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The Promise of Participation

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INTRODUCTION

Professor Owen Fiss's seminal work, The Civil Rights Injunction,[1] inspired a generation of scholars and practitioners to flesh out the significance of his insights. With remarkable prescience, he captured a moment in intellectual and legal history and created a vocabulary that continues to shape the debate over the court's role in public law litigation. The Allure of Individualism[2] continues the Fiss tradition of capturing a singular, emblematic issue and sketching with broad strokes the contours of emerging debate. His springboard is *Martin v. Wilks*,[3] a case that aptly frames the current dilemmas and choices posed by structural injunction litigation.[4] *Martin v. Wilks* addresses a central issue raised by structural injunctions: To what extent must courts afford those whose interests may be adversely affected by a decree the opportunity to participate in its formulation and implementation?[5]

Martin v. Wilks answers this question by granting third parties the right to full adversary participation. It holds that white firefighters may collaterally attack a consent decree adopting an affirmative action plan if they did not participate as parties in the proceedings resulting in that decree. The Civil Rights Act of 1991[6] reverses this holding and recasts third parties' right to "individual participation" as a right to "interest representation": It precludes collateral attacks if third parties had notice and a reasonable opportunity to object or if someone who previously challenged the judgment adequately represented their interests.

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1. Owen M. Fiss, The Civil Rights Injunction (1978).

2. Owen M. Fiss, The Allure of Individualism, 78 Iowa L. Rev. 965 (1993).

3. 490 U.S. 755 (1989).

4. Professor Fiss defines structural injunctions as decrees "through which the judiciary seeks to reorganize ongoing bureaucratic organizations so as to bring them into conformity with the Constitution." Fiss, supra note 2, at 965. In this Article, I use the term interchangeably with "public law remedies" to refer to a class of cases seeking to change the policies, practices, and conditions of institutions, such as schools, prisons, mental health facilities, and places of employment, to conform with legal norms.

5. These individuals are typically referred to as "third parties." This Article questions the appropriateness of the term "third party" as a way of describing everyone interested in the public remedial process. *See* infra pp. 987-91. It does use the term where its generally accepted meaning in fact applies.

6. 42 U.S.C. § 2000e-2(n)(1) (Supp. III 1991).

Professor Fiss does not shrink from the potentially far-reaching implications of *Martin v. Wilks*. He quite correctly notes that, although *Martin v. Wilks* involves a consent decree, its reasoning is equally applicable to decrees following an adjudication of liability.[7] He also acknowledges the implicit due process foundations of the Court's decision. Indeed, much of the commentary on the issue of third-party challenges to injunctions proceeds in terms of the traditional due process rights of third parties.[8] The strains of constitutional analysis in *Martin v. Wilks* implicate the rights of third parties to challenge injunctions not addressed by the Civil Rights Act of 1991, and leave open the possibility that the procedures established by the Civil Rights Act do not conform to the requisites of due process.

Professor Fiss uses the stark opposition of *Martin v. Wilks* and the Civil Rights Act of 1991 to highlight what he perceives as an inevitable conflict between process and outcome, between participation values and the efficacy and finality of the structural injunction. He embraces the value choice embodied by the Civil Rights Act of 1991. Indeed, The Allure of Individualism serves in part as an effort to provide a normative justification for the political victory achieved by the legislature's reversal of *Martin v. Wilks*. Professor Fiss introduces and defends a scheme that I refer to as "vicarious interest representation." Third parties may participate through a surrogate whom they did not select and cannot hold accountable, but who the court deems an adequate representative. Fiss concedes that this

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7. Fiss, supra note 2, at 968. Professor Fiss apparently agrees with the result reached by the Court in Martin v. Wilks because of his discomfort with the consent decrees as a mode of dispute resolution. He argues that consent decrees should be treated as no more than contracts between two private parties and should thus have no binding effect on third parties. I disagree with Professor Laycock's suggestion that Professor Fiss's concession concerning consent decrees dramatically limits the significance of his argument. Although structural injunctions do create incentives for parties to negotiate consensual agreements, decisions by judges imposing structural relief over the objection of parties (and others) fill the federal reporters. *See, e.g.*, United States v. City of Yonkers, 845 F.2d 444 (2d Cir. 1988) *rev'd in part sub nom.* Spallone v. United States, 493 U.S. 265 (1990) (housing discrimination); Davis v. East Baton Rouge Parish Sch. Bd., 721 F.2d 1425 (5th Cir. 1983) (schools); Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (M.D. Fla. 1991) (employer); Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd*, 679 F.2d 1115 (5th Cir. 1982) (prisons). Moreover, the status of consensual decrees that emerge following an adjudication of liability and an order by the court to prepare an injunction has never been clarified.

In any case, I disagree with Professor Fiss's blanket assertion that all consent decrees are to be treated with the same finality as a contract, regardless of the adequacy of the process leading to their adoption. *See* Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073, 1085 (1984). As Laycock points out, Professor Fiss's insistence on litigated decrees guarantees the failure of structural injunctions. *See* Douglas Laycock, Due Process of Law in Trilateral Disputes, 78 Iowa L. Rev. 1011, 1012-13 (1993). Moreover, a self-conscious and judicially structured process of deliberation offers a legitimate normative framework for upholding and enforcing consent decrees as a form of injunction. I develop this theory supporting the legitimacy of consent decrees in a forthcoming article.

8. *See* Samuel Issacharoff, When Substance Mandates Procedure: *Martin v. Wilks* and the Rights of Vested Incumbents in Civil Rights Consent Decrees, 77 Cornell L. Rev. 189, 200 (1992); Larry Kramer, Consent Decrees and the Rights of Third Parties, 87 Mich. L. Rev. 321, 331 (1988); Douglas Laycock, Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties, 1987 U. Chi. Legal F. 103, 105-10.

approach deprives third parties of important aspects of participation, but is willing to sacrifice these values to preserve the effectiveness of the structural injunction.

This Article shows that the value conflict identified by Professor Fiss stems not from an inevitable clash between process and outcome, but from his unstated acceptance of a variety of premises about the nature of participation and representation at the remedial stage of public law litigation. He conflates a series of important questions and choices that must be unpacked to address adequately the issue of third-party participation in structural injunctions.

First, is a distinct normative theory of participation needed for the remedial stage of public law litigation to account for basic differences in the goals and demands of liability and remedial decision making? Professor Fiss's treatment of third parties assumes that the theory and form of participation designed for liability determinations necessarily govern the public remedial process. I argue that this approach overlooks the importance of institutional context in defining the values and processes of participation. The distinctive character of public remedial decision making suggests the need for an independent theory of participation grounded in that judicial role. The values and forms of participation which characterize liability determinations respond poorly to the demands of an evolving remedial practice. That practice frequently departs from the adversary model and strives to develop and implement effective, fair, and consensual remedial solutions.[9]

Second, what participation values are important at the remedial stage of decision making? Professor Fiss enumerates the two values of participation embraced by *Martin v. Wilks*: the dignitary value of preserving individual autonomy and the instrumental value of achieving accurate decisions. He assumes that these two values define the universe of participation values implicated by remedial decision making, and he justifies departing from these values by downplaying the significance of instrumental values generally and minimizing the importance of dignitary values in the context of structural injunctions. This Article suggests that the ongoing debate over process values fails to address the demands of remedial participation. It offers five participation values for public remedial decision making and begins the task of rethinking the dignitary theory of participation in the context of structural remedies implicating group interests.

Third, what form best accommodates the values of remedial participation? Professor Fiss, like most courts and commentators, assumes that participation requires engagement in full adversary process. I argue that the adversary model cannot realize the process values at stake in the public remedial context. More interactive forms of participation are both possible and crucial to achieving remedial legitimacy and success.

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9. In most cases, the process of developing, monitoring, and enforcing a remedy departs dramatically from the adversary model. Judges and parties use mediation, expert consultation, and other informal modes of fact finding and problem solving. *See generally* Susan Sturm, A Normative Theory of Public Law Remedies, 79 Geo. L.J. 1355 (1991).

Finally, what role does representation play in fulfilling the participation values relevant in public remedial decision making? Professor Fiss proposes a move from direct participation to vicarious interest representation without justifying this move with any explicit theory of representation. He fails to show what makes a particular individual representative of the group he or she purportedly represents and does not even discuss what the representative must do to fulfill his or her responsibilities as representative. I explore a more dynamic and explicit theory of representation grounded in the remedial context which bridges the individual and group interests implicated in structural injunctions.

These four questions provide a framework for assessing the adequacy of Professor Fiss's treatment of third-party participation in structural injunctions. This Article analyzes the traditional conception of the terms "third party" and "finality," demonstrates Professor Fiss's general preoccupation with the liability model of decision making, and sets forth the basis for a distinct normative theory of public remedial process. It then criticizes Fiss's liability-driven approach to participation and representation and outlines a more promising theory and form for the public remedial context.

I. The Liability-Based Paradigm for Participation

Martin v. Wilks held that plaintiffs must either join third parties who will be adversely affected by a decree or face third-party-challenges to the decree in subsequent proceedings. Writing for the majority, Chief Justice Rehnquist based this judgment on the Court's "deep-rooted historic tradition that everyone should have his own day in court."[10] Although the opinion does not spell out what it means to have one's own "day in court,"[11] its language and use of the term conjure up visions of full adversary hearings with discovery, presentation and cross-examination of witnesses, briefing, and opportunity to appeal.[12] Only after a person has become a party and participated in this sense can she be bound by a court order.

Professor Lon Fuller explained the widely shared view that participation values are inextricably linked to adversary process: "The distinguishing characteristic of adjudication lies in the fact that it confers on the party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor."[13] Two theories of

10. *Martin v. Wilks*, 490 U.S. at 762.

11. For a discussion suggesting that the Court has failed to articulate a general theory of participation supporting the "day-in-court" principle animating its decision in Martin v. Wilks, see Robert G. Bone, Rethinking the "Day in Court" Ideal and Nonparty Preclusion, 67 N.Y.U. L. Rev. 193, 204 (1992).

12. Indeed, the Birmingham Firefighters Association did appear and file objections as amicus curiae at the initial hearing on the consent decree, and the district court considered its objections. However, the district court denied its motion for intervention as untimely, and thus the court did not afford it formal party status, and it did not have the right to appeal. *Martin v. Wilks*, 490 U.S. at 759. Even if the Birmingham Firefighters Association was deemed to represent the interests of the white firefighters who filed suit in Martin v. Wilks, the more limited form of participation afforded by the trial court would not satisfy Rehnquist's conception of having its "day in court."

13. Lon Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 364 (1978).

participation have emerged as the justification for this insistence on the right to one's "day in court." First, participation respects the dignity of the individual by providing those affected by decisions a "formally guaranteed opportunity to affect those decisions."[14] Second, participation serves the instrumental value of accuracy. Adversarial presentation by parties' lawyers enhances the likelihood of reaching a correct decision.[15] In his opinion, Chief Justice Rehnquist implicitly embraces this adversary conception of participation and applies it to each individual "who could be adversely affected by a decree granting broad remedial relief."[16] Unless an individual has been formally heard as a party, she remains free to challenge the court decree in the future.

Professor Fiss, along with many in the civil rights community, reacted to *Martin v. Wilks* with alarm.[17] He characterizes the Court's insistence on formal participation as a threat to the viability of the structural injunction. Professor Fiss shares Rehnquist's commitment to the value of formal participation[18] and accepts without comment the traditional "day in court" paradigm of participation articulated in *Martin v. Wilks*.

However, Professor Fiss despairs of preserving participation values without sacrificing the finality and efficacy of the structural injunction. The decree's vulnerability to collateral attacks and the resulting delay in implementation "exposes every decree to . . . an almost endless series of challenges." Consequently, "[i]n order to achieve some measure of finality and efficacy . . . . It may be necessary to forgo the right of participation . . . ."[19]

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14. Lon Fuller, Collective Bargaining and the Arbitrator, 1963 Wis. L. Rev. 3, 36; *see also* Goldberg v. Kelly, 397 U.S. 254, 264-65 (1970) (stating that participation "foster[s] the dignity and well-being of all persons"); Jerry L. Mashaw, Due Process in the Administrative State 161-62 (1985); Frank I. Michelman, Formal and Associational Aims in Due Process, *in* Due Process: Nomos XVII 127-28 (J. Roland Pennock & J. Chapman eds., 1977) (identifying importance of having "played a part in [and] made one's apt contribution to, decisions which are about oneself").

Some commentators challenge the validity of a dignitary theory of due process and question the significance of dignitary values independent of their instrumental importance in achieving accurate decisions. *See, e.g.*, Ronald Dworkin, A Matter of Principle 101-03 (1985); Lawrence Alexander, The Relationship Between Procedural Due Process and Substantive Constitutional Rights, 39 U. Fla. L. Rev. 323, 325-26, 341-43 (1987); Martin H. Redish & Lawrence C. Marshall, Adjudicatory Independence and the Values of Procedural Due Process, 95 Yale L.J. 455, 484-85 (1986). Others have questioned whether the values of individual autonomy and dignity can be served through the adversary process. Mashaw, supra, at 180; Cynthia Farina, Conceiving Due Process, 3 Yale J.L. & Feminism 189, 219-20 (1991); Michelman, supra, at 127-28. Despite these reservations, commentators are drawn to the intuitive appeal of dignitary theory of process, and the decision in Martin v. Wilks suggests that the Supreme Court credits individual dignity as an important and intrinsic process value.

15. Mashaw, supra note 14, at 102-03; Owen Fiss, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 42 (1979); Fuller, supra note 13, at 366-67.

16. *Martin v. Wilks*, 490 U.S. at 767.

17. *See* S. Rep. No. 315, 101st Cong., 2d Sess. 49 (1990).

18. *See* Fiss, supra note 2, at 968 (reflecting Fiss's assumption that participation requires full adversary process).

19. Fiss, supra note 2, at 969, 979.

Faced with what he perceives as a choice between two irreconcilable values, Professor Fiss comes down on the side of the structural injunction. He proposes to compromise the participation value by moving from individual to vicarious interest representation. Third parties participate vicariously through a surrogate identified by the court as having similar interests. Individuals do not have a right of participation in the process unless no member of the group the court deems them to be a part of has participated. They need have no involvement in selecting their representative or holding her accountable.

Professor Fiss thus accepts Chief Justice Rehnquist's equation of participation with adversary process, but seeks to limit this right to vicarious representation to preserve the effectiveness of the structural injunction. Professor Fiss's solution closely tracks the approach adopted by the Civil Rights Act of 1991. The Act precludes challenges to consent and litigated decrees if a person had notice of the proposed order and an opportunity to present objections *or* if a similarly situated person who previously challenged the judgment on the same legal and factual grounds adequately represented the potential challenger's interests.[20]

Professor Fiss argues that this approach solves many of the problems created by *Martin v. Wilks*. In his view, it avoids the necessity of joining the "countless" people whom the injunction might affect. It binds future persons whom the court cannot identify when it enters its decree. It encourages early participation by those whom the decree may adversely affect. According to Professor Fiss, by achieving formal finality and precluding future collateral attacks, the vicarious interest representation model satisfies the values of finality and efficacy, albeit at the expense of participation.

The strength of Professor Fiss's position depends on formalistic, liability-driven conceptions of party, finality, representation, and participation. However, if examined in relation to the particular character and demands of the remedial process, his vicarious interest participation model fails, even on his own terms. It ignores critical issues concerning the scope and form of participation by third parties in structural injunctions. It does not meet the stated concerns of finality and efficacy which prompt Professor Fiss to depart from traditional due process. Professor Fiss's proposal lacks a coherent theory of representation to justify its departure from individual participation. Moreover, like the Civil Rights Act of 1991, it fails to provide standards to determine whether the representative had a meaningful opportunity to participate or whether she was in fact representative of the putative challenger. Finally, it fails to account for the distinct values served by participation at the remedial stage which are necessary to achieve effective implementation and preserve the legitimacy of the court.

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20. 42 U.S.C. § 2000e-2(n)(1) (Supp. III 1991).

A. *From Third Party to Stakeholder: Liability- Versus Remedy-Type Claims for Participation*

In *Martin v. Wilks* white firefighters challenged the legality of a consent decree that adopted hiring and promotion goals for black firefighters. The white firefighters claimed that the city's employment practices pursuant to the decree violated Title VII.[21] They did not claim a legal violation independent of the decree, but their third-party challenge essentially sought a liability-type determination: Did the remedy itself violate the legal rights of third parties? The white firefighters thus claimed the right to the process afforded to any party seeking an adjudication of fault and responsibility under our current system of judicial process—full adversary adjudication of their legal claims.[22]

The liability-based challenge of the white firefighters differs from the position of many third parties at the remedial stage of public law litigation. As both Professor Fiss and Chief Justice Rehnquist recognize, public law remedies affect many people who lack valid independent legal claims but have important concerns grounded in less formal interests. They may be in a position to block the remedy, may be profoundly affected by it, or may be needed to implement it, although they are not necessarily legally responsible:

> 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 work loads affected; and of course, the taxpayers who will have to shoulder the financial burden of the busing plan.[23]

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21. *Martin v. Wilks*, 490 U.S. at 759.

22. I do not suggest that the adversary process is the only or even the best way to address conflicts over liability. A number of commentators, particularly those drawing on feminist theory, claim that the adversary process cannot satisfy the participation values that underlie our concern for due process and urge a more general "re-vision" of the structure of judicial process that builds on an ethic of care and develops "a flexible, contextually-sensitive due process jurisprudence." Farina, supra note 14, at 269; *see also* Martha Minow, Interpreting Rights: An Essay for Robert Cover, 96 Yale L.J. 1860, 1876 (1987); Deborah L. Rhode, Feminist Legal Theories, 42 Stan. L. Rev. 617, 631 (1990).

I share this dissatisfaction with the adversary process as a means of resolving all legal disputes, even those that involve multiple parties, require interpreting general, aspirational legal norms, involve competing theories of causation, and offer the possibility of more textured and Solomonic solutions that respond to the multiple concerns and perspectives affected by public law issues. Indeed, in a forthcoming article, I explore the potential of consent decrees as a form for expanding our repertoire of legitimate judicial role beyond the adversary model. However, my argument in this Article is much less ambitious and far-reaching. I am suggesting that we acknowledge and embrace the distinctive character of remedial decision making that has already promoted a departure from the adversary process in most cases. *See* Sturm, supra note 9, at 1360-78 (describing the distinctive character of public remedial decision making and the ways in which the process of public remedial decision making departs from the adversary model).

23. Fiss, supra note 2, at 969-70; *see Martin v. Wilks*, 490 U.S. at 766 (recognizing "the sort of complexities that may arise from a decree affecting numerous people in different ways"). For those wedded to a liability conception of process, it may be difficult to imagine a

Martin v. Wilks and the Civil Rights Act of 1991 essentially lump all of these third parties together in terms of the nature of their right of participation. Rehnquist includes "those who could be adversely affected by a decree granting broad relief,"[24] in his discussion of third parties and states that all third parties should have their "day in court." This suggests the necessity of formal adversary hearings to satisfy the requirement of participation regardless of the nature of the third-party interest. Similarly, the Civil Rights Act of 1991 removes the requirement of formal party participation for all third parties—those asserting liability-type remedial challenges and those seeking to change the terms of the decree to protect their interests.[25] Professor Fiss's solution also equates liability- and remedy-driven challenges to structural injunctions and reverses *Martin v. Wilks* for both. He would abolish the requirement of participation for those asserting cognizable legal claims *and* for those seeking to protect their interests.[26]

Chief Justice Rehnquist, Professor Fiss, and the Civil Rights Act of 1991 all ignore a critical difference in the form and purpose of participation for the white firefighters in *Martin v. Wilks* and the families of school children seeking to participate in the formulation of a school desegregation plan. They fail to appreciate the distinctive character of remedial decision making and the resulting implications for the nature and role of remedial participation. The firefighters are asserting legal rights to invalidate a remedy. Their arguments involve the bread-and-butter of formal adjudication: interpretation of legal doctrine and the application of legal doctrine to controverted facts. In contrast, the school children are engaging in the task of formulating a fair and effective remedy.[27] Their involvement does not consist of presenting arguments grounded in liability norms, which provide only the goals and boundaries for the remedial decision. They seek to influence the choice of remedy based on its potential impact on values

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Martin-type challenge ever arising except as a liability-type claim. However, there are many examples of third parties seeking to challenge the content of remedial decrees on the grounds that these decrees adversely affect their interests. A good example is the unsuccessful attempt of the Philadelphia District Attorney to intervene to challenge a consent decree establishing mandatory population caps on the ground that the decree adversely affected the interests of the citizens in upholding the criminal laws. *See* Harris v. Pernsley, 654 F. Supp. 1042, 1045 (E.D. Pa.), *appeal dismissed*, 820 F.2d 592 (3rd Cir.), *cert. denied*, 484 U.S. 947 (1987); *see also* United States v. Crucial, 722 F.2d 1182, 1190-91 (5th Cir. 1983) (allowing intervention to separate organization of parents to protect the educational interests of minority students); Berkman v. City of New York, 705 F.2d 584, 588 (2d Cir. 1983) (firefighters' union allowed to intervene at remedial stage of Title VII case to participate in design of nondiscriminatory firefighters' test).

24. *Martin v. Wilks*, 490 U.S. at 767.

25. 42 U.S.C. § 2000e-2(n)(1)(B) (Supp. III 1991).

26. Professor Fiss acknowledges the ambiguity in "Rehnquist's conception of the universe of persons to be joined," Fiss, supra note 2, at 970, but insists that even if Martin v. Wilks' joinder requirement is limited to those with cognizable legal claims, it imposes an insurmountable burden on plaintiffs. Contrary to Professor Fiss's rhetorical suggestion that any interest can be transformed into a cognizable legal claim, most third parties who participate in structural injunction cases do not have cognizable challenges to the legality of the remedy. I consider Professor Fiss's limiting interpretation on the scope of plaintiffs' joinder requirement to ease substantially plaintiffs' burden and thus to undercut the force of Professor Fiss's claim that Martin v. Wilks destroys the finality and efficacy of the structural injunction.

27. *See* Sturm, supra note 9, at 1363-65.

and goals that do not directly relate to the liability norm, such as promoting effectiveness, preserving community-based education, and enhancing educational value.

Remedial legitimacy comes not from finding and proclaiming the right result, but from overseeing a process that is fair and that produces effective results. Unlike the process of liability determination, the structural injunction's successful implementation depends on the cooperation of those who must implement, support, and live with it. The remedial stage poses the challenge of achieving the understanding and acceptance of the remedy by those who are affected by it. The parties' perception of the legitimacy of the court's intervention is crucial to achieving cooperation in a particular case and to maintaining the legitimacy of judicial involvement.

Professor Laycock, in his article commenting on Professor Fiss's The Allure of Individualism,[28] recognizes the existence of a difference between liability- and remedy-driven challenges by third parties, but fails to appreciate the significance of that difference. The distinction prompts him to assert that only those with arguable legal claims need participate in the remedial process or have the opportunity to challenge a decree.[29] In part, this conclusion results from a narrow reading of *Martin v. Wilks*, perhaps an effort to minimize its reach by limiting the holding to the facts. As Professor Laycock points out, Chief Justice Rehnquist does refer at the beginning of the opinion to "the general rule that a person cannot be deprived of his legal rights in a proceeding to which he is not a party,"[30] and the party before the Court was asserting legal rights. However, the Court's discussion and justification of the holding refer repeatedly to the variety of ways a decree may affect third parties, and explicitly address and accept the potential consequences of a rule that applies to third parties "who could be adversely affected by a decree granting broad remedial relief."[31] Certainly the drafters of the Civil Rights Act read *Martin v. Wilks* as applying to all third parties seeking to challenge a decree.

Laycock's minimization of the interests of third parties with remedy-based challenges to decrees illustrates our preoccupation with the liability stage. Laycock characterizes participation by third parties with remedy-driven claims as "good politics," but legally unnecessary; only when a court is disposing of claims of right will we recognize judicial process norms.[32] This approach reflects a formalistic and incomplete conception of the law that underestimates the significance of the courts' remedial function. Laycock equates law with adjudicating issues of entitlement and fault. But courts clearly engage in legal activity when they formulate and enforce injunctions, even though parties frequently cannot claim an entitlement to any particular remedial solution. Courts make and enforce law even when they act on indeterminate, nondoctrinal, remedial principles. Their impact on third parties can be equally or more significant when they act in this

28. Laycock, supra note 7, at 1021-23.

29. Id. at 1013-14.

30. *Martin v. Wilks*, 490 U.S. at 758.

31. Id. at 766.

32. Laycock, supra note 7, at 1013.

nonadjudicatory role. Indeed, participation may well play the most significant role in disciplining and legitimizing judicial involvement when doctrinal considerations do not purport to dictate the result.

Professor Laycock also falls into the trap of equating legally mandated participation with a full opportunity to litigate. If full adversary process is not required, participation is purely a matter of politics and convenience and is neither legally mandated nor worthy of further discussion. This unquestioned adherence to the adversary model even in remedial decision making is widely shared and understandable; the adversary model tracks the assumptions and values basic to the liberal legal model.[33] However, other forms of participation are possible and crucial to achieving remedial legitimacy. Courts frequently depart from the adversary model in formulating a structural injunction. The fluidity of the remedial process frees us to tailor the form of involvement by those whom the decree potentially affects to the interests at stake and the values that remedial participation serves. The nature of the third-party's interest should dictate not whether a third party should participate, but rather the form of participation that is required.

Third parties claiming that a remedy violates their legal rights, such as the white firefighters in *Martin v. Wilks*, present the same types of issues that courts address in making pure liability determinations. Consequently, the form of participation will depend on the form of process generally governing liability determinations. In most cases, liability-type determinations involve adequate participation in the adversary process.[34]

However, those seeking to influence the scope and content of the remedy require a form of participation that better suits the demands and goals of the remedial process.[35] The adversarial model's traditional notions of party status fail to account for the range of roles and interests at stake at the remedial stage. The term "party" generally evokes notions of individual representation by an attorney who conducts discovery, examines witnesses, presents documentary evidence, submits briefs and arguments to the factfinder, and appeals unfavorable decisions. These aspects of participation form the image of professional gladiators using every available tool to win for their clients.

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33. *See* Farina, supra note 14, at 244.

34. Contrary to Professor Fiss' understanding, *see* Fiss, supra note 2, at 968 n.16, my work does not propose to eliminate procedural rights associated with the adversary process at the liability stage, although it recognizes that the arguments I develop for the remedial stage may have some bearing on liability determinations.

The question of the appropriate form of participation does not determine whether the requirement of adequate participation can be satisfied through participation by representatives, rather than individual participation. As a doctrinal matter, Professor Laycock correctly observes that the class certification procedure under Rule 23 and the appointment of guardians ad litem would permit representative litigation. *See* Laycock, supra note 7, at 1019-20. As a normative matter, the appropriateness of representative rather than individual participation requires a theory of participation and representation—a topic addressed in Parts III and IV of this Article.

35. *See* infra pp. 1002-07.

The gladiator metaphor does not capture the essence of participation in the remedial enterprise, which looks more like a web of coordinated, purposive activities by players with assigned roles and varying interests. Indeed, the term "party," with its formal, binary connotations, fails to account for the roles and relationships of participants in the remedial process. The term "stakeholder" better describes the varying roles of interested participants in the remedial process. People occupy different positions in relation to the remedial enterprise. Some participants bear responsibility for implementing aspects of the project. Some will be the prime consumers of the product and care deeply about the result. Some may oppose the project because of its potential adverse impact on their lives or official duties, and they have the power to prevent its realization.

The extent and significance of stakeholders' relation to the underlying remedial enterprise dictate the nature of their participation in the remedial process. For some, adequate participation may require only the opportunity to provide information and express their perspective. Others may need to be full participants in the formulation of the remedial plan. A more complete exposition of the extent and form of remedial participation requires a normative theory of participation tailored to the public remedial context. I articulate such a theory in Part II(B) of this Article.

B. The Fiction of Formal Finality

Professor Fiss's stated goal in proposing his vicarious interest representation scheme is to preserve the finality and efficacy of the structural injunction. He purports to accomplish this by formally precluding the collateral attacks of those whose interests were adequately represented at the initial proceeding. This solution unravels when considered in relation to the realities of remedial process.

The success of Professor Fiss's proposal in promoting finality depends on the identification of a finite number of interests at the outset of the litigation. Professor Fiss acknowledges that the requirement of providing notice and an opportunity to intervene to interested parties creates the same practical difficulties he is trying to avoid.[36] His response is to fall back on the concept of group interests as a way of limiting the scope of potential challenges to the adequacy of representation. Professor Fiss's assumption that third parties' interests are finite and shared suggests that he assesses interest in relation to the underlying liability claim, rather than in relation to the interests affected at the remedial stage.

Professor Fiss's solution depends on the capacity to establish *ex ante* a set of unchanging shared interests that are limited in number and that adequately reflect the concerns of all those "similarly situated." Although Professor Fiss does not elaborate on the standards governing the determination of interests, his scheme presumes the existence of essential, objective, and externally discernable features shared by all members of a group. This static conception of interests might be operative at the liability stage, during which parties must choose sides on the question of whether

36. Fiss, supra note 2, at 972-73.

defendants' conduct violates the law.[37] However, it has little relationship to the interests implicated at the remedial stage of public law litigation.

The tenuousness of Professor Fiss's approach to finality is exemplified by the example he offers of interest representation. He suggests that the city of Birmingham might adequately represent the interests of white firefighters. Laycock attributes Professor Fiss's equation of the city's and the white firefighters' interests to ideological blinders.[38] I believe that conceptual rather than ideological blinders are at work. Professor Fiss analyzes the interests of third parties with the liability stage in mind. He appears to assume that both the city of Birmingham and the white firefighters have an interest in defeating the black firefighters' claim that past discrimination entitles them to a remedy. This assumption may be flawed in light of the demographic changes in the city of Birmingham resulting in a black majority and black leadership in city government.[39]

More to the point, Professor Fiss fails to recognize that the dichotomous definition of interests in terms of establishing or defeating liability breaks down at the remedial stage. There the choice is not win or lose, but rather how the remedy should proceed. Because of the multiplicity of choices and values informing those choices,[40] interests and incentives that overlap at the liability stage frequently diverge at the remedial stage. *Martin v. Wilks* offers a good illustration of this point. As Professor Sam Issacharoff pointed out,[41] once a court establishes liability, the employer's and third-party challengers' interests typically conflict. Employers seeking to minimize their exposure to back-pay liability are quite content to sign on to hiring and promotion preferences for plaintiffs at the expense of white employees seeking to protect their job security and promotion prospects.

Indeed, the fragmentation of interests at the remedial stage occurs on both sides of the case. Plaintiffs who are similarly situated with respect to liability and who occupy identical positions in relation to the organization at issue, such as parents of school children or black firefighters seeking promotion, disagree strongly about fundamental questions of policy and values.[42] For example, in the school desegregation area, the "[d]ispute has centered on the relative importance of integration, financial resources, minority control, and ethnic identification in enriching school

37. Even at the liability stage, there is reason to question the validity of a static conception of interests based on likely party affiliation. As Laycock points out, remedial concerns frequently drive parties' positions on liability and trial strategy. Moreover, particularly in public law cases, legal norms and factual determinations are more complex and multifaceted than the win-lose character the liability model reflects. This disjuncture between adversary process and the nature of public law conflicts has led some to argue for a more general restructuring of judicial process. *See, e.g.*, Farina, supra note 14, at 276-77.

38. Laycock, supra note 7, at 1023.

39. *See* Issacharoff, supra note 8, at 244-45.

40. For a thorough discussion of the conflict of interests that frequently emerges among class members at the remedial stage, see Deborah L. Rhode, Class Conflicts in Class Actions, 34 Stan L. Rev. 1183, 1189 (1982).

41. Issacharoff, supra note 8, at 241-47.

42. *See* Derrick A. Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470, 471 (1976); Rhode, supra note 40, at 1184.

environments."[43] Thus, Professor Fiss's assumption that members of a group are fungible and hold similar perspectives on the remedy ignores fundamental cleavages within groups about value choices underlying particular remedial strategies.

Thus, interests viewed from a remedial perspective frequently diverge from those of the parties to the liability determination; moreover, these diverging interests may be difficult to ascertain in advance of implementation. The fluidity of remedial interests and lack of clear guidelines concerning the types of interests requiring separate representation further increase the likelihood of challenges by stakeholders excluded from participating in remedial proceedings. Indeed, in response to my observation that interests at the remedial stage are not predetermined or finite, Professor Fiss proposes to introduce a second round of notice and potential challenges to the decree at the remedial stage.[44] This concession opens the door to subsequent challenge of remedial decrees by all those whose interests do not coincide with those of the designated representative. Thus, Fiss's vicarious interest representation solution buys a marginal increase at best in formal finality.

There is a deeper problem with Professor Fiss's approach to achieving finality and efficacy. Professor Fiss discusses finality as if it could be achieved by the entry of a binding judgment insulated from collateral attack. This view corresponds to traditional conceptions of finality in adjudication involving a remedy that is self-executing. However, in structural injunction litigation, the issuance of a decree is only the first step in a process that continues until the defendants actually implement the injunction.[45] Decrees are continually subject to both formal and informal challenge. Certainly the collateral bar rule in effect at the time did not deter the white firefighters in *Martin v. Wilks* from filing a challenge. Even if third parties may not directly challenge the validity of a decree, they may seek to intervene to modify a decree based on changed circumstances.[46] Particularly if the court did not foresee the impact of a remedial provision when it first adopted the decree, third parties' capacity to challenge its fairness and effectiveness through modification presents a considerable limitation on the finality achieved.

The fatal flaw in Professor Fiss's approach to achieving finality is his failure to take into account the capacity of third parties to challenge decrees through informal resistance. Unlike liability and damage determinations, finality in the structural injunction context requires implementation, and implementation depends on obtaining the cooperation of third parties responsible for or in a position to block it. Courts have recognized this important distinction between liability and remedy in articulating the standard used to determine the adequacy of injunctive relief: "[A] district

43. Rhode, supra note 40, at 1189.

44. Fiss, supra note 2, at 972-73.

45. *See* Susan Sturm, Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons, 138 U. Pa. L. Rev. 805, 807 (1990).

46. Inmates of Suffolk County Jail v. Rufo, 112 S. Ct. 748, 752 (1992).

court's remedial plan is to be judged by its effectiveness."[47] Effectiveness requires actually changing behavior and conditions to conform to a stated norm or standard. Aspirations and agreements cannot substitute for actions in the remedial context. For this reason, courts have been willing to consider the problem of white flight in determining an appropriate remedy in school desegregation cases, even though the same considerations are irrelevant to liability.[48]

Exclusion of stakeholders from the remedial process frequently backfires as a way of achieving prompt and effective relief, and sometimes results in lengthy or permanent postponement of implementation. The concerns that prompt stakeholders to challenge a remedy exist whether or not the court acknowledges them. An approach that fails to confront disagreements with a proposed remedial approach by those who must live with a remedy offers no vehicle for dealing constructively with predictable efforts to prevent its implementation. Indeed, it may encourage informal and subversive challenges to judicial remedies, such as adopting narrow and formalistic interpretations of the order or developing administrative end-runs that neutralize the impact of the court's mandate.[49] These responses frustrate efforts to achieve compliance and prolong judicial involvement.

For example, in the St. Louis school desegregation case, the parties excluded representatives of the state of Missouri—the primary source of funding for the desegregation plan—from the negotiations. The State subsequently objected to the settlement agreement and became a major obstacle to compliance.[50] In the employment context, exclusion of white workers from participation in litigation leading to affirmative action plans has triggered protracted litigation challenging court decrees[51] and has exacerbated racial tension within the workplace.[52] Consider the position of black supervisors faced with the task of managing white workers committed to undermining court ordered integration of the workforce by engaging in informal harassment, refusing to comply with their directives, or interfering with their work performance.[53]

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47. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971).

48. *See* Paul Gewirtz, Remedies and Resistance, 92 Yale L.J. 585, 642 (1983).

49. Sturm, supra note 45, at 870-71.

50. D. Bruce La Pierre, Voluntary Interdistrict School Desegregation in St. Louis: The Special Master's Tale, 1987 Wis. L. Rev. 971, 997 n.89, 1028.

51. Issacharoff, supra note 8, at 196-97.

52. Studies have documented an increase in racial tension and perceived morale problems when companies promote minority or female workers to supervisory and managerial positions pursuant to an affirmative action plan. *See, e.g.*, Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal 117 (1992) ("There is also the worry that blacks who are promoted to supervisory positions may not obtain the best performance from white subordinates, who may be resentful if not actually resistant."); Herbert R. Northrup & John A. Larson, The Impact of the AT&T-EEO Consent Decree 78-79 (1981).

53. Cases involving the promotion of women to positions traditionally held by men vividly document this kind of harassment. *See, e.g.*, Johnson v. Transp. Agency of Santa Clara County, 480 U.S. 616, 624 n.5 (1987); Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (M.D. Fla. 1991).

Thus, Professor Fiss's formalistic approach to preserving the finality of structural injunctions necessarily fails. At the remedial stage, formal procedural solutions cannot achieve finality in the face of profound social and legal controversy. The cooperation and participation of third parties is frequently crucial to achieving a final remedial resolution. The legitimacy and effectiveness of structural injunctions depend on developing a theory of participation that proceeds from this understanding of the public remedial context.

II. Rethinking Remedial Participation

Determination of the appropriate extent of participation by interested stakeholders presupposes some implicit or explicit theory of participation. What values underlie the concern to afford stakeholders an opportunity to influence a particular decision? Although Professor Fiss does not explicitly set forth a theory of participation, he does attempt to justify his proposal to limit participation by stakeholders in the remedial process. He argues that participation values are less significant in remedial decision making and that values such as finality and efficacy trump any claim for participation. He embraces uncritically the traditional conception of participation embodied in Chief Justice Rehnquist's notion of assuring individuals their "day in court." His approach fails to articulate a coherent theory of participation that accounts for the relationship between autonomy and group status and that fulfills the goals and demands of public remedial decision making. His formalistic solution also fails to satisfy the precise goals of remedial efficacy that lead him to compromise the participation values he holds dear.

Professor Fiss accepts the two values underlying participation in the adversary system: individual dignity and promoting accurate decision making.[54] He argues that the dignity value is less significant in the structural injunction context and that the instrumental value can be compromised in the interest of preserving the structural injunction's efficacy. Both arguments ignore the significance of participation in achieving remedial efficacy and legitimacy.

A. *Instrumental Values of Participation*

Professor Fiss attempts to justify compromising the value of participation by downplaying the significance of the instrumental values of achieving accurate and effective remedial decisions. He suggests that because we may value individual participation in structural litigation "only to serve instrumental rather than dignitary ends," it "loses some of its force."[55] He does not explain this ranking of process values. It may reflect dissatisfaction with a process model that ignores nonpositivist, intrinsic values of dignity and legitimacy which legal processes might further.[56] It may reflect a skepticism, which I share, of the merits of the balancing approach that characterizes much recent due process jurisprudence.

54. Fiss, supra note 2, at 978.

55. Id.

56. *See* Mashaw, supra note 14, at 104.

However, it is important to look beyond formal doctrine in assessing the instrumental role of participation. Accuracy and effectiveness are important attributes of fair and legitimate decision making.[57] Many scholars of due process theory challenge the view that intrinsic values trump instrumental concerns in the due process calculus, and some consider participation's instrumental value more defensible than dignitary concerns.[58] Indeed, Professor Fiss has argued that participation, albeit by spokespeople for a group, plays a crucial role in legitimizing the role of the court in the structural reform context by enabling a special kind of moral dialogue between the judge and the litigants.[59]

Moreover, Professor Fiss's entire justification for departing from a deeply held commitment to participation is an instrumental one—to preserve the efficacy and finality of the structural injunction. Implicit in this concern for efficacy is an acknowledgment of a distinctive characteristic of the remedial stage: the importance of implementation to remedial success and legitimacy. The instrumental character of structural injunctions distinguishes them from liability determinations and elevates the importance of instrumental participation values at the remedial stage of public law remedies. Thus, Professor Fiss's acknowledgment of the practical significance of participation to remedial efficacy[60] is fatal to his claim that participation should be sacrificed in the name of remedial efficacy.

Because the goal of public law remedies is to change the behavior and conditions of individuals and institutions, participation serves functions at the remedial stage that do not pertain to liability determinations. The participation values germane to public remedial decision making must take into account the importance of implementation, which usually requires cooperation by those who must implement and live with the decree. One cannot determine who should participate or how to participate in structural injunctions without a full understanding of the participation values implicated by the process of formulating and implementing a decree.

First, participation plays a crucial role in promoting cooperation with the remedy.[61] Direct involvement influences the participants to accept the

57. *See* Farina, supra note 14, at 213 ("Government could be said to act arbitrarily or unfairly when it harms the individual on the basis of a careless or unsound assessment of the facts of his case.").

58. *See* supra note 14.

59. Fiss, supra note 15, at 12-14. In The Forms of Justice, Professor Fiss treats separately the issue of participation and individualism. He identifies participation in a dialogue requiring a judge to listen and respond as a structural characteristic crucial to the court's legitimacy as an expositor of public values. However, he criticizes the view that insists on individual participation as the only form preserving the court's capacity to engage in dialogue. Although Professor Fiss does not develop a theory of group participation and representation, he does recognize that the issue of determining the adequacy of representation is a difficult one, and that participation by an individual sharing objective characteristics is not necessarily enough. This insight is lost in Professor Fiss's uncritical embrace of vicarious interest representation, as articulated in The Allure of Individualism.

60. Fiss, supra note 2, at 968.

61. *See* E. Allan Lind & Tom R. Tyler, The Social Psychology of Procedural Justice 94 (1988); Lawrence Susskind & Jeffrey Cruikshank, Breaking the Impasse: Consensual Approaches to Resolving Public Disputes 27 (1987); Sturm, supra note 9, at 1393.

results. Research supports the conclusion that broad participation by affected parties enhances the perceived legitimacy and fairness of the result, and this also increases their willingness to cooperate.[62]

Second, participation serves an integrative function of identifying the group of actors responsible for remedying a problem and involving those actors in the problem-solving enterprise.[63] Often, no such opportunity to mobilize a concerted effort to address social problems exists apart from the remedial process. Through discussion, actors can learn their relationship to the problem underlying the litigation and their potential role in addressing the problem. Individuals who are part of a group affected by the remedy can actively address the issues necessary to eliminate the problems causing the legal violation.[64]

Third, participation produces better substantive outcomes by producing a dialogue among actors with different perspectives on the causes of the underlying problem and the impact and feasibility of proposed solutions. Participation affords an opportunity to obtain and synthesize these varying perspectives and insights, and shapes the views of both the participants and the decision maker.[65]

Finally, participation serves an educational function by informing those responsible for implementation about obstacles and potential solutions to problems. Participation also educates the plaintiffs about the operation of complex institutions and the skills and approaches necessary to bring about change.[66]

B. Dignitary Theory and Public Remedial Process

Professor Fiss embraces the importance of preserving "the dignity and worth of the individual" as intrinsic to participation and entitled to greater solicitude than the instrumental value of "ensuring that courts are presented with the facts and issues in the sharpest possible terms."[67] He must then justify his willingness to compromise these fundamental process values. He does so by minimizing their importance in the structural injunction context. Professor Fiss asserts that dignity values do not come

62. *See* Lind & Tyler, supra note 61; John W. Thibaut & Laurens Walker, Procedural Justice: A Psychological Analysis 94 (1975); Richard F. Elmore, Organizational Models of Social Program Implementation, 26 Pub. Pol'y 185, 213-15 (1978).

63. *See* Carole Pateman, Participation and Democratic Theory 33 (1970) (discussing the integrative function of participation).

64. Elizabeth M. Schneider, The Dialectic of Rights and Politics, 61 N.Y.U. L. Rev. 589, 610-23 (1986).

65. *See* Farina, supra note 14, at 271 ("If knowledge is situated in context and contingent upon perspective, then a decisionmaker cannot learn to use her power wisely unless she listens to those who are affected by her decisions."). Farina suggests that this interactive exchange in which "knowledge, desires and values are created" serves both instrumental and intrinsic values. The responsibility to communicate "would be one of the clearest commitments to nurturing the personhood of both citizen and government official." Id.

66. *See* William H. Simon, The Invention and Reinvention of Welfare Rights, 44 Md. L. Rev. 1, 17-18 (1985); Lucie E. White, Mobilization at the Margins of the Lawsuit: Making Space for Clients to Speak, 16 N.Y.U. Rev. L. & Soc. Change 535, 540 (1978-88).

67. Fiss, supra note 2, at 978.

into play in structural litigation because, unlike the criminal or administrative contexts which single out individuals, structural remedies "are forward-looking and the practices of a bureaucratic organization are examined for the impact on the welfare of a social group."[68] His suggestion that we need not protect dignity values has implications far beyond the issue of third-party participation in structural decrees. His reasoning applies with equal force to class members purportedly represented by a self-selected representative, or a representative selected by the opposing party. Because structural injunctions involve group interests, we apparently need not worry about concerns of dignity and autonomy.

Professor Fiss's willingness to jettison dignity as a concern in the structural injunction context introduces the troubling notion that dignity no longer matters in a world defined by group status. By conflating the concepts of individualism and participation, Professor Fiss, like many dignitary theorists, throws in the towel on a central challenge confronting theorists and practitioners—how to recognize and respect the dignity and diversity of individual group members and yet acknowledge commonalities in perspective, status, and interests. Most process theorists treat autonomy and dignity as pertaining solely to the individual. When individuals are defined in relation to groups, autonomy concerns disappear. This analysis distorts the nature of the relationship between individuals and groups and the role of group membership in defining and preserving individuals' autonomy and sense of self.[69]

The task of constructing a full-blown dignitary theory that accounts for group status and remedial decision making is an ambitious one which exceeds the parameters of this Article. I will, however, sketch out the basis for my critique of Professor Fiss's treatment of dignitary values in the structural injunction context and offer some preliminary thoughts on the direction such a group dignitary theory might take.

Professor Fiss does not explain his claim that dignity values drop out when the potential harm caused by state action affects a group. To understand and assess this claim, it is necessary to lay out the concerns underlying dignitary theory and assess their vitality in the structural injunction context. At the heart of dignitary theory is the concern that "[g]overnment should deal fairly and humanely with people, especially when it contemplates harming them."[70] Professor Fiss's distinction between structural remedies and the criminal and administrative contexts may rest on the assumption that the only government action which threatens serious harm is intentional conduct directed at an individual. But this argument ignores the lessons of Professor Fiss's own work that harm to individuals in the modern, bureaucratic state frequently results from conditions and

68. Id.

69. *See* Stephen Ellman, Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups, 78 Va. L. Rev. 1103, 1122-24 (1992). This redefinition of individual identity as a dynamic and interactive conception that evolves in relation to others is an important insight offered by feminist theory. *See, e.g.*, sources cited supra note 22.

70. Farina, supra note 14, at 214.

practices embedded in institutional structures. These harms are no less serious than those resulting from action specifically targeting an individual. Remedial action may profoundly and adversely affect the status of individual members of a group, without a decision imposing liability which intentionally alters the status of an individual. Indeed, when judicial action imposes costs on stakeholders who bear no legal responsibility for plaintiffs' injuries, there is arguably a greater need for some form of participation in the formulation of a remedy to preserve judicial legitimacy.

Another aspect of dignitary theory posits that those similarly situated should be treated the same and that no one's interests should be ignored or minimized in favor of similarly situated persons.[71] This concern, which relates to basic notions of fairness, assumes particular significance in remedial decision making, where decisions explicitly depend on value choices that are not dictated by universal, legally-determined norms. Because group members are likely to disagree about these value choices, the specter of unfairness looms over any process that does not provide access to those with differing views or at least justify the preferential position of those with access. Professor Fiss's vicarious interest representation scheme does neither.

Professor Fiss appears most troubled by the application to structural injunctions of dignity theory's basic moral commitment to the preservation of the individual's capacity as an autonomous moral agent. He assumes that this value demands full adversary process afforded to each affected individual and concludes that this requirement would be fatal to the structural injunction. He accepts liberal legal theory's characteristic definition of the individual's relation to groups and to the state, namely, essentially separate, fully formed individuals who seek to further their interests in opposition to those of the group or the community.[72] He seems to argue that, because the functional unit in structural injunctions involves groups rather than individuals, autonomy concerns are not relevant.

Professor Fiss overstates the group character of structural remedies. His approach suggests the existence of groups that self-consciously identify and function as distinct entities. Often, this is not the case. Groups are frequently artificial creations of the litigation that may or may not comprise a homogeneous community of relevant interests or have access to a mechanism for reconciling differences of perspective. Ironically, Professor Fiss seems to accept a principle of remedial homogeneity that automatically equates a group's interests with a monolithic, predetermined remedy.[73] Yet, he is among the most eloquent critics of this formalistic approach to public law remedies. Individuals who may share all relevant characteristics for purposes of determining liability are not a monolithic group for purposes of their remedial interests. Structural remedies frequently affect individuals differently, and group members often disagree concerning the best reme-

71. *See* Mashaw, supra note 14, at 173.

72. *See* Farina, supra note 14, at 241, 249.

73. Robert Bone names and subscribes to this principle of remedial homogeneity. He is also an advocate of virtual representation in public law litigation. *See* Bone, supra note 11, at 265.

dial approach to further their interests. Conflict over the remedy within groups and among those occupying different positions is inevitable, and requires structures for mediating between individual and group status.

Furthermore, in some cases implementation requires that courts individualize public law remedies. This is certainly true in the employment context because the remedy involves allocating particular jobs or benefits to particular individuals. Public law remedies often involve the distribution of resources, jobs, prison cells, and other benefits that require individual allocation to group members. Thus, strong parallels exist between Professor Fiss's prototype for due process protection—an individual facing an administrative hearing—and an individual facing the implementation stage of a remedial decree. In the administrative law context, the legislature makes the group determinations; in the structural injunction context, the court does so through the formulation of the decree. In both cases, the court must consider the implications of group-based classifications for individual members of those groups.

There is a more fundamental problem with Professor Fiss's assumption that dignitary concerns drop out when the interests at stake are common to a group. The individual does not disappear as a moral agent because of interests shared with a group. The dichotomy between individual and group is a false one. Individuals frequently define their identity in relation to a group, and individual autonomy is at least partially a function of group status. Recognition of the group's interests constitutes an important aspect of individual dignity. Moreover, individual and group interests interact. In many cases the group does not have clearly-defined, preexisting, and shared interests; the group's identity and interests only emerge from conflict and consensus among group members.

The recognition of the continuing significance of dignitary theory for group interests and public remedial process poses a challenge to the prevailing mode of participation in judicial decision making—the adversary process. According to Professor Fiss, the adversary process in its current form presents a stark choice between insisting on an unmanageable form of adversary participation by each affected individual, or limiting participation in the adversary process to vicarious representatives who are neither selected by nor accountable to those they purport to represent.[74]

There is an additional, more general problem posed by dignitary theory: How can the commitment to dignity be reconciled with the process of mandating participation by the government? As Michelman puts it:

> [I]t can be argued that a due process entitlement . . . cannot convey the nonformal, the interpersonal meanings of revelation and participation . . . because an official whose explanations have been *requisitioned* by someone who assertedly owns these elements

74. As Professor Laycock points out in his response to The Allure of Individualism, Professor Fiss ignores the potential for class action devices to provide a structure for moving from individual to group participation. Laycock, supra note 7, at 1014. However, Laycock does not address the failure of current class action theory or practice to satisfy basic concerns of participation or to satisfy the participation values operative at the remedial stage of public law litigation.

> of his behavior just will not be engaging in the kinds of acts which carry the interpersonal meanings that (possibly) we yearn for.[75]

Cynthia Farina offers a partial response to this concern by criticizing its implicit equation of individuals and government actors and reconceptualizing the status of government participants to include the responsibilities associated with assuming official status, including the duty to deal fairly with citizens.[76] She also links this potential failure of dignitary theory to the limitations of the adversary model of party participation. "Courts preside over [these] hostilities, channeling the adversaries through rituals which, if conducted properly, result in victory without violence."[77]

Indeed, the type of party participation contemplated by the adversary model—indirect and formal submissions controlled by lawyers—seems inconsistent with all of the participation values relevant to the public remedial process. It does not promote effective communication, acceptance of legal norms, identification with the remedial enterprise, or knowledge of the dynamics of institutional reform. In fact, adversary participation tends to produce the opposite effect: hostility and resistance.[78] Lawyers' control over the process detracts from the client's sense of autonomy and responsibility. Similarly, the stylized interaction and win-lose character of the adversary process stymies the exchange and integration of multiple perspectives necessary to produce effective and fair remedial decisions.[79]

To meet this challenge, it is necessary to rethink the forms of participation that developed with purely individual concerns in mind. The structural injunction provides an appropriate and realistic context for developing alternative forms of participation that will realize dignitary values. The finding of liability or consent which predicates courts' remedial activity removes any lingering doubt concerning the duty of government officials to participate in the remedial process. Practitioners have already begun experimenting with consensual forms of decision making that hold more promise as a foundation for a new model of remedial participation.[80] Informality now characterizes much remedial decision making and implementation, and affords the opportunity for more inclusive forms of participation. Context dictates the content of the structural injunction, and

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75. Michelman, supra note 14, at 157.

76. Farina, supra note 14, at 250-51.

77. Id. at 249.

78. *See* Melvin A. Eisenberg, Private Ordering Through Negotiation: Dispute Settlement and Rulemaking, 89 Harv. L. Rev. 637, 660 (1976) ("The prospect of subjection to [an adverse judgment] coupled with the lack of control over the process leading up to the judgment, tends to generate a state of tension and to drive the disputants irreconcilably apart."); William L. F. Felstiner, Influences of Social Organization on Dispute Processing, 9 Law & Soc'y Rev. 63, 70-71 (1974) (noting alienating affect of adversary process); Sturm, supra note 9, at 1364, 1394-95.

79. Susan M. Olson, Clients and Lawyers: Securing the Rights of Disabled Persons 140 (1984) ("Norms of legal advocacy inhibit client autonomy and responsibility by imposing the authority of a supposedly neutral expert on the client."); Eisenberg, supra note 78, at 658-60.

80. Sturm, supra note 9, at 1365-76 (describing forms of remedial practice that deviate substantially from the formal adjudicatory model, including the bargaining model, the legislative or administrative hearing model, the expert remedial formulation model, and the consensual remedial formulation model).

the necessity of constructing a remedy anew in each context permits the development of a process that reconciles the concern for individual autonomy with the group nature of the problem. Indeed, the remedial stage could serve as a laboratory for rethinking the adversary process and the nature and adequacy of participation more generally.

The challenge is to develop a form of participation that can capture the dynamic relationship between the individual and the group. This task requires a discussion of the role of representation in a remedial theory of participation.

III. Representation, Participation, and Public Remedial Process

The previous section argues that participation plays a crucial role in enabling fair, legitimate, and effective remedial decision making. It also identifies a dilemma arising from the importance of remedial participation: How can participation be achieved in situations affecting the interests of diverse groups of people?

The prospect of unwieldy, unpredictable, and unending involvement by innumerable individuals prompts Professor Fiss to shift from a right of participation to a right of vicarious interest representation. To accomplish this, he offers two moves: first, from individual to interest as the locus of participation, and second, from direct to vicarious symbolic participation. He leaves intact the adversary form that participation takes in traditional adjudication and simply proposes to limit access to participation to vicarious representatives of group interests. The court determines the adequacy of interest representation at the "initial proceeding" and "failure to challenge the adequacy of representation at that stage would foreclose any subsequent attacks on the decree at all."[81] Group members need not participate in the identification of their representative, and Professor Fiss's proposal assigns the designated representative no special responsibility to the group he or she purportedly represents.

Professor Fiss's argument for shifting the locus of inquiry from individuals to groups is compelling, and builds on the insight of his previous work that the victims of illegal social conditions can best be identified by their status within an organization or their membership in a group.[82] However, Professor Fiss fails to examine the relationship between participation and representation. If, as he argues, participation values drop out in structural injunctions, what is the basis for an individual's claim to representation? Professor Fiss would likely respond that representation is a compromise justified by the decreased importance of participation in structural injunctions and the significance of the substantive rights at stake.

This response presumes that representation bears some relationship to participation. But Professor Fiss's discussion of vicarious interest representation offers no explicit theory of representation. He does not define what makes someone "representative" of those he or she purports to

81. Fiss, supra note 2, at 972.

82. Fiss, supra note 15, at 18-19.

represent. Furthermore, he provides no indication of the role a representative should play and how "representation" will satisfy any of the values served by participation.

Professor Fiss's vicarious interest representation scheme does implicitly choose a theory of representation. It clearly eschews an agency approach, which depends on advance authorization by the constituents to act in their behalf.[83] Under Professor Fiss's scheme, "[a]n 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."[84] Vicarious interest representation also rejects an accountability view of representation, which depends on holding the representative accountable for what she does.[85] Nor does Professor Fiss embrace a functional conception of representation that offers a view of the goals or purposes pursued on behalf of constituents.[86] He does not prescribe any particular role for the representative.

In Professor Fiss's scheme, "[t]he 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."[87] "Representativeness" consists of possessing common characteristics or interests. This language reflects a descriptive conception of representation; individuals who share identical interests with other group members can serve as proxies or exemplars for each group member.[88] "The representative does not act for others; he 'stands for' them, by virtue of a correspondence or connection between them, a resemblance or reflection."[89] By pursuing their self-interest, these representatives will speak for absent group members by conveying information about the group and taking positions that reflect group characteristics.

The vicarious interest representation scheme contains the shortcomings typical of descriptive representation theories. Its viability depends on a tight correspondence between the characteristics of the representative and the group. It is premised on the existence of a group defined by a static and uniform set of interests that can be discerned by the application of judicially crafted standards. If this monolithic group exists, any individual

83. *See* Hannah Pitkin, The Concept of Representation 43 (1967).

84. Fiss, supra note 2, at 974.

85. Pitkin, supra note 83, at 55.

86. Id. at 114-15.

87. Fiss, supra note 2, at 972.

88. *See* Pitkin, supra note 83, at 61; Martha Minow, From Class Actions to Miss Saigon: The Concept of Representation in the Law, 39 Clev. St. L. Rev. 269, 281 (1991). "Descriptive representation" in the electoral context is representation by culturally and physically similar persons. *See* Pitkin, supra, at 60-91; Barnard Grofman, Should Representatives Be Typical of Their Constituents?, *in* Representation and Redistricting Issues 97 (Barnard Grofman ed., 1982). For a critique of this concept of descriptive representation in the voting rights context, see Lani Guinier, The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 Mich. L. Rev. 1077, 1102-09 (1991).

89. Pitkin, supra note 83, at 61.

member of the group can serve as group representative, so the arbitrariness of the choice loses significance. But this assumption of homogeneity frequently does not pertain to groups at the remedial stage of public law litigation in which those with identical formal characteristics have different conceptions of their interests.[90] It reduces members of a group with diverse perspectives and interests to a fictional, monolithic entity. Individuals who do not accept or identify with the perspective or positions articulated by their self-selected representative are frozen out of the process.

Professor Fiss's approach also assumes that interests exist and persist independent of the process used to identify and select remedial alternatives. However, the interaction with others concerning the remedy may influence or even define the interests and positions of participants in the remedial dialogue. Sustained dialogue with people of differing perspectives shapes those perspectives and opens up the possibility of finding common interests.[91] For this reason, it is particularly difficult to determine the range and commonality of interests among group members at the outset of the litigation, before the participants have proposed the range of possible remedial approaches.

Moreover, Professor Fiss offers no basis to determine whether an individual's interests are "similar or comparable" to those of a group already participating in a dispute, or sufficiently significant and distinct to warrant separate representation. Professor Fiss never actually identifies the types of interests that entitle a group to distinct representation. He simply asserts that there are groups with common interests justifying aggregate rather than individual participation. He assumes the existence of a neutral, externally defined standard for determining shared interests. But determining whether individual interests diverge depends on a frame of reference concerning the considerations relevant to the issue at hand.[92] How do we know whether asserted differences in perspective are sufficiently important and relevant to warrant independent representation? Professor Fiss's treatment of the city's claim to represent the interests of the white firefighters in *Martin v. Wilks* is illustrative of the problem.[93] He does not give us any externally defined standard for determining whether the city was or could be a descriptive representative of the white firefighters. I

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90. *See* supra pp. 999-1001.

91. Roger Fisher & William Ury, Getting to Yes: Negotiating Agreement Without Giving In 42 (2d ed. 1991) ("In many negotiations . . . a close examination of the underlying interests will reveal the existence of many more interests that are shared or compatible than ones that are opposed."); Martha Minow, Foreword: Justice Engendered, 101 Harv. L. Rev. 10, 72 (1987).

92. As Hannah Pitkin noted, "As soon as the correspondence is less than perfect, we must begin to question what sorts of features and characteristics are relevant to action, and how good the correspondence is with regard to just those features." Pitkin, supra note 83, at 88.

93. Professor Fiss made this point more forcefully in his remarks at the American Association of Law Schools panel. In response to rather pointed criticism of his uncritical assumption that the city represented the interests of white firefighters, he qualified his assertion of identity of interest. Fiss, supra note 2, at 971.

question whether it is possible or desirable to determine this issue conclusively without a discussion of specific remedial alternatives and their potential implications.

Once we acknowledge the potential divergence of interest among group members and the value choices inherent in identifying which interests matter, the justification for descriptive representation founders. Descriptive representation may offer one important aspect of representation by striving toward some commonality of perspective and incentives between representative and constituents.[94] But the definition of "representative" necessarily reflects disputable value choices among competing conceptions of interest, so the identity of interests between representative and constituents cannot justify representation.

This multiplicity of interests at the remedial stage undermines the validity of Professor Fiss's reliance on *Mullane v. Central Hanover Bank & Trust Co.*[95] to support the move from individual to interest participation. Professor Fiss's concept of representation defines the group as those with "similar or comparable interests."[96] However, the Court in *Mullane* is careful to state that "[t]he individual interest does not stand alone but is *identical* with that of the class . . . . Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all."[97] The Court assumes a homogeneity of interest that cannot be simply transposed to the structural injunction context.

The potential divergence in perspective between a representative and group members highlights another inadequacy of the descriptive model of representation. It offers no guidance for the representative's behavior. Professor Fiss's move from identical to comparable interests is difficult to justify without a more functional and interactive view of representation that acknowledges potential differences among group members and the repre-

94. *See* Minow, supra note 88, at 284-86.

95. 339 U.S. 306 (1950). Professors Fiss and Laycock both rely on *Mullane* to support their arguments, and draw opposite conclusions concerning the meaning of the case. Robert Bone has offered a plausible explanation for this disagreement over the meaning of *Mullane*. On one hand, *Mullane* opens the door to the concept that, at least in some circumstances, adequate representation may substitute for individual participation to serve other important goals. Unlike Laycock, I do not read *Mullane* to rely on the existence of fiduciary responsibilities by the representative as a basis for this conclusion. Professor Fiss relies on this strand of the holding. Professor Laycock emphasizes the second strand of *Mullane* and its progeny, which implicitly embraces the "day in court" notion of due process and rejects the notion that representation can substitute for individual participation when it is possible to provide notice. The Court in *Mullane* never reconciles these two strands. *See* Bone, supra note 11, at 216-18.

96. Fiss, supra note 2, at 973. In an earlier draft, Fiss actually cites *Mullane* for the proposition that it is sufficient that "notice be given to a substantial number of persons or groups who have *similar or comparable* interests."

97. *Mullane*, 339 U.S. at 319. The contrast between *Mullane* and Martin v. Wilks illustrates the difference between public and private law remedies first introduced by Abe Chayes. Abe Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976). All of the beneficiaries of the common trust fund in *Mullane* share an interest in maximizing their income and avoiding fraud and waste. This identity of interests does not exist for all presumed beneficiaries of a public law remedy, such as a school desegregation decree or the consent decree instituting an affirmative action plan in Martin v. Wilks.

sentative's responsibility to account for those differences. However, Professor Fiss does not prescribe any fiduciary, trustee, agency, or mediating role for the group representative. He eschews any mechanism enabling constituents to determine their appropriate group affiliation, to select their representative, to voice their views, or to hold their "representative" accountable.

Professor Fiss's vicarious interest representation proposal builds in and compounds the limitations of the adversary model of participation. The individual designated as the group representative faces all of the limitations of adversary process as a form of remedial participation identified earlier in this Article.[98] Members of the group purportedly represented face dual insulation from the process—from their representative and from the adversary process.

Thus, Professor Fiss's vicarious interest representation scheme is unsatisfying as a means of justifying and structuring the move from participation to representation. Yet, representation is the linchpin for bridging the individual and the group, for achieving the values served by participation at the remedial stage. In many contexts, public law remedies cannot proceed individually because they concern conditions and practices that will affect others with the same status. Moreover, problems of scale necessitate the move to some form of representation. Yet, there is a need to acknowledge the dynamic relationship between the individual and the group, and the contingent and shifting character of group identity.

The task of crafting a more viable approach to representation must begin with the theory of the goals and values served by remedial participation. At the remedial stage, interests assume a more fluid and dynamic character, suggesting that a more expansive and process-oriented approach to interest representation might be necessary to provide adequate representation of the diverse interests implicated by structural injunctions.[99]

The theory of remedial participation developed in the previous part provides a framework for developing a concept of effective representation in the public remedial context.[100] The goal of achieving the cooperation of stakeholders in the remedy suggests that the representative must play a more interactive role in developing a set of group interests, conveying the group's perspectives, and communicating with the group concerning the progress of and rationale for remedial decisions. The goals of educating the participants concerning implementation and integrating them into the community responsible for the remedy may necessitate active exchange of information and proposed solutions, particularly with those whose cooperation is essential to remedial success. The goal of achieving dialogue among those with diverse perspectives supports the necessity of exposing and confronting conflict, rather than closing it out of the process or using artificial devices such as majority rule to determine the position of a particular group.

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98. *See* supra p. 1001.

99. *See* Minow, supra note 22, at 1894 (advocating process rather than rule-oriented approach to defining procedural requirements).

100. *See* supra pp. 995-1002.

Finally, the concern for dignity suggests that individual group members must have some mechanism for communicating with their representative. This mechanism need not assure each individual participant the right to control the outcome or even the strategy of the group. Such a level of control would extend beyond the individual's status in relation to the group and thus exceed the legitimate expectations of each group member. At the same time, preserving individual dignity requires some mechanisms for assuring individual group members that their representative is presenting their views and that their interests do influence the process of remedial decision making.

This functional theory of representation also dictates the selection of relevant interests worthy of representation and the designation of individual representatives. Instead of attempting to articulate a universal standard governing the identification of categories of interested parties, the potential stakeholders would themselves identify the range of individuals and organizations potentially affected and the extent of their overlapping interests. They would also select representatives to participate directly in the remedial deliberations. These representatives bear the responsibility of accounting to the group and speaking for the group in the remedial discussions.[101] This approach moves beyond the notion of descriptive representation underlying Professor Fiss's proposal toward an interactive and facilitative conception of representation that offers a substantive view of the representative's function and includes some degree of accountability and control by group members.

IV. The Deliberative Model: A First Attempt to Implement a Remedial Theory of Participation and Representation

The remaining and perhaps most formidable task in developing a theory of remedial participation and representation concerns its implementation. Is there a form of participation and representation that is both workable and true to the values and concerns articulated in the previous sections? I argue that the solution to this quandary depends on our willingness to look beyond the adversary model of dispute resolution.

In a recent article entitled A Normative Theory of Public Law Remedies,[102] I have offered the deliberative model of remedial formulation as one proposal for structuring participation and representation at the remedial stage of litigation to satisfy the dual concerns of legitimacy and efficacy. Under this model, the court's role is to structure a deliberative process whereby stakeholders in a dispute concerning a structural injunction develop a consensual remedial solution using reasoned dialogue. It also evaluates the adequacy of this process and the remedy it produces.[103] The stakeholders participate directly in an informal but structured process of exchanging information, brainstorming, and attempting to reach con-

101. *See* Sturm, supra note 9, at 1422-24.

102. Sturm, supra note 9.

103. This model builds on the public consensual dispute resolution model articulated by Susskind & Cruikshank, supra note 61.

sensus. This process offers the potential to educate the parties, develop working relationships, integrate differing perspectives, and generate creative solutions.

Instead of offering a substantive standard to determine who should participate in framing the remedy, the deliberative model establishes a process to identify the individuals, groups, and organizations whose participation is necessary to develop and implement a fair and workable remedy. If the remedial problem implicates concerns of similarly situated individuals, the model provides a process for identifying the categories of interested parties and enabling each group to select a representative empowered to speak on their behalf.[104] These representatives have no authorization to act unilaterally on behalf of the group. Rather, they are charged with the responsibility "to amplify concerns of larger groups, to carry messages and information to them, and to return with a sense of the group's willingness to commit to whatever consensus emerges."[105] Thus, the deliberative model moves beyond descriptive representation to a more interactive form of representation that enables group members to gain access to the content of the deliberations, to express their perspectives on various remedial proposals, and to hold their representatives accountable.

To some, it may sound like heresy or lunacy to look to nonadversarial processes to realize the values essential to judicial legitimacy. However, precedents for more dynamic forms of representation and participation exist in other areas of public law, such as bankruptcy and collective bargaining.[106] Indeed, it is not a coincidence that the precedents urged by the black firefighters in *Martin v. Wilks* involve railroad reorganization.[107] Theorists in areas other than judicial process, such as public consensual dispute resolution and feminist theory, offer useful insights that can direct our search for an alternative vision of remedial participation.

CONCLUSION

Owen Fiss selected *Martin v. Wilks* as one of a series of decisions by the Rehnquist court cutting back on public law remedies. If one takes seriously

104. The model provides for the selection of a third-party facilitator to assist the stakeholders in the deliberative process.

105. Susskind & Cruikshank, supra note 61, at 105. This description of the representative's role does not resolve the issue of whether the representative ever may depart from the expressed interests of group members. There may be situations, such as where the interests of absent group members conflict with those present, in which a representative may be justified in articulating views not shared by those present. These situations may require the appointment of a guardian ad litem or some other representative of the interests of future stakeholders. The question also remains whether the representative ever may depart from the expressed will of the group on the ground that the position held by the group members does not actually serve the interests of the group. The answer to this dilemma may well depend on the circumstances of particular cases, such as the capacity of group members to understand and express their interests and the extent of consensus among group members. These are serious issues which warrant further thought. For one commentator's view that lawyers should determine the interests of the class when a conflict exists between present and future class members, see David Luban, Lawyers and Justice: An Ethical Study 347-49 (1988).

106. *See* Sturm, supra note 9, at 1414 n.317, 1432 n.402.

107. *Martin v. Wilks*, 490 U.S. at 765-66.

the importance of rethinking the value of participation in the structural injunction context, however, *Martin v. Wilks* takes on a different meaning. It offers glimmerings of acknowledgment of the distinctive character of the remedial process.[108] It recasts the issue of third-party participation as one of structuring incentives for developing a more robust and contextualized form of remedial participation that can realize the promise of participation as a bridge between legitimacy and efficacy.

The theory and form of participation and representation developed in this Article would go a long way toward preventing the dilemma that faced the court in *Martin v. Wilks*. A structure would exist for identifying and involving all potential stakeholders at the outset of the remedial process, thus eliminating the issue of who should bear this responsibility.[109] Those with potential liability-type challenges to the validity of a decree would receive notification and the opportunity to litigate such claims before the court enters a decree. The court and the participants would address the issue of the representativeness of those asserting such claims at the outset of the remedial process. This would eliminate the incentive for white firefighters deliberately to sit on the sidelines and then assert individual challenges if they do not like the result of the first round of litigation. It will also create incentives for plaintiffs to confront and address potential challenges to the decree, rather than risk subsequent delay, subversion, and opposition.

Even if the white firefighters lose their liability-type challenge to a proposed remedy, they would retain the opportunity to participate in structuring the remedy. However, their participation would be tailored to satisfy the five remedial values of participation and implemented through an interactive and facilitative form of representation. Participation by groups such as the white firefighters is essential not only to protecting their own interests, but to the legitimacy of the judicial enterprise, and to the integrity and effectiveness of the structural injunction. Professor Fiss's proposal to limit participation through vicarious interest representation encourages a subversive response that frequently prevents courts from achieving their remedial goals. By including competing perspectives, the remedial process may force the stakeholders to come up with a solution that has greater long-term potential for maintaining a stable, integrated workforce.[110]

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108. Several other decisions issued by the Rehnquist Court show a remarkable tolerance of the structural injunction as a fixture of the legal landscape. *See, e.g.*, Inmates of Suffolk County Jail v. Rufo, 112 S. Ct. 748 (1992); Missouri v. Jenkins, 495 U.S. 33 (1990); Spallone v. United States, 493 U.S. 265 (1990).

109. This structure does not resolve the question of who should bear the cost of notice to stakeholders. There is a compelling argument that because remedial formulation process is the first stage of the remediation process, those costs should be borne by the defendants as the first step in eliminating an established legal violation. This Article does not address or resolve that question, which should be the subject of further study.

110. In Local 93 v. City of Cleveland, 478 U.S. 507, 509 (1986), the Supreme Court described one success story in Atlanta in which negotiations involving black and white employees and a public employer produced a workable resolution to a dispute over an affirmative action plan. In Atlanta, negotiations that involved the interested stakeholders produced an agreement under which the city expanded the number of promotions it would

I have offered one possible approach for structuring remedial participation. I do not claim to have a solution that will work in every context or that will convince every reader. I am emphasizing the need to fill the gap in our thinking about public remedial process. Only by moving beyond the allure of adversary process will we begin to realize the promise of participation.

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make over a short period of time so that it would promote the same number of officers who would have obtained promotions under the existing system. Unfortunately, strained relationships between the firefighters and the city of Cleveland prevented a successful resolution of the dispute in *Local 93*, illustrating that participation does not ensure a fair and effective agreement in every situation.