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# Civil Rights Procedural Problems

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# CIVIL RIGHTS PROCEDURAL PROBLEMS

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Congress passed the Civil Rights Act of 1991[1] primarily to modify numerous Supreme Court opinions of the 1988 Term that jeopardized the rights of minorities and women. Particularly striking about those Supreme Court cases was the number which involved procedural questions and process values. These included the timing of litigation, both when employment discrimination victims must commence actions and when non-parties can reopen civil rights cases resolved through consent decrees; litigant responsibility for the expense of lawsuits; and proof requirements.

Most of the procedural developments in civil rights and employment discrimination litigation of the 1988 Term, however, were only recent manifestations of judicial decisionmaking that has disadvantaged civil rights and employment discrimination plaintiffs over the past fifteen years. Moreover, the determinations encompass restrictive interpretations by the Supreme Court and lower federal courts of the Federal Rules of Civil Procedure, fee-shifting legislation, and procedural provisions in civil rights and employment discrimination statutes.

In short, the whole picture for civil rights and employment discrimination litigation has been more than the sum of the procedural parts. The federal judiciary's decisionmaking has adversely affected civil rights and employment discrimination plaintiffs, who Congress intended to serve as private attorneys general, but whose lack of resources for litigating often makes them risk averse.[2] Because these judicial determinations

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1. PUB. L. No. 102-166, 105 Stat. 1071 (1991).

2. Private attorneys general are individuals or groups that seek to assert the interests of non-party discrimination victims or of the public. They have emerged because public attorneys general lack the requisite resources to sue or choose not to litigate for other reasons. *See* Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353 (1988). To encourage such private litigants, Congress affords them procedural advantages or attorney's fees when they prevail. *See* Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 285, 312 (1989) [herein-

threatened the progress that minorities and women have achieved through litigation, Congress enacted the new civil rights and employment discrimination legislation which rectifies or ameliorates certain procedural difficulties faced by civil rights and employment discrimination plaintiffs. Unfortunately, Congress did not treat a number of important procedural problems that significantly disadvantage civil rights plaintiffs. This essay addresses those omissions.

The article initially examines procedural developments that have detrimentally affected civil rights plaintiffs over the last decade and a half. The piece then analyzes the Civil Rights Act of 1991, emphasizing how that measure fails to remedy numerous procedural complications which confront these plaintiffs. Accordingly, the essay affords suggestions for additional change that would respond to the procedural difficulties which remain.

## I. DISADVANTAGEOUS PROCEDURAL DEVELOPMENTS

### *A. The Federal Rules*

The Supreme Court's 1989 application of Federal Rule of Civil Procedure Rule 19,[3] which governs compulsory party joinder, and Rule 24,[4] which covers intervention, in *Martin v. Wilks*[5] exemplifies the federal judicial interpretation of procedural requirements that has disadvantaged civil rights plaintiffs. The Court's construction resembles its readings of other federal rules and their relation to the Civil Rights Attorneys' Fees Awards Act (Fees Act)[6] as well as considerable lower federal court enforcement of yet additional rules, such as Rule 11 pertaining to sanctions.[7]

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after Tobias, *Public Law Litigation*]. Because many discrimination victims possess relatively few resources, adverse judicial determinations can chill their enthusiasm to file suit. *See* Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 495-98 (1988-1989) [hereinafter Tobias, *Rule 11*]. "Civil rights plaintiff" includes "employment discrimination plaintiff," unless the latter term is specifically used.

3. FED. R. CIV. P. 19.

4. FED. R. CIV. P. 24.

5. 490 U.S. 755 (1989).

6. 42 U.S.C. § 1988 (1982).

7. For discussion of the Fees Act and its interrelationships with other Rules, see Tobias, *Public Law Litigation, supra* note 2, at 313-17. *See also* Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291 (1990) (comprehensive analysis of Supreme Court's fee-shifting jurisprudence, especially relating to the Fees Act).

*1. Rules 19 and 24*

In *Martin v. Wilks*, Chief Justice Rehnquist rejected the position of the majority of circuits. These courts had not required civil rights plaintiffs, such as black fire fighters whose employment discrimination cases against employers result in consent decrees, to sue absentees, specifically white fire fighters whose job advancement the plaintiffs' litigation might jeopardize. Instead, the courts had demanded that the absentees intervene in the employment discrimination actions and had proscribed their pursuit of separate, subsequent lawsuits as "impermissible collateral attacks" on the consent decrees.[8] Rejecting this appellate court resolution, the Supreme Court did not require absentees to intervene in employment discrimination cases which might prejudice them. The court stated that consent decrees entered in such litigation can only bind those who were made parties to the lawsuits.

This ruling meant that civil rights plaintiffs whose cases could have resulted in consent decrees were required to sue all absentees who may have been prejudiced or risk having absentees collaterally attack the decrees after their signing, as many absentees did. That approach undermined the effectiveness of consent decrees—which had proved to be a valuable mechanism for expeditiously resolving much civil rights litigation—by reducing the incentives for plaintiffs and defendants to enter into them. The Court's interpretation required that civil rights plaintiffs spend substantial, additional resources on litigating their cases, often to conclusion. Under *Martin v. Wilks*, even if civil rights plaintiffs were able to persuade defendants and all of the absentees joined to sign consent decrees, the plaintiffs would have expended large sums identifying and suing those absentees. Correspondingly, a number of the plaintiffs sustained significant costs defending the decrees against collateral attack by unjoined absentees or others whom the decrees prejudiced after their entry. Indeed, the prospect of incurring these expenses apparently dissuaded some discrimination victims, who contemplated suit, from filing.[9]

8. *See* Martin v. Wilks, 490 U.S. at 762. That position had "sufficient appeal to have commanded the approval of the great majority of the Federal Courts of Appeals." *Id.* Analysis of the opinion in the remainder of this paragraph is drawn from *id.* at 762-69. *See also* Susan Grover, *The Silenced Majority:* Martin v. Wilks *and the Legislative Response*, 1992 U. ILL. L. REV. 43 (helpful analysis of the case); George M. Strickler, Jr., Martin v. Wilks, 64 TUL. L. REV. 1557 (1990) (same).

9. The Chief Justice also rejected a reading of the rules more solicitous of civil rights plaintiffs, stating that it "would require a rewriting rather than an interpretation." *See* Martin v. Wilks, 490 U.S. at 767. For analysis of many federal courts' technical, private law approach to Rule 24 which has disadvantaged these plaintiffs and other public interest litigants, see Tobias, *Public Law Litiga-*

### 2. *Rules 68 and 23(e) and the Fees Act*

The Supreme Court's 1985 application of Rule 68 governing settlement offers and its interrelationship with the Fees Act in *Marek v. Chesny*[10] has similarly affected civil rights plaintiffs. The Court directly contravened a half-century understanding that Rule 68 "costs" did not encompass attorney's fees by reading the Rule to include fees under the Fees Act; this has meant that civil rights plaintiffs who rejected settlement offers more favorable than the relief they secured at trial could not recover fees for services performed after rejecting the offers.[11] The difficulty of predicting precisely what cases are worth before discovery, the problem of comparing defendants' monetary offers with injunctions that the plaintiffs frequently seek and are granted, and the threat of losing post-offer fees has caused some plaintiffs to settle prematurely and forgo broad relief (such as judicial declarations that governmental practices are unconstitutional) which may affect many people. The Court's resolution is "entirely at odds with Congress' intent."[12]

The Court's 1986 interpretation of Rule 23(e), which requires trial court approval of class action settlements, and the provision's relation to

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*tion, supra* note 2, at 322-29. *See also* Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415. Typical cases include Ragsdale v. Turnock, 941 F.2d 501, 503-06 (7th Cir. 1991); United States v. Kentucky Util. Co., 927 F.2d 252, 253-55 (6th Cir. 1991).

Martin v. Wilks could be viewed as a "timing" case, in the sense of when judicial determinations become final. Thus, it resembles another 1989 opinion in which the Court held that when an employer and a union allegedly have "negotiated and adopted a new seniority system with the intention of discriminating against women in violation of Title VII, . . . [the 300 day] limitations period set forth in [the statute], begins to run immediately upon the adoption of that system." *See* Lorance v. AT&T, 490 U.S. 900, 913 (1989) (Marshall, J., dissenting). This ruling made it difficult for female employees to challenge certain types of discriminatory seniority systems because their discriminatory impact could not be anticipated. *Lorance*, therefore, additionally diminished Title VII's application to the systems. *Id.* at 919. Martin v. Wilks and *Lorance* also must be contrasted; the opinions are consistent in their disadvantaging of minorities and women and their benefiting of white males.

10. 473 U.S. 1 (1985). *See also* Roy D. Simon, Jr., *The New Meaning of Rule 68:* Marek v. Chesny *and Beyond*, 14 N.Y.U. REV. L. & SOC. CHANGE 475 (1986) (helpful analysis of *Marek*).

11. *See Marek*, 473 U.S. at 10-11 (majority's reading); *id.* at 21-22 (Brennan, J., dissenting) (half-century understanding). One problem with the majority's interpretation is its substitution of a mechanical comparison for the Fees Act's discretionary determination, which means that some plaintiffs whose fee requests formerly would have been granted have not been granted. *See id.* at 30.

12. *Id.* at 32 n.48. For cases that typify the problems created for civil rights plaintiffs, see Spencer v. General Elec. Co., 894 F.2d 651 (4th Cir. 1989); Lawrence v. City of Philadelphia, 700 F. Supp. 832 (E.D. Pa. 1988). For discussion of these and some additional difficulties that *Marek* poses, see Tobias, *Public Law Litigation, supra* note 2, at 314-16. *See generally* Thomas D. Rowe, Jr. & Neil Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, 51 LAW & CONTEMP. PROBS. 13 (Autumn 1988).

the Fees Act in *Evans v. Jeff D.*,[13] apparently has had analogous impacts on civil rights plaintiffs. Justice Stevens found that district court judges could approve settlements in which civil rights plaintiffs had agreed to waive attorney's fees to which they might have been entitled under the fee-shifting statute in return for substantive relief.[14] This approach appears to have complicated the efforts of discrimination victims to secure counsel. Plaintiffs have little reason not to waive any fees that they might recover; however, fewer lawyers apparently have been willing to accept civil rights cases, because the attorneys have reduced prospects for receiving their fees, a result completely inconsistent with Congress' purposes in adopting the Fees Act.[15]

### *3. Rule 11*

Since Rule 11's 1983 amendment, lower court enforcement of the provision has presented difficulties for civil rights plaintiffs similar to the problems previously discussed. The federal judiciary has found civil rights plaintiffs in violation of the Rule's reasonable pre-filing inquiry requirements more frequently than entities that pursue other types of civil litigation.[16] Some courts have enforced these mandates against civil rights plaintiffs with considerable rigor; a few judges have even levied substantial sanctions on them.[17] These factors appear to have chilled the enthusiasm of individuals who bring civil rights cases.[18]

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13. 475 U.S. 717 (1986). *See also* Brand, *supra* note 7, at 328-29 (helpful analysis of *Evans*); Dana K. Apple, Note, *Attorneys—The Elimination of Statutory Attorneys' Fees Through Simultaneous Negotiations*—Evans v. Jeff D., 35 U. KAN. L. REV. 625 (1987) (same).

14. *See Evans*, 475 U.S. at 737-38.

15. *See id.* at 754-59 (Brennan, J., dissenting). For discussion of this and some additional difficulties that *Evans* poses, see Tobias, *Public Law Litigation*, *supra* note 2, at 316-17. There have been few problematic reported opinions to date, apparently because lawyers have protected themselves by requiring clients to sign contracts in which they agree to assume responsibility for attorney's fees. For one case that affords a sense of the difficulties that may arise, see Phillips v. Allegheny County, 869 F.2d 234, 235-40 (3d Cir. 1989).

16. *See* Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1327 (1986); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200-01 (1988). *See also* ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, CALL FOR WRITTEN COMMENTS ON RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND RELATED RULES, *reprinted in* 131 F.R.D. 344, 345 (1990) [hereinafter CALL FOR COMMENTS].

17. *See, e.g.*, Avirgan v. Hull, 932 F.2d 1572 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 913 (1992); *In re* Kunstler, 914 F.2d 505 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1607 (1991); Blue v. United States Dep't of Army, 914 F.2d 525 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1580 (1991).

18. *See* Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105, 116-21 (1991); Vairo, *supra* note 16, at 200-01. *See also* CALL FOR COMMENTS, *supra* note 16, at 345.

The Standing Committee on Rules of Practice and Procedure of the United States Judicial Conference recently issued a preliminary draft of a proposal to amend Rule 11.[19] Certain components, such as provisions for safe harbors and for reduced judicial reliance on fee shifting, should be responsive to the needs of civil rights plaintiffs.[20] Nonetheless the preliminary draft, if promulgated as proposed, could foster another decade of satellite litigation, inconsistent judicial application and chilling of civil rights litigation.[21]

### *B. Fee-Shifting Legislation*

Closely related to the federal judiciary's problematic construction of the Federal Rules and of specific rules' interrelationships with the Fees Act has been its interpretation of that statute and additional fee-shifting legislation in ways which disadvantage civil rights plaintiffs. Congress passed the measures to facilitate vindication of civil rights by encouraging fee awards to prevailing plaintiffs and in recognition of resource discrepancies between civil rights plaintiffs and those parties they ordinarily oppose, such as governmental bodies and corporations.[22]

The Supreme Court's 1989 reading of one of these fee-shifting provisions in *Independent Federation of Flight Attendants v. Zipes*[23] typifies its

19. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE, *reprinted in* 137 F.R.D. 53, 74-82 (1991) [hereinafter PROPOSED AMENDMENTS].

20. Safe harbors are mechanisms, such as the ability to withdraw inadequate assertions upon notification of their insufficiency, which insulate litigants from sanctions. *See, e.g.*, PRELIMINARY DRAFT OF PROPOSED RULE 11(c)(1)(A), 137 F.R.D. 74, 76 (1991). *Cf.* PRELIMINARY DRAFT OF PROPOSED RULE 11 ADVISORY COMM. NOTE, 137 F.R.D. at 78 (preliminary draft calls for greater restraint in considering sanctions imposition).

21. *See* Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. No.4 (forthcoming 1992) (this proposition and additional analysis of preliminary draft). As this Article goes to press, in mid-June 1992, the Standing Committee approved a final proposal, the most important aspect of which makes judicial imposition of sanctions discretionary. *See* Randall Samborn, *Key Panel Votes Shift in Rule 11*, NAT'L L.J., July 6, 1992, at 13. Certain additional changes that the Advisory Committee made and the Standing Committee agreed with are solicitous of civil rights, so that the proposal should constitute substantial improvement.

22. The Fees Act is a typical example. Congress adopted, and the Court approved, a dual standard: "prevailing plaintiffs ordinarily recovered attorney's fees, but successful defendants normally did not." Tobias, *Public Law Litigation*, *supra* note 2, at 312. For thorough analysis of fee-shifting, see Symposium, *Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 1 (Winter 1984).

23. 491 U.S. 754 (1989). The Court addressed § 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-5(k) (1964), which is similar to another fee-shifting provision of that Act and the Fees Act. *Cf. Zipes*, 491 U.S. at 758 n.2 (explaining that fee-shifting statutes' similar language is a

own interpretations and considerable lower court jurisprudence. The Court narrowly construed congressional commands which were intended to promote meritorious civil rights litigation. In *Zipes*, the Court rejected the views of numerous circuit and trial judges; they had confirmed district court discretion to grant fees to civil rights plaintiffs who prevailed over intervenors, employing lenient standards comparable to the requirements for imposing fee liability on defendants.[24] Justice Scalia held that trial judges could only award attorney's fees against a losing intervenor whose "action was frivolous, unreasonable, or without foundation,"[25] which is the same test for fixing fee responsibility on civil rights plaintiffs. This approach has apparently prevented some victorious civil rights plaintiffs from recovering fees because: (1) the activities of few intervenors have been found sufficiently egregious to have violated that standard, (2) intervenors have made arguments that defendants normally would and, thus, insulated defendants from fee liability, and (3) much fee-shifting legislation is similarly phrased.[26]

Closely linked with *Zipes* has been the judiciary's application of the standard invoked in the case to require that civil rights plaintiffs pay their opponents' attorney's fees.[27] A Ninth Circuit panel recently re-

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strong indication that they are to be interpreted alike). *See also* Joseph E. Koehlen, Note, *When Worlds Collide: Intervenors and Attorney's Fees in Title VII Actions*—Independent Federation of Flight Attendants v. Zipes, 21 ARIZ. ST. L.J. 1201 (1989) (helpful analysis of *Zipes*).

24. *See* 491 U.S. at 760-62. The lower courts finding discretion typically had emphasized that plaintiffs were prevailing parties while evincing less concern about the nature of intervenors' action, such as whether they were liable on the merits. Examples include: the Seventh Circuit opinion reversed in *Zipes*, Zipes v. Trans World Airlines, 846 F. 2d 434, 438 (7th Cir. 1988); another opinion of that court, Charles v. Daley, 846 F.2d 1057, 1068-70 (7th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989); and the cases cited by Justice Marshall in his *Zipes* dissent, 491 U.S. at 774 (Marshall, J., dissenting).

25. *See Zipes*, 491 U.S. at 760 (citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978)).

26. *See supra* note 22 (first reason); *Zipes*, 491 U.S. at 779-80 (Marshall, J., dissenting) (second reason); *supra* note 23 (third reason). There have been relatively few problematic reported opinions to date. For one case that illustrates the difficulties that can arise, see Bigby v. City of Chicago, 927 F.2d 1426, 1428-29 (7th Cir. 1991). *But see* United States v. City of San Francisco, 132 F.R.D. 533, 535-38 (N.D. Cal. 1990).

The Supreme Court sharply circumscribed the expert witness fees that a prevailing party can recover in a civil rights case. *See* West Virginia Univ. Hosps. v. Casey, 111 S. Ct. 1138 (1991). *See also* Crawford Fitting Co. v. J.T. Gibbons, 482 U.S. 437 (1987). *See generally* Tobias, *Public Law Litigation, supra* note 2, at 318-19; Maria-Elena Cigarrou, Comment, *The Recoverability of Expert Witness Fees in Civil Rights Cases: The Post-*Crawford *Crisis*, 10 REV. LITIG. 185 (1990). *But see infra* note 48 and accompanying text.

27. This is the *Christiansburg Garment* standard. *See supra* note 25 and accompanying text. *See also supra* note 22.

versed a district judge's denial of a defendant's motion for summary judgment, announced that the plaintiff's civil rights suit was frivolous, and stated that the plaintiff must pay the defendants' attorney's fees under the Fees Act.[28] In short, the Court's treatment in *Zipes* resembles considerable federal judicial interpretation of fee-shifting legislation, particularly because it restrictively viewed congressional mandates.[29]

### *C. Proof Requirements*

The Supreme Court's 1989 imposition of stricter proof requirements upon plaintiffs in an important employment discrimination context is similar to the stringent pleading that all of the circuit courts now demand of civil rights plaintiffs under Rule 8. In *Wards Cove Packing Co. v. Atonio*,[30] the Court made it more difficult for plaintiffs who allege employment discrimination to win disparate impact cases and significantly changed the understanding regarding proof that had prevailed since the

28. *See* Maag v. Wessler, 944 F.2d 654 (9th Cir. 1991). In denying a request for rehearing and rehearing en banc, however, the panel remanded the case to the "district court for consideration of the appellants' request for attorney fees under 42 U.S.C. § 1988." Maag v. Wessler, 960 F.2d 773, 776 (9th Cir. 1992). *Cf.* Brown v. Borough of Chambersburg, 903 F.2d 274, 279 (3d Cir. 1990) (denying a directed verdict does not, as a matter of law, foreclose consideration of civil rights defendant's subsequent Fees Act fee request premised on claim's frivolousness); William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1019 (1988) (questioning how a case could be so frivolous as to warrant Rule 11 sanctions yet have sufficient merit to withstand summary judgment motion). *See generally* Foster v. Mydas Assocs., 943 F.2d 139, 143-44 (1st Cir. 1991). *But see* Brooks v. Cook, 938 F.2d 1048, 1054-55 (9th Cir. 1991); Leffler v. Meer, 936 F.2d 981, 986 (7th Cir. 1991).

29. One particularly troubling Supreme Court ruling for civil rights plaintiffs and other public interest litigants has been Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 724-28 (1987); 478 U.S. 546 (1986). In *Pennsylvania*, a splintered Supreme Court sharply limited the use of multipliers of lodestar fees to compensate attorneys for assuming the risks of loss under most fee-shifting statutes, thus reducing their attractiveness. Last term, the Court flatly proscribed their use. *See* City of Burlington v. Dague, 60 U.S.L.W. 4714 (June 24, 1992). Other recent examples of restrictive interpretations are Hewitt v. Helms, 482 U.S. 755, 760-64 (1987) (concluding that when respondent received no relief on the merits of his claim, he failed to qualify as a "prevailing party" eligible for attorney's fees under § 1988) and Rhodes v. Stewart, 488 U.S. 1 (1988) (same). An example of narrow lower court interpretation is that of the Fifth Circuit which the Supreme Court reversed in Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 791-92 (1989). This case and others, such as Blanchard v. Bergeron, 489 U.S. 87, 93 (1989), reflect ambivalence in the Court's treatment of fee-shifting statutes. For a comprehensive examination of the Supreme Court's fee-shifting jurisprudence, see Brand, *supra* note 7.

30. 401 U.S. 424 (1971). *See also* Robert Belton, *Causation and Burden—Shifting Doctrines in Employment Discrimination Law Revisited: Some Thoughts on* Hopkins *and* Wards Cove, 64 TUL. L. REV. 1359 (1990) (helpful analysis of *Wards Cove*); L. Camille Hébert, *Redefining the Burdens of Proof in Title VII Litigation: Will the Disparate Impact Theory Survive* Wards Cove *and the Civil Rights Act of 1990?*, 32 B.C. L. REV. 1 (1990) (same).

Court's 1971 decision in *Griggs v. Duke Power Co.*[31] Under *Griggs*, when employment practices constituted obstacles to the hiring and advancement of minority workers, employers had the burden of justifying them. As a practical matter, the *Griggs* requirement had been onerous.[32]

In *Wards Cove*, the Court demanded more of employment discrimination plaintiffs in making out prima facie cases. Justice White, who found the plaintiffs' statistical data relating to the results of employment processes insufficient, insisted that plaintiffs show specific job criteria which excluded minority applicants.[33] The *Wards Cove* majority required even more from plaintiffs after they have made out prima facie cases. Earlier opinions had imposed on employers the burden of proving that a "business necessity" justified the challenged employment practices.[34] Justice White stated, however, that employers merely have the burden of production, not persuasion; once they offer substantial evidence of business necessity, the plaintiffs have the ultimate burden of convincing the fact finder that there is no such justification.[35] The Court also changed the substantive standard from business necessity to whether challenged practices significantly serve employers' legitimate employment goals. This revision requires plaintiffs to demonstrate that the practices lack any valid purpose or to suggest equally effective alternatives.[36] Moreover, Justice White admonished lower courts analyzing the legitimacy of employment practices that judges are "generally less competent than employers to restructure business practices."[37]

The new proof regime instituted in disparate impact cases is analogous to appellate and trial courts' imposition of strict pleading on civil rights plaintiffs under Rule 8. All of the federal circuits have "articulated a requirement of particularity in pleading for civil rights complaints."[38]

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31. 490 U.S. 642, 656-58.

32. Justice Stevens thoroughly recounts the *Griggs* regime in his *Wards Cove* dissent. *See* 490 U.S. at 662-73 (Stevens, J., dissenting).

33. "[A] plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack." *Id.* at 657.

34. *See id.* at 666-68 (Stevens, J., dissenting) (listing relevant prior case law).

35. *See id.* at 659-60.

36. *See id.*

37. *See id.* at 661. For one case that illustrates the proof difficulties that plaintiffs can confront, see Gilty v. Village of Oak Park, 919 F.2d 1247, 1254-55 (7th Cir. 1990).

38. Hobson v. Wilson, 737 F.2d 1, 30 (D.C. Cir. 1984); *accord*, Elliott v. Perez, 751 F.2d 1472, 1479 (5th Cir. 1985). *See also* Arnold v. Board of Educ., 880 F.2d 305 (11th Cir. 1989) (recent example); Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935 (1990) (providing a thorough analysis of

Many courts have held that civil rights complaints which include conclusory, speculative or vague allegations are inadequate. These courts have required factual specificity about the alleged conduct that violated the plaintiff's rights.[39] Some judges even have demanded that the plaintiff offer factual showings of the defendant's actual intent to discriminate or that references to material facts support claims.[40] These developments have occurred, despite the Supreme Court's clear endorsement of the Federal Rules' flexible, liberal pleading system in its 1957 *Conley v. Gibson* decision.[41] Moreover, some judges and numerous commentators have persuasively questioned whether adequate judicial authority and empirical data support elevated pleading.[42]

Therefore, the factual particularity now required in civil rights complaints is similar in its effect to the onerous proof demands that *Wards Cove* placed on plaintiffs who brought employment discrimination cases involving disparate impact. These requirements have impaired the efforts to pursue essential civil rights of litigants whom Congress and the Court have indicated should receive solicitous judicial treatment.[43]

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particularity requirement). *See generally* Cash Energy, Inc. v. Weiner, 768 F. Supp. 892, 896-900 (D. Mass. 1991).

39. *See, e.g.*, Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984); Scott v. Rieht, 690 F. Supp. 368, 370-71 (E.D. Pa. 1988).

40. *See, e.g.*, Slotnick v. Staviskey, 560 F.2d 31, 33 (1st Cir. 1977); Parish v. NCAA, 506 F.2d 1028, 1033-34 (5th Cir. 1975).

41. *See* 355 U.S. 41, 45-48 (1957).

42. The questionable empirical basis is that civil rights cases are more frivolous than others. *See, e.g.*, Rotolo v. Borough of Charleroi, 532 F.2d 920, 925, 927 (3d Cir. 1976) (Gibbons, J., dissenting) (assertion by judge); C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677, 688 (1984) (assertion by author). *See generally* Tobias, *Public Law Litigation, supra* note 2, at 299-300.

The federal judiciary may lack sufficient power, because the Advisory Committee expressly provided for stringent pleading only in Rule 9 governing fraud, rejected heightened requirements in drafting Rule 8 originally, and has not altered these judgments while preserving a flexible pleading regime intended to serve restricted purposes. *See* Elliott v. Perez, 751 F.2d 1472, 1482 (5th Cir. 1984) (Higginbotham, J., concurring) (judge questioning authority); Wingate, *supra*, at 692 (author questioning authority). *See generally* Tobias, *Public Law Litigation, supra* note 2, at 299-300.

43. Congressional indications are the substantive civil rights statutes and fee-shifting legislation mentioned in this essay. Court pronouncements are Bounds v. Smith, 430 U.S. 817, 828 (1977); Newman v. Piggie Park Enters., 390 U.S. 400 (1968). *Cf.* Adam Clymer, *Debate Over Civil Rights Bill Raises Questions About the Law and Job Bias*, N.Y. TIMES, May 26, 1991, § 1, at 22 (describing NAACP Legal Defense and Educational Fund report that concluded that *Wards Cove's* overall effect has "substantially dampened the willingness and ability of lawyers to litigate employment discrimination cases . . . . [so that] claims affecting thousands of discrimination victims are not being filed."); Tobias, *Public Law Litigation, supra* note 2, at 330-31 (discussing additional Rules' application in ways that disadvantage civil rights plaintiffs and other public interest litigants); Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L.

### *D. Detrimental Implications for Civil Rights Plaintiffs*

All of these procedural developments in civil rights litigation have had numerous deleterious consequences. The developments have made it increasingly difficult for individuals and groups who believe that they have suffered discrimination to institute, continue and win civil rights suits, as well as maintain any victories secured. The interpretations particularly disadvantage discrimination victims with limited resources, whom Congress envisioned would act as private attorneys general vindicating civil rights of many citizens who are not before the courts. A number of procedural developments have undercut clear congressional intent in passing civil rights legislation that was frankly remedial in purpose. Congress meant, partially through providing procedural advantages and attorney's fees for plaintiffs who pursue civil rights in federal court, to rectify decades of discrimination. Congress intended to eliminate discrimination, such as that rampant in the Birmingham, Alabama fire department.[44]

## II. ANALYSIS OF THE CIVIL RIGHTS ACT OF 1991

In the Civil Rights Act of 1991, Congress commendably attempted to remedy or ameliorate several problems that the restrictive federal court interpretation has created for civil rights plaintiffs. For instance, the legislation removes onerous requirements that *Wards Cove* placed on employment discrimination plaintiffs and reinstates the proof regime prescribed in *Griggs*. This action should facilitate plaintiffs' pursuit of disparate impact cases.[45] Moreover, Congress responded to the difficulties that *Lorance v. AT&T* imposed on employees who considered challenging allegedly discriminatory seniority systems. The statute specifically provides that an "unlawful employment practice occurs" when a seniority system adopted with an intentionally discriminatory purpose "is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system."[46]

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REV. 341, 349-81 (1990) (same and discussing other "efficiency procedural reforms" that reduce minority court access).

44. *See* Martin v. Wilks, 490 U.S. at 777 (Stevens, J., dissenting) (first black lieutenant in fire department named pursuant to consent decree in 1981); Blanchard v. Bergeron, 489 U.S. 87, 96 (1989) (congressional intent in passing fee-shifting legislation); Tobias, *Public Law Litigation, supra* note 2, at 312 n.252 (same).

45. *See* Civil Rights Act of 1991, PUB. L. NO. 102-166, § 105, 105 Stat. 1071, 1074 (1991). *See also supra* notes 30-37 and accompanying text; *infra* note 50 and accompanying text.

46. *See* § 112, 105 Stat. at 1078-79. *See also supra* note 9.

Congress also addressed the problems of *Martin v. Wilks* by significantly limiting the opportunities for absentees to mount collateral attacks on consent decrees entered in employment discrimination litigation. It prohibited such challenges by (1) all individuals who, before entry of a consent judgment, had actual notice sufficient to be apprised that its entry could adversely affect their interests and legal rights and a reasonable opportunity to protest the judgment; and (2) anyone whose interests had been adequately represented by another person who challenged the judgment on identical legal grounds and under similar factual circumstances.[47] In addition, Congress rectified one important deficiency in fee-shifting jurisprudence by authorizing courts to exercise discretion in awarding prevailing parties their expert witness fees.[48]

Numerous additional provisions of the legislation, which are less important to the procedural focus of this piece, should afford benefits for civil rights plaintiffs. For example, the statute permits certain victims of intentional racial and gender discrimination to recover greater damages, particularly in the form of compensatory and punitive relief.[49]

The Civil Rights Act of 1991 is, nevertheless, flawed, because it places too much trust in the judiciary's discretion to implement the statute. For instance, Congress left for judicial resolution several highly controversial issues, such as the meaning of "business necessity," as raised by *Wards Cove*.[50] This problem may be an intractable aspect of any effort to draft an enactment that attempts to rectify procedural difficulties for civil rights plaintiffs. Nonetheless, Congress could have drafted legislation that would have more sharply circumscribed judicial discretion and the courts' ability to construe the provisions narrowly. After all, it was the expansive exercise of judicial power and niggardly statutory interpretation which led Congress in the first place to pass the recent measure.

47. *See* § 108, 105 Stat. at 1076. *See also supra* notes 8-9 and accompanying text. Because Rules 19 and 24 cover myriad public and private law party joinder situations, Congress' decision not to amend the rules seems appropriate. *See generally* Carl Tobias, *Amending the Other Party Joinder Amendments*, 139 F.R.D. 519 (1992).

48. *See* § 113, 105 Stat. at 1079. *See also supra* note 26.

49. *See* § 102, 105 Stat. at 1072-73. Congress, however, imposed caps on the amount of compensatory and punitive damages that plaintiffs who suffer gender discrimination can recover. *See id.* For thorough analyses of the Civil Rights Act of 1990, which included many provisions passed in the 1991 Act, see Sondra Hemeryck et al., Comment, *Reconstruction, Deconstruction and Legislative Response: The 1988 Supreme Court Term and the Civil Rights Act of 1990*, 25 HARV. C.R.-C.L. L. REV. 475 (1990); Cynthia L. Alexander, *The Defeat of the Civil Rights Act of 1990: Wading Through the Rhetoric in Search of Compromise*, 44 VAND. L. REV. 595 (1991).

50. Section 104, 105 Stat. at 1074. *See also supra* note 45 and accompanying text.

Moreover, the Reagan and Bush administrations have substantially increased the number of federal judges who have read civil rights and other "social legislation" restrictively; in fact, Presidents Reagan and Bush will have appointed two-thirds of the sitting federal judges by 1993.[51]

Congress also failed to address numerous pressing procedural complications that narrow federal court construction has engendered. The third section of this essay, therefore, provides recommendations for additional change that would be responsive to these procedural difficulties.

## III. CIVIL RIGHTS PROCEDURAL LEGISLATION

Congress should seriously consider enacting a civil rights procedure statute. Such legislation would restore certain procedural advantages which civil rights plaintiffs have lost through restrictive federal judicial interpretation. In the alternative, Congress should at least remove the obstacles that such construction has imposed, which hurdles Congress recently failed to address in the Civil Rights Act of 1991. This article, which does not explore every statutory modification that Congress might adopt, recognizes that some problems may warrant additional study. Nevertheless, Congress can reach, and should rectify, the major remaining difficulties resulting from narrow federal court interpretation in the area of civil rights procedure, just as Congress has in the substantive civil rights field and through procedural mechanisms in the new legislation.[52]

### *A. Federal Rules*

Congress should amend certain federal rules of civil procedure, making the rules more responsive to the needs of civil rights plaintiffs. In 1988, Congress adopted novel rule revision procedures to open the

51. *See* Carl Tobias, *The Gender Gap on the Federal Bench*, 19 HOFSTRA L. REV. 171, 173-75 (1990) (offering interpretations of the Reagan and Bush administrations' appointees); William Lilley, III & James C. Miller, III, *The New "Social Regulation,"* 47 PUB. INTEREST 49 (Spring 1977) (discussing "social legislation"); Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294, 306 (1991) (explaining that two-thirds of sitting judges by 1993 will be Reagan or Bush appointees).

52. *See, e.g.*, *supra* notes 46-49 and accompanying text (procedural mechanisms in new statute); Civil Rights Restoration Act of 1987, PUB. L. NO. 100-259, 102 Stat. 28 (1988) (substantive statute). *Cf.* Hemeryck, *supra* note 49, at 586-87 (describing additional substantive congressional responses to Court's interpretations). *But cf.* Roy L. Brooks, *Beyond Civil Rights Restoration Legislation: Restructing Title VII*, 34 ST. LOUIS U. L.J. 551 (1990) (advocating broader substantive legislation rather than statute aimed primarily at modifying rulings of 1988 Term); Derrick Bell, Foreword: *The Final Civil Rights Act*, 79 CAL. L. REV. 597 (1991) (similar suggestion). The suggestions offered are meant to be exactly that, suggestive, and they are intended to be representative.

amendment process to greater public scrutiny.[53] Moreover, Congress has infrequently revised specific rules and bypassed the normal amendment process, where the Supreme Court and the Civil Rules Advisory Committee suggest changes in which Congress effectively acquiesces.[54] Nonetheless, Congress has intercepted an increasing number of proposals over the last two decades, while the Court and the Committee have evinced little interest in revising the Rules to make them more solicitous of civil rights plaintiffs and even have modified, or proposed to amend, some rules in ways that could disadvantage these plaintiffs.[55] Congress also should revise certain rules before more federal judges interpret them in a manner which continues to erode Congress' intent in enacting civil rights statutes.

One significant change that Congress could institute is to eliminate the elevated pleading that courts demand of civil rights plaintiffs under Rule 8, thus restoring notice pleading.[56] The adoption in every circuit of stringent pleading requirements, which are premised on minimal judicial authority and little empirical data, has seriously disadvantaged civil rights plaintiffs.[57]

Congress could also modify Rule 11. Since its 1983 amendment, Rule 11's implementation has been equally, if not more, problematic for civil rights plaintiffs. It forces many of the parties to participate in expensive satellite litigation and requires some of the plaintiffs to pay large sanctions which chills their enthusiasm.[58] Few compelling reasons exist to

53. *See* 28 U.S.C. §§ 2073-74 (1989). *See also* 28 U.S.C. §§ 2073(c)(1)-(2),(d) (1989). *See generally* Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C.L. REV. 795 (1991).

54. *See* Carl Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 933, 961 (1991).

55. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1018-20 (1982) (describing increased congressional willingness to intercept proposed rules); Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975) (same); Tobias, *Public Law Litigation, supra* note 2, at 310-13 (lack of solicitude); Tobias, *Rule 11, supra* note 2, at 524 n.150 and accompanying text (same). *But see* Letter from Judge Joseph Weis, Chairman, Standing Committee on Rules of Practice and Procedure (Aug. 9, 1989) (on file with author) (increased solicitude); Letter from Professor Paul Carrington, Reporter, Advisory Committee (Aug. 7, 1989) (on file with author) (same); *infra* note 66 and accompanying text (same).

56. Some courts have suggested such or have indicated that reliance on Rule 56 summary judgment is preferable. *See* Tobias, *Public Law Litigation, supra* note 2, at 299 n.181, 300 n.189 and accompanying text.

57. *See supra* notes 38-42 and accompanying text.

58. *See* George Cochran, *Rule 11: The Road to Amendment*, 61 MISS. L. J. 5, 5-7 (1991); Tobias, *supra* note 21. *See also supra* notes 16-21 and accompanying text.

retain Rule 11 in its current or proposed form. The principal difficulty, litigation abuse, which prompted the 1983 revision has been ameliorated.[59] Rule 11 has achieved additional, significant purposes that underlay the amendment. Most importantly, the Rule has led numerous attorneys to perform reasonable prefiling inquiries, encouraging the lawyers to stop and think before filing and reducing the pursuit of frivolous litigation.[60]

Although securing these goals and others is worthwhile, judges can accomplish the objectives with several efficacious measures that impose fewer disadvantages than Rule 11. Relatively effective mechanisms for deterring litigation abuse are Section 1927 of Title 28 of the United States Code, civil contempt, and tort suits, such as abuse of process.[61] The sanctioning provisions in Rules 16, 26 and 37 cover considerable inappropriate litigation conduct that occurs before and after the filing of papers, thus limiting the need for Rule 11 or the continuing duty, an integral feature of the Rule preliminarily proposed.[62]

Both judges and commentators have offered numerous helpful suggestions for changing Rule 11. Some observers have recommended that Congress make Rule 11 inapplicable to civil rights litigation or reinstate certain elements of the pre-1983 version of the Rule, such as a standard of subjective bad faith for imposing sanctions, especially for attorney's fees.[63] A distinguished committee of the bench and bar, which includes Judges Leon Higginbotham, Patrick Higginbotham, and Mary Schroe-

59. *See* Advisory Comm. on Civil Rules, Interim Report on Rule 11, at 6-7 (Apr. 9, 1991); Schwarzer, *supra* note 28, at 1014-15.

60. *See* Schwarzer, *supra* note 28, at 1014-15; Vairo, *supra* note 16, at 234-35.

61. The initial two measures principally protect courts, while tort law remedies primarily protect litigants. *See* Tobias *supra* note 21, at 4. *See also* Tobias, *supra* note 54, at 959; *infra* notes 78-79 and accompanying text.

62. *See* FED. R. CIV. P. 16, 26, 37. The continuing duty would require a litigant or lawyer to "withdraw or abandon a position after learning that it ceases to have any merit." PROPOSED AMENDMENTS, *supra* note 19, at 77-78. *See also* Memorandum from John P. Frank, Lewis & Roca, to the Rule 11 Warriors (June 19, 1992) (on file with author) (Standing Committee agreement to soften continuing duty). A recent Supreme Court opinion increases the possibilities for sanctioning abuse pursuant to inherent judicial authority, thereby reducing the need to sanction with Rule 11. *See* Chambers v. Nasco, Inc., 111 S. Ct. 2123 (1991). Sanctioning under Rule 11's comparatively straightforward requirements, however, appears preferable to sanctioning with inherent authority. Exercise of that authority increases judicial power vis-a-vis Congress and parties whose vindication of interests Congress meant for the courts to facilitate. *See also Chambers*, 111 S. Ct. at 2141 (Kennedy, J., dissenting); Tobias, *supra* note 54, at 948-49, 961-62.

63. *See, e.g.*, Cochran, *supra* note 58, at 27-28; Tobias, *Rule 11, supra* note 2, at 513-17, 522-25; Vairo, *supra* note 16, at 235. *See also supra* note 21 (Standing Committee agreement to revert to pre-1983 notion of discretionary sanctioning).

der, recently suggested substantial modifications of Rule 11.[64] The committee proposed, for instance, that: (1) rule violations be premised on the "paper as a whole," rather than small portions of a paper; (2) that attorneys and parties have notice and opportunity to be heard before they are sanctioned; and (3) that any sanctions levied be payable into the registry account of the district court clerk.[65]

Congress may be reluctant to revise Rule 11 for several reasons. The 1983 amendment of Rule 11 has been very controversial. Moreover, the Advisory Committee labored assiduously to develop the preliminary draft; it commissioned a comprehensive Federal Judicial Center study, solicited and reviewed written comments of 125 persons and organizations, listened to the testimony of sixteen experts during a public hearing, and diligently crafted proposed changes that it thought would respond to all of the interests that Rule 11 affects and that would improve the Rule.[66] Congress also may be unwilling to prevent the nascent procedures for rule revision from running their course before it has had an adequate opportunity to ascertain whether they succeed. Nevertheless, if Congress and the Supreme Court adopt the Rule as preliminarily drafted, federal judges, as well as federal court practitioners and litigants, may experience another decade of difficulties as serious as those prevalent since 1983—namely satellite litigation, inconsistent judicial application, and chilling of civil rights litigation.[67]

Finally, Congress should remove civil rights plaintiffs or attorney's fees from the purview of Rule 68's settlement offer provisions and proscribe district court approval of civil rights class action settlements that are conditioned on plaintiffs' fee waivers under Rule 23(e).[68] The threat that civil rights plaintiffs may not recover post-offer fees, in light of the Supreme Court's interpretation of Rule 68 in *Marek*, has required some plaintiffs to settle prematurely and forfeit wide-ranging relief that would

64. *See* Bench-Bar Proposal to Revise Civil Procedure Rule 11, *reprinted in* 137 F.R.D. 159, 159-74 (1991).

65. *See id.* at 165-66. *See also* Memorandum, *supra* note 62 (Standing Committe rejection of paper as whole notion and restriction of sanction of fee-shifting to opponents).

66. *See* Carl Tobias, *Rule Revision Roundelay*, 1992 WIS. L. REV. 236. *See also* CALL FOR COMMENTS, *supra* note 16. *See generally* Tobias, *supra* note 21.

67. *See* Tobias, *supra* note 66, at 236. *See generally supra* note 21.

68. The bills that the House and Senate passed in 1990 so provided. *See* Civil Rights Act of 1990, H.R. 4000, 101st Cong., 2d Sess. § 9 (1990); S. 2104, 101st Cong., 2d Sess. § 9 (1990). *See also* NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND 129 (1989).

have benefited numerous individual absentees.[69] The Court's reading of Rule 23(e) in *Evans* has similarly affected potential civil rights plaintiffs by, for example, complicating their attempts to obtain counsel.[70] *Marek* and *Evans* individually and synergistically may have created other problems, such as depleting the pool of attorneys who are willing to assume the risks of representing civil rights plaintiffs.[71]

### *B. Fee-Shifting Legislation*

Moreover, Congress should modify the federal judiciary's interpretations of fee-shifting statutes so that they are more responsive to civil rights plaintiffs. It has several means of treating *Zipes*. Congress could restore trial court discretion to award prevailing plaintiffs fees against intervenors or lower the standard for imposing fee liability on certain intervenors, especially those who do not make civil rights allegations or who do not assert their own constitutional or statutory rights.[72] Correspondingly, Congress might create a presumption that successful plaintiffs recover their expenses of intervention from defendants.[73]

Furthermore, Congress should re-examine federal court construction of fee-shifting measures involving questions other than that in *Zipes* to ascertain whether specific interpretations have so undermined legislative intent that amendment is currently warranted.[74] Congress should alter those rulings that have diminished the attractiveness of fee-shifting provi-

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69. *See supra* notes 10-12 and accompanying text.

70. *See supra* notes 13-15 and accompanying text. The application of Rule 68 apparently has been worse quantitatively and qualitatively for civil rights plaintiffs because defendants seem to have many more opportunities to invoke the offer of judgment provision than to negotiate fee waivers under Rule 23(e).

71. For suggestions with regard to all of the rules mentioned and other rules that have been or could prove problematic for civil rights plaintiffs, see Tobias, *Public Law Litigation, supra* note 2, at 314-15, 318, 328-34.

72. These two ideas are variations on a similar theme suggested by Justice Marshall in his *Zipes* dissent. Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 777-79 (1989) (Marshall, J., dissenting). He also warned that intervenors and defendants might cooperate to avoid all fee liability to plaintiffs. District judges should be alert to that possibility and punish the activity. *See id.*

73. This is Justice Blackmun's suggestion in his *Zipes* concurrence. *See id.* at 767-68 (Blackmun, J., concurring).

74. That suggestion as to the Fees Act has been made. See Tobias, *Public Law Litigation, supra* note 2, at 338 n.385. *Cf.* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 518-19 (1986) (explaining that the Court has interpreted Fees Act to make its provisions less attractive). *See also* Brand, *supra* note 7, at 369. Such an amendment might treat, for example, the difficulties *Marek* and *Evans* create, although amending Rules 23(e) and 68 may be preferable. See *supra* note 68 and accompanying text.

sions. For instance, it should permit courts to use multipliers of lodestar fees to compensate lawyers for assuming the risks of loss.[75] Congress should correspondingly analyze whether the requirements enunciated in *Christiansburg Garment* for shifting fees from civil rights plaintiffs to defendants—prescriptions analogous to those that many courts apply in finding Rule 11 violations[76]—have similarly disadvantaged the plaintiffs and, therefore, warrant change.[77] Congress should also re-evaluate Section 1927 of Title 28 of the United States Code to ascertain whether that measure has adversely affected civil rights plaintiffs. The statute's relatively stringent standard for fee-shifting—the unreasonable and vexatious multiplication of proceedings[78]—apparently has limited fee awards. The provision consequently has disadvantaged the plaintiffs somewhat less than Rule 11 and *Christiansburg Garment.*[79]

Finally, Congress should not be deterred by the argument that its recent passage of the Civil Rights Act of 1991, after much rancorous debate, has rendered unnecessary additional legislation.[80] Many members of Congress recognized that the new statute was a compromise measure and ultimately addressed numerous problematic Supreme Court cases of the 1988 Term. Indeed, before the 1991 Act even passed, several Senators vowed to introduce new legislation that would address controversial

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75. *See supra* note 29.

76. Many courts find Rule 11 violations when prefiling inquiries are unreasonable or papers are frivolous. *Cf. supra* note 25 and accompanying text (*Christiansburg Garment's* standard of "frivolous, unreasonable, or without foundation"). *See generally* Carl Tobias, *Certification and Civil Rights*, 136 F.R.D. 223, 226-27 (1991).

77. I am indebted to Professor Tom Rowe, Duke University School of Law, for suggesting to me that *Christiansburg Garment* might be disadvantaging plaintiffs. I conducted a survey of recent cases, which indicates that fee-shifting under *Christiansburg Garment* has been less problematic quantitatively than Rule 11, but apparently has been equally or more problematic qualitatively than Rule 11.

78. *See* 28 U.S.C. § 1927 (1988).

79. I also am indebted to Professor Rowe for suggesting to me most of the ideas in this sentence and in the two textual sentences immediately above. A survey of recent cases that I conducted indicates that § 1927 has been somewhat less problematic quantitatively than the other two possibilities, but appears as problematic qualitatively as both. Section 1927 also may be less problematic for the plaintiffs because its terms expressly apply only to attorneys. *See* 28 U.S.C. § 1927. In making fee requests, civil rights defense counsel often invoke various permutations and combinations of the three possibilities. *See, e.g.*, Blue v. United States Dep't of Army, 914 F.2d 525, 531 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1580 (1991); Danese v. City of Roseville, 757 F. Supp. 827, 828-29 (E.D. Mich. 1991).

80. The issue of quotas was at the center of much of this debate. *See, e.g., President Endorses Rights Compromise; Two Senate Leaders Predict Quick Passage*, WASH. POST, Oct. 26, 1991, at A1; *Senate Democrats Back a Compromise on Civil Rights Bill*, N.Y. TIMES, Oct. 26, 1991, § 1, at 1.

issues, such as caps imposed on the punitive damages which women can recover for gender discrimination.[81]

## CONCLUSION

The Supreme Court and many lower federal courts have issued a number of procedural rulings that threaten the rights of minorities and women. The cumulative effect of judicial decisionmaking has impeded efforts of discrimination victims to vindicate essential civil rights and to fulfill the functions Congress intended for them as private attorneys general. The Civil Rights Act of 1991 rectifies certain problems which civil rights plaintiffs confront; however, it fails to address numerous procedural difficulties that the parties face. Congress must promptly pass remedial civil rights procedural legislation if there is to be greater progress in eradicating the national scourge of gender and racial discrimination.

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81. Senator Kennedy (D. Mass.) and Senator Wirth (D. Colo.) made such vows in the articles cited *supra* note 80. Until Congress acts, the federal judiciary should apply the requisite procedures in ways more solicitous of civil rights plaintiffs. For suggestions as to such enforcement, see Brand, *supra* note 7, at 369-79; Tobias, *Public Law Litigation, supra* note 2, at 336-37; Tobias, *Rule 11, supra* note 2, at 518-22; *supra* note 56.