NOTICE, SCOPE, AND PRECLUSION IN TITLE VII CLASS ACTIONS

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CONTROVERSY over class actions under Title VII of the Civil Rights Act of 1964 has focused on the principle of liberal certification: that Title VII cases are particularly appropriate for certification as "across the board" class actions challenging a broad range of employment practices because employment discrimination is "by definition" class discrimination. Adherence to this principle has been uneven and the reasons for accepting it are doubtful. These reasons have become still more doubtful after the recent decision of the United States Supreme Court in General Telephone Co. v. Falcon, in which the Court reversed certification of a Title VII class action for undue reliance on the principle of liberal certification. As the Court stated, "The District Court's error in this case, and the error inherent in the across-the-board rule, is the failure to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a)."

Whether or not the Supreme Court has eliminated the independent force of the principle of liberal certification, or only repeated an earlier warning that "careful attention to the requirements of

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In the last stages of writing this article, I participated in the preparation of oral argument for General Telephone Company of the Southwest in General Tel. Co. v. Falcon, 102 S. Ct. 2364 (1982). The views expressed in this article, however, are my own.

2 For the statement of one court that has espoused this position, see Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968).
3 I have discussed these points at length in an earlier article. See Rutherglen, Title VII Class Actions, 47 U. Chi. L. Rev. 688 (1980).
4 102 S. Ct. 2364 (1982).
5 Id. at 2372.
Fed. Rule Civ. Proc. 23 remains nonetheless indispensable," it has left unresolved, indeed largely unaddressed, many of the questions that regularly arise in Title VII class actions. Is certification necessary to obtain injunctive relief on behalf of a class of employees? Must class members be given individual notice and the right to opt out of the class action? If the district court certifies a class action, how should it define the scope of the class? What is the preclusive effect of a judgment in a class action on subsequent claims by class members?

No single abstract principle, endorsed or condemned by a court of last resort, can resolve these questions. "General propositions do not decide concrete cases." Still less do they determine every aspect of complex class litigation. Neither the principle of liberal certification, nor its mirror image, the principle of conservative certification, takes account of the claims asserted on behalf of the named plaintiff and the class. Both are defective because they apply without regard to the claims before the court. Although some Title VII claims are amenable to certification as class actions, others are not. The theory of disproportionate adverse impact of Griggs v. Duke Power Co. facilitates claims that an employment practice has an adverse effect on an entire class of employees. Other theories of liability, such as the theory of intentional discrimination of McDonnell Douglas Corp. v. Green, are best suited for individual actions. Arguments for the principle of liberal certification generalize too readily from the insight that Title VII favors recovery by plaintiffs with substantial, but not clearly meritorious claims. This insight does not support liberal certifica-

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* 401 U.S. 424 (1971). The theory of disproportionate adverse impact places on the plaintiff the burden of proving that an employment practice has a disproportionate adverse impact on employees of a particular race, sex, or national origin. If the plaintiff meets this burden, then the defendant must show that the practice is justified by "business necessity" or that it is "related to job performance." Id. at 431. If the defendant meets this burden, then the burden shifts back to the plaintiff to show that the practice is a pretext for discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).
* Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 274 n.10 (4th Cir. 1980).
* The Supreme Court has elaborated on the burdens of proof with respect to claims of individual discrimination in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981), and Board of Trustees v. Sweeney, 439 U.S. 24, 25 (1978).
tion of class actions, but an examination of the claims actually advanced by the plaintiff in a particular case. If a limited examination of the merits reveals that the claims asserted by the named plaintiff favor class-wide recovery, then the court should certify a class action. Otherwise it should not.

The supplementary rules needed to decide concrete cases arise naturally from a limited examination of the merits before certification. On the issue of scope, for instance, the class can be defined naturally by comparing the substantial claims of the named plaintiff with those of the class. If these claims are likely to require diverging evidentiary or legal support, or to result in conflicting relief, then the risk of inadequate representation requires denial of certification, certification of a narrower class, or certification of subclasses. Examining the claims of the named plaintiff and the class allows realistic comparison of these alternatives. Is a broad class action likely to result in representation substantially worse than in individual actions or in a narrower class action? If so, the court should certify a narrower class, certify separate subclasses, or deny certification altogether.

The particular rules that govern Title VII class actions depend on the fundamental constitutional requirement of adequate representation of class members. It is primarily a requirement of fairness to class members, but because the judgment in a class action is binding on class members only if they are adequately represented, it is also a condition of efficient adjudication, or indeed of any valid class-wide adjudication at all. Standard formulations of the requirement of adequate representation have emphasized the competence of counsel and the absence of conflicts of interest between the named plaintiff and the class, but adequate representation requires more than a good attorney and a disinterested named plaintiff. It also requires similarity of interest between the named plaintiff and the class, a requirement usually subsumed

12 I have defended this proposal in an earlier article. See Rutherglen, supra note 3, at 724-36.

13 For a discussion of what constitutes a substantial claim, see id.


under a separate subdivision of rule 23 that requires the claims of the named plaintiff to be typical of the claims of the class. The similarity between the claims of the named plaintiff and those of the class provides some assurance that the named plaintiff, in advancing his own claims, also advances the claims of the class. In the words of the Supreme Court, the named plaintiff must "'possess the same interest and suffer the same injury' as the class members."17

Requiring the "same interest" and the "same injury," however, does little to clarify the standard of adequate representation. These terms can expand or contract at will. They leave unresolved the fundamental tension between two models of representation: representation in an individual action and representation in the most efficient form of class action. Courts cannot make the standard of adequacy so lenient that class members can convincingly argue that they would have done better in individual actions. Otherwise, courts might easily find representation adequate in certifying a class action, but on collateral attack find representation inadequate because class members were likely to obtain greater relief by prosecuting their own actions. On the other hand, the standard of adequacy cannot be set so high that the efficiencies of class litigation are lost. Procedural protection of absent class members generally increases the cost of class litigation. Although representation in a class action must be judged by reference to representation in individual actions, it cannot provide class members with the same procedural rights as in individual actions, nor is it likely to provide them with equally extensive relief.

In practice, of course, the requirement of adequate representation must take a more determinate form. The district judge must decide whether to certify a class action early in the litigation, when he has little evidence of the actual representation of the class by the named plaintiff and the class attorney. The district judge must therefore have some other assurance that the class is likely to be adequately represented. Searching out inadequate representation later in the proceedings is likely to be difficult and costly, if it is possible at all. Absent class members cannot protect their own

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17 East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. at 403 (citations omitted).
interests, and the district judge possesses neither the time nor the power to second-guess decisions of the class attorney. Moreover, because a subsequent finding of inadequate representation invalidates earlier proceedings in whole or in part, other means must be found to assure adequate representation.

Two such means are available: giving notice to class members and allowing them to opt out, or defining the class so that the claims of class members resemble those of the named plaintiff. The first of these alternatives is superior for several reasons. Failure to opt out after having received notice at least approximates actual consent to representation in the class action. By contrast, inclusion in a class defined solely by court order leaves class members without any choice whether to be represented or not. Class members should be given a choice because they are the persons initially granted the private right of action in Title VII. Moreover, no one present in court is in a good position to make this choice for them: the named plaintiff and the class attorney are the very representatives whose adequacy is in question, the defendant opposes the class, and the district judge does not have the power to decide whether claims should be prosecuted. From a practical perspective, the district judge can rely on the response of class members to notice of the action, and particularly their decisions to intervene or to opt out, to assess adequacy of representation. These procedures also relieve the district judge of the need to define perfectly the scope of the class. Even if the class is too broadly defined, marginal class members can protect their interests by intervening or opting out.

In the absence of notice and the right to opt out, the district court must determine whether potential class members would be prejudiced by inclusion in the class. Comparing the claims of the named plaintiff to the claims of the class provides the only objective basis for such a determination. The district court should define the class so that the claims of the named plaintiff and the class are so similar that they are likely to be asserted with equal

19 "[The judicial] power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law." Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 326, 361 (1824). See also Pan Am. World Airways v. United States Dist. Court, 523 F.2d 1073, 1077 n.3 (9th Cir. 1975).

20 See infra note 71.
strength. If this standard is met, it is not likely that class members would be better represented in individual actions or in a narrower class action. This standard also recognizes the natural tendency of the named plaintiff and the class attorney, and even the district court, to approach the litigation from the perspective of the named plaintiff's individual claims. In many cases, moreover, no other substitute for consent by class members is available. Some employment practices can be challenged only in class actions that bind all class members regardless of their desire to opt out, and in other class actions, many class members cannot be given notice and the right to opt out because they cannot be identified or located. By necessity, proper definition of the class must serve as a substitute for consent by members of the class.

Strict attention to the requirement of adequate representation early in a class action has obvious advantages in preventing wasted proceedings later. It also has obvious disadvantages. Generally, increasing the procedural protection of class members increases the cost or decreases the scope of class actions, leaving some potential plaintiffs entirely unrepresented. Providing class members with notice and the right to opt out increases the cost to the named plaintiff of initially maintaining a class action, and narrowing the scope of the class necessarily excludes potential class members. In both cases, some class members may be left unrepresented in any class action and may fail to bring individual actions.

The fact that some excluded claimants are left unrepresented, however, does not establish that they were prejudiced by exclusion from the class. It is safe to assume that such persons desire awards of backpay or remedial seniority, especially without risking legal expenses. But not all class actions end in victory for the class and fewer still result in relief uniformly beneficial to all class members. Injunctive relief restructuring hiring, promotion, or seniority practices or altering conditions of work is unlikely to work to the benefit of all class members. Instances of class members rejecting rep-

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21 See infra notes 79-80 and accompanying text.
22 Examples are class actions that include many future employees, past applicants, and deterred nonapplicants. See infra notes 125-65 and accompanying text.
representation by the named plaintiff or the class attorney by large majorities are well known.\textsuperscript{24} And if union representation elections are any guide, employees do not always choose collective representation by others over individual representation by themselves. Unions obtain a majority in less than half of representation elections, and even when they prevail, they rarely do so unanimously.\textsuperscript{25} Excluded class members would not invariably benefit from representation in a class action, especially under a weakened standard of adequacy of representation.

Subsequent sections of this article attempt to formulate workable rules to assure adequate representation. Section I addresses the preliminary question whether certification of a class action is necessary whenever a plaintiff seeks class-wide relief. Section II examines the question whether class members are entitled to receive notice and to opt out of the class action, an issue usually characterized as whether Title VII class actions should be certified under subdivision (b)(2) or (b)(3) of rule 23.\textsuperscript{26} Section III is a lengthy discussion of the many different dimensions along which the scope of a class should be defined. Section IV concludes the article with a brief analysis of the preclusive effect of class actions and related government actions on subsequent private actions for individual or class-wide relief.

I. THE NEED FOR CERTIFICATION

An improbable but widely litigated preliminary issue is whether Title VII class actions need to be certified at all. One line of decisions has allowed private actions for class-wide injunctive relief to

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  \item for monetary relief under subdivision (b)(3). Yeazell, supra, at 1111. For a discussion of this topic, see infra notes 72-75 and accompanying text.
  \item In recent years, unions have won approximately 45% of the representation elections conducted by the National Labor Relations Board. See National Labor Relations Board, Forty-Fifth Annual Report 269-70 (1980); National Labor Relations Board, Forty-Fourth Annual Report 296-97 (1979); National Labor Relations Board, Forty-Third Annual Report 366-67 (1978).
  \item Fed. R. Civ. P. 23(b)(2)-(3). For the text of these subdivisions, see respectively infra notes 36 & 44.
\end{itemize}
go forward without certification. Such cases have reasoned that injunctive relief can extend to an entire class without the additional procedures that encumber class actions. This reasoning first appeared in school desegregation cases decided before the revision of rule 23 in 1966 and in cases in which the defendants were government entities or officials. It subsequently spread to Title VII actions, although it has never gained wide acceptance.

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29 See, e.g., Bailey v. Patterson, 323 F.2d 201, 206 (5th Cir. 1963), cert. denied, 376 U.S. 910 (1964); Potts v. Flax, 313 F.2d 284, 289-90 (5th Cir. 1963).


32 The United States Court of Appeals for the Seventh Circuit and several district courts have explicitly rejected this reasoning. See, e.g., Vergara v. Hampton, 581 F.2d 1281, 1284 (7th Cir. 1978), cert. denied, 441 U.S. 905 (1979); Alliance to End Repression v. Rochford, 565 F.2d 975, 980 (7th Cir. 1977); Vickers v. Trainor, 546 F.2d 739, 747 (7th Cir. 1976);
In all but a few cases, the argument for doing without certification should be rejected. Its fundamental flaw is that it expands the scope of relief beyond the limits imposed by the identity of the parties. Because the Constitution restricts federal jurisdiction to cases or controversies, federal courts may issue relief only to plaintiffs who are properly before them. A federal court cannot, therefore, issue relief to persons who have not yet sued. Likewise, the presence of a single claim by a single plaintiff does not provide a federal court with jurisdiction to decide claims not yet asserted by other persons. The court can issue relief to additional plaintiffs only after it has joined them in the action, either individually or through certification of a class action. Certifying a class action does not guarantee the existence of a case or controversy, but it is a necessary condition for bringing the members of the class before the court. The identity of the parties limits the scope of relief.

Of course, nonparties often benefit from relief issued to a party, but only indirectly. For instance, a nuisance action by one landowner to enjoin a nearby factory from polluting the air may benefit neighboring landowners, but only because full relief to the actual plaintiff requires the factory to reduce pollution to all landowners. By contrast, in employment discrimination cases a court can usually grant full relief to one employee without benefiting other employees. An award of reinstatement, hiring, promotion, backpay, or remedial seniority to one employee does not benefit any other employees, and indeed, an award of remedial seniority may leave other employees at a competitive disadvantage.


U.S. Const. art. III, § 2.

"The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." Warth v. Seldin, 422 U.S. 490, 499 (1975). See Currie, Misunderstanding Standing, 1981 S. Ct. Rev. 41.
But even when the court can grant relief to an individual only by granting relief to an entire class, certification is no less necessary. An action to restructure hiring or promotion practices, or to reform a seniority system, meets the requirements of subdivisions (b)(1) and (b)(2) of rule 23. Such actions fall under subdivision (b)(1) if individual actions might require the employer to establish inconsistent employment practices or might, as a practical matter, affect the interests of other employees not party to individual actions.\textsuperscript{55} They fall under subdivision (b)(2) if the disputed employment practice applies generally to the class, and class-wide injunctive or declaratory relief might be appropriate.\textsuperscript{56} The cases that originally dispensed with the need for certification were decided before subdivisions (b)(1) and (b)(2) were added to rule 23 in 1966. These subdivisions are specifically suited to actions for injunctions on behalf of a class, and subdivision (b)(2) in particular was drafted with civil rights actions in mind.\textsuperscript{57} After the revision of rule 23, the inapt procedure of issuing class-wide injunctions in individual actions is no longer necessary.

The revision of rule 23 also superseded another justification for dispensing with certification of class actions: that "the action filed is patently a class action and the parties have all proceeded to trial on the assumption that the action was a class action."\textsuperscript{58} Subdivi-

\textsuperscript{55} Subdivision (b)(1) provides for class actions when:

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

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

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


\textsuperscript{56} Subdivision (b)(2) provides for class actions when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).


tion (c)(1) of the revised rule requires that certification decisions be made "[a]s soon as practicable after the commencement of an action brought as a class action." The court has an independent duty to comply with this requirement, and the named plaintiff's failure to request early certification may be evidence of inadequate representation.

The only remaining reason for avoiding certification is that the defendants are government officials who have agreed, implicitly or explicitly, to abide by the decision in an individual action as if it were a class action. This reason applies only to a narrow range of cases, and even in these cases, certification has the practical advantage of defining the class to be bound by the judgment and assuring adequate representation of its members. Without certification, the preclusive effect of the judgment and the scope of any injunction remain open to question. Can class members collateraly attack the judgment? Can they relitigate related claims? How can the district court determine whether class members have been adequately represented? Who is entitled to benefit from any injunction that is issued? An explicit ruling on certification solves these problems by defining the class represented by the named plaintiff and bound by the resulting judgment.


II. NOTICE

Rule 23 divides class actions into three kinds corresponding to its subdivisions (b)(1), (b)(2) and (b)(3). As the preceding section indicates, subdivision (b)(1) applies to class actions that are necessary to protect the party opposing the class or the members of the class from inconsistent adjudications in separate actions, and subdivision (b)(2) applies to class actions for class-wide injunctive or declaratory relief. Subdivision (b)(3) applies when common questions of law or fact predominate and a class action would be superior to other means of adjudication. In practice, however, the broadly worded provisions of subdivision (b)(3) have been applied only to class actions for damages. Apart from the requirements for certification, rule 23 establishes the same procedure for (b)(1) and (b)(2) class actions, but in (b)(3) actions it requires that class members be given individual notice and the right to opt out. This is the crucial difference between class actions under subdivision (b)(1) or (b)(2) and class actions under subdivision (b)(3).

In Eisen v. Carlisle & Jacquelin, the Supreme Court held that rule 23 requires individual notice at the named plaintiff's expense in all (b)(3) class actions. In particular, the Court required the named plaintiff to pay for individual notice, before any decision on the merits, "to all class members whose names and addresses may

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42 Fed. R. Civ. P. 23(b)(1). For the text of subdivision (b)(1), see supra note 35.
44 Subdivision (b)(3) provides for class actions when:
(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.
Fed. R. Civ. P. 23(b)(3). The general requirements for certification under subdivision (b)(3) appear only to restate and emphasize the requirements for certification of any class action. See Rutherglen, supra note 3, at 698 n.62.
46 Fed. R. Civ. P. 23(c)(2)-(3).
be ascertained through reasonable effort." By contrast, in (b)(1) or (b)(2) class actions the district court has discretion to order individual notice or not. Courts have ordered posted or published notice, or no notice at all, in (b)(1) and (b)(2) class actions far more frequently than they have ordered individual notice to all identifiable class members. Although the due process clause might conceivably require individual notice in all class actions, most lower federal courts have held that it does not, and the Supreme Court has left these decisions undisturbed. Consequently, certification under subdivision (b)(2) usually relieves the named plaintiff of the cost of individual notice.

Most Title VII class actions are certified under subdivision (b)(2) because they allege discrimination in employment practices applicable to the entire class and because they seek correspondingly broad injunctive relief. This brings them easily within the literal terms of subdivision (b)(2). Title VII class actions, however, are equally amenable to certification under subdivision (b)(3) because they usually also seek individual compensatory relief, such

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48 Id. at 173.
50 See cases cited infra notes 51, 76-77. See also 2 H. Newberg, Newburg on Class Actions: A Manual for Group Litigation at Federal and State Levels §§ 2575, 2575a (1977).
52 See Quern v. Jordan, 440 U.S. 332, 335 n.3 (1979); Sosna v. Iowa, 419 U.S. 393, 397 n.4 (1975); Developments, supra note 28, at 1402-03 & n.64.
53 See infra note 57. In non-Title VII class actions involving requests for both individual compensatory and class-wide prospective relief, district courts have also tended to certify classes under subdivisions (b)(1) or (b)(2) rather than under subdivision (b)(3). See Chayes, The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court, 96 Harv. L. Rev. 4, 35 & nn.191-92 (1982).
54 See supra note 36.
as backpay and remedial seniority. Like class actions for damages under subdivision (b)(3), Title VII actions aggregate the claims of individual class members for compensatory relief. Consequently, Title VII class actions fit under both subdivisions (b)(2) and (b)(3). Why then do courts certify them exclusively under subdivision (b)(2)?

The arguments supporting certification exclusively under subdivision (b)(2) are surprisingly weak. Three have been advanced: that the Advisory Committee note to rule 23 singled out civil rights actions as especially appropriate for certification under subdivision (b)(2), that backpay and other forms of individual compensatory relief are essentially equitable in nature and ancillary to class-wide injunctive relief, and that Title VII classes are inherently cohesive because victims of racial and sexual discrimination have an overriding common interest in obtaining relief. These arguments share the common theme that the explicit provisions and underlying policies of Title VII exempt Title VII class actions from the usual requirements of rule 23. This is a variant of the principle of

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55 See infra notes 57-59.
liberal certification, and it suffers from the same defects. Nothing in the statute or its underlying policies supports certification of all Title VII class actions under subdivision (b)(2).

The specific arguments for certification under subdivision (b)(2) are likewise defective. The argument from the Advisory Committee note to rule 23 reads too much into the Advisory Committee's statement that civil rights actions are illustrative of class actions appropriate for certification under subdivision (b)(2). The Advisory Committee foresaw neither the surge in filings of Title VII class actions nor decisions that award individual compensatory relief based on findings of class-wide discrimination. Consequently, the Advisory Committee simply did not address the desirability of notice in Title VII class actions for compensatory relief.

The argument that compensatory relief is essentially equitable in nature and ancillary to broad injunctive relief has equally obvious defects. As a matter of substantive law, compensatory relief cannot be brushed aside as ancillary; it "should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." As a matter of procedural law, the distinc-

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**Footnotes:**

60 "Title VII, however, contains no special authorization for class suits maintained by private parties." General Tel. Co. v. Falcon, 102 S. Ct. 2364, 2370 (1982). See Rutherglen, supra note 3, at 690-725.

61 The Advisory Committee's full statement was only two sentences: "Illustrative are various actions in the civil rights field where a party is charged with discriminating against a class, usually one whose members are incapable of specific enumeration. . . . Subdivision (b)(2) is not limited to civil rights cases." Fed. R. Civ. P. 23 advisory committee note (citations omitted), reprinted in 39 F.R.D. 98, 102 (1966).

62 The Advisory Committee note cited cases on desegregation of schools and common carriers. Id. In a separate analysis, the reporter of the Advisory Committee cited two employment discrimination cases, one of which was decided before Title VII took effect. See Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 389 (1967). See also Note, supra note 23, at 665, 667-68.


tion between legal and equitable relief has no discernible relevance to the question of notice to class members. The appropriate distinction is not between damages as a form of relief at common law and injunctions as a form of relief in equity, but between class-wide injunctive relief that restructures employment practices and any form of individual compensatory relief, whether legal or equitable. A court can award compensatory relief to an individual class member only after finding that he is a victim of discrimination and that he deserves a specific amount of backpay or remedial seniority. Courts can make such individualized determinations only after each class member has received notice and an opportunity to be heard. But this procedure—class-wide determination of liability followed by individualized determinations of compensatory relief—is exactly the procedure in damage class actions certified under subdivision (b)(3). Moreover, an individual class member's claim for reinstatement, backpay or remedial seniority is often worth enough to justify intervention in the class action or prosecution of a separate action. It may also be stronger than the claims of most other class members, or worth more, or in other respects sufficiently distinctive to justify a separate action. Notice and the right to opt out give class members the greatest freedom in seeking relief by allowing them to acquiesce passively in the class action, to participate actively by seeking intervention, or to opt out and maintain a separate action.

The final argument for certifying Title VII class actions under subdivision (b)(2)—that Title VII classes are more cohesive than


See Rutherglen, supra note 3, at 704 & nn.88-89.
other classes—rests upon an unfounded assumption. The argument asserts that victims of alleged employment discrimination have an overriding common interest in ending discrimination, or at least a greater common interest than victims of other forms of illegal conduct. At best, this assertion is unsupported and, at worst, it ignores the divergent individual interests of Title VII plaintiffs. Class members in a Title VII class action have common interests in obtaining injunctive relief against future discrimination, but they also have individual interests in obtaining compensatory relief for past discrimination. Their common interests are no stronger than those of class members in actions for similar relief under other statutes. Moreover, notice and the right to opt out assure adequate representation of common interests as well as divergent interests. Notice allows class members an opportunity to attempt to intervene if they are dissatisfied with representation of the class in any respect, and the right to opt out allows them to express their dissatisfaction by abandoning the class action entirely. The procedures in (b)(3) class actions complement determination of scope in assuring adequate representation. They may also allow broader definition of the class than in (b)(2) class actions without jeopardizing adequacy of representation.

The inadequacy of the reasons usually offered for certification under subdivision (b)(2) suggests that other, unstated reasons support this practice. The most plausible such reason is that the lower federal courts are dissatisfied with the Supreme Court’s decision in Eisen. In that case, the Supreme Court held that rule 23, by its literal terms, required individual notice to all identifiable class members in all (b)(3) actions, even if notice was so expensive that it caused the class action to be abandoned and even if it would have elicited no response from most class members because of the small value of their claims. On the facts of Eisen, the combina-

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69 See Note, supra note 23, at 673-80.
70 In particular, their common interests appear to be no stronger than those of the class members in Eisen. Yet the Supreme Court found the strength of the common interests in Eisen insufficient to dispense with individual notice. See Eisen v. Carlisle & Jacquelin, 417 U.S. at 172-77.
71 Discretionary notice under subdivision (b)(2) has often been given to provide additional assurance of adequate representation. See Fed. R. Civ. P. 23(d)(2). See also 3B J. Moore & J. Kennedy, supra note 15, ¶ 23.72, at 23-489 to -490; 7A C. Wright & A. Miller, supra note 15, § 1793, at 205-11.
72 See Dam, supra note 67, at 105.
tion of selective individual notice and published notice ordered by the district court, but found inadequate by the United States Court of Appeals for the Second Circuit and the Supreme Court, was more likely than comprehensive individual notice to result in effective presentation of class members' claims. The expense of individual notice to all identifiable class members apparently prevented their claims from being heard at all. The effectiveness of individual notice in facilitating assertion of individual claims suggests that the Supreme Court was less concerned in Eisen with the best means of giving notice than with restricting an unwieldy class action. With apparent approval, the Court adopted Judge Lum-bard's characterization of the case as a "Frankenstein monster posing as a class action."

Whatever the reason for the Supreme Court's holding in Eisen, difficulty of notice does not justify certification of Title VII class actions under subdivision (b)(2). The notice requirement of subdivision (b)(3) cannot be evaded by the simple expedient of certification under subdivision (b)(2). Moreover, in most Title VII class actions, the cost of individual notice is not prohibitively expensive. Present employees can be given notice with their paychecks and, 52 F.R.D. 253, 267-68 (S.D.N.Y. 1971), rev'd, 479 F.2d 1005 (2d Cir. 1973), vacated, 417 U.S. 156 (1974). Individual notice was sent to the 2,000 class members with sufficiently substantial claims to justify personal intervention and to an additional 5,000 members randomly selected from the class of two million. The remaining class members were to be notified by publication. Id.

54 The Supreme Court ordered the class action dismissed as originally defined. Eisen v. Carlisle & Jacquelin, 417 U.S. at 179 n.16. Although the Supreme Court's order left open the possibility that the class might be narrowed on remand, no subsequent decision has been reported. Id. See also id. at 179-86 (Douglas, J., dissenting in part).


57 Posted notice may be a cheaper but equally effective means of communicating with present employees. It has frequently been ordered as a form of discretionary notice in (b)(2) class actions. See Fowler v. Birmingham News Co., 608 F.2d 1055, 1059 (5th Cir. 1979); Doe v. First City Bancorp., 31 F.R.D. 562, 571 (S.D. Tex. 1978); Sinyard v. Foote & Davies, 13 Fair Empl. Prac. Cas. (BNA) 1237, 1261 (N.D. Ga. 1975); Ellison v. Rock Hill Printing & Finishing Co., 64 F.R.D. 415, 417-18 (D.S.C. 1974). See also Fujishima v. Board of Educ., 460 F.2d 1355, 1360 (7th Cir. 1972) (notice could be given to class of students by posting or announcement over intercom); Collins v. Schoonfield, 344 F. Supp. 257, 263 n.9 (D. Md. 1972) (class of prisoners notified by posting in prison); Dam, supra note 67, at 109-16; Smalls, supra note 57, at 1435; Note, supra note 23, at 689-94; Note, supra note 51, at 1259.
except in the largest classes, past employees are not too numerous to be given mailed notice at moderate expense. Applicants for employment are more difficult to notify, but they are also more difficult to identify and locate. If the Supreme Court required individual notice in order to limit unwieldy class actions indirectly, this purpose can be fulfilled by certification of narrower classes whose members are more easily notified. Problems in giving notice foreshadow other problems in managing a class action. If giving individual notice is expensive, giving individual relief is also likely to be difficult. Just as giving individual notice can facilitate definition of the class, narrowing the scope of the class can facilitate giving individual notice.

Nevertheless, if Title VII class actions should not be certified entirely under subdivision (b)(2), neither should they be certified entirely under subdivision (b)(3). The remedies available in a single action under Title VII do not fit within any single subdivision of rule 23. As a matter of substantive law, the statute authorizes both class-wide injunctive relief and individual compensatory relief. After finding a violation, the court must award both forms of

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(1980); Note, supra note 59, at 889-90. Nevertheless, Eisen appears to foreclose posted notice as an alternative to individual notice in (b)(3) class actions.


78 In Eisen, the Supreme Court suggested that individual notice to members of a narrower class might be feasible. Eisen v. Carlisle & Jacquelin, 417 U.S. at 179 n.16; id. at 179-86 (Douglas, J., dissenting in part).
relief almost as a matter of course.\textsuperscript{79} But as a matter of procedural law, rule 23 sharply distinguishes between subdivision (b)(2) actions for class-wide injunctive relief and subdivision (b)(3) actions for individual compensatory relief. Moreover, as a matter of substantive law, this distinction corresponds to the different forms of relief available in Title VII class actions. Injunctions that restructure hiring, promotion, or seniority practices, or that alter conditions of work do not easily admit of exceptions. Indeed, if an injunction applicable to the entire class is the only feasible form of prospective relief, certification under subdivision (b)(1) is justified.\textsuperscript{80} To prevent class members from creating exceptions to class-wide injunctions by opting out, actions for such relief should be certified under subdivision (b)(1) or (b)(2). Individual compensatory relief, on the other hand, is not impaired by granting class members the right to opt out through certification under subdivision (b)(3).

Because Title VII class actions fit partially under subdivision (b)(2) and partially under subdivision (b)(3), but not entirely under either, courts should certify them as hybrid class actions under both. Specifically, courts should certify claims for class-wide injunctive relief under subdivision (b)(2) and claims for individual compensatory relief under subdivision (b)(3). In such hybrid class actions, all class members interested in compensatory relief would receive notice and the right to opt out. Class members who opted out as to individual relief, however, would remain bound by the disposition of claims for class-wide injunctive relief, just as if the class action had been confined to such claims. They would also be precluded from asserting any individual claims for future discrimination arising from the same employment practices as the claims for class-wide relief. Opters-out would benefit from a class-wide injunction, and they would be bound by an adverse judgment to the same extent as class members interested only in class-wide relief. Class members would have the right to opt out only insofar as the class action sought compensation for past discrimination. Claims


\textsuperscript{80} Fed. R. Civ. P. 23(b)(1). For the text of subdivision (b)(1), see supra note 35. Subdivision (b)(1) was modeled on the provisions of rule 19 governing necessary and indispensable parties. See Rutherglen, supra note 3, at 704-05; Note, supra note 23, at 682.
for injunctive relief would be treated as if the class action had been certified entirely under subdivision (b)(2).

The United States Court of Appeals for the Fifth Circuit has taken a position that, in some respects, resembles hybrid certification of Title VII class actions. In *Johnson v. General Motors Corp.*, the Fifth Circuit held that a class member who had not received individual notice in a (b)(2) class action was not barred from seeking backpay in a subsequent individual action. In the class action, the named plaintiffs had obtained injunctive and declaratory relief for the class but had sought backpay only for themselves. In his individual action, the class member alleged precisely the same discriminatory practices alleged in the class action and sought injunctive and declaratory relief as well as backpay. The Fifth Circuit held that the due process clause requires that individuals receive notice before a class action can preclude their claims for monetary relief; consequently, the class action precluded only the class member’s claims for injunctive and declaratory relief.

An implication, if not an outright holding of *Johnson* is that all class members must receive notice in any Title VII class action seeking backpay. As argued above, courts should also require notice if the plaintiff seeks other forms of compensatory relief such as reinstatement and remedial seniority. But in *Johnson*, the Fifth Circuit suggested that notice need not conform to the stringent requirements in (b)(3) class actions and that it might be postponed until after a finding of class-wide liability. Other lower federal courts have followed similar procedures. These proce-

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* Johnson v. General Motors Corp., 598 F.2d 432 (5th Cir. 1979). For critical appraisals of this decision, see Note, supra note 51; Note, supra note 23, at 686-88.
* 598 F.2d at 434.
* Id. at 433, 437-38.
* See supra notes 64-68 and accompanying text.
* See, e.g., Bing v. Railroad Express, Inc., 485 F.2d 441, 444-49 (5th Cir. 1973); Carter v. Shop Rite Foods, Inc., 470 F. Supp. 1150, 1154 (N.D. Tex. 1979); Neely v. City of Grenada,
dures reduce the costs of notice to named plaintiffs, either by avoiding the expense of individual notice to all identifiable class members or by shifting the cost of notice to the defendant after a finding of liability. They provide some notice to class members without creating the obstacles to class actions posed by individual notice at the initial expense of the named plaintiff. The very advantages of these procedures, however, bring them into conflict with the Supreme Court’s decision in *Eisen*, which held that individual notice in (b)(3) class actions could not be postponed until after a finding of liability in order to shift the cost of notice to the defendant. By means of the due process clause, the Fifth Circuit in effect required certification of claims for monetary relief under subdivision (b)(3), but without the procedures required by the Supreme Court in *Eisen* for (b)(3) class actions.

Instead, the Fifth Circuit should have required certification of claims for class-wide injunctive and declaratory relief under subdivision (b)(2) and certification of claims for individual compensatory relief under subdivision (b)(3). If it had, the court would

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Class Actions

have avoided the constitutional question whether individual notice is required by the due process clause. More importantly, it would have avoided problems with the preclusive effect of judgments in favor of the defendant. If class members have not received notice, according to the Fifth Circuit, a judgment for the defendant does not preclude them from seeking backpay in subsequent individual actions. Subsequent suits claiming backpay for the entire class, and not merely for isolated individuals who opted out of the earlier class action, may force the defendant to relitigate issues on which it had previously prevailed. The threat of continued liability for backpay also undermines any judgment for the defendant on claims for class-wide injunctive or declaratory relief. To avoid liability for backpay, the defendant may be forced to alter employment practices that the district court found to be legal and refused to enjoin. Despite his victory on the merits, the defendant may have gained nothing at all.

Because the Fifth Circuit did not explicitly require certification under both subdivisions (b)(2) and (b)(3), it obscured the close relationship between preclusion of subsequent claims for individual compensatory relief and preclusion of claims for class-wide injunctive and declaratory relief. Hybrid certification would have required the court to define the relationship between claims for different forms of relief. In order to protect defendants from multiple and inconsistent adjudications, the judgment on claims for class-wide injunctive or declaratory relief should bar all claims subsequently arising out of the same employment practices. Class-wide injunctive and declaratory relief operate almost wholly prospectively,91 to prevent future discrimination. Consequently, the judgment in the (b)(2) component of a hybrid class action should pre-

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Some commentators have also recommended hybrid certification. See 3B J. Moore & J. Kennedy, supra note 15, ¶ 23.45[1], at 23-322 & n.46; Barnard, supra note 65, at 526. Cf. Note, supra note 65, at 672-82 (proposing change from (b)(2) to (b)(3) certification after finding of liability).

91 Only class-wide injunctions requiring preferential treatment have any compensatory purpose, but even these injunctions are often imposed to prevent future discrimination. See Note, Preferential Relief Under Title VII, 65 Va. L. Rev. 729, 763-71 (1979).
clude all subsequently arising claims concerned with the same employment practices, including claims for compensatory relief. The (b)(2) judgment should not, however, preclude claims for compensatory relief that arose before it was entered. Compensatory relief operates retrospectively, to remedy discrimination that has already occurred.\(^92\) Claims for such relief should be precluded only by the judgment in the (b)(3) component of a hybrid class action. Class members who opted out of the (b)(3) subclass would not be bound by the judgment on the (b)(3) claims for compensatory relief. Because class members could not opt out of the (b)(2) subclass, however,\(^93\) the judgment would bind them on claims for injunctive and declaratory relief. Class members could independently pursue their claims for compensatory relief that had already accrued,\(^94\) but they could not seek relief that would undermine the

\(^{92}\) This is true of frontpay as well as backpay. The purpose of both kinds of relief is to remedy past discrimination. Front pay differs from backpay only in that it provides compensation for the post-judgment effects of past discrimination. See Note, Front Pay—Prophylactic Relief Under Title VII of the Civil Rights Act of 1964, 29 Vand. L. Rev. 211, 213 (1982).

\(^{93}\) Class members have a right to opt out only in (b)(3) class actions. Fed. R. Civ. P. 23(c)(2)-(3). See also Kyriazi v. Western Elec. Co., 647 F.2d 388, 395 (3d Cir. 1981); 3B J. Moore & J. Kennedy, supra note 15, ¶ 23.60, at 23-466. In the exercise of discretion to manage class actions, however, some courts have allowed class members to opt out of (b)(2) class actions as well. See Penson v. Terminal Transp. Co., 634 F.2d 989, 992-96 (5th Cir. 1981). See also Bauman v. United States Dist. Court, 557 F.2d 650, 659-60 (9th Cir. 1977) (finding split in authorities).


It might be better, however, to treat class members who opted out as if they had exhausted administrative remedies under Title VII. The named plaintiff's exhaustion of administrative remedies usually suffices for the class. Rutherglen, supra note 3, at 707, 717-18. Class members who opted out would therefore be in the same position as charging parties who had received a right-to-sue letter after exhausting administrative remedies. Charging parties in this position have 90 days from receipt of the right-to-sue letter to start judicial proceedings. 42 U.S.C. § 2000e-5(f)(1) (1976). Class members who opted out should be subject to the same limitation. This proposal has the advantage of avoiding the many complications that surround the limitations applicable to administrative remedies under Title VII. See 42 U.S.C. § 2000e-5(e), (g) (1976). See also Zipes v. Trans World Airlines, Inc., 102 S.
judgment on claims for class-wide injunctive or declaratory relief. These procedures allow the different forms of relief available under Title VII to be accommodated to the different forms of class actions defined by rule 23.

III. Scope of the Class

The proper composition of a class presents not one question but many, corresponding to the many different and overlapping ways in which victims of employment discrimination can be classified. Potential class members can be divided into employees and applicants for employment and into past, present and future employees and applicants. They can be classified by position or by place of employment. They can be divided into those represented by a union and those who are not. And of greatest relevance to discrimination claims, they can be classified by race, national origin, and sex.

Whether a court should include one or another of these groups in any particular class requires different inquiries for each group and different answers for each class. No single abstract principle identifies a uniquely appropriate class. Yet the consequences of such decisions are too important to be left wholly to the discretion of the district judge. The scope of the class determines whom the judgment will bind. It also determines whether the court can certify the class at all, because a narrowly defined class may have too few members to satisfy the numerosity requirement of rule 23. More fundamentally, decisions about the scope of the class are governed by the same principles as decisions whether to certify a class. The principle of liberal certification, for example, has been used to justify certification of "across the board" classes encompassing all claims of discrimination against a single employer re-
gardless of the named plaintiff's individual claim. The Supreme Court recently has criticized this principle for precisely this reason.

In *General Telephone Co. v. Falcon*, the Court reversed certification of a class of rejected applicants who allegedly suffered discrimination in hiring because an employee who allegedly suffered discrimination only in promotions sought to represent them. The Court held that the principle of liberal certification was inadequate to bridge the gap between the otherwise unrelated claims of the named plaintiff and the class. The Court did not, however, hold that employees can never represent applicants or that across-the-board classes are never justified apart from the principle of liberal certification. These questions, and the general question of how to determine the appropriate scope of Title VII class actions, remain unanswered.

Three general considerations should guide the district judge's discretion in sorting through the welter of different groups of employees that might be included in a class. First, as the Supreme Court inquired in *Falcon*, how closely are the claims of the named plaintiff related to the claims of the class? The named plaintiff's individual claims must provide some definite limits on the scope of the class. Specifically, the substantial claims asserted on behalf of the class must resemble the substantial claims asserted on behalf of the named plaintiff. Otherwise, the interests of the named plaintiff in pursuing his claims are likely to diverge from the interests of the class in pursuing dissimilar claims.

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96 102 S. Ct. 2364 (1982).
97 Id. at 2371.
98 Id. at 2371-72 & n.15.
99 For a discussion of the meaning of this term, see Rutherglen, supra note 3, at 725-27.
100 As I have argued in an earlier article, the allegations of the complaint are an inadequate basis for comparison because they are too easily manipulated by the named plaintiff or, more likely, his attorney. Id. Accord Karro, *The Importance of Being Earnest: Pleading and Maintaining a Title VII Class Action for the Purpose of Resolving the Claims of Class Members*, 49 Fordham L. Rev. 904, 924-33 (1981); Note, *Conflicts in Class Actions and Protection of Absent Class Members*, 91 Yale L.J. 590, 597-98 (1982).

The scope of the named plaintiff's charge is also an inadequate basis for comparison. The generally followed rule is that "the 'scope' of the judicial complaint is limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970). Because it is filed at the very beginning of enforcement proceedings before any factfinding has been undertaken, the administrative charge imposes only loose and unreliable constraints on the scope of the class.
Second, what is the structure of the defendant's operations and employment practices? This question is closely related to the first: the more centralized an employer's personnel practices, the stronger the relationship between the claims of the named plaintiff and those of the class. Alleged discrimination in an explicit, company-wide practice is more likely to justify certification of a company-wide class than discrimination in a decision by a single supervisor with broad discretion over personnel decisions. The structure of the defendant's operations deserves separate emphasis because it provides a readily ascertainable standard that is not easily manipulated for purposes of litigation.

Third, is the named plaintiff an adequate representative of the class? This issue is the most fundamental because adequacy of representation is a constitutional prerequisite to a judgment binding on the class. It is less specific than the issues of similarity of claims and centralization of employment practices, but because it is more significant, it determines the manner and, in some cases, the outcome of these more concrete inquiries. Adequacy of representation imposes two requirements relevant to the scope of the class: first, the interests of the named plaintiff must not conflict with those of the class, and second, the interests of the named plaintiff cannot be so remote from those of any segment of the class that he is unlikely to assert their interests as vigorously as his own. These different aspects of adequacy of representation reflect the different ways in which the interests of the named plaintiff can diverge from those of the class: by a straightforward conflict of interest, in which granting relief to the named plaintiff would impair the interests of members of the class, or by a subtle attenuation of shared interests, which would erode the named plaintiff's incentive to pursue the interests of the class aggressively.

Straightforward conflicts of interest between the named plaintiff and members of the class are easy to imagine, but difficult to verify. A risk of conflict of interest is present in almost all class actions. Relief granted to one segment of the class may work to the disadvantage of another. Awards of backpay to some class members, for instance, may reduce the fund available from the employer for awards of backpay to other class members. Awards of

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remedial seniority to some class members may place them ahead of other class members.\footnote{\textsuperscript{102} See C. Wright & A. Miller, supra note 15, § 1768, at 647-49.} The question is whether any of these potential conflicts is likely to make representation in a class action substantially worse than representation in a series of individual actions. Relief granted to other class members with similar claims may impair the relief granted to a single class member, but no more than would relief granted in a series of individual actions. It remains for the district court to resolve the difficult question whether any potential conflict of interest rises above the threshold of competing interests present in the assertion of similar claims by different plaintiffs.

The second form of inadequate representation, attenuation of shared interests between the named plaintiff and the class, is also difficult to define and detect. The danger is that litigation decisions to pursue the claims of some class members may deplete the resources available to pursue the claims of other class members or may cause such claims to be ignored altogether. When do such tactical decisions, not easily discerned or evaluated by the district judge, result in a denial of adequate representation? More generally, when do shared interests become so weak that representation is no longer likely to be adequate?

The difficulty of directly evaluating adequacy of representation, particularly early in the action when the certification decision is made, lends increased importance to the first two determinants of the appropriate scope of the class: the structure of the employer's personnel practices and the relationship between the named plaintiff's individual claims and the class claims. These factors provide an explicit basis for indirectly assessing the elusive risk of inadequate representation.

A. Past and Present Employees

Potential class members must be either past, present, or future victims of alleged discrimination. The most frequently litigated questions concern past and present employees. Can a named plaintiff who is currently employed represent class members who were formerly employed? Conversely, can a named plaintiff who has either retired, been fired, or quit represent class members still em-
ployed by the defendant? These two questions require separate analysis because present employees are interested both in compensatory relief and in injunctions altering conditions of employment, while past employees are interested primarily in compensatory relief. The interest of past employees in improving conditions of employment depends on their right to reinstatement. To assure adequate representation, past employees should be allowed to represent present employees only if they seek reinstatement and are likely to obtain it, or if they assert claims on their own behalf that closely resemble the claims of present employees. By contrast, the claims of present employees usually encompass those of past employees because present employees have an independent interest in both compensatory and injunctive relief.

The decided cases provide some support for the distinction between the representation of present employees by past employees and the reverse. Few cases have explicitly decided that present employees can represent past employees, but almost all of them have allowed such representation.103 Most cases have permitted such representation without discussion, apparently assuming that it was obviously appropriate.104 Decisions explicitly concerned with past employees seeking to represent present employees are far more numerous and far less consistent. Those allowing representation have usually followed the leading decision of the United States Court of Appeals for the Third Circuit in *Wetzel v. Liberty Mutual Insurance Co.*,105 which held that past employees can represent present

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employees even in the absence of a claim for reinstatement. The Third Circuit reasoned that past employees are superior to present employees as class representatives because they need not fear retaliation by the employer. The United States Court of Appeals for the First Circuit, however, has endorsed this reasoning only when the named plaintiff's claims closely resemble the class claims.\(^{106}\) Other courts have refused to apply this reasoning when a plaintiff has voluntarily quit,\(^{107}\) has been out of the defendant's employment for a number of years,\(^{108}\) or has demonstrated little knowledge of the defendant's present employment practices.\(^{109}\)

The facts of Wetzel illustrate how the scope of the named plaintiff's individual claims should affect the scope of the class. The named plaintiffs were two women formerly employed in the defendant's insurance claim department. They alleged that they had been denied higher paying jobs because women in the department were segregated in lower paying positions.\(^{110}\) They also alleged on

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\(^{106}\) The First Circuit has held that a district court did not abuse its discretion in decertifying a class of present employees headed by a past employee who did not seek reinstatement. DeGrace v. Rumsfeld, 614 F.2d 796, 810-11 (1st Cir. 1980). At the same time, however, the court endorsed the reasoning in Wetzel as it applied to cases in which "class claims were apt to be advanced in the process of litigating the individual claims." Id. at 810.


\(^{110}\) 508 F.2d at 244.
behalf of the class, but apparently not on their own behalf, that the defendant discriminated on the basis of sex in denying leaves and disability benefits for pregnancy. The named plaintiffs had quit their jobs, allegedly because the defendant's discriminatory practices had forced them to resign, but the record did not reveal whether they sought reinstatement. The Third Circuit resolved this ambiguity by assuming that the named plaintiffs did not seek or were not entitled to reinstatement.\footnote{Id.}

On this assumption, the Third Circuit correctly allowed the named plaintiffs to represent present employees on the claim of discriminatory denial of higher paying jobs. If they had prevailed on this claim, they were entitled to backpay, as were all present employees who had suffered from the same discriminatory practices.\footnote{See Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-25 (1975).} Injunctive relief against practices found to be discriminatory would have followed as a matter of course.\footnote{See International Bhd. of Teamsters v. United States, 431 U.S. at 361.} Despite the failure of the named plaintiffs to seek reinstatement, their interests coincided with those of present employees because the claims of each group were identical.\footnote{The First Circuit has adopted a similar interpretation of Wetzel. See DeGrace v. Rumsfeld, 614 F.2d 796, 810-11 (1st Cir. 1980).}

The Third Circuit, however, was wrong to allow the named plaintiffs to represent the class on claims of discrimination in denial of pregnancy benefits. The named plaintiffs did not pursue compensatory relief for themselves on these claims and, given the court's assumption that they did not seek reinstatement, they would not have benefited from any prospective injunctive relief granted to the class. The self-interest of the named plaintiffs in asserting their own claims provided no guarantee that they would adequately represent the class. Because the named plaintiffs severed their ties with present employees by failing to seek reinstatement, and thus insulated themselves from future personnel decisions of the defendant, they were worse representatives of the class, not better representatives as the Third Circuit reasoned.\footnote{See id. See also Brown v. Eckerd Drugs, Inc., 663 F.2d 1268, 1276-77 (4th Cir. 1981), vacated and remanded, 102 S. Ct. 2952 (1982).} As it happened, in Wetzel the risk of divergent interests between

\footnote{Id.}

\footnote{Id.}

\footnote{See Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-25 (1975).}

\footnote{See International Bhd. of Teamsters v. United States, 431 U.S. at 361.}

\footnote{The First Circuit has adopted a similar interpretation of Wetzel. See DeGrace v. Rumsfeld, 614 F.2d 796, 810-11 (1st Cir. 1980).}

\footnote{See id. See also Brown v. Eckerd Drugs, Inc., 663 F.2d 1268, 1276-77 (4th Cir. 1981), vacated and remanded, 102 S. Ct. 2952 (1982).}
the named plaintiffs and present employees never materialized. The named plaintiffs and their attorneys vigorously prosecuted the claims of discrimination in denial of pregnancy benefits.\textsuperscript{117} But hindsight can neither justify a certification decision made early in the litigation, even if subject to revision,\textsuperscript{118} nor provide assurance against inadequate representation that might later go undetected.

In addition to attenuation of shared interests when past employees seek to represent present employees, certification may be defeated by a straightforward conflict of interest when either group seeks to represent the other. The well-known decision in \textit{Air Line Stewards & Stewardesses Association, Local 550 v. American Airlines, Inc.}\textsuperscript{119} is illustrative. Several former flight attendants and their union sued American Airlines and TWA, alleging that the airlines’ policy of dismissing pregnant flight attendants violated Title VII. The union’s attorney conducted the litigation on behalf of past and present employees and eventually negotiated a settlement with the defendants. In the meantime, the union and the airlines agreed in collective bargaining to eliminate the no-pregnancy rule, resolving the claims of present employees and leaving only the claims of past flight attendants for reinstatement, backpay, and remedial seniority.\textsuperscript{120} The union settled these claims by obtaining reinstatement for all past employees, but without backpay, and more significantly, without remedial seniority.\textsuperscript{121} As the union’s attorney frankly admitted, the claims of past employees for remedial seniority were sacrificed to preserve the seniority rights of present employees, who were more influential in the union’s internal affairs.\textsuperscript{122} When some past employees objected to the settlement and appealed, the United States Court of Appeals for the Seventh Circuit held that they had been inadequately represented.\textsuperscript{123}

\textsuperscript{118} Fed. R. Civ. P. 23(c)(1).
\textsuperscript{119} 490 F.2d 636 (7th Cir. 1973), cert. denied, 416 U.S. 993 (1974).
\textsuperscript{120} Id. at 638.
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 640.
\textsuperscript{123} Id.
This case is distinctive because the conflict of interest was so obvious. The settlement granted reinstatement to past employees but not remedial seniority, which would have given some past employees greater seniority than present employees. Rather than conceal this conflict of interest, the union argued that it was authorized to resolve the conflict because it was the exclusive bargaining representative of the interested employees.\(^{124}\)

In most cases, deficiencies in the settlement of class claims are not so apparent and conflicts of interest not so readily admitted. Consequently, preventing divergence of interests is usually the best means of preventing conflicts of interest. The limited resources available for litigation and the limited relief obtainable in settlement negotiations inevitably require choices among the claims of different class members. Confining the scope of the class to similarly situated employees with similar claims reduces the risk that any one segment of the class will be exploited for the benefit of another. Initial certification of a narrow class also reduces the need for ongoing supervision of the actual performance of the named plaintiff and the class attorney in representing the class. Continuous and searching assessment of adequacy of representation distracts the district judge from the merits of the case, forces him to review the tactical decisions of the named plaintiff and the class attorney, and risks the appearance of partiality towards the class. By contrast, narrowing the scope of the class prevents hidden conflicts of interests from arising in the first place.

### B. Future Employees

Representation of future employees presents questions similar to whether a class needs to be certified at all. Any injunction that modifies terms and conditions of employment will apply to employees hired after the class action is decided, whether or not they are included in the class as certified. If future employees will be subject to the injunction in any event, there is little need to include them in the class initially. Moreover, including them in the class creates administrative and conceptual difficulties. Should future employees be counted towards satisfying the numerosity requirement of rule 23? If rule 23 requires notification of future em-
ployees, how can they be identified? And if they cannot be identified, how can the district court ascertain the nature of their claims to determine adequacy of representation? When courts have explicitly raised these questions, they have usually excluded future employees completely from the class or occasionally excluded them only for certain purposes, such as determining numerosity.

Binding future employees by the judgment in a class action raises further, and more severe, conceptual problems. On the one hand, they must be bound by any class-wide injunction. Otherwise, compliance with the injunction would not protect the employer from claims by future employees that the injunction was inadequate to remedy the discrimination alleged in the class action. On the other hand, future employees seemingly cannot be bound by an action in which they could not participate. Perhaps because some courts have sensed both the need to bind future employees and the difficulty of doing so, they have simply included them in the class with little or no comment.

As with other problems in class action practice, the fundamental issue is adequacy of representation. Comparing the interests of future employees to those of the named plaintiff can solve the paradox of binding unidentifiable future employees. If the named plaintiff adequately represents present employees, his interests are

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126 See infra note 130.

almost always identical to those of future employees. For instance, the present employee who alleges discrimination in conditions of employment has a personal interest in obtaining injunctive relief that modifies future conditions of employment.

Moreover, unlike past or present employees, future employees do not have rights that are likely to be compromised for the benefit of some other segment of the class. They do not have seniority rights that the named plaintiffs can trade off for the benefit of other employees. Likewise, they have no right to require employers to use tests and qualifications, instead of seniority, to determine future promotions. Relief in the form of preferential treatment for minorities or women does work to the disadvantage of some future employees, but not those minorities and women who are future members of the class. On the contrary, such future class members are those most likely to benefit from preferential treatment. Absent an unusual alignment of facts and interests, future employees may be represented by any adequate representative of present employees.

It follows that a class action can bind future employees whether it results in an injunction for the class or a judgment for the employer. Most courts have assumed that future employees can benefit from an injunction even if they are not included in the class, but that they are not bound by a judgment denying an injunction or granting only partial relief. Future employees must be bound, however, if the employer is to receive the full benefit of a favorable judgment. Otherwise, employment practices found to be legal in the class action might be challenged by future employees in subsequent actions.

The clarity gained by including future employees in the class is partially offset by the difficulty of bringing them within some of the requirements of rule 23, particularly the requirement of numerosity, and by the apparent harshness of binding them for

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129 The numerosity requirement is contained in Fed. R. Civ. P. 23(a)(1).
the indefinite future. Most courts have solved the first problem by the sensible expedient of not counting future employees in determining numerosity.\textsuperscript{130} Courts can apply other requirements of rule 23, such as commonality and topicality,\textsuperscript{131} to future employees in the same way they apply the fundamental requirement of adequacy of representation: by determining whether the named plaintiff has a substantial interest in future conditions of employment. Courts can limit the prospective effect of an injunction or declaratory judgment, as well as the preclusive effect of judgments in general, through equitable modification.\textsuperscript{132} The prospective effect of a judgment on future employees differs in degree, but not in kind, from its effects on present employees, who are also bound, at least in theory, for the indefinite future. What is needed is not a sharp distinction between present and future employees, but sensible modification of judgments to take account of changes in the workplace and changes in the law.\textsuperscript{138}

C. Applicants

Like past employees, rejected applicants for employment are primarily interested in compensatory relief. They must first secure employment with the defendant before they can benefit from any prospective relief that affects conditions of employment. Moreover, rejected applicants must allege discrimination in hiring, which is usually of no concern to present employees who, by definition, have succeeded in the hiring process. Applicants and employees have a common interest only in employment practices that affect both hiring and promotion as, for example, tests that determine both an employee's initial position and his opportunities for subsequent promotion.\textsuperscript{134} Only in such cases of converging interests can


\textsuperscript{131} These requirements are contained in Fed. R. Civ. P. 23(a)(2)-(3).

\textsuperscript{132} See Fed. R. Civ. P. 60(b)(5).


\textsuperscript{134} Accord General Tel. Co. v. Falcon, 102 S. Ct. 2364, 2371-72 n.15 (1982).
applicants and employees adequately represent one another.

The lower federal courts are divided on the issue of representation of employees by applicants. Despite the different claims of applicants and employees, decisions in the Fifth Circuit have uniformly allowed applicants to represent employees.\textsuperscript{135} These decisions have reasoned directly from the principle of liberal certification: "[T]he purpose of Title VII and the Fifth Circuit’s repeated endorsement of across-the-board representation mandated the conclusion that a plaintiff complaining of one employment practice can represent an employee complaining of a different employment practice."\textsuperscript{136} Decisions in other circuits have held applicants to be inadequate representatives of employees, although they have often relied on reasons peculiar to each case.\textsuperscript{137}

The question whether present employees can represent applicants has been considered in more cases and, until the Supreme Court’s recent decision in \textit{General Telephone Co. v. Falcon},\textsuperscript{138} with more widely varying results. In \textit{Falcon}, the Fifth Circuit affirmed a district court’s decision allowing such representation, again relying explicitly on the principle of liberal certification.\textsuperscript{139} It found the


\textsuperscript{136} Cooper v. University of Texas, 482 F. Supp. 187, 192 (N.D. Tex. 1979), aff’d per curiam, 648 F.2d 1039 (5th Cir. 1981).


\textsuperscript{138} 102 S. Ct. 2364 (1982).


named plaintiff's claim of discrimination in promotions to be similar to the applicants' claims of discrimination in hiring because both claims alleged discrimination on the basis of national origin and because the named plaintiff "showed a similarity of interests based on job location, job function and other considerations." \(^{140}\) Broad similarities of this kind, which can be found in almost any case, do little to bridge the gap between the claims of employees who have been hired and the claims of applicants who have not. In *Falcon*, the court decided the named plaintiff's claim of discrimination in promotions entirely independently of the applicants' claims of discrimination in hiring. \(^{142}\)

It is not surprising, then, that the Supreme Court reversed the Fifth Circuit's decision. \(^{142}\) Although the Court agreed with the proposition "that racial discrimination is by definition class discrimination," it did not find that proposition to be decisive or, perhaps, even relevant. \(^{143}\) Evidence that an employer discriminated in pro-

\(^{140}\) 626 F.2d at 376.

\(^{141}\) The Supreme Court also noted this fact. 102 S. Ct. at 2371. The Fifth Circuit initially affirmed the district court's finding of discrimination in promotions and its award of monetary relief to injured employees, 626 F.2d at 380, but vacated the finding of discrimination in hiring and remanded for further findings. Id. at 383. The Supreme Court later vacated the decision of the Fifth Circuit and remanded for reconsideration in light of Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). On remand, the Fifth Circuit vacated the district court's judgment on the promotion claims but not on the hiring claims. 647 F.2d at 633. The Supreme Court then granted certiorari and reversed and remanded the Fifth Circuit's decision on the class action issues. 102 S. Ct. at 2364.

\(^{142}\) The Supreme Court did not simply reverse the decision of the Fifth Circuit, but reversed and remanded "for further proceedings consistent with this opinion." 102 S. Ct. at 2373. This disposition of the case created the theoretical possibility of certification of a class of applicants on remand. This possibility resulted in Chief Justice Burger's partial dissent on the ground that there was no need to remand for further proceedings because it was clear that no class should have been certified. Id. at 2373-74 (Burger, C.J., concurring in part and dissenting in part). It is doubtful, however, that certification of a class of applicants on remand would be consistent with the Court's opinion, which criticized the original certification order in strong terms. The Court stated, for instance, "It is clear that the maintenance of respondent's action as a class action did not advance 'the efficiency and economy of litigation which is a principal purpose of the procedure.'" Id. at 2372 (citation omitted).

\(^{143}\) The Court first stated that an allegation of racial discrimination "neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified." Id. at 2371. The Court later added, however, that "[t]he District Court's error in this case, and the error inherent in the across-the-board rule, is the failure
motions, the Court reasoned, would not justify an inference that the employer practiced a general policy of discrimination, let alone that such a policy manifested itself in promotions and hiring in the same way.\textsuperscript{144} The Court nevertheless left open the possibility that employees could represent applicants upon a showing of common employment practices, such as an employment test used for both promotions and hiring, or upon "[s]ignificant proof" of an employer's general policy of discrimination.\textsuperscript{145} The Court's holding in \textit{Falcon} was that the district court could not certify a class of applicants on the record as it stood, yet the Court did not lay down an absolute rule against employees ever representing applicants.

The United States Court of Appeals for the Fourth Circuit apparently laid down just such an absolute rule in \textit{Hill v. Western Electric Co.},\textsuperscript{146} relying on the Supreme Court's earlier statement that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members."\textsuperscript{147} The Fourth Circuit explicitly disapproved a prior decision allowing an employee claiming discrimination in promotions to represent rejected applicants who had sought the same positions initially.\textsuperscript{148} In such cases, however, the congruence of claims asserted
to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a)." Id. at 2372.


\textsuperscript{146} 102 S. Ct. at 2371-72 & n.15. Subsequent decisions granting certification of broad classes—or leaving open the possibility of such certification—have emphasized this passage in the opinion. See Anderson v. City of Albuquerque, 690 F.2d 795, 799-800 (10th Cir. 1982); Wheeler v. City of Columbus, 586 F.2d 1144, 1147 n.3 (5th Cir. 1982); Meyer v. MacMillan Publishing Co., 95 F.R.D. 411, 414-15 (S.D.N.Y. 1982); Hawkins v. Fulton County, 95 F.R.D. 88, 93-94 (N.D. Ga. 1982); Nation v. Winn-Dixie Stores, Inc., 95 F.R.D. 82, 87-88 (N.D. Ga. 1982); Osmer v. The Aerospace Corp., 30 Fair Empl. Pract. Cas. (BNA) 204, 205, 207 & n.3, 209 (C.D. Cal. 1982).


\textsuperscript{148} East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. at 403 (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216 (1974)).

\textsuperscript{149} 596 F.2d at 101. The earlier decision was Barnett v. W.T. Grant Co., 518 F.2d 543, 546 (4th Cir. 1975). Even before the decision in \textit{Hill}, district courts in the Fourth Circuit had
on behalf of employees and applicants assures the congruence of interests and injury that the Supreme Court required.

The Third Circuit has taken a more moderate, though less definite position. In *Scott v. University of Delaware*, it held that an employee could not represent applicants in challenging an employment qualification that he possessed but that they did not, when he would compete with them for renewal of his contract. Although this holding is narrowly framed, it has broader implications. Employees usually possess qualifications that rejected applicants do not; otherwise they would not have been hired. Likewise, competition between applicants and employees is likely to be present in most cases to a greater or lesser degree. The Third Circuit nevertheless distinguished divergence of interests from conflict of interests: "Often such a divergence will be harmless in that it will not impair the incentive of the named representative in vigorously prosecuting all aspects of the case."


151 601 F.2d at 85. This argument has been taken to the opposite extreme: that former employees who do not seek reinstatement can represent applicants because they will not compete with them for future employment opportunities. *Greene, Title VII Class Actions: Standing at Its Edge?*, 58 U. Det. J. Urb. L. 645, 693 (1981). Former employees who do not seek reinstatement, however, have even less in common with rejected applicants than with present employees. See supra notes 105-18 and accompanying text.
of applicants and employees assure adequate representation. As the Supreme Court suggested in *Falcon*, the district court should determine initially whether the claims of the named plaintiff and the class concern similar employment practices.\(^{163}\) If not, the court should exclude applicants from the class, or if a rejected applicant can be found to serve as a named plaintiff, he should represent applicants separately through certification of a subclass.\(^{163}\)

### D. Nonapplicants

The most elusive victims of employment discrimination are those deterred from applying for jobs with an employer by its reputation for discriminatory employment practices. Theoretically, such victims are entitled to relief under Title VII. Courts usually exclude nonapplicants from Title VII class actions, however, for various reasons: such persons would benefit from injunctive relief anyway;\(^{164}\) they are inadequately represented by present and past employees;\(^{165}\) or they cannot be identified.\(^{166}\) In some cases, courts have included deterred applicants in the class, usually by relying on the principle of liberal certification.\(^{167}\)

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\(^{163}\) 102 S. Ct. at 2371-72 & n.15. The First Circuit appears to have taken this position in dicta. See *DeGrace v. Rumsfeld*, 614 F.2d 796, 809-10 (1st Cir. 1980).

Paradoxically, the Fifth Circuit has included deterred nonapplicants in classes precisely because they are difficult to identify. See *Williams v. New Orleans S.S. Ass'n*, 673 F.2d 742, 745 (5th Cir. 1982); *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1022 (5th Cir. 1981).
The fundamental question concerning deterred nonapplicants is one of remedy: whether they are entitled to class-wide injunctive relief or individual compensatory relief. If they are to benefit from injunctions that reform hiring and recruiting practices, they must apply for a job at some time in the future. To this extent, past nonapplicants become future applicants who should be included in the class for other reasons. If they are to receive compensatory relief, they must receive notice of their right to such relief and of the need to come forward individually to establish their claims. In theory, compensatory relief for nonapplicants follows from the remedial purposes of Title VII, which are to deter future discrimination and to compensate victims of past discrimination. The Supreme Court has applied these principles to present employees deterred from applying for promotions, although it has cautioned that they have "the not always easy burden" of proving that they would have applied but for the employer's discriminatory practices. The problem with extending relief to nonapplicants is that, unlike present employees deterred from applying for promotions, nonapplicants are not easily distinguishable from members of the public at large. Furthermore, deterred nonapplicants must receive notice of their right to individual compensatory relief. Both problems arise from the difficulty of identifying those who would have applied for a position with the employer but for his discrimi-


158 Technically, deterred nonapplicants may benefit from changes ordered in recruiting practices even if they do not actually make an application for a job with the employer. This is particularly true if the changed recruiting practices give them a greater opportunity to make a successful application. But even in this respect, deterred nonapplicants are indistinguishable from future applicants, most of whom also benefit in the same way from changed recruiting practices.

159 See supra notes 125-33 and accompanying text.


161 International Bhd. of Teamsters v. United States, 431 U.S. at 368 n.52.

natory practices.

In most cases, this difficulty is insurmountable. Short of an open invitation to members of a given race or sex throughout the area surrounding an employer's facilities, the court has no means of advising nonapplicants of their rights to relief. To be effective, such notice must amount to more than formal publication, and even if it were effective, it would threaten the court with a flood of individual claims. Occasionally, the number of potential applicants is so limited that the cost of individual notice and adjudication is not prohibitive. For example, in Byrd v. IBEW, Local 24, the court certified a subclass of skilled sheet metal workers and ironworkers deterred from applying for membership in the unions that represented those trades in the Baltimore area. Using census data, the court identified approximately 1400 blacks with the skills needed for work in the sheet metal and ironworking trades. The court refused to certify other subclasses of nonapplicants because their members could not be identified by any objective measure. In certifying the nonapplicant subclass, the court implicitly found that the subclass was not too large to prevent individualized adjudications. The court's holding in its entirety was exactly right: including nonapplicants in a class action should be the exception—applicable only when they are identifiable—and not the rule.

E. Employees of Different Status

Employees can be divided according to the social status or prestige of the position that they occupy. Indications and consequences of status, of course, are various; they may include amount and method of compensation, extent of fringe benefits and perquisites, dangers and discomforts of working conditions, duration and scheduling of working time, prerequisites of skill, education and experience, recognition in the industry or community, and rank and responsibility within the employer's organization. Positions of different status are also various; they range from production, service, and clerical employees, to technical and professional employ-

164 Id. at 1288-89.
165 Id.
166 The order was conditioned on a finding that the defendant had violated Title VII. Id. at 1296.
ees, to managers and supervisors. Moreover, differences in status also vary by industry and employer, so that greater or fewer, or broader or narrower categories may be appropriate for different industries, or for different employers within the same industry. In a factory, employees can be meaningfully classified as skilled or unskilled workers, but in a hospital skilled employees include doctors, nurses, and lab technicians. Differences of status are further complicated because they overlap with differences among organizational units. Employees of different status may be assigned to different divisions, plants or departments as, for example, when production and clerical employees are assigned to different departments within the same plant. Furthermore, employee status also overlaps with union representation of employees in collective bargaining. The status of employees in a proposed bargaining unit is among the factors that determine whether the unit is appropriate under the National Labor Relations Act. 167

These three factors—employee status, organizational structure, and union representation—have a common basis in the employer’s personnel policies. It is the scope of such policies that must determine the scope of the class. If the named plaintiff alleges discrimination in employment practices common to a large group of employees, certification of an equally large class is usually appropriate. Employment practices that apply to smaller groups justify correspondingly narrower classes. Hard and fast rules would force widely varying employment practices and equally diverse claims of discrimination into predetermined forms of litigation. Employee status, organizational structure, and union representation must instead be taken for what they are: easily determined indications of the scope of challenged employment practices that may nevertheless be rebutted by examination of the employer’s operations. The remainder of this section examines three such rules of thumb that might be derived from employee status. Subsequent sections examine organizational structure and union representation.

1. Production, Clerical, and Service Employees

Classes of production, clerical, or service employees present two questions. First, should employees of different status be included in the same class? Second, should employees of the same status be further subdivided before they are included in the class? The first question is often framed in terms of the distinction between employees who are covered by the minimum wage and hour provisions of the Fair Labor Standards Act, and employees who are exempt from its provisions, primarily executive, administrative, and professional employees and outside salesmen. A typical case is *Vuyanich v. Republic National Bank,* in which the district court certified subclasses of exempt applicants, nonexempt applicants, exempt employees, and nonexempt employees. Hiring, compensation and job evaluation procedures differed among these groups, as did the evidence of race and sex discrimination that the plaintiff presented to support certification. In other cases, in which no named plaintiff was an exempt employee and the named plaintiffs presented less evidence of discrimination before certification, courts have simply excluded exempt employees from the class.

The few cases that have reached a contrary result have relied on the principle of liberal certification or, more justifiably, on a

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172 82 F.R.D. at 433-34.
claim of discrimination that unifies the interests of lower and higher status employees, typically discrimination in promotions to higher status jobs. A claim of discrimination in promotions can be asserted on behalf of employees who have already been promoted, as well as those who have not, because promoted employees can obtain relief for delayed promotions or for denial of further promotions. Moreover, a claim of discrimination in promotions might also support certification of an across-the-board class. Evidence for such a claim would constitute evidence that apparently disparate employment practices applicable to different groups of employees are part of an overall pattern of discrimination. A finding that such a pattern may be present in a particular case, of course, requires an examination of the evidence, illustrating again the importance of examining the merits before certification.

The answer to the second question, whether the district court should further subdivide employees of the same status, depends on the structure of the employer’s operations. Distinctions among production, service, and clerical employees depend on how the employer has organized its work force. When such distinctions reflect differences in allegedly discriminatory employment practices, the court should restrict the scope of the class accordingly. Some cases have distinguished employees on the basis of such factors as skill, tenure, opportunities for promotion, and working conditions. Others, relying largely on the principle of liberal certifi-


177 See supra note 100 and accompanying text.


179 See Gibson v. Local 40, Supercargoes & Checkers, 543 F.2d 1259, 1264-65 (9th Cir. 1976); Whittaker v. Department of Human Resources, 30 Fed. R. Serv. 2d (Callaghan) 931, 933 (N.D. Ga. 1980).


176 See supra note 100 and accompanying text.


180 Different working conditions often result from assignment of employees to different
cations, have not. Distinctions among employees of similar status must relate to the substantial claims asserted on behalf of the named plaintiff and the class. The question is not one of degree, but of relevant similarities and differences: whether the claims of discrimination asserted on behalf of employees in both jobs are substantially the same.

2. Technical and Professional Employees

Classes of technical and professional employees present the same problems as classes of skilled employees. Employers usually give special treatment to technical and professional employees because of the greater skill and prestige attached to their work. Typically, the different employment practices applicable to technical and professional employees require exclusion of other employees from the class, and frequently require further distinctions among technical and professional employees themselves. For instance, in Sobel v. Yeshiva University, the class was limited to medical doctors at one campus of the defendant's medical school, and for limited purposes, doctors at another campus. The court excluded staff employees with degrees other than "M.D." from the class because their relationship to the employer was different from that of doctors. The cases that have allowed professional employees to represent employees of lower status have relied on allegations that the named plaintiffs were aggrieved by the same practices as other


181 These are usually cases in which lower status employees have also been allowed to represent higher status employees. See supra notes 174-75.


183 See Duncan v. Maryland, 78 F.R.D. 88, 95 (D. Md. 1978). See also Smith v. Crozier-Chester Medical Center, 24 Fed. R. Serv. 2d (Callaghan) 628, 630 (E.D. Pa. 1977) (technicians in training program could only represent other technicians in training program).


185 Id. at 1169.
employees. Assuming such allegations were substantial, these cases were correctly decided. Employee status only suggests the answer to the basic question: whether the employment practices alleged to be discriminatory apply to every segment of the class.

3. Supervisors and Managers

Courts generally have not allowed supervisors and managers to represent lower status employees, although exceptions to this rule have been frequent. Courts usually reason that supervisors and managers have claims that are not typical of production, service or clerical employees, and more commonly, that the two groups have different or conflicting interests. The leading case denying representation is Wells v. Ramsay, Scarlett & Co., in which the Fifth Circuit held that a foreman could not represent longshoremen because he lacked a sufficient “nexus” with them. The court apparently meant the requirement of “nexus” to merge various discrete requirements of rule 23, such as commonality, typicality, adequacy of representation, and appropriateness of class-wide injunctive relief. The court gave content to the requirement, however, not by abstract definition, but by referring to the defendant’s different treatment of supervisors and rank-and-file em-


189 506 F.2d 436 (5th Cir. 1975).

190 Id. at 437.

191 See Huff v. N.D. Cass Co., 485 F.2d 710, 714 (5th Cir. 1973) (en banc).
ployees. This is the correct basic inquiry.

The cases allowing representation, almost without exception, have involved claims of discrimination in promotions or other common conditions of employment. As in cases involving attempts by lower status employees to represent higher status employees, promotion claims offer the strongest possible ground for finding common interests between higher status representatives and lower status class members. Such claims implicate the interests of lower status employees in obtaining promotions and the interests of higher status employees in recovering for delayed promotions and in obtaining further promotions.

F. Employees in Different Organizational Units

The scope of a class might extend to employees of different employers or employees of a single employer in different plants, divisions or departments. As with employees of different status, the most important determinant of class size is the extent of common employment practices. This issue is usually framed in terms of centralization of employment practices: whether decisions of several employers are governed by the same rules, typically found in a collective bargaining agreement, or whether decisions in different subdivisions of the same employer are administered by a central personnel office.

1. Employees of Different Employers

Courts have included employees of different employers in the same class only when a collective bargaining agreement applicable to several employers has come under attack. Such decisions have been confined mainly to the construction industry, in which multi-

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193 See supra note 175 and accompanying text.
employer collective bargaining agreements are common.\textsuperscript{194} These agreements usually cover a broad range of employment practices, such as hiring, promotion, seniority and entry into apprenticeship programs. If so, any claim of discrimination in such practices naturally extends to all employees of covered employers. Indeed, one case has gone so far as to certify defendant classes to include all covered employers.\textsuperscript{195} Nevertheless, even when courts have certified broad plaintiff classes, they have divided such classes into subclasses for each employer or trade because apparently identical employment practices may vary in application from one employer or trade to another.\textsuperscript{196}

Another line of cases concerns a related but distinct question: whether separate but commonly owned business entities, typically parent and subsidiary corporations, count as one employer or several. Here, as in other areas of law, courts may look behind the form of nominally distinct entities to determine their real structure and, in particular, whether their personnel decisions are sufficiently integrated to justify certification of a single class.\textsuperscript{197} As a practical matter, integrated employment practices usually accompany generally integrated operations. Consequently, unified treatment of separate employers for other purposes, such as imposing liability in corporate law, also supports unified treatment for purposes of class certification.\textsuperscript{198}

2. Employees in Different Plants, Divisions, or Departments of the Same Employer

When courts have defined a class according to plants, divisions, or departments of a single employer, they have relied explicitly on the degree of centralization of the employer's personnel decisions. As with other aspects of class definition, this inquiry must focus on the specific employment practices alleged to be discriminatory and the particular employer who has been sued. Centralization of employment practices can take as many forms as organizational structure. Personnel decisions may be made by a single office, by local managers, or by some combination of the two, according to broader or narrower guidelines. Most likely, different kinds of decisions and policies are made at different levels in the employer's management structure. Overall centralization of employment practices is generally not as important as centralization of the specific practices alleged to be discriminatory.

Actions challenging uniform, centrally established policies provide the clearest justification for certification of broadly defined classes. The most dramatic of these are nationwide class actions that cover all the facilities of a single employer.199 An example of a properly certified nationwide class is *Wetzel v. Liberty Mutual Insurance Co.*200 The plaintiff in *Wetzel* alleged discrimination in assigning women to lower paying positions in the employer's claims department and in denying leaves and disability benefits for preg-

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Although the plaintiffs' claims were confined to one office, they concerned policies that applied nationwide to all the employer's offices. The Supreme Court has endorsed the same principle in *Califano v. Yamasaki*, an action challenging a regulation under the Social Security Act. The Court held that certification of a nationwide class was not an abuse of discretion if the requirements of rule 23 were otherwise satisfied. Likewise, in Title VII cases, if the scope of the challenged practice extends nationwide, the scope of the class should be equally broad.

Most cases, of course, are more complex. The issues most frequently raised are whether the class should extend to employees at different plants and whether it should include employees in different departments of the same plant. These questions may be answered independently. A class may include all employees at different locations, or as *Wetzel* illustrates, only employees in a single department at different locations. And of course, a class may be confined to employees at a single location or employees in a sin-

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201 Id. at 244. The *Wetzel* decision is also discussed at supra notes 105-18 and accompanying text.
204 Id. at 701-03.
In a leading decision, *Stastny v. Southern Bell Telephone & Telegraph Co.*, the Fourth Circuit held that certification of a statewide class must be justified by evidence of statewide employment practices. It reversed certification of a class that included all of the defendant's female employees in North Carolina who had held management positions or who had been denied promotion to management positions on account of their sex. The Fourth Circuit found no evidence that personnel decisions were made under central control or that managerial positions were filled from a statewide labor pool instead of the labor market for the area surrounding each facility. The evidence suggested instead that authority over personnel decisions was dispersed among at least twenty-four facilities around the state. The Fourth Circuit reasoned that the district court might have acted correctly in initially certifying a statewide class, but that it should have reconsidered its decision before or during trial in light of evidence going to the merits of the plaintiffs' claims. Without evidence of an identifiable pattern or practice of discrimination applicable to female employees throughout the state, the district court should have revoked certification of the statewide class. As the Fourth Circuit emphasized, the appropriate inquiry was not whether a "rigid rule-of-law checklist" had been satisfied, but whether the plaintiffs' claims on the merits concerned centralized employment practices applicable to the entire class.


2. 628 F.2d 267 (4th Cir. 1980).

3. Id. at 278-81.

4. Id. at 275-76.

5. Id. at 277.

6. Id. The Fourth Circuit quoted with approval the list of factors formulated by Judge
The need to take account of the structure of the defendant's operations is most apparent when the only issue is the scope of the class and not whether it should be certified at all. In such cases, the scope of classes and subclasses is better defined by reference to the defendant's distribution of authority over personnel decisions than by reliance on inflexible rules that always confine the class to a single plant, division, or department. In *Wofford v. Safeway Stores, Inc.*,\(^{214}\) for example, the district court certified several sub-


classes corresponding to various of the employer's organizational units in northern California. One subclass included minority employees within the San Francisco Retail Division, in which hiring, training, and general employment policies were entirely centralized, but excluded employees above the level of store manager and employees at the division headquarters because they were subject to different employment practices. A second subclass included only women in the same positions, but was confined to claims of discrimination in promotions. A third subclass covered minority employees at corporate headquarters, but was limited to clerical employees and their supervisors because they alone were subject to centralized employment practices. The district court refused to certify a final subclass of minority or female employees in the defendant's supply divisions in the absence of evidence of a pattern of discrimination. Such detailed rulings on certification can be justified, as they were in Wofford, only by reference to the defendant's allocation of authority within its management structure. Inflexible rules would not fit the variety and complexity of Title VII litigation, and at the opposite extreme, reliance on the discretion of the district judge would all but eliminate consistency in certification decisions.

G. Union Representation

Union representation in collective bargaining complicates class representation in litigation over allegedly discriminatory employment practices. The extent of union representation usually corresponds to factors independently relevant to certification, especially the scope of common employment practices and the organizational structure of the employer. The National Labor Relations Act and the Railway Labor Act require such factors to be taken into account.

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215 Id. at 481-83.
216 Id. at 483-84.
217 Id. at 484-85.
218 Id. at 486.
219 Other cases have also divided claimants into subclasses corresponding to the employer's organizational structure. See Vuyanich v. Republic Nat'l Bank, 82 F.R.D. 420, 423-34 (N.D. Tex. 1979); Lightfoot v. Gallo Sales Co., 15 Fair Empl. Prac. Cas. (BNA) 615, 618 (N.D. Cal. 1977).
account in defining units appropriate for collective bargaining. Union representation most frequently complicates class litigation when the union seeks to represent the class. In such cases, the union’s role as collective bargaining representative conflicts with its role as class representative. Because of this conflict—which is most evident when the union might itself be liable for discriminatory employment practices—unions should rarely be allowed to serve as class representatives.

In most cases, union representation is a reliable indicator of common employment practices. It most clearly defines the scope of the class when the union is a defendant. Discrimination by the union adversely affects only employees and applicants for positions in the unit it represents and, occasionally, unemployed union members and applicants for union membership. When the union is not a defendant, union representation provides a less certain measure of the scope of the class. The collective bargaining agreement usually establishes common employment practices applicable only to employees represented by the union, but if the class action attacks employment practices applicable to both union and nonunion employees, a broader class may be appropriate. Union representation is evidence of common employment practices, but it

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Class Actions does not invariably determine class size.

When the union is not sued as a defendant, but itself sues on behalf of the class, its role as collective bargaining representative conflicts with its role as class representative. This conflict is most obvious if the union itself might be liable for discrimination related to the negotiation or administration of the collective bargaining agreement. It is also evident when the union represents some members of the class in collective bargaining but not others, or consistently represents some members of the class better than others. A similar but more pervasive conflict of interest arises from the union’s incentive to compromise its position in litigation in exchange for concessions in collective bargaining. Neither the union nor the employer is likely to separate litigation and settlement entirely from negotiation of the collective bargaining agreement.

The variety of these conflicts of interest and the likelihood that they will arise warrant a presumption that the district judge should deny certification unless the union demonstrates that the risk of conflict is minimal.

The decided cases, however, have not required the union to demonstrate the absence of any conflict of interest. Most have allowed union representation unless the record revealed an appreciable risk of conflict of interest. A few have refused to allow union representation, citing the risk of conflict of interest arising from


See International Woodworkers v. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1266-67, 1268-69 (4th Cir. 1981); Social Servs. Union, Local 535 v. County of Santa Clara, 609 F.2d 944 (9th Cir. 1979); International Woodworkers v. Georgia-Pacific Corp., 568 F.2d 64, 67-68 (8th Cir. 1977); Local 194, Retail, Wholesale & Department Store Union v. Standard Brands, Inc., 540 F.2d 864, 867 (7th Cir. 1976). See also Note, supra note 226, at 1630-31; Comment, supra note 226, at 756-88.
the union's potential liability for discrimination. The cases that have allowed union representation have underestimated the difference between representation in collective bargaining and representation in class litigation. In collective bargaining, the union acts as the representative selected by a majority of the employees, but in class actions, the named plaintiff must adequately represent all class members. Although the union's representation of the majority in collective bargaining is constrained by a duty to represent all employees fairly, the union's principal obligation is to the majority of employees, whereas the named plaintiff's obligation is to represent each segment of the class adequately, if not each individual class member. The majoritarian processes that dominate collective bargaining have no place at all in class actions. Moreover, the constituencies represented in each instance are quite different. The union in collective bargaining represents all employees, whereas the named plaintiff represents only alleged victims of discrimination. These structural differences between collective bargaining and class representation are not offset by the greater experience and financial resources of the union. The danger of union representation is not that it will be unsophisticated or underfinanced, but that it will serve the interests of the majority of employees rather than the interests of each segment of the class.

Moreover, unions need not be class representatives to make valuable contributions to employment discrimination litigation. They can intervene or join as an additional party plaintiff. Indeed, they appear to be necessary parties to any action alleging discrimi-

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230 Under both the National Labor Relations Act and the Railway Labor Act, exclusive bargaining representatives are designated by the majority of employees in the unit to be represented. 29 U.S.C. § 159 (1976); 45 U.S.C. § 152 Third, Ninth (1976).


232 R. Gorman, supra note 222, at 695-728; Note, supra note 227, at 1330-32.

nation related to the collective bargaining agreement. Independent representation of the class, with separate participation by the union, allows both groups to coordinate litigation strategy to the extent that their interests are similar, but does not risk the interests of individual class members who might not be influential in the union. Like representation of subclasses by different counsel, separate representation of the class and the union allows the attorneys for the two groups to coordinate litigation strategy to further common interests and, to the extent that their interests diverge, to take different positions. The union can best serve its function of representing a majority of all employees—both inside and outside the class—by joining the litigation as a party, not by serving as a class representative.

H. Different Racial, National Origin and Sexual Groups

Named plaintiffs often assert claims of discrimination on behalf of persons of different race, national origin, or sex in a single class action. For example, claims of racial and sexual discrimination might be brought on behalf of a class composed of black men, black women, and white women. Combining such groups in a single class, however, creates obvious conflicts of interests. Black men have an interest only in proving racial discrimination, while white women have an interest only in proving sexual discrimination. From the start, the two groups are likely to disagree over the allocation of resources available for asserting these claims. Later, if the court finds that the employer has discriminated on the basis of race or sex, a remedy of compensatory seniority or preferential treatment for one group is likely to diminish the opportunities available to the other. Claims of discrimination on behalf of different groups differ sharply in theory, evidence, remedy, and identity of claimant.

Courts have generally recognized these risks when plaintiffs allege discrimination against different groups. Instead of certifying

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235 See infra notes 249-56 and accompanying text.
236 For a similar conclusion, see Note, supra note 226.
a single class, courts have insisted on the need for separate named plaintiffs and class attorneys.\textsuperscript{238} Certification of subclasses for each group allows separate representation without sacrificing the efficiency of a consolidated action. By certifying subclasses, the district court allows representatives and attorneys for each subclass, rather than a single named plaintiff and the class attorney, to balance the competing interests of the subclasses and to decide whether to prosecute separate claims in a single action. Certification of subclasses, of course, increases the number of parties and attorneys before the court and decreases the likelihood of settlements, but these added costs must be subordinated to protection of class members from conflicts of interest.\textsuperscript{239}

The cases that have certified a single, composite class have minimized the differences among claims of different groups and have left any finding of conflict of interest to be based on specific evidence that might arise later in the proceedings.\textsuperscript{240} A leading decision is \textit{Vuyanich v. Republic National Bank},\textsuperscript{241} in which the district court certified separate subclasses of black and female applicants for nonexempt positions only after a showing of conflict of interest based on evidence in the record. The evidence showed

\begin{footnotes}
\item[239] See infra notes 244-56 and accompanying text.
\item[241] 82 F.R.D. 420 (N.D. Tex. 1979).
\end{footnotes}
that the employer had discriminated against black women and in favor of white women. But the court consolidated black and female applicants for exempt positions in a single class because there was no evidence of similar discrimination in hiring for those positions. This reasoning might be correct insofar as it allows certification of a composite class in exceptional cases. Generalizations about the proper scope of a class must yield to a showing that apparently divergent claims are in fact similar and that typically conflicting interests are actually in harmony. The court was wrong, however, to place the burden of producing evidence on those supporting separate subclasses. Claims of discrimination on behalf of different groups are more likely than not to cause conflicts of interest. In the absence of evidence to the contrary, courts should certify separate subclasses for persons of different race, national origin, or sex.

I. Multiple Named Plaintiffs

As courts have limited classes to persons similar to the named plaintiffs, plaintiffs’ attorneys have responded by joining several named plaintiffs in a single action and seeking certification of a class defined by reference to the claims and characteristics of a

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242 Id. at 433-36. Other cases have certified some composite subclasses but refused to certify others. See Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 490-91 (N.D. Cal. 1978); Minority Alliance Group, Inc. v. Cook County, 28 Fair Empl. Prac. Cas. (BNA) 1298, 1305 (N.D. Ill 1976).


Further subdivision of classes by race and sex is not necessary. For instance, in an action alleging racial and sexual discrimination, there is no need for subclasses of black men, black women, and white women. Subclasses of blacks and women are sufficient because they exactly resemble the classes that would be certified in independent actions alleging racial and sexual discrimination. If separate class actions on behalf of blacks and women would not give rise to conflicts of interests, neither would a consolidated action on behalf of subclasses of blacks and women. Conceivably, a case might arise in which further subclassing would be necessary to prevent conflicts of interest, but I have encountered none.

A related problem might arise if only one named plaintiff sought to represent two overlapping subclasses, for instance, in the preceding example if a black woman sought to represent both a subclass of blacks and a subclass of women. Allowing the black woman to represent both subclasses creates a conflict of interest, but not allowing her to do so prevents her from representing at least one subclass with which she shares common interests. This problem might be solved either by soliciting intervention of black men and white women as additional named plaintiffs for each subclass or by appointing separate counsel for each subclass. See infra notes 244-56 and accompanying text.
group of named plaintiffs instead of only one. Such attempts to expand the scope of the class by expanding the number of named plaintiffs are, in some cases, an appropriate means of obtaining certification of a broader class. It is necessary only for plaintiffs' attorneys to act within ethical constraints and for the court to assure that segments of the class with conflicting or divergent interests are represented, not only by different named plaintiffs, but also by different attorneys.

Representation by separate named plaintiffs and by separate counsel complement one another. Named plaintiffs, even if they do not contribute to tactical litigation decisions, impose significant constraints on the decisions of class counsel. In the absence of any named plaintiff, the class attorney's selection of claims would determine the scope of the class, subject only to the liberal pleading requirements of the Federal Rules of Civil Procedure and the district court's review for numerosity, predominance of common issues, and adequate representation by counsel. Ethical rules that prohibit solicitation of named plaintiffs would not constrain the class attorney nor would the need for similarity between the claims of the class and the claims of the named plaintiff. The district court would lack any benchmark for determining whether common issues predominated and whether the interests of class members were likely to conflict. Instead of examining the concrete claims and characteristics of an actual plaintiff, the court would be confronted by an array of abstract claims of unknown class members.

The requirement of a named plaintiff with claims similar to those of the class imposes a structure on class actions that limits the power of the class attorney, who would otherwise become a

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247 Fed. R. Civ. P. 23(a)(1)-(2), (4). The requirements of rule 23(b) largely duplicate and amplify those of rule 23(a). See Rutherglen, supra note 3, at 698.

248 See supra note 245.
self-appointed representative of a class entirely of his own choosing. This requirement also provides guidance to the district court in making certification decisions. Unlimited discretion in the hands of the district judge cannot effectively restrict unlimited power in the hands of the class attorney. A district judge cannot ferret out every instance of inadequate representation without an excessive commitment of time and a significant loss of impartiality. The principal role of the district judge is to decide the case, not to act as an ombudsman for the class.

Requiring separate counsel for plaintiffs with disparate claims assures adequate representation of segments of the class with conflicting or divergent interests. Defining the class by reference to the claims and characteristics of the named plaintiff eliminates the most likely sources of inadequate representation. This protection would be lost if class members with disparate claims were represented by a single attorney just because named plaintiffs with equally disparate claims had been joined in the same action. The class attorney would resolve conflicts of interest among different segments of the class in consultation with the named plaintiffs, whose participation would probably be inconsequential.\footnote{See Gill v. Monroe County Dep't of Social Servs., 92 F.R.D. 14, 16-17 (W.D.N.Y. 1981); Martinez v. Bechtel Corp., 11 Fair Empl. Pract. Cas. (BNA) 898, 904-05 (N.D. Cal. 1975); Bell v. Automobile Club, 16 Fair Empl. Pract. Cas. (BNA) 1613, 1613-14 (E.D. Mich. 1974). Cf. Vuyanich v. Republic Nat'l Bank, 82 F.R.D. 420, 435-36 (N.D. Tex. 1979) (requiring separate counsel for subclasses with conflicts of interest).}

Certification of subclasses ensures that similarly situated named plaintiffs and separate counsel represent each segment of the class with distinctive interests. Subclasses must generally conform to the same requirements as ordinary classes,\footnote{Fed. R. Civ. P. 23(c)(4)(B); 7A C. Wright & A. Miller, supra note 15, § 1790, at 191-92.} although the requirement of numerosity might apply less strictly to subclasses created from a class that already satisfied this requirement.\footnote{See Fed. R. Civ. P. 23(a)(1). This requirement is notoriously indeterminate. 3B J. Moore & J. Kennedy, supra note 15, ¶ 23.05[1]; 7 C. Wright & A. Miller, supra note 15, § 1762 (1972 & Supp. 1981).} Dividing a large class into small classes may be more efficient than narrowing the
scope of the class or denying certification altogether, which could result in multiple individual actions. Likewise, if no named plaintiff is available to represent a particular subclass, a court may solicit intervention by members of the subclass to serve as named plaintiffs instead of simply excluding them from the class.\textsuperscript{292} Such solicitation is most appropriate when the need to certify a subclass becomes apparent only late in the litigation and narrowing the class would invalidate much of the earlier proceedings.\textsuperscript{293}

In addition to finding an appropriate named plaintiff, the court should appoint separate counsel to represent each subclass. Although appointment of counsel for each subclass undoubtedly complicates class litigation,\textsuperscript{294} attorneys for each subclass can be expected to coordinate litigation strategy to the extent that the interests of their subclasses coincide. If the interests of subclasses do not coincide, the district judge can eliminate duplication of effort by using his extensive powers to manage the class action\textsuperscript{295} and to determine the amount of attorney’s fees awarded to prevailing plaintiffs.\textsuperscript{296} The remaining complexity resulting from representation by separate counsel only makes apparent the real complexity of interests within the class, which would otherwise be reflected only in the decisions of a single class attorney.


\textsuperscript{295} See Fed. R. Civ. P. 23(d). See also Rutherfenglen, supra note 3, at 698-99.

IV. PRECLUSION

The judgment in a class action binds all class members who were adequately represented and, if the action was certified under subdivision (b)(3), who were properly notified and did not opt out.257 This rule, however, is easier to state than to apply. The difficulty of determining whether representation is adequate or notice is required creates uncertainty about the preclusive effect of the judgment which, in turn, invites collateral attack by dissatisfied class members and discourages reliance by the employer. Uncertainty about the preclusive effect of class action judgments is unfair to defendants in much the same way as was one-way intervention under the old version of rule 23.258 The defendant cannot rely on a favorable judgment, which is open to collateral attack by class members, but is stuck with an unfavorable judgment, under which class members can obtain relief.259 In Title VII class actions, one-way preclusion has resulted most frequently from collateral attack on two grounds: failure to assert claims on behalf of some members of the class and failure to seek compensatory relief, usually backpay, on behalf of the entire class. The proposals advanced earlier in this article—to provide notice to all class members with claims for compensatory relief and to define the class according to the named plaintiff’s individual claims—would reduce collateral attack on both grounds. The need for certainty in precluding the claims of individual class members confirms the value of procedures protecting the class.

A class action, however, has consequences other than preclusion of individual claims. Even if the judgment in a class action does not preclude a subsequent individual action, it may preclude certification of a subsequent class action. The judgment may leave so few individual claims to be adjudicated, or leave such disparate individual claims, that the requirements of numerosity and commonality of rule 23260 cannot be satisfied. A later class action may in-

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terfere with class-wide injunctive relief or the distribution of individual compensatory relief already ordered in the original class action. It may also disrupt compromises reached through settlement of the original class action. Or, more generally, it may duplicate litigation of claims already decided or settled in the original class action.

Although "pattern or practice" actions by the government have no preclusive effect on individual claims, such actions have much the same effect as class actions on subsequent class litigation. Pattern-or-practice actions are, in effect, statutorily authorized class actions brought by the Equal Employment Opportunity Commission or the Attorney General. As the term indicates, such actions allege a pattern or practice of discrimination that necessarily affects a class of applicants or employees. Unlike class actions, however, pattern-or-practice actions are not governed by rule 23 and do not, of their own force, preclude subsequent individual actions. However, if enough employees waive their claims for individual relief, or if the pattern-or-practice action results in extensive injunctive relief, then it should preclude subsequent class actions.

A. Preclusion of Individual Claims

The ordinary rules of preclusion appear to govern Title VII class actions. In fact, they do not. Courts have not applied the ordinary rules of issue preclusion and claim preclusion to class actions, although in theory these rules could be applied to all members of the class as persons in privity with the named plaintiff. Preclusion by class actions has usually been accomplished by a hybrid of issue and claim preclusion. Courts have not held that relitigation of one issue was precluded but that the remainder of the claim could go forward. Partly because of the prevalence of settlements of Title VII class actions, subsequent claims by class members have been either precluded entirely or not at all. On the other hand,

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courts have departed from the usual rule that claim preclusion extends to all claims arising out of the same transaction or occurrence as the claims that were actually litigated and, instead, have limited claim preclusion to those claims that were actually litigated.

These variations on the ordinary rules of preclusion reflect the fundamental importance of adequacy of representation in class actions. Courts have limited claim preclusion to claims that were actually litigated because failure to assert a claim is strong evidence of inadequate representation. This limitation on claim preclusion, in turn, blurs the distinction between claim and issue preclusion. A claim can take on different dimensions according to the quality of representation: it may refer to different acts of the defendant, such as a claim for discrimination in hiring as opposed to promotions, or it may refer to requests for different forms of relief, such as a claim for backpay as opposed to an injunction. Because claim preclusion applies only to litigated claims, and because it can expand or contract according to the quality of representation, it takes on some of the characteristics and most of the functions of issue preclusion.

Two kinds of claims have formed the basis for collateral attack in Title VII cases: claims applicable only to particular class members and claims for compensatory relief, usually backpay, on behalf of the entire class. Class members can usually avoid preclusion of claims based on a theory of recovery that the named plaintiffs did not advance in litigating or settling the original class action. Courts have allowed subsequent claims of seasonal employees "seemingly lost in the breadth and ambition of the class's overall interest,"
claims of retaliation not asserted on behalf of the class, claims of isolated instances of discrimination not encompassed by claims of class-wide discrimination, and claims of joint union-employer practices when the prior action was only against the union. In all of these cases, the class was clarified or redefined in collateral proceedings according to the claims actually litigated. Although the definition of the class must be open to reexamination, redefining the class on collateral attack wastes resources expended in litigating the claims of those excluded from the class and, more importantly, undermines the reliability of the judgment by encouraging collateral attack by other members of the class. Instead of putting an end to litigation once and for all, the judgment invites collateral attack by class members who believe that they can pursue their claims more successfully in separate actions. If the class is initially restricted to persons with claims and characteristics similar to those of the named plaintiff, claims nominally within the class action are more likely to be pressed in litigation or settlement. This, in turn, reduces the probability of successful collateral attack and, consequently, the incidence of attempted collateral attack.

Class members have also avoided preclusion of claims for backpay and for other forms of compensatory relief. They have relied on the named plaintiff’s failure to assert these claims or to obtain adequate awards in settlement, especially when the court has granted awards of compensatory relief exclusively to the named plaintiff. The surest means of preventing collateral at-

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271 See Dickerson v. United States Steel Corp., 582 F.2d 827, 830-31 (3d Cir. 1978).
tack on these grounds is to certify claims for such relief under subdivision (b)(3), thereby requiring class members to be given individual notice and the right to opt out. This step would reconcile practice in Title VII class actions with *Eisen v. Carlisle & Jacquin.* It would also diminish the opportunities for collateral attack by allowing class members an opportunity to intervene, or if they were dissatisfied with the named plaintiff's performance, to avoid preclusion by opting out. Several cases, for instance, have held that participation by class members in settlement proceedings precludes them from subsequent collateral attack. Other cases have relied on the general response of class members to notice of proposed settlement to determine whether it should be approved. Certification of claims for compensatory relief under subdivision (b)(3) would provide similar assurance of adequate representation, but it would also give class members the right to opt out, and because they would receive notice early in the proceedings, it would allow them to monitor the named plaintiff's performance over a longer period of time.

**B. Preclusion of Subsequent Class Actions**

Even if the judgment in a class action does not preclude a class member's individual claim, it may still prevent certification of a subsequent class action. It may not be binding on a particular class member or as to a particular claim, but it may remain valid as to most claims and class members within its scope. Particularly when the class action results in an injunction requiring extensive reform of employment practices, courts are likely to find the judgment valid as to most class members and most claims for similar relief.
In such cases, a subsequent class action poses a greater threat of inconsistent relief than individual actions, by interfering with the injunction already issued or by disrupting any compromise reached in a settlement.

A series of cases against school districts that were already subject to general desegregation decrees is illustrative. These cases, largely from the Fifth Circuit, denied certification of separate employment discrimination class actions because the general desegregation decrees already covered the school districts’ employment practices. Employees were already class members in the desegregation actions and the desegregation decrees provided them with adequate class-wide relief or could be modified to do so. Since the claims of most class members had already been resolved, there was no need to certify the subsequent lawsuits as class actions. The desegregation actions did not, by contrast, preclude the named plaintiffs’ individual claims because those claims had not been previously litigated in the desegregation actions.

Courts should certify subsequent class actions only when they raise claims entirely independent of the prior actions and, consequently, pose little threat of inconsistent adjudication or injunctive relief. For instance, in Stevenson v. International Paper Co., the Fifth Circuit held that a class action alleging discrimination in hiring, promotion and seniority practices was not barred by a prior class action alleging discrimination in the merger of previously segregated unions and breach of the duty of fair representation. The subsequent class action alleged that the employer and unions had discriminated by denying employment opportunities to blacks, while the prior class action alleged that the unions had discriminated by merging previously segregated locals. The claims in the two cases were entirely different.

Other cases have reached the same result, although some have narrowed the scope of the subsequent action to eliminate claims that were litigated in the prior

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281 516 F.2d 103 (5th Cir. 1975).

282 Id. at 108-10.

action. In all these cases, both those granting and those denying certification, the general principle is the same: preclusion of the claims of most class members prevents certification of a subsequent class action.

C. Preclusion by Pattern-or-Practice Actions

Pattern-or-practice actions by the Attorney General or the EEOC are public actions analogous to private class actions. They are brought on behalf of a class of applicants or employees, alleging a class-wide pattern or practice of discrimination, and seek class-wide injunctive relief and individual compensatory relief. They differ from class actions, however, in several respects. Title VII, not rule 23, authorizes pattern-or-practice actions. In General Telephone Co. v. EEOC, the Supreme Court held that rule 23 does not apply to government actions on behalf of a class of employees, whether or not it is denominated a pattern-or-practice action. It added, however, that government actions do not have the same preclusive effect as class actions on the claims of individual employees. A government action bars a subsequent individual action only to the extent that the individual has received benefits from the government action or has waived the right to seek further relief. Because employees usually waive their individual claims only in exchange for relief of some kind, the preclusive effect of a pattern-or-practice action generally depends on the participation of employees in the relief that the action affords.

Even more readily than class actions, pattern-or-practice actions

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287 See General Tel. Co. v. EEOC, 446 U.S. at 327-28 & n.10.


289 446 U.S. 318 (1980).

290 Id. at 322-33. Restatement (Second) of Judgments § 41(e) comment d, illustration 7 (1980); Note, Res Judicata in Successive Employment Discrimination Suits, 1980 U. Ill. L.F. 1049, 1061-70, 1077-84.

A government action precludes individual claims, however, if it is brought on behalf of a small number of individuals who do not constitute a class. Adams v. Proctor & Gamble Mfg. Co., 30 Fair Empl. Prac. Cas. (BNA) 1228 (4th Cir. 1983) (en banc).
may prevent certification of subsequent class actions without precluding individual actions. A pattern-or-practice action may result in relief to so many employees that no class of employees with common claims remains. Numerous employees with disparate claims may nevertheless have preserved their right to seek relief in individual actions. For instance, after entry of the nationwide consent decree between the EEOC and AT&T,\textsuperscript{291} district courts refused to certify class actions in a series of cases against AT&T subsidiaries.\textsuperscript{292} The courts uniformly found that any further class-wide relief would be redundant or inconsistent with the consent decree. Like prior class actions, however, prior pattern-or-practice actions do not prevent certification of class actions that concern claims not already litigated.\textsuperscript{293}

Pattern-or-practice actions preclude related class actions despite the limited priority that Congress gave to private actions in enforcing Title VII. If the Attorney General or the EEOC commences a public action on behalf of one or more employees, the statute grants the employees a right to intervene,\textsuperscript{294} although some courts have not applied this right to pattern-or-practice actions.\textsuperscript{295} By contrast, if an employee commences a private action, either on his own behalf or as a class action, the Attorney General and the EEOC can intervene only upon certification that the case is of general public importance and then only in the discretion of the district court.\textsuperscript{296} The legislative history of Title VII also emphasizes


the importance of private actions in enforcing the statute.297 For these reasons, the Supreme Court may have been reluctant to hold that government actions of their own force preclude individual actions.298 But these reasons do not apply to preclusion of subsequent class actions, contrary to the decisions of some lower courts.299 Repeated class-wide litigation of similar claims furthers neither individual participation in litigation nor efficient enforcement of the statute. Like repeated class actions, class actions following upon pattern-or-practice actions result only in unnecessary and potentially inconsistent litigation.

V. CONCLUSION

This article has considered a range of questions that commonly arise in Title VII class actions: the need for certification of claims for class-wide relief, the right of class members to receive notice and to opt out, the proper definition of the class, and preclusion of subsequent actions. These questions implicate diverse issues of procedural and substantive law, but they share a common theme. The preclusive effect of a class action should be settled as early as possible in the litigation. The class should be certified, its scope should be defined according to the claims of the named plaintiff and the class, and class members should be given individual notice and the right to opt out on claims for compensatory relief. These steps can be taken early in the litigation only by relying on rules—derived from the procedural and substantive law applicable to Title VII class actions—to guide the district judge in certifying and defining the class. These rules assure that the class is adequately represented and that it is bound by the resulting judgment. Although these rules are not without exceptions, they provide a structure within which the district judge can exercise discretion in supervising representation of the class. By structuring

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298 See General Tel. Co. v. EEOC, 446 U.S. at 332-33.
the class action to protect absent class members, these rules further both the fairness and effectiveness of Title VII class actions.