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How Many Injuries Does It Take? Article III Standing in the Class Action Context

James Keenley†

INTRODUCTION

Standing doctrine is a judge-made tool for ensuring that the federal judiciary's role in ordering society's affairs is limited to the function established by Article III of the Constitution. The doctrine derives its authority from Article III's case or controversy requirement, a reference to the constitutional grant of jurisdiction over all cases under federal law and to all controversies between certain enumerated parties.[1] Standing doctrine is the contemporary device for interpreting the meaning of a case under Article III; it requires the plaintiff invoking the power of the federal judiciary to establish a sufficient personal stake in the outcome of the case[2] to ensure the court that she is the "proper party to present the claim in an adversary context and in a form historically viewed as capable of judicial resolution."[3] Personal stake is established when the plaintiff alleges having suffered an "injury-in-fact" fairly traceable to the conduct of the defendant and likely to be redressed by the requested relief.[4]

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1. U.S. CONST. art. III.

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

3. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 218 (1974) (quoting Flast v. Cohen, 392 U.S. 83, 100, 101 (1968)) (internal quotation marks omitted).

4. Ass'n of Data Processing Srvs. Orgs. v. Camp, 397 U.S. 150, 152 (1970); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs, Inc., 528 U.S. 167, 180–81 (2000); Allen v. Wright, 468 U.S. 737, 751 (1984).

Standing doctrine generally and the injury-in-fact test in particular have not received a warm welcome from the academic community. Commentators widely assert that the doctrine is applied in an inconsistent, if not incoherent, manner.[5] Many claim that federal courts use standing doctrine to dodge difficult questions,[6] or as an unprincipled device to dispose of cases for unstated substantive reasons without actually analyzing the questions under review.[7] Even one of the Court's own referred to standing as naught more than "a word game played by secret rules."[8] Determinations that plaintiffs lack injury-in-fact appear to have effectively cut off certain constitutional provisions from judicial interpretation or enforcement.[9] This has led some scholars to argue that the injury-in-fact test is inconsistent with the constitutional design.[10]

Nearly all of the seminal injury-in-fact cases occur in the context of lawsuits commenced by private parties to challenge public/government action or inaction.[11] Scholars, in turn, have focused their analysis of the injury-in-fact requirement on how it impacts the ability of private plaintiffs to assert public rights.[12] What is lost in this discussion is the impact injury-in-fact doctrine has on jurisdictional issues in private disputes. Perhaps this is because the big question in the Article III inquiry—whether an alleged injury is sufficiently particularized or concrete to invoke the federal judicial power—is not particularly meaningful in lawsuits between private parties because such disputes do not present the constitutional separation of powers concerns that arise when the federal judicial power is invoked against other public bodies. In

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5. *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE. L. J. 221, 221 (1989); Edward A. Hartnett, *The Standing Doctrine of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking For Answers in All The Wrong Places*, 97 MICH. L. REV. 2239 (1999); Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635 (1985); Stephen L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1372 (1987).

6. Fletcher, *supra* note 5, at 228–29; A. BICKEL, THE LEAST DANGEROUS BRANCH 119–27 (1962).

7. *See* Abram Chayes, *The Supreme Court 1981 Term-Forward: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 22–23 (1982); Mark Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1715 n.72 (1980).

8. Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

9. *See, e.g.*, Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208 (1974) (holding that anti-war veteran plaintiffs could not challenge the military status of elected federal representatives because they lacked standing to bring claims as citizens under the Incompatibility Clause of the Constitution).

10. *See* Martin H. Redish, *The Passive Virtues, The Counter-Majoritarian Principal, And The "Judicial-Political" Model of Constitutional Adjudication*, 22 CONN. L. REV. 647, 647–48 (1990); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434 (1988).

11. *See, e.g.*, *Schlesinger*, 418 U.S. at 208 (challenging executive department inaction); O'Shea v. Littleton, 414 U.S. 488 (1974) (challenging county law enforcement practices); Allen v. Wright, 468 U.S. 737 (1984) (challenging IRS inaction); Ass'n of Data Processing Servs. Orgs. v. Camp, 397 U.S. 150 (1970) (challenging regulations issued by the Comptroller of the Currency).

12. *See supra* notes 5 - 7 & 10 (citing scholars on standing).

a typical two-party private dispute the only meaningful standing inquiry ought to be whether the plaintiff's claim rests on a legal right created in positive law.[13] If not, the plaintiff's case is dead on arrival, regardless of the Article III issues. We should not be surprised that injury-in-fact jurisprudence has had little, if any, discernible effect on the conduct of bilateral private lawsuits in federal court.

But, the injury-in-fact requirement may become a critical contest in multiparty private lawsuits where plaintiffs seek to represent a class of similarly situated persons. To illustrate the problem, suppose that employee Erica is a computer technician at W Corporation whose job duties qualify her for overtime pay for time worked in excess of 40 hours a week under federal law. W, however, classifies Erica, and all other computer technicians it employs, as exempt from federal overtime law. Erica will not have a problem establishing her standing to sue W in this situation; but what if Erica discovers that W utilizes the same employment policies at subsidiary corporations X, Y and Z, erroneously classifying computer technicians in those companies who perform substantially the same work she does as exempt from the federal overtime provisions? Even though Erica did not work at companies X, Y, and Z, she would like to expand her suit to cover a class of computer technicians at those companies in order to maximize the value of her claim to her attorneys, spread litigation costs by expanding the class, and effectuate the broadest possible relief from W's illegal employment practices.

Throughout this paper I refer to this type of lawsuit as a "multi-defendant common practice lawsuit." While my examples focus on employment, civil rights, and securities law, this type of case can arise in any context where distinct legal entities engage in practices guided by a single uniform policy. In Erica's case, because the injury-in-fact test contains elements of causation and redressability, defendants X-Z can all plausibly argue that since they have not caused injury specifically to Erica there is no case or controversy between them and the representative plaintiff. The question I seek to answer is: must Erica demonstrate that she has personally suffered injury by the hands of each company in order to have constitutional standing to directly challenge their practices in federal court?

There are two possible approaches to this problem. One method reasons that since standing is a constitutional requirement necessary for the court's subject matter jurisdiction,[14] and because no defendant may be held to the

13. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434 (1988). I use the term "positive law" to mean law that has been promulgated and enforced in a particular jurisdiction by the political authorities of that jurisdiction. Positive law in the United States could be said to consist of federal, state, and local statutes, regulations, and codes, as well as authoritative rules from appellate courts. *See* BLACK'S LAW DICTIONARY 1182 (7th ed. 1999).

14. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998) (terming Article III

power of the court unless jurisdiction is proper, the representative plaintiff must therefore establish personal standing to sue each defendant in his or her individual capacity prior to any other adjudicative activity, such as a motion to certify a class. Numerous courts have taken this position, which amounts to a constitutional bar on multi-defendant common practice lawsuits.[15] Another plausible interpretation of the case or controversy requirement in the class action context is to decide class certification issues first by utilizing Rule 23 standards to determine the boundaries of the class that the plaintiff can legally represent. Then, once the class is defined, the court can treat the class as a distinct legal entity and consider the injuries suffered by the class as the relevant variables for the injury-in-fact test. The Seventh Circuit Court of Appeals has explicitly taken this approach.[16] Other courts have adopted similar reasoning either implicitly or in the context of statutory standing questions.[17] The current trend, however, seems to be in favor of the former approach, requiring the plaintiff or plaintiffs to establish personal standing vis-à-vis each

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standing a "threshold jurisdictional question.").

15. *See, e.g.*, *In re* Eaton Vance Corp. Sec. Litig., 220 F.R.D. 162, 171 (D. Mass. 2004) (reaffirming on remand a denial of standing to bring a class action suit against a mutual fund company in which the plaintiffs owned no shares but were under the control of the same corporate entity that controlled funds in which the plaintiffs did have an investment); Herman v. Steadman, 50 F.R.D. 488, 489–90 (S.D.N.Y. 1970) (same holding as *In re* Eaton Vance Corp. Sec. Litig.); *see also* Henry v. Circus Circus Casinos, Inc., 223 F.R.D. 541, 544 (D. Nev. 2004) (dismissing state law wage and hour class claims brought by plaintiff security guards against defendant hotels where the named plaintiffs only worked for one of the hotels despite the fact that all the hotels were owned and operated by the same corporate parent); Miller v. Pac. Shore Funding, 224 F. Supp. 2d 977, 995–96 (D. Md. 2002) (holding that plaintiffs could not bring a class action asserting Maryland state consumer claims against lending institutions with which they had no contractual relationship even though plaintiffs were challenging practices identical to those which had caused plaintiffs' direct injuries); Angel Music, Inc. v. ABC Sports, Inc., 112 F.R.D. 70, 73–74 (S.D.N.Y. 1985) (denying standing for a plaintiff publisher to bring a copyright infringement suit against a defendant class of content distributors because the plaintiff individually had suffered injury at the hands of only one defendant); Weiner v. Bank of King of Prussia, 358 F. Supp. 684, 690, 697–98 (E.D. Pa. 1973) (denying standing as to nineteen banks with whom the plaintiff had never had a credit transaction even though the plaintiff did have clear standing to sue one bank and the other nineteen were "clear . . . members of the class of banks" engaging in the same putatively illegal conduct).

16. Payton v. County of Kane, 308 F.3d 673, 681–82 (7th Cir. 2002) (finding standing valid where plaintiffs sought to represent a class of persons subjected to allegedly unconstitutional bail fees in all Illinois counties even though the named plaintiffs had contacts with only four counties), *cert. denied*, 540 U.S. 812 (2003).

17. *See* Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 422 (6th Cir. 1998) (holding that a plaintiff could bring a class action on behalf of members of defendant's ERISA governed medical benefit plans to which he was not a member so long as Rule 23 requirements were met); Doe v. Guardian Life Ins. Co. of Am., 145 F.R.D. 466, 472 (N.D. Ill. 1992) (same); *see also* Forbush v. J.C. Penney Co., Inc., 994 F.2d 1101, 1106 (5th Cir. 1993) (allowing plaintiff to represent a class of participants in employer provided pension plans to which he was not a member); Alaniz v. California Processors, Inc., 73 F.R.D. 269, 275 (N.D. Cal. 1976) (certifying a class of employee members challenging an industry-wide, multi-employer collective bargaining agreement even though the named plaintiffs were themselves employed only by a small number of the defendants).

defendant prior to class certification–what I term the "many personalized injuries rule."[18]

I argue that the current trend in standing doctrine, demanding that the representative plaintiff allege personalized injury from each defendant, is incorrect as a matter of constitutional law, and operates as an inefficient bar on suits seeking to remedy injuries caused by common practices. The many personalized injuries approach, while purporting to adhere to Article III constraints on judicial power, is actually a judicially crafted and enforced limitation on Congress's legislative power. It is also out of step with Supreme Court case law implicitly and explicitly recognizing a properly certified class as a distinct legal entity with respect to the case or controversy requirement. The consequence of these infelicities is a rule that encourages repeat litigation over the same factual and legal issues, thereby straining court resources and needlessly limiting the practical federal court access of plaintiffs as a class. Perhaps more importantly, the many personalized injuries rule effects the relative distribution of economic and regulatory power between corporations and individuals in a manner that thwarts some of the central aims of contemporary market regulation. The rule places significant restrictions plaintiffs' ability to collectively assert rights created by regulatory statutes against economically dominant corporate institutions. It is a rule that provides corporate entities with a constitutional pike to fend off enforcement of legal duties arising under federal law that were intended to protect individual economic security against the inequities of market-oriented decision making.

This is not to suggest that the personal stake requirement has no place in private litigation. I merely argue that under certain circumstances it is desirable, on efficiency and fairness grounds, to authorize plaintiffs to bring class actions against non-injurious defendants, and that the Constitution cannot be fairly read to bar this practice. To this end, the paper proceeds in three movements. First, I will establish why, and under what circumstances, a legal system should allow a common practice multi-defendant lawsuit to go forward in the absence of injured named plaintiffs for each defendant. Next, I argue that the many personalized injuries rule inappropriately applies the Article III case or controversy requirement as a constitutional right of defendants to be free from certain forms of litigation, even where Congress has specifically authorized the litigation. Finally, I will show how federal courts can use Rule 23, and the juridical link doctrine created thereunder,[19] to provide for effective enforcement of Congress' regulatory aims while remaining consistent with existing standing law.

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18. *See, e.g.*, *In re* Eaton Vance Corp. Sec. Litig., 220 F.R.D. 162 (D. Mass. 2004); Henry v. Circus Circus Casinos, 223 F.R.D. 541 (D. Nev. 2004).

19. For a discussion of the juridical links doctrine, see La Mar v. H & B Novelty Loan & Co., 489 F.2d. 461 (9th Cir. 1973) and *infra* notes 150–156, and accompanying text.

I
WHY ALLOW COMMON PRACTICE SUITS IN THE FIRST PLACE?

It is not self evident why a legal system should, under any circumstances, allow a plaintiff to bring suit against defendants with whom she has not had injurious contact. At a minimum, it seems that such suits conflict with the Anglo-American legal tradition of not allowing a plaintiff to sue to vindicate the interests of other people without some sort of special justification, and this justification is largely defined by reference to efficacious adjudication and law enforcement.[20] The *qui tam* action, whereby citizens are allowed to bring suit to vindicate the rights of the government and in turn receive a piece of the recovery, is one such instance where third party standing has been long accepted in English and American law.[21]

The class action device is the exception of most contemporary significance to the traditional rule that a litigant may not assert the rights of others. Currently governed by Rule 23 of the Federal Rules of Civil Procedure, the class action is a congressionally authorized proccdure enabling one plaintiff to conclusively litigate the rights of many others.[22] The class action device operates in two ways, serving either to allow a plaintiff or group of plaintiffs to coercively consolidate and represent the rights of a much larger group,[23] or to enable a single defendant or group of defendants (either willingly or unwillingly) to litigate the consolidated defenses of a much larger group.[24] The

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20. Craig v. Boren, 429 U.S. 190, 193 (1976) (holding that a liquor vendor could sustain a challenge, on gender discrimination grounds, to a statute mandating a lower legal drinking age for women than for men. ("[L]imitations on a litigant's assertion of *jus tertii* [third party standing] are not constitutionally mandated, but rather stem from a salutary 'rule of self-restraint' designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative."). It is worth noting that in finding that third party standing is not barred by the Constitution the Court is necessarily suggesting that the causal nexus in the injury-in-fact test does not require the harm to run between the plaintiff and the defendant, but rather between the person whose rights are being adjudicated and the defendant.

21. Hartnett, *supra* note 5, at 2241–44 (arguing, *inter alia*, that the constitutionality of *qui tam* actions demonstrates that injury-in-fact cannot be a constitutional requirement).

22. Rule 23(a) sets forth four requirements for a class aetion to proceed: (1) numerosity of the parties; (2) commonality of legal and factual issues; (3) typicality of claims and defenses of the class representatives; and (4) adequacy of representation. In addition, the claim must fit into one of three categories detailed in Rule 23(b): (1) the prosecution of separation actions would create risk of inconsistent adjudication or individual suits would as a practical matter be dispositive of the interests of other class members not parties to the litigation; (2) the defendant has acted on grounds generally applicable to the class; or (3) there are common questions of law and fact and a class action is superior to the other available methods for the fair and efficient adjudication of the controversy.

23. *See, e.g.*, Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 188–87 (N.D. Cal. 2004) (eertifying a plaintiff class of female employees).

24. *See, e.g.*, Alvarado Partners, L.P. v Mehta, 130 F.R.D. 673 (D. Colo. 1990); *In re* Alexander Grant & Co. Litigation, 10 F.R.D. 528 (S.D. Fla. 1986); Northwestern Nat. Bank of Minneapolis v. Fox & Co., 102 F.R.D. 507 (S.D.N.Y. 1984). In contemporary times the defendant class action has largely been limited to securities actions, however, the practice of litigating

two different modes of class action are not mutually exclusive of each other and present courts with the same basic issue: to what extent does the consolidated action increase judicial efficiency and preserve norms of fairness for absent class members?

Plaintiffs seeking to pursue class actions are also concerned with fairness and efficiency issues, though typically through the lens of their financial and strategic position in the litigation (as opposed to the court system writ large). The cost of contemporary litigation is often so high that a claimant's individual case is too small to be worth presenting as a single lawsuit, and the transaction costs of noncoercive (not compelled by judicial decree) claim consolidation are often prohibitive. Thus, class actions allow small claim plaintiffs to acquire legal representation and overcome the substantial cost burdens of litigation and coordination.[25]

Defendants, of course, also have financial and strategic concerns that lead them to perceive class actions as more or less efficient and fair. Most of the time defendants resist class certification because it will dramatically increase the financial stakes of a litigation defeat. Sometimes, however, defendants prefer class-based adjudication in order to efficiently dispose of large groups of claims.[26]

A similar set of policy rationales counsels in favor of allowing plaintiffs, in certain situations, to bring class actions against defendants who are not alleged to have injured the representative plaintiffs.[27] Such cases arise repeatedly in four different contexts: securities actions brought by classes of small investors against multiple financial institutions engaged in putatively illegal common practices; employment disputes brought by classes of employees; allegations of systematic breaches of fiduciary duty as to multiple ERISA-governed employee benefit plans; and systematic civil rights

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against a class of mostly absent defendants was utilized to resolve the myriad issues of land tenure in 17th and 18th century England. NEWBERG ON CLASS ACTIONS § 4:46; *see, e.g.*, How v. Tenants of Brooms Grove, 1 Vern. 22, 23 Eng. 277 (1681).

25. John C. Coffee, *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 (1986). Professor Coffee observes that absent the class action device a free rider problem would arise in litigation. Litigation is a high cost enterprise, but its products are public goods–they are usable by anybody–thus, all potential litigants experience incentives to let others do the litigating and to reap the benefits of that litigation without bearing any share of the costs. Absent devices for spreading the costs of litigation (such as class actions) plaintiffs would find litigation generally underfunded. *Id.*

26. The two attempts to settle all current and future asbestos claims by a single massive class action are good examples of this latter instance. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612–13 (1997); Ortiz v. Fibreboard Corp. 527 U.S. 815 (1999); *infra* notes 88–93 and accompanying text.

27. Correspondingly, these rationales would also allow a defendant to rope other defendants (who did not injure the representative plaintiffs) into a given case, but this circumstance is much less likely to occur.

violations.[28] Each of these types of cases presents concerns of due process, judicial efficiency, and regulatory economics that are unique to lawsuits alleging common illegal practices on the part of multiple defendants.

A. Due Process

A major due process concern running through all varieties of common practice lawsuits is that a decision in one case is likely to have a de facto preclusive effect on other cases. For instance, it is common for major insurers who serve as ERISA plan administrators to market the same benefit plan policy to a variety of different employers. Suppose that a retiree of company X, which uses the same pension benefits provider and plan design as independent companies Y and Z, brings suit against the benefit provider (not the employer) alleging that the method employed to calculate the retiree's monthly benefit is a misinterpretation of the plan that effects a breach of fiduciary duty under ERISA. Such a claim is a relatively straightforward dispute over contract interpretation except that the same disputed contractual text and practices are being implemented in the course of three different contractual relationships. If X's retiree brings his claim solely on an individual level,[29] and is successful on the merits, it is quite possible that retirees of companies Y and Z will be able to assert collateral estoppel to block the insurer from re-litigating the case as to their pension plans.[30] But, if the retiree loses the reverse would not be true–the insurer will still be vulnerable to litigation under the other two benefit plans.[31]

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28. *See supra* note 15 (citing cases).

29. Such a lawsuit would not be individual in the sense that no other parties are bound by the result because under ERISA a plan participant sues on behalf of the plan in which she is a participant, thus any recovery runs to the plan, not the individual. A judgment in an ERISA case alleging breaches of fiduciary duty owed to the plan will thus likely be preclusive of the rights of other plan participants. *See* Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142 (1985) ("A fair contextual reading of the [ERISA] statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would effect the entire plan, rather than the rights of an individual beneficiary.").

30. The normal rule on issue preclusion is that if issues are "actually litigated and determined by a final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties whether on the same or a different claim." RESTATEMENT (SECOND) OF JUDGMENTS § 27. In the ERISA example the retirees of companies Y and Z are not the same parties as the retiree from company X, but the defendant insurance company is identical. This situation calls for non-mutual issue preclusion (collateral estoppel) barring the insurance company from relitigating the central issue in the litigation regarding its contract with company X (proper interpretation of the plan contract) against the retirees of Y and Z. Non-mutual issue preclusion can be used to the benefit of plaintiffs not parties to the original action when those plaintiffs could not be expected to have joined the action and where preclusion would not be manifestly unfair to the defendant. *See* Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 331–32 (1979).

31. Whether preclusion applied against the claims of the absent retirees would depend on whether they were in privity with the retiree from company X, measured by whether or not they had substantial control over the litigation. *See* Gonzalez v. Banco Central Corp., 27 F.3d 751, 756–760 (1st Cir. 1994).

We can nonetheless readily pereeive that the rights of retirees of companies Y and Z have been precluded for all practical purposes beeause they are asserting an already rejected position about an already judicially interpreted contraet. Any subsequent litigation Y and Z retirees bring is likely, if not certainly, going to be resolved under the persuasive authority of the prior decision.

The same is true of cases alleging a particular practice violates federal securities regulations,[32] cases alleging civil rights violations,[33] and nearly every case challenging a common practice used by multiple defendants, or one used by a single defendant with regard to distinct groups of plaintiffs. In such cases it only takes one round of litigation to sort out the essential factual and legal issues surrounding the common praetice. Not allowing such suits to proceed as class actions against defendants who did not injure the named plaintiffs directly creates two due proeess irregularities. First, defendants who did injure the representative plaintiffs in the initial litigation will not get the direct benefits of issue and claim preclusion if they prevail. Second, potential plaintiffs on whom the judgment in the initial litigation might be, for all practical intents, binding will not receive any formal legal protection–even that of notice–enabling them to ensure that their interests are fully represented. Due process norms, therefore, suggest that both plaintiffs and defendants would benefit from a regime friendly to multi-defendant common practiee lawsuits.

B. Judicial Efficiency

Numerous factors, such as crowded court dockets,[34] limited court budgets,[35] and recent legislation expanding federal court jurisdiction,[36] counsel

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32. *See, e.g., In re* Eaton Vance Corp. Sec. Litig., 220 F.R.D. 162 (D. Mass. 2004). This case involves claims against four mutual funds, two of whom had not injured the named plaintiff directly, but who were engaged in the same allegedly illegal practice and managed by the same company. *Id.* at 164.

33. *See, e.g.*, Payton v. County of Kane, 308 F.3d 673, 681–82 (7th Cir. 2002); DeAllaume v. Perales, 110 F.R.D. 299 (S.D.N.Y. 1986) (class action suit against fifty-eight county commissioners in New York state).

34. *See* RICHARD H. FALLON, ET. AL., HART & WECHSLER'S: THE FEDERAL COURTS & FEDERAL SYSTEM 48–49 (5th ed. 2003). Circuit court judge Richard Posner observes that the number of cases filed annually in federal courts "inore than tripled, roughly from 80,000 to 280,000–a 250 percent increase, coinpared with less than 30 percent in the prceding quarter century" from the period between 1960 and 1983. RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 63–64 (1985). However, some scholars are skeptical of the notion that there is a significant caseload problem. *See generally* Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 5 (1983); Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 1 (1986); Mullenix, *Discovery and Disarray: The Pervasive Myth of Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994).

35. *See* THE FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990), *reprinted in* 22 CONN. L. REV. 733, 890–91 (1990) (rccommending significant budget increases for the Administrative Office and the Federal Judicial Center, two

in favor of leveraging economies of scale in litigation where it is possible to do so without compromising established legal norms. The class action is one long-recognized device for courts to ease the burdens on their dockets by consolidating claims with similar factual and legal scenarios.[37] In the context of a lawsuit alleging common illegal practices on the part of multiple defendants, the efficiency concerns that encourage the formation of litigation economies of scale are in full effect.

Suppose that employee Ethan has the formal job title of assistant manager at a fast food franchise and has been classified by his employer as exempt from federal overtime wage laws. Ethan brings suit against the franchisee (his direct employer) and the franchisor (who does not employ him in a formal sense) for unpaid wages, alleging that his employer, the franchisee, has a co-employer relationship with the franchisor and that each has been responsible for misclassifying him as exempt from overtime compensation under federal law.[38] Further suppose that Ethan can show that the franchisor has a centralized process for ensuring compliance with federal employment laws, and in so doing defines uniform job titles for each position in its franchises. The individual franchisees use these uniform titles to determine which employees should receive overtime compensation as required by federal law.

Even though Ethan's damages are potentially substantial (let us suppose $10,000 per year for a three year limitations period) and there are two other people working in Ethan's franchise with the job title assistant manager (putting the total value of the case in the $90,000 range), it may still be quite difficult for Ethan to secure legal representation. For one thing, if he is constrained to limit the suit to his own franchise he will not be able to satisfy the numerosity requirement of Rule 23, and will thus not be able to compel the consolidation of his co-workers' claims.[39] Any hope of increasing the value of the claim through multi-party litigation will only be realized by negotiating

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bodies whose support functions are essential to the continuing viability of the federal judiciary).

36. *See* Class Action Fairness Act, 28 U.S.C. §§ 1332(d), 1453, 1711-1715 (2006) discussed *infra* at note 41 and accompanying text.

37. Collective litigation has roots tracing back to the chancery courts of 17th century England. 1 NEWBERG ON CLASS ACTIONS § 4:46; *see, e.g.*, How v. Tenants of Brooms Grove, 1 Vern. 22, 23 Eng. 277 (1681). The modern class action device traces its origins to 18th and 19th century England. HAZARD, ET. AL., PLEADING AND PROCEDURE 733–37 (9th ed. 2005).

38. Such lawsuits are permissible under the Fair Labor Standards Act. *See, e.g.*, Real v. Driscoll Strawberry Assoc., Inc., 603 F.2d 748, 754–56 (9th Cir. 1979).

39. There is no set minimum for satisfying the numerosity requirement, and classes can be quite small; one court, for instance, certified a class consisting of only 14 plaintiffs. Grant v. Sullivan, 131 F.R.D. 436 (M.D. Pa. 1990). Another court suggested that a class could be certified with as few as three members if the device could help overcome jurisdiction and venue problems. Prudential Ins. Co. of Am. v. Trowbridge, 313 F. Supp. 428, 429 n.1 (D. Conn. 1970). Ethan's case does not present this situation and would almost certainly fail on numerosity grounds. *See* Hodge v. McLean Trucking Co., 607 F.2d 1118 (5th Cir. 1979) (denying certification for a class of four plaintiffs in an employment discrimination action).

with his co-workers. Even if these efforts are successful, $90,000 is likely too small a potential award for plaintiffs' attorneys to litigate an unpaid overtime case against a large franchisor that likely has many thousands of assistant mangers working around the country and thus has a strong incentive to invest heavily in the outcome of the litigation. Given the importance of the issue to the franchisor, Ethan's lawyer estimates that she will incur at least $100,000 in costs over the course of a relatively small lawsuit on behalf of three employees. The financial constraints make it unlikely that Ethan's claim will be brought if its reach is limited to those assistant managers working for his direct employer; as a result the employees' right to overtime, or at least their right to challenge their classification, will not be realized.

In this situation, Ethan could overcome these financial constraints by making his lawsuit as big as possible, increasing the aggregate value of his claim. Specifically, Ethan would like to represent a class of assistant managers nationwide in a suit against the franchisor. He can attempt to accomplish this without raising standing problems by suing only the franchisor; however, his lawyer is concerned that the franchisees who directly employ assistant managers will be regarded as necessary parties for complete relief under federal overtime law (which only provides causes of action against "employers"). Thus, Ethan's lawyer fears that the action will be dismissed without the franchisees' presence in the suit.[40] To solve this problem, Ethan's complaint names several geographically dispersed franchisees as defendants and representatives of a putative defendant class of all franchisees. The named franchisees (excepting Ethan's direct employer) respond with a motion to dismiss for want of subject matter jurisdiction; they claim that he has not alleged any injury-in-fact running from them and therefore lacks standing to sue them under Article III.

If the defendants' motion were successful in this hypothetical one of two glaring inefficiencies is likely to emerge. If the plaintiff's lawyer pursues and prevails on the much narrower and less valuable claim on the merits (figuring that even if the instant case fails to yield positive returns she will be able to prosecute other future claims at significantly reduced costs), each individual franchisee will likely find itself (eventually) the subject of a similar lawsuit. If the plaintiff were an employee of a franchise like McDonald's this could result in literally thousands or tens of thousands of individual lawsuits–perhaps a *bona fide* litigation crisis. To my knowledge, there has not been a major litigation crisis as a result of this issue, but the potential for such an event is nonetheless real. It is not clear why, if it were otherwise constitutional, the

40. If Ethan only sues the franchisor the defendant will resist the lawsuit on the grounds that it does not employ the defendant. In order to get at the franchisor Ethan will have to sue the direct employer (the individual franchise) and allege that there is a coemployer relationship between the direct employer and the franchisor. *See generally* Real v. Driscoll Strawberry Assoc., Inc., 603 F.2d 748, 754–56 (9th Cir. 1979); FED. R. CIV. P. 19(a)–(b).

judiciary should shy away from presiding over this sort of claim as a single large class action. Indeed, the recent implementation of the Class Action Fairness Act (CAFA)[41], which dramatically increased federal court diversity jurisdiction in class action lawsuits, seems to demand that federal judges take case consolidation more seriously than before. The federal docket is only going to get more crowded, and the pressures on judicial efficiency greater, as CAFA's effects are felt in the coming years.

In fact, if the many personalized injuries rule were to achieve Supreme Court approval as valid constitutional law it could potentially undermine the functioning of CAFA by barring the transfer of suits otherwise removable under CAFA, but involving defendants not directly injuring the representative plaintiffs. Suppose that a plaintiff brings a multi-defendant common practice lawsuit in a state court system that does not have a comparable jurisdictional limitation to the Article III injury-in-fact requirement. Presumably, it would not be possible to remove the claims against the non-injurious defendants to federal court because it is unlikely that the plaintiffs would have constitutional standing to sue those defendants in the federal forum.[42] Therefore, it seems quite possible that those claims would stay in state court and state law would determine whether the claim could continue in the absence of valid injury-in-fact parties.

This type of asymmetry—where state courts are paradoxically left to resolve significant issues of federal policy—is not unheard of in Article III standing jurisprudence. In *ASARCO, Inc. v. Kadish*, the Court confronted a situation where New Mexico state courts had incorrectly adjudicated federal law claims brought by plaintiffs who lacked Article III standing, which was not a requirement in New Mexico's jurisdictional scheme.[43] To resolve this predicament, the Court held that the defendants had Article III standing to bring their appeal to the U.S. Supreme Court because the New Mexico Supreme Court's incorrect interpretation of federal law inflicted the necessary "injury-in-fact."[44] Such jurisdictional gymnastics would not solve the CAFA problem, which does not necessarily involve mistaken application of federal substantive law. No cases have yet addressed the interactions of Article III, CAFA, and

41. 28 U.S.C. § 1332 (2006). CAFA provides for original jurisdiction in district courts of "any class action where the aggregate amount in controversy exceeds $5,000,000 and any single member of the class is diverse from any single defendant." HAZARD, *supra* note 37, at 820.

42. Doremus v. Bd. of Educ., 342 U.S. 429, 434 (1952) ("We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of 'case or controversy,' we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.").

43. 490 U.S. 605, 610 (1989).

44. *Id.* at 618.

state court jurisdiction in this context.[45]

There is one major objection to allowing the above class action to proceed in the form I have suggested: manageability. Though manageability is only an express requirement of Rule 23(b)(3) class actions, it is considered an implicit requirement in all class actions.[46] In Ethan's case the franchisor would argue that the sheer size of the class action, and its nationwide focus, make it too large for a single case to manage all the issues of liability and damages. They might suggest, for instance, that due process requires mini-trials for each franchise or that the damages calculations are too individualized to manage in a class context. These arguments would likely fail because trial courts generally have broad discretion in crafting procedures to manage complex litigation, including splitting the trial into separate liability and damages phases.[47] In fact, the federal judiciary publishes a comprehensive manual of such strategies.[48] In *Dukes v. Wal-Mart Stores, Inc.*, Judge Martin Jenkins rejected a manageability challenge to a class of over 30,000 employees at 3,244 individual stores, holding that "once the court determines that there are sufficient common questions to justify proceeding as a class, the liability phase properly focuses on evidence that affects the class generally—not on individuals or other minor segments of the class."[49]

The second, perhaps more serious, inefficiency that could result from not allowing Ethan's suit to proceed as a single large class action would be no lawsuit at all. Ethan may not be able to find an attorney willing to undertake the costs of litigation for a $30,000 claim or even a $90,000 claim. Assistant managers nationwide (and their would-be attorneys) will have an incentive to free ride on Ethans's claim, and his lawyer may not feel she will be able to capture sufficient value from subsequent litigation, and may accordingly choose not to pursue the claim. It is true that Ethan's attorney, if able to sign up numerous individual plaintiffs, could reduce much of the free rider problem. But, in the context of a nationwide class action, the transaction and coordination costs involved in such an effort are potentially too high to justify making the effort in the context of a high-risk investment like contingency-fee litigation. It is also possible to solve these cost problems by bringing in a federal agency like the Department of Labor to sue on Ethan's behalf. But this is only a viable answer in a very small number of cases. The federal

45. For more reading on the consequences of asymmetry in federal and state standing law, see Comment, *Standing in Good Stead: State Courts, Federal Standing Doctrine, and the Reverse-*Erie *Analysis*, 99 NW. U. L. REV. 1315 (2005); Helen Hershkoff, *State Courts and the "Passive Virtues:" Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001).

46. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 173 (N.D. Cal. 2004).

47. *See id.* (referring to such splits as the "standard approach" in employment discrimination class actions).

48. *See generally* MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004).

49. 222 F.R.D. at 174.

government does not have the resources to police the entire labor market. Our system has been designed such that much federal regulation relies on private enforcement.[50]

If Ethan were not able to bring his suit, the franchisor's illegal activity would go unremedied, and Congress's regulatory aims would be frustrated by underinvestment in the federal right to receive overtime compensation. Of course under-enforced rights are not problems of judicial efficiency *per se* because the judiciary does not bear costs of under-enforcement. But, persistent illegal activity that is unremediable due to a standing hurdle is an allocative inefficiency for the legal system as a whole because such a situation suggests that insufficient resources are being directed towards law enforcement activities as a result of the jurisdictional rule. An allocative inefficiency in law enforcement is important because it undermines legislative intent and the functioning of the regulatory state.

C. Regulatory Economics

Multi-defendant common practice lawsuits tend to arise in the context of regulatory regimes that attempt to control the behavior of large governmental and corporate entities.[51] These regimes create legal duties that run from the regulated objects, generally corporate and governmental entities, to the regulatory beneficiaries, generally ordinary citizens. The rational response to such duties on the part of regulatory objects is to capitalize on the availability of what I term "compliance economies of scale." Large organizations are able to achieve these compliance economies of scale by centralizing and standardizing their policy-setting processes. For example, a corporate parent might make overtime classification decisions at the corporate parent level on the basis of functional job titles applied to a large number of employees throughout the corporate umbrella.[52] Or a company providing an employee benefit plan might contract all decisions on plan administration to an insurer who administers, under identical rules, policies, and interpretations, hundreds of similar or identical plans with different employers that provide benefits to tens of thousands of employees. At the governmental level, in the context of judge-made constitutional regulation (e.g., the numerous prison condition rules crafted under the Eighth Amendment), we might encounter situations where states dictate prison policy at dozens of individual prisons.[53]

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50. *See infra* note 138 and accompanying text.

51. *See, e.g.*, *In re* Eaton Vance Corp. Sec. Litig., 220 F.R.D. 162 (D. Mass. 2004) (securities regulation); Henry v. Circus Circus Casinos, Inc., 223 F.R.D. 541, 544 (D. Nev. 2004) (regulation of the labor market); Payton v. County of Kane, 308 F.3d 673, 681–82 (7th Cir. 2002) (constitutional regulation of law enforcement practices).

52. *See, e.g.*, Henry v. Circus Circus Casinos, Inc., 223 F.R.D. 541, 541-42 (D. Nev. 2004).

53. *See, e.g.*, Payton v. County of Kane, 308 F.3d 673, 673 (7th Cir. 2002).

Nothing normatively untoward, or socially unjust, occurs simply because regulatory objects leverage the power and efficiency of compliance economies of scale. But, principles of fairness, equity, and the underlying purposes of regulation, suggest that plaintiffs ought to be able to marshal their own enforcement economies of scale. Take for instance *Henry v. Circus Circus Casinos,*[54] where two plaintiff security guards sought to represent a class of security guards employed at all of the hotels under the control of the corporate entity Mandalay Resort Group.[55] Their claim was that Mandalay Resort Group established time and wage policies for all of its subsidiary hotels that, when applied to security guards, violated state and federal law.[56] The district court, on injury-in-fact grounds, refused to grant standing to sue the hotels at which the plaintiffs had never been employed.[57] The court reasoned that since the named plaintiff guards were only employed at one hotel, they did not suffer injury at the hands of the other hotels; therefore the named plaintiffs lacked standing to sue those other hotels and could not even attempt to represent a class of persons suing those hotels.[58]

It is clear, without getting into the legal merits of the district court's holding, that its decision affects an imbalance in regulatory power. Assuming that the plaintiffs' allegations were true, the decision gives Mandalay Resort Group the power to make decisions about compliance with labor laws that affect employees throughout its corporate umbrella (without regard to what entity a particular employee works at) while simultaneously shielding itself from the full effect of the risk their decision is wrong. Instead of facing a lawsuit and damages from all of the security guards whom its decision affected, it will face these suits, if at all, hotel by hotel.

I assert that in this situation plaintiffs will have substantial difficulties mounting an effective challenge of Mandalay's policy. All of the security guards in the Mandalay Resort Group (and the attorneys who might potentially represent them) now experience an incentive to let the guards at one hotel bear the costs of the initial litigation so they may capitalize on the public good of a litigation victory without making a substantial investment in that victory—a classic free riding problem.[59] The plaintiffs' attorneys might be able to solve this problem, but the transaction and opportunity costs of coordinating activity between potential plaintiffs at various hotels are going to be high and risky in

54. 223 F.R.D. 541.
55. *Id.* at 542.
56. *Id.*
57. *Id.* at 544.
58. *Id.*
59. A litigation victory is a public good in this context because persons who have not invested in its creation can nonetheless capitalize on its precedential, preclusive, and persuasive value.

the context of contingency fee litigation.[60] Moreover, the task is logistically difficult in the face of professional conduct restrictions on marketing to potential clients.[61] Government agencies might intervene but, again, this is not how the U.S. wage regulation system is typically implemented. Moreover, the plaintiffs' attorneys are now holding a claim that has a relatively lower value and thus the bargaining dynamics of the lawsuit have been significantly altered in the defendant's favor.

The overtime example illustrates that in a regulatory state that relies on private enforcement actions to achieve its regulatory aims standing doctrine will have a powerful effect on the distribution of power between regulatory objects and beneficiaries. Article III standing rules affect the scope of who can sue whom to enforce federal rights. The scope of enforcement in turn affects the ability of regulatory objects and beneficiaries, respectively, to leverage compliance and enforcement economies of scale. Multi-defendant common practice lawsuits expose this phenomenon in pointed fashion. If employee Ethan lacked standing in the franchisor overtime case described above, the ability of Ethan (the regulatory beneficiary) to leverage enforcement economies of scale will be substantially reduced. At the same time, the value of the franchisor's compliance economy of scale is greatly increased; the franchisor is able to consolidate its compliance efforts and thereby reduce operating costs without a corresponding increase in liability risk. A standing rule barring multi-defendant lawsuits of the sort Ethan seeks to pursue would overvalue compliance economies of scale; such overvaluation would, in turn, lead to increased incidence of unremedied defective compliance with the law.[62] The costs of this noncompliance are shifted entirely to the regulatory beneficiaries because the noncompliant object does not bear the cost of an irremediable failure to comply.

When noncompliance costs are borne excessively by regulatory beneficiaries noncompliant behavior is incentivized. Many, if not most, regulatory statutes extend the benefits of their protections to vast swaths of the population, such as all persons who are employed or seek to become so,[63] all

60. The coordination cost is a particularly risky undertaking in contingency fee litigation because the plaintiff's attorney bears the entire risk of an unfavorable result.

61. *See generally* MODEL CODE OF PROF'L RESPONSIBILITY EC 7.1–7.6 (2006).

62. This is so because when a regulatory object utilizes complianee economies of scale, it necessarily makes decisions about its compliance with regulatory regimes at a higher level of abstraction less connected to the specific factual circumstances that are relevant to determinations of regulatory compliance. The more abstract a eompliance decision is, the more likely that decision is noncompliant as applied to specific regulatory beneficiaries. In the overtime context, for example, as the number of employees labeled exempt from overtime by a single decision cxpands, the relative variance in job duties (the relevant factor in federal overtime law) among those employees also increases. Consequently, there is a higher probability that any given employee's classification is incorrect with regard to federal overtime law.

63. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2006); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2006).

persons who have searched for housing,[64] and all participants in employer-sponsored benefit plans.[65] Thus, in the aggregate, when noncompliance costs are shifted onto regulatory beneficiaries they are essentially shifted onto the public at large—the society subsidizes noncompliance with its own regulations. A rule that bars multi-defendant common practice lawsuits necessarily has this effect, so long as there are not parallel restrictions on the ability to leverage compliance economies of scale. Moreover, when the rule is constitutional in character it is effectively a constitutionalized subsidy of unlawful behavior.

The three areas of concern outlined above provide guidelines for what factual circumstances justify allowing multi-defendant lawsuits to go forward against non-injurious defendants. Due process suggests that the multi-defendant suit should be allowed where the rights of absent litigants would, as a practical matter, be substantially at stake in the litigation even when the non-injurious defendants are dismissed from the claim. Concerns of judicial efficiency advise in favor of keeping the non-injurious defendants in the action where subsequent repetitious litigation is likely. Finally, the economics of a regulatory system that relies on private enforcement encourage use of multi-defendant lawsuits where that form of lawsuit would cause the costs of regulatory noncompliance to be borne by the noncompliant regulatory object. Where these concerns are not present, we can comfortably rely on the normal rule that litigants may only assert their own claims, and not those of other persons. The trick is finding and developing a legal doctrine that accommodates these policies. Later, in Part III, I will consider the juridical links doctrine as one potential solution, but for now we are detained by more troubling matters.

II
THE CONSTITUTIONALITY OF MULTI-DEFENDANT COMMON PRACTICE LAWSUITS

I have presented three main policy justifications for allowing plaintiffs to pursue multi-defendant common practice lawsuits. But no matter how sound these reasons might be they are little more than hot air if the constitutional design somehow prohibits common practice lawsuits. In the following section, I take up the constitutional question: in a multi-defendant federal class action lawsuit, does Article III require a representative plaintiff alleging injury running from each defendant, or only one? I briefly review the constitutional purposes that standing law serves, and then consider the constitutional status of multi-defendant common practice lawsuits through the lens of *In re Eaton Vance*. *Eaton Vance* is a securities action in which the court considered the issue at length and concluded that constitutional standing rules require injury-

64. *See, e.g.*, Fair Housing Act, 42. U.S.C. §§ 3601-3631 (2006).
65. Employee Retirement Income Security Act, 9 U.S.C. §§ 1001-1461 (2006).

in-fact running from each defendant to at least one representative plaintiff.[66] The case is a useful and important artifact for contextualizing the standing question. Though only a district court disposition, a variety of districts across the country have followed its conclusions.[67] Moreover, the district court prepared the opinion at the direct request of a First Circuit appellate panel, making it a lengthy and well reasoned defense of the multiple personalized injuries rule.[68]

A. Standing's Constitutional Intentions

The case or controversy language of Article III aims to ensure that the unelected federal judiciary does not perform functions constitutionally reserved for the elected branches of government. In pursuing this end, standing doctrine consists of both prudential rules (rules born of judicial convenience and to which there are numerous exceptions) and constitutionally mandated elements (to which there are no exceptions).[69] Injury-in-fact is specifically articulated as a constitutionally mandated requirement—it has been called an "irreducible minimum" of Article III.[70] Notably, though the constitutional injury-in-fact requirement facially appears to limit judicial power, it is decidedly not a limit on the power of federal courts. Outside the direct Constitutional grants of original jurisdiction to the Supreme Court, the federal judiciary does not exist and has no power to do anything except to the extent it has been created or authorized to act by Congress; therefore when constitutional standing doctrine operates to exclude a certain form of lawsuit from the judicial power, it operates as a restriction on congressional power to create federal court jurisdiction.[71] Thus, the many personalized injuries rule does not limit courts, litigants, or litigators, but rather is an absolute bar on the ability of Congress to authorize suits by representative plaintiffs against non-injurious defendants.

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66. *In re* Eaton Vance Corp. Sec. Litig., 220 F.R.D. 162 (D. Mass. 2004).

67. *See, e.g.*, *supra* note 15 (citing cases).

68. *See infra* note 86 and accompanying text.

69. Warth v. Seldin, 422 U.S. 490, 498 (1975).

70. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) ("[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'") (quoting Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) and Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976)).

71. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 886 (1983) ("[Article III] is a limitation, I would assert, only upon the *congressional* power to confer standing, and not upon the courts, since the courts *have* no such power to begin with.") (emphasis in original). It is debatable whether Congress was constitutionally required to create the lower federal judiciary, or if Congress today has the power to completely dismantle that judiciary.

B. Testing the Constitutionality of a Multi-Defendant Lawsuit

Plaintiffs have successfully prosecuted common practice civil rights class actions against non-injurious defendants.[72] But, such cases are ill-suited for testing the constitutionality of the common practice lawsuit I am endorsing because civil rights issues are sometimes said to be subject to an accommodating standing requirement on grounds of public policy.[73] I shall argue later that the substantive qualities of the underlying dispute should not be relevant to the Article III inquiry, but for now it is most persuasive to consider the constitutional problem in the context of a less accommodating field: securities law. Of late, standing in securities litigation has been disfavored as a matter of public policy.[74] As such, it is particularly useful to show why a ban on common practice lawsuits cannot be constitutional in origin. The securities field, because of the proliferation of liability-incurring entities under the control of single companies (mutual funds, for example), is also an area where the multi-defendant common practice lawsuit scenario is apt to occur.

In re Eaton Vance Securities Litigation, a class action alleging various violations of federal securities laws against Eaton Vance Corporation and four mutual funds under its control, contains an elaborate discussion of standing in the context of a common practice lawsuit.[75] The named plaintiffs invested in only two of the four funds named as defendants and thus could allege direct injury only from the management of those two funds.[76] In response to a motion to dismiss on standing grounds by two of the mutual funds, the court employed the classic characterization of Article III standing as a requirement that the plaintiff allege "(1) a personal injury . . . that is (2) fairly traceable to the defendant's allegedly unlawful conduct and (3) likely to be redressed by the requested relief."[77] That the case had been brought as a class action was of little moment; the court, relying on *Lewis v. Casey*[78] and *Blum v. Yartesky*,[79]

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72. *See, e.g.*, Payton v. County of Kane, 308 F.3d 673, 681–82 (7th Cir. 2002).

73. *In re* Eaton Vance Corp. Sec. Litig., 220 F.R.D. 162, 168 (D. Mass. 2004) (citing Wilder v. Bernstein, 499 F. Supp. 980, 993 (S.D.N.Y. 1980)).

74. In 1995, Congress passed the Private Securities Litigation Reform Act out of a belief that the "plaintiff's bar had seized control of class action suits, bringing frivolous suits on behalf of only nominally interested plaintiffs in the hope of obtaining a quick settlement." Greebel v. FTP Software, Inc., 939 F. Supp. 57, 58 (D. Mass. 1996).

75. *In re* Eaton Vanee Corp. Sec. Litig., 220 F.R.D. 162, 168 (D. Mass. 2004) (containing an elaborate discussion of standing). *See also In re* Eaton Vance Corp. Sec. Litig., 219 F.R.D. 38, 39-40 (D. Mass. 2003) (earlier disposition describing underlying facts of the class action).

76. *Eaton Vance*, 219 F.R.D. at 40–41.

77. *Id.* at 41 (citing Allen v. Wright, 468 U.S. 737, 751 (1984)).

78. 518 U.S. 343 (1996).

79. 457 U.S. 991 (1982). Neither of these cases, nor any other Supreme Court precedent, actually addresses the issue raised in the *Eaton Vance* case. In *Blum*, the court found that the plaintiffs were not using the class device to ereate standing, but actually had suffered personalized injuries in fact. *Id.* at 1000. *Lewis* dealt with an actual injury requirement specifie to prison litigation derived from, but not coextensive with, Article Ill standing law. 518 U.S. at 349.

found that the class action status of the lawsuit "adds nothing to the question of standing."[80] Ultimately, the court dismissed the two mutual funds with whom the named plaintiffs were not investors because these defendants only injured the proposed class, not the representative plaintiffs.[81] The court did certify a class to proceed against the two mutual funds in which the named plaintiffs did have investments.[82]

Eaton Vance took a strange turn when the dismissals came up on appeal to the First Circuit. While the case was pending, the Supreme Court decided *Ortiz v. Fibreboard Corp.*,[83] where it opted not to discuss serious Article III injury-in-fact issues in favor of disposing the case on Rule 23 grounds.[84] Without making a decision on the merits, the First Circuit remanded *Eaton Vance* to the district court for analysis in light of *Ortiz*, and the "juridical link" doctrine established in *La Mar v. H & B Novelty Loan & Co.*[85] The district court, though seemingly perplexed by the request,[86] engaged in a lengthy discussion of *Ortiz* and its application in other circuits.[87] The principal issue in the *Eaton Vance* memorandum was whether the case fell within the logically antecedent inquiry rule created in *Amchem Prods., Inc. v. Windsor*[88] and affirmed by the court in *Ortiz*.[89] Both of those cases involved attempts by a consortium of asbestos manufacturers, their attorneys, and several important asbestos plaintiffs' attorneys, to settle all current and future asbestos claims by means of a class action settlement.[90] Objectors to the *Amchem* and *Ortiz* settlements

80. *In re* Eaton Vance Corp. Sec. Litig., 219 F.R.D. 38, 41 (D. Mass. 2003) (quoting *Lewis*, 518 U.S. at 357).

81. *Id.* at 41.

82. *Id.* at 43.

83. 527 U.S. 815 (1999).

84. *Id.* at 821.

85. 489 F.2d. 461 (9th Cir. 1973). The juridical link doctrine guides class certification analyses and is discussed *infra* in Part III(a).

86. The court apparently thought it was issuing an advisory opinion to the circuit court, and expressly denied that the exercise was a reconsideration of its prior decision: "[t]he following memorandum, therefore, is not a reconsideration of this Court's decision on the motion for class certification, but simply a discussion of *Ortiz* and the juridical link doctrine, as requested by the First Circuit." *In re* Eaton Vance Corp. Sec. Litig., 220 F.R.D. 162, 164 (D. Mass. 2004). The district court also did not perceive a significant connection between *Ortiz* and the juridical links doctrine, calling them "two separate and distinct questions." *Id.* at 164. If the district court is correct in its interpretation of the First Circuit's request the entire exercise would seem to be a violation of the general ban on issuing advisory opinions. *See* CORRESPONDENCE OF THE JUSTICES (1793), *as printed at* FALLON, ET. AL., *supra* note 34, at 78–79; *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998) (holding that federal courts may not bypass jurisdictional problems in order to dispose of a case on the merits because the resultant judgment, if based on invalid jurisdiction, would come "to the same thing as an advisory opinion").

87. *Eaton Vance*, 220 F.R.D. at 165–69.

88. 521 U.S. 591, 611–13 (1997).

89. *Eaton Vance*, 220 F.R.D. at 165.

90. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997); Ortiz v. Fibreboard Corp. 527 U.S. 815, 821 (1999).

claimed that Article III standing doctrine prevented approval of a settlement that purported to settle the claims of "future injury" plaintiffs on the theory that unidentified individuals with unmanifested injuries could not meet the injury-in-fact requirement.[91] The Court did not address this standing argument in either case; rather, it found that the class certification issues were "logically antecedent to the Article III concerns and themselves pertain to statutory standing, which may properly be treated before Article III standing."[92] Ultimately, the class certification issues in both cases proved dispositive as the Court declined to approve either settlement.[93]

The *Eaton Vance* court's memorandum on the effect of *Ortiz* came to the conclusion that the logically antecedent inquiry rule should be very narrowly construed.[94] Doing so forced the district court to distinguish *Eaton Vance* from *Payton v. County of Kane*,[95] which had applied the *Ortiz/Amchem* logically antecedent inquiry rule to a civil rights class action against multiple defendants—most of whom had no contact with the named plaintiffs.[96] In *Payton*, the Seventh Circuit allowed the named plaintiffs to represent a class challenging the uniform, allegedly unlawful, bail practices of every Illinois county even though the representatives themselves had only been subject to the practices in four counties.[97] The *Payton* court read *Ortiz* as a "directive to consider issues of class certification prior to standing," and reasoned that the logic of this holding rested on the "long-standing rule that, once a class is properly certified, statutory and Article III standing requirements must be assessed with reference to the class as a whole, not simply with reference to the individual named plaintiffs."[98]

The *Payton* reasoning did not persuade the *Eaton Vance* court when confronted with the securities case before it because the *Eaton Vance* court understood *Payton* as embodying an exception to normal standing doctrine grounded on the importance of civil rights litigation.[99] The court also dismissed the idea that properly certified classes are jurisdictionally independent of the representative plaintiffs because it regarded the holdings establishing that proposition as limited to prudential standing issues such as mootness.[100] Nonetheless, the court acknowledged that "[t]here may well be instances when it is necessary to create exceptions to the general rule that Article III standing

91. *See Amchem*, 521 U.S. at 612; *Ortiz*, 527 U.S. at 831.
92. *See Ortiz*, 527 U.S. at 831 (quoting *Amchem*, 521 U.S. at 612).
93. *See Amchem*, 521 U.S. at 628–29; *Ortiz*, 527 U.S. at 864–65.
94. 220 F.R.D. at 165–66.
95. 308 F.3d 673 (7th Cir. 2002).
96. *In re* Eaton Vance Corp. Sec. Litig., 220 F.R.D. 162, 167 (D. Mass. 2004).
97. *Payton*, 308 F.3d at 681–82.
98. *Id.*
99. 220 F.R.D. at 168.
100. *Id.* at 167.

should be addressed before other issues."[101] But those exceptions were to be narrowly tailored to meet the demands of "national litigation cris[es] that defie[d] customary judicial administration" and civil rights actions in order to "carry out Congress' lofty goal[s]" in that field.[102]

The district court based its interpretation of the logically antecedent rule as a narrow exception to established doctrine, only to be applied to extreme situations, on a fundamental misapprehension of the Supreme Court's reasoning. While it is true that the *Ortiz* and *Amchem* Courts were eager to point out the striking and unprecedented characteristics of asbestos litigation, these facts were not directly relevant to the logically antecedent inquiry theory. Rather, the logically antecedent rule was based on a simple chain of fact-based logic. In the asbestos cases all the standing problems swirled around "exposure only" or "future injury" plaintiffs whose injuries were not yet manifest, but would become so in the future.[103] The Court reasoned that it did not need to address standing issues as to these plaintiffs unless it was proper to certify a Rule 23 class including them.[104] The future injury plaintiffs were not before the Court (indeed, they were by definition unidentified), and thus the standing questions would not become salient as to those plaintiffs unless and until the class was certified—hence the class certification issues were "logically antecedent" to the standing issues.[105] This reasoning, contrary to the *Eaton Vance* court's assertion, does not depend on the existence of a national litigation crisis, but rather on the existence of putative class members who pose standing problems distinct from those of the representative plaintiffs. Moreover, the *Ortiz/Amchem* rationale implicitly recognized that in passing Rule 23 of the Federal Rules of Civil Procedure, Congress had granted all plaintiffs statutory standing to represent a class of similarly situated claimants so long as certain conditions are met; conditions which could be properly analyzed prior to any Article III inquiry.[106]

The logically antecedent reasoning implies that the Court recognizes the class as a legal entity with a jurisdictional claim distinct from that of the representative plaintiffs. This is true even though the *Ortiz* and *Amchem* Courts rejected class certification; an interpretation made more persuasive when *Ortiz* and *Amchem* are read in light of other cases that treat the class as a distinct jurisdictional entity. In *Sonsa v. Iowa*, for example, the Court held that in the

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101. *Id.*

102. *Id.* (internal quotations omitted).

103. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612 (1997); Ortiz v. Fibreboard Corp. 527 U.S. 815, 831 (1999).

104. *In re* Eaton Vance Corp. Sec. Litig., 220 F.R.D. 162, 168 (D. Mass. 2004).

105. *Id.*

106. *Ortiz*, 527 U.S. at 831 (finding that class certification issues "pertain to statutory standing, which may properly be treated before Article III standing.") (quoting *Amchem*, 521 U.S. at 612).

context of a class action, a properly certified class's claim did not become moot when the representative plaintiff's did.[107] *United States Parole Commission v. Geraghty* extended the *Sonsa* rationale in holding that a class's claim did not become moot even though the representative plaintiff's claim was moot before class certification.[108]

An identical concept is at stake in *East Texas Motor Freight System, Inc. v. Rodriguez* where the Court stated in dicta that if a class is properly certified but the representative plaintiff is subsequently found not to be a member of the class, the class's claim continues unhindered.[109] Similarly, in *Craig v. Boren* the Court rejected a constitutional challenge to "third party" standing.[110] If the Constitution does not bar third party standing (standing to assert the rights of a party not before the court) it necessarily follows that the injury-in-fact causal nexus does not require the harm to run between specific plaintiffs and defendants, but rather between the defendants and a person (or, in class actions, the persons) whose rights are being adjudicated. In class actions, the question is not whether the defendants have injured the specific representative plaintiffs, but rather whether the defendants have injured persons in the classes of people those plaintiffs represent. While the Court has never addressed the precise question raised in a multi-defendant common practice lawsuit, its consistent recognition of the unique jurisdictional status of classes strongly suggests that Article III should be read in light of class injuries, and not representative plaintiff injuries, in the multi-defendant context.

Another of the primary arguments advanced in favor of a narrow reading of *Ortiz* was that the logically antecedent rule did not apply where the plaintiffs were attempting to bootstrap into claims that were not their own.[111] The district court feared that by "accepting the reasoning" of the courts that had applied the logically antecedent rule to similar fact situations it would be:

> run[ning] the risk that: 'any plaintiff could sue a defendant against whom the plaintiff has no claim in a putative class action, on the theory that some member of the hypothetical class, if a class were certified, might have a claim.'[112]

The court's fears are misplaced for two reasons. First, barring such bootstrapping suits might very well be a good idea but the *Eaton Vance* case did not raise the specter of this issue: the plaintiffs did not lack personal claims. Rather, each had valid individual claims against multiple of the mutual funds,

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107. 419 U.S. 393, 399 (1975).

108. 445 U.S. 388, 404 (1980).

109. 431 U.S. 395, 406 n.12 (1977).

110. 429 U.S. 190, 193 (1976).

111. *See In re* Eaton Vance Corp. Sec. Litig., 220 F.R.D. 162, 169 (D. Mass. 2004); *see also In re* Eaton Vance Corp. Sec. Litig., 219 F.R.D. 38, 41 (D. Mass. 2003).

112. *Eaton Vance*, 220 F.R.D. at 169 (quoting Dash v. FirstPlus Home Loan Owner Trust 1996–2, 248 F.Supp.2d 489, 503 (M.D.N.C. 2003)).

whose independence from the corporate parent was marginal at best, and the district court found that they were qualified to represent a class of investors in those claims.[113] Second, even if the court's concern with hypothetical lawsuits was appropriate in this case, it is unclear how the logically antecedent rule would permit plaintiffs with no individual claim whatsoever to bring class action lawsuits. As a matter of Rule 23 jurisprudence, no court would allow such class action because a plaintiff with no claim at all will not have a claim typical of that of the class, as required by the text of the Federal Rules.[114] Therefore, even if the logically antecedent rule applied to such a case, the class certification issue should be dispositive of the matter, because once the class certification failed there would by definition be no claim. It is hard to believe that the federal judiciary would long struggle with this hypothetical lawsuit problem, regardless of the outcome in *Eaton Vance*.

The purportedly well-established practice of narrowly according standing in securities cases was another pillar of the *Eaton Vance* court's narrow reading of *Ortiz/Amchem*.[115] Unfortunately, reliance on this principle does not provide support for the court's constitutional standing decision as it confuses questions of statutory standing with the methods of Article III jurisdictional analysis. The district court's holding was that Article III jurisdictional constraints had to be satisfied vis-à-vis each defendant to the action prior to class certification unless the case fell within very narrow exceptions to this rule.[116] A securities case did not fall within the narrow logically antecedent inquiry exception, the court reasoned, because the practicalities of securities cases counseled in favor of narrow grants of standing.[117]

An interpretation of the logically antecedent rule as a narrow exception to normal practice is not on its face unreasonable; however, the notion that the substantive policy concerns determine the width of the exception misses the mark. The Supreme Court announced the logically antecedent rule because it perceived that there was an important question of statutory standing that would be dispositive of the case even if constitutional standing was valid.[118] In short, considering the logically antecedent inquiry first allowed the Court to avoid answering a difficult constitutional question until it was certain that the

113. *Eaton Vance*, 219 F.R.D. at 43.

114. FED. R. CIV. P. 23(a)(3) provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if. . . . the claims or defenses of the representative parties are typical of the claims or defenses of the class." Rule 23(a)(2)'s commonality requirement is not applicable here because it deals with the commonality of the class's claims in the aggregate, and does not specifically call for a comparison between the representative plaintiffs and the class. 1 NEWBERG ON CLASS ACTIONS 3:13 (4th ed.).

115. *Eaton Vance*, 220 F.R.D. at 168.

116. *Id.* at 169.

117. *Id.* at 168.

118. Ortiz v. Fibreboard Corp. 527 U.S. 815, 831 (1999).

question actually existed.[119] Understood this way, the logically antecedent rule is an extension of the principle that constitutional questions are to be avoided if there are sub-constitutional means to dispose of the case.[120] Thus, the fact that securities lawsuits are subject to strict standing rules actually supports a position contrary to that taken by the *Eaton Vance* court. If standing to enforce securities laws is narrowly granted, the plaintiffs' standing to sue under the statutory grant of jurisdiction should be considered prior to engaging in constitutional inquiries. Likewise, under the *Ortiz/Amchem* logic, it would be appropriate to first ask if, in light of the purportedly narrow jurisdictional grant in securities cases, class certification was appropriate for those mutual fund investors who did not invest in the same funds as the named plaintiffs—and only then attempt to decide the constitutional question.

The *Eaton Vance* court also justified its constitutional holding on separation of powers grounds. After tacitly accusing the plaintiffs of using the class action device to litigate hypothetical claims on behalf of hypothetical plaintiffs,[121] the court announced that the "principles at the heart of Article III standing are simply too important to permit such bootstrapping."[122] Finding that the heart of Article III was the separation of powers "between the judicial and political branches,"[123] the court connected this concept with the factual situation before it by asserting:

> But it is worth remembering that the separation of powers is not simply an end unto itself. It constitutes the essential and elemental structure of our form of government. Its ultimate purpose is to protect individual liberty.[124]

Due regard for this "ultimate purpose" so pressed the district court's conscience that it found it could not sweep "aside the requirements of Article III simply because a plaintiff decides to file a motion seeking to represent a class."[125]

Assuming, *arguendo*, that the district court is correct in claiming not only

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119. *Id.* Had the Court seen fit to certify the class it is an open question whether or not they would have held that Article III permitted the judicial power to reach future injury plaintiffs. For arguments pro and con, compare John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995) (arguing against granting standing), with Note, *And Justiciability For All?: Future Injury Plaintiffs And The Separation of Powers*, 109 HARV. L. REV. 1066 (1996) (arguing for standing).

120. *See* Ashwander v. TVA, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 111 (1998) (Breyer, J. concurring) ("The Constitution does not impose a rigid judicial 'order of operations'" on the standing inquiry.).

121. 220 F.R.D.162, 169 (D. Mass. 2004). A charge that was a stretch, to say the least. *See, supra* note 113, and accompanying text.

122. *Id.*

123. *Id.* (citing Raines v. Byrd, 521 U.S. 811, 820 (1997)).

124. *Id.* (citing Mistretta v. United States, 488 U.S. 361, 380 (1989) ("[T]he separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.")).

125. *Id.* (citing Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 473 (1982)).

that the *Eaton Vance* securities dispute implicates the balance of powers between the coordinate branches, but also that the individual liberty of the mutual-fund defendants hangs in the balance, the court's conclusion is nonetheless wrong as a matter of constitutional law. As noted above, to the extent the injury-in-fact test enforces separation of powers norms, it does so by limiting not the power of the federal courts, but the power of Congress to use those courts for certain purposes.[126] The constitutional scheme and the implications of the Madisonian compromise suggest that the federal judiciary has no inherent authority to assert judicial power over anyone unless authorized to do so by statutory or constitutional law.[127] The *Eaton Vance* holding, to the extent that it is based on separation of powers principles, must therefore be read as a constitutional limit on congressional authority; specifically, it means that Congress cannot authorize plaintiffs to bring class action lawsuits against non-injurious defendants even if Congress desired to do so.

Such a holding was inconsistent with accepted boundaries of congressional power, and the *Eaton Vance* court knew it had to deal with this problem. In *Payton*, one of the cases distinguished in the *Eaton Vance* opinion, the Seventh Circuit found that there "may be standing" to challenge allegedly unconstitutional and discriminatory bail fee practices in nineteen Illinois counties that had never had any contact with the named plaintiffs if those plaintiffs could "fulfill all the requirements of Rule 23."[128] The *Eaton Vance* court did not purport to say that the result in the *Payton* case was incorrect or unconstitutional. Instead, it explicitly endorsed the notion that there are exceptions to the normal constitutional rule—civil rights among them.[129]

Apparently, the district court did not realize the paradox of this rationale: the notion that there are judge-made exceptions to constitutional limits on the ability of Congress to define the judicial power puts the fox in charge of the henhouse. Such a position asserts that usually Congress is unable to authorize plaintiffs to bring suit on behalf of a class against non-injurious defendants because Article III disallows such tomfoolery. But sometimes, when the judiciary perceives a litigation crisis or an overwhelming public interest, it may lift the normal constitutional limitation and open its ears to such claims. Such a rule would hardly serve to protect the separation of powers between the coordinate branches, nor would it foster the liberty of individual citizens. Quite

126. *See supra* note 71 and accompanying text; Fletcher, *supra* note 5, at 233–34 ("[The injury-in-fact requirement] limits the power of the legislature to articulate public values and choose the manner in which they may be enforced.").

127. *See* Scalia, *supra* note 71.

128. Payton v. County of Kane, 308 F.3d 673, 681 (7th Cir. 2002).

129. 220 F.R.D.162, 168 (D. Mass. 2004) (citing Wilder v. Bernstein, 499 F. Supp. 980, 993 (S.D.N.Y. 1980) ("[C]ourts have traditionally applied a broad and accommodating concept of standing in civil rights cases in recognition of the strong public interest in effective enforcement of the civil rights statutes which is not always present in commercial litigation between private parties.")).

the contrary, it would vest the federal judiciary (unelected, life tenure judges) with sweeping discretionary authority to place shifting constitutional barriers on the ability of democratic processes to provide for the enforcement of public norms. The *Eaton Vance* court's reasoning usurps Congress's constitutional authority to define the jurisdiction of the federal courts. *Payton* and *Eaton Vance* cannot simultaneously be correct. Article III either prohibits suits against non-injurious defendants in all situations or in none.[130]

C. *Injury-in-Fact as a Standard of Minimal Constitutional Sufficiency.*

Even though *Eaton Vance* is wrong as a matter of constitutional law, I do not assert that the injury-in-fact test has no relevance to class action cases. Rather, its application to representative plaintiffs should be moderated, and the test applied only to determine if the plaintiff's claim meets a standard of minimal constitutional sufficiency. The rule lends itself to such an interpretation because the injury-in-fact test is routinely articulated as a device to ensure that the plaintiff invoking the judicial power has a sufficient "personal stake" in the outcome of the litigation to present the claim "in an adversary context and in a form historically viewed as capable of judicial resolution."[131] As a matter of logic, a personal stake will be present if the plaintiff has successfully pled injury-in-fact with regard to any defendant, and there is no need to make the representative plaintiff in a class action pass the constitutional test with regard to each defendant.[132]

Applying the constitutional limitation in this limited fashion keeps the federal judiciary working in a non-legislative and non-executive role.[133] So long as the plaintiff can demonstrate a constitutionally valid injury resulting from the conduct of at least one defendant, a federal court can be confident that it is presiding over a "case" as that term is understood in Article III—that it is engaged in the practice of judging. Beyond this initial determination, there is no need to consider the claims against other defendants as distinct events in the lawsuit, or to require that there be individual "cases" involving all the defendants. Rather, courts can protect defendant interests and resolve the propriety of a particular defendant's presence in a given lawsuit by consulting

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130. The *Eaton Vance* court's position also seems to conflict directly with Supreme Court precedent. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992) ("[T]here is absolutely no basis for making the Article III inquiry turn on the source of the asserted right.").

131. Flast v. Cohen, 392 U.S. 83, 100–01 (1968).

132. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 218 (1974) (citing Ass'n of Data Proc. Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970), for the proposition that injury-in-fact is the "essence" of the case or controversy requirement, and in turn captures the "personal stake" requirement of Baker v. Carr, 369 U.S. 186, 204 (1962)).

133. Redish, *supra* note 10, at 648 ("Article III expressly confines the exercise of the federal judicial power to the adjudication of "cases" or "controversies," lest the unrepresentative judiciary exercise the type of power reserved, in a constitutional democracy, to the representative branches of government.").

the positive law that forms the basis of the plaintiff's claim—be that law granting the plaintiff standing to bring claims on behalf of third parties (e.g., Rule 23), or the substantive rights at issue. Notably, the Supreme Court could have enunciated a "many personalized injuries rule" of its own by granting certiorari and reversing the decision in *Payton*, but it declined to do so.[134] Though denial of certiorari is indeterminate, it does at least suggest that the Court does not understand injury-in-fact to operate as a constitutional right that defendants can assert against federal court litigation with parties whom they have not injured.

The injury-in-fact test serves best for determining whether the subject position of the plaintiff is constitutionally sufficient to create an adversarial contest.[135] So applied, injury-in-fact is not a quantum of the relationship between the plaintiff and defendant, but instead is a minimal constitutional threshold for defining a case. As noted previously, when injury-in-fact is applied to non-constitutional disputes between private parties, it is effectively an analysis of the legal sufficiency of the pleadings.[136] For example, if Brad and Gretchen are dating, and Gretchen dumps Brad, it is of little concern to a federal court that Brad has experienced an actual injury. In order for Brad to have standing to sue Gretchen for the harm of the breakup (the only meaningful standing inquiry in this case) he will need to show that some source of positive law (be it state common law or statutory enactments) gives him a legal remedy for the breakup. The *Eaton Vance* approach goes astray when it assumes that the situation of particular private defendants vis-à-vis particular private plaintiffs implicates any constitutional problem. It does not. Once the minimal constitutional threshold is met, whether the *Eaton Vance* plaintiffs can sue a given mutual fund should be, like the suit between Brad and Gretchen, determined by reference to the plaintiffs' standing to sue under the sources of positive law forming the basis of their claims: Rule 23 and federal securities laws.

My argument that the relationship between particular plaintiffs and defendants is a question not of constitutional law, but of common law or statutory standing grants draws support from the general, though perhaps grudging, acceptance of the private attorneys general concept of civil law enforcement; manifested in the United States legal system in two ways.[137] The first is through statutory and common law causes of action that authorize individual plaintiffs to litigate group interests. Examples of such suits include *qui tam* actions, where a plaintiff sues to recover damages incurred on the government by the fraud of a private party in exchange for a bounty;[138] statutes

134. 540 U.S. 812 (2003).

135. *See Baker*, 369 U.S. at 204; *Flast*, 392 U.S. at 100.

136. *See supra* note 13 and accompanying text.

137. For an extended discussion of this concept see generally Coffee, *supra* note 25.

138. *Qui tam* actions are themselves constitutionally controversial. *See* Hartnett, *supra* note

according standing to "any person" who is "aggrieved" by a violation of the act;[139] and statutes that authorize individual plaintiffs to conclusively litigate the civil claims of third parties.[140] The second manifestation of the private attorneys general concept is a *de facto* structural consequence of rules governing plaintiffs' attorneys' compensation.[141] Because procedures like "common fund litigation,"[142] "contingent fees,"[143] and "fee shifting"[144] encourage private attorneys to invest in private law enforcement, professional plaintiffs' attorneys will often identify unlawful behavior before securing a particular client with an allegation of harm.[145]

Given the repeated occurrences of the private attorneys general concept, it is indisputable that the United States legal system relies, wisely or not, on achieving civil-regulatory enforcement through the energies of entrepreneurial litigators. A rigorous defendant-by-defendant constitutional injury-in-fact inquiry is difficult to square such a system on both practical and theoretical grounds. The many personalized injuries rule, as applied in *Eaton Vance* and other cases,[146] assumes that the relationship between the law-breaking party and the law-enforcing party is essential to the conduct of constitutionally valid law enforcement. If this were so, it is hard to imagine that the legal or political

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5, at 2241–44 (arguing, *inter alia*, that the historical validity of *qui tam* actions demonstrates that injury-in-fact cannot be a constitutional requirement).

139. *See, e.g.*, FEC v. Akins, 524 U.S. 11, 19–26 (1998) (holding that the Federal Election Campaign Act's authorization of standing enabled voters to challenge FEC determinations regarding the status of third parties not directly before the court); Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14 (1942) (holding that under *Sanders* "private litigants have standing only as representatives of the public interest"); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940) (holding that section 402(b) of the Federal Communications Act created a previously unknown legal interest in freedom from competition that could serve as the basis for standing to challenge the FCC's issuance of a broadcast license).

140. *See, e.g.*, FED. R. CIV. P. 23 (authorizing judicial certification of classes of litigants with similar claims or defenses); Fair Labor Standards Act, 29 U.S.C. § 216(b) (authorizing potential plaintiffs to formally opt-in to existing litigation upon the issuance of notice); Employee Retirement Income Security Act, 29 U.S.C. § 1132(a)(3) (authorizing members of employee benefit plans to challenge fiduciary conduct on behalf of the plan as a whole).

141. *See* Coffee, *supra* note 25, at 670 n.2.

142. Common fund litigation allows plaintiffs to recover litigation costs (including attorney fees) from a common recovery fund on a theory of unjust enrichment. *See* Boeing, Co. v. Van Gemert, 444 U.S. 472, 478-81 (1980); Hornstein, *The Counsel Fee in Stockholder's Derivative Suits*, 39 COLUM. L. REV. 784 (1939).

143. Contingent fees enable the attorney to take up litigation as a de facto joint venturer with the client. *See* Findlater, *The Proposed Revision of DR 5–103(B): Champtery and Class Actions*, 36 BUS. LAW. 1667, 1669–70 (1981).

144. Fee shifting allows successful plaintiffs to extract litigation costs from liable defendants under certain causes of action. *See generally* John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984).

145. For a discussion of this phenomenon and an analysis of how procedural rules relating to attorney compensation incentivize or disincentivize private law enforcement, see generally Coffee, *supra* note 25.

146. *See supra* note 15.

orders would long stomach the private attorneys general concept. The proliferation of private attorneys general bespeaks of a shared understanding that law enforcement can proceed efficiently and constitutionally without so narrow an understanding of the definition of an Article III case.

Where then, does this leave us? By analyzing the arguments put forward in the *Eaton Vance* case, applying Supreme Court precedent, and considering the implications of a system of privatized civil law enforcement, we can readily see that Article III does not raise a flat-out constitutional bar to class actions in which some of the claims are asserted against defendants who did not injure the representative plaintiffs personally. That point is not trivial—numerous other courts have adopted the *Eaton Vance* rationale either in holdings or dicta.[147] Of course, the lack of a clear constitutional bar does not mean that there are no defensible restrictions on multi-defendant suits, or on the ability of plaintiffs to employ the class action device as a tool to redress systematic and diffuse harms. I devote the remainder of this Comment to analyzing what those restrictions might be and how we might tie together standing doctrine with accepted class action principles in a manner that makes sense of the common practice lawsuit problem.

III
A BETTER APPROACH

Federal district courts are in a bind when it comes to sorting out common practice lawsuit problems on a daily basis. From the right, they are presented with a conflicted body of Article III case law that seems, at first glance and in its more contemporary application, to require the application of the injury-in-fact test to each defendant in the action before considering class certification issues. Not to be outdone, Rule 23 sweeps in from the left, demanding due respect for its principles of fairness and efficiency. I have suggested that the constitutional status of the injury-in-fact test is itself in doubt,[148] and argued that it is neither theoretically nor practically sensible to read Article III as completely barring plaintiffs from bringing common practice lawsuits against noninjurious defendants, or, put another way, barring Congress from authorizing such suits. But this argument by itself does not go very far because

147. *See supra* note 15 (citing cases); *see also* Mutchka v. Harris, 373 F. Supp. 2d 1021, 1024 (C.D. Cal. 2005) (allowing standing because the named plaintiffs did make out a case with each defendant individually, but explicitly stating its holding would be otherwise if the defendants had merely acted similarly with respect to other persons not presently before the court); Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 422–23 (Granting standing to represent a class of ERISA benefit plan participants challenging practices common to multiple plans even though the named plaintiff was only a member in one plan, but stating that the plaintiff "must demonstrate individual standing vis–à–vis the defendant." In this case the plaintiff's claim fit within the confines of Article III because the same defendant administered all of the relevant benefit plans.).

148. *See supra* note 10, and accompanying text (citing commentators).

injury-in-fact is undoubtedly the current law of the land—it cannot be ignored merely for want of sense.

The solution to this conundrum lies in stringing together disparate threads of Article III and Rule 23 case law. Specifically, I propose that when confronted by a common practice lawsuit, such as that found in *Eaton Vance*, federal courts should apply a three-step inquiry: first, the court should ask if the plaintiff has made a minimal showing of injury-in-fact sufficient to meet the personal stake requirement of *Baker v. Carr* against any defendant; second, the court should hear and decide class certification motions and other arguments regarding the validity of statutory standing as those are the logically antecedent inquiries to any further challenges to the court's subject matter jurisdiction; finally, the court should employ the "juridical link" doctrine to ensure that non-injurious defendants are only implicated in lawsuits where the factual circumstances suggest such implication would be advantageous.

A. Rule 23 Class Actions and the Juridical Link Doctrine

Consider again the example of Ethan, the assistant manager trying to challenge federal employment law compliance determinations made by his direct employer's franchisor.[149] Suppose that by employing the constitutional argument above Ethan has survived a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Ethan is now preparing a reply brief for his motion to certify classes of plaintiffs (consisting of all persons with the job title assistant manager working at a franchisee that utilizes the franchisor's employment policies) and defendants (consisting of all unnamed franchisees employing said policies). The defendants argue that the proposed classes fail to meet the requirements of Rule 23, most specifically, 23(a)(3) the "typicality" requirement, and 23(a)(4) the "adequacy" requirement.[150] The defendants claim that typicality compares the claims or defenses of the representative parties with their respective classes, and that typicality is usually found "lacking when the representative plaintiff's cause of action is against a defendant unrelated to the defendants against whom the cause of action of the members of the class lies."[151] The defendants further argue that a representative plaintiff cannot "adequately" represent plaintiffs whose claims he does not directly share.[152]

The defendants' understanding of the typicality and adequacy requirements appears in *La Mar v. H & B Novelty & Loan & Co.*,[153] where the Ninth Circuit held that the representative plaintiff could not represent a class of

149. *See supra* note 38, and accompanying text for a complete description of this hypothetical.

150. FED. R. CIV. P. 23(a)(3)–(4).

151. *See* La Mar v. H & B Novelty & Loan & Co., 489 F.2d 461, 465 (9th Cir. 1973).

152. *See id.* at 466.

153. *Id.*

persons presenting state unfair lending claims against defendant pawn brokers with whom he had not had any contact.[154] Simultaneous with this holding, the court articulated two exceptions to the general rule. The first was for cases of conspiracy or concerted action, and the second was the "obvious" exception for "instances in which all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious."[155] Ethan would like to invoke the latter exception, commonly known as the juridical link doctrine.[156]

Though at least one commentator claims that the juridical link doctrine was subject to a recent "unwarranted expansion,"[157] there is little evidence to justify this claim. Since shortly after its inception in 1973 when the due process revolution was at its pinnacle, the doctrine has been repeatedly invoked, with varying degrees of success, in suits challenging the common practices of governmental entities,[158] private non-profit entities such as unions and collective bargaining organizations,[159] and business entities united by ownership or association.[160] Many recent cases are highly skeptical of the doctrine. For instance, the Chief Judge of the Nevada District Court, Philip Pro, sitting in the circuit that announced the doctrine in the first instance, rejected a juridical link claim as inapplicable in light of intervening precedent holding

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154. *Id.* at 462.

155. *Id.* at 466 (citing Broughton v. Brewer, 298 F.Supp. 260 (N.D. Ala. 1969)).

156. *See* W.D. Henderson, *Reconciling the Juridical Links Doctrine With The Federal Rules of Civil Procedure And Article III*, 67 U. CHI. L. REV. 1347, 1348 (2000).

157. *Id.* at 1349.

158. *Compare* DeAllume v. Perales, 110 F.R.D. 299, 303–04 (S.D.N.Y. 1986) (finding a juridical link between members of a defendant class of local social service agencies who administered various welfare benefits according to a statewide policy), *with* Thompson v. Bd. of Educ. of the Romeo Cmty. Sch., 709 F.2d 1200, 1204–05 (6th Cir. 1983) (declining to apply doctrine to defendants boards of education because the case did not "involve a state statute or uniform policy being applied statewide"). *See also* Akerman v. Oryx Commc'ns, Inc., 609 F. Supp. 363, 376 (S.D.N.Y. 1984) (observing that a juridical link exists where the "plaintiff class as a whole has been victim of a unified governmental policy carried out by the individual defendants").

159. *Compare* Alaniz v. California Processors, Inc., 73 F.R.D. 269, 276 (N.D. Cal. 1976) (holding that Rule 23 requirements were satisfied because defendant employers and unions "operate under a single, industry-wide collective bargaining agreement"), *with* Leer v. Wash. Educ. Ass'n., 172 F.R.D. 439, 447–50 (W.D. Wash. 1997) (declining to apply the juridical link doctrine in a suit against local affiliates of a teacher union).

160. *Compare In re* Itel Sec. Litig., 89 F.R.D. 104, 121 (N.D. Cal. 1981) (applying the juridical link doctrine to certify a plaintiff class against defendant underwriters who relied on a common association to issue securities prospectuses), *and* Barker v. FSC Sec. Corp., 133 F.R.D. 548, 553–54 (W.D. Ark. 1989), *with* Turpeau v. Fidelity Fin. Servs., Inc., 936 F. Supp. 975, 978–79 (N.D. Ga. 1996) (declining to apply juridical link to defendant lenders and insurance companies alleged to be engaging in identical violations of state law), *aff'd without opinion*, 112 F.3d 1173 (11th Cir. 1997), *and* Akerman, 609 F. Supp. at 375–76 (declining to apply juridical link to securities underwriters who distributed identical literature but lacked an independent legal relationship), *aff'd in pertinent part*, 810 F.2d 336, 344 (2d Cir. 1987).

that jurisdictional claims must be resolved before merits questions.[161] The same commentator who found an "unwarranted expansion" of the juridical link doctrine urged that it be construed narrowly to apply exclusively to Rule 23(b)(3) "opt-out" defendant class actions; an ironic position that effectively eviscerates the doctrine by limiting it to situations where the defendants actually consent to the class action form of suit—a rare occurrence.[162]

Despite the recent skepticism the juridical link doctrine has not been overturned, and courts should revive its use in light of the policy and constitutional arguments presented above, I will concede that as a general background rule it is probably not desirable to allow a plaintiff to prosecute claims not her own. But, this presumption is and should be rebuttable when the plaintiff can show that the factual circumstances warrant consolidated litigation. While this inquiry will usually occur under Rule 23, it should follow the principles of due process, judicial efficiency, and regulatory economics outlined above.[163] Applying Rule 23 to situations where a plaintiff attempts to prosecute the similar claims of other persons against the same party who has injured her is a routine matter. But there is a special layer of concern when a plaintiff attempts to prosecute claims against defendants who have injured other groups of people, but not her. Specifically, there are significant benefits associated with individual defendant-by-defendant proceedings, such as the gradual accumulation of greater factual knowledge as multiple cases are worked out; the increasing predictability of a claim's value that comes from repeat litigation, which theoretically improves the likelihood of settlement in future cases; and the reduced risk associated with an "incorrect" outcome in individual cases compared to consolidated actions.

Given these concerns, the interpretation of the typicality and adequacy requirements announced in *La Mar*, (that similar claims against "unrelated" defendants lack typicality and adequacy absent some special link) is likely correct.[164] The exception for situations where there is a juridical link counseling in favor of aggregation is perfectly sensible, the trick is filling that exception with principled content. I posit that increasing claim aggregation

161. Henry v. Circus Circus Casinos, Inc., 223 F.R.D. 541, 543 (D. Nev. 2004) (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93-101 (1998), and Lee v. Oregon, 107 F.3d 1382, 1390 (9th Cir. 1997)). The court failed to discuss at all the holdings in *Ortiz* and *Amchem* that class certification issues could be considered prior to standing questions. *See supra* notes 90–93 and accompanying text.

162. *See* Henderson, *supra* note 156, at 1351.

163. *See supra* Part I (A)–(C).

164. 489 F.2d 461, 465 (9th Cir. 1973). This holding is not an inevitable interpretation of Rule 23(a)(3), which by its terms only requires typical, not identical claims and says nothing about the relatedness of the defendants or plaintiffs. FED. R. CIV. P. 23(a)(3). The individual members of plaintiff classes, for instance, normally are not related to each other in any special way. Nonetheless, where defendants are truly unrelated, I believe the policy concerns justifying multi-defendant common practice lawsuits will likely not be present.

ought always be allowed (and hence juridical links should be found) so long as the representative plaintiff can show a substantial likelihood that litigation of her claim will be practically dispositive of the other claims she wishes to prosecute. This situation will most likely occur when the dispute centers on clearly articulated and uniformly applied policies or practices like corporate human resources policies, insurance policy administration, or publicly promulgated rules. Thus, in Ethan's overtime dispute he should be allowed to sue all franchisors who use the employment policies distributed by the franchisee because subsequent litigation on identical factual concerns would center on exactly the same policies and thus would be wastefully repetitious and unlikely to produce substantially different results. Because a negative decision on the merits for Ethan would likely end the litigation hopes of any absent potential plaintiffs, the court can better protect those plaintiffs' due process rights by consolidating the claim as a plaintiff class, thereby imposing a legal duty on Ethan to represent the absent employees' interests. The same is true of the claim in *Eaton Vance* because the non-injurious mutual funds were engaging in precisely the same activity and controlled by the same corporate parent, and in *Henry* because the security guards at the hotel were allegedly working under identical time and wage policies.

If it is not possible to show a likelihood that absent claims will be practically resolved in the extant litigation, it will be more difficult to establish a juridical link. Consider, for instance, a lawsuit challenging policies of racial exclusion at local restaurants. Suppose that plaintiff Polly has been denied service on account of her race at one restaurant in a town where many restaurants practice racial exclusion. Even though Polly would like to sue all the offending restaurants, a juridical link is not necessarily justified by the common practice because it is unlikely that a lawsuit against one restaurant will be dispositive of lawsuits against the other restaurants. Perhaps regulatory economics could justify finding a juridical link here on a theory that the enforcement of civil rights laws is undervalued and in need of subsidization. This is less likely here because attorney's fees are generally available to the prevailing plaintiff in a civil rights action so there is less reason to be worried about the enforcement cost problem. But, it may nonetheless be the case that a single lawsuit is insufficiently valuable in light of nonlitigation means (such as protests or boycotts) for accomplishing the same remedy. Judicial efficiency might also justify prosecuting this case as a single large class action, but it is unclear that significant efficiency gains are to be had simply by lumping the disparate restaurants into a single instance of litigation. Efficiency is a much stronger concern where there is a high probability of many hundreds or thousands of claims emerging out of a single common practice.

Ultimately, the juridical link doctrine needs fleshing out through application to diverse factual situations (by courts with an accurate understanding of standing law) before it will be possible to predict with a

reasonable degree of certainty where the precise boundaries of the multi-defendant common practice lawsuit ought to lie. In addition to the many courts that will never have an opportunity to apply the doctrine because of their conclusion that Article III imposes a flat out ban on suits against "unrelated" defendants,[165] some courts have mistakenly grafted the juridical link doctrine directly onto Article III injury-in-fact analyses.[166] This latter position merely repeats the mistake of the former by failing to treat the Article III injury-in-fact test as a minimal determination of constitutional sufficiency and instead letting it operate as a *de facto* constitutional right of defendants. Courts should confine the juridical link doctrine to Rule 23 and related procedures so as not to confuse the constitutional standing inquiry, a process for defining the judicial role, with something that it is not: a process for determining the propriety of a particular defendant's presence in a lawsuit.

CONCLUSION

The multi-defendant common practiee lawsuit is a fairly rare phenomenon in contemporary litigation, perhaps because of the seeming rigidity of the injury-in-fact test and its application to some common practice suits. Nonetheless, as a mode of litigation, it offers significant advantages for the efficacious enforcement of various regulatory regimes. The case law dealing with multi-defendant lawsuits, with respect to both standing and class certification issues, is scattered, confused, and in much need of higher court guidance. For reasons unknown to this author, the Seventh Circuit Court of Appeals is the only appellate court that has taken up the issue with any kind of directness.[167] It did so, however, in the relatively easy context of a lawsuit against public agencies enforcing uniform public rules. As of this writing, there is no significant appellate court opinion on the correctness of the constitutional standing rules developed in *Eaton Vance* and similar cases.

Much of the confusion might very well trace to the confusing nature of the injury-in-fact requirement as applied by the Supreme Court. Because many of the leading cases involve litigation against a governmental entity, most have presented salient concerns for federalism and the separation of powers. Unsurprisingly, the standing decisions have thus been laden with a great deal of pomp and circumstance regarding freedom, liberty, and the constitutional design. It is possible that in their enthusiasm to enforce these holdings, lower courts have misperceived the importance of these concepts when the relationships of purely private parties—as opposed to branches of the government—are at stake. Then again, maybe injury-in-fact is simply too

165. *See supra* note 15 (citing cases).

166. *See, e.g.*, Alves v. Harvard Pilgrim Health Care Inc., 204 F. Supp. 2d 198, 205 (D. Mass. 2002).

167. *See* Payton v. County of Kane, 308 F.3d 673 (7th Cir. 2002).

elusive a test for the district courts to consistently and coherently apply, in which case a direct Supreme Court holding on the multi-defendant lawsuit standing issues is highly desirable.