the risk that the monetary exposure presented by the availability of compensatory and punitive damages to each class member will force defendants to settle regardless of any wrongdoing."<sup>122</sup> Indeed, the *Allison* court quite explicitly expressed concern about the possibility that certification in that case might be used to force settlement. In affirming the district

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118. See, e.g., *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834-35 (7th Cir. 1999). Courts also find interlocutory review appropriate when a district court denial of certification would make prosecution of individual cases unlikely because of the costs to each individual plaintiff and when a new legal question is presented in the context of the certification. See *id.* at 835. See also *In re Sumito Copper Litig. v. Credit Lyonnaisse Rouse, Ltd.*, 262 F.3d 134, 138-40 (2d Cir. 2001); *Newton*, 259 F.3d at 163-65; *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138, 143-46 (4th Cir. 2001).

119. *Bridgestone/Firestone*, 288 F.3d at 1016. See *West*, 282 F.3d at 937 ("The effect of a class certification in inducing settlement to curtail the risk of large awards provides a powerful reason to take an interlocutory appeal.")

120. See, e.g., *Susman*, *supra* note 104, at 5 ("Rule 23(f) essentially gives an appellate court complete license to retry the certification question and substitute its judgment for that of the trial judge.")

121. *Silver*, *supra* note 111, at n.8. See Jennifer K. Fardy, *Disciplining the Class: Interlocutory Review of Class Action Certification Decisions Under Rule 23(f)*, 13 A.B.A. SEC. LITIG. COMM. ON CLASS ACTIONS & DERIVATIVE SUITS 3, 9 (2003) (reporting that as of that time, federal circuit courts had granted thirty-two petitions for interlocutory review, and that no 23(f) appeal had led to the reversal of a district court's denial of class certification).

122. *Piar*, *supra* note 55, at 343. See Brief of Amicus Curiae Equal Employment Advisory Council at 17, *Home Depot U.S.A. v. U.S. Dist. Ct.*, *cert. denied*, 520 U.S. 1103 (Mar. 3, 1997) (No. 96-943) ("Once a class is certified, setting up the prospect for huge litigation expenses and creating the risk of a billion dollar judgment, cases are likely to settle before the merits of the claims of discrimination are even explored. In the end, nobody knows whether the employer discriminated or not—only that it paid a lot of money to get out of a no-win situation in which it never should have been placed.")

court's denial of certification, the Fifth Circuit cautioned: "we should not condone a certification-at-all-costs approach to this case for the simple purpose of forcing a settlement. Settlements should reflect the relative merits of the parties' claims, not a surrender to the vagaries of an utterly unpredictable and burdensome litigation procedure."<sup>123</sup>

The powerful effect of this fear that class certification will operate as judicially sanctioned blackmail requires more consideration of the merits of the claims underlying the fear. Is it accurate, in general, and particularly in the context of employment discrimination suits, that class certification will compel defendants to settle meritless cases? There is substantial persuasive evidence that the claim is "unsupported on any basis currently articulated in judicial opinions or legal scholarship."<sup>124</sup> For example, in an empirical study, researchers for the Federal Judicial Center found that "rulings on motions and [established] case management practices limit[] the ability of a party to coerce a settlement without regard to the merits of the case," and that there is not support for the claim that "the certification decision itself, as opposed to the merits of the underlying claims, coerce[s] settlements with any frequency."<sup>125</sup>

Those who raise the specter of the blackmail settlement often point to multi-million dollar settlements in employment discrimination cases to make their point.<sup>126</sup> But these large settlements cannot, without more information, support the charge that employment class suits are being settled by inappropriate coercion.<sup>127</sup> The fact of a large settlement is

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123. *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 422 n.17 (5th Cir. 1998).

124. Warren F. Schwartz, *Long-Shot Class Actions: Toward a Normative Theory of Uncertainty*, 8 LEGAL THEORY 297, 298 (2002). See Hay & Rosenberg, *supra* note 104, at 1379 (concluding that "the risks of . . . blackmail settlements have been overstated"); David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 430 (2000) (expressing "doubt that litigation class actions . . . exert systemic blackmail pressure against defendants"); Silver, *supra* note 111, at 1359 ("[M]any academics deny that class actions give claimants excessive leverage over defendants.").

125. THOMAS E. WILLGING ET AL., FEDERAL JUDICIAL CENTER, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 61 (1996).

126. See, e.g., Shively, *supra* note 29, at 925 & n.1, 927 & n.16; Piar, *supra* note 55, at 335 & nn.120 & 122. (suggesting that district courts may certify with the specific intent to force settlement and mentioning two large employment discrimination class actions that settled after initial certification of the class).

127. Many of the well-known recent settlements were in suits brought by the Equal Employment Opportunity Commission. The EEOC prosecutes a relatively small number of cases each year, and has a thorough process in place to evaluate the merits of claims. It seems unlikely that the EEOC would be forcing settlement of claims lacking any valid basis. In any event, settlement of EEOC cases cannot support any claim that Rule 23 certification of private employment classes is inappropriate, as the EEOC is not obligated to satisfy the requirements of Rule 23 in bringing a pattern-and-practice claim against an employer. See *supra* note 13.

only evidence of a “blackmail class” if there was no good basis on the merits for the defendant to settle. Quite to the contrary, the factual background of some of the most infamous recent employment discrimination class settlements suggest that the defendants were wise to settle not because of the coercive effects of class certification but because the plaintiffs had strong evidence on the merits of their claims.<sup>128</sup>

It seems likely that the perception that employment discrimination class actions are bad things is part of the:

general misperception, one that has been fueled by the popular anti-employment discrimination rhetoric often financed by conservative interest groups, [that] strongly influences courts’ perception of the cases. This general misperception is that employment cases are easy – not difficult – to win, and the volume of discrimination cases is said to reflect an excessive amount of costly nuisance suits.<sup>129</sup>

The conviction that plaintiffs easily win employment discrimination suits and that settlement is being coerced certainly increases hostility to these claims. In fact, employment discrimination cases are quite difficult for plaintiffs to win.<sup>130</sup> The empirical evidence suggesting how

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128. This is not the forum for cataloging all of the employment discrimination claims that have settled with significant press in recent years. But, a couple of examples might be instructive. One of the most famous race discrimination settlements in U.S. employment litigation was the payment that Texaco made to members of a class of African American employees in 1996. At that time, the upper management of Texaco was almost entirely white; no black employee had ever held a job in the highest pay grade; and of 873 high paid executives, only six were black. Kurt Eichenwald, *The Two Faces of Texaco*, N.Y. TIMES, Nov. 10, 1996, at A1. While the suit was pending, executives of Texaco held a meeting (allegedly to discuss the destruction of documents that they did not want to turn over in discovery) that was tape-recorded by someone in attendance. The tape of that meeting appears to show a number of executives using racial epithets. See Kurt Eichenwald, *Texaco Executives, On Tape, Discussed Impeding a Bias Suit*, N.Y. TIMES, Nov. 4, 1996, at A1. Texaco settled the suit, paying members of the class \$115 million in damages and promising to spend considerable sums to improve the pay structure and climate for African American employees at Texaco. See Press Release, Texaco, Texaco Announces Settlement in Class Action Lawsuit (Nov. 15, 1996), available at <http://www.texaco.com/sitelets/diversity/>. In another extremely recent example, occurring in early February of 2004, United Airlines settled a suit for \$36.5 million with a group of former female flight attendants. The flight attendants had charged the airline with discrimination because United had imposed weight restrictions that required women to weigh up to 27 pounds less than men of the same height. See Associated Press, *United Airlines ordered to Pay \$36.5 Million to Settle Sex-Discrimination Lawsuit*, (Feb. 12, 2004). United’s weight restrictions had been declared facially discriminatory just four years earlier, so the settlement in this most recent case seems quite tied to the merits of the plaintiffs’ claims. See *Frank v. United Air Lines*, 216 F.3d 845 (9th Cir. 2000).

129. Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 556 (2001).

130. See generally Selmi, *supra* note 129; see also David Benjamin Oppenheimer, *Verdicts*

difficult it is for a plaintiff to win an employment discrimination claim raises further questions about the legitimacy of “blackmail settlement” fears in this context.

## 2. The Rights of Absent Class Members

The second concern that has fueled substantial criticism of class action litigation in recent years is the possibility that the rights of absent class members are being ignored by the attorneys representing the class.<sup>131</sup> In employment discrimination class actions, concerns about absent class members are less significant because the definition of the class itself should ensure relatively easy notice procedures. In an employment suit, the class members are defined by their relationship to one particular employer. Given the Supreme Court’s imperative in *Falcon* that courts pay careful attention to the requirements of Rule 23(a),<sup>132</sup> class members may be defined even more narrowly to include only those employees in a particular geographic location. Reaching employees, and even former employees, will rarely present the kinds of notice problems that may exist in mass tort class suits, and that have contributed to the current criticisms. Of course, courts may ensure that notice is actually provided to absent class members. And it may be that in intentional discrimination suits, in which the plaintiffs seek compensatory and punitive damages, class members must be given an opportunity to opt out of the class and pursue their own claims. A number of courts certifying employment discrimination classes have reached this conclusion,<sup>133</sup> and their attention to the issue raises further doubts about the legitimacy of this concern as a barrier to certification.

### *B. The Perception that Class Actions in Employment are Unnecessary*

A second factor that may explain the willingness to effectively eliminate employment discrimination class actions is the widely held belief that class actions are no longer necessary to full enforcement of anti-discrimination laws. Prior to 1991, private systemic discrimination

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*Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 516-18 (2003).

131. See Nagareda, *supra* note 107, at 163; John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986); Darren Carter, *Notice and the Protection of Class Members’ Interests*, 69 S. CAL. L. REV. 1121 (1996).

132. See *supra* notes 21-28 and accompanying text.

133. See, e.g., cases cited in note 78.

suits were generally recognized as central tools in fighting unlawful behavior. Since 1991, however, a number of judges and academics have suggested that private employment discrimination classes are no longer essential for a number of reasons: 1) because the 1991 law increased the value of individual plaintiffs' claims, and therefore made individual suits more likely; 2) because individual suits can seek the same kind of injunctive relief that class action litigation would secure, and therefore make the kinds of sweeping change that class actions have traditionally been valued for doing; and 3) because the EEOC can bring pattern-and-practice claims where class litigation might be necessary, thus eliminating the need for the private class suit.<sup>134</sup>

While the "need" for class litigation of a claim may not be a justification for certifying a class, the perceived absence of that need certainly makes it easier to deny certification. In fact, Rule 23(b)(3) specifically requires judges to evaluate whether a class suit will be "superior to other methods for adjudication."<sup>135</sup> Certification under 23(b)(2) does not require the same evaluation, but it seems likely that judges considering whether to certify a class are moved in some part by their sense of the effectiveness or value of class litigation as compared to the alternatives.

Since the perception that class litigation is not needed may decrease the likelihood of certification, it becomes particularly important to understand whether the claims apparently demonstrating the diminished need for class litigation have support. To the contrary, much available evidence suggests that private class litigation is very much needed in the employment context. Perhaps most significantly, after losing the certification battle in these cases, plaintiffs often do not go on to pursue their own individual claims of discrimination.<sup>136</sup> Thus, class litigation of employment discrimination claims appears to allow individuals who would not otherwise challenge employer policies and decisions to do so.<sup>137</sup>

Moreover, the structure of proof in class action and government pattern-and-practice employment discrimination claims is different from

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134. See, e.g., Piar, *supra* note 55, at 346.

135. FED. R. CIV. P. 23(b)(3).

136. Stamps, *supra* note 56, at 445.

137. *Id.* at 445-46. Stamps suggests several possible explanations for individual decisions not to pursue their own claims. The expense of the suits, and uncertainties over the award of attorney's fees may make individual cases too risky for attorneys and therefore potential plaintiffs may be unable to find representation. Individual claimants may also wish to avoid personal involvement in litigation and the personal and professional hazards that attend suing an employer. *Id.*

the structure of proof in individual discrimination suits.<sup>138</sup> Because plaintiffs in individual suits do not have a “private, non-class cause of action for pattern or practice discrimination,” under Title VII,<sup>139</sup> the kinds of evidence they must bring forward to survive summary judgment are different from the evidence that would support a showing of a pattern of discrimination in the workforce. While a group of plaintiffs may be able to demonstrate that the employer operates a pattern of discrimination, this does not guarantee that any individual plaintiff will be able to prove that the particular decisions made regarding her employment were tainted by discrimination. An employer could, therefore, operate with a pattern of discrimination, yet still win one or more individual suits, depending completely on the identity of the particular plaintiff who chooses to file suit. Further, although plaintiffs in individual cases may present evidence of widespread discrimination in order to support their claims, the Federal Rules of Evidence may impose limits on what courts will allow an individual plaintiff to present about circumstances at a workplace that do not relate directly to any adverse action taken against that employee.<sup>140</sup> And finally, the relief sought in individual cases typically differs from the relief sought in government or private class cases.<sup>141</sup> The fact that an individual plaintiff *may* request an injunction that will benefit others in the same protected class as that plaintiff simply does not make individual discrimination suits as effective as class litigation in addressing patterns of discrimination.

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138. See, e.g., *Celestine v. Petroleos de Venezuela SA*, 266 F.3d 343, 355 (5th Cir. 2001); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 760 (4th Cir. 1998), *vacated on other grounds*, 119 S. Ct. 2388 (1999); *Babrocky v. Jewel Food Comm.*, 773 F.2d 857, 866-67 n.6 (7th Cir. 1985) (“Plaintiffs’ use of ‘pattern-or- practice’ language also seems to be misplaced, since such suits, by their very nature, involve claims of classwide discrimination, and the five plaintiffs, while attacking policies that would have affected all of Jewel’s women employees as a class, have stated only their individual claims, not a class action.”) (citations omitted); *Scarlett v. Seaboard Coast Line R.R.*, 676 F.2d 1043, 1053 (5th Cir. 1982) (“This is not a ‘pattern and practice suit’ by the government . . . [n]or is this a private class action . . . [a]n individual proceeding as an individual under Title VII must prove the elements of a discriminatory hiring claim as set forth in *McDonnell Douglas*.”); *Axel v. Apfel*, No. WMN 97-1614, 2000 WL 1593446, at \*6 (D. Md. 2000); *Herendeen v. Mich. State Police*, 39 F. Supp. 2d 899, 905 (W.D. Mich 1999).

139. *Lowery*, 158 F.3d at 760.

140. See FED. R. EVID. 403.

141. See, e.g., *Lowery*, 158 F.3d at 161 (“Class action pattern or practice suits differ from disparate treatment suits in the nature of their remedies . . . [T]he relief typically sought in class action pattern or practice suits is injunctive and may include such aspects as, for example, affirmative action plans and the altering of a seniority system. See 1 Larson, *Employment Discrimination* § 8.01[3], at 8-14 (2d ed.1994) . . . . On the other hand, in a private, non-class disparate treatment case . . . the relief typically sought involves reinstatement, hiring, back-pay, [and] damages.”).

Reliance on the EEOC to pursue systemwide discrimination is also a poor substitute for the “private attorney general” scheme that has long been central to enforcement of a variety of federal civil rights laws. The EEOC is a government agency, subject to the limitations on funding and the political uncertainties of any such entity. Moreover, the EEOC has often been criticized for its poor enforcement record.<sup>142</sup> And, even operating under the best of circumstances, the agency was not designed to challenge every instance of discrimination in U.S. employment. When Congress enacted Title VII, the legislature specifically intended that enforcement of the law would be split between private and governmental action. Indeed, one author has argued that “the crucial innovation in the 1964 Civil Rights Act was the enlargement of the role of the individual right to sue in the federal courts, rather than the enhancement of administrative agency powers.”<sup>143</sup> To abandon a significant part of the private side of this enforcement structure is to thwart that intent.

*C. The Concern that the Underlying Substantive Claims may Lack Merit*

I suspect that another factor affecting certification decisions, and contributing to criticisms of class litigation in employment cases, is the substance of the underlying claims. Many employment discrimination class claims today include allegations that the employer used excessively subjective decisionmaking processes that led to discrimination throughout the workplace.<sup>144</sup> Indeed, both *Allison* and *Robinson* involved primarily these subjective decisionmaking claims.<sup>145</sup> These claims are certainly cognizable under Title VII. More than 20 years ago, when the Supreme Court recognized a possible exception to the ban on across-the-board discrimination claims, it observed that “significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in the same general fashion, *such as through entirely subjective decisionmaking processes.*”<sup>146</sup> But the

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142. See, e.g., Clyde Summers, *Effective Remedies for Employment Rights*, 141 U. PA. L. REV. 457, 479-82 (1991); David L. Rose, *Twenty-Five Years Later: Where do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121, 1136 (1989).

143. ALFRED W. BLUMROSEN, *BLACK EMPLOYMENT AND THE LAW* 4 (1971) (citation omitted).

144. See Kramer, *supra* note 31, at 417 (“Allegations of employers’ ‘excessively subjective’ decisionmaking frequently form the basis of these class actions.”).

145. See *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 407-08 (5th Cir. 1998); *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 155 (2d Cir. 2001).

146. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982).

availability of a claim for excessively subjective decisionmaking has not translated into judicial comfort with the claim.<sup>147</sup> Many courts reject the claim all together, or acknowledge that a group of plaintiffs could in theory present sufficient evidence to make out the claim, but that the bar would be extremely high.<sup>148</sup>

Although the Supreme Court long ago held that courts should not consider the merits when evaluating whether to certify a class,<sup>149</sup> there is plenty of evidence that courts do not, and cannot, entirely separate the merits from the certification decision. Consideration of the merits of a claim may come up in several ways during the certification process. First, several of the Rule 23(a) factors are sufficiently intertwined with questions about the merits of the particular claim that it is extremely difficult, if not impossible, for courts to avoid some evaluation of the merits in determining whether to certify a class.<sup>150</sup> For example, the requirements of typicality, commonality and adequacy may raise doubts in a judge's mind about whether the underlying claims will be provable at all. Second, judges may simply conduct a quick evaluation of the claims being pushed by the plaintiff class and may, consciously or unconsciously, import their views about the merits into their evaluation of certification.

Several commentators have argued that it may not be such a terrible thing for courts to consider the merits of these claims in reaching their certification decisions.<sup>151</sup> I agree that there may be reason to give a

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147. For a more extended discussion of this issue, see Melissa Hart, *Subjective Decisionmaking in Employment Discrimination: Are There Problems Law Can't Solve?* (forthcoming, on file with author).

148. See, e.g., *Denney v. Albany*, 247 F.3d 1172, 1186 (11th Cir. 2001) ("It is inconceivable that Congress intended antidiscrimination statutes to deprive an employer of the ability to rely on important criteria in its employment decisions merely because those criteria are only capable of subjective evaluation."); *Sattar v. Motorola, Inc.*, 138 F.3d 1164, 1170 (7th Cir. 1998) ("Nothing in Title VII bans outright the use of subjective evaluation criteria."); *Weihaupt v. Am. Med. Ass'n*, 874 F.2d 419, 429 (7th Cir. 1989); *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1427 (7th Cir. 1986); *Vitug v. Multistate Tax Comm'n*, 88 F.3d 506, 514 (7th Cir. 1986) ("But arbitrariness alone does not amount to discrimination. It is not enough for a plaintiff to demonstrate that an employment practice could theoretically be used to discriminate—Title VII does not forbid subjective selection processes."); *Richter v. Revco D.S., Inc.*, 959 F. Supp. 999 (S.D. Ind. 1997), *aff'd sub nom. Richter v. Hook-Superx, Inc.*, 142 F.3d 1024 (7th Cir. 1998).

149. *Eisen v. Carlisle & Jaquelin*, 417 U.S. 156, 177 (1974).

150. See, e.g., Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1266 (2002) ("In fact, judges sometimes do probe behind the allegations and examine supporting evidence to determine whether Rule 23's requirements are satisfied.")

151. See Priest, *supra* note 108, at 483 ("If the economic power of the certification of the class is such that, if certified, the defendant will settle on some terms, then it seems to me that it's necessary in order to achieve the goals of justice in our society, to evaluate the merits of the claims as to whether the claims have sufficient merit on their face without a lot of discovery and to

quick look at the merits of the underlying claims before sending the parties and the court through the enormous expense of litigation. But more importantly, if courts do, as I suspect they do, already consider the merits in reaching their certification decisions, that fact should be acknowledged. It would be better to have frank discussion about the substantive claims themselves than to hide that discussion in a Rule 23 analysis that cannot benefit the development of either the procedural or the substantive law.

#### IV. CONCLUSION

When the Fifth Circuit decided *Allison* almost six years ago, civil rights advocates feared that its bright-line rule against certification of employment discrimination class actions would take hold throughout the country and would signal the end of one of the primary mechanisms for enforcement of Title VII. In fact, while some courts have adopted analyses similar to the Fifth Circuit's, decisions like that of the Second Circuit in *Robinson* have provided an attractive alternative interpretation of the interaction between Rule 23 and the Civil Rights Act of 1991. But, even though *Allison* did not herald the demise of the employment discrimination class, the opinion raises interesting questions about current judicial attitudes to class action litigation, both in employment discrimination and more generally. The current hostility to class litigation rests on a number of assumptions that do not withstand scrutiny, at least in employment discrimination suits. Unfortunately, the inaccuracy of these assumptions does not diminish the powerful impact that hostility to class litigation might have on the development of both Rule 23 doctrine and the underlying substantive guarantees of the civil rights laws.

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examine whether the claims have sufficient potential merit to justify the creation of great economic power through class certification.”); Bartlett H. Maguire, *The Death Knell for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366, 368-70 (1996); Douglas M. Towns, *Merit-Based Class Action Certification: Old Wine in a New Bottle*, 78 VA. L. REV. 1001, 1028-29 (1992) (arguing for permitting consideration of the merits as part of the certification decision).