Due Process of Law in Trilateral Disputes

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Owen Fiss was my Remedies teacher, in a course called Equity. I obviously owe him enormous intellectual debts; indeed, I have spent much of my career pursuing questions that were suggested in his course and in The Civil Rights Injunction. 1 Owen also made what may have been the ultimate sacrifice on my behalf. He left The University of Chicago and went to Yale at exactly the right time to free up his Equity course so that I could begin teaching it.

All of this leaves me in an awkward position, because I disagree with almost everything he said about Martin v. Wilks. 2 Martin v. Wilks held that white firefighters are not bound by a consent decree between their employer and a class of black firefighters, and that they cannot be bound unless they are brought into the litigation. Owen sees this requirement as an insuperable obstacle to effective use of the structural injunction. 3

I agree with Owen that Martin v. Wilks is a due process case. But I do not believe the trade offs are nearly as sharp as he does; I think we can have an effective structural injunction and have racial justice and also have due process. I am not sure we can have it the other way. We cannot afford to make the claims of the civil rights movement depend upon systematic injustice to other members of the community. We can and must achieve civil rights with due process.

The problem of Martin v. Wilks has been most prominently argued in the context of affirmative action cases, but it is by no means limited to that context. It has arisen in environmental litigation, 4 religious liberty

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I. THE PROBLEM OF SETTLEMENTS

My first disagreement with Professor Fiss concerns his concession that nothing he proposes in his article should apply to settlements. He says little to explain this distinction between settlements and litigated decrees, but it seems to grow out of his earlier work opposing settlements on the ground that they do less than complete justice. The exclusion of settlements renders the rest of his article largely irrelevant, because most cases settle. Even if a structural injunction case fails to settle at the liability stage, it will almost certainly settle at the remedy stage. Indeed, some of Professor Sturm's work shows quite effectively that in the classic example of structural injunctions—the institutional reform cases—the remedy must be settled. Litigated structural remedies break down; only negotiated structural remedies work.

So if Professor Fiss is right when he says that full participation of the Martin v. Wilks sort is an insuperable obstacle to the effectiveness of the structural injunction, and if he is also right that nonparticipants cannot be bound unless the case is completely litigated, he has compounded the dilemma raised by his earlier work opposing settlements. If third parties generally cannot participate, and if nonparticipants cannot be bound by settlement, then every case affecting third parties must be litigated to the bitter end through liability and remedy. But Professor Sturm has shown that the requirement of complete litigation would itself be a terrible obstacle to the goals that depend on structural injunctions. If the structural

9. See GAB Business Serv., Inc. v. Syndicate 627, 809 F.2d 755, 760 (11th Cir. 1987); Restatement (Second) of Torts § 886A cmt. g (1981).
10. Fiss, supra note 3, at 968.
injunction is the only kind of case that has to be litigated all the way, the structural injunction is doomed to failure.

II. THE WORKABILITY OF MARTIN v. WILKS

I also think that Professor Fiss misreads Martin v. Wilks and exaggerates its requirements. I may be wrong about that. It is a short opinion, and its requirements are not specified in any detail. Chief Justice Rehnquist has surprised me before with some of his astonishing beliefs, and this may be another one of those occasions. But I read Martin v. Wilks as merely one more in a long line of relatively consistent cases, discussed in Part III of this Article. I do not think that Martin v. Wilks requires that every affected person in the community be individually joined in the litigation. Rather, I think that there are two significant limits on the obligation to join affected parties.

The first limit is this: The case does not require joinder of every person affected, but only of every person affected in a way that is, at least arguably, legally protected. The plaintiffs in Martin v. Wilks were incumbent firefighters alleging that they were being passed over for promotion because of race. That stated a prima facie case, and all other issues went to the employer's defenses. From the perspective of the Martin v. Wilks plaintiffs, their employer refused to reconsider the race-based promotion policy because it was required by judicial decree; yet they had not been parties to either the litigation or the settlement underlying that decree, and they believed that the decree lacked sufficient justification under the legal standards governing such decrees. The Martin v. Wilks plaintiffs may have been right or wrong on the merits, but plainly they had a claim on which they were entitled to be heard before decision. The Court described it as a Title VII claim, and it invoked "the general rule that a person cannot be deprived of his legal rights in a proceeding to which he is not a party." Martin v. Wilks was a case about alleged "legal rights"; it was not a case about legally unprotected interests or desires.

If a disgruntled third party does not have a plausible legal claim, she does not have to be joined, and she will not be able to challenge the decree later. Consider the hypothetical shopkeeper whose business is adversely affected because of disruptive activity around a desegregated school. She does not have a legal claim; therefore, she does not have to be joined, and I do not think the Court intended that she be joined. Even if the Court did intend that such a shopkeeper be joined, the parties can safely ignore her. If she appears later and files a lawsuit, her suit will be dismissed for failure to state a claim on which relief can be granted. Maybe it would be good politics to give her an opportunity to comment, but it is neither necessary nor feasible that she be given a full opportunity to litigate. As a practical matter, plaintiff does not need to join people who would have no plausible legal claim now or later. The universe of people who might have plausible legal claims that are violated by a decree is a small subset of the universe of

14. Id. at 759 (emphasis added).
all the people who might in some direct or indirect way be affected by the litigation.\textsuperscript{16}

The second limit on the duty to join is that it is often enough to join representatives of missing parties. \textit{Martin v. Wilks} does not say anything about representative litigation, but there is no reason to believe that it implicitly overrules all the pre-existing law on representation. One way to represent missing parties in \textit{Martin v. Wilks} itself would be to certify a class of white firefighters or even a class of future white applicants.\textsuperscript{17} The class certification procedure under Rule 23 includes important procedural safeguards; there are no such safeguards in the argument that anyone who should have read about a case in the newspaper is bound by his failure to intervene. Another way to represent missing parties is to appoint guardians ad litem.\textsuperscript{18} The guardian ad litem procedure is especially appropriate for foreseeable claimants whose identities are unknown, such as future job applicants.

Class actions and guardians ad litem suggest at least two ways to make this kind of litigation workable. Nothing in \textit{Martin v. Wilks} suggests that those methods are forbidden in the future.

\section*{III. The Due Process Case Law}

I also think that Professor Fiss exaggerates or misreads the Court's willingness to dispense with individual notice in the earlier due process cases.\textsuperscript{19} He misreads \textit{Mullane v. Central Hanover Bank \\& Trust Co.},\textsuperscript{20} and he seems unaware of the long line of cases applying it. \textit{Mullane} has the ironic distinction of being central both to Professor Fiss's article and to an article I published in 1987, an article that in some ways anticipated \textit{Martin v. Wilks}.\textsuperscript{21}

We both rely on \textit{Mullane}, but we rely on it for almost entirely opposite points. In part we are able to do that because there were two holdings in \textit{Mullane}; I emphasize one and he emphasizes the other. But in fact the two holdings are consistent, and neither lends any support to an opposite result in \textit{Martin v. Wilks}. I will belabor what to me seems obvious here, because the resistance to these cases has been so persistent.

\textit{Mullane} was decided in 1950. The case concerned the management of common trust funds in New York, and those funds had many beneficiaries. The statutory scheme was to appoint a special guardian to represent the interests of all the beneficiaries of the common trust. No notice was sent to any of the beneficiaries, but the guardian was supposed to represent them all. The issue was whether the special guardian procedure was sufficient to satisfy due process, or whether at least some beneficiaries were entitled to individual notice and an opportunity to assert their own interests.

\begin{itemize}
\item[16.] For further analysis of who must be joined, see Laycock, supra note 7, at 121-24.
\item[17.] \textit{See} id. at 148-48.
\item[18.] \textit{See} id. at 148-49.
\item[19.] \textit{See} Fiss, supra note 3, at 975-77.
\item[20.] 339 U.S. 306 (1950).
\item[21.] \textit{See} Fiss, supra note 3, at 975-76; Laycock, supra note 7, at 111, 147-49.
\end{itemize}
I will return to Martin v. Wilks in more detail after reviewing Mullane and its progeny, but the critical point can be stated simply: In Martin v. Wilks there had been neither individual notice nor a guardian ad litem for unrepresented interests. The procedure in Martin v. Wilks was far less adequate than either of the options at issue in Mullane.

In Mullane, the Court held that representation by a special guardian was constitutionally inadequate for the present income beneficiaries, because their names and addresses were already in the hands of the bank. For these easily identifiable claimants, a guardian was not good enough; adequate representation was not good enough; balancing the costs and benefits of individual notice was not good enough. For present beneficiaries whose names and addresses were known, the Court applied a per se rule of individual mail notice:

Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

The trustee has on its books the names and addresses of the income beneficiaries represented by appellant [the special guardian], and we find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail to the record addresses.

The Court's subsequent cases on notice routinely cite Mullane for its requirement of individual mail notice to claimants whose names and addresses are known. States, and even the lower federal courts, have been eager to create exceptions to Mullane, so the Court has had many occasions to apply it over the years.

Thus, the Court required individual notice to property owners affected by the widening of a street, and to riparian owners affected by diversion of a river; in each case, their names and addresses were readily available from deed and tax records. Faced with a provision of the Bankruptcy Act that required "reasonable notice . . . by publication or otherwise," the Court required individual notice to known creditors; publication was unreasonable where names and addresses were known.

The Court held that natural fathers are entitled to individual notice of adoption proceedings affecting their children. The Court held that mortgagees of real property are entitled to individual notice of tax foreclosure sales. The Court required actual notice to "known and

ascertainable creditors” in probate proceedings.\textsuperscript{28}

In all of these cases, the key to Mullane's requirement of individual mail notice was knowledge of individual names and addresses of persons who might have a viable legal claim. The Court summarized the rule as follows: "The general rule that emerges from the Mullane case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question."\textsuperscript{29} And again: "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable."\textsuperscript{30}

In many of these cases, publication notice had been the traditional practice because the situations tended to produce large numbers of affected parties, some of whose identities could not be known. Diverting a river affects hundreds or thousands of property owners; railroad bankruptcies affect thousands of creditors. The numbers of potential claimants did not excuse the requirement of individual notice to those whose names and addresses were known. The Court also rejected several collateral arguments that have echoes in the dispute over Martin v. Wilks: that notice should not be required for claimants who actually knew about the proceeding and failed to file claims,\textsuperscript{31} that notice should not be required for sophisticated claimants who had means of learning about pending litigation from the public record,\textsuperscript{32} and that an opportunity to attack a decree after it was entered could adequately substitute for notice and an opportunity to litigate before the decree was entered.\textsuperscript{33}

In most of these cases, the only efforts at notice had been publication, posting on or near the affected property, or both. But of course in Mullane itself a special guardian had been appointed to represent absent claimants, and that procedure was held insufficient. Whenever the issue arose, the Court continued to apply Mullane to require individual notice in cases where the states or lower courts relied on some representative to adequately represent the interests of unnotified parties. Thus, in the case requiring notice to mortgagees of tax foreclosure sales, the Court rejected the argument that it was sufficient to notify the owner.\textsuperscript{34} And the Court struck down a strange Illinois law that extinguished a plaintiff's civil rights claim if the enforcement agency failed to schedule a factfinding conference within 120 days.\textsuperscript{35} The enforcement agency was charged with representing plaintiffs; it would have issued a complaint if it had found substantial notice.

\textsuperscript{30.} Mennonite Bd., 462 U.S. at 800 (emphasis in original).
\textsuperscript{32.} Mennonite Bd., 462 U.S. at 800.
\textsuperscript{34.} Mennonite Bd., 462 U.S. at 799.
evidence of a violation. Implicit in the case is that the actual plaintiff was entitled to a hearing at which he represented himself, and that he was not bound by the procedural default of someone appointed to represent him.

The Court’s most famous and controversial application of the Mullane principle was its application to class actions in Eisen v. Carlisle & Jacquelin. Eisen goes further than either Mullane or Martin v. Wilks; Eisen is not necessary to my argument, and I do not rely on it. But neither do I think that it was some sort of a turning point that changed Mullane and led to Martin v. Wilks. The worst that can be said of Eisen is that it was a wooden application of the principle in Mullane.

Eisen relied on the Federal Rules of Civil Procedure instead of the Due Process Clause, but the opinion notes that the drafters of the Rules had themselves relied on Mullane and the Due Process Clause. The Advisory Committee’s Notes to the 1966 amendments said:

This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. See Hansberry v. Lee, 311 U.S. 32 (1940); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

The text of Rule 23(c)(2) expressly codified Mullane’s per se rule:

[T]he court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

The plaintiffs in Eisen wanted to read the italicized clause as though it began: “including, if practical, individual notice.” Read that way, the italicized clause would add nothing to the requirement of “best notice practicable.” The italicized clause makes

37. Id. at 173-74.
39. Fed. R. Civ. P. 23(c)(2) (emphasis added). Because a colleague noted that the requirement of individual notice to identifiable individuals is in a dependent clause, and argued that this somehow reduces its force or makes it subject to the independent clause that precedes it, I note that the Advisory Committee comments paraphrase this provision in a compound verb that is directly attached to the subject of the sentence and wholly independent of the other clauses in the sentence:

The notice, setting forth the alternatives open to the members of the class, is to be the best practicable under the circumstances, and shall include individual notice to the members who can be identified through reasonable effort.


There is currently circulating a draft amendment to Rule 23 that would overrule Eisen by deleting both the requirement of individual notice and the requirement of best notice practicable, and instead authorize the court to consider “the expense and difficulties of providing actual notice to all class members.” Fed. R. Civ. P. 23(d)(2), draft documents attached to letter from Edward Cooper to Civil Procedure Buffs, Jan. 21, 1993 (hereinafter Draft Amendments). This proposal is currently pending deep in the committee structure of the United States Judicial Conference.
sense only if it unqualifiedly requires individual notice to those who can be identified with reasonable effort. Both Mullane and Rule 23 required individual notice to reasonably identifiable claimants, and indulged open-ended inquiries into practicality only with respect to those claimants who were not so readily identifiable.

The only way to escape the italicized clause would have been to imply an uncodified exception on the ground that the Rules Committee had never contemplated a case like Eisen. The Rule reflects the assumption that identification is the obstacle to individual notice, and that when the class members can be identified, individual notice is always practical. Faced with a case in which identification was easy and individual notice impossible, the Court might have gone outside the Rule. But it could not credibly affirm in the guise of merely interpreting an ambiguous provision.

The Court did not create an exception. “The short answer to these arguments is that individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23.”40 The Court enforced Rule 23(c)(2) literally, and it did so against the background of the Court's due process cases. Eisen quoted Mullane's holding that when names and addresses are known, “the reasons disappear for resort to means less likely than the mails to apprise them of” a pending lawsuit,41 and it quoted the Court's later summary of the “general rule” based on “known or very easily ascertainable” names and addresses.42 Class members who were individually known had to be individually notified.

The most that can be said about this is that Eisen applied a settled rule to a fact situation more extreme than any the Court had previously faced, and that it refused to create a new exception for the new situation. But the rule the Court applied was not new. Mullane had announced a per se rule of individual notice to known claimants, noting that “exceptions in the name of necessity do not sweep away the rule.” The Court had applied that per se rule in several other situations where individual notice was burdensome. Rule 23 codified that per se rule, and Eisen applied the rule as codified. I had accepted a job in a plaintiffs' class action firm when Eisen came down, and I was as unhappy as everyone else in the field, but I think we were all engaged in wishful thinking. In considering the claim that Eisen was obviously wrong or a sharp departure from the past, it is not irrelevant that the decision was unanimous on the duty to give individual notice, and that Justices Douglas, Brennan, and Marshall thought the solution was to define a subclass that plaintiff could afford to notify.43 Eisen was simply one more holding in the Mullane line of cases.

There remains one oddity about the rules on notice in class actions. Rule 23's requirement of individual notice to reasonably identifiable class members applies only in class actions certified under Rule 23(b)(3), and not

40. Eisen, 417 U.S. at 176.
41. Id. at 174-75 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318 (1950)).
42. Id. at 175 (quoting Schroeder v. City of New York, 371 U.S. 208, 212-13 (1962)).
43. Id. at 179-86 (Douglas, J., dissenting).
in class actions certified under Rule 23(b)(1) or (2). Some courts have permitted (b)(1) and (b)(2) class actions without notice to class members, even in cases where the principal relief sought was back pay to individuals whose names and addresses were known. The Supreme Court has never ruled on the constitutionality of this practice. It is impossible to see how the requirements of due process could be affected by choosing to proceed under a different subsection of the Federal Rules, if there is no difference in the real interests and identifiability of the class members. Proposed amendments to Rule 23 would eliminate the distinction among the subsections and impose a uniform inquiry into the utility and feasibility of notice.

Even if (b)(1) and (b)(2) class actions without notice are thought to be consistent with due process, these cases would provide no precedent for an opposite result in Martin v. Wilks. These class actions depend on formal certification of an adequate representative under Rule 23; there is no such representative for the unrepresented interest in trilateral disputes.

I come at last to the other holding in Mullane. That holding dealt with people not so readily identifiable: future beneficiaries, unknown beneficiaries, contingent beneficiaries, and even, the Court said, those who "could be discovered upon investigation, [but who] do not in due course of business come to the knowledge of the common trustee." With respect to these people, individual notice was not required, but neither could their interests be ignored. Instead, as the New York statutory scheme already provided, the Court appointed someone with the sole duty of representing those interests. This representative was not someone like the employer in Martin v. Wilks, who was already in the case with interests of his own, but someone specially charged with representing these unidentified claimants. Such a guardian had been appointed and was diligently litigating in Mullane, so Mullane cannot support the proposition that anything less is adequate.

The two holdings in Mullane thus divided the trust beneficiaries into two groups. Each group would be represented by the special guardian, but in addition, one group would receive individual notice. The line between the two groups was whether individual names and addresses were known to the bank in the due course of business. "Whatever searches might be required in another situation under ordinary standards of diligence," searches beyond the routine course of business were unnecessary here, because of the "great numbers of beneficiaries" and the "remote" and "ephemeral" nature of many of their interests. If there were more at stake—for example, if the question were identifying the remainderman entitled to distribution of the principal sum of the trust—due diligence might require great investigation. But for an accounting of the common fund, due diligence was satisfied by pulling names and addresses out of the existing business records. This relaxation of diligence in efforts to identify

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44. Fed. R. Civ. P. 23(c)(2).
48. Id. at 317.
unknown claimants is no authority at all for failing to notify known claimants, or for failing to appoint a guardian to represent the unknown claimants. Nor does the Court's decision to order ordinary mail instead of hand service suggest that anything less than individual mail notice would suffice.

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.

The opinion is not ambiguous on the relationship between the two holdings. New York had already provided adequate representation through the special guardian, so the Court's holding can only mean that adequate representation is insufficient when individual notice is practical. The Court relied on other trust beneficiaries similarly interested to represent those whose notice got lost in the mail, but that holding also treats vicarious representation as second-best after serious efforts at individual notice have failed. I find it preposterous to say that adequate representation is the essence of due process as interpreted in Mullane. And whatever the Court may have thought about the limits of practicality casts no doubt on Martin v. Wilks. Individual notice to incumbent workers certainly, and individual notice to applicants with pending applications probably, is no more difficult than individual notice to the many trust beneficiaries in Mullane.

The case most commonly cited for the proposition that adequate representation is the essence of due process is Hansberry v. Lee. But notice and hearing were not at issue in Hansberry. Hansberry held only that a representative with a conflict of interest does not satisfy due process. Hansberry did not present the question addressed in Mullane: Is individual notice required even when the court has also appointed an independent representative with no conflict of interest? Nor do Hansberry's proffered reasons for class actions—lack of jurisdiction over all class members, lack of names and addresses for all class members, and abatement of the action by death if all class members were made full parties—suggest a rationale for dispensing with individual notice to class members whose names and

49. Id. at 319.
50. 311 U.S. 32 (1940).
51. Id. at 44-46.
52. Hansberry summarized the reasons for class actions as follows:

Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts is unknown or where if all were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree.

Id. at 41.
addresses are known. *Mullane* squarely answered the question whether adequate representation substitutes for individual notice; *Hansberry* did not present it.

I therefore view the due process cases as running in a straight and continuous line from at least *Mullane* through *Martin v. Wilks*. The cases require individual notice for those people who are readily identifiable, and independent representatives for the others. *Martin v. Wilks* should not have been a surprise, and it was in no sense a betrayal. Like *Eisen*, it was based on the Federal Rules of Civil Procedure, but also like *Eisen*, it implemented the values of the Due Process Clause. And because the number of claimants whose names and addresses are known is so much smaller, *Martin v. Wilks* was a much easier case than *Eisen*. Even if *Eisen* should have been an exception to *Mullane*, *Martin v. Wilks* should not have been an exception.

**IV. Adequate Representation for Employees**

The possibility of appointing a representative for unknown claimants brings me to my fourth area of disagreement with Professor Fiss. All the force of his attack on *Martin v. Wilks* comes from his initial assumption that the employer is generally an adequate representative of the nonplaintiff employees. This is the most Republican thing I have ever heard Owen Fiss say. In my blue collar union family, we knew perfectly well that the employer did not represent the employees. In the face of vigorous attacks on this assumption, Professor Fiss concedes that "there may be good reason to doubt" it.53 But he is not willing to give up the point.54

Especially at the remedy stage, the employer and the nonplaintiff employees have fundamentally different interests. Above all else, the employer wants to avoid or minimize liability for back pay. Often the best way for the employer to do that is to offer an aggressive affirmative action plan in the future in exchange for releasing the back pay claims, or settling them for a smaller sum. Even if the case is fully litigated all the way through the remedy stage, the employer has a far bigger incentive to litigate back pay, and the other employees would have a far bigger incentive to litigate the future affirmative action plan.

Because the nature and scope of the remedy depend on the nature and scope of the violation, the conflict between the employer and nonplaintiff employees begins at the liability stage. It is generally in the nonplaintiff employees' interest that liability be based on specific acts of discrimination against individual victims who can be compensated. It is in the employer's interest that liability be based only on systemic underrepresentation and that no victims be identified.

The white, Mexican-American, Asian-American, and other nonplaintiff employees have every reason to want the employer to bear the cost of his past discrimination. The employer has every reason to put the cost on somebody else, and the most readily available somebodies are the other employees. It is illustrative that in the typical case that Professor Fiss asks us

53. Fiss, supra note 3, at 971.
54. Id. at 971 n.23.
to imagine, he does not even mention back pay as part of the remedy.\textsuperscript{55} That is precisely the way the employer wants it to come out. But a remedy without back pay puts little burden on the employer, and provides no reason to believe that the employer's interests were sufficiently congruent with the interests of nonplaintiff employees to treat one as representative of the other. If the employer does not pay full value on all the plausible back pay claims, either by settlement or litigated decree, the decree against the employer is no indication that he was sufficiently guilty to justify imposing burdens on anyone else.

I am not claiming that the employer sides with the plaintiff employees in any emotional, ideological, or other human way, or that he believes in affirmative action, or even that the employer is not in some of these cases a thorough-going racist. A thorough-going racist employer has exactly the same incentives of self-interest to trade other employees' jobs for a release of back pay claims.

\textit{Martin v. Wilks} illustrates the point. I do not doubt that the City of Birmingham discriminated against blacks who wanted to be firefighters. But the City of Birmingham did not pay for the settlement. The original back pay claims totalled five million dollars; the city settled for $265,000 and a fifty percent goal for both hiring and promotion.\textsuperscript{56} The lawyer for the black plaintiffs described the settlement as trading "money for jobs,"\textsuperscript{57} and the lawyer for the city told a reporter to "bear in mind we were facing about five million dollars or so in total exposure."\textsuperscript{58} In a subsequent letter to the editor, he denied trading jobs for money, but he did not deny the quotation.\textsuperscript{59} The Mayor said it was the "best business deal" the city ever made.\textsuperscript{60} The fifty percent promotion goal was greatly disproportionate to the less than ten percent of blacks among rank-and-file firefighters,\textsuperscript{61} and the incumbent firefighters alleged a customary right to seniority-based promotions, which arguably triggered statutory and case-law protections for seniority systems.\textsuperscript{62} It is doubtful whether so stringent a promotion goal could have been imposed in a litigated case; it is nearly certain that trilateral settlement negotiations would have distinguished between the hiring goal and the promotion goal. In considering the disruptive potential of opening

\begin{footnotes}
\footnote{55. Id. at 968-69.}
\footnote{58. Id.}
\footnote{62. Issacharoff, supra note 56, at 231-36.}
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settlements to challenge by affected third parties, it is noteworthy that there has been little sustained challenge to the hiring goals in Birmingham. Incumbent workers of all races are far more likely than mere job applicants to complain about discrimination.63

The problem of cynically self-interested alliances is not unique to the civil rights context. The employer-employee example most commonly arises in affirmative action litigation, but the general point is simply that one person in a trilateral dispute cannot represent either of the other two. It is well settled and understood in sociology and in game theory that all trilateral relationships tend to break down into alliances of two against the third, that those alliances are unstable, and that any of the three parties who pursues his self-interest and is willing to break and re-form alliances whenever convenient can maximize his own power in the relationship.64

The law offers many examples in which people form alliances against their natural preferences or inclinations. Criminal defendants turn state's evidence and inform on their confreres. Personal injury plaintiffs take assignments of the defendant's claims against the defendant's liability insurer. Defendants settle for a share of the plaintiff's claim against codefendants. And employers settle by trading some of their employees' jobs to other employees to avoid back pay liability. That the white employees and a discriminating employer were once on the same side, that they were once part of the same political coalition in the community, says nothing about the employer's propensity to sell those employees out to avoid a back pay award. The employer is not an adequate representative of any group of employees—to believe otherwise requires ideological blinders.

V. THE CIVIL RIGHTS ACT OF 1991

Congress responded to Martin v. Wilks in the Civil Rights Act of 1991.65 The Act says that nonplaintiff employees' claims under the Constitution and federal civil rights laws are barred in two situations. Curiously, the Act does not affect claims under the employees' employment contracts or collective bargaining agreement, the state or federal civil service laws, or state civil rights laws.

First, federal civil rights claims are barred if the claimant's interest was adequately represented by someone who had the same interest and

63. See id. at 250. Discrimination charges with the Equal Employment Opportunity Commission are six times as likely, and lawsuits in a sample of large cities three times as likely, to allege discrimination in discharge as discrimination in hiring. These data are collected and analyzed in John J. Donoghue III & Peter Siegelman, The Changing Nature of Employment Litigation, 43 Stan. L. Rev. 983, 1015-16 (1991); the sources of the data are described id. at 985 n.3. Most job seekers apply for more than one job and most job holders are never discharged, so there must be many more rejected applicants than discharged workers in the economy. Thus, the likelihood of a lawsuit by a discharged incumbent who suspects discrimination must be many times greater than the likelihood of a lawsuit by a rejected applicant who suspects discrimination. The likelihood of a lawsuit by an incumbent denied promotion presumably falls somewhere in between.


challenged the decree on the same legal grounds. For the reasons already stated, that person cannot be the employer, because the employer does not have the same interest and simply does not represent his employees. Without the fallacious assumption that the employer represents employees, the only effect of this provision is to convert every challenge by a nonplaintiff employee into a de facto class action. It would be far better to use the formal procedures of Rule 23 to safeguard absent class members than to proceed informally and argue later whether an employee who litigated on his own behalf adequately represented all others in spite of himself.

Second, federal civil rights claims are barred if the claimants had notice that gave them a deadline—a notice that said they must file objections by a certain date or be bound. The typical newspaper story will not satisfy this provision. As a practical matter, I think the court must send a formal notice to assure that the deadline is enforceable. And whatever the statute might be read to say, Mullane and the Constitution require that the notice be sent individually to those employees whose names and addresses are readily available.

The Act does attempt to impose one important limitation on Martin v. Wilks. The Act does not require notice at the beginning of the case, when notice might provide a full and fair opportunity to litigate. The Act requires only that the notice be “prior to the entry of the judgment or order,” and that it provide “a reasonable opportunity to present objections to such judgment or order.” Similarly, the adequate representation provision does not require that the representative have a full and fair opportunity to litigate the case, but only that he have had “a reasonable opportunity to present objections to such judgment or order,” apparently before or after entry of the decree.

Martin v. Wilks apparently contemplated that those whose claims of legal right were being adjudicated should be made parties. In sharp contrast, the Act provides only a chance to object to the work of others, and only after the parties have reached an agreement that is awaiting the signature of a judge who is delighted to have one more case off his docket. In fully litigated cases, the judge is apparently supposed to decide the case and issue a proposed decree, and then pause to invite objections from third parties before he enters the decree. Experienced litigators will believe in that procedure “with the same mental reservations one has in teaching of Santa Claus or Uncle Sam or Easter bunnies or dispassionate judges.”

Whether the original parties settle or fully litigate the case, the question is whether such an after-the-fact hearing is sufficient due process for the adjudication of claims of legal right that were not represented in the underlying litigation. Class members objecting to a settlement under Rule 23 are relegated to such a makeshift hearing, where they can object to the fairness of the settlement but cannot actually litigate any issue in the case. But objectors are relegated to this procedure only after settlement of a

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proper class action, which means there is a finding that the class representative adequately represents the absent class members, and there was an opportunity for full litigation by the class representative. In cases where the Civil Rights Act attempts to ban claimants who had a mere opportunity to object to a proposed or final decree, objecting employees will not have been represented by anyone. In the absence of an adequate representative with a full chance to litigate, these hearings are too late to satisfy due process. Certainly it is not sufficient to hold a hearing that inquires only into "fairness" or "reasonableness."

No hearing is adequate if the objecting parties bear the burden of proving that the consent decree should not be entered. This is the plain implication of Armstrong v. Manzo, where the Texas courts erroneously held that lack of notice and hearing could be cured by a later hearing on a motion to set aside the decree. The Supreme Court reversed because petitioner bore the burden of proof on the motion to set aside the decree:

Had the petitioner been given the timely notice which the Constitution requires, the Manzos, as the moving parties, would have had the burden of proving their case as against whatever defenses the petitioner might have interposed. It would have been incumbent upon them to show not only that Salvatore Manzo met all the requisites of an adoptive parent under Texas law, but also to prove why the petitioner's consent to the adoption was not required.

... "[T]he opportunity to be heard" ... must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.

Hearings on objections to proposed decrees raise the same issues. To accord due process, the original plaintiffs and the employer must bear the burden of proving that a remedy can lawfully override the objecting parties' rights under the Constitution and federal civil rights laws—"the burden of proving their case as against whatever defenses" the objecting parties might interpose. That can be accomplished only if the court is willing to "set aside the [proposed] decree and consider the case anew."

69. See Laycock, supra note 7, at 137-39.
70. 380 U.S. 545 (1965).
71. Id. at 550-51.
72. "[T]he burden of proof lies may be decisive of the outcome." Id. at 551 (quoting Speiser v. Randall, 357 U.S. 513, 525 (1957)).
74. Armstrong, 380 U.S. at 551.
75. Id. at 552.
The difference between the right to make the original parties prove their case and the limited right to object to a presumptive settlement is the difference between due process and an ineffectual formality. So long as objecting third parties have neither the right to demand that the original parties prove their case, nor the right to withhold approval from a settlement, the original parties have little reason to take objecting third parties seriously. If it is enough to say that the settlement is reasonable in light of litigation risks, all settlements are reasonable.76

Settling plaintiffs and employers will undoubtedly urge some such interpretation of the new Act. They will interpret the Act with the same goal that drove the case law prior to Martin v. Wilks. The goal was to get the third parties out of the case and ignore their rights and interests. Professor Sturm may want to bring absent parties in "just enough to co-op them";77 Professor Fiss wants to bring them in just so long as they are "controllable."78 Objecting third parties can have the form of a hearing so long as there is no danger they might actually influence the results. The job opportunities appropriated from those third parties can be used to subsidize a settlement between the employer and the plaintiffs. An opportunity to object to a presumptive settlement will not interfere with continued appropriation of that subsidy. But it is plainly illegitimate for the employer to get that subsidy. The plaintiffs are more sympathetic figures, but they are not entitled to appropriate an unauthorized subsidy from third parties either.

VI. IMPLEMENTING DUE PROCESS

A right to full and fair litigation, with notice to known claimants and adequate representation for all claimants, does not mean the end of the structural injunction, and it does not mean the end of affirmative action remedies. To make the structural injunction workable, and to fully legitimate affirmative action remedies, we have to bring in representatives of the other affected employees early in the case.

First, either plaintiff or the court must send individual notice to all the incumbents; Mullane requires at least that much. Incumbent employees must be individually notified and given an opportunity to organize themselves into a class. Second, the court must appoint a guardian ad litem to represent unknown future applicants and others who might be affected but have no class representative.

A managerial judge and diligent plaintiffs’ lawyers can make that litigation workable. There will not be nine hundred firefighters, each appearing with their nine hundred lawyers. The greater risk is that there will be nine hundred defaults because the parties are not sufficiently organized. But with guardians ad litem and class representatives, the court

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76. For further analysis of the inadequacies of fairness hearings as customarily conducted, by a successful scholar who is also an experienced litigator, see Issacharoff, supra note 56, at 227-30, 235-36.
77. Fiss, supra note 3, at 968 n.16 (characterizing Professor Sturm's proposal).
78. Id. at 973.

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can organize this litigation into three separate interests: the employer, the victims of discrimination, and the other employees who do not claim to have been victims of discrimination.

Once the litigation is organized in this way, it may settle with all three interests consenting, or it may go to trial. With plaintiffs pushing for a complete remedy, and the third parties pushing to put the full cost on the employer, it is predictable that victims of discrimination might collect more back pay. That is one reason why so many repeat defendants filed amicus briefs in *Martin v. Wilks*. It is also predictable that affirmative action remedies might be somewhat less aggressive and somewhat more closely tailored to the effects of the employer's past discrimination, because those parties who bear the principal costs of affirmative action would now be represented. But it is not predictable that including all three affected interests will mean the end of affirmative action remedies. Affirmative action is an established part of the courts' remedial inventory, with a firm basis in law and fact in a wide range of cases. The plaintiffs' claim to affirmative action is not so weak that it depends on excluding adverse interests from the litigation.

*Martin v. Wilks* should be viewed not as an attack on the structural injunction, but as a necessary step in legitimating the structural injunction and assimilating it to the rest of our law. The structural injunction frequently involves trilateral disputes, in which three claims of legal right are squarely at issue. If the court is adjudicating the rights of third parties, it is basic that those third parties should be given notice and a full opportunity to be heard.

Similarly, the Civil Rights Act of 1991 should not be interpreted to reinstate the pre-*Martin* status quo. Rather, it should be interpreted as a constructive proposal to make *Martin v. Wilks* more workable. The Act provides that instead of serving a summons and a complaint, the court should send a notice inviting third parties to join the litigation by a date certain, and informing them that their claims will be barred if they decline the invitation. That change, first proposed by Professor Strickler, probably simplifies the procedure for everyone. It can "provide, as a practical matter, no less protection to nonparties than a system of mass joinder."

By itself, this change neither solves the central problem nor interferes with a solution. What is critical is that the notice be sent early, that those who respond be given the full rights of parties, and that guardians ad litem

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79. Briefs were filed on behalf of thirty-two states, the District of Columbia, the Virgin Islands, the Council of State Governments, the National League of Cities, the National Association of Counties, and other governmental associations, and on behalf of the Equal Employment Advisory Council, a nationwide association of private employers. The statements of Interest of Amici Curiae in these briefs unambiguously asserted the amici's interest as defendant employers. See Brief of the National League of Cities et al., as Amici Curiae in Support of Petitioners; Brief of Alabama et al., as Amici Curiae in Support of Petitioners; Brief Amicus Curiae of Equal Employment Advisory Council in Support of Petitioners. These briefs are available on LEXIS, Genfed Library, Briefs File.


81. Id. at 1599.
be appointed for those who cannot respond, such as unknown future applicants. Then the case can proceed as the three-cornered dispute it really is.

**CONCLUSION**

Owen Fiss is famous for many things. One of those things is bringing the structural injunction to the forefront of scholarly attention. Another is beginning his course and his casebook on civil procedure with *Goldberg v. Kelly.* The preface to that casebook, which recognizably reflects Owen's writing style, explains the focus on *Goldberg* as follows:

*Goldberg* is a case in which the Supreme Court attempts to identify and to explain what the value of procedure is. *Goldberg* is the central narrative of the first chapter and provides an opportunity to consider the basic problems of constructing a procedural system: What constitutes legitimate decisionmaking by state-empowered individuals? What information must be provided the decisionmakers? Must those affected be permitted to participate in the process for it to be considered fair?

*Goldberg* is the quintessential case on the hearing component of the right to notice and hearing, just as *Mullane* is the quintessential case on the notice component. *Martin v. Wilks* may also become a quintessential case, about the right to notice and hearing in the context of structural injunctions. Owen apparently fears that his deep commitment to notice and hearing cannot coexist with his deep commitment to structural injunctions. I believe his fear is mistaken. The Due Process Clause applies to structural injunction cases, and we can make it work.

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83. Cover, Fiss, & Resnick, supra note 82, at vii.