**58 U. Pitt. L. Rev. 435**

**University of Pittsburgh Law Review**
Winter 1997
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# DUE PROCESS AND THE IMPERMISSIBLE COLLATERAL ATTACK RULE IN EMPLOYMENT DISCRIMINATION CASES: AN ANALYSIS OF SECTION 108 OF THE CIVIL RIGHTS ACT OF 1991

## I. Introduction

A well-recognized component of the due process guaranteed by the Fourteenth Amendment is the right to litigate a legal claim.[1] However, the contours of this right have been in dispute in the area of employment discrimination litigation. Before 1989, a majority of the federal courts of appeals articulated the view that a consent decree or litigated judgment entered in an employment discrimination case could not be subsequently challenged by a non-party to the original action.[2] Basically, this "impermissible collateral attack" doctrine said that a majority employee whose prospects for promotion or hire were diminished due to an affirmative action program that resulted from earlier litigation between the employer and minority or women employees could not bring a reverse discrimination action challenging the employer's hiring or promotion practices under the affirmative action program.[3] The doctrine did not bar the majority workers from participating in the original employment discrimination litigation brought by the minority or women employees, but merely precluded a subsequent, collateral attack on the judgment entered in the ***436** earlier litigation, regardless of whether the majority workers had actually participated in the original litigation or the possible merit of the majority workers' legal claim that they suffered employment discrimination as a result of their employer's implementation of the judgment or decree that had been entered in the original litigation.[4] The cases imposing this impermissible collateral attack rule did so on various rationales: the challenger[5] failed to intervene despite notice and an opportunity to intervene in the original litigation;[6] the decree did not create an actionable wrong in favor of non-minority employees;[7] the court ought to abstain for reasons of comity (the original court has continuing jurisdiction over the decree or injunction);[8] and Congress intended to encourage settlement under Title VII and that purpose would be thwarted if collateral attack of settlement agreements were permitted.[9]

However, in 1989, the Supreme Court, in Martin v. Wilks ,[10] rejected the impermissible collateral attack doctrine and held that disadvantaged majority employees who were not parties to the litigation in which a consent decree was entered could challenge the consent decree in subsequent collateral proceedings.[11] Under Martin, unless a majority employee or prospective employee is joined, under Federal Rule of Civil Procedure 19, in the original litigation, that employee is free to bring his or her own claim challenging the employer's hiring and promotion policies carried out under the consent decree.[12]

As many commentators have pointed out, Martin represents what could be the death knell for affirmative action plans implemented in the settlement of Title VII claims.[13] It would be expensive, burdensome, and nearly impossible to join all interested parties in the original litigation. In addition, the unfortunate result of Martin is that an employer who settles an employment discrimination claim by agreeing to implement an affirmative action program pursuant to a consent decree risks

having to defend a multiplicity of subsequent reverse discrimination actions by majority ***437** employees and prospective employees, each of whom asserts essentially the same legal claim. Further, the impact of Martin on minority and women employees who were the plaintiffs in the original litigation is substantial. The plaintiffs in the original employment discrimination case likely agreed to forego damages or other remedies to which they were entitled in exchange for the employer's agreement to implement an affirmative action plan. Permitting subsequent attacks on the decree risks destroying everything that these employees accomplished by litigating their employment discrimination claim. Consequently, Martin thwarts a basic policy of Title VII: to encourage minority and women employees to bring and settle employment discrimination claims.

In an attempt to overturn Martin and prohibit collateral attacks of employment discrimination consent decrees and judgments in certain circumstances, Congress included section 108 in the Civil Rights Act of 1991. Section 108 bars legal challenges to employment discrimination consent decrees or litigated judgments when the challenger had notice and an opportunity to be heard or was adequately represented in the original litigation.[14]

Critics of section 108 have insisted that it violates due process by depriving plaintiffs of a day in court to litigate an arguably meritorious legal claim.[15] This article argues, however, that section 108 can and should be interpreted as consistent with due process guarantees in order to encourage and protect settlement agreements under Title VII, while providing adequate protection of majority workers' legitimate legal claims. Further, this article proposes an interpretive model which should guide courts in applying section 108.

### A. Martin v. Wilks

Martin was a reverse discrimination case in which white firefighters alleged that hiring and promotion decisions made by the Birmingham Fire Department pursuant to a consent decree constituted racial discrimination in violation of the Fourteenth Amendment and Title VII.[16] The consent decree had been entered in an employment discrimination class action case that the NAACP and black individuals had brought against the City of Birmingham, Alabama and the Jefferson County, Alabama ***438** Personnel Board.[17] The plaintiffs had alleged that the City and the Board had violated Title VII of the Civil Rights Act of 1964 by engaging in racially discriminatory hiring and promotion practices.[18] The district court held that tests used by the City and the Board to screen employment applicants were discriminatory.[19] While awaiting a decision after another trial on issues related to other testing and screening procedures used by the Board, the parties negotiated proposed consent decrees.[20]

The district court conducted a fairness hearing to consider the proposed consent decrees.[21] The Birmingham Firefighters Association (BFA), which represented a majority of the City's firefighters, participated in the hearing by filing objections to the proposed decrees.[22] After the hearing, but before the consent decrees were entered, the BFA and two of its members moved to intervene.[23] The district court denied the BFA's motion as untimely and the Eleventh Circuit affirmed.[24]

After the consent decrees were entered in the NAACP case, white male firefighters brought a separate suit challenging hiring and promotion decisions made pursuant thereto. The district court concluded that the white firefighters were "bound by the consent decrees."[25] The Eleventh Circuit reversed on the grounds that the white firefighters had not been in privity with any party to the original proceeding as would bind them to the judgment under principles of res judicata and collateral estoppel.[26] ***439** The Supreme Court affirmed the Eleventh Circuit and held that, under the Federal Rules of Civil Procedure, the white firefighters could maintain their collateral challenge.[27]

In particular, the Court rejected the argument that since the white firefighters had been aware of the original litigation and knew that their interests could be adversely affected by the outcome of that litigation, but failed to file a timely motion to intervene in that litigation, they should be precluded from collaterally attacking the consent decree.[28] The Court concluded that interpretating Federal Rule of Civil Procedure 24 as requiring mandatory intervention was inconsistent with the permissive language of the rule.[29] In other words, the Court rejected the mandatory intervention theory of collateral bar in favor of a theory of mandatory joinder under Federal Rule of Civil Procedure 19.[30]

  

***440** The Court did not specifically state that its holding was mandated by due process. Rather, the Court stated that its conclusion was "part of our 'deep-rooted historic tradition that everyone should have [a] day in court.'"[31] However, commentators have argued that despite the Court's failure to articulate the constitutional basis for its holding in Martin, due process does require the conclusion that non-parties must be permitted to collaterally attack consent decrees and litigated judgments.[32] Although certainly due process is implicated by the issues raised in Martin, it has never been the law that due process precludes binding all non-parties to judgments. Rather, when certain conditions are present, such as privity or a properly certified class, non-parties frequently are barred from pursuing subsequent challenges to judgments. Indeed, Martin recognized this; Justice Rehnquist's opinion noted two exceptions to the principal that non-parties are not bound by judgments or decrees among parties: (1)when the non-parties' interests are adequately represented by a party who shares the same interests as the non-parties, such as in a class action or representative suit; and (2) where a "special remedial scheme" expressly forecloses subsequent lawsuits, such as in bankruptcy or probate.[33] Martin did not hold that Rule 19 joinder is the only possible way to bind a non-party to a judgment; rather, it established that absent privity, class certification, or other means by which a non-party can be bound to a judgment, the proper way to bind a non-party is Rule 19 joinder.

### B. The Congressional Response: Section 108 of The Civil Rights Act of 1991

Shortly after Martin was decided, Congress enacted section 108 of the Civil Rights Act of 1991, which was intended to overrule the Martin holding.[34] In subparagraph (1)(B) of section 108, Congress set out the ***441** circumstances under which a litigant can be precluded from challenging a consent decree or litigated judgment in an employment discrimination suit. Under the statute, a person may not collaterally challenge employment practices conducted in compliance with a decree or judgment if that person received "actual notice" and a "reasonable opportunity to present objections" or if that person's "interests were adequately represented" in the original litigation "by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact."[35]

***442** By enacting section 108, Congress reaffirmed its policy of encouraging and protecting voluntary settlement and final resolution of Title VII claims. Section 108 protects employers who have made employment decisions based, in good faith, on valid consent decrees or judgments from conflicting obligations which could result from collateral attacks of affirmative action plans they are bound to implement pursuant to a judgment or decree. As the Martin dissent pointed out, the Martin majority's holding could subject an employer to liability under Title VII for complying with an order remedying a Title VII violation, a result which clearly was not contemplated by Title VII or the Equal Protection Clause.[36] The EEOC regulations provide that "actions taken pursuant to the direction of a Court Order cannot give rise to liability under title VII."[37] Indeed, protection against conflicting judgments is one of the primary rationales for the doctrine of res judicata.[38]

In addition, section 108 furthers Title VII's fundamental goal of providing protection for minority and women employees against discriminatory employment practices. Indeed, often the minority and women employees agree to an affirmative action plan to settle an otherwise legitimate claim for monetary damages. Without section 108, the minority and women employees will lose the benefit of their bargain and the protection of the affirmative action plan. This will remove the minority and women employees' incentive for bringing and settling Title VII claims and diminish the protection available under Title VII, thereby undermining the purposes and policies of Title VII.

However, section 108 raises due process questions regarding the propriety of eliminating the challenger's cause of action. Indeed, Congress recognized this and included in section 108 a provision that it should not be construed to "authorize or permit the denial to any person of the due process of law required by the Constitution."[39] Thus, it is necessary to focus on whether and how section 108's provisions can be interpreted to protect the interests of employers and minority and women employees, promote the policy of encouraging and protecting settlements in employment discrimination cases, and, significantly, protect the due process rights of majority employees who have an arguably meritorious reverse discrimination claim.

***443** A due process inquiry requires a three-step analysis. It is necessary to determine, first, the nature of the property right at

  

stake; second, what process is due; and third, whether that process can, consistently with the statute, be afforded.[40] The remainder of this article will address these three inquiries in the context of section 108.

## II. The Nature of the Right To Participate in the Litigation of One's Own Legal Claim

### A. The Litigant's Right To an Opportunity To Be Heard on the Merits

At stake in the notion of barring a challenger from asserting a challenge to an employment discrimination decree or judgment is the right to participate in litigating one's own legal claim. The challenger's cause of action is the property right that is protected by the Due Process Clause of the Fourteenth Amendment.[41] The challenger in a reverse-employment discrimination case does not have a right to a favorable judgment, but does have a right to litigate the claim to a favorable judgment.

An illustrative case is Logan v. Zimmerman Brush Company .[42] There, a litigant had been deprived of a right to maintain an employment discrimination claim due to a state administrative agency's failure to comply with state legislative procedures which were, under state law, prerequisites to the right to sue.[43] The Court held that the litigant had a property right in the cause of action and, thus, that the litigant could not be deprived of that right without due process of law.[44] The claim asserted by a challenger to an employment discrimination judgment or decree is analogous to the employment discrimination claim asserted by the plaintiff in Logan ; both are statutorily created employment discrimination causes of action.

In particular, it is the right to a hearing on the merits that is protected by the Due Process Clause.[45] The Court stated in Logan that "the ***444** Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged."[46] Similarly, the Supreme Court stated in Boddie v. Connecticut[47] that "absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."[48] Further, the Court has stated that "having made access to the courts an entitlement or a necessity, the State may not deprive someone of that access unless the balance of state and private interests favors the government scheme."[49] The Supreme Court, in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation ,[50] stated that

> [s]ome litigants<endash>those who never appeared in a prior action<endash> may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.[51]

In other words, reading Blonder-Tongue in its narrowest sense, a litigant has a due process right to a full and fair opportunity to litigate a legal claim and, without having been a party to litigation, one cannot be bound by the judgment in that litigation. This right to a meaningful opportunity to be heard on one's legal claim essentially means the right to an opportunity to participate in litigating one's own legal claim. The right includes an opportunity to present evidence for consideration on the merits of the claim and an opportunity to strategically direct the litigation.

### B. Satisfaction of the Right by Affording Notice and an Opportunity to be Heard

If the challenger received notice and an opportunity to be heard in the original litigation, there is no deprivation of the right to be heard. The property right protected is the opportunity to participate and if that opportunity was afforded, no further procedural protections are required.[52] ***445** The notice must satisfy section 108(1)(B)(i), which requires actual notice, and due process notice requirements that were established in Mullane v. Central Hanover Bank & Trust .[53]

It is on these grounds that section 108 directly overrules Martin. Martin held that Rule 24 would not mandate intervention even though there was actual notice and an opportunity to intervene.[54] Section 108 essentially directs that when there is notice and an opportunity to intervene (or otherwise meaningfully participate), that opportunity must be taken advantage of and

  

failure to do so will nonetheless result in a bar against subsequent litigation.[55]

Mullane is the seminal case defining the due process requirements of notice. Mullane involved a due process challenge to the sufficiency of notice provided under a New York statute.[56] Pursuant to the New York statute establishing a common trust fund and the procedure for subsequent judicial settlement of accounts, notice of judicial settlement was published in local newspapers.[57] Beneficiaries of the common trust fund in Mullane, all of whom were known by the trustee and some of whom lived outside of New York, challenged the sufficiency of this notice.[58] The Court held that, because the names and addresses of the interested parties were known, notice by publication was insufficient and violated due process.[59]

The Mullane Court recognized that " [a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[60] Thus, under Mullane, interested persons whose names and addresses are known to the parties or easily ascertainable must be given individual notice by mail.[61] The notice must, under Mullane, "be of such nature as reasonably to convey the required ***446** information and ... afford a reasonable time for those interested to make their appearance."[62]

Despite the Court's due process focus on the reasonableness of the notice, section 108(1)(B)(i) purports to require actual notice as a prerequisite to collateral bar.[63] The requirement of actual notice should be construed as establishing a separate notice requirement which is distinct from the due process inquiry as to the reasonableness of the notice. That is, section 108(1)(B)(i)'s actual notice requirement and section 108(2)(D)'s admonition that the statute should not be construed to "authorize or permit the denial to any person of the due process of law required by the Constitution"[64] create two separate notice requirements. This interpretation is consistent with legislative intent. An earlier version of section 108 had a reasonable notice requirement[65] that was changed in the final version of section 108 to an actual notice requirement,[66] thus suggesting that Congress meant that only actual, subjective notice would be sufficient to bar subsequent litigation. In addition, Senator Robert Dole's interpretive memorandum stated that the purpose of the provision barring collateral attack after notice and an opportunity to be heard was to ensure that only those who were "fully apprised of their interest in litigation and given an opportunity to participate, but who declined that opportunity" would be precluded from subsequently attacking the judgment.[67]

Thus, in order for a collateral attack to be barred by section 108(1)(B)(i), the challenger must have received actual notice and the notice must satisfy due process requirements. The actual notice requirement of section 108(1)(B)(i) is completely independent of the due process inquiry. A challenger may have received actual notice of the proposed judgment, yet notice of the judgment may not satisfy due process. For example, suppose an employer posts on a workplace bulletin board a notice of a proposed consent decree. Under Mullane, this notice would not satisfy the requirements of due process; due process, under Mullane, would require that each employee be mailed an individual notice. Yet, if an employee actually saw, read, and understood the notice posted on the bulletin board, that employee would have received actual notice, such as ***447** would satisfy section 108(1)(B)(i)'s actual notice requirement. The employee would not, however, be barred by section 108(1)(B)(i) from collaterally attacking the judgment because due process would not have been satisfied in this case. On the other hand, due process might be satisfied, but an employee might not have received actual notice. In that case, the employee would not be barred by section 108(1)(B)(i) from collaterally attacking the judgment.

In determining whether the challenger received actual notice, then, a court would look to whether the challenger had, at the appropriate time, subjective knowledge of the pending action and its potential impact on the challenger's legal rights.[68] This requirement is consistent with the purpose of section 108(1)(B)(i), which is to preclude collateral attack by only those people who actually knew about the pending original litigation and its potential impact on them, but did not take advantage of an opportunity to participate in the original litigation.[69]

Next, the court must undertake a due process analysis of whether notice was sufficient. In order to satisfy due process in the context of barring collateral attack of employment discrimination decrees and judgments, all known employees and applicants must, under Mullane, be given individual notice by mail.[70] Prospective employees, whose identities could not be easily ascertained at the time of the litigation due to difficulties in predicting who will apply for a job with a particular

  

employer in the future may be notified by other means reasonably calculated to apprise them of the possible adverse impact on their legal interests.[71]

## III. Process Required To Justify a Deprivation of the Right To an Opportunity To Participate in Litigating One's Own Legal Claim

Under section 108(1)(B)(ii), even if a challenger did not receive actual notice and an opportunity to be heard in the original litigation, the collateral attack may still be barred if the challenger's "interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or ***448** fact."[72] This provision offers several advantages: protection of the judgment or decree in the original action (including protection of the employer's interest in not being exposed to conflicting obligations or judgments, the original plaintiffs' interests in an affirmative action plan, and the court's interest in protecting the integrity of its judgments and orders); participation, albeit through representation, by the diverse interest-holders affected by the judgment or decree; and avoidance of the complexity that would pervade the litigation if all interested persons were joined as parties.[73]

However, this provision raises due process concerns because, under the adequate representation provision, the challenger's right to litigate a claim is being deprived. Indeed, section 108 recognizes both the existence and the individual nature of the right[74] in the provision that section 108 should not be "construed to ... authorize or permit the denial to any person of the due process of law required by the Constitution."[75] Critics have argued that the adequate representation provision violates due process for two reasons. First, the adequate representation provision ***449** does not contain any notice requirement; under the plain language of section 108(1)(B)(ii), suit can be barred even though neither actual notice nor notice reasonably calculated to provide actual notice was provided.[76] Second, the adequate representation provision does not require that the challenger have been in privity with the representative, but merely requires that the challenger's interests were represented in the original litigation.[77] Thus, the question raised by section 108's adequate representation provision is whether due process will permit a non-party to be barred from collaterally challenging a judgment where the challenger had neither notice of the earlier proceedings nor privity with any party to the original litigation.

In order to answer this question, the remainder of this part will discuss what process is required. In particular, part III.A will explain why neither privity nor Rule 23 class certification is required. In addition, part III.A will conclude that the doctrine of virtual representation does not aid the inquiry as to what process is required. Then, part III.B will discuss why due process is satisfied by a fairness hearing which critically examines the adequacy of the representation in the original litigation, the similarity of interests between the challenger and the purported representative, the legal and factual similarity of the claims asserted in the original litigation and the collateral challenge, and whether there have been intervening changes in law or facts that would suggest that it would be unfair to bind the challenger.

### A. Neither Privity Nor Rule 23 Class Notice Is Required

1. Privity

In Parklane Hosiery Company v. Shore ,[78] the Court stated that " i t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard."[79] A "privy" is a non-party who has a sufficiently close relationship and commonality of interest with a party to justify depriving the non-party of the right to litigate a claim or an issue.[80] Privity ***450** is a common law concept, but it is rooted in due process concerns. The theory underlying the privity requirement is that a non-privy has a substantial interest in litigating legal claims and not being bound by prior judgments as to those claims, and that this interest outweighs countervailing interests.[81] Despite the litigant's interest in autonomy and individual participation, those in privity with parties in the original action may be barred from relitigating claims or issues[82] in order to protect the sanctity ***451** of the court's judgment and to protect litigants' interests in not being exposed to conflicting judgments.[83] The rationale behind allowing privies to be bound is that they have,

  

in effect, had a day in court by virtue of their relationship and similarity of interests with a party in the original litigation.[84]

Certainly, Martin did not wipe out the entirety of the privity doctrine as justification for binding non-parties to judgments. The issue before the Supreme Court in Martin was not whether the plaintiffs were in privity with a party to the prior litigation such that they could be barred under res judicata principles;[85] rather, the Martin Court focused on the question of whether a non-privy who failed to timely intervene despite ***452** notice and an ample opportunity to timely intervene should be bound to the judgment.[86] Thus, the Supreme Court's opinion in Martin did not represent a departure from traditional principles relating to the binding effect of judgments, but rather, provided an interpretation of the Federal Rules of Civil Procedure .[87]

Thus, if privity can be established, a non-party can, consistently with Martin, be bound by a judgment under traditional res judicata principles. Indeed, some have argued that section 108(1)(B)(ii)'s adequate representation provision, when read together with section 108(2)(D)'s admonition that section 108 should not be construed to deny due process, merely establishes a privity requirement.[88] This interpretation is illogical, however, because so read, section 108's adequate representation provision is without effect; it merely codifies already established rules concerning the binding effect of judgments. That is, even without section 108(1)(B)(ii), a privy can be bound to the judgment.[89] The adequate representation provision, under this interpretation, is superfluous.[90]

Thus, the adequate representation provision must be read to endorse binding non-privies to the original judgment or decree in employment discrimination cases. Indeed, Congressman Don Edwards pointed out in ***453** an interpretive memorandum that section 108(1)(B)(ii) would bar collateral attack of employment discrimination decrees and judgments without requiring a finding that the challenger was in privity with a party to the original litigation.[91] The question, then, is whether due process will permit a court to bind a non-privy to a judgment without notice or an opportunity to be heard.

Courts and commentators have disagreed about whether the Martin holding was mandated by due process.[92] Significantly, the Court quoted Hansberry v. Lee[93] <endash>a due process case<endash>to establish its primary premise that a non-party cannot be bound by a judgment in personam.[94] Certainly, as discussed above, due process underlies all the doctrines relating to depriving someone of the opportunity to litigate a legal claim.[95]

However, due process implications notwithstanding, Martin did not hold that privity is a constitutional prerequisite to binding a non-party to a judgment. In fact, the Court specifically noted two exceptions to the principle that non-parties cannot be bound by judgments: class or representative actions and special legislative schemes that do not violate due process.[96] Neither of these exceptions require privity.[97] Thus, due process does not require privity; privity is merely one common law theory for binding non-parties to prior judgments.

### 2. Rule 23 Class Notice and Opt Out

Of course, a long-recognized exception to the privity requirement has been the class or representative action. Class and representative actions were endorsed by Martin ,[98] and are a widely used procedural device by which non-parties who are not in privity with any party can be bound ***454** to a judgment.[99] The Supreme Court, in Hansberry v. Lee, recognized that "the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it."[100]

Although the class action is one way to bind non-parties to employment discrimination judgments and decrees, section 108 should not be interpreted by reading Federal Rule of Civil Procedure 23's class action requirements into section 108. Although such an interpretation would be consistent with section 108(2)(D)'s requirement that the statute be interpreted so as not to offend due process, this interpretation is likely a poor reflection of congressional intent. If Congress meant to impose a class action requirement to bar collateral challenges to employment discrimination decrees and judgments, it easily could have done so by merely referring to Rule 23 in the text of the statute. Indeed, it is apparent from the omission of such reference along with the complete dearth of support for such a construction in the legislative history, that section 108(1)(B)(ii) was not meant to incorporate Rule 23 class action requirements.

  

The question, then, is whether due process requires the elaborate procedures set out in Rule 23 in order to bind non-privies, or whether section 108(1)(B)(ii) provides adequate procedural protections to bar collateral litigation without violating challengers' due process rights.

Rule 23(b)(1)(A) would be the appropriate mechanism for binding absent majority employees or prospective employees as a class in an employment discrimination action.[101] Rule 23(b)(1)(A) provides for maintenance of a class action when the litigation of separate actions by or against individual class members would create the potential for "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."[102] Thus, under this section, an employer could argue that a court should certify a class or classes of absent interested persons in order to protect the employer from inconsistent obligations or judgments.[103]

***455** Neither notice nor an opt-out opportunity are required by the Federal Rules of Civil Procedure in Rule 23(b)(1) and (b)(2) classes.[104] The Supreme Court has not resolved the issue,[105] but a majority of the circuits have held that, due to the nature of Rule 23(b)(1) and (b)(2) class actions, notice and an opportunity to opt out are not constitutionally required.[106]

***456** Some courts have based the determination of whether notice and an opt-out opportunity are required on the relief sought rather than the type of class involved. These courts would hold that notice and an opt-out opportunity are required when monetary damages are sought but not when injunctive or declaratory relief is sought.[107] Thus, for example, in Phillips Petroleum Company v. Shutts ,[108] the Supreme Court held that when money damages are sought, minimal due process protection is required to bind an absent class member under Rule 23(b)(3).[109] According to the Court, " t he non-party must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel."[110] The Court expressly noted that its "holding was limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments."[111] The distinction is based on the individual nature of a claim for monetary relief versus the greater cohesiveness or unity presumed to exist within the class where injunctive relief designed to remedy the group's harm is sought.[112] In addition, when injunctive relief is sought, the defendant has a strong interest ***457** in having interested parties bound in order to avoid inconsistent obligations under an injunction or consent decree.

This rationale supports the argument that due process does not require affording either notice or an opportunity to opt out to majority employees before binding them to an employment discrimination judgment or decree that results from a settlement between the employer and minority or women employees (assuming the majority employees' interests are represented in the original litigation). At the time of the original litigation, the majority employees do not have any cognizable employment discrimination claim for monetary damages; their only interest in the original litigation is to affect the affirmative action plan that is imposed by judgment or decree upon the employer. Thus, the majority employees have a similarity of interest sufficient to bind them, assuming there is adequate representation, without notice and an opportunity to opt out. In addition, the employer who has certain obligations under an injunction or consent decree has a strong interest in avoiding the inconsistent obligations that could result if majority employees were permitted an opportunity to opt out and pursue their own separate actions challenging the original judgment or decree.

Even if notice and an opportunity to opt out of Rule 23 class actions are required by due process, they are not constitutionally required to bind a non-party under section 108(1)(B)(ii). Under Rule 23, notice is required, if at all, because Rule 23 class certification cuts off the adequacy of representation determination early in the class action litigation. A member of a properly certified Rule 23 class loses entirely the opportunity to come forward later and challenge the adequacy of the representation; any judgment automatically binds all class members, and their claims are barred without any further determination of the adequacy of the representation.[113] Thus, notice is required in order to protect the potential class member whose rights are about to be terminated.

However, section 108 does not terminate the non-party's right to challenge the adequacy of representation. At the time that section 108 is raised as an affirmative defense to an employment discrimination claim<endash>that is, when the collateral challenge is brought<endash>the issue of whether the challenger's interests were adequately represented in the original litigation is raised for the first time. There will not have been ***458** any binding determination on that issue in the original

  

litigation.[114] The challenger has an opportunity to fully litigate the question of whether representation in the original litigation was adequate. Thus, even if notice is required to bind a Rule 23 class member<endash>even a non-(b)(3) class member<endash>notice of the original litigation is not constitutionally required to preclude a collateral challenge under section 108(1)(B)(ii).

More troublesome is the opt-out provision, which allows a class member to protect an individual claim by opting out of the class early in the litigation.[115] If due process requires that in order to bind a non-privy, an opportunity to opt out must be afforded, then section 108's adequate representation provision will fail because it does not contemplate any opportunity to opt out. However, a clear majority of the circuits have concluded that an opportunity to opt out is not constitutionally required under Rule 23(b)(1) and (b)(2).[116] In addition, even if courts ultimately conclude that the Constitution requires an opt-out opportunity before Rule 23 class members can be bound, an opt out is not constitutionally required in all representation litigation.[117] According to Hansberry, due ***459** process does not require the adoption of particular rules or schemes for the class action; rather, a court should look at the particular case and determine whether the procedure employed ensured the protection of the absent parties sought to be bound to the original judgment.[118]

Thus, in accordance with Hansberry, section 108 may establish its own procedure, which may differ from Rule 23's procedure, as long as the challenger's due process rights are adequately protected. In other words, while the litigants in an employment discrimination case could seek to have classes certified to bind absent non-parties, neither due process nor section 108 require class certification or the procedural protections of Rule 23 to bar collateral attack, as long as due process is satisfied in the particular case. Therefore, an interpretation of the adequate representation provision that is more consistent with Congress's apparent intention is an interpretation that focuses solely on the adequacy of the representation and the identity of the interests.

### 3. Virtual Representation

The doctrine of "virtual representation," which supports binding non-privies under a non-class action representational theory with neither notice nor an opportunity to opt out, comes closest to the approach set out in section 108(1)(B)(ii).[119] Under this doctrine, an absent non-privy may be bound to a judgment<endash>and thereby deprived of his or her own day in court<endash>if the non-party's interest is similar to that of a represented party in the original litigation.[120] Stated broadly, the virtual representation doctrine "would preclude relitigation of any issue that had once been adequately tried by a person sharing a substantial identity of interests with a nonparty."[121]

***460** The virtual representation doctrine originated from probate law,[122] where it was invoked to "bind persons unknown, unascertained, or not yet born,"[123] and thus avoid perpetual litigation of estates. Modern courts[124] expanded the doctrine to permit broad application of res judicata; then, almost immediately, began to narrow the doctrine and impose stricter restrictions of preclusion of non-parties.[125] As a result of courts' struggling to define the emerging doctrine of virtual representation, there can be no certain determination as to what sorts of cases might fall within the ambit of this theory.[126] Some courts have characterized the adequate representation present in such suits as privity,[127] or required the ***461** same type of relationship as that required under traditional privity doctrines.[128]

Arguably, the courts' retreat from a broad application of the virtual representation doctrine implies that courts perceived an unfairness which, in turn, suggests that due process concerns underlie the retreat. However, no court has definitively addressed the issue of whether due process permits binding non-parties upon a mere finding of adequate representation of similar interest. Therefore, the doctrine of virtual representation does not aid the inquiry into the process required to deprive a litigant of the right to litigate a legal claim.

## B. A Fairness Hearing Is Required and Satisfies Due Process

Having rejected traditional theories under which a party may be bound, it is necessary to turn to the question of whether the

  

specific language of section 108's adequate representation provision provides a procedure by which challengers can be bound despite the lack of privity and notice and an opportunity to be heard in the original litigation. Section 108's text does not specifically provide for any process, but merely notes in subsection (2)(D) that no language in section 108 shall be construed to "authorize or permit the denial to any person of the due process of law required by the Constitution."[129] Arguably, this provision gives courts the authority to interpret section 108 to require whatever procedural mechanisms ***462** are necessary to avoid offending due process. Thus, the original question remains: what process is due to permit depriving a litigant of the opportunity to litigate a legal claim?

The Supreme Court has not provided concrete guidance as to the minimum limits of procedural due process; there are no clear rules for defining what is constitutionally required to justify a deprivation of the right to participate in litigating one's own legal claim. Indeed, the Court has stated that " [d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances."[130] "Rather, due process is flexible and calls for such procedural protections as the particular situation demands."[131] The result of the Supreme Court's amorphous treatment of the contours of procedural due process requirements relating to the binding effect of judgments is utter confusion and the absence of any principled framework in which the lower courts can analyze cases and litigants can structure litigation to protect their judgments.

Some basic themes emerge, however, and form the basis of a due process analysis. First, the Supreme Court has repeatedly characterized procedural due process as procedural fairness. For example, in the context of personal jurisdiction, the Court has held that a court cannot exert jurisdiction over a defendant unless the defendant has had "minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[132] In addition, the Court has noted that any deprivations of protected rights must be "fair."[133] Clearly, non-parties with privity,[134] or who are members of a Rule 23 class,[135] or who control the litigation[136] may be bound to the judgments. These are situations in which the Court has deemed it "fair" or "just" to deprive a non-party of the right to participate in litigating their own legal claim.

In addition, the Court has repeatedly stated that " [t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful ***463** time and in a meaningful manner."'[137] The Court stated in Grannis v. Ordean that " t he fundamental requisite of due process of law is the opportunity to be heard."[138] In addition, Mullane v. Central Hanover Bank & Trust Company established that "at a minimum due process require s that deprivation of ... property by adjudication be preceded by notice and opportunity for hearing."[139] In Logan v. Zimmerman Brush Company, the Court stated that "' some form of hearing' is required before the owner is finally deprived of a protected property interest."[140] "What the Fourteenth Amendment ... require s ... 'is "an opportunity ... granted at a meaningful time and in a meaningful manner,"... "for a hearing appropriate to the nature of the case ...."'"'[141]

Thus, due process requires a hearing on the fairness of the deprivation. The nature of the hearing will depend on the nature of the competing interests, including "the importance of the private interest and the length or finality of the deprivation, ... the likelihood of governmental error, ... and the magnitude of the governmental interests involved."[142]

As Logan recognized, an employee's right to participate in litigating ***464** an employment discrimination claim is a substantial interest.[143] There are presumed benefits flowing from the right to participate in litigating one's own claim which render a majority employee's right very important. On the other hand, the interest in precluding collateral attack of Title VII judgments and decrees is also significant. The employer has an interest in avoiding conflicting judgments which might result. In particular, the employer runs the risk of having obligations under the original decree or judgment which subject the employer to continued or repeated liability if employees are permitted to maintain numerous challenges to the employment practices under the original decree or judgment. In addition, the court has an interest in protecting its judgments and orders, which interest is compromised if challenges are maintained. By enacting section 108, Congress has made a legislative determination that the policies underlying Title VII, including encouraging and protecting settlements and judgments in employment discrimination cases, are substantial.

However, the likelihood of error cannot be determined without inquiry into the particular factors articulated in section 108.

  

The court must assess, on a case-by-case basis, the likelihood that preclusion of the challenger's action will result in subjecting the challenger to an erroneous judgment. That is, the court must determine that there is a sufficient similarity of interests between the challenger and the purported representative and that representation was adequate to suggest that the subsequent challenge is not likely to lead to a result which is "more correct" than the result achieved in the original litigation. Then, the little chance of a more correct result, combined with the defendant's strong interest in avoiding relitigation, enable the court to conclude that it is fair to bind the challenger to the original judgment.

In Logan, the Court concluded that a hearing on the merits of the plaintiff's claim was necessary before a decision to terminate the claim could be justified under the Due Process Clause.[144] There, the plaintiff's right to bring an employment discrimination claim had been cut off by a state administrative agency's failure to issue a complaint within 120 days.[145] The agency had not made any determination on the merits of the plaintiff's claim, but merely had, through negligence, maliciousness, or otherwise, failed to convene a conference and issue a complaint as the state statute required.[146] In concluding that the agency's inaction was insufficient ***465** process to satisfy the Due Process Clause, the Court reasoned that the plaintiff's interests were substantial and the deprivation final because of the unavailability of judicial review of the state agency's inaction.[147] In addition, the Court concluded, the state procedure that cut off the plaintiff's claim<endash>a 120 day time limit within which a state agency must have issued a complaint<endash> deprived persons of their claims in a random manner and, therefore, created an unjustifiably high risk that meritorious claims would be terminated.[148] Finally, the state did not establish any substantial interest in barring the plaintiff's claim; there was no evidence of a large number of claims that would unduly burden the state if plaintiff's were allowed to proceed.[149] Essentially, the Court held that the process required to deprive Logan of his right to litigate his claim was a hearing on the merits.

However, this does not mean that a hearing on the merits is always required; the Logan court stated that not every civil litigant is entitled "to a hearing on the merits in every case."[150] The State has the power to "erect reasonable procedural requirements for triggering the right to an adjudication."[151] Indeed, the situation which arises under section 108's adequate representation provision is distinguishable from the situation in Logan and the procedure available under section 108 is adequate to satisfy due process. First, although the Logan plaintiff's rights were permanently cut off by the agency's failure to convene a conference and issue a complaint, there is no such final deprivation under section 108; the challenger who is unable to proceed to the merits due to an adverse ruling under section 108 is entitled to appeal that determination and take advantage of full judicial review of the deprivation of the right to proceed on the merits.[152] Second, section 108's procedure is not random, as was the procedure at issue in Logan ; rather, the court must undertake a meaningful inquiry into various factors related to whether the statute's requirements were satisfied.[153] Third, the government and the defendant have a substantial interest in avoiding relitigation of the claims in a section 108 bar case, whereas no such interest was implicated in Logan. In ***466** particular, the defendant (the employer) has an interest, recognized by Congress in enacting section 108, in avoiding inconsistent judgments and obligations under conflicting court orders and in avoiding having to defend against a multiplicity of suits alleging the same claims. In addition, the court has a strong interest in protecting its judgment or order in the original litigation.

A hearing which involves a meaningful inquiry into the substantive requirements of section 108's adequate representation provision as indicia of the fairness of the deprivation should be sufficient process to justify depriving a challenger of the right to individually participate in litigating the claim. Thus, a court must interpret the statute's requirements so as to assure that challengers will be bound only when it is fair to bind them. It is fair to bind a challenger if there is no significant likelihood that a hearing on the merits would lead to a result that is more correct than that in the original litigation. In particular, representation must have been adequate (meaning that the purported representative must have had an opportunity to participate in litigating the merits), the interests must have been substantially similar ( i.e., the purported representative must have been similarly situated with the challenger<endash>an employee could not represent a prospective employee), the claims asserted by the purported representative must have been factually and legally similar to those asserted by the challenger, and there must have been no intervening change in law or fact as would suggest that a different outcome might result in the subsequent litigation.[154] These are the statutory elements. But, if they are interpreted as substantive indicia of fairness and applied accordingly, then the hearing on whether section 108 is satisfied is really a hearing as to the fairness of the deprivation<endash>which is all that due process requires.

  

It is imperative, for due process purposes, then, that the substance of the adequate representation hearing be meaningful. The focus of the court's inquiry must be on assuring an appropriate accommodation of the interests involved.[155] Thus, the court must keep in mind the significant property interest involved<endash>the right to participate in litigating an arguably meritorious legal claim<endash>and balance that interest against the likelihood of an erroneous deprivation and the court's and the defendant's interests in avoiding further litigation of matters already fully litigated.

***467 IV. Satisfaction of Due Process Through the Section 108 Fairness Hearing**

In order to provide a meaningful hearing that will satisfy due process and justify depriving, under section 108(1)(B)(ii)'s adequate representation provision, a challenger of the right to participate in litigating a claim, the court must entertain an inquiry into whether (1) representation in the original proceeding was adequate; (2) the interests of the purported representative and the challenger were similar; (3) the purported representative challenged the judgment or decree in the original proceeding on the same legal and factual grounds as those asserted by the challenger; and (4) there has been an intervening change in law or fact.[156]

The focus of this inquiry must be on the likelihood that permitting the challenge would produce a result that is more correct than the result obtained in the original litigation, so that precluding the challenger from litigating the claim would result in fundamental unfairness. In order to facilitate the fairness determination, the court should assess the similarity of interests and the extent to which those interests were asserted in the original litigation by someone who had control in the litigation and an interest in the outcome that is consistent with the outcome sought by the collateral challenger. Thus, the emphasis is not on the technical relationship between the challenger and the participant in the original litigation<endash>as it would be in the privity determination<endash>or whether the participant was formally a party to the original litigation and the challenger had notice<endash>as it would be in the class action determination. Rather, the court should decide whether the challenger's interest was actively represented in the original litigation by someone who had a similar interest in the outcome of the litigation as would suggest the absence of a likelihood that the court would come to a more correct conclusion on the merits of the challenger's claim than the conclusion to which the court came on the merits of the representative's claim. That is, the baseline inquiry is whether relitigating is likely to lead to a more correct result, and that inquiry is conducted by looking at the statute's requirements.

The court, in conducting this analysis, will have dual purposes: (1) to determine that the statute's requirements have been satisfied; and (2) to satisfy due process by affording the challenger an opportunity to be heard as regards the fairness of the deprivation of the right to participate in litigating the challenger's legal claim. The due process focus must be on assuring that there is no significant likelihood of error as would overcome ***468** the court's and the defendant's interests and permit the conclusion that due process would necessitate permitting the challenger to proceed to a hearing on the merits.

This analysis provides adequate protection for the court's interest in protecting its judgments or orders and for the defendant's interest in avoiding conflicting judgments and having to defend against a multiplicity of suits on the same issues, while focusing on the challenger's significant interest in participating in litigating the merits of a legal claim.

To facilitate this inquiry, the court entertaining the collateral challenge[157] must look at the record from the original litigation and make a factual determination as to whether the judge who entered the decree or judgment actually considered and rejected the claim asserted by the challenger. Without a clear record, there is no basis for the subsequent court to conclude that the original court considered the claim or that the claim considered in the original proceeding and that asserted in the collateral litigation were sufficiently similar to justify depriving the challenger of the right to litigate the claim. Further, a clear statement of the claims considered and the reasons for rejecting them gives the subsequent court adequate assurances that there is not a likelihood that the determination in the original proceeding was erroneous and that there is not a significant chance that the outcome would be more correct if the challenger were permitted to litigate the claim.

Thus, in order to protect the consent decree from collateral attack, the original judge should include a discussion of the particular challenges considered and the principled reasons for rejecting each challenge on the record. Without this record,

  

there will be no basis for a later determination that a challenger may be barred from collaterally attacking the judgment.

### A. Adequate Representation

The first inquiry, then, is whether the purported representation was adequate. In order to determine that the representation was adequate, the purported representative must have had a full and fair opportunity to litigate the allegedly similar claim in the original proceeding, including sufficient control over the litigation to justify binding the representative to the judgment as a party.[158] The representative must have been permitted ***469** to propound discovery, access to discovery conducted by the other parties to the original litigation, and the opportunity to put evidence and argument before the court. The purported representative must have had an opportunity to take advantage of the right to a meaningful hearing on the merits of the similar claim. "To have control of litigation requires that a person have effective choice as to the legal theories and proofs to be advanced in behalf of the party to the action. He must also have control over the opportunity to obtain review."[159] Without this opportunity, neither due process nor section 108(1)(B)(ii)'s requirement that the representation be adequate can be satisfied: there are not adequate assurances of the accuracy of the original determination rejecting the claim and the purported representative did not have an adequate opportunity to represent the challenger's interest.

Certainly, the purported representative need not be given power to preclude settlement between the original parties, but neither the purported representative nor the challenger is bound by an agreement unless the claims raised by the purported representative were fully developed and given due consideration by the court. Parties who settle without permitting the court to fully consider competing claims do so at the risk of the settlement being subjected to collateral attack.[160] In addition, in order to create a record that will allow the court to protect a consent decree, the court in the original litigation should permit interest holders to present evidence and give due regard to arguments raised at the fairness hearing.

The adequacy of representation inquiry under section 108 must be different than that conducted in a Rule 23 class action context. The Rule 23 inquiry focuses primarily on whether the purported representative has interests that are adverse to the purported class members.[161] The section 108 adequate representation, however, should focus more on the substance of the representation itself. A separate inquiry should look into the similarity of interests between the challenger and the purported representative.

### *470 B. Similarity of Interests

Second, the court must determine that the purported representative shares a similarity of interests with the challenger.[162] Here, the focus of the inquiry should be on "whether the purported representative's claim and the challengers' claims are so interrelated that the interests of the challengers will be fairly and adequately protected in their absence."[163] The court should look to whether the challenger and the purported representative share an identity of incentives<endash>that is, whether the reasons for pursuing the claim were the same. Specifically, the court should look to what the challenger seeks and why such relief is sought, and only if the relief sought and the reasons for seeking the relief were the same should the court conclude that the challenger's interests are sufficiently similar to those of the purported representative. The similar incentive inquiry will assist the court in assuring that the challenger does not have a unique interest to assert and will enable the court to conclude that there is no significant likelihood that reconsideration of the claim would lead to a more correct result.

Specifically, the majority employee or prospective majority employee who is the representative should be similarly situated with the majority employee or prospective majority employee who is asserting the challenge. Although employees and prospective employees both might have an interest in opposing an affirmative action program, their interests (and incentives) are not the same. The employee seeks to protect opportunities for promotion and to avoid layoff, whereas the prospective employee, though perhaps concerned with promotion and job security, is interested also in hiring practices. This difference in interests suggests that an employee's interests are not sufficiently similar to a prospective employee's interests to justify a conclusion that one can be represented by the other.[164] Similarly, a union does not have a sufficient similarity of interests with majority employees to bar the majority employees' collateral challenge.[165] This is because the union must represent all

  

employees-majority ***471** and minority-and thus does not have the same incentive for participating in the litigation that a majority employee would have.

### C. Legal and Factual Similarity

Third, the court must determine that the challenger's claim is factually and legally similar to one asserted in the original litigation. Here, a court can look to cases interpreting Federal Rule of Civil Procedure 23(a)(2)'s requirement that there must be "questions of law or fact common to the class."[166] However, the reason for the inquiry is slightly different and that difference should guide the court in interpreting this requirement. Rule 23(a)(2)'s common question requirement is designed to insure that there are efficiencies to be achieved from litigating the claims of the class together, whereas section 108(1)(B)(ii)'s legally and factually similar claim requirement is designed to ensure that it will be fair to bind the challenger because the same claims were adequately litigated. A difference in the factual or legal basis for the claim asserted suggests that the challenger should be permitted an opportunity to litigate the claim. The more significant the difference in the claims the more likely an erroneous deprivation would result if the challenger were not permitted to litigate the claim.

### D. Intervening Change in Law and Facts

Finally, the challenger must be permitted to fully litigate any claim when there has been an intervening change in the law and facts since the original litigation that would suggest a different result in the collateral litigation. This is a textual requirement of section 108(1)(B)(ii).[167]

For guidance as to what sorts of changes can provide a basis for permitting collateral attack of a decree or judgment, a court can look to Federal Rule of Civil Procedure 60(b), which provides for modification of judgments and decrees when there has been a change in law or facts,[168] and the cases interpreting it. In particular, a court would look to the standard set out in Rufo v. Inmates of Suffolk County Jail .[169] Rufo established the Rule 60(b) standards for modification of an institutional reform consent decree, and thus, Rufo is applicable in the employment discrimination context. In particular, Rufo adopted a flexible standard, where ***472** the "party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree."[170] Thus, a court must make a case-by-case inquiry to determine whether there has been a significant change in circumstances as would justify re-opening the original judgment or decree.

## V. Conclusion

A court conducting an original employment discrimination case should do so with section 108 in mind. The court must take care to permit interested persons to intervene and, even absent formal intervention or joinder of interested majority employees, give due consideration to the claims made by majority employees and permit meaningful participation in the original litigation by representative interest holders. Despite full dockets, courts should see the benefit of conducting the original litigation in a way that will enable subsequent courts to protect the judgments. Otherwise, costly and wasteful duplicative litigation will have to proceed in order to give adequate protection to the due process rights of majority employees who did not have notice or an opportunity to be heard in the original proceedings.

The challenger's right to an opportunity to individually participate in litigating the claim is certainly an important right which cannot be deprived without due process of law. As long as the challenger received notice and an opportunity to be heard in the original litigation, there is no deprivation and thus additional procedures are not required. In addition, under section 108's adequate representation provision, a collateral challenge may be barred as long as due process is satisfied. Due process requires a hearing and, under section 108's adequate representation provision, the challenger has an ample opportunity to a hearing regarding the deprivation of the right which only occurs if the substantive requirements of section 108 are satisfied. In addition, the hearing should protect the challenger's interest in fairness, as required by due process, by focusing on factors indicative of the likelihood that the challenge will bring about a more correct result such that depriving the challenger of the

  

right to litigate the merits of the claim is fundamentally unfair. If the challenger was adequately represented in the original litigation by someone whose interests in pursuing the challenge were virtually the same as the challenger and if the purported representative actively litigated claims which are legally and factually similar to those raised by the challenger, it is ***473** fair to bind the challenger to the original judgment or decree; nothing will be gained by relitigating the claim and, indeed, the defendant's interest in avoiding inconsistent judgments and having to defend countless readjudications of the same issues suggests that much could be lost if the claim is relitigated.

Footnotes

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[1] See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985) ( " [A] chose in action is a constitutionally recognized property interest ...."); Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) (noting that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause"); Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 338 (5th Cir. 1982) ("The right to a full and fair opportunity to litigate an issue is. . . . protected by the due process clause of the United States Constitution.").

[2] See, e.g., Striff v. Mason, 849 F.2d 240, 245 (6th Cir. 1988); Marino v. Ortiz, 806 F.2d 1144, 1146-47 (2d Cir. 1986), aff'd by an equally divided Court, 484 U.S. 301 (1988); Thaggard v. Jackson, 687 F.2d 66, 68-69 (5th Cir. 1982); Stotts v. Memphis Fire Dep't, 679 F.2d 541, 558-59 (6th Cir. 1982), rev'd on other grounds sub nom. Firefighters v. Stotts, 467 U.S. 561 (1984); Dennison v. Los Angeles Dep't of Water & Power, 658 F.2d 694, 695 (9th Cir. 1981); Goins v. Bethlehem Steel Corp., 657 F.2d 62, 64 (4th Cir. 1981); Society Hill Civic Ass'n v. Harris, 632 F.2d 1045, 1051 (3d Cir. 1980).

[3] See Marino, 806 F.2d at 1146.

[4] See id. at 1146-47.

[5] As used herein, "challenger" refers to a litigant bringing an action to challenge a litigated judgment or consent decree that was entered in a prior employment discrimination case. "Original litigation" refers to the prior case wherein the decree or judgment being challenged was entered.

[6] See Marino, 806 F.2d at 1146.

[7] See Stotts, 679 F.2d at 558.

[8] See Thaggard v. Jackson, 687 F.2d 66, 68 (5th Cir. 1982).

[9] See Marino, 806 F.2d at 1146; Thaggard, 687 F.2d at 69.

[10] 490 U.S. 755 (1989).

[11] See id. at 764-65.

  

[12] See id.

[13] See, e.g., Owen M. Fiss, The Allure of Individualism, 78 Iowa L. Rev. 965, 966 (1993).

[14] See 42 U.S.C. § 2000e-2(n) (1994).

[15] See, e.g., Michael Stokes Paulsen, Double Jeopardy Law After Akhil Amar: Some Civil Procedure Analogies and Inquiries, 26 Cumb. L. Rev. 23, 27 n.17 (1995) ("Section 108 is of dubious constitutionality ....").

[16] See Martin, 490 U.S. at 758.

[17] See id. at 759.

[18] See id.

[19] See Ensley Branch of the NAACP v. Seibels, 14 Fair Empl. Prac. Cas. (BNA) 670 (1977). The Eleventh Circuit affirmed this holding but remanded for a consideration of when the City's Title VII liability commenced. Ensley Branch of the NAACP v. Seibels, 616 F.2d 812 (5th Cir. 1980).

[20] See In re Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1494 (11th Cir. 1987), aff'd sub nom. Martin v. Wilks, 490 U.S. 755 (1989). Under the consent decrees, the City would be permanently enjoined from engaging in discriminatory employment practices. The goal was to achieve " 'employment of blacks and women ... in percentages which approximate their respective percentages in the civilian labor force.'" In re Birmingham Reverse Discrimination Employment Litig., 37 Fair Empl. Prac. Cas. (BNA) 1, 3 (N.D. Ala. 1985) (quoting Consent Decree). The Board was required to certify blacks so as to achieve the goals established in the City decree. See In re Birmingham Reverse Discrimination Employment Litig., 833 F.2d at 1495 n.6. Essentially, the consent decrees created a hiring and promotion preference for qualified minority applicants. See In re Birmingham Reverse Discrimination Employment Litig., 37 Fair Empl. Prac. Cas. at 2.

[21] See In re Birmingham Reverse Discrimination Employment Litig., 833 F.2d at 1494.

[22] See id. at 1494-95, 1495 n.6; United States v. Jefferson County, 720 F.2d 1511, 1515 (11th Cir. 1983).

[23] See In re Birmingham Reverse Discrimination Employment Litig., 833 F.2d at 1495.

[24] See Jefferson County, 720 F.2d at 1520.

[25] In re Birmingham Reverse Discrimination Employment Litig., 833 F.2d at 1497.

[26] See id. at 1497-98.

[27] See Martin v. Wilks, 490 U.S. 755, 765 (1989).

  

[28] See id. at 763-65.

[29] See id. Fed. R. Civ. P. 24 provides in part:
(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

[30] See Martin, 490 U.S. at 763-65. Fed. R. Civ. P. 19 provides in part:
(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.
(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

[31] Martin, 490 U.S. at 762 (quoting 18 Charles Alan Wright et al., Federal Practice and Procedure § 4449, at 417 (1981)).

[32] See, e.g., Fiss, supra note 13, at 967.

[33] Martin, 490 U.S. at 762 n.2.

[34] See 137 Cong. Rec. H9529 (daily ed. Nov. 7, 1991) (memorandum of Rep. Edwards) (stating that section 108 codifies the impermissible collateral attack doctrine, which the majority of the courts of appeals had accepted prior to Martin ).

[35] 42 U.S.C. § 2000e-2(n)(1)(B) (1994). The full text of section 108 provides as follows:
(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders.
(1) (A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).
(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights

  

laws<endash>
(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had:
(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and
(II) a reasonable opportunity to present objections to such judgment or order; or
(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.
(2) Nothing in this subsection shall be construed to<endash>
(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;
(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;
(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or
(D) authorize or permit the denial to any person of the due process of law required by the Constitution.
(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28.
Id.

[36] 490 U.S. at 790-91 (Stevens, J. dissenting).

[37] 29 C.F.R. § 1608.8 (1995).

[38] See 18 Charles Alan Wright et al., Federal Practice and Procedure § 4403, at 12-13 (1981).

[39] 42 U.S.C. § 2000e-2(n)(2)(D) (1994).

[40] See Mathews v. Eldridge, 424 U.S. 319, 332-33 (1976) ( "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.").

[41] See Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982).

[42] 455 U.S. 422 (1982).

[43] See id. at 426-28.

[44] See id. at 428-29.

[45] See Societe Internationale Pour Participations Industrielles et Commerciales, S.A.v. Rogers, 357 U.S. 197, 209 (1958) (noting that the Fifth Amendment's Due Process Clause imposes "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause"); Logan, 455 U.S. at 429-30 (concluding that the Fourteenth Amendment's Due Process Clause protects the same interest).

  

46 Logan, 455 U.S. at 433.

47 401 U.S. 371 (1971).

48 Id. at 377.

49 Logan, 455 U.S. at 430 n.5.

50 402 U.S. 313 (1971).

51 Id. at 329.

52 See Andrea Catania & Charles A. Sullivan, Judging Judgments: The 1991 Civil Rights Act and the Lingering Ghost of Martin v. Wilks, 57 Brook. L. Rev. 995, 1041-45 (1992) (discussing the extent of the opportunity to participate required by due process).

53 339 U.S. 306 (1950).

54 Martin v. Wilks, 490 U.S. 755, 765 (1989).

55 See 42 U.S.C. § 2000e-2(n)(1)(B) (1994).

56 339 U.S. at 307.

57 See id. at 308-10.

58 Id. at 309.

59 See id. at 318.

60 Id. at 314.

61 Id. at 318; see also Polansky v. Richardson, 351 F. Supp. 1066, 1069 (E.D.N.Y. 1972) (" [A]ctual receipt of [notice] is not the test ..., but rather whether 'such reasonable steps had been taken to give [the adverse party] notice ....'") (quoting Atherton v. Atherton, 181 U.S. 155, 172 (1901)).

62 339 U.S. at 314 (citations omitted).

63 See 42 U.S.C. § 2000e-2(n)(1)(B)(i) (1994).

64 Id. § 2000e-2(n)(2)(D).

  

[65] See S. 2104, 101st Cong. § 6 (1989); H.R. 4000, 101st Cong. § 6 (1989).

[66] See 42 U.S.C. § 2000e-2(n)(1)(B)(i)(I).

[67] 137 Cong. Rec. S15,477 (daily ed. Oct. 30, 1991) (memorandum of Sen. Dole).

[68] See 42 U.S.C. § 2000e-2(n)(1)(B)(i)(I).

[69] See 137 Cong. Rec. S15,477 (daily ed. Oct. 30, 1991) (memorandum of Sen. Dole).

[70] 339 U.S. at 318.

[71] See id. at 314, 317.

[72] 42 U.S.C. § 2000e-2(n)(1)(B)(ii) (1994). Section 108(1)(B)(ii) permits collateral attack despite adequate representation when there has been a change in fact or law between the time the original decree was entered and the time the collateral litigation was initiated. This is consistent with Fed. R. Civ. P. 60(b) which permits modification of a consent decree upon a showing of a change in the facts or law upon which the court based its determination that the consent decree was reasonable. See Roberts v. St. Regis Paper Co., 653 F.2d 166, 172-74 (5th Cir. 1981) (recognizing the potential for modification of consent decree due to change in law); Marshall v. Board of Educ., 575 F.2d 417, 421-22 (3d Cir. 1978) (modifying injunction in light of Supreme Court decision); cf. Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424, 438, 440 (1976) (upholding modification of injunction as exercise of court's equitable power); System Fed'n No. 91, Railway Employees' Dep't v. Wright, 364 U.S. 642, 647 (1961) (recognizing court's equitable power to modify injunctions upon finding a change in circumstances). Congress sought to preserve that basis for modification of consent decrees under section 108. See 42 U.S.C. § 2000e-2(n)(2)(B) (1994). In addition, section 108 does not prevent parties to the original litigation from seeking a modification of the decree or prevent non-parties from challenging the decree on the basis of fraud, collusion, or that the decree is transparently invalid or was entered by a court lacking subject matter jurisdiction. See id. § 2000e-2(n)(2)(C).

[73] In contrast to section 108's notice and opportunity to be heard bar (which was intended to overrule the essential holding of Martin that despite notice and an opportunity to intervene, a challenger must be joined under Fed. R. Civ. P. 19 to be bound to the judgment or decree in the original litigation), there is no indication in the statute itself or the legislative history as to the specific intent of section 108's adequate representation provision (as distinct from the general intent of section 108 to encourage and protect settlements and judgments in employment discrimination cases).

[74] The right to participation is an individual right, of which an individual litigant may not be deprived without due process. See Boddie v. Connecticut, 401 U.S. 371, 379-80 (1971); William J. Brennen, Jr., Reason, Passion and "The Progress of the Law ," 10 Cardozo L. Rev. 3, 15 (1988) (address to the Association of the Bar of New York City (Sept. 17, 1987)) (" [D]ue process require [s] fidelity to a more basic and more subtle principle: the essential dignity and worth of each individual.").

[75] 42 U.S.C. § 2000e-2(n)(2)(D) (1994) (emphasis added).

[76] See id. § 2000e-2(n)(1)(B)(ii).

  

77 See id.

78 439 U.S. 322 (1979).

79 Id. at 327 n.7.

80 See Southwest Airlines Co. v. Texas Int'l Airlines, Inc., 546 F.2d 84, 94-95 (5th Cir. 1977); see also Restatement (Second) of Judgments §§ 34-63 (1982) (describing parties and other persons affected by judgments). Examples of the relationships that traditionally have been held sufficient to establish privity and thus bind a non-party to a judgment include successors in interest in property, those whose claims are derivative of the party's claim, indemnitors, those who have agreed to be bound, those exerting control in the original litigation, and those contractually subject to representation by another. See id. §§ 43-61. However, a similarity of interest, without more, has been held insufficient to establish privity as to bind a non-party to judgment. See Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (5th Cir. 1982). In Hardy, the Fifth Circuit concluded that asbestos manufacturers, who had an identity of interests with defendants against whom judgment was rendered in a prior action, were not bound by the prior action because the Hardy defendants had no "relationship" with the defendants in the earlier action. Id. at 338-40. The court looked to the lack of control exerted by the Hardy defendants in the prior litigation and concluded that they had not had an opportunity to fairly litigate their claims in the prior litigation; they did not participate directly or through a trade representative, they did not maintain any relationship with the defendants in the earlier litigation, and they claimed that they were unaware even of the pendency of the earlier action until after judgment. Id. at 338-41.
Another traditional requirement of res judicata and collateral estoppel is mutuality. The mutuality requirement would preclude strangers to the original litigation from taking advantage of the prior judgment in collateral litigation. The doctrine of mutuality has been abandoned by many courts, including the United States Supreme Court. See Parklane Hosiery, 439 U.S. at 324-35 (offensive collateral estoppel); Blonder-Tongue Lab. v. University of Illinois Found., 402 U.S. 313, 328-50 (1971) (defensive collateral estoppel).
Use of the term "privity" has been criticized in favor of merely assessing the relationship between the party and the non-party to determine whether it is adequate to justify binding the non-party. See Southwest Airlines Co., 546 F.2d at 95 n.40, 97-98. The Restatement (Second) of Judgments has abandoned use of the term altogether. In this article, the term "privity" refers specifically to the requirement that the non-party have some legally sufficient relationship with a party such that the non-party can be bound to the judgment. In this way, section 108's adequate representation requirement is distinguishable from privity; section 108(1)(B)(ii) does not require any relationship to bind a non-party, see 42 U.S.C. § 2000e-2(n)(1)(B)(ii), whereas, under this definition, privity does.

81 See generally Richards v. Jefferson County, 116 S. Ct. 1761 (1996).

82 Res judicata is the doctrine under which a final judgment on the merits bars parties and privies from pursuing another claim on the same cause of action. Under collateral estoppel, a party is barred from relitigating an issue that was actually and necessarily determined by a court of competent jurisdiction in prior litigation. See Montana v. United States, 440 U.S. 147, 153 (1979). Although not all courts have consistently permitted privies to be bound under collateral estoppel, many, including the federal courts, have applied principles of privity to bind non-parties under collateral estoppel as well as res judicata. See id. ("A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties or their privies ....'") (quoting Southern Pacific R.R. v. United States, 168 U.S. 1, 48-49 (1897)).
Technically, collateral estoppel is the doctrine which would bar privies from litigating their challenges to an employment discrimination judgment or decree. This is because the challenger's claim against the employer is technically not the same claim as the one litigated in the original employment discrimination litigation. Under section 108 and the pre-Martin impermissible collateral attack doctrine, challengers are barred from litigating the issue of whether the employer's hiring and promotion practices under the decree or judgment discriminate against the majority employees or potential employees; that is, the issue in the subsequent litigation is whether the original decree or judgment is fair and legal. Presumably, this issue was litigated in the original action (it must have been for collateral estoppel to bar relitigation of the issue) and it is the court's determination of that issue that is the basis of the collateral bar in the subsequent litigation. If minority or women workers brought a subsequent action against the

  

employer stating a Title VII claim that is the same as the Title VII claim litigated in the original litigation, that action would be barred by res judicata.

[83] See Montana v. United States, 440 U.S. at 153-54; Southern Pacific R.R. Co., 168 U.S. at 49. The litigants' interest in avoiding conflicting judgments is particularly significant in the employment discrimination litigation context, and was one of the primary justifications for the development of the pre-Martin collateral bar rule and for section 108.

[84] See 18 Wright et al., supra note 38, §ect>4449, at 418 n.23.

[85] The Eleventh Circuit meticulously scrutinized all the relationships which could have possibly established that the Martin plaintiffs were privies to the original judgment and concluded, as had the District Court, that the plaintiffs had neither a sufficiently close relationship nor similarity of interest with any party to the original action to bind them under traditional res judicata principles. See In re Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1499 (11th Cir. 1987). The Martin plaintiffs' interests were not, according to the Eleventh Circuit, sufficiently aligned with the City to establish privity because the City had not actively litigated against liability for employment discrimination. See id. The theory was that the City had not asserted any interest in opposing an adverse judgment on the merits of the NAACP's claim, and thus could not be said to represent the majority employee's interest in opposing the merits of the NAACP's claim. See id. Second, the Eleventh Circuit concluded that the Union's participation via amicus curiae at the fairness hearing was insufficient to render the Union a party; thus, the court reasoned, the Martin plaintiffs could not be bound by reason of their alignment with the Union's interests. See id. Arguably, a union could never have the requisite privity relationship with majority employees because in employment discrimination litigation, the union must represent all employees, including minority and majority employees. Thus, the argument goes, there is not a sufficient identity of interests between the union and the majority employees to establish privity. Third, the Eleventh Circuit concluded that the privity relationship was not established even though the same attorney represented the Union in the original litigation and the plaintiffs in the Martin litigation. See id. This conclusion is consistent with the general view that representation by the same attorney does not establish privity. See Freeman v. Lester Coggins Trucking, Inc., 771 F.2d 860, 864 (5th Cir. 1985); 18 Wright et al., supra note 38, § 4451, at 432-33.

[86] See Martin v. Wilks, 490 U.S. 755, 762 (1989).

[87] Martin established that mere notice and failure to intervene under Rule 24 is insufficient to bind a non-party to a judgment. 490 U.S. at 763. To the extent that section 108 directly overrules Martin, it is on this point; section 108(1)(B)(i)'s notice and opportunity to be heard bar to collateral attack simply rejects Martin 's preference for mandatory joinder and imposes a legislative preference for mandatory intervention when the challenger had notice and an opportunity to be heard. As discussed above, as long as the notice and opportunity to be heard comport with due process requirements, there is no reason why section 108's notice and hearing bar should not be upheld. See supra part II.B. Section 108(1)(B)(ii)'s separate adequate representation bar to collateral attack neither contradicts nor even implicates the holding in Martin ; it represents an entirely separate bar to collateral attack and one that was not addressed by the Court in Martin .

[88] For example, Senator Robert Dole, in an interpretive memorandum, stated that
" [a]dequate representation" requires that the person enjoy a privity of interest with the later party. This is because in Section [108] both [the notice and opportunity to be heard provision and the adequate representation provision] must be construed with [section 108(2)(D)] so that people's due process rights are not jeopardized. And the Supreme Court has stated clearly: "It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore never had an opportunity to be heard."
137 Cong. Rec. S15,477 (daily ed. Oct. 30, 1991) (quoting Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979)). This argument ignores, however, that the Supreme Court has never adhered to such a narrow definition of the circumstances in which a non-party may be bound to a prior judgment. Indeed, in Hansberry v. Lee, 311 U.S. 32, 41 (1940), the Court expressly noted that a non-privy may be bound in a class or representative action.

  

89 See Richards v. Jefferson County, 116 S. Ct. 1761, 1766 (1996).

90 See Marjorie A. Silver, Fairness and Finality: Third Party Challenges to Employment Discrimination Consent Decrees After the 1991 Civil Rights Act, 62 Fordham L. Rev. 321, 367 (1993).

91 See 137 Cong. Rec. H9529 (daily ed. Nov. 7, 1991) (memorandum of Rep. Edwards) ("There is no requirement that the prior challenger and the later challenger be in privity with each other, or that they have any relationship to each other going beyond what is contained in the bill.").

92 See, e.g., RSH Constructors, Inc. v. United States, 20 Cl. Ct. 1, 5 (1990) (suggesting that the Martin holding is mandated by due process); Fiss, supra note 13, at 967; Douglas Laycock, Due Process of Law in Trilateral Disputes, 78 Iowa L. Rev. 1011 (1993); Susan S. Grover, The Silenced Majority: Martin v. Wilks and the Legislative Response, 1992 U. Ill. L. Rev. 43.

93 311 U.S. 32 (1940).

94 See Martin v. Wilks, 490 U.S. 755, 761 (1989).

95 See supra part II.

96 See Martin, 490 U.S. at 761-62, 762 n.2.

97 Indeed, Martin approvingly cited Montana v. United States, 440 U.S. 147, 154 n.5 (1979), in which the Court expressly rejected the use of the term "privy" to describe a non-party who directed commencement and litigation of claims in the original litigation, but held that the non-party who exerted control was barred from relitigating the same claims in a subsequent action. See Martin, 490 U.S. at 762 n.2.

98 490 U.S. at 762 n.2.

99 See id. ; Fed. R. Civ. P. 23.

100 311 U.S. 32, 41 (1940).

101 Plaintiff classes in Title VII, section 706 cases are typically maintained under Rule 23(b)(2). See Advisory Committee's Notes to the Proposed Rules of Civil Procedure, 39 F.R.D. 69, 102 (1966). The plaintiffs in the original employment discrimination litigation<endash>typically minority or women employees<endash>should be distinguished from the majority employees that are joined as a class in order to preclude subsequent collateral attack of the judgment in the original litigation.

102 Fed. R. Civ. P. 23(b)(1)(A).

103 It is not clear who, under Fed. R. Civ. P. 23(b)(1)(A), would bear the cost and other burdens of having a class certified. Under Fed. R. Civ. P. 23(b)(3), the plaintiff usually bears that burden. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 179 (1974). Arguably, however, the Rule 23(b)(3) class action is distinguishable in this regard because, under Rule 23(b)(3), it is typically the plaintiff who seeks to have a class certified; whereas, under Rule 23(b)(1)(A), it is the defendant who seeks to have a class certified in order

  

to avoid inconsistent judgments. Even under Rule 23(b)(3), Eisen allows the courts some discretion to impose the burden of class certification on the defendant if that would be more fair under the circumstances. 417 U.S. at 179 n.16. Thus, in light of the differences between Rule (b)(3) and Rule (b)(1)(A) and the flexibility provided by Eisen, the defendant is probably the party upon whom the burden of class notification and certification should fall. Of course, alternatively, the parties to the original litigation could agree to split the costs as both would have an interest in protecting the judgment or decree entered in the original litigation.

104 Fed. R. Civ. P. 23(d), which gives courts discretionary powers for conducting Rule 23 class actions, provides that
the court may make appropriate orders ... (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action.
This provision gives the court discretion to order notice and an opt-out opportunity, but does not mandate either. See Penson v. Terminal Transport Co., 634 F.2d 989, 993 (5th Cir. 1981).

105 See Ticor Title Ins. Co. v. Brown, 114 S. Ct. 1359 (1994) (expressly declining to determine whether due process requires an opportunity to opt out of any class action which asserts monetary claims on behalf of the class).

106 See, e.g., Penson, 634 F.2d at 994 (" [A] member of a Rule 23(b)(2) class ... has no absolute right to opt out of the class, even where monetary relief has been sought and is made available."); Dosier v. Miami Valley Broad. Corp., 656 F.2d 1295, 1299 (9th Cir. 1981) (holding that due process did not require allowing members of a Rule 23(b)(2) class an opportunity to opt out); Fontana v. Elrod, 826 F.2d 729, 732 (7th Cir. 1978) (holding that neither notice nor an opt-out opportunity are required to bind a class under Rule 23(b)(2) in a suit for declaratory or injunctive relief); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 254 (3d Cir. 1975) (holding that due process did not require notice to bind Rule 23(b)(2) class members); see also Frimes v. Vitalink Communications Corp., 17 F.3d 1553 (3d Cir. 1994) (holding that an opportunity to opt out was not constitutionally required where notice of the pending class action and an opportunity to be heard and participate were provided). But cf. Johnson v. General Motors Corp., 598 F.2d 432, 433 (5th Cir. 1979) (holding that notice was required in Rule 23(b)(2) action where monetary damages were sought, but that the scope of the notice may vary and need not necessarily satisfy the notice requirements for Rule 23(b)(3) actions); Schrader v. Selective Serv. Sys. Local Bd. No. 76, 470 F.2d 73, 75 (7th Cir. 1972) (holding that due process requires notice in order to bind members of Rule 23(b)(1) and (b)(2) classes); Pasquier v. Tarr, 318 F. Supp. 1350, 1354 (E.D. La. 1970) (holding that absence of notice to absent Rule 23(b)(1) an (b)(2) class members violated due process), aff'd, 444 F.2d 116 (5th Cir. 1971).

107 Compare Arata v. Nu Skin Int'l, Inc., No. 92-15380, 1993 WL 321710, at *2 (9th Cir. Aug. 24, 1993) (holding that an opt-out provision was not required where a complaint sought, in addition to monetary damages, equitable and injunctive relief because an opt out in those circumstances "might create a risk of inconsistent or varying adjudications which could establish incompatible standards of conduct for the defendants"), with Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992) (holding that minimal due process, which includes an opportunity to opt out, must be afforded Rule 23(b)(1) and (b)(2) class members in order to bind them on claims that are wholly or predominately for monetary damages), aff'd on other grounds, 114 S. Ct. 1359 (1994). See also Fontana, 826 F.2d at 732 (distinguishing Rule 23(b)(2) actions that seek monetary damages from those seeking injunctive and declaratory relief and holding that the former require notice while the later do not); Johnson, 598 F.2d at 433 (" [D]ue process ... require [s] notice before the individual monetary claims of absent class members may be barred.") (emphasis added).

108 472 U.S. 806 (1985).

109 Id. at 811-12.

110 Id. at 812.

111 Id. at 811 n.3. The Court noted the differences between binding a defendant to a judgment, which would require minimum contacts with the forum plus notice and an opportunity to be heard, and binding a member of a plaintiff class, who could be bound, in an

  

action for money damages upon a finding that there was notice and an opportunity to be heard. See id. at 808-12. The differences noted by the Court centered on fairness. It would be unfair, the Court reasoned, to subject a defendant to a court's jurisdiction unless the defendant had minimum contacts with the forum such that the defendant would expect to be sued there; the expenses of litigation and the possibility of being subjected to liability made it unfair to hale the defendant into an out-of-state forum. See id. at 806-08. On the other hand, the Court noted that the members of a plaintiff class were well represented in the litigation and thus, it seemed fair to bind them to the judgment. See id. at 809-10. Due to the individual nature of a claim for money damages, notice was required to permit the class member to participate in litigating the claim. See id. at 811-12.

112 See Penson v. Terminal Transp. Co., 634 F.2d 989, 994 (5th Cir. 1981).

113 See Dolan v. Project Constr. Co., 725 F.2d 1263, 1266 (10th Cir. 1984) ("Rule 23 provides that upon establishment of a class a subsequent judgment binds all members of the class unless they have expressly opted out of the class action.").

114 Indeed, under this analysis, there can be no binding determination of the adequacy of representation of various interests at the time of the original litigation unless the court and the parties employ Rule 23 procedures. Section 108 does not provide for any determination of the adequacy of representation of the interests of absent non-parties during the original litigation. If an employer or a Title VII plaintiff seeks to structure the original litigation so as to protect the judgment or decree from collateral attack, they might be well-advised to follow Rule 23's procedures for certifying a class or classes of majority employees and prospective employees. Even under Rule 23, however, it might be difficult to bind all potential collateral challengers because of the difficulty of providing notice to all potentially interested persons. Certainly, current employees and known applicants could be notified and bound in a Rule 23 class, but unknown, potential applicants and other potential interest holders cannot be certainly identified and thus, cannot be individually notified. Thus, to the extent individual notice is required under Rule 23, non-parties may not be bound without it.

115 See Fed. R. Civ. P. 23(c)(2)(A).

116 See, e.g., In re Asbestos Litig., 90 F.3d 963, 986 (5th Cir. 1996); Crawford v. Honig, 37 F.3d 485, 487 n.2 (9th Cir. 1994); Gottlieb v. Wiles, 11 F.3d 1004, 1101 (10th Cir. 1993); In re Real Estate Title & Settlement Serv. Antitrust Litig., 869 F.2d 760, 763 (3d Cir. 1989); Williams v. Burlington Northern, Inc., 832 F.2d 100, 103 (7th Cir. 1987); Holmes v. Continental Can Co., 706 F.2d 1144, 1153 (11th Cir. 1983); Kincade v. General Tire & Rubber Co., 635 F.2d 501, 506 (5th Cir. 1981); Laskey v. International Union, 638 F.2d 954, 956-57 (6th Cir. 1981); Reynolds v. National Football League, 584 F.2d 280, 283 (8th Cir. 1978); Larionoff v. United States, 533 F.2d 1167, 1182 n.37 (D.C. Cir. 1976). But cf. Kurt A. Schwarz, Note, Due Process and Equitable Relief in State Multistate Class Actions After Phillips Petroleum Co. v. Shutts, 68 Tex. L. Rev. 415, 448-50 (1989) (arguing that notice and an opportunity to opt out are constitutionally required even under Rule 23(b)(2)).

117 Indeed, a class action is not the only type of representative action that will bind non-parties. In Hansberry v. Lee, 311 U.S. 32, 41 (1940), the Court distinguished between "class" and "representative" actions when it stated that " [t]o these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it." By mentioning the class and representation actions separately, the Court suggested that different sorts or representation would be adequate to bind a non-party, but the Court did not explain the distinction.

118 See id. at 42.

119 See McArthur v. Scott, 113 U.S. 340 (1885) (recognizing the doctrine of virtual representation but declining to apply it to bind unborn remaindermen to a judgment in a will contest action).

120 For a thorough discussion of the due process implications of the virtual representation doctrine, see Jack L. Johnson, Comment,

  

Due or Voodoo Process: Virtual Representation as a Justification for the Preclusion of a Nonparty's Claim, 68 Tul. L. Rev. 1303, 1305 (1994) (concluding that, " [a]t a minimum, due process requires notice and the opportunity for meaningful participation in any suit that deprives a person of [a] property interest in the lawsuit," and that the virtual representation doctrine potentially violates this principle).

121 18 Wright et al., supra note 38, § 4457, at 494; see also Aerojet-General Corp. v. Askew, 511 F.2d 710, 719 (5th Cir. 1975) ("Under the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative."); Chicago R.I. & P. Ry. Co. v. Shendel, 270 U.S. 611 (1926); Heckman v. United States, 224 U.S. 413, 445-46 (1912); Kerrison v. Stewart, 93 U.S. 155, 160 (1876).
This broad statement of binding non-parties whose interests were represented in the original litigation has been criticized as being in contradiction with Martin 's rejection of a mandatory intervention theory. See Johnson, supra note 120, at 1314-15. However, Martin did not address whether the plaintiffs' interests were adequately represented in the original litigation such that they could be bound under an adequate representation theory. Indeed, the Eleventh Circuit had concluded that the plaintiffs' interests were not adequately represented in the original litigation by a party thereto. In re Birmingham Firefighters Litig., 833 F.2d 1492, 1499 (11th Cir. 1987). The issue of adequacy of representation was not raised by the parties before the Supreme Court in Martin, and the Martin Court's holding can be limited to the question of whether a non-party who had notice and an opportunity to be heard could be bound under the Federal Rules of Civil Procedure. Preclusion based on notice and a failure to intervene would suggest a mandatory intervention theory; preclusion based on adequate representation does not suggest a mandatory intervention theory.

122 For a good discussion of the origins of the virtual representation doctrine, see generally Johnson, supra note 120, at 1310-14.

123 18 Wright et al., supra note 38, § 4457, at 494.

124 The modern doctrine is frequently applied to bind citizens or private litigants to actions litigated by a municipality. See, e.g., Southwest Airlines Co. v. Texas Int'l Airlines, Inc., 546 F.2d 84, 97-102 (5th Cir. 1977) (holding that several airlines were bound by prior litigation instituted by municipality raising the same issues, but concluding that the bar was based on privity rather than "virtual representation"); Aerojet-General Corp v. Askew, 511 F.2d 710, 719-20 (5th Cir. 1975) (holding that county was barred from litigating a claim that state board failed to raise in previous litigation due to close alignment of county's and board's interests); Rynsburger v. Dairymen's Fertilizer Coop., Inc., 72 Cal. Rptr. 102, 107 (Cal. Ct. App. 1968) (holding that landowners were barred from litigating their nuisance claim after similar claim had been fully litigated by public authority).

125 Compare Aerojet-General Corp., 511 F.2d at 719 (holding that a non-party may be bound as long as a party's interests were closely aligned with the non-party) with Pollard v. Cockrell, 578 F.2d 1002, 1008-09 (5th Cir. 1978) (expressly limiting Aerojet holding).

126 See Gonzales v. Banco Central Corp., 27 F.3d 751, 761 (1st Cir. 1994) ("There is no black-letter rule."); Colby v. J.C. Penney, Inc., 811 F.2d 1119, 1125 (7th Cir. 1987) (" [N]o uniform pattern has emerged from the cases ...."); Ethnic Employees of Library of Congress v. Boorstin, 751 F.2d 1405, 1411 n.8 (D.C. Cir. 1985) (noting the "highly uncertain scope" of the virtual representation doctrine); Silver, supra note 90, at 355 (noting that the virtual representation "cases are sporadic, and the doctrine often idiosyncratic").

127 See, e.g., Sondel v. Northwest Airlines, Inc., 56 F.3d 934, 939 n.9 (8th Cir. 1995) (noting that "Minnesota ... has stated that virtual representation analysis appears to be no different from the traditional privity analysis"); Southwest Airlines Co. v. Texas Int'l Airlines, Inc., 546 F.2d 84 (5th Cir. 1977) (declining to apply the virtual representation doctrine to bind a group of local airlines to a judgment in a prior action brought by a municipality, but ultimately holding that the airlines were bound as privies because the municipality had adequately represented the airlines' interests in the case).

128 See, e.g., Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 43 F.3d 1054, 1069-70 (6th Cir. 1994) (requiring a relationship between a party and non-party as a prerequisite to collateral bar); Collins v. E.I. Dupont De Nemours & Co., 34 F.3d 172, 176-77 (3d Cir. 1994) ("Virtual representation does not mean merely that the person in the suit serves the interests of the person outside

  

the suit. It requires a relationship by which the party in the suit is the legally designated representative of the non-party ...."); Pollard v. Cockrell, 578 F.2d 1002, 1008 (5th Cir. 1978) ("Virtual representation demands the existence of an express or implied legal relationship in which parties to the first suit are accountable to non-parties who file a subsequent suit raising identical issues."). Thus defined, virtual representation is indistinguishable from privity. However, the cases imposing requirements in addition to adequate representation of similar interests do not expressly rest their holdings on the Due Process Clause, although due process concerns are arguably the basis for the additional requirements. Since this article seeks to find the precise limits of due process, it will distinguish "privity" and "virtual representation" on this basis: to establish privity, there must be a similarity of interests and a sufficiently close relationship, whereas to bind a non-party under the virtual representation theory, all that is needed is a showing that the challenger's interests were adequately represented in the original litigation.

129 42 U.S.C. § 2000e-2(n)(2)(D) (1994).

130 Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

131 Id. (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

132 International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

133 See, e.g., Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 320 (1985); Mathews, 424 U.S. at 348; International Shoe, 326 U.S. at 316.

134 See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979).

135 See Hansberry v. Lee, 311 U.S. 32, 42 (1940).

136 See Montana v. United States, 440 U.S. 147, 154 (1979).

137 Mathews, 424 U.S. at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

138 234 U.S. 385, 394 (1914). Of course, an individual hearing is not always required. For example, the legislative due process principle articulated in Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441 (1915), would permit a legislative decision to deprive an individual right to due process when the legislative scheme applies generally to a large number of people. This principle is inapplicable in the context of section 108, however, because, by its terms, section 108 invites individual inquiries into the particulars of each case. That is, a court faced with applying section 108 to bar a challenger's claim must undertake an individual analysis as to whether the prerequisites to the bar are present. That individual analysis gives rise to a right to individual consideration of the propriety of the deprivation. See O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 800 (1980) (Blackmun, J., concurring) ("' [T]he case for due process protection grows stronger as the identity of the persons affected by a government choice becomes clearer; and the case becomes stronger still as the precise nature of the effect on each individual comes more determinately within the decisionmaker's purview."') (quoting Laurence H. Tribe, American Constitutional Law § 10-7 (1978)); see also Silver, supra note 90, at 368.

139 339 U.S. 306, 313 (1950).

140 455 U.S. 422, 433 (1982) (quoting Board of Regents v. Roth, 408 U.S. 564, 570-71 n.8 (1972)).

  

141 Id. at 437 (quoting Boddie v. Connecticut, 401 U.S. 371, 378 (1971); Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Mullane, 339 U.S. at 313).

142 Id. at 434 (citing Goss v. Lopez, 419 U.S. 565, 579 (1975); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19 (1978); Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976); Wolff v. McDonnell, 418 U.S. 539, 561-63 (1974)). Timing of the hearing is also a factor involved in a due process inquiry, see id., however, section 108 does not deprive the challengers of an opportunity for a pre-termination hearing. The challenger has a full opportunity to address the propriety of the deprivation before a court concludes that the case is barred. See 42 U.S.C. § 2000e-2(n)(1)(B) (1994).

143 See Logan, 455 U.S. at 434.

144 Id.

145 See id. at 426.

146 See id.

147 See id. at 434.

148 See id. at 434-35.

149 See id. at 435.

150 Id. at 437.

151 Id.

152 A determination that a challenger's claim was barred by section 108 would be a final order ending litigation on the merits of the claim. As such it would be immediately appealable. See 28 U.S.C. § 1291 (1994).

153 See infra part IV.

154 See 42 U.S.C. § 2000e-2(n)(1)(B)(ii) (1994).

155 See Logan, 455 U.S. at 434.

156 See 42 U.S.C. § 2000e-2(n)(1)(B)(ii) (1994).

157 Section 108(3) provides that the collateral challenge should be brought in the same court, and preferably before the same judge, that entered the original decree or judgment. See 42 U.S.C. § 2000e-2(n)(3) (1994).

  

158 See, e.g., Montana v. United States, 440 U.S. 147, 153-55 (1979).

159 Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 339 (5th Cir. 1982) (quoting Restatement (Second) of Judgments § 39 cmt. c (1982)).

160 See John O. McGinnis, The Bar Against Challenges to Employment Discrimination Consent Decrees: A Public Choice Perspective, 54 La. L. Rev. 1507, 1511-15 (1994) (discussing litigants' incentives to settle Title VII claims without considering third parties' interests).

161 See, e.g., Air Line Stewards Tile Ass'n v. American Airlines, Inc., 490 F.2d 636 (7th Cir. 1973) (holding that union was not adequate representative of discharged employees because of potential conflict of interest between reinstatement of the discharged employees and the union's representation of currently-employed employees, who the union was required to represent).

162 See Chase Manhattan Bank v. Celotex Corp., 56 F.3d 343, 346 (2d Cir. 1995) ("Absent such an identity of incentives, the application of claim preclusion ... would violate concepts of elemental justice and probably due process.").

163 General Telephone Co. v. Falcon, 457 U.S. 147, 158 n.13 (1982) (holding that employee's claim that he was denied a promotion was not typical, for purposes of a Rule 23 class action, to represent prospective employees who alleged discrimination in hiring).

164 See id. at 147.

165 See Air Line Stewards Tile Ass'n, 490 F.2d at 640-42.

166 Fed. R. Civ. P. 23(a)(2).

167 See 42 U.S.C. § 2000e-2(n)(1)(B)(ii) (1994).

168 See Fed. R. Civ. P. 60(b).

169 502 U.S. 367 (1992).

170 Id. at 383.

58 UPTLR 435

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