The Allure of Individualism

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The civil rights injunction takes many forms, but none as significant as the structural injunction: the formal medium through which the judiciary seeks to reorganize ongoing bureaucratic organizations so as to bring them into conformity with the Constitution. The structural injunction represents the most distinctive contribution to our remedial jurisprudence drawn from the civil rights experience, and though the structural injunction has been used in all manner of cases—housing, mental health, and prisons—its origins in civil rights litigation are never forgotten. The structural injunction received its most authoritative formulation in civil rights cases, specifically those involving school desegregation, and has been legitimated in terms of those cases. Required to defend structural relief, reference will always be made to Brown v. Board of Education1 and the duty it imposed on the courts of the nation to transform dual school systems into constitutionally acceptable forms.

The fate of the structural injunction has also been tied to that of the civil rights movement. The remedy grew in power and scope over a twenty-year period, beginning in 1954 and continuing until 1974. Ever since, it has been under attack. William Rehnquist has led the assault, first as Associate Justice and later as Chief Justice. He sees the structural injunction as the epitome of Warren Court activism and appears determined to curb that remedy in all manner of ways. Now and then, a narrow majority of the Court has managed to defeat his purposes—here I am thinking especially of the Chicago public housing,2 Kansas City school desegregation,3 and Arkansas prison4 cases—but the formation of such coalitions has been the exception. The structural injunction has suffered many defeats over the last twenty years and has been confined and enfeebled by a plethora of devices.

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This essay addresses one such device created by Chief Justice Rehnquist in *Martin v. Wilks*, a 1989 case involving a structural decree seeking to end racial discrimination against blacks in the Birmingham fire department. A group of firefighters who were not parties to the initial proceeding in which the decree was entered claimed that the decree was invalid because it required unconstitutional actions by the city. These firefighters are white and specifically complained that the system of preferences for blacks created by the decree was a form of "reverse discrimination." In an opinion by Chief Justice Rehnquist, a narrow majority held that the white firefighters were entitled to a full hearing on the merits of their claim.

The Chief Justice justified his ruling in terms of technical preclusion rules, more specifically, the notion that individuals cannot be bound by a previous adjudication in which they did not participate. However, the decision in *Martin v. Wilks* has far-reaching implications for all structural injunctions, rendering them vulnerable to collateral attack and thus interfering with the implementation process. The irony is that while in other areas of the law, most notably in reviewing state criminal convictions, Rehnquist and his colleagues have insisted on the need for finality and remedial efficacy, in the context of the structural injunction these very same values were thrown to the wind.

I believe that the doctrine announced in *Martin v. Wilks* will have great practical importance, placing all structural decrees under a cloud of uncertainty. But in choosing it as my subject, I do not mean to suggest that of all the devices created over the last two decades to cabin the structural injunction, the rule of *Martin v. Wilks* is the most efficacious. Rather, my choice of topic reflects another consideration altogether. I focus on *Martin v. Wilks* because it makes claim to a value—providing to every citizen a day in court—that resonates with those members of the profession, myself included, who are deeply attached to the structural injunction and the substantive values it seeks to further. *Martin v. Wilks* may not be the most important practical setback for the structural injunction, but it is the most defensible. It is a hard case, maybe the hardest; it has divided the civil rights community and even put friends of the structural injunction at odds with one another. At this very moment, the Supreme Court is being reconstituted, creating the hope of a new future for the structural injunction, but that hope will only become reality if the controversies *Martin v. Wilks* has provoked are somehow resolved and the rule of that case abandoned or modified.


At the heart of *Martin v. Wilks* is what I call "the right of participation": the notion that every person is entitled to a day in court and that no one can have his or her rights determined by a court without having participated in the proceeding.\(^8\) The formal basis or nature of this right is not clear. At various points in his opinion, Chief Justice Rehnquist invoked the Federal Rules of Civil Procedure, specifically Rule 19, claiming, in a manner reminiscent of Justice Powell's so-called "short answer" in *Eisen v. Carlisle & Jacqueline*,\(^9\) that his duty is to interpret, not rewrite, the Rules.\(^{10}\) Although Rehnquist seemed to acknowledge the undesirable consequences that will flow from his ruling—structural decrees will forever be open to relitigation—he insisted that he had no choice. He said that the result is required by the Rules and that he is bound by them.

I take issue with both these assertions, but there is no need to engage the Chief Justice on this level, for if *Martin v. Wilks* rests on the Rules, it has subsequently been undermined by the Civil Rights Act of 1991.\(^{11}\) That Act seeks to alter the result in *Martin v. Wilks* and in so doing disputes Rehnquist's reading of the Rules and his claim that the Rules give rise to a right of participation. Congress should have the last word when it comes to construing the Rules, for they are promulgated pursuant to a congressional statute and obtain whatever authority they possess from that statute.

Some might let the matter rest with the Civil Rights Act, but I cannot because I fear that *Martin v. Wilks* is a due process, not a Rules, decision. Rehnquist quoted Justice Brandeis's opinion in *Chase National Bank v. Norwalk*\(^{12}\) and in so doing suggested that the Rules codify a more fundamental principle of our jurisprudence. The Chief Justice also spoke of a deep historical tradition which guarantees to everyone a day in court.\(^{13}\) I am not sure there is any such tradition, but if so, *Martin v. Wilks* would survive the enactment of the Civil Rights Act of 1991. That Act specifically


\(^{9}\) 417 U.S. 156, 176 (1974). Justice Powell argued that the "short answer" to the question in *Eisen* of who must receive notice was given unambiguously by the language of Rule 23. This presupposes that the class action could only be maintained as a (b)(3) class action, since the individual notice requirement of subdivision (c)(2) was tied to the kind of class action. The fact of the matter is that the plaintiffs also invoked (b)(2) and (b)(1) which have no such requirement. Justice Powell refused to consider the suit as a (b)(2) action because it sought damages as well as an injunction—a ruling hardly justified by the wording of (b)(2). Section b(2) is indeed aimed at injunctive (or declaratory judgment) actions, but does not become unavailable for suits such as *Eisen* which seek both an injunction and damages. Justice Powell also refused to consider the suit as a (b)(1) action, on the ground that the interest of individual small odd-lot investors was too insubstantial to present a risk of inconsistent adjudications. This seems to be a realistic assessment on Powell's part, but at odds with the formalist approach he took on the question of whether each and every small odd-lot investor should be sent a letter about the suit being brought on his or her behalf.

\(^{10}\) *Martin v. Wilks*, 490 U.S. at 767.


\(^{12}\) 291 U.S. 431, 441 (1934) ("The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.").

\(^{13}\) *Martin v. Wilks*, 490 U.S. at 762.
disavows any intention of making a statement about the requirements of due process, and it is extremely doubtful that Congress could alter those requirements.

Martin v. Wilks involved a decree entered on the basis of consent rather than a full adjudication, and my concern with the decision would be considerably diminished if it were so confined. This is not to diminish or overlook the role of consent decrees in structural litigation, but only to recognize their specific limitations. Consent decrees are essentially contracts and obtain their authority from the consent of the parties as opposed to a judgment of a court of law. As a consequence, all affected parties must consent to them, for simple justice requires that a contract should not bind anyone who has not participated in its creation. Considerations of remedial efficacy also dictate a generous measure of inclusiveness when it comes to consent decrees.

The comparative efficacy of consent decrees is difficult to judge because they are only a poor approximation of what would have been obtained after a full adjudication; like the outcome of any bargaining process, they turn on a myriad of strategic considerations that have little to do with justice. Nevertheless, the claimed efficacy of consent decrees stems from the entirely plausible hypothesis that people are more likely to do what they have agreed to do than what they are ordered to do. To capture this advantage, however, it is essential to obtain the consent of all the people who are to implement the decree or who otherwise will be affected by it, or at least to allow them to participate in its formulation.

Thus, whether the concern is justice or a proper regard for remedial efficacy, I would be inclined to support the rule of Martin v. Wilks if it were confined to consent decrees. The white firefighters of Birmingham should not be precluded from challenging the constitutionality of practices that the city was prepared to take pursuant to the consent decree since they were in no sense parties to the agreement. I do not believe, however, that Martin v. Wilks turns on the negotiated character of the decree. In my view it threatens to prevent any decree, even one fully litigated, from binding those who did not participate in the proceeding that led to its issuance. In Martin v. Wilks the Chief Justice declared that “a person cannot be deprived of his legal rights in a proceeding in which he is not a party,” and this

14. 42 U.S.C. § 2000e-2 (Supp. III 1991) provides: “Nothing in this subsection shall be construed to . . . . (D) authorize or permit the denial to any person of the due process of law required by the Constitution.”


16. That is why Professor Susan Sturm, who favors negotiated decrees out of consideration of efficacy, takes almost as inclusive a view toward participation as does Justice Rehnquist, though she stresses the importance of participation at the liability stage and would not equip those who are to be heard at that stage with all the procedural rights that we tend to associate with the adversarial process—just enough to co-op them. See Sturm, supra note 7; Susan Sturm, A Normative Theory of Public Law Remedies, 79 Geo. L.J. 1555 (1991); Susan Sturm, Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons, 158 U. Pa. L. Rev. 805 (1990).

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declaration was in no way limited to consent decrees or made dependent on the fact that the decree in question was entered on the basis of a negotiation between the parties. *Martin v. Wilks* would come out exactly the same way, I venture to say, even if it had been fully litigated.

To test this hypothesis, and to explore more fully the consequences of such a rule, let us imagine a lawsuit in which there is a claim by black firefighters against a municipal fire department, a full trial on the merits, a judgment that the defendant fire department discriminated on the basis of race in initial hires and promotions, a hearing on the remedy, and then the issuance of a strong decree. That decree requires an aggressive recruitment program aimed at blacks; a prohibition against discrimination in the future; and to compensate for past discrimination, a preferential treatment program intended to give blacks an advantage in both initial hires and promotions. To give the preferential program some bite, assume that the decree also contains goals and timetables.

Let us further assume that this decree is subsequently attacked by persons such as the white firefighters who were not parties to the case but who will be adversely affected by the decree. They claim that the system of preferential treatment is a form of unjust discrimination and thus unconstitutional. In passing on this claim, the trial court might be constrained by considerations of stare decisis but not, according to *Martin v. Wilks*, by the tougher preclusion rules of res judicata and collateral estoppel. The trial court would have to give the white firefighters a full hearing on their claim even though, before entering the decree, the court had already concluded that such preferences were constitutional, indeed necessary, to correct for the past violations. Even if it is unlikely that they will prevail on the merits, these new challengers could not be precluded from adjudicating the issue afresh since they did not participate in the initial proceedings. They did not have their day in court.

I take this to be the true import of *Martin v. Wilks*, and one can see at a moment's glance the unsettling consequences of such a rule. It exposes every decree to the risk of a subsequent challenge, actually to an almost endless series of such challenges. Ultimately, the trial court may decide the subsequent challenge has no merit, and the precedential value of the earlier decision may help it to reach that conclusion, but the very need to adjudicate the merits of the challenge will postpone the moment of implementing the decree. That postponement will last as long as is needed to litigate the merits of the claim against the decree, and that period will be considerably extended because the trial court cannot invoke the stronger preclusion doctrines to dismiss the challenge.

At various points in his opinion, the Chief Justice tried to minimize the consequences of his ruling by claiming that finality could be achieved and the right of participation honored by joining all the would-be challengers as parties in the initial proceeding. While this response might be adequate in some contexts, in the structural context it is not. There are two features of the structural injunction that make the kind of joinder Rehnquist envisioned a virtual impossibility.

One is the simple fact that structural injunctions affect countless people, indeed the entire public. Consider, for example, the number of
people affected by the typical school desegregation decree: every child and family in the school district; teachers and administrators; residents and shopkeepers in the areas close to the schools; police and transportation officials who will have their schedules and workloads affected; and of course, the taxpayers of the school district who will have to shoulder the financial burden of the busing plan. Fewer persons may have to be joined in an employment case like Martin v. Wilks to give effect to the right of participation, but not significantly so. They would include all the present workers, managerial personnel, new applicants, the owners of the firm or, in the case of a government agency, the taxpayers, and the customers or those otherwise dependent on the service provided by the firm or agency.

Granted, there is an ambiguity in Rehnquist's conception of the universe of persons to be joined: At some points he speaks very broadly of all those "who could be adversely affected by a decree," but at others he refers more restrictively to someone who will "be deprived of his legal rights." The narrower reading would lessen the damage wrought by Martin v. Wilks, but that damage would still remain substantial, for the group of possible challengers to a structural decree—those who could advance a legal claim against its validity—is enormous. Is there any interest today that cannot be transformed into a legal claim? It is also important to bear in mind that Martin v. Wilks requires not that these interests be adequately represented, which might be manageable, but rather that each of the individuals adversely affected be joined in the initial proceeding. Joinder of that magnitude is simply not manageable. Indeed, it is hard to imagine what such a lawsuit might look like.

A second difficulty with Rehnquist's response—that finality can be achieved through joinder—stems from the forward-looking aspects of structural decrees. Because structural injunctions seek to reorganize bureaucratic organizations, they will necessarily affect people who, at the moment of the initial suit, have no relationship whatsoever to the organization but who may be brought into contact with the organization at some later day and only then be adversely affected by the decree. Reorganizing the Birmingham fire department will affect not only those who are working for the department today, but those who one day may seek employment in the department—many of whom are not in the community at the moment or may not even be born at the time of the suit. As a result, the joinder Rehnquist offers by way of consolation is not simply impractical, but downright impossible, for it requires the plaintiff to have knowledge about matters that cannot be known.

Of course, we might have to live with these consequences if the right of participation were constitutionally grounded, but that is far from clear. I believe that what the Constitution guarantees is not a right of participa-
tion, but rather what I will call a "right of representation": not a day in court but the right to have one's interest adequately represented. The right of representation provides that no individual can be bound by an adjudication unless his or her interest is adequately represented in the proceeding. This means that finality can be conferred on a structural decree if, but only if, all the interests are adequately represented in the proceeding. If any interest is not adequately represented, then the decree remains vulnerable to a new challenge; if, however, that interest was fully represented in the proceeding that led to the entry of the decree, then the court could summarily dismiss the new challenge on the ground that it was already adjudicated—even though the challenger had not participated in the initial suit.

The application of this rule in *Martin v. Wilks*, or more specifically, my imagined redoing of it, is not entirely clear. If the city or any other party who fought the claim of liability and the entry of the decree adequately represented the interests of the white firefighters, then the white firefighters would be foreclosed from relitigating the validity of the decree. On the other hand, none of the parties may have adequately represented their interests. The racial politics of Birmingham may make the city government—led by blacks—a most unreliable representative of the white firefighters. Or there may be good reason to doubt that an employer can ever be an adequate representative of the employees. In that instance, then, the interest of the white firefighters would not have been adequately represented in the initial proceedings, and thus even within my framework, the white firefighters would be entitled to a hearing on their claim, unconstrained by the tougher preclusion doctrines.

On the last hypothesis, namely, that the interests of the white firefighters were not adequately represented in the initial proceeding, the result I envision seems to be exactly the same as the Court reached in *Martin v. Wilks*: The claim tendered by the white firefighters against the validity of the decree must be fully litigated. There is, however, an important difference arising from the ground or basis of the decision. While my result turns on the right of representation, Rehnquist invoked not that right, but the right of participation. This difference is not only of theoretical significance, but also has great practical consequences for structural decrees, since a far greater measure of finality would be achieved under the right of representation. The white firefighters' claim against the validity of the decree would have to be litigated only if they could show that their interest was not adequately represented. Under the rule of *Martin v. Wilks*, there is virtually no threshold requirement. The would-be challengers need only show that they were not parties in the initial proceeding.

22. Sturm, supra note 7, at 992.

23. Professors Sturm and Laycock, building on the work of Samuel Issacharoff, argue that the employer will welcome a preferential promotion program as a way of minimizing liability for back pay. See Issacharoff, supra note 7, at 241-47. But they never consider the possibility that employees who were the victims of past discrimination have an intense interest in fighting for back pay. Pressing for their interest might correct for the imperfection in the representational structure due to the alleged conflict between employer-employee interests.
In drawing this distinction between the participatory and representational rights, I have assumed that the inquiry into the adequacy of representation would take place in the subsequent proceeding. This might be deemed undesirable, however, because the inquiry as to whether the would-be challenger's interests were adequately represented in the initial proceeding might interfere with the implementation process. Every hearing takes time and creates uncertainty. This delay in implementation could be avoided, however, by requiring, first, that all challenges to the adequacy of representation take place in the initial proceeding and, second, that failure to challenge the adequacy of representation at that stage would foreclose any subsequent attacks on the decree at all. Then the difference between the representational and participatory scheme would be even more dramatic. Implementation would have to begin at once, with no delay occasioned by a hearing on the merits of the claim against the decree or even on the adequacy of representation in the initial proceeding.

While such a rule would confer finality on the decree and avoid the burdens and delays of subsequent challenges, it creates new burdens for the initial proceeding. Cutting off the possibility of any subsequent proceeding would be strictly dependent on there having been full and ample notice of the initial proceeding so that those who might one day claim that their interests were not adequately represented would have already had the opportunity to challenge the adequacy of the representation of their interests. In addition, a hearing would have to be held in the course of the initial proceeding on any such challenges to the adequacy of the existing representational structure, with two possible outcomes: displacing the putative initial representative with the new challenger or, more realistically, allowing the new challenger to intervene and then to share in the representational role.

Such inquiries into the adequacy of the representational structure in the initial proceeding and any efforts to correct that structure by allowing intervention might seem to confront courts with the same practical difficulties that I see in Rehnquist's scheme of mandatory joinder—perhaps that is why the issue in Martin v. Wilks is often presented as a purely technical one (joinder v. intervention), with no great practical differences turning on how it is resolved. I believe this is a mistake. While the burden on courts working within the representational framework would be considerable, it is not nearly as oppressive as the one imposed by Martin v. Wilks.

In large part this is because the representation that I speak of is not a representation of individuals but a representation of interests. It is not that every person has a right to be represented in structural litigation, but only that every interest must be represented. If an individual's interest has been adequately represented then he or she has no further claim against the decree. The right of representation is a collective, rather than an individual right, because it belongs to a group of persons classed together by virtue of their shared interests.

The notice required in the initial proceeding will be adjusted accordingly. In one sense, the notice must be broad and comprehensive. It must give all those groups whose interests are at stake a fair opportunity to contest the adequacy of representation. Also, the notice requirement must
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take account of the chance, rightfully underscored by Professor Sturm, that interests may change over time and may become realigned once the proceeding moves from the liability to the remedial stage. A second round of notice may thus be required at the remedial stage to take account of this contingency. On the other hand, there is no need to give each and every individual member of the group notice of the proceeding. It is sufficient that notice be given to a substantial number of persons within the group, since by definition all members of the group have similar or comparable interests, and in the absence of any special indication, one person is as likely as the next to protect his or her interest and that of the group. Given the nature of the representational right, what is required is collective, not individual, notice.

Similarly, there is no need to be especially concerned with those individuals who have not yet arrived in the community or who have had no contact with the organization. They are an embarrassment to Rehnquist’s scheme, for they cannot possibly be joined in the initial proceeding and thus, could not be barred from challenging the validity of the decree once they appear on the scene. But they are not a special problem within the representational framework. Notice could not be given to them, but there is no need to, for presumably they would fall into one of the groups (e.g., job seekers, incumbent employees) who received notice and whose interests were represented in the initial proceeding.

Effective notice is likely to produce a number of applications for intervention, and although that too will complicate the initial proceeding, I believe that this scheme is still better than Rehnquist’s. Intervention, like joinder, is a mechanism for participation, but differs from it in three important respects. First, the burden moves from the plaintiffs to the would-be challengers—assuming that there is adequate notice. Second, intervention requires a special showing. There is no need to allow intervention to everyone who might be adversely affected by the decree or has a legal claim against its validity; intervention as a matter of right is conditioned upon a showing that the applicant’s interest is not being adequately represented. Third, while the participation allowed under intervention is intended to serve a discrete purpose—to perfect the representational structure—the participation permitted under joinder is more ambiguous as to purpose and thus is more open-ended and less controllable. It is harder for a court to control the participation of a person joined as a defendant than one allowed to intervene.

Admittedly, even if the right of intervention is specially conditioned and limited to perfecting the representational structure, it will have a significant impact upon structural litigation. The interests at stake in such cases are manifold, and it is always difficult to know with certainty what those interests are and whether they are being adequately represented. The prudent judge, determined to achieve a measure of finality and to get on with the business of structural reform, is likely to err on the side of inclusiveness. As a result, the initial lawsuit is likely to become multicentered or involve so many different parties as to make it close to a “town
meeting. But that new construct still would be far short of the phantasm produced by the kind of joinder required to give effect to Rehnquist's right of participation—putting the burden on plaintiff to join each and every individual who might be adversely affected by the decree or who might have a claim against its validity.

In contrast to what Rehnquist offers in Martin v. Wilks, the scheme I propose and that is incorporated into and affirmed by the Civil Rights Act of 1991 makes structural litigation a real possibility. It does, however, require qualifying the commitment to the notion that every individual is entitled to a day in court before his or her right is adjudicated, and this compromise of individualistic values is no small matter. The right of participation appears to afford more respect or control to the individual than the right of representation, and these days, when we have become skeptical of all kinds of state power, including that wielded by the judiciary, it seems more and more desirable to build a fortress around the individual. Over the last twenty years, Roe v. Wade has replaced Brown v. Board of Education as the central organizing precedent of our jurisprudence, and it has commonly been taken to affirm the value of individual autonomy. Relinquishing the right of participation and placing in its stead the right of representation might be thought—by all of us, not just the Chief Justice—to betray this very same value.

Some forms of representation are fully consistent with individualistic values, for example, when a person appoints an agent and has full control over that agent. To a theorist like Lon Fuller, the kind of representation obtainable in the electoral context is also consistent with individualist values, though obviously the power of the individual voter depends on a number of factors, including the total size of the electorate, party structure, and the distribution of resources. Compared to the ordinary agency relationship, the power of the individual in electing a representative is likely to be minuscule. However, the kind of representation entailed in structural litigation differs qualitatively from the kind of representation found in the ordinary agency relationship or even electoral representation. As I acknowledged before, it is a representation of interests. An individual can be bound by the action of someone purporting to be his or her representative even though that individual had no say whatsoever over the selection of that representative, indeed, might not have even known of the appointment or that he or she was being represented.

To some, interest representation may seem a strange form of representation, but in truth it can be found in many social settings including the family, organized religion, and universities. A president of a university is often said to represent the faculty in important policy disputes with the trustees or students even though the faculty had no role whatsoever in choosing the president. The tie between the two is largely one of interest.

27. See Lon Fuller, Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 365-67 (1978).
Interest representation also plays a role in some forms of our political life outside the electoral context and has recently produced dramatic changes in world history. In some of the so-called "round table negotiations" of 1989 that resulted in the collapse of the Communist regimes in Eastern Europe, the vast majority of ordinary citizens were represented by a small group of self-appointed representatives who claimed their authority on the basis of a shared interest.\textsuperscript{28} As is often the case, the leaders of the so-called opposition spoke for and bound others, indeed entire populations, even though these leaders were not empowered by an election or in any meaningful sense chosen by the citizenry.

Even in the law, representation of interest is not confined to the structural injunction. It can be found in the law regarding common trusts and was sustained by Justice Jackson in \textit{Mullane v. Central Hanover Bank & Trust Co.},\textsuperscript{29} as consistent with due process. New York relied on the representation of interests in the procedure it established to settle accounts or to foreclose the right to an accounting by the beneficiaries of common trusts. In a proceeding to be brought by the trustee, the interests of the beneficiaries were to be represented by a guardian appointed by the court, not by the beneficiaries. The judgment rendered would fully bind the beneficiaries and foreclose their right subsequently to obtain an accounting even though they did not participate in the initial proceeding.

The dispute in \textit{Mullane} largely centered around the notice that was to be provided to the beneficiaries in the initial settlement proceeding. One part of Jackson's decision was negative. The Court held that newspaper notice allowed by New York was not sufficient for purposes of due process. Letters would have to be sent. A second part of the decision was more affirmative in that it sought to ease the burden on the trustee. The Court held that the settlement proceeding could bind beneficiaries who never received notice (because their letter went astray) or who were never sent notice (because their interests or addresses were presently unknown).

A rule disallowing newspaper notice and requiring more individualized notice is ambiguous as to its purpose. On the one hand, it might be thought to be protective of the right of participation. The notice advises individuals that the settlement proceeding constitutes their opportunity to challenge the way the common trust was handled—it is their day in court—and that failure for them to step forward constitutes a waiver or relinquishment of that right. Alternatively, the rule requiring more individualized notice might be seen as a better mechanism than newspaper publication for insuring the adequacy of representation. Letters are sent to individual beneficiaries to alert them that their interests are being represented by a person appointed by the court and to invite them to speak up if they have any information indicating that the representation will not be adequate.

While taken by itself the requirement of more individualized notice is ambiguous, this ambiguity is resolved decisively in favor of the represen-
tational interpretation once account is taken of what I have called the more affirmative dimension of Mullane: the decision of the Court allowing individual beneficiaries who never received any notice whatsoever of the pendency of the settlement proceeding—because the letter went astray or their address was not at hand—to be bound by that proceeding. While that result is easily understandable within the representational framework, for not every single member of a group need receive notice in order to provide a check on the adequacy of representation, it would be intolerable if the foundational right were one of participation. There would be no basis at all for concluding that these individuals had their day in court or somehow relinquished it. They never even knew of the suit.30

In some scattered places, Jackson used the rhetoric of participation to justify the ruling that due process required more than notice by publication. He spoke of a “right to be heard” and said that it would have “little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.”31 But this would not be the first time that Jackson’s language exceeded his point. As can be seen most clearly in his unwillingness to impose a requirement of actual notice, his fundamental concern was to render the common trust a viable financial instrument, and for that purpose, he was prepared to compromise certain individualistic values and to allow what I have called a representation of interests. As he put it, getting to the core of his decision, “The individual interest does not stand alone but is identical with that of a class . . . . Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any

30. Professor Laycock recognizes this aspect of Mullane, but rather than trying to harmonize both holdings into a single theory as I do—one founded on the right of representation—he keeps them distinct. He views the willingness of the Mullane Court to dispense with the requirement of individual notice regarding certain categories of beneficiaries as an exception, or as he puts it, a “second-best solution when individual notice is impractical.” He writes:

Perhaps the point on which Professor Fiss and I disagree is the relationship between the two holdings in Mullane. He seems to see a general rule of discretion and reasonableness, with adequate representation as the essence of due process, and with the particular result that on the facts of Mullane, identifiable claimants should be individually notified. I see individual notice to identifiable claimants as the general rule and the essence of due process, and adequate representation as a second-best solution when individual notice is impractical.

Laycock, supra note 7, at 1090. Of course, individual notice to beneficiaries whose address is unknown is not “impractical,” but only more expensive because it requires the expense of a search or investigation to determine the whereabouts of these beneficiaries. In that respect it stands on the same footing as individual notice to beneficiaries whose addresses are known, which differs from that allowed by the state (newspaper publication) in terms of expense. The amounts may differ but the metric is the same. Similarly, to deal with the contingency of a letter going astray in the mail, the Court might have required certified mail or personal service—once again, not “impractical” but only more expensive. In any event, Professor Laycock fails to explain why the Court should ever tolerate “second-best solutions” when constitutional rights are at stake. If, as Professor Laycock claims, individual notice is of the essence of due process, then the Court should have given the trustee the burden of spending more on notice to make sure due process is afforded or, alternatively, hold that the settlement of accounts is not binding on those individuals who did not actually receive notice.

objection sustained would inure to the benefit of all." 32

A similar use of the concept of interest representation can be found in the class action, so central to modern procedure, though only grudgingly acknowledged in a footnote by Rehnquist in Martin v. Wilks. 33 The class action permits representation of interest in order to enhance private enforcement of public laws. 34 In a plaintiff class action, the representative is self-appointed; in the defendant class action, the representative is appointed by the adversary. Notice is provided to the members of the class, but only as a way of checking on the adequacy of representation, not to protect the individual's right to participation. 35 One of the principal tasks of a court in a class action is to make certain that the interests of the members of the class are adequately represented, for the law provides that all members of the class will be fully bound by the judgment rendered.

In Eisen v. Carlisle & Jacqueline, 36 Justice Powell broke from Mullane—not Mullane's specific ruling about the insufficiency of newspaper notice, but its underlying principle. Eisen involved a plaintiff class action seeking enforcement of the federal antitrust and securities laws against an odd-lot trader, and the district court had devised a notice scheme that seemed ample for purpose of insuring the adequacy of representation: (1) publication in prominent newspapers; (2) individual notice to all members of the New York Stock Exchange, all commercial banks with large trust departments, and all large odd-lot investors, that is, those with ten or more transactions; and (3) individual notice to a number of small odd-lot investors who would be chosen at random. Justice Powell disallowed the random notice to the small odd-lot investors and, in an extravagant expression of individualism foreshadowing Martin v. Wilks, insisted that every small odd-lot investor whose address was known—some 2,250,000—be sent individual letters. This escalated the costs of notice considerably and thus impaired the efficacy of the class action as a law enforcement device by requiring a greater front-end investment. Yet the damage wrought by Eisen to the class action was less significant than that inflicted by Martin v. Wilks on the structural injunction. Eisen was largely justified in terms of the requirements of the Federal Rules of Civil Procedure, not due process; in any event, it was limited to the special type of class actions involved ("(b)(3)") and presumably does not apply to the other types of class actions permitted by the Rules ("(b)(2)" and "(b)(1)"). 37

32. Id. at 319.
33. Martin v. Wilks, 490 U.S. at 762 n.2.
35. The right to opt-out provided in Rule 23 might be seen as giving expression to a right of participation, but the opt-out right is only provided in one category of class actions and presumably is not based on due process. See Mark W. Friedman, Note, Constrained Individualism in Group Litigation: Requiring Class Members to Make a Good Cause Showing Before Opting Out of a Federal Class Action, 100 Yale L.J. 745 (1990).
In all these instances, some legal, others social and political, we embrace a representation of interests in order to achieve worthy pragmatic objectives. Similarly, we should allow representation of interest and tolerate a compromise of individualistic values in a case like *Martin v. Wilks* in order to make the structural injunction a viable remedy. The structural injunction is as worthy of our respect as the common trust or class action. We can all feel the attraction of individualism, but a too-rigid insistence upon individualistic values, or upon an individualistic conception of representation as might be entailed in the ordinary agency relationship, would virtually destroy the structural decree. That would, in effect, deprive the black firefighters, or other persons whose rights have been denied, of any viable remedy for the injustices they suffer.  

To be sure, the value of individual participation has an important role to play in the legal process, but we must also recognize that we accord that value different weight in different contexts. Where particular individuals have been singled out, as in the criminal law, or in administrative contexts such as *Goldberg v. Kelly*, where an individual's welfare payments are in jeopardy, the value of individual participation ranks very high, maybe even supreme. In those situations, participation has a value in its own right, manifesting a public commitment to the dignity and worth of the individual, as well as a more instrumental value, ensuring that courts are presented with the facts and issues in the sharpest possible terms. But in structural litigation no individual is singled out; the remedies are forward-looking and the practices of a bureaucratic organization are examined for the impact on the welfare of a social group. Accordingly, the value of participation, understood in its individualist form, loses some of its force. We may value individual participation in structural litigation, but only to serve instrumental rather than dignitary ends: to insure that all interests are accounted for and that the strongest arguments are made on their behalf.  

At this point, one might, as indeed I have on earlier occasions, try to justify the structural injunction within an individualistic framework. We would simply need to aggregate the losses and gains of individual rights. But I am doubtful that such a response is faithful to the kind of individualism that Chief Justice Rehnquist has in mind in *Martin v. Wilks* or that underlies the right of participation. That kind of individualism springs from a conception of individual autonomy which does not allow sacrifices of

38. In the comment that follows, Professor Laycock insists that my fears are exaggerated, and he proposes a scheme that promises to be faithful to *Martin v. Wilks* and to protect structural injunctions, at least in the employment context. Laycock, supra note 7, at 1026-28. In truth, however, that scheme, consisting of a combination of the class action device—individual notice to all incumbent employees, an opportunity to organize themselves into separate classes, and the appointment of a guardian ad litem for future unknown employees—rests on the right of representation, not the right of participation affirmed by *Martin v. Wilks*.  


the rights of some individuals to advance the rights (much less the welfare) of other individuals. It is Kantian in nature and gives to each individual total control over his or her rights, a certain kind of veto power. The structural injunction departs from that kind of individualism—it is, most emphatically, a collective instrument—but that does not doom it as a matter of due process.

Due process requires that procedures be fair, but fairness is a pragmatic ideal; it affords protection to the individual, but not in a way that would require the sacrifice of other important rights. As the reference to *Mullane* and our experience with the class action makes clear, due process has never been reduced to the kind of individualism that informs Rehnquist's opinion in *Martin v. Wilks*. It does not give absolute control to each and every individual; it does not require a disregard for the social consequences of a procedural rule. It permits a rule—whether propounded by a court or by legislature, as in the case of the Civil Rights Act of 1991—that seeks an accommodation of both the procedural rights of the white firefighters and the substantive rights of the black firefighters.

In order to achieve some measure of finality and efficacy for the structural injunction, it may be necessary to adjust the procedural rights of the white firefighters or other would-be challengers. It may be necessary to forgo the right of participation and to leave various individuals with no other assurance than that their interests will be adequately represented. But this adjustment of the procedural rights of would-be challengers rests on the most appealing of all premises—that doing so will more fully remedy the violation of the rights of others, including the right to be free from discrimination. This is not, as Professor Laycock charges, to sacrifice due process for the sake of civil rights, but rather to free due process from the grips of an overly individualistic conception of due process and to acknowledge that the fairness of procedures in part turns on the social ends that they serve. Due process does not write into law the ethical theories of Professor Immanuel Kant.