Standing and Mootness in Class Actions: A Search for Consistency

*Jean Wegman Burns**

A foolish consistency is the hobgoblin of little minds adored by little statesmen and philosophers and divines.[1]

During the last twenty years the Supreme Court has grappled repeatedly with the "amorphous"[2] issues of standing and mootness in class actions.[3] The number of its decisions in this area shows that the Court clearly recognizes both the importance of the class-action device in virtually all types of litigation and the significance of determining who may use that device.[4] The last major decision pertaining specifically to class-action standing and mootness, however, dates from 1980, and is now nine years old.[5] Recent lower court decisions show that the

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* Associate Professor of Law, Brigham Young University. B.A. 1970, Vanderbilt University; J.D. 1973, University of Chicago.

[1] R.W. EMERSON, *Self Reliance*, in ESSAYS: FIRST SERIES 26, 35 (1926).

[2] Standing has been called one of " 'the most amorphous [concepts] in the entire domain of public law.' " Flast v. Cohen, 392 U.S. 83, 99 (1968).

[3] As the Supreme Court and commentators have recognized, standing and mootness are two sides of the same coin. *See* United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980). Mootness is " 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).' " *Id.* at 397 (quoting Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)); Sosna v. Iowa, 419 U.S. 393, 402 (1975) ("[T]he general principles of Art. III jurisdiction require that the plaintiff's personal stake in the litigation continue throughout the entirety of the litigation.").

[4] *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980).

> The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Id. at 339.

[5] *Geraghty*, 445 U.S. at 388. What analyses there were of the problems of standing and mootness in class actions largely ended after the Supreme Court's decision in *Geraghty*. *See, e.g.*, Greenstein, *Bridging the Mootness Gap in Federal Court Class*

time has come for the Supreme Court to revisit these issues to bring some order and logic to what has become a confused and conflicting morass.[6]

This Article maintains that the confusion in, and conflict among, the lower courts today can be directly traced to two different signals that the Supreme Court has sent in its opinions. In dealing with standing and mootness issues in the class-action context, the Court has embraced two quite different and conflicting approaches. The "traditional" approach was taken from the rules for standing and mootness developed in nonclass actions.[7] The other, a more functional approach,[8] emerged to handle the peculiarities of class actions.[9] The Supreme Court has

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Actions, 35 STAN. L. REV. 897 (1983); Willborn, *Personal Stake, Rule 23, and the Employment Discrimination Class Action*, 22 B.C.L. REV. 1 (1980); Comment, *Class Standing and the Class Representative*, 94 HARV. L. REV. 1637 (1981); Note, *Flexible Mootness in Class Certification*, 30 CLEV. ST. L. REV. 295 (1981) [hereafter Note, *Flexible Mootness*]; Note, *Article III Justiciability and Class Actions: Standing and Mootness*, 59 TEX. L. REV. 297 (1981) [hereafter Note, *Article III Justiciability*]. For earlier analyses, see Bledsoe, *Mootness and Standing in Class Actions*, 1 FLA. ST. U.L. REV. 430 (1973); Champlin, *Personal Stake and Justiciability: Application to the Moot Class Action*, 27 U. KAN. L. REV. 85 (1978); Kane, *Standing, Mootness, and Federal Rule 23 — Balancing Perspectives*, 26 BUFFALO L. REV. 83 (1976); *see also* Floyd, *Civil Rights Class Actions in the 1980's: The Burger Court's Pragmatic Approach to Problems of Adequate Representation and Justiciability*, 1984 B.Y.U. L. REV. 1, 38-44 (1984) (discussing "unanswered questions" after *Geraghty*).

Wholly lacking in this outpouring, however, is any analysis of standing-mootness problems in class actions in light of the Supreme Court's 1982 opinion in Blum v. Yaretsky, 457 U.S. 991 (1982), and the recent lower court opinions. This Article argues that these recent decisions bring into sharp focus the exact nature of the inescapable conflict in the Supreme Court opinions.

[6] Standing in nonclass actions has been a recurring problem for the Supreme Court. Some commentators contend that the law of standing in nonclass cases similarly lacks a cohesive conceptual framework. *See, e.g.*, Scott, *Standing in the Supreme Court — A Functional Analysis*, 86 HARV. L. REV. 645, 660-69 (1973); Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977) [hereafter Tushnet, *The New Law of Standing*]; Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1705-06 (1980) [hereafter Tushnet, *The Sociology of Article III*]; Note, *"More Than an Intuition, Less Than a Theory": Toward a Coherent Doctrine of Standing*, 86 COLUM. L. REV. 564, 564-69 (1986). Indeed, the Supreme Court has acknowledged the lack of any framework: "Generalizations about standing to sue are largely worthless as such." Association of Data Processing Serving Org. v. Camp, 397 U.S. 150, 151 (1970).

[7] *See infra* notes 17-43 and accompanying text.

[8] *See infra* notes 44-63 & 87-105 and accompanying text.

[9] The Court has repeatedly recognized that "[t]he class-action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' . . . '[T]he class-action device saves the resources of both

wavered between these two approaches, sometimes using one and sometimes the other, but never abandoning either and never constructing any overarching, unifying analytical framework.[10]

The recent lower court decisions reflect and magnify the confusion in the Supreme Court opinions and bring into sharp focus the inescapable logical inconsistency between the Court's two approaches. Not only are there splits among the circuits (and even conflicting decisions from the same circuit) on particular issues,[11] but, moreover, the whole area of law has taken on a patchwork-quilt quality. Lacking any cohesive and unifying framework for deciding issues involving class-action standing and mootness, the lower courts tend to approach each particular issue as independent from and unrelated to other class-action issues. As a result, even when there is partial consistency in handling a particular question, there is no logical consistency between class-action issues.

The confusion and logical inconsistency in the lower courts has now reached a critical level. Furthermore, because standing and mootness questions affect all class actions (whether involving employment discrimination, constitutional questions, securities regulation, or consumer disputes) the confusion in this area will obviously have far-reaching consequences.[12]

This Article first reviews the Supreme Court decisions and examines

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the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.'" General Tel. Co. v. Falcon, 457 U.S. 147, 155 (1982) (quoting Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979)).

[10] One commentator has remarked that "while the Court has rendered justice in individual controversies, its 'confusing' and 'irreconcilable' opinions have presented analytical difficulties for the judges, attorneys and scholars who interpret this facet of the federal court justiciability doctrine." Greenstein, *supra* note 5, at 897; *see also* Willborn, *supra* note 5, at 1-16 (arguing that the Supreme Court decisions lead to "horizontal inequities" with treatment differing according to where the case is along a time line). In contrast, Professor Floyd argues that the Supreme Court decisions regarding civil-rights class actions display a unifying focus on the pragmatic aspects of class actions. Floyd, *supra* note 5.

[11] *See infra* Part II(B); *infra* note 169 and accompanying text.

[12] Much has been written on the pros and cons of class actions. *See, e.g.*, Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits — The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971); Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842 (1974); Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664 (1979); Wilton, *The Class Action in Social Reform Litigation: In Whose Interest?*, 63 B.U.L. REV. 597 (1983). Whatever one's view, there is no denying that class actions can have an enormous impact on litigation.

the emergence of the two approaches the Court uses in resolving standing and mootness problems in the class-action context. In doing so, the Article reveals the inherent conflict between the two approaches. The Article then explores three particular issues with which the lower courts recently have wrestled. The courts' handling of these issues highlights the inescapable nature of the inconsistency between the Supreme Court's two approaches. In addition, lower court decisions vividly demonstrate the resulting confusion in the law emerging from the lower courts. Finally, a resolution of the problem is proposed.

I. A REVIEW OF THE SUPREME COURT DECISIONS

Article III of the Constitution[13] and Federal Rule of Civil Procedure 23(a)[14] provide starting points in resolving class action standing and mootness issues. Neither, however, provides any meaningful guidance in determining precisely when standing to sue exists in a class action or exactly what the class representative's role should be in the standing determination.[15] Rather, the law in this area has necessarily evolved in fits and starts through gradual case-law development.[16]

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[13] U.S. CONST. art. III, § 2.

[14] This rule states:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

[15] Article III and Rule 23 address two related yet different concerns. Article III asks if this plaintiff has a "case or controversy" with this defendant. Put bluntly, has what this defendant done injured this plaintiff? Rule 23, on the other hand, asks: Is this plaintiff a proper representative of a class? *See* 1 H. NEWBERG, CLASS ACTIONS §§ 2.06-.07 (2d ed. 1985); Greenstein, *supra* note 5, at 925. Nonetheless, the two concepts blur together as courts typically speak of "standing to sue as a class representative." *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216 (1974).

[16] *See* Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 SUP. CT. REV. 459, 480-82, 486-88 (1983) (arguing that the Supreme Court has never chosen between the joinder model and the representational model in dealing with class actions); *see also* Bledsoe, *supra* note 5; Kane, *supra* note 5; Willborn, *supra* note 5, at 5-16; Comment, *supra* note 5, at 1639-47.

A. The Traditional Approach: Flast v. Cohen

In 1968, in *Flast v. Cohen*,[17] the Supreme Court purported to give a "fresh examination" to Article III's case or controversy requirement and to the intertwined concept of standing.[18] A taxpayer challenge to certain federal expenditures, *Flast* presented as a threshold question the taxpayer plaintiff's standing to bring the nonclass lawsuit.[19]

At the outset of his analysis, Chief Justice Warren warned that "[j]usticiability is . . . not a legal concept with a fixed content or susceptible of scientific verification."[20] Furthermore, because standing was part of the larger concept of justiciability, it too was "surrounded by the same complexities and vagaries that inhere in justiciability."[21] Standing had, he noted, "been called one of 'the most amorphous [concepts] in the entire domain of public law.' "[22] With that background, Warren attempted to flesh out the amorphous concept of standing.

Warren began by looking at the purpose behind the Article III case or controversy requirement. The goal of standing, according to Warren, was to ensure that there would be "concrete adverseness" between the parties, which in turn would "sharpen the presentation" of the issue for the court.[23] By insisting on standing, a court could guarantee that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution," and could thereby avoid ill-defined, hypothetical, or abstract cases.[24]

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[17] 392 U.S. 83 (1968).

[18] *Id.* at 94.

[19] On the relevance of the *Flast* decision to nonclass-action standing cases, see Scott, *supra* note 6, at 660-62; Sedler, *Standing, Justiciability and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479, 481-84 (1972).

[20] *Flast*, 392 U.S. at 95 (footnote omitted). The Court noted that "justiciability" covers "two complementary but somewhat different limitations." *Id.* First, it limits "courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Id.* Second, it "define[s] the role assigned to the judiciary in a tripartite allocation of power." *Id.* As one commentator has observed: "[A] reading of the cases makes clear [that] it is often difficult to distinguish between the constitutional and the prudential underpinnings of the justiciability doctrine." Greenstein, *supra* note 5, at 899.

[21] *Flast*, 392 U.S. at 98.

[22] *Id.* at 99 (quoting *Hearings on S.97 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 89th Cong., 2d Sess., 465, 498 (statement of Professor Paul A. Freund)).

[23] *Id.*

[24] *Id.* at 101. Thus, Warren noted that "[a] proper party is demanded so that federal courts will not be asked to decide 'ill-defined controversies over constitutional issues' . . . or a case which is of 'a hypothetical or abstract character.' " *Id.* at 100.

The key to achieving this desired "concrete adverseness" was, under Warren's analysis, the requirement that the individual plaintiff have a sufficient "personal stake" in the outcome of the case.[25] Quoting from *Baker v. Carr* (another nonclass case), Warren viewed the plaintiff's personal stake as causally linked to the sought-after "concrete adverseness."[26] That is, by insisting that the individual plaintiff have something personally at stake in the case, a court would obtain the "concrete adverseness" necessary to sharpen the issue:

> The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy *as to assure* that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[27]

Thus, the focus of the standing question, according to Warren, was on the individual plaintiff, specifically, on whether she was the proper party to bring the lawsuit, not on whether the issue being presented was a "live," hotly contested issue. "The fundamental aspect of standing," Warren stated, "is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."[28] Only by having a plaintiff with a sufficient personal stake could a court be assured of having the issue presented in a truly adverse context.

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[25] As Professor Jaffe has noted, the usual justification for insisting on personal stake in meeting the case-or-controversy requirement is explained

> in terms of the necessary conditions for the rational exercise of the judicial power. The court, not being a representative institution, not having initiating powers and not having a staff for the gathering of information, must rely on the parties and their advocates to frame the problem and to present the opposing considerations relevant to its solution. It is argued that unless the plaintiff is a person whose legal position will be affected by the court's judgment, he cannot be relied on to present a serious, thorough, and complete argument.

Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1037 (1968). A second argument for the personal-stake requirement, Jaffe notes, is based on the contention that the requirement is necessary to keep the court, a nonrepresentative body, from becoming in essence, a legislative body by making laws. *See id.* at 1038; *see also* Tushnet, *The Sociology of Article III*, *supra* note 6, at 1713.

[26] *Flast*, 369 U.S. at 99 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

[27] *Id.* (emphasis added) (quoting *Baker*, 369 U.S. at 204).

[28] *Id.*

B. O'Shea *and* Warth: *The Traditional Approach Moves Into Class Actions*

In the mid-1970s, the Supreme Court applied the *Flast* standing analysis to class actions.

In *O'Shea v. Littleton*[29] a citizens group brought a class action against various public officials who allegedly had engaged in a pattern of racial discrimination. The complaint, however, sought only injunctive relief and did not allege any discrimination against any of the named plaintiffs. Furthermore, because the district court dismissed the complaint without ever reaching the class certification issue, the case reached the Supreme Court as an uncertified class action.

The Supreme Court disposed of *O'Shea* on standing grounds. Speaking for the Court, Justice White repeated the *Flast* analysis that personal stake assures concrete adverseness.[30] As in *Flast*, White framed the standing question as: Had the plaintiffs alleged direct personal injury, thereby giving them a personal stake in the action?[31]

Without discussion, White also stated that, although *O'Shea* was an uncertified class action, the "parties" who must satisfy the personal-stake requirement were the named representative plaintiffs. "[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."[32]

Because the named plaintiffs in *O'Shea* had not alleged that they themselves were or would be the victims of discriminatory actions by defendants, White concluded that the plaintiffs lacked standing to bring the lawsuit and that the district court, in turn, never had jurisdiction over the case.[33] White made no reference to the fact that the unnamed members of the uncertified class would continue to suffer injury because of defendants' alleged discrimination.[34]

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[29] 414 U.S. 488 (1974).

[30] *Id.* at 494.

[31] *See id.* at 495. "It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct." *Id.* at 494.

[32] *Id.*

[33] *Id.* at 495-96.

[34] In an earlier class action, Bailey v. Patterson, 369 U.S. 31, 32-33 (1962), the Supreme Court had stated: "They [the named plaintiffs] cannot represent a class of whom they are not a part." *Bailey*, however, in which the named plaintiffs were found to be members of the injured class, offered no further insight into standing in class actions and, of course, came before the "fresh examination" of standing in *Flast*.

The following term, in *Warth v. Seldin*,[35] the Supreme Court used the same approach to deny standing in another class action — this time, a class action challenging the defendant town's zoning policies. As in *O'Shea*, the district court in *Warth* had dismissed the complaint before ruling on the issue of class certification. Thus, as in *O'Shea*, the case reached the Supreme Court as an alleged, but uncertified, class action and, once again, the issue was whether the plaintiffs had standing to bring the action.

The Supreme Court again held that to satisfy Article III a plaintiff must have " 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."[36] The Court further concluded, as it had in *O'Shea*, that the named plaintiffs in a class action (at least in an uncertified class action) "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent."[37]

Thus, in *O'Shea* and *Warth* (in both of which standing was lacking)[38] the Supreme Court carried over into class actions the "traditional" personal-stake approach to standing developed in *Flast*.[39] The

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[35] 422 U.S. 490 (1975).

[36] *Id.* at 498-99 (emphasis in original).

[37] *Id.* at 502. The Court also noted that in addition to the constitutional requirements for standing, judicial self-restraint imposed related prudential limits on who could sue. In particular, even when the plaintiff met the constitutional requirement of alleging injury to herself (thereby fulfilling the personal stake requirement), unless Congress has authorized otherwise, "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.* at 499.

[38] In *Warth*, Justice Douglas, dissenting, somewhat cynically observed: "Standing has become a barrier to access to the federal courts . . . ." *Id.* at 519.

[39] In Sierra Club v. Morton, 405 U.S. 727 (1972), the Supreme Court similarly applied the *Flast* analysis to a representative action. In *Sierra Club*, a conservation organization brought a "public action" seeking to restrain federal officials from approving recreational development in a national forest. The Sierra Club alleged no direct injury to the club or its members as a result of the challenged development. The defendants challenged the Sierra Club's standing to maintain the action. The Supreme Court agreed that standing was lacking and dismissed the case.

As in *Flast*, the Supreme Court in *Sierra Club* analyzed the standing question in terms of whether the plaintiff, the Sierra Club, was the proper party to bring the action. The presence of a hotly debated issue, the sophistication and expertise of the Sierra Club in environmental matters, and the fact that some members of the public would doubtless be injured by the development project, were all deemed irrelevant. The crucial factor, as in *Flast*, was whether the plaintiff had a "personal stake" in the case.

emphasis continued to be whether this particular plaintiff had shown that she had a personal stake in the controversy. Would she benefit by the recovery sought or be injured without it?[40] The reason for the insistence on a showing of personal stake was the oft-repeated belief that a personal stake in the plaintiff assured that the issue would be presented to the court in an adversary context (or, to use the Court's buzz words, there would be "concrete adverseness").[41]

Who must satisfy the standing requirement in a class action, moreover, was spelled out in *O'Shea* and *Warth*. Without discussion the Court assumed that in a class action the named plaintiff, not the unnamed class members, must satisfy the standing requirement by showing that she had a personal stake in the controversy — at least, when, as in *O'Shea* and *Warth*, the class was uncertified.[42]

C. *The Beginning of a Flexible and Functional Approach to Standing in Class-Action Cases:* Sosna v. Iowa

The same term it issued its decision in *Warth*, the Supreme Court also decided *Sosna v. Iowa*.[43] *Sosna*, although not repudiating the traditional approach of *Flast* and *O'Shea*, marked the beginning of a different, more flexible, and functionally oriented approach to the Arti-

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The litigation, in short, must be "in the hands of those who have a direct stake in the outcome." *Id.* at 740. "[A] mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem," is not sufficient for standing. *Id.* at 739. Rather, "the party seeking review [must] be himself among the injured." *Id.* at 735.

[40] Chief Justice Burger echoed the same theme two years later:

> [A] named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs; it bears repeating that a person cannot predicate standing on injury which he does not share. Standing cannot be acquired through the back door of a class action.

Allee v. Medrano, 416 U.S. 802, 828-29 (1974).

[41] In nonclass-action cases, the Supreme Court was taking an equally hard line on the standing requirement. In DeFunis v. Odegaard, 416 U.S. 312 (1974), for instance, the Court held that the plaintiff's nonclass challenge to a law school's allegedly discriminatory admissions policy was moot because the plaintiff was in his final quarter of law school by the time the case reached the Supreme Court.

[42] In the representative action of *Sierra Club*, 405 U.S. at 727, the Court was willing to look to *either* the representative party (*i.e.*, the Sierra Club) or to its unnamed members to fulfill the standing requirement. *See generally* 3B J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 23.04[3] (1987) (collecting cases on the standing of an organization to represent its members' interests).

[43] 419 U.S. 393 (1975). For detailed examinations of the *Sosna* decision, see Champlin, *supra* note 5, at 88-99, and Kane, *supra* note 5, at 100-05.

cle III case-or-controversy requirement in class actions.

In *Sosna*, the plaintiff, who had recently moved to Iowa, brought a class action challenging the constitutionality of Iowa's one-year residency requirement for initiating divorce proceedings. The district court certified the class and upheld the constitutionality of the Iowa statute. However before the Supreme Court heard the case, the plaintiff, Mrs. Sosna, had lived in Iowa long enough to satisfy the residency requirement and had also obtained a divorce in another state.

At the outset of its opinion the Supreme Court addressed the question of mootness given Sosna's changed circumstances. Justice Rehnquist, writing for the Court, noted that mootness, which necessarily calls into question the jurisdiction of the Court, is just a standing question presented later in time. "[T]he general principles of Art. III jurisdiction require that the plaintiff's personal stake in the litigation continue throughout the entirety of the litigation."[44]

In *Sosna*, the Supreme Court held that, even though Sosna no longer had a "live" controversy, the case was nonetheless not moot. In explaining the ruling, Justice Rehnquist admitted that had this been an individual, nonclass action, mooting the plaintiff's claim would have mooted the entire case and required dismissal of the action. What saved *Sosna* from being moot was class certification. When the district court certified the class, Rehnquist explained, "the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by [the plaintiff]."[45] Even though Sosna, the class representative, no longer had a "live" claim, the *class* continued to have a live controversy. The case, Rehnquist observed, "remains very much alive for the class of persons" she represents.[46] The case-or-controversy requirement of a "personal stake" was satisfied by the certified class's continuing controversy with the defendant.[47] "The controversy may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named

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[44] *Sosna*, 419 U.S. at 402; *see also* sources cited *supra* note 25.

[45] *Sosna*, 419 U.S. at 399.

[46] *Id.* at 401.

[47] Justice Rehnquist also noted the transitory nature of the injury produced by the Iowa statute. With the passage of time, a plaintiff would always fulfill the Iowa residency requirement and cease to have a "live" controversy. Yet, although no single named plaintiff was likely ever to be subject repeatedly to the requirements of the Iowa statute, other unnamed class members would continue to be injured by the statute. *Id.* at 400. In Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), the Court specifically held that despite such comments in *Sosna*, the *Sosna* decision was not limited to issues "capable of repetition, yet evading review." *Id.* at 754.

plaintiff has become moot."[48]

In response to the dissent's accusations that his approach "detract[ed] from the firmly established requirement"[49] of Article III, Rehnquist limited the holding in *Sosna* to cases in which (1) a class had been certified; and (2) the named plaintiff had a "live" case both at the time the complaint was filed and at the time of class certification.[50] Only in such a situation, according to Rehnquist, could the class satisfy the personal-stake requirement.

Having found Article III satisfied by the personal stake and continuing live claim of the unnamed class members, Rehnquist turned to what he dealt with as a separate and distinct question: whether Sosna could fairly and adequately represent the class, as required by Rule 23, given her own mooted claim.[51] Noting that it would be unlikely that segments of the class would have interests conflicting with those that Sosna sought to advance, Rehnquist concluded that Sosna remained an adequate class representative to press the merits of the class claims.[52]

Justice White, who had authored the opinion of the Court in *O'Shea*, dissented in *Sosna*. The majority's approach in *Sosna*, White recognized, was fundamentally at odds with his approach in *O'Shea*. Whereas the Court in *O'Shea* had looked to the class representative to satisfy the Article III personal-stake requirement, the Court in *Sosna* was willing to look to the certified class to do this. By the "legal fiction" of "reifying" the class,[53] the Court was essentially backing off the "personal stake assures concrete adverseness" formula as applied to class actions. Even though Sosna no longer had a personal stake in

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[48] *Sosna*, 419 U.S. at 402.

[49] *Id.* at 412 (White, J., dissenting).

[50] "There must . . . be a named plaintiff who has such a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23 . . . ." *Id.* at 402.

[51] Rehnquist thus in effect separated the Article III question and the Rule 23 question.

> A named plaintiff in a class action must show that the threat of injury in a case such as this is "real and immediate," not "conjectural" or "hypothetical." . . .
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> This conclusion does not automatically establish that appellant is entitled to litigate the interests of the class she seeks to represent, but it does shift the focus of examination from the elements of justiciability to the ability of the named representative to "fairly and adequately protect the interests of the class."

Id. at 402-03; *see supra* note 15 and accompanying text.

[52] *Sosna*, 419 U.S. at 403.

[53] *Id.* at 412-13 (White, J., dissenting).

striking down the Iowa statute, it was sufficient that there was a class of people for whom this was a "live" issue.[54]

Thus, one result of *Sosna* was to make the class separate from and seemingly independent of the class representative.[55] The certified class, having a legal status separate from the named plaintiff, could supply the "personal stake" said to be necessary for standing,[56] and the class representative's job was simply to provide adequate representation.[57]

Furthermore, the *Sosna* approach diluted the importance of the class representative. While Rehnquist's opinion parroted the oft-repeated principle that "[a] litigant must be a member of the class which he or she seeks to represent," Rehnquist significantly added the phrase: "*at the time* the class action is certified by the district court."[58] In other

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[54] Justice White observed in his dissent:

> [Sosna] retains no real interest whatsoever in this controversy, certainly not an interest that would have entitled her to be a plaintiff in the first place, either alone or as representing a class. In reality, there is no longer a named plaintiff in the case, no member of the class before the Court. The unresolved issue, the attorney, and a class of unnamed litigants remain.

Id. at 412.

[55] *See* Greenstein, *supra* note 5, at 915; Comment, *supra* note 5 (taking the position that the class and the class representative should be separated for standing and mootness considerations).

[56] Professor Champlin argues that the class in *Sosna* — A Rule 23(b)(2) class whose members were neither identified nor notified of the action — did not functionally fulfill the personal-stake requirement if that requirement (and the related goal of adverseness) is regarded as coming, in part, from the personal attorney-client relationship. Champlin, *supra* note 5, at 92-97.

[57] Because Rehnquist carefully limited his holding in *Sosna* to certified class actions, the district court's certification of the class also took on, for no obvious reason, critical significance for Article III purposes. In his dissent, White argued that "[c]ertification is no substitute for a live plaintiff with a personal stake . . . . Moreover, certification is not irreversible or inalterable . . . ." *Sosna*, 419 U.S. at 415.

One commentator has suggested that certification may be important "because it offers substantial assurance that a class, as defined by Rule 23(a) and (b), in fact exists." Hutchinson, *supra* note 16, at 487; *see also* Champlin, *supra* note 5, at 104-06. However, another commentator has observed that "if a class exists, it exists from the time of filing, and rule 23 certification is a procedural device, requiring the court formally to ascertain whether the class does, in fact, exist . . . . The action of certification neither creates nor transforms the class members' rights." Greenstein, *supra* note 5, at 912, 922.

[58] *Sosna*, 419 U.S. at 403 (emphasis added). Rehnquist cited Bailey v. Patterson, 369 U.S. 31 (1962), for this proposition but neglected to note that he had added the caveat "at the time the class action is certified by the district court." The *Bailey* dicta on which Rehnquist relied contained no such reference to the time of certification. *See supra* note 34.

words, although Sosna having fulfilled the one-year residency requirement and having obtained a divorce could not possibly have been a member of the class she purported to represent in the Supreme Court, she nonetheless could be an "adequate" representative because she had been a member of the class when it was certified and had "competently" sought to advance the interests of the class.[59] No consideration was given to the possibility that Sosna's lack of a "personal stake" in the outcome might lessen the vigor with which she acted.[60]

The *Sosna* decision thus marked a loosening of the traditional rules of standing and a movement toward a functional approach in the class-action area. Although the Court did not cast away the "personal stake insures concrete adverseness" litany, it now was willing to indulge in the fiction that the certified class supplied the personal stake.[61] The question of standing was now framed in essentially functional terms: Was there an adversary relationship sufficient to fulfill the function of presenting a sharply contested issue? A necessary corollary was that the role of the class representative was diminished. According to *Sosna*, the class representative only had to be a member of the class until certification. Thereafter, she could continue to represent the class adequately even with nothing at all to gain or lose in the outcome of the case.[62]

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[59] *Sosna*, 419 U.S. at 403. Justice White responded in his dissent that "the Court in reality holds that an attorney's competence in presenting his case, evaluated *post hoc* through a review of his performance as revealed by the record, fulfills the 'case or controversy' mandate." *Id.* at 413.

[60] *See* Willborn, *supra* note 5, at 7-8.

[61] *See* Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 40 (1982) (noting that in *Sosna* the Court came close to recognizing the class itself as the significant litigant).

[62] *See Sosna*, 419 U.S. at 403. In the following term, in Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), the Court fleshed out the reach of *Sosna*. More specifically, *Franks* made clear that the holding of *Sosna* was not limited to intrinsically transitory claims. *See supra* note 47.

Franks involved a Title VII class action in which the claim of the sole class representative for the certified class was mooted before the case reached the Supreme Court. As in *Sosna*, the Supreme Court in *Franks* framed the mootness question in functional terms: whether there was "an adversary relationship sufficient to fulfill [the] function" of "sharpen[ing] the presentation of issues . . . ." *Franks*, 424 U.S. at 755-56. And, as in *Sosna*, the Court in *Franks* held that the unnamed members of the certified class, who continued to have a "personal stake" in the outcome of the controversy, provided the needed adverse relationship with the defendant, even though the named representative's claim was moot.

The Court in *Franks* specifically dismissed the suggestion that *Sosna* was limited to issues "capable of repetition, yet evading review" because the certified class insured adverseness. *Id.* at 753-54.

D. The Limits of and Exception to Sosna*:* Jacobs *and* Gerstein

Shortly after deciding *Sosna*, the Supreme Court issued its opinions in *Board of School Commissioners v. Jacobs*[63] and *Gerstein v. Pugh*.[64] These cases and their progeny set the inner and outer limits of the *Sosna* holding.

The *Jacobs* plaintiffs, six high school students, brought a class action challenging the constitutionality of certain school regulations. The district court, although finding the named plaintiffs to be "qualified as proper representatives of the class whose interests they seek to protect," never formally certified a class.[65] The district court entered judgment for the plaintiffs and the court of appeals affirmed. However, by the time the case reached the Supreme Court, all the named plaintiffs had graduated from high school.

In a per curiam decision, the Supreme Court held that with the mooting of the named plaintiffs' claims *before* certification of the class the entire case was moot. Without certification, the class could not supply the "personal stake" needed to keep the controversy alive. The Court made no reference to (and evidently deemed irrelevant) the interests of the other students in the uncertified class who would continue to be subject to the school regulations in question.

The upshot of *Jacobs* was to limit *Sosna* to postcertification class actions.[66] Only a certified class could provide the "personal stake" for

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[63] 420 U.S. 128 (1975).

[64] 420 U.S. 103 (1975).

[65] *Jacobs*, 420 U.S. at 130.

[66] The *Jacobs* decision was followed in Weinstein v. Bradford, 423 U.S. 147 (1975), and in Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976). In *Weinstein*, a prisoner brought a class action challenging the procedures of a parole board. The district court denied class certification and dismissed the complaint. The plaintiff appealed the dismissal of the complaint but, by the time the case reached the Supreme Court, the plaintiff had been paroled. As in *Jacobs*, the Court dismissed the case in *Weinstein* as moot. In sharp contrast to the treatment afforded the mooted plaintiff in *Sosna*, the Court in *Weinstein* stated that "[f]rom [the date of parole] forward, it is plain that respondent can have no interest whatever in the procedures [for] granting parole." *Weinstein*, 423 U.S. at 148.

Spangler, like *Jacobs*, involved a class action brought by students (this time, challenging alleged segregation in schools). As in *Jacobs*, the district court in *Spangler* ruled on the merits but never certified a class, and as in *Jacobs*, all the individual plaintiffs had graduated from school by the time the case reached the Supreme Court. The Supreme Court held, consistent with *Jacobs*, that but for the intervention of the United States as a plaintiff, the case would have been moot with the graduation of the named plaintiffs. The Court specifically rejected the arguments that all parties had "treated [the case] as a class action" and that the district court's failure formally to

"concrete adverseness." And "certification" meant that the district court had formally entered the proper Rule 23 order.[67] The obvious existence of a "class" (albeit uncertified) of interested persons was irrelevant,[68] as was the fact that the district court and parties had treated the action as a class action.[69] Until certification occurred, the Court would look, as in *O'Shea*, solely to the named plaintiff's personal stake.[70]

At the same time that the Supreme Court was taking away with its right hand, it was giving with its left hand. In *Gerstein v. Pugh*, decided the same day as *Jacobs*, the Supreme Court held that in a narrow group of cases *Sosna* would be extended to precertification cases.

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certify the class was "merely the absence of a meaningless 'verbal recital.' " *Spangler*, 427 U.S. at 430; *see also* Baxter v. Palmigiano, 425 U.S. 308 (1976) (suggesting that, but for the intervention of a third inmate, prisoner class action in which one named plaintiff died and other was paroled before class certification would have been moot).

[67] *Jacobs* can be read somewhat more narrowly:

> [T]he trial judge [in *Jacobs*] failed to identify and describe the class before judgment was entered in the lower court, leaving open the possibility that the case would be treated as an individual suit on appeal. . . . Thus, read more narrowly, *Jacobs* simply establishes that if a class action is not properly certified prior to judgment being entered and the representative's claim becomes moot on appeal, then the action must be dismissed as moot.

7B C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE § 1785.1, at 163 (2d ed. 1986). It is questionable, however, whether this "narrower" reading solves any of the inconsistency problems, and it is equally questionable whether it has been adopted by the Supreme Court or the lower courts. *See infra* notes 105-08 and accompanying text (discussing Blum v. Yaretsky).

[68] The school board intended to continue to enforce the regulations in question and thus current and future students would confront them. *Jacobs*, 420 U.S. at 133-34 (Douglas, J., dissenting).

[69] In his dissent, Justice Douglas argued that the district court judge had certainly *intended* to certify the class. *Id.* at 130-35. The district judge had, Douglas noted, stated, "I will make a finding that . . . a class action is appropriate" and, in a later written opinion, stated that the two named plaintiffs who had not at that time graduated were "qualified as proper representatives of the class whose interest they seek to protect." *See id.* at 131.

[70] The following year, in Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976), a class action challenge to certain Internal Revenue Regulations, the Court similarly echoed the traditional view of standing:

> [W]hen a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation. . . . The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement.

Id. at 38-39 (citation omitted).

Gerstein involved a prisoner class-action challenge to certain pretrial detention procedures. The district court certified the class and granted the requested relief. The court of appeals affirmed. In the Supreme Court the defendants raised an issue of mootness because the record did not indicate that any of the named plaintiffs had actually still been in pretrial custody, and therefore members of the class, when the district court certified the class.

Justice Powell, writing for the Court, acknowledged that ordinarily the named plaintiff must have had a live, nonmoot claim at the time of class certification to fit under the *Sosna* rule. Although this was not true of Mr. Gerstein, Powell nonetheless held the case was not moot. To support his conclusion, Powell cited footnote 11 of *Sosna* in which the Court had noted:

> There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to "relate back" to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.[71]

The claim in *Gerstein*, Powell noted, was of such a transitory type. It was unclear that any individual would be in pretrial detention long enough for a district court to certify the class. Furthermore, although there was no indication that the named plaintiffs would be subject to pretrial detention again, the *class* claim was of the "capable of repetition, yet evading review" type. In addition, Powell concluded that "the constant existence of a class of persons suffering the deprivation is certain," and that the Court could "safely assume" that the plaintiffs' lawyer (a public defender) "has other clients with a continuing live interest in the case."[72]

The analytical basis for this new doctrine was presumably the "relation back" rationale stated in the *Sosna* footnote. When the plaintiff presented an inherently transitory claim like that in *Gerstein*, class certification after the named plaintiff's claim had been mooted would "relate back" to the date the complaint was filed (when the named plaintiff had a live claim).[73] The certified class thereafter, as in *Sosna*,

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[71] *Sosna*, 419 U.S. at 402 n.11 (cited by *Gerstein*, 420 U.S. at 111 n.11).

[72] *Id.*

[73] The Court in *Gerstein* cited *Sosna* footnote 11 but did not explicitly adopt the "relation back" rationale. Most courts and commentators, however, assume that *Gerstein* is based on the relation back notion. *See, e.g.*, Trotter v. Klincar, 748 F.2d 1177 (7th Cir. 1984); Candy H. v. Redemption Ranch, Inc., 563 F. Supp. 505, 518

supplied the personal stake.[74]

In *Gerstein* the Supreme Court thus created an exception to the *Sosna* rule: to avoid mootness the named plaintiff had to have a live, nonmoot claim at the time the case was certified.[75] Further, although the "capable of repetition, yet evading review" exception to the personal-stake standing requirement had earlier been used in nonclass cases,[76] *Gerstein* permitted its use in certain transitory class cases even though there was no indication that the named plaintiff himself would suffer any repetition of the injury.[77] Furthermore, in *Gerstein*, the Court, for the first time, was openly willing to *assume* the existence of an ongoing "class" of persons with an interest in the controversy, even before certification.[78]

(M.D. Ala. 1983); *Greenstein*, *supra* note 5, at 906.

[74] The same "relation back" rationale was again used by the Supreme Court in United States Parole Comm'n v. Geraghty, 445 U.S. 388, 406 n.11 (1980); *see infra* note 103.

[75] The Supreme Court has used the *Gerstein* exception in two other cases involving inherently transitory claims. *See* Schall v. Martin, 467 U.S. 253 (1984); Swisher v. Brady, 438 U.S. 204 (1978); *see also* 3B J. MOORE, W. TAGGART & J. WICKER, *supra* note 42, ¶ 23.04[2], at 23-119 (collecting lower court decisions applying *Gerstein*).

[76] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 123-25 (1973). The rationale for this exception to the usual standing requirements in nonclass actions is that the litigant, facing some likelihood of becoming involved in the same controversy in the future, can be expected to prosecute the case with vigorous advocacy. *Geraghty*, 445 U.S. at 398; Champlin, *supra* note 5, at 88-89. Thus, in nonclass actions it is routinely required that the plaintiff herself likely face the same injury in the future. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 105-10 (1983); Weinstein v. Bradford, 423 U.S. 147, 149 (1975). *See generally* Donaldson, *A Search for Principles of Mootness in the Federal Courts: Part One — The Continuing Impact Doctrines*, 54 TEX. L. REV. 1289, 1291-1308 (1976).

[77] Courts interpret *Gerstein* to contain two requirements: (1) The claim must be "capable of repetition, yet evading review" for the class; and (2) the claim must additionally be so transitory that it is likely always to expire before the class can be certified. *See* cases cited *infra* note 122.

[78] In Kremens v. Bartley, 431 U.S. 119 (1977), the Supreme Court dealt with a different, and less difficult issue — mootness that affects all or a substantially all of the class. In *Kremens*, a class action challenging state commitment procedures for mentally ill juveniles, the state promulgated new regulations before class certification and enacted an entirely new statute after the class had been certified. The new regulations and statute changed the commitment procedures for the named plaintiffs and part of the certified class (juveniles 13 or older). The Court held that in such a case, when the case was mooted for the entire class or a substantial portion of the class, the entire case was moot despite the certification of the class. The Court added:

> [In *Sosna* and *Franks*] the metes and bounds of each of those classes remained the same; the named plaintiff was simply no longer within them.

E. Rodriguez*: A Return to the Traditional Approach*

In 1977 the Supreme Court seemed to return to the traditional view of standing in class actions in its unanimous opinion in *East Texas Motor Freight System, Inc. v. Rodriguez*.[79] In *Rodriguez*, three employees brought a Title VII class action alleging that their employer and union had discriminated on the basis of race in certain employment practices. The named plaintiffs, however, did not move for class certification but proceeded to trial on their individual claims. Following the trial the district court dismissed the class-action allegations and ruled against the named plaintiffs on the merits of their individual cases.[80]

On appeal, the Fifth Circuit held that the district court erred in failing to certify the class, and the court of appeals itself certified the class.[81] The Fifth Circuit then found classwide liability against the defendants. The court did not, however, disturb the trial court's adverse findings on the plaintiffs' individual claims.[82]

The Supreme Court reversed. Analyzing the issue in terms of Rule 23 rather than Article III standing, the Court held that a class could not properly be certified in *Rodriguez* for the simple reason that the named plaintiffs were not proper class representatives. The named plaintiffs failed as class representatives because, having lost on the merits of their individual cases, they were not members of the class alleged. Even if the employer had engaged in discriminatory practices, "they [the named plaintiffs] could have suffered no injury as a result of the alleged discriminatory practices, and they were, therefore, simply not eligible to represent a class of persons who did allegedly suffer injury."[83] And without a proper class representative the action could not

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> Here, by contrast, the metes and bounds of the class certified by the District Court have been carved up by two changes in the law.

Id. at 130-32.

Even here, the dissenting justices (Brennan and Marshall) argued that the Court should go ahead and consider the claims, which were unchanged, of that part of the certified class composed of juveniles younger than 13. The named representatives, although their individual claims were moot, could, the dissent argued, continue to represent the pared-down class pursuant to *Sosna* and *Franks* because "concrete adverseness" was present and "[a]ttorneys for the class continue diligently to defend their judgment in behalf of the children who are still within the purview of Pennsylvania parental commitment law." *Id.* at 142-43.

[79] 431 U.S. 395 (1977).

[80] *Id.* at 398-400.

[81] The Fifth Circuit found the named plaintiffs to be adequate representatives of the certified class. *Id.* at 401.

[82] *Id.* at 401-02.

[83] *Id.* at 403-04.

be a proper class action.[84] Thus, in *Rodriguez*, which was basically a precertification case, the issue of adequacy of the class representative was treated as part of the issue of propriety of the class. A class could not be certified (and thereafter provide the necessary personal stake) when the class representative proved inadequate. Put another way, before certification there simply was no "class" when the class representative was inadequate. This was in sharp contrast to *Sosna*, which in the postcertification setting separated the issue of whether the case could go forward on behalf of the class from the issue of whether Sosna, with her mooted claim, was still an adequate representative.

The *Rodriguez* decision also accentuated the different standard the Supreme Court was applying for "adequacy of representation" in the precertification setting as opposed to the postcertification context. Before class certification the plaintiff had to be, under *Rodriguez*, a member of the class to be an adequate class representative. However, *after* certification, a named plaintiff who was no longer a member of the class (because of mootness) could nonetheless be an adequate representative under *Sosna*.[85]

F. The Re-Emergence of the Functional Approach: Geraghty

In 1980 the Supreme Court flip-flopped again. In *United States Parole Commission v. Geraghty*,[86] which involved mootness after the denial of class certification, the Court once again adopted a functional approach to standing and mootness in class actions.

In *Geraghty* a prisoner brought a class action challenging the parole commission's release guidelines. The district court denied class certification and granted summary judgment for the defendants. The plaintiff appealed both decisions, but, while his appeal was pending, he was

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[84] The Supreme Court also noted that, as a further reason class certification was improper in addition to the named plaintiffs' lack of membership in the class, the named plaintiffs had not fairly and adequately protected the interests of the class. *Id.* at 404-05.

[85] The Court in *Rodriguez* obviously recognized that it was using a different approach for the precertification stage than it had used in *Sosna* in the postcertification context. The Court stated in a cryptic footnote that "[o]bviously, a different case would be presented if the District Court had certified a class and only later had it appeared that the named plaintiffs were not class members or were otherwise inappropriate class representatives." *Id.* at 406 n.12; *see infra* note 173 (discussing the confusion this footnote has caused).

[86] 445 U.S. 388 (1980). The *Geraghty* decision is examined in detail in Note, *Flexible Mootness*, *supra* note 5, at 319-28; *see also* Note, *Article III Justiciability*, *supra* note 5, at 310-17.

released from prison. The question before the Supreme Court was whether the plaintiff could press the appeal despite the mootness of his individual claim. In a 5-4 decision, the Supreme Court held that the plaintiff could appeal the denial of class certification.[87]

Writing for the majority, Justice Blackmun emphasized that when dealing with a class action "the flexible character of the Art. III mootness doctrine" must be considered.[88] A plaintiff in a class action, according to Blackmun, had two separate and distinct interests: (1) his claim on the merits; and (2) his interest in representing the class. That a plaintiff's claim on the merits might be moot did not mean that his interest in representing the class was moot.[89]

Acknowledging that Geraghty's claim on the merits was moot (because Geraghty had been released from prison), Blackmun turned to the question of the plaintiff's personal stake in the class certification issue. Applying the personal-stake doctrine to such a procedural claim is, Blackmun admitted, "not automatic or readily resolved."[90] In analyzing the issue, Blackmun went back to the function served by the personal-stake requirement, which was to assure that the issue was presented in an adversary context. This need for an "adversary context" (or "a case capable of judicial resolution") was satisfied, Blackmun observed, when there were "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating

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[87] 445 U.S. at 404. On the same day that the Court decided *Geraghty*, it also decided Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980). *Roper* involved a class action by credit card holders who alleged that the defendant bank's finance charges were usurious. The district court denied the plaintiffs' motion to certify the class, and the bank then tendered to each named plaintiff the maximum amount that he or she could have recovered. The plaintiffs refused the tender, but the district court entered judgment in plaintiffs' favor and dismissed the action. When the plaintiffs sought to appeal the denial of class certification, the bank argued that the case had been rendered moot.

The Supreme Court, in an opinion by Chief Justice Burger, held that the case was not moot. Justice Burger noted that the named plaintiffs asserted an economic interest in the certification issue because if a class were certified and ultimately prevailed, they could shift certain litigation costs to the class. The Court concluded that the named plaintiffs thereby retained a continuing personal stake in the class certification question that permitted them to appeal the denial of class certification.

[88] 445 U.S. at 400. In creating exceptions to the "strict, formalistic view" of Article III, the Court had, he noted, "looked to practicalities and prudential considerations." *Id.* at 406 n.11.

[89] *Id.* at 402. The dissent argued that the majority erred in regarding these as two distinct claims. The claim to represent a class, the dissent contended, is only procedural and ancillary to the substantive claim on the merits. When the substantive claim fails, no procedural claim is left. *Id.* at 422-23.

[90] *Id.* at 402.

opposing positions."[91] These requirements, Blackmun concluded, were all satisfied in *Geraghty* for the class certification issue, despite the mootness of Geraghty's claim on the merits.[92] "The question whether class certification is appropriate remains," Blackmun noted, "as a concrete, sharply presented issue."[93]

In keeping with his "flexible" approach, Blackmun thus specifically rejected the traditional "personal stake is necessary to insure concrete adverseness" formula, at least in "nontraditional forms of litigation,"[94] such as class actions.[95] "Implicit in [the *Sosna*] decision," he noted, "was the determination that vigorous advocacy can be assured through means other than the traditional requirement of a 'personal stake in the outcome.' "[96] The important thing was vigorous advocacy. Personal stake for the named plaintiff in the outcome might be one, but not necessarily the only, means of achieving vigor. The *Sosna* approach was specifically endorsed, while *Jacobs* was characterized (or, as the dissent argued, dismissed) as "adopting a less flexible approach,"[97] and *Rodriguez* was completely ignored.

Moreover, as in *Sosna*, the Court treated the class representative in *Geraghty* as something apart from the class and replaceable at will. Because he vigorously advocated class certification, Geraghty could continue, under Blackmun's analysis, to press the issue of class certification on appeal and, presumably, if successful on appeal, in the district court

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[91] *Id.* at 403.

[92] Having found the purpose or function behind the "personal-stake" requirement satisfied, Blackmun concluded that the personal-stake requirement itself was satisfied. Geraghty "continues vigorously to advocate his right to have a class certified" and, therefore, he "retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined." *Id.* at 404. Although Blackmun talked of Geraghty retaining a personal stake in the class certification issue, it can be argued that in reality Blackmun was allowing the uncertified class to supply the personal stake, just as the *Sosna* Court had allowed the certified class to do. *See* Greenstein, *supra* note 5, at 915.

[93] 445 U.S. at 403-04. The dissent responded: "The Court cites no decision that has premised jurisdiction upon the bare existence of a sharply presented issue in a concrete and vigorously argued case, and I am aware of none." *Id.* at 421 (footnote omitted.)

[94] *Id.* at 402.

[95] In contrast, Justice Powell in his dissent objected to the creation of special standing or mootness rules for class actions. *Id.* at 413.

[96] *Id.* at 404.

[97] *Id.* at 400 n.7. *Jacobs*, *Weinstein*, and *Spangler* were also distinguishable, according to Blackmun, in that each involved an attempt to appeal the merits rather than an appeal of denial of class certification. Justice Powell, dissenting, observed: "[A]s they are about to become second-class precedents, these cases are relegated to a footnote." *Id.* at 418.

on remand.[98] Furthermore, in keeping with *Sosna*, the district court could, if it eventually certified a class, then consider whether Geraghty was a proper representative for the purpose of representing the class on the merits.[99]

Thus, *Geraghty* continued the approach begun in *Sosna*.[100] The personal stake required for the named plaintiff in a class action was now further reduced,[101] if not eliminated.[102] Provided there was "concrete adversity," so that the purpose behind Article III was satisfied, a mooted plaintiff could appeal the denial of class certification.[103] Indeed,

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[98] The dissenting justices in *Roper*, the companion case to *Geraghty*, *see supra* note 87, noted:

> On remand, respondents will serve as "quasi-class representatives" solely for the purpose of obtaining class certification. Since they can gain nothing more from the action, their participation can be intended only to benefit counsel and the members of a putative class who have indicated no interest in the claims asserted in this case. Respondents serve on their own motion — if indeed they serve at all.

Roper, 445 U.S. at 357 (footnote omitted).

[99] *Geraghty*, 445 U.S. at 405-07; *see* Hutchinson, *supra* note 16, at 488.

[100] The decision in *Geraghty* can, of course, be explained as not so much the result of renewed, flexible thinking about standing and mootness but as the result of Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). In *Livesay* the Court had held that the class representative could not appeal the denial of class certification as an interlocutory order. A class representative was, therefore, left in *Geraghty*'s position of appealing the denial of class certification after a decision on the merits of the case. Had the court found the *Geraghty* plaintiff's claim moot, then no one could have appealed the denial of class certification. This would have left the district court's denial of class certification unreviewable in many cases. *See* Willborn, *supra* note 5, at 13; Note, *Appealability of Class Certification Denials After* Roper *and* Geraghty*: The Flexible Character of the Case or Controversy Requirement*, 55 ST. JOHN'S L. REV. 277, 296-306 (1981).

[101] One commentator has stated that "it requires an almost complete perversion of Article III to permit the named member with a moot claim to appeal the denial of class certification." Hutchinson, *supra* note 16, at 495.

[102] Although the majority in *Geraghty* effectively eliminated the personal-stake requirement of the class representative for purposes of appealing the denial of certification, only one Justice was expressly willing to have the class alone supply the Article III case-or-controversy requirement throughout the precertification stage. Justice Stevens, in a concurring opinion in *Roper*, 445 U.S. at 326, the companion case to *Geraghty*, *see supra* note 87, took the position that once a class action complaint was filed, the unnamed class members were parties to the action for Article III purposes. *Roper*, 445 U.S. at 342. Thus, under Stevens' approach, a court did not need to worry about the mooting of the named plaintiff's individual claim because the unnamed class members (before and after certification) could supply the Article III case or controversy.

[103] Blackmun's holding in *Geraghty* was limited in two respects: (1) there had to be a denial of class certification; and (2) the named plaintiff had to have had a "live"

whereas *Sosna* permitted the moot plaintiff to continue as class representative after certification, *Geraghty* now allowed the moot plaintiff, in the precertification context, to continue as class representative for at least some class-certification purposes.[104]

G. Blum: *Another Return to the Traditional Approach*

Just two years after the *Geraghty* decision, the Supreme Court decided *Blum v. Yaretsky*.[105] In *Blum* the Court again switched directions, returning to the traditional approach to standing espoused in *O'Shea* and *Warth*.

Blum involved a class-action challenge by Medicaid patients to transfers affecting their medical-care levels. The named plaintiffs in *Blum* were all patients who had been transferred to lower levels of care. Pursuant to their request, the district court certified a class consisting of patients whose care had similarly been reduced or terminated. The plaintiffs then enlarged their claims to include a challenge to procedures applicable to transfers to *higher* levels of care. The district court permitted the new claim and defined the class broadly enough to include it. The district court then entered judgment for the plaintiffs on transfers both to lower and to higher levels of care, and the court of appeals affirmed.[106]

The Supreme Court reversed the judgment insofar as it applied to transfers to higher levels because the named plaintiffs, all of whom had had reductions in care, lacked standing to assert this claim. That the certified class included patients who had been transferred to higher levels of care was irrelevant. Citing *Warth* and *O'Shea*, the Court noted that the named plaintiffs " 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.' "[107]

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interest at the time class certification was denied. These limits were necessary, according to Blackmun, for the "relation back" rationale to work. If Geraghty prevailed on the class certification issue, the certification would "relate back" to the date on which certification was denied, a date on which Geraghty's claim was not moot. *Geraghty*, 445 U.S. at 406 n.11.

[104] Whereas *Sosna* elevated the district court's act of certifying a class to prominence, "the *Geraghty* Court may have stripped certification itself, once the basic criterion of achieving article III status, of its constitutional significance." Greenstein, *supra* note 5, at 908.

[105] 457 U.S. 991 (1982).

[106] *Id.* at 995-98.

[107] *Id.* at 1001 n.13.

Thus, in *Blum* the Court returned to the strict *O'Shea* approach of judging standing in a class action by the class representative's personal stake. When the named plaintiff had never been a member of the class alleged, she lacked standing, and the entire case must be dismissed. This was true even though the district court had (1) certified that a class of injured persons existed; and (2) granted relief to that class.[108]

II. The Patchwork Pattern of Class Action Decisions in the Lower Courts

The Supreme Court decisions regarding standing and mootness in class actions have thus reflected two distinct, and largely inconsistent, philosophical approaches. One line of cases — *O'Shea*, *Warth*, *Jacobs*, *Rodriguez*, and *Blum* — has applied the traditional personal-stake approach to class action standing and mootness questions. The other line of cases, which includes *Sosna* and *Geraghty*, has adopted a much more flexible approach that focuses not so much on the plaintiff's personal stake but on whether the function of the standing requirement has been met.[109] The Supreme Court has, moreover, exacerbated the confusion by jumping between one approach and the other, with little effort to reconcile the two approaches.[110]

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[108] The Court similarly took a strict approach to standing in Valley Forge Christian College v. Americans United, 454 U.S. 464 (1982), a taxpayers' and citizens' suit challenging the government's transfer of surplus land to a religious school. Deciding that the plaintiffs failed to allege personal injury from the challenged activity, the Supreme Court held that the plaintiffs lacked standing to challenge the transfer. "[A]t an irreducible minimum," the Court stated, Article III requires that the plaintiff " 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.' " *Id.* at 472 (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)). The Court specifically rejected the notion that "judicial power requires nothing more for its invocation than important issues and able litigants." *Id.* at 489.

[109] *See* Chayes, *supra* note 61, at 39-45.

[110] The Supreme Court decisions on other aspects of class actions have done nothing to clarify the issue. If anything, the loose language in some decisions has just further muddied the waters.

In American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), for instance, the Court held that when a class-action complaint is filed, the statute of limitations is tolled for the absent "class members" until the district court denies class certification. In doing so, the Court spoke of the uncertified class members "as parties to the suit until and unless they received notice thereof and chose not to continue" — suggesting that the class is "present" before certification. *Id.* at 551. This language, however, was very probably not intended as a principle of class action standing law. *See* Wheeler, *Predismissal Notice and Statutes of Limitations in Federal Class Actions After* American Pipe & Construction Co. v. Utah, 48 S. Cal. L. Rev. 771, 773-75 (1975).

The decisions of the lower courts reflect this confusion and, indeed, highlight the unavoidable inconsistency in the two Supreme Court approaches. Decisions on a particular issue vary and, more troubling, because the Supreme Court has provided no single, coherent view of standing and mootness in class actions, the lower courts tend to treat each separate issue in this area as a discrete matter, wholly unrelated to other standing and mootness problems. The result is a patchwork-quilt body of case law with no consistency or even cross reference from one issue to another.

The confusion that the Supreme Court's ambivalence has engendered in the lower courts is particularly stark in three areas: (1) the precertification mootness cases; (2) the postcertification and posttrial cases; and (3) the precertification settlement cases.[111]

A. Precertification Mootness

Assume that a plaintiff brings a class action challenging the constitutionality of a statute. Before the district court rules on the motion to certify the class, the representative plaintiff's individual claim is mooted. Can the case go forward? The answer depends on which line

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In United Airlines v. McDonald, 432 U.S. 385 (1977), the issue before the Court was the right of a member of the uncertified class to intervene and appeal the denial of class certification after the named plaintiffs had obtained final judgments on their individual claims. In holding that the class member could intervene for purposes of appealing the denial of class certification, the Court noted that although "the case was 'stripped of its character as a class action' upon denial of certification by the District Court . . . 'it does not . . . follow that the case must be treated as if there never was an action brought on behalf of absent class members.' " *Id.* at 393 (quoting Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 461 (E.D. Pa. 1968)). The dissenting justices objected to the suggestion that the absent class members continued to be in the case after the denial of class certification. They argued that after the denial of certification, the case was a nonclass action and, therefore, the former class representatives had no further duty to the "class," and the "class members" had no right to rely on the existence of the lawsuit to protect their interests:

> Pervading the Court's opinion is the assumption that the class action somehow continued after the District Court denied class status. But . . . the denial of class status converts the litigation to an ordinary nonclass action . . . . After the denial of class status, [the former class representatives] were simply individual plaintiffs with no obligation to the members of the class.

Id. at 399.

[111] For a discussion of the problem of the dissenting class member and the likely impact of the Supreme Court's decisions in *Rodriguez*, 431 U.S. at 395, and General Tel. Co. of Sw. v. Falcon, 457 U.S. 147 (1982), on that problem, see Floyd, *supra* note 5.

of Supreme Court decisions the trial court follows.[112] On the one hand, under the traditional approach of *Jacobs* the mootness of the representative plaintiff's claims *before* class certification moots the entire case.[113] Yet on the other hand, *Geraghty* recognized that even when a class had not been certified, the certification issue might be presented in a concrete, adverse setting sufficient to satisfy the purpose of the Article III standing requirement.[114]

The lower courts, even after *Geraghty*, have mainly taken the traditional approach to the precertification mootness cases and held that mootness of the class representative's claims before certification moots the entire case.[115] In doing so, courts in the precertification stage look strictly to the individual plaintiff to provide the "personal stake" said to be necessary for "concrete adverseness." That a similarly situated "class" of persons is interested in the resolution of the merits of the case is irrelevant.[116] Similarly, that dismissal of the case is on the eve of trial or will likely result in an identical case being filed by one of these interested persons is typically of no consequence.[117] For the case to go forward, courts require that the named representative satisfy the personal-stake requirement of Article III.[118] In keeping with the tradi-

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[112] *See generally* 3B J. MOORE, W. TAGGART & J. WICKER, *supra* note 42, ¶ 23.04[2] (collecting precertification mootness cases); Comment, *The Headless Class Action: The Effect of a Named Plaintiff's Pre-Certification Loss of a Personal Stake*, 39 MD. L. REV. 121, 134-35 (1979).

[113] *See supra* notes 63-70 and accompanying text.

[114] *See supra* notes 86-104 and accompanying text.

[115] *See, e.g.*, Tucker v. Phyfer, 819 F.2d 1030 (11th Cir. 1987); Davis v. Ball Memorial Hosp. Ass'n, 753 F.2d 1410 (7th Cir. 1985); Kennerly v. United States, 721 F.2d 1252 (9th Cir. 1983); Inmates of Lincoln Intake & Detention Facility v. Boosalis, 705 F.2d 1021 (8th Cir. 1983); Bishop v. Committee on Professional Ethics, 686 F.2d 1278 (8th Cir. 1982); Swan v. Stoneman, 635 F.2d 97 (2d Cir. 1980); Cicchetti v. Lucey, 514 F.2d 362 (1st Cir. 1975); K. v. Complaints Comm. of Miss. State Bar, 618 F. Supp. 307, 312-13 (S.D. Miss. 1985).

[116] *See, e.g.*, *Tucker*, 819 F.2d at 1030; *Boosalis*, 705 F.2d at 1021; *Bishop*, 686 F.2d at 1278; *Cicchetti*, 514 F.2d at 362.

[117] *See, e.g.*, *Davis*, 753 F.2d at 1410.

[118] A precertification-mootness type of situation can also arise when class certification is denied and the individual plaintiff then loses on the merits of her individual case. Pursuant to *Geraghty*, the individual plaintiff will be allowed to appeal the denial of class certification along with the merits of her individual case. In a series of cases, however, the Fifth Circuit has held, consistent with the traditional approach, that if the representative plaintiff loses on appeal on the merits of her individual case, no class can be certified, even if the original denial of class certification was erroneous. *See, e.g.*, Trevino v. Holly Sugar Corp., 811 F.2d 896, 906 (5th Cir. 1987); Everitt v. City of Marshall, 703 F.2d 207, 210 (5th Cir. 1983). In reaching this conclusion, the Fifth

tional approach, the lower courts typically give no consideration in these precertification mootness cases to whether the named plaintiff might be an otherwise adequate representative.[119] Indeed, courts have held that mootness of the representative's claim requires dismissal of the entire case even when the representative plaintiff has won on the merits of some of her claims and these claims are identical to those she wishes to press for the class.[120]

The primary exception to this strict approach in the precertification stage is the limited exception alluded to in footnote 11 of *Sosna* and applied in *Gerstein* — the inherently transitory claim that expires before the district court can rule on class certification.[121] Yet even in

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Circuit has relied on the traditional reasoning found in *Rodriguez* — without a valid class representative, no class can exist and when the representative plaintiff has lost on the merits of her case, she, by definition, is not a member of the class and therefore not a valid class representative.

In contrast, in a pre-*Geraghty* decision, the Fourth Circuit suggested that the proper procedure in this situation was to remand the case to the district court to see if a new class representative came forward. Under this approach, unlike the Fifth Circuit approach, the class exists in some sense apart from the named representative. Goodman v. Schlesinger, 584 F.2d 1325, 1332-33 (4th Cir. 1978); *see also* International Woodworkers of Am. v. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1270 (4th Cir. 1981). For a discussion of these cases, frequently called "headless class actions," see Comment, Goodman v. Schlesinger *and the Headless Class Action*, 60 B.U.L. REV. 348 (1980); Comment, *supra* note 112, at 151-63; Note, Satterwhite v. City of Greenville *and Breathing New Life into the Headless Title VII Class Action*, 32 STAN. L. REV. 743, 747-63 (1980); *see also* Floyd, *supra* note 5, at 48-58 (discussing the obligation of the court to assist in intervention when the representative party's claim is mooted).

In Reed v. Bowen, 849 F.2d 1307 (10th Cir. 1988), the Tenth Circuit held that when the named plaintiffs' claims are mooted, plaintiffs' counsel is not entitled to discovery to find and identify new potential intervening class representatives. The district court's ruling that the original named plaintiffs were no longer adequate representatives, the Tenth Circuit reasoned, "left [the] case with no party plaintiff" and raised case-or-controversy considerations. *Id.* at 1313.

[119] *See, e.g.*, cases cited *supra* note 116.

[120] *See, e.g.*, *Bishop*, 686 F.2d at 1278.

[121] The courts will also avoid a finding of mootness when the named representative retains some active interest in the case. *E.g.*, McKinnon v. Talladega County, 745 F.2d 1360, 1362 (11th Cir. 1984); Jordon v. County of Los Angeles, 669 F.2d 1311 (9th Cir.), *vacated on other grounds*, 459 U.S. 810 (1982). Courts also avoid finding mootness when the changed circumstances are because of the defendant's voluntary cessation of the challenged practice and when there is no assurance that the change is permanent. *See, e.g.*, United States v. W.T. Grant Co., 345 U.S. 629 (1953); Jager v. Douglas County School Dist., 862 F.2d 824, 833-34 (11th Cir. 1989); Blankenship v. Secretary of HEW, 587 F.2d 329 (6th Cir. 1978). When the mootness was because of the defendant's tendering full payment to the representative plaintiff, courts do not find moot-

applying this exception courts have typically construed it narrowly and required that the class claim be both "capable of repetition, yet evading review" and that it be so inherently transitory that it is likely always to dissipate before a district court can rule on class certification.[122]

The reasoning of and results reached by the lower courts in the precertification mootness cases are fully consistent with the rationale and holdings of cases like *O'Shea*, *Jacobs*, and *Rodriguez*. To have a class certified, these cases teach, the representative plaintiff must be a member of the class alleged at the time of certification. If the representative's claims are mooted before certification, there can be no "class" to acquire, under *Sosna*, an "independent legal significance."

Yet at the same time these cases are fundamentally at odds with *Geraghty*'s rationale and approach.[123] In *Geraghty*, when the class cer-

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ness. *See, e.g.*, Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980). Interestingly, such a holding may be justified by a need to protect the absent "class." *See, e.g.*, Griffith v. Bowen, 678 F. Supp. 942, 947 (D. Mass. 1988) ("[W]hile the named plaintiffs may no longer be adequate class representatives, . . . there is no reason to punish the absent class."). And when the case falls within the traditional "capable of repetition, yet evading review" category, the courts also do not find mootness. *See* Roe v. Wade, 410 U.S. 113 (1975); *see also* Wilton, *supra* note 12, at 629-33. In addition, if the failure to certify the class before mootness occurs is because of delay on the district court's part, dismissal may not be required. *See, e.g.*, Cruz v. Hauck, 627 F.2d 710, 716-18 (5th Cir. 1980).

[122] *See, e.g.*, Davis v. Ball Memorial Hosp. Ass'n, 753 F.2d 1410, 1418 (7th Cir. 1985); Inmates of Lincoln Intake & Detention Facility v. Boosalis, 705 F.2d 1021, 1023-24 (8th Cir. 1983); Milonas v. Williams, 691 F.2d 931 (10th Cir. 1982), *cert. denied*, 460 U.S. 1089 (1983); Cicchetti v. Lucey, 514 F.2d 362, 367 (1st Cir. 1975); Candy H. v. Redemption Ranch, Inc., 563 F. Supp. 505, 518 (M.D. Ala. 1983). The Seventh Circuit, in fact, has held that the *Gerstein* exception applies only when the representative party has actually *moved* for class certification before her claim is mooted. If the mootness occurs after the class action complaint is filed but before the motion for class certification is made, *Gerstein* has no application, according to the Seventh Circuit, even if the claim is inherently transitory and capable of repetition for the class. *See* Trotter v. Klincar, 748 F.2d 1177, 1183-84 (7th Cir. 1984); *see also* 3B J. MOORE, W. TAGGART & J. WICKER, *supra* note 42, ¶ 23.04[2] (collecting cases). *But cf.* Lewis v. Tully, 99 F.R.D. 632, 638-44 (N.D. Ill. 1983) (holding *Gerstein* exception applies even though named plaintiff's claim was moot before complaint filed, relying on "flexible" *Geraghty* doctrine).

[123] For a "dialogue" concerning precertification mootness problem, see Greenstein, *supra* note 5, at 922 ("[The class members'] disputes with the defendant exist just as surely before certification as after. And if a class representative without a personal stake may constitutionally represent their interests after certification, there is no logical reason that he cannot represent their interests before certification."). Other commentators have similarly noted the incongruity in treating precertification cases differently from postcertification cases. *See* Kane, *supra* note 5, at 104-05; Willborn, *supra* note 5, at 14-16.

tification issue was "sharply presented" in a "concrete factual setting" with "self-interested parties vigorously advocating opposing positions," the Supreme Court decided that the standing requirement was satisfied for the class certification issue, despite the mootness of the named plaintiff's personal claim before certification.[124] The Court noted that should the mooted class representative be successful in pressing the class certification issue the district court could then decide whether the named plaintiff was an adequate representative to press the case on the merits.[125]

The same approach, as the Third[126] and Fifth[127] Circuits have re-

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[124] *Geraghty*, 445 U.S. at 403-07.

[125] The district court could presumably substitute a new representative in place of a representative it deemed inadequate. *Id.* at 405-07. In Reed v. Bowen, 849 F.2d 1307 (10th Cir. 1988), the Tenth Circuit held that the district court did not abuse its discretion when, on remand, it found that the named plaintiffs whose claims had been mooted were *not* adequate class representatives. In making this determination, the district court properly considered whether a "class" actually existed and the named plaintiffs' financial stake in the outcome of the litigation.

[126] In Wilkerson v. Bowen, 828 F.2d 117, 121 (3d Cir. 1987), the class representatives' claims were mooted while class certification was pending. The Third Circuit noted:

> It would seem to us that the principle espoused in *Geraghty* is applicable whether the particular claim of the proposed class plaintiff is resolved while a class certification motion is pending in the district court (as in the present case) or while an appeal from denial of a class certification motion is pending in the court of appeals (as in *Geraghty*). In neither event is the plaintiff automatically disqualified from being a class representative and the question still must be decided whether, all other factors being considered, the plaintiff can fairly and adequately represent the class and meet the other requirements of Fed. R. Civ. P. 23.

Id. (footnote omitted).

However, finding that the plaintiffs in *Wilkerson* did have a continuing personal stake in the litigation and that the district court had erred in denying motions to intervene by other would-be class representatives, the Third Circuit did not have to decide whether *Geraghty* applied to a garden-variety precertification-mootness situation.

[127] In Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030 (5th Cir. 1981), the Fifth Circuit recognized, in dicta, the potential application of *Geraghty* to precertification mootness cases even when the claim does not fit within the *Gerstein* transitory claim exception:

> Since, as these cases [*Sosna*, *Geraghty*, and *Franks*] indicate, the proper focus of a mootness inquiry in the class action context is on the adversary relationship, and since an adversary relationship sufficient for Article III purposes can arise by virtue of the unnamed class members' justiciable claims whether or not such claims are "capable of repetition, yet evading review," one might argue that the relation back doctrine is applicable whether or not the controversy is so transitory that no single named plain-

cently recognized, could be applied in precertification mootness cases. The named plaintiff, who at one time suffered the injury alleged, could be permitted to press for class certification, despite the mootness of her personal claim, if the district court found there to be "vigorous advocacy." Then, if class certification were held proper, the district court could decide (pursuant to *Sosna*) whether the mooted representative plaintiff was an adequate representative to press the class claims on the merits.[128] If a court wished to use the relation-back rationale, it could say that the certification related back to the filing of the complaint.[129]

Put another way, there is no reason under the *Geraghty* approach why the plaintiff presenting the *Gerstein*-type transitory claim should be the only precertification mootness plaintiff permitted to press a class-certification claim. The "vigorous advocacy" that the personal stake requirement seeks to achieve is not enhanced by the transitory nature of the claim. As long as there clearly is a "class" of persons interested in the issue on the merits[130] and the certification issue is presented with "vigorous advocacy," there is no difference from a functional point of view between: (1) the mooted representative plaintiff in *Geraghty* who is seeking to reverse the denial of class certification; (2) the *Gerstein*

> tiff could maintain a justiciable claim long enough to reach the class certification stage of the litigation. So long as the claims of the unnamed class members are presented in an adversary relationship sufficient to assure "that concrete adverseness which sharpens the presentation of issues," this broader reading of the relation back doctrine would allow the district court a reasonable time to rule on the certification question despite the intervening mootness of the named plaintiffs' claims.

Id. at 1048.

[128] One commentator has suggested that the same rationale could be applied even when the mootness occurred before the complaint was filed. Willborn, *supra* note 5, at 15-16. This was done in Lewis v. Tully, 99 F.R.D. 632, 638-44 (N.D. Ill. 1983). In *Lewis* the plaintiff seeking injunctive relief on behalf of class challenged the defendant county's procedures for discharging prisoners. The plaintiff's own claim for injunctive relief was moot before he filed suit and there was no indication that he would again suffer the injury alleged. The court nonetheless permitted the action to proceed as a certified class action on the basis of the "flexible" *Geraghty* approach. Such an approach, however, is seemingly at odds with Rule 23(a), which requires that the representative party be a member of the class she purports to represent. *See* 7B C. WRIGHT, A. MILLER & M. KANE, *supra* note 67, § 1761 (collecting cases).

[129] *See* Greenstein, *supra* note 5, at 914.

[130] As commentators have recognized, the court can use other considerations, including the requirements of Rule 23(a), to ascertain if there is a "class" of persons for whom the issue on the merits is a "live" issue — irrespective of whether it is a "live" issue for the representative plaintiff. *See, e.g.*, Chayes, *supra* note 61, at 45; Greenstein, *supra* note 5, at 923-24; Comment, *supra* note 5, at 1650-59.

plaintiff who is pressing the class certification issue for the first time despite her own mooted claim; and (3) the garden-variety precertification-mootness plaintiff who seeks to press the certification issue for the first time despite her individual mootness. Yet, although the first two plaintiffs are held to have standing, the third is not.[131]

Thus, the precertification-mootness cases highlight the fundamental internal inconsistency in the two approaches to class action standing espoused by the Supreme Court.[132] In keeping with the traditional approach, the lower courts have typically deemed the named representative plaintiff to be all-important in the precertification stage. Unless she personally has a "live" case at the time certification is sought, the entire case is dismissed (unless she can fit within the narrow *Gerstein* exception for transitory claims). No concern or weight is given to the unnamed class members. However, under *Geraghty*, if the representative plaintiff manages to keep her claim alive until a decision on the certification issue, then whether she wins or loses on the issue, she can at least proceed in pressing the class certification issue and very possibly, if she ultimately wins on the certification issue, with the class claims on the merits.[133]

B. Postcertification or Posttrial Mootness or Inadequacy

The inconsistent nature of the case law becomes even more apparent when the roles of the class representative in the pre- and postcertification cases are compared. In contrast to the pivotal role played by the class representative in the precertification stage, in the postcertification and posttrial cases some courts have effectively dispensed with the

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[131] The *Geraghty*-type plaintiff has, to be sure, pressed for class certification once and lost, whereas the garden-variety precertification mootness plaintiff has never, before mootness, pressed for class certification. It is difficult to understand, however, why someone who has tried once — and failed — is treated more favorably than one who has not tried at all.

[132] *See generally* 1 H. NEWBERG, *supra* note 15:

> Judicial interpretation of the mootness doctrine generally displays a tension between the goals of the class device and the unwillingness to reduce the named plaintiff to figurehead status by diluting the requirement that the putative class representative have a tangible personal stake in the outcome of the suit throughout the entire litigation.

Id. at 122.

[133] Or, after a reversal of the denial of class certification, the district court may decide on remand that the mooted class representative is not an appropriate class representative. "If that is so, then it is hard to see what conceivable interest this person has in the question of class certification." Hutchinson, *supra* note 16, at 496.

named representative altogether. Other courts treat the class representative as nothing more than a necessary, but essentially fungible and interchangeable, nuisance.

Three cases from the Fourth, Third, and Fifth Circuits illustrate this highly flexible approach to the role of the class representative. In each, because of a change or development in the law the named plaintiff was found after the trial on the merits to have been a legally inadequate class representative. Yet in each case, the "class" had been successful (at least in part) at the trial.

The Fourth Circuit case *Hill v. Western Electric Co.*[134] was a Title VII class action in which the plaintiffs made an across-the-board attack on the defendant employer's hiring and promotion practices.[135] Although the named plaintiffs had been denied promotions, none had been denied employment. After a bench trial the district court found in favor of the individual plaintiffs and the class on both the hiring and the promotion claims. On appeal the Fourth Circuit, in light of the intervening Supreme Court decision in *Rodriguez*, vacated the district court's findings of hiring discrimination because there had been no adequate representative for the alleged hiring class.[136] On remand to the district court, three new plaintiffs moved to intervene as representatives of the hiring-class claim. The district court denied the motion.[137]

Plaintiffs appealed, and again the Fourth Circuit reversed. In its sec-

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[134] 672 F.2d 381 (4th Cir.), *cert. denied*, 459 U.S. 981 (1982). The *Hill* decision is reviewed in Note, *Reinstating Vacated Findings in Employment Discrimination Class Actions: Reconciling* General Telephone Co. v. Falcon *with* Hill v. Western Electric Co., 1983 DUKE L.J. 821.

[135] Before the Supreme Court's decisions in *Rodriguez*, *see supra* notes 79-85 and accompanying text, and General Tel. Co. of Sw. v. Falcon, 457 U.S. 147 (1982), some federal courts permitted an employee in an employment-discrimination class action to bring an "across-the-board" attack. The basic notion was that the plaintiff-employee who suffered one type of employment discrimination could represent a class asserting other, different types of employment discrimination. For instance, the employee discriminated against in promotion might represent a class of applicants denied employment as well as a class of employees who, like herself, were denied promotion. *See, e.g.*, Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975).

[136] The first appeal to the Fourth Circuit is reported at Hill v. Western Elec. Co., 596 F.2d 99 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979).

[137] Hill v. Western Elec. Co., 672 F.2d 381, 384-85 (4th Cir.), *cert. denied*, 459 U.S. 981 (1982). The district court denial of the motion to intervene was based in part on the court's desire to avoid delaying relief on the job assignment and promotion claims. *Id.* at 385. The district court's decision is reported at 12 Fair Empl. Prac. Cas. (BNA) 1175 (E.D. Va. 1976).

ond decision,[138] the Fourth Circuit held that, although it had vacated the district court's findings regarding discrimination in hiring on the first appeal, the district court should nonetheless consider postjudgment intervention of new representative parties and the possibility of reinstating the vacated findings and conclusions. Such a "reinstatement" procedure would conserve judicial resources and would be appropriate, the Fourth Circuit held, when the finding of inadequacy of the original class representatives had been based solely on a "technical lack of identity of interest and injury between representative and class," as opposed to "demonstrated" or "actual" ineffectiveness of representation.[139] The original named plaintiffs' "actual effectiveness," the court noted, was readily seen in the favorable result on the class claims.[140]

Thus, in *Hill* a class action was permitted to continue — with a postjudgment switching of the representative parties — even though at the time the "class" was certified the then representatives were not, and could not legally be, members of the class certified. This deficiency in the representatives was deemed to be merely "technical" and did not require the loss of the factual findings made while they headed the class.[141]

The Third Circuit used the same approach a few years later in *Goodman v. Lukens Steel Co.*,[142] in which, as in *Hill*, the district court certified an across-the-board class action in an employment discrimination suit.[143] As in *Hill*, the district court, following trial, found in favor of the individual plaintiffs and the class on a number of issues.[144] However, after the district court had rendered its findings, the Supreme Court issued its opinion in *General Telephone Co. of Southwest v. Falcon*, which sharply curtailed the use of across-the-board class actions in employment discrimination suits.[145] On appeal, defendants at-

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[138] *Hill*, 672 F.2d at 381.

[139] *Id.* at 389.

[140] *Id.* at 391.

[141] On remand from the second decision of the Fourth Circuit, the district court again denied the motion of three petitioners to intervene as class representatives. On appeal, the Fourth Circuit affirmed on the ground that none of the would-be intervenors was a proper class representative. Hill v. AT&T Technologies, Inc., 731 F.2d 175 (4th Cir. 1984).

[142] 777 F.2d 113 (3d Cir. 1985), *aff'd on other grounds*, 482 U.S. 656 (1987).

[143] *See supra* note 136.

[144] The district court opinion is reported at 580 F. Supp. 1114 (E.D. Pa. 1984).

[145] *See supra* note 135. In General Tel. Co. of Sw. v. Falcon, 457 U.S. 147 (1982), the Supreme Court held that, absent proof the employer "operated under a general policy of discrimination," an employee alleging employment discrimination could not use an across-the-board attack. *Id.* at 157, 159 n.15. Quoting from *Rodriguez*, *see*

tacked the findings of discrimination with respect to initial assignment of newly hired employees on the ground that none of the named plaintiffs had alleged that during the statutory period he had suffered discrimination in initial assignment. The Third Circuit agreed that in light of *Falcon* and *Rodriguez* the named plaintiffs could not be legally adequate representatives of the initial-assignment class because none had been members of that class during the statutory period. As in *Hill*, the court of appeals vacated the findings applicable to that part of the class.[146]

The Third Circuit, however, then discussed "the realities of class suits."[147] The reality, according to the Third Circuit, is that "[i]n a massive class action such as the one at hand, it is counsel for the class who has the laboring oar."[148] "The class representatives," the court noted, "furnish the factual basis to invoke the jurisdiction of the court and provide the outline of the controversy, but the lawyers shape the claims for adjudication by the compilation of factual and expert testimony and the presentation of statistical and documentary evidence."[149] There was, the Third Circuit felt, a "distinct possibility that the evidence presented would not have varied one iota had a qualified representative for each claim been present from the inception of the suit."[150] If that were true, then a new lawsuit filed by a qualified class representative would produce only a duplicative trial, a "result [that] would yield no discernable benefit to anyone but would generate substantial loss in time for court, counsel and parties."[151] To avoid such wasteful duplication of effort, the Third Circuit, citing *Hill*, directed the district court to consider intervention of a new representative plaintiff, followed by reinstatement of the vacated findings.[152]

In *Thurston v. Dekle*,[153] the Fifth Circuit faced a situation similar to that in *Hill* and *Goodman*. In *Thurston* the plaintiff, a terminated employee, brought a class action challenging a municipality's rules for sus-

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supra notes 79-85 and accompanying text, the Court repeated that " 'a class representative must be part of the class and "possess the same interest and suffer the same injury" as the class members.' " 457 U.S. at 156.

[146] 777 F.2d at 121-24.

[147] *Id.* at 124.

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.* If no proper class representative came forward, the initial-assignment claim must, the Third Circuit recognized, be dismissed as to the class. *Id.* at 125.

[153] 531 F.2d 1264 (5th Cir. 1976), *vacated on other grounds*, 438 U.S. 901 (1978).

pension and dismissal of employees. The plaintiff sought damages for himself and the class and sought injunctive and declaratory relief for the class. The district court certified a class and entered judgment in favor of the plaintiff and the class. After the district court issued its decision, the Fifth Circuit ruled in another case that damages were not available in such a suit against a municipality. On appeal in *Thurston*, the defendants argued that (1) because the district court had lacked subject matter jurisdiction over Thurston's individual claim for damages; and (2) because Thurston did not himself have standing to raise the claims of declaratory or injunctive relief, there was no named plaintiff and the case should be dismissed.

The Fifth Circuit frankly admitted that "[u]se of the conventional form of standing analysis leads to the conclusion that this case should be reversed because no named plaintiff had standing."[154] However, adopting a functional approach to standing, the court refused to "exalt[] form over substance."[155] The Fifth Circuit noted that in *Thurston* the defendants and the district court had all *believed* that Thurston had standing. Thus the adversary context, which was "standing's ultimate purpose," had prevailed in the district court, despite Thurston's legal lack of standing.[156] Furthermore, to reverse the case for lack of standing "will predictably result in another attack on these same ordinances before the same trial court"[157] by another plaintiff. Such relitigation, the court noted, would only waste money and court time. The Fifth Circuit concluded that because "the purpose of the standing requirement has been fulfilled by the presence of an adversary context which has remained concrete throughout the entire proceedings" and because "standing was subsequently determined not to exist because of a change in law affecting subject matter jurisdiction," the court of appeals should reach the merits of the case.[158] The "rights of the class to an adjudication of their claims should survive . . . ."[159]

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[154] *Id.* at 1270.

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.* at 1791.

[159] *Id.* The decision of the Fifth Circuit was vacated by the Supreme Court, 438 U.S. 901 (1978), in light of Monell v. Department of Social Serv. of the City of New York, 436 U.S. 658 (1978), which held that under certain circumstances, local government bodies can be sued directly under § 1983 for money damages. On remand, the Fifth Circuit continued to assert that regardless of the district court's decision on the merits on remand, standing was no problem.

To the extent that the district court may determine that Thurston's suit

Cases such as *Hill*, *Goodman*, and *Thurston* are instructive in two respects. First, they highlight again the inescapable conflict between the two approaches to class action standing advanced by the Supreme Court. Second, when compared to the precertification-mootness cases, these cases demonstrate vividly the lack of any overarching philosophical consistency in dealing with standing and mootness questions in the class-action context.

With respect to the two Supreme Court approaches, the decisions in *Hill*, *Goodman*, and *Thurston* are basically logical extensions or applications[160] of the functional *Sosna-Geraghty* approach.[161] As in *Sosna* and *Geraghty*, the courts in *Hill*, *Goodman*, and *Thurston* effectively separated the class from the class representative and drastically reduced (if not eliminated) the role of the class representative. In *Hill* and *Goodman* the failure of the representative plaintiff to be a member of the class was regarded as a mere "technical" defect. Indeed, the Third Circuit in *Goodman* candidly acknowledged that it viewed class counsel, not the class representative, as the key to shaping the case.[162] In *Thurston* the representative's failure to be a member of the class "certified" was disregarded altogether on the ground that the parties' and district court's *belief* (albeit mistaken) that he had standing was sufficient to supply "concrete adverseness." Quite simply, the representative party was viewed, in these three cases, as a necessary nuisance who provided the admission ticket to court but whose failure did not result

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> was directly maintainable against the city or its officials, Thurston clearly had standing to bring this action. However, even if it is determined that standing was legally lacking, the purposes of that legal theory were fulfilled by the presence of an adversary context which remained concrete throughout the entire proceedings. Even though standing were to be subsequently determined not to exist because of a change in law, this court should now reach the merits.

Thurston v. Dekle, 578 F.2d 1167, 1169 (5th Cir. 1978).

[160] Although the Fifth Circuit's opinion in *Thurston* predates the *Geraghty* opinion, it uses the same functional rationale that formed the basis of the *Geraghty* decision.

[161] *See* Note, *supra* note 134, at 843-44 (arguing that *Hill* was rightly decided in light of *Geraghty*). Professor Floyd similarly concludes that *Hill* was correctly decided although Floyd admits that the case appears "at first blush to be inconsistent" with *Rodriguez*. Floyd, *supra* note 5, at 47.

[162] Commentators have similarly recognized the important role that class counsel plays. *See* Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 COLUM. L. REV. 299, 308 (1980) ("In most small-claim class damage actions, where no single class member or named plaintiff stands to realize any significant economic gain, plaintiff's counsel, as the one with the largest stake in the outcome, is in reality the class representative."); Kane, *supra* note 5, at 113 ("[T]he attorney is truly the class representative.").

in the dismissal of the action.[163]

Instead, the focus of the courts' attention was, consistent with *Sosna* and *Geraghty*, on whether as a functional matter the issues in the case had been "sharply presented" in a "factual context" with "vigorous advocacy." In each case, the court concluded that they had, even though there was no technically valid class representative at the time of certification. In each case, therefore, the "class" could continue to exist — apart from the "technically defective" representative — awaiting a new representative.[164]

Additionally, as in *Sosna*, the lower courts saw the real question in judging the adequacy of the class representative as: Was she "actually effective"? Did the class win on its claims? This was, moreover, the Third Circuit acknowledged, actually a way of asking: Was class counsel effective?[165]

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[163] The Third Circuit likewise dispensed with the class representative entirely in Mayberry v. Maroney, 558 F.2d 1159 (3d Cir. 1977), a prisoner class action. In *Mayberry*, after the class had been certified and the parties had engaged in a substantial amount of litigation, the named plaintiff fired his lawyer and indicated he wished to proceed *pro se*. The district court allowed the lawyer to withdraw his representation of the named plaintiff but ordered the lawyer to continue to represent the class. Thereafter, although the named plaintiff showed no interest in the lawsuit, the lawyer for the class continued to litigate the case. When the district court granted the defendant's motion to vacate an earlier consent judgment, the lawyer appealed on behalf of the class.

The Third Circuit, relying on *Sosna*, held that there continued to be a live case or controversy, even assuming there was no longer an active named plaintiff.

> Even assuming that we may no longer look to Mayberry to advance the necessary live interests at this stage in the proceedings, the record fails to raise any doubt that, at the time the complaint was filed and at the time the class was certified, Mayberry provided this jurisdictional prerequisite. . . . [W]e may now look to the interests of the class, rather than those of its representative, to provide such a live controversy . . . . Thus, live interests, sufficient to meet the "case or controversy" requirement, are properly before the [c]ourt.

Id. at 1161-62.

[164] Indeed, in *Thurston*, the court deemed the named plaintiff's past vigorous advocacy to be sufficient for him to have standing to press the merits of the case on appeal, even though his lack of standing was, by then, apparent.

[165] The adequacy of class counsel has typically been, under Rule 23(a)(4), a matter that the district court considers in determining whether to certify a class initially. See 1 H. NEWBERG, *supra* note 15, § 3.24 (collecting cases). One commentator noted that "the single most important factor considered by the courts in determining the quality of the representatives' ability and willingness to advocate the cause of the class has been the caliber of the plaintiff's attorney." Symposium on Class Actions, *The Class Representative: The Problem of the Absent Plaintiffs*, 68 NW. U.L. REV. 1133, 1136 (1974).

Yet while *Hill*, *Goodman*, and *Thurston* are consistent with the philosophy of *Sosna* and *Geraghty*, they are at the same time obviously inconsistent with the *O'Shea-Rodriguez-Blum* line. These later cases state quite clearly that the representative party must be a member of the class and have a personal stake in the particular conduct in question to have standing to maintain the suit.[166] Put another way, the district court lacks jurisdiction and there can be no "class" or "findings" to reinstate if the class representative lacks standing.[167] Furthermore, as the Supreme Court made clear in *Blum*, it is of no significance that the "class" has been certified or has prevailed.[168] In keeping with *Blum*, some lower courts have ruled, contrary to *Hill*, *Goodman*, and *Thurston*, that a class action must be dismissed when it is realized later that the named representative was legally unable to be a member of the class, even though the "class" has won on the merits of its case.[169]

The *Hill*, *Goodman*, and *Thurston* cases thus highlight the unavoidable conflict between the traditional and the flexible approaches to standing when the representative's lack of membership in the class becomes apparent only after trial on the merits. Indeed, only by resorting to some pretty fine line drawing can *O'Shea*, *Sosna*, *Rodriguez*, and *Blum* be reconciled in the posttrial situation. The line that must be drawn is between the representative who was at one time a member of the class but whose individual claim is thereafter mooted and the representative who was never a member of the class certified. In *Sosna*, for

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What makes *Hill*, *Goodman*, and *Thurston* different is that *post hoc* judgment as to class counsel's performance is being used to justify standing or existence for the class — even though the representative party was, at all times, legally inadequate.

[166] *See supra* notes 29-42, 79-85 & 105-08 and accompanying text.

[167] In dissent, Judge Widener stated:

> The named plaintiffs were never part of the class of disappointed applicants for employment and thus certification never should have occurred.
>
> The majority characterizes the problems with the original certification as involving only a "technical lack of identity of interest and injury between representative and class," . . . and thus easily cured. . . . Such statements trivialize . . . *Rodriguez* by their necessary implication that class composition is of little or no importance in the Title VII actions.

Hill, 672 F.2d at 397 (Widener, J., dissenting).

[168] *See supra* notes 105-08 and accompanying text.

[169] *See, e.g.*, Berger v. Iron Workers Reinforced Rodmen Local 201, 843 F.2d 1395, 1409-11 (D.C. Cir. 1988); Griffin v. Dugger, 823 F.2d 1476, 1482-84 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 1729 (1988); Brady v. Thurston Motor Lines, 726 F.2d 136, 146 (4th Cir. 1984), *cert. denied*, 469 U.S. 827 (1984). The Fifth Circuit seems to be on both sides of this issue. *Compare Thurston*, 531 F.2d at 1264 *with* Vuyanich v. Republic Nat'l Bank of Dallas, 723 F.2d 1195, 1200-01 (5th Cir.), *cert. denied*, 469 U.S. 1073 (1984).

instance, the representative party was allegedly (and, apparently, factually) a member of the class when the class was certified. In contrast, the representative plaintiff in *Blum* was not, by the allegations of the complaint, a member of the class of patients transferred to higher levels of care. Similarly, in *O'Shea* the representative plaintiffs' lack of membership in the class alleged was visible from the complaint. In *Rodriguez*, the plaintiffs' lack of membership in the class was not apparent from the complaint but was established by a trial of the plaintiffs' individual claims before "certification" of the class. Thus, one can draw a line between those cases (such as *O'Shea*, *Rodriguez*, and *Blum*) in which the court should have known, either from the pleadings or trial, that the named plaintiff was not a member of the class at the time of the purported certification and those cases (such as *Sosna*) in which the plaintiff *was* a member of the class at the time of certification.[170] It can then be argued that only when the plaintiff was a member of the class at the time of certification could there be a "properly certified class" to provide the "personal stake" necessary to keep the case alive.[171]

Under this analysis, *Hill*, *Goodman*, and *Thurston* were all wrongly decided. In each case, the district court should have known from the pleadings that the representative party was not a member of the class and, therefore, that the district court lacked jurisdiction to certify the "class" and to entertain the claims.[172] Because the district court lacked

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[170] *See* Bledsoe, *supra* note 5, at 455-56. *See generally* Note, *The Personal Stake Requirement in Federal Class Action Litigation*, 33 BAYLOR L. REV. 337, 346-48 (1981).

[171] *See infra* note 173.

[172] A situation somewhat different from the *Hill-Goodman-Thurston* scenario is presented when the class is certified and then the class wins on the merits of the claim but the representative loses on the merits of her individual claim because of a factual finding against her. Here again, the lower courts have split on how to handle the situation. The Fifth and Eleventh Circuits have held that although the trial of the representative's claims demonstrates that she did not suffer the injury suffered by the class, the class does not have to be decertified. Carpenter v. Stephen F. Austin State Univ., 706 F.2d 608, 616-18 (5th Cir. 1983); Scott v. City of Anniston, 682 F.2d 1353, 1356-58 (11th Cir. 1982). The Eleventh Circuit justified this result on two grounds. First, the court relied on footnote 12 of *Rodriguez* which suggested that if at the time of certification it could not be known that the named plaintiffs were not members of the class, the class could go forward. *See infra* note 173. Second, as in *Hill* and *Goodman*, the court also emphasized that the named representatives in fact provided adequate representation — as shown by the favorable outcome on the class claims. *See also* Sirota v. Solitron Devices, Inc., 673 F.2d 566, 572 (2d Cir. 1982) (stating that decertification not necessary when named plaintiff was member of class as certified but not under post-trial stipulation of parties). *But cf.* Roby v. St. Louis Sw. Ry., 775 F.2d 959, 961-63 (8th Cir. 1985) (holding that the district court properly decertified certified class after

jurisdiction from the outset, there were no valid findings to be reinstated.[173]

There are two problems with this analysis. First, the Supreme Court has never adopted it. Second and more fundamental, it flies in the face of the *Geraghty* rationale. The "vigorous advocacy" of the representative party is in no way affected by whether she actually had a "live" claim at the time of the class certification ruling. In *Hill*, *Goodman*, and *Thurston*, the named plaintiffs all believed that they were legally adequate representatives and all proceeded vigorously and successfully on both the certification issue and on the merits. Further, as the Third Circuit observed, the "reality" is that class counsel, not the class representative, shapes the class case, and the evidence put forward on behalf

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trial on the merits of class and individual claims revealed that named plaintiffs not affected by employment practices being challenged).

When the class is certified and both the class and the individual plaintiff lose on the merits, courts have held that decertifying the class, although not automatically required, is proper if the named plaintiff was an inadequate representative. *See, e.g.*, Bowen v. General Motors Corp., 685 F.2d 160, 162 (6th Cir. 1982); Scott v. University of Del., 601 F.2d 76, 84-88 (3d Cir. 1979), *cert. denied*, 444 U.S. 931 (1979). Put another way, the class cannot be bound by the adverse decision if there was an inadequate representative. *Bowen*, 685 F.2d at 162. One factor to consider in determining the adequacy of representation, the courts note, is whether in hindsight the named plaintiff was in fact a member of the class certified. *Bowen*, 685 F.2d at 162; *Scott*, 601 F.2d at 86-88.

[173] Much of the trouble in *Hill* and *Goodman* is probably due to misreading footnote 12 of *Rodriguez*. That footnote stated:

> Obviously, a different case would be presented if the District Court had certified a class and only later had it appeared that the named plaintiffs were not class members or were otherwise inappropriate class representatives. In such a case, the class claims would have already been tried, and, provided the initial certification was proper and decertification not appropriate, the claims of the class members would not need to be mooted or destroyed because subsequent events or the proof at trial had undermined the named plaintiffs' individual claims. . . . Where no class has been certified, however, and the class claims remain to be tried, the decision whether the named plaintiffs should represent a class is appropriately made on the full record, including the facts developed at the trial of the plaintiffs' individual claims. At that point, as the Court of Appeals recognized in this case, "there [are] involved none of the imponderables that make the [class-action] decision so difficult early in litigation."

Rodriguez, 431 U.S. at 406 n.12 (citations omitted).

What the courts in *Hill* and in *Goodman* overlooked is that, in footnote 12, the Supreme Court was referring to a "properly certified class." One can argue that only in the *Franks*- or *Sosna*-type case — in which there was no indication of inadequacy of the class representative at the time of the certification — can there be a "properly certified class." *See supra* note 172.

of the class will typically be the same regardless of whether the representative is herself a member of the class.[174] Indeed, the *Sosna* and *Geraghty* decisions themselves demonstrate the feasibility of having a vigorous representative who is not a member of the class. In *Sosna*, the plaintiff was permitted to press the merits of the case despite her own moot claim.[175] The *Geraghty* plaintiff presented the class certification claim "vigorously" and, according to the Supreme Court, could have been deemed an adequate representative to press the class claims on the merits, even though his personal claim had long since expired.[176]

Quite simply, although the holdings of the various Supreme Court decisions can be reconciled with some fine line drawing, their rationales and policies cannot. If the *Geraghty* functional approach is to be used, *Hill*, *Goodman*, and possibly *Thurston* (at least in the district court) were rightly decided. Yet each of these decisions is clearly at odds with *O'Shea*, *Rodriguez*, and *Blum*.

The *Hill*, *Goodman*, and *Thurston* decisions also graphically demonstrate the inconsistency in how the lower courts analyze issues of class action standing that arise in different settings. In the precertification cases, the personal stake and standing of the named class representative are pivotal — if the class representative lacks a live claim at the time of certification, the entire case is typically dismissed. The existence of an obvious "class" of persons with similar interests is irrelevant, as is the fact that the case is on the eve of trial and dismissal will only result in the filing of a duplicative lawsuit.[177] In the posttrial setting, in contrast, the class representative is treated as simply a necessary nuisance. Although the lower courts appear reluctant to dispense with the class representative entirely,[178] the courts are willing to recognize the "real-

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[174] The Third Circuit is not alone in this view of the "reality" of class actions. *See* sources cited *supra* note 162. For discussions of the role and ethical problems facing class counsel, see Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986); Coffee, *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 629 (1987) ("Indeed, as a practical matter, the attorney often finds the client only after the attorney has first prepared the action."); Waid, *Ethical Problems of the Class Action Practitioner: Continued Neglect by the Drafters of the Proposed Model Rules of Professional Conduct*, 27 LOY. L. REV. 1047 (1981).

[175] *See supra* notes 51-60 and accompanying text.

[176] *See supra* notes 98-99 and accompanying text.

[177] *See supra* notes 115-20 and accompanying text.

[178] Justice Stevens in his concurring opinion in Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 342-44 (1980), suggested dispensing with the class representative. *See supra* note 102.

ity" that the named representative contributes little to the development of the class claims.[179] They are much more willing to recognize that the class issues can be presented with "vigorous advocacy" and in a "concrete, factual setting" even if the named representative never had standing. Indeed, the named representative's inherent inability to be a member of the class, something that would be fatal in the precertification stage, is now reduced, by some courts, to a mere "technical defect." The key factor in judging adequacy of representation in the posttrial stage is success — did the class prevail?[180] Finally, because the courts and the parties in the posttrial setting have likely invested much time and effort in the case, judicial economy becomes a concern (or, at least, a justification) in determining whether the action should be dismissed.[181]

C. Precertification Settlement

Suppose that after the filing of a class action complaint but before the district court rules on class certification, the named plaintiff settles her own individual claim but not any class claims. Must the members of the uncertified "class" be notified or otherwise protected? Does Rule 23(e) of the Federal Rules of Civil Procedure apply?[182] That rule pro-

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[179] A different issue is presented when the named plaintiff has, at all times a "live," nonmoot claim, but a nonnamed class member seeks to appeal, on behalf of the class, the final judgment or decree in the case. In this latter situation, the Fifth and Eleventh Circuits have held that the nonnamed class member lacks standing to appeal on behalf of the class. Her remedy, according to these courts, is to move to intervene in the class action or to collaterally attack the adequacy of the representation provided by the named plaintiff. Walker v. City of Mesquite, 858 F.2d 1071 (5th Cir. 1988); Guthrie v. Evans, 815 F.2d 626 (11th Cir. 1987).

[180] One is reminded of Justice White's dissent in *Sosna*: "The Court in reality holds that an attorney's competence in presenting his case, evaluated *post hoc* through a review of his performance as revealed by the record, fulfills the 'case or controversy' mandate." *Sosna*, 419 U.S. at 413.

[181] As the Seventh Circuit has recently noted, in dealing with the different question of issue preclusion when the party seeking preclusion has "opted out" of an earlier class action: " 'Judicial economy' sounds like a sure-fire Good Thing — especially to the ears of judges." Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, 814 F.2d 358, 365 (7th Cir. 1987). However, as the court there recognized, judicial economy, despite its undoubted appeal, cannot always be a grounds for deciding class action issues. Justice White had earlier voiced the same thought in his dissent in *Sosna* when he noted: "Article III is not a rule always consistent with judicial economy." 419 U.S. at 418.

[182] There is no question that Rule 23(e) applies to cases in which the class has been certified or in which the *class* claims are being settled before or after certification. Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324 (E.D. Pa. 1967); 7B C. WRIGHT, A. MILLER & M. KANE, *supra* note 67, § 1797 (collecting cases).

vides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."[183] Is there a "class action" which is being dismissed or compromised before class certification?

The Supreme Court has never addressed these questions, but the lower courts have generated a considerable body of case law on the subject.[184] However, the lower courts have, here again, generally treated the issue as wholly separate from and unrelated to other class-action standing issues.[185]

Courts addressing the precertification-settlement question[186] have generally held that Rule 23(e) does apply to settlements of the named plaintiff's individual claim before class certification.[187] (Most courts

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[183] FED. R. CIV. P. 23(a). The same question arises when the representative party, instead of settling her individual claim before class certification, seeks simply to dismiss voluntarily the entire case before certification or seeks to amend the pleadings to delete the class references. Typically, the courts treat all three situations alike. *See* 7B C. WRIGHT, A. MILLER & M. KANE, *supra* note 67, § 1797 and cases cited *infra* note 187.

[184] Commentators have also generated a considerable amount of literature on the subject. *See generally* 2 H. NEWBERG, *supra* note 15, § 11.69 (collecting cases); Almond, *Settling Rule 23 Class Actions at the Precertification Stage: Is Notice Required?*, 56 N.C.L. REV. 303, 316-37 (1978) (collecting cases); Wheeler, *supra* note 110 (collecting cases and arguing that the Supreme Court's decision in American Pipe & Const. Co. v. Utah, 414 U.S. 538 (1974), does not shed any light on the issue); Comment, *The Applicability of Rule 23(e) to Precertification Proceedings: The Functional Approach Applied*, 25 VILL. L. REV. 487 (1979-80).

[185] One court has flatly asserted that the questions of standing and mootness addressed by the Supreme Court in cases such as *Sosna* are "unrelated" to the application of Rule 23(e) to precertification settlements of individual, nonclass claims. Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61, 66 (S.D. Tex. 1977). A few courts have, however, recognized the logical connection between precertification mootness and precertification settlement of the named plaintiff's individual claim. *See, e.g.*, Glidden v. Chromalloy Am. Corp., 808 F.2d 621, 626 (7th Cir. 1986); Shelton v. Pargo, Inc., 582 F.2d 1298, 1303-04 (4th Cir. 1978); Gaddis v. Wyman, 304 F. Supp. 713, 714-15 (S.D.N.Y. 1969) (using Rule 23(e) as basis for determining precertification mootness question); *see also* Bledsoe, *supra* note 5, at 447-49; Greenstein, *supra* note 5, at 911 (noting that the courts' application of Rule 23(e) to precertification settlement is a basis for arguing that a class exists even when there is precertification mootness on the part of the representative party).

[186] The term "precertification settlement" is used as a shorthand reference to include not only precertification settlements as such but also precertification voluntary dismissals and precertification amendment of pleadings to delete class allegations. *See supra* note 183.

[187] *See, e.g.*, *Glidden*, 808 F.2d at 627; Simer v. Rios, 661 F.2d 655, 664-66 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982); *In re* Phillips Petroleum Sec. Litig., 109

hold that Rule 23(e) mandates approval by the district court of any such settlement but that notice to the class is a matter within the trial court's discretion.[188]) The courts typically reason that even in the pre-certification stage, a "class" exists, at least presumptively, for purposes of Rule 23(e).[189] Many quote the language of the Advisory Committee that a denial of class certification "strip[s] [the action] of its character as a class action"[190] and conclude from that that the filing of a class-action complaint causes the "class" to exist.[191] The Third Circuit, taking a somewhat metaphysical approach, has said that before certification the "class members" are in a "twilight zone."[192] Less metaphysical courts simply find that Rule 23(e) applies to any action in which a class is alleged in the complaint.[193]

Whatever the language used, whether metaphysical or not, the motivation behind the courts' rulings is at bottom a concern with the absent "class members." The named plaintiff, the courts note, may be using the class allegations as leverage to obtain a larger settlement. If she does, any additional settlement dollars she obtains "belong" to the class members, not to the named plaintiff.[194] Plaintiff's counsel, who is also

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F.R.D. 602, 607 (D. Del. 1986); Larkin Gen. Hosp. v. American Tel. & Tel. Co., 93 F.R.D. 497, 500 (E.D. Pa. 1982); Wallican v. Waterloo Community School Dist., 80 F.R.D. 492, 493 (N.D. Iowa 1978); *Magana*, 74 F.R.D. at 64-66; Duncan v. Goodyear Tire & Rubber Co., 66 F.R.D. 615, 616 (E.D. Wis. 1975); *see also* Ross v. Warner, 80 F.R.D. 88, 90 (S.D.N.Y. 1978) (holding that if plaintiff seeks to amend class action complaint before class certification in way that reduces class, notice must be sent to "class members" affected.); 7B C. WRIGHT, A. MILLER & M. KANE, *supra* note 67, § 1797 at 347. *Contra Shelton*, 582 F.2d at 1304-05 (holding that Rule 23(e) as such does not apply but that the district court should nonetheless review the precertification settlement of the representative's individual claims).

[188] *See, e.g.*, *Glidden*, 808 F.2d at 627-28; *Larkin*, 93 F.R.D. at 500; *Wallican*, 80 F.R.D. at 493.

[189] *See, e.g.*, *Glidden*, 808 F.2d at 626; Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir. 1970), *cert. denied*, 398 U.S. 950 (1970); Burgener v. California Adult Auth., 407 F. Supp. 555, 560 (N.D. Cal. 1976).

[190] The Advisory Committee notes on the 1966 Amendments and on Rule 23(c)(1), in particular, state, among other things: "A negative determination [on the motion for certification] means that the action should be stripped of its character as a class action."

[191] *See, e.g.*, Pearson v. Ecological Science Corp., 522 F.2d 171 (5th Cir. 1975), *cert. denied*, 425 U.S. 912 (1976); *Magana*, 74 F.R.D. at 66; Gaddis v. Wyman, 304 F. Supp. 713 (S.D.N.Y. 1969); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324, 326 (E.D. Pa. 1967).

[192] *In re* Fine Paper Litig., 632 F.2d 1081, 1086 (3d Cir. 1980).

[193] *See* cases cited *supra* note 187.

[194] *See, e.g.*, Glidden v. Chromalloy Am. Corp., 808 F.2d 621, 626-27 (7th Cir. 1986); Simer v. Rios, 661 F.2d 655, 664 (7th Cir. 1981); Shelton v. Pargo, Inc., 582 F.2d 1298, 1305-07 (4th Cir. 1978); Wallican v. Waterloo Community School Dist., 80

class counsel, may similarly be willing to "sell out" the class's interest to be able to participate in a settlement recovery immediately.[195] The absent "class members" (and defendants) must, according to the courts, be protected from such "strike suit" tactics.[196] In addition, courts note that the "class members" may be relying on the lawsuit to vindicate their interests, that class members may not learn of the named plaintiff's settlement,[197] and that the statute of limitations has again begun to run.[198]

The "presumed" existence of the class and the overriding concern with potential prejudice to the absent "members" of the uncertified class are in sharp contrast to the treatment given to "class members" when the named plaintiff's claim is mooted before class certification. Then, as explained earlier, the courts follow the traditional *Jacobs* approach and routinely dismiss the entire action, no matter how "obvious" the class or how great the potential prejudice to absent "class members."[199] The courts indulge in no "presumption" of class existence in the precertification-mootness situation (except when the case falls within the narrow *Gerstein* exception for transitory claims).

Thus, when the precertification mootness cases are compared to the precertification-settlement cases, one gets a "now you see it, now you don't" feeling about the uncertified class. The uncertified "class" in the precertification settlement setting is deemed to exist and need protection even when the representative settles only her own individual claim.[200]

F.R.D. 492 (N.D. Iowa 1978); *see* Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 MICH. L. REV. 308, 314-19 (1985).

[195] *See* sources cited *supra* note 194.

[196] *Id.*

[197] *Id.* Courts also reason that even if the "class members" know of the named plaintiff's settlement, they will likely nonetheless be prejudiced in that they must now incur the additional expense of bringing their own lawsuits. *Id.*

[198] The statute of limitations is tolled from the filing of the class-action complaint until class certification is denied or the action is dismissed. American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 552-59 (1974).

[199] *See supra* notes 113-20 and accompanying text.

[200] Because there is thought to be, in the case of an involuntary dismissal, little or no chance of collusion or benefit to the representative plaintiffs at the expense of the remaining class members, courts do not typically apply Rule 23(e) to involuntary dismissals. *See, e.g.*, Guthrie v. Evans, 815 F.2d 626, 629 (11th Cir. 1987); Riddick by Riddick v. School Bd. of Norfolk, 784 F.2d 521, 531 (4th Cir. 1986); Jones v. Caddo Parish School Bd., 704 F.2d 206, 215 (5th Cir. 1983).

The distinction between voluntary and involuntary dismissals, however, is not completely satisfactory. First, although an involuntary dismissal may offer less ground for collusion or "bonus" for the representative party, the class members may still be

Yet if that same class representative's claims should be mooted, as opposed to settled, the "class" has no legal significance, and there is no concern for prejudice to it. Although it is possible to distinguish and reconcile the vastly different treatment given the uncertified class in these two situations,[201] there is no denying the fundamental inconsistency.

At bottom, the problem again boils down to which of the two Supreme Court approaches will a court follow? Although the courts handling precertification-settlement cases typically do not rely on either line of Supreme Court cases (the lower courts generally view the precertification-settlement question as unrelated to any standing or mootness issues), they clearly are proceeding on a functional, *Geraghty*-type basis. Their primary concern is a practical one — will the settlement and dismissal of the named representative's claims be at the expense of or injure the absent "class"?[202] Outside the Third Circuit, the courts have spent little time worrying about the exact "legal status" of the uncertified class.[203] Rather, as in *Geraghty*, there is in the precertification-settlement cases an implicit recognition that regardless of the lack of certification a "class" of persons interested in the litigation exists and that functionally the issue of prejudice to absent class members by the named plaintiff's settlement is a "live" issue that the court can and should decide.

Once again, as in the posttrial cases, this attitude is fully consistent with the *Geraghty* functional approach yet fundamentally at odds with the traditional *O'Shea-Rodriguez-Blum* approach. Quite simply, if the uncertified "class" lacks standing to press for class certification, it is hard to understand how it has "standing" to be a factor when the named plaintiff settles her own, individual claim. Unless one is willing to engage in a truly metaphysical distinction of "presence" or standing

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prejudiced in not knowing that the statute of limitations has begun to run again. Furthermore, it may not always be easy to tell what is an involuntary dismissal as opposed to a settlement. *See, e.g.*, Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1170-75 (5th Cir. 1978) (stating that court must determine whether district court's order was consent decree incorporating parties' settlement or a judgment); Comment, *Involuntary Dismissals of Class Actions*, 40 U. CHI. L. REV. 783 (1973).

[201] One can argue, for instance, that the uncertified class is not really "present" in the precertification-settlement context; it is just being protected *if* it exists. Using this type of analysis, however, leads one into the "twilight zone" reasoning of the Third Circuit. *See In re* Fine Paper Litig., 632 F.2d 1081, 1086 (3d Cir. 1980). Furthermore, it does nothing to explain why the "class" is protected in one situation but not in the other.

[202] *See* sources cited *supra* note 194.

[203] *See supra* notes 186-93 and accompanying text.

for one purpose as opposed to another, the inconsistency is once again inescapable.

CONCLUSION: A PROPOSED RESOLUTION

Consistency in the handling of class-action standing and mootness issues is likely to be impossible while the Supreme Court continues to straddle the fence and to embrace both the traditional *O'Shea-Rodriguez-Blum* approach and the functional *Sosna-Geraghty* approach. Obviously, the time has come for the Court to choose one approach or the other. Indeed, the Court got itself into this muddle by initially failing to focus on the peculiar nature of the class action and how those peculiarities might affect the doctrines of standing and mootness.[204] Instead, in the early cases the Court simply took the "personal stake insures concrete adverseness" formula that it had developed in nonclass cases and applied it, without any thoughtful analysis, to class actions.[205] Then, when the Court was unhappy with where the traditional approach was leading it, as in *Sosna* and *Geraghty*, the Court injected the functional approach.[206] Yet, as evidenced by the *Blum* decision, the Court has never abandoned the traditional approach nor made any meaningful attempt to reconcile the two approaches.

The problem, moreover, cannot be written off as merely the search for one of those foolish consistencies that are the hobgoblins of little minds. The conflicting signals that the Supreme Court sends have resulted in a body of case law in the lower courts that is fundamentally irreconcilable. Not only is there a lack of consistency among the courts in the handling of particular problems, there is no analytical logic or cohesiveness whatsoever when one moves from one discrete issue to another.

From the point of view of pure logical consistency, it probably matters less which of the two approaches the Supreme Court settles on than that the Court choose one or the other.[207] As a matter of class-action law, however, the preferable solution would be for the Court to adopt a functional approach across the board for all class-action

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[204] As Professor Wood recently remarked, "It has become well recognized that class actions are, for many purposes, a unique breed." Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 598 (1986).

[205] *See* Kane, *supra* note 5.

[206] *See supra* notes 43-62 & 86-104 and accompanying text.

[207] Whichever road is taken, there will be a certain amount of disruption in the sense that the Court will have to back off from one line of cases or the other. One hopes that the Court will do so openly and candidly.

standing and mootness questions.[208] More is at stake in a class action than the class representative's individual claim. The "reality," as the Third Circuit recognized[209] (and as the Supreme Court implicitly acknowledged in *Sosna* and *Geraghty*), is that very often the named plaintiff plays at most a small and essentially anecdotal role in the prosecution of the class action.[210] Provided there is an actual controversy in a concrete setting and parties genuinely contesting the issue — all matters that the court can ascertain — what difference does the named plaintiff's "personal stake" make?[211] Article III requires a case or controversy. It does not say who must have that case or controversy.[212] Regardless of the stage of the litigation, whether precertification or postcertification,[213] a court's focus should be on whether functionally in this particular class action the "concrete adversity" at which

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[208] As Professor Kane has observed:

> [A]lthough the potential for abuse and strike suitism is enormous, an analysis of the structure and function of the class suit and its differences from other types of public interest litigation suggests that rigid standing and mootness requirements may not be a necessary or desirable way of regulating class actions.

Kane, *supra* note 5, at 84.

[209] *See supra* notes 142-52 and accompanying text.

[210] *See* Hutchinson, *supra* note 16, at 487; Tushnet, *The Sociology of Article III*, *supra* note 6, at 1716-17; Willborn, *supra* note 5, at 24-38; Note, *Recent Developments in Class Action Mootness and Attorney Fees Doctrine: Giving Recognition to the Enforcement Rationale of Class Actions*, 28 WAYNE L. REV. 343, 362-64 (1981).

[211] Permitting a functional approach to standing and mootness questions in the class-action context but not in the nonclass context would arguably run afoul of Rule 82 of the Federal Rules of Civil Procedure, which states: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of the actions therein." One solution that has been suggested is to permit a more functional approach to standing in nonclass actions. *See* sources cited *infra* note 215.

[212] Relaxing the "personal stake" doctrine may have little practical effect. One commentator has noted: "While judicial opinions still abound with talk about the necessity for a 'personal interest,' that concept bears very little resemblance to its ancestor in the earlier private rights model . . . . [T]he concept has been so diluted that even the most trivial interest will suffice." Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1382 (1973); *see* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980) (holding that named plaintiffs' interest in shifting certain litigation costs to the class, if the class prevailed, sufficient to satisfy personal stake requirement); *see also* Kane, *supra* note 5, at 98 (arguing that "class standing" should be permitted in class actions).

[213] The particular stage of the litigation is not necessarily critical from a functional point of view. Regardless of the stage of the litigation, the focus should be on whether there was a genuinely contested issue in a concrete setting being sharply litigated. *See* Willborn, *supra* note 5, at 24-32.

standing is aimed is satisfied.[214]

The downside of adopting wholeheartedly such a functional approach is the same downside that comes whenever a "flexible," as opposed to a rule-oriented, approach is used. Although some measure of fairness in individual cases may be achieved, it will be at the cost of certainty. No longer will parties be able to look at the personal stake of the named plaintiff and predict the likely ruling on standing.[215] The bad reputation that standing decisions have for being "concealed decisions on the merits"[216] will only be aggravated.

Whatever "certainty" there is in the area of standing and particularly class-action standing is, however, largely illusory.[217] The lower courts have created a veritable hodge-podge of case law in this area. Given the special nature of the class action, it is unlikely, even if the Supreme Court abandoned the functional approach altogether, that the lower courts would cease finding "exceptional circumstances" calling for modification of the traditional rule.

The simple truth is that there are no "right" answers to standing and mootness questions the way there are to geometry problems.[218] Logical consistency, however, is something for which the Supreme Court can and should strive. In the area of class-action standing and mootness, the Court has, by its dual approach, fostered confusion and inconsistency. The time has come for the Court to acknowledge the

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[214] For instance, a court may want to consider, among other matters, whether the representative party has *ever* suffered the injury about which she is complaining. If the representative party has never suffered the injury in question, the court may well conclude (as courts typically do) that the case cannot go forward because the issue is not presented in a concrete factual setting with sufficient adversity. *See* 7B C. WRIGHT, A. MILLER & M. KANE, *supra* note 67, § 1761 (collecting cases). A different situation is obviously presented when the representative party's claim, once alive, has expired or been mooted. For other discussions of the use of a functional approach to standing in class actions, see Willborn, *supra* note 5, at 24-32; Comment, *supra* note 5, at 1647-59.

[215] Some commentators have gone further and have argued that personal stake should not even be a prerequisite to bringing a nonclass public action lawsuit — a lawsuit brought to vindicate the public interest in the enforcement of public obligations. *See* Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Jaffe, *supra* note 25. *See generally* Tushnet, *The Sociology of Article III*, *supra* note 6 (advocating a "liberal" approach to standing in general).

[216] Tushnet, *The New Law of Standing*, *supra* note 6.

[217] As commentators have noted, the entire area of standing is permeated with confusion and inconsistency. *See* sources cited *supra* note 6.

[218] Indeed, even mathematics is not perfect. As Kurt Gödel proved in 1931, mathematics cannot be both internally consistent and complete at the same time. For a layman's explanation see E. NAGEL & J. NEWMAN, GÖDEL'S PROOF (1967).

problem and to acknowledge that the peculiar class-action beast requires a different, and more flexible, standing-and-mootness analysis than the garden-variety nonclass action.[219]

[219] "[W]e want to control, we want to prevent abuses. We do not want to really kill this little beastie. We do not want to so entangle it so that it cannot be used effectively." Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299, 304 (1973).