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Adequacy and the Public Rights Model of the Class Action After *Gratz v. Bollinger*

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INTRODUCTION

The day after the Supreme Court's decision in *Gratz v. Bollinger*,[1] newspapers hailed it as a defining moment in the history of affirmative action. *The New York Times* reported that, along with its companion case, *Grutter v. Bollinger*,[2] *Gratz* "provided a blueprint for taking race into account without running afoul of the Constitution's guarantee of equal protection."[3] The *Chicago Tribune* called the pair of cases the "most significant and wide-ranging affirmative action rulings in a generation."[4] And the *Los Angeles Times* questioned whether formulaic admissions systems could continue at all in light of the Court's invalidation of a race-based point system.[5]

No one, however, thought twice about another issue addressed by the Court in *Gratz*: the relationship between standing and class certification. Before reaching the constitutionality of the University of Michigan's freshman admissions policy, the Court first had to resolve whether the named representative was properly before it. In deciding that he was, the Court made explicit the difficulty in reconciling the demands of class certification—notably the requirement that a class representative be an "adequate" one—and the Constitution's case or controversy requirement. The newspapers, of course, cannot be blamed for this oversight; the parties had not even briefed the issues, and the public certainly was not waiting in rapt attention for the Court to resolve a seeming technicality. But now that the smoke from these cases has thinned, *Gratz v. Bollinger* is as notable for what it failed to resolve as for what it did resolve. Specifically, in addition to majority and dissenting opinions regarding the use of race in admissions, a split emerged among the Justices as to the relationship between Federal Rule of Civil Procedure 23 and constitutional standing.

The split arose because the named representative, Patrick Hamacher, asked the Court to enjoin the University from using race in the freshman admissions policy on behalf of a class of similarly situated individuals, even though that policy could never affect him again. He had applied as a freshman once before, and the University had denied Hamacher's application. He could therefore only attend the University of Michigan—and thus encounter the University's policies regarding race—if he applied as a transfer student. The transfer student policies, however, were not before the Court and that prompted Justice O'Connor to ask at oral argument whether the Court even had jurisdiction to

1. 539 U.S. 244 (2003).

2. 539 U.S. 306 (2003).

3. Linda Greenhouse, *Justices Back Affirmative Action by 5-4, but Wider Vote Bans a Racial Point System*, N.Y. TIMES, June 24, 2003, at A1.

4. Jan Crawford Greenburg, *Supreme Court Narrowly Upholds Affirmative Action*, CHI. TRIB., June 24, 2003, at 1.

5. David G. Savage, *Court Affirms Use of Race in University Admissions*, L.A. TIMES, June 24, 2003, at 1.

hear the claim.[6] Based on the Court's standing jurisprudence, Hamacher's odds of winning on this point did not seem good. The Court had long held that it was without power to provide forward-looking relief unless the person requesting it would derive some future benefit from that relief.[7] As things stood, it looked as though Hamacher would gain nothing if the Court invalidated the freshman admissions policy. Nonetheless, the majority found jurisdiction, over the dissents of Justices Stevens and Souter, and invalidated the use of race in the freshman admissions policy.

In so doing, the majority did not look to the Constitution but to the Federal Rules of Civil Procedure. Rule 23 governs class certification and requires, among other things, that a class representative be "adequate." Writing for the majority, Chief Justice Rehnquist first reasoned that Hamacher was an adequate representative; there was no conflict of interest between him and the class, and the claims he raised were "appropriate for class treatment."[8] In addition, he had standing to raise a claim because, although the two admissions policies were technically distinct, they were close enough: "[T]he University's use of race in undergraduate transfer admissions does not implicate a significantly different set of concerns than does its use of race in undergraduate freshman admissions."[9] The Chief Justice noted that the University considered the same set of factors in evaluating freshman and transfer applicants; the only difference was that the transfer policy gave more weight to race. This difference, in Chief Justice Rehnquist's estimation, had "no effect on petitioners' standing to challenge the University's use of race in undergraduate admissions."[10] In their respective dissents, Justices Stevens and Souter took issue with the majority's reliance on the Federal Rules and its flexible approach to Article III standing. There was no chance that the freshman admissions policy would affect Hamacher again in the future, and a "basic principle of Article III standing [is that] a plaintiff cannot challenge a government program that does not apply to him."[11] Thus, regardless of whether he would "adequately protect the interests of the class" or if the two policies implicated similar concerns, Hamacher was not the right person to make the claim.

The opinions in *Gratz* demonstrate how little about standing and the class action is clear. As it turns out, the Supreme Court is not the only court wrestling with the tension between Article III and Rule 23. Circuit and district court decisions have evinced a similar divide. The problem is a common one in the class context and has persisted for some time. Typically, a plaintiff brings a claim against a defendant alleging a particular injury. The plaintiff then seeks to

6. Transcript of Oral Argument at 4, *Gratz*, 539 U.S. 244 (No. 02-516).

7. City of Los Angeles v. Lyons, 461 U.S. 95, 102-03 (1983).

8. *Gratz*, 539 U.S. at 263-64 (2003).

9. *Id.* at 265.

10. *Id.* at 266.

11. *Id.* at 291-92 (Souter, J., dissenting).

certify a class that will challenge both the conduct forming the basis of the plaintiff's injury and some related conduct that has injured the unnamed class members, but not the named plaintiff himself. For example, a few prisoners can bring a class action challenging both the conditions of their confinement and the inadequacy of certain medical services that they have never received on behalf of unnamed class members.[12] Or a former employee who is not entitled to reinstatement seeks to enjoin an employment practice that will never again apply to her.[13] In answering whether the named representative can bring the claims, some courts say yes, because the named plaintiff is an adequate representative; other courts say no and point to his lack of standing.

This Article examines this split between standing and adequacy and offers a simple solution: in order to be an "adequate" representative for purposes of Rule 23, a named plaintiff must have standing to raise each claim asserted by the class. This conclusion flows from both the values preserved by Rule 23's adequacy requirement and the separation of powers values protected by Article III. First, a shared injury is the most effective way to protect the due process rights of unnamed class members. The class action, as a form of representative litigation, poses potentially high agency costs.[14] Unnamed members, though nominally "parties," frequently have their legal rights advanced by some person they do not know, in a lawsuit of which they are likely unaware, and in a courtroom they will never see. Or, to the extent that the plaintiff's attorney drives much of the litigation, the named representative serves to monitor the behavior of class counsel on behalf of the class.[15] In addition, even if unnamed members know of the class action, they have a strong incentive not to monitor the named plaintiff and, instead, rely on other class members to do the work.[16] There is no guarantee that in so doing the representative will place the interests of the class on the same plane as his own. This Article proposes that, at a minimum, one named representative must share each injury alleged on behalf of the class. The "remedial" incentives provided by a desire to rectify a past injury (or prevent a future

12. Hessine v. Jeffes, 846 F.2d 169, 176 n.3 (3d Cir. 1988).

13. Gutierrez v. Johnson & Johnson, 467 F. Supp. 2d 403, 414-15 (D.N.J. 2006).

14. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION 35 (Discussion Draft 2006) (discussing agency costs associated with representative litigation); *cf.* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 679-80 (1986) (discussing agency costs with respect to class counsel in similar terms).

15. Jean Wegman Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165 (1990) (noting and rejecting this purpose of the class representative).

16. *See* AMERICAN LAW INSTITUTE, *supra* note 14, at 41 ("The economically rational strategy for any individual may be to rely on others to monitor, so as to gain the benefit of improved agent performance without bearing the cost.").

injury) ensure that the named representative will provide adequate representation of the absent class members' interests.

Second, this conception of adequacy also serves the values guaranteed by Article III. A court's articulation of the law, through the facts of the case before it, limits the possibility that the judiciary will become a politicized institution and narrows the scope of its remedial powers. An expansive reading of Rule 23 would divorce the court's powers from the requirement that an injured party appear before it and thus threatens to remove or blunt these limitations. In addition, the ability of the courts to expand upon the types of claims that it can hear in a particular case works a change in the underlying substantive law as well. An expansive reading of Rule 23 permits courts to hear claims in a way that Congress did not intend and may even allow courts to hear claims that Congress could not permit based on the limits imposed by Article III.

This Article proceeds in three parts. Part I explains the Supreme Court's fractured case law regarding standing and adequacy, details its holding in *Gratz v. Bollinger*, and explains the Court's use of Rule 23's adequacy requirement to permit the named plaintiff to bring a claim he would otherwise not have standing to bring. Part II proposes a solution: a named plaintiff who does not have standing to raise each of the claims asserted by the class is necessarily inadequate. Part III explains why this proposal does a better job of ensuring that the class representative advances the interests of the class and then explains the ways in which this reading of adequacy preserves important separation of powers values.

I. The Supreme Court's Fractured Approach to Standing and the Class Action

Gratz v. Bollinger highlighted stark differences of opinion regarding the relationship between Rule 23 and Article III standing. But the division that appears in *Gratz* is not new. The debate over the relationship between standing and Rule 23 is in many ways simply an extension of the familiar debate regarding the scope of the "judicial power" from the non-class context. The doctrine of standing, as currently packaged, arose out of a conflict over whether the courts should protect only those private rights related to injuries claimed by particular individuals or protect so-called "public rights" affecting the populace at large (if not the party before the court). As exemplified by such cases as *City of Los Angeles v. Lyons*[17] and *Lujan v. Defenders of Wildlife*,[18] the private rights approach to standing won the day.

As it turns out, a similar debate has been simmering in the class action context. As illustrated in *Gratz*, the class mechanism provides a means to challenge policies that, while not affecting the named plaintiff personally, affect a larger segment of the population—specifically, the class. Unlike standing cases from

17. 461 U.S. 95 (1983).

18. 504 U.S. 555 (1992).

outside the class context, however, the Court has failed to indicate whether the private or public rights model will prevail.[19] In some cases, courts employ the private rights model contained in modern standing doctrine; in others, a looser standard that resembles the public rights doctrine is in effect. *Gratz* provides the latest and, perhaps, starkest illustration that this tension remains.

To provide context for the Court's discussion in *Gratz*, Section I.A first provides a brief sketch of the bygone quarrel over public rights and private rights in the context of standing. It discusses how the Supreme Court resolved the debate in favor of the private rights model in *Lyons* and *Lujan*. Section I.B discusses this same debate in the context of the class action, and Section I.C illustrates how this debate unfolded most recently in *Gratz* when the majority rejected this model in the class context.

A. The Debate Between Public Rights and Private Rights in the Standing Context

The judicial power is, in some ways, a contradiction. On the one hand, courts are capable of implementing and have ushered in wide-reaching changes to various aspects of society. From school desegregation to affirmative action, the courthouse has frequently served as a forum for sweeping social change. But the judicial power is one that is normally associated with resolving the claims of individuals, not formulating broader social policy. Regardless of the effects of the judicial power, the power itself does not traditionally look much further than the parties before the court.

Over the last forty years, courts and commentators have generally divided into two camps in resolving this seeming contradiction within the judicial power. One camp, espousing the "public rights" model, fully embraces the judiciary's power to affect broader social change or to define the rights of parties not before the court.[20] The public rights model is most commonly associated with *Flast v. Cohen*, in which the Court upheld taxpayer standing to raise claims

19. Gratz v. Bollinger, 539 U.S. 244, 263 n.15 (2003). The Court has recognized that this issue is unresolved. As Chief Justice Rehnquist stated, "[a]lthough we do not resolve here whether such an inquiry in this case is appropriately addressed under the rubric of standing or adequacy, we note that there is tension in our prior cases in this regard." *Id.* In his dissent, Justice Souter phrased the issue somewhat differently. He characterized the proposition "that Article III standing may not be satisfied by the unnamed members of a duly certified class" as a "weakness" in its case law—albeit one that "no party ha[d] invited [it] to reconsider" and which was now "settled law." *Id.* at 292 n.1 (Souter, J., dissenting).

20. *See, e.g.*, Susan Bandes, *The Idea of the Case*, 42 STAN. L. REV. 227, 289-90 (1990) (stating that courts should hear cases so as to "see the widest ramifications of its decisions as it engages in public norm creation"); Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 14 (1979) ("The task of a judge, then, should be seen as giving meaning to our public values and adjudication as the process through which that meaning is revealed or elaborated.").

under the Establishment Clause.[21] In *Flast*, the Court stated that such standing was appropriate even though each taxpayer would have a relatively negligible interest in the tax revenue supporting allegedly unconstitutional conduct. Instead, what mattered was the effect: someone could challenge expenditures that appeared to violate the Establishment Clause. With taxpayer standing, the Court was "confident that the questions will be framed with the necessary specificity [and] that the issues will be contested with the necessary adverseness"[22] to permit effective judicial resolution.

So described, the public rights model has two defining characteristics. First, although the party invoking the judicial power must be significantly adverse to the opposing party, he does not need to allege a personal injury as to every issue adjudicated.[23] In *Flast*, the Court upheld taxpayer standing after stating that standing doctrine "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."[24] If the party is sufficiently "adverse," standing and the exercise of the judicial power are appropriate. This belief stems from a simple assumption of exactly what the judiciary is meant to do. The particularized injury alleged by the named party simply exemplifies the larger issue that the court must resolve. As Professor Fiss has explained, "[w]hat is critical is not the black child turned away at the door of the white school, or the individual act of police brutality" but "rather a social condition that threatens important constitutional values and the organizational dynamic that creates and perpetuates that condition."[25] In other words, the judicial power serves to cure the broader social problems exemplified by an individual's claimed injury, not the injury itself.

Second, the public rights model justifies the courts' involvement in utilitarian or consequentialist terms. As implied by Professor Fiss above, it is the perceived importance of the right at issue or the perceived benefits of the social policy to be advanced—whether defined statutorily or otherwise[26]—that per-

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21. Flast v. Cohen, 392 U.S. 83, 105-06 (1968).

22. *Id.* at 106.

23. *See* Bandes, *supra* note 20, at 290 (describing the injury as "unimportant" once the court has framed the issue to its satisfaction because "the primary goal is to resolve the issue, not to settle a dispute between parties").

24. *Flast*, 392 U.S. at 99.

25. Fiss, *supra* note 20, at 18.

26. *See* Cass R. Sunstein, *Standing and the Privatization of Standing Law*, COLUM. L. REV. 1432, 1438-42 (1988). Professor Sunstein describes the creation of the public rights model as occurring in two steps. First, courts agreed that statutes provided cognizable interests that parties could advance without showing an injury. The parties implicated by particular policies embedded in statutes could thus seek to enforce those implicated interests in court without an injury. Second, Congress developed "surrogate standing," in which "certain plaintiffs [could] bring suit to vindicate the claims of the public at large even though they did not themselves have a statutorily protected interest." *Id.* at 1439.

mits the exercise of the judicial power. In *Flast*, the Court was clearly moved by the fact that no private party could challenge "such palpably unconstitutional conduct as providing funds for the construction of churches for particular sects."[27] More dramatically, Justice Douglas's dissent in *Sierra Club v. Morton* urged the Court to exercise jurisdiction over an environmental claim on behalf of the "inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage."[28] Similarly Professor Bandes has embraced the public rights model of standing so that a court can "see the widest ramifications of its decisions as it engages in public norm creation."[29] For Justice Douglas and Professor Bandes, as with the public rights model generally, the "[c]ontemporary public concern" over a particular matter, not the injuries of the parties before it, justifies a court's involvement.[30]

Though the public rights model made a brief appearance in the Supreme Court's case law in the 1960s and 1970s, an alternate model—the private rights model—has prevailed.[31] As exemplified by two cases—*City of Los Angeles v. Lyons* and *Lujan v. Defenders of Wildlife*—the Court rejected the public rights model of litigation in favor of the private rights model. It defined the judicial power in terms of the particularized injuries of the parties before the Court. For example, in *Lyons*, the Court rejected a request for injunctive relief based on a past chokehold by the Los Angeles police that would not likely affect the plaintiff in the future.[32] Similarly, in *Lujan*, the Court refused to enjoin the Secretary of the Interior from exempting overseas government projects from domestic environmental legislation when the plaintiffs could only assert a "some-day" intention to return to the affected region.[33] In both cases, an "irreducible consti-

27. 392 U.S. at 98 n.17.

28. 405 U.S. 727, 741 (1972) (Douglas, J., dissenting).

29. Bandes, *supra* note 20, at 290.

30. *Sierra Club*, 405 U.S. at 741-42 (Douglas, J., dissenting).

31. *See* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 126–27 (5th ed. 2003). For a brief history of the Court's standing case law, see Sunstein, *supra* note 26.

32. City of Los Angeles v. Lyons, 461 U.S. 95 (1983). Instead, what was before the local authorities was the proper venue for pressing claims regarding the chokeholds: "A federal court . . . is not the proper forum . . . unless the requirements for entry and the prerequisites for injunctive relief are satisfied." *Id.* at 111-12. In dissent, Justice Marshall called the Court's holding an "unprecedented and unwarranted approach." *Id.* at 113 (Marshall, J., dissenting). Prior to *Lyons*, Marshall argued, "[n]one of our prior decisions [had] suggest[ed] that . . . requests for particular forms of relief raise any additional issues concerning his standing." *Id.* at 114. At least one commentator agreed. *See* Richard H. Fallon Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 5 (1984) (calling *Lyons* an example of the "unrestrained reworking of [standing] doctrine," which is hostile toward public law litigation).

33. Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992).

tutional minimum" of injury in fact, causation, and the court's ability to fix the injury bested a public rights model that focused more on the adverseness of the parties.[34] Unlike the public rights model, a particularized injury is essential to the private rights model; a plaintiff challenging the "legality of government action" must be "an object of the action . . . at issue."[35] Although both *Lyons* and *Lujan* seemingly mark the death knell for the public rights model in the non-class context, the same cannot be said of the class action.

B. The Class Action Confusion: The Peaceful Coexistence of the Public and Private Rights Models

Despite the Court's clear rejection of the public rights model in individual litigation, the Supreme Court has inconsistently applied the standing principles in *Lyons* and *Lujan* to class actions. In short, the Court has alternated between a strict adherence to the standing principles announced in *Lyons* and *Lujan* and a lax approach that relies on Rule 23's adequacy requirement. One set of cases is consistent with enforcing the private rights model announced in *Lyons* and *Lujan* in the class context. Another focuses squarely on adequacy and shapes the judicial power in a way akin to the public rights model.[36]

In two cases, *Blum v. Yaretsky* and *Lewis v. Casey*, the Court has appeared to embrace the private rights model of litigation in the class context. In *Blum*, a class of Medicaid recipients challenged decisions by state-funded nursing homes to transfer patients to higher or lower levels of care without notice or a hearing.[37] The named plaintiffs had only moved to a lower level of care. Nonetheless, they sought to enjoin state officials from transferring patients on behalf

34. *Id.* at 560.

35. *Id.* at 561.

36. Other scholars have noted the same dichotomy, but have coined different terms for the phenomenon. For example, Professor Shapiro, in "the interest of oversimplification" describes one model, which he calls the "aggregation model," that describes the class as a method for pooling common, individualized claims and would thus require individual involvement. David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 918 (1998). The second model—called the "entity" model—considers the class to provide the requisite adverseness. *Id.* at 919. By referring to the public and private rights models, this Article views the divide from the perspective of judicial power. That is, regardless of whether the class is a separate entity or enjoys an independent legal significance, this Article examines how the judicial power operates on the unnamed members of the class.

37. Blum v. Yaretsky, 457 U.S. 991, 995-96 (1982). Thus, if a patient lived in an intensive care facility but was self sufficient enough to reside in an intermediate care facility, the nursing home would transfer the patient to the intermediate care facility and the state would stop funding the higher level of care. *Id.* at 993-95. The converse was also true; patients could move from lower levels of care to facilities that provided more intensive care. *Id.*

of a class of Medicaid recipients that had been transferred to both higher and lower levels of care, and the district court complied.[38] On appeal, the Supreme Court held that it was without jurisdiction to evaluate the policies governing transfers to higher levels of care because the named plaintiffs had not been affected by or threatened with such transfers.[39] Justice Rehnquist's majority opinion foreshadowed much of the reasoning that would characterize *Lyons* in the next Term. Because the named plaintiffs had "not been threatened with transfers [to higher levels of care], they ha[d] no standing to object," and the district court "was without Article III jurisdiction to enter its judgment."[40] In addition, class representatives "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent."[41] Just because the named plaintiff could allege an injury to challenge one practice did not mean that he "possess[es] by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject."[42]

Similarly, in *Lewis*, the Court denied that an illiterate class representative had standing to enjoin prison practices—such as inadequate legal assistance to non-English-speaking inmates—that did not affect him.[43] In *Lewis*, a class of inmates claimed that the law libraries and legal services provided by the Arizona Department of Corrections were constitutionally deficient.[44] The district court agreed and instituted a sweeping injunction related to everything from the availability of bilingual "legal assistants" for non-English-speaking inmates to the content of educational videos on mounting a legal defense.[45] The Supreme Court reversed, holding that the only "inadequacy which the suit empowered the court to remedy" related to the prisons' failure to accommodate illiterate

38. *Id.* at 996.

39. *Id.* at 1001-02.

40. *Id.* at 999.

41. *Id.* at 1001 n.13 (quoting Warth v. Seldin, 422 U.S. 490, 502 (1975)).

42. *Id.* at 999.

43. 518 U.S. 343, 347-49 (1996).

44. *Id.* at 346. The Supreme Court had held in *Bounds v. Smith*, 430 U.S. 817, 828 (1977) that inmates had a "fundamental constitutional right of access to the courts," and in order to give effect to this right, prisons were required to provide law libraries and a minimum level of legal assistance.

45. *Lewis*, 518 U.S. at 347. To resolve what it perceived to be constitutional deficiencies, the district court imposed a sweeping injunctive order covering everything from the hours the libraries must remain open to the content of a legal education video for inmates. *Id.* The court also required the prisons to find and train bilingual inmates to serve as "Legal Assistants" for those inmates who did not speak English and appointed a Special Master to ensure that the prisons complied. *Id.*

inmates, not the sundry other challenges related to legal services.[46] The reason was simple: "standing is not dispensed in gross," and a plaintiff with the "right to complain of *one* administrative deficiency" was not thereby able to challenge "*all* administrative deficiencies" solely by use of the class mechanism.[47] Otherwise, "any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review."[48]

Lower courts have similarly enforced standing requirements to limit the class action. The Eleventh Circuit invalidated a class claim to challenge testing requirements for prison correctional officers when the named plaintiff had never been injured by those testing requirements.[49] The court noted "it is not enough that a named plaintiff can establish a case or controversy between himself and the defendant . . . as to just one of many claims he wishes to assert."[50] Similarly, in *Drayton v. Western Auto Supply Company*, the Eleventh Circuit invalidated the district court's class certification order and held that the named plaintiffs could not challenge a company's allegedly discriminatory hiring practices under Title VII when the defendant had hired all of the named plaintiffs.[51] The named plaintiffs "lack standing to challenge . . . hiring practices or to represent job applicants because each . . . was hired at the store where he or she applied for a position."[52] As the Supreme Court had reasoned in *Blum* and *Lewis*, the class action added nothing to questions of standing.

Thus conceived, the class action serves simply as a procedural mechanism to aggregate particularized injuries for purposes of litigation, but it does not otherwise change the underlying standing requirements.[53] Both *Blum* and *Lewis* are consistent with the private rights model typified by *Lyons* and *Lujan* as applied to the class context, and both cases limit the use of the class device to an aggregating function. With the class action, as in the non-class context, the constitutional injury serves to determine not only when the doors of the federal

46. *Id.* at 358.

47. *Id.* at 358 n.6.

48. *Id.*

49. Griffin v. Dugger, 823 F.2d 1476, 1483 (11th Cir. 1987).

50. *Id.*

51. No. 01-10415, 2002 WL 32508918, at *3 (11th Cir. 2002).

52. *Id. See also* Robinson v. City of Chicago. 868 F.2d 959, 968 (7th Cir. 1989) (rejecting claim that class independently conferred standing to seek an injunction because "the *Lyons* plaintiff could have acquired standing simply by pleading his claim as a class action").

53. *See, e.g.*, Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475, 484-86. As argued by Professor Epstein, the "origin and appeal" of the class action stemmed from those instances in which the expected recovery was too small for any individual to file suit. Class actions thus permit these plaintiffs to aggregate smaller individual claims "in order to take advantage of what they hope will prove to be economies of scale." *Id.* at 485-86.

court will swing open but also how widely. Had the Court applied *Blum* and *Lewis*, the procedural issues in *Gratz* would have made for an easy case. Nonetheless, despite being largely consistent with the private rights model exemplified by *Lyons* and *Lujan*, neither *Blum* nor *Lewis* definitively ushered the private rights model into the class context.

Although the Supreme Court and lower courts have frequently relied on standing concepts to limit the class action, courts have also relied on Rule 23 at the expense of standing principles, which produces "judicial power" that is similar to that envisioned by the public rights model. In *General Telephone Co. v. Falcon*, the Court invalidated so-called "across-the-board" challenges to allegedly discriminatory employment practices.[54] The district court had certified a class consisting of Mexican-American employees and future applicants who were challenging all unequal employment practices alleged to have been committed by the employer pursuant to a policy of racial discrimination.[55] The named plaintiff, Falcon, had simply alleged that he was denied a promotion.[56] The Court held that the district court had erred in certifying the class, although it did so based on the reasoning of Rule 23 and not Article III. The class mechanism had displaced this traditional notion in favor of litigating common issues in an "economical fashion."[57] The plaintiffs had failed to illustrate that any common injury linked their denied promotion to the policies applicable to job applicants.[58] In particular, the "class representative must be part of the class and

54. 457 U.S. 147 (1982). The broadside attacks started soon after the passage of Title VII and the revision of Rule 23 in 1966. The logistics of an "across the board" challenge were simple. A named plaintiff would allege simply that the employer had discriminated against him based on a protected characteristic, usually race. The district court could then certify a class consisting of all employees or applicants who were members of that protected class. The entirety of a company's policies then entered the case, even if unrelated to the named plaintiff. *See, e.g., id.* at 149-50, 156-59. The first "across the board" challenge to an employment practice occurred in *Johnson v. Ga. Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969); *see* Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 38 n.207 (1982) (crediting *Johnson* as first to use "across the board" challenge). The Fifth Circuit denied the defendant's contention that a "discharged Negro employee . . . could only represent other discharged Negro employees." *Johnson*, 417 F.2d at 1124. Instead, the court credited the trial court's reasoning that the "Damoclean threat of a racially discriminatory policy hangs over the racial class (and) is a question of fact common to all members of the class." *Id.* (quoting Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966)).

55. *Falcon*, 457 U.S. at 152.

56. *Id.* at 147. In creating such a class, the district court was not breaking any new ground; the "across-the-board" challenge had enjoyed a long life in the courts of appeals. Chayes, *supra* note 54, at 38 n.207 (1982) (crediting creation of across-the-board challenges to 1969 decision).

57. *Falcon*, 457 U.S. at 155.

58. *Id.* at 158.

'possess the same interest and suffer the same injury' as the class members."[59] This shared injury ensured that the class representative would be sufficiently adverse and that the class would satisfy Rule 23's requirements of commonality, adequacy, and typicality.[60] The differences between the claims raised by the named plaintiff and the class undermined the efficiency of the class action by bogging down the court in multiple unrelated issues.[61] Absent some showing of a common issue aside from the race of the class members, class certification was inappropriate.[62]

Although perhaps unintended, the Court's holding in *Falcon* exemplifies the two defining characteristics associated with the broader judicial power of the public rights model. First, the Court left open the possibility that a named plaintiff could challenge policies that did not immediately affect him, provided that the challenged policies were similar to the named plaintiff's claims.[63] The

59. *Id.* at 156 (quoting E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977)).

60. *Id.* at 156-57. (stating that Court was concerned with the same injury "such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims"). The Court went on to note that the commonality and typicality requirements ensure that the "interests of the class members will be fairly and adequately protected in their absence" and that, in this regard, these two requirements tend to merge with the adequacy requirement. *Id.* at 157-58 n.13.

61. *Id.* at 159.

62. *Id.* at 157. Even though the Court thus far closed the door on the plaintiff's class, it left a crack open for future claims in its much-discussed Footnote Fifteen. *See, e.g.*, Daniel S. Klein, *Bridging the Gap: Do Claims of Subjective Decisionmaking in Employment Discrimination Class Actions Satisfy the Rule 23(a) Commonality and Typicality Requirements?*, 25 REV. LITIG. 131, 138-39 (2006) (describing the Court's "oracular" Footnote Fifteen and containing an exegesis on its meaning). The Court permitted "across the board" claims where there was "[s]ignificant proof that an employer operated under a general policy of discrimination [that] manifested itself in hiring and promotion practices in the same general fashion." *Falcon*, 457 U.S. at 159 n.15. In other words, if two separate policies were significantly similar in their manner of discrimination or if the employer pervasively discriminated in a consistent fashion, plaintiffs could lodge a broader challenge. The lower courts have yet to establish the exact contours of this proviso to the Court's holding. *See, e.g.*, Webb v. Merck & Co., Inc., 206 F.R.D. 399, 405-06 (E.D. Pa. 2002) (rejecting class certification as it would require the factfinder "to consider each of the named plaintiffs' claims on a case-by-case basis along with the unique defenses Merck will raise to each plaintiff"). Nonetheless, it would permit some form of "across the board" challenge, meaning a challenge to policies that do not affect a named plaintiff. *See, e.g.*, McReynolds v. Sodexho Marriott Servs., Inc., 208 F.R.D. 428, 436 & n.15, 449 (D.D.C. 2002) (certifying class that sought to enjoin companywide discrimination in segments of the company not represented by a named plaintiff).

63. *Falcon*, 457 U.S. at 159 n.15.

central inquiry under Rule 23 was whether the class claims and the named representative's claims were close enough to ensure the requisite level of adverseness for the unnamed class members' claims. In *Flast*, the Court upheld taxpayer standing under a similar rationale: proof of adverseness justified standing as to a particular claim, even if the named plaintiff could not allege a particularized (or noticeable) injury as to each and every issue raised. Second, the Court justified the reliance on Rule 23 in consequentialist terms. Whereas the public rights model stressed the importance of the legal issue (e.g., the Establishment Clause or the environment), the Court in *Falcon* stressed efficiency. The Court refused to hear the case because the varying forms of proof threatened to blunt the efficiency benefits promised by the class mechanism, not because, as discussed in *Blum*, an individualized injury was a sine qua non of federal jurisdiction.

In a related context, the Court long ago abandoned a strict adherence to Article III notions when dealing with mootness. In *Franks v. Bowman Transportation Corp.*, the Court denied that the case was moot when the defendant lawfully terminated the named plaintiff, effectively denying him one form of post-judgment relief.[64] The Court characterized the mootness issue as "turn[ing] on whether, in the specific circumstances of the given case at the time it is before this Court, an adversary relationship [exists that is] sufficient to" ensure adverseness.[65] The Court pointed to the unnamed class member; the "adversary relationship obviously obtained as to unnamed class members with respect to the underlying cause of action," eliminating any mootness concerns.[66]

Lower courts have seized upon this rationale, holding that the question of whether a named plaintiff can seek injunctive relief that will not benefit him directly is a question solely of adequacy. In so holding, the courts credit the ability of the named plaintiff to fairly represent the interests of the class as a whole.[67] Outside of the modest constraints imposed by Rule 23's adequacy requirements, the lack of standing will not get in the way of class certification. Permitting injunctive relief as long as the named plaintiff was an adequate representative thus protects the "flexibility" inherent in class actions from an overly rigid enforcement of standing rules.[68] Second, courts have also upheld class claims for in-

64. 424 U.S. 747, 752-54 (1976).

65. *Id.* at 755-56.

66. *Id.* at 756.

67. *See, e.g.*, Rosenburg v. IBM, No. C 06-0430 PJH, 2006 WL 1627108, at *10-11 (N.D. Cal. June 12, 2006) (upholding class certification seeking injunction where named plaintiff would not be injured in the future based on adequacy of representative); Gutierrez v. Johnson & Johnson, 467 F. Supp. 2d 403, 413-14 (D.N.J. 2006).

68. *See* Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239 (3d Cir. 1974); *Rosenberg*, 2006 WL 1627108; Lewis v. Tully, 99 F.R.D. 632, 645 (N.D. Ill. 1983);. In *Wetzel*, the Third Circuit held that a former employee who was not entitled to reinstatement could nonetheless seek to enjoin the defendant's promotion policies. 508 F.2d at 247. The court failed to note any standing problems that might attend the injunc-

junctive relief based solely on the unnamed class members' interest in obtaining future relief.[69] The plaintiff may lack standing to seek an injunction, but the class does not.[70] Unlike the pure adequacy approach above, this rationale does recognize that there are at least some standing constraints imposed by Article III. But courts have concluded that if the named representative is otherwise adequate, the class's interests in injunctive relief satisfy the constitutional requirements. As long as the named representative has *some* injury (e.g., a past injury) to get before the court, the class's interests in future relief can provide the needed future injury for injunctive relief.

This view of the class action has found a legion of support among commentators. Many commentators advocate a relaxed notion of standing based on a belief that the class itself has an independent legal significance that justifies departing from the private rights model. Professor Harold Shapiro defines this view as the entity model and justifies it in terms of the efficiency of resolving multiple related claims all at once.[71] The unnamed class members become an independent entity, such as a corporation or a union, and "should be regarded

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tion and, instead, defended the former employee's adequacy under Rule 23. *Id.* The court reasoned that, as former employees, the named plaintiff would be adequate because he possessed extensive knowledge of the company and would be free from retaliatory discharge. *Id.* Similarly, in *Rosenburg*, the district court certified a class whose named plaintiffs were former employees who were not seeking reinstatement. 2006 WL 1627108, at *10. The defendants claimed that certain named plaintiffs lacked standing to seek injunctive relief, but the court rejected this claim by stating that the named plaintiffs were still adequate class representatives. *Id.* In other words, because the plaintiffs were adequate to represent the class, the objections to their standing to seek an injunction were simply besides the point. In both of these cases, the courts permitted the former employees to serve as class representatives despite the fact that the injunctive relief could not possibly benefit them in the future. *See also* Bates v. United Parcel Serv., Inc., 511 F.3d 974, 986 (9th Cir. 2007) (holding that an employee who is precluded from applying for a job using the test he seeks to enjoin has standing to raise class claims); Gavin v. AT&T Corp., 543 F. Supp. 2d 885, 895 n.12 (N.D. Ill. 2008) (stating that "where the details of the named plaintiff's injury varies [sic] from that of putative class members, the issue may not be one of Article III standing at all but one of adequacy under Rule 23"); *In re* Mutual Funds Inv. Litigation, 519 F. Supp. 2d 580, 582 n.2 (D. Md. 2007) (asking parties for further briefing on "whether a plaintiff who owns shares in one mutual fund can be a proper class representative under Rule 23 for owners of shares in other mutual funds within the same family of funds").

69. This position is consistent with envisioning the class as an "entity," as theorized by Professor David Shapiro. *See* Shapiro, *supra* note 36, at 933.

70. *Cf. In re* Relafen Antitrust Litig., 221 F.R.D. 260, 269 (D. Mass. 2004) (stating that "in the 'nontraditional' context of class actions, the purpose of the standing requirement—'limiting judicial power to disputes capable of judicial resolution' . . . —may be served even absent a personal stake held by the named plaintiff").

71. Shapiro, *supra* note 36, at 933.

not only as the party plaintiff but as the client" for purposes of the case-or-controversy requirement.[72] Similarly, Professors Macey and Miller have gone one step further and called for the elimination of the class representative entirely.[73] In their view, the class representative is a "mere figurehead who adds little or nothing to the conduct of the litigation in the large-scale, small-claim setting."[74] As a result, "[i]t should not be necessary from the standpoint of justiciability . . . that there be *any* named plaintiff at all."[75] Notably, as the Court did in *Falcon* and in its public rights cases, they defend this contention by pointing to both the guarantees of adverseness otherwise provided by the unnamed class members.[76]

Thus, when the Court finally heard *Gratz*, it was an open question—whether viewed in terms of the Court's precedent or the academic commentary—which model it would choose when resolving the standing of the class representatives.

C. Gratz v. Bollinger: *The Supreme Court Holds That Rule 23 Trumps Standing Requirements*

Gratz v. Bollinger involved a challenge to the use of race in undergraduate admissions at the University of Michigan. In late 1996, Patrick Hamacher applied for admission to the University of Michigan's College of Literature, Science, and the Arts, but his credentials fell short of the requirements for first-review admission. Although the College of Literature, Science, and the Arts would have immediately admitted a minority applicant with Hamacher's credentials, Hamacher, a white applicant, remained on the waiting list for several months and was ultimately rejected. In the fall of 1997, Hamacher enrolled at Michigan State University, intending to transfer to the University of Michigan the following year. Prior to transferring, Hamacher and another rejected candidate, Jennifer Gratz, filed suit in the Eastern District of Michigan challenging the University's freshman admissions guidelines.[77] Critically, the plaintiffs sought compensatory relief for the University's past admissions policy (which

72. *Id.* at 939.

73. Jonathan 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, 83 (1991).

74. *Id.*

75. *Id.*

76. *Id.* at 82. First, the professors argue that, "whether or not the named plaintiff's claim had become moot, there remained a concrete, live controversy in both cases with clearly framed issues for adjudication." *Id.* In addition, a converse rule gives a defendant a perverse incentive to "buy off" the named plaintiff, frustrating efforts to assess their liability to the class. *Id.*

77. Complaint, Gratz v. Bollinger, 97-CV-75231 (E.D. Mich. Oct. 14, 1997).

had been used to reject Hamacher and Gratz's applications), and they sought to enjoin the use of race in the University's slightly modified freshman admissions policy that was in place at the time they filed suit (which the University had not applied to Hamacher or Gratz).[78] The district court certified a class of individuals who "applied for and were not granted admission" because of their race and appointed Hamacher as the class representative.[79] Soon thereafter, the district court found for the University on summary judgment and an appeal followed. The appeal quickly reached the Supreme Court.[80] The only issue before the Court was whether to enjoin the University's extant freshman admissions policy on behalf of the class; the claims for compensatory relief fell out of the case altogether.[81] At oral argument, Justice O'Connor asked a question that neither party had briefed: Does "the named plaintiff Patrick Hamacher ha[ve] standing in this case?"[82]

The answer to this question ultimately divided the Court. Though Justice Souter voiced his own concerns over the majority's "indulgent" theory of standing,[83] the primary objection to Hamacher's standing was set forth in Justice Stevens's dissent. In arguing that Hamacher lacked standing to challenge the freshman admissions policy, Justice Stevens relied on the private rights line of cases from both the non-class and class action contexts. First, citing *Lyons*, Justice Stevens reaffirmed the rule that a past injury does not confer standing to seek future relief.[84] When the suit was filed, "neither [Gratz nor Hamacher] faced an impending threat of future injury based on Michigan's new freshman admissions policy;" therefore, they were bringing claims to challenge a policy

78. Gratz v. Bollinger, 539 U.S. 244, 252-56 (majority opinion), 282-84 (Stevens, J., dissenting).

79. Opinion Granting Plaintiff's Motion for Class Certification and Bifurcation, Gratz v. Bollinger, 97-CV-75231-DT (E.D. Mich. Dec. 23, 1998).

80. The district court ruled on the parties' motions for summary judgment; admissions policies in place from 1995 to 1998 were unconstitutional, but the University's point-based policies in place from 1999 forward could go to trial. *See* Plaintiff's Memorandum of Law in Support of Motion for Partial Summary Judgment on Liability at 4-15, Gratz v. Bollinger, CV 97-75231 (E.D. Mich. Apr. 8, 1999). An appeal to the Sixth Circuit followed, in which both parties sought to reverse and affirm the district court's decisions. After the case had been briefed and argued but before the Sixth Circuit's decision, the Supreme Court granted certiorari to evaluate the University's undergraduate and law school admissions policies in tandem. *See* Gratz v. Bollinger, 539 U.S. 244 (2003).

81. *Gratz*, 539 U.S. at 283-84 (2003) (Stevens, J., dissenting) (discussing the procedural posture and the way in which other claims fell out of the case).

82. Transcript of Oral Argument at 4, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516).

83. *Gratz*, 539 U.S. at 292 (Souter, J., dissenting).

84. *Id.* at 284 (Stevens, J., dissenting).

that did not apply to them.[85] The transfer policy was the only one the plaintiff could enjoin, and it was "not before [the] Court and was not addressed by the District Court."[86] Thus, Justice Stevens argued, jurisdiction was lacking based on the "elementary" principle that "[t]o have standing, . . . the petitioners' own interests must be implicated."[87]

Second, Justice Stevens rejected the claim that similarities between the freshman and transfer admissions policies were sufficient to justify the Court's involvement. In the first place, the Court would render its decision without having examined the details of the transfer policy. Unlike freshman admissions, "Michigan does not use points in its transfer policy; some applicants, including minority and socio-economically disadvantaged applicants, 'will generally be admitted' if they possess certain qualifications . . . ."[88] In addition, there was no guarantee that an injunction "would have any impact on Michigan's transfer policy."[89] After all, the majority did not find that *any* use of race was impermissible. It simply held that the existing freshman admissions policy was not narrowly tailored. In short, the Court could not be sure that its injunction against the "use of race" would affect the only policy that could conceivably impact the named plaintiffs.[90] Finally, echoing *Blum* and *Lewis*, Justice Stevens denied that the class action changed the relevant inquiry. Even though some members of the class would certainly encounter the freshman admissions policy in the future, "a class action . . . adds nothing to the question of standing," and a named plaintiff cannot rely on the injuries of unnamed class members to gain it.[91] In support of this claim, Justice Stevens pointed to the Court's rationale in *Blum*. Hamacher might have had standing "to claim damages for past harm on behalf of class members," but he could not serve as a class representative for the "limited purpose of seeking injunctive and declaratory relief."[92]

Although the majority did note the "tension in [the Court's] prior cases," it chose not to resolve it.[93] Whether Justice Stevens's objection was viewed as ade-

85. *Id.*

86. *Id.* at 286.

87. *Id.* at 289.

88. *Id.* at 286 (quoting the University of Michigan's transfer policy).

89. *Id.* at 287.

90. *Id.* For Justice Stevens, "the differences between the freshman and the transfer admissions policies ma[d]e it extremely unlikely, at best, that an injunction requiring respondents to modify the freshman admissions program would have any impact on Michigan's transfer policy." *Id.*

91. *Id.* at 289 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976)).

92. *Id.* at 289 n.7.

93. *Id.* at 263 n.15. The majority noted a tension between *Blum* and *Falcon*.

quacy or standing, either was "clearly satisfied in this case."[94] This claim notwithstanding, the majority resolved the issue as a question of Rule 23 adequacy as opposed to Article III standing. In so doing, the Court sided squarely with the broader approach to standing posited by *Falcon*, giving less credence to the traditional limitations on the judicial power announced in *Lyons* and *Blum*. The Court justified its decision, in part, based on the benefits of efficiency. In short, the majority concluded that, because Hamacher had standing to challenge the transfer admissions policy and because the freshman admissions policy raised the "same set of concerns," he could properly seek to enjoin both admissions policies on behalf of the class, even though the freshman admissions policy would never apply to him again.[95]

First, the majority considered the named plaintiffs to be sufficiently adverse to permit the class action to go forward. The majority considered the class representative's "personal stake, in view of both his past injury and the potential injury he faced at the time of certification."[96] As evidence of his adverseness, the majority considered the litigation history. From the initial complaint through oral argument, the named plaintiffs had "consistently challenged the University's use of race in undergraduate admissions and its asserted justification of promoting 'diversity.'"[97] The request for an injunction that would prevent the formulaic consideration of race in both freshman and transfer admissions decisions was consistent with their asserted opposition to the use of race. Second, the court justified injunctive relief based on the logic of Rule 23 and the fact that the policies did not "implicate a significantly different set of concerns," despite the fact that the freshman admissions policy would not affect the named plaintiffs again.[98] The district court had correctly certified the class after finding that the defendant's "practice of racial discrimination pervasively applied on a classwide basis."[99] Permitting Hamacher to challenge the freshman admissions policy hinged in large part on the fact that the freshman and transfer admissions policies involved the same criteria. The list of factors used to evaluate transfer applicants "specifically cross-reference factors and qualifications considered in assessing freshman applicants."[100] The same factors used to evaluate the contribution made by freshman applicants to a diverse class were used to evaluate transfer applicants. The only difference between the two was that "freshman applicants receive 20 points and 'virtually' all who are minimally qualified are admitted, while 'generally' all minimally qualified minority trans-

94. *Id.* at 263.

95. *Id.* at 245.

96. *Id.* at 268.

97. *Id.* at 263.

98. *Id.* at 264.

99. *Id.* at 263-64.

100. *Id.* at 265.

fer applicants are admitted outright."[101] In other words, the difference between the policies was merely a question of degree, not kind. In turn, this difference had "no effect on [Hamacher's] standing."[102]

To support its claim, the majority first pointed to *Blum*.[103] The majority characterized the Court's decision to pare back on the class claims in *Blum* as turning on the factual differences between transfers to higher or lower levels of care. The majority stated that the class representative who had only been threatened with transfers to lower levels of care could not represent a class challenging transfers to higher levels of care because the former "involved a number of fundamentally different concerns."[104] In particular, "transfers to lower levels of care implicated beneficiaries' property interests given the concomitant decrease in Medicaid benefits, while transfers to higher levels of care did not."[105] The majority said nothing about the Article III reasoning in *Blum*. Instead, it characterized the case as solely considering the "fit" between the claims of the class representative and the class.[106]

The majority also pointed to *Falcon* as being "[p]articularly instructive."[107] In *Falcon*, the Court had left a door open for a potential "across-the-board" class action, which would include both applicants and employees, if an employer "used a biased testing procedure to evaluate both applicants for employment and incumbent employees."[108] In *Gratz*, the University's desire to have a "diverse student body" provided the equivalent of a "biased testing procedure" that permitted the Court to examine a broad range of related claims, even if the named plaintiffs could not allege an injury as to every challenged policy.[109] Finally, the majority justified its decision, in part, on the efficiency gains achieved by the class device. Unlike in *Falcon*, the class device "saved the

101. *Id.* at 266.

102. *Id.*

103. *Id.* at 264.

104. *Id.*

105. *Id.*

106. *Id.* at 264-65 ("[In *Blum*,] we found that transfers to lower levels of care involved a number of fundamentally different concerns than did transfers to higher ones .... In the present case, the University's use of race in undergraduate transfer admissions does not implicate a significantly different set of concerns than does its use of race in undergraduate freshman admissions.").

107. *Id.* at 267.

108. *Id.* (quoting Gen. Tel. Co. v. Falcon, 457 U.S. 147, 159 n.15 (1982)). For a discussion of Footnote Fifteen, where the Court set forth this reasoning, see *supra* note 63 and accompanying text.

109. *Id.* at 266-67.

resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion."[110]

A thorough analysis of the *Gratz* decision leads one to ask: Did the *Gratz* majority replace remedial standing with adequacy in the class context? By all measures, the Court gave no indication that it was breaking new ground in deciding that Hamacher could enjoin the freshman admissions policy. At each turn, the majority situated its conclusions within the Court's case law governing the relationship between standing and adequacy. However, it is undeniable that Hamacher, as the representative of a class, was able to enjoin a policy that he would not have had standing to enjoin outside of the class-action context or under certain class-action precedents. By defining the injury broadly as stemming from the "use of race," the majority had cut the restraints that *Lyons* and *Lujan* had imposed on the remedial powers of federal courts.[111]

More to the point, however, the Court reworked its own precedent concerning standing in the class context. Before *Gratz*, *Blum* stood for the proposition that "a plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar."[112] After *Gratz*, however, the precedent stood for the seemingly contradictory proposition that a class representative could challenge policies that did not "involve[] a number of fundamentally different concerns."[113] *Blum* and *Falcon*—formerly in serious tension—now stood for the same proposition: in the class context, it is adequacy, not standing, that drives the Court's consideration.[114]

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110. *Id.* at 267 (quoting Califano v. Yamasaki, 442 U.S. 682, 701 (1979)).

111. In *Lyons*, the chances of the plaintiff receiving a future chokehold were "no more than speculation," and the plaintiff, accordingly, lacked standing to seek prospective relief. City of Los Angeles v. Lyons, 461 U.S. 95, 108 (1983) (stating that "it is surely no more than speculation to assert either that Lyons himself will again be involved in one of those unfortunate instances... "). In *Gratz*, the odds of Hamacher dealing with the freshman admissions policy again were even lower (namely, zero) yet he still had standing to enjoin the policy.

112. Blum v. Yaretsky, 457 U.S. 991, 999 (1982).

113. Gratz v. Bollinger, 539 U.S. 244, 264 (2003).

114. At least one court has interpreted *Gratz* this way. In *In re Mutual Funds Inv. Litig.*, 519 F. Supp. 2d 580, 583-86 (D. Md. 2007), the district court examined the case law from *Blum* to *Gratz* and concluded that a strict notion of standing did not apply in the class context. Instead, the question now is whether "a defendant's allegedly illegal conduct caused the same type of harm to the plaintiff and all the other on whose behalf he is asserting claims." *Id.* at 587. Allegations that "investment advisers, traders, and brokers who engaged in market timing and late trading activities caused the same type of harm by the same type of misconduct to shareholders in various mutual funds within the same family of funds." *Id.*

II. STANDING AS ADEQUACY AND THE PROCEDURAL IMPLICATIONS AT TRIAL

As the varying approaches taken in the Supreme Court and lower courts demonstrate, a clear divide exists in the case law regarding the relationship between standing and adequacy. The case law has set forth two options for reconciling the class action and standing. First, some courts, like the majority in *Gratz*, treat standing as an all-or-nothing proposition. If a named plaintiff has standing to challenge some of the defendant's actions, the class inquiry can be broadened to include claims that are sufficiently similar to the named plaintiff's. In other words, the named plaintiff either has standing or he does not. If he does, it is Rule 23—not Article III—that will determine the scope of the class. Second, other jurists, characterized by Justice Stevens's dissent in *Gratz* and the Eleventh Circuit in *Griffin*, limit the scope of a class action through standing. This approach is consistent with the private rights model of litigation: Courts address particular practices that have injured the named plaintiffs before the court. Rule 23 cannot expand upon jurisdiction that would otherwise be lacking.

This Article proposes a third route: in order to be an adequate representative, a named plaintiff (or collectively, the named plaintiffs) must have standing for each claim raised or form of relief sought by the class. This method for deciding standing would reject the efforts to reconceptualize the requirements of Article III in light of Rule 23 and would instead tie the law of standing to Rule 23's adequacy requirement. Unlike the pure Article III approaches taken above, the proposal below would resolve the standing issue by denying class certification, not by dismissing the claims altogether. This less severe action ensures that the class has an opportunity to amend a motion for class certification to include additional named plaintiffs prior to certification. The following sections outline what this solution would look like in practice. Section II.A sketches the process that a district court would follow leading up to class certification and issues that may arise at the trial or appellate level. Section II.B then discusses the impact of this proposal on claims that become moot and potential procedural solutions to obviate dismissal of the case when this occurs.

A. The Trial Court's Assessment of Standing

The timing of the standing determination during class certification is currently the subject of some disagreement among the circuits.[115] Under the pro-

115. The disagreement stems from a delphic observation made by the Supreme Court: "[C]lass certification issues are . . . 'logically antecedent' to Article III concerns." Ortiz v. Fibreboard Corp., 527 U.S. 815, 831 (1999). As with the treatment of class certification and standing generally, this phrase has split the circuits. Some circuits take this to mean that issues of standing are deferred until after class certification; others see the abstruse phrase as a limited exception that occurs if the standing issue would exist regardless of whether the suit was filed as a class action. *See generally* Linda Mullenix, *Standing and Other Dispositive Motions After* Amchem *and* Ortiz*: The Problem of "Logically Antecedent" Inquiries*, 2004 MICH. ST.

posal made here, however, the standing inquiry would occur at two points in the class certification process: (1) when the plaintiff first files his claim and (2) before the court issues a motion for class certification. First, when a plaintiff files a claim in federal court, the court must examine whether this plaintiff has suffered *any* cognizable injury from the defendant's actions.[116] In this respect, the initial standing inquiry is no different than a non-class proceeding. If the named plaintiff cannot point to some personal injury, the defendant can (either in his response or in a separate motion) answer that the plaintiff fails to state a claim upon which relief can be granted or, alternately, that the court lacks subject matter jurisdiction.[117] The court can then dismiss the claim before either side has expended much energy litigating the matter.

Scholars have debated whether even this basic showing is necessary in the class context or whether the existence of the class provides the requisite adverseness.[118] As discussed above, Professors Shapiro, Macey, and Miller have argued for eliminating the class representative for standing purposes.[119] In addition, writing before *Lyons*, Professor Greenstein argued that the function of the named plaintiff is "not to supply the injury needed to satisfy the case-or-controversy requirement."[120] The question of the named plaintiff's standing has "no constitutional significance," and courts thus ensure a prudential form of standing by looking solely to Rule 23.[121]

These arguments notwithstanding, courts generally agree that some injury is necessary despite their disagreement over whether a named plaintiff must allege all the injuries sought by the class.[122] Thus, even those lower courts that

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L. REV. 703 (discussing the effect of *Amchem* and *Ortiz* on district courts' assessment of class certification).

116. *See* O'Shea v. Littleton, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.").

117. FED. R. CIV. P. 12(b)(1) & (6). *See* Miller v. Pac. Shore Funding, 224 F. Supp. 2d 977, 994 (D. Md. 2002) (discussing the use of a 12(b)(1) motion to challenge the standing of the class representative).

118. *See* Richard K. Greenstein, *Bridging the Mootness Gap in Federal Court Class Actions*, 35 STAN. L. REV. 897 (1983) (justifying a laxer approach to mootness in the class context); Kenneth H. Leggett, Note, *Article III Justiciability and Class Actions: Standing and Mootness*, 59 TEX. L. REV. 297, 299 (1980).

119. *See supra* notes 73-75 and accompanying text.

120. *See* Greenstein, *supra* note 118, at 925 (arguing that "the function of the named plaintiff, with respect to the claims of the class, is to represent the interests of putative class members").

121. Greenstein, *supra* note 118, at 925.

122. *See, e.g.*, *In re* Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 307 (3d Cir. 1998) (finding that once the named parties have demonstrated that they are properly before the court, the issue becomes one of compliance with

would not require a named plaintiff to allege an injury as to each challenged policy would agree that some injury is necessary.[123]

This initial inquiry, however, would not end the matter. Under this Article's proposal, the court would also have to evaluate the standing of the class representative during the inquiry into whether class certification is appropriate.[124] Unlike the first inquiry, the second standing inquiry would be much narrower. As part of this inquiry, the district court would have to determine that the named plaintiff had standing to raise all class claims or seek all forms of relief sought by the class. A motion by the plaintiff seeking class certification—either independently or as part of the pleadings—is commonly the method for seeking class certification.[125] Because they bear the burden, plaintiffs frequently provide a supporting memorandum or a brief that details the merits of class

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the provisions of Rule 23, not with one of Article III standing); *see also* Osgood v. Harrah's Entertainment, Inc., 202 F.R.D. 115, 120-24 (D.N.J. 2001) (examining the threshold injury needed to establish standing for a class that was challenging claims unrelated to injury).

123. *See, e.g.*, Hassine v. Jeffes, 846 F.2d 169, 176 n.3 (3d Cir. 1988). In *Hassine v. Jeffes*, the district court denied class certification for a group of prisoners challenging the conditions of their confinement. *Id.* The lower court held that the plaintiffs lacked "standing to raise claims of inmates other than themselves," and thus the class action was too broadly defined. *Id.* at 175. In addition, the lower court held that the differences in claims made class certification unavailable under Rule 23; the class failed to satisfy the commonality, typicality, and adequacy prerequisites. *Id.* On appeal, the Third Circuit reversed the lower court's denial of class certification. In the first place, the court had misused the concept of standing. Standing meant simply that the plaintiffs have a "sufficient interest in the outcome of each of the challenged conditions," not that they were injured by each challenged policy. *Id.* at 176 n.3. The proper course of action if a plaintiff lacked standing was to kick them out of court entirely, not to deny class certification. The plaintiffs were "vulnerable to injury that would result from inadequate prison conditions" and thus had standing. *Id.* Although the court would adjust the breadth of the class through Rule 23, this initial showing of adverseness was necessary for "standing" to exist. Under the proposal here, the Third Circuit's definition of standing would encompass only this initial inquiry. If the named plaintiff lacked any injury whatsoever, the court would dismiss the case outright, without inquiring into the appropriateness of class certification.

124. As discussed above, a plaintiff can seek class certification on the basis of the pleadings alone. As a result, these two points of evaluation might be logically—though not temporally or procedurally—distinct. Even so, the statement regarding the named representative's standing to seek each claim on behalf of the class could fit in the "short and plain statement of the grounds upon which the court's jurisdiction depends." FED. R. CIV. P. 8(a).

125. *See* 3 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 7:6 (4th ed. 2006). For an example of a motion seeking class certification, see Plaintiffs [sic] Motion for Class Certification and for Bifurcation of Liability and Damages Trials, Gratz v. Bollinger, No. 97-75231 (E.D. Mich. Oct. 9, 1998).

certification.[126] Courts could look to either of these motions for assurances that the named plaintiff has standing to seek both the relief sought and to raise the class claims.[127] Specifically, the memorandum supporting class certification would include both a definition of the proposed class and a short statement that the plaintiff has standing to raise each of the claims sought by the class.

Wetzel v. Liberty Mutual Insurance Co. helps illustrate how this second inquiry would work and how it could have the effect of paring back on possible claims.[128] In *Wetzel*, the Third Circuit permitted a class action seeking equitable relief to go forward even though the named plaintiffs were all former employees who were not entitled to reinstatement. The named plaintiffs clearly had alleged an adequate injury by virtue of past claims of discrimination. But the district court certified a class that also sought to enjoin allegedly discriminatory workplace policies.[129] The Third Circuit upheld the certification of the class in *Wetzel* because any form of relief gained by the named plaintiffs, "whether it takes the form of back pay, mandatory hiring of female claims adjusters, or increased promotional opportunities for women will benefit all members of the class."[130] Under the second inquiry outlined above, however, the class could not have included claims for injunctive relief alongside claims for damages. Prior to class certification, the named plaintiffs would have been required to show that the requisite threat of future injury existed to justify injunctive relief. Because the named plaintiffs were all former employees not entitled to reinstatement, they could not have shown the constitutionally required threat of future injury to permit claims for injunctive relief.

The second inquiry into the named representative's standing has certain advantages. First, the ruling as to class certification defines the class that will proceed in the litigation. If the court determines that the named plaintiff lacks

126. *See, e.g.*, Memorandum of Law in Support of Plaintiffs' Motion for Class Certification and Bifurcation of Liability and Damages Trials and in Opposition to Defendants' Motion to Deny Certification, *Gratz*, No. 97-75231.

127. It should be noted that, although the unnamed class members are parties for some purposes, this would not suffice for standing. For example, in cases involving group litigation outside the class context, courts are concerned that at least one party has standing for each of the claims raised. *See, e.g.*, Massachusetts v. EPA, 127 S. Ct. 1438, 1446-47 (2007) (stating that, in order to reach substantive issues, "at least one petitioner [must] ha[ve] standing to invoke our jurisdiction under Article III of the Constitution"). In the class context, the unnamed members add nothing to the question of standing, although a consolidated case of five named plaintiffs raising five related but distinct claims (or at least one petitioner in a group of five with standing to raise all five claims) would survive a standing challenge.

128. 508 F.2d 239 (3d Cir. 1975).

129. *Id.* at 245. The district court divided up the case into liability and remedy phase. In ruling on motions for summary judgment, however, the district court considered but ultimately rejected claims for injunctive relief. *Id.*

130. *Id.* at 248.

standing, the court can always define the ultimate class more narrowly based on the plaintiff's particular injuries.[131] Alternately, the court can grant the named plaintiffs leave to add an additional class representative that would have standing for the claims or relief sought.[132] This allowance has the benefit of treating all of the class claims together following the addition of another named representative, avoiding potential prejudice to unnamed class members, and increasing the efficiency of the class device. Second, the inquiry is made early in the litigation. Deciding standing as part of adequacy will pay dividends both in protecting unnamed class members against dispositive motions on their claims and in providing defendants an opportunity to eliminate claims for which no named plaintiff is before the court.[133]

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131. *See* FED. R. CIV. P. 23(c)(4) ("When appropriate, an action may be maintained as a class action with respect to particular issues."); FED. R. CIV. P. 23(c)(5) ("When appropriate, a class may be divided into subclasses that are each treated as a class under this rule."); *see also* 1 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 2:3 (4th ed. 2002) (discussing the Court's "full power" to redefine the class in light of standing concerns).

132. *See* 1 CONTE & NEWBERG, *supra* note 131, § 2:26 (2002) (describing the fact that the substitution of class representative is "freely allowed" by courts following the mootness of former representative's claims).

133. *See, e.g.*, Barrett Computer Servs., Inc. v. PDA, Inc., 884 F.2d 214, 220 (5th Cir. 1989) (stating that "in a case in which considerations of standing can be severed from a resolution of the merits, a preliminary hearing—to resolve disputed factual issues determining standing—is an appropriate course"). There is some tension between this Article's proposal and the Supreme Court's *Ortiz* and *Amchem* jurisprudence. Some courts treat the *Amchem* and *Ortiz* cases as precluding *any* standing challenges prior to class certification; *see* Mullenix, *supra* note 115, at 726-27. Under this view, a defendant cannot challenge standing issues raised only by class certification prior to class certification. Aside from the case where a named plaintiff lacks *any* injury whatsoever, it is difficult to understand what the difference is between a standing issue that would exist independently of the class action and one that would exist solely because of class certification. Imagine a named plaintiff that challenges the behavior of a defendant based on alleged violations of the laws of all fifty states, but who has only been injured in one state and thus could only sue under this law. Is the deficiency in standing the result of class certification (because, if a class is certified, the unnamed members will have standing to challenge the defendant's behavior in the other forty-nine states), or would the deficiency exist outside of the class action (because she could not raise claims under the laws of the other forty-nine states)? At least one court has said that this deficiency was a class certification issue, which a defendant could thus not challenge until after class certification. Clark v. McDonald's Corp., 213 F.R.D. 198, 204-05 (D.N.J. 2003).

This argument is unpersuasive. Any standing challenge in a class action can be phrased as one that depends on the class certification, even if the plaintiff attempts to put the whole system on trial. One way out of this quandary would be treat *Ortiz* and *Amchem* as preventing only pre-certification challenges to the *scope* of a shared injury rather than to the named plaintiff's standing to challenge

B. Potential Mootness Issues Raised by Stricter Adherence to Standing May Require a Procedural Solution

As is implied by a claim that standing is an essential feature of adequacy, if the named representative's claim should become moot following class certification, a new representative would need to intervene. This issue would arise when the named plaintiff's claims become moot, for whatever reason, but the claims of the class do not. This Article's proposal sits in considerable tension with the Supreme Court's extant case law regarding the mootness of a class representative's claims after class certification.[134] As discussed in Section II.A, current doctrine holds that if a named representative's claim becomes moot following class certification, the case can continue as though nothing happened.[135] The case proceeds under the fiction that the unnamed members of the class provide the requisite adverseness to avoid mootness. Under the theory advanced in this Article, however, the class representative would be inadequate if he did not share the same injury as the class. As will be discussed more fully below, the shared injury serves as a necessary incentive for the named representative to advance the claims of the class and provides a necessary focus for the judicial power. Mootness necessarily implies that the named representative does not continue to share this needed injury.

Despite this tension, the change in approach would pose easily surmountable problems. First, mootness problems only affect a relatively small number of

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behavior or activity that has not injured him. Thus, a defendant-company could not seek to dismiss a class action challenging its discriminatory hiring practices across the country on the grounds that the plaintiff had only been discriminated against in the same way as the class members. In this way, the class certification really does create standing issues because the named plaintiff's injury is otherwise sufficient to raise each claim in the complaint but is obviously limited by the scope of her alleged injury. Most importantly, this understanding would prohibit pre-certification standing challenges to "settlement classes," which are certified solely for the purpose of settlement. One could always seek to challenge the creation of the settlement class under the theory that it is a collusive lawsuit done solely for the purposes of a binding settlement.

134. *See, e.g.*, U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 398 (1980) ("When, however, there is no chance that the named plaintiff's expired claim will reoccur, mootness still can be avoided through certification of a class prior to expiration of the named plaintiff's personal claim."); Sosna v. Iowa, 419 U.S. 393, 399 (1975) (discussing the fact that "the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant" after the class representative's claim became moot). Some scholars think the mootness approach is a good thing. *See, e.g.*, Macey & Miller, *supra* note 73, at 66-67 (describing the Court's mootness analysis as being sensible as compared to its standing analysis).

135. *See supra* notes 116-134 and accompanying text; *see also U.S. Parole Comm'n*, 445 U.S. at 403; 5 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS §§ 16:6-16:8 (4th ed. 2006).

claims. For example, under current doctrine, if the would-be class representative's claims become moot prior to class certification, the case is moot.[136] The fact that the representative was seeking to certify a class will not prevent mootness. Second, if the class representative's claims become moot following certification, an exception to the mootness doctrine might apply. Exceptions could include an injury "capable of repetition, yet evading review,"[137] the voluntary cessation of the challenged activity by the defendant,[138] or the collateral effects of the judgment.[139] These exceptions have the effect of entirely removing those claims that would most frequently become moot. The category of claims that would potentially become moot, therefore, is fairly small but is by no means negligible.

For those cases that would be prevented under a stricter approach to standing, the easiest way to resolve the tension posed by the shared injury requirement is procedurally, not through the fiction that unnamed (and likely unaware) parties are meaningfully adverse. If the named representative's claim becomes moot at the district court level, the court can and should resolve any adequacy issues related to a new representative in a hearing.[140] The plaintiff's counsel could introduce a new named representative, and the lower court proceedings could continue in earnest following a determination that the new plaintiff is adequate.[141]

Handling issues related to standing in appellate courts, however, is more complicated. An "injury in fact" is, by definition, a factual inquiry. And courts of appeals are not institutionally capable of dealing with complicated factual inquiries outside of the record. These limitations notwithstanding, in a related context, the courts of appeals have established procedures for resolving new factual issues on appeal. For example, when standing issues have arisen, particularly in appeals from final agency actions, the courts of appeals have resolved them without dismissing the case or remanding to the lower court. To that end, the D.C. Circuit has used affidavits from the parties to resolve standing issues following appeals from final agency determinations.[142] Similarly, the D.C. Cir-

136. 1 CONTE & NEWBERG, *supra* note 131, § 2:23.

137. *See, e.g.*, S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

138. *See, e.g.*, Iron Arrow Honor Soc'y v. Heckler, 464 U.S. 67, 71-72 (1983).

139. *See, e.g.*, Church of Scientology v. United States, 506 U.S. 9, 13 (1992).

140. *See, e.g.*, Bischoff v. Osceola County, 222 F.3d 874, 879 (11th Cir. 2000) (stating the shared view among the circuits that "a district court cannot decide disputed factual questions or make findings of credibility essential to the question of standing on the paper record alone but *must* hold an evidentiary hearing").

141. This view is currently the approach when a class representative's claim becomes moot. *See* 1 CONTE & NEWBERG, *supra* note 131, § 2:26.

142. In *D&F Alfonso Realty Trust v. Garvey*, the FAA claimed that the plaintiffs had failed to establish a causal link between the agency's action and the plaintiff's injury and thus lacked standing. 216 F.3d 1191, 1193-94 (D.C. Cir. 2000). The court noted that neither the record on appeal nor the briefs established the needed

cuit has permitted plaintiffs to establish standing through supplemental briefing[143] or even some form of judicial notice where the plaintiff "shows in its opening brief that its claim to standing is beyond serious question."[144] The court has exhibited a decided belief that it can resolve most standing issues on appeal from agency actions through adversarial proceedings in the court of appeals and not through a remand to the agency or a district court.[145]

Nonetheless, if the court of appeals thought that assessing the adequacy of an intervening named plaintiff was too complicated to resolve through affidavits or supplemental briefing, an appellate court could simply remand for an evidentiary hearing on the adequacy of a new class representative.[146] The fact that the class representative's claim is moot does not require the court to dismiss the entire action, although this is a common course of action when standing is deficient.[147] Instead, the court could remand for a determination that the

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causal link to afford standing. Nonetheless, the court permitted the plaintiff to submit affidavits supporting its claim of standing and, based on those affidavits, concluded that the plaintiff had "standing to challenge the FAA's hazard determination." *Id.* at 1194.

143. *See, e.g.*, Gettman v. DEA, 290 F.3d 430, 432 (D.C. Cir. 2002) (denying standing after the court "ordered supplemental briefing on standing, and specifically asked parties to address the issue of injury").

144. Sierra Club v. EPA, 292 F.3d 895, 901 (D.C. Cir. 2002).

145. *Id.* ("[A] respondent that continues to contest the petitioner's claim to standing will have the opportunity to make an informed response to the petitioner's showing, and the petitioner then will have an opportunity to reply to that objection in its reply brief.").

146. *See* Planned Parenthood Ass'n v. Kempiners, 700 F.2d 1115, 1116 (7th Cir. 1983) (remanding so that additional evidence could be examined on the issue of standing); *cf.* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 249 (1990) (Stevens, J., concurring in part and dissenting in part) (stating that, in light of issues regarding standing of plaintiffs, Justice Stevens could not "join the decision to direct dismissal of this portion of the litigation" and would instead "remand for an evidentiary hearing on the standing issues").

147. Courts are not rendered totally powerless under Article III if a named representative's claim becomes moot. The court is prevented from reaching the merits if jurisdiction is lacking, *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 21 (1994), but is empowered to "make such disposition of the whole case as justice may require." *Id.* A court is not constitutionally precluded from acting at all if the named representative's claim becomes moot. Instead, it has "disposed of moot cases in the manner 'most consonant to justice' . . . in view of the nature and character of the conditions which have caused the case to become moot,'" which implies that the approach to mootness in the class context would permit a court of appeals to evaluate the standing of an intervening plaintiff. *Id.* at 24 (holding that court is not required either to vacate or not vacate a lower court's decision following the mootness of a plaintiff's claims, but may take any action that is justifiable under the court's equitable powers but short of hearing claims as to the merits). The substitution of a new representative would appear to fall short of a

named representative is, in fact, adequate, and the district court could simply reinstate the evidence once this determination has been made.[148] This procedure would entail a delay between the final judgment and the resolution of the appeal and might potentially require additional discovery regarding the named plaintiff. These delays notwithstanding, the limited remand affords an opportunity to add an additional named plaintiff while providing a full opportunity to ensure the standing and adequacy of the class representative.

Finally, plaintiff's counsel could almost entirely eliminate the risk of mootness for a class action by seeking to appoint multiple named plaintiffs as class representatives.[149] This appointment would, however, impose additional front-end costs on the counsel bringing a class action.[150] Whereas before, counsel could find one person that had claims against the defendant and know that the case would not become moot following class certification, under this proposal, counsel would need to find multiple people alleging an injury for the life of the litigation. Finding these additional people would require the plaintiff's counsel to put forth additional outlays of both time and money before filing suit.[151] But, for a cause of action that will resolve the claims of a class of individuals, expecting an attorney to present more than one named plaintiff from that class is not

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decision as to the whole case. In the first place, the issue of standing is distinct (constitutionally, if not practically) from the merits. In addition, the courts of appeals already have the power to substitute parties in at least one context. FED. R. APP. P. 43(a)(1) ("If a party dies after a notice of appeal has been filed or while a proceeding is pending in the court of appeals, the decedent's personal representative may be substituted as a party on motion filed with the circuit clerk by the representative or by any party."). *See also Planned Parenthood*, 700 F.2d at 1138 (Posner, J., concurring) (noting that court has, "and in this case should exercise, the power to order an evidentiary hearing in the district court on the issue of standing").

148. *See, e.g.*, Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985).

149. This solution would not work in those cases where, for example, the nature of the injury is so fleeting (e.g., the nine months needed to bear a child) as to prevent meaningful review. In these instances, an exception to mootness might apply. *See* Roe v. Wade, 410 U.S. 113 (1973) (discussing harms that are capable of repetition, yet evading review). Otherwise, a plaintiff would have to rely solely on past damages. *Cf.* Hudson v. Michigan, 547 U.S. 586 (2006) (discussing the option of damages remedy under section 1983 rather than the exclusion of evidence for cases in which police violate the "knock-and-announce" requirement of the Fourth Amendment).

150. *See* Macey & Miller, *supra* note 73, at 66-67 (stating that, because "representative plaintiffs do not seek out attorneys to represent them in class action," an "increase in the costs to attorneys of obtaining a suitable plaintiff" results. The attorney "must search harder for plaintiffs when suits arise, must spend more time maintaining contacts with potential sources of plaintiffs, and must work harder at convincing potential representatives to agree to act on behalf of the class or corporation.").

151. *Id.*

unreasonable. In addition, as discussed more fully below,[152] these additional costs are simply outweighed by the benefits ensured by the requirement that standing constitute an element of adequacy. As this Part has sought to show, conceiving of standing as a necessary component of adequacy would not be difficult to impose procedurally. However, the next question is whether the proposal laid out here is a good thing.

III. A Shared Injury as the Minimum Guarantee of an Adequate Class Representative

As Part II explained, it is procedurally possible to incorporate standing and a shared injury into Rule 23's adequacy requirement. The question remains whether this incorporation is a positive development. This Part makes the argument that it is. In short, the shared injury requirement serves two functions that are not served solely by Rule 23. First, it ensures a minimum level of adequacy that accounts for the agency costs inherent in representative litigation. A shared injury—providing remedial incentives to advance the claims of unnamed and likely unaware class members—serves as a simpler and more promising measure of a class representative's adequacy than do the available alternatives. Second, a shared injury serves irreplaceable constitutional values by limiting the judicial power to the resolution of individualized injuries.

A. Remedial Incentives Are More Reliable Gauges of the Class Representative's Motivations To Advance the Claims of Unnamed Class Members

Rule 23 ensures that the representative has the appropriate personal incentives to advance the claims of the unnamed members.[153] Rather than entrust the prosecution of the unnamed members' claims to the goodness of the class representative's heart, courts instead have tethered the class representative's adequacy to his self-interest in prosecuting the case. The justification for this rule is rooted in a well-worn belief about human nature: "We may trust man to help his fellow man if by doing so he helps himself . . . ."[154] Stating that the class representative must have self-interest in representing the class, however, does not resolve the matter. Incentives come in a variety of forms and have varied

152. *See* discussion *infra* Part III.

153. Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action 94 (1987) (stating that the "identity of the situation of the representative and the class" ensures that, "in pursuing his own interest, [the class representative] will inevitably pursue those of the class").

154. Adolf Hamburger, *State Class Actions and the Federal Rule*, 71 Colum. L. Rev. 609, 610 (1971).

throughout the history of group litigation.[155] Instead, the relevant question becomes what motivations exist and ought to exist.

Two broad categories of incentives exist for the class representative. In turn, these divergent understandings of the proper incentives for a class representative inform the divisions in the case law concerning the relationship between adequacy and standing. First, a class representative may have an adequate incentive to advance the interests of the class by virtue of the injury or feared injury that he shares with the unnamed class members.[156] These "remedial" incentives rest on the belief that people are highly motivated to rectify their own injuries.[157] The injury ensures necessary adverseness between the plaintiff and the defendant, and this adverseness in turn provides an adequate basis for effective judicial resolution of the plaintiff's claims.[158] Because the named plaintiff and the class have the same injury, the class representative would necessarily advance the interests of the class during the litigation. That is, in challenging the behavior that caused him an injury, the class representative would also serve the interests of unnamed class members who possess the same injury.[159] As a corol-

155. For example, in early representative litigation, it was not uncommon for a lawsuit to arise on behalf of an entire guild, village, or parish. YEAZELL, *supra* note 153, at 54-55. In this context, the motivations to be an adequate representative were likely variegated and incredibly powerful—ranging from economic, social, or political incentives. The social cohesion that existed outside of the litigation context "virtually eliminated the possibility that the group's representatives were going off on a lark of their own." *Id.* at 96. The class representative, who was simply the richest or "better and more discreet" member of a group, had economic, social and political incentives to adequately represent the group. He would be hard pressed to separate his interests from the group as a whole. *Id.* Even if he could, he would be forced to deal with the other group members after the fact—whether in the parish, the neighborhood, or the marketplace. *Id.*

156. *See* Hansberry v. Lee, 311 U.S. 32, 45 (1940) ("Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires."); Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 90-91 (discussing "compensatory" litigation, in which named representatives are motivated primarily by their desire to "make themselves economically whole by obtaining compensation for their injuries caused by the defendants").

157. *See* Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, The Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 571 (2006) (discussing the necessary injury in fact for Article III as an essential feature of adverseness that, in turn, "serves as an essential ingredient in the protections and incentives upon which the adversary system depends").

158. Baker v. Carr, 369 U.S. 186, 204 (1962).

159. *See* Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 301 (2003) ("The logic of the Court's due process standard [in *Hansberry*] is that well-aligned interests within the class effectively enable the represen-

lary to this point, a named plaintiff who did not share the same injury with unnamed class members could not be an adequate representative.

Alternately, a class representative may have sufficient "utility" incentives to advance the interests of the class as a whole. Under this theory, a named representative is adequate if she would receive a sufficient benefit from representing the interests of the class, regardless of whether a representative shares an injury with the class. Although utility is a chameleon-like concept, the two predominant forms of benefit expected by a class representative are money and substantive policy goals. The named representative or the class counsel may have sufficient financial motivations to advance the absent members' claims. In class actions seeking damages, a named plaintiff is typically unable to recover more than her fair share of a particular judgment.[160] Nonetheless, the size of the named plaintiff's expected "fair share" can be a factor in determining adequacy. Congress grafted this understanding of adequacy into the Private Securities Litigation Reform Act (PSLRA).[161] The PSLRA provides a rebuttable presumption that the most adequate plaintiff is one that, among other things, "has the largest financial interest in the relief sought by the class."[162] The logic is that a plaintiff with a substantial economic interest in the litigation would be more vigorous in advancing the claims of the class and protecting the class from any frolic and detour by the class counsel.[163] According to this rationale, adequacy could simply be a question of the named representative's monetary stake in the litigation. Alternatively, the class counsel could have the requisite financial motivations to represent unnamed members.[164] Class counsel can capitalize on the

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tative parties to advance the interests of absent class members simply by advancing their own ends in the litigation.").

160. This limitation is so either because the class action does not resolve the aggregate damages owed to the whole class or because, if the defendant's monetary liability is determined in gross, the named plaintiff is unable to claim more than his fair share. *See generally* Tim A. Thomas, *Permissible Methods of Distributing Unclaimed Damages in Federal Class Action*, 107 A.L.R. FED. 800, 803 (1992) (noting that "[d]istribution of unclaimed damages to previously claiming class members has been disapproved").

161. Private Litigation Securities Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (2006).

162. 15 U.S.C. § 77z-1(a)(3)(B)(iii)(I) (2006).

163. *See, e.g.*, 141 CONG. REC. S9032 (daily ed. June 19, 1995) (statement of Sen. Hatch) (stating, in debates over PSLRA, that the most adequate plaintiff "provision would ensure that litigation decisions are truly in the best interests of the shareholders and are not merely in the best interest of the law firm that won the race to the courthouse door").

164. *See* Jill E. Fisch, *Class Action Reform,* Qui Tam, *and the Role of the Plaintiff*, 60 L. & CONTEMP. PROBS. 167, 178-79 (1997); *see also* Jerry Enter., Inc. v. Allied Beverage Group, L.L.C., 178 F.R.D. 437, 445 (D.N.J. 1998) ("It must be understood that a class action plaintiff may not have very much incentive to contact an attorney or to investigate a potential claim where the claim may be tiny.... The whole

economy of scale produced through the class mechanism by bringing all of the claims together and receiving a larger fee than would otherwise be available. By placing such great reliance on class counsel, the named representative becomes largely vestigial; the class counsel serves as an entrepreneur or "bounty hunter" that manages the litigation.[165] The actual class representative constitutes a "nominal client" who is "often only a necessary procedural step that seldom imposes a substantial barrier."[166] Protecting unnamed class members thus falls to the class counsel, who has an economic motivation to represent their interests.[167]

Instead, adequacy could simply be a function of the ideological benefit a named representative expects from achieving certain policy goals.[168] The class action provides a mechanism to advance "public rights" or those rights that accrue to the public generally rather than to individual plaintiffs.[169] Under this view, the "traditional" model of litigation (one in which a court's "primary function was the resolution of disputes about the fair implications of individual interactions")[170] simply does not apply. The breadth of the class inquiry permits a court to reach out and affect larger segments of society. This power permits

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mechanism of the class action recognizes this lack of incentive and the collective action problems inherent in many individuals having potentially small claims, and encourages lawyers to prosecute these actions on behalf of plaintiffs by holding out the promise of large fee awards.").

165. Professor John Coffee has noted that the economic motivations affecting would-be class counsel—low search costs for potential clients to ensure profitable recovery, contingency fees pegged to the size of recovery, and the ability to only take on profitable cases—provide most of the incentives to bring class claims. Coffee, *supra* note 14, at 677-79, 681-82.

166. *Id.* at 682.

167. *See Jerry Enter.*, 178 F.R.D. at 445.

168. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 736 (1972) ("The Club apparently regarded any allegations of individualized injury as superfluous, on the theory that this was a 'public' action involving questions as to the use of natural resources, and that the Club's longstanding concern with and expertise in such matters were sufficient to give it standing as a 'representative of the public.'"). At least one prominent scholar has referred to this rationale as the "lone ranger" form of class representative. *See, e.g.*, Redish, *supra* note 156, at 90. This notion of utility is de rigeur in another legal context: the literature examining the voting patterns of the Supreme Court. For a sense of why the leading scholars in this field consider this form of utility to be effective and persistent, see LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 1-45 (1998) (defending the model of judicial decision-making that considers policy goals above all else).

169. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (saying that public law litigation is concerned with "the vindication of constitutional or statutory policies").

170. *Id.* at 1285.

litigants to achieve more ambitious substantive goals ranging from stamping out discrimination in employment to ensuring adequate prison facilities.[171]

The choice between these two motivations underlies the split evident in the Supreme Court's case law. An example helps to illustrate the divide. Imagine a former employee who claims that his erstwhile employer failed to comply with state and federal wage laws.[172] In addition to compensation from his alleged past underpayments, the class representative seeks an injunction asking the employer to "cease and desist from unlawful activities in violation of" the wage laws.[173] This class representative certainly has objectives to litigate his past injury; an underpaid employee would want the money rightfully owed for his services. But what motivates him to argue for the future relief? In comparable circumstances, one court resolved this issue by first noting that standing—or the lack of remedial incentives—was not the problem;[174] "[a]lthough Plaintiff might not directly benefit from injunctive relief, he has no disincentive to ask for it on behalf of the class."[175] But this understanding only established that the named representative would not be disinclined to advance the claim for future relief. His future incentives came instead from his ideological desire to see the company comply with the wage laws in the future: "Plaintiff's history with Defendants might actually engender his zealous prosecution of this case on behalf of the proposed class."[176] The ideological benefit that arose from correcting the allegedly illegal wage policies sufficed. With that conclusion came a reliance on the flexible standard imposed by Rule 23 rather than with a strict adherence to the standing case law that arose outside the class context.

But given the purpose of adequacy—to resolve the agency costs associated with representative litigation—remedial incentives ought to be motivating the class representative. First, the remedial incentives provided by a shared injury guarantee that a named plaintiff will not sacrifice the claims of the class in seeking his own relief. Class litigation can be thought of as a type of transaction. The named plaintiff brings his own claim and the claims of a class of similarly situated people. This claim consists of both the named plaintiff's alleged injury and the injuries claimed on behalf of the class as a whole. From the plaintiff's perspective, the price for these claims is either set by the court—monetary or equi-

171. *Id.* at 1284. Courts have, at times, viewed the class action as a means to achieving broader social goals. In the 1960s and 1970s, the class action provided a means to effect institutional reform through lawsuits targeting government or companies accused of unfair employment practices. Edward F. Sherman, *Consumer Class Actions: Who Are the Real Winners*, 56 ME. L. REV. 223, 225 (2004).

172. *See* Krzesniak v. Cendant Corp., No. C 05-05156 MEJ, 2007 WL 1795703, at *11 (N.D. Cal. June 20, 2007).

173. *Id.*

174. *Id.* at *12.

175. *Id.*

176. *Id.*

table relief—or, in the alternative, through some form of voluntary settlement with the defendant.[177] The concern over agency costs that informs the adequacy requirement relates to the degree to which the named plaintiff will negotiate for the best possible price in exchange for the class claims. This ability to negotiate can either take the form of vigorous prosecution or simply the ability to outmaneuver the defendant for a higher settlement amount.

When the injuries of the class and the representative are identical, the price paid for the class's claims and the price paid for the named plaintiff's claims are identical. That is, the relief or settlement that the named plaintiff is willing to accept for his injury is the same that the class will receive. As a result, if the named plaintiff's claims fail to establish the defendant's liability and this court-ordered "price" is unacceptable to him, he can appeal. Similarly, if the plaintiff alleges several injuries on behalf of the class (e.g., both hostile work environment and wrongful termination claims) the named plaintiff will have an incentive to prosecute all allegations with the same intensity. Class members that have one injury, but not the other, can rest assured that their claims will not be sold at a price below their worth.[178] All else being equal, agency costs are zero.[179]

When the injuries to the class and the representative differ, however, the guaranteed mutuality of interests vanishes. A class representative would thus value the injury to the unnamed plaintiff in terms of the financial or ideological benefit that he expects to receive from gaining the sought-for relief. It is possible that the named plaintiff would accept a substantially lower price or negotiate less fiercely for an injury that he did not possess. Or, if the named plaintiff would not benefit from an injunction, he may have little incentive to make sure that it is obeyed. In addition, if the court remedied the named representative's injury but not the injury alleged solely on behalf of the class, the named plaintiff would have little incentive to appeal. In short, absent remedial incentives, there is no guarantee that the amount of the named representative's expected benefit would equal the cost of the injury to the unnamed class members.[180]

177. As a result, the potential "price" range starts from zero, which is a finding of no liability.

178. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 740 (1972) (stating that the injury ensures that the case is "in the hands of those who have a direct stake in the outcome").

179. A counterargument is, as implied by the Third Circuit in *Goodman*, that the named representative's valuation of his injury is meaningless. Instead, the financial benefit expected by the class counsel would provide the motivations to negotiate effectively for the sought-after relief. However, the vigor of representation can be recast as the vigor with which the named representative would monitor class counsel.

180. One cannot help but speculate that the reason for this differential is due to the so-called "endowment effect." The endowment effect suggests that people value goods more highly when they possess them than when they do not. Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 Nw. U. L. Rev. 1227, 1232 (2003). In the present example, a named representative would value an injury that

Second, examining a named plaintiff's injury is a much simpler inquiry than gauging the named representative's expected utility. It is undoubtedly the case that the named plaintiff's perceived ideological or financial utility will often be sufficient to ensure adequate representation. No one denies, to use a litigant from the foregoing discussion, that the Sierra Club feels strongly about public land or national parks. In turn, the Sierra Club would likely provide adequate representation for a class of people concerned about the use of public land.[181] Conversely, there will certainly be cases where a named representative with a shared injury will prove to be inadequate. However, on average, the inquiry into a shared injury provides a much simpler inquiry than an examination into expected utility and promises a greater mutuality of interests between the class and the representative.[182] Most people do not wear their ideological stripes on their sleeves like the Sierra Club. Furthermore, given the strong incentives for the plaintiff to want immediate class certification in order to gain leverage in settlement proceedings, the court has no reliable means to garner evidence regarding the representative's expected utility and, therefore, adequacy. A plaintiff's ipse dixit regarding expected ideological utility is simply unreliable. Similarly, class counsel's expected recovery for the defendant's liability is not an appropriate inquiry at the certification stage.

One could argue that although a broad reading of Rule 23 might expand the jurisdiction of the federal courts, the courts already possess this power based on the inherent vagueness of the constitutional "injury." Scholars have questioned the claim that an injury limits the power of the federal judiciary in any meaningful way. For example, Professor Sunstein has argued that the "injury in fact" requirement is "normatively laden and independent of facts."[183] As a result, a choice as to what constitutes a cognizable "injury" is itself a judgment about the appropriate scope of federal jurisdiction. The requirement of a shared injury, furthermore, could be manipulated. For example, one could argue that *Gratz* is consistent with the model advocated in this Article. The majority simply defined the requisite injury in such a general manner—disagreement over the use of race—to ensure that requisite commonality even though the named representatives would not be directly affected by the policy before the Court.

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he possesses more highly than one unnamed class members possessed. The representative would perceive an acceptable price to his own injury to be much higher than, perhaps, the "fair market value" for his injury. This inflated perception of worth could, in turn, ensure vigorous prosecution.

181. *See, e.g.*, Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 891 (1983) ("Often the very best adversaries are national organizations such as the NAACP or the American Civil Liberties Union that have a keen interest in the abstract question at issue in the case, but no 'concrete injury in fact' whatever.").

182. *See* Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (saying that plaintiff's ideological interest provides "no objective basis upon which to disallow a suit").

183. Cass Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 188-89 (1992).

These limitations notwithstanding, evaluating a shared injury provides a more guided inquiry than the alternative: evaluating the expected ideological utility or the sufficient level of "adverseness" to ensure adequate representation. Though it is certainly possible to manipulate the relevant injury so as to ensure a fit between the class and the named representative, thereby expanding the courts jurisdiction, two considerations make the shared injury focus superior to the alternatives. First, the injuries that the class and the representative share must independently justify jurisdiction in the non-class context. Thus, if the court were to define the shared "injury" in an extremely general manner to support class certification, an individual could file a non-class claim based on the same injury. As a result, if a generalized opposition to the use of race was the injury that linked the representative and the class, a plaintiff could file suit who was simply opposed to the consideration of race. The possibility of a flood of litigation based on the general injury that justifies class certification should provide some disincentive to generically define the shared injury. Second, and more fundamentally, an injury at least has some objective quantum of meaning compared to sufficient ideological or financial incentive or the perceived "fit" between the claims of the class and the representative. Measuring whether a person feels strongly enough about shared claims to support certification is much less guided than an inquiry into whether the defendant has affected both the class and the representative in the same way.

Finally, one might argue that this heightened level of prophylaxis is unnecessary given the availability of relief after the fact. Due process prevents a court from binding an unnamed plaintiff to a class judgment achieved by an inadequate representative.[184] As a result, in order for res judicata to obtain following a class action, the named plaintiff and class counsel must have provided adequate representation throughout.[185] An unnamed plaintiff who does not relish the result at trial is then free to challenge the adequacy of the class representative after the fact. To say that this relief is available, however, is not to say that it is sufficient. The class device is, in no small measure, one conceived in efficiency. Permitting the aggregation of claims under the banner of an inadequate representative and sorting out the equities through subsequent actions will simply multiply proceedings.[186] In addition to these systemic costs, pushing the adequacy determination to after the class proceeding places costs on the unnamed class members. At a minimum, they may bear the cost of proving that the class

184. Hansberry v. Lee, 311 U.S. 32, 44-45 (1940).

185. 5 CONTE & NEWBERG, *supra* note 135, § 16:25 ("Due process of law would be violated for the class judgment unless the court applying res judicata could conclude that the class was adequately represented in the first suit.").

186. *Cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 42 cmt. b (1982) ("The purpose of offering opportunity to dispute the fitness of the representative [through class notice] is to permit anticipation of the possibility of subsequent attack on his authority and thus to assure as far as possible that the judgment in the action will have conclusive effects.").

representative was inadequate.[187] Moreover, class members must cull this proof from a distant record—a process that involves reconstructing the events from trial for the reviewing court.[188] In short, though certainly not the last chance to ensure adequacy, the threshold inquiry is certainly the best chance.

B. A Notion of Adequacy That Incorporates Standing Principles Serves an Essential Feature of Separated Powers

Aside from serving the private interests of the unnamed class members, a notion of adequacy more in line with standing provides systemic benefits within our constitutional scheme of government. These benefits fall into two broader categories. First, courts must rely on the particularized injuries of the parties before it in order to craft sound public policy. Courts are simply not institutionally competent to resolve claims divorced from the particularized injuries of the parties before it. In justifying the injury-in-fact requirement, the Supreme Court has pointed to its relatively feeble powers of investigation as a reason for deferring to Congress on broader issues of policy and sticking to its narrowed ability to formulate law while resolving individual injuries.[189] The two other major expositors of public policy, the legislature and the administrative agency, can rely on much more sweeping powers of investigation before setting policy. For example, Congress has "virtually unlimited power by way of hearings and reports" at its disposal to formulate social policy.[190] Similarly, the notice and comment period provides administrative agencies with an opportunity to gather the requisite information needed to craft meaningful policy.[191] Unless the

187. Res judicata formally has three elements: (1) the parties must be the same; (2) the cause of action must be the same; and (3) the matters raised were or could have been raised in the prior proceeding. 5 CONTE & NEWBERG, *supra* note 135, § 16:21. A defense or an exception to res judicata, however, is that it would violate due process because the prior representative was inadequate. *See, e.g.*, Bittinger v. Tecumseh Prods. Co., 915 F. Supp. 885 (E.D. Mich. 1996), *overruled in part on other grounds by* 123 F.3d 877 (6th Cir. 1997).

188. For example, in *Keene v. United States*, 81 F.R.D. 653 (S.D. W. Va. 1979) a district court held that a class action could not proceed because a year-old judgment from the Tenth Circuit precluded the class's claims. The court reasoned that "in order to hold unnamed, absent class members bound by a judgment in a prior class action the Court must determine whether the class representative's conduct of the entire action was such that due process would not be violated by giving binding effect to the judgment in that prior action." *Id.* at 657. The court then concluded that the prior class action had adequate representation based on the findings from that case.

189. Schlesinger v. Reservist's Comm. To Stop the War, 418 U.S. 208, 221 n.10 (1974).

190. *Id.*

191. *See, e.g.*, Conn. Light & Power, Co. v. NRC, 673 F.2d 525, 530 (D.C. Cir. 1982) (noting that the comment period prevents the agency from operating "with a one-sided or mistaken picture of the issues at stake in a rule-making").

proceeding is "on the record," an agency can rely on any source of information it finds persuasive as long as it is properly vetted before the regulated community.

Courts cannot similarly access the information needed to effect broader public policy. Instead, courts must rely on the parties before them to provide the necessary information to resolve disputes.[192] The injury-in-fact element of standing ensures that a party has the incentive to actually set out the information the courts need. As Oliver Wendell Holmes pointed out, "[i]t is the merit of the common law that it decides the case first and determines the principles afterwards."[193] Culling and refining legal principles from the ether is unlikely to reflect the necessities on the ground in the same way that a notice and comment period or congressional hearing will.[194] At least in economic terms, the common law system of lawmaking—a fact-bound and iterative system—is an efficient system of formulating law.[195] But its efficiency in the long run is due primarily to its inefficiency in the short run. By resolving only those matters that are needed to remedy the injury before it, the judiciary as a branch produces better policy in the aggregate.[196]

Nothing in the class mechanism, however, changes the institutional limitations faced by courts in formulating policy. An expansive reading of the adequacy requirement in Rule 23 simply broadens the court's inquiry. It does little to provide the court with additional tools for resolving more complicated issues of social policy. To be sure, an expansive use of the class device is not as fuzzy as a conception of standing divorced from the injury-in-fact requirement. The claims of the class will be limited by the asserted injuries of the unnamed others, but this limitation simply minimizes the potential reach of the court's policymaking. It does nothing to make the policy more informed.

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192. *Schlesinger*, 418 U.S. at 221.

193. Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870).

194. *See, e.g.*, Liverpool, N.Y. & Phila. Steamship Co. v. Emigration Comm'rs, 113 U.S. 33, 39 (1885) (stating that the second rule of jurisdiction, aside from the rule against deciding unnecessary constitutional questions, is "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied"); Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1003, 1003 (1923) ("Every tendency to deal with [facts] abstractly, to formulate them in terms of sterile legal questions, is bound to result in sterile conclusions unrelated to actualities.").

195. Paul H. Rubin, *Why is the Common Law Efficient*, 6 J. LEGAL STUD. 51 (1977) (arguing that the common law system is efficient based on the parties' incentives to challenge inefficient rules in course of litigation).

196. Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 305 (1979). Professor Brilmayer describes courts' effectiveness in crafting policy as a function of stare decisis. If a court could craft policy in the abstract, it would decide issues at a higher rate, which would weaken stare decisis. *Id.*

Second, a stricter notion of standing in the class context serves separation of powers interests. This stricter standing requirement directs debates over broader issues of public policy to the democratic branches. The injury requirement serves to define both who can invoke the power of the courts and also when that person can appear.[197] The difficulty in getting into court stands in stark contrast to the other branches of government. Political institutions are valued for their accountability to the electorate. Ensuring this accountability requires that interested parties have the opportunity to solicit their elected representatives. Thus, the Constitution requires Congress to listen to any voice that asks for its assistance whether through legislation or pressuring administrative agencies.[198] Courts, on the other hand, are much harder to solicit. The injury requirement separates the plaintiff from the world at large. In turn, it ensures that the court addresses only those grievances that rise to the level of a legally cognizable injury. In this way, it prevents the courts from becoming open to anyone with a political gripe divorced from a cognizable injury.

The second separation-of-powers interest served by a stricter standing requirement concerns the judiciary's role vis-à-vis the other branches. Permitting a named plaintiff to raise claims as part of a class action that he would otherwise lack standing to raise impermissibly expands upon the jurisdiction of the federal courts. Even if the courts could constitutionally hear claims that are merely similar to those raised by an injured plaintiff,[199] the use of adequacy to broaden the scope of the claims raised in the courts would alter the jurisdiction conferred by statute. Congress has enjoyed near plenary power over the jurisdiction of the federal courts over the last two centuries.[200] Though scholars continue to

197. *See* Scalia, *supra* note 181, at 892 ("The degree to which the courts become converted into political forum depends not merely upon what issues they are permitted to address, but also upon when and at whose instance they are permitted to address them.") (emphasis omitted).

198. U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.").

199. For example, many scholars believe that Congress can effectively create a right to anything and thereby confer the requisite injury to permit standing. *See, e.g.*, Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613, 616-17 (1999).

200. Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) (noting that "[c]ourts created by statute can have no jurisdiction but such as the statute confers"). The power is only "nearly" plenary because of the "grave questions" the Supreme Court keeps hinting would be raised if this power were actually plenary. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 575 (2006) (noting petitioner's argument that preferred reading of Detainee Treatment Act would raise "grave questions about Congress's authority to impinge upon this Court's appellate jurisdiction"); *id.* at 672 (asking how there could be any "such lurking questions, in light of the aptly named 'Exceptions Clause' of Article III, § 2") (Scalia, J., dissenting).

debate what this power means at the fringes,[201] there is not too much caviling over the fact that Congress is the body charged with changing federal jurisdiction.

In exercising this power, Congress controls the jurisdiction of the federal courts in two ways. First, Congress can expressly grant the federal courts jurisdiction over a broad swath of cases. The expansive grants of diversity jurisdiction and jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States" clearly fall within this category.[202] Second, Congress can create jurisdiction by creating a federal cause of action to authorize jurisdiction in individual cases. The judicial power can only act upon cases or controversies. Because Congress determines whether a federal case exists for specific acts, specific legislation expands the instances in which the judicial power can be brought to bear. The creation of particular causes of action thus serves to fine tune the jurisdiction of the federal courts.

By expanding upon the types of claims that can be raised in a class action under a particular statute, Rule 23 would expand upon the jurisdiction of the federal courts by increasing the number of people who can raise certain federal claims. Professor Redish refers to class actions as "transsubstantive" because they have the potential to alter the underlying remedial scheme encoded into legislation.[203] Congress most often enacts statutes that are premised on the "private compensatory remedial model," in which plaintiffs can bring private suits to compensate for injuries from statutorily proscribed activity.[204] Alhough this scheme is the most common model of remedy, it is by no means exclusive. Where Congress decides that, for whatever reason, the private compensatory model will not adequately guarantee the statutory right, it is free to modify it. Thus, penalties, fines, criminal prosecution, administrative enforcement, or qui tam actions can supplement or replace the compensatory model at Congress's behest. This remedial scheme, however, has substantive implications. One would not likely think of a particular statutory proscription as a private right if

201. *See* FALLON ET AL., *supra* note 31, at 331-57. Hart and Wechsler cite a number of views regarding the power Congress has to adjust federal court jurisdiction. These views range from the very strict view espoused by Professor Paul Bator in which Congress can adjust jurisdiction on a political whim, to Professor Clinton's view that Congress must delegate all Article III jurisdiction. *See, e.g.*, Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 750 (1984) (arguing, with one narrow exception, that Congress must "allocate to the federal judiciary as a whole each and every type of case or controversy defined as part of the judicial power").

202. 28 U.S.C. § 1331 (2000).

203. Redish, *supra* note 156, at 107.

204. *Id.*

it lacked a private remedy.[205] What good does it do me if only you can recover for my injuries? In turn, this remedial scheme affects the courts' jurisdiction. A court may have jurisdiction if one person brings a claim but not if another does.

In this way, a broader reading of Rule 23 alters the remedial model encoded into the statute and thus expands the courts' jurisdiction. For example, when Congress prohibited employers from discriminating "because of... race" in Title VII,[206] it both established a private right of action and empowered the EEOC to remedy individual acts of discrimination. Thus, the EEOC or "persons aggrieved" can bring a suit alleging unlawful discrimination, which courts can then remedy following a finding of liability.[207] Aside from the EEOC's potential involvement, Title VII clearly envisions what Professor Redish would call a "private compensatory remedial model."[208] In short, "persons aggrieved" by discriminatory conduct are authorized to bring claims seeking redress for past or threatened employment discrimination.[209] After a finding of liability, the court is authorized to impose damages or grant equitable relief to stop the defendant from engaging in the "unlawful employment practice charged in the complaint."[210] This grant of jurisdiction is bundled up with the plaintiff (i.e. a person aggrieved) that Congress envisioned. So if, for example, a court were to permit a plaintiff to seek an injunction in a class action for allegedly discriminatory activity that would not affect her again, the court would have effectively altered the underlying nature of the right through Rule 23. In turn, this reading of the rule would affect the remedial scheme encoded in the legislation.

The court employed such a reading in *Gutierrez v. Johnson & Johnson*.[211] There, a district court certified a class of current and former employees of Johnson & Johnson who were alleging race discrimination in promotion and compensation.[212] The named plaintiffs were four former employees who sought to

205. This view of the case is clear from the Supreme Court's often fierce debates over implied private rights of action. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 286 (2001) ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.").

206. 42 U.S.C. § 2000e-2(a)(1) (2000).

207. 42 U.S.C. § 2000e-5 (2000) (outlining EEOC's procedures for filing suit and authorizing intervention by "persons aggrieved").

208. Redish, *supra* note 156, at 107.

209. 42 U.S.C. § 2000e-5(f)(1) (2000).

210. 42 U.S.C. § 2000e-5(g)(1) (2000).

211. 467 F. Supp. 2d 403, 413-14 (D.N.J. 2006) (stating in dicta that a former employee not entitled to reinstatement can seek injunctive relief on behalf of the class but ultimately denying class certification because other requirements of Rule 23(a) were not met).

212. *Id.* at 414-15.

enjoin the allegedly discriminatory promotion and compensation policies.[213] The defendants challenged the named plaintiffs' adequacy to represent the class based on the fact that they lacked standing to enjoin policies that would not apply to them in the future.[214] The court ultimately rejected class certification but not because the class representatives were inadequate. Although the former employees would normally "not have standing to assert claims for injunctive relief since there was no immediate threat they will be wronged again,"[215] their lack of standing was not dispositive of the issue. To the contrary, because former employees were immune from retaliatory discharge, they might be the only available plaintiffs to reliably raise certain claims on behalf of a company's employees.[216] So if the named plaintiffs could fairly advance the interests of the class, it was not fatal that they otherwise lacked standing to seek an injunction. Rather than combating employment discrimination through a private cause of action brought by either an aggrieved person or the EEOC's enforcement efforts, the class device has added another enforcement mechanism: a third-party or "bounty hunter" action.[217] Rather than a person aggrieved filing a claim and the court granting equitable relief on the basis of that claim, Rule 23 has permitted a person other than the person aggrieved to bring a cause of action if done as part of a class.

In turn, this change in the underlying remedial scheme expands the courts' jurisdiction. The engine of private litigation was undoubtedly an important feature of Title VII.[218] In fact, in deciding on the ultimate enforcement mechanism that would exist under Title VII, the Senate expressly rejected the idea that "charges can be filed by other groups [than the EEOC] 'on behalf of' aggrieved persons."[219] Given the direction of political winds at the time, it is doubtful that a statute purporting to give an interested bystander a cause of action under Title VII would have passed through Congress.[220] The "procedure" of Rule 23 has

213. *Id.* at 404-05.

214. *Id.* at 413.

215. *Id.*

216. *Id.* at 413-14 (justifying the decision to permit a former employee to be a class representative based on the fact that "employers would be encouraged to discharge those employees suspected as most likely to initiate a Title VII suit in the expectation that such employees would thereby be rendered incapable of the bringing [sic] the suit as a class action").

217. Redish, *supra* note 156, at 122, 124.

218. *See* Francis Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 452 (1966).

219. *Id.* (quoting Memorandum Prepared on Behalf of Senate Judiciary Committee, 110 Cong. Rec. 14331-32 (1964). The Senate specifically rejected provisions that contained the language "on behalf of" aggrieved individuals in passing Title VII. *Id.* at 452 n.88.

220. *Id.*

thus changed the underlying substance of federal legislation. Regardless of the wisdom of this policy, decisions of this sort are normally made in the halls of Congress and not through rules of procedure.

Tying the adequacy requirement to standing obviates the risks posed by a judicial expansion of its jurisdiction. The risks posed by the expansion of remedies and the jurisdiction of the federal courts essentially relates to the courts tinkering with matters typically left to Congress through a procedural device. Neither risk arises, however, where the court hews closely to the injury of the class representative. To the extent that Congress typically chooses a "private remedial compensatory model" in safeguarding statutory rights, the named plaintiff's injury plays a central role. By requiring an identity of interests between the named plaintiff and the class, Rule 23 simply serves to aggregate individual remedial claims. Congress does not care with whom aggrieved plaintiffs seek to remedy past wrongs. However, where the class device is severed from the individual injury imagined by Congress, it has changed the underlying substantive right and the jurisdiction conferred on federal courts to resolve the particular disputes.

Conclusion

Given the importance of the Court's decision, *Gratz* will, of course, assume its proper place among the seminal cases of our day. But the substance of the decision—setting the standard for when non-quota-based affirmative-action programs fall short of the Constitution—was almost stranded behind a rule of procedure. The Court in *Gratz* did not have to bend rules of procedure to get to the substantive claim. Nor is it noteworthy that a procedural bar almost kept the Court from hearing what was truly a far-reaching case concerning disputed constitutional values. Instead, the difficulty lies in the fact that the contrary conclusions reached by the majority and dissent both had ample support in the Court's case law. Chief Justice Rehnquist eschewed a previous decision he authored that imposed strict standing requirements in the class context. Justice Stevens defended against the majority's application of a precedent he had authored years earlier. Courts are human institutions, and human beings can change their minds. But one suspects that, given the effect of this procedural choice, a judge less suspicious of affirmative action sought to avoid a holding invalidating such a program, and a more suspicious judge sought the opposite. Perhaps strategy is the real culprit.

This Article suggests how courts can avoid these strategic outcomes. Rather than look to an undefined standard like "adequacy," some named plaintiff must instead have standing to raise all of the causes of action advanced by the class before he will be deemed an adequate representative by the court. Had this rule governed in *Gratz*, the Court could have held that the class representative lacked standing and dismissed the case for want of jurisdiction. Alternatively, the Court could have upheld the representative's standing, but in so doing, it would have announced a generally applicable form of standing for future

cases—class actions or otherwise. At a minimum, such uniformity provides a more consistent understanding of the "judicial power" at work.