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The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process

Charles J. Cooper†

INTRODUCTION

In employment discrimination cases, the imposition of so-called “affirmative action remedies,” such as racially preferential hiring and promotional quotas, directly and adversely affects the employment opportunities of at least some nonminority job seekers and incumbent employees. Because the pool of available jobs or promotions offered by an employer at any given time is fixed, the pursuit of employment or advancement with that employer amounts to a zero-sum game in which preferential treatment of one person inevitably prejudices the interests of some of that person’s competitors. Many, and perhaps most, judicial decrees imposing quota remedies are based not on adjudication of the claim of past discrimination, but on the consent of the parties.1 It is not

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1 During the past four terms, the Supreme Court has decided four major affirmative action cases involving challenges to racial quotas contained in court decrees. See United States v. Paradise, 107 S. Ct. 1053 (1987); Local Number 93 v. City of Cleveland, 106 S. Ct. 3063 (1986); Local 28 of Sheet Metal Workers v. E.E.O.C., 106 S. Ct. 3019 (1986); Firefighters v. Stotts, 467 U.S. 561 (1984). In all of these cases, the quota relief at issue was entered in a consent decree. The prevalence of consent decrees is also reflected by the employment discrimination cases found in the courts of appeals. See, for example, United States v. City of Cincinnati, 771 F.2d 161 (6th Cir. 1985); Deveraux v. Geary, 765 F.2d 268 (1st Cir. 1985), cert. denied, 106 S. Ct. 337 (1986); Turner v. Orr, 759 F.2d 817 (11th Cir. 1985); Williams v. City of New Orleans, La., 694 F.2d 987 (5th Cir. 1982); Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982); Boston Chapter NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982), vacated as moot by Firefighters v. Boston Chapter NAACP, 461 U.S. 477 (1983); United States v. City of Miami, Fla., 664 F.2d 435 (5th Cir. 1980); United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980); E.E.O.C. v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977); United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975). Indeed, nearly 90 percent of the lawsuits brought by the Justice Department under Title VII in the period between 1972 and 1983 were settled by consent decree. See Maimon Schwarzschild, Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform, 1984 Duke L.J. 887, 894. And virtually all of the consent decrees negotiated by the federal government prior to 1981 contain race-conscious remedial measures. In 1981 the Reagan administration adopted a policy against seeking quota relief
difficult to understand why. Employment discrimination class actions are expensive and time-consuming to litigate, and they can lead to enormous back pay awards. In contrast, the monetary value to the employer of the equal employment rights of nonminority employees and job applicants is slight. And, in the typical case, neither the nonminority employees and applicants, nor anyone purporting to represent their interests, is a party to the case or to the agreement that settles it. An employer negotiating a settlement in such a case is thus much like a gambler wagering with someone else’s money: he can afford to be extravagant until he gets to his own stake.

Because the employer’s interest in conserving its financial resources may tempt it to bargain with a currency it holds less dear—the interests of nonminority employees and job applicants in competing for employment opportunities on a nondiscriminatory basis—it would not seem controversial to assert that a non-party to a consent decree who is harmed by its implementation is entitled to a full and fair opportunity to have his legal objections to the decree’s requirements adjudicated on the merits. Yet the federal courts, with one exception, have consistently dismissed such actions as “impermissible collateral attacks” on consent decrees.

When coupled with the restrictions on intervention, which are related to considerations of standing and timeliness, application of the “collateral attack” doctrine typically precludes any judicial

in employment discrimination cases.

See, for example, United States v. Lee Way Motor Freight, Inc., 15 FEP Cases 1385 (W.D. Okla. 1977), aff’d in part and rem’d in part, 625 F.2d 918 (10th Cir. 1979).


See, for example, Thaggard v. City of Jackson, 687 F.2d 66, 68-69 (5th Cir. 1982); Stotts v. Memphis Fire Dept., 679 F.2d 541, 558 (6th Cir. 1982); Prate v. Freedman, 430 F. Supp. 1373, 1374-75 (W.D.N.Y. 1977); O’Burn v. Shapp, 70 F.R.D. 549, 552-53 (E.D. Pa. 1976); McAleur v. American Tel. & Tel. Co., 416 F. Supp. 435, 438 (D.D.C. 1976) (refusing to allow a “collateral attack” on the terms of the consent decree but permitting a cause of action for back pay to a male employee discriminated against under the decree); see also Grann v. City of Madison, 738 F.2d 786, 796 (7th Cir. 1984) (seeing “no more reason to permit a collateral attack on [a state] agency’s order than we do to permit a collateral attack on a consent decree”).

Not confined to employment discrimination cases, the collateral attack doctrine has been employed in other civil rights contexts as well. See, for example, Samayo v. Chicago Bd. of Educ., 798 F.2d 1046, 1049-50 (7th Cir. 1986) (public education); Black & White Children v. School District, 464 F.2d 1030, 1030-31 (6th Cir. 1972) (public education); Burns v. Board of Sch. Com’rs of City of Indianapolis, Ind., 437 F.2d 1143, 1144 (7th Cir. 1971) (assignment of school teachers).
scrutiny of the substantive legality of actions taken pursuant to the consent decree. This article seeks to demonstrate that the parallel operation of the collateral attack doctrine and the rules governing timeliness of intervention improperly deny nonparties to consent decrees an essential component of due process—their day in court.

Part I of this article discusses, by way of example, a recently litigated case, 
Deveraux v. Geary,
 in which the joint application of the collateral attack doctrine and the rules restricting intervention operated to preclude judicial consideration of actions challenging a consent decree brought by persons who were not parties to the consent decree nor to the underlying litigation. Part II examines the due process implications of the collateral attack doctrine thus applied. Finally, Part III discusses some recent positive developments in the case law suggesting that the collateral attack doctrine, applied in cases challenging the legality of actions taken pursuant to consent decrees, is undergoing judicial reexamination.

I. DEVERAUX v. GEARY

In 
Deveraux v. Geary,
The plaintiffs, five white police officers employed by the Metropolitan District Commission (“MDC”), a Massachusetts state agency, sought to challenge the selection of a black police officer, Donald E. Callender, for the position of Provisional MDC Police Captain. Although Callender had scored lower on the promotion exam than any of the plaintiffs,
 he was selected for the position in order to comply with the “minority employment objectives” set forth in a consent decree that had been adopted in an earlier employment discrimination case—
Culbreath v. Dukakis
—brought by a class of minority plaintiffs.

The decree obligated various state agencies, including the MDC, to establish a special minority eligibility list for each job category covered by the decree, and to select applicants from that list rather than from the usual civil service eligibility list when necessary to meet or maintain the decree’s minority employment objectives for the relevant

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See, for example, Thaggard, 687 F.2d at 68-69.


Id.

Callender, with a score of 82, was ranked eighth on the list of eligible candidates, while plaintiffs, with scores ranging from 83 to 85, were ranked from third to seventh on the same list. The candidates ranking first and second had been promoted on earlier occasions.

630 F.2d 15 (1st Cir. 1980).

See Deveraux, 765 F.2d at 269-70; see also Culbreath, 630 F.2d 15 (affirming original consent decree).
job category. The Deveraux plaintiffs claimed that, but for their race, one of them would have been selected for the captain position rather than Callender and that Callender’s selection, therefore, violated their equal protection rights. These plaintiffs have never had the merits of this claim heard by a court of law.

A. Culbreath v. Dukakis: Entry of the Consent Decree

In 1974, three minority plaintiffs filed a complaint for declaratory and injunctive relief in federal court in Massachusetts, alleging that several state agencies employing persons within the City of Boston had engaged in racially discriminatory hiring and promotion practices. The defendants moved to dismiss on several grounds, including the failure to join as necessary parties “nonminority state employees who would be affected by any relief given under the suit.” The district court denied the motion, but noted “an arguable interest” on the part of nonminority applicants for state jobs or promotions and suggested that it would “entertain motions to intervene from interested parties.”

In December 1976, the district court certified a plaintiff class pursuant to Federal Rule 23 to include “all racial minority residents of Boston who sought jobs or promotions with several named state agencies.” After nearly two years of settlement negotiations, the parties submitted a stipulation of facts and proposed consent decree to the trial court. The consent decree required state agencies to appoint applicants from a special minority eligibility list,

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12 Culbreath, 630 F.2d at 18-20. Fed. Rule Civ. Proc. 19(a) provides:
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 his absence complete relief cannot be accorded among . . . [the] parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action . . . may (i) as a practical matter impair or impede his 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 his claimed interest. . . .
13 See Jackson v. Sargent, 394 F. Supp. at 173. This ruling was not appealed. See Culbreath, 630 F.2d at 19.
15 Culbreath, 630 F.2d at 19.
16 “The stipulation adopted the basic facts alleged in plaintiffs’ complaint, and more: a significant underrepresentation of minorities in several state agencies in the Boston Standard Metropolitan Service Area . . . and the existence of a variety of state employment practices and policies which were either racially biased or racially neutral but [which] tended to perpetuate the effects of practices disproportionately affecting minorities.” Id.
rather than from the usual list of eligible civil service applicants, if necessary to attain or to maintain the numerical “objectives” set out in the decree.\textsuperscript{17}

Four state employee labor unions moved to intervene in the Culbreath litigation in order to mount a facial challenge to the minority employment and promotion mechanisms of the consent decree. The district court, however, denied their motions as untimely, and the First Circuit affirmed.\textsuperscript{18} In reaching this conclusion, the court of appeals adopted the four-factor test for timeliness established by the Fifth Circuit in Stallworth v. Monsanto Company.\textsuperscript{19} This test considers: (1) the length of time the would-be intervenors knew or reasonably should have known of their interest in the litigation before petitioning to intervene; (2) the prejudice to the existing parties if intervention is granted; (3) the prejudice to the would-be intervenors if intervention is denied; and (4) the existence of unusual circumstances militating either for or against intervention.\textsuperscript{20} In making its determination that the district court had properly denied the motions, the appellate court relied on the first three of these factors.

Applying the first Stallworth factor, the court of appeals stated that the unions should have known of their interest in the litigation almost immediately after it was filed; the major local newspaper had carried front page accounts of the filing of the complaint, including a general description of the relief sought.\textsuperscript{21}

With respect to the second factor, the First Circuit began its analysis by remarking that the purpose of the rules requiring timely intervention was to “prevent last minute disruption of painstaking work by the parties and the court.”\textsuperscript{22} Noting that the unions would likely oppose the “central principle” of preferential remedies, the court found substantial prejudice to the existing parties in the “distinct probability that the intervention of the unions will destroy the consent decree and force a trial on the merits.”\textsuperscript{23}

\textsuperscript{17} Id. at 20.
\textsuperscript{18} Id. at 25. One petition was lodged a month before the consent decree was proposed and some eight months before the district court approved the decree, and the other three were filed roughly ten weeks after the decree was proposed and six months before it was approved. The court determined, however, that none of the petitions for intervention had been timely filed and concluded that the district court had not abused its discretion in dismissing all four.
\textsuperscript{19} 558 F.2d 257 (5th Cir. 1977).
\textsuperscript{20} Culbreath, 690 F.2d at 20-24.
\textsuperscript{21} Id. at 20-21.
\textsuperscript{22} Id. at 22.
\textsuperscript{23} Id.
Finally, the First Circuit addressed the potential prejudice that the unions might suffer if denied intervention. Noting that a "[c]ollateral attack on the decree will be impossible," the court assumed that a denial of the petitions for intervention might forever foreclose "the unions and their members . . . from challenging the goal mechanisms of the decree." Nonetheless, because, in the court's view, the unions had only a "slight" probability of success on the merits of their claims, they would suffer little prejudice from being forever denied the right to assert them. Judge Aldrich, in a concurring opinion, questioned how the court was "able to determine the merits of [the unions'] case when they ha[d] not been allowed to present it. . . ."

B. Nonminorities Bring Suit

It was against the backdrop of Culbreath that the Deveraux plaintiffs sought judicial redress for being denied promotion on purely racial grounds. The district court held that petitioners' suit was "in essence an attack on the Culbreath consent decree" and therefore treated their action as an "attempt to intervene in that case." In determining whether to permit such intervention, the court applied the Stallworth factors.

With respect to the first prong of the Stallworth test, the court indicated that "if it was unreasonable for the labor unions in [Culbreath] to intervene . . . four years after the complaint was filed, it is even more unreasonable to permit the plaintiffs to intervene now, more than ten years after the complaint was filed." Noting that "the goals and mechanisms sought by the complaint in Culbreath were well-publicized," the district court could conceive of no reason "why these police officers were not aware of and should not be bound by the Culbreath decree." The district court thus concluded that the timeliness of the nonminority plaintiffs'

24 Id.
25 Id. at 23. The court assumed that the district court had determined the settlement to be "fair, adequate and reasonable . . . and not unlawful" and that the entry of the decree amounted, in effect, to "a determination of probability of success on the merits."
26 Id. at 25 (Aldrich, J., concurring).
28 Id.
29 Id. at 1483-84. It made no difference to the district court whether any of the unions denied intervention in Culbreath represented police officers at the time intervention was denied. This point is important, for it indicates that the district court's decision did not rely, as a matter of claim preclusion, on the failed attempt by the unions to intervene in Culbreath.
attempt to intervene should be measured not from the time at which their causes of action accrued, or even from the time at which the consent decree was proposed publicly, but rather from the time at which the complaint in the consent decree case was filed.

As to prejudice, the court believed, as did the First Circuit in Culbreath, that the Deveraux plaintiffs' success "would constitute an extreme example of 'last minute disruption of painstaking work by the parties and the court'" since its effect would be to "disallow implementation of the consent decree."30 "Nothing," according to the district court, "could more clearly prejudice the interests of the existing parties."31 On the issue of prejudice to the would-be intervenors, the district court again indicated that "[a]bsent some unusual circumstance, . . . [the] holding in Culbreath must govern this case."32 Because racial preference schemes constitute an accepted means of remedying past discrimination in our society, the district court concluded that, as in Culbreath, the prejudice to the intervenors is "as slight as [their likelihood] of success on the merits."33 Finally, the district court considered whether the Supreme Court's decision in Firefighters v. Stotts34 constituted an "unusual circumstance" under prong four of the Stallworth test and concluded that it did not.35

Accepting the district court's treatment of the lawsuit as a petition to intervene in Culbreath "rather than as an impermissible collateral attack on the Culbreath consent decree," and accepting the lower court's application of the Stallworth factors, the First Circuit affirmed.36 The court of appeals did not address the claim that the district court's application of the collateral attack doctrine denied plaintiffs' right to due process of law. The Deveraux plaintiffs' petition for a writ of certiorari was denied.37

C. The Judicial Pincer Movement

The Deveraux case brings into sharp focus the dilemma cre-

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30 Id. at 1484, quoting Culbreath, 630 F.2d at 22 (citations omitted).
31 Deveraux, 596 F. Supp. at 1484.
32 Id. at 1485.
33 Id. at 1484-85.
34 467 U.S. 561, 578 (1984) (invalidating under Title VII a district court order modifying a consent decree to require racially preferential layoffs benefiting persons who were not actual victims of illegal discrimination).
35 Deveraux, 596 F. Supp. at 1485-86.
36 See Deveraux v. Geary, 765 F.2d 268, 271 (1st Cir. 1985).
37 106 S. Ct. 3337 (1986).
ated by the joint operation of the collateral attack doctrine and the rules governing timely intervention. Independent actions challenging conduct required or authorized by an extant consent decree are barred as impermissible collateral attacks on the decree, even though the claimants were not parties either to the decree or to the litigation in which it was entered. Indeed, the collateral attack doctrine requires dismissal of a complaint asserting a cause of action that had not even accrued when the consent decree was entered.

Under a typical application of the rules governing timely intervention in the context of an employment discrimination case, the nonminority would-be intervenor is required to see into the future, to speculate on what his interests are likely to be, and to assess whether any of the likely outcomes of the ongoing litigation will adversely affect that speculative interest. If, for example, the would-be intervenor is an incumbent employee of the defendant, he must determine what opportunities for promotion are likely to arise in the future, weigh his own personal interest and aptitude for any such promotion, determine his competitive chances for any such promotion, and so forth. He must then determine such things as whether the litigation will be successful, whether it will result in relief affecting future promotions, and whether any relief is likely to affect adversely his promotional prospects in the future. If he concludes (or should have concluded) that the litigation may adversely affect that speculative interest, he must promptly retain counsel and seek to litigate his claim, even though the claim at that point has not yet accrued (and may never accrue) and is (probably) so speculative that he lacks standing to raise it. For Culbreath teaches that if he delays his attempt to intervene even until a proposed consent decree is made public, which is typically when he would first learn that the employer intends to settle the suit and that his speculative interests may be affected by the settlement, intervention will probably be denied as untimely. And if he delays his attempted intervention in the litigation until his speculative interest becomes real and that real interest is injured

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38 For other cases that affirm denials of intervention as untimely in nonminority challenges to consent decrees, see, for example, United States v. City of Chicago, 798 F.2d 969 (7th Cir. 1986) (firefighters); Corley v. Jackson Police Dept., 755 F.2d 1207 (5th Cir. 1985); Reeves v. Wilkes, 754 F.2d 965 (11th Cir. 1985) (sheriffs); United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1983) (firefighters); Stotts v. Memphis Fire Dept., 679 F.2d 579 (6th Cir. 1982); Prate v. Freedman, 430 F. Supp. 1373 (W.D.N.Y. 1977) (police).

39 As one commentator has put it, "By dismissing [the unions'] objections as untimely, the [Culbreath] court punished them for failing to foresee the unforeseeable." Schwarz-schild, 1984 Duke L.J. at 921 (cited in note 1).
by conduct required as a result of the litigation—that is, if he waits until he has an accrued cause of action to assert—he will almost surely be turned away as untimely, as were the plaintiffs in Deveraux.

Determining the answers to these unknowables is difficult enough for persons, like the plaintiffs in Deveraux, who were incumbent employees when the employment discrimination suit was filed against the employer. But the universe of would-be intervenors who must predict future events is by no means limited to incumbent employees. Because consent decrees entered in employment discrimination suits are often operative for a decade or more, a promotion quota could well disadvantage a person who had not even graduated from high school, let alone joined the employer’s work force, when the consent decree was entered. Indeed, a hiring quota by definition affects only persons who were not incumbent employees when the consent decree was entered. This may lead to results that are not only extreme and unjust, but also absurd. For example, a twenty-year-old applying for a job with the MDC police force in 1986 was eight years old when the initial Culbreath suit was filed. It seems unlikely, to say the least, that this eight year old studied the Boston Globe each day to stay abreast of the happenings at the federal courthouse. But even if he did, it is clearly absurd to require that the child then decide whether he wants to be a police officer with the MDC, and then to demand that he retain a lawyer and seek to intervene. This example simply illustrates the obvious: that it is unreasonable to require any such person (1) to be aware of the lawsuit and the decree imposing a hiring quota, (2) to predict his interest in someday seeking a job with the defendant employer, (3) to assess the likely effect of the hiring quota on that interest, and (4) to make the host of other speculative judgments about future events required under current rules governing the timeliness of intervention.

The would-be intervenor’s problems do not end, however, with

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40 The consent decree in Culbreath could bind a person who did not subscribe to or read any major Boston newspaper or even someone who was not living in Boston in 1974.

41 This point is vividly illustrated by the case of Ronald Ashley, one of the plaintiffs in Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982). Ashley did not apply for employment as a police officer until several months after the consent decree was entered. After Ashley was passed over in favor of allegedly less qualified black applicants by operation of the decree’s one-for-one hiring goal for blacks, he promptly sought intervention in the case in which the decree had been imposed. Intervention was denied and Ashley did not take an appeal. In Thaggard, Ashley’s independent civil rights lawsuit was dismissed as an impermissible collateral attack.
the requirement that he be clairvoyant. Intervention may be denied even to the would-be intervenor who is prescient enough to foresee future events and to determine that the employment discrimination litigation will likely result in a consent decree imposing relief, such as a promotional quota, that will adversely affect his future employment prospects. His intervention petition, if filed before he has an accrued cause of action, is apt to be denied on the entirely reasonable ground that his claim—that he may at some point decide to seek promotion and may do well enough on the requisite tests to be a competitor for a promotion that may open up in the future and that his interests may be adversely affected by a promotion quota that may be entered as a result of the litigation—is entirely speculative and thus not ripe for adjudication.

The case law governing the requirements for timely intervention thus presents a classic "Catch-22" for would-be intervenors in employment discrimination cases. When coupled with the collateral attack doctrine, however, the rules governing timeliness of intervention form a kind of a judicial pincer movement, often leaving the would-be plaintiff without any opportunity to be heard; this is the quintessential denial of due process.

II. DUE PROCESS IMPLICATIONS OF THE COLLATERAL ATTACK DOCTRINE

A. The Fundamental Principles

In *Hansberry v. Lee*, the Supreme Court said, "[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." The Court also declared that the constitutional validity of claim preclusion depends on whether the litigant whose rights have, in effect, been adjudicated by the earlier proceeding was "afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes."
This fundamental principle of due process applies as well in the context of issue preclusion, or collateral estoppel. In *Blonder-Tongue v. University Foundation*, the Court said,

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

This elaboration of the due process principles set out in *Hansberry* makes it abundantly clear that the right to have one's day in court is a personal right. Even if the identical issue has been decided against the position of a litigant in another proceeding, that litigant cannot be prevented from having his own “full and fair opportunity to litigate.” In *Parklane Hosiery Co. v Shore*, the Supreme Court distilled the teachings of *Blonder-Tongue* and *Hansberry* into the general statement 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.”

It follows from these elementary due process principles that a party to a suit cannot be required to settle his claims on terms dictated by the other parties. Indeed, waiver of the right to litigate is the quid pro quo for settling: when a party “has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected. . . .”

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Id. See also Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, 18 Federal Practice and Procedure § 4449 at 417 (1981) (“Our deep-rooted historic tradition that everyone should have his own day in court draws from clear experience with the general fallibility of litigation and with the specific distortions of judgment that arise from the very identity of the parties.”).


If two parties to a lawsuit cannot, consistent with due process, agree between themselves to compromise the claims of a third party to the suit, it is difficult to understand how all of the parties can agree among themselves to compromise the claims of strangers to the suit. Nonetheless, decisions invoking the collateral attack doctrine coexist in some circuits alongside decisions prohibiting the entry of a consent decree over the substantive legal objections of a party. Two cases decided within a year of each other in the Fifth Circuit amply illustrate the circuits' capacity to maintain this inherent contradiction.

The first case, *United States v. City of Miami, Fla.*,\(^{50}\) decided *en banc*, involved a suit brought by the United States against the City, the Fraternal Order of Police ("the Union"), and others, alleging that the defendants had engaged in unlawful employment discrimination. The United States and the City entered into a comprehensive consent decree to which the Union objected, arguing that certain provisions of the decree conflicted with the rights of the Union and its members under a preexisting collective bargaining agreement between the Union and the City. The district court approved and entered the consent decree over the union's objection.

The Fifth Circuit vacated and remanded. It noted that the district court had properly approved the decree "[i]nsofar as the decree [did] not affect the nonconsenting party and its members, or [contain] provisions to which they [did] not object;" but the court held that "parts of the decree [did] affect the third party who did not consent to it, and these parts [could not] properly be included in a valid consent decree."

In analyzing the decree, the *City of Miami* court determined that its quota provisions regarding promotions conflicted with the Union's collective bargaining rights. Although the collective bargaining agreement was silent on promotions, it incorporated municipal ordinances which provided that eligibility for promotion was determined solely on the basis of the employee's score on a civil service test. The consent decree's promotional provisions thus

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\(^{50}\) 664 F.2d 435 (5th Cir. 1981).

\(^{51}\) Id. at 442.
prejudiced the Union and its members by "alter[ing] its contractual rights and depart[ing] from the governmental neutrality to racial and sexual differences that is the fundament of the fourteenth amendment in order to redress past discrimination."\(^2\) Because "[a] party potentially prejudiced by the decree has a right to a judicial determination of the merits of its objection,"\(^3\) the court ordered that the decree be modified to delete the provisions concerning the promotion of police officers and that the case be remanded for trial on the claims of promotion discrimination put forward by the United States.

Less than one year later, in \textit{Thaggard v. City of Jackson},\(^4\) a panel of the same court relied on the collateral attack doctrine to dismiss a suit brought by two nonminority plaintiffs seeking to mount an equal protection and Title VII challenge to the racially discriminatory hiring and promotion "goals" contained in a consent decree, and also denied their motions to intervene as untimely.\(^5\) Neither of the plaintiffs had participated in the underlying lawsuit or the formulation of the consent decree. Nonetheless, likening the plaintiffs' suit to a "mortar attack on the validity of the [consent decree],"\(^6\) the court dismissed the suit as an impermissible collateral attack. The court's opinion in \textit{Thaggard} makes no reference to the \textit{City of Miami} case.\(^7\)

The only apparent distinction between the Union in \textit{City of Miami} and the plaintiffs in \textit{Thaggard}, \textit{Deveraux}, and the other collateral attack cases is the Union's status as a party to the consent decree suit. Accordingly, harmonizing the collateral attack cases with the due process analysis reflected in \textit{City of Miami} requires acceptance of one of two theories. Under the first theory, the plaintiffs in the collateral attack cases are viewed as de facto

\(^{52}\) Id. at 447.
\(^{53}\) Id.
\(^{54}\) 687 F.2d 66 (5th Cir. 1982).
\(^{56}\) 687 F.2d at 69.
\(^{57}\) The Fifth Circuit has still not come to grips with this conflict. In E.E.O.C. v. Safeway Stores, Inc., 714 F.2d 587 (6th Cir. 1983), the court refused to enforce a conciliation agreement when such enforcement would affect persons who had not consented to the agreement and were prejudiced by its terms. The agreement granted retroactive seniority to some workers and, therefore, infringed on the seniority rights of other employees. In refusing to enforce the seniority provisions against a noncomplying employer, the court stated that "such retroactive seniority cannot properly be granted in the absence of either the Union's consent or an adjudication, in which the Union has the opportunity to participate, on the merits of discrimination claims." Id. at 580. Nowhere did the \textit{Safeway Stores} court allude to the \textit{Thaggard} court's refusal to allow a challenge to a consent decree by a nonconsenting nonparty whose interests had been seriously prejudiced by the decree.
parties to the consent decree by virtue of the adequate representation of their interests in the suit by a party that consented to the decree. The second theory is in the nature of a laches argument; the plaintiffs were obliged to seek intervention in the consent decree suit as soon as they learned (or should have learned) of its pendency. Neither theory withstands scrutiny.

B. The “Adequate Representation” Theory of Preclusion

Under the “adequate representation” theory, a nonparty may be precluded from litigating a claim where an adequate representative of the nonparty’s interests participated in an earlier lawsuit relating to the claim.68 The theory appears to rest upon dicta in *Hansberry* to the effect that, consistent with due process, “members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present.”69 This, however, must be read in conjunction with the *Hansberry* Court’s further statement that nonparties to a lawsuit may be bound by the result only if the court employs procedures that “fairly [ensure] the protection of the interests of the absent parties who are to be bound by [the judgment].”70

No such procedures have been employed in the collateral attack cases. None of the leading decisions invoking the collateral attack doctrine asks whether the interests of the nonminority plaintiffs had been represented at all by parties in the underlying litigation.61 Even if the courts in these cases had inquired into the adequacy of representation provided by the actual parties to the consent decree, it would be difficult to imagine which of the typical parties to a structural civil rights consent decree—the minority plaintiffs, the defendant employer, or, perhaps, the union—would amount to an adequate representative of the interests of the absent nonminorities.62

68 See *Bolden v. Pennsylvania State Police*, 578 F.2d 912, 918 (3d Cir. 1978); *Southwest Airlines Co. v. Texas Intern. Airlines*, 546 F.2d 84, 95 (5th Cir. 1977).
69 Id. at 42-43.
70 See also *Fed. Rule Civ. Proc. 23.*
62 In *Bolden v. Pennsylvania State Police*, 578 F.2d 912 (3d Cir. 1978), the Third Circuit considered petitions for intervention by a class of nonminority employees and a class of nonminority job applicants in a suit in which the court had approved a consent decree with racially preferential remedies. In denying the motion of the nonminority employees, the
With respect to the labor union, one could assume, as the court in *Culbreath* did, that the "membership of the unions . . . reflect[s] the racial mix" of the defendant employer's work force.\(^6^3\) Because the alleged underrepresentation of minorities in the employer's work force presumably supplied the initial impetus for the lawsuit, one might further assume, under this scenario, that the unions would be inclined to defend the constitutional and statutory rights of the nonminority members. This reasoning, however, is fundamentally flawed. The union is obliged to represent all members—minorities and nonminorities—competing for the same positions.

Because unions have a legal duty of fair representation,\(^6^4\) they have to face the problem of dealing with conflicting loyalties at the stage of participating in the formulation of the consent decree.\(^6^5\) The legal duty to account fairly for the interests of all its members will likely prevent a union from pursuing the cause of nonminority employees with the same vigor as the employees would have themselves. Commentators have recognized that litigation by associations on behalf of their members often involves "subtle conflicts of interest that defy ready detection" and that "[t]he quality of association litigation . . . while often superb is also spotty."\(^6^8\) Accordingly, courts should presume, absent evidence to the contrary, that unions are not adequate representatives of the interests of their nonminority members in civil rights litigation and the formulation of consent decrees.\(^6^7\)

\(^6^3\) See Culbreath, 630 F.2d at 22.

\(^6^4\) The duty of fair representation is an implied statutory duty imposed under the National Labor Relations Act. See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953). Accordingly, the union must fairly represent the interests of all its members. See *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).

\(^6^5\) Culbreath, 630 F.2d at 22.

\(^6^8\) *Wright, Miller and Cooper, 18 Federal Practice and Procedure § 4456 at 493* (cited in note 47).

\(^6^7\) The inadequacy of the union as a representative of the interests of its nonminority members in the formulation of consent decrees stems in part from the fact that a union's leadership may have interests that diverge from the interests of its constituents. For example, in *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986), the Jackson Education Asso-
As for job seekers, the union owes them no duty of fair representation and has no incentive to represent their interests energetically in the negotiation of a consent decree. It is difficult to imagine any circumstances in which the union would ever constitute an adequate representative of prospective employees in the context of employment discrimination litigation.

The defendant employers are likewise inadequate representatives of the interests of nonminority employees or job seekers in the negotiation of a civil rights consent decree. As suggested earlier, employers have a strong incentive to avoid the time and expense that are entailed in a full-blown trial of an employment discrimination class action. Indeed, an employer’s natural interest in conserving its financial resources is inherently in conflict with the interests of nonminority employees and job seekers in seeing the lawsuit vigorously resisted. Thus, any theory positing the adequacy of union or employer representation of absent nonminority employees and applicants in the negotiation of a civil rights consent decree cannot, it appears, supply the due process justification for binding nonparties to the terms of the decree.

The association negotiated a collective bargaining agreement providing for preferential treatment of minority teachers in layoffs despite the existence of a survey in which fully 96 percent of the teachers who responded indicated that they preferred a straight seniority system. Id. at 1844-45 n.1.


6 But see Bolden, 578 F.2d at 918 (holding that the union “was probably an adequate representative of the class interests of non-minority [job] applicants” in the consent decree negotiations).

7 W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983), is instructive on this point. Faced with a Title VII action brought by the Equal Employment Opportunity Commission, the company entered a conciliation agreement, including, among other things, a layoff provision designed to maintain the existing proportion of women in the plant. Pursuant to this agreement, the company laid off certain male employees in violation of seniority provisions contained in the collective bargaining agreement. In upholding an arbitrator’s back pay award in favor of a male employee, the Court commented on the company’s dilemma of having to pay back pay for an action mandated by the conciliation agreement. Justice Blackmun wrote for the Court that “[b]y entering into the conflicting conciliation agreement, by seeking a court order to excuse it from performing the collective bargaining agreement, and by subsequently acting on its mistaken interpretation of its contractual obligations, the Company attempted to shift the loss [incurred from past sex discrimination] to its male employees, who shared no responsibility for the sex discrimination.” Id. at 770. The temptation to shift the loss in this manner, to buy freedom from Title VII liability by offering up the rights of nonminority employees, must be considered too great to trust the employer adequately to represent the interests of those nonminorities.

71 In general, the concept of adequate representation seems ill-suited to litigation that ends in a settlement between the parties. It would seem that compromise of the absent
C. The "Mandatory Intervention" Theory of Preclusion

Another potential justification for preclusion is found in the "mandatory intervention" theory that the district court in Deveraux appears to have employed. By emphasizing the media coverage of the initial complaint and the likelihood of the Deveraux plaintiffs' knowledge of the consent decree and its impact on their rights, the court suggests that there is a duty to intervene promptly in the litigation as a basis for binding the plaintiffs to the earlier decree. This duty requires intervention at the time the complaint was filed or, at the latest, when the decree was entered.

Presumably such a duty would be consistent with due process in the same manner as are statutes of limitations. With respect to statutes of limitations, a plaintiff may have his day in court, but he must move to protect his rights with reasonable promptness. Similarly, one's right to a day in court may be limited by one's duty to intervene expeditiously in all matters about which one has notice and in which one has an interest. Even if such a duty does exist,
and "an unjustified or unreasonable failure to intervene can serve to bar a later collateral attack," Article III rules of ripeness and standing compel the conclusion that this duty is not triggered until the nonminority employee or job applicant is actually passed over pursuant to the provisions of the decree—that is, until the nonminority employee or applicant has an accrued cause of action.

In order to establish a case or controversy, the minimum requirement to invoke the powers of an Article III court, a plaintiff must allege a "distinct and palpable injury." In this respect, the Supreme Court has clearly stated that allegations of abstract, hypothetical, or conjectural injury will not suffice to meet the core requirements of Article III. Indeed, in challenges to discrimina-

But this conclusion does not . . . rest on collateral estoppel; it is no more than a statement of the well-recognized relationship of the Supreme Court to the inferior federal courts and the effect of the former's decisions on the latter. The decision of the Supreme Court on the issues decided in Penn-Central unquestionably . . . "precluded" them from reaching a contrary conclusion or adjudication on the issues resolved therein by the Supreme Court.

Elsewhere, this theory of mandatory intervention has been resisted. See McGhee v. United States, 437 F.2d 995, 999-1000 (Ct. Cl. 1971). Although in Provident Bank v. Patterson, 390 U.S. 102, 114 (1968), the Supreme Court expressly left open the question whether there was a mandatory duty to intervene, there is substantial Supreme Court precedent explicitly stating that no such duty exists. See Chase National Bank v. Norwalk, 291 U.S. 431, 441 (1934) ("The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention. . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights."); Gratiot State Bank v. Johnson, 249 U.S. 246, 249 (1919) ("[A person] is under no obligation to intervene, and the existence of the right [to intervene] is not equivalent to actual intervention."). Whether there is or is not such a requirement is irrelevant, for even a duty such as that could not justify barring the likes of the Deveraux plaintiffs from challenging the actual application of the consent decree to them. See text at notes 74-80.

See Society Hill, 632 F.2d at 1052.


See Los Angeles v. Lyons, 461 U.S. 95, 108 (1983) (there is no case or controversy where injury rests on: "conjecture" that police will conduct all traffic stops unconstitutionally and inflict injury without "legal excuse"; and "speculation" that plaintiff will again be involved in such an instance); O'Shea v. Littleton, 414 U.S. 488, 497 (1974) ("Apparently, the proposition is that if respondents proceed to violate an unchallenged law and if they are charged, held to answer, and tried in any proceedings before petitioners, they will be subjected to the discriminatory practices that petitioners are alleged to have followed. But it seems to us that attempting to anticipate whether and when these respondents will be charged with crime and will be made to appear before either petitioner takes us into an area of speculation and conjecture [beyond the purview of Article III]."); Golden v. Zwickler, 394 U.S. 103, 109 (1969) (denying standing to a party challenging a statute which prohibited the distribution of anonymous election campaign handbills because it was "wholly conjectural" that defendant would be prosecuted again for distributing similar handbills); United Public Workers of America (C.I.O.) v. Mitchell, 380 U.S. 76, 90 (1967) ("A hypothetical threat [of
tory conduct, standing will be denied where the plaintiffs were not personally subject to the challenged discrimination.\textsuperscript{78}

A nonminority employee’s interest in a consent decree containing a promotion quota is purely speculative and contingent unless and until it can be determined with certainty that the quota will actually cause him to be passed over for promotion in favor of a minority employee. Deveraux illustrates the point. The plaintiffs all scored higher on the civil service exam than Callender, the minority officer promoted by the state to Provisional Captain in order to satisfy the requirements of the consent decree. When the decree was formulated, which under Culbreath might well have been too late anyway, the Deveraux plaintiffs—assuming that they were even employed by the state at that time—would have had to allege that they would become interested in and take a civil service exam for promotion, that they would become eligible and rank high enough on the eligibility list to compete, that they would be passed over for promotion, and that the person who would be promoted over them would be a minority officer who had received a lower civil service exam score and who would not have obtained the promotion but for the terms of the decree.\textsuperscript{79} The potential injury of failing to receive a promotion because of racial discrimination would have been considered too speculative to support standing, and rightly so.\textsuperscript{80} That one “can imagine circumstances in which [one] could be affected by” the consent decree cannot suffice to invoke the power of an Article III court.\textsuperscript{81}

Because any possible duty to intervene promptly in the litiga-
tion to protect one’s interests could not require intervention to protect interests not cognizable under Article III, a mandatory intervention theory of the kind employed in Deveraux cannot justify the application of the collateral attack doctrine to deny a litigant the basic element of due process.

III. RECENT DEVELOPMENTS: A REVIVAL OF DUE PROCESS

Notwithstanding the widespread judicial acceptance of the collateral attack doctrine to immunize employment discrimination consent decrees from substantive challenge, there are some signs that due process is making a comeback. The validity of the collateral attack doctrine has never been expressly decided by the Supreme Court. Indeed, in dissenting from a denial of certiorari in Thaggard (styled in the Supreme Court as Ashley v. City of Jackson), Justices Rehnquist and Brennan, the only members of the Court ever to address the issue, rejected the collateral attack doctrine. They found themselves “at a loss to understand the origins of the doctrine of ‘collateral attack’ employed by the lower courts in this case to preclude a suit brought by parties who had no connection with the prior litigation.”

The Justices believed that “the Court of Appeals... erred in holding that a district court cannot entertain a suit challenging practices allegedly mandated or permitted by a prior consent decree...”. Noting that plaintiffs’ “cause of action did not even accrue until at least a year after the entry of the consent decrees,”

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82 Only those few persons who, at the time the consent decree is formulated, are eligible for hiring or promotion, but under the terms of the decree are certain to be passed over in favor of a less qualified minority candidate, would have standing.

83 One writer advances several additional reasons why a duty to intervene could not justify the results in the collateral attack doctrine cases: (1) notice provided by newspaper accounts of the civil rights litigation leading to the decree is constitutionally inadequate; (2) nonminority employees may have jurisdictional or venue objections to being forced to intervene in the action; and (3) such a system would offend Rule 19’s placement of the burden of joining necessary parties on the existing parties to the suit. Comment, Collateral Attacks on Employment Discrimination Consent Decrees, 53 U. Chi. L. Rev. 147, 160-65 (1986).

84 Ashley v. City of Jackson, 464 U.S. 900, 901-02 (1983) (Rehnquist, J., dissenting from the denial of certiorari in Thaggard). As discussed above, in Thaggard suits were brought by white plaintiffs challenging certain hiring and promotional decisions as racially discriminatory. Finding that the challenged hiring and promotion decisions were the result of consent decrees entered in prior cases, the district court dismissed the suits as impermissible collateral attacks. The Fifth Circuit affirmed. See Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982). The plaintiffs had also attempted to intervene in the consent decree suits in order to challenge the decrees on their face. Intervention was denied as untimely, and the plaintiffs did not appeal. See Ashley, 464 U.S. at 901 (Rehnquist, J., dissenting from denial of certiorari).

85 Ashley, 464 U.S. at 900 (Rehnquist, J., dissenting from the denial of certiorari).
they also found the dismissal of the claim inconsistent with the
fundamental principle, rooted in our ""historic tradition that ev-
everyone should have his own day in court,"" that ""[i]t is a viola-
tion of due process for a judgment to be binding on a litigant who
was not a party nor a privy and therefore has never had an oppor-
tunity to be heard."" The Justices found this principle particu-
larly applicable to a judgment entered by consent, for while a con-
sent decree binds the signatories, it ""cannot be used as a shield
against all future suits by nonparties seeking to challenge conduct
that may or may not be governed by the decree.""

Accordingly, they could find ""no justification, either in general principles of pre-
closure or the particular policies implicated in Title VII suits, for
the District Court's refusal to take jurisdiction over this case.""

It is largely for these reasons that the Eleventh Circuit re-
cently rejected the collateral attack doctrine. In United States v.
Jefferson County, the Birmingham Firefighters Association and
two of its members sought to intervene in pending lawsuits, con-
tending that class-based racial preferences contained in proposed
consent decrees would have a substantial adverse impact upon
them. The district court denied intervention as untimely, and en-
tered the consent decrees. The court of appeals affirmed, conclud-
ing that under the four-factor test established in Stallworth, the
district court had not abused its discretion in denying intervention.

In discussing the third Stallworth factor—the extent to which
a denial of intervention might prejudice the would-be interven-
ors—the Eleventh Circuit considered for the first time ""the preclu-

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88 Id. at 902, quoting Wright, Miller and Cooper, 18 Federal Practice and Procedure
§ 4449 at 417 (cited in note 47).
86 Id.
89 Id. at 904. The leading commentators on federal practice analyzed the Fifth Circuit's
decision in Thaggard as follows:

These actions were dismissed "for lack of subject matter jurisdiction," on the
ground that they constituted an impermissible collateral attack on the consent
decrees. The court observed that it was not faced with determining whether the
plaintiffs were in fact entitled to intervene in the government actions. This dispo-
sition is inadequate. . . . Some means of reviewing individual challenges to the
legality of the decrees must be afforded. The most that can be said for this case is
that it is far more orderly to review the challenges by intervention in the original
proceedings, and that the plaintiffs should have appealed the denial of
intervention.

Wright, Miller and Cooper, 18 Federal Practice and Procedure § 4458 at 148-49 n.38 (1986
Supp.) (cited in note 47).
80 720 F.2d 1511 (11th Cir. 1983).
81 Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977).
sive effect a consent decree in a Title VII case might have on one subsequently claiming reverse discrimination." Because the doctrines of res judicata and collateral estoppel are designed to "prevent the attack of a prior judgment by parties to the proceedings or by those with sufficient identity of interests with such parties that their interests are deemed to have been litigated in those proceedings," a nonparty to the proceedings whose "interests were not represented" cannot be bound by a final judgment, whether by consent of the parties or after an adjudication on the merits. The Eleventh Circuit expressly rejected the view that any action having a burden on a consent decree is an "impermissible collateral attack" on the decree: "We do not follow this path to the extent that it deprives a nonparty to the decree of his day in court to assert the violation of his civil rights."

Noting that the would-be intervenors' claims of reverse discrimination did not even accrue until implementation of the decrees had begun, the court observed that they were now free to bring an independent action "asserting the specific violations of their rights" arising out of implementation of the consent decrees. Based upon this analysis, the court of appeals concluded that the district court's denial of intervention did not impermissibly prejudice the rights of the would-be intervenors.

CONCLUSION

I agree with the Eleventh Circuit and Justices Rehnquist and Brennan that the collateral attack doctrine, as applied in cases such as Deveraux and Thaggard, cannot be squared with fundamental principles of due process. Indeed, the principal justification for precluding actions challenging conduct allegedly required or authorized by a prior consent decree—to avoid the potential for inconsistent judgments—can be minimized by a requirement that the latter action be brought in or transferred to the court.

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92 Jefferson County, 720 F.2d at 1517 (footnote omitted).
93 Id. at 1517-18.
94 Id. at 1519.
95 Id. at 1518.
96 Id. at 1519. The Fifth Circuit has recently acknowledged the due process concern voiced in Jefferson County and Ashley. In Corley v. Jackson Police Dept., 755 F.2d 1207, 1210 (5th Cir. 1985), the court noted that "well-settled intervention rules" and the collateral attack doctrine, when applied "in combination," might "unjustly deny a party his day in court." Feeling itself constrained by the law of the circuit, the panel suggested a reexamination of the collateral attack doctrine in "the appropriate forum." Id.