June 1979

Preferential Treatment Remedies in Employment Discrimination Cases: An Analysis of Institutional Limitations

James J. Mittermiller

Follow this and additional works at: https://scholarship.law.berkeley.edu/ bjell

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z384042

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of Employment & Labor Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Preferential Treatment Remedies In Employment Discrimination Cases: An Analysis of Institutional Limitations

James J. Mittermiller†

The effective functioning of any institution is possible only if that institution exercises some restraint by refusing to undertake tasks for which it is ill-suited. To the extent that such restraint is not exercised, the particular task undertaken is likely to be poorly performed, and the legitimacy of the involved institution consequently damaged. Before this restraint can be intelligently exercised, however, the institution must develop an awareness of the limitations inherent in its structure and function. In this article the author seeks to engender an awareness of certain of these inherent institutional limitations of the adjudicative process, in the hope that some judicial self-restraint might be used to minimize the involvement of that process in the structuring of preferential treatment remedies in employment discrimination disputes.

I
INTRODUCTION

Recent years have witnessed an increasing tendency in America to shape and vindicate constitutional or statutory policies through the adjudicative process.1 With this development, which has been particularly visible in the context of employment discrimination, a new conception of the adjudicative process has emerged, stressing its distinct institutional advantages for this task.2 Yet because of its unique position in the American legal and political system, the adjudicative process also has inherent institutional limitations.3 Whether and to

† B.A. 1975, Claremont Men's College; J.D. 1978, University of California, Berkeley. Member of the California bar.

The author wishes to thank Professor Jan Vetter of the University of California School of Law for his suggestions and advice.

1. Cases in the fields of school desegregation, environmental protection, antitrust, electoral reapportionment, and employment discrimination are prominent examples of this trend.


3. See Fuller, Irrigation and Tyranny, 17 Stan. L. Rev. 1021 (1965); Fuller, Collective Bar-
what extent these limitations will inhibit the continued expansion of the judiciary's role in political decisionmaking is a currently unresolved and much-debated question.4

While any attempt to provide definitive answers in the general debate would at this time be premature, this article's examination of the functioning of the adjudicative process in two recent Title VII employment discrimination cases will shed some light on the issues involved. The Title VII lawsuit provides a good vehicle for exploring these issues because, since the substantive purposes of the statute remain unclear, the burden of their devination has been left to the adjudicative process. The fundamental issue of the general debate, then, restated in a Title VII context, becomes the ultimate question posed by this article: whether adjudication is an appropriate social institution for ordering employment relations.

This article begins to answer that question by examining two recent cases to determine whether the judicial process presently produces results which can be explained and justified. Concluding that it does not, the article then explores whether principles of decision are likely to emerge which will bring the results in these two cases into an evolutionary mold and, if so, to what extent the integrity of the adjudicative process can survive that evolution. The analysis presented here indicates that the resolution of polycentric6 employment discrimination disputes has been forced into an inappropriate decisional mode. As a result, the courts' attempts in Title VII cases to balance interests without the guidance of established legal rules has severely strained the judicial legitimacy which has been established by the courts' tradition of enforcing only recognized rights. To the extent that this conclusion provides insight into the proper uses and limitations of adjudication as a form of social decisionmaking, it suggests specifically that decisional processes more informal than adjudication are better suited for remediing Title VII violations.

II

ILLUSTRATIVE CASES


4. The contrasting conceptions of the adjudicative process are starkly exemplified by the differing perspectives of Lon Fuller and Abram Chayes. This article attempts to analyze the functioning of the adjudicative process from both perspectives.


6. The concept of polycentricity is explained in Part VI of this article.

7. 541 F.2d 832 (9th Cir. 1976).
nia Processors, Inc. are, for several reasons, particularly appropriate specimens for analyzing the suitability of adjudication for the task of reordering employment relations. First, they present similar discrimination problems in the same industry and in the same general geographical regions. In addition, both cases involved the same principal attorneys and were settled by agreements incorporating similar preferential remedies. Those agreements, in turn, suffered the same "unremitting assault" by dissident class members. Yet despite these similarities, the two cases represent fundamentally dissimilar judicial approaches to dispute resolution. In Mandujano the trial court's inquiry into the issues presented was held to be inadequate, and the court was required on remand to meet rather demanding procedural requirements calling for searching substantive analysis. In Alaniz, by contrast, the trial court attempted to lay out and follow a paradigmatic procedural approach to handling problems identical to those presented in Mandujano.

An analysis of these two cases, involving dissimilar approaches to similar problems, provides insight into the institutional problems involved in enforcing the non-discrimination principle through class action suits. Specifically, because the judge's handling of Alaniz seems to be in exemplary compliance with the procedural demands of Mandujano, and therefore would seem to represent the optimal judicial approach to resolution of this type of case, Alaniz serves as an excellent gauge by which to measure the adequacy of the adjudicative process for evaluating a privately negotiated scheme of job distribution incorporating preferential hiring and promotional provisions.

A. Mandujano v. Basic Vegetable Products, Inc.

Mandujano was a class action suit filed under Title VII of the Civil Rights Act of 1964. Investigative proceedings were initiated when nine individuals filed charges with the Equal Employment Opportunity Commission (EEOC) alleging racial and sex discrimination by the employer, Basic Vegetable Products, Inc. (Basic), and the two unions

8. 73 F.R.D. 269 (N.D. Cal. 1976).
9. Id. at 274.
representing Basic employees. The EEOC's investigation resulted in the filing of a series of commissioners' charges against the defendants.

The class action was subsequently filed against the unions and Basic with the same nine individuals as named plaintiffs. The original complaint proposed a class defined as all Chicano workers employed by Basic at one of its plants. In addition to backpay, punitive damages, and attorney fees, the complaint sought declaratory and injunctive relief, including reinstatement of employees wrongfully terminated, and implementation of an affirmative action program involving hiring and promotional preferences and goals.

After nineteen months of further investigation and negotiation, a settlement was reached in which Basic agreed to implement a plan of preferential hiring and promotion for various class members. To reflect the scope of the settlement, an amended complaint was filed under Rule 23(b)(2) of the Federal Rules of Civil Procedure (FRCP) on behalf of an enlarged class of plaintiffs, which included "all past, present, future and potential employees and applicants of Basic who are Negroes, Asians, American Indians, Spanish-surname [sic] Americans or females."

The settlement agreement, which had been negotiated by representatives of the EEOC, Basic, the unions, California Rural Legal Assistance (for plaintiffs), the Mexican-American Legal Defense Fund (for plaintiffs), and the private attorneys for the plaintiff class, was then submitted for court approval. Despite strenuous objections of certain class members as to its adequacy and propriety, particularly with respect to the preferential hiring and promotional provisions, the settlement was approved by the district court. The unsatisfied class members appealed.

The Ninth Circuit Court of Appeals overturned the district court's decision, holding that the approval process had failed to afford dissenting class members adequate procedural safeguards. While acknowledging the appropriateness of a Rule 23(b)(2) class certification in Title VII cases, the appellate court recognized the peculiar vulnerability of such actions to abuse. The court underscored the individual nature of due process rights and emphasized that it is the individual members of

12. 541 F.2d at 833.
14. "The complaints charged that Basic and the Unions had maintained a continuing policy, practice and custom of discrimination against the class with respect to compensation, terms, conditions and privileges of employment based on race, color, religion, sex or national origin." 541 F.2d at 833.
15. Id.
16. Id. at 833-34.
17. Id. at 834 n.2.
18. Mandujano Findings and Conclusions at 3-4.
the class and not the class per se which is represented by the class attorney. Thus, "the attorney for the class is not to be viewed as a negotiator in a process of collective bargaining where majority rule prevails."\textsuperscript{19} Judicial scrutiny of the settlement agreement was required, therefore, to be sufficiently rigorous so as to guard against the unfair compromising of individual class members' interests. Specifically, before approving a settlement as fair, reasonable and adequate, the court must be informed of the sacrifices being made and of the parties called upon to make those sacrifices. In the words of the court, "[o]nly by being so informed can the court be certain that the settlement does not compromise the legal rights of class members without their consent. Such a compromise is a violation of due process."\textsuperscript{20}

To assure that settlement approval hearings comply with due process requirements, the opinion sets out three procedural safeguards to be followed by the trial court. The first such safeguard is a modification of the FRCP Rule 23(e)\textsuperscript{21} requirement that notice be given in a form and manner calculated to reach all identifiable groups. This notice, the court held, should indicate that class members can object to the proposed settlement as well as to the manner in which the class is defined.\textsuperscript{22}

The second procedural safeguard required by \textit{Mandujano} is that all objections to the proposed settlement be made part of the record and be carefully reviewed. If the court determines that certain objections are without substance and "frivolous," it must set forth its reasons for so deciding. If, on the other hand, the court considers certain objections to be substantial, they cannot be rejected without affording the objecting party an opportunity to be heard. This requires a hearing sufficient to enable the trial court to set forth on the record a \textit{reasoned} response to each objection of substance. To be reasoned, the response must include such findings of fact and conclusions of law as may be necessary to support it.\textsuperscript{23}

The third procedural safeguard is a requirement that the trial court permit the objector to be represented by an attorney at the hearing and allow the creation of subclasses where appropriate. Although the reason for this requirement, given in a footnote, was that the trial court would be "greatly aided if the objectors' position were presented

\begin{footnotes}
\footnote{19. 541 F.2d at 834.}
\footnote{21. Rule 23(e) of the Federal Rules of Civil Procedure provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."}
\footnote{22. 541 F.2d at 835.}
\footnote{23. \textit{Id.} at 835-36.}
\end{footnotes}
at the hearing by independent competent counsel,"24 the court nevertheless recognized that, as a practical matter, the same economic incentives prompting settlements which sacrifice the interests of objecting class members will often make it economically infeasible for private counsel to represent small groups of these class members.25 Objections found after this hearing to be of sufficient substance and validity so as to preclude judicial approval of the settlement will, the court observed, necessarily lead to additional negotiations. If successful, these negotiations will produce a settlement offer presumably more responsive to the interests of all class members. If not, the class action must proceed in normal fashion.26

Applying these requirements to the facts in Mandujano, the court held that the trial court had failed to include in the record reasoned responses to numerous objections raised by the dissenters. Of particular significance to the court were the dissenters' charges of (1) existing conflicts among class members, as, for example, between seasonal and regular workers, and (2) the settlement's impermissibly excessive encroachment on the interests of employees who were not members of the class (presumably all Caucasian males).27 The inadequacy of the record compelled the court to remand the case for determinations as to the existence and magnitude of the asserted internal and external conflicts.

Following the Ninth Circuit's decision, further negotiations were conducted involving all the parties, including the dissenters, and a new settlement was reached.28 This agreement retained the hiring and promotional preferences included in the original agreement, to which the dissenters had so strenuously objected on appeal.29 The district court held a hearing to determine the adequacy and fairness of the settlement agreement and, with no outstanding objections, the settlement received judicial approval.30

B. Alaniz v. California Processors, Inc.

Alaniz, like Mandujano, was a Title VII class action suit brought on behalf of female and minority cannery workers.31 The defendants were the employers and unions of some 74 food processing and canning

24. Id. at 835 n.6.
25. Id.
26. Id. at 836.
27. Id. at 836-37.
29. The modifications to the settlement included changes in record-keeping, broader translation requirements, an increase in the settlement fund and changes in an optional dispute arbitration provision.
31. The suit also alleged violations of 42 U.S.C. § 1981 (1976), but, as in Mandujano, this was surplusage addressed neither by the parties nor by the court.
plants in Northern California and their industry-wide collective bargaining agents.\textsuperscript{32} Appearing in the action were the same attorneys who had represented the primary parties—plaintiff class, company defendant, and dissenters—in Mandujano. As in Mandujano, a settlement agreement was negotiated and then challenged by dissenters. That agreement set forth, \textit{inter alia}, a comprehensive five-year plan calling for the restructuring of seniority, job bidding and job training provisions of the industry-wide collective bargaining agreement, and established hiring preferences and goals to increase female and minority representation in the higher-paying and year-round positions.\textsuperscript{33}

In evaluating the settlement, the court followed the two-step procedure set forth in the Manual for Complex Litigation.\textsuperscript{34} Under this procedure, the court first received briefs and affidavits and heard oral argument at a preliminary hearing to determine whether the settlement was within the range of possible approval. Since there was "'probable cause' to think the settlement [was] fair and reasonable,"\textsuperscript{35} the court required that notice of the proposed settlement be given to members of the class. Second, the court held another hearing and allowed class members who opposed approval to introduce all the evidence they could muster after full discovery.\textsuperscript{36} To assist in these proceedings, the court appointed a magistrate to receive statements of potential class members, and two impartial expert witnesses\textsuperscript{37} who received all documents filed by the parties and consulted extensively with them. One of the experts then testified under direct examination by the court and under cross-examination by the parties. Additionally, the court received expert testimony on various phases of the agreement offered by both sides of the dispute.\textsuperscript{38}

Before and during the hearings the agreement was, by stipulation, amended a number of times owing to "a combination of the unremitting assault of the [dissenters] on certain parts of the Agreement and the statesmanlike approach of the Proponents in reasonably dealing with the . . . objections."\textsuperscript{39} The amended agreement was subsequently approved by the court in an opinion which addressed at length the ob-

\begin{footnotes}
\footnotetext[32]{73 F.R.D. at 272.}
\footnotetext[33]{Id.}
\footnotetext[34]{\textit{BOARD OF EDITORS, FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION} § 1.46 (1978).}
\footnotetext[35]{73 F.R.D. at 273.}
\footnotetext[36]{Id. at 274.}
\footnotetext[37]{The two impartial expert witnesses were Mssrs. Sam and John Kagel, whose expertise in the labor relations field is widely acknowledged. Their approach to resolving employment disputes may be examined in Kagel and Kagel, \textit{Using Two New Arbitration Techniques}, \textit{95 MONTHLY LAB. REV.} 11 (November 1972).}
\footnotetext[38]{73 F.R.D. at 273-74.}
\footnotetext[39]{Id. at 274.}
\end{footnotes}
jections raised by the dissenters. This decision will be discussed in the next part.

III

RATIONALITY OF *MANDUJANO* AND *ALANIZ* DECISIONS

In addressing the question whether the judicial process presently produces results which can be explained and justified, this article will analyze the extent to which the resolutions in *Mandujano* and *Alaniz* can be defended as rational. For this purpose, the model developed by decision theorists to analyze the logic of rational choice in prototype decision problems will be used. This model was described by Professor Mnookin as follows:

The decision-maker specifies alternative outcomes associated with different courses of action and then chooses that alternative that "maximizes" his values, subject to whatever constraints the decision-maker faces. This involves two critical assumptions: first, that the decision-maker can specify alternative outcomes for each course of action; the second, that the decision-maker can assign to each outcome a "utility" measure that integrates his values and allows comparisons among alternative outcomes.  

Thus the rationality of approving the settlement agreements in the two illustrative cases will be analyzed in terms of the extent to which the courts were able to project the results of the implementation of those agreements, and the extent to which they were able to assign a meaningful utility to each of those results.

A. Predicting Outcomes

In the rearrangement of employment relations there are an infinite number of alternative outcomes, depending on the remedial means chosen. As explained in *Alaniz*:

There are, obviously, many . . . possible means to redress alleged employment discrimination which could have been discussed, negotiated, and possibly included in the Agreement. A suit of this type addresses a complex of plant procedures, hiring, promotion, layoff, and recall rules and regulations. The industry involved in this case undoubtedly has a more volatile and fluctuating employment pattern than most. What this Court must decide is whether the provisions of this settlement amount to a fair, reasonable, and adequate voluntary resolution of the issues raised by the plaintiffs.  

Although there are an infinite number of possible quota-outcome matrices, the scope of the court’s chore in these cases was limited to pre-

41. 73 F.R.D. at 288.
dicting and analyzing in terms of fairness the outcome resulting from implementation of a single negotiated remedy. While it would seem that predicting class representation in the employer's workforce should be made relatively simple by the use of such means as quotas, incentive pay, special training programs, and changes in the seniority system, this task proved more difficult than might at first appear.

In Mandujano, for instance, the goals set forth in the settlement agreement provided for the following representation of women and minorities at the two job levels:

(a) women
   —20% of high bracket jobs
   —10% of mechanic jobs
(b) minorities
   —no goal with respect to high bracket jobs, as sufficient representation was thought to exist prior to the agreement
   —22% of mechanic jobs.

In evaluating the fairness of these provisions, the court did not attempt to ascertain the extent to which they might achieve the desired goals, although it did note that during the three years the bidding preference had been in effect, minority males had increased "their share" of high bracket jobs.\(^{42}\) The impact on other interests affected by the preferential schemes received only cursory attention. Such an approach, since it abandons the first step in a rational decision-making process—namely, the specification of outcomes—is likely to reach a rational result only by chance.

The court in Alaniz attempted to reach a more rational result by projecting the representation of women and minorities which would result from implementation of the settlement agreement. These results were predicted to be as follows after five years:

(a) women
   —50% of high bracket jobs
   —25% of mechanic jobs
(b) minorities
   —61% of high bracket jobs
(c) total class
   —over 80% of high bracket jobs.\(^{43}\)

A comparison of these projected results with the goals set out in the settlement agreement, however, reveals a discrepancy between the two. The goals set out in the agreement were as follows:

(a) women
   —30% of high bracket jobs
   —20% of mechanic jobs

\(^{42}\) Mandujano Findings and Conclusions at 22.

\(^{43}\) 73 F.R.D. at 281.
The reasons for this discrepancy do not appear in the opinion. In addition, it is not clear how the goals in the two agreements could both be approved as "fair," considering the similarity of the two factual settings and the dissimilarity of the established goals.

B. Assessing Outcomes in Terms of Utility

The disparity between the goals of the two quite similar cases is not due solely to the courts' inability or unwillingness to predict outcomes; it is also due to their inability rationally to assign a "utility" to each such outcome. Before examining the reasons for this judicial shortcoming, it will be helpful to develop an understanding of its extent and effects through a detailed critique of the remedies approved in Mandujano and Alaniz with respect to the courts' ability rationally to assign a "utility" to (1) the choice of a preferential remedy, (2) the definition of the beneficiary classes, (3) the extent of the preference afforded those classes, and (4) the effect of the preferences on both the benefitted classes and on employees who are not members of the benefitted classes.

I. Appropriateness of Preferential Remedy

Alaniz held that the preferential remedy was properly "designed to place class members in the employment status which they would have occupied but for the alleged discrimination of the defendants, and thus gain for such class members their ‘rightful place’ within the cannery work force. Cf. Franks v. Bowman Transportation Co...." Preferential remedies are actually more appropriate, however, where the class to be benefitted consists of persons who have each been the individual subjects of actual discrimination. In Franks, for example, the beneficiaries received a preference not because of their class affiliation, but because they were "identifiable victims of racial discrimination." Professor Brest has emphasized this distinction, pointing out that:

[identifiable victims of actual discrimination] are entitled to a priority not over whites alone, but over all incumbents, including any minorities, hired during the relevant period. By contrast, hiring quotas... are indifferent to whether the preferred individuals were victims of the employer’s discrimination and thus present more difficult issues of fair-

44. Id. at 280.
45. Id. at 281.
46. See id. at 284 (emphasis added).
The court in Mandujano did not offer any justification for its approval of the preferential remedy, beyond noting that the agreement as a whole was an appropriate way "to insure that discrimination does not occur" and that it offered a solution "which effectuates and implements the remedial purposes of Title VII." No authority was cited for these statements and the court did not elaborate on the point. Thus, both cases fail to explain satisfactorily how the preferential treatment remedy maximizes the controlling value of "fairness."

2. Definition of Beneficiary Classes

In discussing the preferential remedies, Alaniz talked only of women and "minorities," each racial or ethnic group presumably constituting a minority. Mandujano did almost the same, except for its frequent references to Mexican-Americans, which it seems to use synonymously with "minorities." The agreements and opinions in both cases made no internal class distinctions; it is nowhere acknowledged that each class contained numerous subclasses with distinct interests.

With classes defined in terms of women, Blacks, Mexican-Americans, Asians, and Native Americans, definitional problems on the individual level remain unaddressed in both opinions. For example, is a person who is three-quarters Black a "Black?" If so, what if he is one-half Black? One-quarter Black? If a person is one-half Asian and one-half Native American, which is he? Either? And what if a person is one-quarter Asian, one-quarter Black, one-quarter Mexican, and one-quarter Native American? Finally, Mexican-Americans are defined as "Spanish-surnamed Americans" in both cases. This definition presumably includes a person who is one-eighth Mexican with a Spanish surname and excludes a person who is seven-eighths Mexican with an Irish surname, with the result that the latter not only will not share in the preferential benefits, but may very well suffer disadvantages in an absolute sense. The fairness problems are obvious.

3. Extent of the Preference—Women

a. High Bracket Jobs

In Alaniz, the preferential treatment of women was projected to result eventually in women holding 50% of the high bracket jobs. The court offered no explanation as to why 50% was an optimal level. It was noted that these measures would "improve" women's participation.
in those jobs, but there is no indication in the opinion that women generally desired high bracket jobs in the same proportion to men. Rather, there is evidence to the contrary. The seniority revisions in Alaniz, for example, were designed to accommodate the desire of many female workers to continue work only on a seasonal basis in low bracket jobs. The court explained the revisions as follows:

If plant seniority were immediately granted to class members for all purposes, large number [sic] of seasonal workers who are mostly women would be placed in line for regular jobs continuing after the season and would be required to accept such employment or lose seniority rights.

Evidence introduced at the hearing suggests that many seasonal employees do not desire year-round employment.50

In Mandujano, a high bracket hiring goal of 20% for women was established, but there were no projections and no stated justifications for this figure in the opinion. Thus it is not clear from a reading of the opinion that the court attempted to assign any specific utility to this result, and it is not clear how the controlling value of fairness to all parties is maximized.

b. Mechanic Jobs

Alaniz established a goal of 20% for women mechanics, which was projected to result in women holding 25% of mechanic positions after five years. The court's only justification for this figure was that it would represent an improvement in women's participation in these jobs. It was not acknowledged that attainment of any hiring goal set above the current level of women's participation would represent an improvement in such participation.

Mandujano set a 10% goal for women mechanics. The court presented no projected results and advanced no justification for the figure. The court did explain, however, that prior to the settlement agreement the company did not train mechanics, but instead filled its mechanics' ranks by hiring already qualified people. In discussing the goal for minority mechanics the court noted that the percentage of minority mechanics in the relevant labor market was the controlling standard: "The relevant labor market in this case is that pool of workers in the hiring area who possess the necessary qualifications for the job. Hazelwood School District v. United States."51

The proponents' brief points out that in the relevant labor markets for the two Basic plants

50. 73 F.R.D. at 283. In fact, many of these women had families and did not want to work year-round (telephone conversation with plaintiff class's attorney, M. Mendelson, May 30, 1978).
51. Mandujano Findings and Conclusions at 17 (Hazelwood opinion at 433 U.S. 299 (1977)).
the percentage of women mechanics was 3.1% and 4.4%. If these figures are accurate the 10% goal is a considerable windfall for women workers, but the court fails completely to discuss its reasons for approving this goal, and one can only guess at the utility assigned to this outcome by the court.

4. **Extent of the Preference—Minorities**

Under the agreement in *Alaniz*, minorities were to be represented in both high bracket and mechanic positions in numbers proportionate to their county population, with a projected 61% share of those jobs after five years. The court offered no explanation for these goals, and did not address the question of whether 61% was a fair approximation of the representation of minorities in the counties involved.

The *Mandujano* agreement set no goals for minorities in high bracket jobs and a 22% goal for mechanic positions. This figure, the court stated, approximated the minority mix of mechanics in the relevant labor market.

5. **Effects of Preferences on Benefitted Classes**

a. **High Bracket Jobs**

With respect to high bracket jobs, women under both agreements seem to have gained most. Yet the disparity in goals between the two agreements, the inadequate justification for the goals in *Alaniz*, and the absence of any projected effects or justification for the goals in *Mandujano*, are perhaps an indication of the difficulty the courts faced in projecting and assigning utility to effects even for the class presumably most benefitted.

Because both agreements and both opinions fail to distinguish among “minorities,” the impact on each distinct minority is difficult to ascertain. Nevertheless, the possibility that the proportional representation required in *Alaniz* could act as a lid on minority advancement seems to have been implicitly recognized by the intervenors’ objection to the agreement’s standard of parity with county labor force statistics rather than plant or work force parity. To this objection, the court responded: “Although work-force parity might well be appropriate if the case proceeded to a litigated outcome, the Court finds no reason for insisting upon such a goal in this settlement.”

 Particularly, as to the representation of minority males, the court stated:

Even if there were to be a reduction in the number of minority males in

---

52. The proponents argued that the ten percent figure was “demonstrably within the ‘permissible’ range established by *Hazelwood*.” Proponents Brief at 31.
54. 73 F.R.D. at 285.
those jobs . . . it is clear that the effect on minority men will be small compared to the effect on Anglo men. In any event, minorities will still hold a high proportion of these jobs compared to either their percentage in the county population or the plant work force.\textsuperscript{55}

Thus the court approved a plan which could adversely affect the interests of some members of a class supposedly benefitted by the plan because another innocent group will suffer more and because the class's representation was already satisfactory. The unfairness of such treatment and the irrationality of the court's decision are too obvious for discussion.

\textit{Mandujano} addressed the dissenters' claims of conflict between minority males and women by denying the existence of the conflict:

The bidding preference does not create a conflict because it applies only until women occupy 20% of the jobs and it applies to only 50% of the openings. In fact the record shows that minority males have been able to increase their share of High Bracket Jobs during the three years that the bidding preference has been in effect.\textsuperscript{56}

Yet it is obvious that interests compete in the zero-sum process of job allocation; the court's language notwithstanding, when one group's opportunities are artificially increased, the other groups' positions are necessarily proportionately weakened. As in \textit{Alaniz}, the court apparently approved such a result without seriously questioning its utility.

\textit{b. Mechanic Jobs}

Women seem again to be the primary beneficiaries of the preferential bidding scheme for mechanic jobs. The court in \textit{Alaniz} did not explain its approval of the agreement's 20% goal, or the projected 25% representation of women in the mechanics' ranks. The \textit{Mandujano} court neither explained its 10% goal, nor projected any results. It is thus impossible to determine the effects the courts expected from these preferential treatment schemes, or the utility assigned by them to such effects or any others which might have been considered in evaluating the fairness of the settlement agreements.

As for minorities, the \textit{Alaniz} opinion gives no clue as to the effects of the required proportional representation in the mechanics' ranks. In \textit{Mandujano}, where the company had previously hired only trained mechanics, the minority members of Basic's workforce should stand to gain by the quota. The fact that Basic's mechanic work force had failed to achieve the 22% minority representation present in the relevant labor market, however, suggests that minority members of Basic's work force are receiving a preferred benefit because of discrimination against non-

\textsuperscript{55} Id.

\textsuperscript{56} Mandujano Findings and Conclusions at 22.
Basic minority mechanics. If so, this remedy seems only to aggravate that situation.

6. Effects on Employees Who are Not Members of the Benefitted Classes

Under the Alaniz agreement, seniority for all class members, at least for job bidding purposes, was to be based on the first date the employee began work at the plant, whether as a seasonal or regular worker. In contrast, the seniority of regular, non-class member (Caucasian male) employees was to be fixed at the date they first moved onto the regular seniority list, with no credit for the time they had worked as seasonals. The objectors argued that such a proposal would grant class members more than their rightful place at the expense of non-class member employees. For example, under the work assignment arrangement then in existence, with all positions open for claiming at the beginning of the season, class members could claim jobs formerly held by non-class members who now had relatively lower seniority. While warning that provisions allowing class members to "bump" non-class incumbents from preferred positions might run afoul of Title VII, the court dismissed the objection, saying, "such openings are not secured jobs from which non-class incumbants are wrenched by the readjustment of seniority." In this instance, since the seniority rules neither required the discharge of incumbants nor contravened the dictates of "business necessity," the court held them to be permissible.

The revised seniority rules were approved even though, by the court's own admission, a substantial adverse effect on Caucasian men would result. The court decided that Caucasian males had a valid interest in maintaining their jobs for the duration of the season without being subject to "bumping," but did not protect their interests in advancement according to the prior seniority system, or even their interest in retaining the same jobs the following season. It did not explain the utility of such a result.

The following scenario illustrates the irrational way in which these interests may interact under the agreement in Alaniz. In order to reach the goals established in the agreement, the company hires a Caucasian woman, who herself has never been a victim of discrimination, into a high bracket job at the outset of the season. She gets the position on

---

57. 73 F.R.D. at 284. It should be noted, however, that incumbents, in effect, are “wrenched” from secured jobs at the time they report for work the following season. It is not merely their expectations of advancement which are diminished, as in Franks, the authority relied upon for this holding. These innocent employees find also that their already established positions have been taken by class members and even their expectations of maintaining their already attained positions have been defeated.

58. See quote at note 55 supra.
the basis of her seniority vis-à-vis other women who may themselves have been actual victims of direct discrimination and, but for the discrimination, would have had greater seniority. A minority male with more seniority does not receive the job. Neither does a Caucasian male who held the position in the prior season, even though he also has more seniority. In fact, under the collective bargaining agreement as modified by the settlement agreement, a minority male with less actual plant seniority than the Caucasian male (whose seniority is measured only by time spent as a regular worker) may have more seniority for purposes of bidding on jobs than the Caucasian if he holds a low bracket position, and for all purposes if he holds a high bracket position.

So despite the fact that the minority worker's class may be fully represented at the job level on which he is bidding, and despite the fact that he has less actual plant seniority than the Caucasian male, he has more effective seniority. Nonetheless, as seen above, his position may be considerably weakened due to the aggressive promotional goals set for women in high bracket and mechanic jobs. In fact, the court acknowledged a possible, but in its opinion unlikely, reduction in the number of minority males holding high bracket jobs at the end of the five-year term of the agreement.

This scenario shows that the effect of implementation of the *Alaniz* preferential treatment remedy could be detrimental to individual members of the classes supposedly benefitted thereby, even if they have been the victims of prior discrimination. It could also adversely affect the interests of the non-beneficiary class of innocent Caucasian males, even though they took no part in the settlement negotiation process. In fact, seventeen days after the *Alaniz* agreement was approved, a motion to intervene was filed by a group of predominantly Caucasian male employees. The district court denied the motion and on appeal the Court of Appeals for the Ninth Circuit agreed that their delay was inexcusable. After noting that delay weighs heavily against applicants for intervention, the court summarized its reasons for denying the motion:

> Appellants sought intervention two and one-half years after suit was filed; they either knew or should have known of the continuing negotiations. The crux of appellants' argument is that they did not know the settlement decree would be to their detriment. But surely they knew the risks. To protect their interests, appellants should have joined the negotiations before the suit was settled. Since appellants have not proved fraudulent concealment, it is too late to reopen this action. 59

The court articulated its basis for imputing knowledge to the appellants in an explanatory footnote: "Individual notices were mailed to

59. Opinion No. 76-2843 (9th Cir. 1976) at 3.
class members; notices were posted at the plant; six days of hearings were held; newspapers reported the events; and the cannery employees undoubtedly discussed the possible effects the lawsuit might have.60 Consequently, even though they were not parties before the court, Caucasian males were held to be bound by the settlement decree through a form of constructive notice. This seems difficult to reconcile with the very stringent notice requirements laid down in *Mandujano* for plaintiff class members.

The district court in *Mandujano*, in response to a direction from the appellate court to “consider explicitly the effect, if any, of the settlement on employees not members of the class,”61 admitted openly its inability to evaluate the fairness of the preferential treatment results for unrepresented parties, including Caucasian males:

The burden placed on Anglo males [to sacrifice seniority advantages to achieve female and minority employment balance] does not seem unreasonable in the circumstances of this case. However, the court is not omniscient and must work within the institutionalized restraint of the adversary system. It can assess the fairness of an agreement between parties before the court, but it cannot weigh and balance the equities of that agreement vis-a-vis the rest of the world.62

The foregoing discussion indicates that the approvals of the settlement agreements in *Mandujano* and *Alaniz* are difficult to justify as rational. The utility of the approved remedies is impossible to maximize because the fairness values are not sufficiently defined and results are sometimes difficult to predict. This tendency toward irrational decisions has its source in certain institutional limitations which relate generally to the proper functioning of any formal process of dispute resolution, and in certain limitations which relate specifically to the unique characteristics of the adjudicative process. Before explaining how the latter limitations render principled judicial resolutions of Title VII disputes problematical, this article will discuss the general limitations of formal processes in dispute resolution.

IV

FORMALITY AS A LIMITATION IN DISPUTE RESOLUTION

Although Title VII provides a blanket prohibition of employment discrimination on the basis of race, sex, religion or national origin, the

60. *Id.* at 3 n.3.
61. 541 F.2d at 837 (emphasis added).
procedural scheme established to enforce this prohibition is characterized by conciliation rather than by compulsion.\textsuperscript{63} This is perhaps evidence of legislative recognition of the theoretical advantages of negotiation and mediation as methods of dispute resolution in the Title VII area. The advantages of these informal processes stem from their allowance for (1) consideration of a wider range of applicable social norms, including those derived from the informal, silent processes which comprise "customary law," and (2) greater flexibility in the administration of these norms. The first section of this part discusses these advantages, while the second section discusses the primary limitations of the informal processes of negotiation and mediation of Title VII disputes.

\textbf{A. Advantages of Informal Processes}

\textit{1. Larger Pool of Applicable Norms}

Because of their greater freedom from restrictive rules, relatively informal processes of dispute resolution take into consideration a more comprehensive collection of potentially applicable norms than do more formal processes. One example of a class of norms which receives more consideration by the informal processes than by the formal is that of person-oriented norms—those which involve an evaluation of the whole person as a social being. Thus, while the formal processes of legislation, adjudication, and administrative decision traditionally limit themselves to act-oriented norms by requiring or prohibiting precisely defined acts, the informal processes of negotiation and mediation can, through person-oriented norms, also regulate roles and functions.\textsuperscript{64} The desirability of considering such person-oriented norms may be illustrated by the following example.

Let us assume that two brothers, Able and Cain, are neighbors. Able, the older, left home after high school to attend college and law school. Since returning to his home town, he has been quite successful as manifested by his large house with its expansive wooded grounds. His younger brother, Cain, never continued past high school, but rather managed the country store owned by the brothers' enfeebled parents and supported them with its modest earnings.

For the past several years, Cain has procured his winter firewood supply by cutting and removing wood from Able's forested yard. Re-


cently, however, after Cain's first wife died, he married a Jewish woman, which infuriated his racist brother so much that he severed all ties with Cain and refused to allow him on his land. Cain, nevertheless, continued to obtain his firewood from Able's yard. Able has filed suit against Cain alleging trespass, and Cain is defending on the basis that several years earlier Able had given him permission to come onto his land to cut and remove the wood.

In deciding this case, the judge will review evidence that may show acts sufficient to make Cain's entry lawful. He will consider such act-oriented issues as whether acquiescence, if enough to constitute assent, has occurred; or whether, if permission must be formally granted, the formal requirements are satisfied. The judge will not consider such person-oriented matters as the pecuniary circumstances of each brother, the relative hardships involved, or whether one of the brothers is more charitable, humane, unselfish, religious, or industrious than the other, except to the extent that one brother may be regarded as more credible than the other. In the adjudicative setting, then, person-oriented norms are generally treated as either invalid or irrelevant.65

By contrast, the person-oriented norm requiring brothers to help each other, even though not found in formal legal rules, does operate in the context of informal social processes.66 In negotiation or mediation, Able would be expected by all parties to deal more charitably with his brother, and this expectation would be one consideration affecting the final resolution of the dispute. Regardless of the weight ultimately given this consideration, the outcome is likely to be more principled than if it were treated as irrelevant, as it is in the adjudicative setting.67

2. More Flexible Administration of Norms

a. Negotiation

Fuller describes negotiation as a procedure by which the affected party (either directly or through representatives) is granted a participation in the settlement which governs his future conduct.68 As a process of dispute resolution, negotiation in many instances offers, as Eisenberg has demonstrated, distinct advantages over more formal processes in terms of effectiveness and legitimacy.69 In addition to its consideration

65. See Eisenberg, supra note 64, at 644.

66. Eisenberg explains:

[A] norm such as "brothers should help each other" might be described as person-oriented, because, despite its apparent generality, its application depends almost entirely on the personal characteristics of the individual parties—a wealthy brother should not seek economic help from a poor one; an unkind brother may not be entitled to any help at all.

Id.

67. See id. at 645.

68. Fuller, Adjudication and the Rule of Law, supra note 3, at 2.

69. Eisenberg, supra note 64.
of a larger pool of applicable norms, including those which are person-oriented, negotiation has the advantage of allowing for a more flexible administration of those norms.

One of the ways in which the process of dispute negotiation allows for a more flexible administration of norms is through its capacity for adjustment of colliding norms. Eisenberg explains that "norms may be said to collide where each has a sphere of action within which it is admittedly valid, but they point in opposing directions in cases in which their respective spheres of applicability intersect." In the employment discrimination situation this may occur where, for example, in seeking to alleviate the consequences of egregious past discrimination against Blacks which has resulted in a particularly high current Black unemployment rate, the employer favors Blacks over Caucasian women, against whom there is no history of such blatant discrimination. Here, one norm dictates that the employer hire those most in need of jobs and another dictates that he not discriminate on the basis of sex.

While less formal means of social ordering can take account of these colliding norms by adjusting for their relative weight and applicability to the facts presented, the more formal legal processes cannot. In an adjudicative setting, for example, the court would typically select one norm as determinative of the outcome of the case and reject the other as inapplicable. In the above example, the norm based on need would be rejected. In negotiation, however, both norms would be considered as legitimate and would be balanced according to their relative importance in the specific employment situation. In this respect, negotiation offers a more principled resolution of the dispute.

Dispute negotiation also allows more flexible administration of norms due to its conciliatory and accommodative nature. Assuming the disputants place some value on the continuance of their relationship, each has an incentive to give some weight to his opponent's good faith claim or defense and the norms and factual propositions that underlie it, even if he considers the norms to be invalid and the facts incorrect. In effect, negotiation norms are weighted according to their degree of authoritativeness and their applicability to the facts, and factual propositions are weighted according to their probability. Traditional adjudication, on the other hand, tends to have a binary character, and lacks the accommodative and compromising qualities of

---

70. *Id.* at 639-46.
71. *Id.* at 643. Eisenberg points to the right to privacy and freedom of speech as colliding norms.
72. *Id.* at 644.
73. However, the parties are unlikely to reach a conciliation agreement based on a norm or factual proposition that one regards as neither valid nor asserted in good faith. *Id.* at 649.
negotiation. It also deprives the parties of the emotional satisfaction of controlling the dispute resolution process and determining the outcome of that process themselves.

b. Mediation

To attain the benefits of a negotiated settlement, or perhaps to obviate the need to achieve a negotiated outcome, the parties to a dispute may enlist the services of a mediator. By focusing on the parties and their dispositions, and not solely upon their acts, the mediator will seek to bring about a more harmonious relationship through persuasion. This may involve helping the parties to negotiate an explicit agreement governing their relationship, encouraging mutual acceptance of "social norms" relevant to their relationship, or simply helping the parties to achieve a more perceptive understanding of one another's problems.

Ideally, mediation would familiarize employers with the nondiscrimination principle and engender mutual trust among the parties so as to obviate any necessity for formal prescriptions of legal duty. In attempting to order their employment relationship, the parties may then make informed decisions reflecting the full universe of social values and norms, including those which are person-oriented. In this way, all the advantages of the more informal process of negotiation become available, and the role played by the mediator steadily diminishes.

B. The Principal Limitation of Informal Processes

As noted above, the enforcement provisions of Title VII are char-

74. Id. at 654-57.
76. Mediation is commonly directed not toward achieving conformity to norms, but toward creation of relevant norms themselves. Id.
77. The importance of achieving mutual trust and understanding, with a reorientation of attitudes and perceptions, is strongly emphasized in the resolution of Title VII disputes, where "conciliation" among the parties is stressed. For example, the settlement agreements in both Mandujano and Alaniz were called "Conciliation Agreement." In United States v. Allegheny-Ludlam Industries, Inc., 517 F.2d 826 (5th Cir. 1975), Judge Thornberry emphasized that "conciliation and voluntary settlement are the preferred means for resolving employment discrimination disputes." Id. at 846. Thus, "voluntary compliance is preferable to court action and . . . efforts should be made to resolve these employment rights by conciliation both before and after court action." Id., quoting Judge Coleman, Dent v. St. Louis-San Francisco Ry., 406 F.2d 399, 402 (5th Cir. 1969).
78. See Eisenberg and Patch, Prominence as a Determinant of Bargaining Outcomes, 20 J. Conflict Resolution 523 (1976), an empirical study of Schelling's notion of prominence in mediated conflict resolution. (See note 84 infra and accompanying text). The authors concluded, inter alia, that as channels of communication between the disputants become more open, the prominence of a mediator's suggestions diminishes and the play of other forces in the bargaining process becomes more significant. Thus, bargaining power, tactics, and norms, particularly person-oriented norms, are given their fullest expression when the parties freely communicate with each other.
acterized by conciliation rather than by compulsion. In fact, the original Act gave the EEOC no enforcement power whatever—if the Commission found substance to a grievant's charges, it was to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." Contrary to the hopes of the draftsmen, however, the force of persuasion alone has proved to be an inadequate weapon in the fight against employment discrimination. Confinement of the EEOC's powers to informal methods of conciliation was seen by many as its crippling deficiency. In 1970, for example, the United States Commission on Civil Rights reported that the EEOC's lack of enforcement power was one of the principal reasons its attempts at conciliation had been frustrated.

This ineffectiveness of conciliation and persuasion alone stems from a lack of interdependence among the parties to an employment discrimination dispute. Mediation, like negotiation, by its nature presupposes that the parties have a relationship which is normally affected by some strong internal pull toward cohesion. Indeed, mediation depends for its effectiveness on an intermeshing of interests sufficiently intense to make the parties willing to collaborate in the mediational effort. In this sense, a mediator's power may derive as much from the urgency of the situation as from any special skills he possesses. For example, when the amateur volunteers to call dances at a square dance, couples may follow his calls not because they are especially apt, but because if they are not followed the dance cannot continue. Likewise,

The bystander who jumps into an intersection and begins to direct traffic at an impromptu traffic jam is conceded the power to discriminate among cars by being able to offer a sufficient increase in efficiency to benefit even the cars most discriminated against.

The failure of the EEOC's attempts at mediation may thus be attributed to the lack of a sufficiently strong sense of interdependence among the parties which would serve to draw them together. The mere fact that an employer excludes certain people from his workforce or fails to treat them in a nondiscriminatory manner attests to his perceived independence from their influence. In addition, there does not

79. See note 63 supra and accompanying text.
82. Fuller, Mediation—Its Forms and Functions, supra note 75, at 330.
83. Id. at 324.
84. T. SCHELLING, THE STRATEGY OF CONFLICT 144 (1960), cited in Fuller, id. at 315. But see Eisenberg and Patch, note 78 supra, concluding that the prominence of a mediator's suggestion is circumscribed by environmental constraints, such as accepted norms of fairness.
PREFERENTIAL TREATMENT REMEDIES

seem to be any widely recognized bond of interdependence among employees with respect to discrimination issues. Absent any internal pull toward cohesion, attempts at mediation are doomed to frustration, unless the mediative efforts are reinforced by the threat of decision.\textsuperscript{85}

Realizing this, Congress amended the Act in 1972 to provide the EEOC with a more threatening power: the authority to sue in court.\textsuperscript{86} As David A. Copus, Deputy Chief of the National Programs Division of the EEOC, explained, "seven years of conciliation convinced Congress and the Commission that voluntary efforts to end discrimination had in large part been unsuccessful."\textsuperscript{87} To date, even though this power to sue has been of some significance in eliminating employment discrimination,\textsuperscript{88} a far greater impact has been made through privately initiated lawsuits. It is the threat of adverse decision in these formal adjudicatory proceedings which has provided the compulsion to compromise and settle discrimination disputes.

Yet even when a Title VII dispute is privately settled, the resolution will usually reflect the perceived likely litigated outcome and incorporate nondiscrimination rights and duties as they have been formally defined and judicially administered. The development of, and judicial involvement in, this formalization process are examined in Part V of this article. Thereafter, Part VI discusses the nature of the task which courts have undertaken in seeking to remedy employment discrimination by reordering employment relations. Part VII then examines the ability of the courts in \textit{Mandujano} and \textit{Alaniz} to execute this task.

\section*{V

FORMALIZATION AND JUDICIAL ADMINISTRATION OF TITLE VII NONDISCRIMINATION PRINCIPLE

A. Alternative Models of Decision

Notwithstanding the traditional American ideological commitment to equality of opportunity,\textsuperscript{89} it was not until 1954 that discrimina-

\begin{footnotesize}
\begin{enumerate}
\item Hill, \textit{id.} at 61-62.
\item Conservative political scientist Harry Jaffa has described the equality principle as "the key to all thoughts" in the Declaration of Independence and has observed that the principle is found in at least seven of the bills of rights accompanying the original state constitutions and implied, if not expressed, in the Declaration of the First Continental Congress (1774) and in the
\end{enumerate}
\end{footnotesize}
tion by the government was outlawed and not until 1964 that private discrimination was forbidden. There was, however, a difference in the public’s perception of private, as opposed to government, discrimination. Whereas “[b]y 1963-1964 there was some consensus that it was wrong for a government to discriminate on the basis of race,” there was, as Owen Fiss has observed, “no comparable consensus concerning the wrongness of private discrimination or the role the law should take in this conflict between liberty and equality.”

This general lack of consensus has been a fundamental problem in the administration of Title VII, which sets no particular standards of legal duty. The attempt formally to regulate an employer’s role, therefore, has required the courts initially to establish specific standards of duty, an undertaking which has been frustrated from the outset by the lack of social consensus as to the precise contours of that duty. The difficulty of attempting judicially to define duties of role performance in the absence of some social consensus as to the proper scope of those duties may be illustrated by a comparison of such attempts to define the duties of a parent with similar attempts to define those of an employer. Since society has long recognized the person-oriented norm establishing the role of a parent in caring for his child, one might at first glance suppose that this norm could be transformed fairly easily into an act-oriented legal rule, compliance with which would be determined by looking to the parent’s acts (whether he has kept his child suitably clothed, fed, etc.). In this way, deciding whether there has been reasonable compliance with the applicable legal standards should be no more difficult than any other adjudicative task.

Outside very narrow boundaries, however, this person-oriented norm of parental duty has historically resisted distillation into act-oriented rules. Modern child-neglect statutes set only broad and vague childcare standards, which like Title VII permit highly individualized and discretionary judicial administration. In the former case, however, while the breadth of these statutes reflects the difficulty of legisla-


90. Fiss, supra note 10, at 743.


94. Mnookin, supra note 40, at 240-44.
tively drawing the specific borders of parental duty, the essence of that duty is clear. There is a core of agreement within society as to the purpose of the statutes, and they are therefore at least marginally administrable.

Title VII, by contrast, is crippled by the lack of any comparable consensus as to the meaning of "discrimination," a term nowhere defined in the Act, or to the purposes of the statute. Herbert Hill has observed, for instance, that "Title VII in fact embodies contradictory and conflicting provisions. The most 'enlightening' portions of the congressional debates reveal that 'totally inconsistent explanations of the bill were offered by its proponents and its opponents.'" Faced with the task of administering Title VII with so little legislative guidance, the judiciary has had the opportunity, as Owen Fiss has explained, of choosing between two alternative models for regulating the employer's role:

1. The process-oriented model, which defines "discrimination" in terms of the use of race, sex, etc. as criteria in employment decisions.
2. The results-oriented model, which defines "discrimination" in terms of an existing imbalance in the allocation of employment benefits among particular employee groups.

Before exploring the extent to which each of these models has been followed in judicial resolution of Title VII disputes, this article will analyze the theoretical advantages and limitations of each for application to that task.

I. Process-oriented Model

The process-oriented model addresses the discrimination problem

95. This core consensus is typified by the comments of the N.Y. Joint Legislative Committee concerning the N.Y. Family Court Act of 1962:

All interested persons agreed that parents "neglect" their children (in a legal sense) when they fail adequately to supply them with food, clothing, shelter, education, or medical or surgical care, "though financially able to do so" . . . . The Committee found, however, that interested persons disagreed over the extent to which children whose parents supply the physical needs of life may nevertheless be adjudicated as "neglected children." Some say when a child suffers from "improper supervision," others, when he suffers from "a parental pattern of not satisfying his emotional needs"; still others, whenever there is a parental pattern of not properly caring for the child. The Committee concluded that these differences reflect the diversity of practices and beliefs in our society, and that this diversity was not a proper matter of governmental regulation so long as basic standards were not violated. The Committee also concluded that the Family Court's neglect jurisdiction should be invoked only in situations of serious need.


by prescribing certain standards to be observed by the employer in his role as decision maker. Compliance with those standards may be determined in either of two ways. First, the court could examine the motive of the employer in particular decisions. This subjective approach suffers from the limitation expressed in the maxim, "law cannot change the hearts of men." Moreover, without reference to specific external acts by which to judge performance, a rule focusing on intent would not be very susceptible of judicial application. As a practical matter, proof problems would tend to be an insurmountable hurdle for plaintiffs. 98

The second approach for assessing the purity of the employer's decisional process would involve an examination of the decision's consequences. 99 Under this approach, statistics could be used to compare the racial balance of the employer's workforce with that of the pool of qualified potential applicants; 100 an imbalance in the employer's workforce would establish a prima facie violation of the nondiscrimination rule. The employer would then be allowed the opportunity to justify the imbalance by detailing the relevant considerations in his decision-making process. 101

One limitation of this process-oriented approach arises from the fact that, in order to evaluate adequately the employer's role performance, the court is expected to consider the full universe of interests represented and of norms, formal as well as informal, which are relevant to the employer's decision. Finding itself in this horrendous polycentric thicket, 102 it will have an understandable tendency to rely too heavily on numbers, thereby blurring the distinction between cause and consequence. Thus, while there may be innocent causes for the racial imbalance in a workforce, the employer's opportunity to rebut may, as a practical matter, be so severely restricted as to make the numbers nearly conclusive. 103 This phenomenon could, in the words of Alfred


100. This presents the difficult task of selecting the appropriate population base from which potential employees may be drawn. Consideration of this problem is beyond the scope of this article.


102. See Part VI of this article.

103. See Fiss, supra note 10, at 762; Fiss, supra note 62, at 263-81.
Blumrosen, produce "a tendency for various groups to claim 'their share' of employment opportunities, for advocates to seize upon proportional representation, and for administrators to think of proportions as ends rather than means." As a result, employers would be pressured to engage in reverse discrimination so as to avoid the prospect of a lawsuit, probably violating not only Title VII itself but, if state action were involved, the equal protection clause as well.

The process-oriented model has two further limitations. First, the remedy does not flow ineluctably from a finding that the employer has used unacceptable hiring criteria, and selecting a remedy can be a very thorny task. Second, and perhaps more significant, there is no guarantee that strict adherence to nondiscriminatory processes will ever produce the desired results of complete integration and equality in the workplace. Even if the process-oriented model eventually does produce these hoped-for consequences, we may wonder, like Owen Fiss, whether "we have, or should have, so much patience."

Some of these limitations are merely concrete examples of a proposition discussed in more abstract terms in Part IV of this article: namely, that formal processes of dispute resolution are not capable of giving adequate consideration to all norms operating in this type of dispute. Nevertheless, because it affords consideration of factors other than the degree of compliance with some statistically defined ideal employment representation mix, this approach may provide some opportunity for meaningful judicial resolution of Title VII disputes. Yet this resolution will not always be "meaningful," in the sense that it will be totally rational and principled, because of the inhibiting formality of the adjudicative process and because of the absence of any extra-legal consensus as to the scope of the employer's duty of nondiscrimination. It does, however, represent the best possible judicial response to the discrimination problem.

2. Results-oriented Model

The results-oriented model addresses the discrimination problem by focusing solely on whether there is some imbalance in the composition of a given workforce. A results-oriented construction of Title VII would thus represent an attempt by the courts to formalize completely the conception of a businessman's social duties. Such a construction would involve the transformation of a role-oriented norm (an employer must not discriminate) into an exclusively act-oriented one (an em-

104. Blumrosen, supra note 91, at 103; see also Fiss, supra note 10, at 763. It is noteworthy that Mandujano used the words "their share" in discussing the rights of minority groups to proportional representation in the workforce. See text accompanying note 56 supra.

105. Fiss, supra note 10, at 765.
Employer must keep his workforce balanced), compliance with which would be tested and the remedy structured in purely numerical terms. Under this model, the court's function would involve balancing interests in obtaining jobs, as opposed to enforcing the right of equal opportunity.

Although this results-oriented model is directed specifically at the elimination of unemployment and underemployment of minorities and women, it has little to do with the nondiscrimination principle per se. In fact, ordering employment relations on the basis of numbers alone is, in addition to being inherently arbitrary, antithetical to the nondiscrimination norm. If compliance with the statute is measured exclusively by numbers, for example, employers would be induced to engage in reverse discrimination, a practice that would contradict the stated purpose of the statute—to eliminate discrimination.  

Besides offending the nondiscrimination principle, the apportionment of jobs through quotas fails even to guarantee benefits to those interests it seeks to advance and may, in fact, work to the detriment of those interests. It is entirely possible, for example, that quotas will set maximum, rather than minimum, opportunities for the class members. Additionally, quotas are somewhat distasteful on a personal level since many persons feel demeaned and stigmatized when regarded as fungible members of a class rather than as individuals. Such treatment undermines both common law notions of individualism and traditional American political philosophy, which dictate that all persons be treated equally under the law without regard to class affiliation by race, sex, etc. This principle is also embodied in the constitutional guarantee of equal protection.

Following a results-oriented approach would also require the courts to determine whether the particular quotas will be set on a strict proportional basis or on the basis of the equities underlying the workforce imbalance. For example, to the extent that the courts confine their efforts to achieving proportional representation in the workforce, they fail to respond to the fact that some classes have suffered greater social and economic discrimination and deprivation than others, and that this has contributed to their under-representation in

106. Such reverse discrimination, coupled with the requisite state action, might violate the equal protection clause as well as Title VII. Cf. Regents v. Bakke, 429 U.S. 953 (1978).

107. In Alaniz, the dissenters' objections to the use of county, as opposed to plant, statistics for parity purposes may have been implicitly addressed to this possibility. See text accompanying note 54 supra.

108. Professor Brest states: "If a society can be said to have an underlying political theory, ours has not been a theory of organic groups but of liberalism, focusing on the rights of individuals..." Brest, supra note 47, at 49. See De Funis v. Odegard, 416 U.S. 312, 336 (1974) (Douglas, J., dissenting) ("no constitutional right for any race to be preferred"); Bakke v. Board of Regents, 18 Cal. 3d 34, 55, 353 P.2d 1152, 1166 (1976), aff'd, 429 U.S. 953 (1978).
the workforce. If the setting of quotas is intended to redress the past injustices which have caused the imbalances, the courts must deal with each type of discrimination mentioned in the Act—race, sex, religion, and national origin—as a social problem in itself with its own unique economic, social, and moral implications. The differing equities underlying these problems have been emphasized by Fasman and Clark, who seriously question, for instance, whether sex discrimination, a child of the 1960’s and hardly as significant a source of human misery and misallocation of social resources as racial discrimination, should be treated the same as the latter. They suggest that our history of racial bigotry coupled with the plight of blacks in ghettos requires far more drastic remedial measures than does sex discrimination.

Judicial administration of the Act on the basis of quotas reflecting these considerations would, however, immerse courts in the raw politics of social planning. Without any principled and judicially manageable standards for selecting groups to be protected and for assigning quotas to that end, the judiciary would face grave problems of institutional morality. Moreover, even if it were restricted to the goal of proportional representation without consideration and adjustment for underlying equities, adherence to the results-oriented model would still shackle the courts with the imponderable burden of determining every class which must be represented and in what proportion.

The quota approach has other social drawbacks, in addition to its effects on the courts. Allocation of jobs solely on the basis of class affiliation, for instance, would ignore the often innocent and socially justifiable causes of an employer’s less-than-fully-integrated workforce. A strictly results-oriented interpretation of the Act would therefore undermine the interests of both the employer and society in efficient economic production, and in the making of employment decisions based upon a full consideration of all relevant norms, informal as well as formal.

Society would also suffer from the divisiveness which would inevitably ensue from the use of quotas, due to the negative impact certain to be felt by those individuals who do not receive their benefits. This problem, representing perhaps the most fundamental objection to the use of quotas, prompts one to consider the means/ends contradiction inherent in their use, i.e., that discriminatory policies (to achieve “de-
sired” results) represented by quotas will not produce a nondiscriminatory society characterized by the absence of class consciousness. A nonquota (more informal) approach, by contrast, would maximize the chances to solve even-handedly problems for all groups traditionally subject to discrimination. Furthermore, avoidance of quotas would recognize the unsuitability of formal legal processes for the ordering of employment relations, and would affirm the commitment of Title VII to the ordering of employment relations without regard to class membership.

B. Current Judicial Approach

I. Finding

Elements of both the process- and results-oriented models have characterized judicial administration of Title VII. In making findings of violations courts have taken a process-oriented approach, focusing primarily on consequences rather than motivation. As Chief Justice Burger explained in *Griggs v. Duke Power Co.*:111 “Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.”112 To determine these consequences, courts have used statistics. Although the practical dangers attending the use of statistics for this purpose are clear, the above discussion shows that it is probably the most viable judicial method of evaluating the quality of an employer’s role performance.

II. Remedy

After a finding of discrimination, the courts must determine an appropriate remedy. Title VII authorizes monetary relief in the form of back pay113 and payment of attorney fees.114 In addition to these remedies, at least one court has awarded punitive damages.115 The Act also provides for equitable relief, both prohibitory and affirmative.116 Of these measures, the ordering of affirmative preferential relief has been the most controversial.

Seizing on the language authorizing them to “order such affirma-

---

111. 401 U.S. 424 (1971).
112. *Id.* at 432. But compare *Washington v. Davis,* 426 U.S. 229 (1976) (Court refused to incorporate into the Constitution this “racially disproportionate impact” doctrine).
116. 42 U.S.C. § 2000e-5(g) (1976) provides:
   If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . . .
tive action as may be appropriate" to eliminate discrimination in employment, many courts have adopted a results-oriented approach in fashioning remedies. In addition to compensating for past unlawful employment practices, these courts regard the results-oriented approach as necessary to eliminate the present effects of that discrimination, and see preferential treatment as the most appropriate remedy for this purpose. They deny that there is a conflict between the imposition of a class-conscious remedy and the Act's command that employment decisions be made without reference to class membership. Thus, although the Act explicitly prohibits awarding “preferential treatment” on account of an imbalance in the workforce, this prohibition is said to apply only to those cases in which there has been a showing of imbalance but no finding of discrimination. After a finding of discrimination, however, a results-oriented remedy is seen as consistent with the Act and, furthermore, as necessary to its successful implementation.

The preferential treatment remedy has survived constitutional challenges in several cases. Blumrosen has called one of those cases, Carter v. Gallagher, "the most important precedent on the matter of numerical standards." In that case, the appellate court rejected as an excessive encroachment upon other interests a district court-approved plan calling for the hiring of minority applicants exclusively. It did, however, approve a scheme requiring minority workers to be hired on a “reasonable ratio” to white applicants (one in three met this test) until proper minority representation was attained. The justification for a class remedy of this nature is said to rest on the “basic social reality” that discriminatees have been denied jobs not as individuals, but as a class. The courts seem to agree with Blumrosen that “the risks do not justify avoidance of the venture, for the human needs are too

117. Id.
119. Preferential remedies thus have two objectives: compensating for injustices committed and providing for increased opportunities to realize equality of access to jobs. Comment, Race Quotas, 8 HARV. C.R.-C.L. L. REV. 128, 151-55 (1973).
121. Blumrosen, supra note 104, at 93.
As the analysis of this article has shown, however, the effectiveness of the adjudicative process in addressing these "needs" is questionable indeed. And, as Part VII will demonstrate, the risks involved in the courts' undertaking of the preferential treatment "venture" are significant. However, before analyzing why the dispositions in cases like Mandujano and Alaniz are so inadequate, this article will examine the complications involved in the ordering of employment relations.

VI

ORDERING EMPLOYMENT RELATIONS:
THE POLYCENTRIC TASK

A. General Observations

Lon Fuller has labeled the ordering of complex relations of interdependence a "polycentric task," a term he has borrowed from Michael Polanyi. The polycentricity of employment relations has been described by Fuller as a seamless web—"pluck it here and a complex pattern of adjustments may run through the whole structure." It is this polycentric quality of employment relations which makes their reordering a task so ill-suited to judicial execution.

In basic terms, polycentricity may be defined as the quality present in any zero-sum situation, where a finite number of benefits are to be allocated among mutually interdependent interests. Some clarifications and qualifications will aid in understanding this concept of polycentricity. First, patterns of decision, not complexity of issues, characterize the polycentric problem. For example, a suit on a promissory note may involve extremely complex issues where the note was given as part of some complicated deal between two parties, but the decision affects only the two parties before the court. This must be distinguished from the polycentricity of employment relations, where a

123. Blumrosen, supra note 104, at 103.
124. M. POLANYI, THE LOGIC OF LIBERTY (1951); Fuller, Adjudication and the Rule of Law, supra note 3, at 3; Fuller, Collective Bargaining and the Arbitrator, supra note 3, at 33.
125. Fuller, Collective Bargaining and the Arbitrator, supra note 3, at 38. The following are examples of polycentric problems:
setting prices and wages within a managed economy to produce a proper flow of goods;
redrawing the boundaries of election districts to make them correspond to shifts in population;
assigning the players of a football team to their respective positions;
designing a system of throughways into a metropolitan area;
allocating scarce funds for projects of scientific research;
allocating air routes among our various cities;
drawing an international boundary across terrain that is complicated in terms of geography, natural resources, and ethnology;
allocating radio and television channels to make balanced programs as accessible to the population as possible.

Fuller, Adjudication and the Rule of Law, supra note 3, at 3.
126. See Polanyi, note 124 supra.
127. Fuller, Adjudication and the Rule of Law, supra note 3, at 4.
decision in favor of one party affects the positions and interests of many other parties.

Second, polycentricity is not defined merely by a multiplicity of affected parties. For example, "[i]f an award were offered for information leading to the capture of a particular criminal, the fact that ten claimants might appear would make for a cumbersome hearing; it would not make the problem polycentric." 128 In a firm with only two employees, however, a dispute between the two parties over the assignment of job duties may involve the polycentric element operating with a vengeance. If there are twenty individual tasks to be performed and the labor is to be divided equally, it is clear that the assignment of any one task has implications for the proper assignment of every other task. An even distribution of the jobs will therefore involve many considerations. For example, each employee may have distinct preferences as to particular tasks depending on how strenuous or challenging or interesting each task is, whether he has the ability to perform it, the length of time it would require him to perform it, the time of day it is to be done (day or night), and so on.

Third, polycentric problems are not necessarily without rational solution. Fuller explains:

There are rational principles for building bridges of structural steel. But there is no rational principle which states, for example, that the angle between girder A and girder B must always be 45 degrees. This depends on the bridge as a whole. One cannot construct a bridge by conducting successive arguments on the angle of every pair of intersecting girders. One must deal with the whole structure at once. 129

In the instance of the two employees dividing jobs, it would be irrational to attempt to assign jobs two at a time so that, for example, each employee had the same number of one hour jobs, forty-five minute jobs, etc., or so that each ended up with ten jobs. Rather, the chore of dividing the jobs equally must be undertaken with a full understanding of all the relevant criteria; the decision must be based on a consideration of the full universe of operative decisional factors. 130

Fourth, through its decision a court may affect a polycentric relationship, and may in fact become a part of that relationship, without exceeding the bounds of its proper function. Fuller demonstrates this point:

[T]here is no better illustration of a polycentric relationship than an economic market, and yet the laying down of rules that will make a market function properly is one for which adjudication is generally well

128. Id.

129. Id.

130. In this respect, Alaniz recognized "the preference of the courts and of the EEOC for industry-wide remedies in Title VII actions." 73 F.R.D. at 276.
suited. The working out of our common law of contracts case by case has proceeded through adjudication, yet the basic principle underlying the rules thus developed is that they should promote the free exchange of goods on a polycentric market. The court gets into difficulty, not when it lays down rules about contracting, but when it attempts to write contracts.\footnote{131}

Similarly, the adjudicative process is somewhat capable of ascertaining the degree of compliance with legal rules providing that employment relations are to be ordered in nondiscriminatory fashion. However, once the court determines that these rules have been violated and seeks to adjust an employment scheme itself, it undertakes an extremely complex polycentric task for which it is fundamentally ill-suited.

Finally, polycentricity is a matter of degree. "[A]ll community is polycentric in nature, as indeed are all living relationships."\footnote{132} The polycentric characteristics of a relationship do not, per se, make it unamenable to ordering by rules laid down in advance. However, the more pronounced the polycentric element, the less susceptible the problem will be to resolution by invocation of formal legal rules and processes.

B. The Polycentric Nature of the Disputes in Mandujano and Alaniz

When one considers the extent of interaction among conflicting interests, both within the class and within the work force generally, it is evident that the disputes in Mandujano and Alaniz were characterized by a high degree of polycentricity. The polycentric task in both cases was that of properly allocating a finite number of job positions. That the interests interacting in the competition for these scarce resources were legion is illustrated by the list in the margin of groups holding distinct and potentially conflicting interests.\footnote{133} Mandujano and Alaniz

\footnote{131} Fuller, \textit{Adjudication and the Rule of Law, supra} note 3, at 4-5.  
\footnote{132} \textit{Id.} at 7.  
\footnote{133} The following is an enumeration of groups which are affected by the decisions in \textit{Mandujano} and \textit{Alaniz} and which have distinct and potentially conflicting interests.  
A. Those persons actually discriminated against.  
B. Those persons who failed to apply for a job because they knew of the discriminatory practices of the employer.  
C. Members of a class which is deemed to have been the object of discrimination:  
1) Minority men  
   a) Mexican-American  
   b) Native American  
   c) Black  
   d) Asian  
2) Minority women  
   a) Mexican-American  
   Each of these groups of deemed discrimination victims in turn contains sub-groups with distinct and potentially conflicting interests:
are typical of most employment discrimination cases, in that the number of potentially conflicting interests which are affected by any alteration in the employment scheme is staggering. With some understanding of the complexity of the polycentric task presented by Title VII employment discrimination disputes, we may now evaluate the appropriateness of the adjudicative process, with its unique institutional limitations, to its execution.

VII

CAPABILITY OF ADJUDICATIVE PROCESS TO RESOLVE POLYCENTRIC EMPLOYMENT DISCRIMINATION DISPUTES

The subjection of employment discrimination problems to adjudicative solution exemplifies well what Tocqueville long ago foresaw as America's penchant for transforming moral and social questions into political questions and eventually into judicial questions. Because their capabilities are finite, however, the courts cannot resolve all moral and social problems which arise; some of these problems are simply intractible to judicial solution. Part III of this article has demonstrated that the judicial resolutions in Mandujano and Alaniz defy rational explanation. This part of the article, in focusing on those cases, analyzes the general institutional suitability of the adjudicative process for the task of evaluating negotiated settlements which establish preferential hiring and promotional schemes. The analysis presented here suggests that because of the courts' inability to insure adequate representation of all interests affected by such settlements and to evaluate such settlements in a legally principled manner, the adjudicative process is ill-

(1) Past employees
   a) With wrongful discharge claims
   b) Without wrongful discharge claims
(2) Present employees
(3) Potential employees.
   b) Native American
   c) Black
   d) Asian
   3) Caucasian women.
D. Those Caucasian men who did not themselves discriminate, but whose interests are affected by any affirmative remedy because of the zero-sum nature of job allocation. All of these employee groups (labeled A through D above) may be further subdivided into classes consisting of regular workers and seasonal workers, each of which holds interests distinct from the other.
E. The employer, who has a "business necessity" interest.
F. The union, which is responsible for the rules contained in the collective bargaining agreement, which orders employment relations.
G. The public, which has an interest in market efficiency (presumably reflected in lower prices), and a general moral, political, and social interest in nondiscrimination.

134. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (ed. 1956).
suited to this complex polycentric task. Each of these points will be discussed in turn.

A. Interest Representation

One of the defining characteristics of adjudication is the institutionally protected opportunity provided an affected party to present proofs and arguments for a decision in his or her favor. While other forms of social ordering also grant a party the opportunity to participate in decisions which affect his or her interests, the participation provided by adjudication is distinctive in that it is both institutionally guaranteed and direct. For example, although voting procedures afford the party a guaranteed right to participate, that participation is not nearly so direct as in the case of adjudication. Contract negotiation, on the other hand, affords a more direct participation than does adjudication, being free from judicial intervention, but the opportunity to participate is not institutionally guaranteed, and there are no formal rules controlling the process.

It is this institutionally protected opportunity to participate directly in the decisional process which has been asserted to be one of the principal advantages of litigation for solving problems of public policy. Remedying past employment discrimination with preferential treatment affects a wide range of interests, and among the competing forms of social decision, only adjudication guarantees all affected interests representation in the process by which the remedy is devised and approved. This right of participation assumes added significance in Title VII lawsuits, which are usually class actions involving a considerable amount of negotiation. Indeed, the preferred method for resolving Title VII disputes is the privately negotiated settlement. Even if the outcome is not privately negotiated, the judicial decree is likely to be quasi-negotiated. When the structural relief is thus fashioned through bargaining and negotiation, vigorous interest representation is crucial. In the class action context, however, as Chayes has noted, even though "[p]articipation of those affected by the decision has a reassuringly democratic ring, . . . when participation is mediated by group representatives, often self-appointed, it gives a certain pause."

In many Title VII class actions, such as Mandujano and Alaniz, there are on the face of the complaint innumerable separate and con-
conflicting interests within the plaintiff class.\textsuperscript{141} FRCP 23(a)(4), however, requires a court determination that "the representative parties will fairly and adequately protect the interests of the class." The difficulty of making such a determination where, as in \textit{Mandujano} and \textit{Alaniz}, the interests within the plaintiff class are many and conflicting and the named plaintiffs represent only a fraction of those interests places the court in an awkward position. A representative party cannot be expected adequately to protect interests which conflict with his or her own. Yet, where there are so many conflicting interests, the court cannot certify a separate class for each such interest and still expect a judicially manageable proceeding. The usual resolution to this quandary is compromise, in which some interests are not protected by the representative parties. Since in such circumstances it is not the representative parties which must fairly and adequately protect the interests of the class, it might at first appear that this responsibility should fall on the attorney for the class. This situation, however, poses serious practical and ethical problems.

The court in \textit{Mandujano} made it clear that "the class is not the client. The class attorney continues to have responsibilities to each individual member of the class even when negotiating a settlement."\textsuperscript{142} These responsibilities are imposed by the Code of Professional Responsibility, which requires an attorney to "exercise independent professional judgment on behalf of a client"\textsuperscript{143} and to "represent a client zealously within the bounds of the law."\textsuperscript{144} Moreover, an attorney is cautioned against representing multiple clients having "potentially differing interests."\textsuperscript{145} The necessity of zealous representation of affected interests is especially pressing in a class action, where the judgment or settlement binds class members not before the court.\textsuperscript{146}

In the zero-sum process of job allocation, these ethical considerations seem to dictate the appearance of separate counsel to represent each distinct interest which will be affected by the outcome. In practice, however, this is logistically impossible. Even if it were financially possible for, say, forty distinct interests to be represented each by independent counsel\textsuperscript{147} the demands for adequate interest representation would undoubtedly be met, but the party structure would introduce so

\begin{footnotesize}

\begin{enumerate}
  \item \textsuperscript{141} See note 133 \textit{supra} and accompanying text.
  \item \textsuperscript{142} 541 F.2d at 834.
  \item \textsuperscript{143} ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 5 (as amended, Feb., 1975).
  \item \textsuperscript{144} ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7 (as amended Feb., 1975).
  \item \textsuperscript{145} ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Considerations (EC) 5-15 and 5-17 (emphasis added). \textit{See also} EC 5-14 and 5-16. Additionally, EC 7-7 states that: "it is for the client to decide whether he will accept a settlement offer . . ." (emphasis added).
  \item \textsuperscript{146} Hansberry v. Lee, 311 U.S. 32, 41 (1940); Dierks v. Thompson, 414 F.2d 453, 456 (1st Cir. 1969).
  \item \textsuperscript{147} While \textit{Mandujano} notes the advantages of separate representation of each interest by
\end{enumerate}

\end{footnotesize}
much complexity that the procedure would certainly fall of its own weight. 148

This is one reason why the courts are reluctant to find interests within the class so conflicting as to preclude class representation by a single attorney. For example, after noting that it is an attorney's ethical responsibility to refrain from representing "potentially different interests," 149 the Mandujano court condoned this practice by stating:

[We are] not prepared to say that the potential, or even actual, existence of this temptation [to sacrifice the interests of certain members of the class in an effort to achieve the greatest good for the greatest number] is sufficient to require denial of Rule 23(b)(2) certification in Title VII cases. 150

Since under Mandujano an attorney is in fact permitted to represent conflicting interests, it must then be up to the court to protect those interests from being unduly sacrificed. 151

To assure that the trial court considers whether adequate interest representation exists, Mandujano set forth a series of procedural requirements to be followed in settlement approval hearings. They are designed to insure not only that the existence of class conflicts will come to the attention of the court, but that if conflicts are present, the court will assure that conflicting interests have been sacrificed proportionately. Moreover, if the court believes the settlement to be fair, it may be imposed on dissenting class members with or without their consent. 152 The Mandujano opinion never addressed the contradiction inherent in the concept of a class action settlement which binds dissenters. On the one hand, the court emphasized that a settlement which compromises the legal rights of class members without their con-

148. See Chayes, supra note 2, at 1312.
149. 541 F.2d at 835 n.4.
150. Id. at 835. The drafters of Rule 23 intended that employment discrimination suits be brought under Rule 23(b)(2). See Advisory Committee on Rule 23, Proposed Amendments to the Rules of Civil Procedure, 39 F.R.D. 69, 102 (1966); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 250 (3d Cir. 1975), cert. denied, 421 U.S. 1011 (1975). In fact, most employment discrimination suits are brought under Rule 23(b)(2), but in some instances, primarily in cases involving back pay, courts may require the action to be maintained under Rule 23(b)(3). In Alaniz, the court certified the action under both Rule 23(b)(2) and (b)(3) and the settlement contained an opt out provision. The opportunity to opt out is insignificant, however, where a court has approved an agreement which presumably reflects an equitable balancing of all interests in the employer's workforce. See Developments in the Law—Class Actions, 89 HARV. L. REV. 1318 (1976).


152. Alaniz explained: "Of course, the Agreement should be approved if it is fair, reasonable, and adequate, if it presents a reasonable compromise taking into account the many factors and variables which enter into a case such as this." 73 F.R.D. at 282.
sent is a violation of due process. On the other hand, the court laid down rules which allow a trial court to approve a settlement over the objections of dissenters if it assures itself that the settlement is just. It is difficult to see how *Mandujano*’s procedural scheme does not violate the right of due process as the court itself defines that right.

The same institutional limitations which preclude the courts from effectively protecting the interests of dissenters also preclude adjudication from providing adequate representation of interests which are not represented by either the plaintiff class or defendants. Even determining whether there are, in fact, interests which are affected by the suit but unrepresented in the proceedings is difficult because notice is not given to non-class members, and these individuals may not even be aware that their interests are directly affected by the lawsuit. Although responsibility for notifying and protecting unrepresented interests should be assumed by the court, *Mandujano* and *Alaniz* demonstrate the inability of judges to discharge that responsibility adequately. In *Alaniz*, absent non-party Caucasian males were held to be bound by a judgment which adversely affected their interests even though they had never been given actual notice of the proceedings; in *Mandujano*, the judge simply accepted the futility of trying to bring in all affected parties, or even of considering the impact of the decision upon their interests. From this discussion it can be seen that the courts are even less successful in protecting the interests of absent parties than they are in protecting the interests of represented parties.

### B. Refining Legal Rules

Even if all affected interests are adequately represented in the proceedings by which the preferential treatment remedy is devised and approved, perhaps the most fundamental problem remains: what is the weight to be assigned to each interest involved, and on what grounds does a judge base his decision? In order to exercise his institutionally protected right to present proofs and arguments for a decision in his favor, a litigant must have some conception of the issues toward which his proofs and arguments are to be directed. The parties cannot litigate

---


154. *Mandujano* emphasized: "The opposition of a significant number of the members of the class to a proposed settlement is a factor to be considered when approving a settlement. Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 7 FEP Cases 822 (3d Cir. 1974), *cert. denied*, 419 U.S. 900, 8 FEP Cases 1007 (1974). . ." 541 F.2d at 837. However, the extent to which the court’s determination will turn on this “factor” is, as *Alaniz* explained, minimal: “Even vigorous opposition to the settlement, or objection by a large number of class members does not render a settlement unreasonable. Bryan v. Pittsburgh Plate Glass Co.” 73 F.R.D. at 282.

155. See text accompanying notes 59-60 *supra*.

156. See text accompanying notes 61-62 *supra*.
in a vacuum; rather, adjudication must take place within a framework of accepted or imposed standards of decision. If the litigant is ignorant of the basis on which the tribunal will decide the case, his right of participation is meaningless.\textsuperscript{157}

The allocation of a scarce supply of jobs is a classic example of the type of polycentric task to which adjudication is particularly ill-suited. Not only must the judge consider factors much more important than those contained in the fragmentary presentation open to any single party, but he will find no established rules to guide his decision.\textsuperscript{158} To the extent that established legal principles\textsuperscript{159} fail to cover the area of controversy, adjudication generally cannot serve as an ordering mechanism consistent with the rule of law.\textsuperscript{160}

In evaluating Title VII class action settlements, courts are guided by a legal standard of "fairness." The court in \textit{Mandujano}, for example, required a finding that the agreement possessed "fundamental fairness."\textsuperscript{161} Similarly, the court in \textit{Alaniz} adopted as "the general principle governing the approval of settlements"\textsuperscript{162} Judge Wyatt's

\begin{itemize}
\item \textsuperscript{157} Fuller states: "Unless there is some standard by which the relevance of proofs can be judged and the cogency of arguments measured, the litigant's participation in the process of decision becomes an empty form." Fuller, \textit{Collective Bargaining and the Arbitrator}, supra note 3, at 28.
\item \textsuperscript{158} "It is this commitment to governance \textit{by} rules—and not only restrained by or even guided by rules—that characterizes adjudication as a special way of exercising authority." P. Nonet, \textit{Administrative Justice: Advocacy and Change in a Government Agency} 201 (1969).
\item \textsuperscript{159} Analytically, it is important to note that legal standards range across a wide and continuous spectrum. At one extreme is the legal rule which requires only the determination of a past fact. At the other extreme is the open-ended principle, distinguished by its lack of specificity. "While a principle provides a purpose or objective, it leaves a decision-maker the task of figuring out how to achieve that objective and the weight to be accorded to that objective when there are other principles pointing in other directions." Mnookin, \textit{supra} note 40, at 231 n.20, discussing H. Hart & A. Sachs, \textit{The Legal Process} 158-60 (1958) (unpublished manuscript in Harvard Law School Library); Dworkin, \textit{The Model of Rules}, 35 U. CHI. L. REV. 14, 27 (1967).
\item \textsuperscript{160} This analysis presupposes an answer to the longstanding jurisprudential dispute over whether there were first rules and then courts, or first courts and then rules. Proponents of the latter argument assert that Roman law and the common law took origins in a case-by-case evolution of doctrine. Proponents of the former argument point out that even Roman law and common law decisions were based on already existing rules. These rules were not rules of law, but were established moral principles generally accepted by the litigants who came before the courts. For this reason, according to Fuller, the development of Roman law and the common law doctrine has no relevance to situations where a court attempts to project its functions into a moral and legal vacuum. Fuller emphasizes that to remain within the rule of law a court must be guided by rules, either legal or moral, authoritatively laid down in advance. Fuller, \textit{Adjudication and the Rule of Law}, supra note 3, at 6. \textit{See also}, e.g., Hart, \textit{Positivism and the Separation of Law and Morals}, 71 Harv. L. Rev. 593 (1958); Fuller, \textit{Positivism and Fidelity to Law—A Reply to Professors Hart and Dworkin}, 71 Harv. L. Rev. 630 (1958). \textit{See also} R. Wasserstrom, \textit{The Judicial Decision: Toward a Theory of Legal Justification} (1961); L. Fuller, \textit{The Morality of Law} (1964); L. Fuller, \textit{Anatomy of the Law} (1968); Nicholson, \textit{Inner Morality of Law: Fuller and His Critics}, 84 Ethics 307 (1974).
\item \textsuperscript{161} 541 F.2d at 835.
\item \textsuperscript{162} 73 F.R.D. at 278.
\end{itemize}
statement in *West Virginia v. Charles Pfizer & Co.*: “Approval should be given if the settlement is fair, reasonable, and adequate. These terms are general and cannot be measured scientifically.” This extremely vague principle provides no real guidance at all, because in the area of Title VII, and particularly in regard to preferential treatment remedies, there is no consensus as to what constitutes “fairness.”

Under such circumstances, as courts continually deal with these types of cases, one might expect more specific legal principles eventually to emerge. As a theoretical matter, Fuller notes that in many instances, legal rules and principles do “develop out of the adjudicative process without being laid down in advance. . . .” In other words, under certain circumstances, adjudication may itself produce a body of principle, as a byproduct of its functioning, which serves to legitimate its decisions. Before this can occur, however, Fuller emphasizes that two major conditions must exist. First, “there must be an extra-legal community, existent or in [the] process of coming into existence, from which principles of decision may be derived.” Second, “the adjudicative process must not, in attempting to maintain and develop extra-legal community, assume tasks for which it is radically unsuited.” It is questionable whether the first of these conditions can be met when a court undertakes the task of decreeing a preferential treatment remedy, since Title VII in both its enactment and administration belies the existence of any extra-legal source of generally accepted values, particularly in regard to quotas. Moreover, in addition to the absence of any consensus as to how employment discrimination suits should be resolved, principles of decision are unlikely to emerge from the adjudicative process alone because the ordering of polycentric employment relations along class-based lines is a task to which adjudication is “radically unsuited.” As discussed above, this unsuitability stems from its relative formality, with its accompanying limitations, and from its unique institutional inabilities to assure adequate interest representa-

---

164. See text accompanying notes 89-110 supra.
165. In the early stages of its formation, a principle may be very broad, allowing a considerable degree of discretion, but the process of reconciling the case at hand with prior cases will often refine the principle and limit judicial discretion. See Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986 (1967).
167. It has been argued that even when judges fail to account for their decisions in terms of general legal principles, the discipline of writing opinions and the concomitant aspiration toward logical decisions serve at least as a protection against arbitrary results. Chazen, *Greening the Grey Flannel Suit*, 86 YALE L.J. 185, 188-89 (1976).
168. *Id.*
169. *Id.*
170. See text accompanying notes 89-96 supra.
tion and to develop legal standards in the absence of extra-legal agreement as to their content.

VIII

CONCLUSION

While Congress has through the well-intended enactment of Title VII attempted to impose the nondiscrimination principle on employers, the administration of the Act has suffered from the absence of any consensus, either in the legislature or in society generally, as to the dimensions of the principle or the substantive goals of the Act. The informal processes which were to be the backbone of Title VII have been of limited effectiveness, although they have been somewhat bolstered by the external threat of adjudicative decision. That this external force has influenced the more informal processes of Title VII dispute resolution is evident by the structure of privately negotiated settlement agreements, which have incorporated judicially introduced results-oriented remedies. This article has sought to demonstrate that the more formal results-oriented approach has limited the potential of the informal processes for dispute resolution consistent with the more theoretically defensible process-defined nondiscrimination principle. More significantly, a results-orientation presents grave problems of institutional morality when the agreement incorporating it receives judicial approval in a settlement decree.

Judicial decisions are supposed to be rational and principled. Yet the preferential treatment remedy is not susceptible of rational and principled application. It has been shown here that the remedy will in many instances burden some persons not even remotely identified with past discrimination, and benefit others who are not actual victims of discrimination. This type of interest-balancing lacks the support not only of specific legal rules, but also of general notions of procedural and substantive fairness. When the courts thus fail to accord parties their traditional procedural rights and to account for their decisions by reference to established legal principles, they become more visibly a part of the political process. This in turn raises serious doubts about judicial disinterestedness and, more fundamentally, about judicial legitimacy. For while the courts do occasionally discharge functions that are not adjudicative in the usual sense of the word,

[such functions] are parasitic in the sense that they can be effectively carried out only by drawing on the legitimacy and moral force that courts have developed through the performance of their inherent function, adjudication according to the traditional conception. A certain amount of such parasitism can be accommodated, but too much undermines the very legitimacy on which it depends, because the nontraditional activities of the judiciary are at odds with the conditions that
ensure the moral force of its decisions.\textsuperscript{171}

It is, therefore, essential to think clearly about the limits of the adjudicative process and about the value of those limits in the perspective of government as a whole. To the extent that the adjudicative system is used in attempting to solve problems which are intractable to judicial solution, there is an undermining of the rule of law and an injection of the element of tyranny. Intrigued by the historical accompaniment of tyranny with irrigation, Fuller has analyzed the causes of despotism in primitive societies’ allocation of scarce water supplies.\textsuperscript{172} His explanation for the phenomenon is that early societies simply took on too difficult a social task too soon. Due to the limited state of social invention at the particular time, despotism was the only institutional means available for execution of the polycentric task.

Today there exists a panoply of social alternatives to despotism. Indeed, the movement away from despotism should, as Fuller has asserted,\textsuperscript{173} reflect not only an increasing availability of social alternatives, but also an increasing moral disposition to employ these alternatives, which should itself be nurtured by their use. The analysis presented here strongly suggests the necessity of a reexamination of the social alternatives available for the task of ordering employment relations on a nondiscriminatory basis. Courts can rationally and fairly administer the nondiscrimination principle only by recognizing their own institutional limitations and by respecting the institutional advantages of other, less formal processes of decision. In their failure to recognize these limitations and to act accordingly, the courts not only disserve the nondiscrimination value they purport to protect, but they also dilute their legitimacy to act in other areas of social concern more appropriate for judicial involvement.

\textsuperscript{171} Chayes, \textit{supra} note 2, at 1304, summarizing Lon Fuller’s argument.
\textsuperscript{172} Fuller, \textit{Irrigation and Tyranny, supra} note 3.
\textsuperscript{173} \textit{Id.}