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# Class Actions and Justiciability

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## CLASS ACTIONS AND JUSTICIABILITY

*Sergio J. Campos\**

### Abstract

A lingering issue in class action law concerns the case or controversy requirement of Article III, otherwise known as the requirement of justiciability. For purposes of justiciability doctrines such as standing, mootness, and ripeness, is the class action brought by all class members, some class members, or just the class representative?

This Article argues that the answer should be none of the above—it should be the class attorney. This Article first shows that the function of the class action is to assign dispositive control of, and a partial beneficial interest in, the class members' claims to the class attorney. Put another way, the class action functionally creates a trust, with the class attorney as trustee of the claims for the benefit of the class. This Article argues that the creation of such a trust is essential for the categories of litigation in which class actions are permitted. But, in doing so, the class action also makes the class attorney the *de facto* real party in interest.

This Article then shows that the current law of justiciability provides some support for viewing the class attorney as the relevant party for Article III purposes. It shows, in particular, that current law permits a court to recognize the standing of a noninjured party like the class attorney when, as in all class action settings, such recognition is necessary to adequately protect the interests of those injured.

This Article concludes by exploring what lessons the trust function of the class action can provide for the law of justiciability. One central lesson of the trust function of the class action is that those who are initially assigned the right to bring a lawsuit, such as those who are personally injured, are not always adequate representatives of their own interests, let

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alone others. This Article uses this lesson to address the adequacy of representation concerns that underlie the law of justiciability. This Article ultimately argues that the law's insistence on a personal injury to satisfy justiciability requirements like standing is misplaced. Federal courts instead should focus on ensuring the adequate representation of all the interests affected by their exercise of jurisdiction.

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## INTRODUCTION

Perhaps the real crime was that Milberg Weiss<sup>1</sup> was too blatant about it. On May 18, 2006, federal prosecutors indicted the law firm for allegedly paying "kickbacks" to "Paid Plaintiffs" to serve as representative parties in securities class actions filed by the firm.<sup>2</sup> Milberg Weiss used the alleged kickbacks to gain dispositive control over all of the plaintiffs' claims through the class action, including the right to settle the claims without the

1. The firm's full name was Milberg Weiss Bershad & Schulman LLP. See *infra* note 2.

2. First Superseding Indictment at 10-14, *United States v. Milberg Weiss Bershad & Schulman LLP*, No. 05-587 (C.D. Cal. May 2006) [hereinafter *Milberg Indictment*]; see also Julie Creswell, *Milberg Weiss Is Charged with Bribery and Fraud*, N.Y. TIMES (May 18, 2006), <http://www.nytimes.com/2006/05/18/us/18cnd-legal.html>.

consent of all of the plaintiffs.<sup>3</sup> The firm did so because class action attorneys typically get a percentage of any net recovery.<sup>4</sup> Before the indictment, Milberg Weiss had amassed a fortune by filing class actions on behalf of plaintiffs who probably had no idea that they were being represented by the firm.<sup>5</sup>

The irony of Milberg Weiss's legal troubles is that it is well known that "[c]lass actions almost invariably come into being through the actions of lawyers—in effect, it is the agents who create the principals."<sup>6</sup> Scholars, practitioners, and courts all recognize that, in almost all cases, the class attorney files the class action as an investment, with virtually no input from the class members the class attorney purportedly represents. Although scholars have criticized this feature of the class action,<sup>7</sup> the reality is that the class attorney has no clients.

This Article uses the reality of class action practice to address a lingering issue in class action law. The issue concerns the law of justiciability under Article III of the Constitution, which includes doctrines such as standing, ripeness, mootness, and the political question doctrine.<sup>8</sup> For example, a party must have sufficient Article III standing to assert a

3. See FED. R. CIV. P. 23(e) (providing procedures for attorneys concerning the "settlement, voluntary dismissal, or compromise" of a class action, but not requiring the consent of all class members).

4. PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.13 cmt. b (2010) [hereinafter ALI, PRINCIPLES] (noting the preference for "the percentage method" among courts); see also Milberg Indictment, *supra* note 2, at 27.

5. See Lonny Hoffman & Alan F. Steinberg, *The Ongoing Milberg Weiss Controversy*, 30 REV. LITIG. 183, 184 (2011) (noting that "Milberg was . . . the top securities class action law firm in the country").

6. Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 341.

7. See, e.g., John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. ILL. L. REV. 903, 904–05; John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1419–20 (2003); Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 132–33 (2001); Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 435 (1999) ("Indeed, in some extreme instances, the parties-plaintiff appears to be almost superfluous or an afterthought: A necessary cipher for the attorneys to develop the litigation and subsequently structure a negotiated settlement of aggregated claims. The concept of the party-plaintiff has been diluted, and this in turn contributes to the idea that the attorneys in these litigations essentially are free agents who identify the problem, broker and draft the legislative compromise, and then seek ratification of the court."); John C. Coffee, Jr., *Conflicts, Consent, and Allocation After Amchem Products—Or, Why Attorneys Still Need Consent to Give Away Their Clients' Money*, 84 VA. L. REV. 1541, 1549–50 (1998); cf. Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 313 (2011) (arguing against advance consent to settle a claim in aggregate settlements because "[w]hether to develop or use that claim at all is, of course, the individual's choice").

8. See generally RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 49–248 (6th ed. 2009) [hereinafter HART & WECHSLER] (defining "justiciability").

justiciable claim in federal court.<sup>9</sup> A party has standing if she has suffered “a personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”<sup>10</sup>

The Supreme Court has imposed this “personal injury” requirement of standing in part to ensure that “concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.”<sup>11</sup> Conversely, federal courts bar lawsuits brought by a citizen with only a “generalized grievance” that is “plainly undifferentiated and ‘common to all members of the public.’”<sup>12</sup> Such a “non-Hohfeldian” party has too small a stake to adequately represent the interests of those not before the court.<sup>13</sup> Moreover, permitting such a party to sue would allow her to use the court to interfere with the discretion of the Executive Branch to enforce the law.<sup>14</sup>

Federal courts have long struggled with the law of justiciability. Recently, the Court decided a number of cases that raised thorny justiciability issues.<sup>15</sup> But federal courts have been particularly puzzled over what showing satisfies Article III’s justiciability requirements in a class action.

9. *Massachusetts v. EPA*, 549 U.S. 497, 536 (2007) (“Standing to sue is part of the common understanding of what it takes to make a justiciable case.” (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998))).

10. *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984) (internal quotation marks omitted)).

11. *United States v. Windsor*, 133 S. Ct. 2675, 2680 (2013) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)); see also Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 87 & n.86 (2007) (noting that “courts have frequently concluded” this and noting that “[c]ases using this quotation to support the ‘litigation-enhancing’ theory of justiciability are legion”).

12. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575 (1992) (quoting *United States v. Richardson*, 418 U.S. 166, 171, 176–77 (1974)).

13. See Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1033, 1036–37 (1968) (defining a “non-Hohfeldian” plaintiff as one who only seeks “to vindicate the interest of the fungible citizen in the enforcement of the law,” and noting that such plaintiffs are generally not permitted to bring suit because “unless the plaintiff is a person whose legal position will be affected by the court’s judgment, he cannot be relied on to present a serious, thorough, and complete argument”); see also Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297, 297–99 (1979).

14. See *Lujan*, 504 U.S. at 576–77 (noting that recognizing standing for generalized harm “is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed’” (quoting U.S. CONST. art. II, § 3)); cf. *Allen v. Wright*, 468 U.S. 737, 761 (1984) (noting that separation of powers concerns “counsel[] against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties” (citing U.S. CONST. art. II, § 3)).

15. See *Windsor*, 133 S. Ct. at 2684–87; *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013); *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528–29 (2013); *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1142–43 (2013); *Chafin v. Chafin*, 133 S. Ct. 1017 (2013); *Already*, 133 S. Ct. at 725–27.

For example, this past term, in *Genesis Healthcare Corp. v. Symczyk*, the Supreme Court addressed whether a “collective action” brought pursuant to the Fair Labor Standards Act (FLSA) was moot because the representative—and only—plaintiff received, but rejected, a settlement offer that would have satisfied her entire claim.<sup>16</sup> In affirming the case as moot, the majority in *Symczyk* distinguished the case from class actions certified under Federal Rule of Civil Procedure 23.<sup>17</sup> The Court noted that in FLSA collective actions, the employees only “become parties . . . by filing written consent with the court.”<sup>18</sup> In contrast, upon certification of a Rule 23 class action, “the class of unnamed persons described in the certification acquire[s] a legal status separate from the interest asserted by [the named plaintiff].”<sup>19</sup>

The new “legal status” created by class certification can be understood as a conclusion by a federal court that each class member is a party before the court,<sup>20</sup> and thus *all* class members must satisfy all Article III justiciability requirements. After all, at least one Justice has stated that “Art[icle] III contains no exception for class actions.”<sup>21</sup> But the Court has also suggested that Article III standing is satisfied if only *some* class members have standing.<sup>22</sup> In fact, there is some support for the view that the justiciability requirements of Article III could be satisfied by a mere showing that the class representative satisfied the requirements.<sup>23</sup>

16. 133 S. Ct. at 1527.

17. *Id.* at 1530.

18. *Id.*

19. *Id.* (alteration in original) (quoting *Sosna v. Iowa*, 419 U.S. 393, 399 (1975)).

20. *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 415 (1980) (Powell, J., dissenting) (“In *Sosna*, the Court simply acknowledged that actual class certification gives legal recognition to additional adverse parties.”).

21. *Id.* at 413; *see also* *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976) (Powell, J.) (“[A] class action . . . adds nothing to the question of standing . . .”).

22. *See, e.g.,* *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 755–57 (1976) (noting that if a class representative’s claim is moot, then the class action is not moot as long as other class members have standing); *cf. Gratz v. Bollinger*, 539 U.S. 244, 251, 260 (2003) (concluding that the named representatives in a class action had standing to challenge the use of race in undergraduate university’s transfer and admission policies even though the admission policies no longer applied to them).

23. *E.g.,* *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 336, 340 (1980) (holding that a class representative of an uncertified class action has standing to appeal the denial of class certification given the representative’s interest in the cost sharing provided by the class action); *see also* Diane Wood Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 SUP. CT. REV. 459, 497–99 (arguing in favor of a representative view of the class action in which only the class representative is required to satisfy the requirements of justiciability); *cf. ALI, PRINCIPLES*, *supra* note 4, § 1.01 cmt. c (“Absent class members are represented nonparties, not parties properly so-called.”) (citing Hutchinson, *supra*, at 497–99)). The Supreme Court has acknowledged, but has not decided, the issue of whether a class action with uninjured plaintiffs can be brought if the class representatives have standing. *See, e.g., Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (acknowledging, but not deciding, the issue of whether exposure-only claimants have standing to

This Article first argues that courts and scholars are focusing on the wrong parties.<sup>24</sup> Instead, this Article argues that the class attorney, rather than any of the members of the class, is the real party in interest for purposes of the law of justiciability. This is because the function of the class action is to create a trust in which dispositive control of the class members' claims is assigned to the class attorney for the benefit of the class.<sup>25</sup> The trust function of the class action is essential in contexts where the class action has been permitted because the class members cannot adequately protect their own interests.<sup>26</sup> Consequently, this Article argues that the justiciability doctrines should reflect a reality that everyone recognizes—the class attorney is the only relevant party.

This Article further shows that the trust function is consistent with much of the existing law of justiciability.<sup>27</sup> Admittedly, under a trust view of the class action, the class attorney's only interest in the action is the attorney's fees provided by the litigation. As noted in *Symczyk*, recent precedent has held that "[an] interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim."<sup>28</sup> However, as discussed below, there is substantial precedent that permits nonparties to bring a justiciable action in federal court when it is necessary to adequately protect the interests of the injured parties.<sup>29</sup> This precedent supports the trust view of the class action because the de facto trust created by the class action is designed precisely "to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."<sup>30</sup>

This Article concludes by examining what lessons the trust function of the class action can provide for the law of justiciability. Other scholars have recognized the parallels between the class action and Article III's

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sue in a class action with injured representatives); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612 (1997) (same).

24. See *infra* Part I.

25. I have discussed the trust function of the class action in prior articles. See Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1077–79 (2012) [hereinafter Campos, *Mass Torts*]; Sergio J. Campos, *Proof of Classwide Injury*, 37 BROOK. J. INT'L L. 751, 772, 775–77 (2012) [hereinafter Campos, *Proof*]. Unlike my prior articles, this Article discusses in much greater detail the trust function's implications for the justiciability requirements of Article III. I plan a thoroughgoing trust model of the class action in a future article, which applies the model to other issues in class action law. See Sergio J. Campos, *A Trust Model of the Class Action* (unpublished draft) (on file with author) [hereinafter Campos, *Trust*].

26. See *infra* Sections I.B–C.

27. See *infra* Part II.

28. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1532 n.5 (2013) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990)).

29. See *infra* Sections II.B–D.

30. See Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969).

limitations on justiciability.<sup>31</sup> Scholars have noted that both share a concern with whether the parties before the court will adequately represent the interests of nonparties who will be affected by the court's exercise of jurisdiction.<sup>32</sup>

The adequacy of representation of the interests of those affected by an action also underlies the Court's separation of powers concerns in the justiciability context. As argued below, these separation of powers concerns can be understood as a concern with the appropriateness of judicial intervention given other political alternatives to protect the interests of those affected. This explains why federal courts prohibit parties from bringing suit solely to enforce the law. Permitting such a suit generally would interfere with the properly elected law enforcement representatives of the people.<sup>33</sup>

However, while some scholars (although rarely and obliquely) have recognized the trust function of the class action,<sup>34</sup> none have examined whether this function suggests any reforms for the law of justiciability. One central lesson of the trust view of the class action is that those actually injured cannot always adequately represent their own interests in court. Accordingly, the trust function of the class action strongly suggests that

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31. E.g., Brilmayer, *supra* note 13, at 306; Eugene Kontorovich, *What Standing is Good For*, 93 VA. L. REV. 1663, 1724 (2007) ("Standing determinations involve some of the same considerations as class certification."); Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 675 (1973).

32. E.g., Brilmayer, *supra* note 13, at 309–10.

33. See *infra* Sections III.A & C.

34. The only other scholars to suggest a trust view of the class action are Martin Redish and Megan Kiernan, but they do not believe that the class action attorney can be seen as the real party in interest for Article III purposes. See Martin H. Redish & Megan B. Kiernan, *Avoiding Death by a Thousand Cuts: The Relitigation of Class Certification and the Realities of the Modern Class Action* 4, 21–22 (Aug. 8, 2013) (unpublished manuscript), available at <http://ssrn.com/abstract=2307683> (noting that class attorneys "act as a quasi-guardian or trustee on behalf of the absent class members," but noting that "[o]f course, we do not mean to suggest that class attorneys should be deemed the real parties in interest in a purely formalistic sense; they could not, for example, assert Article III standing since they do not possess the substantive right being asserted"). Other scholars have only suggested, without stating explicitly, the trust view of the class action. E.g., David Rosenberg, *Response, Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 859 (2002) (noting that a mandatory class action is superior to voluntary aggregation among plaintiffs' firms because it is "unlikely that a single organization (or otherwise optimally assembled group of lawyers) would acquire beneficial interest in all classable claims," which suggests that the class attorney is the trustee of the plaintiffs' claims with a "beneficial interest" in the recovery); Stephen Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 COLUM. L. REV. 299, 308 (1980) ("In most small-claim class damage actions, where no single class member or named plaintiff stands to realize any significant economic gain, plaintiff's counsel, as the one with the largest stake in the outcome, is in reality the class representative."); cf. Hutchinson, *supra* note 23, at 487 (recognizing that the class attorney could be considered the real party in interest, but only if "one is willing to look beyond the person who is technically a party of record to his attorney").



federal courts should not use a showing of a "concrete and particularized" injury that "affect[s] the plaintiff in a personal and individual way" as a proxy for adequacy of representation.<sup>35</sup> In fact, there is an inherent divergence between the private interests of those personally injured and the interests of all those in society affected by the lawsuit.<sup>36</sup> This is especially true in constitutional litigation, where a constitutional interpretation can impact a significant number of individuals not before the court.

This lesson also applies in cases where the Supreme Court has expressed separation of powers concerns. In such cases the Court has been concerned with judicial intervention interfering with the elected representatives of the people. But, again, the class action teaches us that not all individuals initially assigned to represent the interests of others will adequately do so, even when elected.

Instead, federal courts should focus on whether the incentives of the parties in any particular case diverge from the social interest in initiating, developing, and adjudicating the case. The trust function of the class action further suggests that federal courts should permit nonparties to file suit when it is necessary to adequately protect the interests of injured individuals who cannot protect themselves. This Article concludes by using this insight to analyze the justiciability issues decided by the Court this term in litigation involving California's Proposition 8<sup>37</sup> and the Defense of Marriage Act (DOMA).<sup>38</sup>

## I. THE FUNCTION OF THE CLASS ACTION

As background, class actions in federal courts are governed by Federal Rule of Civil Procedure 23, which provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all [class] members" if certain requirements are met.<sup>39</sup> A party seeking class certification must first show that (1) the class is "numerous" (the numerosity requirement); (2) "there are questions of law or fact common to the class" (the commonality requirement); (3) the representative party's claims and defenses are "typical" of the class (the typicality requirement); and (4) "the representative part[y] will fairly and adequately protect the interests of the class" (the adequacy of representation requirement).<sup>40</sup> Second, the party "must satisfy at least one of the three requirements listed

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35. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 & n.1 (1992).

36. See Steven Shavell, *The Social versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333, 339 (1982) (arguing that the private incentive to bring a lawsuit and the social interest in bringing the lawsuit diverge).

37. See *infra* Subsection III.C.2.

38. See *infra* Subsection III.C.1.

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

40. *Id.*

in Rule 23(b).”<sup>41</sup> The Rule 23(b) requirements define three different categories of actions in which the certification of a class action is appropriate.

### A. Joinder v. Representative View of the Class Action

As Judge Diane Wood identified in a seminal article, the history of class actions in federal courts supports two competing conceptions of the relevant parties for Article III purposes.<sup>42</sup> The first is the “joinder” view of the class action, under which “[e]very member of a class . . . must independently satisfy all procedural requirements for appearing before the court in question.”<sup>43</sup> Both the “all class members” and “some class members” view of class action standing discussed above represent different flavors of the joinder view.

The second is the “representative” view of the class action.<sup>44</sup> Under the representative view, once the class representative “has established his right to come before the court, he may act as legal representative for others similarly situated, whether or not they could have sued independently.”<sup>45</sup>

The best support for the “joinder” view of the class action appears in decisions concerning the mootness of the class representative’s claim. As discussed earlier, in *Genesis Healthcare Corp. v. Symczyk*, the Supreme Court addressed whether a FLSA collective action was moot because the lone plaintiff had received a settlement offer that would have satisfied her claim.<sup>46</sup> There, the plaintiff had conceded that her claim was moot, and no other plaintiff opted into the action, as required under the

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41. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548 (2011); *see also* FED. R. CIV. P. 23(b)(1)–(3).

42. Hutchinson, *supra* note 23, at 459–60 (identifying these two conceptions of the class action). These two conceptions were also identified in an earlier survey of class action law. *See Developments in the Law: Class Actions*, 89 HARV. L. REV. 1318, 1466 (1976) [hereinafter *Developments*] (describing these two conceptions).

43. Hutchinson, *supra* note 23, at 459. Admittedly, the term “joinder” is inherently ambiguous and obscures the more specific functions of the procedures the term describes. *See generally* Robin J. Effron, *The Shadow Rules of Joinder*, 100 GEO. L.J. 759 (2012). This Article uses the term “joinder” in the sense used by Judge Wood to mean a procedure that “joins” additional parties to an action but does not change each party’s pre-existing requirement to satisfy Article III.

44. Hutchinson, *supra* note 23, at 460.

45. *Id.*

46. 133 S. Ct. 1523, 1532 (2013); *see also supra* text accompanying notes 16–19. In *Symczyk*, the offer was made pursuant to Rule 68, which allows a defendant to make an offer of judgment prior to trial, and, if rejected, and “[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.” FED. R. CIV. P. 68(d).

FLSA.<sup>47</sup> Accordingly, the Court concluded that the action was moot because the plaintiff's mooted claim was the only one before the Court.<sup>48</sup>

In deciding *Symczyk*, the majority distinguished prior precedent discussing the mootness of the class representative's claim in class actions certified under Rule 23.<sup>49</sup> The majority noted that once a class action is certified under Rule 23, "the class of unnamed persons described in the certification acquire[s] a legal status separate from the interest asserted by [the named plaintiff]."<sup>50</sup> This new "legal status" can be understood as a conclusion by a district court that each plaintiff is a party before it.<sup>51</sup> Thus, each plaintiff not only can be a substitute class representative, but each must satisfy the requirements of Article III.<sup>52</sup>

The Court has also suggested a joinder view of the class action outside the context of Article III. In *Zahn v. International Paper Co.*,<sup>53</sup> for example, the Court addressed whether the statutory amount in controversy requirements for diversity jurisdiction must be satisfied by all class members or just the class representative.<sup>54</sup> The Court held that the amount in controversy requirement must be satisfied by each class member,<sup>55</sup> which strongly suggests that each class member must satisfy all other jurisdictional requirements, including the justiciability requirements of Article III.

Moreover, in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, the Court examined whether a New York state law prohibiting class actions seeking statutory damages under state law prevented a federal court from certifying the same class under Rule 23.<sup>56</sup> In

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47. *Symczyk*, 133 S. Ct. at 1529; see also 29 U.S.C. § 216(b) (2012) (permitting "collective actions" in which the plaintiff asserts the claims of herself and all "other employees similarly situated," but further providing that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought").

48. *Symczyk*, 133 S. Ct. at 1529.

49. *Id.*

50. *Id.* at 1530 (alterations in original) (quoting *Sosna v. Iowa*, 419 U.S. 393, 399 (1975)).

51. See U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 415 (1980) (Powell, J., dissenting) (noting that, in *Sosna*, "the Court simply acknowledged that actual class certification gives legal recognition to additional adverse parties").

52. *Id.* at 413 ("Art[icle] III contains no exception for class actions."); see also *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976) (Powell, J.) ("[A] class action . . . adds nothing to the question of standing.").

53. 414 U.S. 291 (1973).

54. *Id.* at 292 ("The claim of each of the named plaintiffs was found to satisfy the \$10,000 jurisdictional amount, but the District Court was convinced 'to a legal certainty' that not every individual owner in the class had suffered pollution damages in excess of \$10,000."); see also *Hutchinson*, *supra* note 23, at 492–93 (discussing *Zahn*). *Zahn* has since been abrogated by statute. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 556 (2005) (noting that *Zahn* has been abrogated by 28 U.S.C. § 1367).

55. *Zahn*, 414 U.S. at 301 (citing *Snyder v. Harris*, 394 U.S. 332, 338 (1969)).

56. 130 S. Ct. 1431, 1436 (2010) (plurality opinion).

concluding that a federal court could certify the class, Justice Scalia, writing for a plurality, emphasized that Rule 23 was simply a “joinder” device that “allows willing plaintiffs to join their separate claims against the same defendants in a class action.”<sup>57</sup> The plurality further stated that “like traditional joinder, [Rule 23] leaves the parties’ legal rights and duties intact and the rules of decision unchanged,”<sup>58</sup> which presumably includes each party’s duty to satisfy the requirements of Article III.

However, there is also support for the “representative” view of the class action. For example, in *Deposit Guaranty National Bank v. Roper*, the Court addressed whether class representatives whose claims had been mooted nevertheless had standing to appeal the denial of their motion to certify the class action.<sup>59</sup> As in *Symczyk* and the cases discussed there, the *Roper* Court addressed whether the mootness of the class representatives’ claims mooted the entire class action. However, unlike the cases discussed in *Symczyk*, *Roper* did not involve a certified class, which would have made the other class members parties to the action under existing law.<sup>60</sup>

Nevertheless, the *Roper* Court concluded that the class representatives had standing because “they retain[ed] a continuing individual interest in the resolution of the class certification question in their desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails.”<sup>61</sup> In fact, in concluding that this economic interest was sufficient for standing purposes, the Court further noted that the “prospect of such fee arrangements” was essential to motivate “private attorney general[s]” to “bring cases that for economic reasons might not be brought otherwise.”<sup>62</sup>

In *United States Parole Commission v. Geraghty*, a case decided the same day as *Roper*, the Court further concluded that such an economic interest was unnecessary for a class representative with a mooted claim to appeal the denial of a class certification motion.<sup>63</sup> Unlike in *Roper*, the purported representative in *Geraghty* sought injunctive relief concerning his conditions of confinement, and, after his release, he conceded that he had no other interest in the suit.<sup>64</sup> Nevertheless, the Court suggested that an interest in certifying a class action was sufficient for purposes of Article III standing, noting that this right “is more analogous to the private attorney

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57. *Id.* at 1443.

58. *Id.*; see also Kevin M. Clermont, *The Repressible Myth of Shady Grove*, 86 NOTRE DAME L. REV. 987, 1029 (2011) (noting that the *Shady Grove* Court concluded that the coverage of a Rule 23 class action “involv[es] the reach of joinder”).

59. 445 U.S. 326, 329–31 (1980). Like in *Symczyk*, the representative plaintiffs in *Roper* rejected settlement offers that would have satisfied their entire claims. *Id.* at 329.

60. *Id.*

61. *Id.* at 336.

62. *Id.* at 338.

63. 445 U.S. 388, 402–03, 407 (1980).

64. *Id.* at 394–95; see also *id.* at 420 n.14 (Powell, J., dissenting).

general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement."<sup>65</sup>

Accordingly, in both *Roper* and *Geraghty*, the Court suggested that the class action itself, even if uncertified, gives the purported class representative sufficient standing to sue, separate and apart from the standing of the purported class members. Admittedly, these precedents have since been questioned, although neither has been overruled.<sup>66</sup> But both suggest that only the standing of the class representative was necessary for purposes of satisfying Article III.

Additional support for the representative view comes from the text of Rule 23, which not only allows for "representative parties" to file suit on behalf of a class, but further provides that the class action is only permissible when "the class is so numerous that joinder of all members is impracticable."<sup>67</sup> This text suggests that the class action is an exception to "joinder," not an example of it.

The Court has also implicitly accepted a representative view in some cases that predate the current version of Rule 23. For example, in *Supreme Tribe of Ben-Hur v. Cauble*, the Court permitted diverse class representatives to file suit in federal court even though the citizenship of the class members would have destroyed complete diversity.<sup>68</sup> Similarly, in *Handley v. Stutz*, a creditors' bill class action was filed in which the representative plaintiffs met the jurisdictional amount in controversy requirement, but many class members did not.<sup>69</sup> In contrast to *Zahn*, the Court affirmed the denial of a motion for lack of jurisdiction, noting that the circuit court "had jurisdiction of the case" because it could distribute the funds recovered "as a trust fund for the benefit of all the creditors of the corporation."<sup>70</sup>

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65. *Id.* at 403.

66. *See infra* Section II.A.

67. FED. R. CIV. P. 23(a)(1).

68. 255 U.S. 356, 364–66 (1921) (holding that "[d]iversity of citizenship gave the District Court jurisdiction," and that "[t]he intervention of the Indiana citizens in the suit would not have defeated the jurisdiction already acquired"); *see also* Hutchinson, *supra* note 23, at 501 (noting this aspect of *Ben-Hur*). The Court has since concluded that Article III only requires "minimal diversity" in the class action context and other contexts. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 584 (2005) (Ginsburg, J., dissenting) (noting that Article III "demand[s] no more than 'minimal diversity,' i.e., so long as one party on the plaintiffs' side and one party on the defendants' side are of diverse citizenship"). Congress has also recently amended the diversity statute to relax the citizenship and amount-in-controversy requirements for class actions and similar cases. *See generally* 28 U.S.C. § 1332(d) (2012).

69. 137 U.S. 366, 369–70 (1890).

70. *Id.* at 369; *see also* Hutchinson, *supra* note 23, at 493–94 (discussing *Handley v. Stutz*).

### B. *The Trust View of the Class Action*

The Court's decision in *Handley v. Stutz* suggests a third, distinct conception of the class action for justiciability purposes, one that I have discussed briefly in prior writings.<sup>71</sup> This third conception views the class action as a trust device that effectively makes the class attorney the trustee of the class members' claims for the benefit of the class. This section provides a more detailed argument in favor of this trust view of the class action.<sup>72</sup> Specifically, this section shows the superiority of the trust view to the joinder and representative views of the class action.

Admittedly, the trust view of the class action has little to no explicit support in the law of federal class actions. As noted above, the Court in *Handley v. Stutz* conceptualized the creditors' bill class action as a trust action for the benefit of the creditors.<sup>73</sup> However, few federal courts, if any, have followed the *Handley* Court's lead.

Instead, the trust view of the class action derives its support from the function of the class action. In other words, the trust view is based on what the class action actually does, not on what courts and scholars say it does. I acknowledge at the outset that the class action may perform a variety of functions.<sup>74</sup> I also acknowledge that the class action is not the only procedural device that performs a trust function.<sup>75</sup> However, this Article focuses on the trust function of the class action because it provides the best explanation for why the class action is "superior" in the situations where it has been permitted.<sup>76</sup> Put another way, this Article focuses on the trust function of the class action because it is the one function that explains why

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71. See Campos, *Proof*, *supra* note 25, at 771–76; see also Campos, *Mass Torts*, *supra* note 25, at 1076–79.

72. As noted earlier, I also plan to provide a comprehensive trust model of the class action, which I will use to address other issues in class action law. See Campos, *Trust*, *supra* note 25.

73. See *Handley*, 137 U.S. at 369.

74. E.g., Campos, *Proof*, *supra* note 25, at 766 (acknowledging the argument that the class action more efficiently uses judicial resources).

75. Campos, *Mass Torts*, *supra* note 25, at 1079 n.89 (noting that multidistrict litigation also involves a loss of control over the claim, and can be called "quasi-class actions," citing sources); cf. Elizabeth Chamblee Burch, *Adequately Representing Groups*, 81 *FORDHAM L. REV.* 3043, 3070 (noting that the "adequacy of representation" concerns found in the class action can also be found in *parens patriae* and multidistrict litigation).

76. See *FED. R. CIV. P.* 23(b)(3) (defining a residual category of class actions that are permitted only if, among other things, the court finds "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy"). Given that the class action does not uniquely perform a trust function, there is some question whether the superiority requirement of Rule 23(b)(3) requires courts to consider alternatives such as multidistrict litigation. See *ALI, PRINCIPLES*, *supra* note 4, § 2.02(b)(4) (concluding that the alternatives that should be considered in a "superiority" analysis include "an administrative aggregation" such as multidistrict litigation).

courts have preferred the class action in certain situations over the procedures that would ordinarily apply to each individual's claim.<sup>77</sup>

As I have argued previously, the clearest example of the trust function of the class action arises in the context of litigation involving small claims.<sup>78</sup> In small claims litigation, the defendant allegedly commits a common legal violation that injures a large number of dispersed plaintiffs. However, each plaintiff's injury is too small to provide an incentive to file a lawsuit separately. Accordingly, each plaintiff will not file her "negative value" claim, which allows the defendant to escape liability altogether.<sup>79</sup>

Both courts and scholars acknowledge that the class action solves the problem of insufficient stakes in small claims litigation.<sup>80</sup> The class action does so because it forces the plaintiffs to share any common litigation costs under the "common fund" doctrine,<sup>81</sup> while such forced sharing is not

77. See David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 394-95 (2000) (distinguishing between class treatment and the "separate action process"); see also *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002) (distinguishing between the class action as "central planner" model and "a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions" (quoting *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995))).

78. See Campos, *Mass Torts*, *supra* note 25, at 1077; Campos, *Proof*, *supra* note 25, at 772.

79. See David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and "Indivisible" Remedies*, 79 GEO. WASH. L. REV. 542, 546-47 (2011) (defining "'small-stakes' or 'negative-value' cases" as "cases in which no class member has an incentive to bring a case on his or her own"); see also *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (noting that a defendant can escape liability in small claims litigation because "only a lunatic or a fanatic sues for \$30").

80. *E.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that *small recoveries* do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (emphasis added) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 324, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."); Jonathon R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 8 (1991) ("In the absence of the class action device, such injuries would often go unremedied because most individual plaintiffs would not themselves have a sufficient economic stake in the litigation to incur the litigation costs."). I have written separately that the problem of insufficient stakes also applies in the mass tort context because, like small claims litigation, the stakes are substantially asymmetric between the defendant and any one plaintiff. See Campos, *Mass Torts*, *supra* note 25, at 1074-76.

81. *E.g.*, 1 WILLIAM B. RUBENSTEIN & ALBA CONTE, *NEWBERG ON CLASS ACTIONS* § 1:7 (5th ed. 2011) ("The class action device solves this problem [of insufficient stakes] by aggregating many individual claims into a single suit and distributing the costs of representation across the entire claimant group."); see also *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79 (1980) (defining the "common fund" doctrine).

possible when class members file separate claims.<sup>82</sup> Moreover, common litigation costs pervade small claims litigation because the defendant's alleged common legal violation inevitably results in issues of fact and law that are the same for each plaintiff.<sup>83</sup> By investing in common issues together and apportioning those costs equally among themselves, each plaintiff reduces her own individual costs.

Put another way, the class action allows the plaintiffs to use "economies of scale" to invest in common issues, which reduces the cost of these investments for each individual plaintiff.<sup>84</sup> Consequently, litigation investments such as legal research, experts, and document review are less expensive for each plaintiff when these investments are divided over thousands of other plaintiffs. For example, the cost of an expert on a factual issue that is the same for each plaintiff may be prohibitive for one plaintiff (say, \$1 million). However, it would only cost a fraction of the total amount for the plaintiff if she splits the costs with other class members (with 999 other plaintiffs, only \$1,000 each).<sup>85</sup>

Although courts and scholars correctly identify the forced cost sharing function of the class action, few, if any, discuss with precision how the class action produces forced sharing. Under the joinder view, for example, forced sharing would never occur. The joinder view suggests that some form of consent is necessary to force class members to share common costs because the joinder view "leaves the parties' legal rights and duties intact."<sup>86</sup> If so, the very transaction costs that make "joinder of all

82. See Betson & Tidmarsh, *supra* note 79, at 548 n.25 ("Although it is possible for a court to require parties who benefit from the creation of a common fund to share in the costs of creating that fund, the 'common fund' concept has never been extended so far as to require later plaintiffs who sue independently to reimburse earlier plaintiffs whose cases eased their own paths to recovery." (citation omitted) (citing *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 170 (1939))).

83. See David Rosenberg & Kathryn E. Spier, On Structural Bias in the Litigation of Common Question Claims 1–2 (Aug. 1, 2011) (unpublished manuscript) (on file with author), available at <http://ssrn.com/abstract=1950196>; cf. Campos, *Mass Torts*, *supra* note 25, at 1069–72 (noting the similar prevalence of common issues in mass tort litigation, which also arises from the defendant's common conduct).

84. See N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS* 272 (6th ed. 2012) (defining "economies of scale" as arising "[w]hen long-run average total cost declines as output increases"). Here, the "output" would be the development of the claim. It is well recognized that aggregation procedures like the class action "make small claims viable by taking advantage of economies of scale." ALI, *PRINCIPLES*, *supra* note 4, § 1.05 reporters' notes cmt. c; see also Rosenberg, *supra* note 77, at 394 (discussing the inherent scale advantage a defendant has in mass tort and small claims litigation).

85. See Campos, *Mass Torts*, *supra* note 25, at 1075–76 & n.76 (discussing a similar example in mass tort litigation (citing Rosenberg, *supra* note 77, at 399–400)).

86. See *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (Scalia, J.) (plurality opinion) (discussing how Rule 23 is, in some respects, "like . . . joinder"). Arguably the joinder view can be understood in a more limited sense as leaving each party's Article III obligations the same but permitting the Court to impose additional duties, such as a duty to contribute to a common fund. Indeed, some joinder devices such as Federal Rule of Civil Procedure



members . . . impracticable”<sup>87</sup> in the absence of the class action would remain because each plaintiff would have to agree to split all costs.<sup>88</sup>

Unlike the joinder view, the representative view only requires one plaintiff to step forward and tax each of the class members for all common investments. The “common fund” doctrine, in fact, permits the taxing of all benefitting class members without their consent.<sup>89</sup> However, assuming that the plaintiff only cares about her net expected recovery,<sup>90</sup> it is unclear why any plaintiff would step forward. Even though the plaintiff’s costs are reduced, the plaintiff’s individual payoff remains the same. It is unlikely that any one plaintiff would want to front the costs of litigating the class action when she could “sit back” and wait for another plaintiff to come forward.<sup>91</sup> In fact, the opportunity costs involved in successfully litigating the class action, rather than doing something else, are most likely too substantial given the small payoff, even if the payoff is positive.<sup>92</sup>

In addition, there is a risk that the class representative may not collect the tax from each plaintiff. The class representative plaintiff may lose. She may also find that collecting the tax from the other class members is too costly. Consequently, the representative view would effectively require the

13, which concerns compulsory counterclaims, force parties to do things without their consent. FED. R. CIV. P. 13(a). *See generally* Effron, *supra* note 43, at 771–73 (discussing the multiple functions of “joinder” devices and questioning whether “joinder” is a coherent concept). For the sake of clarity, this Article will focus on a more encompassing conception of the “joinder” view because it better accords with Judge Wood’s and Justice Scalia’s view that a joinder conception of the class action leaves the claims intact in all respects. *Cf.* Hutchinson, *supra* note 23, at 459 (defining the “joinder” view to require that “[e]very member of a class . . . must independently satisfy *all procedural requirements* for appearing before the court in question” (emphasis added)).

87. FED. R. CIV. P. 23(a)(1) (defining the numerosity requirement).

88. ROBERT G. BONE, *CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE* 263 (2003) (“It is true that class members could achieve these same benefits [of cost-sharing] by organizing voluntarily. However, the transaction costs of organizing a large group are simply too high.”); *see also* Campos, *Mass Torts*, *supra* note 25, at 1079–80 (noting the similar problem of transaction costs in mass tort litigation undermining voluntarily cost sharing).

89. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (permitting a district court to use the “common-fund doctrine” to apportion attorneys’ fees and other costs against the unclaimed portion of a class action judgment).

90. One goal of this Article is to show that parties may care about things other than the pecuniary value of the potential recovery, particularly in litigation involving constitutional issues. *See infra* Section III.B. Here, this Article assumes that the class members in small claims litigation only care about their net expected recovery because it is an assumption that is universally accepted by courts and scholars in discussing small claims litigation, as evidenced by the common view that “only a lunatic or a fanatic sues for \$30.” *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) (discussing small claims litigation).

91. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985) (noting that, in a small claims class action, the absent plaintiff can “sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection”).

92. *Cf.* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2056–74 (2010) (discussing the optimal fee for class action attorneys, and arguing that they should receive the entire recovery).

class representative to “vouch for the entire costs,” and in small claims litigation, “[o]nly a lunatic would do so.”<sup>93</sup>

Given the deficiencies of the joinder and representative views, most courts and scholars recognize that the class action is meant to give “an attorney” an incentive to bring suit, not any of the class members themselves.<sup>94</sup> It is not a class member, but the attorney who is “willing to underwrite the costs” of investing in the class action.<sup>95</sup> This is because the class attorney “invest[s] . . . on contingent fee, taking the risk of failure in exchange for a premium award if the class prevails.”<sup>96</sup>

In more specific terms, the class attorney is usually (but not always) compensated with a percentage of any net recovery of the plaintiffs as a whole.<sup>97</sup> Moreover, the class attorney has the option to settle the class action as a whole, without the class members’ consent, for an aggregate amount.<sup>98</sup> In doing so, the class attorney can recoup all common costs, as

93. *Rand v. Monsanto Co.*, 926 F.2d 596, 599 (7th Cir. 1991) (Easterbrook, J.) (rejecting a district court finding that the class representative was not adequate because he or she would not bear the total costs of the litigation, noting that “[t]he very feature that makes class treatment appropriate—small individual stakes and large aggregate ones—ensures that the representative will be unwilling to vouch for the entire costs”); see also Campos, *Proof*, *supra* note 25, at 776 & n. 140 (same, quoting *Rand*); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 412 (2000) (“Client financing of the action is highly unlikely because of the inherent collective action problem in class actions; that is, a class representative who expects to receive one percent (or less) of the recovery will not logically finance one hundred percent of the action’s costs.”).

94. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (noting that the class action “aggregat[es] the relatively paltry potential recoveries into something worth someone’s (*usually an attorney’s*) labor” (emphasis added) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) (“A critical fact in this litigation is that petitioner’s individual stake in the damages award he seeks is only \$70. *No competent attorney* would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner’s suit proceed as a class action or not at all.” (emphasis added)); see also ALI, *PRINCIPLES*, *supra* note 4, § 2.02 cmt. b (noting that class actions are “superior” when the claims are not “viab[le],” defined as “the prospect, in practice, that claimants would obtain representation in the market for legal services in the absence of aggregate treatment”); BONE, *supra* note 88, at 262 (“The large potential recovery in the class action can attract a *better lawyer* than would be interested in an individual suit and the efficiencies of group litigation make possible a higher level of investment in discovery and trial preparation.” (emphasis added)); Campos, *Proof*, *supra* note 25, at 772–73 (quoting *Amchem Prods.*, 521 U.S. at 617); Campos, *Mass Torts*, *supra* note 25, at 1077 (same).

95. *Rand*, 926 F.2d at 599.

96. *White v. Sunstrand Corp.*, 256 F.3d 580, 586 (7th Cir. 2001) (Easterbrook, J.) (discussing the risk of uncompensated time).

97. See ALI, *PRINCIPLES*, *supra* note 4, § 3.13(a) cmt. b (noting the preference for “the percentage [of the fee] method” among courts and scholars, although noting that some attorneys are compensated by a “lodestar” method, which looks at the actual time spent on the litigation).

98. See FED. R. CIV. P. 23(e) (providing procedures for attorneys concerning the “settlement, voluntary dismissal, or compromise” of a class action). As noted above, scholars heavily criticize this aspect of the class action. See *supra* note 7 and accompanying text; see also Linda S. Mullenix,

well as her fee, against this common fund, thereby producing the forced sharing of common costs among the class members. The class attorney can also recover in the aggregate after a successful judgment, and similarly assess common costs against the fund and collect her fee.<sup>99</sup>

Accordingly, the class attorney, unlike any one plaintiff or group of plaintiffs, has an incentive to file a class action and develop issues common to the class. The class attorney's expected payoff is both large and correlated to the total payoff to the class. Moreover, the class attorney has the necessary control over the claims to make any investment worthwhile. Unlike the class members, the class attorney can file the action and collect from the common fund, rather than depend on the actions of the other class members to contribute to any common investments.

As I have pointed out in previous writings, the ability of the class attorney to exercise dispositive control over the class members' claims, coupled with receiving a large, partial interest in any net recovery, functionally creates a trust.<sup>100</sup> Specifically, the class attorney's right to exercise dispositive control over the claims, including the right to settle the claims, functionally mirrors the "title" assigned to trustees to exercise dispositive control over any trust assets.<sup>101</sup> Moreover, the class attorney's percentage fee arrangement is similar to trust arrangements where the

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*Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 VAND. L. REV. 1687, 1700–02 (2004) (criticizing the "rubber stamping" of class action settlements by courts in Rule 23(e) fairness hearings).

99. 3 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 10.12, at 505 (4th ed. 2002) (noting that "[w]hen classwide damages are amenable to proof by the class representative, a lump sum damage award is possible on behalf of the class"); see also *id.* § 10.5 ("Aggregate computation of class monetary relief is lawful and proper.").

100. Campos, *Mass Torts*, *supra* note 25, at 1078–79; Campos, *Proof*, *supra* note 25, at 774–75. The trust view of the class action, no matter its tacit acceptance in practice, raises significant due process and ethical concerns because it permits a court to *take* dispositive control of the claims away from the class members (in effect taking the class members' property), and to assign such control to the class attorney. I addressed the due process concerns in great detail in a prior article. See Campos, *Mass Torts*, *supra* note 25, at 1115–21. In a nutshell, I argue that the due process analysis should recognize the primary legal entitlement the plaintiffs have in avoiding the legal violation, and that assigning the right to control the claim to the class attorney better protects this primary entitlement (as well as provide better compensation) than letting the plaintiffs retain control over their claims. See *id.* at 1092–1121. I have not addressed whether the trust function of the class action would be consistent with the law of ethics, although it obviously does not accord with current law. See Erichson & Zipursky, *supra* note 7, at 312–13. Finally, the law of champerty and maintenance restricts the assignment of claims, although some scholars criticize these restrictions. See, e.g., Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 62 (2011) (criticizing the law of champerty and maintenance).

101. See RESTATEMENT (THIRD) OF TRUSTS § 2 (2003) (defining a "trust" as a "fiduciary relationship" which "subject[s] the person who holds title to the property to duties to deal with it for the benefit of . . . one or more persons," at least one of whom is not the sole trustee); see also M.W. LAU, *THE ECONOMIC STRUCTURE OF TRUSTS* 148 (2011) ("The legal title, in theory, gives the trustee complete control and dominion over the trust asset.").

trustee is given a partial beneficial interest in the proceeds produced by trust assets.<sup>102</sup>

Finally, while a trustee of a trust has title and a beneficial interest in the trust asset, the remaining beneficial interest in the asset remains assigned to the beneficiaries.<sup>103</sup> Likewise, in the class action context, the class attorney's dispositive control over the claims is for the benefit of the class members. It is the class members who are the beneficiaries of the class attorney's exercise of control over the claims.<sup>104</sup> Indeed, the class attorney, like a trustee, owes a fiduciary duty to the class members insofar as both Rule 23 and the Due Process Clause require the attorney to adequately represent the class members' interests.<sup>105</sup>

But more importantly, it is the trust function of the class action that produces the forced sharing necessary to overcome the insufficient stakes in small claims litigation. As noted above, neither the joinder view nor the representative view of the class action provides a causal account of how the class action results in the forced sharing of common costs. In contrast, the trust view illustrates that it is the class attorney serving as trustee, and not the class or any one class member, which allows the class to benefit from economies of scale in a class action.

Admittedly, the class action differs from an express trust because an express or donative trust is created by a *settlor*, who conveys the trust property to the trustee for the benefit of the beneficiaries.<sup>106</sup> By contrast, a

102. RESTATEMENT (THIRD) OF TRUSTS § 38 & cmt. c (noting that “[a] trustee is entitled to reasonable compensation out of the trust estate for services as trustee,” and that some state statutes “provide that trustees’ fees are to be based on specified percentages of the principal or of the income and principal of the trust”); see also 1 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 2.1.6 (5th ed. 2006) (“A trustee need not have a legal title to the subject matter . . . since it is possible for a trustee to hold an equitable interest in trust.”).

103. RESTATEMENT (THIRD) OF TRUSTS § 3 cmt. d (noting that “[a] trustee holds the trust property for the benefit of a person or persons who are referred to as the ‘beneficiary’ or ‘beneficiaries,’” and that “the trustee must hold property for the benefit of one or more persons, at least one of whom is not the sole trustee”).

104. *Id.* § 5 cmt. a (“A property arrangement may constitute a trust, as that term is used in this Restatement, even though such terms as ‘trust’ or ‘trustee’ are not used . . . .”); see also *id.* § 5 cmt. j (“One who is the trustee of a chose in action owes duties to the trust beneficiaries to enforce the chose and then pay the proceeds to, or hold and manage the proceeds for, the beneficiaries.”).

105. See FED. R. CIV. P. 23(g) (providing that a court “must appoint class counsel” and “may consider any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class”); see also *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940) (holding that the Due Process Clause requires class action procedures to “fairly insure[] the protection of the interests of absent parties”).

106. RESTATEMENT (THIRD) OF TRUSTS § 2 & cmt. a (2011) (defining a trust as “arising from a manifestation of intention to create that relationship”); 1 SCOTT ET AL., *supra* note 102, § 2.1.8 (“An express trust arises when the settlor manifests an intention to create it.”); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 624 (2004) (“In the prototypical donative trust, the settlor (‘S’) in effect contracts with the trustee (‘T’) to manage a portfolio of assets in the best interests of the beneficiaries (‘B1’ and ‘B2,’ collectively ‘Bs’) . . . .”).

class action is judicially imposed. But the concept of a "trust" is not limited to express trusts. For example, "constructive" trust arrangements are also judicially imposed when equity requires a person to take care of property for the benefit of another.<sup>107</sup> In addition, there are other judicially created "trust" arrangements that are not formally considered trusts, but create analogous fiduciary obligations. These include the assignment of an administrator to control a decedent's estate,<sup>108</sup> the guardianship of property for one who lacks capacity,<sup>109</sup> and bankruptcy trusteeships.<sup>110</sup>

Moreover, a class action can be understood as an express trust if one views the judge as the settlor. Like a settlor, the judge creates the trust relationship between the trustee and the beneficiaries and defines the terms of the relationship through the class certification order.<sup>111</sup> Moreover, the judge can be said to hold and convey property to the class attorney because the judge can create rights to bring an action, as evidenced by the creation of common law causes of action and implied rights of action.<sup>112</sup> If the cause of action has a statutory or other legal source, the judge still holds the keys to the courthouse door, and can use doctrines such as standing to,

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107. RESTATEMENT (THIRD) OF TRUSTS § 1 cmt. e (2001) (defining a "constructive trust," and noting that, unlike an express trust, "a constructive trust is imposed, not necessarily to effectuate an expressed or implied intention, but to redress a wrong or to prevent unjust enrichment. A constructive trust is thus the result of judicial intervention and is remedial in character").

108. *Id.* § 5(b) & cmt. c (noting that "[p]ersonal representatives of decedents' estates and guardians, conservators, and their counterparts, by whatever name, are fiduciaries but they are not trustees," although "many of the rules applicable to trustees are applicable to executors and administrators"); RESTATEMENT (SECOND) OF TRUSTS § 6 & cmt. a (1959) (providing that "[a]n executorship or an administratorship is not a trust," but noting that both are fiduciaries, and that the primary difference between the two is "the tribunals which enforced the duties" of each); 1 SCOTT ET AL., *supra* note 102, § 2.3.2 (noting that "[e]xecutors are often referred to as trustees, and, in a broad sense, they are," with the only difference being that the duties of a trustee "depend on the terms of the trust," while the duties of an executor "are generally limited to winding up of the decedent's estate" (footnotes omitted)).

109. RESTATEMENT (THIRD) OF TRUSTS § 5(c) & cmt. c (noting that "many of the rules applicable to trustees are applicable to . . . guardians and conservators"); 1 SCOTT ET AL., *supra* note 102, § 2.3.3 ("A guardian of the property of one under an incapacity is certainly a trustee in the broad sense of the term, because a guardian is under a duty to deal with the property for the ward's benefit.").

110. *Cf.* RESTATEMENT (THIRD) OF TRUSTS § 5(d) & cmt. d ("When a corporation or an individual is insolvent, and in some other situations, the court may appoint a receiver to administer the corporation's or individual's property under court supervision. The receiver is a fiduciary but does not hold title to the property under administration and is not a trustee.").

111. See 1 SCOTT ET AL., *supra* note 102, § 2.1.8 (noting that the trust instrument governs the relationship between the trustee and the beneficiaries, and thus, "an express trust is like a contract or a mortgage"); Sitkoff, *supra* note 106, at 624–25 (noting that, as a positive and normative matter, the law of trusts "gives priority to the settlor over the beneficiaries as the trustee's primary principal" given that the trust is governed by "the ex ante instructions of the settlor").

112. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing an implied right for damages against federal officers who allegedly violated the Fourth Amendment).

in effect, convey or withhold the right to bring an action. Indeed, one can understand a party who has a right to bring a lawsuit as having a presumptive license from the government to enforce the law through a lawsuit. But, despite the initial assignment of an enforcement license to a party, the court still retains a right to revoke the license and convey the license to someone else for the benefit of others.<sup>113</sup>

Finally, it is worth acknowledging that the trust function does not perfectly align the class attorney's incentive to invest in common issues with the incentives of the defendant to defend common issues. First, federal courts generally do not permit class action attorneys to recover if they lose at trial, or otherwise impose costs that go beyond what each plaintiff recovers.<sup>114</sup> The general inability of class counsel to spread the costs of nonmeritorious litigation means that class attorneys may have less of an incentive to develop the litigation than the defendant, who can spread costs regardless of the outcome.

Second, the class attorney typically only receives a percentage of the total net recovery, while the defendant receives all of the benefits of successful litigation. If the percentage the class attorney recovers is too small, then the class attorney may suffer from the same deficient incentives of the class representative under the representative view. As noted above, under the representative view, the small potential payoff for any one plaintiff makes it unlikely that any plaintiff would step forward to litigate on behalf of the class.<sup>115</sup>

But it is important not to make the perfect the enemy of the good. As an initial matter, the class members suffer from the same inability to tax others for losing efforts. Moreover, the court can establish the fee so that it gives the class attorney a payoff that is sufficiently large and directly correlated with the total net aggregate recovery associated with all common issues.<sup>116</sup> Most importantly, class members can only obtain as large an incentive as the class attorney by informally aggregating, which involves significant transaction costs that the class attorney avoids because she is

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113. For an account of the function of standing that implies this "license" view of the right to bring a lawsuit, see Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 784 (2009) (arguing that "[s]tanding enforces the Article II nondelegation principle by curtailing private prosecutorial discretion").

114. For a counterexample, see *Kamilewicz v. Bank of Boston*, 92 F.3d 506, 508, 512 (7th Cir. 1996), where the Seventh Circuit affirmed a state court settlement of a class action in which one class member received \$2.19 in benefits but was assessed a fee of \$91.33 to cover costs. *Kamilewicz* has been heavily criticized and few cases have followed its lead. See Patrick Woolley, *Collateral Attack and the Role of Adequate Representation in Class Suits for Money Damages*, 58 U. KAN. L. REV. 917, 917 (2010).

115. See *supra* text accompanying notes 91–94.

116. In fact, the best approach for small claims litigation may be to assign the *entire* recovery to the attorney, as some have proposed. See Fitzpatrick, *supra* note 92, at 2046–47; Sitkoff, *supra* note 106, at 637 (noting that "no compensation short of transferring complete ownership . . . will solve the incentive problem in all possible scenarios when the agent's efforts are unobservable").

assigned dispositive control over all claims.<sup>117</sup> In fact, it is precisely these transaction costs that justify the use of the class action, which is only permitted when “joinder of all members is impracticable.”<sup>118</sup>

### C. *The Class Action Categories*

This Article has argued so far that the class action solves the problem of insufficient incentives in small claims litigation because of its trust function. This trust function, moreover, is not adequately captured by the joinder or representative views of the class action.

But small claims litigation does not exhaust the universe of cases where federal courts have permitted class actions. Rule 23 defines two further categories of cases where class actions are considered appropriate. The first category, defined under Rule 23(b)(1)(A) and Rule 23(b)(2), permits class actions when separate actions “would create a risk of . . . incompatible standards of conduct for the party opposing the class,”<sup>119</sup> such as when the plaintiffs seek “final injunctive relief or corresponding declaratory relief” which applies to “the class as a whole.”<sup>120</sup> The second category, defined under Rule 23(b)(1)(B), permits class actions when separate actions, “as a practical matter . . . would substantially impair or impede [the nonparties’] ability to protect their interests.”<sup>121</sup> The second category primarily encompasses class actions involving limited funds, where “the shared character of rights claimed or relief awarded entails that any individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members.”<sup>122</sup>

The trust function of the class action also explains the superiority of the class action for these two separate categories. Both of these categories parallel two situations in which parties are required to join a nonparty under Rule 19.<sup>123</sup> Under Rule 19(a), a “required party” must be joined if,

117. See Campos, *Mass Torts*, *supra* note 25, at 1079–81 (discussing the inferiority of informal aggregation).

118. See FED. R. CIV. P. 23(a)(1) (permitting a class action if “the class is so numerous that joinder of all members is impracticable”). Notably in settlement class actions, where the action is certified only for settlement purposes, the class attorney may have an incentive to settle too cheaply because she cannot threaten a litigation class action. Instead, the class attorney will accept any offer that is greater than the expected recovery obtainable by the attorney’s actual clients. See Howard M. Erichson, *The Problem of Settlement Class Actions*, 81 GEO. WASH. L. REV. (forthcoming 2014) (manuscript at 2) (noting this problem). This Article focuses only on litigation class actions, which avoid this problem.

119. FED. R. CIV. P. 23(b)(1)(A).

120. *Id.* 23(b)(2); see ALI, *PRINCIPLES*, *supra* note 4, § 2.04 & reporters’ notes cmt. a (“Courts . . . have not succeeded in giving any distinct meaning to Rule 23(b)(1)(A) by comparison to Rule 23(b)(2).”).

121. FED. R. CIV. P. 23(b)(1)(B).

122. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999).

123. See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 386 (1967) (“Approaching [R]ule 23,

among other things, failure to join would “leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.”<sup>124</sup> This category corresponds to the first class action category defined under Rule 23(b)(1)(A) and Rule 23(b)(2). Rule 19(a) also requires a “required party” to be joined if failure to do so would, “as a practical matter[,] impair or impede the [nonparty’s] ability to protect the interest.”<sup>125</sup> This category corresponds to the second class action category defined under Rule 23(b)(1)(B).

At a superficial level the joinder view of the class action is consistent with Rule 19, since both presume the literal joining of all parties to avoid the prejudice caused by separate actions. Nevertheless, the joinder view is at odds with the reality of class actions. The class action only applies if “joinder of all members is impracticable.”<sup>126</sup> Moreover, for both of these class action categories, notice to absent parties is not required.<sup>127</sup> This not only demonstrates that the joining of all parties is not contemplated for either category, but makes the actual joining of all plaintiffs practically impossible.

The representative view of the class action fares far worse than the joinder view in explaining why class actions are permitted for the two class action categories defined above. As noted above, Rule 19, which mirrors the two class action categories, seeks to join nonparties as parties when the existing parties would prejudice the interests of those absent. By contrast, the representative view assumes that the existing party will adequately represent the interests of the nonparties.<sup>128</sup> Consequently, under the representative view, class actions would be permitted in both categories even though, by Rule 19’s very terms, the existing parties would not adequately represent the interests of nonparties.<sup>129</sup>

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then, in much the same spirit in which it was considering [R]ule 19, the Committee strove to sort out the factual situations or patterns that had recurred in class actions and appeared with varying degrees of convincingness to justify treatment of the class *in solido*.”).

124. FED. R. CIV. P. 19(a)(1)(B)(i).

125. *Id.* 19(a)(1)(B)(ii).

126. *Id.* 23(a)(1).

127. *See id.* 23(c)(2)(A) (“For any class certified under Rule 23(b)(1) or (b)(2), the court may [but not must] direct appropriate notice to the class.”).

128. *See id.* 23(a)(4) (requiring that “representative parties will fairly and adequately protect the interests of the class”); *see also* *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940) (only permitting a class action when absent class members “are in fact adequately represented by the parties who are present”).

129. *See* John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1431 (2003) (noting that Rule 23(b)(1)(B) “identifies the class members’ competing interests in the limited fund as a basis for bringing the lawsuit as a class action, when in fact that competition between class members gives the court a reason to deny class certification” (emphasis added)); *see also id.* at 1429 (noting that, for Rule 23(b)(1)(A) situations, “[w]hen there is a danger of incompatibility, there is less typicality and worse interest representation. Far from being a requirement for class actions, this type of case should make a court skeptical of a class action”); *cf.*



As with small claims litigation, the trust view of the class action overcomes the inadequacies of the joinder and representative views for the two categories defined under Rule 23(b)(1) and Rule 23(b)(2). By viewing the class attorney as trustee of the plaintiffs' claims, the trust view is not predicated on the joinder of all parties. Moreover, by not relying on the plaintiffs to act at all, the trust view avoids the inadequate representation that results from the representative view.

Most importantly, the trust view rationalizes the use of class actions for these two categories. As for the first category, class actions are seldom used because a single plaintiff can seek an injunction that benefits the class as a whole without filing a class action. The only thing the class action accomplishes is the avoidance of mootness.<sup>130</sup>

The trust view, at the very least, demonstrates how the class action can avoid mootness when the named plaintiff's claim becomes moot, the very situation addressed in cases like *Symczyk*, *Roper*, and *Geraghty*. By creating a trust, the class action, in effect, designates the class attorney as a party whose interest is tied to the existence of the class as a whole.<sup>131</sup> Thus, as long as a class remains, the class attorney's legal interest as trustee survives even if one class member's claim does not. The class attorney, moreover, can typically seek fees and costs in actions involving injunctive relief, and thus would have the requisite incentive to litigate the case, a point that was missed in *Geraghty*.<sup>132</sup>

As to the second category, it is unclear why any plaintiff would bring a class action. Because this category primarily applies in situations that involve a limited fund, it is unclear why a plaintiff would bring a class action, let alone join any other plaintiffs, rather than collect fully on the fund.<sup>133</sup> Under the trust view, however, a class action makes sense in the limited fund context because the class attorney's fee is based on the size of the fund as a whole. Thus, the class attorney has an incentive to invest in

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Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1158–67 (2009) (noting that Rule 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2) class actions are rife with conflicts).

130. See *Developments*, *supra* note 42, at 1464–66 (noting the case law that treats the class action as providing protection against the mootness of the class representative's claim); see also *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404–05 (1980) (noting that the mootness of a class representative's claim does not moot a certified class action). But see HART & WECHSLER, *supra* note 8, at 220 (questioning whether a class action actually changes the mootness requirements).

131. See FED. R. CIV. P. 17(a)(1)(E) (providing that “[a]n action must be prosecuted in the name of the real party in interest,” but that parties like a “trustee of an express trust” may “sue in their own names”).

132. Justice Powell at least acknowledged, however, that the class attorney and the defendants are the only ones who have an interest in the litigation “[i]n any realistic sense.” *Geraghty*, 445 U.S. at 424 (Powell, J., dissenting).

133. Tidmarsh, *supra* note 129, at 1159 (“By definition . . . the self-interested plaintiff could care less about equitable treatment. She is interested in getting as much of the pie for herself as possible; she is under no obligation to—and therefore will not—seek class treatment unless the class action helps her achieve her goals.” (footnote omitted)).

common issues on behalf of *all* the plaintiffs to ensure that *all* of the plaintiffs can recover on as much of the fund as possible.<sup>134</sup> Unlike an individual class member, the class attorney would not seek to recover a portion of the fund at the expense of other plaintiffs.

#### D. *Trust v. Agency*

Other scholars recognize that the class action allows plaintiffs to benefit from economies of scale by assigning dispositive control over their claims to a third party.<sup>135</sup> But instead of analogizing the class action to a trust, these scholars analogize the class action to other governance arrangements that also separate ownership and control to exploit economies of scale.

For example, Professor David Shapiro analogizes the class action to a corporate entity, which also involves an assignment of dispositive control to third parties such as directors and officers for the benefit of shareholders.<sup>136</sup> Likewise, other scholars such as Professors Elizabeth Burch, Samuel Issacharoff, and the late Richard Nagareda have appealed to political entities such as the state, analogizing “the relationship between class members and class representatives as one between the representatives (the governors) and the members (the governed).”<sup>137</sup>

The trust view differs from these other views in one crucial respect. Under the agency principles that underlie corporate law and, arguably, the law of political entities,<sup>138</sup> an agent like a director or a politician “undertakes to act on behalf of his principal and *is subject to his*

134. *Cf. id.* at 1160 (noting that a class action may be filed in litigation involving a limited fund because “[t]he increase in the chance of success plus the ability to spread costs and attorneys fees makes class treatment worthwhile”).

135. ALI, PRINCIPLES, *supra* note 4, § 1.05 reporters’ note cmt. a (noting that “[a] foundational insight of the economic literature on agency relationships is that ownership of assets and control of their disposition must often be separated to achieve economies of scale”); *see id.* § 1.05 cmt. a (noting that “a common structural feature of all aggregate proceedings [is] the loss of control of litigation by persons whose interests are at issue”).

136. *See* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917, 921 (1998) (arguing that, for preclusion purposes, the “class” is the party rather than each individual class member, analogizing the class to “a whole range of voluntary private associations—congregations, trade unions, joint stock companies, corporations” as well as “municipalities and other governmental entities”). *But see* RESTATEMENT (THIRD) OF TRUSTS § 5 cmt. g (2003) (noting that “[c]orporate officers and directors . . . do not hold title to the property of the corporation and therefore are not trustees”).

137. Elizabeth Chamblee Burch, *Governing Securities Class Actions*, 80 U. CIN. L. REV. 299, 305–06 (2011) (citing Issacharoff, *supra* note 6, at 366; Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfeld Revisited*, 75 U. CHI. L. REV. 603, 638 (2008)).

138. *See* D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 676 (2013) (noting that “[p]olitical representatives are agents acting on behalf of diffuse principals: the people,” and that political entities and corporations share the same “agency problem”).

control.”<sup>139</sup> For example, in providing an “entity” account of the class action analogous to a corporation, Shapiro argues that the class action should require some form of accountability, such as an election of class counsel by the plaintiffs.<sup>140</sup> Similarly, supporters of a political governance model of the class action stress the importance of establishing the “legitimacy” of the class attorney to exercise dispositive control over the claims.<sup>141</sup> Although legitimacy is never defined with any precision, the term suggests a concern with allowing class members to have a “voice” in controlling the conduct of the class attorney.<sup>142</sup>

In contrast, a trustee “is *not* subject to the control of the beneficiary, except that he is under a duty to deal with the trust property for his benefit in accordance with the terms of the trust and can be compelled by the beneficiary to perform this duty.”<sup>143</sup> In other words, an agency relationship presumes control by the principal, while a trust relationship provides the beneficiaries little to no control over the trustee’s actions.<sup>144</sup>

This distinction is crucial because introducing some beneficiary control in the class action context would be detrimental to the cost sharing function of the class action. As an initial matter, introducing beneficiary control is unnecessary. In both corporations and political entities, there is a concern that the ruling parties will not be sensitive to the preferences of the ruled. Thus, giving the ruled a voice to control the rulers is necessary.

But such a concern is not present in the class action context. Unlike in a political entity, where the ruled may disagree about their objectives, all class members agree on the same objective: to win by investing in common

139. RESTATEMENT (SECOND) OF TRUSTS § 8 cmt. b (1959) (emphasis added) (citing RESTATEMENT (SECOND) OF AGENCY § 1, 14B (1958)).

140. Shapiro, *supra* note 136, at 940 (“In the case of a trade union or corporation, there are preexisting individuals who have been authorized to speak for the entity and who normally would be the ones to work with counsel. In the case of a class that is, in effect, created for purposes of a particular litigation, there is likely to be no preexisting structure, and methods should be devised for creating that structure and endowing it with the widest representation consistent with efficient case management.”).

141. See Burch, *supra* note 137, at 306 (noting that the political governance model “adds a third, critical dimension: the demand for legitimacy in the institutional arrangement”).

142. *Id.* at 308–09 (praising the Private Securities Litigation Reform Act (PSLRA) for requiring the appointment of lead representative class members because such representatives are “the real source of legitimacy” insofar as they “speak on behalf of other members’ unique interests” and “monitor the class attorneys”); Issacharoff, *supra* note 6, at 339 (“The legitimacy of any particular governmental arrangement then turns on *the ability to curb* oppressive, abusive, or self-serving behavior that may emerge from within the newly created governing class.” (emphasis added)).

143. RESTATEMENT (SECOND) OF TRUSTS § 8 cmt. b (emphasis added); see also 1 SCOTT ET AL., *supra* note 102, § 2.3.4 (noting that under an agency relationship, the agent “is subject to the principal’s control,” while “a trustee must conform to the terms of the trust”); Sitkoff, *supra* note 106, at 676 & n.68 (noting this difference).

144. See Sitkoff, *supra* note 106, at 624–25 (arguing that, as a positive and normative matter, trust law “gives priority to the settlor over the beneficiaries as the trustee’s primary principal”).

issues of liability. More importantly, the class attorney is already properly incentivized to invest in common issues, as this maximizes the attorney's own payoff.<sup>145</sup> Even in class actions involving injunctions, the class attorney has an interest in establishing the defendant's liability for the class because her potential fees and her ability to spread costs among the class depend on it. Accordingly, nothing is added to this incentive by allowing the class members to control the actions of the class attorney through an election or similar procedure.

More importantly, providing control to the class members is detrimental because such control recreates the collective action problems that the class action is designed to solve in the first place. If plaintiffs are insufficiently motivated to sue, as in most small-claims class actions, they are most likely insufficiently motivated to vote. In fact, as demonstrated by empirical evidence, most class action plaintiffs do not even bother to collect any award recovered by the class attorney.<sup>146</sup> If plaintiffs will not even collect any recovery, how can they be expected to select and monitor the class attorney?

Even when some plaintiffs are sufficiently motivated to monitor the class attorney, as may be the case in an injunctive or limited fund class action, such monitoring would still be detrimental. Elections or similar monitoring procedures have transaction costs.<sup>147</sup> Moreover, any disagreements with the class attorney will only reflect the private interests of the plaintiffs, not the interests of the class as a whole.<sup>148</sup> Thus, allowing a plaintiff or a group of plaintiffs to restrain the class attorney may hold the class action hostage to the monitoring plaintiffs for a payoff.<sup>149</sup> It may also result in suboptimal monitoring because of the free-riding of the monitoring plaintiffs' efforts by the nonmonitoring plaintiffs.<sup>150</sup> This

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145. Again, the class attorney is not perfectly incentivized. Nevertheless, class attorneys are "properly" incentivized in the sense that they have a large stake in the litigation that correlates with the plaintiffs' total recovery. See *supra* notes 116–17 and accompanying text.

146. See Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 315 (2010) ("Invariably, in small-claims consumer class actions, less than twenty percent or so of class action damages funds are distributed to plaintiff claimants." (citing Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 120 (2007))).

147. See Campos, *Mass Torts*, *supra* note 25, at 1079–81 (arguing that deficient incentives and transaction costs caused by informal aggregation result in suboptimal investment in common issues).

148. *Id.*

149. Cf. Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 EMORY L.J. 85, 97 (1997) (noting that opt-out rights allow plaintiffs with high-value claims to hold out to extract payoffs).

150. Campos, *Mass Torts*, *supra* note 25, at 1116–17 (arguing that allowing class members to monitor class attorneys by opting out would lead to suboptimal investment in common issues because of free-riding); see also James D. Cox et al., *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 COLUM. L. REV. 1587, 1604–06 (2006)

would be detrimental to the class as a whole because either holding out or freeriding would likely result in suboptimal investment in common issues, which would lower the probability of recovery for the class as a whole.

One could argue that class member control is still necessary because issues unique to each class member are routinely present in class actions. For example, in class actions involving damages, the damages must be distributed to each individual class member. Likewise, in class actions involving injunctive remedies, the class members may disagree as to the substance of the injunction once liability is established.<sup>151</sup> Accordingly, the class members should be afforded a say in the class action's conduct to protect their individual interests.

Although plaintiff control may be necessary to protect each class members' individual interests in the remedy, the plaintiffs cannot obtain a remedy without first establishing liability. Because establishing liability requires a class attorney to act for the benefit of the class as a whole, permitting control by the class members would be self-defeating. It would lead to a lower prospect of getting a remedy in the first place. Moreover, individual remedial issues can be separated from common issues of liability. For example, in class actions involving damages where the method for distributing damages is not obvious, damages can be determined *after* liability has been determined.<sup>152</sup> Similarly, hearings can be held for determining the scope of an injunction after liability has been established.<sup>153</sup> Thus, bifurcation can preserve individual control while still obtaining the benefits of the cost sharing provided by the class action.

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(noting the reluctance of "institutional investors with large potential claims" to serve as lead plaintiffs in securities fraud litigation due, in part to "free rider problems, because institutions, particularly those concerned about minimizing administrative costs generally, are rationally apt to prefer that another investor take the initiative to become involved" (quoting Jill E. Fisch, *Class Action Reform: Lessons from Securities Litigation*, 39 ARIZ. L. REV. 533, 542 (1997))).

151. See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 507 (1976) (noting conflicts among plaintiffs, particularly black parents, over the appropriate injunctive relief in school desegregation cases).

152. Campos, *Proof*, *supra* note 25, at 766-76 (discussing bifurcation as a method of distributing any aggregate recovery, and noting the possibility of damage scheduling to obviate the need for individual determinations of damages). In the context of large-claim class actions like those used in mass torts, many scholars have stressed the inherent conflict among the heterogeneous class members, who are "warring over the allocation of the settlement." See, e.g., Coffee, *supra* note 93, at 386-87. But, as I have argued previously, even in mass tort litigation, the plaintiffs have a common interest in proving common material issues of their claims. Moreover, procedures like bifurcation and damage scheduling can also be used to avoid conflicts among class members. Campos, *Mass Torts*, *supra* note 25, at 1072-73, 1106.

153. See Campos, *Mass Torts*, *supra* note 25, at 1112 n.279 (discussing this possibility).

## II. THE CLASS ACTION AND THE LAW OF JUSTICIABILITY

The previous Part argued that the trust function of the class action provides the best justification for the use of class actions in all of the circumstances in which they are permitted. The trust view strongly suggests that the class attorney, as trustee, is the real party in interest for purposes of the litigation. Unlike the other class members, the trustee is the only one who has the appropriate (and largest) stake to invest in and litigate the class members' claims.<sup>154</sup> Accordingly, the trust view further suggests that the class attorney should have Article III standing in her own right.

This Part addresses whether the current law of justiciability supports the trust view of the class action. Admittedly, and as discussed in more detail below, the Supreme Court has not embraced the view that the class attorney is the relevant party for purposes of Article III. But there is, in fact, substantial precedent which provides support for the trust view of the class action. Specifically, in many circumstances the Court has granted standing to a party who has not been injured or otherwise harmed by the alleged unlawful conduct.<sup>155</sup> The Court has done so particularly when the injured parties cannot adequately protect their own interests. This is, in fact, the same justification for the use of class actions in situations where they are permitted. Accordingly, this precedent shows that, at the very least, the trust view of the class action—which permits the uninjured, unharmed class attorney to assert the rights of the injured class members—is not as startling or as counterintuitive as it may seem.

### A. *Class Actions and Article III*

As background, Article III defines the limited jurisdiction of federal courts.<sup>156</sup> The Supreme Court has interpreted the case or controversy terms of Article III as limiting the jurisdiction of a federal court to only “justiciable” actions.<sup>157</sup> The Court has also recognized prudential considerations that are independent of the justiciability requirements of Article III, although “a clear separation of the constitutional and prudential aspects of the justiciability doctrines is often difficult because both reflect the same basic policy considerations.”<sup>158</sup>

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154. *Cf.* FED. R. CIV. P. 17(a)(1) (providing that “[a]n action must be prosecuted in the name of the real party in interest,” but listing those who “may sue in their own names without joining the person for whose benefit the action is brought,” including “an executor,” “an administrator,” “a guardian,” and “a trustee of an express trust”).

155. *See infra* Sections II.B & C.

156. U.S. CONST. art. III, §§ 1–2 (providing that the federal “judicial power” is limited to “cases” and “controversies” in enumerated, defined areas).

157. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 212 (2000) (Scalia, J., dissenting) (“There must be a justiciable case or controversy as required by Article III.”).

158. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 2.1, at 45 (5th ed. 2007).

Standing is generally considered the most important of the justiciability doctrines.<sup>159</sup> A party has sufficient standing if she satisfies three requirements: she must have “[1] a personal injury [2] fairly traceable to the defendant’s allegedly unlawful conduct and [3] likely to be redressed by the requested relief.”<sup>160</sup> The “personal injury” requirement has been further defined as requiring an injury that is “concrete” and “particularized,”<sup>161</sup> as opposed to a “generalized grievance” that is “plainly undifferentiated and common to all members of the public.”<sup>162</sup>

The plaintiff’s claim also must be “ripe” because a federal court can only assert its jurisdiction “when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough.”<sup>163</sup> In other words, the injury must be “imminent,” rather than “speculative.”<sup>164</sup> Conversely, the plaintiff’s claim must not be “moot,” defined as “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.”<sup>165</sup>

In the past, the Court has referred to mootness as “the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).”<sup>166</sup> The Court recently reaffirmed this view by emphasizing that, under Article III, “the parties must continue to have a personal stake in the ultimate disposition of the lawsuit.”<sup>167</sup>

But the Court has recently acknowledged that “the description of mootness as standing set in a time frame is not comprehensive.”<sup>168</sup> For example, a party with a moot claim may proceed if the injury suffered and

159. *Allen v. Wright*, 468 U.S. 737, 750 (1984) (“The case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government. The Art[icle] III doctrine that requires a litigant to have ‘standing’ to invoke the power of a federal court is *perhaps the most important of these doctrines*.” (emphasis added)).

160. *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013) (quoting *Wright*, 468 U.S. at 751) (internal quotation marks omitted). The “personal injury” requirement is sometimes referred to as the “actual injury” requirement. See *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (noting that, to show standing, a plaintiff must show that she “[1] suffered, or [is] threatened with, an actual injury [2] traceable to the defendant and [3] likely to be redressed by a favorable judicial decision” (quoting *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 477 (1990))).

161. *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1164 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010)).

162. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575 (1992) (quoting *United States v. Richardson*, 418 U.S. 166, 176–77 (1974)) (internal quotation marks omitted).

163. *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 90 (1947).

164. *Clapper*, 133 S. Ct. at 1147 (quoting *Lujan*, 504 U.S. at 565 n.2).

165. *Already*, 133 S. Ct. at 726 (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)).

166. *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (1980) (quoting Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)).

167. *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (internal quotation marks omitted).

168. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (internal quotation marks omitted).

remedied is “capable of repetition, [but would] evad[e] review.”<sup>169</sup> Likewise, and as noted above, a class representative with a mooted claim may continue to have standing in some circumstances, such as when the class action has already been certified.<sup>170</sup>

At first glance, there is some support for the view that the class attorney, as trustee, satisfies the standing and other justiciability requirements of Article III. Most obviously, it is a matter of hornbook trust law that the trustee of a trust has standing to sue on behalf of the beneficiaries.<sup>171</sup> Accordingly, federal courts have followed trust law to conclude that a trustee has sufficient Article III standing to sue.<sup>172</sup>

This is also true of what can be called judicially created trusts, such as the de facto “constructive” trust created by the class action.<sup>173</sup> In *Hodel v. Irving*, for example, the Court considered whether a federal statute that prevented individuals from disposing certain Sioux tribal lands through will or intestacy was considered a “taking” without just compensation in violation of the Takings Clause.<sup>174</sup> The statutory scheme instead escheated the lands to the tribe, and the lands were then consolidated “to ameliorate the problem of fractionated ownership of Indian lands.”<sup>175</sup>

Three plaintiffs—one an heir to escheated land, the other two devisees of the land—challenged the statute.<sup>176</sup> However, the plaintiffs were not express executors or trustees of the land because “[f]or Indians with trust property, statutes require the Secretary of the Interior to assume that general role.”<sup>177</sup>

169. *Id.*

170. See *Sosna v. Iowa*, 419 U.S. 393, 399 (1975); see also *supra* Section I.A (discussing this precedent).

171. RESTATEMENT (SECOND) OF TRUSTS § 280 (1959) (“The trustee can maintain such actions at law or suits in equity or other proceedings against a third person as he could maintain if he held the trust property free of trust.”); cf. FED. R. CIV. P. 17(a) (noting that “a trustee of an express trust” may “sue in their own names without joining the person for whose benefit the action is brought”).

172. 13A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 3531, at 42–43 (3d ed. 2008) (noting cases where, as a matter of standing, “it is the trustee, not the debtor or a creditor, who has authority to pursue a particular claim or issue,” but noting that this confuses standing law with the substantive law of trusts); see also *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 287–88 (2008) (“[F]ederal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit. *Trustees bring suits to benefit their trusts*; guardians ad litem bring suits to benefit their wards; receivers bring suit to benefit their receiverships; assignees in bankruptcy bring suit to benefit bankrupt estates; executors bring suit to benefit testator estates; and so forth.” (emphasis added)).

173. RESTATEMENT (THIRD) OF TRUSTS § 1 cmt. e (2003) (defining a constructive trust, and noting that, unlike an express trust, “a constructive trust is imposed, not necessarily to effectuate an expressed or implied intention, but to redress a wrong or to prevent unjust enrichment. A constructive trust is thus the result of judicial intervention and is remedial in character”).

174. 481 U.S. 704, 706, 709 (1987) (discussing § 207 of the Indian Land Consolidation Act).

175. *Id.* at 709.

176. *Id.* at 709–10.

177. *Id.* at 711; see also 25 U.S.C. § 373a (2012).



Nevertheless, the Court concluded that the plaintiffs had standing to assert the rights of the decedents to dispose of their land through will or intestacy.<sup>178</sup> Specifically, the Court noted that the rule preventing parties from asserting the rights of third parties is a prudential one, and that the rule was not applicable for two reasons. First, although the Secretary of the Interior was, by statute, the trustee of the lands at issue, the Secretary was also administering the statute being challenged, making him a poor advocate for the decedent's right to pass the property at death.<sup>179</sup> Second, the plaintiffs would "pursue the claims vigorously" because they were the intended beneficiaries of the decedent's right to pass property at death.<sup>180</sup>

Accordingly, the Court concluded that the plaintiffs had standing, and that "permitting [the plaintiffs] to raise their decedents' claims is merely an extension of the common law's provision for appointment of a decedent's representative."<sup>181</sup> Indeed, in referencing the common law on appointment of a decedent's representative as supporting standing, the Court implicitly blessed the view that judicially appointed trustees can serve as the relevant parties for purposes of Article III.<sup>182</sup> Accordingly, *Hodel* provides some support for the view that the class attorney, as a judicially appointed trustee of the class, can serve as the relevant party for Article III purposes.

*Roper* provides additional support. There, the Court concluded that the class representatives, who had a mooted claim, had sufficient standing to appeal the denial of class certification given "their desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails."<sup>183</sup> Again, the Court emphasized that this cost shifting was necessary for the class action to function in the first place, because the class action "may motivate [class representatives] to bring cases that for economic reasons might not be brought otherwise."<sup>184</sup>

Implicit in this reasoning is the view that, in the absence of the class action, no case would be brought given the costs. In other words, the class members are incompetent, in the legal sense, to vindicate their own rights

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178. *Id.* at 711–12.

179. *Id.* at 711.

180. *Id.* at 712.

181. *Id.*

182. Again, judicially appointed administrators of an estate are not trustees. *See supra* text accompanying notes 108–10. But again, "many of the rules applicable to trustees are applicable to executors and administrators," making them functionally similar. RESTATEMENT (THIRD) OF TRUSTS § 5(b), § 5 cmt. c (2003) (noting that "representatives of decedents' estates" are not trustees); RESTATEMENT (SECOND) OF TRUSTS § 6 & cmt. a (1959) (providing that "[a]n executorship or an administratorship is not a trust," but noting that both are fiduciaries, and that the primary difference between the two is "the tribunals which enforced the duties" of each).

183. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 336–37 (1980).

184. *Id.* at 338.

in the absence of the de facto trust created by the class action.<sup>185</sup> Indeed, even Justice Lewis Powell, who dissented in both *Roper* and *Geraghty*, which were both decided on the same day, remarked in *Geraghty*: “After certification, the case is no different in principle from more traditional representative actions involving, for example, a single party who cannot participate himself *because of his incompetence* but is permitted to litigate through an appointed fiduciary.”<sup>186</sup>

Here, Justice Powell explicitly identified the link between class actions and other actions brought by trustees and similar fiduciaries like administrators. All recognize a third party as the relevant party for Article III purposes because the beneficiaries of the action cannot adequately represent their own interests. They may be deceased, like the decedents in *Hodel*, or they may be unable to coordinate themselves to enforce their rights, like the class members in *Roper* and *Geraghty*. Thus, the only mistake the Court made in *Roper* and *Geraghty* was choosing the wrong fiduciary. It is the class attorney, not the class representatives, who has the proper incentives to protect the rights of the class.

The Court’s failure to recognize the class attorney as the relevant party for Article III purposes was no oversight. In *Roper*, Justice Powell showed the difficulty in recognizing the class attorney as the real party in interest:

To be sure, respondents’ counsel may have the same interest in an enlarged recovery that is inherent in any contingent fee arrangement. But I know of no decision by any court that holds that a lawyer’s interest in a larger fee, to be paid by third persons not present in the court, creates the personal stake in the outcome required by Art[icle] III.<sup>187</sup>

In fact, *Symczyk* casts even more doubt on the trust view of the class action. The *Symczyk* majority, in particular, stated in a footnote that *Roper* was in some tension with more recent precedent, noting that “[an] interest in attorney’s fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.”<sup>188</sup>

Although *Hodel* provides some support for recognizing the Article III standing of judicially appointed trustees and similar fiduciaries, the class attorney unfortunately never has been formally recognized as such a fiduciary. Moreover, although *Roper* provides support for viewing some

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185. See Kaplan, *supra* note 30, at 497 (noting that the Rule 23(b)(3) category was primarily drafted to vindicate “the rights of groups of people who individually would be without effective strength to bring their opponents into court at all”).

186. U.S. Parole Comm’n v. *Geraghty*, 445 U.S. 388, 415 n.8 (1980) (Powell, J., dissenting) (emphasis added).

187. *Roper*, 445 U.S. at 353 (Powell, J., dissenting).

188. See *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1532 n.5 (2013) (quoting *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 480 (1990)).

features of the class action, such as cost sharing, as providing a sufficient personal stake for Article III purposes, the more recent precedent cited by *Symczyk* clearly states that the prospect of attorney's fees is, "of course, insufficient."<sup>189</sup> Consequently, whatever support cases like *Hodel* and *Roper* provide for the trust view of the class action is unlikely to override this more recent precedent.

### B. Cognizable Injury and Injury in Fact

The trust view of the class action is, admittedly, a metaphor. But like all metaphors, it reveals an important similarity between class actions and trust arrangements like the one described in *Hodel*. In both situations, a court recognizes that the claims of the injured parties are only adequately protected by allocating control over those claims to a third party.

Identifying this functional similarity between class actions and trusts reveals additional support for the trust view of the class action. But before discussing this support, it is important to distinguish between two requirements encompassed by the personal injury requirement for Article III standing. First, the personal injury must be an "invasion of a legally protected interest,"<sup>190</sup> which the Court has referred to as a "judicially cognizable injury"<sup>191</sup> or a "legally cognizable injury."<sup>192</sup> Second, the personal injury also requires harm caused by the defendant's unlawful conduct.<sup>193</sup> The Court has referred to this as a requirement of an injury in fact, the "in fact" terms reflecting that an "actual or imminent" harm is required as opposed to one that is "too speculative."<sup>194</sup>

The distinction between a cognizable injury and an injury in fact mirrors the distinction between an "injury" and "harm" under tort law. Like the law of justiciability, tort law defines an "injury" as "an invasion of a legally protected interest."<sup>195</sup> Tort law also distinguishes an "invasion of a legally protected interest" from the "harm" it causes.<sup>196</sup>

189. *Id.*

190. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (defining "injury in fact" as requiring "an invasion of a legally protected interest").

191. *E.g.*, *Allen v. Wright*, 468 U.S. 737, 754 (1984) (noting that an interest in having the government comply with the law is not sufficient to establish a "judicially cognizable injury").

192. *E.g.*, *Symczyk*, 133 S. Ct. at 1528 ("In order to invoke federal-court jurisdiction, a plaintiff must demonstrate that he possesses a legally cognizable interest, or personal stake, in the outcome." (internal quotation marks omitted)); *see also* *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (noting that, for Article III standing purposes, "[w]e have also stressed that the alleged injury must be legally and judicially cognizable").

193. Other scholars have noted these two sub-requirements. *See* Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915, 1918 (1986) ("Injury analysis demands the exploration of not only the directness or actuality of the litigant's claimed injury, but also the judicial cognizability of the interest alleged to be injured.").

194. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013).

195. RESTATEMENT (SECOND) OF TORTS § 7 cmt. a (1965).

196. *Id.* (noting that "there may be an injury although no harm is done").

Under both tort law and the law of justiciability, a person can suffer harm caused by the defendant's unlawful conduct without necessarily having a legally protected interest violated. For example, the Administrative Procedures Act (APA) permits an "aggrieved party" to challenge an agency action if the action violates federal law.<sup>197</sup> The Court has noted, however, that a party who has suffered an injury in fact caused by an unlawful administrative action may not have standing under the APA if the harm was not "arguably within the zone of interests to be protected or regulated by the statute."<sup>198</sup> The same is true under tort law.<sup>199</sup>

The Supreme Court has generally required both a cognizable injury and an injury in fact to satisfy Article III standing. As a result, individuals without a cognizable injury cannot assert the rights of those with cognizable injuries. The Court has noted that there is a "general prohibition on a litigant's raising another person's legal rights."<sup>200</sup> Consequently, the law of standing *prima facie* does not support the trust view of the class action because the trust view permits a person with no cognizable injury, the class attorney, to assert the rights of those with cognizable injuries.

However, the Court has noted that the prohibition against third-party standing is a "prudential" one "subject to exceptions."<sup>201</sup> In general, the Court has permitted third-party standing when it is necessary to adequately protect the interests of those with cognizable injuries. In *Hodel*, for example, the Court concluded that the exception to the prohibition against third-party standing applied because assigning standing to the intended heirs and devisees of the decedents was necessary to ensure the adequate representation of the decedents' rights.<sup>202</sup> This exception should apply equally to the class action because a third party, the class attorney, is assigned control over the class members' claims in order to adequately protect the interests of the class members.

197. See 5 U.S.C. § 702 (2012).

198. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (quoting *Ass'n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153 (1970)). The Supreme Court has recently held that the zone of interests test is not limited to § 702 claims under the APA. Instead, Article III requires the plaintiff's asserted injury to "fall[] within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, No. 12-873, slip op. at 7 (U.S. Mar. 25, 2014) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004)). I would like to thank Suzanna Sherry for her help in disentangling this area of standing doctrine.

199. RESTATEMENT, *supra* note 195 ("[H]arm' implies the existence of loss or detriment in fact, which may not necessarily be the invasion of a legally protected interest.").

200. *Allen v. Wright*, 468 U.S. 737, 751 (1984); see also *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (noting that a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties").

201. *Hodel v. Irving*, 481 U.S. 704, 711–12 (1986); see also *Lexmark*, No. 12-873 slip op. at 8–9 n.3. (noting that the prohibition against third party standing is a "prudential" one).

202. *Hodel*, 481 U.S. at 711–12.

One benefit of this exception to the prohibition against third-party standing is that it identifies other cases outside the trust context which, like the class action, recognize the standing of third parties without cognizable injuries in order to protect the interests of those injured. One such example is *Craig v. Boren*.<sup>203</sup> There, the plaintiffs contended that a statutory scheme under Oklahoma law violated the Equal Protection Clause because it "prohibit[ed] the sale of 'nonintoxicating' 3.2% beer to males under the age of 21 and to females under the age of 18."<sup>204</sup> The plaintiffs included a vendor of such beer, and the Supreme Court questioned sua sponte whether the vendor could "rely upon the equal protection objections of males 18-20 years of age to establish her claim of unconstitutionality of the age-sex differential."<sup>205</sup>

The Court acknowledged that the vendor suffered a sufficient "injury in fact" for standing purposes because she would either "incur[] a direct economic injury through the constriction of her buyers' market," or suffer "sanctions and possible loss of license" for violating the statutory scheme.<sup>206</sup> However, in considering the standing issue as one of third-party, or "*jus tertii*," standing,<sup>207</sup> the Court implicitly concluded that the vendor's harm was not within the zone of interests protected by the Equal Protection Clause.<sup>208</sup>

Nevertheless, the Court concluded that the vendor could assert third-party standing on behalf of the underage males.<sup>209</sup> Like in *Hodel*, the Court in *Craig v. Boren* noted that limitations on *jus tertii* standing are not "constitutionally mandated, but rather stem from a salutary 'rule of self-restraint.'"<sup>210</sup> The Court then concluded that such limitations did not apply given "the impact of the litigation on the third-party interests."<sup>211</sup> Specifically, the named underage male plaintiff turned twenty-one after the Court granted certiorari, effectively mooted his claim.<sup>212</sup> Apparently mindful of the risk of mootness for any underage male seeking to challenge the statutory scheme, the *Craig v. Boren* Court permitted the third-party standing of the vendor, citing precedent permitting parties like the vendor to "act[] as advocates of the rights of third parties who seek access to their market or function."<sup>213</sup> Indeed, the Court considered the vendor the

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203. 429 U.S. 190 (1976).

204. *Id.* at 191-92.

205. *Id.* at 192-93.

206. *Id.* at 194.

207. *Id.* at 193-94.

208. *See id.* at 196-97.

209. *See id.* at 194.

210. *Id.* at 193 (quoting *Barrows v. Jackson*, 346 U.S. 249, 255 (1953)).

211. *Id.* at 196 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 445 (1972)).

212. *Id.* at 192.

213. *Id.* at 195.

“obvious claimant” given that the statute prohibited the *sale* of beer, rather than its *use*.<sup>214</sup>

Another example appears in the overbreadth context, where the Court has permitted a party to seek to invalidate a statute that violates the First Amendment, even though the party’s own speech could “be regulated by a statute drawn with the requisite narrow specificity.”<sup>215</sup> As in *Craig v. Boren*, the “overbreadth” plaintiff does not fall within the “zone of interests” protected by the First Amendment. Nevertheless, as in *Craig v. Boren*, the Court has permitted the overbreadth plaintiff to sue because waiting for a plaintiff to violate the statute with protected speech and then sue would result in a greater chilling of the First Amendment rights of others.<sup>216</sup> In fact, the overbroad statute may never be challenged because it may chill protected speech completely. As a result, allowing the overbreadth plaintiff to sue, rather than those actually injured, better protects the First Amendment rights of those who would be harmed by an overbroad statute. As in *Craig v. Boren*, the Court has recognized overbreadth plaintiffs’ standing to sue in order to adequately protect the free speech rights of others.

One further similarity between the class attorney and the third-party plaintiffs discussed above is that it is too costly for those actually injured to bring suit. The relevant cost for the injured parties in *Craig v. Boren* is time. It is far less costly for an injured party to wait until he is twenty-one than bring a lawsuit that will most likely endure well after he comes of age. Indeed, the Court noted that permitting the vendor’s “representative” standing is not all that different from a class action where the “fluid membership always included some [males] with live claims.”<sup>217</sup> Likewise, the overbreadth plaintiff is afforded standing because a lawsuit is too costly for a plaintiff who wants to utter protected speech. For such a plaintiff to bring a lawsuit, she must violate the unlawful statute, await prosecution, and risk incarceration.<sup>218</sup> Such a plaintiff would have to be a “lunatic” to engage in that activity.<sup>219</sup>

214. *Id.* at 197.

215. *See, e.g.,* *Broaderick v. Oklahoma*, 413 U.S. 601, 612 (1973) (noting that “the Court has altered its traditional rules of standing to permit—in the First Amendment area—‘attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity’” (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965))).

216. *See, e.g.,* *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985) (permitting overbreadth standing because the challenged statute “also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid”).

217. *Craig*, 429 U.S. at 194 (alterations in original) (quoting *Singleton v. Wulff*, 428 U.S. 106, 117 (1976)).

218. *See Dombrowski*, 380 U.S. at 486–87.

219. *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) (noting that, in small-claims litigation, “only a lunatic or a fanatic sues for \$30”).

### C. Cognizable Injury and the Right to Bring Suit

Cases like *Hodel* and *Craig v. Boren* differ from the class action in one important respect. In both cases the uninjured third-party plaintiffs have at least suffered an injury in fact. The heirs and devisees in *Hodel* lost their land. The vendor in *Craig v. Boren* lost sales. Indeed, the Court noted in both *Craig v. Boren* and *Hodel* “that such injuries establish the threshold requirements of a ‘case or controversy’ mandated by Art[icle] III.”<sup>220</sup>

At first glance there appears to be no harm in the overbreadth context because the overbreadth plaintiff’s speech could be prohibited under a constitutionally valid statute. But some scholars argue that overbreadth plaintiffs have suffered an injury in fact because their prosecution is a harm caused by an invasion of a legally protected interest—“a personal constitutional right not to be subjected to governmental sanctions except pursuant to a constitutionally valid rule of law.”<sup>221</sup> In fact, recognizing such a legally protected interest in constitutionally valid laws suggests that the third-party plaintiffs in *Hodel* and *Craig v. Boren* were asserting their own rights, and not just the rights of others.<sup>222</sup>

Unlike the above third-party cases, the class action attorney has not suffered any injury in fact. Her interest is only in her potential attorney’s fees, “a ‘byproduct’ of the suit itself.”<sup>223</sup> As noted by the Court in *Symczyk* and in other cases, such an interest “itself cannot give rise to a cognizable injury in fact for Article III standing purposes.”<sup>224</sup> Indeed, cases like *Symczyk* cast significant doubt on *Roper* and *Geraghty*, which both held that the class representative’s interest in the entitlements provided by class certification was sufficient for Article III standing purposes.<sup>225</sup>

But cases like *Roper* and *Geraghty* are not isolated incidents. There is, in fact, recent precedent in which the Court explicitly recognized “by-products” of the litigation as sufficient stakes for Article III standing purposes. A clear-cut example is the *qui tam* provisions of the False Claims Act.<sup>226</sup> These provisions assign the right to sue and a partial beneficial interest to a whistleblower, called a relator, to induce her to

220. *Craig*, 429 U.S. at 194; *Hodel*, 481 U.S. at 711 (noting that plaintiffs had suffered “sufficient injury-in-fact to satisfy Article III of the Constitution”).

221. See Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1331 (2000) (citing Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3).

222. See Monaghan, *supra* note 221, at 3 (arguing that overbreadth standing is not third-party standing because “[u]nder ‘conventional’ standing principles, a litigant has always had the right to be judged in accordance with a constitutionally valid rule of law”).

223. Cf. *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 773 (2000) (citing *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83 (1998) and *Diamond v. Charles*, 476 U.S. 54 (1986)).

224. *Id.* (emphasis added).

225. See *supra* Section II.A.

226. 31 U.S.C. § 3729 et seq. (2012).

provide information of possible false claims made against the United States.<sup>227</sup> Like the third-party plaintiffs discussed above, the relator lacks an invasion of a legally protected interest caused by the unlawful conduct because it is the right of the United States to be free from false claims that is being violated.<sup>228</sup> But, like the class attorney, the relator has not suffered harm caused by the alleged fraudulent conduct. Her interest “does not even fully materialize until the litigation is completed and the relator prevails.”<sup>229</sup>

Nevertheless, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, the Court found that a relator had sufficient standing because, in other contexts, the Court has recognized that “the assignee of a claim has standing to assert the injury in fact suffered by the assignor.”<sup>230</sup> The *Vermont* Court, moreover, stressed the “the long tradition of *qui tam* actions in England and the American Colonies.”<sup>231</sup> In doing so, the Court stressed that “Article III’s restriction of the judicial power to ‘Cases’ and ‘Controversies’ is properly understood to mean ‘cases and controversies of the sort *traditionally* amenable to, and resolved by, the judicial process.’”<sup>232</sup>

A more extreme example can be found in *Sprint Communications Co. v. APCC Services, Inc.*, which involved suits brought by “aggregators” on behalf of numerous payphone operators to collect statutory damages from long-distance carriers.<sup>233</sup> The payphone operators assigned their claims to the aggregators via contract, but the aggregators were required under the contract to remit any recovery back to the operators.<sup>234</sup> The aggregators received only a flat fee for their services.<sup>235</sup> Nevertheless, the Court concluded that the aggregators, as assignees of the “legal title” to the claims, had sufficient standing to sue under Article III despite having to remit the entire recovery.<sup>236</sup> Thus, unlike the class attorney or the *qui tam*

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227. *Id.* § 3730; see also *U.S. ex rel. Duxbury v. Ortho Biotech Prods., LP*, 579 F.3d 13, 16 (1st Cir. 2009) (“The *qui tam* provisions permit whistleblowers (known as relators) to bring certain fraud claims on behalf of the United States; in return, ‘[a] private relator is entitled to a portion of any proceeds from the suit, whether the United States intervenes as an active participant in the action or not.’” (alterations in original & citations omitted)).

228. See *Vt. Agency of Natural Res.*, 529 U.S. at 772–73 (“A *qui tam* relator has suffered no such invasion—indeed, the ‘right’ he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails.”).

229. See *id.* (citing 2 WILLIAM BLACKSTONE, COMMENTARIES \*437).

230. *Id.* at 773.

231. *Id.* at 774.

232. *Id.* (emphasis added) (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998)).

233. 554 U.S. 269, 272 (2008).

234. *Id.*

235. *Id.*

236. *Id.* at 285–86.



relator, such an assignee of legal title would not benefit from any potential remedy at all.<sup>237</sup>

As in *Vermont*, the *Sprint* Court justified this result by relying upon historical practice. The Court noted that "history and precedent are clear on the question before us: Assignees of a claim, including assignees for collection, have long been permitted to bring suit."<sup>238</sup> Indeed, even Chief Justice John Robert's dissent in *Sprint* acknowledged that "suits by trustees, guardians ad litem, executors, and the like make up a settled, continuous practice 'of the sort traditionally amenable to, and resolved by, the judicial process,'" and thus pose no justiciability problems.<sup>239</sup>

Both *Vermont* and *Sprint* provide support for the trust view of the class action. Both cases involved parties like the class attorney whose only interest in the litigation was an assignment of the legal title to the claims of the injured. But, unlike the third-party cases discussed earlier, the Court relied upon historical practice to support such standing. Arguably, such a historical argument could be made in support of the class action, particularly given the class action's history as a procedure of equity, a context in which the modern trust also arose.<sup>240</sup>

However, such a historical argument would differ from the functional justification that underlies both the trust view of the class action and the use of third-party standing in cases like *Hodel*, *Craig v. Boren*, and the overbreadth cases. Again, according to that functional justification, third-party standing is permitted when it is necessary to adequately protect the interests of injured individuals. That functional justification tied the trust view of the class action to the permissible uses of third-party standing under the law of justiciability. In contrast, using historical practice provides no such ties.

But the same functional argument can be made to support the use of byproduct standing found in the *qui tam* context and in contract cases like *Sprint*. The key is to recognize that a legally protected interest does not automatically include a right to bring a lawsuit to protect that interest.

The law of Article III standing generally presumes that "a legally protected interest" includes a concomitant right to enforce that interest by filing a lawsuit in court. The requirement of a "judicially cognizable injury," for example, is just another way of saying that an injury is required that is "[c]apable of being judicially tried or examined before a designated

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237. See *id.* at 301 (Roberts, J., dissenting) ("When you got nothing, you got nothing to lose." (quoting BOB DYLAN, *Like a Rolling Stone*, on HIGHWAY 61 REVISITED (Columbia Records 1965))).

238. *Id.* at 275.

239. See *id.* at 304-05 n.2 (Roberts, J., dissenting) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998)).

240. I am exploring this historical relationship in more detail in a separate article. See Campos, *Trust*, *supra* note 25. For an account of the history of the class action and its origins in equity, see generally STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987).

tribunal.”<sup>241</sup> Similarly, the Court has referred to the “zone of interest test,” which applies to challenges of administrative action under § 702 of the APA, as “a guide for deciding whether, in view of Congress’ evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision.”<sup>242</sup> In fact, tort law itself defines an “injury” as an “invasion of a legally protected interest” that “would entitle the person suffering the invasion to maintain an action of tort.”<sup>243</sup>

For most of the rights addressed by the Court, the right is protected by what Professor Guido Calabresi and A. Douglas Melamed have referred to as a “liability rule,” which, in effect, gives another party an option to take the legal entitlement “if he is willing to pay an objectively determined value for it.”<sup>244</sup> A liability rule protects a legal entitlement by giving the victim a right to bring an action to collect the payment associated with the taking, which is usually defined as the actual damages suffered by the victim. By giving the victim a right to bring an action for damages for any invasion of her legal entitlement, a potential injurer is deterred from taking the entitlement unless she is willing to pay damages for it.<sup>245</sup> Thus, it is understandable that the Court has presumed that a “legally protected interest” includes a right to bring suit, because the Court, like all courts, generally deals with liability rules.<sup>246</sup>

But a “legally protected interest” may be protected by something other than a liability rule. As most famously recognized by Calabresi and Melamed, a government not only “has to decide whom to entitle,” but also must decide “the manner in which [those] entitlements are protected.”<sup>247</sup> For example, the federal government may create a legal entitlement to reasonably safe pharmaceuticals, but protect it by barring the sale of any drug unless it has been subjected to intensive pre-market testing for

241. BLACK’S LAW DICTIONARY 295 (9th ed. 2010) (defining “cognizable”).

242. *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987) (emphasis added).

243. RESTATEMENT (SECOND) OF TORTS § 7 cmt. a (1965).

244. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090–92 (1972) (defining a liability rule); see also IAN AYRES, *OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS* 5 (2005) (arguing that liability rules create options that allow other parties to take a legal entitlement if they agree to pay a price).

245. See Steven Shavell, *Liability for Harm versus Regulation for Safety*, 13 J. LEGAL STUD. 357, 357 (1984) (noting that liability rules protect legal entitlements “indirectly, through the deterrent effect of damage actions that may be brought once harm occurs”).

246. Property rules, which protect an entitlement absolutely, are also generally enforced through private rights of actions, where the remedy is an injunction rather than damages. See Calabresi & Melamed, *supra* note 244, at 1115–16 (discussing pollution). For the sake of clarity, this Article will refer to all rules which protect entitlements through private rights of action as “liability rules.”

247. *Id.* at 1090–92.

safety.<sup>248</sup> By using *ex ante* regulation, the federal government legally protects an interest in safety without the need to provide a right to bring an action.<sup>249</sup>

A legally protected interest also may be protected by a liability rule, but the rule may limit who can bring a lawsuit. For example, a court may empower only a subset of victims. In the antitrust context, only “direct purchasers” can bring suit because doing so avoids the complexity involved in determining damages for plaintiffs with indirect invasions of their legally protected interests.<sup>250</sup>

Most importantly, a liability rule may only adequately protect the interests of those injured by permitting a party to sue who lacks any injury or harm altogether. For example, in the class action context, judicial assignment of the legal title of the class members’ claims to the class attorney is necessary to adequately protect the members’ interest in the claims.<sup>251</sup>

But this is also true in both the *qui tam* context and in *Sprint*. In the *qui tam* context, a relator is assigned both the legal title and a partial beneficial interest to the United States’ fraud claim because the relator is in the best position to identify fraud against the United States. Because, by its nature, fraud is concealed from the defrauded, it makes sense to provide a “bounty” to induce an insider to come forward with knowledge of the fraud.<sup>252</sup> This is similar to the function of the “bounty” in the class action context, which incentivizes the class attorney to invest in discovery to gather information that the class members cannot gather on their own due to collective action problems.<sup>253</sup> Consequently, and similar to the class

248. See Shavell, *supra* note 245, at 357 (1984) (describing “liability for harm” and “regulation for safety” as “two very different approaches for controlling activities that create risks of harm to others”); cf. Calabresi & Melamed, *supra* note 244, at 1092–93 (describing an “inalienability rule” as a rule that protects a legal entitlement by “forbid[ding] its sale under some or all circumstances”).

249. Cf. *Wyeth v. Levine*, 555 U.S. 555, 581 (2009) (concluding that state law tort claims were not preempted by *ex ante* regulatory scheme of FDA).

250. See *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746–47 (1977) (holding that only direct purchasers have standing to sue for violations of the federal antitrust laws to avoid complexities of determining downstream damages for indirect purchasers). Although antitrust law is governed by statute, courts have also limited standing to a subset of injured parties in the context of common law rights. See, e.g., *Pruitt v. Allied Chem. Corp.*, 523 F. Supp. 975, 979–80 (E.D. Va. 1981) (only permitting some plaintiffs to sue in tort for economic losses caused by the defendant’s alleged pollution of a river to avoid “double-counting” and “other complexities”).

251. See *supra* Part I.

252. See *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 775 (2000) (noting that the *qui tam* provisions of the False Claims Act arose from English actions “that allowed informers to obtain a portion of the penalty as a bounty for their information”).

253. See MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 35 (2009) (calling a class action that does not provide compensation for most of the class a “disguised bounty hunter action”); see also *id.* at 26–27 (analogizing such class actions to “*qui tam*” actions in which a noninjured third party asserts claims

action, standing is provided to the relator because the United States would not otherwise be able to protect itself against the best concealed fraudulent acts.<sup>254</sup>

The contract at issue in *Sprint* is even more analogous to the class action. The *Sprint* Court noted that the numerous payphone operators assigned the legal title of their statutory claims to the aggregators “[b]ecause litigation is expensive, because the evidentiary demands of a single suit are often great, and because the resulting monetary recovery is often small.”<sup>255</sup> In other words, the payphone operators lacked the incentive to bring suit individually, and thus assigned the legal title to their claims to the aggregator because the aggregator could use cost sharing and economies of scale to vindicate their claims. Accordingly, the assignment contract in *Sprint* mimicked a small-claims class action.<sup>256</sup>

Finally, the functional similarity of the class action to *qui tam* actions and *Sprint* can be used to distinguish class actions from the precedent prohibiting the standing of parties with only an interest in a byproduct of the litigation. The foundation for this precedent is *Diamond v. Charles*, which concerned a challenge to the constitutionality of an Illinois statute that restricted abortion.<sup>257</sup> At issue was the party status of a conscientious

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belonging to the victim, although, unlike *qui tam* actions, “class action bounty actions” have not “been explicitly authorized by congressional statute”).

254. See *supra* notes 226–29 and accompanying text.

255. *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 271 (2008).

256. In fact, the contract in *Sprint* differs from the class action only in one deeply ironic sense. Unlike the class attorney, the aggregators in *Sprint* did not receive a portion of any recovery. But, as noted by Professor Samuel Issacharoff, this may be so only because

[i]n order to be eligible for assignment of a contingent interest, a firm such as APCC Services would have to be a *law firm*. Otherwise, a private firm funding someone else’s litigation and reserving an interest in the outcome could run afoul of traditional common law prohibitions on maintenance and champerty, which bar nonlitigants from funding litigation in exchange for an equity stake in the outcome.

Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 190 (footnotes omitted). Thus, the contract at issue in *Sprint* does not completely mimic the class action because it would be unlawful to do so.

257. 476 U.S. 54, 56 (1986). In fact, the case cited by the *Symczyk* Court, *Lewis v. Continental Bank Corp.*, cited *Diamond v. Charles* for the proposition that an “interest in attorney’s fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim” without any further discussion. *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 480 (1990). Likewise, in *Steel Co. v. Citizens for a Better Environment*, the Court cited *Lewis* for the same proposition with no further discussion. See 523 U.S. 83, 107 (1998).

One could also distinguish *Lewis v. Continental* and *Steel Co.* along functional lines. In *Lewis v. Continental*, the plaintiff Continental’s case became moot, and its only remaining interest, apart from recovering attorneys’ fees, was in potentially filing a future application. *Lewis*, 494 U.S. at 480. In *Steel Co.* the plaintiff sought the disclosure of documents that were ultimately disclosed during the pendency of the litigation, and none of the requested relief would have redressed the

objector to abortion who sought to intervene as a defendant based on his objections, as well as "his status as a pediatrician and as a parent of an unemancipated minor daughter."<sup>258</sup> The plaintiffs won their suit, and after Illinois declined to appeal, the objector sought to appeal the judgment as "the sole appellant."<sup>259</sup>

The Court concluded that the objector lacked standing for two reasons. First, the Court noted that the law of Article III standing "reflects a due regard for the autonomy of those most likely to be affected by a judicial decision."<sup>260</sup> Thus, allowing the objector to appeal after the state accepted the district court's judgment would, in effect, permit the objector "to compel the State to enact a code in accord with Diamond's interests."<sup>261</sup> Second, the Court noted that the objector's interests as a doctor, a father of a daughter, and a citizen concerned with the lives of fetuses were not sufficient because he did not identify any "injury-in-fact" and did not identify himself as "a proper person" to represent any of those interests.<sup>262</sup> In particular, as to his interest as a doctor, the Court noted that the objector had not shown that the law had such "a direct financial impact on his practice" that he could "assert the constitutional rights of other individuals who are unable to assert those rights themselves."<sup>263</sup>

Admittedly, the Court made clear that the objector's liability for attorneys' fees was insufficient to confer Article III standing because it lacked "a nexus to the substantive character of the statute or regulation at issue."<sup>264</sup> However, read in the context of the entire opinion, the Court made clear that there was no need to give the objector standing to protect the interests of the others he purportedly represented. In fact, to recognize his standing would undermine the interests of Illinois, one of the parties he sought to represent. Accordingly, the *Diamond v. Charles* Court arguably concluded that a byproduct of the litigation is an insufficient interest for Article III standing purposes when such a byproduct is *not* necessary to adequately protect the interests of those injured. It should therefore not apply to cases in the class action, *qui tam*, and contract contexts.

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plaintiff for the harm caused by the late disclosure. *Steel Co.*, 523 U.S. at 105–09. In both cases there was no indication that permitting standing solely on the basis of an interest in attorneys' fees was necessary to adequately protect the interests of those injured. In fact, the plaintiffs in both cases could have cured their standing defects with minimal effort, either by actually filing an application or seeking compensatory relief.

258. *Diamond*, 476 U.S. at 57–58.

259. *Id.* at 61.

260. *Id.* at 62.

261. *Id.* at 65.

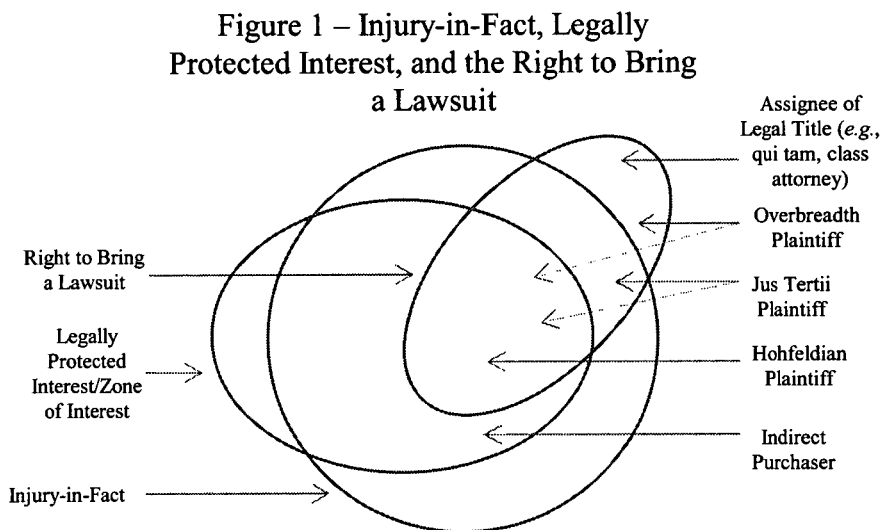
262. *Id.* at 65–67.

263. *Id.* at 65–66.

264. *Id.* at 70.

### D. “Hohfeldian” and “Non-Hohfeldian” Plaintiffs

To conclude, the personal injury requirement can be understood to encompass at least three separate requirements. Traditionally, a personal injury includes (1) an injury in fact (2) that constitutes an invasion of a legally protected interest (3) that further entitles the party to bring a lawsuit. Parties who satisfy all three requirements can be understood as “Hohfeldian plaintiffs,” or plaintiffs whose “personal and proprietary interests” have been violated, which, in turn, entitles them to bring a lawsuit.<sup>265</sup>



265. *Flast v. Cohen*, 392 U.S. 83, 119 n.5 (1968) (Harlan, J., dissenting) (defining a “Hohfeldian plaintiff”). Justice Harlan borrowed the term from Professor Louis L. Jaffe. *Id.* For Jaffe’s own discussion of “Hohfeldian plaintiffs,” see Jaffe, *supra* note 13, at 1033.

These three separate requirements, however, are not necessary in some contexts, as discussed in the previous sections and as shown in Figure 1 above. The left side of Figure 1 shows the three different requirements encompassed by the personal injury requirement of Article III standing. The right side of Figure 1 shows the different types of plaintiffs discussed in this Part and which of the three separate requirements these plaintiffs satisfy. Plaintiffs who do not satisfy all three of the personal injury requirements could be understood as "Non-Hohfeldian" plaintiffs. However, Non-Hohfeldian plaintiffs generally have been limited to plaintiffs who are "bereft of any personal or proprietary coloration" and seek only "to vindicate public rights."<sup>266</sup> The closest analogue to the Non-Hohfeldian plaintiff is the assignee of legal title over the claim, who also lacks any personal or proprietary stake in the litigation other than those stakes created by the litigation itself.

Figure 1, in fact, calls into question the usefulness of distinguishing between Hohfeldian and Non-Hohfeldian plaintiffs in the conventional way because it shows that plaintiffs may exist somewhere in between. *Jus tertii* plaintiffs like the vendor in *Craig v. Boren*, for example, have suffered an injury in fact, which gives them a personal interest in the litigation, even if it is not legally recognized. In fact, and as reflected by the dashed arrows in Figure 1, both *jus tertii* plaintiffs and overbreadth plaintiffs arguably can be understood as Hohfeldian plaintiffs to the extent that they have a legally protected interest "not to be subjected to governmental sanctions except pursuant to a constitutionally valid rule of law."<sup>267</sup>

The better approach is to tease out the different requirements embodied by the "personal injury" requirement and then analyze whether, despite a missing requirement, a federal court should nevertheless recognize standing based on the objectives of the law of justiciability. Of course, to apply such an approach to the "personal injury" requirement requires an understanding of these objectives, which are addressed in the next Part.

### III. THE FUNCTION OF THE LAW OF JUSTICIABILITY

To recap, Part I set forth and defended a trust view of the class action, one which considers the class attorney the real party in interest.<sup>268</sup> Part II argued that the trust view of the class action can be seen as consistent with the law of justiciability under Article III.<sup>269</sup> This is because the law of justiciability permits the standing of uninjured, even unharmed, plaintiffs like the class attorney if doing so is necessary to adequately protect the interests of those injured. Thus, Part II showed that the class action is

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266. *Flast*, 392 U.S. at 119 n.5.

267. Fallon, *supra* note 221, at 1331.

268. See *supra* Part I.

269. See *supra* Part II.

functionally similar to cases in the *jus tertii*, overbreadth, and *qui tam* contexts.<sup>270</sup>

This Part explores more broadly the underlying objectives of the law of justiciability. It first argues that the exceptions discussed in Part II prove the rule. In other words, it takes a functional approach to the law of justiciability,<sup>271</sup> and argues that the core function of the law of justiciability is to adequately protect the interests of those not before the court. As argued in more detail below, this representational function encompasses both of the stated purposes of the law of justiciability articulated by the Supreme Court: (1) to assure that “concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination”<sup>272</sup> and (2) to maintain the “tripartite allocation of power” set forth in the Constitution.<sup>273</sup>

The Part then examines what, if anything, the law of justiciability can learn from the trust view of the class action. The central lesson of the trust view of the class action is that those actually injured cannot always adequately represent their own interests in court. This Part uses this lesson to address the adverseness and separation of powers concerns of the Court.

This exploration of the function of the law of justiciability is not meant to provide a comprehensive theory of Article III justiciability.<sup>274</sup> Instead, this Article’s goal is only to outline a functional framework for understanding the law of justiciability, which suggests a number of ways to improve the existing law.

### A. Adequacy of Representation

Many scholars have noted the similarities between class action law and the law of justiciability.<sup>275</sup> Specifically, scholars have noted that both are concerned with ensuring that the party before the court will adequately

270. See *supra* Sections II.B–C.

271. This is a common approach taken by a number of scholars. *E.g.*, Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 460–61 (2008) (stating that “[i]n this Article, I seek to understand what separation-of-powers functions are served by standing doctrine,” among other things (footnote omitted)); Kontorovich, *supra* note 31, at 1664 (stating that “[t]his Article explains two related functions served by the standing doctrine in public law”); Siegel, *supra* note 11, at 117 (noting that his arguments are “based on the structural or functional role that justiciability constraints play”).

272. *United States v. Windsor*, 133 S. Ct. 2675, 2680 (2013) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

273. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)).

274. For an example of a more comprehensive account of the law of justiciability, see Siegel, *supra* note 11.

275. Brilmayer, *supra* note 13, at 307–09; Kontorovich, *supra* note 31, at 1724; Scott, *supra* note 31, at 675.



represent the interests of the nonparties who will be affected by the court's exercise of jurisdiction.<sup>276</sup>

One of the first to notice this due process similarity was Professor Lea Brilmayer, who particularly focused on “the fairness problems that would arise if an ideological challenger—a challenger without the traditional personal stake—were permitted to litigate a constitutional claim.”<sup>277</sup> Professor Brilmayer pointed out that, just as the preclusive effect of a class action may impair an absent class member's claim, an ideological plaintiff may impair a nonparty's constitutional rights through the precedent created by the ideological plaintiff's action.<sup>278</sup> Furthermore, an ideological plaintiff may impact some nonparties' constitutional rights directly by seeking an injunction, which would apply to those nonparties regardless of their party status before the court.<sup>279</sup> In fact, Professor Eugene Kontorovich has argued that, in the absence of standing restrictions, *any* plaintiff may bring a constitutional claim to extract payments or other concessions from others affected by the claim, making everyone worse off.<sup>280</sup>

This Article goes further to argue that adequacy of representation is the guiding principle of Article III's justiciability requirements. This is particularly true of actions involving constitutional issues, which have been the focus of Professor Brilmayer, Professor Kontorovich, and other scholars, and which have presented the Supreme Court with most difficult questions of justiciability.<sup>281</sup>

276. Brilmayer, *supra* note 13, at 307; Kontorovich, *supra* note 31, at 1724–25; Scott, *supra* note 31, at 675.

277. Brilmayer, *supra* note 13, at 306; *see also* ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 2.1, at 46 (5th ed. 2007) (“[T]he justiciability doctrines also promote fairness, especially to individuals who are not litigants before the court.”).

278. Brilmayer, *supra* note 13, at 307; *see also* Campos, *Mass Torts*, *supra* note 25, at 1099 (noting that the law of procedural due process in the class action context identifies “the preclusive effect of any judgment on the claims of the absent class members” as the relevant deprivation for due process purposes).

279. *See* Bronsteen & Fiss, *supra* note 7, at 1433 (“[W]hen the named plaintiff seeks an injunction, as in the typical school desegregation case, it is not even clear what is to be gained for him or the class by casting the suit in terms of a class action. If the named plaintiff brings suit individually and wins, then the defendant will be bound to act in a way that confers benefits on the entire class—to desegregate the schools—and that obligation can easily be enforced by all the members of the class.”).

280. Kontorovich, *supra* note 31, at 1683 (“Broad standing presents the holdout problem on a massive scale.”).

281. This conclusion is similar to the argument made by Professor Aziz Huq that “a central principle of Article III” is to “sort out cases and controversies that can be resolved without large spillover effects on third parties who are unrepresented in the courtroom.” Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1464 (2013). However, this Article does not argue that courts should avoid cases with large spillover effects, in part because trying to eliminate such cases would be futile, a point that Huq concedes. *See id.* at 1470. More importantly, and as discussed in Section III.C, eliminating cases with large spillover effects may be undesirable in some circumstances.

For example, the Court has repeatedly stated: “At bottom, ‘the gist of the question of standing’ is whether petitioners have ‘such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.’”<sup>282</sup> But why does a federal court require illumination in the first place? One obvious answer is that such illumination is helpful in resolving the dispute before it.

In its older decisions, however, the Court has stressed the importance of adversity as “a safeguard essential to the integrity of the judicial process, and one which we have held to be *indispensable to adjudication of constitutional questions by this Court*.”<sup>283</sup> This concern with the “integrity of the judicial process” can only be understood as a concern with ensuring the adequate resolution of constitutional issues for the benefit of those not before the court. Indeed, it is fairly well recognized by both current members of the Court and scholars that the precedents the Court creates by adjudicating adverse disputes “are not merely the property of private litigants,” but are “valuable to the legal community as a whole.”<sup>284</sup>

The reference to the “public” value of a federal court’s exercise of jurisdiction does not mean that the nonparty beneficiaries of those precedents are amorphous or inchoate.<sup>285</sup> Admittedly, a court’s decision on a constitutional issue affects many nonparties, including some that “may not even be born yet.”<sup>286</sup> Nevertheless, nonparties are, in fact, discrete persons, who differ from the parties before the federal court only because of the mootness or lack of ripeness of their respective claims.

For example, one may lack a ripe claim to challenge a given statute on First Amendment grounds. However, that does not mean one is personally unaffected by a federal court’s decision regarding a First Amendment challenge to that statute. Of course, if the decision is made at the district court level, it may not impair the individual’s First Amendment rights at all. She may live in a different district, where the courts may not find the

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282. *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)); see also Siegel, *supra* note 11, at 87 & n.86 (“Cases using this quotation to support the ‘litigation-enhancing’ theory of justiciability are legion.”).

283. *Poe v. Ullman*, 367 U.S. 497, 505 (1961) (emphasis added) (quoting *United States v. Johnson*, 319 U.S. 302, 305 (1943)).

284. *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 26 (1994) (Scalia, J.) (permitting vacatur of judgment on appeal as moot because of a settlement between the parties only when “the public interest would be served by a vacatur” (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting))); see also Siegel, *supra* note 11, at 92 (noting that “the problem of interested parties who find their rights affected by litigation brought by others is simply intrinsic to our legal system”).

285. See Brilmayer, *supra* note 13, at 312–13 (arguing against a view of “societal interest” that is a “ghostly entity” set “apart from the needs of particular people”).

286. *Id.* at 308; cf. Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 969–70 (1993) (noting “the simple fact that structural injunctions affect countless people, indeed the entire public”).

decision persuasive authority.<sup>287</sup> However, if the Supreme Court makes a decision, then that precedent likely will impact future statutes, which may result in further infringements on one's First Amendment rights. Thus, to borrow the words of Professor Arthur Miller, "Supreme Court decisions . . . are de facto class actions—with the class being the entire nation."<sup>288</sup>

Federal courts recognize the reality of the concrete, personal impact a federal court decision may have, particularly when the court decides a constitutional issue. For example, and as noted by Professor Brilmayer, federal courts permit a nonparty to intervene because of the nonparty's interest in the court's constitutional interpretation, which would not preclude the party but would apply to her as a matter of stare decisis.<sup>289</sup>

Consequently, the Court's insistence on the "'honest and actual antagonistic assertion of rights' to be adjudicated"<sup>290</sup> reflects an implicit conclusion about who would be the most effective representative of all those affected. In the Court's view, the best representative would be one who satisfies the standing requirements—a person with "a 'personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'"<sup>291</sup> For example, if a noninjured party is simply a bystander propped up by the opposing side to get a favorable decision from a federal court, then "the public interest has been placed at hazard."<sup>292</sup>

Moreover, the conclusion that only those with an injury in fact should have standing explains why the Court has insisted that "relief from the injury must be 'likely' to follow from a favorable decision."<sup>293</sup> If the party

287. See, e.g., *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 573 (7th Cir. 2009) (denying intervention of a party who would be affected by the stare decisis effect of a district court judgment because "the decision of a district court has no authority as precedent").

288. Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 399 (1987).

289. FED. R. CIV. P. 24(a)(2) (allowing a nonparty to intervene as of right if she "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest"); cf. *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 829 (5th Cir. 1967) (permitting intervention of a party claiming an interest in the stare decisis effect of the appeals court's interpretation of a federal statute); see also Brilmayer, *supra* note 13, at 307 & n.35 (discussing *Atlantis Development Corp.*).

290. *Poe v. Ullman*, 367 U.S. 497, 505 (1961) (citations omitted).

291. *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

292. *United States v. Johnson*, 319 U.S. 302, 305 (1943) (concluding that a party paid to appear by the opposing party did not have standing to sue).

293. *Allen v. Wright*, 468 U.S. 737, 751 (1984) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)) (defining redressability requirement).

will gain nothing from the lawsuit, then it is unlikely that the party will invest sufficient time and resources to develop its case before the court.<sup>294</sup>

Recently, the Court has not emphasized the importance of the justiciability requirements in ensuring the “‘honest and actual antagonistic assertion of rights’ to be adjudicated.”<sup>295</sup> Instead, the Court has stressed the importance of the law of justiciability in maintaining “the judiciary’s proper role in our system of government.”<sup>296</sup> For example, the Court has recently emphasized that “[t]he law of Article III standing . . . is built on separation-of-powers principles,” and “serves to prevent the judicial process from being used to usurp the powers of the political branches.”<sup>297</sup>

But the separation of powers concerns of justiciability can also be understood as a concern with adequacy of representation. These concerns address whether the exercise of federal court jurisdiction undermines the operation of our tripartite government in a way that adversely impacts others.

Admittedly, the Constitution binds the federal courts as the “supreme Law of the Land.”<sup>298</sup> Thus, separation of powers principles limit a federal court’s exercise of jurisdiction regardless of the whether the case adversely impacts nonparty interests. But the Constitution is also a document designed to “promote the general Welfare,”<sup>299</sup> and presumably the “tripartite allocation of power” set forth in the Constitution was designed to adequately protect the interests of all citizens.<sup>300</sup> Accordingly, any case that undermines the separation of powers would be not only unlawful, but detrimental to those not before the court.

294. See *Baker v. Carr*, 369 U.S. 186, 204 (1962) (requiring a “personal stake” so “as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of constitutional questions”); CHEMERINSKY, *supra* note 277, § 2.1, at 46 (“Because federal courts have limited ability to conduct independent investigations, they just depend on the parties to fully present all relevant information to them. It is thought that adverse parties, with a stake in the outcome of the litigation, will perform this task best.”).

295. *United States v. Johnson*, 319 U.S. 302, 305 (1943) (quoting *Chi. & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892)); see also Siegel, *supra* note 11, at 95 (“In its more recent opinions, the Supreme Court has given less attention to the instrumental view that the justiciability requirements, by ensuring vigorous litigation, serve to help courts in their quest to reach sound decisions.”).

296. *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1146 (2013) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006)).

297. *Id.*

298. U.S. CONST. art. VI, cl. 2 (setting forth the “Supremacy Clause”).

299. U.S. CONST. pmbl.; see also *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970) (concluding that state welfare recipients were entitled to a hearing prior to termination of benefits under the Due Process Clause because “[p]ublic assistance . . . is not mere charity, but a means to ‘promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity’”).

300. *United States v. Bond*, 131 S. Ct. 2355, 2364 (2011) (“[I]ndividuals, too, are protected by the operations of separation of powers and checks and balances . . . .”); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)) (noting this function of justiciability).

For example, the Supreme Court has repeatedly stated that persons who have only an “undifferentiated” interest “common to all members of the public” lack standing to challenge the constitutionality of a law or executive action.<sup>301</sup> The Court, in particular, has expressed a concern that such “generalized grievances” would undermine the Executive Branch’s discretion to enforce federal laws under the Take Care Clause of the Constitution.<sup>302</sup>

Such a conclusion arises from the implicit premise that the political procedures promulgated in the Constitution, which include the election of representatives in Congress and the President, are designed to adequately protect the “generalized” interests of citizens. In other words, “generalized grievances” are “more appropriately addressed in the representative branches.”<sup>303</sup> These generalized grievances include not only grievances against the laws Congress ultimately passes, but also the enforcement of those laws provided by the Executive Branch.

Accordingly, to permit an individual to challenge the level of enforcement provided by the Executive Branch would “remove the matter from the political process and place it in the courts.”<sup>304</sup> In contrast, if a person satisfies the standing requirements, then that person transforms from an ordinary citizen with an interest in law enforcement into a unique citizen whose individual rights have been violated. Consequently, a federal court’s exercise of jurisdiction is appropriate when the standing requirements are met because the majoritarian political processes outlined in the Constitution cannot adequately protect the rights of an injured individual. Indeed, judicial intervention is appropriate because a federal court’s exercise of jurisdiction is designed precisely to “protect[] individuals and minorities against impositions of the majority.”<sup>305</sup>

Another example is the political question doctrine, which denies a federal court jurisdiction altogether when there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards

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301. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575 (1992) (citations omitted) (internal quotation marks omitted).

302. *Allen v. Wright*, 468 U.S. 737, 751, 761 (1984) (citing U.S. CONST. art. I, § 3).

303. *Id.* at 751; *see also* *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 636 (2007) (Scalia, J., concurring) (noting that “generalized grievances affecting the public at large have their remedy in the political process”); *Lujan*, 504 U.S. at 576 (“Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.”); Huq, *supra* note 281, at 1469 (discussing *Lujan*, and noting that “[a] straitened version of injury in fact, in short, conduces to the appropriate allocation of institutional responsibilities”).

304. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983).

305. *Id.*

for resolving it.”<sup>306</sup> One function of the political question doctrine is to prohibit a federal court’s jurisdiction when the issue is dependent on the political choices of the governed, rather than the mandates of the Constitution.<sup>307</sup> Because, again, both the Executive Branch and Congress are designed to take into account the preferences of the electorate, they are appropriately tasked to address such questions rather than the Judicial Branch, which is designed to address only mandatory issues of law.<sup>308</sup> Thus, allowing judicial intervention for such political questions would adversely affect the majority because it would frustrate the procedures of the Constitution designed to adequately protect the popular will.

The discussion so far has only argued that adequacy of representation provides a coherent, functional framework for understanding the stated justifications for the various justiciability requirements. This Article has not addressed the efficacy of those requirements given this representational function. Indeed, many of the flaws of the current law of justiciability are obvious. But one benefit of identifying a coherent, functional account for the law of justiciability is that this account can provide guidance on what reforms, if any, should be made to the law. The next two sections address the current law of justiciability in light of its representational function. In particular, these sections use the lessons of the trust view of the class action to evaluate current doctrine and to suggest reforms.

### B. *Incentives to Litigate*

As noted above, the standing requirements purportedly are designed “to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.”<sup>309</sup> However, whether the standing requirements do, in fact, ensure that the parties before a federal court are sufficiently incentivized to “sharpen[] the presentation of issues” is worth further investigation.

The standing requirements ensure that parties have sufficient incentives to develop the case by limiting standing to those who have suffered a “concrete and particularized” injury which “affect[s] the plaintiff in a

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306. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

307. See Siegel, *supra* note 11, at 95; see also Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1458 (2005) (arguing that “[under] the political question doctrine . . . courts should abstain from resolving constitutional issues that are better left to other departments of government, mainly the national political branches”).

308. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803) (discussing limitations on the issuance of a writ of mandamus, which is inappropriate if the conduct the plaintiff seeks to mandate is within the discretion of the defendant); see also Siegel, *supra* note 11, at 125 (noting that “[t]he critical constraint on judicial interference with democracy” is that courts only review the “legality” of governmental action).

309. *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

personal and individual way.”<sup>310</sup> This is in contrast to an individual who only has an “undifferentiated” interest in the challenged law that is “common to all members of the public.”<sup>311</sup> In the Court’s view, limiting standing to those individuals who have idiosyncratic injuries would result in parties idiosyncratically motivated to develop the facts and law necessary for a court to effectively exercise its jurisdiction.<sup>312</sup>

Some scholars, such as Professors Brilmayer and Kontorovich, defend the concrete and particularized injury requirement as a mechanism to keep those with “generalized grievances” from inadequately protecting the rights of those actually injured.<sup>313</sup> Nevertheless, scholars have heavily criticized the concrete and individualized injury requirement for justiciability. Specifically, numerous scholars have noted that the requirement does not permit ideological organizations to bring claims, even though such organizations are often better motivated and financed to develop the case than any individually injured party.<sup>314</sup> Accordingly, many scholars argue that the idea that “the law of standing can be used to assure the competent presentation of cases. . . . deserves a quiet burial.”<sup>315</sup>

The trust view of the class action, buttressed by the precedent permitting uninjured third-party plaintiffs, suggests that ideological organizational plaintiffs should, at the very least, be an exception to the concrete and individualized injury requirement. Like the class attorney, the organization can be understood as a “trustee” that can use economies of scale to invest in common issues for the benefit of all persons with an interest in those issues. Moreover, like the class attorney, the ideological organization not only has a stake in a common issue that dwarfs any

310. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 & n.1 (1992) (citing cases).

311. *Id.* at 575.

312. There have been exceptions. See *FEC v. Akins*, 524 U.S. 11, 23–24 (1998) (noting that a “widely shared” interest can constitute “injury in fact” if it is not “abstract”).

313. Brilmayer, *supra* note 13, at 306 (noting effect of ideological plaintiff on rights of those injured); Kontorovich, *supra* note 31, at 1683 (noting that “[b]road standing presents the holdout problem on a massive scale”).

314. E.g., Richard A. Epstein, *Standing and Spending—The Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1, 47 (2001) (noting that ideological plaintiffs have sufficient motivation to develop constitutional issues “precisely because they care as much about the structure of American government independent of the impact on their own pocketbooks”); Jaffe, *supra* note 13, at 1038 (noting that “investing money in a lawsuit from which one is to acquire no further monetary profit argues . . . [for] a quite exceptional kind of interest” that is sufficient for standing purposes); William M. Landes & Richard A. Posner, *The Economics of Anticipatory Adjudication*, 23 J. LEGAL STUD. 683, 718 (1994) (contending that ideological parties “have both the desire and resources to mount a vigorous defense of their position”); Mark V. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1706 (1980) (arguing for a “barebones” approach that would permit ideological parties, and that “would insist only on real adversity between plaintiff and defendant, and a plaintiff capable of generating a reasonably good, ‘concrete’ record for decision”).

315. Kenneth Culp Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 470 (1970); see also Siegel, *supra* note 11, at 90 (same, quoting Davis, *supra*).

interest of its members (and nonmembers), the organization's very reason for existence demonstrates that it has an interest that is consistent with the interest of all parties who share the organization's goals. Finally, like the class attorney, the ideological organization can spread common costs by, in effect, taxing its members to fund the litigation of the constitutional issue, and thus avoid the suboptimal investment that would come with others free-riding on the organization's efforts.

Consequently, the ideological organization fits comfortably within the class of recognized exceptions to the concrete and individualized injury requirement. Indeed, the Court has noted that an association has standing to sue as long as "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."<sup>316</sup>

But the class action's trust function reveals a more thoroughgoing flaw with the concrete and particularized injury requirement. In the small-claims context, for example, no individual has an interest in litigating the case before the court. The trust function of the class action solves this problem of insufficient incentives by, in effect, forcing the plaintiffs to share the costs of a joint benefit—the investment in common issues.<sup>317</sup> Both (1) the problem of insufficient incentives in small-claims litigation and (2) the class action trust solution presume a model of rational litigant behavior. A plaintiff will only sue if her expected recovery is greater than the costs of litigation,<sup>318</sup> and the small-claims litigation costs are only lowered by sharing costs and utilizing economies of scale.

This model of litigant behavior, however, also suggests an inherent divergence between the interests of any one party and the interests of others affected by the litigation. This is because the model only considers the costs and benefits of the lawsuit to the plaintiff alone without taking into account the costs and benefits to others.<sup>319</sup> Most obviously, the plaintiff in small claims litigation does not consider how the plaintiff's individual action will benefit others. One benefit of the class action is that it forces the plaintiff to consider the interests of the other plaintiffs.

316. *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553 (1996) (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

317. See *supra* Section I.B.

318. Put more formally, the model assumes that the plaintiff seeks to maximize her payoff based on three factors: (1) the damages recoverable ( $L$ ); (2) the probability of  $L$  occurring ( $P$ ); and (3) the costs of the litigation process itself ( $C$ ). Thus, the plaintiff seeks to maximize  $(P \times L) - C$ . See STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 389–418 (2004) (examining the basic theory of litigation); see also BONE, *supra* note 88, at 34 (same).

319. Shavell, *supra* note 36, at 339 (noting this divergence). Professor Shavell, in particular, noted (1) the costs to the defendant and (2) the costs to the public in the form of court and administrative expenditures. *Id.*



More importantly, and more relevant to the issue of constitutional litigation, the small claims plaintiff does not take into account the benefit of the lawsuit on future plaintiffs and defendants. In the absence of the class action, each plaintiff chooses not to file a lawsuit, which effectively allows a defendant to escape liability for any unlawful conduct that injures a large number of dispersed individuals. Thus, the decision not to file nullifies the enforcement function of the litigation, which adversely affects others who will suffer similar injuries in the future. In fact, some scholars have stressed that the primary function of the class action is precisely to deter such conduct, even when the benefits of the litigation to the class members would be miniscule.<sup>320</sup>

The divergence between the private interests of the parties and the societal interest in litigation is reinforced by the concrete and individualized injury requirement. Far from ensuring adequacy of representation, limiting standing to only those individuals with a concrete and individualized injury inherently ensures that the social interest in the litigation will be subordinated to the personal interests of the parties with standing.

This is particularly true in litigation involving issues of constitutional law. As in small-claims litigation, the joint benefits created by the litigation of constitutional issues are widespread, while the parties permitted to litigate those issues are, under the law of justiciability, required to differ dramatically from persons with only an "undifferentiated" interest in those issues "common to all members of the public."<sup>321</sup> Most obviously, the development of facts and law in any constitutional case most likely benefits from the same economies of scale as the development of common issues in small-claims litigation. But the current law of justiciability does not take into account the benefits of economies of scale in determining which party should have standing to sue.

Despite the inherent divergence in the private and social interest in litigation created by the concrete and individualized injury requirement, some argue that the requirement is beneficial, and arguably harmless, for two reasons. First, parties may voluntarily aggregate to assist in the development of constitutional issues. Indeed, Rule 24 permits intervention as of right to individuals who would be "as a practical matter impair[ed] or impede[d]" by the action.<sup>322</sup> Likewise, the filing of amicus briefs in

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320. See, e.g., Fitzpatrick, *supra* note 92, at 2057–63 (arguing that the entire recovery in a small-claims class action should go to the attorney, since it would maximize deterrence); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 103–08 (2006) (arguing that the compensation function of the small-claims class action is irrelevant).

321. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575 (1992).

322. FED. R. CIV. P. 24(a).

constitutional litigation is widespread and arguably an effective way for nonparties to protect their rights.<sup>323</sup> Second, the use of plaintiffs with concrete and individualized injuries may be harmless. Nonparties may work together in the background to develop the case while using the named plaintiff as a vivid example of the impact of the law being challenged.<sup>324</sup>

Both reasons, however, assume the best without accounting for the worst. As to the first reason, admittedly, and as suggested by the Coase Theorem, private ordering may attain the best possible allocation of legal entitlements, including the right to bring a lawsuit.<sup>325</sup> But Coasean invariance only obtains in the absence of transaction costs, and the small-claims context is the classic example of transaction costs frustrating socially desirable litigation. It is unclear whether a federal court can assume that transaction costs will be sufficiently low to allow sufficient voluntary aggregation in constitutional issues, especially when the effect of the decision is even more widespread than in any small-claims case.

As to the second reason, using plaintiffs with concrete and individualized injuries may result in worse decisions. Particularly with respect to interpretations of constitutional law, a federal court has to consider the aggregate effect of choosing an interpretation that will affect numerous present and future persons.<sup>326</sup> A particularly vivid plaintiff may bias an interpretation of the Constitution that is not socially appropriate and effectively cause the Court to commit fallacies of composition.<sup>327</sup>

Accordingly, federal courts should not presume that a plaintiff with a concrete and individualized injury would be an adequate representative of all of the interests bound up in constitutional litigation (or any litigation). Federal courts should instead look more specifically at (1) the incentives various parties have to litigate a case, and then determine whether (2) these incentives are sufficient, or otherwise should be altered, to ensure the adequate representation of all the persons affected by the action. In contrast to the current concrete and particularized injury requirement, this actual

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323. See Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 691–93 (2012) (discussing use of amici to defend positions in Supreme Court litigation).

324. See Lea Brilmayer, *A Reply*, 93 HARV. L. REV. 1727, 1729 (1980) (arguing that even institutional plaintiffs would choose plaintiffs with concrete and individualized injuries simply as a matter of “wise litigation practice”); cf. Campos, *Proof*, *supra* note 25, at 766–77 (noting that the trust function of the class action allows for the plaintiffs themselves to bring suit individually because the class attorney can invest in common issues in the background).

325. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2–15 (1960) (discussing what would become the Coase theorem).

326. Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 45 (1984) (“Among the vices of standing analysis is that it allows no opportunity to assess the interests served by adjudicating a dispute.”).

327. See Suja A. Thomas, *How Atypical, Hard Cases Make Bad Law* (See, e.g., *The Lack of Judicial Restraint in Wal-Mart, Twombly, and Ricci*), 48 WAKE FOREST L. REV. 989 (2013) (noting how atypical cases may prevent courts from choosing the socially desirable decision).

incentives approach would require a federal court to more explicitly identify the incentives the parties have to litigate the action. It would also be sensitive to whether those incentives would affect the interests of persons not before the court. In other words, it is not enough that a party has some motivation to litigate the case. A federal court must also pay attention to the balance of incentives among *all* of the potential parties, including those who are uninjured.

For example, in the small-claims context, the plaintiffs' insufficient incentives are problematic because the small claims defendant does not suffer from similar deficient incentives. Because issues of liability common to the numerous plaintiffs only apply to the defendant, the defendant can exploit economies of scale to invest in these issues in a way that the plaintiffs cannot in the absence of a class action.<sup>328</sup> Thus, these asymmetric incentives to litigate are functionally equivalent to collusive suits that the Court has rejected for putting "the public interest . . . at hazard."<sup>329</sup>

Accordingly, the Court should be more mindful of situations where the incentives to litigate are similarly asymmetric, leading to biases in the court's exercise of jurisdiction. This is especially true in the context of constitutional litigation. For example, in criminal appeals involving constitutional issues, a criminal defendant's incentives to appeal do not take into account the interests of other present and future criminal defendants affected by the court's resolution of the constitutional issue. The criminal defendant simply wants to avoid incarceration, and thus will present any constitutional argument, however weak, that will increase her chances of avoiding prison.

In contrast, the prosecution will be represented by the U.S. Attorneys' Office, which can coordinate with the Department of Justice in determining how to develop their positions in any appeal. Both have an incentive to consider the wide-ranging effect of any criminal appeal. Thus, unlike the criminal defendant, the prosecution can avoid making weak constitutional arguments that prejudice them in later litigation. In fact, if the criminal defendant cannot afford an attorney and obtains an inadequate public defender, then the criminal defendant may cause an appeals court to create precedent that adversely impacts other criminal defendants.

One possible solution suggested by the trust view of the class action is to permit the federal public defenders' office to intervene as of right in all criminal appeals involving constitutional issues. A federal court could consider the public defenders' office a trustee of the claims of all criminal defendants, and thus grant the office standing to protect the interests of the

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328. Campos, *Mass Torts*, *supra* note 25, at 1075-76; Rosenberg, *supra* note 77, at 399-400 (discussing asymmetric stakes in mass torts).

329. *United States v. Johnson*, 319 U.S. 302, 305 (1943) (concluding that a party paid to appear by the opposing party did not have standing to sue).

population of criminal defendants affected by the appeal. Moreover, an appeals court can further incentivize the parties, including the federal public defender's office, to represent the interests of nonparties by allocating costs to the public defender and the defendant's attorney should they prevail.<sup>330</sup> Finally, an appeals court may consider reducing the precedential effect of decisions on criminal appeals when it concludes that the interests of other criminal defendants were not adequately represented.<sup>331</sup> Reducing the precedential effect of a decision would narrow the impact of that decision to the parties before the court.

### C. Separation of Powers

As noted above, the Court has emphasized in its recent decisions that the justiciability requirements of Article III, particularly the requirement of standing, "is built on separation-of-powers principles," and "serves to prevent the judicial process from being used to usurp the powers of the political branches."<sup>332</sup> The Court has stressed the importance of the justiciability requirements in preventing persons with "generalized grievances" from undermining the Executive Branch's discretion to enforce federal laws under the Take Care Clause of the Constitution.<sup>333</sup>

Like the concrete and particularized injury requirement, this separation of powers concern is subject to a number of criticisms. Although the Executive Branch has discretion to exercise its law enforcement powers, "the Take Care Clause [also] confers a duty insofar as it imposes on the President both a responsibility to be faithful to law and an obligation to enforce the law as it has been enacted, rather than as he would have wished it to be."<sup>334</sup> This point is often missed by those, such as Justice Antonin Scalia, who point out that the people, acting through their elected representative in the President, can decide the level of enforcement.<sup>335</sup>

330. *But see* FED. R. APP. P. 39(b) (permitting an appeals court to assess costs against the United States "only if authorized by the law").

331. Many circuits, including the Second and Ninth Circuits, have internal rules governing the precedential value of its decisions. To a certain extent, many appeals courts, such as the First Circuit, also reduce the externalities created by an appellate decision by limiting oral argument to those cases where the issues will be adequately presented by the parties, with the presumption that only those decisions that arise from oral argument can be authored non-"per curiam" opinions with precedential value. Ironically, the Federal Rules of Appellate Procedure only permit an appellate court to deny oral argument if "the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument." FED. R. APP. P. 34 (a)(2)(C).

332. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013).

333. *Allen v. Wright*, 468 U.S. 737, 751, 761 (1984) (citing U.S. CONST. art. I, § 3).

334. *See* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 212 (1992).

335. *See* Scalia, *supra* note 304, at 897 (noting that "[w]here no peculiar harm to particular individuals or minorities is in question, lots of once-heralded programs ought to get lost or misdirected, in vast hallways or elsewhere").

While true, the people, acting through the President, cannot ignore the law entirely.<sup>336</sup> This is especially true of the provisions of the Constitution, which, "by virtue of their inclusion in the Constitution, are aimed predominantly at *restraining the Government as an instrument of the popular will*."<sup>337</sup> Thus, as Justice Harlan concluded in *Flast v. Cohen*, "[N]on-Hohfeldian plaintiffs as such are not *constitutionally* excluded from the federal courts," and that there may be circumstances where such "representatives of the public interest" are warranted.<sup>338</sup>

Nevertheless, the separation of powers concerns of the law of justiciability reflect a broader concern about the appropriateness of judicial intervention. For example, there is a general consensus that judicial intervention is most appropriate when the constitutional rights of individuals and minorities are involved.<sup>339</sup> In these situations, judicial intervention may be the only method of ensuring compliance with the Constitution. Moreover, in such situations, there is no concern that others will be adversely affected by any infringement on the power of the political branches because the political branches are themselves the problem.

One logical consequence of this consensus is that, while the justiciability doctrines are designed to ensure "the proper—and properly limited—role of the courts in a democratic society,"<sup>340</sup> it does not mean that federal courts should unquestioningly accept the results of majoritarian political processes. Judicial intervention may be necessary if the branches do not adequately represent the interests of the citizens they govern. For example, protecting minorities' rights is a context where judicial intervention is justified to override the actions of the political branches because the branches cannot adequately represent those minorities' interests.

Conversely, judicial intervention is not necessary when political branches do adequately represent the interests of all U.S. citizens. In fact, judicial intervention may be harmful, as it may allow individuals to use federal courts to get preferred outcomes to the detriment of others. The

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336. See *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the [C]onstitution, and entirely inadmissible.").

337. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring) (emphasis added).

338. See *Flast v. Cohen*, 392 U.S. 83, 120 (1968) (Harlan, J., dissenting) (quoting *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14 (1942)).

339. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 102–03 (1980) (defending an "antitrust" conception of judicial review that permits judicial intervention when political "markets" malfunction); Scalia, *supra* note 304, at 895–97; cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

340. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)); see also *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

Supreme Court made this point in a slightly different context in *Diamond v. Charles*, which, as noted earlier, concerned a challenge to an Illinois state law that restricted abortion.<sup>341</sup> There, a district court struck down the law, but the state declined to appeal. Instead, a conscientious objector who lacked any injury in fact of his own sought to appeal and assert the interests of the state, among others.<sup>342</sup> The Court concluded that the objector could not assert the interests of the state when it had declined to appeal because allowing the objector to appeal would permit him “to compel the State to enact a code in accord with Diamond’s interests.”<sup>343</sup> The objector’s appeal would undermine the state’s interests and the interests of the Illinois citizens whom the state represented. Furthermore, the Court provided no indication that the State failed to adequately represent its citizens.

Accordingly, underlying the separation of powers concerns of the law of justiciability is a deep due process concern with ensuring that the various branches, including the Judiciary itself, appropriately protect the legal entitlements of the citizens they govern.<sup>344</sup> As demonstrated by *Diamond v. Charles*, this concern with ensuring that all governmental entities adequately represent the interests of those they govern also extends to state governmental entities.

These concerns with the adequacy of representation provided by governmental institutions, including the judiciary, are clearly illustrated in the recent litigation concerning the constitutionality of Proposition 8<sup>345</sup> and the federal Defense of Marriage Act (DOMA),<sup>346</sup> which the Court addressed last term.<sup>347</sup> For both cases, the due process concern with adequacy of representation that lies at the heart of the law of justiciability provides a metric for evaluating the Court’s decisions. The trust view of the class action also helps to illuminate which approaches taken by the Justices best accord with the representational function of the law of justiciability.

In the Proposition 8 litigation, *Hollingsworth v. Perry*, the plaintiffs challenged the constitutionality of an amendment to the California state constitution, Proposition 8, that prohibited the state to recognize marriages

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341. 476 U.S. 54 (1986).

342. *Id.* at 61.

343. *Id.* at 65.

344. See generally Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012) (arguing that the Court historically analyzed separation of powers concerns under the Due Process Clause).

345. CAL. CONST. art. 1, § 7.5. The provision was passed by “voter-enacted amendment” in November 2008. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013).

346. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2011) and 28 U.S.C. § 1738C (2011)).

347. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *United States v. Windsor*, 133 S. Ct. 2675 (2013).

between same-sex individuals.<sup>348</sup> The plaintiffs were “two same-sex couples who wish[ed] to marry.”<sup>349</sup> In the DOMA litigation, *United States v. Windsor*, the plaintiffs challenged the constitutionality of DOMA, which only allows the federal government to recognize marriages between “one man and one woman.”<sup>350</sup> The plaintiff, Edith Windsor, who was married to Thea Spyer, sued because DOMA prevented Windsor from claiming an “exemption from the federal estate tax” that only applied to “spouses.”<sup>351</sup> Windsor sought to recover \$363,053 in estate taxes she paid because she did not qualify for the exemption.<sup>352</sup>

The plaintiffs prevailed in both suits, but the government defendants declined to appeal. In *Perry*, all state defendants declined to defend the constitutionality of Proposition 8 from the outset.<sup>353</sup> In *Windsor*, the Obama Administration initially defended the constitutionality of DOMA, but later declined to do so.<sup>354</sup> In addition, the defendants in both cases continued to enforce the challenged laws.<sup>355</sup> In *Windsor*, in particular, the U.S. government refused to provide a refund to Windsor despite agreeing with the district court’s judgment.<sup>356</sup>

Consequently, in both cases nonparties to the case sought to intervene in the litigation to appeal the judgments of the trial court. In *Perry*, Proposition 8 was passed not as legislation introduced in the state legislature, but through a statewide referendum.<sup>357</sup> Accordingly, the supporters that proposed Proposition 8 and worked to get it passed sought to intervene and appeal.<sup>358</sup> In *Windsor*, Congress passed DOMA and

348. *Perry*, 133 S. Ct. at 2660; see also CAL. CONST. art. 1, § 7.5 (providing that “only marriage between a man and a woman is valid or recognized in California”).

349. *Perry*, 133 S. Ct. at 2660.

350. *Windsor*, 133 S. Ct. at 2683 (quoting 1 U.S.C. § 7).

351. *Id.*

352. *Id.* at 2683 (citing 26 U.S.C. § 2056(a)); see also 1 U.S.C. § 7 (providing that “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife”).

353. *Perry*, 133 S. Ct. at 2660 (noting that the defendants “refused to defend the law”).

354. *Windsor*, 133 S. Ct. at 2683 (“While the tax refund suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives, pursuant to 28 U.S.C. § 530D, that the Department of Justice would no longer defend the constitutionality of DOMA . . . .”); see also Letter from Eric H. Holder, Jr., Att’y Gen. of the U.S., to John Boehner, Speaker of the U.S. House of Reps. (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (stating that “the President has instructed the Department not to defend the statute”).

355. *Perry*, 133 S. Ct. at 2660; *Windsor*, 133 S. Ct. at 2684.

356. *Windsor*, 133 S. Ct. at 2684 (noting that “[t]he United States has not complied with the judgment”).

357. *Perry*, 133 S. Ct. at 2659.

358. *Perry v. Schwarznegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010), vacated, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (referring to supporters as the “official proponents of Proposition 8”).

President Clinton signed it into law in 1996.<sup>359</sup> However, in 2012, when President Obama declined to defend the statute, the Democratic Party had since become an opponent of the law. Currently, only the House of Representatives has a Republican majority, and it is this majority who sought to defend the statute through the Bipartisan Legal Advisory Group (BLAG), a group consisting of five House members who advise the House as a whole on legal issues.<sup>360</sup>

In both situations the proposed defendants *prima facie* lacked standing to sue under current Article III precedent. Unlike the plaintiffs in both cases, who were denied governmental benefits because their same-sex marriages was not recognized pursuant to the laws being challenged, the proposed defendants only alleged a diffuse interest in maintaining the constitutionality of the law.<sup>361</sup> Thus, the proposed defendants seemed to lack the “concrete and particularized” injury necessary to establish Article III standing.<sup>362</sup>

The problem of defendant standing in both *Perry* and *Windsor* is a recurring problem that arises when a statute burdens (or benefits) a small group of individuals concretely, but benefits (or burdens) a large group of individuals diffusely.<sup>363</sup> Such cases can be understood as the inverse of protecting minority rights through judicial intervention. As noted above, judicial intervention may be necessary when the majority subordinates a minority because political alternatives for the minority to protect its interests are not viable. In contrast, judicial intervention in cases such as *Perry* and *Windsor* may allow a minority to subordinate a majority by

359. See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

360. See Matthew I. Hall, *How Congress Could Defend DOMA in Court (and Why the BLAG Cannot)*, 65 STAN. L. REV. ONLINE 92, 93 (2013), [http://www.stanfordlawreview.org/sites/default/files/online/articles/Hall\\_65\\_SLRO\\_92\\_-\\_BLAG.pdf](http://www.stanfordlawreview.org/sites/default/files/online/articles/Hall_65_SLRO_92_-_BLAG.pdf) (discussing intervention of BLAG).

361. *Perry v. Brown*, 265 P.3d 1002, 1015 (Cal. 2011) (“[T]he parties disagree as to whether an official initiative proponent possesses a special or distinct interest in the validity of an initiative measure the proponent has sponsored once the initiative has been approved by the voters and adopted as state law, and, even if so, whether the nature of that interest and of the injury the proponent would suffer if the initiative measure is invalidated are sufficient to accord the proponent standing for federal law purposes under the particularized interest standard.”); Brief for Court-Appointed Amica Curiae Addressing Jurisdiction, *United States v. Windsor*, No. 12-307 (Jan. 24, 2013), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/01/DOMA-amicus-standing-brief-1-24-12.pdf> (“Yet BLAG asserts only a generalized interest in seeing statutes that Congress enacted implemented, an interest that is widely shared by the people at large. BLAG asserts no judicially cognizable, concrete injury to itself, to the House of Representatives or to Congress.”).

362. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 & n.1 (1992).

363. See Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539, 1552 (2012) (discussing problem); Abner S. Greene, *Interpretive Schizophrenia: How Congressional Standing Can Solve the Enforce-But-Not-Defend Problem*, 81 FORDHAM L. REV. 577, 597 (2012) (discussing problem in context of *Windsor* litigation).



getting the courts to strike down statutes as unconstitutional without a vigorous defense from the majority.

### 1. *United States v. Windsor*

The Court in *Windsor* wrestled with these concerns, but, save for Justice Samuel Alito, did so in a somewhat confused manner. A majority of the Court concluded that the case was justiciable even though the President agreed with Windsor's position.<sup>364</sup> As an initial matter, Justice Anthony Kennedy, writing for the majority, highlighted that the U.S. government refused to refund Windsor her estate tax payment, and thus Windsor satisfied the basic requirements of standing: she suffered a personal injury caused by the alleged unlawful action that was redressable.<sup>365</sup> Likewise, the United States was equally injured because the district court judgment was compelled to refund the payment, something it did not want to do despite agreeing with the district court on the merits.<sup>366</sup>

The majority then considered the lack of adverseness between the United States and Windsor a "prudential" concern that weighed against justiciability, but nevertheless concluded that "countervailing considerations . . . outweigh the concerns underlying the usual reluctance to exert judicial power."<sup>367</sup> First, the Court noted that one consideration is "the extent to which adversarial presentation of the issues is assured by the participation of *amicus curiae* prepared to defend with vigor the constitutionality of the legislative act."<sup>368</sup> Here the Court noted that BLAG, which it considered an amicus, provided a "sharp adversarial presentation of the issues" sufficient to "satisfy[y] the prudential concerns that otherwise might counsel against hearing [the] appeal."<sup>369</sup>

Second, and more importantly, the majority stressed a clear adequacy of representation concern that weighed in favor of deciding the case. The Court noted that failing to address the constitutionality of DOMA would fail to provide "precedential guidance" for federal courts.<sup>370</sup> Accordingly, "[r]ights and privileges of hundreds of thousands of persons would be adversely affected" until a proper case reached the Court.<sup>371</sup> In fact, the Court stressed such a case may take "years" to reach the Court.<sup>372</sup>

In dissent, Justice Scalia, joined by Chief Justice John Roberts and Justice Clarence Thomas, disagreed that the case was justiciable, mocking

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364. *United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013).

365. *Id.* at 2686.

366. *Id.*

367. *Id.* at 2687 (quoting *Warth v. Seldin*, 422 U.S. 490, 500–01 (1975)).

368. *Id.*

369. *Id.* at 2688.

370. *Id.*

371. *Id.*

372. *Id.*

the Court's determination that adverseness is merely a prudential concern.<sup>373</sup> But Justice Scalia also considered the issue of justiciability an issue of adequacy of representation. Specifically, Justice Scalia noted that the Court's conclusion that it can sidestep adversity and address the constitutional issues almost *sua sponte* is "an assertion of judicial supremacy over the people's Representatives in Congress and the Executive."<sup>374</sup> More importantly, Justice Scalia quoted from an older decision by Judge Roger Taney that clarified why adverse parties should be required—the interests of third parties "*would be seriously affected* if the question of law was decided in the manner that both parties to this suit desire it to be."<sup>375</sup> Thus, like the majority, Justice Scalia's position was informed by a concern with adequacy of representation of the rights of others not before the Court.

As it turns out, Justice Alito, writing separately, provided the most sensible position on the justiciability of *Windsor*. In his view, the case was justiciable because BLAG had sufficient standing to appeal.<sup>376</sup> He noted that the House of Representatives, who BLAG represented in the litigation, was injured because the district court's invalidation of DOMA impaired its power to legislate.<sup>377</sup> In fact, he noted that the striking down of the statute, combined with the executive's failure to defend, effectively nullified the House's power to prevent repeal.<sup>378</sup>

Accordingly, and following a suggestion from a prior case, Justice Alito concluded that "'Congress is the proper party to defend the validity of a statute' when the Executive refuses to do so on constitutional grounds."<sup>379</sup> Indeed, current law provides some support for Justice Alito's position. Although current law assigns the Department of Justice the right to defend the constitutionality of a federal statute, Congress (and, arguably, a subpart of it) can defend a statute if it expressly provides for that possibility through statute.<sup>380</sup>

Although Justice Alito did not explicitly defend his position in terms of adequacy of representation, his position actually represented an improvement over those taken by the majority and Justice Scalia's dissent.

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373. *Id.* at 2701 (Scalia, J., dissenting).

374. *Id.* at 2698.

375. *Id.* at 2703 (quoting *Lord v. Veazie*, 49 U.S. (8 How.) 251, 255 (1850)).

376. *Id.* at 2712 (Alito, J., dissenting).

377. *Id.* at 2713–14.

378. *Id.* at 2713 (noting that "indeed, the House's vote would have been sufficient to prevent DOMA's repeal if the Court had not chosen to execute that repeal judicially").

379. *Id.* at 2714 (quoting *INS v. Chadha*, 462 U.S. 919, 940 (1983)).

380. See 28 U.S.C. § 516 (2012) ("*Except as otherwise authorized by law*, the conduct of litigation in which the United States . . . is a party, or is interested . . . is reserved to officers of the Department of Justice" (emphasis added)); see also Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 56 n.8 (D.D.C. 1973) (holding that a resolution by one of the Houses is insufficient to satisfy the statute).

First, it took into account the majority's concern with vigorous advocacy and the adequacy of representation of third-party interests without jettisoning the traditional requirement of adversity. The majority's position required the Court in *Windsor* to determine whether amici could provide sufficiently vigorous advocacy, and whether judicial intervention by the Court should occur now rather than later. In contrast, Justice Alito's position identified a party who intrinsically had an incentive to protect its own power: The House of Representative's authorized representative. Moreover, that party was, or could be, available to defend at any time, thus obviating the need to wait for an appropriate defendant.

Justice Alito's position was also an improvement over Justice Scalia's position in dissent. In Justice Scalia's view, the case was not justiciable because it represented "political arm wrestling" between the President and Congress that was best done through direct confrontation, not by resort to the Court.<sup>381</sup> But two aspects of this case showed the inappropriateness of abstention by the Court. First, the principle issue was the constitutionality of DOMA, and whether the statute complied with the Constitution did not depend on what could be horse-traded between the President and Congress.<sup>382</sup> Second, and more importantly, this case did not represent a clash between the President and Congress, but between the President and only one house of Congress, with the other house, the Senate, controlled by the same party as the President. Had the Democratic Party achieved control of both houses, Congress and the President could formally repeal the statute, or simply not enforce it. However, the choice of nonenforcement by the President would effectively destroy the power of the House and the requirement of bicameralism contained in the Constitution.<sup>383</sup> It would allow the President to effectively repeal the statute without the consent of the House. This quintessential separation of powers concern thus supported the standing of BLAG in this case.

But this separation of powers concern was also, at bottom, a due process concern. Presumably, again, the procedures contained in the Constitution are designed to adequately protect the interests of all. By finding that the case was justiciable, the Court prevented the President from circumventing bicameralism to the detriment of parties not before the Court.

## 2. *Hollingsworth v. Perry*

*Perry* similarly concerns the issue of whether a nonparty can defend a statute on appeal when a governmental entity refuses to defend. However,

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381. *Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting).

382. *Id.* at 2704–05 (noting that Congress can get the Executive to comply with the law by "refusing to confirm Presidential appointees to the elimination of funding").

383. See *INS v. Chadha*, 462 U.S. 919, 946, 948–49 (1983) (holding that a statute can only be passed if it satisfies "bicameralism" and "presentment" to the President).

*Perry* materially differs from *Windsor* in one important respect. Unlike in *Windsor*, supporters of Proposition 8 did not initially pass the proposition through the ordinary procedures for state legislation. Instead, the supporters enacted Proposition 8 through a voter-initiated referendum that bypassed both the state legislature and the governor altogether. Thus, in *Perry*, and unlike in *Windsor*, there was not a political branch, or a subpart like the House of Representatives, that could adequately represent the interests of the supporters.

Because of this difference, the California Supreme Court has supported the standing of supporters of voter-initiated provisions like Proposition 8 to defend such provisions when the state government has declined to do so. In *Perry*, the Ninth Circuit certified to the California Supreme Court the issue of whether the supporters of Proposition 8 had standing to sue under California law.<sup>384</sup> The California Supreme Court concluded that the supporters did have standing, and noted that it has consistently allowed supporters of voter-initiated enactments to defend. The California Supreme Court noted, in particular, that

because the initiative process is specifically intended to enable the people to amend the state Constitution or to enact statutes when current government officials have declined to adopt (and often have publicly opposed) the measure in question, the voters who have successfully adopted an initiative measure *may reasonably harbor a legitimate concern* that the public officials who ordinarily defend a challenged state law in court may not, in the case of an initiative measure, always undertake such a defense with vigor or with the objectives and interests of those voters paramount in mind. As a consequence, California courts have routinely permitted the official proponents of an initiative to intervene or appear as real parties in interest to defend a challenged voter-approved initiative measure in order “to guard the people’s right to exercise initiative power”<sup>385</sup>

Here, the California Supreme Court explicitly treated standing as an adequacy of representation issue. Rather than search for a “concrete and particularized” injury for standing purposes, California law looks to whether the proposed party will “undertake . . . a defense with vigor or with the objectives and interests of those voters paramount in mind.”<sup>386</sup> Indeed, the California Supreme Court noted that it permits such standing

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384. *Perry v. Schwarzenegger*, 628 F.3d 1191 (9th Cir. 2011) (certifying question to California Supreme Court).

385. *Perry v. Brown*, 265 P.3d 1002, 1006 (Cal. 2011) (emphasis added) (quoting *Bldg. Indus. Ass’n v. City of Camarillo*, 718 P.2d 68, 75 (Cal. 1986)).

386. *Id.*

“without any inquiry into or showing that the proponents’ own property, liberty, or other personal legally protected interests would be specially affected by invalidation of the measure.”<sup>387</sup>

The Court, however, did not follow the California Supreme Court’s lead. A majority concluded that the supporters did not have standing to defend for two reasons. First, Chief Justice Roberts, writing for the majority, noted that the supporters lacked standing because they only asserted a “generalized grievance” to enforce the law.<sup>388</sup> Second, the Court relied on general agency principles to conclude that the state of California had not explicitly authorized the supporters to represent their interests on appeal.<sup>389</sup> The majority noted, among other things, that the supporters were not agents of the state because the state could not control the actions of the supporters, which is “an essential element of agency.”<sup>390</sup>

Justice Kennedy, here writing in dissent, and joined by Justice Alito and Justice Sotomayor, concluded that the supporters had sufficient standing.<sup>391</sup> He noted, in particular, that California law, through the California Supreme Court, authorized the supporters to defend.<sup>392</sup> He also highlighted the supporters’ unique role in enacting Proposition 8, which included a substantial investment of time and resources to ensure passage.<sup>393</sup> Justice Kennedy thus implied that this previous investment showed that the supporters would vigorously defend Proposition 8.

More importantly, Justice Kennedy castigated the majority for using agency principles to determine adequacy of representation when they were completely inappropriate in this case. Specifically, he noted that “[t]he very object of the initiative system is to establish a lawmaking process that *does not depend on state officials*.”<sup>394</sup> Thus, the state cannot be the “principal” in an agency relationship who controls the supporters because the point of the initiative process is for the supporters to “circumvent[] elected officials who fail or refuse to effect the public will.”<sup>395</sup> Accordingly, the majority’s position prohibits “a State’s authorized representatives to defend the outcome of a democratic election.”<sup>396</sup>

Justice Kennedy further noted that the majority’s position “is also in tension with other cases in which the Court has permitted individuals to assert the claims on behalf of the government or others,” citing, for

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387. *Id.* at 1005.

388. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013).

389. *Id.* at 2667.

390. *Id.* (quoting 1 RESTATEMENT (THIRD) OF AGENCY § 1.01 (2005)).

391. *Id.* at 2668 (Kennedy, J., dissenting).

392. *Id.* at 2669.

393. *Id.* at 2669–70.

394. *Id.* at 2670 (emphasis added).

395. *Id.* at 2671.

396. *Id.* at 2674.

example, *qui tam* cases.<sup>397</sup> Justice Roberts, anticipating this argument, noted that cases like *qui tam* litigation have historical support.<sup>398</sup> But Justice Kennedy's positions in both *Hollingsworth* and *Windsor* represent, in a way, a reassertion of the functional, adequacy of representation view of the law of justiciability that has lost some saliency in the Court's recent opinions. Indeed, the re-emergence of this functional view of the law of justiciability, as seen in Justice Kennedy's invocation of *qui tam* cases in *Perry*, further provides implicit support for the trust view of the class action. Based on these very recent decisions, decided last term, the trust view of the class action may not be as far-fetched as it initially seems.

The trust view of the class action also highlights the central fallacy of the "agency" approach taken by Justice Roberts in his majority opinion. The trust view of the class action demonstrates that one cannot presume that individuals who are initially assigned the right to bring a lawsuit are the best representatives of those affected. This is true even when the party assigned the right to appear in court has been duly elected and authorized by the electorate. They may be, as in the case of individuals with small claims, or decedents, or fraud victims in *qui tam* situations, incompetent to adequately protect their interests. They may also be, as in the case of the government officials in *Perry*, adverse to the "principals" they are authorized to represent.

The clearest example of a court scrutinizing the adequacy of the parties before them is, ironically, the California Supreme Court. Admittedly, the California law on standing does not necessarily coincide with the law of Article III standing,<sup>399</sup> and thus one cannot infer too much from the California Supreme Court's actions about the objectives of the justiciability requirements of Article III. But it is telling, and somewhat humorous, when Justice Kennedy noted in *Perry* that "[t]he California Supreme Court's opinion reflects a better understanding of the dynamics and principles of Article III than does this Court's opinion."<sup>400</sup>

### CONCLUSION

This Article sought to defend a trust view of the class action and, more broadly, a functional view of the law of justiciability as primarily concerned with adequacy of representation. The arguments presented in this Article are far from comprehensive, particularly the arguments concerning the objectives of the law of justiciability under Article III. But

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397. *Id.* at 2673.

398. *Id.* at 2665.

399. See Matthew I. Hall, *Asymmetric Jurisdiction*, 58 UCLA L. REV. 1257, 1272 (2011) (noting that state standing law does not necessarily follow standing under Article III, which may raise problems).

400. *Perry*, 133 S. Ct. at 2674 (Kennedy, J., dissenting).

they are at least an attempt to develop "[t]he implicit premises of article III . . . as a tool of constitutional jurisprudence."<sup>401</sup>

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401. Brilmayer, *supra* note 13, at 321.