NOTE

WITHOUT A LEG TO STAND ON? CLASS REPRESENTATIVES, FEDERAL COURTS, AND STANDING DESIDERATA

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Class action litigation has become increasingly prominent within the last decade. Observing this reality, this Note explores an emerging trend at the district court level—specifically, that federal courts appear to be scrutinizing the standing of class representatives to decrease litigation abuses. But is this the best way to go about it? This Note takes the position that such “standing scrutiny” is not the best tool to quell abusive or unruly class actions and that “joinder scrutiny” (i.e., scrutinizing the propriety of permissively joining defendants to a class action) is the better way for district courts to proceed. In so doing, this Note briefly reviews the tenets of the standing and permissive joinder doctrines. Furthermore, it provides a comparative analysis of both approaches, looking at the legal and policy implications of each.

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INTRODUCTION

Whether it’s over the siren song of McDonald’s Happy Meals or historic employment discrimination, class actions presently appear to be the desired route for bands of plaintiffs to “stick it to the Man,” that is to say, to seek redress from big business for mass harms. But this is no recent fad. Class action litigation has been on the rise in the last decade and has become one of the most prominent methods of joining multiple complainants in a civil action.

Certainly, increases in class actions have not been without their institutional quandaries. Despite the benefits of class actions, many fear that the bulk of these suits are specious in nature—motivated and orchestrated by attorneys seeking exorbitant fees from settlements instead of genuinely pursuing their clients’ interests. To address this issue, policymakers sought to mitigate class action abuses occurring at the state court level through federal reform measures like the Class Action Fairness Act of 2005 (CAFA).

1 See Ben Rooney, McDonald’s Hit with Class Action over Toys, CNN MONEY (Dec. 15, 2010), http://money.cnn.com/2010/12/15/news/companies/Mcdonalds_Happy_Meal_law_suit/index.htm (reporting on a California class action against McDonald’s for its use of toys in happy meals, which class members claim is “inherently deceptive” to children, “exploits a child’s developmental vulnerability,” and promotes the company’s obesity-causing food); see also Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2546–48 (2011) (ruling on a class action brought against Wal-Mart in which over 1.5 million female employees sought damages for discrimination in job pay and promotion under Title VII of the Civil Rights Act of 1964).


3 See, e.g., James M. Wootton, U.S. Chamber Institute for Legal Reform, Class Action Litigation Abuse in America (on file with author) (summary of testimony before the American Bar Association) (“Over the last decade . . . aspects of class action practice have gone terribly wrong. [This is] largely attributable to two developments—the unprecedented migration of national class actions to the state courts, and the proliferation of class claims initiated by entrepreneurial lawyers on behalf of class members who have not suffered any substantial injury.”).

CAFA increased federal courts’ subject-matter jurisdiction to include certain types of state court class actions and placed additional restrictions on how federal courts administer them. Unsurprisingly, empirical scholarship has demonstrated that the Act’s grant of expanded jurisdiction substantially increased case volumes. Federal courts were already sensitive to the complexity, time, and expense of class actions; in the advent of CAFA, however, they may have additional reasons to further restrain class action procedures.


5 See Clermont & Eisenberg, supra note 4, at 1556–58, for a summary of this increased jurisdiction.

6 See id. at 1560–61 (noting that “CAFA has produced a lot of cases”).


8 Federal Rule of Civil Procedure 23(a) summarizes the requirements a class representative must meet:

One or more members of a class may sue or be sued as representative parties on behalf of all members 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.
sufficient Article III standing to bring claims against all joined defendants.9 One way they have done this is by imposing on class representatives what could be described as a “collective standing” requirement. This approach, which has become especially popular in derivative cases in the past few years, dictates that if none of the named plaintiffs has a colorable claim against a defendant listed in the complaint, even if other unnamed class members may, then those named plaintiffs lack sufficient Article III standing to represent that class against that defendant.10

Other district courts view the standing issue differently. Departing from the collective standing model, these courts maintain that Rule 23(a)(3)’s “typicality” requirement subsumes the representational standing inquiry, making further scrutiny excessive. In this analysis, a named plaintiff does not need to have a claim against every defendant so long as she has individual standing to sue some defendants and her claims are typical of the unnamed class members’ claims against all remaining defendants.11 Some commentators have called

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9 See, e.g., N.J. Carpenters Vacation Fund v. Royal Bank of Scot. Grp., 720 F. Supp. 2d 254, 257 (S.D.N.Y. 2010) (dismissing claims against a joined defendant for lack of standing). Some would go even further, arguing that the standing of putative class representatives should be scrutinized at the motion-to-dismiss stage rather than waiting until the class-certification stage. See, e.g., Mitchell A. Lowenthal & Roger A. Cooper, The Primacy of Standing in Mortgage-Backed Securities Class Actions, 78 U.S. L. Wk. 259, 2664 (May 11, 2010) (citing cases that “make clear that the question of standing presents a threshold issue that cannot be deferred to class certification”). But see Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612–13 (1997) (holding that the issue of class certification is “logically antecedent to” and therefore should be decided before standing issues); see also Ortiz v. Fibreboard Corp., 527 U.S. 815, 830–31 (1999) (applying Amchem’s holding that federal courts should reach class-certification issues before those of Article III standing).

10 See infra note 47 (elaborating on this collective standing approach); see also, e.g., W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche, LLP, 549 F.3d 100, 106 n.5 (2d Cir. 2008) (“Unless [named plaintiffs] can . . . demonstrate the requisite case or controversy between themselves personally and [defendants], none may seek relief on behalf of himself or any other member of the class.” (second alteration in original) (internal quotation marks omitted) (citation omitted)); N.J. Carpenters, 720 F. Supp. 2d at 264–66 (holding that the named plaintiffs lacked standing because they only purchased from two of the fifteen disputed offerings); Plumbers’ Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp., 658 F. Supp. 2d 299, 303–04 (D. Mass. 2009) (“[T]he named plaintiffs are incompetent to allege an injury caused by the purchase of Certificates that they themselves never purchased.”); Hoffman v. UBS-AG, 591 F. Supp. 2d 522, 530–32 (S.D.N.Y. 2008) (acknowledging that Ortiz and Amchem had been limited to the “unique context of global mass settlements” and holding that the plaintiffs could not “meet the injury requirement for claims relating to funds in which they have not purchased shares because they cannot claim to be personally injured by the violations relating to those funds”).

11 See In re Dreyfus Aggressive Growth Mut. Fund Litig., No. 98CIV.4318(HB), 2000 WL.1357509, at *5 (S.D.N.Y. Sept. 20, 2000) (“[B]y proving their claims, [named] plaintiffs will necessarily prove the claims of all other class members.”); see also Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 923 (3d Cir. 1992) (affirming class certification where there were class representatives for fifteen of the twenty-one class securities at issue).
this the “standing-as-typicality” approach to class-representative standing.12

Though both sides make interesting arguments, the U.S. Supreme Court has yet to endorse either school of thought.13 In the void of the Court’s clear guidance, together with the fact that class certification falls under a district court’s discretion,14 the standing inquiry seems to function on a sliding scale: that is, how much or how little a court scrutinizes a named plaintiff’s standing determines which class suits go forward. Thus, by “taking the legs out” from beneath class representatives through an exacting standing inquiry, a court effectively immobilizes what could be, by CAFA standards, a specious class action.15

The standing scrutiny method looks attractive to some practitioners—indeed, it affords defendants a shield against class liability and provides judges wary of attorney-driven litigation another ground on which to quash suspicious certifications—but it has confined the parameters of the discussion to merely one of subject-matter jurisdiction.16

This Note, in contrast, seeks to broaden the scope of the present discourse beyond the foci of class-representative standing and Rule 23(a) and also give due attention to how permissive joinder of defendants under Rule 20(a) (2) informs this process.17 More to the point, the forthcoming discussion has two goals. First, it seeks to highlight the issues with the standing doctrine, especially as it applies to class representatives. Second, it seeks to demonstrate why scrutinizing the permissive joinder of defendants instead of the standing of named plaintiffs is the superior way to quell frivolous class suits. Limiting the

12 See Lowenthal & Cooper, supra note 9 (criticizing the “standing-as-typicality” approach). This Note will refer to this brand of class-representative standing as the “standing-as-typicality” approach.
13 Actually, the Supreme Court opinions on the appropriate standing analysis for class representatives have been equivocal. See infra Part IA for a greater discussion on the perplexities of standing jurisprudence.
14 See Gulf Oil Co. v. Bernard, 452 U.S. 89, 99–100 (1981) (“[A] district court has both the duty and the broad authority to exercise control over a class action . . . .”).
16 To go further, in some situations, the degree of judicial scrutiny of class representative’s standing requirements has been wholly inapposite. See, e.g., Georgine v. Amchem Prods., Inc., 878 F. Supp. 716 (E.D. Pa. 1994), vacated, 83 F.3d 610 (3d Cir. 1996), aff’d sub nom. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612–13 (1997).
17 Federal Rule of Civil Procedure 20(a) (2)‘s permissive joinder of defendants routinely applies to class actions. See, e.g., Chavez v. Ill. State Police, 251 F.3d 612, 632–33 (7th Cir. 2001) (affirming the district court’s use of discretion in denying the class representatives’ request to join another plaintiff to serve as class representative per Rule 20(a)); see also infra Part IIA (collecting additional case applications of permissive joinder in the class action context).
number of certification rulings predicated on standing scrutiny is desirable, particularly given the unsettled nature of the doctrine and its potential error costs. By reconceiving the use of joinder as a tool to manage class actions, district courts will be better equipped to meet the demands that come with increased jurisdiction under CAFA.

This scholarship is the first of its kind to propose the joinder scrutiny alternative as a solution to CAFA-era concerns, as well as to give serious treatment to the pros and cons of joinder scrutiny’s implementation relative to standing scrutiny’s continued use. This Note will serve as an invitation to judges looking to dispose of specious class actions to discontinue the practice of scrutinizing class-representative standing and to reconsider permissive joinder’s instrumentality. Additionally, even in the absence of suspicions that class action abuse is afoot, the proposed joinder approach at the very least will enable federal courts to streamline the parties of class actions and improve case management.

To proceed, Part I begins with a brief overview of standing and its doctrinal evolution. After examining the rudiments of standing, the discussion turns to the current debate among authorities over class-representative standing and its relationship with the “juridical link” doctrine actions under Federal Rule of Civil Procedure 23(a)(3). This discussion intends only to acquaint the reader with the dominant schools of thought and does not take a position on which “has it right.” Moreover, to explore the applicability of joinder in the context of class action litigation, it best serves the discussion to provide due background on the procedural device. Accordingly, Part II looks at the purposive function of joinder rules found in the Federal Rules of Civil Procedure: specifically, Rule 18 (joinder of claims), Rule 20 (permissive joinder of parties), and Rule 21 (misjoinder). The concerted operation of these three tools, particularly Rules 20 and 21, will comprise this Note’s proposed regime of analysis, joinder scrutiny. Part III then makes the case for scrutinizing the permissive joinder of defendants in the first instance. It starts by reviewing court decisions that have effectively administered joinder scrutiny and finishes by evaluating select strengths and shortcomings of this approach. Part IV questions the wisdom of experimenting with standing doctrine and forecasts likely problems with the courts’ continued scrutiny of named plaintiffs’ standing to reach certain ends.
WITHOUT A LEG TO STAND ON?

I
THE TOOL OF CHOICE? STANDING SCRUTINY OF CLASS REPRESENTATIVES

This Part covers two topics. First, it looks at standing doctrine generally. Second, it looks at class-representative standing and how the juridical link doctrine informs it.

A. Standing Doctrine Overview

Standing is an Article III threshold requirement for federal courts concerning which claims are justiciable. If this constitutional requirement is not met, a federal court is without power to adjudicate a plaintiff’s claim. Justice O’Connor laid out the three-part test for Article III standing in *Allen v. Wright*: the plaintiff must (1) have an injury in fact; (2) show that the alleged injury is traceable to the putative defendant’s unlawful conduct; and (3) show that the alleged injury will likely be redressed by the requested relief.

As a threshold obligation for any action in federal court, standing doctrine, through its diverse usage in various areas of the law, has taken many forms. For example, in the administrative law setting, standing doctrine has been modified to provide the federal courts with more judicial supervision of federal agencies. In the antitrust context, courts have especially scrutinized standing doctrine with respect to the first two of *Allen’s* three requirements. Similarly, securi-

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18 Compare U.S. Const. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . to Controversies . . . .” (emphases added)), with Flast v. Cohen, 392 U.S. 83, 94–95 (1968) (“The jurisdiction of federal courts is defined and limited by Article III of the Constitution. . . . [T]he judicial power of federal courts is constitutionally restricted to ‘cases’ and ‘controversies.’”).

19 See Linda R.S. v. Richard D., 410 U.S. 614, 616–18 (1973) (affirming the dismissal of a putative class representative’s claim because she did not have standing to challenge a state policy of allowing plaintiffs to bring nonsupport actions only against fathers of marital children).

20 See 468 U.S. 737, 751 (1984) (“A plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”).


23 See, e.g., Edward Snyder, A New Approach to Antitrust Class Certification, Law 360 (June 14, 2010). http://www.analysisgroup.com/uploadedFiles/Publishing/Articles/Law360_A_New_Approach_To_Antitrust_Class_Certification.pdf (describing an emerging test for standing in antitrust claims, which requires that plaintiffs show injury from an alleged violation by a preponderance of the evidence and that district courts must rigorously examine whether the plaintiffs have met this requirement); cf. Robert Pitofsky et al., Trade Regulation: Cases and Materials 83–91 (6th ed. 2010) (discussing the “interplay among the standing, causation, and antitrust injury concepts, and the difficult policy judgments that [courts must make]” (internal quotation marks omitted)).
ties law has also grappled with the question of who is an injured party under this jurisprudential framework.\textsuperscript{24}

Besides “classic” constitutional standing doctrine, the Supreme Court has also recognized “statutory standing” and “prudential standing”—subcategories of standing that contribute to the doctrine’s enormity.\textsuperscript{25} Statutory standing refers to standing afforded to certain plaintiffs through legislative fiat. That is, even persons who would not normally qualify for standing under the Allen test might still be able to come before a federal court if permitted by statute.\textsuperscript{26} Alternatively, Congress might create additional standing restrictions.\textsuperscript{27} This legislative power radiates from Congress’s constitutional power to control the subject-matter jurisdiction of federal courts under Article III.\textsuperscript{28} Yet, the Supreme Court has not clearly articulated its position on how far Congress may go in expanding the limits of Article III standing.\textsuperscript{29}

Prudential standing refers to the “self-imposed limits” created by the Supreme Court to enable a federal judge to exercise discretion in

\textsuperscript{24} Compare Barnes v. Osofsky, 373 F.2d 269, 271–73 (2d Cir. 1967) (finding that a narrow class of persons have standing to represent claims for securities fraud), with In re Countrywide Fin. Corp. Sec. Litig., 588 F. Supp. 2d 1132, 1157–59, 1164–70 (C.D. Cal. 2008) (permitting greater latitude in defining the class of persons that can bring a securities fraud claim).

\textsuperscript{25} Cf. In re Godon, Inc., 275 B.R. 555, 564 (Bankr. E.D. Cal. 2002) (“One subcategory of ‘prudential standing’ is ‘statutory standing’ in which Congress has explicitly made the prudential standing determination by designating persons who are entitled to enforce a particular right created by statute.”).

\textsuperscript{26} Title II of the Americans with Disability Act of 1990 (ADA) offers one example of statutory standing. See 42 U.S.C. § 12132 (2006); see also, e.g., Loeffler v. Staten Island Univ. Hosp., 582 F.3d 288, 277 (2d Cir. 2009) (affording children of disabled parents standing to sue under the ADA for separate harm); id. at 280-83 (Wesley, J., concurring). But see Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992) (putting limits on Congress’s ability to create statutory bases for standing).

\textsuperscript{27} More specifically, “[c]ourts have recognized such statutory limits to standing in many contexts, including under ERISA, the Fair Housing Act, the Fair Debt Collection Practices Act, and the federal securities laws.” Lowenthal & Cooper, supra note 9, at 2660 (collecting cases that recognize statutory limits to standing under the above-mentioned statutes).

\textsuperscript{28} Congress has power both to broaden standing through creating legal rights or to restrict standing through adding additional requirements by fiat. See Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973) (“Congress may enact statutes creating legal rights, the invasion of which creates [constitutional] standing, even though no injury would exist without the statute.”); Carolina Cas. Ins. Co. v. Pinnacol Assurance, 425 F.3d 921, 926 (10th Cir. 2005) (“Congress may . . . place additional restrictions on who can sue, imposing requirements of ‘statutory standing.’” (citation omitted)).

\textsuperscript{29} Farina, supra note 22, at 22 & n.20 (“The extent to which statutes can affect the constitutional elements [of standing] is a more complex matter. By defining new legally protected interests, a statute may create an injury for standing purposes where none previously existed. . . . At the same time, however, there are limits to Congress’s power to affect the constitutional components of standing—although those limits remain largely unspecified, and highly contested.” (emphasis added) (footnote omitted)).
making standing determinations. These limits usually concern third parties who seek to bring claims on behalf of others. There are three prudential standing requirements, any or all of which a court may use to constrain its jurisdiction: First, a party cannot raise claims or defenses that involve a third party's legal rights—this is known as the *jus tertii* limitation. Second, the alleged injury must lie within the *zone of interests* for which the legislature designed the invoked statute to address. Third, the litigated matter may not be a *generalized grievance* that Congress or the Executive would better address than the courts. But federal courts are left adrift when it comes to employing these prudential standing limitations because of the Supreme Court's inconsistent decisions. As such, the many flavors of standing in the law, together with the uncertainty riddling the statutory and prudential standing doctrines, have made the final mixture "unpalatable" to practitioners.


31 See Richard H. Fallon, Jr. et al., Hart and Wechsler’s The Federal Courts and the Federal System 156–61 (6th ed. 2009); see also, e.g., Warth v. Seldin, 422 U.S. 490, 499 (1975) (noting that the Court has frequently recognized its self-imposed standing requirement that “the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to reliance on the legal rights or interests of third parties”).

32 Allen, 468 U.S. at 751.


35 The Court’s prudential standing decisions evidence a conflicted history. See Farina, supra note 22, at 36 (“Applying the prudential requirement that the injury be to an interest ‘arguably within the zone of interests to be protected or regulated by the statute . . . in question’ is complicated by a series of Supreme Court opinions—most of which garnered narrow, and shifting, majorities—that give conflicting guidance.” (omission in original) (citation omitted)). Compare Sprint Commc’ns Co. v. APCC Servs., Inc., 554 U.S. 269, 290 (2008) (holding that aggregators (third parties) have standing to sue on behalf of clients by distinguishing the facts from those in Warth, which barred the claims of third party plaintiffs on prudential standing grounds), and Craig v. Boren, 429 U.S. 190, 195–95 (1976) (granting an alcohol vendor third-party standing to challenge a discriminatory law against males under age twenty-one who were prohibited from purchasing 3.2% beer), with Elk Grove, 542 U.S. at 17–18 (holding that a parent did not have prudential standing to bring an action in federal court challenging the constitutionality of a school district’s policy of making teachers lead the class in the pledge of allegiance), and Madsen v. Women’s Health Ctr., Inc., 512 U.S. 753, 775–76 (1994) (stating that named protestors did not have third-party prudential standing to assert rights of unnamed protestors in challenging an injunction prohibiting their blockage of an abortion center that disrupted the center during a protest).

36 See supra note 35 and accompanying text; see also Henry P. Monaghan, Third Party Standing, 84 Colum. L. Rev. 277, 278–79 (1984) (describing third-party prudential standing as “unanalyzed and ungrounded notions of judicial ‘discretion’”).

37 See Richard J. Pierce, Jr., Is Standing Law or Politics?, 77 N.C. L. Rev. 1741, 1742–43 (1999) (“The doctrinal elements of standing are nearly worthless as a basis for predicting whether a judge will grant individuals with differing interests access to the courts.”).
Given this survey, what then can be said generally about standing doctrine? At its best, standing doctrine has lacked consistency over the decades. At its worst, standing doctrine has turned into a jurisprudential monstrosity. Notwithstanding the adjectival debate, to be sure, the absence of a “cohesive and unifying framework” for this doctrine deprives judges of clear precedent to follow. Moreover, it unnecessarily confounds those outside the courtroom that seek to best structure their conduct in anticipation of class litigation. Use of this shifting doctrine as a ground for class dismissal, therefore, is ill-advised.

B. Class-Representative Standing and the Juridical Link Doctrine

The previous subpart acknowledged that different legal contexts have shaped modern standing jurisprudence; the class action is no exception. The “juridical link” doctrine, for example, has informed how practitioners think about class-representative standing. For instance, courts favoring the “standing-as-typicality” test have allowed named plaintiffs with no claim against a particular defendant to represent other unnamed class members with such claims through invocation of the juridical link doctrine. As such, an understanding of

38 See Jean Wegman Burns, Standing and Mootness in Class Actions: A Search for Consistency, 22 U.C. Davis L. Rev. 1239, 1262–63 (1989) (decrying the inconsistency of how courts apply standing doctrine to class actions); see also Low & Jeffries, supra note 21, at 357 (“In the last few decades . . . the Supreme Court has become increasingly concerned with issues of standing. Its pronouncements on that subject have not been consistent.”); cf. Flast v. Cohen, 392 U.S. 83, 99 (1968) (“Standing has been called one of the most amorphous [concepts] in the entire domain of public law.” (alteration in original) (internal quotation marks omitted)); Pierce, supra note 37 (arguing that standing doctrine is malleable and used for courts to engage in outcome-deterministic adjudication based on political values); Jonathan D. Varat, Variable Justiciability and the Duke Power Case, 58 Tex. L. Rev. 273 (1980) (discussing how the Supreme Court manipulated standing doctrine to uphold nuclear power in Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59 (1978)).


40 See Burns, supra note 38, at 1241; see also Pierce, supra note 37, at 1762 (“The Supreme Court has issued so many opinions on standing with so many versions of injury, causation, redressability, and zone of interests that any competent judge can find ample precedent to support broad or narrow versions of each of the doctrinal elements that together comprise the law of standing.”).

41 Cf. Burns, supra note 38, at 1241 (“[B]ecause standing and mootness questions affect all class actions . . . the confusion in this area will obviously have far-reaching consequences.”).

42 Low & Jeffries, supra note 21, at 356–57; see also Allen v. Wright, 468 U.S. 737, 751 (1984) (“Like most legal notions, the standing concepts have gained considerable definition from developing case law.”).

43 See supra text accompanying notes 11–12 for a description of this approach.
The Ninth Circuit instituted the juridical link doctrine in the landmark case of La Mar v. H & B Novelty & Loan Co. Though it denied the putative representative standing to represent a class against defendants he had no dealings with, the La Mar court did note that [there are] two exceptions to the rule that a named plaintiff could not represent those injured by other defendants: (1) where “all injuries are the result of a conspiracy or concerted schemes between the defendants at whose hands the class suffered injury;” or (2) where “all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious.” Although only a few sentences, La Mar’s dicta blazed a trail that other jurisdictions have followed to varying degrees.

As stated previously, courts that take the “standing-as-typicality” approach have adopted La Mar’s juridical link exception, allowing them to bypass the more stringent collective standing rule that requires the named plaintiffs to have claims collectively against all defendants. Some of the juridical links that these courts have recognized include partnerships or joint enterprises, conspiracy, and aiding and abetting, since these terms denote some form of relationship or activity on the part of the members of the proposed defendant class that

44 489 F.2d 461 (9th Cir. 1973). It is important to note that the juridical link doctrine’s application is not exclusive to class actions. Courts have extended it to other multiparty litigation devices such as Rule 20 permissive joinder. See, e.g., Barker v. FSC Sec. Corp, 133 F.R.D. 548, 550–53 (W.D. Ark. 1989) (utilizing the judicial link doctrine to join two subsidiaries of a parent corporation as defendants in a class action involving breach of contract and conversion).


47 The rule that plaintiffs must collectively have claims against all defendants was laid down in O’Shea v. Littleton, 414 U.S. 488, 494 (1974) (“Moreover, if 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.” (emphasis added)), and corroborated by Warth v. Seldin, 422 U.S. 490, 502 (1975) (“Unless these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, ‘none may seek relief on behalf of himself or any other member of the class.’” (quoting O’Shea, 414 U.S. at 494)). However, proponents of the juridical link doctrine would contend that these decisions do not abrogate La Mar’s exceptions. According to this view, so long as a juridical link exists between the alleged harms of the immediate defendants and of the most remote defendants, the named plaintiff(s) can hold those remote defendants liable and thereby satisfy the class action standing requirements of O’Shea and Warth.
warrants imposition of joint liability against the group even though the plaintiff may have dealt primarily with a single member. 48

Naturally, class representatives favor this approach because it insulates them from Rule 12(b)(6) dismissal 49 and grants them access to discovery to bolster claims against defendants before the class-certification stage. 50

Despite garnering support from “standing-as-typicality” advocates, the juridical link doctrine in the class action context has met opposition from proponents of collective standing. This is especially true for those that subscribe to a strict reading of the Supreme Court’s holding in O’Shea v. Littleton, understanding it to mean that all named plaintiffs must cumulatively have standing to bring a claim against every defendant. 51 Courts favoring this analysis maintain that notwithstanding the existence of a juridical link among all defendants, standing analysis remains a discrete inquiry; 52 therefore, to prevent discovery abuse, a court should dismiss outright representatives’ complaints that fail this separate test. 53 Moreover, they also contend that finding a juridical link could precipitate named plaintiffs’ inadequate representation of class members’ claims. 54 Much hostility from the


49 Two schools of thought have emerged on when the class-representative standing analysis should take place in litigation. Those in favor of the “standing-as-typicality” model believe that standing is a matter of Rule 23(a)(3) typicality and thus should be reserved until the class certification stage along with the rest of Rule 23(a) criteria. However, proponents of the “collective standing” model insist that class-representative standing analysis is properly conducted as early as the motion-to-dismiss stage of the litigation. See Lowenthal & Cooper, supra note 9, at 2659, 2662–63.


51 See, e.g., Cassese v. Wash. Mut., Inc., 262 F.R.D. 179, 184 (E.D.N.Y. 2009) (“Although the apparent juridical link present in this case might serve to obviate the need for every member of the class to have a claim against each named defendant at the typicality stage of the Rule 23 inquiry, it does not confer standing on the named plaintiffs to seek certification against defendants with whom they have had no interactions.”); Siemers v. Wells Fargo & Co., No. C 05-04518 WHA, 2006 WL 3041090, at *5–7 (N.D. Cal. 2006) (holding that the juridical link doctrine is not available to plaintiff at the pleading stage); Popoola v. MD-Individual Practice Ass’n, 230 F.R.D. 424, 431 (D. Md. 2005) (“[T]he juridical link[ ] doctrine has no bearing on the issue of standing.” (citation omitted) (internal quotation marks omitted)).

52 See Cassese, 262 F.R.D. at 184 (“Courts in this Circuit that have recognized the juridical link doctrine have done so only with respect to the typicality requirement of the class certification question, and have not used it as a basis to find standing.”).

53 See Lowenthal & Cooper, supra note 9, at 2659.

54 In postulating its exceptions to the common class action standing rule, the La Mar court does acknowledge that allowing named plaintiffs to represent unnamed class members against defendants with whom the representatives had no dealing could run afoul of the Rule 23(a)(4) requirement for adequate representation. See La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 468 (9th Cir. 1973).
With case law on both sides of the debate, it is evident that La Mar’s juridical link doctrine contributes to the opacity of the named-plaintiff standing inquiry. Although both views have persuasive arguments, this Note does not pass judgment on which side has the better analysis for class-representative standing. Rather, this Note urges courts to discontinue the use of standing scrutiny as a means to manage abusive or unruly class actions and to reconsider the fitness of Rule 20 joinder to perform this task.

II
BACKGROUND: JOINDER RULES AND MULTIPARTY LITIGATION

Part I surveyed standing doctrine, giving particular attention to the complexities and vulnerabilities of the jurisprudence at present. Before considering the thesis of resorting to scrutiny of joinder propriety in the first instance when dealing with suspicious or overwhelming class actions, it would serve this discussion well to begin with a review of joinder and relevant multiparty procedural devices. Accordingly, this Part briefly summarizes the purpose and function of the following Federal Rules of Civil Procedure: Rule 18 (joinder of claims), Rule 20 (permissive joinder of parties), and Rule 21 (misjoinder).56

A. Rule 18—Permissive Joinder of Claims

Rule 18 provides for the permissive aggregation of various claims by parties to litigation. In pertinent part, the rule’s text reads: “A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.”57 Though the rule today seems straightforward, jurists in previous times were concerned with the extent to which joinder of claims should be permitted. Specifically, there was concern that permissive claim joinder in multiparty litigation could lead to unfairness and inconvenience for parties required to partici-

55 See Donald M. Zupanec, Class Actions—Named Plaintiffs—Standing—“Juridical Link” Theory, Fed. LITIGATOR, Apr. 2010, at 5 (“Courts are occasionally receptive to a [juridical] link argument . . . [but] more often they are not.”).

56 It is important to note that Rule 18 seems to be bootstrapped to Rule 20. The drafters of the 1966 rules realized that permissive joinder of parties would often necessitate a permissive joinder of claims. See generally Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (II), 81 Harv. L. Rev. 591, 593–95, 597 (1968) (discussing the relationship between Rules 18 and 20 and their similar purposes).

pate in claim proceedings unrelated to their conduct. The 1966 version of Rule 18, however, dispensed with these concerns by ensuring that the “niceties” of pleading would not inhibit the underlying policies of liberal multiparty joinder.

B. Rule 20—Permissive Joinder of Parties

Rule 20, permissive joinder of parties, allows plaintiffs and defendants to join nonessential party members to litigation. The purpose of permissive joinder is “to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits.” To that end, the rule permits the addition of litigants

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58 Professor Kaplan discusses the preoccupation of the rules’ draftsmen and contemporary legal scholars with the inconvenience a joinder of claims might subject some defendants to who are entirely unrelated to one of the claims. Courts and scholars have pointed to Federal Housing Administrator v. Christianson, 26 F. Supp. 419 (D. Conn. 1939), when discussing the concern for unfairness and inconvenience in permissive claim joinder. See Kaplan, supra note 56, at 593–95, 597 (discussing Christianson’s interpretation of the old Rule 18). For more discussion of the interpretation of old Rule 18(a), see Developments in the Law—Multiparty Litigation in the Federal Courts, 71 HARV. L. REV. 874, 970–71 (1958) (also discussing the Christianson case); Charles Alan Wright, Joiner of Claims and Parties Under Modern Pleading Rules, 36 MINN. L. REV. 580, 582–97 (1952) (discussing, among other things, the advantages of the then-new Rule 18); Commentary 20a.5, Relation Between Joinder of Parties and Joinder of Claims, 5 FED. R. SERV. 822, 822–26 (1942) (“The proper interrelation of the rules on joinder of claims and parties is a question giving rise to some difficulty.”).

59 According to one commentator, while the 1966 version of Rule 18 provides that “any and all claims may be joined at the pleading stage, it will not unduly confuse the issues in the case, for claims are subject to separation under 42(b) when fairness and convenience require.” Sherman L. Cohn, The New Federal Rules of Civil Procedure, 54 GEO. L.J. 1204, 1213 (1966).

60 Id.

61 Federal Rule of Civil Procedure 20(a)(1), which deals with plaintiff joinder, reads:

Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

With respect to defendant joinder, Rule 20(a)(2) reads:

Persons—as well as a vessel, cargo, or other property subject to admiralty process in rem—may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

Id.

whose presence is procedurally convenient but not necessary for complete claim adjudication. As a procedural rule, permissive joinder does not alter the substantive right of parties. As a discretionary rule, courts may deny joinder if they find that the addition of a party “will not foster the objectives of the rule, but will result in prejudice, expense or delay.” Typically, plaintiffs possess the right under Rule 20 to join defendants or institute separate actions. However, this right is not unlimited. Notwithstanding the satisfaction of Rule 20(a) criteria, the court on its own initiative, or on motion, can consolidate or separate parties and claims pursuant to Rules 20(b), 21, and 42. Moreover, Rule 20 requires that plaintiffs assert rights to relief against each defendant party for joinder to be proper; nevertheless, the rule also expressly states that a plaintiff or defendant need not be actually interested in obtaining or defending all the relief demanded for joinder to be proper.

C. Rule 21—Misjoinder

After claims and parties are permissively joined into one action under Rules 18 and 20, a court may later decide either sua sponte or upon a party’s motion to sever it pursuant to Rule 21 misjoinder. At common law, misjoinder of parties formerly served as grounds for dismissal, but the present Rule 21 departs from this draconian rule.
Now, the Federal Rules explicitly deem misjoinder an invalid reason for dismissal, 73 and modern practice typically allows parties to cure misjoinder defects at any stage of an action. 74

Even so, case law demonstrates that parties are misjoined when they fail to satisfy either requirement of Rule 20(a),75 as well as when a plaintiff does not have a significant interest against a defendant.76 Aside from cases where additional parties’ presence would violate joinder requisites, judges have used misjoinder prudentially to fashion desired litigation outcomes.77 Thus, “[b]y providing for the dropping and adding of parties on terms that are just, Rule 21 furthers the policy of the federal rules to continue and determine an action on its merits whenever that can be done without prejudice to the parties.”78

III
AN ALTERNATIVE TOOL: THE ARGUMENT FOR JOINDER SCRUTINY

A. Joinder Scrutiny Applications

The previous discussion reviewed the relevant permissive joinder provisions comprising the joinder scrutiny method. With this important background established, it is now possible to look at this tool’s applications. To this end, this Part first examines a case in which a district court used standing scrutiny where joinder scrutiny might have been more appropriate. Next, it contrasts this example with those of class action cases where district courts properly used joinder scrutiny to detect and remove misjoined defendants from the suit. Lastly, it appraises one court’s successful application of this approach.


With much ado about proper standing analysis and Rule 23(a)(3), it is likely that some of federal courts have failed to see the relevance of Rule 20 joinder in determining who has standing to sue on behalf of a class.79 This is not surprising—class action litigation

73 FED. R. CIV. P. 21; see, e.g., Acevedo v. Allsup’s Convenience Stores, Inc., 600 F.3d 516, 516, 522 (5th Cir. 2010) (“[T]he district court erred when it dismissed [the] entire action, rather than simply dismissing the claims of any misjoined plaintiffs.”).
74 7 WRIGHT ET AL., supra note 62, § 1681, at 473 (“[A]n action could proceed on its merits despite an initial misjoinder or nonjoinder whenever the error could be corrected without adversely affecting the parties to the action.”).
75 Id. § 1683.
76 See, e.g., Durkin v. John Hancock Mut. Life Ins. Co., 11 F.R.D. 147, 147 (S.D.N.Y. 1950) (holding that the plaintiff was improperly joined when he failed to state a claim upon which relief could be granted, largely because the action was between an employer and a labor union, and the plaintiff was not an employee of the defendant).
77 For examples, see 7 WRIGHT ET AL., supra note 62, § 1683.
78 Id. § 1681, at 474.
79 See FED. R. CIV. P. 20 (permissive joinder of parties); id. 23 (class actions).
can be so involved that it even obscures things in plain view. As such, judges may not notice commonplace issues like misjoinder of defendants amidst the bustle of managing a class action. Cassese v. Washington Mutual, Inc. exemplifies this very tendency.

In Cassese, certain borrowers brought a putative class action against mortgage lender Washington Mutual and its affiliated companies. Named plaintiffs charged defendants with imposing and collecting unlawful fees, prepayment penalties, and finance charges in connection with mortgage loans, and alleged claims for breach of contract, unjust enrichment, and fraud. The borrowers moved to certify a class; however, the district court did not certify it entirely, ruling that the representatives could sue only the defendants with whom they had directly transacted and suffered a loss. Although the named plaintiffs possessed standing to sue the parent company, Washington Mutual, the court found that they lacked standing to sue Washington Mutual’s affiliated companies because none of the named plaintiffs had dealt with them directly. In protest, the plaintiffs contended that they had standing to sue the affiliated companies because their common ownership and collaborative business conduct juridically linked them together with the parent company. The court declined to accept this argument. It reasoned that evidence of a “juridical link” may factor into Rule 23(a)(3)’s typicality of claims assessment, but that nevertheless, meeting the typicality requirement does not satisfy the constitutional standing requirements to bring a class action. Consequently, it ruled that standing doctrine demanded that the named plaintiffs must have a claim against every defendant they wish to sue.

The Cassese court’s partial denial of class certification is problematic because the court based its ruling on the shifting predicate of standing jurisprudence. In particular, the court “picked a side” of the standing debate, and took the more restrictive approach that requires all named plaintiffs to have collective injuries traceable to all defendants. In doing so, however, the court may have picked the “wrong side.” (How could one know if the court’s standing analysis was “right” in light of the inconsistency and laxity besetting the doctrine?) And though the court disposed of the matter in the short run, it did so at the expense of contributing to an already mixed-up body of case law in the long run. What is equally troubling about the decision is

80 Cf. Rothstein & Willging, supra note 4, at 2 (“There is no such thing as a simple class action. Every one has hidden hazards . . . .”).
81 262 F.R.D. 179 (E.D.N.Y. 2009).
82 Id. at 180–81.
83 Id. at 183–85.
84 Id. at 183–84.
85 Id.
86 Id.
that the court probably reached the standing question unnecessarily. Upon a proper permissive joinder analysis, the court could have found that the affiliated companies were misjoined.

*Cassese* falls in line with an emerging trend of cases at the district court level. Fixated on class-representative standing, the opinions of these courts do not discuss how sustaining named plaintiffs’ requests to include certain defendants would violate permissive joinder requirements.87 Either this would seem to suggest that courts have a truncated understanding of how joinder informs party structure in class litigation or that courts have perceived its applicability but found it inadequate for their purposes. In any event, these courts have not taken full advantage of a useful tool.

2. *Proper Applications of Joinder Scrutiny*

The *Wynn v. National Broadcasting Co.* decision provides a nice example for the alternative joinder scrutiny approach to class litigation.88 In *Wynn*, fifty television screenwriters brought a class action under the Age Discrimination in Employment Act of 1967,89 against fifty-one defendant talent agencies and television networks, alleging that defendants participated in an industry-wide “pattern or practice” of age discrimination.90 The putative class members invoked Rule 20(a)(2) as the procedural mechanism to bring all of the defendants into one action.91 Many of the defendants had no dealings with each other—they were each separate entities—and for those that did, their interaction was minimal.92 Nevertheless, complainants moved the court to join the talent agencies and television networks in the litiga-

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87 Unfortunately, cases like *Cassese* unnecessarily focus on the wrong question. The relevant question is not solely whether this group of named plaintiffs has standing; it is also whether that group of named plaintiffs may permissively join these defendants.

88 See 234 F. Supp. 2d 1067, 1078 (C.D. Cal. 2002) (explaining the requirements for joinder under Rule 20(a)).


90 *Wynn*, 234 F. Supp. 2d at 1074–75. The *Wynn* plaintiffs attempted to bring a class action primarily under the ADEA and not under Rule 23. For the remaining non-ADEA claims, however, complainants sought to certify a Rule 23 class action. *See id.* at 1081 & n.8. Alternatively, plaintiffs moved for a permissive joinder of all fifty screenwriters under Rule 20(a)(1). *See id.* at 1085.

91 *Id.* at 1075, 1077–78.

92 *See id.* at 1078 (“The mere assertion that because these employers . . . are members of a common industry is not sufficient to satisfy the requirement that the right to relief . . . arises out of the same transaction or occurrence.”); *see also id.* at 1079 (finding insufficient evidence that fifty-one separate entities are operating under a uniform hiring practice); *cf. id.* at 1085 (“[I]ndividualized issues would be present in the form of numerous defenses that may be asserted by the multitude of defendants—employers and talent agencies alike—that have minimal, if any, connection with one another.”).
tion, arguing that it would best effectuate comprehensive adjudication and judicial economy.\textsuperscript{93}

The district court, in evaluating the propriety of permissively joining all fifty-one defendants, found the Rule 20(a)(2) requirements unsatisfied.\textsuperscript{94} According to that court, the plaintiffs failed to show that the claims they had against every defendant arose from the same transaction or occurrence, or series of transactions or occurrences.\textsuperscript{95} Particularly, the district court found unpersuasive the putative representative’s theory that licensing agreements between the networks and studios implied concerted action to discriminate against older screenwriters.\textsuperscript{96} Reasoning that licensing agreements among \textit{some} defendants did not imply an industry-wide scheme among \textit{all} defendants, the \textit{Wynn} court disagreed that such sporadic linkages justified mass joinder.\textsuperscript{97} Because each defendant was a discrete entity, it deemed unfulfilled Rule 20(a)(2)(A)’s same-transaction-or-occurrence condition. Moreover, the court found that the plaintiffs failed to prove the existence of Rule 20(a)(2)(B)’s requirement of a common question of law or fact between all defendants.\textsuperscript{98} Treating that issue briefly, the court relied on precedent establishing that “alleged claims against Defendants based on the same general theory of law . . . is not a sufficient ground to find that [plaintiffs’] claims raise common legal or factual questions.”\textsuperscript{99} Furthermore, the court found that even if the plaintiffs had met the requirements of Rule 20(a)(2) for the permissive joinder of defendants, it was still within its discretion to order severance of litigation to prevent unfairness and prejudice.\textsuperscript{100} The court believed that allowing permissive joinder of defendants would lead to jurors’ confusion of the issues and unfairly subject those innocent or less culpable defendants to “guilt by association.”\textsuperscript{101} Finding misjoinder, as well as in the interest of preventing unfairness and prejudice to defendants, the court denied the putative class’s motion to join all fifty-one television networks and studios to the action.\textsuperscript{102}

\textsuperscript{93} See \textit{id.} at 1075 (“[A]ll such Defendants should be joined in a single action to ensure the efficient adjudication of common issues . . . .”).

\textsuperscript{94} See \textit{id.} at 1088 (“[J]oiner would instead confuse and complicate the issues for all parties involved.”).

\textsuperscript{95} See \textit{id.} at 1078.

\textsuperscript{96} See \textit{id.} at 1080.

\textsuperscript{97} See \textit{id.} (“Plaintiffs’ allegations that joinder is warranted merely because each Defendant’s (or some sub-group of Defendants’) autonomous hiring decisions, when taken together, comprise an industry-wide discriminatory practice, has no basis in law.”).

\textsuperscript{98} \textit{Id.} at 1080–81.

\textsuperscript{99} \textit{Id.} at 1081.

\textsuperscript{100} \textit{Id.} at 1088–90.

\textsuperscript{101} \textit{Id.} at 1089–90.

\textsuperscript{102} \textit{Id.} at 1090 (“[B]ecause Plaintiffs failed to show that the requirements of Fed. R. Civ. P. 20(a) have been satisfied, and based upon the Court’s discretion, the Court finds that joinder of all Plaintiffs against all Defendants is improper.”).
The Wynn court recognized the relevance of joinder in a putative class action and properly applied joinder scrutiny; it was not the first district court, however, to utilize this approach. In Turpeau v. Fidelity Financial Services, Inc., a putative class of automobile purchasers sued defendant lenders and insurers in state court for violation of a Georgia credit statute prohibiting the sale of excess credit life insurance pursuant to automobile financing. The defendants, seeking to remove to federal court on the basis of diversity jurisdiction, moved to sever some joined defendants that destroyed diversity; the plaintiffs opposed their motion. The plaintiffs contended that because they satisfied Rule 23(a)’s prerequisites to act as class representatives and had instituted an action, the issue of who the defendants were should no longer be open. Disagreeing with the plaintiffs’ view, the court clarified the proper relationship between Rule 23(a) and Rule 20(a)(2):

The prerequisites to a class action determine whether a class is maintainable—in this case, a plaintiff class. Rule 23(a) does not purport to address, however, the propriety of this plaintiff class suing a group of defendants. For this, the inquiry must shift to the issue of permissive joinder under Rule 20.

The court pointed out that "[n]o single plaintiff has a claim against more than one defendant lender and one defendant insurer." As such, it found that the plaintiffs failed to prove that each claim against each defendant arose out of the same transaction or occurrence and accordingly granted the defendants’ motion to sever.

Another case predating Wynn and Turpeau that applies joinder scrutiny within the class action context is Michaels Building Co. v. Ameritrust Co. There, the Sixth Circuit affirmed a district court’s severance of a permissively joined defendant company because the same-transaction-or-occurrence condition was not met. After determining that some of the antitrust conspiracy claims against Ameritrust (one of the several bank defendants) were wholly unrelated to the loan transactions of the other defendants, the court properly affirmed the district court’s finding of misjoinder.

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104 Id. at 976–77.
105 Id. at 978.
106 Id.
107 Id. at 977.
108 Id. at 977–79.
109 848 F.2d 674 (6th Cir. 1988).
110 Id. at 682.
111 Id. ("The one Ameritrust-related loan made to Michaels Building Company has no relation to the loans made by the other defendants. The various transactions, as [the district court judge] wrote, ‘involve different banks, different contracts and different terms.’ Moreover, the Ameritrust loan document contains an entirely different representation as

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104 Id. at 976–77.
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106 Id.
107 Id. at 977.
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110 Id. at 682.
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As the above case history suggests, over the last three decades some jurisdictions have managed, rather prudently, to detect improper joinder from among the din of class action allegations. Nothing from the opinions would suggest that the Wynn, Turpeau, and Ameritrust courts harbored suspicions of class action abuses. Nevertheless, these courts effectively used joinder scrutiny to conserve judicial resources, retain clarity and sharpness of the issues, and ensure fairness to defendants by paring down the size of “lumpy” litigation.\(^{112}\)

3. The Wynn Rule: Review

Wynn stands for the proposition that a group of plaintiffs with like harms against different defendants cannot simply lump them together using Rule 20(a)(2) to argue that such defendants share a general commonality or place into the same industrial category.\(^{113}\) In articulating this view of permissive joinder, Wynn’s rule may appear simplistic to some commentators. However, as this Note suggests, those times when thoughtful jurisprudence simplifies looming complexities in the law should be appreciated, since often, simplicity indicates clarity, which fosters reliability and respect for the law.\(^{114}\) Certainly, Judge Wilson (the author of the Wynn opinion) had many opportunities to make a mess of things. For instance, the judge might have taken the route of the Cassese court in dismantling the multiparty structure of the action\(^{115}\)—that is, he might have first probed the standing of Tracy Wynn and other representatives, and perhaps even ventured into the juridical link debate to justify removing some defendants from the suit. If it had adopted such an approach, the Wynn court would have undoubtedly removed what was a weak case to begin with; at the same time, however, the court likely would have complicated an already-nettling standing doctrine for named plaintiffs. At any rate, because the Wynn court was able to perceive a fundamental defect of multiparty joinder, a discussion of class-representative standing was unnecessary.\(^{116}\)

At first glance, Wynn’s approach—severance of misjoined defendants from the class action suit—may seem to contravene the Federal Rules Advisory Committee’s original vision for permissive joinder:

to its interest rate than the loan documents of the other defendants. Variation in loan policies is a further reason to disallow joinder.” (footnote omitted)).


\(^{113}\) See supra notes 95–98.

\(^{114}\) Cf. ROBERT S. SUMMERS, FORM AND FUNCTION IN A LEGAL SYSTEM—A GENERAL STUDY 184, 283–85 (2006) (“[T]he better defined a legal rule, the more clearly it is expressed . . . the more likely addressees will understand the rule, and, in turn, respectfully comply.”).

\(^{115}\) See supra notes 77–86 and accompanying text.

\(^{116}\) See supra notes 95–102 and accompanying text.
namely, a liberal claim and party joinder that enhanced judicial economy and rendered comprehensive adjudication.\textsuperscript{117} However, it is possible to reconcile the conflict between the rule makers’ original intention and the three above courts’ use of joinder. Though the rule makers intended to make joinder liberal, they designed that this vision conform to (i) judicial discretion\textsuperscript{118} and (ii) the core tenets of permissive joinder—that is, the same-transaction-or-occurrence and common-questions-of-law-and-fact requirements.\textsuperscript{119} Moreover, as it turns out, judicial discretion and reasonable application of these requirements complement one another. On the one hand, judicial discretion helps animate the rules by ensuring that a wooden application does not lead to unreasonable outcomes or undercut important policy interests. In some circumstances, prudence may call for a narrow interpretation of these two requirements to reduce confusion of the issues (e.g., preventing codefendant guilt by association),\textsuperscript{120} or for a broad interpretation for purposes of equity (e.g., making mass-tort victims whole). On the other hand, the structure that permissive joinder’s two elements provide makes judges accountable for how they arrange parties. Specifically, these provisions serve as a check on judicial caprice in multiparty litigation and function as a plumb for appellate courts to evaluate abuses of discretion. Thus, by virtue of the interdependence between judicial discretion and permissive joinder requirements, the \textit{Wynn} court’s use of joinder scrutiny comports with the Advisory Committee’s intended designs for Rule 20.

Given this review of \textit{Wynn}’s philosophy on permissive joinder of defendants, federal courts seeking to employ joinder scrutiny are likely not to go astray in following this court’s example.

\textsuperscript{117} See also Lawrence G. Crahan, \textit{Expansion of Permissive Joinder of Defendants in Missouri}, 41 Mo. L. Rev. 199, 200 (1976) (explaining the Advisory Committee’s intention to prevent narrow interpretations of Rule 20).

\textsuperscript{118} \textit{Cf.} Fed. R. Civ. P. 20(b) (“The court may issue orders—including an order for separate trials—to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.”). This provision illustrates the Federal Rules Committee’s superseding desire to see judges determine the elasticity of the permissive joinder doctrine.

\textsuperscript{119} See Fed. R. Civ. P. 20(a) (allowing plaintiffs and defendants to be joined in one action if the action arose out of the same transaction or occurrence and pertained to any question of fact or law common to the relevant parties).

\textsuperscript{120} See Mary Kay Kane, \textit{Original Sin and the Transaction in Federal Civil Procedure}, 76 Tex. L. Rev. 1723, 1746 (1998) (“[D]ifferences in interpretation of [Rule 20(a)’s “same transaction or occurrence” language] also are supportable as a matter of policy. Effectively, the conclusion that the standard is not met in the Rule 20 context represents a determination that efficiency concerns would not be clearly promoted by joinder and may be outweighed by the complications introduced into the case by including the additional parties. Those considerations certainly are properly within a court’s purview.”).
B. Strengths of the Joinder Approach

The joinder alternative’s many strengths make it an effective tool for reducing class action abuses. For instance, an important advantage of joinder scrutiny is that it is a more demanding standard than either the collective or the typicality versions of class-representative standing scrutiny. This is important because Rule 20(a) requires each named plaintiff to have a “right to relief” arising out of the same transaction or occurrence against every individually joined defendant concerning a common legal or fact question. In other words, if a putative class representative does not have such a claim against one of the defendants, then that representative cannot join that particular defendant to the action. In such a scenario, it is then of no consequence that plaintiffs have collective claims against a defendant or that claims are typical of other class members. Every would-be representative must separately satisfy permissive joinder requirements as to every named defendant if they wish to assert class liability—that is, unless there is a very strong juridical link among the defendants that warrants joinder. Imposing this higher hurdle will make it more difficult for representatives with frivolous class suits to drag individual defendants into federal court; consequently, this will limit the size and expense of class litigation. Thus, standing scrutiny relative to joinder scrutiny is not as tough of a test for complainants to pass.

Furthermore, courts can use joinder scrutiny to reach the same ends as standing scrutiny (e.g., crack down on class action abuse) while simultaneously accomplishing the procedural goals of just process and expediency. Specifically, because of the broad discretion that judges enjoy under Rule 20, federal courts can tailor party structure to maintain clarity of issues, exercise judicial economy, and ensure fairness to all defendants.

122 For more on this caveat, see supra note 44.
123 See infra note 136 and accompanying text. Recall that the tests for joinder and standing are separate. Cf. Lewis v. Casey, 518 U.S. 343, 357 (1996) (noting that procedural devices like Rule 23 “adds nothing to the question of standing”). Since a class representative must pass both tests, does this mean that satisfying the more rigorous joinder test should also be sufficient to satisfy the separate demands of class-representative standing? Under any view of class-representative standing, the answer to this question should be in the affirmative because to pass joinder scrutiny one named plaintiff must have a personal legal controversy with every defendant. Hence, judges need no longer suffer the legal fictions inherent in the “collective standing” and “standing-as-typicality” tests that plaintiffs use to justify representational claim sharing, because all named plaintiffs possess their own direct claims. So although the tests are technically discrete, satisfying the procedural requisites of joinder effectively fulfills what standing jurisprudence requires—so long, that is, as the Rule 20(a) “right to relief” satisfies the three basic Article III standing elements. See supra notes 18–20 and accompanying text.
124 See supra notes 91–111 and accompanying text.
Joinder scrutiny would also be the “safer” option for judges making certification rulings. More specifically, district court judges fearing appellate court reversal for some mistake during the precertification phase should come out better on appeal for using joinder scrutiny than standing scrutiny. Recall that federal circuit courts review the permissive joinder of parties under the very deferential abuse of discretion standard, whereas standing determinations, as questions of law, receive de novo review—which means virtually no deference to the lower court. Following these review standards, a district court’s use of joinder scrutiny would likely receive a substantially less critical review by a court of appeals. Practically speaking, it is a plausible assumption that most courts are strongly risk averse to basing material rulings on unsettled case law (like class-representative standing). As such, it follows that for judges with this risk-avoidance preference, the use of permissive joinder scrutiny is a rational method to curb suspected class action abuses or make class actions more manageable.

Courts will also find joinder scrutiny more user-friendly than standing scrutiny. Joinder is a procedural tool with which judges are very familiar. Perhaps even more importantly, because the law of joinder is more stable and concrete than the law of class-representative standing, courts should feel more comfortable utilizing joinder tools to address class action issues.

A fortiori, application of joinder scrutiny in the class action context would undoubtedly yield a sounder analysis than would standing scrutiny. Named plaintiffs routinely move district courts to add defendants to class action litigation using permissive joinder. Therefore, the removal of improper defendant parties through Rule 21 misjoinder would correspond with Rule 20(a)’s standard application in adding defendant parties. Thus, the joinder rule’s consistency and natural interaction with Rule 23 class actions will enable courts to pare down the size of specious or overwhelming class litigation. Joinder scrutiny would then save courts the trouble of having to wade into the

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125 See, e.g., Michaels Bldg. Co. v. Ameritrust Co., 848 F.2d 674, 682 (6th Cir. 1988) (“The manner in which a trial court handles misjoinder lies within that court’s sound discretion.”).
126 See McBurney v. Cuccinelli, 616 F.3d 393, 398, 402–04 (4th Cir. 2010); Cetacean Cnty. v. Bush, 386 F.3d 1169, 1173 (9th Cir. 2004).
127 Permissive joinder has been around since the first introduction of the Federal Rules of Civil Procedure in 1938. See Sunderland, supra note 62, at 15–17.
unpleasant standing doctrine “morass”\textsuperscript{129} and struggle to make the inconsistent decisions cohere.\textsuperscript{130}

C. Shortcomings of the Joinder Approach

How, one might wonder, have judges failed to perceive the utility of joinder scrutiny as a means of disposing of what might be the specious class litigation that statutes like CAFA sought to address?\textsuperscript{131} One possibility is that some judges are uncertain about the scope of joinder’s applicability. Because they might not perceive how an examination into the propriety of permissively joining a defendant applies to Rule 23 actions, they choose not to use this method to streamline class litigation. It is also possible, however, that courts using standing scrutiny have considered joinder scrutiny, but on balance, have determined that joinder scrutiny was inapposite for removing abusive class suits. These courts may have a point: joinder scrutiny may have some shortcomings depending on the circumstances. Many of these shortcomings, however, are rebuttable.

For example, the main drawback to joinder scrutiny is that misjoinder often times is not a “silver bullet” for suspected attorney-driven litigation (if that is a judge’s desired result). As Rule 21 mandates, misjoinder of defendants, unlike the old common-law rules, are not proper grounds for dismissing an action.\textsuperscript{132} Usually, a court will order dismissal of claims without prejudice and provide leave to amend the complaint.\textsuperscript{133} Therefore, courts seeking to clear their

\textsuperscript{129} See Burns, \textit{supra} note 38, at 1240.

\textsuperscript{130} Unfortunately, the Southern District of New York has had this problem over the decades, vacillating about which named plaintiffs do and do not have standing to bring class securities fraud claims against several permissively joined defendants with which the putative class representatives had not dealt directly. \textit{Compare In re Prudential Sec. Inc. Ltd. P’ship Litig.}, 163 F.R.D. 200, 208 (S.D.N.Y. 1995) (holding that the named plaintiff had sufficient standing to bring a class action suit against all defendants—including those it had no direct dealing with—so long as they were injured by some of defendants), and Tedesco v. Mishkin, 689 F. Supp. 1327, 1335–36 (S.D.N.Y. 1988) (same), \textit{and In re Dreyfus Aggressive Growth Mut. Fund Litig.}, No. 98CV4318(HB), 2000 WL 1357509, at *3–4 (S.D.N.Y. Sept. 20, 2000) (same), \textit{with Hoffman v. UBS-AG}, 591 F. Supp. 2d 522, 530–32 (S.D.N.Y. 2008) (holding that all named plaintiffs must collectively have claims against all defendants), and \textit{Abu Dhabi Commercial Bank v. Morgan Stanley & Co.}, 651 F. Supp. 2d 155, 175 (S.D.N.Y. 2009) (same).

\textsuperscript{131} For more on CAFA’s purpose and attorney-driven class action concerns, see \textit{supra} notes 3–5 and accompanying text.

\textsuperscript{132} See \textit{Fed. R. Civ. P. 21}; see \textit{e.g.}, Acevedo v. Allsup’s Convenience Stores, 600 F.3d 516, 522–23 (5th Cir. 2010) (finding that the district court erred in dismissing the entire action for misjoinder rather than simply dismissing the claims of any misjoined plaintiffs).

\textsuperscript{133} See, \textit{e.g.}, \textit{Acevedo}, 600 F.3d at 522 (“The proper remedy in case of misjoinder is to grant severance or dismissal to the improper party if it will not prejudice any substantial right.” (quoting Sabolsky v. Budzanowski, 457 F.2d 1245, 1249 (3d Cir. 1972))). \textit{But see, e.g.}, Wynn v. Nat’l Broad. Co., 234 F. Supp. 2d 1067, 1123–24 (C.D. Cal. 2002) (dismissing with prejudice some claims against misjoined defendants).
docket of suspicious class actions could find a more direct means through scrutinizing the standing of class representatives.\textsuperscript{134} Yet, collective standing scrutiny may not always function as a “silver bullet” either. For instance, if the narrow application of \textit{O'Shea v. Littleton} becomes the predominant metric for sufficient standing, then such a rule would require that all putative class representatives have collective claims against all defendants.\textsuperscript{135} If named plaintiffs do not pass muster, one possible outcome would be that the class action would be thrown out of court; hence, the “silver bullet” characterization. Another possibility, however, is that upon a ruling of insufficient standing under \textit{O'Shea}, the incumbent representatives will then seek to amend their complaint and immediately begin shopping among class members for those who have good claims against the defendant(s) targeted for permissive joinder. Finding another class member willing and able to serve in the capacity of named plaintiff may be an obstacle, but it is certainly not insurmountable given the thousands of class members from which to choose. If the incumbent representatives succeed in their search, then the class action would remain in court. As such, this procedural game of “musical chairs” would effectively diminish standing scrutiny’s “silver bullet” quality of getting class actions out of court through motions to dismiss and summary judgment.\textsuperscript{136}

In such a scenario, the joinder approach would be superior to \textit{O'Shea’s} collective standing analysis to deal with the “musical chairs” problem. To explain, if a court originally found misjoinder and granted the would-be class representatives leave to amend the complaint, it would still be difficult for them to satisfy the joinder scrutiny rule (i.e., every named plaintiff must have a claim against every defendant) and at the same time join all the potential defendants that the putative class wishes to sue. (This is especially true where there are large numbers of defendants that a class seeks to join individually.)

\textsuperscript{134} In this situation, the complexity of standing doctrine could incentivize some courts to make disfavored class actions “go away quietly.” The protean nature of the standing doctrine makes it convenient for some district courts to play fast and loose in their standing analyses and then simply report the result in unpublished opinions. \textit{Cf.} Dorf, \textit{supra} note 39 (explaining how the Supreme Court has used a malleable standing doctrine to dismiss cases that are unappealing on the merits).

\textsuperscript{135} \textit{See} \textit{O'Shea v. Littleton}, 414 U.S. 488, 494 (1974); \textit{supra} note 47 and accompanying text.

\textsuperscript{136} \textit{See} Cassese v. Wash. Mut., Inc., 262 F.R.D. 179, 184 (E.D.N.Y. 2009) (“[T]he plaintiff may be able to remedy some standing limitations by simply adding additional named plaintiffs that have pertinent claims to establish broader standing . . . .” (omission in original) (quoting Lindquist v. Farmers Ins. Co. of Ariz., No. CV 06-597-TUC-FRZ, 2008 WL 343299, at *11 (D. Ariz. 2008))); \textit{cf.} Zupanec, \textit{supra} note 55 (“If a named plaintiff’s standing as to some defendants is susceptible to challenge, steps must be taken to ensure standing before seeking certification. The simplest way of doing this is by joining additional named plaintiffs.”).
necessity, then, these named plaintiffs will have to shed some of these defendants from the pleadings in order to proceed with the litigation. Consequently, the number of defendants to be joined on re-request to the court will inevitably be smaller than before. Therefore, if the goal of a court is to get rid of a class action, standing scrutiny is a risky way to get the job done due to the reality of named-plaintiff shopping. In comparison, joinder scrutiny may not extinguish a class action, but it definitely is much more likely to yield a substantially smaller litigation in the end, which will be ideal for judicial case management.

Returning to joinder scrutiny’s potential shortcomings, only ancillary issues remain. One concern might be that the broad discretion joinder affords district judges might compete with the certainty that Rule 20’s two requirements supply. Nonetheless, even in extreme circumstances of judicial caprice, distortions of this doctrine would still pale in comparison to the anomalies inherent in class-representative standing jurisprudence. Moreover, a remote problem that could arise is a situation where a putative class representative lacks standing but a court fails to examine this defect due to preoccupation with the propriety of defendant joinder. Odds are, however, that federal judges would almost never make so gross an oversight.

To be clear, this Note acknowledges that joinder scrutiny in class actions may not help district courts surmount all obstacles in getting rid of likely frivolous suits. Nevertheless, on balance, joinder scrutiny is a surer analysis than “intractable” standing inquiries.

IV
FUTURE CONCERNS WITH STANDING SCRUTINY’S CONTINUED USE

Though courts must examine a putative class representative’s standing, courts should not go so far as to scrutinize class-representative standing to stop suspect litigation in its tracks or to free docket space. Because standing doctrine’s tectonics are ever-shifting, the continued reliance on it within the class action context poses future concerns. This Part starts by commenting on the wisdom of experimenting with the standing doctrine and then identifies and discusses some of the imminent problems with a sustained use of standing scrutiny.

137 See supra notes 129–30 and accompanying text for more on inconsistent results in standing jurisprudence.

138 Cf. Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 111 (1998) (Breyer, J., concurring in part and concurring in the judgment) (“Whom does it help to have appellate judges spend their time and energy puzzling over the correct answer to an intractable jurisdictional matter [such as standing] . . .?”).
A. The Prudence of Using Standing Doctrine

Considering that standing doctrine is a matter of constitutional significance, federal courts should not be so quick to tamper with it to accommodate the exigencies of class litigation. One should not forget that, as a threshold requirement, standing goes to the heart of who does and does not have access to federal courts. With more state class actions ending up in federal court through CAFA, it becomes all too important that federal courts proceed cautiously in adjudicating who has the right to represent a class. If district courts fail critically at the class certification stage, then it is likely that many individuals with good claims will face denials of relief in federal courts.

One might counter this concern by proposing that the increased use of standing doctrine serves the important policy of growth in the law. Such an argument has merit, generally. Growth in the law is one thing; yet, overgrowth leading to confusion and distortion is entirely another. Indeed, class-representative standing is an area of the law that has overdeveloped due to its broad application—both proper and improper. Further meddling in this doctrine, to be sure, will add to its intractability.

Consequently, prudence would seem to require that if any additional means can be used to reach the same effect so as not to unnecessarily experiment with the constitutional analysis of standing, then courts should rule on that basis.

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139 See supra Part I.A.

140 Cf. Deposit Guar. Nat’l Bank v. Roper, 445 U.S. 326, 339 (1980) (“A district court’s ruling on the certification issue is often the most significant decision rendered in these class-action proceedings.”).

141 See United States v. Standard Oil Co., 332 U.S. 301, 313 (1947) (“We would not deny the . . . basic premise of the law’s capacity for growth, or that it must include the creative work of judges. Soon all law would become antiquated strait jacket and then dead letter, if that power were lacking. And the judicial hand would stiffen in mortmain if it had no part in the work of creation.”).

142 Cf. Dorf, supra note 39 (“[I]f [the Supreme Court] wants to maintain[standing] law in a sufficiently malleable condition for it to reach whatever results it likes, it gives the same freedom to lower court judges, creating a Frankenstein’s monster.”).

143 A fitting analogue of standing doctrine’s overdevelopment problem is the constitutional substantive due process jurisprudence. For example, after the Lochner-era decisions, substantive due process rights under the Fourteenth Amendment became unwieldy—creating a significant problem for the courts. See McDonald v. City of Chicago, 130 S. Ct. 3020, 3100 (2010) (Stevens, J., dissenting) (“[T]he now-repudiated Lochner line of cases attests to the dangers of judicial overconfidence in using substantive due process to advance a broad theory of the right or the good.” (emphasis added)); see also id. at 3086 (Scalia, J., concurring) (“[T]he Court’s substantive due process jurisprudence . . . illustrates the risks of granting judges broad discretion to recognize individual constitutional rights . . . .”).

144 This proposed treatment of standing doctrine is consonant with the rationale behind the Supreme Court’s “constitutional avoidance” canon. Pursuant to this maxim, district courts should avoid interpreting statutes in such a way that would raise constitutional issues. See Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly
B. Standing Scrutiny’s Error Costs

But prudence aside, if jurisdictions continue to rely on the highly confused standing doctrine to accomplish their ends, it is very likely that some courts will get the analysis wrong.\textsuperscript{145} These failures of the judicial system will come at a social cost. The most serious costs from erroneous rulings on representative standing will probably be: (i) additional false positives (i.e., “Type I errors”), and (ii) a “chilling effect” on the use of the class action device.\textsuperscript{146} More concretely, as federal courts continue to deny putative representatives standing in an effort to cut down on bogus litigation and clear dockets, a further distortion on the doctrine of class-representative standing will occur. Through stare decisis, these erroneous determinations will become precedent that, in turn, could serve as foundation for future erroneous decisions about what constitutes sufficient class-representative standing (i.e., increase in false positives). Furthermore, the prevalent use of this inconsistent doctrine and the increase of erroneously decided cases would eventually discourage would-be class representatives with good standing from seeking class certification (i.e., onset of a chilling effect).\textsuperscript{147} As standing doctrine becomes more complex, rational would-be class representatives (and counsel) would realize the difficulty in predicting their chances of passing standing scrutiny, and ultimately, they would opt out of seeking to certify a class. Thus, standing scrutiny’s error costs would result in less class suits over time. In both instances, the would-be class representatives are the primary

\textsuperscript{145} This statement should not be taken as a slight on judges. It is the author’s view that it is implausible to expect judges to consistently conduct proper standing analyses when the case law defining the analytical method is itself inconsistent. No matter how intelligent the judge, the chances of error are so high in this scenario that mistakes are inevitable.

\textsuperscript{146} The assessment of chilling effects—that is, the negative or impeded exercise of some right because of overreaching or vague statutes, administrative regulations, or judicial decisions—is nothing new. The consideration of this factor to assess the burden a government imperative has placed on an individual’s free enjoyment of a right is customary in the Court’s First Amendment jurisprudence. See Reno v. ACLU, 521 U.S. 844, 874 (1997) (noting the risk that vague statutes may chill expression protected by the First Amendment); accord McConnell v. Fed. Election Comm., 540 U.S. 93, 222–23 (2003) (finding that plaintiffs failed to show that a challenged law had “chilled political speech”).

\textsuperscript{147} Granted, one could make the same complaint that joinder scrutiny’s very rigorous test, see supra note 123 and accompanying text, could create a chilling effect insofar as it would make it harder to sue indirect defendants with some connection to the direct defendant’s wrong (e.g., a corporate tortfeasor’s subsidiary), and ultimately reduce the use of the class action device. This concern is overstated, however, largely because judges can, when necessary, use their discretion to interpret joinder’s two requisites to prevent injustice. See supra notes 117–22 and accompanying text. Even if the joinder approach did reduce class actions, it is still a clearer test than that of standing scrutiny which is comparatively more convenient for parties planning for litigation.
entities internalizing the cost of these errors because they are the ones subject to standing scrutiny’s flawed examination method.

Even so, one might argue that fewer class actions resulting from standing scrutiny’s long-run error costs pose no substantial harm given today’s voluminous class litigation and the remaining option for denied would-be class representatives to pursue claims individually. This rationale fails for two reasons. First, it fails to contemplate that an error of this kind may come at the price of losing some of the efficiency and fairness gains that class actions procure. For instance, rule makers designed the class action device with hopes of leveling the playing field between numerous small plaintiffs and powerful defendants. Strength is found in numbers. Against such defendants, individual plaintiffs typically will not possess the wealth necessary to negotiate a settlement appropriately, let alone conduct a protracted litigation. The net effect of fewer class suits will likely be powerful, sophisticated defendants (like corporations) escaping liability for their mass harms—a socially undesirable outcome. Second, such reasoning is also insensitive to the judiciary’s interest in process integrity, especially in terms of effectively controlling for erroneous decisions. Granted, judicial economy and administrative expediency are important to a well-functioning judiciary; but so too is proce-

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148 Class actions achieve “the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims.” U.S. Parole Comm’n v. Geraghty, 445 U.S. 388, 402–03 (1980); see also Deposit Guar. Nat’l Bank v. Roper, 455 U.S. 326, 339 (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.”).

149 See 7A Wright et al., supra note 62, § 1754, at 55 (noting that the purpose of the class action device was for the “elimination of repetitious litigation and possibly inconsistent adjudications . . . and the establishment of an effective procedure for those whose economic position is such that it is unrealistic to expect them to seek to vindicate their rights in separate lawsuits”); see also Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 617 (1997) (noting that in drafting the class action rule, “the Advisory Committee had dominantly in mind vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all” (citation and internal quotation marks omitted)).

150 See id.

151 See, e.g., Raygor v. Regents of Univ. of Minn., 534 U.S. 533, 549 (2002) (Stevens, J., dissenting) (“The federal [judiciary’s] interest in the fair and efficient administration of justice is both legitimate and important.”).

dural justice, compliance with the law, and institutional respect for reliance interests—hallmarks of sound jurisprudence that go to the core policies of stare decisis.\(^{153}\) Nobility of purpose notwithstanding, if the mechanism used to achieve a desired end tends to obstruct an individual’s pursuit of justice, then it is inapposite. Here, the ends do not justify the means. The interests of reducing class action abuses and conserving judicial resources should not take priority over the citizen’s right to well-reasoned adjudication and procedural justice. If courts do not correctly balance these interests—that is, if they are content to let would-be class representatives with legitimate claims “fall through the cracks” of standing scrutiny for reasons of deterrence and expediency—then this would signal a compromise to the integrity of the judicial system.

This Part has addressed the potential problems that a sustained use of standing scrutiny could create. Concededly, the predictions of error costs associated with this approach are speculative. Nevertheless, if the present trend to attempt class action litigation by anyone for any reason continues to wax, then the concerns this Note expresses now could become palpable within the decade. As a prophylactic measure against these future error costs, courts concerned about CAFA-targeted abuse or interested in mere administrative expediency should scrutinize motions to join defendants permissively via Rule 20(a)(2) in lieu of reaching representative standing. And accordingly, they should use their discretionary powers per Rules 20(b), 21, and 42 to order severance of defendants as appropriate.

**CONCLUSION**

If the McDonald’s and Wal-Mart cases serve as any indication of the future of class action litigation, federal courts will likely be faced with assorted allegations of class liability because of increased subject-matter jurisdiction under CAFA. Chances are that no small amount of these state court class actions will be attorney-driven or frivolous. For that matter, federal judges deserve commendation for seeking to “separate the wheat from the chaff” in class action litigation. Courts would do well, however, to realize that accomplishing this through exacting standing inquiries of named plaintiffs might be imprudent, distort the case law, and ultimately, deter plaintiffs from commencing valid class claims. Therefore, in light of promoting clarity in the law and supporting the policies of stare decisis, district courts should duly circumvent the class-representative standing jurisprudence.

\(^{153}\) See Payne v. Tennessee, 501 U.S. 808, 827 (1991) (“Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” (emphasis omitted)).
Furthermore, federal courts handling troublesome CAFA-type litigation ought to reconsider the role permissive joinder can play in dispensing with these class suits. In proposing this course of action, this Note does not ask courts to adopt some novel theory of jurisprudence. On the contrary, it encourages courts to reimagine the application of a well-established tool to address the burgeoning problems of class action litigation. Concededly, joinder scrutiny may not always be an option; its application depends on a case’s factual circumstances and may not always function as a “silver bullet” to quash suspected class action abuses. Nevertheless, for the reasons this Note has articulated, the benefits of using joinder scrutiny as opposed to standing scrutiny surely outweigh its costs. As such, a preference for the use of joinder scrutiny of defendants over an intricate analysis of class-representative standing is warranted.