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COMMENT

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HOW TO AVOID THE STANDING PROBLEM IN *FLOYD*:  
A RELAXED APPROACH TO STANDING  
IN CLASS ACTIONS

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INTRODUCTION

David Ourlicht, a black Manhattan man in his twenties, was stopped and frisked by New York City police officers three separate times in 2008.<sup>1</sup> That

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<sup>1</sup> *Floyd v. City of New York (Floyd I)*, 283 F.R.D. 153, 169-70 (S.D.N.Y. 2012).

same year, Ourlicht and three other black men who had similarly been stopped and frisked filed a federal lawsuit against the City of New York, alleging that the New York City Police Department's stop-and-frisk program violated their Fourth and Fourteenth Amendment rights.<sup>2</sup> The plaintiffs brought a class action suit in the Southern District of New York on behalf of themselves and all others similarly situated, and they sought an injunction mandating an overhaul of the City's stop-and-frisk program.<sup>3</sup> The case, *Floyd v. City of New York*, was heard by Judge Shira Scheindlin, who, in 2013, found that the City's stop-and-frisk program was unconstitutional<sup>4</sup> and ordered sweeping changes to the program.<sup>5</sup> The plaintiffs got results: in 2011, NYPD officers stopped 686,000 individuals, or on average more than 13,000 per week;<sup>6</sup> by the end of 2013, such stops had fallen by more than 90% to fewer than 2000 per week.<sup>7</sup>

But an even more consequential decision in the case may have been an earlier, overlooked one: in 2012, the *Floyd* court found that the plaintiffs had standing to seek an injunction.<sup>8</sup> More specifically, the court found that David Ourlicht had standing, and since he was a class representative, his standing satisfied Article III's case or controversy requirement.<sup>9</sup> In so holding, however, the court appeared to run afoul of two Supreme Court precedents: one that requires a plaintiff seeking injunctive relief to "establish a real and immediate threat that he [will] again" suffer the alleged harm,<sup>10</sup> and another that holds "[t]hat a suit may be a class action . . . adds nothing to the question of standing."<sup>11</sup> Was there actually a *real and immediate* threat that *David Ourlicht* would again be stopped and frisked by NYPD officers? That seems doubtful.

And yet the district court's finding that the plaintiffs had standing was correct, under both class action theory and Supreme Court precedent. This Comment articulates the reasons why it was correct. Part I begins by giving a brief overview of standing generally. Part II shows how theory and precedent justify a relaxed approach to standing in class actions. Finally, Part III explains the *Floyd* court's standing analysis and shows that, below the surface, the court was actually using a justifiably relaxed approach.

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<sup>2</sup> *Id.* at 159.

<sup>3</sup> *Id.*

<sup>4</sup> *Floyd v. City of New York (Floyd II)*, 959 F. Supp. 2d 540, 658-67 (S.D.N.Y. 2013).

<sup>5</sup> *Floyd v. City of New York (Floyd III)*, 959 F. Supp. 2d 668, 690 (S.D.N.Y. 2013).

<sup>6</sup> *Floyd II*, 959 F. Supp. 2d at 558.

<sup>7</sup> Mike Bostock & Ford Fessenden, 'Stop-and-Frisk' Is All but Gone from New York, N.Y. TIMES (Sept. 19, 2014), <http://www.nytimes.com/interactive/2014/09/19/nyregion/stop-and-frisk-is-all-but-gone-from-new-york.html> [https://perma.cc/6AM8-YLCD].

<sup>8</sup> *Floyd I*, 283 F.R.D. at 169.

<sup>9</sup> *Id.*

<sup>10</sup> *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). Importantly, the *Floyd* court's standing analysis expressly relied on *Lyons*. *Floyd I*, 283 F.R.D. at 169-70.

<sup>11</sup> *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976).

## I. AN OVERVIEW OF STANDING

Article III of the U.S. Constitution gives federal courts the power to hear certain cases and controversies.<sup>12</sup> Standing is a doctrine, read into Article III and expanded beyond it, that developed out of “some basic sense that not everyone who wanted to go to court could do so.”<sup>13</sup> One of the Supreme Court’s classic formulations of the standing question asks whether the plaintiff has “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.”<sup>14</sup> Plainly, answering such a question is hardly like answering a simple question such as “Is it raining?” and the vagueness of the standing inquiry—in that formulation and more generally—gives judges a lot of room to maneuver. Like the other “doctrines that cluster about Article III,” standing relates “to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.”<sup>15</sup> In other words, standing analysis in practice is often an unguided and results-oriented mess.

As alluded to, standing has both constitutional and nonconstitutional aspects. Under current constitutional doctrine, standing has three elements that each federal plaintiff must satisfy: (1) *injury in fact*—“an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent”; (2) *causation*—the injury must be traceable to the defendant’s actions; and (3) *redressability*—it must be “‘likely’ . . . that the ‘injury will be ‘redressed by a favorable decision.’”<sup>16</sup> On top of these Article III limits, the Supreme Court has also imposed nonconstitutional, policy-based restrictions on standing. This body of doctrine, known as “prudential” standing,<sup>17</sup> includes restrictions on hearing claims based on “widely shared grievance[s]”<sup>18</sup> and limits on a party’s ability to litigate the rights of others.<sup>19</sup> Prudential standing’s significance as a *nonconstitutional* doctrine is that, unlike with Article III standing, Congress

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<sup>12</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>13</sup> LARRY W. YACKLE, FEDERAL COURTS 322 (3d ed. 2009).

<sup>14</sup> Baker v. Carr, 369 U.S. 186, 204 (1962).

<sup>15</sup> Allen v. Wright, 468 U.S. 737, 750 (1984) (quoting Vander Jagt v. O’Neill, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)), *abrogated on other grounds by* Lexmark Int’l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387-88 (2014).

<sup>16</sup> Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992) (citations omitted).

<sup>17</sup> YACKLE, *supra* note 13, at 318.

<sup>18</sup> See FEC v. Akins, 524 U.S. 11, 23 (1998) (holding that, in these cases, “the Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy”).

<sup>19</sup> See Craig v. Boren, 429 U.S. 190, 193 (1976) (describing such “restrictions on third-party standing” as “designed to minimize unwarranted intervention into controversies”).

can have the final word: “Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.”<sup>20</sup>

Because both *Floyd* and *City of Los Angeles v. Lyons*, the Supreme Court case on which the *Floyd* court relied in its standing analysis, dealt with Article III standing, the rest of Part I attempts to untangle the history of—and problems with—the two prongs of Article III standing that are relevant here: injury in fact and redressability.<sup>21</sup>

### A. Injury in Fact

In its 1970 decision in *Association of Data Processing Service Organizations v. Camp*, the Supreme Court first established “injury in fact” as a constitutional requirement of standing.<sup>22</sup> In doing so, the Court altered standing’s pre-*Data Processing* injury requirement<sup>23</sup> by untethering it from a need to show a violation of any particular law.<sup>24</sup> “Altered” is intentionally inconclusive: it remains unclear whether injury in fact relaxed or heightened the standard compared to legal injury.<sup>25</sup> In its less strict incarnations, injury in fact is satisfied as long as the plaintiff alleges that he suffered an “adverse effect” from the defendant’s conduct<sup>26</sup>—an easy bar to clear. But the vagueness of injury in fact has allowed the Court to draw arbitrary lines between “judicially cognizable” injuries and those that are “too abstract” to satisfy Article III.<sup>27</sup>

Because it introduced this unpredictable malleability, and for other, more fundamental reasons, the injury in fact requirement has been subject to significant criticism.<sup>28</sup> The core of this criticism was perhaps best expressed

<sup>20</sup> Warth v. Seldin, 422 U.S. 490, 501 (1975).

<sup>21</sup> Because causation was easy for the *Floyd* plaintiffs to satisfy and will not be a serious hurdle in stop-and-frisk cases generally, it does not merit significant discussion here.

<sup>22</sup> 397 U.S. 150, 152 (1970).

<sup>23</sup> See *supra* note 14 and accompanying text.

<sup>24</sup> See Warth, 422 U.S. at 500 (“[S]tanding in no way depends on the merits of the plaintiff’s contention that particular conduct is illegal . . .”).

<sup>25</sup> See F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 300 (2008) (“Not every person who suffers an injury has suffered the violation of a personal right . . . . Nor does every person who suffers the violation of a personal right suffer an injury because of that violation.”).

<sup>26</sup> See *Doe v. Chao*, 540 U.S. 614, 624-25 (2004) (“[A]n individual subjected to an adverse effect has injury enough to open the courthouse door . . .”).

<sup>27</sup> *Allen v. Wright*, 468 U.S. 737, 752 (1984), *abrogated on other grounds by Lexmark Int’l, Inc., v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387-88 (2014).

<sup>28</sup> See, e.g., William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229 (1988) (“Properly understood, standing doctrine should not require that a plaintiff have suffered ‘injury in fact.’”); *id.* at 231 (“[T]he ‘injury in fact’ requirement . . . is a singularly unhelpful, even incoherent, addition to the law of standing.”); Hessick, *supra* note 25, at 299 (“Historical practice . . . does not justify inserting the injury-in-fact requirement into Article III.”); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, ‘Injuries,’ and Article III*, 91 MICH. L. REV. 163, 222 (1992) (“*Data Processing* . . . diverted attention from the relevant question of [whether there is a] cause of action to the irrelevant question of injury in fact.”).

by Judge William Fletcher, then a professor, who argued that the requirement “cannot be applied in a non-normative way” because there “cannot be a merely factual determination [disconnected from any consideration of legal rights of] whether a plaintiff has been injured.”<sup>29</sup> To illustrate the incoherence of injury in fact, Fletcher described a man, not himself homeless, who is upset by the government’s cutbacks of welfare to the homeless. A court would likely say that the man has no standing to sue the government, because he has not suffered an injury in fact. But being upset *is* a factual injury, so what the court would actually be saying is that *being upset is not a sufficient injury to sue under the relevant welfare law*.<sup>30</sup>

Justice Scalia, who long recognized that giving injury in fact its plain meaning results in standing for far too many plaintiffs for his tastes, had long sought to harness the term like the hypothetical court did in the welfare case above.<sup>31</sup> In *Lujan v. Defenders of Wildlife*, the apex of this effort, Scalia constitutionalized a distinction between suits where the “plaintiff is himself an object of the action (or foregone action) at issue” and suits where the “injury arises from the government’s allegedly unlawful regulation (or lack of regulation) of *someone else*.”<sup>32</sup> Scalia’s argument is that because injury in fact is a *constitutional* requirement that each plaintiff must show, Congress does not have the power to grant individuals who do not have such an injury standing to sue on behalf of those who do.<sup>33</sup> Yet while *Lujan*’s invalidation of congressional grants of such “citizen suits” is still good law,<sup>34</sup> its logic, like that of injury in fact doctrine’s generally, is weak and not supported by the history of Article III: “With respect to standing . . . the key question [should be] whether Congress (or some other relevant source of law) has created a cause of action.”<sup>35</sup> If it has, the plaintiff has standing; if it has not, the plaintiff does not.

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<sup>29</sup> Fletcher, *supra* note 28, at 231.

<sup>30</sup> *Id.* at 232; *see also* Sunstein, *supra* note 28, at 177 (criticizing the injury in fact requirement on the grounds that “people have standing if the law has granted them a right to bring suit”).

<sup>31</sup> *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 886 (1983) (“[T]here is a limit upon even the power of Congress to convert generalized benefits into legal rights . . .”).

<sup>32</sup> 504 U.S. 555, 561-62 (1992).

<sup>33</sup> *See id.* at 573 (criticizing the lower court for having “held that the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental ‘right’ to have the Executive observe the procedures required by law”).

<sup>34</sup> *See* FEC v. Akins, 524 U.S. 11, 24 (1998) (noting that Congress cannot grant standing to plaintiffs who can only show “abstract” harm, such as an “injury to the interest in seeing that the law is obeyed”).

<sup>35</sup> Sunstein, *supra* note 28, at 222.

### B. Redressability

For years, the Supreme Court collapsed causation and redressability into a single inquiry.<sup>36</sup> This was an analytical error, because the concepts are distinct; whether the defendant's actions caused the plaintiff's injury is a fundamentally different question than whether the remedy the plaintiff seeks will actually address that injury.<sup>37</sup> A good example of redressability as an independent requirement, and one of the Court's first uses of it as a constitutional bar to a suit by a plaintiff who otherwise had standing, is *Linda R.S. v. Richard D.*<sup>38</sup> In *Linda R.S.*, the mother of an illegitimate child sued the local prosecutor to compel the prosecution of the child's father for failure to pay child support.<sup>39</sup> The Court found that because the harm the mother alleged was that she had not received support payments, it was unclear whether the harm would be addressed by the remedy she sought: "The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative."<sup>40</sup>

Beyond its direct holding, *Linda R.S.* illustrates something else: that the redressability inquiry is always related to how the injury is characterized.<sup>41</sup> In *City of Los Angeles v. Lyons*, the Court clarified this point by erecting a barrier to a plaintiff's attempt to enjoin future harm even when the plaintiff unquestionably has standing to seek damages for past harm.<sup>42</sup> Lyons had been put in a chokehold by Los Angeles police officers during a roadside traffic stop, "rendering him unconscious."<sup>43</sup> Lyons sued both for damages for that chokehold and for an injunction barring future chokeholds by the Los Angeles Police Department.<sup>44</sup> The Court found that because Lyons had neither shown "that

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<sup>36</sup> See, e.g., *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 74 (1978) (analyzing whether "injuries fairly can be traced to the challenged action of the defendant, or put otherwise, that the exercise of the Court's remedial powers would redress the claimed injuries" (emphasis added) (citation omitted)).

<sup>37</sup> Unfortunately, the modern Court has not completely shed itself of this error. See *Massachusetts v. EPA*, 549 U.S. 497, 523 (2007) (analyzing both whether "EPA's refusal to regulate . . . emissions 'contribute[d]' to Massachusetts' injuries" and whether there was "any realistic possibility . . . that the relief petitioners [sought] would . . . remedy their injuries").

<sup>38</sup> 410 U.S. 614 (1973).

<sup>39</sup> *Id.* at 615-16.

<sup>40</sup> *Id.* at 618.

<sup>41</sup> For example, had the *Linda R.S.* plaintiff claimed that she was harmed because the father *had not been prosecuted*, redressability would have been satisfied (but injury in fact would likely not have been). For more on this, see Sunstein, *supra* note 28, at 207 (distinguishing injuries described in "sharply particularistic" terms from those that are merely "characterized as an increased risk of harm").

<sup>42</sup> 461 U.S. 95, 131 (1983). This concept has come to be known as "remedial standing." See generally Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984).

<sup>43</sup> *Lyons*, 461 U.S. at 97-98.

<sup>44</sup> *Id.* at 98.

all police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter” nor “that the City ordered or authorized police officers to act in such manner,” he had not “establish[ed] a real and immediate threat that he would again be stopped” and put in a chokehold.<sup>45</sup> Thus, after *Lyons*, a plaintiff seeking an injunction has to show—as an Article III prerequisite—a “real and immediate threat” of future harm.<sup>46</sup>

*Lyons* came under fire for being a constitutional (rather than a prudential) decision<sup>47</sup> and, relatedly, for ignoring the “substantive policies underlying Congress’s decision to authorize equitable relief under” § 1983,<sup>48</sup> the law under which *Lyons* had sued.<sup>49</sup> Although it predated *Lujan*’s official decree that Congress cannot statutorily create standing where any one of injury in fact, causation, or redressability is lacking, *Lyons*, by “characterizing its remedial standing inquiry as mandated by [A]rticle III[,] . . . implied that Congress could not authorize injunctive relief based solely on past injuries.”<sup>50</sup> This implication in *Lyons* (and mandate in *Lujan*) is particularly important in § 1983 suits, because “[s]everal lines of authority support Congress’s power to adjust doctrines of justiciability to allow private parties to enforce constitutional rights.”<sup>51</sup> As in its injury in fact cases,<sup>52</sup> then, the Court has given Article III’s standing requirements—or, rather, *Data Processing*’s interpretation of Article III’s requirements<sup>53</sup>—enough might to place serious and unjustified limits on Congress’s lawmaking power.

A final example, drawn from the mootness context, shows why *Lyons* is on shaky ground as a constitutional holding and is inconsistent with the Court’s own decisions. With mootness, which is often simply referred to as standing

<sup>45</sup> *Id.* at 105-06.

<sup>46</sup> Justice Marshall’s dissent in *Lyons* attacked the majority on this very point: “Under the view expressed by the majority today, if the police adopt a policy of ‘shoot to kill,’ or a policy of shooting 1 out of 10 suspects, the federal courts will be powerless to enjoin its continuation.” *Id.* at 137 (Marshall, J., dissenting); see also Linda E. Fisher, *Caging Lyons: The Availability of Injunctive Relief in Section 1983 Actions*, 18 LOY. U. L.J. 1085, 1098 (1987) (“A standard requiring virtual certainty [of future injury] is anomalous relative to the body of caselaw regarding standing.”).

<sup>47</sup> See YACKLE, *supra* note 13, at 360 (“[I]t’s hard to see why Justice White didn’t rest on the equitable criteria for injunctive relief alone rather than making the decision turn on the constitutional law of standing.”).

<sup>48</sup> Fallon, *supra* note 42, at 8; see also *id.* at 26 (“*Lyons* apparently erects a heightened barrier to the protection of federal rights in suits for injunctive relief.”).

<sup>49</sup> See 42 U.S.C. § 1983 (2012) (“Every person who . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, *suit in equity*, or other proper proceeding for redress . . . .” (emphasis added)).

<sup>50</sup> Fallon, *supra* note 42, at 30; see also *id.* (“*Lyons*’s remedial standing analysis also may jeopardize the protective powers of Congress.”).

<sup>51</sup> *Id.* at 34.

<sup>52</sup> See *supra* Section I.A.

<sup>53</sup> See *supra* notes 22-28 and accompanying text.

over time,<sup>54</sup> one thorny area the Court has dealt with is where the relevant injury is “capable of repetition, yet evading review.”<sup>55</sup> This type of case generally involves a past injury that will reoccur but will not last long enough for judicial review to be feasible.<sup>56</sup> Here, the Court has relaxed Article III in light of the public policy interest in having these cases heard and has usually held that such cases are not moot as long as there is a “‘reasonable expectation’ or a ‘demonstrated probability’” of the injury’s recurrence.<sup>57</sup> In light of this apparently permissible flexibility, *Lyons*’s rule that Congress cannot authorize suits for injunctive relief where the risk of future injury is anything less than “real and immediate” is even more bewildering.

## II. STANDING IN CLASS ACTIONS: THEORY AND PRECEDENT FOR A RELAXED APPROACH

The four prerequisites for any class action are that

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.<sup>58</sup>

In addition to these threshold requirements, Federal Rule of Civil Procedure 23 provides that a class action may be maintained if “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole.”<sup>59</sup>

Although the Court has acknowledged that “the Rule 23 class-action device was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only,”<sup>60</sup> it has long emphasized

<sup>54</sup> See Fallon, *supra* note 42, at 24-25 (“Mootness is the justiciability doctrine concerned specifically with the relevance or irrelevance of an injury’s temporal passage.”).

<sup>55</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 125 (1973) (illustrating the idea but finding no mootness problem even where the plaintiff, who was challenging abortion restrictions, was no longer pregnant when the Court heard the case).

<sup>56</sup> YACKLE, *supra* note 13, at 408.

<sup>57</sup> E.g., *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). And in *Roe*, 410 U.S. at 125, the Court went so far as to not discuss any “requisite likelihood [of recurrence] at all.” Fallon, *supra* note 42, at 27; see also YACKLE, *supra* note 13, at 409 (“The Court’s decisions regarding mootness . . . are plainly more generous to litigants than are the Court’s parallel decisions on standing.”).

<sup>58</sup> FED. R. CIV. P. 23(a).

<sup>59</sup> FED. R. CIV. P. 23(b)(2).

<sup>60</sup> *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979).



the fact “[t]hat a suit may be a class action . . . adds nothing to the question of standing.”<sup>61</sup> As a surface matter, then, a plaintiff suing for an injunction on behalf of both himself and a multimillion-person class—such as one of *Floyd*’s named plaintiffs—must still individually satisfy *Lyons* by showing a “real and immediate” threat of future harm to himself.<sup>62</sup> This Part shows that, in such cases, class action theory justifies a more relaxed approach to standing, and precedent illustrates that the Supreme Court is open to such an approach.

### A. Theory

The codification of the class action device in Federal Rule of Civil Procedure 23 was an “evolutionary response to the existence of injuries unremedied by the regulatory action of government.”<sup>63</sup> The thinking behind the class action is that many claims are simply not worth enough to justify litigating them on an individual basis, which will lead over time to underenforcement of many laws.<sup>64</sup> “Rule 23 responds to th[is] problem[] and, in so doing, pushes the substantive law closer to maximal implementation.”<sup>65</sup> The substantive law most on the mind of the Advisory Committee on Civil Rules in drafting Rule 23 was civil rights: “If there was a single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation.”<sup>66</sup>

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<sup>61</sup> *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976); see also *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 413 (1980) (Powell, J., dissenting) (“Art. III contains no exception for class actions.”).

<sup>62</sup> For an excellent analysis of the standing problem in *Floyd*, see Katherine Macfarlane, *New York City’s Stop-and-Frisk Appeals Are Still Alive*, J.L. & POL’Y PRACTICUM (Dec. 26, 2013), <http://practicum.brooklaw.edu/articles/new-york-city%E2%80%99s-stop-and-frisk-appeals-are-still-alive> [https://perma.cc/3B3P-GGF4] (explaining that if “*Lyons* is properly applied, the inevitable outcome is that the [*Floyd*] plaintiffs lack standing” and that because “*Lyons* is still good law, the way to overcome it was to acknowledge that *Lyons* is binding, and then explain how to overcome its holding with a new theory of justiciability” (footnote omitted)).

<sup>63</sup> *Deposit Guar. Nat’l Bank of Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980).

<sup>64</sup> David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 593 (2013); see also Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941) (“If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all.”).

<sup>65</sup> Marcus, *supra* note 64, at 593.

<sup>66</sup> John P. Frank, *Response to 1996 Circulation of Proposed Rule 23 on Class Actions*, in 2 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 262, 266 (1997), <http://www.uscourts.gov/file/WorkingPapers-Vol2pdf> [https://perma.cc/JC7M-7WJY]; see also Marcus, *supra* note 64, at 608 (noting that Committee members “designed Rule 23(b)(2) expressly for [the civil rights] cause”).

The upshot of this is that the American class action is not merely a suit with many plaintiffs—it is instead a fundamentally different type of suit.<sup>67</sup> By the mid-1970s, just a decade after the “newly-revised Rule 23 . . . went into effect” and created the modern class action,<sup>68</sup> scholars had recognized as much:

Whatever the resolution of the current controversies surrounding class actions, *I think it unlikely that the class action will ever be taught to behave in accordance with the precepts of the traditional model of adjudication.* The class suit is a reflection of our growing awareness that *a host of important public and private interactions*—perhaps the most important in defining the conditions and opportunities of life for most people—are conducted on a routine or bureaucratized basis and *can no longer be visualized as bilateral transactions between private individuals.*<sup>69</sup>

Conceiving of the class action as not your everyday lawsuit is significant in several ways,<sup>70</sup> but, for present purposes, the question is whether it can affect the analysis of threshold requirements such as standing. Judge Diane Wood, then a professor, illustrated how this might work by positing the class action as a “representational model” under which “one person may represent the interests of others who are not before the court” and the “procedural focus is upon the named representative(s).”<sup>71</sup> This theory places all of the emphasis on the named plaintiff: “only he (they) must satisfy the pertinent jurisdictional and other preliminary requirements for bringing suit.”<sup>72</sup> A contrary view deemphasizes the named plaintiff—going so far as to call for the elimination of the class representative altogether—on the grounds that the “class representative, as the *named* plaintiff, makes the class action resemble the traditional lawsuit,” which is “a mold in which [the class action] will never

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<sup>67</sup> See, e.g., Jean Wegman Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165, 179 (1990) (“[T]he class action simply does not function like the traditional private-rights lawsuit around which most common law jurisprudence and practice has developed.”); Diane Wood Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 SUP. CT. REV. 459, 479 (“The original policy supporting class actions arose out of the ordinary rigidity of the rules governing parties.”).

<sup>68</sup> Marcus, *supra* note 64, at 588.

<sup>69</sup> Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1291 (1976) (emphases added).

<sup>70</sup> See, e.g., John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 632 (1987) (“[T]he practice has developed that the attorney finds the clients, rather than vice versa . . . [E]ven in these true disaster cases the same individuals can turn up recurrently as lead plaintiffs, even where they do not appear to have sustained serious injury.”).

<sup>71</sup> Hutchinson, *supra* note 67, at 497.

<sup>72</sup> *Id.* Importantly, even under this theory, “[i]f the district court certifies a class and the named member’s claim then becomes moot, one need not consider the entire case dead, because there has been judicial recognition that a class exists and its interests are implicated.” *Id.* at 498 (footnote omitted).

fit.”<sup>73</sup> Under this view, “[i]nsofar as standing and mootness issues are concerned, . . . these issues can be analyzed in class actions by focusing *not on the named plaintiff but on the class and absent class members.*”<sup>74</sup>

Underlying this split in views is an inescapable tension between Rule 23 and Article III.<sup>75</sup> Rule 23 simply envisions a different role for the named plaintiff than Article III does. “In a class action suit, the function of the named plaintiff . . . is to represent the interests of putative class members, not to supply the injury needed to satisfy the case-or-controversy requirement of [A]rticle III.”<sup>76</sup> Rather, in a class action, the *class as a whole* provides the relevant injury.<sup>77</sup> For this reason, analyzing standing by narrowly focusing on the named plaintiff undermines the class action’s important function in shifting such analyses away from the defendant’s effects on a single claimant to the defendant’s effects on a sizable and often undifferentiated group of individuals.<sup>78</sup> Even Judge Wood’s representational model—which on its face relies on such a narrow focus—is still based on the idea that, since Rule 23 incentivizes plaintiffs to *bring* claims that would not otherwise be brought, Article III should *allow* them to bring such claims.<sup>79</sup>

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<sup>73</sup> Burns, *supra* note 67, at 186-87; *see also id.* at 179 (suggesting that the insignificance of the named plaintiff is recognized in “[c]lass action practice [as opposed to theory],” where “there is a general recognition that the named plaintiff is largely a figurehead”).

<sup>74</sup> *Id.* at 187 (emphasis added); *see also id.* (urging flexibility on standing in class actions because “Article III requires a case or controversy, but does not dictate who must be party to the case or controversy”).

<sup>75</sup> *See* Jean Wegman Burns, *Standing and Mootness in Class Actions: A Search for Consistency*, 22 U.C. DAVIS L. REV. 1239, 1242 n.15 (1989) (“Article III and Rule 23 address two related yet different concerns. Article III asks if this plaintiff has a ‘case or controversy’ with this defendant. Put bluntly, has what this defendant done injured this plaintiff? Rule 23, on the other hand, asks: Is this plaintiff a proper representative of the class?”).

<sup>76</sup> Richard K. Greenstein, *Bridging the Mootness Gap in Federal Court Class Actions*, 35 STAN. L. REV. 897, 925 (1983); *see also* Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913, 1917 (2007) (arguing that, if *Lyons* had been a class action, because the plaintiff’s “presence in court seeking injunctive relief was a fortuitous consequence of his past injury[, i]t is unclear why *he* [w]ould be authorized, or even trusted, to represent the interests of an unnamed and unknowable class of other potential victims”).

<sup>77</sup> *See* Burns, *supra* note 67, at 167 (“All standing and mootness issues [should] be decided by reference to the status of the class’s claim, not the status of one individual’s claim.”).

<sup>78</sup> *See* Matthew R. Ford, *Adequacy and the Public Rights Model of the Class Action After Gratz v. Bollinger*, 27 YALE L. & POL’Y REV. 1, 5 (2008) (“[T]he class mechanism provides a means to challenge policies that, while not affecting the named plaintiff personally, affect a larger segment of the population—specifically, the class.”); Hutchinson, *supra* note 67, at 505 (criticizing “a joinder approach to class actions” that “treat[s] every individual member of the class just as it would have if the class device were not being used”); Marcus, *supra* note 64, at 593 (“Courts should train their attention instead on the defendant’s conduct toward the aggregate, for this is what needs regulating.”).

<sup>79</sup> *See* Hutchinson, *supra* note 67, at 472 (“The basic controversy remains whether the proper goal for the class action should be limited to the minimum one of providing a shortcut to otherwise multitudinous litigation, or on the other hand, should be extended to the maximum one of opening court access to otherwise nonlitigable claims.” (quoting 3B MOORE, FEDERAL PRACTICE ¶ 23.03[1], at 23-42 (1982))).

The representational model's relaxed approach to standing holds the named plaintiff to traditional standing requirements while exempting unnamed class members from them altogether.<sup>80</sup> But the relaxing could be done quite differently. An "aggregate standing" model in class actions would relax the normal Article III prerequisites on *all* parties by instead asking *whether the class as a whole* has standing.<sup>81</sup> This model would have several benefits. It would coincide with the idea that a "class action is not an application of rights, duties, and remedies to an *individual case* brought by a *particular person*"<sup>82</sup> but instead exists to "permit[] the affected *group* to . . . aggregate (and to some extent average) their individual circumstances and interests in seeking relief."<sup>83</sup> It would refocus attention away from the interests of the relatively insignificant class representative to the interests of the class as a whole.<sup>84</sup> And it would recognize that, despite their differences, Rule 23 and Article III have sufficiently similar goals such that where plaintiffs satisfy Rule 23's requirements, Article III should not independently bar litigation.<sup>85</sup>

Finally, and relevantly in the context of *Floyd*, an aggregate standing model would particularly benefit Rule 23(b)(2), or "public interest," class actions.<sup>86</sup> This type of class action is most at odds with traditional standing doctrine's commitment to individualism, because it provides indivisible, class-wide injunctive relief.<sup>87</sup> Because Rule 23(b)(2) class actions are "a needed means of obtaining redress for very real societal wrongs,"<sup>88</sup> a restrictive approach to standing that leads to countless situations in which "a right exists without an equitable remedy"<sup>89</sup> undermines the very point of the class action. In contrast, an aggregate standing approach, by recognizing that the named plaintiff in a

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<sup>80</sup> Hutchinson, *supra* note 67, at 478.

<sup>81</sup> For a distinct but related idea, see Sergio J. Campos, *Class Actions and Justiciability*, 66 FLA. L. REV. 553, 598 (2014) ("[T]he law of justiciability permits the standing of uninjured, even unharmed, plaintiffs [in class actions] . . . if doing so is necessary to adequately protect the interests of those injured.").

<sup>82</sup> Burns, *supra* note 67, at 180 (emphases added).

<sup>83</sup> *Id.* (emphases added).

<sup>84</sup> *See id.* at 190-92 (criticizing standing approaches that focus on the named plaintiff because they do "nothing to answer the real question: Is there a concrete, class-wide claim that the class wants decided?").

<sup>85</sup> *See* Campos, *supra* note 81, at 600 ("[A]dequacy of representation is the guiding principle of Article III's justiciability requirements."); Ford, *supra* note 78, at 15 ("Many commentators advocate a relaxed notion of standing [in class actions] based on a belief that the class itself has an independent legal significance that justifies departing from the private rights model."); David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 177, 818 (2016) ("Properly applied, class action procedure neutralizes the right plaintiff principle's effect in public law litigation.").

<sup>86</sup> These class actions seek structural reform through injunctive relief. *See* Marcus, *supra* note 85, at 780-81.

<sup>87</sup> *See id.* at 808-10.

<sup>88</sup> C. Douglas Floyd, *Civil Rights Class Actions in the 1980's: The Burger Court's Pragmatic Approach to Problems of Adequate Representation and Justiciability*, 1984 BYU L. REV. 1, 32.

<sup>89</sup> Fisher, *supra* note 46, at 1115; *see also id.* at 1115-16 ("Such a result can be unjust, particularly because the presence of [a] plaintiff class normally would increase the likelihood of recurrence [of injury] to at least some class members.").

class action “can attack more than what the defendant specifically directs toward her,”<sup>90</sup> will ensure that more public interest class actions get past threshold justiciability matters and closer to realizing Rule 23’s original purpose of aiding public law enforcement efforts.<sup>91</sup>

### B. *Precedent*

What would an “aggregate standing” approach in class actions look like in practice? Helpfully, the Supreme Court has opened the door for such an approach. While the Court’s first treatments of justiciability in class actions relied on a traditional, restrictive approach,<sup>92</sup> the Court was at the same time experimenting with a “different, more flexible, and functionally oriented approach to the Article III case-or-controversy requirement in class actions.”<sup>93</sup> An early example of this new leaf was *Sosna v. Iowa*, in which a newly minted Iowa resident (Sosna) brought a class action alleging that Iowa’s one-year residency requirement for initiating divorce proceedings was unconstitutional.<sup>94</sup> The district court certified the class and upheld the Iowa law.<sup>95</sup> Unsurprisingly, however, Sosna had lived in Iowa for more than a year by the time the case reached the Supreme Court, and so, under traditional principles, her *particular* case was moot.<sup>96</sup>

The Court nevertheless found that, for the class as a whole, the case was not moot.<sup>97</sup> Justice Rehnquist, writing for the Court, emphasized class certification:

When the District Court certified . . . the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant . . . . [E]ven though appellees in this proceeding might not again enforce the Iowa durational residency requirement against

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<sup>90</sup> Marcus, *supra* note 85, at 820.

<sup>91</sup> See Marcus, *supra* note 64, at 590 (“[C]ivil rights practitioners . . . argued for what I call the ‘regulatory conception’ of Rule 23.”).

<sup>92</sup> See, e.g., Warth v. Seldin, 422 U.S. 490, 508 (1975) (“[A] plaintiff . . . must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that *he personally* would benefit in a tangible way from the court’s intervention.” (second emphasis added)); O’Shea v. Littleton, 414 U.S. 488, 494 (1974) (“[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.”).

<sup>93</sup> Burns, *supra* note 75, at 1247-48.

<sup>94</sup> 419 U.S. 393, 395 (1975).

<sup>95</sup> *Id.* at 397-98.

<sup>96</sup> *Id.* at 398-99.

<sup>97</sup> *Id.* at 402. The Court decided 8–1 on the mootness issue, with only Justice White dissenting. *Id.* at 410-18 (White, J., dissenting).

appellant, it is clear that they will enforce it against those persons in the class that appellant sought to represent and that the District Court certified.<sup>98</sup>

As a result, Rehnquist wrote, “Although the controversy is no longer live as to appellant Sosna, it remains very much alive for the class of persons she has been certified to represent.”<sup>99</sup> Before proceeding to the merits, however, Rehnquist attempted to ward off expansive interpretations of *Sosna* by reemphasizing certification:

There must . . . be a named plaintiff who has [a live] case or controversy at the time the complaint is filed[] and at the time the class action is certified . . . . [Post-certification, t]he controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot.<sup>100</sup>

Despite this limiting language, it was clear that “the *Sosna* approach diluted the importance of the class representative.”<sup>101</sup> But this was just the beginning. A month later, in *Gerstein v. Pugh*, the Court appeared merely to apply *Sosna* to different facts but actually took this flexible approach to justiciability a step further.<sup>102</sup> *Gerstein* was a class action by prisoners held in pretrial custody who claimed “a constitutional right to a judicial hearing on the issue of probable cause.”<sup>103</sup> By the time the case reached the Court, the named plaintiffs’ cases were moot since they had been convicted and were no longer in pretrial custody.<sup>104</sup> Addressing mootness in a footnote, the Court acknowledged that it was not clear whether any of the named plaintiffs were in custody when the class was certified, which *Sosna* required in order to avoid mootness.<sup>105</sup> Yet, the Court held that *Gerstein* was “a suitable exception to that requirement” because “it [was] by no means certain that any given individual . . . would be in pretrial custody long enough for a district judge to certify the class” and “*in this case the constant existence of a class of persons suffering the deprivation [was] certain.*”<sup>106</sup>

This shows that the *Gerstein* Court did not merely apply *Sosna*’s relaxed mootness approach to a class action involving claims that were “capable of

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<sup>98</sup> *Id.* at 399-400.

<sup>99</sup> *Id.* at 401.

<sup>100</sup> *Id.* at 402.

<sup>101</sup> Burns, *supra* note 75, at 1250.

<sup>102</sup> 420 U.S. 103 (1975).

<sup>103</sup> *Id.* at 107.

<sup>104</sup> *Id.* at 111 n.11.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* (emphasis added).

repetition, yet evading review.”<sup>107</sup> Instead, the Court went beyond the *Sosna* approach and openly acknowledged that injuries suffered by *unnamed class members* could be used in assessing whether the *named plaintiffs*’ claims were justiciable.<sup>108</sup> And a year later, in *Franks v. Bowman Transportation Co.*, a class action suit on behalf of black truck drivers concerning retroactive seniority relief under the Civil Rights Act of 1964, the Court went further still.<sup>109</sup> Addressing mootness because one of the named plaintiffs had since been fired for cause, the *Franks* Court first noted that the class had been certified.<sup>110</sup> But the Court went on to say that because mootness doctrine merely serves to ensure that a true “adversary relationship” exists when the Court hears a case, the fact that the “unnamed members of the class involved [were] identifiable individuals” and “[n]o questions [were] raised concerning the continuing desire of any of these class members for the seniority relief” meant that the doctrine’s purpose was met and the case was not moot.<sup>111</sup>

Importantly, the Court soon thereafter indicated that even *Franks*’s perfunctory attention to class certification was something of a red herring. In two cases decided on the same day in 1980, the Court addressed the question whether a class representative whose claims had been mooted had standing to appeal a denial of his motion for class certification.<sup>112</sup> In *Roper*, where the putative class representatives were credit card holders who had sued their bank alleging unlawfully high charges, the Court answered yes, on the grounds that the named plaintiffs had “a continuing individual interest in the resolution of the class certification question in their desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails.”<sup>113</sup> But in *Geraghty*, a suit brought to enjoin federal parole release guidelines in which the putative class representative had been released from prison by the time the case was heard,<sup>114</sup> the Court “concluded that such

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<sup>107</sup> *Id.* at 110 n.11. The claims were at least more capable of evading review than the claims in *Sosna*. The pretrial custody claims in *Gerstein* usually were not “live” for more than a month because Florida law provided for a probable cause hearing after thirty days, while the claims in *Sosna* could be live for a full year.

<sup>108</sup> See Burns, *supra* note 75, at 1255 (“[I]n *Gerstein*, the Court, for the first time, was openly willing to assume the existence of an ongoing ‘class’ of persons with an interest in the controversy, even before certification.”).

<sup>109</sup> 424 U.S. 747 (1976).

<sup>110</sup> *Id.* at 755.

<sup>111</sup> *Id.* at 755-56.

<sup>112</sup> U.S. Parole Comm’n v. Geraghty, 445 U.S. 388 (1980); Deposit Guar. Nat’l Bank of Jackson, Miss. v. Roper, 445 U.S. 326 (1980).

<sup>113</sup> *Roper*, 445 U.S. at 336. The Court’s analysis also pointed out that a class action was not simply traditional litigation writ large, but served important independent purposes. See *id.* at 338 (“The use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs . . .”).

<sup>114</sup> *Geraghty*, 445 U.S. at 394.

[a *Roper*-like] economic interest was unnecessary.”<sup>115</sup> Unlike his counterparts in *Roper*, the *Geraghty* representative had conceded that he could “obtain absolutely no additional personal relief” if the class were certified.<sup>116</sup> The Court nevertheless found that he had standing to appeal the denial, reasoning that “the right to represent a class” was “more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the ‘personal stake’ requirement.”<sup>117</sup>

Once again, the Court sought to narrow its holdings,<sup>118</sup> but by the time *Geraghty* and *Roper* were decided, the seeds of *Sosna* had grown into a flexible-approach forest that would prove difficult to chop down. Even after *Lujan* and the rise of restrictive standing doctrine, the Court has not tried to do so.

Indeed, the flexible approach is alive and well. In *Gratz v. Bollinger*, rejected applicants to the University of Michigan (UM) brought a class action alleging that UM’s affirmative action policy in freshman admissions was unconstitutional and seeking injunctive relief.<sup>119</sup> The Court agreed and struck the policy down.<sup>120</sup> The Court addressed standing as a threshold matter, however, because the named plaintiffs had since attended different colleges and seemingly had no stake in whether or not UM’s affirmative action policy was enjoined.<sup>121</sup>

Unsurprisingly, the *Gratz* Court found no standing problem,<sup>122</sup> but it did so through a clever use of the flexible approach that claimed to tread no new ground but appears to have set aside justiciability concerns entirely in cases where Rule 23 is satisfied. Focusing on the plaintiff who maintained an ongoing intention to apply to UM as a *transfer* student if its affirmative action policy were struck down, the Court reasoned that—although UM’s policy in freshman admissions was distinct from its policy in transfer admissions, *and only the freshman policy was before the Court*<sup>123</sup>—the policies were similar enough to allow a plaintiff whose live claim was the result of one policy (the transfer) to

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<sup>115</sup> Campos, *supra* note 81, at 563.

<sup>116</sup> *Geraghty*, 445 U.S. at 420 n.14 (Powell, J., dissenting).

<sup>117</sup> *Id.* at 402-03.

<sup>118</sup> See, e.g., *id.* at 404 (“Our holding is limited to the appeal of the denial of the class certification motion.”).

<sup>119</sup> 539 U.S. 244, 252 (2003).

<sup>120</sup> *Id.* at 275.

<sup>121</sup> *Id.* at 260. The parties did not raise the issue, but Justice Stevens devoted his entire dissent to arguing that the plaintiffs lacked standing. *Id.* at 282-91 (Stevens, J., dissenting).

<sup>122</sup> See David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1238 (“[T]he Court’s willingness to [find standing in *Gratz* and] intervene on the merits may well have turned on the political dimension of the substantive rights at stake.”).

<sup>123</sup> Only the freshman policy was the subject of the Court’s ultimate holding. See *Gratz*, 539 U.S. at 275 (“We conclude, therefore, that because the University’s use of race in its current *freshman* admissions policy is not narrowly tailored to achieve respondents’ asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.” (emphasis added)).



represent a class suing to invalidate another policy (the freshman).<sup>124</sup> *Gratz* thus helpfully encapsulates the modern Court's views on justiciability. Not only did it show that justiciability analysis often turns on whether or not the Court wants to take the case on the merits, but also it made clear that the Court has now fully departed from its old view that standing analysis should not differ for class actions. "[I]t is undeniable that . . . the [*Gratz*] representative . . . was able to enjoin a policy that he would not have had standing to enjoin outside of the class-action context . . ." <sup>125</sup>

### III. STANDING IN *FLOYD*

*Floyd* provides an excellent opportunity to see how a post-*Gratz* flexible approach to standing in class actions would work in practice. Indeed, the *Floyd* court found that the plaintiffs had standing using this approach, although it did not say so—the court claimed to find standing by simply applying *Lyons* in a routine manner. But something else was at work in the court's analysis. This Part attempts to unwrap this judicial sleight-of-hand and explain what the court was actually saying.

#### A. *What the Court Said*

In *Floyd*, recall that the four named plaintiffs brought a class action suit against the City of New York to enjoin the NYPD's stop-and-frisk program, alleging that searches made under the program violated the Fourth Amendment's reasonable suspicion requirement and unfairly targeted racial minorities in violation of the Fourteenth Amendment.<sup>126</sup> In opposing class certification, the City argued that three of the four named plaintiffs lacked standing, to which the court responded "by noting that David Ourlicht, the fourth plaintiff, indisputably does have standing and that 'the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.'" <sup>127</sup>

In its three-pronged analysis, the court directly addressed *Lyons*. First, the court noted that since Ourlicht had not only been stopped three times prior to initiating the suit, but also once since, the possibility of a future stop was not speculative.<sup>128</sup> Second, because such stops were not predicated on valid arrests—unlike the chokeholds at issue in *Lyons*—Ourlicht could not avoid them simply by abstaining from unlawful conduct.<sup>129</sup> Finally, the court found

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<sup>124</sup> *Id.* at 263-67.

<sup>125</sup> Ford, *supra* note 78, at 21.

<sup>126</sup> Complaint & Demand for Jury Trial ¶¶ 1, 3, 6, *Floyd I*, 283 F.R.D. 153 (No. 08-01304), ECF No. 1.

<sup>127</sup> *Floyd I*, 283 F.R.D. at 169 (citation omitted).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 169-70.

that “the frequency of alleged injuries inflicted by the practices at issue here create[d] a likelihood of future injury sufficient to address any standing concerns.”<sup>130</sup> On this final point, the court distinguished *Lyons* because there “the police department’s challenged policies were responsible for [only] ten deaths,” whereas in *Floyd*, the New York City “police department ha[d] conducted over 2.8 million stops over six years.”<sup>131</sup> Such “widespread practices” made *Ourlicht’s* “risk of future injury . . . ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’”<sup>132</sup>

### B. *What the Court Actually Meant*

Beneath that surface-level reasoning, the court was actually saying that a class action is not normal litigation, and normal rules—e.g., *Lyons*—do not strictly apply.<sup>133</sup> Because *Ourlicht* is suing on behalf of a class and Rule 23’s requirements are otherwise satisfied,<sup>134</sup> there is no need for him to be held to the same “real and immediate” threat of future harm standard that *Lyons* was held to in order to have standing. It simply should not matter, let alone be dispositive, whether *Ourlicht’s* chances of being stopped again are properly described as “likely,” “probably,” or “certainly,” because it *is certain* that other New Yorkers will be stopped and that the types of claims those stops create will be virtually the same as *Ourlicht’s*. The class representative is just that: a *representative*. Forcing *Ourlicht* to individually satisfy the narrow injury in fact, causation, and redressability requirements that the Supreme Court not only created but has interpreted in unnecessarily restrictive ways ignores the fact that he is representing others not before the court.

For purposes of standing, the *Floyd* court implicitly said that the class is important, but the representative is not. The plaintiffs have satisfied Rule 23(a)’s numerosity, commonality, representativeness, and adequacy requirements and have shown, pursuant to Rule 23(b)(2), that the City’s stop-and-frisk policies “apply generally to the class.”<sup>135</sup> A large number of class members will certainly suffer the alleged harm in the near future. This is sufficient for the case to move forward. A restricted notion of justiciability created for traditional lawsuits should not be an independent hurdle for the plaintiffs to overcome.

Finally, the court implicitly acknowledged that the Supreme Court does not seem to have a problem with a relaxed approach that focuses on the class and Rule 23’s requirements rather than on the named plaintiff and the *Lyons*

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<sup>130</sup> *Id.* at 170 (emphasis added).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)).

<sup>133</sup> Indeed, in *Lyons’s* immediate wake, some courts openly said as much. *See, e.g., Lewis v. Tully*, 99 F.R.D. 632, 638 (N.D. Ill. 1983) (“This case differs significantly from *Lyons*, however, in that there is no indication . . . in *Lyons* that the case had been certified as a class action.”).

<sup>134</sup> The court addressed Rule 23 standards immediately after standing. *Floyd I*, 283 F.R.D. at 170-78.

<sup>135</sup> FED. R. CIV. P. 23(b)(2).

standard. The Court has indicated as much not only directly, by chipping away at justiciability requirements in *Sosna* and seemingly discarding them entirely in *Gratz*, but also indirectly, by analyzing standing in results-oriented ways even in its nonclass decisions. In *Lujan*, for example, the Court faced the problem that the plaintiffs had indeed been injured “in fact,” because they claimed that the federal government’s failure to apply certain endangered species laws outside of the United States threatened their ability to travel and observe those species.<sup>136</sup> This “diminished opportunity” to see the species was undeniably a factual injury.<sup>137</sup> But the Court instead focused on the binary question of whether the plaintiffs would actually see the animals or not, and because the plaintiffs had made no specific travel plans to do so, any claimed injury from the government’s failure to enforce the endangered species laws was deemed speculative.<sup>138</sup> By contrast, in the affirmative action case *Regents of University of California v. Bakke*, where injury in fact was questionable because it was not clear that the white plaintiff would have been admitted to the U.C. Davis Medical School even absent affirmative action, the Court flexibly interpreted the relevant injury as the plaintiff’s inability to compete for admission on a fair playing field—regardless of his actual chances at admission.<sup>139</sup>

What *Lujan* and *Bakke* show is that *even outside the class context*, the Supreme Court frequently adopts an “ends justify the means” approach to justiciability that belies Article III’s purported strictness. In *Floyd*, there is a certifiable class and a guarantee of immediate future injury to its members. Individually, Ourlicht probably does not satisfy *Lyons*—but so what?

#### CONCLUSION

The rationale behind Rule 23 justifies a relaxed approach to standing in class actions, and the Supreme Court has embraced this model in past cases. *Floyd* is a case where the traditional approach would have gotten the wrong result, and where the court, sensing this, implicitly used a relaxed approach and treated the relevant injured party as the class rather than the named plaintiff. While tricky issues remain—such as how a denial of class certification should affect standing analysis—courts should feel able to begin these standing inquiries by noting that class actions are different from traditional litigation, and proceeding from there.

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<sup>136</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562-63 (1992).

<sup>137</sup> Sunstein, *supra* note 28, at 204.

<sup>138</sup> *Lujan*, 504 U.S. at 564.

<sup>139</sup> 438 U.S. 265, 280 n.14 (1978).

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