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Getting Title VII Back on Track: Leaving *Allison* Behind for the *Robinson* Line

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I. INTRODUCTION

In *Robinson v. Metro-North Commuter Railroad Company*,[1] the Second Circuit created an important circuit split by departing from the Fifth Circuit's opinion in *Allison v. Citgo Petroleum Corporation*.[2] The circuit split concerns the proper interpretation and impact of the 1991 Civil Rights Amendments on Federal Rule of Civil Procedure ("Rule") 23. Two issues are at the heart of the split: (1) the availability of compensatory and punitive damages in a Rule 23(b)(2) class action; and (2) the power of federal courts to creatively sub-class, bifurcate, or modify Title VII proceedings under Rule 23(c)(4). These legal differences also have significant practical impacts because: (1) potential plaintiffs are unable to rely upon the federal courts to enforce Title VII civil rights claims; and (2) potential defendants are almost completely relieved from the large monetary and public relations liabilities concomitant with class action litigation.

This Comment argues that *Robinson*'s rejection of *Allison*'s unduly stringent requirements places civil rights back on the right *track* and provides the federal courts with a more judicially-manageable framework for resolving the disputed issues. *Robinson* is the right legal track to follow because it is more faithful to the text of Rule 23(b)(2) and the advisory committee note. This fidelity results in a workable test allowing courts to weigh the relative value of the requested monetary and equitable relief. Enabled to objectively valuate the requested relief, the *Robinson* test preserves judicial discretion to certify Rule 23(b)(2) classes. The *Robinson* test also creates judicial economy and maintains the doors of the federal judiciary open to adjudicate Title VII claims. Given these important jurisprudential considerations, courts should follow *Robinson* over *Allison* when faced with certification of a robust Rule 23(b)(2) class seeking a full range of remedies.

Part II of this Comment examines the 1964 Civil Rights Act, individual and class adjudication of Title VII litigation, the 1991 Civil

1. 267 F.3d 147 (2d Cir. 2001).
2. 151 F.3d 402 (5th Cir. 1998).

Rights Amendments, and the mechanics of Rule 23. Part III summarizes the *Allison* opinion. Part IV examines the procedural history, facts, and reasoning of *Robinson* in detail. Part V contrasts the two decisions and provides a broad outline of the analytic and judicial considerations favoring the *Robinson* track of analysis as better precedent. Part VI analyzes in detail how the *Robinson* and *Allison* tests stack up to the text of Rule 23 and the implications of their differing tests for monetary predominance in certifying a Rule 23(b)(2) class. Part VII explores the legitimacy of bifurcating Title VII class litigation and the conflicting views of *Robinson* and *Allison*. Part VIII provides empirical evidence that the *Allison* test is preventing effective enforcement of Title VII by private litigation, suggesting that the *Robinson* test better reflects congressional intent. Part IX briefly outlines the jurisprudential considerations supporting the adoption of *Robinson's* analysis and concludes by urging courts to leave *Allison* behind and follow the *Robinson* analytical *track*.

II. THE CIVIL RIGHTS ACTS AND TITLE VII LITIGATION

A. The 1964 Civil Rights Act

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.[3] The majority of Title VII enforcement is through private litigation, and a significant number of those suits are class actions.[4] Initially only injunctive, declarative, and equitable remedies were available to victims of discrimination.[5]

3. 42 U.S.C. § 2000e-2 (2000).

4. See, e.g., Amchem. Prods. v. Windsor, 521 U.S. 591, 614 (1997) ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of the use of Rule 23(b)(2).); Jefferson v. Ingersoll Int'l Inc., 195 F. 3d 894, 896 (7th Cir. 1999) ("For many years Rule 23(b)(2) was the normal basis of certification in Title VII pattern-or-practice cases."). The Equal Employment Opportunity Commission (EEOC) also has an enforcement role, but it brings far fewer numbers of cases and is not subject to the constraints of Rule 23. See generally, General Tel. Co. v. EEOC, 446 U.S. 318 (1980).

5. *See* 42 U.S.C. § 2000e-5(g) (2000). These remedies include

> a commitment by the respondent to cease engaging in the unlawful discrimination; the posting of notices alerting all respondent's employees of their right to be free of discrimination; corrective or preventive action designed to ensure that similar violations will not recur; nondiscriminatory placement of each identified victim; expungement of negative comments or adverse actions from employee's records; back pay for each identified victim; and attorney's fees.

2 EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, COMPLIANCE MANUAL, THEORIES OF DISCRIMINATION VOLUME § 604, no. 915.002 (July 14, 1992). After some debate among the circuit courts, front pay was an additional equitable remedy made available to Title VII discrimination victims. Front pay takes the place of employee reinstatement when reinstatement is not possible due

In order to qualify for relief, plaintiffs must prove either a disparate impact or disparate treatment theory of discrimination. Disparate treatment involves intentional discrimination by the employer.[6] However, due to the difficulty of proving an intentional motive, plaintiffs can also show discrimination where similarly situated individuals receive different treatment.[7] Disparate treatment is proved when a member of a protected group, who is qualified for a vacant position, is denied employment and "the employer continue[s] thereafter to seek applicants from persons of complainant's qualifications."[8] Disparate impact results from the use of a facially-neutral, non-intentional employment practice, such as requiring a high school diploma, which nevertheless produces a statistically significant and disproportionate effect on the protected class.[9]

Alternatively, rather than pursuing a claim on an individual basis, plaintiffs may seek to become class representatives and bring a Title VII class action, generally known as a "pattern or practice" suit.[10] This two phase procedure was approved by the Supreme Court in *International Brotherhood of Teamsters v. United States*.[11] "Pattern or practice" class actions are certified under Rule 23(b)(2) and are tried first in a preliminary liability phase. Only if discriminatory liability is found during the liability phase does a remedial damages phase begin.[12] During the first, or liability, phase, plaintiff's burden of proof must establish the employer's use of discrimination as a "standard operating procedure."[13] This burden is proved through the use of anecdotal (i.e., class representative testimony) and statistical evidence (i.e., from the class as a whole).[14] If the employer is unable to rebut the evidence, the court will conclude the existence of a discriminatory employment practice, order class-wide injunctive and declaratory relief, and give a rebuttable presumption of liability to each individual class member during the second phase.[15]

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to continued employee-employer hostility. *See* Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 846 (2001).

6. McDonald Douglas Corp. v. Green, 411 U.S. 792 (1973).

7. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

8. *McDonald Douglas Corp.*, 411 U.S. at 802.

9. Griggs v. Duke Power Co., 401 U.S. 424 (1971) (overruled by statute on other grounds).

10. *Teamsters*, 431 U.S. at 329.

11. 431 U.S. 324 (1977). For an explicit description of the two phases, see *EEOC v. McDonnell Douglas Corp*., 960 F. Supp. 203, 205 (E.D. Mo. 1996).

12. *Id*. at 329.

13. *Id*.

14. *Id.* at 336-37.

15. *Id.* at 361.

Phase two, the remedial stage, adjudicates individual damage claims, such as back pay and reinstatement. During the remedial stage, plaintiffs must prove they suffered an adverse employment action that resulted in an economic loss.[16] Defendant employers avoid individual liability only if they can prove the adverse employment action was motivated by "lawful reasons."[17]

B. The 1991 Civil Rights Amendments

Congress passed the 1991 Civil Rights Amendments "to provide *appropriate remedies* for intentional discrimination . . . and [*expand*] the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."[18] Congress maintained and expanded civil rights in the 1991 amendments in a variety of ways. In cases of intentional discrimination, Congress determined that both compensatory and punitive damages were appropriate remedies.[19] Congress also provided both parties with the right to trial by jury.[20] Additionally, Congress legislatively overruled several earlier Supreme Court decisions that severely limited the scope and application of Title VII.[21] These changes reflect continued congressional reliance upon private litigation to enforce Title VII's provisions.[22] Specifically, Congress assumed that class actions would continue to be certified after

16. *Id.* at 361-62.

17. *Id.* at 362.

18. Civil Rights Act of 1991, Pub. L. No. 102-166, §3, 105 Stat. 1071 (1991).

19. 42 U.S.C. § 1981(a) (2000). A "damage cap" was placed on the total amount of compensatory and punitive damages available, based on the size of the employer and ranging from $50,000 to $300,000. *Id.* § 1981a(b)(3).

20. *Id.* § 1981a(c).

21. The 1991 Act modified or overruled eight previous Supreme Court decisions. Section 101 responds to *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Section 105 responds explicitly to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Section 107 responds to *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989). Section 108 responds to *Martin v. Wilks*, 490 U.S. 755 (1989). Section 109 responds to *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991). Section 112 responds to *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989). Section 113 responds to *W. Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83 (1991). Section 114 responds to *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986). Significantly, the *Teamsters* opinion, setting forth the procedures for Title VII pattern or practice suits, was not addressed by the Act. *See* Susan E. Stokes, et al., Title VII Class Actions after *Allison v. Citgo Petroleum, Inc*. 19 ABA Annual 5 n.6 (1999), *available at* http://www.bna.com/bnabooks/ ababna/annual/99/annual19.pdf. (demonstrating (1) statutory language overriding the *Wilks* Court mirrored the language and structure of Rule 23; (2) committee reports referencing successful class actions as a model for future enforcement; and (3) objections that compensatory and punitive damages would now be available to class plaintiffs claiming discrimination under the 1991 amendments).

22. The House Report for the 1991 Act provides that compensatory and punitive damages were included to "encourage citizens to act as private attorneys general." H.R. REP. NO. 102-40(I), at 65 (1991).

the 1991 amendments.[23] Together, these changes demonstrate that the 1991 Act was intended to expand, not curtail or limit, the use of class actions to enforce civil rights.[24]

C. Federal Rule of Civil Procedure 23—Class Actions

When one individual from a protected class has been discriminated against, similar discrimination against other individuals from that same, or another, protected class frequently occurs. Traditionally, Title VII employment discrimination suits have been brought as employment class actions under Rule 23. However, discrimination itself does not create a presumption of class action suitability, and the proposed class must meet the four universal elements required by Rule 23(a) and conform to at least one of the four types of class actions created by Rule 23(b).[25]

Rule 23(a) requires that a proposed class satisfy the elements of numerosity, typicality, commonality, and adequacy of representation.[26] Rule 23(b) creates four types of class actions and a class must fulfill the requirements of either Rule 23(b)(1), (b)(2) or (b)(3) before qualifying for certification. A Rule 23(b)(1) "prejudice" class occurs when resolving the dispute through individual litigation would result in a race to the courthouse where the first case to be decided would effectively decide all other subsequent lawsuits on the same matter.[27] Similarly, a Rule 23(b)(1) "limited fund" class generally occurs when the defendant has insufficient assets to pay potential legal liabilities of all potential plaintiffs.[28] A Rule 23(b)(2) "injunctive" class allows certification where plaintiffs suffer substantially the same injuries from defendants' allegedly illegal treatment.[29]

A Rule 23(b)(3) "damage" class was created to allow certification of negative value lawsuits that would otherwise never be adjudicated on an

23. *See supra* note 22.

24. *See, e.g.*, Roger Clegg, *A Brief Legislative History of the Civil Rights Act of 1991*, 54 LA. L. REV. 1459, 1459-71 (1994). Additionally, if the 1991 Congress had intended to change the then current practice of certifying Title VII litigation under Rule 23(b)(2), it could have modified the *Teamsters* decision at the same time as it modified the *Wards Cove* and *Wilks* decisions.

25. *See* Gen. Tel. Co. of S.W. v. Falcon, 457 U.S. 147 (1982).

26. FED. R. CIV. P. 23(a).

27. FED. R. CIV. P. 23(b)(1). The text allows certification of a "prejudice" class where separate, individual suits would create "inconsistent or varying adjudications . . . which would establish incompatible standards of conduct" or when adjudications on the individual cases "would as a practical matter be dispositive of the interests of the other members not parties to the adjudication." *Id*.

28. FED. R. CIV. P. 23(b)(1).

29. FED. R. CIV. P. 23(b)(2). The text allows certification of an "injunctive relief" class where the defendant "has acted . . . on grounds generally applicable to the class," and the plaintiffs seek final injunctive or equitable relief that the court can impose "with respect to the class as a whole." *Id*.

individual basis.[30] In the case of a negative value suit, the denial of class certification usually spells the end of all litigation, both class and individual.[31] Unlike other classes, a Rule 23(b)(3) damage class requires predominance[32] and superiority[33] elements in addition to notice & opt-out procedures[34] before certification is proper. Alternatively, the predominance and superiority requirements of a 23(b)(3) class can also be met through certification of "issue-specific" classes dealing only with issues common to the class as a whole and leaving non-common issues for individual adjudication.[35]

The trial court makes the initial certification decision.[36] Historically, the trial court has broad discretion on the appropriateness of class certification due to the fact specific nature of the inquiry.[37] However, Rule 23(f) now allows for appellate review immediately after the trial court's initial certification decision.[38] On appeal, the denial of

30. FED. R. CIV. P. 23(b)(3). *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) ("Class actions . . . permit the plaintiffs to pool claims which would be uneconomical to litigate individually."). A negative value suit occurs when the value of a claim is too small to cover the transaction costs associated with any "meaningful individual enforcement of even well-established, meritorious claims." Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1059 (2002).

31. *See, e.g.*, Coopers & Lybrand v. Livesay, 437 U.S. 463, 470-71 (1978) (recognizing that the denial of class certification "may induce a plaintiff to abandon his individual claim").

32. FED. R. CIV. P. 23(b)(3). The predominance element requires the "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." *Id*.

33. *Id*. The superiority element requires that a class action "is superior to other available methods" of adjudicating the suit. Courts determine superiority by weighing the following four factors: (1) "the interest of members of the class in individually controlling the prosecution or defense of separate actions"; (2) "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class"; (3) "the desirability or undesirability of concentrating the litigation of the claims in the particular forum"; and (4) "the difficulties likely to be encountered in the management of a class action." *Id. See* Amchem Products, Inc. v. Windsor, 521 U.S. 591, 618 (1997).

34. FED. R. CIV. P. 23(c)(2). Notice and opt-out procedures are required in order to give absent class members an opportunity to escape the res judicata effects of litigation under Rule 23(b)(3). *Id*. In contrast, neither a 23(b)(1) nor a 23(b)(2) class requires notice and opt-out procedures because of the cohesive interest of the entire class in the litigation outcome. *See* Johnson v. Gen. Motors Corp., 598 F.2d 432, 437 (5th Cir. 1979); *see also* FED. R. CIV. P. 23(b)(1)-(2). However, if the cohesive interest falters, courts may order notice and opt-out procedures to protect the due process rights of class members. *Johnson*, 598 F.2d at 438. *See also* Kyriazi v. W. Elec. Co., 647 F.2d 388, 392-95 (3d Cir. 1981).

35. FED. R. CIV. P. 23(c)(4). The certification of an issue-specific class, as with all classes, is further subject to the court's power to modify or rescind the class certification if the class proves unmanageable or if discovery creates additional issues that are best adjudicated on an individual basis. FED. R. CIV. P. 23(d)(4)

36. FED. R. CIV. P. 23(c)(1).

37. Sirota v. Solitron Devices, Inc., 673 F.2d 566, 570-72 (2d Cir. 1982).

38. FED. R. CIV. P. 23(f). Rule 23 was amended in 2000 to allow for appeals without the need for a mandamus order or other procedure. *Id*.

certification is reviewed under the abuse of discretion standard due to the highly factual nature of the court's initial determination.[39]

III. *ALLISON V. CITGO PETROLEUM CORP.*, AND THE 1991 CIVIL RIGHTS AMENDMENTS

A. Facts

In *Allison v. Citgo*, over 130 named plaintiffs sought to become class representatives on behalf of a putative class of more than one thousand potential members.[40] They brought suit pursuant to Title VII for allegedly discriminatory employment practices related to hiring, training, compensation and promotion policies.[41] The district court denied class certification and the *Allison* court affirmed the denial of class certification in a 2-1 decision.[42] In denying class certification, the *Allison* court specifically noted, "Before the passage of the Civil Rights Act of 1991 . . . aspects of this case clearly would have qualified for class certification."[43]

Applying the terms of the 1991 Act to the requirements of Rule 23, the *Allison* court found that class certification was inappropriate under 23(b)(2), 23(b)(3), or a bifurcated 23(b)(2) liability phase with a 23(b)(3) remedial phase trial because of three distinct problems: (1) the inappropriate predominant nature of monetary remedies in a 23(b)(2) class; (2) the superiority of individual trials to a 23(b)(3) class where individualized monetary damages are sought; and (3) Seventh Amendment concerns about the existence of common issues between the equitable and legal claims.[44]

B. Allison*'s Analysis*[45]

Allison's first problem with 23(b)(2) certification involved whether the monetary relief requested was incidental or predominant. Noting that the plain language of Rule 23(b)(2) is silent as to the availability of monetary damages in a 23(b)(2) class, *Allison* turned to the advisory committee notes on Rule 23 stating that a 23(b)(2) class "does not extend

39. *Sirota*, 673 F.2d at 570-72; Jenkins v. Raymark Indus., 782 F.2d 468, 471-72 (5th Cir. 1986).

40. 151 F.3d 402, 407 (5th Cir. 1998).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 408-09. *See infra* discussion notes 59-61.

45. Rather than include an analysis of the dissenting opinion in *Allison*, relevant portions of Judge Dennis' dissent are brought up in Part IV and V to support the *Robinson* test.

to cases in which the appropriate final relief relates exclusively or predominantly to money damages."[46] From this language, the court presumed that monetary relief predominates in a 23(b)(2) class unless it is "incidental to requested injunctive or declaratory relief."[47] The court defined incidental monetary relief as "damages that flow directly from liability to the class *as a whole* on the claims forming the basis of . . . relief."[48] Further, incidental monetary relief (1) would be "capable of computation by means of objective standards," (2) would "not require additional hearings to resolve the disparate merits of each individual's case," or (3) "entail complex individualized determinations."[49] Applying this test to the proposed class, the court determined that the compensatory and punitive damages sought required "specific individualized proof," could not be "calculated by objective standards," and were "clearly . . . not incidental to class-wide injunctive or declaratory relief."[50] In sum, the *Allison* court de facto precludes the certification of nearly all (b)(2) classes that seek monetary relief.

The *Allison* court also found that the proposed class failed to meet the superiority and predominance requirements for certification under 23(b)(3). The predominance test could not be met because the compensatory and punitive damages claims, as discussed above, required "individualized and independent proof of injury" in addition to "the means by which discrimination was inflicted" regarding each class member.[51] This requirement, with a "focus almost entirely on facts and issues specific to individuals rather than the class as a whole" would destroy the efficiency of a class proceeding and turn it "into multiple lawsuits separately tried."[52]

Similarly, the superiority element could not be met because "individual-specific issues" would decrease the efficiency of the class, create "manageability problems" with a jury trial with thousands of potential plaintiffs, and create the potential need for multiple juries which could "introduc[e] potential Seventh Amendment problems."[53] Given the 1991 Act's provision for monetary damages and attorney's fees, individuals already had sufficient incentive to file their own

46. FED. R. CIV. P. 23 advisory committee notes.
47. *Allison*, 151 F.3d at 415.
48. *Id.*
49. *Id.*
50. *Id.* at 417.
51. *Id.* at 419.
52. *Id.*
53. *Id.* at 419-20.

individual suits and did not need class certification to overcome the possibility of a negative value suit.[54]

Finally, the *Allison* majority ruled that a bifurcated proceeding, with a 23(b)(2) or 23(b)(3) class certified only for the liability phase would either waste judicial resources or violate the right to jury trial provided by the Seventh Amendment and the 1991 Act. The plaintiffs requested certification "on the disparate impact claim and the first stage of the pattern or practice claim."[55] The court rejected the requests for two reasons. First, the court determined that certifying the pattern or practice claim would not "increase the likelihood that latter certification of the second stage . . . would be possible" and that without this the district court lacked any grounds to certify the class.[56] Second, Fifth Circuit precedent prohibited an end-run around the predominance requirement of 23(b)(3) by temporarily "sever[ing] issues until the remaining common issue predominates over the remaining individual issues" through the use of Rule 23(c)(4).[57]

Having rejected certification of the pattern and practice claim, the *Allison* court finally considered the possibility of partial class certification for the adverse impact claim.[58] However, this course was rejected because the *Allison* court found that the right to a jury trial had attached to the pattern or practice claim, and hence to "all factual issues necessary to resolving that claim."[59] Therefore, because both claims involved the existence of common factual issues, the certification of an adverse impact class would result in factual issues being tried by the court prior to a jury determination and would therefore run "afoul of the Seventh Amendment."[60] The *Allison* court's analysis dominated the opinions of other federal courts and effectively foreclosed class enforcement of Title VII until the Second Circuit's rejection of *Allison* in 2001.[61]

54. *Id. See supra* text and discussion accompanying notes 30-31.

55. *Allison*, 151 F.3d at 420.

56. *Id.* at 421.

57. *Id.* at 422.

58. *Id.*

59. *Id.* at 423.

60. *Id.* at 425.

61. Three circuits have explicitly adopted the *Allison* (b)(2) test while a fourth is wavering. Jefferson v. Ingersoll Int'l, Inc., 195 F.3d 894 (7th Cir. 1999) (adopting *Allison's* (b)(2) predominance test); Lemon v. Int'l Union of Operating Eng'rs, 216 F.3d 577 (7th Cir. 2000) (re-affirming *Allison's* (b)(2) test but allowing consideration of bifurcated proceedings); Barabin v. Aramark Corp., 2003 U.S. App. LEXIS 3532 (3d Cir. 2003) (adopting *Allison's* (b)(2) test in Title VII discrimination suit); Rutstein v. Avis Rent-a-Car Sys., Inc., 211 F.3d 1228 (11th Cir. 2000) (adopting *Allison's* (b)(2) test in §1981 discrimination suit). *But cf.* Molski v. Gleich, 307 F.3d 1155 (9th Cir 2002), *opinion withdrawn*, Molski v. Gleich, 2003 U.S. App. LEXIS 2055 (9th Cir. Feb. 6, 2003). The following circuit courts have all followed the *Allison* (b)(2) test: Reap v. Cont'l Cas. Co.,

IV. *ROBINSON V. METRO NORTH COMMUTER RAILROAD*

A. Facts and Procedural History

In 1997, twenty-five current and former employees of Metro-North Commuter Railroad sought class certification under Rule 23(b)(2) of a Title VII employment discrimination claim against their employer.[62] They charged that Metro-North "engage[d] in company-wide discriminatory practices," i.e. a pattern or practice suit.[63] The plaintiffs were African-Americans seeking to certify a proposed class of "all African-American employees of Metro-North Commuter Railroad from 1983 to 1996" who were either lower-management or unionized workers.[64] District Judge Rakoff denied the motion for class certification after extensive discovery because plaintiffs "failed to carry their burden" on "both the commonality and the typicality" elements of Rule 23(a).[65]

Subsequently, Judge Rakoff granted summary judgment dismissing the claims of nine of the plaintiffs, leaving only four plaintiffs in the suit.[66] Class plaintiffs then appealed the denial of class certification and the Second Circuit reversed and remanded for further proceedings.[67] Judge Newman of the Second Circuit found that the district court, in its denial of class certification, had committed a reversible error by considering "the merits of the claims of the purported class," which is inappropriate at the certification stage.[68] Judge Newman also found that the plaintiffs had met the requirements of Rule 23(a) and ordered the district court to consider the requirements of Rule 23(b) on remand.[69]

Upon remand, Judge Rakoff considered plaintiffs' renewed motion for class certification for trial on bifurcated liability and damages.[70] The court, relying primarily upon, and quoting extensively from, the *Allison* decision, determined that 23(b)(2) certification was inappropriate because of the need for "individualized proof and proceedings to

199 F.R.D. 536 (D.N.J. 2001); Ramirez v. DeCoster, 194 F.R.D. 348 (D. Me. 2000); Rineheart v. Ciba-Geigy Corp., 183 F.R.D. 497 (M.D. La. 1998); Sibley v. Diversified Collection Svcs., Inc., 1998 WL 355492 (N.D. Tex. June 30, 1998).

62. Robinson v. Metro-North Commuter R.R. Co., 175 F.R.D. 46 (S.D.N.Y. 1997).

63. *Id*. at 46-47.

64. *Id.*

65. *Id.*

66. Robinson v. Metro-North Commuter R.R. Co., 1998 U.S. Dist. LEXIS 373, *2 (S.D.N.Y. Jan. 15, 1998). The claims of the other initial plaintiffs were withdrawn prior to this judgment. *Id.* at 2 n.1.

67. Caridad v. Metro-North Commuter R.R. Co., 191 F.3d 283, 296 (2d Cir. 1999).

68. *Id.* at 293.

69. *Id*.

70. Robinson v. Metro-North Commuter R.R. Co., 197 F.R.D. 85 (S.D.N.Y 2000).

determine . . . what individualized damages were appropriate."[71] Such individualized proceedings would "overwhelm" either the liability or damages phase and "make class action treatment inappropriate under Rule 23(b)(2)."[72] For similar reasons, the court determined that 23(b)(3) certification was not possible because "questions of fact affecting individual members of the class" predominated over any common questions.[73] The superiority element also could not be met because of the individual plaintiffs' interest in controlling prosecution of the case, doubts about the adequacy of the class representatives, the localized nature of the dispute within New York, and the challenges of "management of a class action" with highly individualized factors.[74] Given these findings, the court dismissed the case with prejudice.[75]

B. Robinson *Ruling Redux*

On appeal for the second time, the Second Circuit, in a 3-0 decision, vacated the district court's order dismissing the case and ordered the court to certify a disparate impact class under 23(b)(2).[76] The panel also ordered the district court to consider whether the pattern or practice claim should be certified as a 23(b)(2) class or bifurcated to allow certification of the liability stage of the pattern or practice claim.[77] The Second Circuit reached this decision after deciding that the trial court had abused its discretion by applying the wrong legal test in determining the appropriateness of class certification.[78] Chief Judge Walker held that the *Allison* "incidental" test was the incorrect legal standard to apply, that the refusal to bifurcate the pattern or practice claim was an abuse of discretion, that a disparate impact class would not violate the Seventh Amendment, and that consideration of class plaintiffs' adequacy as representatives was inappropriate.[79]

1. Incidental test

In a case of first instance in the Second Circuit, the *Robinson* panel refused to adopt the *Allison* "incidental" test for determining the

71. *Id.* at 88.
72. *Id.*
73. *Id.* at 89.
74. *Id.*
75. *Id.* at 90.
76. Robinson v. Metro-North Commuter R.R Co., 267 F.3d 147 (2d Cir. 2001).
77. *Id.*
78. *Id.* at 167.
79. *Id.* The first three holdings are discussed in detail in this Comment, while the adequacy of the plaintiff class is outside the scope of this Comment.

feasibility of certifying a 23(b)(2) class that seeks monetary, in addition to equitable, relief.[80] The court held that the *Allison* "incidental" test effectively "forecloses 23(b)(2) class certification of all claims that include compensatory damages (or punitive damages)."[81] Rather than adopt this "bright-line bar to 23(b)(2) class treatment of all claims" for monetary damages, the *Robinson* court created an "ad hoc" or "balancing" test to determine the appropriateness of 23(b)(2) certification.[82]

The balancing test essentially adopted the holding of the *Allison* dissent, that the totality of the remedies sought should be weighed, considering whether "the positive weight or value [to plaintiffs] of the injunctive or declaratory relief sought is predominant" and whether "class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy."[83] However, the *Robinson* court added two additional elements for plaintiffs to meet in order to certify a mixed remedy 23(b)(2) class. First, "reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought."[84] Second, "the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits."These two requirements effectively ferret out "sham requests for injunctive relief" that predominantly seek monetary relief.[85]

The court reasoned that a balancing approach was preferable to the bright-line *Allison* prohibition because it restores district court discretion, achieves greater judicial efficiency, and "ensur[es] due process for absent class members."[86] First, Rule 23 vests the decision of whether to grant or deny class certification in the district court.[87] The Second Circuit, turning to precedent and the leading treatise on class actions, was persuaded that "[n]o clear standards have been or could be developed" in light of legislatively granted judicial discretion.[88] Second, judicial efficiency is better served by "permitting district courts to assess issues . . . on a case-by-case basis . . . [rather than] the one-size-fits all approach of the [*Allison*] incidental damages standard."[89] Third, the due process concerns

80. *Id.* at 164.

81. *Id.* at 163.

82. *Id.* at 164.

83. *Id.* (quoting Allison v. Citgo Petroleum Corp., 151 F.3d 402, 430 (5th Cir. 1998) (Dennis J., dissenting)).

84. *Id.*

85. *Id.*

86. *Id.* at 165.

87. FED. R. CIV. P. 23.

88. *Robinson*, 267 F.3d at 165. (quoting 1 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 4.14 at 48-49 (3d 1992)).

89. *Id.*

that led the *Allison* court to adopt a bright-line prohibition are absent when "the district court simply afford[s] notice and opt out rights to absent class members . . . for the damages phase of the proceedings."[90] In the absence of due process concerns, the *Robinson* court held that "the interests of the class members [remain] essentially identical" and are "ensured by adequate representation alone" at the liability phase of class proceedings, and thus and make 23(b)(2) certification appropriate.[91]

2. Bifurcated proceedings

Next, the *Robinson* panel considered the district court's denial of class certification of a liability phase only pattern or practice claim. In finding that the district court erred in not certifying a liability class, the *Robinson* court turned to Rule 23(c)(4), which allows "an action [to] be brought or maintained as a class action with respect to particular issues."[92] This Rule has been interpreted to mean that the use of bifurcated trials should be maximized in district courts in order to conserve "judicial resources."[93] The court agreed with commentators that "class action[s] should not be found unmanageable without exploring . . . bifurcating liability and damages."[94] The court found that a liability-only class would "promote judicial economy" and decrease the "range of issues in dispute" because it would establish whether the plaintiffs' class should receive prospective relief, a presumption of liability for each individual employee, and whether or not a damages phase would even be needed.[95]

3. Seventh Amendment issues[96]

The *Robinson* court also ordered the district court to certify a disparate impact 23(b)(2) class. The district court had not done so because of potential problems with the Seventh Amendment that could

90. *Id.* at 166.

91. *Id.* at 166 n.10.

92. FED. R. CIV. P. 23(c)(4).

93. Cent. Wesleyan Coll. v. W.R. Grace & Co., 6 F.3d 177, 185 (4th Cir. 1993).

94. *Robinson*, 267 F.3d at 168 (quoting Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507, 516 (1987)).

95. *Id.* The court also corrected the district court's misunderstanding regarding the role of anecdotal evidence as "texture" to the "statistical evidence directed at establishing an overall pattern or practice of intentional discrimination." *Id.* at 168.

96. While the Seventh Amendment problem is discussed here as an important part of the *Robinson* decision, it will not be analyzed as it is out of the scope of this Comment. The Seventh Amendment problem deals primarily with procedural problems arising from certifying a disparate impact class. This paper focuses solely upon the appropriateness of bringing a pattern or practice discrimination claim under Rule 23(b)(2) and/or 23(b)(3).

arise if the disparate impact claim were tried first. However, the *Robinson* court noted that this problem was obviated by plaintiffs' "opportunity to proceed to a jury trial first on the liability phase of the pattern-or-practice claim."[97] If the plaintiffs were successful, the disparate impact trial could be delayed until after the remedial phase of the pattern or practice claim, thereby preventing "any overlapping factual issues between the two claims" because they would have been first tried by the pattern or practice jury.[98] Alternatively, if defendants were successful after the liability phase, the disparate impact judge could rely upon "answers to special interrogatories from the pattern or practice jury for any overlapping common factual issues."[99]

V. ANALYTICAL FRAMEWORK: WHY *ROBINSON* IS A BETTER LINE OF LEGAL REASONING TO FOLLOW THAN *ALLISON*

While circuit court splits initially create confusion about the state of the law, the *Robinson* court's rejection of *Allison* actually clears up a substantial amount of confusion caused by the *Allison* decision. The *Allison* court's "incidental" bright-line test of monetary predominance in a Rule 23(b)(2) action has two fundamental flaws. First, it misapprehends both the purpose and text of 23(b)(2). Second, it impermissibly usurps the trial court's legislatively vested discretion in making class certification decisions. *Robinson* corrects the confusion caused by these two errors by creating a balancing test that adheres closely to the purposes of Rule 23(b)(2) actions and preserves the role of the trial court in evaluating class certification motions.

Allison created further judicial confusion by refusing to bifurcate the proceedings and certify a liability-only class under Rule 23(b)(2) or 23(b)(3). Analytically, the *Allison* court's decision denying bifurcation was based upon an overly broad reading of *Castano v. American Tobacco Co.*,[100] a complete misreading of *Cooper v. Federal Reserve Bank of Richmond*,[101] and the unnecessary implication of only potential Seventh Amendment and due process concerns. *Robinson* corrects this by pointing out how proper use of Rule 23(c)(4) can be used to bifurcate class issues and achieve judicial economy.[102]

Additionally, *Allison* condemned the judiciary to adjudicate all Title VII claims seeking monetary damages by individual trials. Practically,

97. *Robinson*, 267 F.3d at 170.
98. *Id.*
99. *Id.*
100. 84 F.3d 734 (5th Cir. 1996).
101. 467 U.S. 867 (1984). *See infra* notes 188-93.
102. *Robinson*, 267 F.3d at 167-69.

the requirement of individual non-class adjudication effectively denies Title VII plaintiffs access to the federal court system designed to protect their rights and eviscerates civil rights enforcement. Despite the availability of compensatory and punitive damages, individual plaintiffs still face the negative value dilemma. This result is clearly at odds with the express intent of Congress when it passed the 1991 Act to expand and increase the scope of remedies available to discrimination victims. *Robinson* corrects this by actively engaging *Allison's* potential constitutional problems and avoiding them by using existing procedures and crafting new procedures. *Robinson*'s analysis safeguards constitutional rights without sacrificing effective civil rights enforcement.

VI. SUPERIORITY OF *ROBINSON'S* RULE 23(B)(2) BALANCING TEST VS. *ALLISON'S* BRIGHT LINE RULE

The *Robinson* court adopted an "ad hoc" or balancing test for the Second Circuit rather than adopting the *Allison* court's bright-line test to decide whether monetary relief *predominates* in a 23(b)(2) class.[103] The balancing approach is superior to a bright-line test for several reasons. First, it adheres to the unambiguous plain meaning established by the text of Rule 23(b)(2) which *Allison* ignores. Second, the advisory committee note on Rule 23(b)(2) clearly calls for a relationship test that weighs the requested injunctive or declarative relief with the requested monetary relief. *Allison* abandons the committee's call in favor of a test that evaluates the procedures required to adjudicate and order the relief requested. In contrast, *Robinson* confronts the committee note's task directly and creates a balancing test to weight the relationship between the monetary and injunctive or declarative relief requested. Third, the *Allison* test for the predominance of monetary relief in a Rule 23(b)(2) suit attempts to re-write the (b)(2) class in the image of Rule 23(b)(3). *Allison* thereby effectively creates a "monetary damages" firewall that protects litigant's due process rights while simultaneously denying these same litigants the opportunity to bring their Title VII claims in a Rule 23(b)(2) class. In contrast, the *Robinson* test, by focusing on the textual requirements of the Rule, recognizes that existing Rule 23 procedures effectively ensure due process without creating an overly broad test. Finally, the *Robinson* test preserves judicial discretion over class certification. In contrast, *Allison* creates an extra-textual test that effectively strips district courts of their discretion to certify a Rule 23(b)(2) class that seeks monetary damages provided for by the 1991

103. Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 162-64 (2d Cir. 2001).

amendments. These four considerations indicate that the *Robinson* court's balancing test is a superior indication of when a Rule 23(b)(2) class seeking a full range of Title VII remedies should be certified.

A. Rule 23(b)(2)'s Minimal Textual Requirements and Plain Meaning

The text of Rule 23(b)(2) establishes a two-prong test for certification. The first prong requires that the defendant "has acted . . . on grounds generally applicable to the class." [104] The second prong requires that plaintiffs seek "final injunctive or equitable relief with respect to the class as a whole."[105] The first prong is met when an employment practice allegedly discriminates in a manner "generally applicable to the class."[106] The second prong is met when the putative class files for final injunctive or declaratory relief from the employment practice on behalf of "the class as a whole."[107]

When these two elements have been met, certification should be granted because neither the text nor its plain meaning establish any further criteria. As a matter of construction, where the text of a statute or rule is unambiguous, the text and plain meaning of the text should be controlling without resorting to extra-textual sources, such as the advisory committee notes, in order to divine legislative intent.[108] Therefore, any class that can meet the textual requirements of Rule 23(b)(2) should be entitled to at least a presumption of legitimacy. However, most courts have eschewed this approach, finding the text of the Rule ambiguous, and relying upon the 1966 advisory committee note on Rule 23(b)(2) for guidance.[109]

104. FED. R. CIV. P. 23(b)(2).

105. *Id.*

106. *Id.*

107. *Id*.

108. *See generally*, Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

109. While reliance upon the advisory committee note is well established in precedent, its necessity is questionable in the current case. Within the context of the Rule, a strong argument can be made that a prospective class that properly meets the two textual requirements of 23(b)(2)is not a "sham" suit and should be certified. In order to achieve 23(b)(2) certification, the injunctive or declaratory relief must be "final" and "settle the legality" of the action or failure to act. These requirements alone might be ruled sufficient, without any need to delve into what "predominant" means. An exact definition might not be necessary because without the injunctive or declaratory relief, no class is possible. If an action contains a *sine qua non*, such as injunctive or declaratory relief, this relief obviously predominates over any other type of relief sought. As a matter of interpretation, where the text of a statute or rule is unambiguous, the plain language and meaning of the text should be controlling without resorting to legislative history in order to divine legislative intent. *See generally id*. Here, because the text of the rule is silent regarding whether or not other forms of relief, in addition to injunctive or declaratory, are available to a 23(b)(2) class, their inclusion should not be read so as to change the explicit textual requirements for certification.

B. Advisory Committee Notes: The Scope of Rule 23(b)(2)

The 23(b)(2) class was specifically created in order to allow the adjudication of civil rights class actions under Title VII.[110] This consideration should shape how both the text of the Rule and the advisory committee note for the Rule are interpreted. The advisory committee note for Rule 23(b)(2) contains one statement that supports the clear meaning of the text and one statement that purports to add an additional element for class certification under the Rule. The note first states:

> This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate.[111]

This initial comment by the 1966 advisory committee mirrors the text of Rule 23(b)(2) and makes it abundantly clear that courts should focus on whether the injunctive or declaratory relief requested "settl[es] the legality of the [employment practice] with respect *to the class*."[112] The note indicates that any test should also focus on whether the injunctive or declaratory relief requested will force or prevent "*action*," in this case the discriminatory employment practice, with respect "*to the class*," not to each individual member of the class.[113] If the above quote were the only language in the note then the matter would be decided based on the two textual requirements of Rule 23(b)(2) alone. This would exclude the inclusion of monetary damages as a relevant factor in determining class certification.

However, the advisory committee note also states that 23(b)(2) classes do "not extend to cases in which the *appropriate* final relief *relates exclusively* or *predominantly* to money damages."[114] The exact meaning of this phrase is the focus of the split between the *Allison* and *Robinson* courts. As discussed above, the *Allison* test concludes that only "incidental" monetary damage claims will not predominate in a 23(b)(2) class.[115] In contrast, the *Robinson* court ruled that monetary damage

110. See, e.g., FED. R. CIV. P. 23(b)(2) advisory committee note; 2-14A MOORE'S MANUAL – FEDERAL PRACTICE AND PROCEDURE, §14A.32 ("Rule 23(b)(2) was promulgated essentially as a tool for facilitating civil rights actions.").

111. FED. R. CIV. P. 23(b)(2) advisory committee note.

112. *Id.* (emphasis added).

113. *Id.* (emphasis added).

114. *Id.* (emphasis added).

115. Allison v. Citgo Petroleum Corp., 151 F.3d 402, 417 (5th Cir. 1998).

claims are appropriate in a 23(b)(2) class as long as they do not predominate over the requested injunctive or declaratory relief.[116]

The text of the committee note itself does not resolve the *Allison/Robinson* split. However, it does provide clear guidance from which to evaluate the two courts' distinct tests. The comment self-defines *appropriate* final relief as being of "an injunctive nature or . . . declaratory nature."[117] Similarly, the "*exclusively*" language is self-defining because the Rule's text requires that a prospective 23(b)(2) class must be seeking *appropriate* injunctive or declaratory relief. In plain meaning, an action "exclusive[ly]" seeking money damages would not allow for the inclusion of any other remedy, i.e., the necessary injunction or declaration. The inclusion of "exclusive" therefore serves as an indicator that "sham" or pre-textual claims for injunctive or declaratory relief will not make money damage claims appropriate for 23(b)(2) certification.[118]

However, this understanding does not answer the question of whether money damages may be sought concurrently with *appropriate* claims for injunctive or declaratory relief. However, the note does indicate that the proper test to determine if money damages predominate is how they "relate[]" to "appropriate" injunctive or declaratory relief.[119] Given the inclusion of the unnecessary "exclusively" language, the committee note clearly asks judges to decide whether the relationship between the injunctive or declaratory "appropriate final relief" and the requested money damages relief is legitimate or whether money damages are sought as the *predominant* form of "final relief" requested.[120] Because the committee note does not define "predominantly," the next section compiles definitions of "predominant" in an attempt to clarify the permissible amount of monetary damage claims that would not predominate in a Rule 23(b)(2) class.

C. Predominant Money Damages: A Relationship Test Comparing Relief or Relief Procedures?

The *Allison* and *Robinson* courts each define "predominant" differently. The *Allison* court focuses upon the procedures required for a court to order the requested monetary relief vis-à-vis injunctive or declaratory relief. The *Robinson* court's definition of predominance directly compares the types of relief requested. A large variety of

116. Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 162-64 (2d Cir. 2001).

117. *Id*.

118. *See* In re Sch. Asbestos Litig., 789 F.2d 996, 1008 (3d Cir. 1986).

119. FED. R. CIV. P. 23(b)(2) advisory committee note.

120. *Id*.

definitions of "predominant" exist. Therefore, before analyzing the word, the following admonition by Justice Douglas is relevant:

> [I]n the English language, each word may have several meanings. Often it is the use of a specific word or term upon which a case or controversy may hinge. Only by using precise language can the waters remain clear and unmuddied allowing justice to take its course unfettered by those who would mislead or misrepresent.[121]

Justice Douglas' quote highlights the high stakes involved in defining when "the appropriate final relief relates . . . predominantly to money damages."[122] Regardless of which test eventually wins out, the lack of a specific definition in the mean time has already hindered the course of justice in deterring discrimination.

The *American Heritage Dictionary of the English Language* defines predominant as "[h]aving greatest ascendancy, importance, influence, authority, or force."[123] This influence "often implies being uppermost at a *particular time*."[124] *Merriam-Webster's Collegiate Dictionary* defines predominant as "being most frequent or common."[125] Predominant monetary damages must therefore be the most important, the most influential, the most frequent or common, or most often requested relief.

The *Allison* test appears to favor a "most infludential" definition, where the "particular time" used to define this influence is at the damages phase of a prospective class's adjudication.[126] Under this understanding of "predominant," the determination of compensatory damages for each individual involves the *most frequent*, *common* or *numerous* relief in the sense of total time necessary to adjudicate the claims.[127] It also makes the individualized claims for monetary damages the most quantitatively numerous in comparison with the single claim for class injunctive and/or declaratory relief.[128] Therefore, this definition of predominance focuses upon the *procedures* necessary for relief to be granted.

In contrast, the *Robinson* test appears to favor a qualitative "most influential" test, where two "particular times" are weighed to determine the predominance of any monetary claims. The first time is the plaintiffs'

121. William O. Douglas, *Foreward* to WILLIAM C. BURTONS, BURTON'S LEGAL THESAURUS vi (3d ed. 1998).

122. FED. R. CIV. P. 23(b)(2) advisory committee note. *See also supra* note 46.

123. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1383 (4th ed. 2000) (emphasis added).

124. *Id.* at 534 (emphasis added).

125. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 918 (10th ed. 1993).

126. Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998).

127. *Id.* at 419.

128. *Id.* at 415-19.

initial decision to pursue both injunctive or declaratory and monetary damages. This test weighs both the comparative "values" of the relief sought and whether the suit would be brought in the absence of monetary damages.[129] The second time is at the granting of any final relief, where the "injunctive or declaratory relief sought would be both reasonably necessary and appropriate" in the event of a finding for plaintiffs.[130] This definition of predominance focuses upon the *relief* itself rather than procedural issues or how evidence would be proven in court.

Both the *Allison* and *Robinson* interpretations of predominant are reasonable in light of the multiplicity of definitions. As *Allison* noted, "[H]ow [the definition] translates into a workable formula for comparing . . . [predominance] is not at all clear."[131] However, each court's relative reliance, or lack thereof, on the advisory committee note signals how these two tests, each of which purports to define predominant, could reach such significant and substantially different results. The *Allison* court stated "[t]he Advisory Committee Notes [sic] make no effort to define or explain" predominantly.[132] Instead, they looked for guidance from "the principles and assumptions underlying the 23(b)(2) class and class actions in general."[133] The *Allison* court thus missed the subtle, yet explicit, contextual direction key to defining predominantly provided in the advisory committee note.

As discussed briefly above[134], the advisory committee note directs courts to focus on the relief requested and whether the relationship between the injunctive relief requested and claims for money damages is predominantly monetary.[135] Earlier, the advisory committee note highlighted that "relief of an injunctive or . . . declaratory nature" was appropriate, if not absolutely necessary, in a 23(b)(2) action.[136] Together, this language indicates that the nature of the relief requested, vis-à-vis money damages, should be weighed in order to determine whether the money damages are more predominant than the injunctive or declaratory relief that is properly available in a 23(b)(2) action.

The result of *Allison*'s omission is a focus on the procedures for, and the potential difficulties of, awarding monetary relief to a 23(b)(2) class rather than the monetary relief's relationship to the requested injunctive or declaratory relief. The *Allison* test is a de facto determination of

129. Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 164 (2d Cir. 2001).
130. *Id.*
131. *Allison*, 151 F.3d at 412.
132. *Id*. at 411.
133. *Id.*
134. *See supra* notes 118-121.
135. FED. R. CIV. P. 23(b)(2) advisory committee note.
136. *Id*.

whether the injunctive or monetary claims would *predominate* the court's time. However, the advisory committee note does not give any indication that the relationship between the court's time and the requested monetary relief is the crucial factor in determining predominance. Further, the amount of time it will take during trial to establish any given claim for relief should not be dispositive of whether that claim will be certified under 23(b)(2). The contrary position is tantamount to saying that only claims or defenses that can be made within a single day, or even a single hour, are properly brought before the courts. Such a suggestion is preposterous on its face.[137]

In contrast, the *Robinson* court's predominance balancing test adheres to the text of the advisory committee note and its call for a relationship test. While *Robinson* does not make a "relief" versus "relief procedures" distinction explicitly, it does create a relationship test comparing the requested injunctive and declaratory relief against the requested monetary relief. This makes the *Robinson* interpretation of the advisory committee's predominance test relatively simple: Does the amount of requested monetary relief predominate the sum of the relief requested when compared to the value of the requested injunctive or declaratory relief? Therefore, by quantifying the value of injunctive or declarative relief requested, the courts have an objective measure of whether plaintiffs' relief is mostly monetary or equitable in nature.[138] If the total amount of monetary damages sought is greater than the value of equitable relief, then class certification is inappropriate under Rule 23(b)(2) and should instead be sought under Rule 23(b)(3). If however the monetary damages are less than the equitable value, the suit may proceed as a Rule 23(b)(2) class. Therefore, the *Robinson* test not only arrives at a better textual interpretation of "predominance," but also one that can readily be adjudicated by the courts.

D. The Robinson *Test Provides a Better Fit in Comparison to the Over-*

137. *But cf.* MCI Communications Corp. v. AT&T Co., 708 F.2d 1081 (7th Cir. 1982) (affirming a twenty-six day limit on both sides for the presentation of their case in chief).

138. Quantifying injunctive and declaratory relief will not present the courts with an unduly difficult task. Courts already routinely quantify equitable relief when determining whether the amount in controversy has been met for diversity jurisdiction purposes under 28 U.S.C. §1332. *See* Mass. State Pharm. Ass'n v. Federal Prescrip. Serv., 431 F.2d 130, 132 (8th Cir. 1970) (injunctive relief action filed originally in federal court). While there is an active debate over the correct perspective from which to valuate equitable relief in individual suits, there is no debate about the capacity of courts to engage in this equitable valuation analysis. 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE— CIVIL §102.109 (2001). Further, in the class action context the courts all appear to agree that the plaintiff's perspective is required. *See generally* Snyder v. Harris, 394 U.S. 332, 338 (1969); Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1050 (3d Cir. 1993); Snow v. Ford Motor Co., 561 F.2d 787, 790 (9th Cir. 1977); 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE— CIVIL §102.109 (2001).

Inclusive Nature of the Allison *Test*

The *Allison* test denies 23(b)(2) certification to any claim for relief that does not "flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief."[139] This result is over inclusive in both form and substance.

First, neither the text nor the plain meaning of the advisory committee note on predominance rules out a 23(b)(2) class that seeks monetary relief that is secondary or dependent to injunctive or declarative relief. Further, monetary damages are permissible even if significant in comparison to injunctive or declarative relief. This possibility exists because the text of Rule 23(b)(2), on its face, does not require that monetary damages be exclusively incidental or nominal in nature. If the *Allison* court disagreed with the plain language of the text of Rule 23(b)(2), it should have noted its dislike and let the parties injured by the language seek a congressional amendment rather than replacing the text with its own interpretation. In contrast, the *Robinson* court created a test that allows litigants to seek appropriate monetary damages.

Second, the *Allison* standard is overly stringent and fails to achieve judicial economy. To twist the *Allison* court's own language, the test is over-inclusive because it de facto denies 23(b)(2) certification to all classes that seek monetary damages. However, this bright-line rule denies litigants the capacity to exercise their statutory rights to "compensatory and punitive damages as well as a jury trial" under the 1991 Civil Rights Act.[140] This bar is especially repugnant where, as the *Allison* court openly admitted, previous to 1991 these classes "clearly would have qualified for class certification."[141] In contrast, the *Robinson* court found a less restrictive means of protecting litigant procedural rights without denying litigants their statutory and civil rights.

The *Robinson* court arrived at a workable test by not looking beyond the textual mark of the advisory committee note and Rule 23. *Robinson* avoided *Allison*'s mistaken assumption that the advisory committee note was silent regarding the form for a predominance test of money damages.[142] This mistake led the *Allison* court to create an incidental test of monetary predominance. However, on its face, it is far from clear that the three words "incidental," "predominant," and "exclusive" create either a complete or even an appropriate spectrum for comparing

139. Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998).

140. 42 U.S.C. § 1981(a) (2000).

141. *Allison*, 151 F.3d at 407.

142. *Id*. at 411.

monetary damages against injunctive or declaratory relief in a 23(b)(2) class.[143]

An examination of the plain meaning of "incidental," compared with the definitions of "predominant" examined above, shows that these two words are not sufficiently opposed to each other to create a boundary between impermissible and appropriate relief in a 23(b)(2) action. While "incidental" and "predominant" do not conflict with each other, non-incidental monetary damages are not necessarily predominant. Non-incidental monetary relief would not lack effect or influence, but could be of either controlling or non-controlling, or in either a numerically superior or inferior position in relation to injunctive or declaratory relief. The failure of these two terms to meet indicates that an incidental test for monetary damages will be over inclusive, excluding non-incidental claims for monetary relief that have an effect, but a non-controlling one, and are thus not predominant.

In contrast, the *Robinson* balancing test focuses on the "weight or value" to plaintiffs of the injunctive relief sought in comparison to the weight or value of the compensatory damages.[144] This assessment determines if the plaintiffs will focus primarily upon proving their monetary damages to the exclusion or detriment of the injunctive or declarative relief. A court therefore asks whether "reasonable plaintiffs" would seek the requested injunctive or declaratory relief as a stand alone remedy. This question is in turn answered by whether the relief is "both reasonably necessary and appropriate."[145] In contrast to the "incidental" test, the balancing test does not automatically exclude non-incidental, non-predominate monetary relief. The balancing test does allow the court sufficient discretion to determine whether the monetary relief sought fails a plain meaning test of predominance. In sum, the case by case balancing test advocated by the *Robinson* court is a closer fit to the text and plain language of Rule 23 and the advisory committee note than the linguistically over-inclusive "incidental" *Allison* test.

143. *Black's Law Dictionary* defines incidental as "subordinate to something of greater importance; having a minor role." BLACK'S LAW DICTIONARY 765 (7th ed. 1999)." In the law of damages, incidental means "losses reasonably associated with or related to actual damages." *Id.* at 395. *Webster's Dictionary* defines incidental as "occurring merely by chance or without intention or calculation" or "lacking effect, force, or consequence: not receiving much consideration or intention." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 1142 (3d 1998). *Merriam-Webster's Collegiate Dictionary* defines predominant as "to hold advantage in numbers or quantity" or "to exert controlling power or influence." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 918 (10th ed. 1993).

144. Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 164 (2d Cir. 2001) (quoting *Allison*, 151 F.3d at 430).

145. *Id.*

E. Procedural Rights and Judicial Economy in a 23(b)(2) Class

The *Robinson* test protects the procedural rights of litigants and promotes judicial economy by leaving discretion in the hands of the trial judge, rather than imposing the *Allison* test's unnecessary, inefficient, and activist "incidental" test. Courts should follow the *Robinson* line of reasoning because it better protects the due process rights of litigants and promotes judicial economy.

1. Notice and opt-out procedures adequately safeguard due process rights

The *Allison* court's definition of predominance avoids two problems it found in the procedure of awarding money damages to a 23(b)(2) class. First, because 23(b)(2) actions are binding on all class members, the *Allison* court defined predominance to include any monetary claim suggesting, "the procedural safeguards of notice and opt-out are necessary."[146] The court was persuaded that monetary damage claims would decrease the presumption of cohesiveness in a 23(b)(2) class. Therefore class notice and opt-out procedures, like those required in a 23(b)(3) class, would be necessary to protect "the individual rights of class members."[147]

In contrast, the *Robinson* court, while acknowledging the procedural concerns of *Allison*, noted that other options existed to "eradicate the due process *risks* posed" by 23(b)(2) monetary damage claims.[148] One option involves adjudication of whether the presumption of class cohesiveness in the injunctive or declaratory relief sought has been compromised and overcome by the individual interest in monetary damages. This option properly recognizes that the adequacy of representation requirement of Rule 23(a) ensures the due process rights of litigants "where the interests of the class members are essentially identical."[149] During the initial phase of a pattern of practice claim, the presumption of cohesiveness remains because the interest of class members is in obtaining the desired injunctive or declaratory relief.[150] Here, the *Robinson* court appropriately discerns that any disparity in class interests due to monetary damages will not arise until after a ruling on the merits of the liability phase of the trial.

146. *Allison*, 151 F.3d at 413.

147. *Id.*

148. *Robinson*, 267 F.3d at 165 (emphasis added).

149. *Id.* at 166 n.10.

150. *See id.* at 166.

Another option invokes the court's power to "require that an opt-out right and notice" be given to class members under Rule 23(d)(2) when and if class cohesiveness fails.[151] While notice and opt-out rights are only required in a 23(b)(3) class, Rule 23(d)(2) allows the court discretion to order such procedural safeguards *sua sponte*, if necessary, during the course of any 23(b)(1), 23(b)(2) or 23(b)(3) proceeding. Also, while not specifically noted by the *Robinson* court during its analysis, a balancing test is also supported by the power of the court to modify or decertify a class during the course of proceedings if the class fails to maintain the requirements for certification, for example, adequacy of representation, under Rule 23(d).

In sum, while the *Allison* "incidental" test does protect the procedural rights of litigants, its reach erects more protection than is needed. In fact, *Allison* may actually infringe on the substantive rights of legitimate 23(b)(2) classes that seek a full range of Title VII remedies in federal court. At best, this flaw detracts substantially from its superiority as a test for predominance. At worst, it sacrifices substantive civil rights in the name of protecting against avoidable procedural phantoms. The strict *Allison* test is unnecessary to protect the constitutional due process rights of litigants. The *Robinson* test recognizes the court's discretionary 23(d)(2) power to order notice and opt-out procedures for class members that ensure litigants their due process rights. This consideration alone favors adoption of the *Robinson* balancing test because it adequately protects the procedural and substantive rights of all litigants while simultaneously allowing plaintiffs to prosecute Title VII claims in defense of their civil rights.

2. Judicial economy and discretion

The second concern of the *Allison* court centered on the lack of 23(b)(3) predominance or superiority tests in 23(b)(2) actions, which it felt were necessary to protect judicial economy. The *Allison* court found that any 23(b)(2) predominance test must "achieve a significant measure of judicial economy," which could best be promoted by "concentrating the litigation on common questions of law and fact."[152] In effect, this holding meant that the *Allison* court's "incidental" 23(b)(2) predominance test would "serve essentially the same functions as the . . . efficiency and manageability standards mandated in 23(b)(3) class actions," i.e., the requirements for superiority and predominance of

151. *Id.* (quoting Holmes v. Cont'l Can Co., 706 F.2d 1144, 1154-55 (11th Cir. 1983)).

152. *Allison*, 151 F.3d at 414.

common questions.[153] With this understanding, the *Allison* court's test focuses on the amount of time it would take to adjudicate the claims for relief requested by the prospective 23(b)(2) class.

However, the *Robinson* test better protects judicial economy and discretion, and creates an adequate test of monetary predominance without re-writing Rule 23(b)(2) as a 23(b)(3) class. The over inclusive reach of the "incidental" test is ill-suited for making class certification decisions. A bright-line test imposed by a circuit court panel is inflexible and unable to account for the factual differences in each case that are a hallmark of the common law system. The *Robinson* court correctly concluded that a "case-by-case basis" was superior to the "one-size-fits-all," bright-line "incidental" test.[154]

This conclusion is supported by the second consideration, judicial discretion. Historically, trial judges have been given broad discretion in whether or not to certify class actions.[155] One leading commentator has noted that "the trial court has broad discretion in determining whether the action may be maintained as a class action and its determination should be given great respect by a reviewing court."[156] The leading treatise on class actions states that "no clear standards have been or could be developed . . . in this area so pregnant with judicial discretion."[157] Both of these texts suggest that the adoption of a bright-line test for determining whether or not the requirements for class certification have been met is entirely inappropriate. Any such test "nullifies the district court's legislatively granted . . . discretion."[158] It would also negate "the district court's inherent power to manage and control pending litigation."[159]

The *Allison* "incidental" test is subject to all of these criticisms because it was created from the court's consideration of "the principles and assumptions underlying the 23(b)(2) class and class actions in general."[160] It is precisely the "principles and assumptions" of Rule 23 and 23(b)(2) requirements that courts have discretion to decide upon in light of the facts on a case by case basis. The *Allison* test dictates the result on the principal of class cohesiveness embodied in the adequacy

153. *Id.* at 414-15.

154. *Robinson*, 267 F.3d at 164-65.

155. Sirota v. Solitron Devices, Inc., 673 F.2d 566, 570-72 (2d Cir. 1982).

156. 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.50 at 1104-05 (3d ed. 1974).

157. 1 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 4.14 at 48-49 (3d ed. 1992).

158. *Allison*, 151 F.3d at 430 (Dennis, J., dissenting).

159. *Id.* at 408.

160. *Id.* at 412.

requirement of 23(a) and the lack of judicial economy in a class seeking non-incidental monetary relief in a 23(b)(2) class. The *Allison* court's concerns are therefore better met by the *Robinson* test, which leaves the factual determination of whether the predomination test has been met to the district court. Similarly, the *Robinson* test allows courts to determine for themselves the questions of class representation adequacy and whether the class would achieve an appreciable measure of judicial economy.

Third, the *Allison* "incidental" test is an effort to re-write the requirements of Rule 23(b)(2) in a way that the drafters of Rule 23 implicitly rejected. The *Allison* court recognized that controlling Fifth Circuit precedent held that an "inquiry into the manageability or superiority of a class action and whether common issues predominate over individual ones has 'no place in determining whether a class should be certified under 23(b)(2).'"[161] This precedent recognized the rule of statutory construction that the explicit inclusion of a requirement in one section of legislation excludes its possibility in other relevant sections.[162] This rule should have made it clear that the explicit inclusion of a predominance and superiority analysis for a 23(b)(3) class implicitly denies its applicability to either a 23(b)(1) or 23(b)(2) class. However, the "incidental" test expressly and explicitly seeks to "serve[] essentially the same functions as the . . . efficiency and manageability standards mandated in [23](b)(3) class actions."[163] The "incidental test" should be rejected for this reason alone, as it re-writes the requirements of the 23(b)(2) class to include findings of both superiority and predominance in order to satisfy 23(b)(2)'s monetary damages "predominance" test. The *Robinson* test, rather than re-writing the rules for certifying a 23(b)(2) class, properly depends on the discretion of district courts to ensure that the *textual* requirements of 23(b)(2) and the constitutional requirements of due process are met.

VII. BIFURCATION, PRECEDENT, AND JUDICIAL ECONOMY

In *Robinson*, the plaintiffs asked the court to certify a bifurcated proceeding, in which the liability phase of the pattern or practice claim would be certified under (b)(2) and the damages phase under (b)(3).[164] *Robinson* approved a (b)(2) liability only class after finding that it would significantly promote judicial economy and was proper under Rule

161. *Id.* at 414 n.8 (*quoting* Forbush v. J.C. Penney Co., 994 F.2d 1101, 1105 (5th Cir. 1993)).

162. The formal name for this rule of construction is *expressio unius est exclusio alterius*.

163. *Allison*, 151 F.3d at 430.

164. Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147 (2d Cir. 2001).

23(c)(4).[165] In contrast, the *Allison* court failed to see the relationship between a disparate treatment and pattern or practice claim.[166] Additionally, *Allison* followed Fifth Circuit precedent holding that the use of (c)(4) would be an inappropriate circumvention of (b)(3) certification.[167]

First, the *Robinson* decision should be followed instead of *Allison* because the former is supported by the plain meaning of (c)(4). Second, the *Robinson* court corrects *Allison*'s misunderstanding of the relationship between a disparate treatment and pattern or practice claim. This misunderstanding led the *Allison* court to believe that judicial economy would not be served by certifying a liability only (b)(2) class.

A. The Text of Rule 23(c)(4)

Rule 23(c)(4) allows courts to certify "an action . . . with respect to particular issues" only.[168] The policy behind this Rule is to allow courts to certify distinct issues in order "to reduce the range of disputed issues" in complex litigation.[169] Additionally, this Rule allows courts to "achieve judicial efficiencies" by reducing the need for a common issue to be adjudicated more than once through the use of class certification.[170] Commentators agree that a class that would fail the common question requirement of Rule 23 may be creatively sub-classed or the proceedings may be bifurcated to allow class certification.[171] Bifurcated proceedings are generally limited by a requirement that the use of Rule 23(c)(4) to "manufacture" predominance be limited only to those common issues whose resolution will materially advance the adjudication of the entire litigation.[172] This requirement ensures that certification of the issue specific class "will materially advance [the] disposition of the litigation as a whole."[173]

165. *Id.* at 168-69.

166. *Allison*, 151 F.3d at 421.

167. *Id*.

168. *See* Eubanks v. Billington, 110 F. 3d 87 (D.C. Cir. 1997).

169. *In re* A.H. Robins Co., 880 F.2d 709, 740 (4th Cir. 1989).

170. Cent. Wesleyan Coll. v. W.R. Grace & Co., 6 F.3d 177, 185 (4th Cir. 1993).

171. 32B AM. JUR. 2D. *Federal Courts* §1994 (2002). ("[T]he court may limit the class to those members having common questions . . . . Furthermore, questions of liability may be separated from individual questions of damages . . . .").

172. *See In re* Kirschner Med. Corp. Sec. Litig., 139 F.R.D. 74 (D. Md. 1991) (holding that when the liability issues are common to the class, common questions predominate over individual ones); 32B AM. JUR. 2D. *Federal Courts* §1994 ("[I]t is not necessary that the issues considered in the partial class action predominate when compared with all the issues in the case.").

173. *See In re* Tetracycline Cases, 107 F.R.D. 719, 727 (W.D. Mo. 1985).

B. Plain Meaning: Robinson *and* Allison/Castano

The plain meaning and substantial weight of authority support the *Robinson* court's use of Rule 23(c)(4) to bifurcate the liability and damages issues. In contrast, the *Allison* court's lack of analysis and complete reliance upon *Castano v. American Tobacco Co.*, to deny the use of Rule 23(c)(4) in bifurcating a trial should be rejected.[174] The *Castano* court ruled, "A district court cannot manufacture predominance through the nimble use of subdivision (c)(4)."[175] The court held that to use Rule 23(c)(4) to bifurcate issues would "eviscerate the predominance requirement of Rule 23(b)(3)" resulting in "automatic certification in every case where there is a common issue."[176] The *Allison* court applied this holding in rejecting plaintiff's request for a bifurcated Rule 23(b)(3) trial because it had already found that individualized issues predominated over common issues and felt it inappropriate to "manufacture" predominance and allow bifurcation.[177]

However, the logic of *Castano* should be distinguished in cases involving Title VII claims. In *Taylor v. D.C. Water & Sewer Authority***,** a Title VII class action, the court ruled that *Castano* was easily distinguishable from the facts in both the instant case and *Allison* because "*Castano* was a mass torts action involving millions of class members and wide variations in state law."[178] In *Taylor* the court appropriately recognized that while wholesale use of Rule 23(c)(4) in order to effectively subclass all of the plaintiffs was inappropriate, this logic did not apply to the simple bifurcation of liability and damage issues and subsequently certified a bifurcated Title VII class.[179]

The *Robinson* court's decision to bifurcate and certify a liability only Rule 23(b)(2) class comports with the plain language of Rule 23(c)(4) allowing issue certification. First, the advisory committee note expressly endorses the certification of liability issues. It approved of this procedure by stating that in some cases an "action may retain its 'class' character only through the adjudication of liability to the class."[180] Second, as one commentator noted, "A plain reading of Rule 23(c)(4) seems to allow this type of certification . . . [because] the court has the power to sever

174. Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996).
175. *Id*. at 745 n.21.
176. *Id*.
177. Allison v. Citgo Petroleum Corp., 151 F.3d 402, 422 (5th Cir. 1998).
178. Taylor v. D.C. Water & Sewer Auth., 205 F.R.D. 43, 50 (D.D.C. 2002).
179. *Id*.
180. Fed. R. Civ. P. 23(c)(4) advisory committee note.

any issues that it deems appropriate and try them separately."[181] Third, another commentator has gone so far as to say that the "drastic step[]" of dismissing a class should never be taken "whenever the court can profitably isolate the class issues under Rule 23(c)(4)" and that the Rule places an affirmative duty upon the court to do so.[182] These considerations strongly militate towards the use of bifurcation under Rule 23(c)(4) in Title VII cases.

C. Analysis: Judicial Economy

The *Robinson* court properly recognized that a judicial economy of scale could be created even if only the liability phase of a Title VII suit was certified for class treatment. Regardless of the outcome on the merits, bifurcation creates an economy of scale. This finding is superior to that of the *Allison* court, which misunderstood the relationship between pattern or practice and disparate treatment claims. In fact, while the claims focus on different theories for proving liability, both require a prima facie case of discrimination and employer liability.[183] Therefore, while certification should be proper for the damages phase under either Rule 23(b)(2) or (b)(3),[184] the *Robinson* court recognized that judicial economies of scale result from resolving liability as a class issue even if compensatory and punitive damages proceed by individual adjudication.[185]

1. Cooper *on Title VII:* Allison *got it all wrong*

What is the relationship of disparate treatment to pattern or practice claims? The answer to this critical question determines whether bifurcating proceedings creates judicial economy. The *Allison* court decided there was "none" and rejected certification of a liability phase only class. *Allison* failed to "see how certifying the first stage of the

181. Robert M. Brava-Partain, Due Process, Rule 23, and Hybrid Classes: A Practical Solution, 53 Hastings L.J. 1359, 1375 (2002).

182. 7B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1790 (2nd ed. 1986).

183. See Craik v. Minn. State Univ. Bd., 731 F. 2d 465, 470 (8th Cir. 1984) ("In pattern or practice cases, however, the presumption shifts to the employer not only the burden of production, but also the burden of persuading the trier of fact that it is more likely than not that the employer did not unlawfully discriminate against the individual.").

184. *See In re* Asbestos Sch. Litig., 104 F.R.D. 422, 431 (D.C.Pa.1984); *In re* Agent Orange Product Liability Litigation, 100 F.R.D. 718, 722 (D.C.N.Y.1983) (need for individual damage calculations does not make class action certification inappropriate when common questions as to liability predominate).

185. Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 168 (2d Cir. 2001) ("[E]ven assuming that the remedial stage is ultimately resolved on a non-class basis, the issues and evidence relevant to these individual adjudications would be substantially narrowed.").

pattern or practice claim significantly increases the likelihood that later certification . . . would be possible."[186] In answering "none," the *Allison* court relied upon a gross misinterpretation of the Supreme Court's holding in *Cooper v. Federal Reserve Bank of Richmond*.[187] However, by focusing on the continued claims of plaintiffs for statutorily available compensatory and punitive damages, the court largely ignored the issue of individual liability. Without any independent analysis, and relying entirely upon *Cooper*, the *Allison* court decided that except for "a shift of the burden of proof in the plaintiff's favor," there are "no common issues between the first stage of a pattern or practice claim and an individual discrimination lawsuit."[188]

However, *Allison* misses *Cooper*'s point. The *Cooper* Court found a significant relationship between the two types of claims precisely because of the plaintiffs' shifted burden of proof.[189] *Cooper* held that neither class representatives for, nor members of, a class are barred by res judicata from bringing individual discrimination claims after an adverse finding on the merits against the pattern or practice class claim.[190] The *Cooper* Court did reason that a "crucial difference" exists between the two types of claims because they involve different types of evidence and focus on distinct allegedly discriminatory actions taken by the employer.[191] Therefore, the *Cooper* Court said, "It could not be more plain that the rejection of a claim of classwide discrimination does not warrant the conclusion that no member of the class could have a valid individual claim."[192] This left the plaintiffs in *Cooper* free to pursue their individual disparate treatment claims.

In fact, the *Teamsters*[193] Court anticipated and rejected the *Allison* court's interpretation of *Cooper*. In interpreting *Cooper*, the *Allison* court reasoned that there were "no common issues between the first stage of a pattern or practice claim and an individual discrimination lawsuit."[194] In

186. Allison v. Citgo Petroleum Corp., 151 F.3d 402, 421 (5th Cir. 1998).

187. 467 U.S. 867 (1984).

188. *Id.*

189. *Id.* at 880 ("The judgment is not, however, dispositive of the individual claims the . . . petitioners have alleged in their separate action.").

190. *Id.*

191. *Id.* at 876. ("The crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. The inquiry regarding an individual's claim is the reason for a particular employment decision, while 'at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decision making.") (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 360 n.46 (1977); *see also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575 n.7 (1978).

192. *Cooper*, 467 U.S. at 878.

193. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

194. *Allison*, 151 F.3d at 421.

Teamsters, the employer, T.I.M.E.-D.C., Inc. attempted to employ similar reasoning. It claimed that the Court's *McDonnell Douglas* test was the "only means of establishing a prima facie case of individual discrimination."[195] However, the Court rejected this contention and pointed to explicit language in *McDonnell Douglas* recognizing that "'[the] facts necessarily will vary in Title VII cases, and . . . the prima facie proof required'" will thus also vary.[196] From this, the *Teamsters* Court concluded,

> The importance of McDonnell Douglas lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that *any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion* illegal under the Act.[197]

Both the *McDonnell Douglas* test and the liability phase of a pattern or practice suit create a rebuttable presumption of discrimination under Title VII. In the language of the *Teamsters* Court, this rebuttable presumption, carries "the initial burden . . . adequate to create an inference" of discrimination and "the finding of a pattern or practice change[s] the position of the employer to that of a proved wrongdoer."[198] While *Allison* got off on the wrong track, *Robinson* corrects and allows for bifurcation.

2. Robinson *on* Cooper*:* Allison *got it wrong*

Robinson correctly understands the relationship between individual disparate treatment and pattern or practice class claims and its ramifications on judicial economy.[199] The *Robinson* court recognized three possible scenarios resulting from certification of a Rule 23(b)(2) liability class that would create judicial economy. First, the class might prevail and establish an illegal and discriminatory pattern or practice.[200] This would result in "plaintiff class's eligibility for appropriate prospective relief . . . [and] a prima facie case with regard to the remedial

195. *Teamsters*, 431 U.S. at 358.

196. *Id.* at 358 (citing McDonald Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973)).

197. *Id.* (emphasis added)

198. *Id.* at 358-59 ("[B]y 'demonstrating the existence of a discriminatory hiring pattern and practice' the plaintiffs had made out a prima facie case of discrimination against the individual class members.").

199. The *Robinson* court did not directly address *Allison*'s misunderstanding and failure to achieve the judicial economy of bifurcation. Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 168 (2d Cir. 2001).

200. *Id*.

phase of the suit."[201] Second, the case might proceed on a "non-class" individual basis. In that case, "the issues and evidence relevant to these individual adjudications would be substantially narrowed," because of the establishment of the prima facie case of liability established which attaches to each individual.[202] Third, the defendant might prevail, "eliminating entirely the need for a remedial stage inquiry."[203]

Robinson establishes that bifurcation of the liability and damages phase achieves judicial economy regardless of the outcome. First, the establishment of liability in a pattern or practice class would substantially "reduce the range of issues in dispute" and make certification of a Rule (b)(2) or (b)(3) damages class more likely.[204] Second, in the event that class certification for the damages phase was inappropriate, the individual members of the class would not each have to proceed through the liability phase of a disparate treatment case. Third, the victory of the defendant would obviate the need for any further proceedings on the issue of class liability and any individual plaintiffs would be able to bring their cases.

Other courts have also realized the enormous judicial economy of scale that is achieved by class treatment of the liability phase. One court reasoned:

> It seems specious and begging the question to say that if these 500 law suits were brought into a class so that proof on the issues of conspiracy need be adduced only once and the result then becomes binding on all 500, that thereby the common issue of conspiracy no longer predominates because from a total time standpoint, cumulatively individual damage proof will take longer.[205]

To illustrate, instead of five hundred plaintiffs each having to make a prima facie disparate treatment case, the matter is greatly simplified by their ability to make one prima facie "pattern or practice" case to prove defendant's liability (or innocence). While the 500:1 ratio above might be a *best case* scenario, one study found that "separation of issues," such as the bifurcation of liability and damages, "will save, on the average, about 20 per cent of the time that would be required if these cases were tried under traditional rules."[206] While bifurcation will not eliminate

201. *Id.* (quoting Craik v. Minn. State Univ. Bd., 731 F.2d 465, 470 (8th Cir. 1984)).

202. *Id.*

203. *Id.*

204. *Id.*

205. Minnesota v. U.S. Steel Corp., 44 F.R.D. 559, 569 (D.C. Minn.1968).

206. Hans Zeisel & Thomas Callahan, *Split Trials and Time Saving: A Statistical Analysis* 76 HARV. L. REV. 1606, 1608 (1963). The five hundred plaintiff hypothetical is not far from the truth in the post-*Allison* Title VII world. In one case, a court applying the *Allison* test denied class certification and was then faced with over 180 individually filed cases when the individual plaintiffs

individual suits or be appropriate in all circumstances, in applicable cases it creates an enormous judicial economy of scale and should be received favorably by courts considering whether or not to actively use Rule 23(c)(4). Therefore, the propriety and availability of bifurcated proceedings provides another reason to follow *Robinson* instead of *Allison*. However, in addition to the analytical and economic superiority of *Robinson*, significant policy and practical considerations also favor its adoption over *Allison*.

VIII. POLICY AND PRACTICE: WHILE *ALLISON* DERAILS, *ROBINSON* TRACKS CONGRESS

Legislative intent and the continued threat of negative value suits should encourage courts to adopt the *Robinson* balancing test instead of *Allison*'s bright line test. As discussed in Part II, Section A, above, legislative history demonstrates a clear congressional intent to increase Title VII litigation and combat discrimination.[207] Therefore, the threat of eviscerating effective Title VII enforcement should give courts pause when evaluating whether to follow *Robinson* or *Allison* as precedent. *Allison* threatens Title VII enforcement because it de facto denies the use of class litigation to plaintiffs who then face the continued existence of the negative value suit dilemma. *Robinson* stays on track and provides a legal framework upholding the proven use of class action procedures to enforce Title VII. Given the negative value suit threat and congressional intent, courts should actively seek any and all procedural rules and trial techniques available to prevent potential constitutional concerns that threaten enforcement of constitutional rights guaranteed by Title VII. This section lays out the theoretical and empirical case for the continued certification of Title VII class actions.

Legally, *Allison* barred the door to the federal judiciary for plaintiff's seeking to use Rule 23 to enforce violations of Title VII. By denying certification under either Rule 23(b)(2) or (b)(3), litigants are left to bring individual suits. The *Allison* court was persuaded that attorney's fees, in addition to the availability of compensatory and punitive damages, constituted a sufficient inducement for private Title VII enforcement.[208]

refused to be denied their day in court. Miller v. Hygrade Food Prods., Inc., 198 F.R.D. 638 (E.D. Pa. Jan. 29, 2001); Personal Interview with Mr. Stephen Whinston, Berger & Montague, P.C., (June 15, 2002).

207. *See supra* notes 18-24.

208. Allison v. Citgo Petroleum Corp., 151 F.3d 402, 419-20 (5th Cir. 1998).

However, empirical research on twelve cases denied class certification in the wake of *Allison* refutes this assumption.[209]

Currently, numerous potential plaintiffs face the negative value suit dilemma following class certification denials based on the *Allison* test. Of the twelve cases that directly followed *Allison* in denying class certification, only two of the attorneys contacted indicated that individual suits had continued after the denial of certification.[210] The other attorneys interviewed provided several reasons why individual actions were not economically feasible. First, fees are only available to the prevailing party.[211] Recently, the Supreme Court has limited the definition of prevailing party, making it even harder for attorneys to take on fee-shifting cases in the hope of being awarded attorney's fees.[212]

Second, the costs of the litigation, which must be borne upfront, usually by the attorney or firm handling the case, can be prohibitive. In one case where class certification was denied, over one million dollars was spent simply pursuing certification.[213] While individual actions would be much less expensive, one attorney indicated that cost efficiency reasons would prevent the use of the necessary "statistical evidence for individual case[s]."[214] Costly statistical analysis is commonly used as evidence to prove disparities between the average hourly pay of the protected class of employees and other employees. Such statistical

209. From July 16 to July 18, 2002, the author interviewed plaintiff's attorneys in the following twelve cases: Carson v. Giant Food, Inc. 187 F. Supp.2d 462 (D. Md. 2002); Reid v. Lockheed Martin Aeronautics Co., 205 F.R.D. 655 (N.D. Ga. 2001); Bacon v. Honda of Am. Mfg., Inc., 205 F.R.D. 466 (S.D. Ohio 2001); Miller v. Baltimore Gas & Elec. Co., 202 F.R.D. 195 (D. Md. 2001); Riley v. Compucom Sys., Inc., 2000 WL 343189 (N.D. Tex. Mar. 31, 2000); Burrell v. Crown Cent. Petroleum, Inc. 197 F.R.D. 284 (E.D. Tex. 2000); Adams. v. Henderson, 197 F.R.D. 162 (D. Md. 2000); Hoffman v. Honda of Am. Mfg., Inc., 191 F.R.D. 530 (S.D. Ohio. 1999); Faulk v. Home Oil Co., 186 F.R.D. 660 (M.D. Ala. 1999); Zachery v. Texaco Exploration & Prod. Inc., 185 F.R.D. 230 (W.D. Tex. 1999); Miller v. Hygrade Food Prods. Corp., 198 F.R.D. 638 (E.D. Pa. 2001); Barabin v. Aramark Corp., 210 F.R.D. 152 (E.D. Pa. 2002).

210. Mr. Stephen Whinston, a partner in Berger & Montague, P.C., and counsel of record in *Miller* and *Aramark*, indicated that his firm filed individual complaints for over 180 of the *Miller* class members. However, this was a strategic move made in order to gain the attention of the courts. Under regular circumstances, nearly all of these individual cases would not have been filed. Personal Interview with Mr. Stephen Whinston, Berger & Montague, P.C., (June 15, 2002). The other example was in the *Reid* case. There, the firm informed their clients of the result of a denial of class certification and proceeded on an individual basis only with those clients who wished to proceed on an individual basis and had signed retainer agreements. Even then, many named plaintiffs may choose not to continue on an individual basis. In *Reid*, over half of the named plaintiffs decided not to pursue individual actions. Telephone Interview with Ms. Angela Joy Mason, The Cochran Firm (July 17, 2002).

211. Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (1982).

212. Buckhannon Bd. and Care Home, Inc., v. W. Va. Dep't of Health and Human Res., 532 U.S. 598, 607 (2001).

213. *Bacon*, 205 F.R.D. 466. Telephone Interview with Mr. Robert Steinberg, (July 17, 2002).

214. *Burrell*, 197 F.R.D. 284. Telephone Interview with Mr. Ruben Guttman, (July 17, 2002).

evidence is often necessary to ferret out workplace discrimination because of the rarity of direct evidence.[215]

Third, many individual attorneys and small firms are simply economically unable to accept fee shifting cases. An individual disparate treatment case can require from $100,000 to $200,000 in attorney's fees and costs alone.[216] Additionally, while expert witness and investigation fees may be recoverable, not all other costs will be.[217] This results in potential plaintiffs and their attorneys having to pay extra expenses in order to bring a Title VII action. Fourth, "individually bringing cases is impossible" in many cases simply due to the large number of possible plaintiffs.[218] This is not an economic consideration, but one of sufficient numbers of attorneys to handle the potential number of cases. Fifth, firm economics and attorney time are not the only limitation in bringing individual suits. Many possible plaintiffs might not wish to pursue individual litigation because of a desire to avoid personal involvement in litigation, a fear of retaliation, a perception of nominal claim(s), or other reasons.[219] While the 1991 Amendments provided compensatory and punitive damages in order to encourage and reward private citizens for enforcing the law, the amount is limited by the employer's size and could be as small as $50,000 total for both types of damages.[220]

One limitation courts have considered in relation to the existence of a negative value suit is the possibility of a *blackmail* class.[221] However, this concern should not enter into the court's analysis and could be considered an abuse of discretion. After *Eisen v. Carlisle & Jacquelin*,[222] it is clear that an inquiry into the merits of the class is not appropriate at the certification stage. The only proper inquiry is whether or not

215. *See* Hunt v. Cromartie, 526 U.S. 541 (1999) (Discussing the fact that after nearly forty years of discrimination lawsuits, facial and direct discrimination in the workplace has become increasingly rare. However, discrimination in the workplace remains and statistical evidence is used to prove or disprove the existence of discriminatory employment practices.).

216. Farias v. Instructional Sys., Inc., 259 F.3d 91, 102-03 (2d Cir. 2001) (allowing fees and costs of $132,193.75); Bishop v. Gainer, 272 F.3d 1009, 1020 (7th Cir. 2001) (allowing fees and costs of $238,000).

217. Mota v. Univ. of Tex. Houston Health Science Ctr., 261 F.3d 512, 530 (5th Cir. 2001) (investigation fees recoverable, but costs of videotaped depositions and mediation fees not recoverable under Title VII).

218. *See supra* note 207.

219. Telephone Interview with Ms. Angela Joy Mason, The Cochran Firm (July 17, 2002).

220. 42 U.S.C. § 1981(a) (2000).

221. In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1297-99, 1302-03 (7th Cir. 1995) (Judge Posner described a blackmail class as one where the "sheer magnitude of the risk to which the class action, in contrast to the individual actions pending or likely, exposes [the defendants]" to legal blackmail.).

222. 417 U.S. 156 (1974) (holding that any factual inquiry into the merits of a claim, as opposed to factual inquiry regarding the requirements of Rule 23, is inappropriate when deciding upon class certification).

plaintiffs meet the textual requirements of Rule 23. While certification of a class bent on pursuing an impermissible motive might create tremendous pressure for the defendant to settle, it should instead seek to use the procedural weapons available to it that properly address the merits, i.e. either a 12(b)(6) or summary judgment motion. Either motion would defeat a class truly without merit. If a claim can survive both of these motions then any pressure to settle is proper. Defendants feeling otherwise should take the matter up in Congress, not attempt to persuade courts to legislate an additional requirement into class certification. On balance, the possibility of negative value suits precluding the enforcement of Title VII by private litigation should be a strong consideration taken into account by courts when deciding class action certification.

IX. CONCLUSION: *ROBINSON* IS THE RIGHT TRACK FOR TITLE VII CLASS LITIGATION

Courts deciding whether to follow the *Allison* or *Robinson* line face a difficult decision. Decisions such as this determine whether the judiciary is willing to accept its duty to enforce Title VII. For over twenty-five years, the pattern or practice class has proven itself as an effective deterrent and motivation for employers to eliminate large-scale discrimination in the workplace. Courts denying certification for run-of-the-mill disparate treatment class actions effectively eviscerate Title VII enforcement. These

courts face two consequences. First, many individual plaintiffs may be effectively barred from bringing their claims due to the small recoveries available compared to litigation expenses. Second, where sufficient recoveries are available or where the discrimination is severe, court dockets will be clogged with individual claims which could have been more effectively and economically adjudicated on a class basis.

A thorough comparison of the *Robinson* and *Allison* decisions demonstrates that effective Title VII enforcement is threatened by the over-inclusive bright-line "incidental" test of monetary predominance advocated by *Allison*. The *Allison* test de facto denies the utilization of Rule 23(b)(2) class actions to plaintiffs that seek compensatory and punitive damages provided by Title VII. In the name of preventing unmanageable classes which pose a constitutional risk to due process, the test departs from the advisory committee's suggestion for directly comparing the relationship between the equitable and monetary relief requested by the class. This departure creates an over-inclusive test which denies legitimate non-predominant monetary claims class certification. In effect, the *Allison* test requires putative Rule 23(b)(2)

classes to meet the superiority and predominance requirements of a Rule 23(b)(3) class. This interpretation of Rule 23(b)(2) represents a radical departure from its creation as a procedure intended to facilitate civil rights enforcement. To add insult to textual injury, *Allison* also holds that putative classes seeking monetary damages will usually fail the superiority and predominance requirements of Rule 23(b)(3) due to unmanageable class sizes and the predominance of individual issues in determining damages. *Allison* further shuts the door of the judiciary to Title VII class litigation by denying the use of bifurcated liability and damages proceedings due to the risk of violating the Seventh Amendment.

In stark contrast, the *Robinson* court allows Title VII class litigation to get back on track and into the courts. Rather than abdicate its duty to adjudicate Title VII claims,

The *Robinson* court tackles the jurisprudential and constitutional concerns of *Allison* head on. First, the *Robinson* court fashioned a Rule 23(b)(2) test of monetary predominance that directly compares the relationship between the equitable and monetary relief requested. *Robinson* provides courts with an objective, narrowly-tailored test which can weed out monetary claims that "predominate" over equitable relief without being over-inclusive and precluding non-predominating, yet still substantial, monetary relief. The balancing test also preserves the discretion of the district court to make class certification decisions without undue appellate second-guessing. Second, *Robinson* approves the use of bifurcated proceedings to adjudicate the issue of Title VII liability. This decision corrects *Allison's* legal derailment and misinterpretation about the relationship between pattern or practice and individual disparate treatment claims. Bifurcation also allows an over-worked judiciary to achieve a significant economy of scale in adjudicating Title VII claims. Finally, *Robinson* defends the historic role of Rule 23(b)(2) class actions in enforcing Title VII. This decision reflects proper deference to congressional intent and allows discrimination victims to avail themselves of class litigation in order to avoid the negative value suit dilemma.

The current failure of the judiciary to follow *Robinson's* superior legal analysis will result in either a congressional override statue or the resolution of the dispute by the Supreme Court. Although the Supreme Court refused to grant certiorari on *Robinson* to resolve the split with *Allison*, they will receive another opportunity when the Ninth Circuit re-issues its opinion on *Molski v. Gleich*.[223] Regardless of *Molski's* decision

223. 2003 U.S. App. LEXIS 2055 (9th Cir. Feb. 6, 2003).

on whether to follow *Allison* or *Robinson*, the wide divide between the two monetary predominance tests demands resolution. Therefore, the Supreme Court should grant certiorari in *Molski*. Furthermore, given the important jurisprudential and policy reasons articulated in this Comment, the Supreme Court should follow the *Robinson* court's track and let *Allison's* precedential value derail.

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