NOTE

PARTIES OR NOT?: THE STATUS OF ABSENT CLASS MEMBERS IN RULE 23 CLASS ACTIONS

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When should absent class members—individuals who are bound by and share in a class recovery but who are not active participants in the litigation—be treated as "parties" in Rule 23 class actions? This simple question has confused courts and litigants almost since the initial conception of the class action device. In 1983, then-Professor Diane Wood introduced the joinder and representational models to classify approaches to this question in her now-seminal article. The joinder model treats absent class members as parties to the litigation at all times, while the representational model presumes only the named plaintiffs are parties to the case itself. At various moments, the Supreme Court has expressed exclusive support for the representational approach, exclusive support for the joinder approach, and a preference for a balanced approach which treats absent class members as parties for some procedural issues if not for others. Through the lens of the joinder and representational models, this Note clarifies the decisions courts are making when assessing the procedural rights of absent class members, and ultimately suggests that the status of absent class members should depend on the procedural right being asserted.

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INTRODUCTION

When a lawsuit proceeds as a class action, how should we think about the "absent" members of the class—people who might share in the relief that the court awards, and who are also at risk of being bound by an adverse judgment, but who are not named and are not actively participating in the suit? In a classic 1983 article, then-Professor (now Judge) Diane Wood argued that courts had unknowingly been using two different approaches, which she called the "joinder" model and the "representational" model.[1] Broadly, the joinder model treats all members of the class as full parties to the litigation, whether or not they are named and actively participating.[2] On that view, the court would need to consider the absent members of the class when answering threshold questions about jurisdiction or venue, and the absent members of the class would also have all the rights and obligations of parties as the case proceeds.[3] By contrast, the representational model treats only the named members of the class as parties to the litigation for procedural purposes; the named members are considered to be representing absent class members throughout the litigation, but the absent class members whom they represent are not actually parties to the case.[4]

[1] Diane Wood Hutchinson, Class Actions: Joinder or Representational Device?, 1983 Sup. Ct. Rev. 459, 459. Judge Wood now serves as a senior judge on the U.S. Court of Appeals for the Seventh Circuit.

[2] Id.

[3] Id.

[4] Id. at 460.

For a simplified example of the distinction, imagine a plaintiff class action in which the named plaintiffs are all citizens of State *A*, but some of the absent class members are citizens of State *B*. If the defendant is a citizen of State *B*, then whether the suit qualifies for diversity jurisdiction under 28 U.S.C. § 1332(a) depends on whether the absent class members are regarded as additional plaintiffs. The joinder model would deny diversity jurisdiction in this case because some of the plaintiffs are citizens of the same state as the defendant, while the representational model would grant diversity jurisdiction (assuming that the amount in controversy requirement is satisfied) because the representational model is only concerned with the named parties.

The models can produce equally stark differences on questions that might arise as the suit proceeds. For example, in a major consumer protection lawsuit against the at-home exercise company Peloton, the joinder model would permit the district court to allow all forms of discovery against its, at the time, estimated 3.1 million subscribers to the platform,[5] while the representational model would only permit interrogatories or requests for admission to be levied against the named class members.[6] Or, the joinder model would require all absent class members to consent to adjudication by a magistrate rather than a district court judge, while the representational model would only require the named plaintiffs to consent.[7] These different treatments for absent class members can have major practical impacts on class action litigation in whether suits can be brought in federal court and, when they are, what absent class members are required to do.

Judge Wood herself advocated for using the representational model. In her view, applying that model across the board would best promote two goals of class actions: to provide efficiency for litigants and to act as a

[5] Lauren Thomas, Peloton Thinks It Can Grow to 100 Million Subscribers. Here's How, CNBC (Sept. 15, 2020, 2:29 PM), https://www.cnbc.com/2020/09/15/peloton-thinks-it-can-grow-to-100-million-subscribers-heres-how.html [https://perma.cc/D2VF-3FZ4].

[6] Cf. Fishon v. Peloton Interactive, Inc., 336 F.R.D. 67, 74 (S.D.N.Y. 2020) (permitting limited deposition of absent putative class members). Some discovery devices, such as requests for admissions and interrogatories, can only be directed at parties to the lawsuit. See, e.g., Fed. R. Civ. P. 33 (interrogatories); Fed. R. Civ. P. 36 (requests for admissions). Parties can aim other discovery mechanisms, such as depositions or subpoenas at parties and non-parties alike. See, e.g., Fed. R. Civ. P. 30 (oral depositions); Fed. R. Civ. P. 45 (subpoenas).

[7] See, e.g., Dewey v. Volkswagen Aktiengesellschaft, 681 F.3d 170, 180–81 (3d Cir. 2012) (holding that unnamed class members are not parties for purposes of consenting to adjudication by a magistrate judge).

"private attorney-general" enforcement mechanism.[8] Since the publication of her article, however, the Supreme Court has struck different notes.[9] For example, in *Martin v. Wilks*, the Supreme Court presumed the representational model applied, labeling the class action as a "certain limited circumstance[]" where "a person, although not a party, has his interests adequately represented by someone with the same interests who is a party."[10] By contrast, Justice Scalia's plurality opinion in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.* described the class action as a straightforward "joinder" device that "merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits."[11] And, in 2002, Justice O'Connor's majority opinion in *Devlin v. Scardelletti* asserted that "[n]onnamed class members . . . may be parties for some purposes and not for others."[12]

How courts should characterize absent class members bears on many continuing controversies. For example, after the Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California*,[13] most lower courts have followed *Devlin*'s approach to confirm that, even if absent class members are parties for some purposes, they are not parties necessary to determine whether the court has personal jurisdiction over

[8] Wood Hutchinson, supra note 1, at 480.

[9] Even before Judge Wood's article, Justice Stevens's concurring opinion in *Deposit Guaranty National Bank v. Roper* noted that "[t]he status of unnamed members of an uncertified class has always been difficult to define accurately." 445 U.S. 326, 343 n.3 (1980) (Stevens, J., concurring). In *Roper*, Justice Stevens suggested that absent parties be conceived of as parties for some procedural purposes even if they are not for others. Id. Justice Powell's dissent strongly disagreed with this statement, arguing that Justice Stevens cited no authority to support his position and provided no explanation "as to how a court is to determine when these unidentified 'parties' are present." Id. at 358 n.21 (Powell, J., dissenting). This Note attempts to propose a solution to Justice Powell's concern.

[10] 490 U.S. 755, 762 n.2 (1989); see also Taylor v. Sturgell, 553 U.S. 880, 894 (2008) (agreeing with this characterization of class actions).

[11] 559 U.S. 393, 408 (2010) (plurality opinion).

[12] 536 U.S. 1, 9–10 (2002). One might find it curious that Justice Scalia wrote the dissent in *Devlin* arguing for a representational approach as he would later write the majority opinion in *Shady Grove*, which called a class action a species of "traditional joinder." *Shady Grove*, 559 U.S. at 408. In dissent, he wrote that the majority's decision to permit both the joinder and the representational model "abandons the bright-line rule that only those persons named as such are parties to a judgment, in favor of a vague inquiry 'based on context.'" *Devlin*, 536 U.S. at 20 (Scalia, J., dissenting).

[13] 137 S. Ct. 1773 (2017).

the defendant.[14] As recently as June 2021, however, the Court seemed to follow Justice Scalia's characterization of the class as a "joinder" device when it concluded that all absent class members need to demonstrate standing in order to recover damages.[15] It follows that under what circumstances absent class members should be considered parties remains a live issue almost forty years after Judge Wood's initial article. The Court itself has not offered consistent guidance on the status of absent class members, and its recent decisions on personal jurisdiction and standing have acutely raised these questions for lower courts.[16] The time is right to both clarify the choice lower courts will be making in these determinations and to suggest a new path forward considering the changes from the past forty years.

This Note identifies the contours of the question for various procedural doctrines, and, ultimately, suggests that *Devlin*'s approach of considering absent class members as parties for some purposes but not for others is preferable to a strict joinder or representational approach. Judge Wood's article, which advocated for a more rule-like approach to the representational model, focused primarily on the jurisdiction and justiciability doctrines that govern absent class members' access to federal courts.[17] When broadening the scope of procedural doctrines that affect absent class members during litigation, such as discovery or counterclaims, this Note contends that a more balanced approach would better vindicate the efficiency and private attorney general functions of the class action device. Writing now with the benefit of *Devlin*'s statement that absent class members may be treated differently for different purposes, a less rule-like approach is not only preferable but possible.

Part I of this Note explains in detail the differences between the representational and joinder models and Judge Wood's reasons for

[14] See, e.g., Mussat v. IQVIA, Inc., 953 F.3d 441, 447–48 (7th Cir. 2020); Al Haj v. Pfizer Inc., 338 F. Supp. 3d 815, 820 (N.D. Ill. 2018). Not all courts have interpreted *Bristol-Myers Squibb* in this way. For more, see infra Subsection II.A.2.

[15] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207–08 (2021). Notably, the Court reserved judgment on "whether every class member must demonstrate standing *before* a court certifies a class." Id. at 2208 n.4. For further discussion on this question, and whether this actually implicates the representational model, see infra Subsection II.A.3.

[16] See infra Subsection II.A.2 (personal jurisdiction); infra Subsection II.A.3 (standing).

[17] See Wood Hutchinson, supra note 1, at 478 ("The characteristics that would lead a court to treat a class action as a glorified joinder device or as a true representational action are different. Those characteristics are 'procedural' in this sense: They establish one's right to sue in a federal court on the substantive claim, rather than in a state court.").

expressing a preference for the representational model. Part II surveys post-1983 doctrine in certain procedural issues implicating the joinder and representational models in class actions. While, for the most part, courts have continued to use the representational model to conceive of absent class members, there are some areas in which Congress and the courts have shifted towards a more joinder-based approach. Part III evaluates why *Devlin*'s approach of treating absent class members differently based on context is preferable to following the representational model in all areas. Ultimately, it suggests that the joinder model is valuable for some litigation conduct but that the representational model continues to be a valuable way to conceive of access to federal courts for class action procedures.

I. JUDGE WOOD'S SEMINAL ARTICLE: CLASS ACTIONS: JOINDER OR REPRESENTATIONAL DEVICE?

This Part surveys Judge Wood's article which first recognized the joinder and representational models. Understanding her initial construction of the two models and the basis for her ultimate conclusion that courts should apply the representational model is essential to understanding what approach courts have taken since her article and whether using only the representational model remains sound. Judge Wood's article employs the history of the class action device and the policy goals underlying it to support her normative conclusion that courts should be using the representational over the joinder model.[18] This Part summarizes this history and her presentation of the policy goals of class actions.

Judge Wood sought to offer a taxonomy and a resolution for dealing with procedural issues facing absent class members in her article Class Actions: Joinder or Representational Device?[19] Specifically, she sought to determine when courts should follow the representational model—in her words, "[w]hen can the class action make possible litigation on the part of absentee class members that would otherwise be unavailable in federal court?"[20] Or, on the other hand, "when is the class action only a convenience device that goes slightly beyond Rule 20 joinder?"[21] Judge

[18] Id. at 507.
[19] Id. at 459–60.
[20] Id. at 476.
[21] Id.

Wood's first goal in drafting her article was to convince courts to identify the difference between these two models and acknowledge that they had been inconsistent in procedural decisions implicating absent class members.[22] Her second goal was to then argue that the representational model should control in these decisions because it best comports with the history of class actions and best effectuates the policy goals underlying class actions.[23]

A. History of Class Actions

Judge Wood employs the history of the class action device for two reasons. First, as she points out, the joinder and representational distinction is not a new phenomenon; the debate has its roots in equity litigation and prior iterations of Federal Rule of Civil Procedure 23. Second, and more importantly, the history of the class action device shows its evolution from a joinder device to a representational one.[24]

She begins by discussing the varied and disjointed forms of group litigation present before the class action was codified as "the original Rule 23" in 1938.[25] The upshot of this history is that, prior to the adoption of the "original" Rule 23 in 1938, courts were reluctant to permit fully representative class actions—those having a binding effect on the absent class members—except in narrow circumstances.[26] "Real" class actions were those that were viewed as truly representative, rather than just aggregated claims, and typically were those in which there was a special relationship between the named representative and the absent class members—such as being a member of the same fraternal organization[27]—or cases similar to a set of traditionally recognized categories.[28]

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[22] Id. at 460, 506.

[23] Id. at 506–07.

[24] Id. at 504 ("[T]he verdict of history in the United States also favors the representational model.").

[25] Id. at 460–69.

[26] Id. at 469.

[27] Id. at 464–65; Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 357 (1921).

[28] In 1820, Justice Story, riding circuit in *West v. Randall*, acknowledged that there were some cases in which courts traditionally allowed the "few [to] sue for the benefit of the whole," and thus the "general equity rule requiring joinder of all materially interested parties was relaxed." Wood Hutchinson, supra note 1, at 460–61. He listed five types of cases that courts had traditionally recognized as being subject to this representative structure:

> (1) suits by a part of the crew of a privateer against prize agents for an account and their portion of prize money; (2) suits by a few creditors suing on behalf of the rest; (3) suits by legatees seeking relief and an account against executors; (4) suits by a few members

Judge Wood then focuses on a little-discussed debate after the adoption of the "original" Rule 23 in 1938: the jurisdictional requirements absent class members should need to satisfy.[29] In later writings, James Moore, an author of the initial draft of the 1938 rule, described a new type of action identified by the 1938 Rule 23—the "spurious class action"[30]—as a "permissive joinder device."[31] He worried, however, that this rendered the spurious class action "superfluous" as it tracked too closely to Rule 20's joinder provisions.[32] Thus, in order to give any effect to the spurious class action, Moore suggested that absent class members be able to intervene without satisfying the diversity jurisdiction requirements of diversity of citizenship and the amount in controversy.[33]

In a 1941 law review article, two critics of this approach called it "a trick for obtaining federal jurisdiction."[34] They instead suggested a different path to give any effect to the spurious class action: named plaintiffs would litigate the action, and then, during recovery, the decision would be held open to absent class members to collect.[35] Thus, absent class members would be truly absent and would not conceivably need to satisfy jurisdictional requirements.[36] Moore termed this option the "maximum goal," because it would "allow representation of certain types of claims that would not otherwise be brought."[37] He termed his solution,

of a voluntary society or an unincorporated body of proprietors; and (5) suits in which the lord of a manor sued representative tenants, or representative tenants sued the lord. Id. at 461. These categories continued to be recognized by courts as ones that qualified for treatment as a "real" class action. Id. at 468–69.

[29] Id. at 469–72.

[30] Id. at 470. The 1938 Rule contained three different types of class actions: a "true" class action, a "hybrid" class action, and a "spurious" class action. Id. The spurious class action is today most similar to a Rule 23(b)(3) action. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997).

[31] Wood Hutchinson, supra note 1, at 470 (citing 3B James William Moore, Moore's Federal Practice ¶ 23.10[1] (2d ed. 1987)).

[32] Id. Judge Wood notes that, while Moore's concern focused on the spurious class action (the predecessor to Rule 23(b)(3)), this question of how to treat the jurisdictional obligations of absent class members applied to true and hybrid class actions as well. Id. at 472.

[33] Id. at 470–71.

[34] Harry Kalven, Jr. & Maurice Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684, 704 n.66 (1941); see also Wood Hutchinson, supra note 1, at 471 (describing Kalven and Rosenfield's reactions to Moore's article).

[35] Kalven & Rosenfield, supra note 34, at 714–15; see also Wood Hutchinson, supra note 1, at 471 (describing Kalven and Rosenfield's recovery model).

[36] Wood Hutchinson, supra note 1, at 471.

[37] Id. at 471–72 (citing 3B James William Moore, Moore's Federal Practice ¶ 23.01[1], at 23–42 (2d. ed. 1987)).

which just permits freer intervention rather than establishing a truly representative action, the "minimum" goal.[38] This debate over whether the minimum goal (exemplifying the joinder approach) or the maximum goal (exemplifying the representational approach) should control did not dominate the discussion of the original Rule 23.[39] Because other foundational questions took precedence, such as when a class action could be maintained, how absent class members could be bound, and what a fair proceeding would look like, these procedural debates about absent class members were pushed to the background.[40]

Judge Wood then outlines Rule 23, as amended in 1966.[41] Judge Wood highlights the development of Rule 23 in order to show that the class action has evolved from its original form to a more representational approach.[42] It has imposed sufficient safeguards for the interests of absent class members such that their due process rights will be protected under a representational model.[43] She notes, however, that the distinction between the three types of Rule 23 class actions—the (b)(1), (b)(2), and (b)(3) actions—has little bearing on the choice between the joinder and representational models.[44] Choosing between the joinder and representational models implicates procedural concerns while the distinctions between (b)'s subsections implicate "substantive interests shared by the [class] members."[45] It is here that Judge Wood confirms her focus on the procedural rules that grant litigants access to federal court, rather than those that govern the behavior of parties while present there.[46] She labels the characteristics that implicate a joinder or representational approach as procedural because "[t]hey establish one's right to sue in a federal court on the substantive claim, rather than in a state court."[47] Although she does refer to discovery and counterclaims later while

[38] Id. ("The basic controversy remains whether the proper goal for the class action should be limited to the minimum one of providing a shortcut to otherwise multitudinous litigation, or on the other hand, should be extended to the maximum one of opening court access to otherwise nonlitigable claims.").

[39] Id. at 472.

[40] Id.

[41] Id. at 473.

[42] See id. at 504 (arguing that the history of the class action provides greater support for the representational model over time).

[43] Id.

[44] Id. at 477–78.

[45] Id.

[46] See supra note 17.

[47] Wood Hutchinson, supra note 1, at 478.

discussing the joinder and representational models,[48] her focus from the outset appears to be on the procedural rules that would or would not grant litigants access to federal courts.

B. Policy Goals of the Class Action Device

Concluding her summary of the history of the class action, Judge Wood then more briefly touches on the other justification for her conclusion that the representational model is superior to the joinder model: the policy goals of the class action device.[49] Class actions both promote "efficiency and economy of litigation" and serve a "private attorney-general" function by allowing private individuals to vindicate interests that might otherwise only be protectable by government entities.[50] She characterizes the private attorney general function of the class action as a way for private litigants to enforce their legal rights when these rights might be otherwise unaddressed through other means.[51]

Finally, Judge Wood discusses the contours of the joinder and representational devices in various areas of procedure and how courts have developed doctrine across various areas at the time of her writing.[52] Because the rest of this Note touches on these individual areas, it is sufficient to say for now that Judge Wood primarily focuses on the doctrines that govern whether absent class members will gain access to

[48] Id. at 484–85, 497.

[49] Id. at 478.

[50] Id. at 480. For example, small infractions limiting interest payments from credit card holders might themselves not be something that individuals bring as an independent lawsuit but might be effectively challenged in a class action. Otherwise, private citizens would have to rely on government enforcement of consumer protection laws alone.

[51] Id. at 481. Judge Wood remarks that these two goals might be seen as in tension with one another because while class actions do allow for more efficient litigation by aggregating claims, the device may also permit suits to be filed that otherwise would be non-litigable, increasing the docket load of the federal courts. Id. at 480–82. Thus, a refined definition of efficiency is essential to reconcile the two goals. Specifically, efficiency should be defined as achieved if the benefits of a certain action outweigh the burdens imposed by the action. See id. at 482 ("[U]nder a definition of judicial economy that excludes litigation benefits, *any* increase in caseloads and case-time consumption would constitute an impairment of judicial efficiency, and courts would be most efficient with no cases at all!" (internal quotation marks omitted) (quoting Roger Bernstein, Judicial Economy and Class Actions, 7 J. Legal Stud. 349, 353 (1978))). Viewed this way, the private attorney general purpose of the class action, which allows individuals to come together as a group to enforce legal rights that otherwise might not see any private or public enforcement, can be reconciled with the efficiency goals as two essential purposes of the class action device.

[52] Wood Hutchinson, supra note 1, at 482–506.

federal court, such as subject matter jurisdiction and mootness.[53] Using these areas as illustrations makes sense when one considers that two cases which—in Judge Wood's view—used the joinder model to the detriment of the ultimate outcome of the case had just been decided by the Supreme Court.[54] And while Judge Wood mentions issues that affect litigants during trial in passing, such as discovery and counterclaims, she does not focus heavily on them, perhaps influencing her ultimate conclusion that the representational model definitively effectuates the efficiency and private attorney general goals of the class action best.[55]

II. POST-1983: APPROACHES TO THE JOINDER OR REPRESENTATIONAL MODEL

This Part outlines which approaches courts and Congress have taken to specific procedural issues and whether they have recognized the joinder and representational models. Even if courts have not always explicitly labeled their actions as taking the joinder or representational approach, they have undoubtedly begun to approach the procedural rights of absent class members through the lens of asking whether they are "parties" to the litigation. As a whole, courts have moved towards the representational approach, particularly in areas which grant litigants access to federal courts. In other ways, however, Congress and the courts have expressed a preference for the joinder model. Neither have heeded Judge Wood's call to adopt a unified representational model.

A. Threshold Procedural Questions

1. Subject Matter Jurisdiction

In class actions brought in federal court under diversity jurisdiction, whether the court treats absent class members as "parties" for purposes of the diversity of citizenship and amount in controversy requirements implicates the choice between the joinder and representational models.[56]

[53] Id. at 483, 485.

[54] Id. at 492, 496; see Zahn v. Int'l Paper Co., 414 U.S. 291, 292 (1973); U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 408 (1980). For a discussion of Judge Wood's opinion on *Zahn*, and modern responses to it, see infra Subsection II.A.1.

[55] Wood Hutchinson, supra note 1, at 507.

[56] Generally, if a class is certified and meets the adequacy, typicality, and commonality requirements of Rule 23, any federal questions which grant subject matter jurisdiction will be common to the class. And, even if individual class members have supplemental state law

And how these two requirements have been treated provides one of the clearest examples of how courts and Congress have refused to entirely embrace either the joinder or representational model, showing that, even within the singular area of diversity jurisdiction, Judge Wood's advocacy for the representational model has not been accepted. Requirements for diversity jurisdiction in class actions differ between those actions governed by the Class Action Fairness Act ("CAFA")[57] and those that are not. This Section first discusses how historical decisions have affected non-CAFA class actions and then introduces how the 2005 statute modified the approach for some class actions.

As far back as 1921, the Court considered the question of whether the citizenship of absent class members should be considered when evaluating diversity of citizenship.[58] In *Supreme Tribe of Ben-Hur v. Cauble*, the Court held that only the named plaintiffs in a class action needed to have diversity of citizenship to satisfy diversity jurisdiction.[59] This structure—whereby class counsel could defeat complete diversity by simply assigning a diverse party as named plaintiff, even if there were multiple absent class members who would have otherwise defeated complete diversity—drew large criticism.[60] Even still, outside of those cases which CAFA covers, this facet of *Ben-Hur* has not been overturned by the Supreme Court.

claims, 28 U.S.C. § 1367 grants supplemental jurisdiction over those claims as long as they are part of the same Article III case or controversy. See 28 U.S.C. § 1367; United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966).

[57] For more on what types of class actions are covered by CAFA, see infra notes 72–73 and accompanying text (describing CAFA as covering generally those class actions which exceed one hundred persons and $5,000,000 amount in controversy).

[58] Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 365–66 (1921).

[59] Id. (noting that the suit was "a class suit brought by a large number of the class as representatives of all its membership"). Of course, this case was decided before the current codification of class actions at Rule 23, and diversity jurisdiction at 28 U.S.C. § 1332, but the principles expressed in it still apply today. See Wood Hutchinson, supra note 1, at 501. The Court referenced an earlier case decided in equity in which it concluded that individuals joining the suit I not be considered for complete diversity because they could just as easily have their claim adjudicated either "as co-complainants" or "before a master, under a decree ordering a reference to prove the claims of all persons entitled to the benefit of the decree," after the matter had been adjudicated with the named plaintiffs. *Ben-Hur*, 255 U.S. at 365 (internal quotation marks omitted) (quoting Stewart v. Dunham, 115 U.S. 61, 64 (1885)). This latter prospect is referenced in Kalven and Rosenfield's counter to Moore's view of the spurious class action. See Kalven & Rosenfield, supra note 34, at 693–94.

[60] See Richard L. Marcus, Assessing CAFA's Stated Jurisdictional Policy, 156 U. Pa. L. Rev. 1765, 1770 (2008).

In those suits not governed by CAFA, the Court and Congress have shifted the approach to the amount in controversy requirement of § 1332 in a way that does not fully embrace the representational model but does permit the same outcomes as the representational model. In *Zahn v. International Paper Co.*, the Court held that all absent class members, as well as all named plaintiffs, must independently satisfy the amount in controversy requirement.[61] The Court based its decision in *Zahn* on its prior holding in *Snyder v. Harris* that individual plaintiffs could not combine their asserted damages to meet the amount in controversy requirement.[62] In *Snyder*, none of the named plaintiffs satisfied the amount in controversy requirement.[63] Thus, *Snyder*'s resolution did not depend on the distinction between a joinder or representational model because, even under the representational model, the suit would not have been permitted in federal court. *Zahn*, on the other hand, "illustrates a perfect application of the joinder model."[64]

However, in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, the Court explicitly found that, in passing 28 U.S.C. § 1367, Congress overturned *Zahn*.[65] The Court interpreted § 1367 to confer jurisdiction over claims that do not meet the amount in controversy requirement so long as one claimant does meet the amount in controversy requirement.[66] *Exxon* still required parties to meet the diversity of citizenship requirement and required their claims to comprise the same Article III case or controversy as other claims in the suit, but it did not require all claims to individually meet the amount in controversy requirement.[67]

Still, the Court did not base its holding on the idea that absent class members are not parties to the litigation. Instead, it simply held that § 1367 could confer supplemental jurisdiction over these additional claims. And the Court did not completely effectuate a representational approach: a truly representative action would only require the named class members to meet § 1332's amount in controversy requirement.[68] Instead,

[61] 414 U.S. 291, 292, 301 (1973).
[62] Id. at 301; Snyder v. Harris, 394 U.S. 332, 335, 338 (1969).
[63] 394 U.S. at 333.
[64] Wood Hutchinson, supra note 1, at 494.
[65] Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 566 (2005).
[66] Id. at 558–59.
[67] Id.
[68] 28 U.S.C. § 1332(a) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs.").

under the specific holding in *Exxon*, the outcome of the representational model could be reached—that is, the absent class members may not need to meet the amount in controversy requirement. But, even if a court were to use the joinder approach and consider absent class members to be parties, it could still find supplemental jurisdiction over absent class members' claims.[69]

Importantly, not only did the Court in *Exxon* not acknowledge the joinder and representational models in analyzing § 1367, but it actually went further than the representational model would require. The Court considered two consolidated cases in *Exxon*, one of which was a class action in which one class representative had met the amount in controversy requirement even though other named and absent class members had not.[70] The Court held that only *one* named plaintiff, rather than all named plaintiffs, needed to reach the amount in controversy requirement to allow other named and absent class members to bring their claims under supplemental jurisdiction.[71] While the doctrine after *Exxon* has the same effect on absent class members as the representational model would, the actual outcome shows that the Court has still not focused on the distinction between the joinder and representational models. After *Exxon* and *Ben-Hur*, class actions not subject to CAFA do not generally follow a representational or joinder model when it comes to diversity jurisdiction, but they could have the same outcome as the representational model would dictate: absent class members need not have complete diversity from named plaintiffs, and they need not meet the amount in controversy requirement as long as one named plaintiff does.

[69] For example, outside of the class action context, imagine a suit by two co-plaintiffs against a defendant. If the first plaintiff meets the amount in controversy requirement and the second plaintiff does not, so long as the second plaintiff's claims are so related as to form the same Article III case or controversy, this second plaintiff will have supplemental jurisdiction under 28 U.S.C. § 1367 (assuming the requirements of § 1367(b) are not disturbed and that the district court does not dismiss the second plaintiff's claim in the discretion afforded to it by § 1367(c)). But this is an application of § 1367's grant of supplemental jurisdiction, rather than a feature of the representational model. See, e.g., *Exxon*, 545 U.S. at 551–52, 572 (describing this factual scenario and granting jurisdiction over the claims of the plaintiffs who did not meet the amount in controversy requirement).

[70] Id. at 550–51.

[71] Id. at 549. Prior to *Exxon*, other circuits had held that, in class actions, absent class members did not need to meet the amount in controversy requirement, but, as the Supreme Court noted, these circuits had not clarified whether all named plaintiffs would need to meet the amount in controversy requirement. Id. at 551 (citing In re Abbott Lab'ys, 51 F.3d 524 (5th Cir. 1995)); Gibson v. Chrysler Corp., 261 F.3d 927, 934 (9th Cir. 2001).

In class actions governed by CAFA, the Class Action Fairness Act, Congress similarly did not cleanly distinguish between the joinder and representational models. CAFA was a sweeping piece of legislation intended to broaden the reach of federal courts over class actions.[72] To do this, Congress primarily broadened the requirements of diversity jurisdiction for class actions subject to CAFA—generally, those in which the total amount in controversy is more than $5,000,000 and where the total number of plaintiffs exceeds one hundred.[73] In doing so, Congress approached the requirements through a joinder lens, even if the outcome of the rules might sometimes be the same as the outcome under the representational model.

Specifically, Congress amended § 1332 to include new rules for diversity of citizenship and amount in controversy requirements for class actions that exceed $5,000,000.[74] The Act first states that district courts may have jurisdiction over actions in which any class members differ in citizenship from any defendant.[75] It then permits district courts to decline to exercise jurisdiction when "greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed," based on a consideration of listed factors.[76] The Act then requires district courts to decline to exercise jurisdiction when certain citizenship requirements are met. Specifically, if more than two-thirds of plaintiffs are citizens of the same state, and either one defendant is a citizen of the state where the action was initially filed and much of

[72] The statutory purposes claim this extension of the federal forum is to protect the interests of class members and provide a forum for issues of national importance to be litigated. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b), 119 Stat. 4, 5 (codified as amended at 28 U.S.C. § 1711); Marcus, supra note 60, at 1766. However, Justice Ginsburg has pointed to legislative history which indicates that Congress wanted to remove more class actions to federal courts to overcome what it saw as states' overreadiness to certify class actions. See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 459 (2010) (Ginsburg, J., dissenting) (referencing legislative history that "disapprov[ed of] 'the "I never met a class action I didn't like" approach to class certification' that 'is prevalent in state courts in some localities'" (quoting S. Rep. No. 109-14, at 22 (2005))).

[73] 28 U.S.C. § 1332(d)(2), (d)(5)(B). These requirements are a generalization, and there are provisions of § 1332 which afford a district court discretion as to whether it will exercise jurisdiction.

[74] Id. § 1332(d).

[75] Id. § 1332(d)(2)(A)–(C). Similar to § 1332(a)(1)–(3), diversity of citizenship can be established by plaintiffs and defendants being citizens of different states within the United States, or by one party being a citizen of a foreign state.

[76] Id. § 1332(d)(3).

the events comprising the litigation took place in the same state,[77] or all principal defendants are from the same state as over two-thirds of plaintiffs,[78] then district courts must decline to exercise jurisdiction.

These specific jurisdictional rules do not themselves indicate whether Congress has followed a representational or a joinder model, but Congress's definition of class members in its CAFA amendments to § 1332 confirm that it at least was taking a joinder-based *approach* to diversity jurisdiction. Specifically, Congress defined "class members" in a class action as the "persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action."[79] Thus, when district courts in an action covered by CAFA determine whether they have jurisdiction, they need to inquire into the citizenship of the entire class of plaintiffs, named and unnamed.[80] Thus, the citizenship of absent class members can both *grant* federal jurisdiction under § 1332(d)(2) and can remove federal jurisdiction mandatorily under § 1332(d)(4) or by the district court's discretion under § 1332(d)(3).

The combination of CAFA's treatment of diversity jurisdiction and the *Ben-Hur*/*Exxon* approach to non-CAFA-governed class actions confirms that courts and Congress have not distinguished between the joinder and representational models when determining how diversity jurisdiction shall be determined in class actions. If the total value of Suit *A* is $5,000,001 while the total value of Suit *B* is $4,999,999, absent class members' citizenship and their amount in controversy will be treated dramatically differently. While Part IV considers whether the representational or joinder model is more appropriate for questions of diversity jurisdiction, the failure to distinguish between the two models even within the singular area of diversity jurisdiction confirms that courts and Congress have not met Judge Wood's minimum goal to acknowledge the difference between the joinder and representational models.

[77] Id. § 1332(d)(4)(A)(i)–I. This statement is a simplified version of the statute itself which contains more specific requirements the district court must find before it must decline to exercise jurisdiction.

[78] Id. § 1332(d)(4)(B).

[79] Id. § 1332(d)(1)(D).

[80] The same treatment is somewhat true of the amount in controversy requirement provisions in CAFA's amendments. Section 1332(d)(6) tells courts to aggregate "the claims of the individual class members . . . to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." Id. § 1332(d)(6). Thus, while this aggregation only occurs to determine whether the class action falls under CAFA's ambit, rather than whether it falls into the amount in controversy requirements of § 1332 more broadly, it still follows a joinder approach.

2. Personal Jurisdiction

The question of whether absent class members should be considered parties to the litigation when determining personal jurisdiction over defendants is one which the Court has reinvigorated in *Bristol-Myers Squibb Co. v. Superior Court of California*.[81] Prior to *Bristol-Myers Squibb*, the majority of courts had presumed without deciding that they only needed to consider the claims of named plaintiffs when determining if they could exercise personal jurisdiction over the defendant.[82] In other words, so long as named plaintiffs had minimum contacts with the forum state involving the specifically charged conduct of the defendant sufficient to establish specific personal jurisdiction, the court would not need specific personal jurisdiction over absent class members.[83] This approach exemplifies the representational model as it would mean the court would only treat named plaintiffs as parties when assessing specific personal jurisdiction over the defendant.

However, the Supreme Court threatened this balance after its 2017 decision in *Bristol-Myers Squibb*. The case involved claims against Bristol-Myers Squibb for injuries allegedly caused by its blood thinner, Plavix.[84] It was brought in California under a mass action, a different form of aggregate litigation governed by state law.[85] The Court held that, in order for the courts to have jurisdiction over Bristol-Myers Squibb, the company had to have sufficient litigation-related conduct aimed at or in California to establish minimum contacts with the forum state, California.[86] Courts could not exercise personal jurisdiction over the defendant on claims that did not meet this threshold of minimum contacts with California just because these claims were a part of the same litigation as claims where Bristol-Myers Squibb *did* meet these minimum

[81] 137 S. Ct. 1773 (2017). Note that this reinvigoration only applies to how the courts have approached the specific personal jurisdiction courts exercise over defendants as related to the claims of absent plaintiff class members.

[82] Mussat v. IQVIA, Inc., 953 F.3d 441, 445 (7th Cir. 2020).

[83] See Al Haj v. Pfizer Inc., 338 F. Supp. 3d 815, 820 (N.D. Ill. 2018).

[84] *Bristol-Myers Squibb*, 137 S. Ct. at 1777–78.

[85] In this type of case, the individual plaintiffs are seen as bringing distinct cases. Daniel Wilf-Townsend, Did *Bristol-Myers Squibb* Kill the Nationwide Class Action?, 129 Yale L.J.F. 205, 211 (2019) (describing such a mass tort action as one "in which all plaintiffs appear as named individuals with distinct claims").

[86] *Bristol-Myers Squibb*, 137 S. Ct. at 1781.

contacts.[87] *Bristol-Myers Squibb* did not hold that absent class members' claims would need to satisfy the Court's minimum contacts test in order to establish personal jurisdiction over defendants. However, as Justice Sotomayor noted in her dissent, the case left open the question of whether it would apply to class actions.[88] Indeed, Justice Sotomayor identified the precise question as whether absent class members would be considered parties for personal jurisdiction purposes, citing to Judge Wood's article discussing the representational and joinder models as they relate specifically to personal jurisdiction.[89]

In the years after *Bristol-Myers Squibb*, commentators considered the application of the decision to class actions,[90] and courts began to confront the question.[91] The majority of lower courts to consider the issue and rule on it have found that *Bristol-Myers Squibb*'s reasoning does not apply to class actions, permitting nationwide class actions under Rule 23 to move forward.[92] Even still, it is a nascent issue. The only circuit court thus far to have ruled on the question[93] has been the U.S. Court of Appeals for the

[87] Id. ("As we have explained, 'a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction.'" (quoting Walden v. Fiore, 571 U.S. 277, 286 (2014))).

[88] Id. at 1789 n.4 (Sotomayor, J., dissenting).

[89] Id.

[90] See Wilf-Townsend, supra note 85, at 206–07; Richard Levick, The Game Changes: Is Bristol-Myers Squibb the End of an Era?, Forbes (July 11, 2017, 2:21 PM), https://www.forbes.com/sites/richardlevick/2017/07/11/the-game-changes-is-bristol-myers-squibb-the-end-of-an-era [https://perma.cc/FMN2-5PPU]; Robert Channick & Becky Yerak, Supreme Court Ruling Could Make It Harder to File Class-Action Lawsuits Against Companies, Chi. Trib. (June 22, 2017, 11:28 AM), https://www.chicagotribune.com/business/ct-supreme-court-ruling-mass-actions-illinois-0625-biz-20170622-story.html [https://perma.cc/53UB-SH7G]; James M. Beck, Due Process Limits on Nationwide Class Actions Post-*BMS v. Superior Court* (Wash. Legal Found., Critical Legal Issues Working Paper Series No. 207, 2018), https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/legalstudies/workingpaper/03-18BeckWP.pdf [https://perma.cc/WL9T-9P64].

[91] See, e.g., Cruson v. Jackson Nat'l Life Ins. Co., 954 F.3d 240 (5th Cir. 2020); Mussat v. IQVIA, Inc., 953 F.3d 441 (7th Cir. 2020); Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293 (D.C. Cir. 2020); see also Wilf-Townsend, supra note 85, at 229–37 (collecting district court cases).

[92] See, e.g., Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc., No. 17-cv-00564, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017); Al Haj v. Pfizer Inc., 338 F. Supp. 3d 815, 820 (N.D. Ill. 2018); Knotts v. Nissan N. Am., Inc., 346 F. Supp. 3d 1310, 1333 (D. Minn. 2018); see also Wilf-Townsend, supra note 85, at 214.

[93] Both the U.S. Court of Appeals for the Fifth Circuit and the D.C. Circuit have heard cases where they considered the question of whether *Bristol-Myers Squibb* should apply to class actions but have declined to rule on the question. In both cases, the court declined to rule on the personal jurisdiction question because it was not properly before the court at the pre-class certification stage of the litigation. *Cruson*, 954 F.3d at 250; *Molock*, 952 F.3d at 299.

Seventh Circuit in an opinion fittingly written by Judge Wood.[94] In *Mussat v. IQVIA, Inc.*, Judge Wood considered whether *Bristol-Myers Squibb* would prohibit a named plaintiff injured in Illinois from bringing a class action in Illinois on behalf of others who were not injured in the forum state and against a defendant who was not subject to general jurisdiction there.[95] The court first noted that, prior to *Bristol-Myers Squibb*, courts routinely upheld these types of nationwide class actions.[96] It then distinguished the action in *Bristol-Myers Squibb* from a Rule 23 action, stating that *Bristol-Myers Squibb* did not comment on how to treat personal jurisdiction in Rule 23 class actions.[97] Finally, Judge Wood made the crucial move of treating this as a choice between the joinder and representational models. First, she noted that the Supreme Court had acknowledged in *Devlin* that absent parties can be parties to the litigation for some purposes and not for others.[98] The court then concluded that it saw "no reason why personal jurisdiction should be treated any differently from subject-matter jurisdiction and venue" where absent class members are not treated as parties to the litigation.[99]

Notably, it is not just Judge Wood, and the other judges on the Seventh Circuit panel, who have framed the question of whether *Bristol-Myers Squibb* applies to class actions as one implicating the joinder and representational models. For example, in a class action alleging Canada Dry ginger ale falsely advertised the amount of actual ginger in their beverage, the U.S. District Court for the Northern District of California considered whether claims brought by a class containing absent class members harmed by alleged false advertisements outside of California could be included in the suit.[100] The court noted that *Devlin* allowed

[94] *Mussat*, 953 F.3d at 443.

[95] Id.

[96] Id. at 445 (noting that even the Supreme Court "regularly entertained cases involving nationwide classes where the plaintiff relied on specific, rather than general, personal jurisdiction in the trial court, without any comment about the supposed jurisdictional problem [the defendant] raises").

[97] Id. at 447 ("The *Bristol-Myers Squibb* plaintiffs brought a coordinated mass action, which . . . does not involve any absentee litigants.").

[98] Id. at 447–48.

[99] Id. ("Fitting this problem into the broader edifice of class-action law, we are convinced that this is one of the areas *Scardelletti* identified in which the absentees are more like nonparties, and thus there is no need to locate each and every one of them and conduct a separate personal-jurisdiction analysis of their claims.").

[100] Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc., No. 17-cv-00564, 2017 WL 4224723, at *1 (N.D. Cal. Sept. 22, 2017) ("Does Canada Dry Ginger Ale contain ginger root?

absent class members to be treated as "parties for some purposes and not for others."[101] However, it held that *Bristol-Myers Squibb* had not labeled absent class members as parties because it found the mass tort device in *Bristol-Myers Squibb* meaningfully different than a Rule 23 class action.[102]

Most similar to the Seventh Circuit's decision in *Mussat* is the Northern District of Illinois's decision in *Al Haj v. Pfizer Inc.*, which explicitly found that absent class members were not parties for the purposes of determining personal jurisdiction.[103] Concluding that *Devlin* requires courts to consider the context of procedural rights, the court found that treating absent class members as nonparties for personal jurisdiction purposes best aligns with their treatment for other procedural rights that are prerequisites to entering into federal court, such as subject matter jurisdiction and venue.[104] Indeed, in a 2019 survey of cases confronting the question, Professor Daniel Wilf-Townsend remarked that many of the cases which did not apply *Bristol-Myers Squibb* to class actions did so by noting *Devlin*'s statement about parties.[105]

Those courts that did decide to apply *Bristol-Myers Squibb* to class actions primarily ground their decisions in the idea that excluding absent class members from the personal jurisdiction inquiry violates defendants' due process rights.[106] They also reference the idea that this could violate the Rules Enabling Act as it would allow individuals to bring suit against

The Court does not know, and fortunately, that is not the question it is being asked to answer here.").

[101] Id. at *5 (quoting Devlin v. Scardelletti, 536 U.S. 1, 9–10 (2002)); see also Knotts v. Nissan N. Am., Inc., 346 F. Supp. 3d 1310, 1333 (D. Minn. 2018) ("Because of Rule 23's procedural safeguards, the Supreme Court has allowed procedural flexibility for unnamed class action plaintiffs in certain contexts.").

[102] *Fitzhenry-Russell*, 2017 WL 4224723, at *5.

[103] Al Haj v. Pfizer Inc., 338 F. Supp. 3d 815, 820 (N.D. Ill. 2018).

[104] Id.

[105] See Wilf-Townsend, supra note 85, at 216 ("Courts regularly invoked *Devlin* for its statement that unnamed class members 'may be parties for some purposes and not for others.'").

[106] See, e.g., Am.'s Health & Res. Ctr., Ltd. v. Promologics, Inc., No. 16-cv-9281, 2018 WL 3474444, at *2 (N.D. Ill. July 19, 2018) ("Those decisions finding *Bristol-Myers Squibb* applicable to class actions have generally observed that due process requirements do not differ between class and non-class actions."); Leppert v. Champion Petfoods USA, Inc., No. 18-cv-4347, 2019 WL 216616, at *4 (N.D. Ill. Jan. 16, 2019) ("Moreover, as this Court has recognized, a defendant's due process rights should remain constant regardless of the suit against him, be it an individual, mass, or class action."); see also Wilf-Townsend, supra note 85, at 217–18 (collecting cases).

a defendant in federal court under Rule 23 when they would not otherwise be able to in another action.[107] Indeed, Wilf-Townsend found that only one court that applied *Bristol-Myers Squibb* to class actions invoked *Devlin*'s language on parties.[108] The fact that cases focus on the impact that absent class members might have on defendants' due process rights shows that courts are taking a joinder approach, even if they do not explicitly acknowledge it. Under these courts' views, the representational model may even be *inoperable* because of the constraints placed on personal jurisdiction doctrine by the Constitution or the Rules Enabling Act.[109] The Court's opening of this issue for the lower courts shows again that no unified model has been applied to personal jurisdiction doctrine.

3. Article III Standing

The same story is arguably true for Article III standing doctrine. In order to bring a case in federal court, individual litigants must have Article III standing,[110] requiring that they show injury in fact, causation, and redressability.[111] Two questions about standing in class actions implicate the joinder versus representational model debate: First, do all absent class members need to have established standing by the end of litigation in order to recover? Second, if they do need standing to recover, at what point in the litigation do they need to establish standing?

Prior to the Court's recent decision in *TransUnion LLC v. Ramirez*, lower courts had taken a wide variety of responses to the standing requirements for absent class members.[112] However, in *TransUnion*, the

[107] See, e.g., Prac. Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc., 301 F. Supp. 3d 840, 861 (N.D. Ill. 2018); Mussat v. IQVIA, Inc., No. 17-cv-8841, 2018 WL 5311903, at *6 (N.D. Ill. Oct. 26, 2018), *rev'd and remanded*, 953 F.3d 441 (7th Cir. 2020).

[108] Wilf-Townsend, supra note 85, at 217–18 (citing *Am.'s Health & Res. Ctr., Ltd.*, 2018 WL 3474444, at *3, *4 n.3).

[109] If a court believes the Due Process Clause puts these limits on how courts can exercise personal jurisdiction over defendants in a class action, it is easy to see how the Rules Enabling Act would prohibit enlarging the scope of personal jurisdiction over defendants simply because they are bringing suit under Rule 23. 28 U.S.C. § 2072(b) ("Such rules [of procedure] shall not abridge, enlarge or modify any substantive right.").

[110] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021).

[111] Id. ("[T]o establish standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief.").

[112] Compare Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 362 (3d Cir. 2015) (finding no standing required for absent class members at certification), Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 676 (7th Cir. 2009) (finding that only one member of the class needed to have standing at the class certification stage), and Melendres v. Arpaio, 784 F.3d 1254, 1261–62

Supreme Court definitively stated that courts must individually determine the standing of absent class members at the point of recovery for damages. Writing for the majority, Justice Kavanaugh stated that "[e]very class member must have Article III standing in order to recover individual damages."[113] This holding had been foreshadowed by Chief Justice Roberts's concurrence in *Tyson Foods, Inc. v. Bouaphakeo*.[114] Chief Justice Roberts argued against allocating damages to uninjured class members by noting that "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."[115] However, Justice Kavanaugh specifically left open the question of when absent class members would need to establish standing in the litigation.[116] After *TransUnion*, it is clear—if there was any doubt[117]—that the central

(9th Cir. 2015) (same), with Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d Cir. 2006) ("[N]o class may be certified that contains members lacking Article III standing."). Some circuits, similarly to the Third Circuit in *Neale*, choose to structure the analysis through Rule 23's predominance requirement, rather than Article III's standing requirement. See Cordoba v. DIRECTV, LLC, 942 F.3d 1259, 1277 (11th Cir. 2019) ("[W]e only hold that in this case the district court must consider under Rule 23(b)(3) before certification whether the individualized issue of standing will predominate over the common issues in the case."); In re Asacol Antitrust Litig., 907 F.3d 42, 58 (1st Cir. 2018) (rejecting the idea that all absent class members must show standing at class certification stage, but declining to certify the class because individual issues of whether absent class members were injured would predominate, violating Rule 23(b)(3)); In re Nexium Antitrust Litig., 777 F.3d 9, 32 (1st Cir. 2015) (allowing class to be certified when not "more than a de minimis number of uninjured consumers are included in the certified class" but noting that standing must be satisfied by every party—named or absent—who seeks to recover); In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252 (D.C. Cir. 2013) (interpreting predominance requirement to require that *all* absent class members prove injury at the class certification stage, most closely mirroring cases that require Article III standing of absent class members).

[113] *TransUnion*, 141 S. Ct. at 2208. Note this holding is limited to suits for individual damages. In the opinion below, the Ninth Circuit distinguished between a class action for injunctive relief and one where absent class members received individualized damages. Ramirez v. TransUnion LLC, 951 F.3d 1008, 1023 (9th Cir. 2020), *rev'd*, 141 S. Ct. 2190 (2021). Specifically, the Ninth Circuit has held that in class actions where plaintiffs seek injunctive relief, only the named plaintiffs need have standing to recover, Bates v. United Parcel Serv., Inc., 511 F.3d 974, 985 (9th Cir. 2007) (en banc), and it did not overturn this holding in its opinion in *Ramirez*. 951 F.3d at 1023. Instead, it distinguished Article III's requirements in individualized damages cases from injunctive relief cases. Id.

[114] 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring).

[115] Id.

[116] *TransUnion*, 141 S. Ct. at 2208 n.4 (citing *Cordoba*, 942 F.3d at 1277) ("We do not here address the distinct question whether every class member must demonstrate standing *before* a court certifies a class.").

[117] Prior to *TransUnion*, the Third Circuit had held that, so long as named plaintiffs had standing, certifying a class with uninjured absent class members—those that lacked standing—did not violate Article III. *Neale*, 794 F.3d at 364. Rather, the court believed Rule

dispute about Article III standing doctrine and absent class members is *when* absent class members need to establish standing: at class certification or the damages stage.

At first glance, this timing question may not seem to implicate the joinder or representational debate. After all, if *TransUnion* tells us that absent class members must have standing to eventually recover, this seems to follow a classic joinder approach as it requires all absent class members to be treated as parties at the end of the litigation. However, if viewing the joinder and representational models through the lens of when otherwise non-litigable claims could reach federal court, only requiring the named plaintiff to prove Article III standing at the time of certification takes a definitively representational approach. It ignores absent class members who otherwise might be unable to enter federal court, and, while it does not allow them to recover, it allows the suit to proceed with them as absent class members.[118]

Indeed, if the choice between the representational and the joinder models is only to be a procedural one, as Judge Wood hoped and proved

23(b)(3)'s requirement that individual issues do not predominate resolved concerns about uninjured class members' presence. Id. at 368–69. If questions of individualized injury predominated because the class included uninjured in addition to injured class members, the class would not be certified. Id. at 368 ("[A] properly formulated Rule 23 class should not raise standing issues."). *Neale* could be read to suggest Article III standing only requires the named plaintiff to prove standing throughout the litigation. Id. at 369. However, *Neale* and other cases in this circuit split are likely best understood as ones which do not require Article III standing for absent class members *at the certification stage* but which offer no opinion on whether uninjured absent class members can recover. See id. at 358 (remarking on the topic of standing for absent class members and responding to defendant's argument that "all *putative* class members must have Article III standing" (emphasis added)); *Kohen*, 571 F.3d at 676 (determining standing of absent class members at certification would put "the cart before the horse" because it would cause the trial to "precede the certification"); cf. *Ramirez*, 951 F.3d at 1023 & n.5 (citing *Neale* for the proposition that absent class members need not have standing at the "*class certification stage*" (emphasis added)). When contrasted with cases like those in the Second Circuit which require absent class members' standing to be determined at class certification, Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d Cir. 2006), the real locus of dispute between the circuits even prior to *TransUnion* is better viewed as when uninjured class members need to be excluded from the class.

[118] For example, compare this to the previously described practice of a suit proceeding with only the named plaintiffs, followed by a proceeding overseen by a master to allocate damages. See supra note 59 (comparing this to Moore's "maximum" goal as explained by Kalven and Rosenfield). Requiring absent class members to prove standing only at the damages stage, rather than at class certification, would have the same effect as this historical practice that takes the representational model to its fullest extent. When compared to this practice, it becomes clear that the timing of when absent class members must show standing does implicate the joinder and representational models.

in her description of the models,[119] it would undermine this goal to say the representational model is only effectuated if all absent class members never have to prove standing. Allowing uninjured class members to recover, when they would be unable to in an individual action, would likely violate the Rules Enabling Act's mandate that the Federal Rules of Civil Procedure do not "abridge, enlarge, or modify any substantive right."[120] Thus, after *TransUnion*, courts that do allow a class to proceed throughout the litigation without requiring absent class members to have Article III standing will embody the representational model, while those that require absent class members to demonstrate Article III standing at any point prior to the damages stage will follow the joinder model.

B. Procedural Questions Arising During or After Trial

How absent class members are treated during or after trial raises a separate set of concerns. Whether absent class members are seen as full parties to the litigation when bringing suit—whether the joinder model applies with respect to threshold questions of jurisdiction and justiciability—affects whether and where the suit can be brought based on the composition of the class at the outset of litigation. Treating absent class members as full parties to the litigation for these procedural areas could have the effect of completely barring a class action from moving forward. By contrast, whether absent class members are full parties during or after trial implicates the burdens that absent class members will face throughout the litigation. Treating absent class members as parties for areas like discovery, counterclaims, and appellate issues could, in some circumstances, have a different normative outcome for Judge Wood's identified policy goals of the class action device.

1. Discovery

Discovery practices implicate the joinder and representational models by answering whether absent class members should be subject to discovery requests in the same way other "parties" would be. Specifically, when should courts permit counsel to issue an interrogatory, a request for admission, or otherwise treat absent class members as "parties" for the purposes of discovery?[121] In a major consumer class action such as the

[119] Wood Hutchinson, supra note 1, at 478, 491, 497–501.
[120] 28 U.S.C. § 2072(b); see *Ramirez*, 951 F.3d at 1023–24.
[121] See Fed. R. Civ. P. 33; Fed. R. Civ. P. 36.

Peloton example above,[122] should defense counsel be barred from obtaining information that might be necessary to their client's defense just because there are a large number of absent class members? On the other hand, should absent class members—who may want no involvement in the suit other than to benefit from the outcome—be subjected to extensive requests for admission or depositions? Either decision has an impact on whether class actions will continue to be efficient actions which vindicate a private attorney general function.

Of course, in practice, the question of whether courts treat absent class members as "parties" could have less impact in discovery decisions because nonparties in traditional litigation are subject to a number of discovery mechanisms as well. So, while the representational model would not permit absent class members to be subject to interrogatories, they could still be subject to a deposition, for example. But, curiously, many courts[123] have not distinguished between Federal Rules applying to parties and those not applying to parties when determining whether absent class members are subject to party-based discovery rules.[124] Instead,

[122] See supra notes 5–7.

[123] The majority of cases dealing with this question are at the district court level, and, because, as will be described, the test for permitting discovery requests against absent class members is flexible and fact-dependent, circuit court review is often limited to abuse of discretion review. Cf. In re Porsche Automobil Holding SE, 985 F.3d 115, 121–22 (1st Cir. 2021). Only a few federal circuit courts have issued specific holdings on the question of discovery and absent class members, and the U.S. Supreme Court has never considered it. The Supreme Court has, however, in dicta, acknowledged that discovery requests levied on absent class members will be infrequent. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 n.2 (1985) ("Petitioner places emphasis on the fact that absent class members might be subject to discovery . . . . We are convinced that such burdens are rarely imposed upon plaintiff class members.").

[124] See, e.g., Cruz v. Dollar Tree Stores, Inc., Nos. 07-cv-2050, 07-cv-4012, 2011 WL 843956, at *6 (N.D. Cal. Mar. 8, 2011); Boynton v. Headwaters, Inc., No. 02-cv-1111, 2009 WL 3103161, at *1–2 (W.D. Tenn. Jan. 30, 2009); Kline v. First W. Gov't, No. 83-cv-1076, 1996 WL 122717, at *2 (E.D. Pa. Mar. 11, 1996) ("Some courts have accepted the argument that absent class members are not 'parties' and are therefore not subject to at least some forms of discovery (i.e. interrogatories). . . . This does not appear to be a majority position, however, and I do not agree with it." (citations omitted)); see also 3 William B. Rubenstein, Newberg on Class Actions § 9:12 (5th ed. 2011); 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1796.1 (3d ed. 2005). Some courts, however, have acknowledged and observed the distinction between non-party and party-based discovery. See, e.g., Aldapa v. Fowler Packing Co., No. 15-cv-0420, 2021 WL 2551000, at *10 (E.D. Cal. June 22, 2021) (deeming absent class members not parties for discovery purposes when ruling on a motion to sanction for failure to comply with orders to conduct depositions); Fishon v. Peloton Interactive, Inc., 336 F.R.D. 67, 69 (S.D.N.Y. 2020) (acknowledging discovery mechanisms directed at parties and non-parties should be applied

courts have applied a consistent presumption against allowing discovery for absent class members in order to protect them from becoming too involved in the litigation. Courts that identify the source of their ability to apply party-only discovery rules to absent class members do so through a presumed discretionary authority under Rule 23(d).[125]

Even though district courts do not always distinguish between discovery mechanisms based on party status, they do generally impose a presumption against recovery by absent class members. First, they begin with the presumption that absent class members are typically not subject to discovery because they generally do not play an active role in litigation.[126] They then relax this presumption in a narrow set of cases for which courts have formulated tests using different language,[127] but which derive from a similar set of concerns. First, courts want to maintain the efficiency of the class action device, something that could be undermined if discovery were constantly permitted against absent class members.[128] Second, courts are worried about the burden of discovery on absent class members because it could both impose unnecessary costs on absent class members and actually limit the size of the litigating class in a Rule 23(b)(3) action where class members might choose to opt out rather than

differently to *putative* absent class members); Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972).

[125] See, e.g., In re Publ'n Paper Antitrust Litig., No. 04-md-1631, 2005 WL 1629633, at *1 (D. Conn. July 5, 2005); Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1004–05 (7th Cir. 1971). Courts have used this Rule 23(d) authority even when acknowledging that "[t]he Federal Rules of Civil Procedure do not provide for discovery from absent class members as 'parties.'" *In re Publ'n Paper Antitrust Litig.*, 2005 WL 1629633, at *1. Rule 23(d) permits courts overseeing class actions to "prescribe measures to prevent undue repetition or complication in presenting evidence or argument," and "deal with similar procedural matters." Fed. R. Civ. P. 23(d)(1)(A), (d)(1)(E).

[126] See Vasquez v. Leprino Foods Co., No. 17-cv-00796, 2019 WL 4670871, at *3 (E.D. Cal. Sept. 25, 2019).

[127] See Stinson v. City of New York, No. 10-cv-4228, 2015 WL 8675360, at *3 (S.D.N.Y. Dec. 11, 2015) ("[T]here is no uniform test in the federal courts for allowing discovery of absent class members.").

[128] See Mendez v. Avis Budget Grp., No. 11-cv-6537, 2019 WL 1487258, at *3 (D.N.J. Apr. 3, 2019); In re Carbon Dioxide Indus. Antitrust Litig., 155 F.R.D. 209, 212 (M.D. Fla. 1993) ("The efficiencies of a class action would be thwarted if routine discovery of absent class members is permitted."); see also Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (citing Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)) (noting the efficiency goal of the class action).

be subject to discovery.[129] However, courts also recognize that defendants may need information from absent class members in order to mount their case, and so, if discovery needs to be levied against absent class members to get some of this information, courts will permit it in certain cases.[130]

Courts will also sometimes permit discovery against an absent class member who has "injected" herself in some way into the litigation[131]—for example, if an absent class member is slated to appear as a witness for the plaintiff, or if she has filed a declaration in support of class certification.[132] This comports with the policy goals expressed above because an absent class member who injects herself into the litigation might have more notice that she will be burdened by the litigation, and the defendant might have a stronger case that discovery against this absent class member is truly necessary. Courts will still evaluate the discovery against an "injected" class member on a case-by-case basis.[133]

For discovery, then, courts do not take a formal approach based on either the joinder or representational model. Instead, the majority do not consider party status of absent class members clearly. Even still, if one considers the representational model as permitting absent class members to take a more passive role as they are not "parties," this approach to discovery, while not formally adopting the representational model, is more similar to it. Courts also take a joinder approach, however, in the

[129] See *Fishon*, 336 F.R.D. at 70 (remarking also that *requiring* absent class members to be subject to discovery in order to recover could transform the litigation into an opt-in action); see also In re Porsche Automobil Holding SE, 985 F.3d 115, 121 (1st Cir. 2021).

[130] See, e.g., *Fishon*, 336 F.R.D. at 70. Using these principles, courts have developed a variety of formulations for determining whether absent class members can be subject to discovery. One of the most common formulations permits discovery when

> the proponent of the discovery establishes that (1) the discovery is not designed to take undue advantage of class members or to reduce the size of the class, (2) the discovery is necessary, (3) responding to the discovery requests would not require the assistance of counsel, and (4) the discovery seeks information that is not already known by the proponent.

McPhail v. First Command Fin. Plan., Inc., 251 F.R.D. 514, 517 (S.D. Cal. 2008) (citing Clark v. Universal Builders, Inc., 501 F.2d 324, 340–42 (7th Cir. 1974)); see also McCarthy v. Paine Webber Grp., 164 F.R.D. 309, 313 (D. Conn. 1995) ("Discovery is only permitted where a strong showing is made that the information sought (1) is not sought with the purpose or effect of harassment or altering membership of the class; (2) is directly relevant to common questions and unavailable from the representative parties; and (3) is necessary at trial of issues common to the class.").

[131] See *Vasquez*, 2019 WL 4670871, at *4.

[132] Id.

[133] Aldapa v. Fowler Packing Co., No. 15-cv-00420, 2019 WL 2635947, at *4 (E.D. Cal. June 27, 2019).

instances where they find this presumption against discovery from absent class members overcome.

2. Counterclaims

Similar to discovery, whether defendants can assert counterclaims against absent class members without joining them to the litigation—whether they are "parties" for purposes of the litigation—implicates the joinder and representational models. And, like discovery, courts typically find that absent class members are not parties to the litigation within the meaning of Rule 13.[134] Counterclaims are governed by Rule 13.[135] Under the rule, a party must—in order to avoid losing the opportunity to bring the claim at all—bring a counterclaim if it "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim,"[136] and can choose to bring any permissive counterclaim.[137]

The majority of federal courts, particularly in recent years, have held that absent class members are not "parties" for the purposes of Rule 13.[138] However, a few courts, in older decisions, have held that absent class members are "parties" for the purposes of filing counterclaims against them.[139] They limited counterclaims to either the damages stage (for set-off counterclaims) or when absent class members had come forward to identify themselves in the litigation.[140] While these cases have not been overruled, they are contrary to the weight of more recent authority.[141]

[134] See infra note 138. Like discovery, the Supreme Court has not directly spoken to this question but has suggested that absent class members are not "parties" who can be served with a counterclaim. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 n.2 (1985) ("Petitioner places emphasis on the fact that absent class members might be subject to . . . counterclaims . . . . We are convinced that such burdens are rarely imposed upon plaintiff class members.").

[135] Fed. R. Civ. P. 13.

[136] Fed. R. Civ. P. 13(a) (compulsory counterclaim).

[137] Fed. R. Civ. P. 13(b) (permissive counterclaim).

[138] See Portillo v. Nat'l Freight, Inc., No. 15-cv-7908, 2021 WL 1884892, at *4 (D.N.J. May 11, 2021) ("This conclusion that absent class members are not 'parties' for the purposes of Rule 13 conforms to federal courts' piecemeal application of procedural rules to absent class members."); Allapattah Servs., Inc. v. Exxon Corp., 333 F.3d 1248, 1259 n.14 (11th Cir. 2003), *aff'd*, 545 U.S. 546 (2005); Circle Click Media LLC v. Regus Mgmt. Grp., No. 12-cv-04000, 2013 WL 4353550, at *4 (N.D. Cal. Aug. 13, 2013).

[139] See, e.g., Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch., 75 F.R.D. 40, 42 (S.D.N.Y. 1977); Wolfson v. Artisans Sav. Bank, 83 F.R.D. 552, 554 (D. Del. 1979); Weit v. Cont'l Ill. Nat'l Bank & Trust Co. of Chi., 60 F.R.D. 5, 8 (N.D. Ill. 1973).

[140] See, e.g., sources cited supra note 139.

[141] See *Portillo*, 2021 WL 1884892, at *4; *Circle Click Media*, 2013 WL 4353550, at *3.

The courts that find absent class members are not parties under Rule 13 base their decisions on some of the same concerns that underlie limiting discovery against absent class members. Specifically, they worry that permitting counterclaims against absent class members would make them feel compelled to hire an attorney or would otherwise disincentivize them from joining the action.[142] One recent case even emphasized the fact that the Supreme Court has acknowledged absent class members are treated as "parties" differently for different procedural rights.[143]

Even when holding that absent class members are not "parties" under Rule 13, some courts have found that counterclaims can still be levied against them. The Eleventh Circuit, in *Allapattah Services, Inc. v. Exxon Corp.*, wrote that, while absent class members were not parties under Rule 13, this only meant that "any counterclaims that may be permitted in a class action are not governed by Rule 13 and *are purely discretionary with the court*."[144] This suggests some mechanism for levying a counterclaim against an absent class member even though they are not a party within the Federal Rule that permits counterclaims. However, as a leading treatise on class actions has recognized, "[n]o case locates the source of that discretion,"[145] and no subsequent cases have had occasion to apply this "discretionary" framework.[146]

If a counterclaim could be brought against absent class members—based either on this vague discretion presumed by some courts, or based on treating absent class members as "parties" under Rule 13—the court might still face issues exerting personal jurisdiction over the absent class members. In individual litigation, when a defendant brings a counterclaim against a plaintiff, the court will typically have personal jurisdiction over the plaintiff because the plaintiff will have waived any ability to challenge this exercise of personal jurisdiction by bringing the case to the court in

[142] See, e.g., *Circle Click Media*, 2013 WL 4353550, at *3; Donson Stores, Inc. v. Am. Bakeries Co., 58 F.R.D. 485, 489–90 (S.D.N.Y. 1973).

[143] *Portillo*, 2021 WL 1884892, at *4.

[144] 333 F.3d 1248, 1260 n.14 (11th Cir. 2003), *aff'd*, 545 U.S. 546 (2005).

[145] 3 William B. Rubenstein, Newberg on Class Actions § 9:24 (5th ed. 2011) (citing Fed. R. Civ. P. 83(b)) (noting, however, this discretion could be located in Rule 83, which permits a judge to "regulate practice in any manner consistent with federal law").

[146] That being said, at least one case has confused these "discretionary" counterclaims with "permissive" counterclaims, permitting those to be levied against absent class members. See James D. Hinson Elec. Contracting Co. v. BellSouth Telecomms., Inc., No. 07-cv-598, 2011 WL 2448911, at *6 (M.D. Fla. Mar. 28, 2011) ("Because *Allapattah* dictates that Rule 13 does not apply to putative class members, BellSouth's counterclaims against the putative class members are permissive.").

the first instance.[147] However, because it could be said that absent class members do not consent to litigation in a specific forum in the same way as named plaintiffs, should courts treat them differently for personal jurisdiction purposes? Under the joinder view, as absent class members are parties to the suit, presumably the answer would be that absent class members have consented to suit in the forum state just as named plaintiffs have.

But this arguably runs contrary to the Supreme Court's characterization of absent class members' due process rights in *Phillips Petroleum Co. v. Shutts*.[148] In *Phillips*, the defendant argued that, in order for the district court to exercise personal jurisdiction over the claims of absent class members, they had to meet the minimum contacts test.[149] Finding that absent class members' due process rights are protected by other mechanisms, such as representation by named plaintiffs, the Court held that absent plaintiff class members need not have the same "minimum contacts with the forum which would support personal jurisdiction over a defendant" in order for a court to exercise personal jurisdiction over them.[150] The Court never characterized the absent class members as having consented to jurisdiction but, instead, consistently noted that they were entitled to some due process protections, even if fewer than a defendant in a non-class suit.[151] Indeed, the Court explicitly reserved judgment on whether this holding applied to a suit where absent class members were subject to counterclaims because this "burden[] [is] rarely imposed."[152] At least one lower court that assumed counterclaims could be filed against absent class members has also assumed that, without establishing minimum contacts with the forum, the court could not exercise personal jurisdiction over absent class members.[153] Thus, even if

[147] See Trade Well Int'l v. United Cent. Bank, 825 F.3d 854, 859 (7th Cir. 2016). This is true even when the plaintiff does not have sufficient minimum contacts with the forum state related to the specific counterclaim.

[148] 472 U.S. 797, 808 (1985).

[149] Id. at 807–08.

[150] Id. at 811.

[151] Id.

[152] Id. at 810 n.2.

[153] Kay v. Nat'l City Mortg. Co., 494 F. Supp. 2d 845, 854 (S.D. Ohio 2007). In *Kay*, the court considered whether it should transfer the class suit to South Carolina. Noting that more absent class members had minimum contacts with South Carolina than Ohio, the court found the potential inability of the defendants to bring counterclaims against these absent class members in Ohio a compelling reason to support transfer of the action. A leading treatise on

courts determined that counterclaims could be brought against absent plaintiff class members, in practice, defendants may only be able to do so for those plaintiffs who have met the minimum contacts test.

3. Appellate Rights

The joinder and representational models are most implicated during an appeal when an absent party attempts to appeal either an order of judgment from or a settlement agreement approved by the district court.[154] Under the representational model, because absent class members are not parties to the litigation, they would have to move to intervene in order to appeal an order from the district court. The joinder model, by contrast, would allow all absent parties to appeal the judgment without intervention. Because nonparties can just move to intervene, it might not seem apparent why the distinction between the two models as applied to appellate rights makes much difference.[155] But, this Note focuses on appellate rights for two reasons. First, there might be a small set of circumstances where an individual is not permitted to intervene, and would be then barred from appealing a judgment to which she was bound.[156] Second, and more importantly, the Court's opinion dealing with appellate rights provides one of the clearest pictures of how courts treat absent parties in the modern class action.

In *Devlin v. Scardelletti,* the Supreme Court determined that an absent class member need not intervene in order to appeal a district court's approval of a settlement.[157] Writing for the majority, Justice O'Connor specified that the inquiry necessary to the decision was "whether [the absent class member] should be considered a 'party' for the purposes of appealing the approval of the settlement."[158] In finding that absent class members are parties when bringing an appeal, she referenced the fact that

class actions supports this view of personal jurisdiction over absent class members as well. See 3 William B. Rubenstein, Newberg on Class Actions § 9:24 (5th ed. 2011).

[154] Federal Rule of Civil Procedure 23(e) governs settlement agreements and requires them to be approved by the district court.

[155] See Devlin v. Scardelletti, 536 U.S. 1, 20 (2002) (Scalia, J., dissenting) (calling intervention a "very easy . . . means for nonnamed class members" to become parties for appeal).

[156] See, e.g., id. at 20 n.4.

[157] Id. at 14 (majority opinion). The Court specified that the individual class member had to have timely objected at the fairness hearing that Rule 23(e) provides for after the court has approved of a settlement. Id.

[158] Id. at 7.

they are not considered parties for the purposes of finding diversity jurisdiction.[159] She found, however, that this poses no bar to the holding because "[n]onnamed class members . . . may be parties for some purposes and not for others," and the "label 'party'" is merely a "conclusion about the applicability of various procedural rules that may differ based on context."[160]

She then discussed the "context" that matters for appellate purposes as compared to diversity jurisdiction, focusing on how treating absent class members as parties for one but not the other vindicates the goals of the class action device.[161] Specifically, she focused on the efficiency goals of the class action and the class action's role in acting as a private attorney general. Because forcing parties to intervene before they appeal a decision would potentially balloon the number of parties in the litigation, allowing parties to simply appeal without intervention best promotes the efficiency goals of the class action, in the majority's eye.[162] By contrast, Justice O'Connor noted that not treating absent class members as "parties" for the purposes of diversity jurisdiction makes sense given the context. Determining the citizenship of all absent class members—"many of whom may even be unknown"—would be inefficient, and the complete diversity requirement may render class actions too difficult to try, hampering the private attorney general mechanism.[163] The majority told courts to look at the same goals Judge Wood first identified in her article—efficiency and the private attorney general effect of class actions—to determine whether or not absent class members are parties to the litigation.

Justice Scalia, joined by Justices Kennedy and Thomas, dissented, arguing not only that the representative model should apply to this instance, but that it always has, and that the Court upset this balance in *Devlin*.[164] He wrote that this treatment of absent class members "is

[159] Id. at 9 (citing Snyder v. Harris, 394 U.S. 332, 340 (1969)).

[160] Id. at 9–10.

[161] She also discusses that absent class members are treated as "parties" because filing a class action tolls the statute of limitations for them. Id. at 10 (citing Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974)). Because statutes of limitations toe the line between procedural and substantive, see Wood Hutchinson, supra note 1, at 485, this Note does not focus on them.

[162] *Devlin*, 536 U.S. at 10. The majority also notes that simply not permitting absent class members to appeal a judgment or settlement would be unfair because they are "parties to the proceedings in the sense of being bound by the settlement." Id.

[163] Id.

[164] Id. at 19–20 (Scalia, J., dissenting) ("Today's opinion not only eschews such a rule; it destroys one that previously existed. It abandons the bright-line rule that only those persons

confirmed by the application of those Federal Rules of Civil Procedure that confer upon 'parties' to the litigation the rights to take such actions as conducting discovery and moving for summary judgment" and claimed that it is undisputed that only named parties have those procedural rights.[165] He also faulted the majority for imposing uncertainty on the procedural rights of absent class members by creating an "oh-so-sophisticated new inquiry" dependent on the context around procedural rights.[166] *Devlin* thus represents either a shift in or a clarification of the Court's conception of absent class members' procedural rights, depending on whether one believes the majority's or the dissent's characterization of the landscape.[167] Regardless of its impact on prior doctrine, *Devlin*'s statement about absent parties has greatly influenced how courts have treated novel procedural issues that have arisen since its opinion. The next section reflects on whether this case-by-case rule is preferable to Judge Wood's more rule-like approach applying the representational model across the board.

III. HOW THE MODERN CLASS ACTION SHOULD TREAT ABSENT PARTIES

As noted, Judge Wood's article had at least two goals: (1) have courts recognize the difference between the joinder and the representational models, and (2) encourage courts to then use the representational model. Part II outlined that, while courts have recognized the distinction between the two models in at least some areas, such as personal jurisdiction or appellate doctrines,[168] courts and Congress have still continued to use both models to approach procedural doctrines such as subject matter

named as such are parties to a judgment, in favor of a vague inquiry 'based on context.'"). As highlighted *supra* note 12, this position contradicts one Justice Scalia would later take in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393, 408 (2010) (plurality opinion).

[165] *Devlin*, 536 U.S. at 15–16 (Scalia, J., dissenting).

[166] Id. at 20 ("Although the Court does not say how one goes about selecting the result-determinative 'context' . . . I gather from its repeated invocation of this phrase that the relevant context in the present case is the 'goals of class action litigation.'").

[167] A central thesis of Judge Wood's article is that there was at least confusion among the courts as to whether the joinder or representational model applied to different procedural rights. While the courts moved towards the representational model in some respects eventually, see supra Subsection II.A.1, at the time of writing, the Court had not yet interpreted § 1367 to overturn *Zahn v. International Paper Co*. See Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 566 (2005). Thus, it is difficult to see that there was a longstanding adherence to the representational model across all procedural rights.

[168] See supra Subsections II.A.2, II.B.3.

jurisdiction and discovery.[169] Judge Wood's second goal—having courts apply the representational model to all procedural issues involving absent class members—is valuable in that rules can be easier for courts to apply, and it does apply fairly consistently to the procedural issues that grant access to federal courts, such as jurisdiction and justiciability.[170] However, in other doctrines, the joinder model likewise vindicates the efficiency and private attorney general goals expressed by Judge Wood—and potentially does so better than the representational model. Ultimately, this Part answers whether it is valuable to apply the representational or joinder models at all times or whether it is more prudent to heed the Supreme Court's statement from *Devlin v. Scardelletti* that absent class members "may be parties for some purposes and not for others."[171]

This Note so far has surveyed a number of procedural aspects of how to treat absent class members and has demonstrated that certain aspects have come to follow the representational model and some have come to follow the joinder model.[172] Still, the majority of procedural areas see either unsettled doctrine[173] or courts and Congress applying both models in tandem even when the doctrine is settled.[174] This Note ultimately concludes that, because different procedural rights bear differently on the duties and rights of absent class members, the *Devlin* approach is superior to an exclusive joinder or exclusive representational approach.

For procedural rights that determine access to a federal forum, such as subject matter and personal jurisdiction and standing, Judge Wood's initial determination that the representational model should apply as a rule-like presumption is still justified by the goals of the class action. As the Court has acknowledged, imposing the complete diversity requirement on absent class members would severely limit the ability of class actions to enter into federal court via diversity jurisdiction because the sheer number of absent class members makes it more likely that complete diversity will be thwarted.[175] Additionally, this imposes high costs on the district court to determine the citizenship of every absent

[169] See supra Subsection II.A.1, II.B.1.

[170] Wood Hutchinson, supra note 1, at 506–07 (encouraging courts to apply the representational model as a way of lessening the "chaos generated by class actions").

[171] 536 U.S. 1, 2 (2002).

[172] See supra Subsection II.B.3 (appellate rights).

[173] See supra Subsection II.A.2 (personal jurisdiction); supra Subsection II.A.3 (standing).

[174] See supra Subsection II.A.1 (subject matter jurisdiction); supra Subsection II.B.1 (discovery); supra Subsection II.B.2 (counterclaims).

[175] *Devlin*, 536 U.S. at 10–11.

class member, particularly in actions where the classes are so large and some absent class members may not even be known to the court.[176] Requiring the court and parties to consider all absent class members and their claims to determine whether the court has personal jurisdiction over the defendant could effect a similar bar to class actions in federal court.[177] Barring class actions to this extent from federal courts arguably undermines the private attorney general function of the class action because plaintiffs have less recourse to vindicate their legal rights.[178] Additionally, forcing courts to individually analyze the jurisdictional requirements for absent class members undermines the purpose of the class action device to provide for a more efficient aggregation method for claims.

Still, these goals cannot be viewed in a vacuum. For example, if the only goal of an aggregated action was pure efficiency, one could argue that simply aggregating all claims by a single plaintiff against all defendants she chose to sue in a year, regardless of whether they were a part of a same factual event, could be more efficient.[179] Instead, there are countervailing interests the courts should consider when determining whether to treat absent class members as parties for jurisdictional purposes. For example, for subject matter jurisdiction, permitting only the named plaintiffs to be considered when determining diversity and the amount in controversy could create negative incentives for class counsel to choose a class representative based solely on where she lives and how much the defendant allegedly injured her.[180] Additionally, one might be

[176] Id. at 10.

[177] See Wilf-Townsend, supra note 85, at 205–06. Venue determinations would not bar litigants from a federal forum by the joinder approach, but permitting courts to only look at the claims of the named plaintiffs would allow the courts to focus on more of the venue categories that are present in § 1391, rather than just determining venue based on where the defendant is subject to personal jurisdiction. See 28 U.S.C. § 1391(b)(3); cf. Wood Hutchinson, supra note 1, at 484 (discussing venue).

[178] See Wood Hutchinson, supra note 1, at 503.

[179] Cf. id. at 481–82 (quoting Bernstein, supra note 51, at 349, 352–53) (describing the type of efficiency encouraged by a class action).

[180] See Marcus, supra note 60, at 1781. It is true, however, that the latter concern might be one that we want class counsel to consider when choosing a named plaintiff. Specifically, if an individual is injured by a larger amount than the rest of the class, they might be more incentivized towards vigorous prosecution of the claim over anyone else. Additionally, concerns that only looking at the named class member for jurisdictional purposes allows the class counsel to game jurisdiction by choosing certain named plaintiffs are not limited to jurisdictional decisions. Class counsel chooses a named plaintiff for any number of reasons, whether it be that the named plaintiff has a more sympathetic story to litigate or because the

concerned that the original justification for diversity jurisdiction—that federal courts provide a forum for individuals who might be suing in a foreign, hostile state court—is not justified in an action where a named plaintiff from State *A* is suing a defendant located in State *B* on behalf of an entire class of litigants from State *B*. For personal jurisdiction, courts might well be worried about the due process rights of defendants in a situation where the majority of the absent class members were not injured by their conduct in the forum state. Thus, there are tradeoffs to choosing either the joinder or representational model, and courts should not consider the two class action goals alone when making these determinations.

Permitting Article III standing requirements to follow the representational model similarly promotes efficiency goals. While it is true that courts will eventually need to determine injury faced by individual absent class members to determine whether they have standing at the damages phase,[181] allowing courts to postpone this determination to the damages phase best comports with the efficiency goals of the class action. If courts will need to determine individualized damages already at the end of the litigation, waiting until then to determine whether or not absent class members are injured is most efficient. One potential argument against this is that a large class with a vast number of uninjured class members could incentivize a defendant to settle when she otherwise would continue with litigation. But courts can marshal other requirements of Rule 23—such as the predominance inquiry and requirements related to class definition—to prevent a class that includes far too many uninjured class members. And, because courts are barred from certifying a "fail-safe" class, which defines its membership through the injury that occurred, there is always a small chance that uninjured class members will be included.[182]

For procedural prerequisites to suit, Judge Wood's conclusion that the representational model should control has not been altered by changes to doctrine. A different story can be told when considering whether the

named plaintiff is more interested in the litigation. Perhaps choosing them based on residential status is not preferable, but this concern is less serious than nationwide class actions being prohibited in courts. After all, absent class members still retain a due process right to adequate representation by the named plaintiffs and can challenge the judgment if they believe this right has been violated. Hansberry v. Lee, 311 U.S. 32, 45–46 (1940).

[181] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208 (2021).

[182] See 1 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 2:3 (5th ed. 2011).

joinder or representational model should apply to procedural rights that apply to absent class members during trial, such as discovery and counterclaims. The overarching policy concern in this case is not whether classes will be barred from suit, but whether absent class members who otherwise "need not hire counsel or appear" in court will be subject to requirements during the litigation.[183] In some cases, the efficiency goal of the class action device may support treating absent class members as parties for discovery or counterclaim purposes, if moderated by the district court. However, some mitigating steps must be taken so to not encourage absent class members to choose to opt out of a Rule 23(b)(3) action, which would then cut against the private attorney general function of the class action.

For example, if defendants have counterclaims against individuals that would reduce their liability in the action, it might be sensible to permit these counterclaims to offset the recovery of the absent class members. However, as courts have begun to do with discovery, allowing absent class members to be treated as parties should be done in a way that does not incentivize them to leave the litigation, or else the class action device may become less effective. When class members opt out of a Rule 23(b)(3) class, it undermines the efficiency of the class action device because, if the recovery amount is large enough, these class members could themselves bring another claim against the defendant. On the other hand, if the recovery is too small, absent class members might not bring suit on their own, but they will also not recover anything from the defendant's violation of their rights, impairing the private attorney general function of the class action.

CONCLUSION

The story of absent class members' procedural rights is disjointed, and this Note, like Judge Wood's initial article, hopes to bring some clarity to it. Courts have taken various approaches to different procedural rights, and, as the Court has told us, it is proper to treat absent parties differently based on the context of the procedural rule. Thus, the guiding principles for courts making this determination should be the background goals of the class action device, viewed in context of other countervailing interests. As Judge Wood showed in her article, courts had not been precise in identifying the two models. And as this Note makes clear,

[183] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 (1985).

courts have continued to do so to this day. While some courts have begun to recognize the distinction, particularly in the wake of *Devlin*, others remain muddled. However, when new procedural questions arise, courts should look to the joinder and representational models to see which, in light of the twin goals of class actions, best apply to absent class members.