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# One Good Plaintiff Is Not Enough

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## ONE GOOD PLAINTIFF IS NOT ENOUGH

AARON-ANDREW P. BRUHL†

### ABSTRACT

*This Article concerns an aspect of Article III standing that has played a role in many of the highest-profile controversies of recent years, including litigation over the Affordable Care Act, immigration policy, and climate change. Although the federal courts constantly emphasize the importance of ensuring that only proper plaintiffs invoke the federal judicial power, the Supreme Court and other federal courts have developed a significant exception to the usual requirement of standing. This exception holds that a court entertaining a multiple-plaintiff case may dispense with inquiring into the standing of each plaintiff as long as the court finds that one plaintiff has standing to pursue the claims before the court. This practice of partially bypassing the requirement of standing is not limited to cases in which the plaintiffs are about to lose on other grounds anyway. Put differently, courts are willing to proceed as if all plaintiffs have standing as long as one plaintiff has it, and they will then decide the merits for or against all plaintiffs despite doubts about the standing of some of those plaintiffs. We could call this the “one-plaintiff rule.”*

*This Article examines the one-plaintiff rule from normative and*

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† Professor of Law, William & Mary Law School. I thank Tara Grove, Teddy Rave, Adam Steinman, Joan Steinman, Elizabeth Thornburg, Howard Wasserman, and participants at the Civil Procedure Workshop at the University of Arizona for comments on earlier drafts. I thank Paul Hellyer for help locating sources. I thank Ben Holwerda, Brandon Orewyler, and Trevor Ward for research assistance.

*positive perspectives. On the normative side, the goal is to establish that the one-plaintiff rule is erroneous in light of principle, precedent, and policy. All plaintiffs need standing, even if each presents similar legal claims and regardless of the form of relief they seek. To motivate the normative inquiry, the Article also explains that the one-plaintiff rule is harmful as a practical matter because it assigns the benefits and detriments of judgments to persons to whom they do not belong. The Article's other principal goal is to explain the puzzle of how the mistaken one-plaintiff rule could have attained such widespread acceptance. The explanatory account assigns the blame for the one-plaintiff rule to the incentives of courts and litigants as well as to the development of certain problematic understandings of the nature of judicial power.*

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## INTRODUCTION

The fundamental principle of federal jurisdiction is that the federal courts are courts of limited jurisdiction.<sup>1</sup> They must scrupulously ensure that they do not exceed their rightful authority. One limitation on their authority, as set forth in Article III of the Constitution, is that the federal courts may only adjudicate genuine “cases or controversies” and may not address abstract questions of law or policy. The Supreme Court has gone so far as to declare that “[n]o principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.”<sup>2</sup> The “case or controversy” limitation has generated the elaborate doctrine of standing to sue. To have standing under Article III, a plaintiff must have suffered an injury in fact that is traceable to the defendant’s

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1. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173–76 (1803) (holding a federal statute unconstitutional because it conferred a type of jurisdiction not authorized by Article III).

2. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976) (emphasis added).

conduct and likely to be redressed by the plaintiff's requested remedy.<sup>3</sup> The Supreme Court frequently reiterates the importance of standing, calling it "an indispensable part of the plaintiff's case."<sup>4</sup>

Despite the importance that the federal courts attribute to Article III standing, the Supreme Court and lower federal courts have developed a significant exception to the standing requirement. This exception holds that a court entertaining a multiple-plaintiff case may dispense with inquiring into the standing of each plaintiff as long as the court finds that one plaintiff has standing. Courts sometimes invoke this rule when the plaintiffs are about to lose on the merits anyway, but courts also invoke this rule even when the plaintiffs might, and ultimately do, prevail on the merits. In other words, courts are willing to proceed through the litigation process and eventually enter judgment on the merits for or against all plaintiffs, despite acknowledged doubts as to the standing of some of those plaintiffs. We could call this the "one-plaintiff rule" or, by analogy to the doctrine of supplemental jurisdiction,<sup>5</sup> a form of supplemental-plaintiff standing.

The one-plaintiff rule is applied with considerable frequency. It has been invoked in more than two dozen Supreme Court cases and probably hundreds of cases in the lower federal courts, and it has figured in several of the highest-profile cases of the last several years. Courts used the one-plaintiff rule in the litigation involving President Donald Trump's travel ban,<sup>6</sup> the Obama administration's "deferred action" immigration program,<sup>7</sup> the Affordable Care Act's individual mandate,<sup>8</sup> climate change,<sup>9</sup> and same-sex marriage.<sup>10</sup> In *King v.*

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3. *Allen v. Wright*, 468 U.S. 737, 751 (1984). In addition to the requirements of Article III, there are also several "judicially self-imposed," or prudential, restrictions on standing. *See id.* The focus of this Article is constitutional standing rather than prudential standing, though the latter doctrine does make an appearance at a few points. *See infra* Part III.E.5.

4. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

5. *See* 28 U.S.C. § 1367 (2012) (providing that district courts may exercise supplemental jurisdiction over certain claims related to a claim within their original jurisdiction).

6. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 586 (4th Cir. 2017) (en banc), *cert. granted*, 137 S. Ct. 2080 (2017), *vacated as moot*, No. 16-1436, 2017 WL 4518553 (U.S. Oct. 10, 2017) (mem.).

7. For a discussion of the use of the one-plaintiff rule in the deferred-action immigration case, *see infra* text accompanying notes 29–31, 143–51.

8. *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1243 (11th Cir. 2011), *aff'd in part, rev'd in part sub nom.* *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

9. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

10. *Bostic v. Schaefer*, 760 F.3d 352, 370–71 (4th Cir. 2014).

*Burwell*,<sup>11</sup> the most recent Supreme Court case over the Affordable Care Act, the one-plaintiff rule may explain why the Court's opinion did not address standing at all, despite the fact that there were very serious doubts about the standing of most of the plaintiffs in the case.<sup>12</sup> After all, the one-plaintiff rule meant that only one of the plaintiffs in *King* needed standing, and the federal government conceded that one plaintiff probably had it.<sup>13</sup> Due to its role in the *King* litigation, the one-plaintiff rule achieved the unusual distinction among standing doctrines of having been discussed in the popular press.<sup>14</sup>

The one-plaintiff rule's prevalence in judicial decisions far outstrips the amount of deliberation the courts have given it. This Article hopes to force a more thoughtful confrontation. It examines the one-plaintiff rule from both normative and positive perspectives. On the normative side, the Article aims to establish that the one-plaintiff rule is wrong as a matter of principle and, further, that it is practically harmful or at least not as practically beneficial as might be supposed. Therefore, courts should stop using it. Commentators, who rarely linger over the rule, should not endorse it.<sup>15</sup> Instead, courts and

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11. *King v. Burwell*, 135 S. Ct. 2480 (2015).

12. See Nicholas Bagley, *Do the Plaintiffs in King Have Standing to Sue?*, INCIDENTAL ECONOMIST (Feb. 16, 2015), <http://theincidentaleconomist.com/wordpress/do-the-plaintiffs-in-king-have-standing-to-sue/> [<https://perma.cc/J8TT-LFUZ>]; Rob Weiner, *King v. Burwell: Standing Pat or Standing Corrected*, BALKINIZATION (Feb. 18, 2015), <http://balkin.blogspot.com/2015/02/king-v-burwell-standing-pat-or-standing.html> [<https://perma.cc/48FB-FLLY>].

13. The issue of standing came up at the beginning of oral argument, but it was not pursued very forcefully because both sides, and the Court, seemed to accept the one-plaintiff rule. Transcript of Oral Argument at 3, *King*, 135 S. Ct. 2480 (No. 14-114) (Ginsburg, J.) (stating that “each plaintiff, or at least one plaintiff, has to have a concrete stake in these questions”); *id.* at 7 (counsel for challengers) (stating that “it’s blackletter law that only one plaintiff needs standing”); *id.* at 39 (Solicitor General) (“[W]ith respect to standing, the question—the case or controversy question turns on whether any of the four Petitioners is liable for the tax penalty for 2014.”).

14. E.g., Louise Radnofsky, Jess Bravin & Brent Kendall, *Health-Law Challenger’s Standing in Supreme Court Case Is Questioned*, WALL STREET J. (Feb. 6, 2015), <https://www.wsj.com/articles/health-law-challengers-standing-in-supreme-court-case-is-questioned-1423264458> [<https://perma.cc/P8BX-XWH9>] (“Standing issues with these three [*King v. Burwell*] plaintiffs don’t jeopardize the case, legal experts say, because only one plaintiff needs standing for the suit to proceed before the court.”).

15. The most substantial treatment of the rule, which endorses its validity, comes from Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be—Part I: Justiciability and Jurisdiction (Original and Appellate)*, 42 UCLA L. REV. 717, 726–50 (1995). Since that article was published, the one-plaintiff rule has become both more entrenched in judicial practice and, due to other doctrinal developments, more problematic. For a description of Steinman’s position and the impact of later developments, see *infra* note 155.

commentators should recognize that all plaintiffs in a case need standing, even if all of them present similar legal claims and seek only generalized injunctive or declaratory relief. And, importantly, one can and should reject the one-plaintiff rule even if one believes that modern standing doctrine has unduly limited access to the courts in many situations, particularly when Congress has created new statutory injuries.

Turning to the positive side of the analysis, the Article attempts to explain the rule's advent and general acceptance. Given the supposedly fundamental importance of the standing requirement, it is jarring to see courts treat it so casually. The situation calls out for an explanation of how such a mistake could arise and thrive. This Article attempts to provide one.

The Article is organized as follows. Part I describes the one-plaintiff rule, the exceptions to it, and the history behind it. Part II explores the one-plaintiff rule's underappreciated harmful effects. The problems with the rule are not merely theoretical (though, as far as theory goes, the rule is unsound); rather, the rule assigns the concrete benefits and burdens of party status to persons who should not enjoy those benefits or bear those burdens. Part III then presents the case against the one-plaintiff rule by showing that it is inconsistent with the Constitution and the larger web of standing doctrine. Part III also sets forth the right way for courts to handle cases in which only some parties have standing. If implemented wisely, the rejection of the one-plaintiff rule need not cause much harm to values like judicial economy.

Switching from the normative to the positive, Part IV attempts to explain how courts could have fallen into the error of perpetuating the one-plaintiff rule. The explanation assigns responsibility to the material incentives of courts and government litigants and to certain aspects of contemporary legal culture. The legal-cultural factors include background assumptions about judicial supremacy and the tendency, now manifesting itself even in lower courts, to elevate the judiciary's law-declaration function over its dispute-resolution function. The same legal-cultural trends may explain problematic developments in adjacent doctrinal spaces, such as the growing willingness of district courts to issue nationwide injunctions that bar the government from enforcing a law against any person, including non-parties.<sup>16</sup>

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16. See generally Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*,

## I. THE ONE-PLAINTIFF RULE AND ITS ORIGINS

This Part provides some background on the one-plaintiff rule. It begins by describing the rule, how it operates, and its pervasive role in the federal courts today. It also discusses limitations on the rule's use, particularly with respect to the nature of the relief at stake. Finally, this Part explores the rule's genesis, which might best be described as unintentional.

### A. *The Rule, Its Operation, and Some Examples*

Standing is required in every federal case. In a single-plaintiff case, that means the plaintiff is required to have standing, and the case will be dismissed if the plaintiff lacks it. In a multiple-plaintiff case, a suit may proceed at least with respect to the plaintiff(s) with standing. According to the one-plaintiff rule, a court need not consider the standing of other plaintiffs once one plaintiff is determined to have standing. Further, the rule permits a court to proceed to adjudicate the merits of the entire case, *as to all plaintiffs*, as long as one of them has standing. That is the rule the courts have developed, and that is the rule this Article rejects.

Once one becomes aware of its existence, one finds the one-plaintiff rule everywhere. The Supreme Court has invoked some version of the one-plaintiff rule more than two dozen times in the last several decades.<sup>17</sup> In all but one of those cases, the Court had before it both standing issues and merits issues.<sup>18</sup> The one-plaintiff rule allowed the Court to proceed to the merits after identifying one proper plaintiff, rather than addressing the standing of all plaintiffs and then resolving the merits only for the plaintiff(s) found to have standing. To be sure, there are cases in which the Court, without mentioning the one-plaintiff rule one way or the other, performs distinct standing inquiries for multiple plaintiffs. This is particularly true in cases that

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131 HARV. L. REV. (forthcoming 2017) (observing this development and criticizing it on historical and judicial-structural grounds).

17. The Appendix provides a list of the cases in which the Supreme Court used the one-plaintiff rule, along with some additional information on the cases. I included those cases in which, once the Court determined that one plaintiff had standing, the Court stated that it or the lower court need not consider the standing of other plaintiffs. The earliest Supreme Court case I identified is from 1964, but the rule did not begin to appear with any regularity until the mid-1970s.

18. The exception was *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1648 (2017), which is discussed further in Part I.B.2.



only address justiciability and not the merits.<sup>19</sup> There are also multiple-plaintiff cases in which the plaintiffs are identically situated for standing purposes, so that they are most naturally analyzed as a collective.<sup>20</sup> But, to generalize, applying the one-plaintiff rule has become the Court's usual practice in cases in which different plaintiffs present distinct standing issues. The Court has never directly criticized the rule. The one-plaintiff rule has become so routine that it is assumed on all sides.<sup>21</sup>

As with most rules of federal jurisdiction and procedure, the lower courts have far more occasion to use the one-plaintiff rule than does the Supreme Court. They have called the rule an "abundantly clear," "well-established," "general rule" of federal practice.<sup>22</sup> It is regularly used by federal courts across the country, typically (though not exclusively) in cases involving nonmonetary relief.<sup>23</sup>

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19. *E.g.*, *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2343–47 (2014); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181–83 (2000); *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 109–115 (1979). There was a dissent in *Friends of the Earth*, so the Court's discussion of multiple plaintiffs' standing might have been an attempt to bolster the evidentiary basis for the standing ruling, in case the Court's ruling was not persuasive as to a particular plaintiff.

20. *E.g.*, *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 272–74 (2008); *FEC v. Akins*, 524 U.S. 11, 22–24 (1998).

21. *See, e.g., supra* note 13 (quoting comments from both advocates and the Court during the *King v. Burwell* oral argument).

22. *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1243 (11th Cir. 2011) ("The law is abundantly clear that so long as at least one plaintiff has standing to raise each claim . . . we need not address whether the remaining plaintiffs have standing."), *aff'd in part, rev'd in part sub nom. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012); *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993) ("The general rule applicable to federal court suits with multiple plaintiffs is that once the court determines that one of the plaintiffs has standing, it need not decide the standing of the others."); *Tuaua v. United States*, 951 F. Supp. 2d 88, 92–93 (D.D.C. 2013), *aff'd*, 788 F.3d 300 (D.C. Cir. 2015) ("It is well-established that a court need not consider the standing of the other plaintiffs when at least one plaintiff has standing.").

23. At least twelve of the thirteen courts of appeals have used the one-plaintiff rule. *E.g.*, *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 710 (6th Cir. 2015); *Tierney v. Advocate Health & Hosps. Corp.*, 797 F.3d 449, 451 (7th Cir. 2015); *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 471 (5th Cir. 2014); *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 316 n.7 (4th Cir. 2013); *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 29 (10th Cir. 2013); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 84 n.2 (2d Cir. 2012); *Lozano v. City of Hazleton*, 620 F.3d 170, 182–83 (3d Cir. 2010); *ACLU of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1195 (11th Cir. 2009); *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1266 (D.C. Cir. 2004); *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993); *Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d 962, 972 (1st Cir. 1993); *Nat'l Wildlife Fed'n v. Agric. Stabilization & Conservation Serv.*, 955 F.2d 1199, 1203 (8th Cir. 1992). I have not identified a relevant case from the Court of Appeals for the Federal Circuit. The courts listed above have not invariably followed the rule; for some instances in which lower courts required all plaintiffs to show standing, see notes 47–51 and accompanying text. For

Contrary to what one might suppose, the courts' use of the one-plaintiff rule is not limited to cases in which the plaintiffs are about to lose on the merits anyway. In such cases, one might be tempted to adopt a "no harm, no foul" attitude. But the plaintiffs *prevailed* on the merits in more than half of the Supreme Court cases applying the rule.<sup>24</sup> In the lower courts too, parties who benefited from the rule sometimes win on the merits and sometimes lose. There are too many lower court cases to provide a precise breakdown of the proportions, but both outcomes occur with some frequency.

Cases applying the one-plaintiff rule often state that, once one proper plaintiff has been found, they "need not consider" or "need not address" whether other plaintiffs have standing.<sup>25</sup> This language makes it sound as though the court is remaining agnostic on the standing of the other plaintiffs, not ruling on standing one way or the other. But such agnosticism is not possible, at least not for long. A plaintiff either remains in the case or not. When courts apply the one-plaintiff rule, the other plaintiffs remain in the case, and not only as an interim measure while, for example, complicated jurisdictional facts are sorted out. Rather, the other plaintiffs remain in the case as full-fledged parties, which, depending on the case, might go so far as trial and judgment on the merits or appeal and remand for further proceedings on the merits.<sup>26</sup> At least as a functional matter, and as the courts themselves sometimes put it, courts employing the one-plaintiff rule *assume* that all plaintiffs have standing and adjudicate the merits based on that assumption.<sup>27</sup>

Courts easily slide from the erroneous proposition that the standing of certain plaintiffs need not be considered to the even worse act of proceeding as if all plaintiffs in fact have standing. Consider the

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the relevance of the form of relief being sought and examples of cases involving damages, see *infra* Part I.B.1.

24. See *infra* Appendix.

25. *E.g.*, *Clinton v. City of New York*, 524 U.S. 417, 431 n.19 (1998) ("Because both the City of New York and the health care [plaintiffs-]appellees have standing, we need not consider whether the [plaintiff-]appellee unions also have standing to sue.").

26. See, *e.g.*, *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1170 (11th Cir. 2006) ("So long as one party has standing, other parties may *remain* in the suit without a standing injury." (emphasis added)). On remand, the district court described the Eleventh Circuit's decision as having resolved issues of standing "in *Plaintiffs'* favor," and the district court then proceeded to the merits. *Sierra Club v. U.S. Forest Serv.*, 535 F. Supp. 2d 1268, 1273 (N.D. Ga. 2008) (emphasis added).

27. *E.g.*, *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 44–45 (1974) (stating that "we assume without deciding that [one plaintiff] does have standing" where another plaintiff did).

Fifth Circuit's opinion in *Texas v. United States*,<sup>28</sup> the case brought by Texas and twenty-five other states to block the Obama administration's "deferred action" immigration program. The Fifth Circuit determined that one plaintiff state, Texas, had standing on the theory that it expended funds to issue driver's licenses to beneficiaries of deferred action.<sup>29</sup> Citing the one-plaintiff rule, the court deemed Texas's standing sufficient to proceed to the merits of the case as a whole.<sup>30</sup> But the last sentence of the court's Article III standing discussion stated that "[t]he *states* have standing,"<sup>31</sup> as if all of them did, which is a conclusion that was never justified or even examined. Other courts occasionally slip up in much the same way.<sup>32</sup>

The effects of the one-plaintiff rule are heightened by the fact that the rule is not limited to cases in which one could safely assume that all plaintiffs would be found to have standing if only the court bothered to conduct the analysis. *Massachusetts v. EPA*<sup>33</sup> provides a good example of a case in which the standing of the additional plaintiffs was questionable. In that case, a dozen states, along with several other government entities and a collection of environmental groups, filed suit to challenge the Environmental Protection Agency's (EPA) decision declining to regulate greenhouse-gas emissions.<sup>34</sup> Before addressing the questions on the merits—which concerned the EPA's authority under the Clean Air Act—the Supreme Court addressed what it described as "serious" questions about whether the challenge presented an Article III case or controversy.<sup>35</sup> The Court did not discuss whether all of the challengers had standing, but instead stated,

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28. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

29. *Id.* at 150.

30. *Id.* at 151.

31. *Id.* at 162 (emphasis added).

32. *E.g.*, *Pelphrey v. Cobb Cty.*, 547 F.3d 1263, 1279–80 (11th Cir. 2008) (writing in a section heading that "the taxpayers" have standing even though the court used the one-plaintiff rule to limit its analysis to one taxpayer plaintiff); *Citizens for Responsibility & Ethics in Wash. v. Cheney*, 593 F. Supp. 2d 194, 226 (D.D.C. 2009) ("The Court finds that [one plaintiff] has established standing to advance *Plaintiffs'* claims." (emphasis added)). For another example, see *supra* note 26.

33. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

34. *Massachusetts v. EPA*, 415 F.3d 50, 53 (D.C. Cir. 2005), *rev'd*, 549 U.S. 497 (2007). In this particular case, the challengers had filed a petition for review of agency action, so they were "petitioners" rather than "plaintiffs," but that distinction makes no relevant difference for Article III standing purposes.

35. *Massachusetts*, 549 U.S. at 506.

in accordance with the one-plaintiff rule, that only one of them needed standing.<sup>36</sup> The one and only party whose standing the Court addressed was Massachusetts, and the standing-conferring injury that the Court relied upon was the inundation, brought about by rising sea levels, of the state's own coastal property.<sup>37</sup> After discussing how Massachusetts satisfied the standing requirements, the Court then concluded its standing analysis by writing that “petitioners”—apparently all of them now, as a group—had standing to challenge the EPA's denial of their rulemaking petition.<sup>38</sup> Turning to the merits, the Court upheld the challengers' objections to the EPA's decision and required the agency to revisit the matter.<sup>39</sup>

It is by no means clear that the other challengers in *Massachusetts v. EPA* would have been found to have standing had the Court inquired. The loss of coastal landholdings could not support standing for all of the petitioners, not even for all of the states, as some of them were not coastal. And the standing of the environmental groups was even less certain. The Court's opinion stated that Massachusetts, as a state protecting its “quasi-sovereign interests,” was “entitled to special solicitude in our standing analysis.”<sup>40</sup> The opinion therefore provides some reason to question whether the environmental groups, without such special solicitude, could have established standing if they had been required to do so.

The standing of certain plaintiffs was likewise questionable in *Bowsher v. Synar*.<sup>41</sup> In that case, the Supreme Court invoked the one-plaintiff rule to bypass the question whether members of Congress had standing to challenge the constitutionality of the Balanced Budget and Emergency Deficit Control Act. The Court did so on the ground that another plaintiff, a government worker who lost out on a raise because of the Act, did have standing.<sup>42</sup> Given that the legislators' interest was more institutional than personal, it was highly doubtful that they had standing.<sup>43</sup> One could provide many more examples of cases in which

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36. *Id.* at 518.

37. *Id.* at 522.

38. *Id.* at 526.

39. *Id.* at 534.

40. *Id.* at 520.

41. *Bowsher v. Synar*, 478 U.S. 714 (1986).

42. *Id.* at 721.

43. Probably they did not have standing, at least not according to the approach the Court used when it did directly address legislator standing in a later case. *See Raines v. Byrd*, 521 U.S.

the standing of some plaintiffs was questionable at best.<sup>44</sup>

Courts do not treat the one-plaintiff rule as mandatory. That is, I have not encountered any case outright forbidding an inquiry into other plaintiffs' standing upon finding one proper plaintiff. There are some decisions that mention the one-plaintiff rule, expressly describe it as a discretionary option, and then proceed to analyze standing for every plaintiff and dismiss plaintiffs who lack standing.<sup>45</sup> Yet, if a court does not have to consider the standing of other plaintiffs but does so anyway, then its discussion of those extra plaintiffs' standing is not strictly necessary and, in that sense, is arguably mere dictum. In a few cases, courts have indeed taken that position, deeming a previous court's holding on the standing of an additional plaintiff to be nonbinding because it was unnecessary.<sup>46</sup>

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811, 829–30 (1997) (holding that members of Congress lacked standing to challenge the constitutionality of the Line Item Veto Act). *See generally* Nat Stern, *The Indefinite Deflection of Congressional Standing*, 43 PEPP. L. REV. 1 (2015) (noting that the Court has repeatedly declined opportunities to recognize legislator standing without definitively foreclosing it).

44. *See, e.g., supra* note 12 and accompanying text (discussing standing in *King v. Burwell*).

45. *E.g., Thiebaut v. Colo. Springs Utils.*, 455 F. App'x 795, 802 (10th Cir. 2011) (“[N]othing in the cases addressing this [one-plaintiff] principle suggests that a court *must* permit a plaintiff that *lacks* standing to remain in a case whenever it determines that a co-plaintiff has standing. Instead, courts retain discretion to analyze the standing of all plaintiffs in a case and to dismiss those plaintiffs that lack standing.”); *We Are Am./Somos Am., Coal. of Ariz. v. Maricopa Cty. Bd. of Supervisors*, 809 F. Supp. 2d 1084, 1091 (D. Ariz. 2011) (“[The one-plaintiff] rule does not strictly prohibit a district court, in a multiple plaintiff case such as this, from considering the standing of the other plaintiffs even if it finds that one plaintiff has standing.”); *see also Florida ex rel. McCollum v. U.S. Dep’t of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1148 (N.D. Fla. 2010) (invoking one-plaintiff rule and finding that some plaintiffs have standing but then “for the sake of completeness” addressing standing of remaining plaintiff and concluding that it also had standing), *aff’d in part, rev’d in part*, 648 F.3d 1235, 1243 (11th Cir. 2011), *aff’d in part, rev’d in part sub nom. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

46. In *Director, Office of Workers’ Compensation Programs v. Perini North River Associates*, 459 U.S. 297 (1983), there was a question regarding the standing of the Director of the Office of Workers’ Compensation Programs to seek review of an adverse employee-benefits decision. *Id.* at 302. The Court treated the question of the Director’s standing to appeal as open and further held that it need not resolve the question because the injured employee was also a party to the proceedings. *Id.* at 302–05. The Court acknowledged a few previous instances in which it had granted petitions filed by the Director, but the Court did not regard those cases as settling the matter of standing. Regarding one of those prior cases, the Court stated that “[i]t was not necessary to consider the issue of the Director’s standing in [the prior case] because a justiciable controversy was before the Court by virtue of the petition of the employer and insurer.” *Perini N. River Assocs.*, 459 U.S. at 303 n.11. In other words, the Court treated the prior case as if it had silently applied the one-plaintiff rule even though that case did not discuss standing at all.

Another example of treating a standing ruling as unnecessary dictum comes from the unusual case of *Cetacean Community v. Bush*, 386 F.3d 1169 (9th Cir. 2004). A prior Ninth Circuit panel entertaining an environmental case had held that environmentalists *and a bird* had standing

Although the lower courts have largely embraced the one-plaintiff rule, there are a few lower-court cases that depart from it. As one decision from the Sixth Circuit put it, “Our determination of standing is both plaintiff- and provision-specific. That one plaintiff has standing to assert a particular claim does not mean that all of them do.”<sup>47</sup> In that particular case, several plaintiffs challenged two different provisions of a state law, and the court separately analyzed whether each plaintiff had standing to challenge each provision, finding that only two of the plaintiffs had standing and that they had it only for one of the challenged provisions.<sup>48</sup> Other Sixth Circuit cases, however, follow the one-plaintiff rule without apparent realization of any conflict.<sup>49</sup> The confusion extends to the Sixth Circuit district courts: some of them cite the one-plaintiff rule, but one district court within the circuit, in a rather stunning decision, sanctioned an attorney partly because of his repeated contentions that only one of his plaintiffs needed standing.<sup>50</sup> Still, such examples aside, most courts treat the one-plaintiff rule as a given—so much so that one decision by the D.C. Circuit reduced an award of attorneys’ fees because the attorneys gathered standing affidavits from multiple plaintiffs when, according to the court, only one plaintiff’s standing had to be shown.<sup>51</sup> Part of the value of this Article is to make the one-plaintiff rule more salient to courts and litigants, which should prevent such inconsistencies.

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to sue. The subsequent panel treated the standing ruling as to the bird as unnecessary dictum in light of the one-plaintiff rule. *Id.* at 1173–74. Although courts these days often give binding effect to statements in prior cases without regard to traditional distinctions between holding and dictum, in this case there was a strong reason for the later panel to try to avoid following the earlier ruling.

47. *Fednav, Ltd. v. Chester*, 547 F.3d 607, 614 (6th Cir. 2008); *see also Pagan v. Calderon*, 448 F.3d 16, 26 (1st Cir. 2006) (“The standing inquiry is both plaintiff-specific and claim-specific. Thus, a reviewing court must determine whether each particular plaintiff is entitled to have a federal court adjudicate each particular claim that he asserts.”). *Pagan* was a damages case, which may explain why it did not use the one-plaintiff rule, though the decision did not indicate that the nature of the relief mattered. Both of these decisions cited language in the Supreme Court’s decision in *Allen v. Wright*, 468 U.S. 737 (1984), as rejecting the one-plaintiff rule, but I do not think *Allen* can be so read. *See infra* note 239.

48. *Fednav*, 547 F.3d at 614–15, 618.

49. *E.g.*, *Parsons v. U.S. Dep’t of Justice*, 801 F.3d 701, 710 (6th Cir. 2015); *Sch. Dist. v. Dep’t of Educ.*, 584 F.3d 253, 261 (6th Cir. 2009) (en banc) (plurality opinion of Cole, J.).

50. *Liberty Legal Found. v. Democratic Nat’l Comm.*, No. 12-2143-STA, 2012 WL 6026496, at \*2–3 (W.D. Tenn. Dec. 4, 2012), *aff’d*, 575 F. App’x 662 (6th Cir. 2014). The lawsuit contended that President Barack Obama was ineligible to serve as president, so there were other frivolous arguments too. For a district court in the Sixth Circuit applying the one-plaintiff rule, *see Poe v. Snyder*, 834 F. Supp. 2d 721, 732 (W.D. Mich. 2011).

51. *New Jersey v. EPA*, 703 F.3d 110, 115–16 (D.C. Cir. 2012).

More common than express statements that all plaintiffs must have standing are cases in which courts separately analyze the standing of all plaintiffs in a case without mentioning the one-plaintiff rule one way or the other.<sup>52</sup> Perhaps this is because the judges know the rule is discretionary and have chosen to analyze the standing of each plaintiff, albeit without explaining their reasoning. More likely the judges just did not think about what they were doing, perhaps because the parties failed to address the one-plaintiff rule in their briefs. Again, part of the goal is to bring the one-plaintiff rule, which often hides in plain sight, out into the light where it can be seen and scrutinized.

The discussion so far has concerned Article III standing, but versions of the one-plaintiff rule apply in other contexts too. For example, courts have applied the same rule with regard to multiple-plaintiff cases involving other justiciability doctrines. With regard to mootness, courts have said that they need not decide whether the claims of some plaintiffs have become moot as long as one plaintiff retains a live claim.<sup>53</sup> So too with ripeness<sup>54</sup> and prudential standing.<sup>55</sup>

### *B. Some Elaborations and Exceptions*

A few more details are necessary to complete the picture of the one-plaintiff rule in operation. Courts apply the one-plaintiff rule in a variety of contexts, without regard to the particular procedural mechanism by which a case came to have multiple plaintiffs. Yet courts have recognized some restrictions on the rule's use, in particular by limiting it to cases in which all of the plaintiffs pursue similar claims and relief.

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52. See *supra* note 19 (citing examples from the Supreme Court).

53. E.g., *Cutter v. Wilkinson*, 544 U.S. 709, 712 n.1 (2005) (stating that “we do not reach the question whether the claims of [plaintiffs] Cutter and Gerhardt continue to present an actual controversy” because other plaintiffs’ claims were not moot); see also 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.1, at 733 (3d ed. 2008) (“[A]s with standing, where it suffices to find one plaintiff with standing, a live action remains despite mooting as to some parties so long as there is a non-moot dispute between at least one plaintiff and one defendant.”).

54. E.g., *Allandale Neighborhood Ass’n v. Austin Transp. Study Policy Advisory Comm.*, 840 F.2d 258, 263 (5th Cir. 1988) (declining to reach constitutional ripeness issues of other plaintiffs where at least two plaintiffs’ claims were constitutionally ripe).

55. E.g., *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996). In *Secretary of the Interior v. California*, 464 U.S. 312 (1984), it appears that the Court bypassed a question of prudential “zone of interests” standing as opposed to Article III standing, but the opinion is not clear on this point. *Id.* at 319 n.3. For a discussion of whether courts may permissibly bypass prudential standing, see *infra* Part III.E.5.

1. *Application to Various Procedural Contexts.* There are a few different procedural routes through which a case may come to have multiple plaintiffs or, more generally, multiple parties invoking federal jurisdiction. For the most part, the courts have not distinguished between these different contexts when applying the one-plaintiff rule.

At the district court level, several joinder rules can generate multiple plaintiffs. The basic joinder rule, and the rule that provides the most occasions for use of the one-plaintiff rule, is Rule 20, which permits plaintiffs asserting related claims to join together in one case.<sup>56</sup> Some decisions invoking the one-plaintiff rule arise from separate cases that were consolidated under Rule 42.<sup>57</sup> One might suppose that courts would be reluctant to use the one-plaintiff rule when handling a consolidated case that began as two separate cases, one of which lacked a plaintiff with standing, but in fact the courts seem perfectly willing to employ the one-plaintiff rule in such situations.<sup>58</sup> The rule is also used in the context of intervention under Rule 24, where courts have held that an intervenor-plaintiff does not need standing as long as another party aligned with the intervenor has it.<sup>59</sup>

In another variation on the theme, a similar rule has been applied in the context of standing to appeal an adverse judgment, although here the authorities are fewer. In *Horne v. Flores*, parents and students prevailed in a lawsuit charging the state of Arizona with breaching its duties to provide proper support to students learning English.<sup>60</sup> Years later, the defendant superintendent of education, along with state

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56. FED. R. CIV. P. 20(a)(1).

57. FED. R. CIV. P. 42(a) (permitting the district court to consolidate cases or take other measures to effectively manage cases sharing common questions of law or fact).

58. *E.g.*, *Bowsher v. Synar*, 478 U.S. 714, 719–21 (1986); *Planned Parenthood Ass’n of Atlanta Area, Inc. v. Miller*, 934 F.2d 1462, 1465–67 nn.2–3 (11th Cir. 1991); *see also* Steinman, *supra* note 15, at 728 n.31 (citing examples of consolidated cases in which courts employed the one-plaintiff rule).

59. FED. R. CIV. P. 24. The Supreme Court’s most recent encounter with the one-plaintiff rule involved an intervenor-plaintiff, but the Court did not find the intervention context to hold any particular significance. *See* *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017); *infra* Part I.B.2 (discussing the case). Before *Town of Chester*, the majority of the courts of appeals already applied the one-plaintiff rule in intervention contexts, though some had not. *See* 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531, at 51 n.65 (3d ed. 2008) (citing majority and minority positions); *see also* David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 726–27 (1968) (arguing that intervenors should not have to satisfy the justiciability tests applied to original plaintiffs).

60. *Horne v. Flores*, 557 U.S. 433 (2009).



legislators who had recently intervened in the case, moved for relief from the district court's continuing injunction on the basis of changed circumstances. The district court denied their motion for relief from the judgment, and the court of appeals affirmed.<sup>61</sup> The superintendent and the legislators then petitioned for certiorari. The Supreme Court began by addressing the petitioners' standing to seek review and ruled that the superintendent—a defendant against whom the judgment ran—had standing.<sup>62</sup> The Court then stated that “[b]ecause the superintendent clearly has standing to challenge the lower courts' decisions, we need not consider whether the Legislators also have standing to do so.”<sup>63</sup> The Court's decision to bypass consideration of the legislators' standing is particularly noteworthy because the legislators and the superintendent had filed separate petitions for certiorari by separate counsel, though the Court consolidated the cases.<sup>64</sup> The Court ultimately ruled in the petitioners' favor on the merits and ordered the lower court to conduct a new inquiry into whether to grant relief from the judgment.<sup>65</sup>

In contrast to the easy acceptance the one-plaintiff rule has won in most contexts, it has been met with some resistance in the context of class action suits that seek damages. It is not surprising that the one-plaintiff rule engenders more opposition when plaintiffs seek huge damages from a private party than when they seek declaratory or injunctive relief from a government entity that ordinarily tries to treat similarly situated persons equally. The defendant facing a plausibly meritorious claim for damages has a strong incentive to raise whatever arguments might prevent certification or at least narrow the membership of the class.

The question that has generated controversy in the class-action

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61. *Id.* at 443–44.

62. *Id.* at 445–46.

63. *Id.* at 446; *see also* *Dir., Office of Workers' Comp. Program v. Perini N. River Assocs.*, 459 U.S. 297, 302–05 (1983) (holding that it was unnecessary to decide whether a government official had Article III standing to seek appellate review where an injured individual was also a party before the Court); *cf.* *Diamond v. Charles*, 476 U.S. 54, 64 (1986) (stating that a party found to lack standing to appeal could “ride ‘piggyback’” on another party's standing, if that other party had appealed).

64. *See* *Horne v. Flores*, 555 U.S. 1092 (2009) (mem.) (granting certiorari and consolidating cases).

65. *Horne*, 557 U.S. at 472. The district court ultimately vacated its previous injunction against the state, and the court of appeals affirmed. *Flores v. Huppenthal*, 789 F.3d 994, 1101 (9th Cir. 2015).

context is generally phrased as whether all the members of a class must have Article III standing.<sup>66</sup> Some courts, probably the majority, appear to hold that the one-plaintiff rule applies in class actions, so that only the representative party, but not all the class members, need have Article III standing.<sup>67</sup> Other courts appear to hold the opposite, stating that all plaintiffs, including all the members of the class, must have Article III standing.<sup>68</sup> As explained below, the class action context differs in meaningful ways from other situations in which the one-plaintiff rule arises, and many of the cases that purport to concern the standing of class members do not truly involve Article III standing.<sup>69</sup>

2. *Limitations Based on the Remedies at Stake.* Courts sometimes limit the use of the one-plaintiff rule according to the type of relief requested in the case. The restrictions have been expressed in two different, though partly overlapping, ways.

First, some courts and commentators have distinguished between injunctive and declaratory relief on the one hand and monetary relief on the other, restricting the one-plaintiff rule to the former.<sup>70</sup>

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66. *E.g.*, Petition for Writ of Certiorari, at i, *Ticketmaster v. Stearns*, 132 S. Ct. 1970 (2012) (No. 11-983), 2012 WL 441276; Theane Evangelis & Bradley J. Hamburger, *Article III Standing and Absent Class Members*, 64 EMORY L.J. 383, 385, 387, 392 (2014).

67. *E.g.*, *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 362 (3d Cir. 2015); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676 (7th Cir. 2009); *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc). When there are multiple class representatives, the usual one-plaintiff rule appears to operate among them, so that only one needs standing. *E.g.*, *Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1212 (10th Cir. 2014); see 1 WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 2:8 (5th ed. 2011).

68. *E.g.*, *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); see also *In re Deepwater Horizon*, 732 F.3d 326, 340–44 (5th Cir. 2013) (opinion of Clement, J.) (adopting this approach in a portion of the opinion that was not joined by the other members of the panel). I refer to what the courts “appear” to hold because it is unclear what these courts really mean and how much difference there is between the supposedly conflicting positions. See 1 RUBENSTEIN, *supra* note 67, § 2:3 (summarizing the cases and reconciling some of the apparently conflicting statements).

69. See *infra* Part III.E.4.

70. *E.g.*, *Nat’l Ass’n of Optometrists & Opticians Lenscrafters, Inc. v. Brown*, 567 F.3d 521, 523 (9th Cir. 2009) (“As a general rule, in an injunctive case this court need not address standing of each plaintiff if it concludes that one plaintiff has standing.”); *Sch. Dist. v. Missouri*, 460 F. Supp. 421, 437 (W.D. Mo. 1978) (“In an action for monetary damages, each and every plaintiff must have standing to reap the benefits of judgment against the defendant. In an equity proceeding seeking declaratory and injunctive relief, such as the instant litigation, it is customary for courts to cease their inquiry once a proper plaintiff has been identified which satisfies the ‘case or controversy’ requirements.”); 15 JAMES WM. MOORE & MARTIN H. REDISH, *MOORE’S FEDERAL PRACTICE* § 101.23 (Daniel R. Coquillette et al. eds., 3d ed. 2017) (“Only one plaintiff must have standing to assert a claim. Therefore, once a court determines the existence of one

Moreover, even when courts do not expressly state such a remedy-based limitation, the cases in which the one-plaintiff rule is invoked are usually cases involving injunctive or declaratory relief, such as cases that seek to enjoin an allegedly illegal government policy or action.<sup>71</sup> Although this Article argues that the one-plaintiff rule is incorrect regardless of the remedy sought, it is certainly understandable that courts would draw this remedy-based distinction. Any error in granting generalized nonmonetary relief is harder to see than the error in putting money into the pocket of a plaintiff whose standing was only assumed.

Still, courts have not always drawn this money-versus-injunction distinction. Courts have sometimes required individualized standing inquiries in injunctive cases that would require the defendant to take different actions for each plaintiff.<sup>72</sup> And courts occasionally apply the one-plaintiff rule even in cases involving claims for damages.<sup>73</sup> Of particular note here are damages class actions, where, as discussed above, debates over the standing of class members sometimes implicate the one-plaintiff rule.<sup>74</sup>

A second, and slightly more subtle, way of expressing a remedy-based limitation on the one-plaintiff rule is to say that the rule applies when all plaintiffs seek the same relief but not when they seek different relief. That is how the Supreme Court described the rule in its recent

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plaintiff with standing, at least when generalized equitable relief is sought, it need not consider whether other plaintiffs also have standing to assert that claim. Of course, in order to qualify for the award of damages each plaintiff must establish injury.”); *see also* *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 109–15 (1979) (treating two groups of plaintiffs separately for standing purposes in a case that potentially involved damages, without mentioning the one-plaintiff rule).

71. *E.g.*, *Clinton v. City of New York*, 524 U.S. 417, 431 n.19 (1998) (applying the one-plaintiff rule in suit seeking declaratory relief holding Line Item Veto Act unconstitutional).

72. *E.g.*, *Wikimedia Found. v. Nat’l Sec. Agency*, 857 F.3d 193, 216–17 (4th Cir. 2017) (conducting separate standing inquiries where plaintiffs sought to have agency purge records of their particular communications). *But see id.* at 218 n.1 (Davis, J., concurring in part and dissenting in part) (criticizing the majority for engaging in an unnecessary plaintiff-by-plaintiff standing inquiry).

73. *See, e.g.*, *Hardaway v. D.C. Hous. Auth.*, 843 F.3d 973, 979 (D.C. Cir. 2016) (reinstating a case seeking damages and injunctive relief where one plaintiff had standing); *Laroe Estates, Inc. v. Town of Chester*, 828 F.3d 60, 65–66 (2d Cir. 2016) (applying one-plaintiff rule to an intervenor in a case seeking damages), *vacated*, 137 S. Ct. 1645 (2017) (vacating and remanding for the court of appeals to determine whether the additional plaintiff sought different damages than the original plaintiff); *see also infra* notes 130–34 (describing cases awarding attorneys’ fees and costs to parties who have not demonstrated standing).

74. *See infra* Part I.B.1.

decision in *Town of Chester v. Laroe Estates*,<sup>75</sup> which ruled that an additional plaintiff whose standing is uncertain “must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing.”<sup>76</sup> The Court did not attempt to explain what exactly that means, though presumably the Court’s “same relief” test would be satisfied at least in cases seeking “generalized” relief, such as an injunction that bars enforcement of an unconstitutional statute. But *Town of Chester* itself was a damages case, and it is hard to know how the same-relief test applies in that context. Is an award of damages the “same relief” when a second plaintiff seeks to share in the judgment without changing the total amount sought from the defendant? Or is it the “same relief” only when the additional plaintiff seeks no money judgment in his or her own name? That was the awkward position that the additional plaintiff in *Town of Chester* eventually conceded itself into.<sup>77</sup> Questions about the application of the test remain unanswered, because the Court did not apply its own test but instead remanded for the court of appeals to figure out what exactly the additional plaintiff still wanted.<sup>78</sup>

It is not yet time to present the argument against the one-plaintiff rule, but the Court’s recent embrace of this remedy-based test warrants a brief preview. As Part III will more fully explain, the one-plaintiff rule is incorrect *whatever* relief is at issue and whether or not different plaintiffs seek the same or different relief. *Town of Chester*’s central error is to forget that judgments are person-specific. That means, contrary to *Town of Chester*, that relief to different people is always different relief.<sup>79</sup>

3. *Limitation to Common Claims.* Courts sometimes qualify their use of the one-plaintiff rule by stating that the rule applies only when multiple plaintiffs raise the same issues, advance the same claim, or challenge the same law.<sup>80</sup> And, in practice, courts tend to limit its use

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75. *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017).

76. *Id.* at 1651. The additional plaintiff in this case was a Rule 24 intervenor-plaintiff rather than a Rule 20 co-plaintiff, but the Court viewed that as immaterial. *Id.*

77. *Id.* at 1652 n.4 (noting the intervenor’s assertion that it sought only to “maximize [the original plaintiff’s] recovery”).

78. *Id.* at 1651–52.

79. *See infra* Part III.A.

80. *E.g.*, *Gen. Bldg. Contractors Ass’n, Inc. v. Pennsylvania*, 458 U.S. 375, 402 (1982) (“Petitioners have not challenged the standing of the other plaintiffs and, therefore, even if Pennsylvania lacks standing, the District Court possessed Art. III jurisdiction to entertain those

to such scenarios, at least when they are being careful. For example, imagine a case that involves challenges to two related laws or policies—Provision 1 and Provision 2—with three plaintiffs—A, B, and C. Plaintiff A challenges only Provision 1, and the other two plaintiffs challenge only Provision 2. In such a circumstance, the court would probably feel compelled to determine whether Plaintiff A has standing to challenge Provision 1 and whether at least one of the other plaintiffs has standing to challenge Provision 2. If Plaintiff B is found to have standing to challenge Provision 2, then the court would feel free to dispense with considering the standing of Plaintiff C to challenge that same provision. That is, the courts generally require one good plaintiff per issue or claim.

The Supreme Court conducted such a fine-grained standing inquiry in *Lewis v. Casey*,<sup>81</sup> which involved multiple plaintiffs presenting different issues. *Lewis* concerned the propriety of an injunction ordering Arizona to improve law libraries throughout its prison system and to protect inmates' access to the courts, especially for inmates who were illiterate, did not speak English, or were held in lockdown.<sup>82</sup> The plaintiffs were a group of twenty-two prisoners who sued as representatives of a class composed of all Arizona prisoners.<sup>83</sup> But only two prisoners, both of whom were illiterate or nearly so, had been found by the district court to have suffered adverse consequences—such as dismissal of a case—due to inadequate legal resources.<sup>84</sup>

There was broad agreement on the Court that the district court's injunction was too intrusive and failed to give adequate consideration to the state's legitimate penological interests.<sup>85</sup> The Court split, however, over the degree to which the district court's errors should be

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common issues presented by all plaintiffs.”); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996) (“For each claim, if constitutional and prudential standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim.”); *see also* *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 44–45, 67–70 (1974) (employing one-plaintiff rule in a section of the opinion where the same issues were presented by the additional plaintiff but not in a later section of the opinion where the plaintiffs presented different issues).

81. *Lewis v. Casey*, 518 U.S. 343 (1996).

82. *Id.* at 346–47.

83. *Id.* at 346.

84. *Id.* at 358–59.

85. *See id.* at 409 (Stevens, J., dissenting) (agreeing with the majority that the district court's remedy was “broader than necessary”).

described as transgressions of Article III as opposed (merely) to an abuse of its equitable discretion in fashioning relief.<sup>86</sup> Both Justice Souter’s concurrence and Justice Stevens’s dissent applied some version of the one-plaintiff rule, reasoning that the Court’s jurisdiction over the case was secure because at least the two illiterate plaintiffs had a cognizable injury under even the strictest understanding of what counts as a deprivation of access to the courts.<sup>87</sup> The concurrence and the dissent thought the case could then be resolved on nonstanding grounds, such as improper definition of the class or the excessiveness of the remedial order. The majority, however, thought that standing had more work to do. In particular, the fact that an illiterate named plaintiff had suffered injury did not suffice to allow him to obtain relief for prisoners who suffered different types of deprivations, such as prisoners who did not speak English, those held in lockdown, or those in the general prison population.<sup>88</sup> In response to the dissent’s argument that Article III standing requirements had been satisfied, the Court responded that “standing is not dispensed in gross.”<sup>89</sup>

The Court’s exacting scrutiny of the different plaintiffs’ circumstances in *Lewis* was probably triggered by the fact that different prisoners were differently situated with respect to the deprivation of legal resources, such that the necessity of a granular approach to standing was especially apparent. One lesson we might draw from such cases is that the courts generally will not apply the one-plaintiff rule when doing so would obviously expand the scope of the case or of the proper relief. But courts generally do apply it when, as the courts see it, the case would proceed in the same way regardless of the plaintiffs involved. The courts’ mistake in drawing this distinction, as Parts II and III will explain, is that allowing plaintiffs to remain in a case without

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86. *See id.* at 394 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (suggesting that the Court would have been unanimous but for the majority’s decision to cast much of its ruling in terms of standing).

87. *Id.* (“[T]here is no apparent question that the standing of at least one of the class-action plaintiffs suffices for our jurisdiction . . . .” (citation omitted)); *id.* at 407–08 (Stevens, J., dissenting) (“[E]ven the majority finds on the record that at least two of the plaintiffs had standing in this case, which should be sufficient to satisfy any constitutional concerns.” (footnote omitted) (citation omitted) (citing *id.* at 356 (majority opinion))).

88. *Id.* at 357–58 (majority opinion). The Court further held that, given the limited evidence of violations, it was improper to provide system-wide relief addressing the obstacles faced by illiterate prisoners, though this last ruling was not based on Article III standing. *Id.* at 359–60, 360 n.7.

89. *Id.* at 358 n.6.

standing is *always* wrong in principle and problematic in practice, even when all plaintiffs present similar claims on the merits.

C. *The Rule's Origins*

It is difficult to identify the source of the one-plaintiff rule with confidence. There are some judgment calls involved in deciding whether a particular case is invoking the rule. Nonetheless, at the Supreme Court level, the rule dates back at least to a handful of cases from the 1960s and 1970s. Most of the early cases using the rule are well known today, though for their rulings on the merits rather than for their rulings on standing. The early development of the rule does not show that there was any well-articulated justification behind it or criteria for when it should be used.

The first Supreme Court case to use the rule may have been *Baggett v. Bullitt*,<sup>90</sup> in which plaintiffs challenged state laws that required state employees to take loyalty oaths.<sup>91</sup> The district court upheld the requirement, but the Supreme Court reversed, ruling that the oaths—which required employees to swear that they were not “subversive persons”—were unconstitutionally vague.<sup>92</sup> The primary plaintiffs in the case were university employees, but there were also a few students, whom the district court had dismissed for lack of standing.<sup>93</sup> Of them, the Supreme Court wrote:

Since the ground we find dispositive immediately affects the professors and other state employees required to take the oath, and the interests of the students at the University in academic freedom are fully protected by a judgment in favor of the teaching personnel, we have no occasion to pass on the standing of the students to bring this suit.<sup>94</sup>

It is not clear where this left the students' claims as a formal matter. The Court believed the students' interests were protected as a practical matter by the judgment for the professors, so perhaps that means the Court saw no harm in leaving undisturbed the district court's dismissal of the students. On this reading, the Court affirmed the district court's apparently harmless dismissal. Yet the bottom line of the Court's

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90. *Baggett v. Bullitt*, 377 U.S. 360 (1964).

91. *Id.* at 366.

92. *Id.* at 361–66.

93. Transcript of Record at 44, *Baggett*, 377 U.S. 360 (No. 220).

94. *Baggett*, 377 U.S. at 366 n.5.

opinion says simply “reversed,” not “reversed in part and affirmed in part” or “dismissed in part.”<sup>95</sup> So the better reading is probably that the Court believed it could simply leave the students’ standing in a state of limbo. As far as the briefs and oral argument reveal, the idea that the Court could bypass a ruling on the students’ standing was not suggested by the parties. The appellants’ brief had a short section arguing that the students did have standing, and it did not suggest that their standing was irrelevant or could be ignored.<sup>96</sup> Although *Baggett* has been cited by a few later cases for the one-plaintiff rule,<sup>97</sup> the opinion itself gives no sense that it was attempting to establish any general rule of procedure.

Several of the other early cases applying the one-plaintiff rule were abortion cases, including *Doe v. Bolton*,<sup>98</sup> the companion case to *Roe v. Wade*.<sup>99</sup> *Doe* involved a challenge to the Georgia abortion statute brought by a pregnant woman, nine physicians, seven nurses, five clergymen, two social workers, and two nonprofits that advocated for abortion liberalization.<sup>100</sup> The plaintiffs sought to represent classes of persons similarly situated.<sup>101</sup> The district court had dismissed the claims of all plaintiffs but *Doe*, the pregnant woman, for lack of an immediate controversy.<sup>102</sup> The Supreme Court began by holding that *Doe* had standing.<sup>103</sup> “Inasmuch as *Doe* and her class are recognized [as proper plaintiffs],” the Court then observed, “the question whether the other appellants—physicians, nurses, clergymen, social workers, and corporations—present a justiciable controversy and have standing is perhaps a matter of no great consequence.”<sup>104</sup> The Court nonetheless went on to hold, contrary to the district court, that the physicians too

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95. *Id.* at 380.

96. Brief of Appellants at 215–17, *Baggett*, 377 U.S. 360 (No. 220). The oral argument does not reveal any discussion of standing. Oral Argument, *Baggett*, 377 U.S. 360 (No. 220), <https://www.oyez.org/cases/1963/220> [<https://perma.cc/WCG2-GNHF>].

97. *E.g.*, *Allandale Neighborhood Ass’n v. Austin Transp. Study Policy Advisory Comm.*, 840 F.2d 258, 263 n.15 (5th Cir. 1988).

98. *Doe v. Bolton*, 410 U.S. 179 (1973).

99. *Roe v. Wade*, 410 U.S. 113 (1973).

100. *Doe*, 410 U.S. at 184.

101. *Id.* at 185–86.

102. *Doe v. Bolton*, 319 F. Supp. 1048, 1052–54 (N.D. Ga. 1970), *aff’d as modified*, 410 U.S. 179 (1973). The district court’s justiciability ruling relied primarily on *Poe v. Ullman*, 367 U.S. 497 (1961), which had refused to adjudicate a challenge to what the Court described as a moribund statute. *Doe*, 319 F. Supp. at 1053.

103. *Doe*, 410 U.S. at 187.

104. *Id.* at 188.



had standing. They were directly targeted by the abortion law, and the Court would not require them to violate the law and face prosecution in order to assert their rights.<sup>105</sup> The Court then deemed it unnecessary to rule on the standing of any more parties:

The parallel claims of the nurse, clergy, social worker, and corporation-appellants are another step removed and as to them, the Georgia statutes operate less directly. . . . We conclude that we need not pass upon the status of these additional appellants in this suit, for the issues are sufficiently and adequately presented by Doe and the physician-appellants, and nothing is gained or lost by the presence or absence of the nurses, the clergymen, the social workers, and the corporations.<sup>106</sup>

The Court then turned to the merits. The district court had entered a declaratory judgment invalidating several aspects of the Georgia abortion statute but upholding other aspects.<sup>107</sup> The Supreme Court modified the district court's ruling by finding additional provisions unconstitutional.<sup>108</sup>

The passage quoted above cited *Roe v. Wade*, but *Roe* did not invoke the one-plaintiff rule despite the opportunity to do so. In *Roe*, the Supreme Court determined that Jane Roe, a single woman pregnant at the time the suit was commenced, had standing to challenge the constitutionality of the Texas abortion statute.<sup>109</sup> Also before the Court was a married couple, going by the pseudonyms John and Mary Doe, who, like Roe, sought declaratory and injunctive relief against the Texas statute.<sup>110</sup> The Court wrote that “[i]n view of our ruling as to Roe’s standing in her case, the issue of the Does’ standing in their case has little significance.”<sup>111</sup> The Court nonetheless went on to address their standing and to determine that they lacked standing,

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105. *Id.* In deciding to address the standing of the physicians even after Doe had been found to have standing, the Court presumably thought that something was to be gained by doing so. Some of the arguments on the merits related to the physicians’ interests in particular, such as their interest in practicing their profession freely and without fear of vague criminal prohibitions. *See id.* at 191–93.

106. *Id.* at 189.

107. *Id.* at 186–87.

108. *Id.* at 201–02.

109. *Roe v. Wade*, 410 U.S. 113, 124–25 (1973).

110. *Id.* at 127.

111. *Id.*

and the Court affirmed the district court's ruling to that effect.<sup>112</sup> This is the sort of situation in which the Court might have invoked the one-plaintiff rule and probably would do so today. The Court's decision not to use the one-plaintiff rule in *Roe* while using it in *Doe* does not seem to reflect any particular thinking—in fact, “decision” is probably too strong a word for it.<sup>113</sup> It probably goes without saying, but the Court's attention in *Doe* and *Roe* was not centrally focused on matters of standing.

Other early Supreme Court cases invoking the one-plaintiff rule include the campaign finance landmark *Buckley v. Valeo*<sup>114</sup> and the housing discrimination case *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>115</sup> Both decisions invoked the one-plaintiff rule in a single sentence without providing a citation to authority supporting it.<sup>116</sup> *Arlington Heights* has often been cited in later cases using the one-plaintiff rule and probably did more than any other early case to popularize the one-plaintiff rule.

Although doctrinal innovations are generally assumed to spread from the top of the system down, it appears that the one-plaintiff rule was independently discovered in the lower courts. There are lower court cases from the 1960s and early 1970s that invoke the rule without citing any Supreme Court authority (and, indeed, there would have been little to cite at that point).<sup>117</sup> Like the early Supreme Court cases, these cases do not reveal any sustained thought about why the one-plaintiff rule is permissible.

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112. *Id.* at 129.

113. The district court had consolidated the Does' case with Roe's case. *Id.* at 121. One might be tempted to believe that this explains why the Court felt it necessary to address the Does' standing separately after finding that Roe had standing, but that is almost certainly not the explanation. First, the Court's opinion in *Roe* did not say anything to suggest such reasoning. Second, it has become clear in the years since *Roe* that the distinction between one case filed by multiple plaintiffs (some of whom have doubtful standing) and consolidated cases (in which the plaintiff in one case has doubtful standing) does not make any difference to the Court when it comes to the one-plaintiff rule. See Steinman, *supra* note 15, at 728. For cases illustrating this point, see *supra* note 58.

114. *Buckley v. Valeo*, 424 U.S. 1 (1976).

115. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

116. *Id.* at 264 n.9; *Buckley*, 424 U.S. at 12.

117. *E.g.*, *Air Line Pilots Ass'n, Int'l v. Quesada*, 276 F.2d 892, 894 n.2 (2d Cir. 1960); *Ga. Socialist Workers Party v. Fortson*, 315 F. Supp. 1035, 1037 (N.D. Ga. 1970), *aff'd sub nom. Jenness v. Fortson*, 403 U.S. 431 (1971); *Norton v. Ensor*, 269 F. Supp. 533, 536 (D. Md. 1967); see also *Alameda Conservation Ass'n v. California*, 437 F.2d 1087, 1091–92 (9th Cir. 1971) (showing disagreement between majority and dissent over whether standing of all plaintiffs had to be addressed).

## II. WHY THE ONE-PLAINTIFF RULE MATTERS

Part III of this Article will demonstrate that the one-plaintiff rule is wrong. To motivate the normative argument, it is important to appreciate why it matters that courts get things right. It should go without saying that there is value in getting the law right just for the sake of getting things right. But in this instance there is more, as the one-plaintiff rule has bad consequences. Some of them are direct and concrete, such as improper awards of fees and costs and confusion over preclusive effect, which will be discussed in Section A. Other consequences, discussed in Section B, are more indirect, such as excessively broad injunctions and the stunted development of precedent.

### A. *The Consequences of Incorrectly Granting Party Status*

To appreciate the bad effects of the one-plaintiff rule, it is helpful to remember two distinct functions of judicial decisions in our legal system: dispute resolution and law declaration.<sup>118</sup> A court's judgment resolves a dispute between the parties and thereby imposes certain rights and duties on those particular people. In addition, courts can issue opinions that establish, clarify, or otherwise declare the law that governs like cases.<sup>119</sup> A party to a lawsuit is affected by the decision very differently than a nonparty. Everyone gets the decision's precedential value—subject to the limitations of the rendering court's reach and disputes over the meaning of the precedent—but only the parties get the judgment that definitively decides their rights and liabilities.<sup>120</sup>

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118. See generally RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 73–75 (7th ed. 2015) (describing these two aspects of judicial decisionmaking).

119. Decisions can also resolve disputes without establishing law. Many decisions are not accompanied by reasoned opinions at all, many judicial opinions are formally without precedential effect, and so on.

120. See *Stryker v. Crane*, 123 U.S. 527, 539–40 (1887) (distinguishing between the force of a judgment and the lesser force of a precedent). The rise of nonmutual preclusion diminishes the significance of party status, but it does not nullify the distinction between parties and nonparties, even in public-law cases brought against the government. First, nonmutual preclusion is not automatic, particularly when asserted by plaintiffs, but is instead subject to the equities of the circumstances. Second, even when otherwise appropriate, nonmutual preclusion does not apply against at least some government defendants. See *United States v. Mendoza*, 464 U.S. 154, 158–59 (1984) (holding that it does not apply against the federal government); *Petition for Writ of Certiorari at 10–18, Demaree v. Fulton Cty. Sch. Dist.*, No. 13-307, 2013 WL 4782249 (Sept. 5, 2013) (showing circuit split regarding application of nonmutual preclusion against state and local

The magnitude of the practical difference between being subject to a judgment and being subject merely to precedent—that is, the difference party status makes—varies depending on what kind of court renders the decision. The gulf between parties and nonparties is widest in the district courts, where most litigation occurs. District court decisions are not binding precedent at all, not even within the district.<sup>121</sup> Public and private actors within the district might choose to follow the district court’s decision because they prophesy that a similar rule might be applied in future litigation, but they are not required to do so. The Supreme Court, by contrast, sets nationwide precedent. Because officials generally treat a Supreme Court holding as conclusive for all disputes within the holding’s scope, everyone is affected in approximately the same way as the parties.<sup>122</sup> Indeed, the diminished stakes of party versus nonparty status at the Supreme Court level probably go a long way toward explaining how the misguided one-plaintiff principle got its start. Nonetheless, no matter which court is at issue, party status still matters. The one-plaintiff rule’s central fault is that it elides the difference between parties and nonparties, thus incorrectly assigning the benefits and burdens of judgments to persons who should neither enjoy the benefits nor suffer the burdens.

Concrete benefits and detriments accrue to parties alone. A winning plaintiff may enforce a judgment—perhaps, for example, by pursuing civil contempt against a recalcitrant defendant—but nonparties ordinarily may not.<sup>123</sup> A judgment generally has preclusive effect only against parties: a losing party is estopped from relitigating the claims and issues resolved by the prior judgment, while a similarly

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governments). Third, preclusion might be denied when a party seeks to estop the government from relitigating a question of law (as opposed to fact). See *RESTATEMENT (SECOND) OF JUDGMENTS* § 29 cmt. i, illus. 8 (1982).

121. See *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011).

122. Cf. Arthur S. Miller, *Constitutional Decisions as De Facto Class Actions: A Comment on the Implications of Cooper v. Aaron*, 58 U. DET. J. URBAN L. 573, 574 (1981) (observing that “Supreme Court decisions, in constitutional cases at least, are de facto class actions”).

123. JOHN F. DOBBYN, *INJUNCTIONS IN A NUTSHELL* 223 (1974); cf. 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, *FEDERAL PRACTICE AND PROCEDURE* § 3032, at 208–10 (3d ed. 2014) (discussing Rule 71, which allows certain nonparty beneficiaries to enforce judgments). In some instances, nonparties might intervene after judgment for purposes of enforcement, e.g., *Berger v. Heckler*, 771 F.2d 1556, 1565–66 (2d Cir. 1985), but such intervenors would need to have standing. See *Moore v. Tangipahoa Par. Sch. Bd.*, 625 F.2d 33, 34 (5th Cir. 1980) (clarifying that Rule 71 cannot be used by a nonparty “to enforce an order in an action in which [that person] has no standing to sue”).

situated nonparty is not so bound.<sup>124</sup> A losing party may appeal a judgment, but nonparties ordinarily may not.<sup>125</sup>

All of the foregoing propositions, which depend on the line between party and nonparty status, can be upended by the one-plaintiff rule. It licenses courts to give enforceable judgments to persons who lack standing and therefore should not be parties at all. Recall *Massachusetts v. EPA*, in which the Supreme Court found that Massachusetts had standing, employed the one-plaintiff rule to bypass consideration of other challengers' more tenuous claims to standing, and remanded the case to the court of appeals for proceedings on the merits.<sup>126</sup> On remand to the D.C. Circuit, all of the petitioners remained involved in the case on the same terms as Massachusetts without, so far as the record reveals, any inquiry into the standing of the other challengers. The D.C. Circuit remanded their petitions for review to the EPA for the agency to take regulatory action.<sup>127</sup> After the EPA had not taken action for a year, the various petitioners asked the D.C. Circuit for a writ of mandamus ordering the agency to act. The majority denied the request, but it does not appear that the non-Massachusetts petitioners seeking enforcement—parties whose standing remained uncertain—were treated any differently in the enforcement proceedings than the one party found to have standing.<sup>128</sup>

Further, the one-plaintiff rule sometimes leads courts to award monetary relief to parties whose standing was never established. With

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124. *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); RESTATEMENT (SECOND) OF JUDGMENTS § 34 (1982). Persons who are not parties to a case may be bound by the preclusive effects of the judgment in limited circumstances, such as where the nonparty was represented by a party or stands in a certain relationship, traditionally denominated “privity,” with a party. See *Taylor v. Sturgell*, 553 U.S. 880, 893–95 (2008).

125. See 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3902.1, at 102–32 (2d ed. 1992) (discussing the general rule and its exceptions); Joan Steinman, *Irregulars: The Appellate Rights of Persons Who Are Not Full-Fledged Parties*, 39 GA. L. REV. 411, 484–517 (2005) (same).

126. *Massachusetts v. EPA*, 549 U.S. 497, 521, 535 (2007); *supra* text accompanying notes 33–40.

127. *Massachusetts v. EPA*, 249 F. App'x 829, 830 (D.C. Cir. 2007) (remanding the petitions for review in Nos. 03-1361, 03-1362, 03-1363, and 03-1364). Case No. 03-1361 was filed by Massachusetts (the only party found to have standing) and about a dozen other states and territories. The other petitions were filed by California (No. 03-1362), various environmental and public-interest groups (No. 03-1363), and cities (No. 03-1364).

128. The panel majority did not write an opinion explaining its denial of mandamus relief, but it appears from Judge Tatel's separate opinion that the panel did not think that the EPA's delay was egregious enough. *Massachusetts v. EPA*, No. 03-1361, slip op. at 2–3 (D.C. Cir. June 26, 2008) (Tatel, J., concurring in part and dissenting in part).

some exceptions, courts usually do not apply the one-plaintiff rule when the plaintiffs seek damages.<sup>129</sup> However, financial rewards accrue to prevailing parties even when damages are not sought. A prevailing party can sometimes recover attorneys' fees, as in some federal civil rights cases and environmental cases.<sup>130</sup> And regardless of the nature of the suit, prevailing parties are ordinarily entitled to recover the costs of the proceedings (filing fees, copying costs, etc.) in the trial court and on appeal.<sup>131</sup> When these sorts of tangible benefits and detriments are at issue, courts often realize that an individualized standing analysis is necessary to avoid awarding fees or costs to a "prevailing" party who should not have been in the suit at all.<sup>132</sup> But, surprisingly, they do not always recognize the problem, even at the highest court in the land. In *Horne v. Flores*,<sup>133</sup> two groups of petitioners obtained Supreme Court review. The two sets of petitioners were represented by different attorneys. The Court bypassed the standing inquiry for one group based on the one-plaintiff rule, and the petitioners' position prevailed on the merits.<sup>134</sup> The Supreme Court's judgment awarded court costs separately to both sets of petitioners, despite the fact that one group had not been determined to have standing.<sup>135</sup> Perhaps the Court intended to treat the bypassed parties as winners, but I suspect the real explanation is simple inattention.

The one-plaintiff rule also sometimes leads to improper awards of attorneys' fees. This has happened even in cases in which the plaintiffs are separately represented,<sup>136</sup> but it happens with apparently greater

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129. See *supra* Part I.B.2.

130. *E.g.*, 33 U.S.C. § 1365(d) (2012) (citizen suits under Clean Water Act); 42 U.S.C. § 1988(b) (2012) (civil rights). When fee-eligible cases reach the Supreme Court, the fees are generally awarded by the lower court rather than being ordered by the Supreme Court itself. STEVEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARNETT & DAN HIMMELFARB, *SUPREME COURT PRACTICE* 854–55 (10th ed. 2013).

131. SUP. CT. R. 43; FED. R. CIV. P. 54; FED. R. APP. P. 39.

132. *E.g.*, *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 531 (7th Cir. 1988); *Women's Med. Ctr. of Providence, Inc. v. Roberts*, 512 F. Supp. 316, 319–20 (D.R.I. 1981).

133. *Horne v. Flores*, 557 U.S. 433 (2009).

134. *Id.* at 438, 446–47; see also *supra* notes 60–65 and accompanying text.

135. See *Horne v. Flores*, Nos. 08-289 & 08-294 (July 27, 2009) (issuing judgment).

136. In *Shaw v. Hunt*, 154 F.3d 161 (4th Cir. 1998), the Fourth Circuit awarded fees to plaintiff-intervenors who lacked standing but whose positions were allied with separately represented parties who did have standing. *Id.* at 163, 165–67. The court reasoned—incorrectly, according to the argument of this Article—that the plaintiff-intervenors did not require their own standing, and thus they could be “prevailing parties” because of their contributions to the case. *Id.* at 165–67.

frequency when the plaintiffs have the same attorney. That is, some courts seem to believe that standing can be ignored even at the fees stage as long as the party whose standing is bypassed shared an attorney with a co-party who did have standing.<sup>137</sup> Being represented by the same attorney is insufficient to support an award of fees either functionally or formally. As a functional matter, the need to represent several plaintiffs rather than one can be expected to increase expense, as the attorneys need to confer with more clients, prepare for additional depositions, and so on. As a formal matter, fee awards are not made in favor of attorneys but rather in favor of parties—parties who then, as a matter of contract, may or may not be obligated to pay some amount to their attorneys.<sup>138</sup> Because parties are the awardees, it is problematic for a party who lacks standing to be awarded relief.

Most of the discussion above concerns the problematic consequences of giving relief to plaintiffs who might actually lack standing. When a plaintiff whose standing is assumed instead goes on to *lose* on the merits, one is tempted to adopt a “no harm, no foul” approach. But that would be a mistake. Even when the plaintiffs lose on the merits, use of the one-plaintiff rule leads not just to an error of principle but also to practical problems.

The practical problems arise because not all losses are created equal. The consequences for a losing plaintiff differ depending on how the plaintiff loses. A failure of standing is a jurisdictional defect that prevents a court from adjudicating the merits of a case.<sup>139</sup> A dismissal for lack of standing therefore has very different preclusive effects than an adverse determination of the merits. In particular, a dismissal for lack of standing does not preclude later litigation of the merits of the same claim, provided the lack of standing can be overcome in the

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137. *E.g.*, *Guam Soc’y of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 701–02 (9th Cir. 1996). In *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011), the court of appeals affirmed an award of attorneys’ fees to two groups even though it bypassed the standing inquiry for one of the groups. *Id.* at 943–44, 951. Further, the court of appeals granted the plaintiffs’ motion for fees expended on the appeal, again despite the absence of a ruling on one plaintiff’s standing. *Order Granting Attorneys’ Fees, Comite de Jornaleros de Redondo Beach*, 657 F.3d 936 (Nos. 06-55750, 06-56869) (ECF No. 125) (granting motion for attorneys’ fees).

138. *Astrue v. Ratliff*, 560 U.S. 586, 591, 597–98 (2010) (construing Equal Access to Justice Act); *Venegas v. Mitchell*, 495 U.S. 82, 87–90 (1990) (construing 42 U.S.C. § 1988).

139. *See, e.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990); *Allen v. Wright*, 468 U.S. 737, 750–54 (1984).

second suit.<sup>140</sup> As one federal court of appeals explained:

Whether a dismissal is for want of jurisdiction, for failure to plead a claim, or for the failure to prove a genuinely disputed material fact is significant for more than technical reasons. A dismissal for want of jurisdiction bars access to federal courts and is *res judicata* only of the lack of a federal court's power to act. It is otherwise without prejudice to the plaintiff's claims, and the rejected suitor may reassert his claim in any competent court.<sup>141</sup>

Thus, for example, a claim that has been dismissed for lack of standing in federal court may sometimes be brought in state court, where the standing requirements may be more lenient.<sup>142</sup>

### B. *Indirect Effects of the One-Plaintiff Rule*

The one-plaintiff rule has other bad effects too. In particular, it can indirectly lead to overly broad injunctive relief and inhibit the development of precedent that would clarify standing doctrine.

The problem of overly broad injunctions typically arises in cases challenging widely applicable government policies. A recent example is *Texas v. United States*, the case brought by twenty-six states to block the Obama administration's "deferred action" immigration program.<sup>143</sup> The Fifth Circuit determined that one plaintiff state, Texas, had standing because state law provided that beneficiaries of deferred action would be able to obtain Texas driver's licenses and the license

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140. 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4436, at 149–179 (2d ed. 2002); *see, e.g.*, *Media Techs. Licensing, LLC v. Upper Deck Co.*, 334 F.3d 1366, 1369–70 (Fed. Cir. 2003); *Cont'l Cas. Co. v. Canadian Universal Ins. Co.*, 605 F.2d 1340, 1342–43 (5th Cir. 1979); *see also* FED. R. CIV. P. 41(b) (providing that dismissals for lack of jurisdiction do not operate as an adjudication on the merits); RESTATEMENT (SECOND) OF JUDGMENTS § 20 (1982) (stating that a dismissal for lack of jurisdiction does not preclude the plaintiff from asserting the same claim again). One might be inclined to say that it does not seem so unfair to preclude from further litigation the standingless plaintiff who is allowed by the one-plaintiff rule to proceed to the merits and lose; the plaintiff initiated the suit, after all. Notice, though, that the same logic could be used to impose claim preclusion against plaintiffs in single-plaintiff cases dismissed on standing grounds—but that is not the practice.

141. *Daigle v. Opelousas Health Care, Inc.*, 774 F.2d 1344, 1348 (5th Cir. 1985).

142. *See* *Watkins v. Resorts Int'l Hotel & Casino, Inc.*, 591 A.2d 592, 601–04 (N.J. 1991). In *Watkins*, it was not entirely clear that the prior federal judgment should have been characterized as based on lack of standing (or, at least, lack of Article III standing), but that is how the state court regarded the prior judgment. *See id.* at 603.

143. *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).



fee did not fully cover the administrative costs of issuing a license.<sup>144</sup> Citing the one-plaintiff rule, the court deemed that economic harm sufficient to proceed to the merits with regard to all plaintiffs.<sup>145</sup> The court then affirmed the district court's order preliminarily enjoining enforcement of the program everywhere and with regard to all persons,<sup>146</sup> despite the fact that fifteen states plus the District of Columbia had filed an amicus brief *welcoming* the administration's policy.<sup>147</sup>

Such an expansive injunction, especially at the preliminary stage, was improper. The proper scope of injunctive relief—and in particular whether an injunction may extend to nonplaintiffs—is admittedly a matter of some difficulty in the law of remedies.<sup>148</sup> But the better view, because it respects the limits on the power of a single court and the distinction between class and nonclass litigation, is that a court should, as a general matter, issue injunctions that redress or prevent the plaintiff's injury rather than broader injunctions that bind the defendant to behave similarly as to all other persons.<sup>149</sup> Thus, a proper injunction in the immigration case, and others like it, would have gone

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144. *Id.* at 150. In addition to finding that Texas had standing under the driver's license theory, the district court also suggested there was standing under an "abdication theory" that apparently applied to all the states. *Texas v. United States*, 86 F. Supp. 3d 591, 624, 636, 643–44 (S.D. Tex. 2015). The Fifth Circuit rested its standing decision on the licenses. *Texas*, 809 F.3d at 150.

145. *Texas*, 809 F.3d at 151. Indeed, the court mistakenly fell into stating that "the states"—that is, all of them—had standing. *Id.* at 162.

146. *Id.* at 188.

147. See Amicus Brief of the States of Washington et al. in Support of the United States at 13–14, *Texas*, 809 F.3d 134 (No. 15-40238), 2015 WL 1611823, at \*13–14 (Apr. 6, 2015).

148. See DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 276 (4th ed. 2010) (stating that "the cases are mixed, even within jurisdictions"); Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 *CARDOZO L. REV.* 2017, 2030–34 (2015) (describing the case law as unclear and citing competing approaches); Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 *HARV. J.L. & PUB. POL'Y* 48, 521–38 (2016) (raising concerns about wide use of "defendant-oriented injunctions" that require governmental defendants to apply a ruling to all persons); see also Bray, *supra* note 16 (manuscript at 20) (arguing that national injunctions are a recent innovation without support in traditional equity practice).

149. In this regard, I agree with the views expressed in Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 *HASTINGS CONST. L.Q.* 243, 249–50 (2016), and Marty Lederman, *Understanding Standing: The Court's Article III Questions in the Same-Sex Marriage Cases (VII)*, SCOTUSBLOG (Jan. 21, 2013, 9:01 PM), <http://www.scotusblog.com/2013/01/understanding-standing-the-courts-article-iii-questions-in-the-same-sex-marriage-cases-vii> [<https://perma.cc/3TPH-TKHT>]. Both of these pieces argue for the principle that injunctions should generally benefit only the plaintiffs in a case.

no further than necessary to protect the plaintiff state(s) that the court found to have standing. If Texas were the only plaintiff found to have standing, the preliminary injunction should have protected only Texas from the immigration policy.<sup>150</sup>

To be clear, the excessively broad scope of the injunction in the “deferred action” case did not flow exclusively from use of the one-plaintiff rule. After all, the district court issued and the Fifth Circuit affirmed an injunction that applied across the *whole* country, not just in the twenty-six plaintiff states, and that prevented *anyone* from benefiting from the policy, even persons who could not burden Texas or any other plaintiff state. Therefore, it is possible that the district court might have issued a universal injunction even if Texas had sued as a lone plaintiff and the court made no assumptions about other states. So the error may go beyond just embracing the one-plaintiff rule.

Still, if the courts were required to conduct a plaintiff-by-plaintiff inquiry, it is at least plausible that the injunction would have been narrower in this case and others like it. That is especially true if some of the plaintiff states would, upon inquiry, be dismissed for lack of standing.<sup>151</sup> But even if most or all of the plaintiff states would have been found to have standing, the need to undertake a more rigorous standing inquiry might have forced the court to think about how to protect the interests of the particular plaintiff states *and* of their sister states who disagreed with them, rather than thinking of the prevailing party as “the states” en bloc. The issuance of nationwide injunctions by district courts and the widespread use of the one-plaintiff rule reveal some similar assumptions or misconceptions about the nature of judicial power;<sup>152</sup> more granular thinking about standing could thus be

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150. Perhaps there would be administrative difficulties in temporarily having different policies in effect in different states, but it should have been up to the federal government to decide whether it valued the partial implementation of its policy enough to outweigh the administrative inconvenience of separate regimes. For its part, the federal government argued for limiting the injunction, so the government evidently thought it was possible to apply the policy in some states but not others, at least for a time. *See Texas*, 809 F.3d at 187.

151. As for the license-cost theory, which is the theory the Fifth Circuit adopted, it appears that some of the plaintiff states already offered driver’s licenses to undocumented immigrants without suffering any financial detriment. *See* Amicus Brief of the States of Washington et al. in Support of Petitioners at 5, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674), 2016 WL 922867, at \*5. There were, of course, other potential theories of standing, though all of them were questionable.

152. *See infra* Part IV.

expected to foster more restrained use of remedies generally.

In addition, the one-plaintiff rule has consequences for the development of precedent. In particular, pretermittting standing means that certain questions of standing, difficult ones most especially, are not resolved. For example, the doctrine of congressional standing could have been clarified earlier, sparing the lower courts more than a decade of missteps, had the Court been required to address it in *Bowsher v. Synar* rather than sidestepping it after finding one good nonlegislator plaintiff.<sup>153</sup> It may be that decisions on standing are sufficiently fact specific, or ideologically manipulable, that precedent is not as systemically valuable in this context as in others, but presumably the creation of precedent has at least some value.<sup>154</sup>

### III. WHY THE ONE-PLAINTIFF RULE IS WRONG—AND WHAT COURTS SHOULD DO INSTEAD

Courts often repeat the one-plaintiff rule but rarely offer any justification for it, and scholarly commentary on the issue is rare. To the extent that there is a prevailing view of the rule's propriety in the sparse literature on the topic, it endorses the rule.<sup>155</sup> That view is

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153. Compare *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (pretermittting a question of congressional standing), with *Raines v. Byrd*, 521 U.S. 811, 820–30 (1997) (holding that members of Congress lacked standing to challenge Line Item Veto Act), and *id.* at 816–17, 820 n.4 (rejecting the D.C. Circuit's existing case law on legislator standing).

154. If it is unnecessary to rule on the standing of additional parties once one plaintiff has been found to have standing, then those additional rulings are arguably dicta. See *supra* note 46 and accompanying text. My argument, of course, is that it is necessary to rule on the standing of all plaintiffs because, for the reasons stated in Part III, the one-plaintiff rule is wrong.

155. The most extensive treatment of the permissibility of the one-plaintiff rule of which I am aware is that of Professor Steinman, *supra* note 15. Steinman focuses on the procedural effects of consolidating cases under Rule 42, but incident to that discussion she also considers joinder of plaintiffs under Rule 20. See, e.g., *id.* at 737–38. Steinman concludes that the one-plaintiff rule (or the “look only for one good plaintiff” rule, as she calls it) is consistent with Article III, the Rules Enabling Act, and the Federal Rules of Civil Procedure. *Id.* at 726–50. To the extent that allowing plaintiffs without standing to proceed to judgment would cause later difficulties, she indicates that collateral challenges may provide a partial response. *Id.* at 730–31. I am reluctant to disagree with Professor Steinman, but I note that she wrote without the benefit of later developments like *Steel Co.* and *DaimlerChrysler*. See *infra* Part III.A. I believe those developments have further undermined the one-plaintiff rule, though I would say it was wrong as a matter of first principles even before.

I note as well that a recent article by Erik Zimmerman endorses the one-plaintiff rule as support for his argument that a plaintiff should be allowed to assert multiple claims without possessing standing for each claim, especially in the context of decisions about whether invalid portions of statutes are severable. Erik R. Zimmerman, *Supplemental Standing for Severability*, 109 NW. U. L. REV. 285, 337–38 (2015); see also *infra* note 257 (discussing Zimmerman's position).

mistaken. The one-plaintiff rule is unlawful, and it should be rejected.

It is tempting to view the validity of the one-plaintiff rule as pitting a pragmatic case for the rule against a formalist argument rejecting it. And there is indeed some truth to that characterization. The argument in favor of the one-plaintiff rule, to the extent it is articulated at all, is mostly driven by functional or pragmatic considerations such as judicial economy. The case against the one-plaintiff rule emphasizes Article III's limits. Nonetheless, it is an oversimplification to cast the dispute as a stark conflict between formalism and functionalism. The case against the one-plaintiff rule draws on some functional considerations, and the case for the one-plaintiff rule obviously tries to show that the rule satisfies constitutional requirements.

Before making the argument against the one-plaintiff rule, it is worth acknowledging that the Supreme Court's law of standing remains controversial and contested. The scholarly literature contains some powerful indictments of the Court's jurisprudence and, in particular, its requirement of personalized injury in fact.<sup>156</sup> My own sympathies lie with an approach to Article III standing that is somewhat more pragmatic and generous than the approach the Court now embraces, especially in cases in which Congress has tried to identify previously noncognizable harms and create statutory remedies. But none of that unease with the current doctrine affects the argument against the one-plaintiff rule: even if standing should be somewhat looser, all plaintiffs in a case still need it. Although the Court's approach to standing may well change at the margins as the Court's personnel and priorities shift, the Court's approach is unlikely to liberalize in the radical way that would be necessary to legitimize the one-plaintiff rule, which, when properly understood, is a major departure from the fundamentals of standing.<sup>157</sup>

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156. See generally William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); James E. Pfander, *Standing to Sue: Lessons from Scotland's Actio Popularis*, 66 DUKE L.J. 1493 (2017); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992). But see generally Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004) (defending standing doctrine against some historical criticisms).

157. The Court has shown unanimous support for the proposition that a party must have standing for each *claim* it wishes to litigate. See *infra* notes 246–47 and accompanying text. Even if the Court took the highly unlikely step of eliminating standing as a separate constitutional requirement and instead treated standing as a question of whether a particular party has a cause of action, *cf.* Fletcher, *supra* note 156 (urging such an approach), that probably would not justify the one-plaintiff rule. That one plaintiff has a cause of action would not seem to justify allowing

This Part's argument against the one-plaintiff rule has several components, so an outline of the argument may be helpful. Section A provides the core of the argument that the Constitution requires all plaintiffs in a federal case to have standing. Section B takes on the economy-based justification for the one-plaintiff rule and shows that it fails on its own terms. Section C explains why courts cannot defer matters of standing until the remedial stage of a case. Section D argues that *stare decisis* cannot save the one-plaintiff rule. Section E sets out the correct way for courts to deal with standing in multiple-plaintiff cases.

### A. *The Case Against the One-Plaintiff Rule*

This Section begins by explaining why the one-plaintiff rule is inconsistent with the nature of Article III judicial power. It then goes on to explain that a plaintiff's lack of standing cannot be overcome through party-joinder rules or concepts of supplemental standing, nor can judicial economy justify bypassing standing.

1. *Article III Standing and the Nature of Judicial Judgments.* Article III vests the federal courts with the "judicial power" and limits that power to the adjudication of certain "cases" and "controversies."<sup>158</sup> This rather sparse text has generated a bevy of doctrines intended to keep the federal courts within their "proper—and properly limited—role."<sup>159</sup> Probably chief among these limitations on judicial power is the doctrine of constitutional standing. As the Supreme Court has explained:

In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. . . . In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III.<sup>160</sup>

To have standing under Article III, a plaintiff must have suffered an

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a co-plaintiff without one to proceed to judgment. *Cf. infra* text accompanying note 288 (making similar point in the context of the "zone of interests" doctrine). The development of standing as a nonmerits threshold doctrine may have, perversely, allowed the one-plaintiff rule's rise.

158. U.S. CONST. art. III, §§ 1–2.

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

160. *Id.* For the subconstitutional, or "prudential," aspects of standing, see *infra* Part III.E.5.

injury in fact that is traceable to the defendant's conduct and likely to be redressed by the plaintiff's requested remedy.<sup>161</sup>

The Supreme Court usually presents its constitutional standing jurisprudence as an interpretation and elaboration of the "case or controversy" language, but for present purposes the "judicial power" language to which it is wedded probably provides the best lens through which to perceive the one-plaintiff rule's faults. The requirement of standing (along with other constitutional justiciability doctrines) ensures that the federal courts exercise only properly judicial power. In *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*,<sup>162</sup> the Court articulated this relationship between standing and judicial power:

The power to declare the rights of individuals and to measure the authority of governments, this Court said 90 years ago, "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy." Otherwise, the power "is not judicial . . . in the sense in which judicial power is granted by the Constitution to the courts of the United States."

As an incident to the elaboration of this bedrock requirement, this Court has always required that a litigant have "standing" to challenge the action sought to be adjudicated in the lawsuit.<sup>163</sup>

The further requirement that *every* plaintiff in a case possess standing derives from the nature of judicial judgments. The judicial power is a power to issue dispositive judgments in cases over which the courts have jurisdiction.<sup>164</sup> Judgments are specific to the parties before the court. The judgment resolving a case establishes the parties' rights and duties: D owes P the sum of \$100,000, D has violated the due process rights of P1 and P2 and is enjoined from doing so further, etc. The judgment may be accompanied by an opinion that may establish law for future cases. The decision's precedential value, if any, is available to everyone. But the parties get the judgment that definitively

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161. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

162. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982).

163. *Id.* at 471 (citations omitted) (quoting *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1982); and then quoting *United States v. Ferreira*, 54 U.S. (13 How.) 40, 48 (1852)); see also *Muskrat v. United States*, 219 U.S. 346, 361 (1911) (describing the judicial power as "the right to determine actual controversies arising between adverse litigants").

164. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217–25 (1995); William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1815–31 (2008).

decides their rights and liabilities.<sup>165</sup> The one-plaintiff rule's crucial error is that it overlooks the person-specific nature of judgments and thereby elides the difference between parties and nonparties.

This error is on display in the Supreme Court's most recent engagement with the one-plaintiff rule, *Town of Chester v. Laroe Estates*. As noted above, the Supreme Court ruled that the determination of whether an additional plaintiff needs to have standing depends on whether that plaintiff seeks relief that is "different from that which is sought by a party with standing."<sup>166</sup> In addition to the considerable difficulties inherent in trying to decide whether relief is the same or different—which the Court left for the court of appeals to sort out on remand—the question itself is founded on a mistake. Relief for different people is necessarily different relief because it changes the (again, person-specific) judgment in the case. Someone without standing is not a proper party to invoke the judicial—that is, judgment-issuing, rights-determining—power and therefore should not receive any judgment, even if "only" for nonmonetary relief like a declaration of unconstitutionality or for a joint money judgment. The Court in *Town of Chester* did not try to grapple with any of this but instead issued a short opinion that relied largely on the parties' purported agreement with the basic idea of the one-plaintiff rule and remedy-based distinctions implicit in the existing case law.<sup>167</sup>

To the extent that one could reconcile the one-plaintiff rule with the demands of Article III, the most plausible argument would be that a federal court's authority extends to the entire case or controversy

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165. See *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally."); *Stryker v. Crane*, 123 U.S. 527, 539–40 (1887) (distinguishing between the force of a judgment and the lesser force of a precedent); *Judgment*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A court's final determination of the rights and obligations of the parties in a case."). To say that judgments apply only to specific persons does not mean that the judgment must individually name them; on the contrary, a judgment can describe them, as in class actions. See FED. R. CIV. P. 23(c)(3); 1 A.C. FREEMAN, TREATISE OF THE LAW OF JUDGMENTS 950–54 (Edward W. Tuttle ed., 5th ed. 1925). Note that we are not concerned here with judgments *in rem*, which are traditionally said to determine ownership of an item of property as against the whole world.

166. *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017); *supra* Part I.B.2.

167. *Town of Chester*, 137 S. Ct. at 1651–52. One virtue of relying on party concessions, one hopes, is that doing so makes it easier for the Court to change course in a future case. In the spirit of full disclosure, I note that I submitted an amicus brief in *Town of Chester*. The brief argued that the case could be resolved on narrow grounds (similar to those the Court relied on) but also urged the Court to rethink its one-plaintiff doctrine more generally, which the Court did not do.

before it, so that once one plaintiff with standing creates an Article III case, other plaintiffs, with or without standing, may join the case without violating Article III. That is, one could envision a doctrine of “supplemental standing” as an analogue to the supplemental subject-matter jurisdiction recognized in cases such as *United Mine Workers of America v. Gibbs*<sup>168</sup> and now codified at 28 U.S.C. § 1367.

But that theory of supplemental standing does not work. As a practical matter, an obvious sign of trouble is that the theory could license the joinder of innumerable interested-but-uninjured plaintiffs who disfavor the same law or action. And as a matter of constitutional text and principle, standingless plaintiffs are impermissible because the thing that extends to an entire case is the Article III *judicial power*. Whatever claims and parties a case may encompass, a federal court can only deal with them judicially. To be a federal plaintiff invoking the judicial power is to aim at the goal of a favorable judicial judgment: that is what a plaintiff’s complaint must demand, and an enforceable judgment granting relief and backed by the power of the United States is what a successful plaintiff receives.<sup>169</sup> Given that judgments operate for and against specific people, it follows that each person invoking this judgment-issuing power must have standing.

That is the core of the Article III case against the one-plaintiff rule. To flesh out the case and respond to counterarguments, it is necessary to consider the role of joinder rules and supplemental jurisdiction in defining the scope of a case, the doctrine of hypothetical jurisdiction, and the potential relevance of judicial economy. The following subsections turn to those tasks.

2. *The Relationship Between Joinder Rules, Supplemental Jurisdiction, and the One-Plaintiff Rule.* The liberal joinder rules of the Federal Rules of Civil Procedure, combined with the doctrine of supplemental jurisdiction, can expand judicial power beyond those plaintiffs and claims that can enter federal court on their own. Nonetheless, none of these rules or doctrines can extend constitutional standing to a plaintiff who would not have standing if suing alone.

Consider the following scenario. A person with an intense interest

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168. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966).

169. FED. R. CIV. P. 8(a), 54; *cf.* *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) (“Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.”).



in protecting the environment—call him Plaintiff 1—seeks injunctive relief against a federal agency because the agency, in alleged violation of federal environmental laws, has approved a development project that would ruin an area of great natural beauty. If Plaintiff 1 has nothing more at stake than his sincere and powerful concerns for environmental preservation and governmental compliance with environmental law, this suit lacks the “injury in fact” required for Article III standing.<sup>170</sup> Consider now a different plaintiff—call her Plaintiff 2—who files a separate lawsuit over the same development project, but this plaintiff actually uses the area in question and will no longer be able to enjoy the unspoiled landscape if the allegedly illegal project proceeds. Plaintiff 2 does have an Article III injury.<sup>171</sup> Plaintiff 1’s case should be dismissed for want of standing, but Plaintiff 2’s case may proceed, at least as far as “injury in fact” is concerned.

The next step is now obvious: Suppose that Plaintiff 1 and Plaintiff 2 decide to sue together, joining their claims under Federal Rule of Civil Procedure 20, which permits parties to join as plaintiffs when they assert claims that arise from the same events and present common questions of law or fact.<sup>172</sup> They will assert identical claims and seek identical injunctive relief. Can Plaintiff 1 invoke Article III jurisdiction on the strength of Plaintiff 2’s standing? Under the one-plaintiff rule, the answer is *yes*. The correct answer should instead be *no*, though getting to that answer takes a bit of explanation.

We can begin with Rule 82, which provides that “[t]hese rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts.”<sup>173</sup> On one possible reading, Rule 82 means that a claim over which the federal courts lack jurisdiction when filed by itself cannot come within their jurisdiction just by being combined,

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170. *See, e.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009); *Sierra Club v. Morton*, 405 U.S. 727, 735–40 (1972).

171. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000); *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 n.4 (1986).

172. One might wonder whether the mere fact that multiple people are challenging the same law provides a sufficient basis to support joinder under the terms of Rule 20, which requires not just “[common] question[s] of law or fact”—a requirement that is satisfied due to the plaintiffs’ advancing the same legal challenge—but also that the plaintiffs’ claims “aris[e] out of the same transaction, occurrence, or series of transactions or occurrences.” FED. R. CIV. P. 20(a)(1). In many public-law cases challenging the validity of a law, the only relevant events are the law’s enactment and its application, in separate but similar events, to the different plaintiffs—or, indeed, the expectation that the law would be (again, separately) applied to the plaintiffs in the future.

173. FED. R. CIV. P. 82.

through the Rules' joinder provisions, with another claim that does invoke jurisdiction. Rule 82's usual application is to prevent expansion of statutory jurisdiction, but, as the Supreme Court has stated, Rule 82 "applies *a fortiori* to any effort to extend by rule the judicial power of the United States described in Article III of the Constitution."<sup>174</sup>

One might think that Rule 82 straightforwardly outlaws the one-plaintiff rule, and indeed some litigants have made that argument, but the matter is actually a bit more complicated than the simple interpretation of the rule suggests. As the architects of the Federal Rules explained, and as case law both before and after the promulgation of the Rules showed, joinder rules can permissibly have the indirect effect of expanding subject-matter jurisdiction by increasing the size of the relevant litigation unit—that is, the case—to which the preexisting jurisdictional rules are applied. In other words, joinder rules may bring into a unitary federal case some claims and parties that would not independently satisfy the requirements of federal subject-matter jurisdiction.<sup>175</sup>

The jurisdictional authority to entertain such additional claims came, initially, from the judicially developed doctrines known as ancillary, pendent, and pendent-parties jurisdiction. The basic idea of these doctrines was that efficiency counselled, and the Constitution permitted, the federal courts to exercise power over an entire transactionally unified controversy, even if some claims or parties bound up in it did not have their own jurisdictional basis.<sup>176</sup> To take one example, consider a Rule 14 impleader claim based on state law and

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174. *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992).

175. *See Lesnik v. Pub. Indus. Corp.*, 144 F.2d 968, 973 (2d Cir. 1944) (acknowledging Rule 82 but stating that "jurisdiction is not extended by mere devices making possible more complete adjudication of issues in a single case" and that "a mere broadening of the content of a single federal action must not be confused with the extension of federal power"); 12 WRIGHT ET AL., *supra* note 123, § 3141, at 555–58; Carole E. Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 395, 431–43 (1976). *See generally* Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CALIF. L. REV. 1399 (1983) (arguing that the constitutional scope of supplemental jurisdiction is coextensive with the scope of lawfully adopted joinder rules).

176. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725–26 (1966); *see also* George B. Fraser, *Jurisdiction of the Federal Courts of Actions Involving Multiple Claims*, 76 F.R.D. 525 (1978) (describing the scope of ancillary and pendent jurisdiction). For a summary of ancillary and pendent jurisdiction before the adoption of the Federal Rules of Civil Procedure, *see* Harry Shulman & Edward C. Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 YALE L.J. 393, 420 (1936).

brought by a defendant against a nondiverse third party.<sup>177</sup> That impleader claim could not, standing on its own, satisfy the requirements of federal-question or diversity jurisdiction because it arises under state law and involves two nondiverse parties. Yet courts would entertain such claims as a matter of ancillary jurisdiction.<sup>178</sup> Though this was initially the result of judicially created doctrine, the supplemental-jurisdiction statute now lends the practice express statutory authority.<sup>179</sup>

In these types of cases, liberal joinder rules provide the opportunity for the exercise of reserves of whole-case-encompassing jurisdiction that might otherwise lie dormant. Such examples show that the simple Rule 82 argument sketched above—if no jurisdiction as an independent case, then no jurisdiction when joined—is a little too simple and, in fact, does not align with longstanding practices.<sup>180</sup>

However, neither is it the case that proper joinder under the Rules automatically means proper jurisdiction over all joined claims. Far from it. The law of ancillary and pendent jurisdiction was complicated, but in the context of multiple plaintiffs, the Supreme Court did *not* allow plaintiffs whose claims fell short of the required jurisdictional amount to obtain jurisdiction by joining with another plaintiff who had an independently sufficient claim.<sup>181</sup> Moreover, those cases involved plaintiffs and claims that failed to satisfy only a *statutory* requirement

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177. FED. R. CIV. P. 14(a) (permitting a defending party to join a nonparty who may be liable for all or part of the judgment against the defending party).

178. *E.g.*, *Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co.*, 426 F.2d 709, 716–17 (5th Cir. 1970) (counterclaim by nondiverse third-party defendant); *City of Boston v. Boston Edison Co.*, 260 F.2d 872, 874 (1st Cir. 1958) (cross-claims between nondiverse co-defendants); *Morrell v. United Air Lines Transp. Corp.*, 29 F. Supp. 757, 758 (S.D.N.Y. 1939) (impleader claim in which defendant and one third-party defendant were not diverse).

179. 28 U.S.C. § 1367 (2012).

180. One might wonder what Rule 82 means if it does not mean that a claim that is jurisdictionally deficient when filed alone cannot become sufficient through joinder. Perhaps the correct meaning of Rule 82 is that the Rules do not and may not directly expand jurisdiction, though they may do so incidentally through their properly procedural functions (promoting the just and economical resolution of disputes, etc.). *See* Goldberg, *supra* note 175, at 441–43.

181. *E.g.*, *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 301 (1973) (“Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—‘one plaintiff may not ride in on another’s coattails.’” (quoting *Zahn v. Int'l Paper Co.*, 469 F.2d 1033, 1035 (2d Cir. 1972))); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 590 (1939) (“Proper practice requires that where each of several plaintiffs is bound to establish the jurisdictional amount with respect to his own claim, the suit should be dismissed as to those who fail to show that the requisite amount is involved.”); *Hackner v. Guar. Tr. Co. of N.Y.*, 117 F.2d 95, 97–98 (2d Cir. 1941).

of subject-matter jurisdiction. If the principles of ancillary and pendent jurisdiction did not even allow an additional plaintiff to overcome the statutory impediment of an insufficient amount in controversy, then it is hard to fathom how an analogous theory of “pendent-plaintiff standing” could provide a ticket into federal court for a plaintiff who lacks constitutional standing altogether.

The supplemental-jurisdiction statute enacted in 1990 overrules some of the prior case law that had limited jurisdiction over joined plaintiffs, but it does not authorize the one-plaintiff rule either. The statute extends statutory subject-matter jurisdiction over certain claims that are transactionally related to a claim that has its own original basis for subject-matter jurisdiction, and this expansion applies even when the related claims are brought by a new plaintiff.<sup>182</sup> As the Supreme Court has interpreted the statute, a plaintiff asserting a claim with an insufficient amount in controversy can now get into federal court by joining, under Rule 20 or 23, with a plaintiff whose claim is sufficient.<sup>183</sup> But it is well established that the supplemental-jurisdiction statute does not confer Article III *standing* on new parties or claims.<sup>184</sup>

Indeed, the Supreme Court has told us that transactional relatedness between claims cannot overcome a lack of standing. In *DaimlerChrysler Corp. v. Cuno*,<sup>185</sup> the plaintiffs challenged the legality of both a municipal tax exemption and a state tax credit. The Supreme Court held that the plaintiffs lacked standing to pursue a challenge to the state tax credit, which was considered its own claim.<sup>186</sup> The plaintiffs

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182. 28 U.S.C. § 1367(a) (authorizing jurisdiction over transactionally related claims “includ[ing] claims that involve the joinder or intervention of additional parties”).

183. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 549, 566–67 (2005). The statute does not override the complete diversity rule, which is only a requirement of statutory jurisdiction. See *id.* at 553–54. Thus, the statute extends jurisdiction over an additional plaintiff with an insufficient amount in controversy, but it still requires that this plaintiff (like all plaintiffs in a diversity case) be diverse in citizenship from all defendants.

184. See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 351–52 (2006) (rejecting the analogy between supplemental statutory jurisdiction and standing); *Turner v. City & Cty. of San Francisco*, 892 F. Supp. 2d 1188, 1198 (N.D. Cal. 2012) (stating that “Article III standing must be established for each claim, including those over which there is supplemental jurisdiction”); *Montoya ex rel. S.M. v. Espanola Pub. Sch. Dist. Bd. of Educ.*, 861 F. Supp. 2d 1307, 1310 (D.N.M. 2012) (stating that “[t]here is no case law which supports Plaintiff’s position” that a plaintiff need not satisfy Article III standing requirements for supplemental claims under section 1367). It is not clear to me that the defect in *Montoya* was actually an Article III defect rather than a failure on the merits, but that is how the court understood it.

185. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006).

186. *Id.* at 346.

nonetheless argued that their (assumed) standing to challenge the municipal tax exemption gave them standing to challenge the state tax credit on the theory that the two challenges derived from a common nucleus of operative fact and thus composed a single “case” according to the jurisdictional test of *Gibbs*.<sup>187</sup> The Court rejected this notion of “ancillary standing.”<sup>188</sup>

What we have never done is apply the rationale of *Gibbs* to permit a federal court to exercise supplemental jurisdiction over a claim that does not itself satisfy those elements of the Article III inquiry, such as constitutional standing, that “serv[e] to identify those disputes which are appropriately resolved through the judicial process.” We see no reason to read the language of *Gibbs* so broadly, particularly since our standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press.<sup>189</sup>

*DaimlerChrysler*’s rejection of supplemental standing came in the context of a plaintiff with multiple, related claims. It did not contemplate the addition of plaintiffs with no cognizable injury at all, which, given the person-specific nature of judgments, is at least as problematic.<sup>190</sup>

Further, excluding additional plaintiffs who lack standing is desirable from the point of view of the relevant functional concerns. Allowing federal jurisdiction to extend to claims that are jurisdictionally defective on their own can sometimes promote the rational, efficient adjudication of the whole dispute between all of the affected parties.<sup>191</sup> That laudable goal is generally promoted, the Supreme Court tells us in *Gibbs*, when we allow the federal court to hear together all of the claims that arise from the same nucleus of operative fact.<sup>192</sup> But the one-plaintiff rule does not promote optimal packaging of the various claims and parties that together flesh out an entire controversy, for it invites into the case parties who do not have

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187. *Id.* at 350–51 (citing *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966)).

188. *Id.* at 353.

189. *Id.* at 351–52 (alteration in original) (citation omitted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

190. *Cf. Finley v. United States*, 490 U.S. 545, 549 (1989) (“Our cases show . . . that with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly.”).

191. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725–26 (1966).

192. *See id.*

a redressable injury at all. The only commonality among the plaintiffs is that they all challenge the same law or policy, but because the additional plaintiffs need not have an actual injury, there is no logical stopping point to how many might be added on a supplemental-standing theory. This leads to absurdities. If you were sensitive, attentive, and litigious enough, then you, gentle reader, could be a supplemental-standing plaintiff in hundreds of cases every year. Provided just one plaintiff in each of your cases has standing, your own standing need never be shown or found—and you could even win lots of favorable judgments.

Based on the foregoing arguments, it appears that Congress lacks the constitutional power to enact a “supplemental standing” statute that would, like the judicially developed one-plaintiff rule, allow multiple-plaintiff cases to be decided on the merits as to all parties as long as one plaintiff has standing. The Supreme Court’s cases are full of statements about the inflexible, legislatively unalterable nature of Article III’s standing requirement. “It is settled that Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.”<sup>193</sup> More broadly, the federal courts have only “judicial” power, which has been understood to prohibit them from adjudicating the rights of mere interested bystanders.<sup>194</sup> A supplemental-standing statute would license the federal courts to adjudicate not just the wrong kind of case—such as a state-law claim between nondiverse parties—but to act as something other than a federal *court* exercising the Article III *judicial power*.<sup>195</sup> The violation is all the worse if the overstepping is the product of judicial design rather than legislative authorization, as the

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193. *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997); *see also Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979) (“In no event . . . may Congress abrogate the Art. III minima . . .”).

194. *See supra* Part III.A.

195. As two commentators have stated in another context:

[T]here is a key conceptual difference between issue- or party-based limits on federal subject matter jurisdiction and the case-or-controversy requirement that renders a violation of the latter considerably more troubling: when a court violates the case-or-controversy requirement, *it ceases to act like a court*. This is not so when a court violates an issue- or party-based limit.

Martin H. Redish & Sopan Joshi, *Litigating Article III Standing: A Proposed Solution to the Serious (but Unrecognized) Separation of Powers Problem*, 162 U. PA. L. REV. 1373, 1388 (2014); *cf. Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996) (stating that “an Article III case or controversy, once joined by intervenors who lack standing, is—put bluntly—no longer an Article III case or controversy”).

one-plaintiff rule is, for then it is usurpation as well.

In any event, even if the language of Article III is open-textured enough to give Congress the power to enact a supplemental-standing statute, Congress has not done so. Section 1367 certainly is not such a statute, for the reasons already explained.<sup>196</sup> And the familiar doctrine of avoiding interpretations of statutes that raise doubtful questions about congressional authority<sup>197</sup> would require that Congress speak clearly before the courts find that it has attempted to achieve such a result. For similar reasons, the Rules Enabling Act should not be read to license procedural rules that confer standing on additional parties, even if that were constitutionally possible.<sup>198</sup>

3. *Judicial Economy Cannot Justify Skipping over Standing.* The one-plaintiff rule is justified largely on grounds of judicial economy: if a court is going to resolve the merits anyway due to the presence of one plaintiff with standing, resolving difficult standing issues for co-plaintiffs is a waste of effort. The economy gains are themselves overstated, as will be explained shortly.<sup>199</sup> But even if the one-plaintiff rule serves judicial economy, that benefit cannot justify skipping over standing.

Probably the best illustration of the limited role of economy-based arguments in this context comes from *Steel Co. v. Citizens for a Better*

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196. See *supra* notes 182–92 and accompanying text.

197. See, e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”).

198. The Rules Enabling Act authorizes the courts to promulgate “rules of practice and procedure” and mandates that the rules “shall not abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072 (2012). The Act’s relationship to jurisdiction is a bit obscure. Compare *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941) (“There are other limitations upon the authority to prescribe rules which might have been, but were not mentioned in the Act; for instance, the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute.”), and Leslie M. Kelleher, *Taking “Substantive Rights” (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 94 (1998) (stating that “[s]ubstantive rights,’ as the term is used in the Act, includes matters, such as subject matter jurisdiction, as to which rulemaking authority could not constitutionally be delegated to the Court”), with Goldberg, *supra* note 175, at 433–41 (arguing that subject-matter jurisdiction is “procedural” for purposes of the Rules Enabling Act but that the rules are not permitted to define Article III boundaries, as opposed to subconstitutional jurisdictional limits), and 28 U.S.C. § 1292(e) (2012) (authorizing courts to promulgate rules permitting interlocutory appeals).

199. See *infra* Part III.B.

*Environment*.<sup>200</sup> In *Steel Co.*, the Supreme Court disapproved the concept of “hypothetical jurisdiction,” according to which a federal court could “proceed immediately to the merits [of the case], despite jurisdictional objections, at least where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied.”<sup>201</sup> The Court rejected hypothetical jurisdiction because a court without authority cannot determine the merits, even if only to determine the merits against a plaintiff who may upon careful inquiry have also failed on jurisdictional grounds.<sup>202</sup> The jurisdictional question in *Steel Co.* itself was one of Article III standing.<sup>203</sup> The Court was accordingly required to address standing as a threshold matter and, upon doing so, found that the plaintiff lacked standing. The Court therefore did not reach the merits.<sup>204</sup>

The one-plaintiff rule might be considered a form of partial hypothetical jurisdiction: although jurisdiction in the form of Article III standing is not assumed for the whole case, it is still assumed as to some parties. To that extent, using the one-plaintiff rule is, as *Steel Co.* puts it, “by very definition . . . to act ultra vires.”<sup>205</sup>

The argument against the one-plaintiff rule based on *Steel Co.* is subject to two potential responses. One is more promising than the other, but neither ultimately succeeds in vindicating the one-plaintiff rule.

First, there are some exceptions to *Steel Co.*’s rule against pretermitted questions of standing. Justice O’Connor’s concurrence, joined by Justice Kennedy, was necessary to make a majority for the relevant portion of Justice Scalia’s opinion of the Court, and Justice O’Connor was willing to allow that future cases could present appropriate occasions for deviating from a strict jurisdiction-first approach.<sup>206</sup> And, indeed, in subsequent cases the Court did allow

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200. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83 (1998).

201. *Id.* at 94, 93.

202. *Id.* at 94–95.

203. *Id.* at 102.

204. *Id.* at 102, 109–10.

205. *Id.* at 102.

206. *See id.* at 110–11 (O’Connor, J., concurring) (“I write separately to note that, in my view, the Court’s opinion should not be read as cataloging an exhaustive list of circumstances under which federal courts may exercise judgment in ‘reserv[ing] difficult questions of . . . jurisdiction when the case alternatively could be resolved on the merits in favor of the same party.’” (alteration in original) (quoting *Norton v. Mathews*, 427 U.S. 524, 532 (1976)); *see also* Jack H.



various kinds of jurisdictional questions to be skipped over in favor of various kinds of nonjurisdictional-yet-threshold inquiries. For example, the Court has allowed determinations of jurisdiction to be pretermitted in favor of dismissals on grounds of *forum non conveniens*,<sup>207</sup> and it has ruled that class certification can be denied when certification presents questions “logically antecedent” to questions of Article III standing.<sup>208</sup> The Court also allowed a question of Eleventh Amendment state sovereign immunity, which is a type of jurisdictional question, to be pretermitted in order to rule that the statute giving rise to the claim at issue did not even encompass the state as a defendant.<sup>209</sup>

*Steel Co.* may be permeable, but the one-plaintiff rule cannot fit within the letter or the logic of the exceptions described above. The one-plaintiff rule involves skipping a question of Article III jurisdiction—the most fundamental limit on federal judicial power—in order to resolve a plaintiff’s claim on ordinary merits grounds. No Supreme Court case elaborating on or limiting *Steel Co.* has licensed that. Rather, the cases that qualify *Steel Co.* give courts discretion to choose among threshold *nonmerits* grounds.<sup>210</sup> Notably, even the case that bypassed state sovereign immunity in order to decide a question of statutory coverage still decided a question of Article III standing before reaching any other ground for decision.<sup>211</sup> Further, in cases involving the one-plaintiff rule, the resolution of the merits question is generally not logically antecedent to the standing inquiry, a feature that has sometimes justified resolving a nonjurisdictional ground first.<sup>212</sup> Finally, it bears remembering that all of these hypothetical-jurisdiction cases involve decisions *against* plaintiffs. Some cases under the one-plaintiff rule go on to rule against the supplemental plaintiff(s) on the merits, but others rule in favor of the supplemental plaintiff(s), a result the hypothetical-jurisdiction cases would not have dreamed of.

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Friedenthal, *The Crack in the Steel Case*, 68 GEO. WASH. L. REV. 258, 265–66 (2000) (describing the uncertainty over the scope of the *Steel Co.* holding caused by the multiple conflicting opinions in the case).

207. *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 436 (2007). This case involved questions of personal jurisdiction and statutory subject-matter jurisdiction, though not Article III jurisdiction.

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

209. *Vt. Nat. Res. Agency v. United States ex rel. Stevens*, 529 U.S. 765, 779–80 (2000).

210. *See Sinochem Int’l Co.*, 549 U.S. at 430–31.

211. *Vt. Nat. Res. Agency*, 529 U.S. at 771.

212. *Id.* at 779; *Ortiz*, 527 U.S. at 831.

A second argument against the decisiveness of *Steel Co.* contends that the one-plaintiff rule does not compromise the principles underlying standing doctrine in the same way that hypothetical jurisdiction does. In *Steel Co.* and most other hypothetical-jurisdiction cases, an assumption in favor of jurisdiction would allow the court to address a merits question that would not otherwise be addressed. In the cases at issue here, in contrast, the merits are going to be reached regardless, because at least one plaintiff has standing. The one-plaintiff rule therefore does not lead to a court resolving a question it otherwise would not resolve. In this way, the rule arguably does not entail a judicial usurpation of authority or otherwise offend the restraint-oriented justifications for standing doctrine.<sup>213</sup> Moreover, the presence of at least one plaintiff with a genuine stake in the controversy—as shown by having a redressable injury caused by the defendant—helps to ensure that the case will be vigorously contested, which serves another goal of standing doctrine.<sup>214</sup> In this respect, the one-plaintiff rule is arguably less problematic than the doctrine of hypothetical jurisdiction condemned in *Steel Co.*

This argument is more promising than the first one, but it is still not ultimately persuasive. The rule against hypothetical standing is not a rule about the generalized interest in restraining courts from reaching certain merits issues. It is a rule about judicial power to issue judgments on the merits.<sup>215</sup> And judgments, unlike precedents, apply to specific persons.<sup>216</sup> In *Vermont Natural Resources Agency v. United States ex rel. Stevens*,<sup>217</sup> the Court justified its decision to pretermitt Eleventh Amendment immunity based partly on the fact that doing so would not “permit the court to pronounce upon any issue, or upon the rights of any person, beyond the issues and persons that would be reached”

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213. See Steinman, *supra* note 15, at 729–30; cf. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006) (condemning the plaintiffs’ “ancillary standing” theory and observing that it would lead to “federal courts thus deciding *issues* they would not otherwise be authorized to decide” (emphasis added)).

214. The relationship between vigorous contestation and constitutional injury is tenuous and unreliable, but standing doctrine does traditionally posit such a connection. See *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (observing that standing doctrine tries to “assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions” (internal quotation marks omitted) (quoting *Baker v. Carr*, 369, U.S. 186, 204 (1962))).

215. See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95 (1998).

216. See *supra* notes 118–20, 164–65 and accompanying text.

217. *Vt. Nat. Res. Agency v. United States ex rel. Stevens*, 529 U.S. 765 (2006).

otherwise.<sup>218</sup> The one-plaintiff rule, in contrast, allows courts to adjudicate the rights of persons outside of their power. In sum, the hypothetical-jurisdiction line of cases shows that judicial economy cannot authorize the one-plaintiff rule's pretermission of standing.

*B. Rebutting the Efficiency-Based Case for the One-Plaintiff Rule*

The argument in favor of the one-plaintiff rule mostly relies on a pragmatic concern for judicial economy.<sup>219</sup> Once a court determines that one plaintiff has standing, the court must proceed to the merits regardless of other plaintiffs' standing, and so—the argument goes—the other plaintiffs' standing is then immaterial. And because deciding whether the other plaintiffs have standing would require some extra effort, particularly where those other plaintiffs' standing is a close call, courts may properly dispense with a plaintiff-by-plaintiff analysis. Beyond judicial convenience, a further reason to avoid ruling on standing comes from the general policy of avoiding unnecessary constitutional decisions.<sup>220</sup>

The previous Section explained why the relevant legal principles and precedents require that all plaintiffs have standing. This Section explains why the efficiency-based argument for the one-plaintiff rule fails even on its own terms.

1. *The One-Plaintiff Rule Is Not as Efficient as It Seems.* The first problem with the judicial-economy-based argument for the one-plaintiff rule is that it starts from an incorrect premise, namely that the standing of other plaintiffs is immaterial once one proper plaintiff has been found. If in fact the standing of other plaintiffs mattered, though, then one could not so easily ignore it in the name of judicial convenience. And it does matter. That the standing of the other plaintiffs is important is especially clear when the plaintiffs end up winning on the merits. As discussed above, there are genuine benefits

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218. *Id.* at 779 (emphasis added).

219. *See* Thiebaut v. Colo. Springs Utils., 455 Fed. App'x 795, 802 (10th Cir. 2011) (citing "judicial efficiency"); Steinman, *supra* note 15, at 729.

220. *See* Ry. Labor Execs.' Ass'n v. United States, 987 F.2d 806, 810 (D.C. Cir. 1993) (citing the doctrine of constitutional avoidance as support for the one-plaintiff rule); 13B WRIGHT ET AL., *supra* note 53, § 3531.15, at 337 (stating that "[t]he temptation to make unnecessary rulings as to the standing of surplus plaintiffs should be resisted"); *see also* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring) (providing a classic statement of the avoidance policy).

that come along with winning a judgment as opposed to merely winning favorable precedent.<sup>221</sup> The benefits are most obvious when matters like attorneys' fees and costs are at issue, though as we have seen, courts are often, though not always, careful to conduct plaintiff-by-plaintiff analyses when awarding such relief. But even apart from that, it matters whether one is a judgment holder or instead merely a nonparty who likes the outcome. For example, a prevailing plaintiff's claims merge into the judgment as a matter of claim preclusion, the issues resolved in the plaintiff's favor support issue preclusion in later litigation, a winning plaintiff can later enforce the judgment, and so on.

When the plaintiffs whose standing is questionable are going to lose on the merits, the pragmatic argument for pretermitted standing has more appeal, though even here the gains are often illusory. True, it would be desirable to avoid the judicial effort required to say exactly why a plaintiff loses.<sup>222</sup> That is a sure benefit of using the one-plaintiff rule. Still, even in this scenario, it is not irrelevant how a plaintiff loses. Different consequences attach to jurisdictional losses versus merits losses, such as different preclusive effects in later litigation.<sup>223</sup>

Because of the different consequences of merits losses versus jurisdictional losses, the one-plaintiff rule saves some time in one case only to introduce the risk of inconvenience and uncertainty later. As a general rule, dismissals on the merits are preclusive of later litigation on the same claims or issues, but dismissals for want of standing do not preclude later litigation of the merits if the lack of standing can be overcome.<sup>224</sup> When a plaintiff's standing is bypassed under the one-plaintiff rule, it may be unclear what preclusive effect to give the merits ruling as to that plaintiff.<sup>225</sup> On the one hand, if the merits of the claims

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221. *See supra* Part II.A.

222. As Justice Breyer asked in the context of hypothetical jurisdiction, "Whom does it help to have appellate judges spend their time and energy puzzling over the correct answer to an intractable jurisdictional matter, when (assuming an easy answer on the substantive merits) the same party would win or lose regardless?" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 111 (1998) (Breyer, J., concurring in part and concurring in the judgment).

223. *See supra* notes 139–42 and accompanying text.

224. *See supra* notes 140–42 and accompanying text.

225. Sorting out preclusive effects was a problem under the old doctrine of hypothetical jurisdiction, which the Supreme Court has now largely disapproved but which still exists in some forms. For commentary taking different views on the matter, see, e.g., Joshua S. Stillman, *Hypothetical Statutory Jurisdiction and the Limits of Federal Judicial Power*, 68 ALA. L. REV. 493, 541–44 (2016); Alan M. Trammell, *Jurisdictional Sequencing*, 47 GA. L. REV. 1099, 1147–49 (2013); Ely Todd Chayet, Note, *Hypothetical Jurisdiction and Interjurisdictional Preclusion: A "Comity" of Errors*, 28 PEPP. L. REV. 75, 96–101 (2000); Comment, *Assuming Jurisdiction*

and issues resolved in the first case are open to reexamination in a later suit, or if uncertainty over the judgment's preclusive effects merely breeds later litigation, then we have undermined the efficiency rationale for premitting standing in the first place. On the other hand, to treat the first court's determination of the merits as fully binding would be jarring given the doubt about the first court's constitutional authority, a doubt that the court itself acknowledged yet intentionally disregarded.<sup>226</sup> To be sure, it does not sit well to see a former plaintiff, who after all was the one invoking the federal court's power, later deny the existence of that power when the merits turn out badly—and yet in some other circumstances we allow plaintiffs to launch belated attacks on subject-matter jurisdiction despite the odor of opportunism.<sup>227</sup> Whichever approach we take, these are not good options. There are costs that come with choosing the path of immediate expediency represented by the one-plaintiff rule.

*2. Requiring All Plaintiffs To Have Standing Does Not Lead to Impracticalities or Bad Consequences.* The case in favor of the one-plaintiff rule relies primarily on considerations of judicial economy. But requiring a standing inquiry for all plaintiffs is not so bad from the point of view of practicalities. It even has some practical virtues.

First, deciding whether all plaintiffs have standing often would not require much additional judicial effort. When the plaintiffs in a case are similarly situated—for example, multiple users of a recreational area threatened with environmental harm—the standing inquiries will all be parallel, and so a court can handle them en bloc.<sup>228</sup>

Second, even when some plaintiffs present distinctive and difficult standing questions, a court will not always have to resolve them. Although courts may not ignore standing, courts have enough

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*Arguendo: The Rationale and Limits of Hypothetical Jurisdiction*, 127 U. PA. L. REV. 712, 754 n.110 (1979); see also Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intrasuit Preclusion*, 63 FLA. L. REV. 301, 308–32 (2011) (emphasizing the important link between jurisdictional sequencing and preclusion).

226. If a case is litigated on the merits without any doubts about subject-matter jurisdiction being raised, the judgment can later withstand a collateral attack despite the undiscovered defect. See *Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940); RESTATEMENT (SECOND) OF JUDGMENTS §§ 12, 69 (1982). Our situation is different in that the potential defect was considered in the first case but then consciously disregarded.

227. *E.g.*, *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804).

228. *E.g.*, *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269 (2008); *FEC v. Akins*, 524 U.S. 11 (1998); *Bennett v. Spear*, 520 U.S. 154 (1997). In each of the multiple-plaintiff cases just cited, the Court conducted a single standing inquiry that applied equally to each plaintiff.

flexibility in managing dockets and sequencing decisions to help some standing questions disappear. Once a court finds standing for the most obviously injured plaintiff(s), or hints that such a ruling is likely, the defendant might agree to settle the case or the other plaintiffs might voluntarily dismiss themselves with the expectation that they will practically benefit from a victory by the remaining plaintiff. (The mechanics of how courts should rule on standing, and how much flexibility they have in determining exactly when to do so, are described in more detail below.<sup>229</sup>)

Third, once the need for all plaintiffs to have standing becomes well established in the case law, some parties with questionable standing may no longer try to ride along as additional plaintiffs in a suit that has a clearly injured plaintiff. The burden of pleading and, if necessary, factually establishing standing is on the plaintiffs, not the court, and so supernumerary plaintiffs whose standing is questionable may have to face the costs of collecting affidavits, eating up pages of their briefs, and other efforts to establish their standing.<sup>230</sup> When another plaintiff has standing and will secure relief that will practically benefit other potential plaintiffs, the cost may not be worth it.

Fourth, rejecting the one-plaintiff rule would not deprive the public of judicial decisions on the merits of important questions. To be sure, the courts find it acceptable for there to be important disputes in which nobody can invoke judicial review.<sup>231</sup> Yet even if one favored universal judicial review, the point of the one-plaintiff rule is that there already is another person who has standing to litigate the merits of the dispute, right there in the form of a co-plaintiff in the case at bar. So the same issues can be resolved regardless.

Fifth, rejecting the one-plaintiff rule probably would not damage the quality of the litigation process. One might have that worry in the situation in which the would-be plaintiff without standing is a well-equipped interest group while the plaintiff with standing is a concretely injured, but unsophisticated, individual. Of course, it is a general feature (or perhaps rather a bug) of standing doctrine, even in single-plaintiff litigation, that it might select as a “proper” litigant someone

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229. See *infra* Part III.E.

230. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 188–89 (1936).

231. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) (“The assumption that if [these plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing.”).

who does not appear likely to present the case in the strongest way.<sup>232</sup> As in other cases, there are ways to compensate for weak plaintiffs: the sophisticated party can file briefs as *amicus curiae*, provide pro bono representation to the injured-but-under-resourced party, and so on.

Sixth, and as already noted, although the one-plaintiff rule may save a court from making a difficult standing decision in the case at hand, it does so at the cost of depriving the legal system of precedent.<sup>233</sup> Precedent on hard questions has value for the public and other courts.

### C. “Sort It Out Later” Is Not a Solution

One potential response to the arguments above is to acknowledge that there is something problematic with giving benefits to plaintiffs who lack standing but, in response, to embrace a seemingly pragmatic compromise according to which standingless plaintiffs only need to be weeded out if and when it really “matters.” For example, if a plaintiff whose standing was initially pretermitted later tries to introduce distinct legal claims or enforce a judgment or obtain attorneys’ fees or take whatever actions a court believes would exceed the scope of the party’s supplemental standing, *at that point* the question of standing can be resolved and the plaintiff’s request granted or denied accordingly.

This approach has some appeal, and it is probably what some courts applying the one-plaintiff rule assume will happen, but it will not work. As a doctrinal matter, standing is described as a threshold inquiry that must be satisfied to pursue relief, not just to get it.<sup>234</sup> And during this meantime when it supposedly “doesn’t matter” whether a plaintiff has standing, the court is still exercising power on behalf of and against a plaintiff whose standing is openly in doubt. These activities might include granting preliminary relief, entering merits-related discovery orders, dismissing a claim on the merits, allowing the party to put on evidence and cross-examine witnesses at trial, or granting a final judgment entitling all plaintiffs to injunctive relief. If the proponent of the pragmatic compromise concedes that at least some such exercises of power “matter,” as Supreme Court precedent suggests they do,<sup>235</sup> then one cannot defer standing decisions for long.

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232. *Cf.* *Sierra Club v. Morton*, 405 U.S. 727, 738–41 (1972) (denying standing to the Sierra Club because of lack of allegations of particularized harm to a member).

233. *See supra* Part II.B.

234. *E.g.*, *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

235. *Cf.* *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76–77

And so the compromise position unravels.

Further, the pragmatic delaying tactic is not always so pragmatic when one thinks it through. To the extent that some standing inquiries are put off until a request for attorneys' fees (which are common in cases against governmental defendants), the enforcement of the judgment, or another decision point, the effort involved in making a decision is merely shifted around. And, as noted already, leaving a plaintiff's standing unresolved sows uncertainty that may crop up in subsequent litigation about the effects of the prior litigation.<sup>236</sup> In sum, for both formal and functional reasons, sorting out standing at some indefinite future date is not a satisfactory response. The proper way for a district court to address standing—a way that respects Article III while also allowing some room for consideration of judicial economy—is described below.<sup>237</sup>

#### D. *Does Stare Decisis Save the One-Plaintiff Rule?*

If the foregoing arguments are correct, the one-plaintiff rule never should have gotten off the ground. Even so, by this point more than two dozen Supreme Court cases, plus many more cases in the lower courts, have applied the one-plaintiff rule in one form or another. Although the Supreme Court has sometimes implicitly departed from the rule by conducting standing inquiries that the rule would deem unnecessary,<sup>238</sup> the Court has never directly rejected the rule.<sup>239</sup> The rule can therefore claim some authority, regardless of its correctness, simply as a matter of stare decisis. Accordingly, the proponent of

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(1988) (holding that nonparty witness may raise the court's lack of subject-matter jurisdiction in defense of a civil contempt citation for failure to respond to discovery requests, despite the absence of a final judgment in the underlying action).

236. See *supra* notes 224–27 and accompanying text.

237. See *infra* Part III.E.

238. See *supra* note 19.

239. Some litigants and lower courts have cited a passage from *Allen v. Wright*, 468 U.S. 737 (1984), as a rejection of the one-plaintiff rule: “Typically, however, the standing inquiry requires careful judicial examination of a complaint’s allegations to ascertain whether *the particular plaintiff* is entitled to an adjudication of the particular claims asserted.” *Id.* at 752 (emphasis added); see *supra* note 47 (citing cases that rely on this passage). This reliance is ill placed. *Allen* did not involve any sort of supplemental-standing scenario. It did involve multiple plaintiffs, indeed a nationwide class action. *Allen*, 468 U.S. at 743. But it was not a case in which different plaintiffs were differently situated such that the Court undertook different standing inquiries for different parties. Rather, the plaintiffs were found to lack standing, as a group, for reasons that applied in common to all. To use this language to undermine the one-plaintiff rule is to take it out of context.



change must present something more than an argument that the one-plaintiff rule is wrong. That “something more” comes from three further considerations: lack of reliance on the one-plaintiff rule, the rule’s tension with other lines of precedent, and the rule’s unreasoned genesis and repetition.

1. *No Reliance Interests.* A crucial factor in deciding whether to overrule precedent is whether there has been reliance on the prior law such that overruling it would unfairly frustrate expectations.<sup>240</sup> Reliance interests are generally slight when it comes to matters of judicial procedure as compared, for example, to property rights or other substantive entitlements.<sup>241</sup> That generalization holds true here. It is hard to imagine that the ill-defined generic category composed of parties who lack a constitutionally cognizable harm could have ordered their affairs around their ability to be a party when they join as co-plaintiffs with parties who do have standing. The possibility of reliance further erodes given that the one-plaintiff rule is not mandatory; courts *may* choose to bypass standing of additional plaintiffs, but they are also permitted to analyze the standing of every plaintiff and dismiss those without standing.<sup>242</sup> Some standingless plaintiffs, though not all, have gotten lucky in the past, but there is no right to good luck.

2. *Out of Step with Other Developments.* If a doctrine is out of step with other lines of precedent, that inconsistency both tends to show that the outlier doctrine is wrong and, more importantly here, militates in favor of jettisoning it so as to increase the overall coherence of the *corpus juris*.<sup>243</sup> Admittedly, one might say that coherence-oriented arguments are not particularly compelling in the standing context, given that the whole doctrine is a bit wanting in coherence. Still, consistency is a virtue the law should strive to embody. Developments since the one-plaintiff rule’s advent make it an increasingly anomalous

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240. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992). See generally Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459 (2013) (examining the role of reliance arguments in the doctrine of *stare decisis*); Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035 (2013) (same).

241. See *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases . . . involving procedural and evidentiary rules.” (citations omitted)).

242. See *supra* note 45 and accompanying text.

243. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 388–93, 403–05 (1970).

outlier.<sup>244</sup>

First, the Supreme Court has become increasingly granular in its standing inquiries in single-plaintiff scenarios. The law is now clear that a single plaintiff must satisfy standing requirements for every claim that the plaintiff asserts. The Supreme Court's most extensive discussion came in *DaimlerChrysler*. The plaintiffs in that case challenged the legality of both a municipal tax exemption and a state tax credit. The Supreme Court held that the plaintiffs lacked standing to challenge the state tax credit.<sup>245</sup> In response to the plaintiffs' argument that their assumed standing to challenge the municipal tax exemption gave them a form of supplemental standing to bring their related challenge to the state tax credit, the Court turned them away. "[O]ur standing cases confirm," the Court ruled, "that a plaintiff must demonstrate standing for *each claim* he seeks to press."<sup>246</sup> No Justice dissented.<sup>247</sup>

Indeed, the Court has gone beyond even claim-specific standing, requiring as well that a plaintiff demonstrate standing as to each form of relief sought. Illustrative in this regard is *City of Los Angeles v. Lyons*,<sup>248</sup> in which the Court held that a motorist who had been choked by the police could seek damages for his past injury but, in light of the absence of a real threat of recurrence, lacked standing to seek injunctive relief to prevent future harm.<sup>249</sup>

Second, the one-plaintiff rule was developed before *Steel Co.*'s rejection of hypothetical jurisdiction, the practice whereby a court

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244. Depending on its future membership, the Court could shift toward more lenient standing rules in certain respects. For example, in cases involving plaintiffs with somewhat speculative injuries, or in cases in which Congress has given individual consumers the right to enforce technical regulatory requirements through provisions for statutory damages, the Court may come out differently in the future than it has in the recent past. But any reasonably foreseeable Supreme Court is unlikely to abandon its largely formalistic approach (honored sometimes in the breach, to be sure) about the mandatory, jurisdictional nature of Article III standing. The one-plaintiff rule is therefore likely to remain anomalous even if the Court's doctrine shifts a bit this way or that.

245. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006).

246. *Id.* at 352 (emphasis added).

247. Justice Ginsburg filed a separate concurrence to express disagreement with some of the limitations on standing that the Court has developed since the 1970s, but she did not object to the every-claim rule in particular. *Id.* at 354–55 (Ginsburg, J., concurring in part and concurring in the judgment).

248. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

249. *Id.* at 105, 109. I am uncomfortable with this aspect of the Court's current approach to standing. But discomfort with *Lyons*'s remedy-specific approach to standing is perfectly compatible with rejection of the one-plaintiff rule, which gives judgments to persons without standing to seek any relief whatsoever.

could pretermite discussion of standing in order to dismiss a case on the merits.<sup>250</sup> As discussed already,<sup>251</sup> the one-plaintiff rule conflicts with *Steel Co.*'s proposition that assuming jurisdiction to adjudicate the merits is *ultra vires* for an Article III court, and it also clashes with *Steel Co.*'s broader reluctance to bypass jurisdictional hurdles in the name of judicial economy.

There is at least one aspect of current standing law that does fit comfortably with the one-plaintiff rule, and that is the doctrine of associational standing. According to this doctrine, an organization has standing to sue if at least one of its members would have standing as an individual, the interests at stake are related to the association's purpose, and neither the claim asserted nor the requested relief requires the individual members' participation.<sup>252</sup> Associational standing has a superficial resemblance to supplemental-plaintiff standing in that one entity's standing is sufficient to confer standing on another, but the theory behind the two doctrines is quite different. Associational standing is a form of representational standing in which the association stands in the shoes of its affected members.<sup>253</sup> In the usual multiple-plaintiff case in which the one-plaintiff rule is applied, the parties who obtain the benefit of the rule do not stand in any such representational relationship; they merely have the same legal claim as the other plaintiffs.<sup>254</sup> The doctrine of associational standing therefore stands even if the one-plaintiff rule falls.<sup>255</sup>

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250. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–95 (1998).

251. *See supra* Part III.A.3.

252. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). This form of standing is typically employed in cases seeking declaratory or injunctive relief; the joinder of the affected members as parties is often necessary when the complaint seeks damages for the members. *Compare* *Warth v. Seldin*, 422 U.S. 490, 515–16 (1975) (requiring joinder of members for damages claims), *with* *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553 (1996) (allowing organization to seek damages for members). This form of associational standing should be distinguished from the related doctrine according to which an organization has standing to seek redress for its *own* injuries suffered as an organization. *See, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

253. *United Food & Commercial Workers Union Local 751*, 517 U.S. at 555, 557.

254. *Cf.* *Taylor v. Sturgell*, 553 U.S. 880, 896–98 (2008) (distinguishing, in the preclusion context, between representative relationships and mere shared interests).

255. Alternatively, one could challenge the correctness of associational standing as well, such as because it has the effect of circumventing Rule 23 or other legal requirements for establishing representational relationships. Eliminating associational standing would not be very disruptive because of the availability of suits brought by affected members (who could be represented by the organization as counsel) and class actions. The Supreme Court, however, has not shown an interest in revisiting the basic soundness of associational standing. *See Int'l Union v. Brock*, 477

The one-plaintiff rule, is, in short, “a derelict in the stream of the law.”<sup>256</sup> The overall coherence of the Supreme Court’s standing doctrine would be improved were it overruled.<sup>257</sup>

3. *Ill-Considered and Unexplained.* Suppose a court exercises jurisdiction over a case without any discussion of the propriety of doing so. According to the Supreme Court, unexamined assumptions of jurisdiction do not establish precedent that controls a later case in which the jurisdictional question is actually put into controversy.<sup>258</sup>

That is not exactly the situation we confront in the cases applying the one-plaintiff rule, but one could make a similar argument oppugning the precedential value of those cases. Although the cases repeating the rule do not simply assume jurisdiction *sub silentio*, they do state it only in passing, without reflection, often in a footnote and rarely spending more than one sentence on it.<sup>259</sup> Further, the rule originally developed in a rather casual way, without adverse briefing from the parties or, so far as one can tell, careful judicial deliberation. The Supreme Court has never provided a justification for the one-plaintiff rule, whether to explain how it is consistent with standing doctrine or why the rule is valuable enough to allow a departure from

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U.S. 274, 288–90 (1986).

256. N.D. Bd. of Pharmacy v. Snyder’s Drug Stores, Inc., 414 U.S. 156, 167 (1973).

257. Zimmerman uses the Court’s practice in severability analysis to undermine the Court’s generally claim-specific approach to standing and, along the way, briefly discusses the one-plaintiff rule as another doctrine that is in tension with the claim-specific approach. Zimmerman, *supra* note 155, at 337–38. I agree with him that there is tension between the multiple-claim cases (like *DaimlerChrysler v. Cuno*), which expressly reject a form of supplemental standing, and the multiple-plaintiff cases, which allow uninjured plaintiffs to tag along. But we differ on how to resolve the tension. It is the multiple-plaintiff cases that are out of step, from a coherentist perspective, with the larger pattern of particular doctrines and underlying principles of standing. (I believe that severability, which is his main focus, presents rather different issues that are not best understood as shedding light on standing one way or the other.) Coherence therefore supports eliminating the one-plaintiff anomaly. Again, I myself have some doubts about aspects of the Court’s standing doctrine, but whatever one thinks standing requires, all plaintiffs require it.

258. *E.g.*, *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144–45 (2011); *see also Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998) (denying the precedential value of “drive-by jurisdictional rulings”).

259. *E.g.*, *Clinton v. City of New York*, 524 U.S. 417, 432 n.19 (1998) (“Because both the City of New York and the health care [plaintiffs-]appellees have standing, we need not consider whether the [plaintiff-]appellee unions also have standing to sue.”); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 n.9 (1977) (“Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit.”).

ordinary principles of standing. The closest the Court has come was this passage in *Doe v. Bolton*, one of the first Supreme Court decisions to announce the one-plaintiff rule:

We conclude that we need not pass upon the status of these additional appellants in this suit, for the issues are sufficiently and adequately presented by Doe and the physician-appellants, and nothing is gained or lost by the presence or absence of the nurses, the clergymen, the social workers, and the corporations.<sup>260</sup>

The implicit theory here appears to be that a finding of standing makes no difference (“nothing is gained or lost”) and so the analysis can be skipped, presumably as a matter of judicial convenience. The Court neglects to consider either the practical consequences of party status or the formal validity of dispensing with a ruling on constitutional jurisdiction.

The Court’s attention in the early cases applying the one-plaintiff rule was, somewhat understandably, focused elsewhere than on standing doctrine. None of the early cases were cases in which the Court addressed only standing; standing was discussed on the way to a holding on the merits. And those decisions on the merits were significant, sometimes momentous, such that the Court’s attention was surely directed toward substance rather than standing. Several of the early cases were abortion cases, and one of the others was the campaign finance landmark *Buckley v. Valeo*,<sup>261</sup> which was decided under unusually rushed circumstances.<sup>262</sup>

In sum, the Supreme Court’s creation and propagation of the one-plaintiff rule has not been particularly thoughtful or deliberate. As such, the rule should not enjoy the respect the Court ordinarily accords its precedents.

#### *E. What Courts Should Do in Multiple-Plaintiff Cases with Doubtful*

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260. *Doe v. Bolton*, 410 U.S. 179, 189 (1973). This passage is followed by a citation to *Roe v. Wade*, 410 U.S. 113 (1973), but that case did not apply the one-plaintiff rule. Rather, the Court found that plaintiff Roe had standing and then went on to rule that the Does, a married couple who also sued, lacked standing. *Id.* at 127–29.

261. *Buckley v. Valeo*, 424 U.S. 1 (1976).

262. See Richard L. Hasen, *The Untold Drafting History of Buckley v. Valeo*, 2 ELECTION L.J. 241, 242 (2003) (describing the “rushed drafting by committee” that characterized the *Buckley* opinion).

*Standing*

Let us suppose that the Supreme Court sees the light and repudiates or seriously limits the one-plaintiff rule. How, in that new regime, should courts assess standing in multiple-plaintiff cases? The basic rule is simple: courts need to assess the standing of all plaintiffs rather than effectively assuming the standing of every plaintiff upon finding that one plaintiff has standing. To be clear, a court should not dismiss a case in its entirety if it finds that some but not all plaintiffs lack standing. Just as one plaintiff's standing should not transfer to another plaintiff, neither should one plaintiff's lack of standing undermine the standing of another plaintiff and bar an injured party from the courts. What should happen is that the court should proceed to the merits only with regard to the proper plaintiff(s), dismissing the other(s).

The approach just stated is simple enough, but its proper implementation varies according to the circumstances. In particular, the rule works a bit differently in different courts, so we should separately consider the mechanics in the district courts, courts of appeals, and Supreme Court.

1. *The Supreme Court.* For the Supreme Court, it should be simple to do the right thing. The discretionary character of the Court's docket provides ample opportunities to honor the requirements of Article III standing without causing the Court inconvenience.

To begin with, the Court can reduce the need for the one-plaintiff rule through its choices at the certiorari stage. Questions that are worth a place on the Court's docket rarely appear in only one case. When deciding whether a particular multiple-plaintiff case presents the best vehicle for reviewing a particular legal question, the Court could consider whether the standing of all plaintiffs is secure.

Once the Court has granted certiorari, it has several options. Most obviously, it could consider the standing of all parties and dismiss those found to lack standing, as it sometimes does already.<sup>263</sup> One virtue of this approach is that it would provide litigants and lower courts additional guidance on close matters of standing. (Of course, the Court may not want to provide such guidance, either because it wishes to preserve its own future flexibility or because it does not regard the time

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263. See *supra* note 19 and accompanying text (citing examples of the Court doing this).

as well spent.)

But the Court need not undertake a per-plaintiff inquiry if that would be inconvenient. If the Court determines that one party has standing, the Court could decide the merits as to that party and could remand for further consideration of the other plaintiffs' standing—an approach that would be especially appealing if the Court is going to remand for other reasons anyway. The proceedings on remand might not actually occur: if the Court reaches the merits as to any party and creates nationwide precedent, issues involving other plaintiffs would typically be settled without further judicial involvement. That would almost certainly be true when the case involves injunctive relief against a government defendant.

Finally, the Court could dismiss certiorari as improvidently granted (DIG) as to the troublesome plaintiffs. A dismissal does not amount to an adjudication even of standing, let alone of the merits, but simply leaves the dismissed matter as it was had certiorari never been granted.<sup>264</sup> That would mean leaving in place a decision the correctness of which the Court is not certain, but of course the Court does that all the time by denying certiorari outright in the vast majority of cases that are brought to its attention.

2. *Courts of Appeals.* As before, the basic rule is that the court may not decide the merits as to a particular party when that party's standing remains unresolved. One obvious disposition, which courts sometimes use already, is to decide the standing of all plaintiffs, order the dismissal of those who lack it, and decide the merits as to those who have it.<sup>265</sup> Yet other options are available too, for courts have some flexibility regarding when and how a question of standing is taken up.<sup>266</sup> Especially when a fact-intensive issue of standing is raised for the first

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264. See generally Michael E. Solimine & Rafael Gely, *The Supreme Court and the DIG: An Empirical and Institutional Analysis*, 2005 WIS. L. REV. 1421 (discussing the Supreme Court's DIG practice). Although a DIG usually dismisses the whole case, the Court can DIG part of a case but not all of it. See *id.* at 1434. A different procedural route to a similar outcome is illustrated by *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999). The Court had before it two appeals from different lower courts that had been consolidated for oral argument. After resolving the merits of one of the cases, the court dismissed the other appeal because that case "no longer present[ed] a substantial federal question." *Id.* at 344. That second appeal involved serious questions as to standing, as the plaintiff was the House of Representatives.

265. See, e.g., cases cited *supra* notes 19, 45.

266. See generally Justin Pidot, *Jurisdictional Procedure*, 54 WM. & MARY L. REV. 1 (2012) (discussing various ways that courts deal with jurisdictional questions that arise on appeal).

time on appeal, the appellate court might remand the question of the standing of one or more plaintiffs to the district court for that court to consider standing in the first instance.<sup>267</sup> There is no apparent barrier to a mixed disposition in which a court of appeals decides the merits as to a party it finds to have standing and remands for further investigation into the standing of others. In many such cases, no further proceedings would take place, as the parties would voluntarily resolve the case in light of the merits ruling occasioned by the proper plaintiff's claim. Thus can some of the efficiency benefits of the one-plaintiff rule often be had, and without violating Article III.

3. *District Courts.* For every plaintiff as to whom the opposing party has raised a genuine question regarding standing, or as to whom standing looks questionable to the court even without any objection from the opposing party, the court must look into the issue and decide whether standing is proper. In other words, the court should be as vigilant about standing in multiple-plaintiff cases as it would be in a single-plaintiff case.<sup>268</sup>

The duty to resolve a question of standing does not mean that a district court must decide on the standing of all parties the moment a question about standing appears. In single-plaintiff cases, although standing is a threshold issue that the court must not ignore, a district court need not follow a rigid timetable for deciding standing. If a court is unable to resolve a standing question when it initially presents itself, the court may order discovery or additional briefing on the matter.<sup>269</sup> A district court might rule that one party has standing but rule that the

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267. One might wonder whether a court of appeals has jurisdiction to order a remand when standing, and thus its own jurisdiction, is questionable. A court has jurisdiction to determine its jurisdiction. *United States v. Ruiz*, 536 U.S. 622, 628 (2002). Likewise, it has at least enough jurisdiction to remand to the district court for that court to determine its jurisdiction. *E.g.*, *Belleri v. United States*, 712 F.3d 543, 549 (11th Cir. 2013); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 263 F. App'x 348, 356 (4th Cir. 2008).

268. As in a single-plaintiff case, the court can in certain circumstances dismiss a plaintiff's claim for threshold nonmerits reasons without satisfying itself of subject-matter jurisdiction. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430–31 (2007); *supra* notes 207–09 and accompanying text (discussing exceptions to *Steel Co.*'s “jurisdiction first” rule).

269. *See* 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350, at 250–55 (3d ed. 2004). Joshi and Professor Redish argue that judges should resolve questions of standing as soon as possible, even when there are factual disputes over standing that overlap with determinative questions on the merits. Redish & Joshi, *supra* note 195, at 1388. I am not sure I would push so hard to have judges decide such overlapping questions. But I agree with them that courts should not pretermitt standing completely, which is what the one-plaintiff rule does.



standing of other parties requires further factual or legal development. A ruling that at least one party has standing may well be enough to encourage the other plaintiffs to voluntarily dismiss their claims or cause the defendant to settle the case. Knowing that a ruling on only one plaintiff's standing could have such effects on the parties, a settlement-minded district judge might telegraph during a hearing or status conference that such a ruling is forthcoming. A further bit of flexibility comes from the fact that an initial ruling on standing that is made with only limited time and information, such as when ruling on interim relief, can be revisited later.<sup>270</sup>

4. *The Special Case of Class Actions.* Recall the dispute over whether absent class members must have standing.<sup>271</sup> Despite the constitutional garb in which the issue is often clothed, most of the issues surrounding the standing of class members are actually better understood as questions about whether a class should be certified and how the class should be defined, questions that involve Rule 23 and substantive law more than they involve Article III.<sup>272</sup>

Consider a damages case in which a class alleges that the defendant misrepresented the features of a product. If the proposed class is to be defined as all purchasers of the product, then the defendant might object that the proposed class would violate Article III because some members were not injured by the defendant's misrepresentations.<sup>273</sup> But suppose that the substantive law effectively presumes reliance through a representation's effect on the market price, as in "fraud on the market" securities cases.<sup>274</sup> Or suppose that all members of the class were exposed to the same objectively deceptive representations about the product and that an individual plaintiff could win under a state consumer protection law without

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270. See, e.g., *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 516 (4th Cir. 2003) (ruling that the district court should have revisited its initial ruling on standing after further factual development).

271. See *supra* Part I.B.1.

272. See 1 RUBENSTEIN, *supra* note 67, § 2:3 (explaining that questions about the standing of class members have caused confusion in the courts and that "[m]ost courts concerned about the standing of absent class members are in fact concerned about whether the class is properly defined").

273. E.g., *Petition for Writ of Certiorari, Wells Fargo Bank, N.A. v. Gutierrez*, 136 S. Ct. 1512 (2016) (No. 14-1230), 2015 WL 1642015 (presenting an argument along these lines).

274. See *Basic Inc. v. Levinson*, 485 U.S. 224, 241-47 (1988).

testifying that he or she actually relied on the representations.<sup>275</sup> In both of those cases, the defendant does not have a good Article III standing argument, because the substantive law controls the elements of the claim.<sup>276</sup> Consider by way of contrast a scenario in which actual reliance is an element of the claim and varying oral representations were made by hundreds of individual salespeople. In that case, the defendant has a good argument against certification of a class—because the variations in the putative class members’ circumstances make certification improper in light of Rule 23’s requirements of commonality, typicality, and predominance.<sup>277</sup>

Or take the case of a group of purchasers of a defectively designed or manufactured product that has manifested its defect in only a small number of cases. The proposed class is composed of all purchasers of the product. The defendant might assert an Article III objection because the class contains “uninjured” members. But, again, whether purchasers are injured depends on the applicable substantive law, which could require only the purchase of a product containing a value-impairing defect despite absence of manifestation. If the substantive law instead requires further injury beyond purchase of the product and purchasers have varying experiences with the product, then a class composed of all purchasers is probably inappropriate. A more narrowly defined class could be perfectly acceptable on Article III and Rule 23 grounds.

The controversy over the one-plaintiff rule has mostly arisen in class actions in which damages are sought. Other types of cases, such as Rule 23(b)(2) injunction class actions, should present less difficulty. In a school-desegregation case, to pick a classic 23(b)(2) scenario, all of the plaintiffs are relevantly affected by the defendant’s actions in the same way, so one brief standing analysis could easily cover all of the plaintiffs. That Article III requires all plaintiffs to have standing does not, however, mean that Article III requires that all plaintiffs in a case have the *same* injury. If, to use another example, different categories of prisoners are affected by different prison deficiencies, then the proper course of action might be to have multiple classes or subclasses

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275. See, e.g., *In re Tobacco II Cases*, 207 P.3d 20, 38–41 (Cal. 2009).

276. The Supreme Court could limit legislatures’ ability to define such claims (on Article III or due process grounds), but in that case no plaintiff would be able to sue on such a claim, whether individually or as a class representative or as a class member. The one-plaintiff rule would not be involved.

277. FED. R. CIV. P. 23(a)(2)–(3), (b)(3).

with separate representatives. But that result is required, if it is required at all, by Rule 23 rather than by Article III.<sup>278</sup>

5. *The Special Case of Prudential Standing.* In addition to the requirements of Article III, there are “judicially self-imposed,” “prudential” limits on standing.<sup>279</sup> As compared to the Article III standing requirements, the prudential requirements are avowedly more flexible and more responsive to the demands of good sense under the circumstances.<sup>280</sup> Although the one-plaintiff rule is not appropriate when it comes to Article III standing, it is acceptable for at least some kinds of prudential standing.

An example of the use of the one-plaintiff rule to bypass an inquiry into prudential standing comes from *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>281</sup> In that case, a housing developer’s plan to build a low- and moderate-income housing project was thwarted by a local government’s zoning decision. The developer satisfied the constitutional standing requirements.<sup>282</sup> One of the developer’s claims was that the government’s zoning decision was unconstitutionally arbitrary and irrational.<sup>283</sup> The more promising claim, however, was that the zoning decision was racially discriminatory, and that was a claim that the developer, as a corporate entity with no racial identity, could not raise on its own behalf.<sup>284</sup> Were the developer the only plaintiff, the Court would need to consider whether, despite the prudential rule disfavoring third-party standing, the developer should nonetheless be allowed to raise the equal-protection rights of its prospective minority tenants. But the Court did not need to undertake that prudential standing analysis. The Court had before it “at least one individual plaintiff who has demonstrated standing to assert these [equal-protection] rights as his own”—namely, an African-American co-plaintiff interested in living in the planned development.<sup>285</sup> Satisfied that the constitutional and prudential

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278. See FED. R. CIV. P. 23(c)(5) (providing for subclasses); see also 4 RUBINSTEIN, *supra* note 67, § 4:34 (discussing whether “cohesiveness” is required in (b)(2) class actions).

279. *Allen v. Wright*, 468 U.S. 737, 750–51 (1984).

280. See *United States v. Windsor*, 133 S. Ct. 2675, 2686–89 (2013); *Craig v. Boren*, 429 U.S. 190, 193–94 (1976).

281. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

282. *Id.* at 261.

283. *Id.* at 263 (citing, *inter alia*, *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

284. *Id.* at 263.

285. *Id.* at 263–64. In addition, and more problematically, the Court in *Village of Arlington*

prerequisites were satisfied, the Court then reached the merits and rejected the plaintiffs' constitutional claims.<sup>286</sup>

The Court's decision to bypass the developer's prudential standing was permissible even under the theory urged in this Article. The policy considerations that animate the usual limitations on third-party standing—in particular, worries about unnecessary judicial decisions and lack of concrete adverseness<sup>287</sup>—had no application in the case at hand. Indeed, in light of the flexible nature of the prudential standing limitations, courts facing multiple-plaintiff cases with third-party standing issues could go further than just bypassing the prudential analysis for extra plaintiffs. Instead, a court might justifiably decide that all plaintiffs affirmatively satisfy the prudential requirements *because* one plaintiff satisfies them, as long as the extra plaintiffs' presence in the case would not add any complications.

The example above concerns the third-party standing strand of prudential standing; the analysis for other forms of prudential standing is different, if indeed those other forms still exist. The Supreme Court recently held that the supposedly prudential doctrine requiring that a plaintiff fall within the “zone of interests” protected by a statute is not a standing doctrine at all, prudential or otherwise, but is instead just the *merits* question whether the statute, properly construed, confers a cause of action on a person like the plaintiff.<sup>288</sup> So conceived, it seems inescapable that a court cannot go ahead and grant relief to a party without a cause of action just because a co-plaintiff does have a cause of action. As for the “generalized grievance” branch of prudential standing, it may be that some cases in that category actually involve Article III abstractness problems.<sup>289</sup> In any event, there would be little role for the one-plaintiff rule in this kind of case, as it should not often happen that one plaintiff's grievance is too generalized to satisfy the prudential requirement while a co-plaintiff's grievance is not, for the one-plaintiff rule applies only when the plaintiffs present the same legal issues.<sup>290</sup>

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*Heights* also assumed that still other plaintiffs had standing, this time apparently of the Article III variety. *Id.* at 264 n.9.

286. *Id.* at 270.

287. See 13A WRIGHT ET AL., *supra* note 59, § 3531.9, at 662–72 (describing the policies behind the prudential rule against raising the rights of others).

288. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386–88 (2014).

289. See *id.* at 1387 n.3.

290. See *supra* Part I.B.3.

#### IV. HOW THIS MISTAKE HAPPENED (AND WHAT IT REVEALS)

If the one-plaintiff rule is so wrong, how did it come to seem so right to so many courts, with only a few courts questioning it? Some explanations have already surfaced: the Supreme Court has never really thought the issue through, and the rule is usually applied in cases in which its consequences are not immediately visible to courts, especially for appellate courts removed from the practicalities of remedies.<sup>291</sup> Beyond those general explanations, there are a few factors that help to explain why the one-plaintiff rule in particular could arise. The spread of the one-plaintiff rule can plausibly be explained as the result of two kinds of factors, one material and one ideological. More specifically, the fault lies with the incentives of courts and litigants on the one hand and with problematic features of our contemporary legal culture on the other.

##### A. *Institutional Incentives*

Part of the explanation for the one-plaintiff rule's advent and persistence is that actors in the legal system have some incentives to perpetuate it and too few incentives to correct it.

1. *Judicial Self-Interest.* The one-plaintiff rule serves the interests of courts, though it does so differently for the Supreme Court and the lower courts. For all of the Supreme Court's talk about the role of constitutional standing as a "fundamental," "crucial," irreducible restriction on judicial power,<sup>292</sup> the Court's actions show that its greater interest—at least when it comes to its own docket—is to pronounce on the pressing legal issues of the day. The cases in which the Supreme Court has invoked the one-plaintiff rule have almost never been only about standing. Rather, the cases have discussed standing on the way to resolving the merits issue that attracted the Court's attention, often a merits issue involving sensitive matters like abortion or race. When one is focused on resolving the merits of a great public controversy, it must be tempting indeed to sidestep thorny questions of standing that do not seem to make a practical difference to the impact of the ruling.<sup>293</sup>

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291. See *supra* Part I.B.1–2.

292. E.g., *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

293. Cf. H.W. PERRY, *DECIDING TO DECIDE* 107 (1991) (noting that the Court sometimes "skip[s] over jurisdictional problems quite cavalierly" rather than addressing them or dismissing

Lower courts, for their part, labor under a heavy workload; they cannot simply deny certiorari as a way of managing their dockets.<sup>294</sup> For them, there are obvious and understandable incentives to avoid undertaking difficult, time-consuming inquiries, especially when it appears that resolution of an issue will not affect the outcome on the merits.<sup>295</sup> In various contexts, therefore, the lower courts have sought decisionmaking shortcuts even when the Supreme Court has tried to prohibit them.<sup>296</sup> Through the one-plaintiff rule, the Supreme Court has officially licensed a shortcut, so it is not surprising to see the lower courts embrace it with gusto.

2. *Litigants' Incentives To Disregard Standing.* The typical case in which the one-plaintiff rule is invoked is one in which plaintiffs challenge the legality of some governmental policy and seek declaratory and injunctive relief. Governmental defendants in such scenarios often lack the incentive to challenge plaintiffs' standing at all, let alone the standing of additional plaintiffs when one plaintiff has standing.

Consider the situation in which all plaintiffs in a given case may well lack standing but some potential plaintiffs somewhere probably have it. In *King v. Burwell*, the 2015 case challenging the availability of subsidies under the Affordable Care Act, there were serious doubts about the standing of most of the plaintiffs, perhaps all of them.<sup>297</sup> Let us suppose that careful investigation would have shown that none of the plaintiffs had standing. Still, the government would have little incentive to seek dismissal on that ground. Plenty of other potential plaintiffs throughout the country certainly had standing to challenge

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certiorari as improvidently granted).

294. See Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 865–68 (2014).

295. Cf. Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 305–14 (1999) (discussing factors that contributed to the popularity of hypothetical jurisdiction).

296. See, e.g., *Campiti v. Matesanz*, 333 F.3d 317, 321–22 (1st Cir. 2003). The court in *Campiti* explained:

Only as a last resort should the circuit courts read Supreme Court decisions to create . . . mandatory [sequencing] priorities. A circuit court judge may, in an average circuit, be responsible for 50 full-scale opinions a year and may vote on several hundred merits cases. . . . Anything that precludes judges from taking the shortest distance to a result impairs their ability to give truly difficult cases the time they require.

*Id.*

297. See Bagley, *supra* note 12; Weiner, *supra* note 12.

the subsidies, and, win or lose, the government had an interest in obtaining the Supreme Court's definitive resolution of the subsidies' legality.

Even more clearly, government defendants ordinarily have little or no incentive to seek dismissal of uninjured plaintiffs when at least one plaintiff clearly has standing. That is because the government will often give the benefit of a pro-plaintiff ruling to all persons, whether they were parties or not. That is most obviously the case when the decision comes from the Supreme Court. Today it is only barely conceivable that government officials would treat a Supreme Court decision as applicable only to the named plaintiffs while continuing to act on their own contrary understanding of the law as to all other persons similarly situated.<sup>298</sup> Even when a decision comes from a lower court, government officials will often acquiesce in rulings that they (at least officially) opposed, choosing to give the ruling a power not required by its judgment, which is limited to the parties, or even by its precedential effect, which is especially limited for district court decisions.<sup>299</sup> Government officials may act this way for a variety of reasons: because they find the court's reasoning convincing, because they predict that future cases will come out the same way, because they misunderstand the limited force of the decision, or because they wish to use the court's ruling as an excuse to let them follow preferences that differ from their constituents' wishes.

Now, to be sure, the incentives to challenge standing are very different in certain other contexts. In class actions seeking damages, defendants have a strong incentive to litigate vigorously on all fronts, including by casting their objections in constitutional and jurisdictional terms so as to make them seem more urgent. And so it is not surprising that the one-plaintiff rule has encountered opposition in the class

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298. *But see* William Baude, *Could Obama Bypass the Supreme Court?*, N.Y. TIMES, March 17, 2015, at A27 (arguing that the Obama administration was not required to obey a potential adverse ruling in *King v. Burwell*, and should not do so, with respect to people besides the plaintiffs in the case). What is much more common is for actors who dislike a Supreme Court ruling to give the Court's holding a narrow scope even if they do not question the decision's applicability beyond the parties.

299. *See, e.g.*, Blackman & Wasserman, *supra* note 149, at 257–72 (discussing state and local officials' voluntary compliance with lower court rulings on same-sex marriage); *cf.* Galvan v. Levine, 490 F.2d 1255, 1261–62 (2d Cir. 1973) (explaining that class certification was properly denied as unnecessary where the government defendant would apply the ruling to all persons similarly situated).

context, as discussed earlier.<sup>300</sup>

### B. Culture

The development of the one-plaintiff rule also reflects and reveals certain features of contemporary legal culture, more specifically certain views about the nature of judicial power and our tendency to take the Supreme Court as the model for all courts.

The success of the one-plaintiff rule reflects the ascendance of a particular view of the judicial role. Academic debate still rages over the desirability of different versions of judicial supremacy on the one hand and departmentalism on the other.<sup>301</sup> The basic question in that debate involves the power of a judicial ruling, rooted in a dispute between particular parties, to settle the law for all persons and places. Despite the continuing academic debate, judicial supremacy today controls most of the territory, especially in the minds of judges, such that the question is just how far it will triumph. Similarly, it is widely acknowledged that the Supreme Court has been moving ever closer to embodying the law-declaration model of the judicial function and eschewing the more modest dispute-resolution function.<sup>302</sup> The Court accordingly cares little for the particulars of the factual circumstances and potential remedies applicable to the specific litigants before it. The joint rise of judicial supremacy and the law-declaration model means that the Supreme Court promulgates directives on national law that are regarded as final and binding with respect to all potential disputes within their scope. Both of these developments have in common the erosion of the distinction between party and nonparty status. The one-plaintiff rule, as already observed, relies on the breakdown of that same distinction.<sup>303</sup> If parties and nonparties alike are bound or benefitted by a decision announcing national law, it makes little sense to be careful

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300. *Supra* Part I.B.1.

301. *See, e.g.*, Symposium, *Judicial Supremacy vs. Departmentalism*, 58 WM. & MARY L. REV. 1433 (2017).

302. *See* Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1952–53 (2016); Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 668–69 (2012); *see also* Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 56–59 (2009) (arguing that law declaration is the proper approach for the modern Supreme Court); Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 432–38 (describing the Supreme Court’s “Olympian” posture). For further discussion of these two aspects of adjudication, *see supra* notes 118–20 and accompanying text.

303. *See supra* Part II.



about sorting the one from the other.

That the one-plaintiff rule should go unquestioned in the Supreme Court is not especially surprising given the Court's lawmaking role, but, in the nature of things, the vast majority of cases invoking the rule come from the lower courts. In the lower courts, the distinction between party and nonparty is more consequential because the precedential effect of lower court rulings is geographically limited or nonexistent.<sup>304</sup> The one-plaintiff rule should therefore be more obviously problematic in those courts. That the one-plaintiff rule has been embraced even in the lower courts suggests that the lower courts increasingly see their role in law-declaration terms.

The nearly unquestioned acceptance of the one-plaintiff rule is of a piece with other developments signaling the relative erosion of the dispute-resolution model in the lower courts. The use of the one-plaintiff rule dovetails, for example, with the relatively recent practice of district courts regularly granting nationwide injunctions barring the federal government from enforcing a statute or policy against any person anywhere in the country.<sup>305</sup> More generally, it has become common to hear talk of lower courts "striking down" a law in whole or in part as a remedy for a constitutional defect.<sup>306</sup> It would be more precise, not to mention judicially modest, to say that a court has held that a law cannot validly be applied to the plaintiff(s) before the court. Commentators have long observed that any public-law case before the Supreme Court is, even when prosecuted by a single plaintiff, functionally similar to a class action.<sup>307</sup> The one-plaintiff rule is symptomatic of the slide toward a world in which all cases against the government have this class-like cast, even in the district courts.

#### CONCLUSION

The one-plaintiff rule has been accepted into the mainstream of federal practice with little notice. It is understandable that the rule should spread, for its effects are often hard to see and, partly for that

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304. See *supra* notes 121–22 and accompanying text.

305. See *supra* notes 148–51 and accompanying text (describing and criticizing this practice).

306. See Bray, *supra* note 16 (manuscript at 43–44) (observing this tendency and linking it to the rise of nationwide injunctions); cf. Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 755–57 (2010) (distinguishing between the historic concept of displacing repugnant law and the modern notion of striking down law).

307. See Miller, *supra* note 122, at 574.

reason, litigants and courts often have little incentive to object to the rule. Further, the rule's acceptance makes sense when one considers that it stands comfortably alongside other relatively recent developments, like routine nationwide injunctions, that reflect and reinforce notions of judicial power that emphasize law declaration over retail-level dispute resolution. But even if the one-plaintiff rule's acceptance is understandable, the rule is wrong, and, if one looks more closely, it is wrong in consequential ways. Courts should stop using it.

APPENDIX: SUPREME COURT CASES INVOKING THE ONE-PLAINTIFF  
RULE

Case name and citation	Did parties granted supplemental standing win <sup>308</sup> on the merits in the Supreme Court?
Town of Chester, N.Y. v. Laroe Estates, Inc., 137 S. Ct. 1645 (2017)	N/A
Horne v. Flores, 557 U.S. 433, 446–47 (2009)	Yes
Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 189 n.7 (2008)	No
Massachusetts v. EPA, 549 U.S. 497, 498 (2007)	Yes
Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 52 n.2 (2006)	No
Cutter v. Wilkinson, 544 U.S. 709, 712 n.1 (2005) (mootness)	Yes
McConnell v. FEC, 540 U.S. 93, 233 (2003)	Yes
Bd. of Educ. v. Earls, 536 U.S. 822, 826 n.1 (2002)	No
Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 330 (1999)	Yes
Clinton v. City of New York, 524 U.S. 417, 431 n.19 (1998)	Yes

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<sup>308</sup> A “win” includes cases in which the supplemental-standing parties prevailed in part, even if they also lost in part. *Town of Chester* is the only case in which the Court considered only standing and not the merits.

Lee v. Weisman, 505 U.S. 577, 584 (1992)	Yes
Dep't of Labor v. Triplett, 494 U.S. 715, 719 (1990)	Yes
Pennell v. City of San Jose, 485 U.S. 1, 8 n.4 (1988)	No
Bowen v. Kendrick, 487 U.S. 589, 620 n.15 (1988)	Yes
Bowsher v. Synar, 478 U.S. 714, 721 (1986)	Yes
Sec'y of the Interior v. California, 464 U.S. 312, 319 n.3 (1984)	No
Dir., Office of Workers' Comp. Programs v. Perini N. River Assocs., 459 U.S. 297, 305 (1983)	Yes
Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 403 n.22 (1982)	No
Watt v. Energy Action Educ. Found., 454 U.S. 151, 160 (1981)	No
Babbitt v. United Farm Works Nat'l Union, 442 U.S. 289, 299 n.11 (1979)	No
Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 377 n.14 (1978)	No
Carey v. Population Servs., Int'l, 431 U.S. 678, 682 (1977)	Yes
Whalen v. Roe, 429 U.S. 589, 595 n.14 (1977)	No
Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264 n.9 (1977)	No
Bellotti v. Baird, 428 U.S. 132, 139 n.9 (1976)	No

Buckley v. Valeo, 424 U.S. 1, 12 (1976)	Yes
Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 44 (1974)	No
Doe v. Bolton, 410 U.S. 179, 189 (1973)	Yes
Baggett v. Bullitt, 377 U.S. 360, 366 n.5 (1964)	Yes