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THREE MODELS OF ADJUDICATIVE  
REPRESENTATION

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INTRODUCTION ..... 1743

I. THE INDIVIDUAL MODEL: ONE ATTORNEY,  
ONE CLIENT.....1747

II. THE POLITICAL MODEL: GOVERNMENT ATTORNEYS  
REPRESENTING THE PUBLIC.....1752

III. THE COLLECTIVE MODEL: ATTORNEYS IN  
AGGREGATE LITIGATION .....1757

CONCLUSION..... 1764

INTRODUCTION

One of the core tenets of democratic government is that We the People should have a voice in decisions that affect us collectively. Yet, given the size and scope of modern society, it will rarely be feasible for all of us to participate directly in the policymaking process. Instead, we participate via political representatives. It is through representation that the people are made “present” in government, and generations of political theorists have sought to make sense of the relationship between representation and democracy.<sup>1</sup>

The standard account of political representation emphasizes three features that serve to legitimize and democratize representation: Representatives must be *authorized* to act on the people’s behalf; there must

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<sup>1</sup> HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 8-9 (1967).

be some means by which the people can hold their representatives *accountable* for their actions; and the representatives must in fact endeavor to *advance the people's interests*.<sup>2</sup> The precise meaning of the last condition is the subject of one of the longest-running debates in political theory. Some commentators argue that representatives ought to serve as delegates for the people, channeling their constituents' wishes into action. Others envision representatives as enlightened and largely independent trustees who follow their own autonomous judgment about how best to promote their constituents' interests.<sup>3</sup> Where a particular representative sits on the spectrum from "instructed delegate" to "enlightened trustee" has important consequences for the representative relationship, and—for some theorists—for the legitimacy of representation.<sup>4</sup>

Most theories of political representation focus on legislative bodies as centers of policymaking authority and, thus, key sites for representation. But policymaking in the United States is by no means confined to the legislative branch. Of particular relevance here, our legal system also depends heavily on courts and litigants to develop and enforce the law through case-by-case adjudications.<sup>5</sup> The reality that adjudication involves more than mechanical law application is most obvious in common law cases, but the point extends to many instances in which courts are called upon to interpret statutes and constitutional provisions.<sup>6</sup> And, because "[c]ourts are not self-starting,"<sup>7</sup> the choices made by litigants and lawyers—which may be driven by considerations of strategy, resources, values, and more—play a vital role in shaping how the law operates in practice.

Representation is critical to adjudication, though at first glance the link to political representation may seem to be little more than semantic coincidence. If the prototypical political representative is an elected official who represents a multitude of citizens, the standard model of adjudicative

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2 Andrew Rehfield, *Towards a General Theory of Political Representation*, 68 J. POL. 1, 3 (2006).

3 See Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515, 516 (2003) ("In the 'mandate' version of the model, the representative promises to follow the constituents' instructions or expressed desires; in the 'trustee' version the representative promises to further the constituency's long-run interests and the interests of the nation as a whole.").

4 See, e.g., PITKIN, *supra* note 1, at 145 (describing this as "the central classic controversy in the literature of political representation"); Andrew Rehfield, *Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy*, 103 AM. POL. SCI. REV. 214, 214 (2009) ("[I]n representative government, the central normative problem of democracy is often restated in terms of the relationship between citizens and *their* representatives: how closely must a representative's votes on legislation correspond to the preferences and will of his or her constituents?").

5 See generally SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010).

6 See Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 422-34 (2008) (discussing judicial policymaking and the influence of the Realists).

7 Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 21 (1996).

representation is that of a single attorney representing a single client. The reasons for representation also appear to shift when we move from the political to the adjudicative context. Clients rely on attorneys to speak for them in adjudication, not because it is impossible for them to participate more directly, but because they wish to take advantage of attorneys' specialized legal training.

These differences reflect the distinctive norms that govern participation in adjudication and lawmaking. The norms of adjudication are individualistic, focused on litigant autonomy and captured in the ideal that every disputant is entitled to his own "day in court."<sup>8</sup> That ideal, in turn, is formalized in due process rights of notice and an opportunity to be heard.<sup>9</sup> But those rights do not apply in the context of regulatory or legislative decisions of more general applicability. As the Court explained in the famous *Bi-Metallic* case,

[w]here a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption . . . . Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.<sup>10</sup>

Despite these differences, the worlds of lawmaking and adjudication are closer than they first appear. As many others have observed, the lines between lawmaking and adjudication are blurry at best.<sup>11</sup> Statutes and regulations may be narrowly drawn, targeting identifiable individuals and groups.<sup>12</sup> And, given rules of preclusion and *stare decisis*, the results of adjudication may have wide-ranging, prospective effects.<sup>13</sup>

This familiar point about the overlap between lawmaking and adjudication also has ramifications for representation. To borrow the language of *Bi-Metallic*, adjudication can and often does establish "rule[s] of conduct" that apply to "more than a few people"—sometimes *many* more. That point is self-evident in

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<sup>8</sup> *Martin v. Wilks*, 490 U.S. 755, 762 (1989).

<sup>9</sup> *See, e.g., Postal Tel. Cable Co. v. Newport*, 247 U.S. 464, 476 (1918) ("[A]s a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard, so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.").

<sup>10</sup> *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

<sup>11</sup> *See, e.g., JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 16-21 (1927) (problematizing the lawmaking/adjudication divide); Ralph F. Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259, 260-65 (1938) (same).

<sup>12</sup> *See* Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 625, 640-47, 688-94 (2014) (discussing problems with "special legislation" and proposing a requirement of legislative generality).

<sup>13</sup> *See* Lemos, *supra* note 6, at 439-40 & n.165 ("Although a judicial decision may technically apply to the parties to the case, the fact remains that unless and until the relevant court changes the relevant rule, the rule stands.").

class actions and other forms of aggregate litigation in which the interests being adjudicated are themselves quite numerous.<sup>14</sup> Indeed, a primary purpose of the class-action device is to facilitate litigation in circumstances where it is inefficient or impossible for all the affected individuals to sue one by one. But even cases with a single plaintiff and a single defendant can have serious consequences for third parties, particularly where the goal of the suit is to change institutional conduct or establish a new rule of law.

In these circumstances, the conventional model of adjudicative representation—one attorney, one client—seems inaccurate, or at least inadequate. Meanwhile, the questions that have animated theories of political representation come to the forefront. How can diverse and sometimes conflicting interests be represented by a single person? How might representatives be authorized and held accountable, and what should we do when they are not? Should representatives behave like delegates or trustees? To be sure, lawyers and legal academics talk about these questions, particularly in the context of class actions. Too often, though, the conversation is confined to the silo of law, ignoring that theorists from other disciplines have studied the same questions for generations.<sup>15</sup>

In this Article, I use the lens of political theory to examine the concepts of adjudicative representation in different types of litigation settings. My use of the plural is intentional. Our legal system employs multiple models of representation, and my principal goal is to survey the litigation landscape to take account of the diversity of adjudicative representation. Given limitations of space, the survey is necessarily truncated. First, I focus only on *attorneys* as representatives, though there is much that could be said about representative *parties*. Second, I consider only three adjudicative settings: individual suits, civil suits by government, and private class actions. Because the potential for overlap between adjudicative and political representation is at its peak in areas where adjudication touches on contested questions of social policy, most of the discussion that follows concerns public law litigation.<sup>16</sup> In the class action context, for example, I focus on injunctive class actions, which tend to be spearheaded by public interest lawyers.

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<sup>14</sup> See, e.g., Stephen C. Yeazell, *From Group Litigation to Class Action Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067, 1071 (1980) (“In group litigation the theory of representation . . . permits, in theory, a lawsuit involving . . . ‘the multitude’ to go forward because what would otherwise be an impracticably large number of people is represented by the active litigant . . .”).

<sup>15</sup> Cf. Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1193 (1982) (“By contrast to political theory, which suffers from an ‘embarrassment of riches’ in defining, if not resolving, problems of representation, judicial analysis is impoverished in both concept and application. Most notably, the perennial debate over how much paternalism a representative is entitled to exercise receives almost no attention in reported cases.”).

<sup>16</sup> See David Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, 165 U. PA. L. REV. 1571–72 (2017) (describing the public law model of adjudication).

Even with these limitations, the survey reveals three distinct models of adjudicative representation, each of which presents different challenges and produces different consequences for the immediate litigants and third parties. As political theorists long have recognized, no system of representation is perfect; “the suppression of differences is a problem for *all* representation.”<sup>17</sup> But different types of representation include and exclude—empower and disempower—in different ways. As I suggest in a brief conclusion, recognizing this diversity in adjudicative representation might open up fruitful lines of inquiry into the comparative advantages and disadvantages of each model, and a better understanding of where each model is most, and least, desirable.

### I. THE INDIVIDUAL MODEL: ONE ATTORNEY, ONE CLIENT

The conventional vision of adjudicative representation features an individual attorney representing an individual client. The same vision permeates the rules of professional conduct for attorneys, most of which “simply assume that the client is an individual.”<sup>18</sup> In this vision, the attorney acts as an agent of the client. The client relies on the attorney for legal expertise, but the client is in charge: her preferences as to the “objectives of representation” control, even if the attorney believes them to be unwise.<sup>19</sup> I will call this the “individual model” of adjudicative representation.

If we compare this model to the standard account of political representation, we find both similarities and differences. Recall that the orthodox view of political representation stresses three elements: authorization, accountability, and interest representation. As described below, the first two elements become problematic when we move away from conventional lawyer–client arrangements and into larger-scale litigation in which an individual attorney represents many people at once. But in the simple case of one attorney and one client, the requirements of authorization and accountability are straightforward as a conceptual matter.

It is with respect to the third element of representation—the requirement that the representative *act for* the represented, promoting her interests—that the individual model of adjudicative representation diverges from most theories of political representation. As the Introduction suggested, the verb form of “represent” raises thorny questions about what

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<sup>17</sup> Suzanne Dovi, *Political Representation*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring 2014), <https://plato.stanford.edu/archives/spr2014/entries/political-representation/> [https://perma.cc/QRS5-4ZFS].

<sup>18</sup> Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 FORDHAM L. REV. 2449, 2452 (1998).

<sup>19</sup> MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 2017) (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued.”).

it means for one person to represent the interests of another, and to do so *well* or *badly*. Should the representative follow the wishes of her constituents? Or should she exercise autonomous judgment in service of her constituents' welfare? In the conventional attorney–client relationship, the answer seems clear enough: the attorney must follow the client's mandate. The attorney, in other words, acts as an “instructed delegate” rather than an “enlightened trustee.” Some theorists conceive of political representation in the same way, but the question is hotly contested. And, it seems safe to say, the “delegate” view is a minority position in political theory.<sup>20</sup>

This aspect of the individual model of adjudicative representation reflects, and reinforces, the “strongly individualistic system of litigation” in the United States.<sup>21</sup> It also suggests something interesting about how our system conceives of legal entitlements. In her famous book, *The Concept of Representation*, Hannah Pitkin argued that resolution of the delegate vs. trustee question depends on a constellation of considerations, including the relative capacity of representative and represented as well as the kinds of issues with which the representative will have to deal.<sup>22</sup> Perhaps most importantly for present purposes, Pitkin reasoned that the “delegate” approach will tend to be correlated with an understanding of interests as personal and subjective, while the “trustee” approach will seem more appropriate in contexts where the relevant interests are conceived in objective terms:

The more [one] sees interests . . . as objective, as determinable by people other than the one whose interest it is, the more possible it becomes for a representative to further the interest of his constituents without consulting their wishes . . . . In contrast, the more [one] sees interests, wants, and the like as definable only by

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<sup>20</sup> See, e.g., BERNARD MANIN, *THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT* 163 (1997) (“Representative systems do not authorize (indeed explicitly prohibit) two practices that would deprive representatives of any kind of independence: imperative mandates and discretionary revocability of representatives (recall.)”); Rehfield, *supra* note 4, at 214 (“No one expects there to be an exact correspondence between [the laws of a nation and the preferences of the citizens governed by them] . . . . As long as . . . deviations do not become the norm (in which the law routinely fails to correspond to citizen preferences), they fit well within broad conceptions of democracy.”); Nadia Urbinati & Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 ANN. REV. POL. SCI. 387, 398 (2008) (“Elections establish the nonindependence of the representative from the represented in principle, although in practice, representative institutions require enough autonomy to carry out their political functions, which will require bodies that can engage in deliberative political judgments.”); see also *infra* notes 51–53 and accompanying text (describing Pitkin’s view).

<sup>21</sup> Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 U. ILL. L. REV. 43, 48; see also, e.g., William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1652 (1996) (noting that the “day in court” ideal seems to entail “the client having ‘control’ of the litigation”).

<sup>22</sup> See Pitkin, *supra* note 1, at 210–12.

the person who feels or has them, the more likely he is to require that a representative consult his constituents and act in response to what they ask him.<sup>23</sup>

On this view, the individual model makes sense if we think about adjudicative choices—whether to sue (or defend) in the first place, what remedies to seek (or oppose), whether to settle or press on to trial, and so on—as inherently personal choices rather than decisions that can be said to be objectively right or wrong. That perspective is certainly plausible. Take the facts of *Taxman v. Board of Education of the Township of Piscataway*,<sup>24</sup> a case I will refer to throughout this Article for purposes of illustration and discussion. Budget pressures force a public high school to make layoffs, and the choice comes down to two teachers of equal seniority. One teacher, Sharon Taxman, is white. The other, Debra Williams, is black. Williams is the only minority teacher in her department. The school's affirmative action policy provides that, when two or more equally qualified candidates are competing for a position, racial minorities “will be recommended.” After concluding that Taxman and Williams are equally qualified, the school board invokes the affirmative action policy and votes to terminate Taxman's employment.

Here, the board's decision and the role that race played in that decision are matters of objective fact. Whether it is “worth it” for Taxman to sue is, at least arguably, something that only she can decide. This point is not just about time, money, and a taste for conflict; it is also—in its strong form—about values. Taxman's attorney can help her understand the legal claims available to her, but only she can decide what to do with that advice. Only she can decide whether her layoff pursuant to the affirmative action policy was a *wrong*, on whatever terms she thinks are relevant. That, at least, is the perspective suggested by the individual model of adjudicative representation.

This understanding of adjudicative representation suggests that we can identify *challenges* for representation in instances where client autonomy appears to be at risk—where the attorney, not the client, is calling the shots.<sup>25</sup> Similar challenges can arise when an attorney endeavors to advance interests different from those of the immediate client. For example, Sarah Weddington, the attorney for Norma McCorvey—the woman behind the pseudonym “Jane Roe” in *Roe v. Wade*—reportedly understood herself as “a

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<sup>23</sup> *Id.* at 210.

<sup>24</sup> 91 F.3d 1547 (3d Cir. 1996).

<sup>25</sup> See, e.g., Deborah Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 92-97 (surveying empirical data suggesting that attorneys normally control lawsuits in non-class tort cases, in part because such cases were often aggregated together informally); Southworth, *supra* note 18, at 2460 & n.53 (concluding that “[t]he influential role of lawyers for individuals in this study is consistent with other empirical evidence demonstrating that lawyers typically exercise substantial control in service to poor individuals and in ‘personal plight’ practice,” and collecting sources).

pathbreaking representative for a broad female constituency.”<sup>26</sup> To her, the name Jane Roe “represented all women, not just one.”<sup>27</sup> That outlook shaped Weddington’s litigation choices. In the initial meeting between the two women, McCorvey told Weddington that her pregnancy resulted from rape. The operative state law made no exception for rape, though many other state laws had been reformed to decriminalize abortion in cases of rape or incest. Thus, a seemingly promising approach to the case would have been to challenge the law on relatively narrow grounds related to rape. But Weddington favored a more ambitious “abolition” strategy that sought complete repeal of criminal abortion laws. She later explained that “we did not want the Texas law changed only to allow abortion in cases of rape. We wanted a decision that abortion was covered by the right of privacy. . . . Our principles were not based on how conception occurred.”<sup>28</sup>

Such an approach is hard to square with the individual model of adjudicative representation, which gives primacy to the interests of the client. As one critic put it:

To whom is Weddington referring when she uses the words ‘we’ and ‘our’? She might simply mean the lawyers, herself and [co-counsel]. Or she might be referring to the lawyers’ broader constituency, supporters of the abortion rights cause. . . . In either case, the assumption underlying this reference to the desires and principles of the lawyers or their constituency as a justification for rejection of the rape allegation is at odds with basic conflict of interest norms governing lawyers. Neither the interests of the lawyer nor the interests of third parties are permitted to influence the judgment of a lawyer in representing a client. Rather, only the interests of the client are to guide the lawyer.<sup>29</sup>

As this critique suggests, a *consequence* of the individual model is the exclusion of third-party interests. We all know that individual cases can have significant consequences for individuals and groups who are not involved in the litigation but are nevertheless affected by it. To be sure, third parties will not be formally bound by the results; they remain free to have their own day in court if they wish.<sup>30</sup> But, given the operation of precedent, that day will likely be short and not very sweet.<sup>31</sup>

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26 Kevin C. McMunigal, *Of Causes and Clients: Two Tales of Roe v. Wade*, 47 HASTINGS L.J. 779, 783 (1995) (discussing SARAH WEDDINGTON, A QUESTION OF CHOICE (1992)).

27 *Id.* at 800 (quoting WEDDINGTON, *supra* note 26, at 54).

28 *Id.* at 794 (quoting WEDDINGTON, *supra* note 26, at 52-53).

29 *Id.* at 798.

30 *See, e.g.*, Taylor v. Sturgell, 553 U.S. 880, 892, 894 (2008) (reiterating “the general rule that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process” (internal quotation marks omitted)).

31 *See* Rubenstein, *supra* note 21, at 1647 (“The only difference between . . . precedential effect and pure preclusion is that the later plaintiffs can literally have their day—albeit a short one—in

Consider the *Taxman* case again. Suppose Taxman sues in federal court to challenge the school board's affirmative action policy as a form of racial discrimination, in violation of Title VII of the Civil Rights Act of 1964. Suppose she wins. And suppose that the case presents an as-yet unresolved question: whether, and under what circumstances, a desire for diversity is a permissible justification for a racial preference under Title VII. At the very least, the decision in Taxman's case will affect the affirmative action policy in Piscataway, with concrete consequences for various individuals who might have been advantaged or disadvantaged by the operation of the policy. But the consequences will be broader than that, particularly if the trial court's decision is appealed to the Third Circuit. Because courts do not lightly overturn statutory precedents,<sup>32</sup> it is a good bet that any decision by the Third Circuit will shape affirmative action policies in the mid-Atlantic region for years to come. Obviously, the effects will be even more extensive if the case goes all the way up to the Supreme Court. Under the individual model of adjudicative representation, Taxman's attorney has no obligation to consider those larger ramifications of the suit, nor to take into account the third-party interests that might be at stake. Such inattention to third-party interests is not a failure of representation under the individual model, but an all-but-inevitable consequence of it.<sup>33</sup>

To some observers, this is a bug in our litigation system. It means that private litigants and lawyers have the capacity to shape policy for the rest of us, but without any authorization, accountability, or assurance that our interests will be protected—in short, without any representation.<sup>34</sup> In a democracy, that result may be hard to swallow.

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court. In practice, the outcome of [individual] lawsuits did harm (or benefit) others within their community.”); accord Rhode, *supra* note 15, at 1197 (“[G]iven the force of stare decisis, the practical consequences for unrepresented constituencies are often the same, whether or not they are part of a certified class.”).

<sup>32</sup> See, e.g., Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 317 (2005) (“The Supreme Court has long given its cases interpreting statutes special protection from overruling.”).

<sup>33</sup> For a critique of this model, at least as applied to litigation-framing decisions in acknowledged “test case[s] meant to make law for the entire community,” see Rubenstein, *supra* note 21, at 1652-53 (“A more robust vision of client loyalty in this circumstance would ask the litigator to acknowledge her larger client—the community—and thus to consider the consequences of her tactics on the community’s interests”); see also, e.g., JEROLD AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 267-69 (1976) (describing how civil rights lawyers wrestled with “whether their client was, as traditional professional precepts dictated, a solitary party to a discrete case, or . . . a cause larger than any client”).

<sup>34</sup> See, e.g., Bryant G. Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective*, 77 NW. U. L. REV. 492, 499-500 (1982) (observing that the accountability problems in class actions also plague individual actions brought by organizations in which plaintiffs seek broad injunctive relief).

One response might be that third parties are represented in a different way: via the political process that produced the laws that are being implemented and enforced through adjudication. On that view, a statute like Title VII creates a policy lever that any affected individual can pull. Having participated in the creation of the law, third parties have no right, based on democratic principles, to influence other individuals' decisions to pull that lever. The important choices have already been made with their input; the law is the law.<sup>35</sup>

This response has some force, but it lies in tension with the idea that legal entitlements implicate subjective, rather than objective, interests. The individual model of adjudicative representation leaves the decision to sue in the hands of each individual: no matter how strong the legal claim, Taxman's attorney cannot initiate a suit on Taxman's behalf unless *Taxman herself* wishes to take that step. As noted above, such an approach to representation makes sense if we understand the decision to pull the enforcement lever as a personal choice. But if we accept that view of legal entitlements, we cannot then treat the decision to sue as a given, or as legally preordained.<sup>36</sup> Instead, we ought to acknowledge that other teachers in Taxman's shoes might have foregone suit, or crafted their claims differently, or sought different remedies. We ought to be clear-eyed about the fact that those other teachers' lives will be affected by the outcome of Taxman's suit, and that Taxman's attorney need not—indeed, must not<sup>37</sup>—attempt to represent their interests.

## II. THE POLITICAL MODEL: GOVERNMENT ATTORNEYS REPRESENTING THE PUBLIC

For those who are uncomfortable with the consequences of the individual model, one possible fix is to substitute one kind of attorney for another. Suppose that Taxman's suit is initiated not by a private attorney retained by

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<sup>35</sup> Cf. Yeazell, *supra* note 14, at 1115 (“If federal civil rights legislation proclaims it a violation of national policy to discriminate in education on the basis of sex, and an active litigant presents herself, alleging that she belongs to a definable group suffering from such discrimination, the court may feel itself hard pressed to deny that it is in the ‘interest’ of the group’s members to seek redress for such discrimination. National law has, in effect, proclaimed a national interest in eliminating such discrimination . . .”).

<sup>36</sup> That is a big “if.” My goal here is not to defend the subjective understanding of legal entitlements, but to suggest that the individual model of adjudicative representation must rest on such an understanding. Professor Yeazell has argued that in circumstances such as Taxman’s “it is not a great leap of thought to conclude that the individual [plaintiff] is acting less to enforce a peculiarly private right than a public policy—a policy that should be enforced whether other similarly situated persons desire it or not.” *Id.* Maybe so, but it is hard to see why such logic should stop with “similarly situated persons.” If the public policy “should be enforced,” why not compel Taxman herself to sue—at least if legal representation can be secured for free?

<sup>37</sup> Absent informed consent of the client.

Taxman herself, but by government attorneys working in the Civil Rights Division of the federal Department of Justice. The crux of the claim is the same, but what was once a private suit has become a governmental one. With that change comes a shift in representation. The attorneys handling the case are no longer duty-bound to advocate on behalf of Sharon Taxman. Their client is now the United States and, by extension, the public.<sup>38</sup> Their obligation is to promote the public interest, to “seek justice.”<sup>39</sup>

This kind of litigation—civil suits by government attorneys seeking to enforce constitutional and statutory entitlements—is ubiquitous. Unlike individual adjudication, government litigation can take account of all of the affected interests, considering not just the private but also the social costs and benefits of the suit. Moreover, government attorneys can represent collective interests without clearing the various procedural hurdles that stand in the way of private class actions.<sup>40</sup> At a time when many courts seem intent on raising those hurdles ever higher, the governmental alternative seems attractive indeed.<sup>41</sup>

The model of adjudicative representation that prevails in these types of governmental actions differs in significant respects from the individual model described above. I will call this the “political model” of adjudicative representation, because the primary means of influence and control are political. Most government lawyers are part of organizational hierarchies that are headed by elected officials or their political appointees.<sup>42</sup> Others, such as state attorneys general, are themselves elected officials.<sup>43</sup> Whether directly or indirectly, elections serve to establish the

38 Bruce A. Green, *Must Government Lawyers “Seek Justice” in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 269 (2000) (“Whether one views the client as the government, a government official or a government official, the client is distinctive in at least this respect: the client owes fiduciary duties to the public.”); William B. Rubenstein, *On What a “Private Attorney General” Is—And Why it Matters*, 57 VAND. L. REV. 2129, 2138 (2004) (“Many public attorneys . . . consider ‘the public’ or ‘the public interest’ as their real client in interest; the agency or government official to whom they report is simply an intermediary form of that principal.”).

39 Green, *supra* note 38, at 238; see also Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 789 (2000) (“It is an uncontroversial proposition in mainstream American legal thought that government lawyers have greater responsibilities to pursue the common good or the public interest than their counterparts in private practice . . .”).

40 See Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 499-510 (2012) (comparing state attorney general suits with class actions).

41 See, e.g., Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. (forthcoming 2018) (manuscript at 30-34) (discussing “state public enforcement as a response to the Roberts Court’s curtailment of . . . private aggregate litigation”); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 660 (2012) (arguing that “state attorneys general . . . have the ability to fill the void left by class actions”).

42 See Clopton, *supra* note 41, at 65.

43 See Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. (forthcoming 2017) (manuscript at 29-41) (describing the institutional arrangements that structure government litigation).

requirements of authorization and accountability.<sup>44</sup> But the relationship between representative and represented is far more attenuated in the context of governmental litigation than it is in the individual model. When an individual client is responsible for hiring and firing an attorney, her influence is both personal and immediate. She, and only she, is the client; the decisions are hers to make. In contrast, influence over a public official like a state attorney general is diffused among the states' citizens. The preferences and actions of any one individual are unlikely to make much of a difference. Equally important, the representational relationship extends well beyond any one case, as the state attorney general discharges various responsibilities over a multi-year term. If I am unhappy with my state attorney general's performance in a given case, I can hope to vote the bum out of office—but I may have to wait several years before I get that chance.

The political model of adjudicative representation also differs from the individual model with respect to interest representation. I have argued elsewhere that government litigation ought to be understood in terms similar to those that Pitkin suggests for political representation.<sup>45</sup> This means that government attorneys should be theorized as something in between instructed delegates and enlightened trustees. Those responsible for the government's adjudicative choices should pay attention to the wishes of interested members of the public and should be prepared to justify their decisions to those individuals, but they need not be slaves to public desires if they believe that the public interest would be better served by a different course of action.<sup>46</sup>

This approach is justified by the nature of affirmative government litigation. In part because of the breadth and ambiguity of many substantive legal commands, our legal system neither assumes nor encourages maximal enforcement. Instead, we depend on litigants—especially “public” litigants—to choose cases carefully and to ignore violations that fall outside the principal purposes of the law. As Justice Jackson wrote during his tenure as Attorney General, “[w]hat every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.”<sup>47</sup> Jackson was referring to prosecutorial discretion, but the necessity—and desirability—of

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44 Cf. RICHARD MULGAN, HOLDING POWER TO ACCOUNT: ACCOUNTABILITY IN MODERN DEMOCRACIES 31 (2003) (“Political accountability can . . . include accountability both within the executive branch to the president as well as to Congress and to sections of the public at large.”); see also Jeremy Waldron, *Accountability: Fundamental to Democracy* at 14 (N.Y. Univ. Sch. Of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 14-13), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2410812](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410812) [<https://perma.cc/UPG5-A8LE>] (noting that “accountability in modern democracies is often mediated,” as where a civil servant answers to a supervisor who answers to an elected official, who in turn answers to voters).

45 Lemos, *supra* note 43, at 46-50.

46 *Id.* at 34-36.

47 Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 5 (1940).

discretion extends to the civil sphere as well. Such “discretionary nonenforcement”<sup>48</sup> may not make law in a formal sense, but it profoundly shapes the way the law operates in practice.

Understanding government litigation this way, as a form of discretionary policymaking, highlights the importance of measures that facilitate public input and dialogue about choices that have the potential to affect all of us. It highlights, in other words, the normative relevance of citizens’ preferences. It does not follow that the government’s litigation decisions should simply channel majority sentiment, however. In many cases, public opinion will be uninformed or misinformed. It may rest on false premises about the law or the conduct in question, or on considerations that the law deems irrelevant. Worse, public opinion may be based on inputs, such as racial bias, that the law affirmatively rejects. That risk is particularly stark when the law being enforced was designed to protect minority interests from majority will.<sup>49</sup>

Similar concerns have led Pitkin and many other political theorists to reject the most extreme “mandate” or “delegate” view of political representation.<sup>50</sup> On Pitkin’s account, the representative must consider her constituents’ wishes, and be “responsive to” them.<sup>51</sup> Nevertheless, the representative’s ultimate obligation is to do what is good for her constituents, not to follow their every wish.<sup>52</sup> Decisions that deviate from public preferences are permissible, but they must be capable of justification in terms of the public interest.<sup>53</sup>

As applied to adjudication, this model suggests that we can identify *challenges* for representation in areas where, for example, meaningful accountability appears to be lacking. Failures of accountability could occur for various reasons. Information is critical to political accountability—information *from* members of the public about our experiences and wishes, and information *to* the public about what government is doing on our behalf.<sup>54</sup> A lack of

48 William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 38-41 (1975) (discussing the causes and effects of discretionary nonenforcement by public enforcers).

49 See Lemos, *supra* note 43, at 41-42.

50 See *supra* note 20.

51 PITKIN, *supra* note 1, at 162; see also MANIN, *supra* note 20, at 170 (“Representatives are not required to act on the wishes of the people, but neither can they ignore them . . . . It is the representatives who make the final decisions, but a framework is created in which the will of the people is one of the considerations in their decision process.”).

52 PITKIN, *supra* note 1, at 162.

53 *Id.* at 163-64; see also Rehfield, *supra* note 4, at 214 (“[W]e must always justify and explain cases in which law deviates from citizen preferences.”).

54 MULGAN, *supra* note 44, at 9 (“Forcing people to explain what they have done is perhaps the essential component of making them accountable . . . . [T]he core of accountability becomes a dialogue between accountors and account-holders, using a shared ‘language of justification.’”); Waldron, *supra* note 44 (arguing that “it goes to the essence of the political relationship . . . for the people to demand an account [from government]”).

transparency about enforcement policy should therefore be cause for concern under the political model of representation. And, because accountability to the public is different from accountability to narrow special interests, the same is true of institutional structures that permit those interests to exercise outsized influence over government litigation.<sup>55</sup>

We can also predict certain *consequences* of the political model of adjudicative representation. Put simply, it will be political. The objectives of government litigation will change with presidential or gubernatorial administrations, or (in most states) with attorney general elections, or with shifts in control of the legislatures, which control the purse strings. The *Taxman* case illustrates the point. The Department of Justice did in fact initiate the litigation during the George H.W. Bush Administration. As the attorney for the Piscataway Board of Education later related, the Bush administration had been “looking for a test case to press its conservative affirmative action agenda in the federal courts,” and *Taxman* seemed like a perfect vehicle.<sup>56</sup> The government won in the district court, but it had changed its tune by the time the case reached the Third Circuit. The DOJ withdrew as a party to the case<sup>57</sup> and sought to file a brief as *amicus curiae* on behalf of the defendant board.<sup>58</sup> The reason was a change in administration: with Clinton’s election in 1992, the politics of affirmative action had shifted. For years, Democrats had argued in favor of measures designed to remedy past discrimination, but many had shied away from explicit endorsements of affirmative action. The Clinton Administration was the first to support affirmative action fully. And the new head of the Civil Rights Division—Deval Patrick, a former attorney for the NAACP Legal Defense Fund—decided the government should switch sides in the *Taxman* case.<sup>59</sup>

Critics of affirmative action were shocked—shocked!—by the DOJ’s about-face. Charles Fried, who had been Solicitor General under President Reagan, said “[i]t strikes me as naked politics and transparent and wrong. Just wrong.”<sup>60</sup> Others raised ethical questions about the propriety of the government’s working closely and confidentially with *Taxman* and her attorney at the trial level and then coming out against her position on appeal.<sup>61</sup> For his part, Patrick insisted that he and his staff had carefully considered the ethical questions before committing to the new position. “We

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<sup>55</sup> I discuss these and other challenges for government litigation at length in Lemos, *supra* note 43, at 29-52.

<sup>56</sup> David B. Rubin, *Courtus Interruptus: One Lawyer’s Experience in the Life of the Law*, N.J. LAW., Apr. 2003, at 28, 28.

<sup>57</sup> Because *Taxman* had intervened as a plaintiff at the trial level, the dispute remained live.

<sup>58</sup> See Iver Peterson, *Justice Dept. Switches Sides in Racial Case*, N.Y. TIMES, Aug. 14, 1994, at A37.

<sup>59</sup> See Terry Eastland, *They Went Piscataway*, THE AM. SPECTATOR, Apr. 1997, at 64, 64-65.

<sup>60</sup> Peterson, *supra* note 58.

<sup>61</sup> *Id.*

never represented Mrs. Taxman,” Patrick explained. “We represent the interests of the United States.”<sup>62</sup> As that statement suggests, the interests that the government serves in adjudication will include the interests of defendants—or, at least, interests that are antagonistic to those of plaintiffs in equivalent private suits. That, too, is a consequence of the political model of adjudicative representation.

### III. THE COLLECTIVE MODEL: ATTORNEYS IN AGGREGATE LITIGATION

The individual model of adjudication focuses on the client’s interests in isolation, while the political model takes account of interests on all sides of every issue. One might be tempted to complain, Goldilocks-style, that the first perspective is too narrow and the second too broad. An adjudicative model in which similarly situated individuals are able to secure an attorney to represent their *collective* interests might then seem just right. I will call this the “collective model” of adjudicative representation. Its clearest manifestation, of course, is in the private class action.

Class actions represent a break from the “day in court” ideal, because all of the interested individuals do not actually participate in the adjudication themselves—and yet they are bound by the judgment.<sup>63</sup> Representation is baked into the class-action system for reasons both legal and practical. As a practical matter, as interested parties proliferate, it becomes infeasible for each to speak for herself; the Court’s observations in *Bi-Metallic* about the necessity of representation in the context of lawmaking begin to make sense for adjudication as well. Representation is required as a legal matter, too: an individual who did not participate directly in an adjudication may be bound by the judgment only if her interests were “adequately represented.”<sup>64</sup>

Despite its manifest importance, we lack a satisfying model of collective adjudicative representation. As class-action scholars have noted, problems of authorization and accountability loom large here. The notion that opt-out rights in damages class actions promote meaningful accountability and a kind of post-hoc authorization is debatable, to say the least.<sup>65</sup> And members of

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<sup>62</sup> Tim O’Brien, *Pushing the Race Button*, N.J.L.J., Sept. 12, 1994, at 261, 265.

<sup>63</sup> See Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1058 (2002) (“A class action is simply, when all else is stripped away, a state-created procedural device for extinguishing claims of individuals held at quite a distance from the ‘day in court’ ideal of Anglo-American jurisprudence.”).

<sup>64</sup> Taylor v. Sturgell, 553 U.S. 880, 893 (2008). Cf. Fiss, *supra* note 7, at 25 (“[T]o be precise, the legal system does not guarantee that every person will have a day in court, but only that the interest of each person will be represented in court.”).

<sup>65</sup> See, e.g., David Marcus, *Flawed But Noble: Desegregation Litigation and its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 663 n.22 (2011) (noting that the “consent-based

“mandatory” injunctive classes—my focus here—have no opt-out rights at all.<sup>66</sup> That is so notwithstanding the fact that divisions within the class as to the proper objectives of the litigation are “particularly likely” in injunctive class actions.<sup>67</sup>

When we get to the element of interest representation, moreover, the collective-representation model seems to veer from the individual model’s instructed delegate to the other extreme of a wholly independent, “enlightened trustee.” As Stephen Yeazell has observed, Rule 23 appears to adopt a Burkean approach to representation.<sup>68</sup> Burke famously told his constituents that, instead of obeying their instructions, he “conformed to the instructions of truth and nature” and “maintained [their] interest even against [their] opinions.”<sup>69</sup> Burkean representation is notoriously elitist, justifying the independence of the representative by reference to his superior wisdom and knowledge.<sup>70</sup> It understands “interests” as abstract and objective, matters of “truth and nature” rather than opinion or feeling. The representative’s duty is to do what *he* thinks is best for the represented, even if they insist that they want something else.

The Burkean conception of interests, and of representation, is hard to swallow in today’s world.<sup>71</sup> As Pitkin argued, “for most representation theorists since Burke’s time, political questions are inevitably controversial ones without a right answer.”<sup>72</sup> The same is true of many *legal* questions. Return once more to the *Taxman* example.<sup>73</sup> Most lawyers, I suspect, would contend that there are better and worse—if not right and wrong—answers to

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justification for notice and opt-out rights is quite weak” and citing critics); *see also* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1561 (2004) (“The overwhelming inaction displayed by class members in the reported cases suggests that a class member’s failure to opt out should not readily be equated to an affirmative consent to jurisdiction.”).

<sup>66</sup> FED. R. CIV. P. 23(c)(2).

<sup>67</sup> *See* Rhode, *supra* note 15, at 1184 (emphasizing that “the often indeterminate quality of relief available makes conflicts within plaintiff classes particularly likely”); Yeazell, *supra* note 14, at 1110 (observing that Rule 23 dispenses with consent in injunctive actions, where “the coincidence of interests is most debatable”). *Cf.* Southworth, *supra* note 18, at 2454 (noting that “injunctive class action litigation almost always raises difficult problems of accountability”).

<sup>68</sup> *See* Yeazell, *supra* note 14, at 1069; *see generally* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1790); EDMUND BURKE, THOUGHTS ON THE CAUSE OF THE PRESENT DISCONTENTS (1770).

<sup>69</sup> PITKIN, *supra* note 1, at 176 (internal quotation marks omitted).

<sup>70</sup> *See* Jane Mansbridge, *Clarifying the Concept of Representation*, 105 AM. POL. SCI. REV. 621, 623 (2011) (“[T]he concept of a trustee, particularly a Burkean trustee, implies a hierarchy in which the representative has more wisdom, intelligence, or prudence than the voter.”).

<sup>71</sup> Yeazell, *supra* note 14, at 1069 (emphasizing the divergence between “political and litigative definitions of legitimate representation” and noting that “[g]roup litigation established itself on a concept of abstract interest representation just as that concept was rejected in political life”).

<sup>72</sup> PITKIN, *supra* note 1, at 189.

<sup>73</sup> 91 F.3d 1547 (3d Cir. 1996); *see generally supra* text accompanying notes 56–62.

the question of whether Taxman was subjected to unlawful racial discrimination. At the same time, though, most of us would anticipate that different judges might resolve the question differently; we would concede that reasonable minds might disagree. Now, perhaps we would still insist that the question is one for lawyers only, that the views of the people affected by the Piscataway affirmative action policy and others like it are irrelevant. Perhaps the elitism of Burkean representation would feel more appropriate in legal circles than in political ones. But my guess is that many of us would balk at the suggestion that questions of law should be decided in such a sterile, technical environment, sealed off from considerations of their consequences.

If the *Taxman* example doesn't give pause, consider Derrick Bell's critique of school-desegregation litigation, which was opposed by many African-American families who thought that school quality, rather than integration, should be the goal of race-discrimination lawsuits.<sup>74</sup> Bell's account calls attention to the potential for divergent views among class members, not just on what the law requires but on what to do about it.<sup>75</sup> Like questions of whether to sue in the first place, questions of remedy are rarely clear-cut and objective.<sup>76</sup> Their answers may not be wholly subjective, but neither do they appear to be matters of truth and nature.<sup>77</sup> To the extent that is true, it becomes uncomfortable to ignore the preferences of the individuals with the most at stake.

Nevertheless, a Burkean approach might be necessary, as a practical matter, in order to sustain the class action device. Recall that the individual model of adjudicative representation understands interests as subjective, akin to wishes or desires. Such an understanding of "interest" would make collective representation all but impossible, at least in the absence of affirmative consent by each class member.<sup>78</sup> The collective model of representation that Rule 23(b)(2) entails—with no opt-out rights, much less opt-in rights—is coherent only if one conceives of interests in more objective terms, analogous to the goals embodied in substantive law.

Under the collective model of adjudicative representation, then, we can identify *challenges* to representation by reference to outcomes, rather than by parsing the interactions between represented and representative.<sup>79</sup> A

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<sup>74</sup> Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 505-11 (1976).

<sup>75</sup> See, e.g., *id.* at 507 (noting that "many black parents oppose total reliance on racial balance remedies to cure the effects of school segregation").

<sup>76</sup> See Rhode, *supra* note 15, at 1188-91 (discussing intraclass conflicts over remedy).

<sup>77</sup> Yeazell, *supra* note 14, at 1069.

<sup>78</sup> See *id.* at 1103 ("If . . . the validity of a class depends on the subjective desire of the individuals constituting it . . . classes could consist only of volunteers.").

<sup>79</sup> See, e.g., Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 583 (2010) ("Adjudication's close connection to substantive law means there is an independent metric for evaluating outcome quality—namely, how

representative has done well if she has helped to vindicate the “fundamental values dictated by substantive law”; if not, she has done poorly.<sup>80</sup>

Similarly, a *consequence* of the collective model is that the preferences of class members do not control. Indeed, they may not even be relevant.<sup>81</sup> Under the collective model, we do not ask whether class members actually *want* the outcome that the litigation will yield; we ask only whether that outcome is “congruent with the policy of the underlying substantive law.”<sup>82</sup> We “blind[] ourselves to the variety and arbitrariness of individual desires”<sup>83</sup> and fall back on the response that Part I considered and rejected as inconsistent with the individual model: the law is the law.

There are good reasons for this concession to formalism. Class actions serve important purposes in our legal system, empowering so-called “private attorneys general” to vindicate legal rights on behalf of groups that may lack the organization—or the resources—to protect their interests. It bears emphasis, moreover, that in many cases involving injunctions or other forms of structural relief, an individual suit by one person could produce the same result as a class action, but with no consideration of third-party interests whatsoever.<sup>84</sup> That hardly seems like an improvement; a little representation is better than none.

Still, for some observers, this is not good enough. These commentators search for procedural mechanisms to make class actions more “democratic,” to take account of individual preferences in some way.<sup>85</sup> For example, Deborah Rhode argues for “full disclosure of, although not necessarily deference to, class sentiment.”<sup>86</sup> And Bill Rubenstein suggests “[r]ules that

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closely the outcome fits the parties’ substantive entitlements. Thus, features of process design, such as adequate representation, are not necessary to an outcome-based theory.”); Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1139 (2008) (arguing that “[r]epresentation by class representatives and counsel is adequate if, and only if, the representation makes class members no worse off than they would have been had they engaged in individual litigation”).

<sup>80</sup> Yeazell, *supra* note 14, at 1116 (offering the example of a settlement in a hypothetical sex discrimination case that “does not address the acts giving rise to liability, but instead proposes greatly increased funding for a Women’s Studies Center at the university”).

<sup>81</sup> See, e.g., Marcus, *supra* note 65, at 690 (“Judges [in school-desegregation litigation] dealt with the problem of conflicts in litigant preferences among class members by denying their relevance. Really at stake, they reasoned, were group rights, and individuals did not matter all that much.”).

<sup>82</sup> Yeazell, *supra* note 14, at 1117.

<sup>83</sup> *Id.* at 1119.

<sup>84</sup> See Rhode, *supra* note 15, at 1195 (“Regardless of how the action is denominated, a finding of liability typically triggers class-wide relief and class-wide concerns. Most institutional reform lawsuits now filed as class actions could also proceed as personal claims. Denying certification would often introduce all the inefficiencies attending individual suits, without necessarily restricting the scope of the ultimate decree.”).

<sup>85</sup> See, e.g., Rubenstein, *supra* note 21, at 1626 (“Community member disputes concerning the goals of litigation are inherently political in nature and therefore call for more democratic forms of decisionmaking. . .”).

<sup>86</sup> Rhode, *supra* note 15, at 1185.

require[] individuals or experts filing group-based cases to demonstrate that some level of community dialogue preceded the decision to file, or to show some level of community participation in the filing, or to establish approval for their filings from democratically elected representatives. . . .”<sup>87</sup>

Thinking about these issues from the perspective of political theory suggests a complementary line of inquiry, one that extends beyond the immediate case. As noted above, one of the most jarring features of representation under the collective model is the lack of authorization and accountability—a feature that sharply distinguishes collective representation, not only from the individual model of adjudicative representation, but from the standard account of political representation as well.<sup>88</sup> Yet political theorists today are increasingly moving away from, or at least beyond, that standard account. Recognizing the increasing complexity of modern governance and the waning relevance of geographical (and thus electoral) lines of division, these theorists are exploring alternative bases for legitimizing representation in the absence of conventional forms of authorization and accountability.<sup>89</sup>

Of particular relevance here are theories that try to make sense of “self-appointed representatives”—representatives who are never elected or otherwise formally selected by those they claim to represent.<sup>90</sup> Perhaps the most common examples of self-appointed representatives are nonprofit organizations, which uses various strategies, including both political and legal advocacy, to advance the interests of particular groups. Such organizations need money and other resources in order to survive, and they will not be effective unless their claim to representation is widely recognized as valid. In an important sense, then, nonprofits *are* accountable—to those who support and validate them.<sup>91</sup>

<sup>87</sup> Rubenstein, *supra* note 21, at 1659.

<sup>88</sup> Cf. Fiss, *supra* note 7, at 25 (noting that class actions entail self-appointed representatives and that “[s]elf-appointment . . . is an anomalous form of representation, only justified, if at all, by the most exceptional circumstances”).

<sup>89</sup> See generally Urbinati & Warren, *supra* note 20, at 388 (reviewing “the concept of representation from the perspective of recent democratic theory”).

<sup>90</sup> See generally Laura Montanaro, *The Democratic Legitimacy of Self-Appointed Representatives*, 74 J. POL. 1094 (2012); see also Mansbridge, *supra* note 3, at 522 (defining “[s]urrogate representation” as “representation by a representative with whom one has no electoral relationship—that is, a representative in another district”); Michael Saward, *Authorisation and Authenticity: Representation and the Unelected*, 17 J. POL. PHILOSOPHY 1, 2 (2009) (arguing that Mansbridge’s “notion of surrogacy can be usefully extended to include actors who are not elected at all”).

<sup>91</sup> See, e.g., Rubenstein, *supra* note 21, at 1668 (“[P]rofessional civil rights attorneys are often the only attorneys who are actually appointed by and answerable to their communities.”); see also Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 226 n.26 (1990) (reviewing STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1997)) (“[T]he need to finance civil rights litigation through voluntary contributions forced litigating representatives, such as the NAACP, to forge a classwide fundraising organization and thus to take account of the litigation

Political scientist Laura Montanaro uses the term “authorizing constituency” to refer to “those empowered to exercise authorization [of] and demand accountability” from the representative through their contributions of money, time, or rhetorical support.<sup>92</sup> For Montanaro, self-appointed representation is “democratic” when the authorizing constituency has significant overlap with what she calls the “affected constituency”—the individuals whose interests will be affected by the representative’s work.<sup>93</sup>

This understanding of self-appointed representation has interesting implications for adjudication. As Montanaro and others have argued in recent work, self-appointed representatives can be “particularly useful politically when they provide representation for peoples whose interests are affected by policies but who are not situated within electoral constituencies that can determine those policies.”<sup>94</sup> This may be true when affected communities spill over electoral lines, or comprise a persistent political minority. In legal circles, adjudication is recognized as an important outlet for such groups: as the Supreme Court noted in *NAACP v. Button*, “[g]roups which find themselves unable to achieve their objectives by the ballot frequently turn to the courts. . . . For such a group, association for litigation may be the most effective form of political association.”<sup>95</sup>

Legal advocacy organizations like the NAACP’s Legal Defense Fund are frequent players in injunctive class actions. They are also archetypal self-appointed representatives. Montanaro’s theory suggests that the legitimacy of their representation turns on their *ongoing* relationships with the “affected constituencies”—the constituencies whose interests they purport to represent in litigation—not merely (or even especially) their conduct in any given case.

This broader perspective on the representational relationship is consistent with the nature of legal public interest work. Legal advocacy organizations rarely devote themselves exclusively to litigation.<sup>96</sup> Litigation is typically part

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preferences of class members. The existence of this group organization helped ensure adequate representation through accountability . . . .”). *But see infra* notes 96-100 and accompanying text (describing the disconnect that often occurs between those funding legal advocacy organizations and those benefitting from the organizations’ services).

<sup>92</sup> Montanaro, *supra* note 90, at 1096, 1099.

<sup>93</sup> *Id.* at 1095.

<sup>94</sup> *Id.* at 1094; *see also* Mansbridge, *supra* note 3, at 523 (arguing that “[s]urrogate representation, both state- and nation-wide, plays the normatively critical role of providing representation to voters who lose in their own district”); Saward, *supra* note 90, at 2 (“[E]lections can, in some circumstances, act to restrict the nature and range of representative perspectives and voices, and . . . these restrictions can be democratically troubling.”).

<sup>95</sup> 371 U.S. 415, 429-31 (1963).

<sup>96</sup> Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2043 (2007) (“It is, as surveyed leaders [of public interest law organizations] generally recognized, impossible to ‘create policy,’ ‘change attitudes’ or ‘build a movement’ solely through litigation.”).

of a larger, multipronged strategy of social and legal change.<sup>97</sup> Where that is true, assessing the legitimacy of representation by focusing only on opportunities for constituents to participate in specific cases risks missing the forest for the trees. Because policy decisions inevitably involve tradeoffs, and because their full consequences are often not visible immediately or in isolation, we tend to gauge the adequacy of political representatives based on their conduct over the long term. Rule 23's provisions demand more short-term, case-based assessments of adjudicative representation, and commentators understandably have focused on those questions. But to say that case-based evaluation is necessary is not to say that it is sufficient. At the very least, those of us who are inclined to view litigation—especially impact litigation—through a political lens need not be so confined.

In addition to expanding the relevant frame of inquiry, thinking about legal advocacy organizations as self-appointed representatives also highlights the importance of funding. For self-appointed representatives, accountability often will stem largely from financial contributions.<sup>98</sup> One consequence is that there may be very little overlap between the “authorizing” and “affected” communities, particularly where the latter suffers from social and structural disadvantage—as will often be the case in public interest litigation. Legal advocacy organizations are highly dependent on outside funding,<sup>99</sup> and donor preferences can help shape their initiatives and objectives.<sup>100</sup> Yet funding for public interest litigation remains something of a black box: we know it matters, but we have very little systematic data on where it comes from, or

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<sup>97</sup> *Id.*

<sup>98</sup> See Montanaro, *supra* note 90, at 1101 (“Authorizing constituencies derive their capacity to authorize from the resources—as examples, money and status—they can offer the self-appointed representative. These resources may produce, reproduce, and even exacerbate inequalities between the authorizing constituency and the affected constituency . . .”); cf. Mansbridge, *supra* note 3, at 523 (“Because all the power that is exercised in any surrogate representation works through monetary or other contributions and through contributors rather than voters, surrogate representation in the United States today embodies far more political inequality than does even the traditional legislator-constituent relation.”).

<sup>99</sup> See STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 93, 263 (1987) (noting that organizations in the public-interest bar “share a common characteristic: all depend on fund-raising for a substantial part of their operating expenses” and that “the real check” on representatives in collective public interest litigation “lies in the unstated requirement that the organization raise enough funds from either public or private sources to finance the litigation”).

<sup>100</sup> See, e.g., Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights From Theory and Practice*, 36 FORDHAM URB. L.J. 603, 605 (2009) (“[M]oney matters: how public interest law is financed affects the kinds of cases that can be pursued and their likely social impact. A deeper understanding of financial constraints and opportunities in different practice contexts is therefore critical to effective reform.”); see also Rhode, *supra* note 96, at 2052 (finding that nearly two-fifths of public interest law organizations reported that funders have a moderate impact on priorities).

what drives it.<sup>101</sup> Filling in those blanks will not be easy, but it is critical to understanding the accountability relationships—or lack thereof—that shape adjudicative representation.<sup>102</sup>

### CONCLUSION

This short Article has offered a sketch of three different models of adjudicative representation. Whether one focuses on authorization, accountability, or interest representation, one finds different answers depending on context. That diversity is, in itself, striking. Among other things, it reflects our legal system's ambivalence about the nature of legal entitlements, and about the lines between "public" and "private"—or "individual" and "group"—rights.

Reflecting on the multifaceted nature of adjudicative representation also highlights the benefits of thinking about different litigation devices in comparative terms. Scholarship on class actions often compares and contrasts collective and individual litigation. Yet most such efforts focus on defending one of the forms against the other. What I have in mind here is a more contextual assessment of comparative competence, so to speak. As is true of different models of political representation, each model of adjudicative representation "generates a set of normative criteria by which it can be judged."<sup>103</sup> Theorizing representation therefore allows us, not only to assess the quality of representation in different settings, but also to think through the relative advantages or disadvantages of each type. We might ask, for example, in what circumstances the objective conception of legal interests that we find in the class-action contexts makes the most—and least—sense. We might take up Bill Rubenstein's suggestion that "certain cases be [required to] be filed in class action-like form,"<sup>104</sup> and spend more time on the question of which kind. Or, we might seek to develop theories about the types of cases in which government litigation works as an effective (or even superior) substitute for private action, and the cases in which the government's necessarily broad and "political" perspective tends too strongly toward majoritarian objectives.

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<sup>101</sup> Cf. Rhode, *supra* note 96, at 2054 (offering statistics on relative rates of funding by foundations, individuals, etc. and showing that an overwhelming majority of nonprofits receive foundation funding).

<sup>102</sup> *Id.* at 2057 (flagging "broader issues about strategic philanthropy [and its consequences for public interest legal work] that deserve further research").

<sup>103</sup> Mansbridge, *supra* note 3, at 515.

<sup>104</sup> Rubenstein, *supra* note 21, at 1669.