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The Shadow Rules of Joinder

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The Federal Rules of Civil Procedure provide litigants with procedural devices for joining claims and parties. Several of these rules demand that the claims or parties share a baseline of commonality, either in the form of the same "transaction or occurrence" or a "common question of law or fact." Both phrases have proved to be notoriously tricky in application. Commentators from the academy and the judiciary have attributed these difficulties to the context-specific and discretionary nature of the rules.

This Article challenges that wisdom by suggesting that the doctrinal confusion can be attributed to deeper theoretical divisions in the judiciary, particularly with regard to the role of the ontological categories of "fact" and "law." These theoretical divisions have led lower court judges to craft shadow rules of joinder. "Redescription" is the rule by which judges utilize a perceived law–fact distinction to characterize a set of facts as falling inside or outside a definition of commonality. "Implied predominance" is the rule in which judges have taken the Rule 23(b)(3) class action standard that common questions predominate over individual issues and applied it to other rules of joinder that do not have this express requirement.

After demonstrating the instability of the shadow rules, this Article suggests that the Rules drafters move away from a commonalities approach to joinder and toward a system in which each joinder directive contains criteria that stress the unique purpose of each joinder device and that account for the different managerial challenges that judges face in granting or denying joinder under each device. Such rules would not remove the delicate context-specific determinations from judges but would result in greater transparency and consistency of joinder decisions.

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INTRODUCTION

On a cold winter's day, Jessica and her friend Katie decide to make a quick trip in Jessica's car to the supermarket. Upon arrival in the supermarket's icy parking lot, Jessica's car collides with another vehicle driven by Leo. All three sustain physical injuries, Jessica's car is totaled, and Leo's car requires substantial repairs.

Any first-year law student can quickly spot a number of claims: Jessica and Katie might sue Leo for negligence resulting in personal injury; Jessica might sue Leo for the property damage to her car; Leo and Katie might sue Jessica for negligence resulting in personal injury; and Leo might also believe that Jessica is responsible for the property damage to his car. All three might believe that the supermarket was negligent in maintaining its parking lot during the storm or that a defect in one of the automobiles led to the accident.

Today, we take it for granted that Jessica, Katie, and Leo would not have to

proceed individually, claim by claim, in separate lawsuits to seek recovery. Instead, the modern civil procedure system allows them to combine their claims using an amalgamation of joinder of parties, joinder of claims, and the assertion of counterclaims and crossclaims. The reasons for these procedural devices are well-worn: it benefits the parties and the judiciary to reap the efficiencies of litigating cases together rather than forcing each party to proceed separately, asserting one claim at a time.

This proposition seems uncontroversial enough, and a world that limits the boundaries of a lawsuit to one plaintiff, one defendant, one claim is as alien to modern American lawyers as are the rules of a foreign legal system itself. The Big Debates about joinder largely concern Big Cases, the realm of complex litigation occupied by class actions and large numbers of cases consolidated for pretrial purposes as multidistrict litigation (MDLs). Recognizing the pressures that complex litigation can place on claimants, defendants, and the judiciary, scholars and judges have struggled to answer the question: How common is common enough to gain the efficiencies of litigating large numbers of claims together before a case becomes too unwieldy?[1] The stakes of this debate are high because the decision to certify a class or to allow a group of cases to proceed as an MDL is sometimes tantamount to a decision to allow the cases to proceed at all[2] or to pave the way for a large settlement by a defendant.[3]

Somewhere between the obviousness of joining together the claims of a few persons in a car crash and the serious theoretical and empirical questions posed by class actions or large consolidated actions with thousands of claimants lies a world of joinder uncertainty. Litigants are taught to rely on the liberal rules of joinder to build their lawsuits, but these rules are not without limits. At some point, the extra claims and parties are too remote or their presence is too disruptive, and joinder fails.[4]

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1. *See, e.g.*, Edward K. Cheng, Essay, *A Practical Solution to the Reference Class Problem*, 109 COLUM. L. REV. 2081, 2095–97 (2009) (suggesting a model for using statistical proof for the reference-class problem); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 98–99 (2009). *See generally* ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 259–98 (2003) (considering the efficiency of class actions); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995) (same); Richard L. Marcus, *Confronting the Consolidation Conundrum*, 1995 BYU L. REV. 879 (assessing empirical evidence for efficiency in consolidated litigation); Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: "The Political Safeguards" of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929 (2008) (considering the efficiency of class actions).

2. *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338–39 (1980) (explaining negative-value suits where no plaintiff has an incentive to file and pursue her own lawsuit due to the small amount of expected recovery); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974) (observing that, in an action in which each plaintiff's claim averaged $70, "[n]o competent attorney would undertake [the plaintiff's] . . . action to recover so inconsequential an amount").

3. *See* Nagareda, *supra* note 1, at 99 ("[C]lass settlements can be quite significant, potentially involving dollar sums in the hundreds of millions or requiring substantial restructuring of the defendant's operations.").

4. The addition of claims or permissive counterclaims between existing parties generally does not require any inquiry into their relatedness. *See* FED. R. CIV. P. 18 (joinder of claims); FED. R. CIV. P.

Judges have broad discretion to grant permissive joinder of plaintiffs and defendants, join permissive and compulsory counterclaims, add apparently time-barred claims to an original complaint, allow intervention in a lawsuit, or consolidate cases within a district for trial or pretrial purposes. However, this is not a limitless enterprise. Rather, the current rules operate under a "commonalities approach," a loose framework of rules by which the judge can exercise discretion.[5] Under the commonalities approach, the judge must decide that the new party or claim is sufficiently related to the original action, and then may use other discretionary factors regarding efficiency and fairness to make a decision to grant or deny joinder.

The commonalities approach of the Federal Rules of Civil Procedure (FRCP), whereby relatedness is a threshold for certain rules of joinder, does not provide the optimal set of discretionary standards by which judges can decide joinder issues. As Mary Kay Kane has observed, the different policy objectives underlying the various rules of joinder "may lead to what superficially might seem to be inconsistent results in which a particular claim may be deemed part of the same transaction for one purpose, but not for another. But in fact there would be no inconsistency."[6] While I agree with Kane that the different policies behind joinder necessitate differing and case-specific results, I disagree that inconsistent interpretations and applications of the rules are merely superficial. Rather, the policies underlying joinder devices are used to create shadow rules. The shadow rules reveal a world in which some commonalities are more important than others, in which commonalities of fact and commonalities of law are given different weights, and in which the categorization of an issue as one of fact or as one of law makes all the difference to the joinder outcome of a case.

Thus, the shadow rules are not applied consistently within each rule, across the rules with similar texts, or among the circuits interpreting the rules. One result of the shadow rules is the large variability in outcomes to joinder questions. If anything, the story of the shadow rules of joinder is interesting precisely because it is so ordinary. The term shadow rules is just shorthand for categorizing the interpretive differences among courts. The utility of the project is in identifying the differences and suggesting paths toward uniformity.

Professor Subrin has argued that the FRCP tradition, steeped in the flexible and broad principles of equity, is at least partially responsible for "the disgruntlement over unwieldy cases" and has suggested that "reinject[ing] some common law limitations" into the system would provide a measure of stability and

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13(b) (permissive counterclaims). Claims proceeding under both of these rules are subject to being broken apart at some or all points in the proceeding pursuant to FED. R. CIV. P. 42(b).

5. This Article addresses the Federal Rules of Civil Procedure (FRCP) joinder rules that require relatedness in the noncomplex litigation context. *See infra* notes 14–27 and accompanying text.

6. Mary Kay Kane, *Original Sin and the Transaction in Federal Civil Procedure*, 76 TEX. L. REV. 1723, 1736 (1998).

predictability to procedural decisions.[7] This Article invites a different sort of experiment by questioning whether it is possible to generate more procedural predictability through more specific equity-style rules, rather than by common law rules that are explicitly designed to contain or constrain judges.[8]

This Article hypothesizes that the variation in outcomes and the difficulty in defining "transaction or occurrence" and "common question of law or fact" stem from the underlying structure of the joinder rules. The inadequate fit between the text of each rule and the purpose of each rule contributes to the variations in definition within and among the rules. The function of a compulsory counterclaim is quite different from a rule tolling the statute of limitations for purposes of adding an otherwise time-barred claim and is different still from the purpose of a rule permitting the joinder of parties or their intervention in a lawsuit. Furthermore, the commonalities approach invites courts to categorize issues as either law or fact—often in conflicting ways—in order to define relatedness in different and sometimes conflicting ways.

The commonalities approach represents a view that the relatedness of claims or parties conveys significant information about whether joinder is appropriate. The shadow rules, however, show judicial resistance to this idea. The relatedness of parties or claims is described and redescribed so as to make the definition of commonalities fit the managerial or policy mandates driving the ultimate joinder.

The question "how common is common enough?" has driven a good deal of the judicial and academic discourse on class actions and mass tort litigation policy.[9] This myth of the perfectly sized lawsuit continues to puzzle commentators, particularly as we seek to integrate new tools for large-scale aggregation into our analysis. In the recent quest for a standard of commonality for mass tort litigation, the question of commonalities for smaller cases has been left underexplored or is mentioned as an afterthought to mass-tort-litigation discussions.[10]

Joinder policy and the tools used to achieve it deserve their own treatment. The purpose of joining claims and parties and the role of individual joinder

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7. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 974 (1987).

8. *See id.* at 975–82.

9. *See, e.g.*, Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1471–76 (1987) (book review); Cheng, *supra* note 1, at 2085–86; Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 680–82 (1981); Robin J. Effron, Commentary, *The New Commonality: Rule 23(a)(2) After* Wal-Mart v. Dukes, 18 WESTLAW J. CLASS ACTION 16 (2011); Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567 (2004) (arguing that commonalities of legal issues are not common enough); Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5, 46–50 (1991); Alexandra D. Lahav, *The Curse of Bigness and the Optimal Size of Class Actions*, 63 VAND. L. REV. EN BANC 117, 117 (2010), http://www.vanderbiltlawreview.org/content/articles/2010/11/Lahav-The-Curse-of-Bigness-63-Vand.-L.-Rev.-En-Banc-117-20101.pdf.

10. *See* Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 811 (1989) ("Most recent proposals . . . have focused on the 'big case.'").

tools should not get lost in more prominent debates about the efficacy of mass litigation devices. Addressing the question "how common is common enough?" has not led to any clear answers. Instead, it has resulted in a smattering of seemingly inconsistent results and the suppression of some of the real policies and efficiency concerns driving joinder decisions. Visibility decreases with rules thought to impart broad discretion.[11] Therefore, the patterns and circuit splits I identify do not, upon casual inspection, appear as rules or differing interpretations but are hidden under the mantle of flexibility and broad discretion. Investigating the rules of joinder, therefore, reveals underlying tensions regarding the role of judicial discretion and the utility of broad standards in crafting procedural rules.

Eight FRCP govern the grouping of claims (Rules 13, 14, and 15), parties (Rules 19, 20, and 23), claimants (Rules 23 and 24), and actions (Rule 42), to which I will refer collectively as the "rules of joinder". Although these rules serve different purposes, they share language. The joinder FRCP can be sorted by the language used to establish commonality. Aside from the rules that do not require commonality beyond the identity of the parties already in the action,[12] the rules can be divided into three groups that are listed in the Appendix: "transaction or occurrence" rules, "common question of law or fact" rules, and "interest" rules.[13]

The first two categories use the phrases "transaction or occurrence" and "common question of law or fact" to denote that the claims or parties at hand possess a certain commonality. The "interest" rules, on the other hand, do not directly address themselves to the idea of commonality. This Article is confined to an investigation of the rules of joinder and consolidation found in the FRCP that require a finding of commonality. A brief word is in order to discuss my choices in this matter.

First, I have excluded several sources of rules for joinder of claims and parties in federal court outside of the FRCP. These joinder-oriented rules can be found in statutes[14] and in other procedural rules, such as those governing consolidation for appeal,[15] local rules for intradistrict transfer and consolidation promulgated by each judicial district,[16] or those governing the operation of

11. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982) ("[B]ecause managerial judging is less visible and usually unreviewable, it gives trial courts more authority and at the same time provides litigants with fewer procedural safeguards to protect them from abuse of that authority.").

12. *See* FED. R. CIV. P. 13(b); FED. R. CIV. P. 18.

13. *See infra* Appendix.

14. *See, e.g.*, 28 U.S.C. § 1335 (2006) (codifying interpleader); *id.* § 1367 (giving district court power to exercise supplemental jurisdiction); *id.* § 1369 (creating multiparty, multiforum jurisdiction); *id.* § 1407 (establishing multidistrict litigation).

15. *See* FED. R. APP. P. 3(b).

16. A large number of districts provide for consolidation of "related" cases. *See, e.g.*, D. CONN. LOC. R. CIV. P. 40(b)(1); D.D.C. LOC. CIV. R. 40.5(c); M.D. FLA. LOC. R. 1.04; N.D. ILL. LOC. R. 40.4; D. MASS. LOC. R. 40.1(G); D.N.J. LOC. CIV. R. 40.1(c).

specialized courts such as bankruptcy courts.[17] I have chosen to focus solely on the FRCP because I am interested not only in the interpretation of the language governing joinder, but also in the use of a core set of phrases that are used in a single procedural system that is meant to operate as a unit.

Moreover, some of the statutory rules implicate significant federal policies that are absent from FRCP considerations, such as the scope of federal subject matter jurisdiction.[18] Other rules are directed at actors other than the trial judge. For example, decisions to consolidate cases for pretrial purposes under the multidistrict litigation statute are made by the Judicial Panel on Multidistrict Litigation, a panel of seven district and appellate judges convened specially for that purpose,[19] and the rules for consolidation of cases on appeal are exercised exclusively by appellate judges.

I also have excluded FRCP joinder rules that do not have a baseline commonality requirement. Rule 19, the rule for "Required Joinder of Parties," does not ask that the claims or parties themselves share a commonality. Rather, it states that the party must "claim[] an *interest* relating to the subject of the action."[20] Similarly, the rule for intervention of right states that the party must "claim[] an interest relating to the property or transaction that is the subject of the action."[21] Rule 22, "Interpleader," is concerned with parties who might be exposed to multiple liability,[22] and only *some* aspects of Rule 14 require a commonality—the basic impleader provision is premised on a showing of derivative liability.[23]

At the most extreme end of the spectrum of commonality requirements are a few judge-made doctrines. For example, "[t]he Supreme Court has suggested that 'inherently inseparable' claims are inappropriate for [R]ule 54(b),"[24] the rule that allows district courts to enter judgment for some but not all claims in a case.

Finally, the role of class actions in this Article must be clarified. I have included interpretations of Rule 23(a)(2)'s "common question of law or fact" in the analysis to the extent that it has had an effect on the meaning of that phrase

17. *See, e.g.*, FED. R. BANKR. P. 7013 (counterclaims); FED. R. BANKR. P. 7018 (joinder of claims and remedies); FED. R. BANKR. P. 7020 (permissive joinder of parties); FED. R. BANKR. P. 7024 (intervention); FED. R. BANKR. P. 7042 (consolidation of adversary proceedings).

18. *See* 28 U.S.C. §§ 1367, 1369 (2006).

19. *See id.* § 1407(a)–(d).

20. FED. R. CIV. P. 19(a)(1)(B) (emphasis added).

21. FED. R. CIV. P. 24(a)(2).

22. FED. R. CIV. P. 22(a).

23. *Compare* FED. R. CIV. P. 14(a)(1) (allowing a defendant to implead another defendant for derivative liability), *with* FED. R. CIV. P. 14(a)(2)(D) (allowing a third-party defendant to "also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff"), *and* FED. R. CIV. P. 14(a)(3) (allowing a plaintiff to assert claims "arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff").

24. Ginett v. Computer Task Grp., Inc., 962 F.2d 1085, 1095 (2d Cir. 1992) (quoting Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 436 (1956)).

in other rules.[25] With the Supreme Court's *Wal-Mart Stores, Inc. v. Dukes*[26] decision, the threshold commonality requirement for class actions has jumped to the forefront of thinking and debate on that subject, and will surely influence interpretations of the phrase going forward.

This Article thus covers the extent to which the FRCP, "the primary source of discretion to fashion case-specific procedure,"[27] address commonality as a requirement for joinder of parties or claims.

This Article proceeds in four parts. Part I sets the stage for the shadow rules by exploring the traditional rationales for joinder doctrine and the methods by which the FRCP should be interpreted.

Part II introduces the first of the shadow rules operating underneath the stated rules. "Redescription" is the shadow rule that attempts to answer the question of which commonalities matter—commonalities of fact or commonalities of law. In redescription, courts redescribe factual issues as issues of law in order to either strengthen or weaken a finding of joinder, depending on whether the redescribed issue reinforces the relatedness of claims or drives a wedge of uncommonality into the case.

Part III introduces the shadow rule of "implied predominance"—the rule that attempts to answer the question of how common is common enough. Implied predominance, when used, states that the common issues must outweigh uncommon issues. Although this rule is unsupported by the text, its use demonstrates how courts try to exercise managerial control over the scope of litigation by expanding and narrowing the definition of commonalities. Implied predominance also depends on a use of the law–fact distinction for its operation.

Part IV contemplates the broader implications of the shadow rules. It contemplates what it would mean to abandon the commonalities approach and replace it with a different approach to joinder, one that is more sensitive to the purposes of each joinder device and the challenges that judges face in applying these rules.

I. JOINDER IN THE FEDERAL COURTS: CURRENT THEORY AND DOCTRINE

This Part introduces the world of litigation that encompasses cases beyond the model of one plaintiff, one defendant, and one claim. Section I.A reviews the traditional typology of aggregation devices and summarizes the policies behind joinder that led the Rules drafters and courts to adopt the specific joinder devices in the FRCP. Section I.B examines the methods of interpreting the FRCP, particularly in light of the fact that the FRCP are not drafted or directly voted upon by Congress.

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25. *See infra* section III.B.

26. 131 S. Ct. 2541 (2011).

27. Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1967 (2007).

A. WHY JOINDER? THE TUG OF WAR OF BROAD POLICIES

Taken together, the devices that allow a case to expand beyond the one plaintiff, one defendant, one claim structure to a case with multiple parties and multiple claims are known as the rules of joinder, and they are found primarily in the Federal Rules of Civil Procedure.[28] Rules that group different cases together for pretrial or trial purposes are rules governing consolidation, and Rule 23 class actions are representative actions.[29] In this Article, I will refer to all of these aggregation tools generally as "joinder devices."[30]

The joinder rules reflect policy goals from two broad perspectives, embodied in the FRCP as a whole.[31] One perspective is litigant and third-party centered, encompassing the policies of fairness and avoiding duplicative litigation. These policies assure fairness to defendants by providing notice and finality and assure fairness to plaintiffs by ensuring that they are not foreclosed by formalities from bringing meritorious claims. The other perspective is that of the judicial system in which joinder empowers judges with discretionary authority to manage pending litigation. The push and pull of these two competing, although not mutually exclusive, perspectives shapes the contours of joinder.[32]

The FRCP joinder rules were derived from existing state codes and federal

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28. A few rules are found in statutes such as 28 U.S.C. § 1335 (2006) (statutory interpleader), § 1369 (Multiparty, Multiforum Trial Jurisdiction Act (MMTJA)), and § 1407 (authorization for pretrial consolidation by the judicial panel on multidistrict litigation).

29. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.31 n.1061 (2004); Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 VAND. L. REV. 1687, 1694–95 (2004) ("[C]lass action litigation . . . is *representational* litigation. This basic understanding distinguishes class litigation from ordinary bipolar litigation or even simple aggregated litigation such as consolidated cases."); Charles Silver, *Comparing Class Actions and Consolidations*, 10 REV. LITIG. 495, 497 (1991) ("Because a consolidation is a set of independent lawsuits, it cannot properly be characterized as a representational suit in which a lead party stands on behalf of everyone else.").

30. There is disagreement as to the utility and boundaries of the additional categories of consolidated actions and representative actions. *See, e.g.*, Diane Wood Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 SUP. CT. REV. 459, 459–60 (delineating the "joinder model" and "representational model" of conceptualizing class actions); Alexandra D. Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939, 1941 (2011) ("The two dominant schools of thought on the structure of the class action consider it to be either an advanced joinder device, merely aggregating individual cases, or a transformative procedural rule that creates an entity out of a dispersed population of claimants."); *see also* Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1035–36 (2005) (arguing that a representative action should not eliminate the conceptual prerequisite that each claimant meet individual burdens).

31. *See* Michael S. Pardo, *Pleadings, Proof, and Judgment: A Unified Theory of Civil Litigation*, 51 B.C. L. REV. 1451, 1468–69 (2010) ("The procedural values that underlie civil litigation include: factual accuracy, efficiency (including costs to parties, courts, and society generally), participation, respect for substantive rights, notice, predictability, fairness (including notions of equality), and political legitimacy.").

32. *See* Edward Brunet, *The Triumph of Efficiency and Discretion over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 276 (1991) ("[T]he trade-off between efficiency and fairness dominates the policy questions troubling complex litigation.").

rules of equity,[33] as well as accepted modes of practice in both federal and state courts,[34] and drafters cemented a number of emerging policies, including "settl[ing] as many matters as possible in one lawsuit."[35] The enthusiasm for joinder reflected a growing acknowledgement that permitting—if not requiring[36]—parties to try their cases claim by claim and litigant by litigant resulted in rigid formalism and redundant efforts by different tribunals and the litigants before them.[37]

The Supreme Court frequently peppers its opinions with projoinder statements, such as "joinder of claims, parties and remedies is strongly encouraged,"[38] and refers to the "liberal joinder provisions of the Federal Rules."[39] This broad and permissive joinder policy is thought to provide benefits to four different groups of actors within the judicial system—tribunals, plaintiffs, defendants, and third parties—each of whom benefit from avoiding piecemeal litiga-

33. *See* Subrin, *supra* note 7, at 922 (describing how the FRCP developed from the procedural rules in equity).

34. For a thorough description of the rulemaking process, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1069–95 (1982); Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1041–73 (1993); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103–19 (2002). Some states had moved toward modern joinder procedures, and the FRCP drafters followed this example. *See, e.g.*, 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1581 & n.11 (3d ed. 2010).

35. Charles Alan Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 MINN. L. REV. 580, 580–81 (1952) (summarizing the objectives of the Minnesota Rules of Civil Procedure, which mirror the FRCP).

36. *See* RICHARD D. FREER, CIVIL PROCEDURE § 12.1, at 609 (2d ed. 2009) ("Historically, joinder rules were quite restrictive. At common law, for example, the writ system . . . permitted the plaintiff to assert only a single, narrowly defined claim. The concept of a case was, correspondingly, quite narrow."); WRIGHT ET AL., *supra* note 34, § 1581 (outlining history of joinder of claims); *see also* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 29–39 (1989) (describing the older approach to multiplicity of lawsuits under the Field Code); Wright, *supra* note 35, at 580, 582–83 (describing the old rules for claim splitting under Minnesota law).

37. *See* John C. McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707, 707 (1976) ("The resources devoted to any lawsuit . . . are scarce. Spending them in repeated examination of the issues raised by a single transaction is a waste."); *see also* Freer, *supra* note 10, at 813 ("Packaging eliminates duplicative litigation . . . ."); Resnik, *supra* note 9, at 6–7 (describing the shift from individualized cases to aggregation).

38. United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966).

39. Henderson v. United States, 517 U.S. 654, 676 n.1 (1996) (Scalia, J., concurring) (discussing United States v. Sherwood, 312 U.S. 584 (1941)); *see also* Chauffeurs, Local No. 391 v. Terry, 494 U.S. 558, 589 (1990) (Kennedy, J., dissenting) (referring to "the spirit of the Federal Rules of Civil Procedure, which allow liberal joinder," in the context of merging legal and equitable claims); Snyder v. Harris, 394 U.S. 332, 340 (1969) (referring to Rule 20 as a "liberal joinder" provision); Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 432 (1956) ("With the Federal Rules of Civil Procedure, there came an increased opportunity for the liberal joinder of claims in multiple claims actions."); Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 10 n.3 (1951) ("Rules 18, 20, and 23 of the Federal Rules of Civil Procedure permit the most liberal joinder of parties, claims, and remedies in civil actions." (quoting 28 U.S.C. § 1441 (reviser's note))).

tion because of the duplicative efforts that such cases would involve.[40]

In addition to preventing duplicative litigation, the rules of joinder work alongside the rules of res judicata[41] to assure a degree of consistency in judgments. This avoids the discomfort associated with the fact that "different triers of law and fact, responding perhaps to slightly different evidence or presentation at different times or places, might well reach different judgments on the same transaction."[42]

Set against this backdrop of openness toward broad joinder is a different doctrine—the policy of broad judicial discretion and case management. Broad judicial discretion is just as compelling and just as rooted in the drafters' intentions and evolving practices of the court.[43] The application of each joinder rule is subject to a judicial determination that joining the parties or claims at issue would either further or hinder the district judge's ability to manage the litigation.[44]

Thus, although Supreme Court and appellate decisions encourage district judges to use their discretion to further the broad and liberal joinder policies embodied in the FRCP, the "deep[] [commitment of the federal judiciary] to the case-management model"[45] carries with it the notion that such policies might take a backseat to the managerial demands of a given lawsuit.[46] Judicial discretion, particularly as a tool of case management, has a long history of judicial application and academic debate because "[f]or as long as we have had a culture of judicial case management, we have also had critics of that culture."[47]

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40. *See* Freer, *supra* note 10, at 837–40 (promoting avoidance of duplicative litigation as the primary reason for granting joinder); Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347, 1348–49 (2000) (describing how duplicative litigation gives rise to "procedural burdens and inefficiencies").

41. Although the FRCP themselves do not contain rules for claim or issue preclusion, these doctrines are often the consequence of failing to utilize one of the joinder tools available for claims and parties.

42. McCoid, *supra* note 37.

43. *See* Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1578 (2003) ("Overall, the rules were infused with latitude for judges . . . ."); Subrin, *supra* note 7, at 925 ("The norms and attitudes borrowed from equity define our current legal landscape . . . [including] enlarged judicial discretion . . . .").

44. *See* Bone, *supra* note 36, at 100 (noting that the Rules drafters thought that questions of judicial management are "ideally suited" to the exercise of broad judicial discretion); Douglas D. McFarland, *In Search of the Transaction or Occurrence: Counterclaims*, 40 CREIGHTON L. REV. 699, 703 (2007) ("[J]oinder objections . . . are matters for later exercise of broad trial court discretion over trial convenience."). Even compulsory joinder rules may be tempered by a judge's decision to sever claims or parties for trial, FED R. CIV. P. 42(b), or to dismiss an entire case because of an inability to join a necessary party. FED. R. CIV. P. 19(b).

45. Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 673 (2010).

46. The clash of such broad policies is not limited to interpretation of joinder rules. As Professor Struve has observed, "[t]he statutes and rules that suggest the broad purposes of the Rules are unlikely to resolve most interpretive issues." Struve, *supra* note 34, at 1141 n.177.

47. Gensler, *supra* note 45, at 690.

Hovering above and between these two policy goals looms the overarching policy goal of "secur[ing] the just, speedy, and inexpensive determination of every action."[48] The resource-consuming efforts of litigating a dispute claim by claim and party by party led the Rules drafters to craft rules allowing parties to avoid such repetitious litigation. On the other hand, the very real possibility that a case with a multitude of claims and parties can become unwieldy and inefficient at any number of points during litigation demands that the Rules permit judges, often at the suggestion of the parties, to mold the architecture of a lawsuit to avoid these problems.[49] The vague demands of judicial efficiency are marshaled both in the service of underlying values and as a way to justify the grant or denial of a joinder request.[50]

B. INTERPRETING THE RULES OF JOINDER

The two phrases in the FRCP, "transaction or occurrence" and "common question of law or fact," lend themselves to a wide variety of interpretations.[51] The interpretation of any set of legislative rules is always a controversial enterprise, with different canons and ideological commitments jostling for prominence. The task of interpreting the FRCP is further complicated by the fact that they are not statutes passed by Congress and presented to the President. Instead, they are drafted by members of the bar and judiciary, are approved by the Supreme Court, and become law in the absence of a congressional veto.[52] Absent congressional drafting, or even traditional agency drafting of administrative rules, many of the traditional tools of statutory interpretation do not apply to the FRCP. Few commentators have addressed how the FRCP should be treated as an interpretive matter.[53]

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48. *See* FED. R. CIV. P. 1; *see also* Brunet, *supra* note 32, at 283–85 (discussing the value of fairness in complex litigation). *See generally* Patrick Johnston, *Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1*, 75 B.U. L. REV. 1325 (1995) (tracing the history and varying interpretations of Rule 1).

49. Professor Freer has advocated active judicial case management and discretion to package and manage cases to avoid inefficiencies in litigation. Freer, *supra* note 10, at 831–33 (criticizing the current joinder rules because "the structure of the lawsuit is left entirely in the parties' hands" and suggesting that "court[s] should be empowered to compel such joinder to avoid duplicative litigation"). Other scholars, however, have questioned the utility of turning to a growing set of discretionary management tools as the default answer to case-management challenges. *See* Gensler, *supra* note 45, at 672 ("Does judicial case management really work? Does it actually reduce expense and delay? Do judges have the right tools at their disposal? . . . Are judges sufficiently and properly using the tools and resources they do have?").

50. *See* Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 85 (1997) ("The buzz words of the Federal Rules movement—uniformity, simplicity, and flexibility—at one level describe drafting attributes. They describe means, rather than ends, for a procedural system.").

51. *See* Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1487 (2005) ("[T]he courts themselves have taken mixed and, in some cases, contradictory approaches to Rule 20 . . . .").

52. *See* sources cited *supra* note 34.

53. *See* Struve, *supra* note 34, at 1100–01 ("[F]ew scholars have addressed the interpretation of . . . the Federal Rules of Civil Procedure.").

Although the FRCP on joinder share common text in either the "transaction or occurrence" or "common question" language, it is not obvious that they should be subject to a uniform interpretation. There are slight variations among each of the rules that use the "transaction or occurrence" language. Under Rule 13(a), a compulsory counterclaim is one that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim."[54] Rule 15(c) adds the word "conduct" to "transaction or occurrence" for claims that relate back to the original complaint,[55] and Rule 20 permits joinder of parties if the party asserts a claim that "aris[es] out of the same transaction, occurrence, or series of transactions or occurrences" as the existing claims.[56]

Despite these differences, the decision to employ the same core words, "transaction or occurrence," to denote when claims or parties share a requisite commonality hardly seems accidental. Recognizing the relationship between rules sharing the same language, the Supreme Court has remarked that "Rule 14 extends [Rule 13(a)'s] compulsion to third-party defendants."[57]

The Supreme Court has approved the "'normal rule of statutory construction' that 'identical words used in different parts of the same act are intended to have the same meaning.'"[58] The FRCP, of course, are not a statute but a set of judicially promulgated rules that become law in the absence of a congressional veto.[59] Nevertheless, it makes sense to impose internal consistency on the FRCP as a complete code.[60] Uniformity was itself a goal of the single procedural system embodied in the FRCP.[61] The consistent interpretation of identical words within the FRCP theoretically would promote uniformity not only across the rules, but also across districts and courts as they interpret these rules.

Some scholars have criticized attempts to impose a uniform meaning on the

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54. FED. R. CIV. P. 13(a)(1)(A).

55. FED. R. CIV. P. 15(c)(1)(B).

56. FED. R. CIV. P. 20(a)(1)(A) (permissive joinder of plaintiffs); FED. R. CIV. P. 20(a)(2)(A) (permissive joinder of defendants).

57. Ashe v. Swenson, 397 U.S. 436, 455 (1970) (Brennan, J., concurring).

58. Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995) (quoting Dep't of Revenue v. ACF Indus., Inc., 510 U.S. 332, 342 (1994)).

59. *See* sources cited *supra* note 34; *see also* Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: The Lessons of Administrative Law*, 59 UCLA L. REV. (forthcoming June 2012) (manuscript at 3–4), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1897864 (arguing that the Court is like an administrative agency and should "favor[] rulemaking over adjudication on civil procedure issues").

60. Some courts have, however, resisted interpreting identical words alike when the laws are not part of a single statutory system, even if they are each addressed to procedure. *See* Firstar Bank, N.A. v. Faul, 253 F.3d 982, 989–91 (7th Cir. 2001) (refusing to give the word "located" an identical meaning when found in a banking statute and a procedural statute).

61. *See* Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 314–17 (2001) (describing uniformity of the Federal Rules and criticism of recent examples of local rule disparities); Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1447 (1994) ("For more than half a century, the normative vision animating federal civil procedure has been national uniformity and regularity in procedural rules.").

phrase "transaction or occurrence" as it is used across the FRCP. Mary Kay Kane prominently quoted Professor Walter Wheeler Cook in resisting the idea that transaction would have a unified meaning in the FRCP, arguing that "[i]t has all the tenacity of original sin and must constantly be guarded against."[62] As the Third Circuit explained, "the phrase . . . is given meaning by the purpose of the rule which it was designed to implement."[63]

The vagueness of the term could be an indication that the phrase is meant to have different meanings in different rules. The charge that the term *transaction* is "so vague as to defy definition" is a long-standing complaint.[64] The result of the vagueness of this term, however, has not been to foster a rule-specific interpretation of the phrase that furthers the individual purposes of each rule.[65] Instead, it has been to produce a multitude of meanings *within* each rule as well as across the rules.

The multiple uses and interpretations of the phrase "common question of law or fact" have not produced the same scholarly reaction as the phrase "transaction or occurrence." However, courts have given multiple and inconsistent interpretations to the "common question" phrase within and across these rules, which gives rise to the same interpretive question of whether identical words within the FRCP should be given the same meaning.

The purpose of this Article is not to give a definitive answer to these questions of interpretation, but to explore the consequences of using identical phrases for rules with different purposes and within a system that places a high value on judicial discretion to manage litigation.

Two factors conspire to muddle the definitions of "transaction or occurrence" and "common question of law or fact": The first factor is the broadness of the terms. The second factor is the inadequate fit between the purpose of the rules and the terminology. This is particularly so because "courts most often do not articulate how the policies underlying a particular procedure or rule influence or shape their definitions of what constitutes a transaction."[66]

In the absence of a consistent definition of commonality tied either to "transaction or occurrence" or "common question of law or fact," courts have developed shadow rules that are an attempt to grapple with the competing concerns of meeting a commonality standard while exercising managerial con-

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62. Kane, *supra* note 6, at 1723 (quoting Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 337 (1933)). *But see* McFarland, *supra* note 44, at 708–28 (criticizing the inconsistent interpretations of "transaction or occurrence" in Rule 13(a) and suggesting inconsistencies in other rules as well).

63. Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 634 (3d Cir. 1961) (defining "logical relationship" for purposes of "transaction or occurrence" under Rule 13(a)).

64. *See* Wright, *supra* note 35, at 582–83 (summarizing judicial difficulties defining term); *see also* Michael D. Conway, Comment, *Narrowing the Scope of Rule 13(a)*, 60 U. CHI. L. REV. 141, 149 (1993) ("In interpreting Rule 13(a), courts have struggled to determine when claims arise from the same 'transaction or occurrence.'").

65. *See* Kane, *supra* note 6.

66. *Id.* at 1724.

trol over the shape of litigation.

My argument is not that courts have been deliberately derelict in providing a clear interpretation of these phrases, nor that they, for the most part, have gotten it *wrong*. Instead, I believe that courts are unlikely to settle on a definition for either of these phrases when the ideal level of commonality is vague and the purposes behind each rule of joinder are diverse. Just as lawyers have developed "informal"[67] or "parallel"[68] systems of aggregation and case management for the FRCP, the shadow rules have been created by judges to impose a level of formality and rigor on otherwise broad rules.

The FRCP themselves were designed to give judges the flexibility to shape litigation according to the needs of the parties and the court on a case-by-case basis. The shadow rules could, in theory, exist side by side with the text of each rule as rules of thumb that would guide judges in their discretion.[69] The rules that have actually developed mirror the tension in the structure of the Rules themselves: a set of rules that are meant to be highly flexible and context specific, yet simultaneously demand an elusive base line of commonality.

Parts II and III outline how courts have developed shadow rules to grapple with the two central questions of the commonalities approach and how these rules lead to the wide range of outcomes that are traditionally ascribed to "broad judicial discretion": which commonalities matter and how much should commonalities matter? These shadow rules do not provide a comprehensive framework by which every single joinder decision can be explained. They do, however, account for a substantial part of the doctrinal variance, and their existence shows the weakness of the commonalities approach to joinder.

II. THE SHADOW RULE OF REDESCRIPTION: (MIS)USING THE LAW–FACT DISTINCTION

The first shadow rule, redescription, involves a determination of whether the rule at hand encompasses factual commonalities only, or if fact and law are included. Because the "common question" rules refer directly to fact and law, this step involves the "transaction or occurrence" rules only. If the definition of "transaction or occurrence" is not restricted to fact only and commonalities of law are a permissible part of the analysis, then the next questions concern the relative weight of the presence of a common or uncommon issue of law.

67. *See* Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 383–86 (2000).

68. *See* Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981, 2001–14 (2004).

69. *See* Subrin, *supra* note 50, at 90 ("The federal rule focus on 'transaction and occurrence,' although it, too, represents artificial boundaries, accords with the modern understanding of life and disputes.").

The phenomenon of redescription depends on the ability of courts to manipulate the law–fact distinction. In short, redescription is a process by which courts connect the relatedness of claims or parties to whether the claims or allegations are questions of law or questions of fact, and then describe or redescribe a party's claims or allegations to fall into one category or the other.

The categories of fact and law are pervasive in American civil procedure yet notoriously difficult to define. Labeling an issue as factual or legal has a number of well-documented consequences. An issue of fact is submitted to a jury, while a judge retains the authority to decide issues of law on a motion for summary judgment[70] or a directed verdict.[71] An issue of law is reviewed de novo by an appellate court whereas an issue of fact is reviewed under a far more deferential standard such as abuse of discretion or clear error.[72] These conclusions of fact and law and the ensuing consequences for the identity of the decision maker and the standard by which such decisions are made pervade all areas of procedure. The law–fact distinction stretches beyond allocating decision-making authority for the merits of a case to decisions about pleading,[73] jurisdiction,[74] admissibility of evidence,[75] and class certification[76] to name just a few.[77] As we shall see,

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70. FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."); *see* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) ("[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) ("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'").

71. FED. R. CIV. P. 50(a).

72. *See* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 435–36 (2001) (explaining that questions of law are reviewed de novo and questions of fact are reviewed for abuse of discretion or as "clearly erroneous" (quoting United States v. Bajakajian, 524 U.S. 321, 336 n.10 (1998)) (internal quotation marks omitted)); John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 545 (2007) (suggesting that courts of appeals are better suited and legally obligated to correct errors of law, rather than erroneous or misguided findings of fact).

73. *See, e.g.*, Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 830 (2010); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1308 (2010).

74. *See* Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 1000–04 (2006) (discussing standards of proof for issues of fact and issues of law in personal jurisdiction).

75. *See* Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 GEO. L.J. 827, 882 (2008) ("The division of tasks between judge and jury, the inconsistent treatment of hearsay and its many exceptions, and the debate over the distinction between questions of fact and those of law illustrate the tension in evidence law between trust and distrust of the jury." (footnotes omitted)).

76. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978) ("[C]lass determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" (quoting Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558 (1963))).

77. For descriptions of other examples, see Ronald J. Allen & Michael S. Pardo, Essay, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1778–89 (2003) (surveying the law–fact distinction in several areas); Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 262–64 (2006) (discussing the law–fact distinction in decisions of qualified immunity); Jesse S. Keene, *Fact or Fiction: Reexamining the Written Description Doctrine's Classification as a Question of Fact*, 18 FED. CIR. B.J. 25, 49–51 (2008) (exploring the law–fact distinction in the written-description doctrine in

joinder decisions, too, are subject to assumptions and conclusions based on the law–fact distinction.

The question of whether law and fact exist as separate categories has produced a long-standing debate in the academy and the judiciary. While some maintain that law is a category distinct from fact,[78] others have rejected the idea "that there is a qualitative or ontological distinction between them."[79] This Article is not meant to reinvent the law–fact debate or to reproduce its arguments in full because this debate has been ably tackled by other scholars, most notably in a recent article by Professors Allen and Pardo.[80]

Although my sympathies lie with Allen and Pardo's conclusion that the law–fact distinction "stems from a false assumption (namely that legal and factual issues constitute discrete ontological categories)" and that "most legal issues are factual,"[81] I do not mean to resolve the debate here.[82] From a practical standpoint, the law–fact distinction's importance to the rules of joinder arises because judges rely on these categories and the distinction carries certain consequences for joinder decisions.[83] In other words, even if the categories of law and fact do not exist or are difficult to delineate, judges behave as if these categories exist,[84] and it is the reliance on these categories as perceived by

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patent law); Rebecca Sharpless, *Fitting the Formula for Judicial Review: The Law-Fact Distinction in Immigration Law*, 5 INTERCULTURAL HUM. RTS. L. REV. 57 (2010) (exploring the law–fact distinction in immigration law doctrines).

78. *See* Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 103 (2005) ("While others have recently argued that there is no analytical distinction between the categories of law and fact, I maintain that there are several distinct categories of judicial issues . . . ." (footnote omitted)); Aaron G. Leiderman, Note, *Preserving the Constitution's Most Important Human Right: Judicial Review of Mixed Questions Under the REAL ID Act*, 106 COLUM. L. REV. 1367, 1382–83 (2006) (creating different definitions for law and fact); *see also* Allen & Pardo, *supra* note 77, at 1770 (characterizing their opponents as holding "the belief that the two terms, 'law' and 'fact,' specify different kinds of entities").

79. *See* Allen & Pardo, *supra* note 77, at 1770; *see also* Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 NW. U. L. REV. 916, 925 (1992) ("[T]he allocation of law determination to the courts and fact-finding to the jury . . . is impossible to effectuate in pure form, largely because of limitations on the power of articulation."); Kenneth Vinson, *Disentangling Law and Fact: Echoes of Proximate Cause in the Workers' Compensation Coverage Formula*, 47 ALA. L. REV. 723, 723 (1996) ("Confusion is the natural result of a system in which the judiciary encourages the idea that the legal system's distinction between law and fact is meaningful.").

80. Allen & Pardo, *supra* note 77.

81. *Id.* at 1790.

82. *Cf.* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 233 (1985) ("The incoherence argument seems greatly overdrawn once it is recognized that any distinction posited between 'law' and 'fact' does not imply the existence of static, polar opposites." (footnote omitted)).

83. *See* Sharpless, *supra* note 77, at 60 ("I assume that the law-fact distinction does exist as a concept in the law, regardless of its ontological or epistemological status. We therefore must reckon with it.").

84. *See* Paul F. Kirgis, *The Right to a Jury Decision on Sentencing Facts After* Booker*: What the Seventh Amendment Can Teach the Sixth*, 39 GA. L. REV. 895, 949 (2005) ("Efforts to distinguish laws from facts at this level—in relation to questions about the nature of law—will always fail. That does not mean, however, that it is impossible to distinguish 'questions of law' from 'questions of fact' as those terms are and traditionally have been used by judges in practice."); Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1209–10 (2011) (agreeing with Allen and Pardo's conclusions on the law–fact

judges that matters for the manner in which the two concepts are used in joinder decisions.[85]

A good deal of the law–fact debate centers on the use (or misuse) of the law–fact distinction to allocate decision-making authority—that is, whether it is between judge and jury, or between trial and appellate courts.[86] In the context of the rules of joinder, however, the law–fact distinction does not allocate *authority* among different types of judicial actors, but instead is used to allocate the *workload* of deciding cases among the same types of judicial actors—that is, trial judges.[87] Thus, the law–fact distinction as applied to the rules of joinder is unmoored from its normal function in translating the judiciary's opinion about the institutional competence of various actors. Hidden as it is from this better-known realm of authority allocation, the law–fact distinction provides a set of background conditions or assumptions upon which some aspects of joinder analysis are based.

A. REDESCRIPTION EXAMPLE # 1: RULE 13(A) COMPULSORY COUNTERCLAIMS AND THE STORY OF THE LOUSY LENDER

Upon first inspection, the phrase "transaction or occurrence"[88] does not implicate the law–fact distinction, particularly because the transaction or occurrence rules do not use the words *common*, *fact*, or *law*. In applying these rules, however, courts employ interpretations that are either confined to facts alone or refer to legal issues as well. These two definitions provide the first opportunity for divergent outcomes in joinder cases,[89] followed by a second layer of divergence when courts apply the specifics of a case to the chosen standard and categorize those facts as factual or legal issues. The following chart illustrates the points of divergence and possible outcomes:

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distinction but making an argument that "accept[s] as given that the American legal system distinguishes factual from legal propositions [and] treats them differently for many purposes").

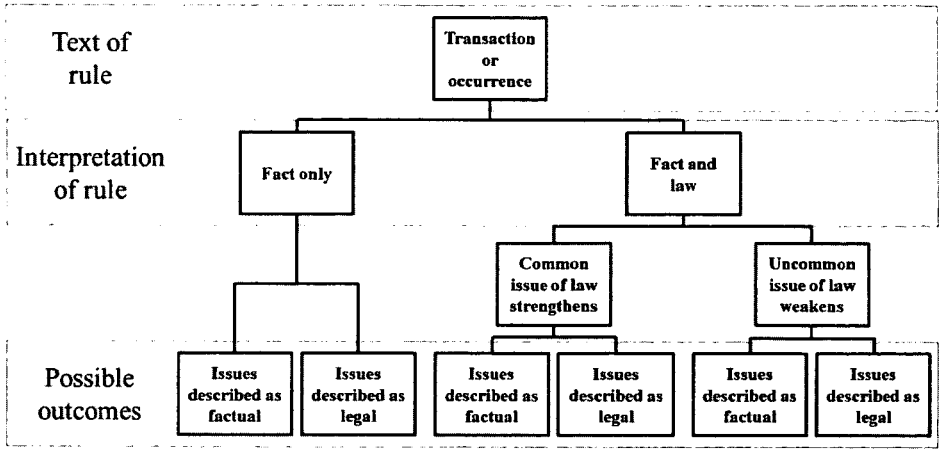
85. The tendency of judges to create shadow or parallel rules that hinge on separate categories of fact and law stands in interesting contrast to Subrin and Main's thesis that lawyers have created their own parallel world of procedure that actually utilizes an "integration of law and fact." Subrin & Main, *supra* note 68, at 1998.

86. *See* Miller v. Fenton, 474 U.S. 104, 113–14 (1985) (citing Monaghan, *supra* note 82, at 237) ("[T]he fact/law distinction at times has turned on a determination that . . . one judicial actor is better positioned than another to decide the issue in question."); Allen & Pardo, *supra* note 77, at 1790 (explaining that the law–fact distinction is in the service of a "pragmatic allocative decision").

87. One exception is when the principles of commonality are used for the purposes of supplemental jurisdiction as a way of allocating work between federal and state courts. Even here, however, the allocation is between trial judges and not between other types of judicial actors such as juries or appellate judges.

88. FED. R. CIV. P. 13(a). Variants include FED. R. CIV. P. 20 ("series of transactions or occurrences") and FED. R. CIV. P. 15(c) ("conduct, transaction, or occurrence").

89. *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926), the case that interpreted the term "transaction" and announced the "logical relationship" test, *id.* at 609–10, has been used to support both interpretations. *See* Jones v. Ford Motor Credit Co., 358 F.3d 205, 209 (2d Cir. 2004) (looking at fact only); Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 634 (3d Cir. 1961) (looking at both fact and law).



The possible outcomes displayed on the chart do not explain the entire world of variance in joinder decisions. Many alternative explanations are not mutually exclusive with this taxonomy. The role of considering possible outcomes based on the law–fact distinction, then, is to show how distinctions that are not necessarily related to the merits of joinder can be used to mask deeper policy differences about how cases should be litigated, or to show that the variety of outcomes is due to the vagaries of judicial discretion.

One can follow these points of divergence through the following claim–counterclaim fact pattern that arises from loan transactions:

Party *A* lends money to Party *B*, and Party *B* defaults on the debt. Party *A* now sues Party *B* for failure to repay the loan, and Party *B* asserts a counterclaim seeking damages, claiming that Party *A* violated federal lending statutes.[90] In some cases, the parties are reversed because *B* sues *A* for lending violations and *A* counterclaims for nonpayment of the debt.[91] In either case, the counterclaim is permissible because Rule 13(b) does not require transactional relatedness.[92] The problem arises when the defendant does not assert its claim as a counterclaim in the first action, but files a separate lawsuit at a later time. At this point, the court hearing the second lawsuit must decide if that action is claim precluded because the plaintiff should have brought her claim as a compulsory counterclaim in the first suit.[93]

90. *See, e.g.*, R.G. Fin. Corp. v. Vergara-Nuñez, 446 F.3d 178, 180–82 (1st Cir. 2006). The federal lending statutes include the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601–1667f (2006 & Supp. III 2010), and the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691–1691f (2006).

91. *See, e.g.*, *Jones*, 358 F.3d at 207.

92. *See* FED. R. CIV. P. 13(b) ("A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.").

93. A court might also use a compulsory counterclaim to retain supplemental jurisdiction over the state causes of action if federal causes of action are dismissed and federal jurisdictional requirements are still met. *See* Whigham v. Beneficial Fin. Co. of Fayetteville, 599 F.2d 1322, 1323–24 (4th Cir. 1979).

In order to decide if the counterclaim was compulsory, the judge must determine whether the two claims arise out of the same "transaction or occurrence." By funneling the definition of "transaction or occurrence" into a "fact-only" or "law or fact" definition and then characterizing issues within the case as fact or law, the outcome possibilities multiply in the following fashion:

First, courts must interpret "transaction or occurrence." Some courts interpreting this phrase define it in terms of commonalities of fact. Rule 13(a), as interpreted via the "logical relationship" test for "transaction or occurrence," focuses on "the essential *facts* of the claims."[94] This interpretation extends beyond Rule 13(a) into other "transaction or occurrence" rules.[95] The emphasis on fact excludes reference to "similarit[ies] between the legal theories" because "Rule [13(a)] itself refers to similarities among the transactions or occurrences [that] make up the *factual bases* of the lawsuits."[96] According to courts following this formulation, "the *factual* underpinnings of the complaint are more properly the focus of Rule 13(a)."[97]

Other courts have announced a standard for "transaction or occurrence" in which shared legal issues are a permissible commonality for a court to consider. These formulations interpret the "transaction or occurrence" language to mean that a court should inquire, among other things, as to "whether the issues of fact and *law* raised by the claim and counterclaim are largely the same,"[98] or determine whether the claims involve "the same factual and *legal* issues."[99]

If the standard does allow the judge to consider both commonalities of fact and law, then the court will move on to a second interpretive step wherein it determines the weight given to each.[100] If, however, the standard only encom-

94. *Jones*, 358 F.3d at 209 (emphasis added) (quoting Critical-Vac Filtration Corp. v. Minuteman Int'l, Inc., 233 F.3d 697, 699 (2d Cir. 2000)); *see also* Pochiro v. Prudential Ins. Co. of Am., 827 F.2d 1246, 1249, 1251 (9th Cir. 1987) (defining transaction or occurrence for Rule 13(a) as "'whether the *essential facts* of the various claims are . . . logically connected'" and whether "the *facts* necessary to prove the [claim and counterclaim] substantially overlap" (emphasis added) (quoting Harris v. Steinem, 571 F.2d 119, 123 (2d Cir. 1978))); Albright v. Gates, 362 F.2d 928, 929 (9th Cir. 1966) (stating that transaction or occurrence involves overlapping "bundles of facts").

95. A transaction or occurrence for purposes of Rule 15(c) means that the new claims must arise out of the "general *fact* situation set forth in the original pleading." Rosenberg v. Martin, 478 F.2d 520, 526 (2d Cir. 1973) (emphasis added).

96. Grumman Sys. Support Corp. v. Data Gen. Corp., 125 F.R.D. 160, 162 (N.D. Cal. 1988) (emphasis added).

97. *Id.* at 163 (emphasis added).

98. *Whigham*, 599 F.2d at 1323 (emphasis added) (citing 6 WRIGHT ET AL., *supra* note 34, § 1410). Although the *Grumman* court argued that "[t]he few older federal cases giving weight to similarity of issues have been criticized and are in the minority," *Grumman*, 125 F.R.D. at 162, the Wright and Miller formulation, which includes fact or law in its transaction or occurrence definition, is widely cited. *See, e.g.*, Valley View Angus Ranch, Inc. v. Duke Energy Field Servs., Inc., 497 F.3d 1096, 1104 (10th Cir. 2007); Murphy Exploration & Prod. Co. v. Davis, 41 F.3d 663, 663 (5th Cir. 1994) (per curiam); Scott v. Long Island Sav. Bank, F.S.B., 937 F.2d 738, 742–43 (2d Cir. 1991); Sue & Sam Mfg. Co. v. B-L-S Constr. Co., 538 F.2d 1048, 1053 & n.4 (4th Cir. 1976).

99. Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 634 (3d Cir. 1961) (emphasis added).

100. *See infra* notes 110–20 and accompanying text.

passes commonalities of fact, then there are still ways in which the law–fact distinction leads to divergent interpretations of the rule. This occurs when courts describe commonalities as belonging to the category of fact in order to justify joinder or commonalities of law to justify a denial.

Both the Fifth and Ninth Circuits use a fact-only definition of "transaction or occurrence" when defining the phrase.[101] This counterclaim is compulsory in the Fifth Circuit, but not in the Ninth Circuit.

The Fifth Circuit's holding that in federal-lending-violation cases, counterclaims for an underlying debt are compulsory, centers on the loan made to the consumer as the relevant transaction for purposes of the standard. The court reasoned that "because a single aggregate of operative facts, the loan transaction, gave rise to both plaintiff's and defendant's claim,"[102] those claims arose from the same transaction or occurrence.[103] The court made these definitions without reference to legal categories.

However, as one Arizona judge discovered, the way to find that causes of action stemming from the same loan do not arise from the same transaction or occurrence is to use *legal* categories, that is, the causes of action, to define the boundaries of the facts.[104] In *Hart v. Clayton-Parker & Associates, Inc.*, the court acknowledged the existence of a factual relationship between the claims but categorized the factual issues as legal issues, thus removing them from consideration as facts that could belong to the same transaction or occurrence.[105] The court held that "the [federal-lending] claim and the claim on the underlying debt raise different legal and factual issues governed by *different bodies of law*."[106]

Here, the *Hart* court makes a subtle shift from the facts underlying the two causes of action to the facts that will be the evidence specific to each claim: "[A] cause of action on the debt arises out of events different from the cause of action for abuse in collecting."[107] In other words, this court has worked backwards from the general facts that one would expect to accompany a

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101. *See* Pochiro v. Prudential Ins. Co. of Am., 827 F.2d 1246, 1249 (9th Cir. 1987) (stating that the test for Rule 13(a) focuses on "whether the essential facts from the various claims are . . . logically connected" (quoting Harris v. Steinem, 571 F.2d 119, 123 (2d Cir. 1978)) (internal quotation marks omitted)); Plant v. Blazer Fin. Servs., Inc. of Ga., 598 F.2d 1357, 1361 (5th Cir. 1979) (finding a "'logical relationship' to exist when the counterclaim arises from the same 'aggregate of operative facts'" (quoting Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 715 (5th Cir. 1970))).

102. *Plant*, 598 F.2d at 1361.

103. *Id.* at 1364.

104. *See* Hart v. Clayton–Parker & Assocs., Inc., 869 F. Supp. 774, 777 (D. Ariz. 1994).

105. *See id.* ("Although defendants' right to payment from plaintiff is certainly factually linked to the fairness of defendants' collection practices . . . a cause of action on the debt arises out of events different from the cause of action for abuse in collecting." (quoting Ayres v. Nat'l Credit Mgmt. Corp., No. 90-5535, 1991 WL 66845, at *1 (E.D. Pa. Apr. 25, 1991)) (internal quotation marks omitted)).

106. *Id.* (emphasis added).

107. *Id.* (quoting *Ayres*, 1991 WL 66845, at *1) (internal quotation marks omitted). "The former centers on evidence regarding the existence of a contract . . . . The latter centers on evidence regarding the improprieties and transgressions, as defined by the [federal-lending statute], in the procedures used

particular cause of action and fit the facts of the overall case into legal categories. By breaking the facts into legal categories based on the causes of action, the court avoids a finding of factual commonalities.[108]

The Fifth and Ninth Circuits represent the outcomes at the first point of divergence, the point where the court has decided to interpret the meaning of "transaction or occurrence." It should be noted, however, that the interpretation itself can produce variance, even within a circuit. While the Ninth Circuit consistently uses the fact-only formulation in its interpretation of "transaction or occurrence," the Fifth Circuit's definition varies from context to context. Lending counterclaims in the Fifth Circuit are subject to the fact-only standard, whereas other counterclaims are to be judged looking at commonalities of both fact and law.[109]

In other circuits, the definition (usually delivered through an explanation of the logical relationship test) either includes commonalities of law and fact or a substantial factual overlap between the plaintiff's and the defendant's claims.[110] Alternatively, courts have indicated that commonalities of law are permissible for satisfying the requirements of the rule, but are not necessary because commonalities of fact alone can suffice.[111] The interpretive categories become trickier. Rather than stating that the transaction or occurrence rests on factual commonalities only and then fitting the commonalities inside or outside the definition of fact, courts will grapple with the relative importance of factual commonalities and legal commonalities, and then narrate the story of the case in either category accordingly.

Given the flexibility that the rules are meant to embody, it is not surprising that judges hearing different cases will put more of an emphasis on some commonalities in some cases and on other commonalities in other cases. However, there are shared intuitions about the interpretation and application of both versions of the rule: perhaps commonalities of fact still hold pride of place in the analysis. And if this is so, what ought we to make of the *presence* of commonalities of law, the *absence* of commonalities of law, or the *presence* of uncommon issues of law?

There is little use for a "pure" or completely abstract common question of law to serve as the sole basis of a commonality. In the context of "transaction or

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to collect the debt, regardless of the debt's validity." *Id.* (quoting *Ayres*, 1991 WL 66845, at *1 (internal quotation marks omitted)).

108. The Ninth Circuit has approved this mode of analysis. *See* Yarnall v. Four Aces Emporium, Inc. (*In re* Boganski), 322 B.R. 422, 429 (B.A.P. 9th Cir. 2005). Although the court emphasized the factual differences involved in debt collection, its "cause of action" analysis was motivated by a reliance on the TILA authority, and when the Ninth Circuit approved of this analysis, it did so in the TILA context. *Id.*

109. *See, e.g.*, Tank Insulation Int'l, Inc. v. Insultherm, Inc., 104 F.3d 83, 85–86 (5th Cir. 1997) (concluding that an antitrust counterclaim to a patent lawsuit is compulsory).

110. *See, e.g.*, Nasalok Coating Corp. v. Nylok Corp., 522 F.3d 1320, 1325–26 (Fed. Cir. 2008).

111. *See, e.g.*, Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 634 (3d Cir. 1961) (stressing that compulsory counterclaims exist "[w]here multiple claims involve many of the same factual issues, or the same factual and legal issues").

occurrence" rules, a question of law must be couched in terms of its relation to the relevant transaction or occurrence. In the "common question" rules, courts have rejected the pure question of law as a sufficient basis for commonality, even though the disjunctive text of the rule—common question "of law *or* fact"—suggests that a common question of law would be sufficient.[112]

With the pure question of law out of the picture, the question then becomes: given that there must be *at least* a common factual link between the claims, what role, if any, do commonalities of law play? Taken at face value, the presence of common issues of law can strengthen a case for joinder and the presence of uncommon issues of law can weaken the case for joinder. However, because the commonalities or dissimilarities are simply factual issues redescribed, looking for common or uncommon issues of law provides little predictive power in analyzing joinder decisions.

Several of the circuits in which the counterclaim is merely permissive instead of compulsory rely heavily on the fact that the "counterclaim raises issues of fact and *law* significantly different from those presented by the [plaintiff] borrower's claim."[113] The facts are framed by the elements of the causes of action for which they will be used. Notice how the following Delaware judge, for example, begins with an explanation of facts that are then severed from each other based on their utility to legal categories:

> [T]he Plaintiff alleges in his complaint that Defendant violated the provisions of TILA by failing to disclose the amount financed, the amount of finance charges, the annual interest rate of the finance charge and the number, amount, due dates or periods of payments to repay the indebtedness. None of these issues is related to whether the underlying sales contract was valid or enforceable under state contract law.[114]

Differentiating the issues of law may take several forms. The court might emphasize that the claim and counterclaim are based in two different causes of action, and additional punch for this difference is available in cases where one cause of action is created by federal law and the other by state law.[115]

The same facts take on different meanings when attached to different issues of law. For example, one court has opined that a TILA claim on its own does not fall within the same "transaction or occurrencé" as a debt collection counter-

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112. *See* FED. R. CIV. P. 20 (emphasis added); FED. R. CIV. P. 23(a) (emphasis added); FED. R. CIV. P. 24(b) (emphasis added); FED. R. CIV. P. 42(a) (emphasis added).

113. *See* Whigham v. Beneficial Fin. Co. of Fayetteville, 599 F.2d 1322, 1324 (4th Cir. 1979) (emphasis added).

114. Brady v. C.F. Schwartz Motor Co., 723 F. Supp. 1045, 1050 (D. Del. 1989).

115. *See* Peterson v. United Accounts, Inc., 638 F.2d 1134, 1137 (8th Cir. 1981) ("[T]he suit on the debt brought in state court is not logically related to the federal action initiated to enforce federal policy regulating the practices for the collection of such debts."); *Whigham*, 599 F.2d at 1324 ("The only question in the borrower's suit is whether the lender made disclosures required by the federal statute . . . . The . . . counterclaim . . . requires the court to determine . . . state law.").

claim.[116] If, however, the plaintiffs also allege a cause of action for conversion, the landscape changes because "[p]art of defendants' defense to that claim would include allegations of failure to make payments, which are the same allegations set forth in the defendants' counterclaim."[117] This conclusion makes sense from a practicalities approach because the judge appears to be considering the efficiency gains from litigating these particular claims together. Under a commonalities approach, however, the exact same facts leap in and out of the boundaries of the same "transaction or occurrence" simply because of the legal categories to which they belong.

The Second Circuit has held that debt collection counterclaims are permissive and not compulsory, but did so by characterizing the issues *only* as factual. It was not the presence of different causes of action, but the fact that the plaintiffs' claims were related to finance charges and interest-rate policies in general, whereas the "counterclaims concern[ed] the individual Plaintiffs' non-payment after the contract price was set."[118] In other words, the proper frame of reference for the *Jones* court is facts, not legal issues, and these facts are grouped from the perspective of a lender's *policy* versus several individual loan transactions themselves.[119]

Two lessons emerge when comparing *Hart*, *Plant*, and *Jones*. First, simply identifying that the scope of the logical relationship test is fact-only does not predict results. The facts of the claims may be segregated by redescribing them as issues of law and thus outside of the factual "transaction or occurrence," or by choosing alternate frames of reference: a company-wide policy or an individual loan transaction. Second, while the law–fact distinction explains some aspects of the divergence in outcomes, it does not explain every outcome in every circumstance. Once courts have reached the point at which they profess to only look at issues of fact, we will need further theories or shadow rules to explain which facts or frame of reference will prevail.[120]

In addition to the law–fact distinction, the differences in outcomes among courts concerning compulsory counterclaims can be attributed to other factors, including the underlying policies of statutes like TILA and the question of whether evidence will overlap in any of the claims. While the law–fact distinction does not give rise to these concerns, it works to obscure the role that such factors should play in joinder decisions.

For example, when the Fifth Circuit held that TILA counterclaims were compulsory rather than permissive, it noted that the holdings were driven as

116. *See* Wojcik v. Courtesy Auto Sales, Inc., No. 8:01CV506, 2002 WL 475173, at *2 (D. Neb. Mar. 29, 2002) ("In general, I agree with the plaintiffs that this claim is permissive in nature and is not part of the case or controversy in a TILA action.").

117. *Id.* ("Arguably, that makes the counterclaim a compulsory rather than a permissive one.").

118. Jones v. Ford Motor Credit Co., 358 F.3d 205, 209 (2d Cir. 2004).

119. *See id.*

120. Questions regarding the weight of factually common issues as against themselves is addressed *infra* at Part III in the context of the shadow rule of implied predominance.

much by the policies behind TILA as they were by the policies behind Rule 13(a).[121] Although this might have been a victory for consumer rights in the courts disallowing the debt counterclaims, shoving TILA policies into the category meant for litigation fairness and efficiency only serves to mask or subordinate the TILA policies themselves and subject them instead to the whims of the ever-flexible "transaction or occurrence" standard.

Alternatively, a court might use the "different evidence" factor often cited as part of the logical transaction test. Under the different evidence factor, claims might not arise from the same transaction or occurrence if different evidence is needed to prove each claim. At first glance, this requirement might provide courts with a useful tool for tying *factual* relatedness to different causes of action. Differences in legal issues matter more when each claim requires different facts providing evidence, as it were, of factual unrelatedness.

Unfortunately, the different evidence factor is a blunt instrument. It is used almost entirely to echo conclusions that courts have already made. It is not difficult to identify different evidence for different causes of action, and the different evidence test does no more to identify *how different* the evidence must be than the logical relationship test does to identify what is the relevant factual frame for "transaction or occurrence." Mostly, the different evidence test simply repeats a judge's argument that differences of issues of law are present or is omitted entirely when factual similarities are perceived as obvious.[122]

One possible view of the presence of uncommon issues of law is that they might *defeat* the presence of common issues of fact. In the TILA cases, for example, a few courts have acknowledged that "the claim and counterclaim do arise out of the same transaction within the literal terms of Rule 13(a)."[123] The differences in legal issues, however, convince the court that the claims do not, in fact, arise out of the same transaction or occurrence.[124]

B. REDESCRIPTION EXAMPLE # 2: RULE 15(C), RELATION BACK, AND THE EXPANDING EMPLOYMENT TRANSACTION

As demonstrated by the Rule 13(a) counterclaim example above, some courts do not confine the formal definition of "transaction or occurrence" to commonalities of fact. The courts make decisions about which commonalities to privilege and then characterize the issues at hand as either factual or legal.

The role played by individual issues of law also resurfaces in courts' struggles to find the proper frame of factual reference for the employer–employee relation-

121. Plant v. Blazer Fin. Servs., Inc. of Ga., 598 F.2d 1357, 1364 & n.13 (5th Cir. 1979).

122. *See* Kittel v. First Union Mortg. Corp., No. CIV-00-1945-R, 2001 U.S. Dist. LEXIS 24403, at *5–7 (W.D. Okla. Feb. 9, 2001) (interpreting Oklahoma's compulsory-counterclaim rule, which is identical to FED. R. CIV. P. 13(a), with the different evidence test restating other factors present in Rule 13(a) analysis).

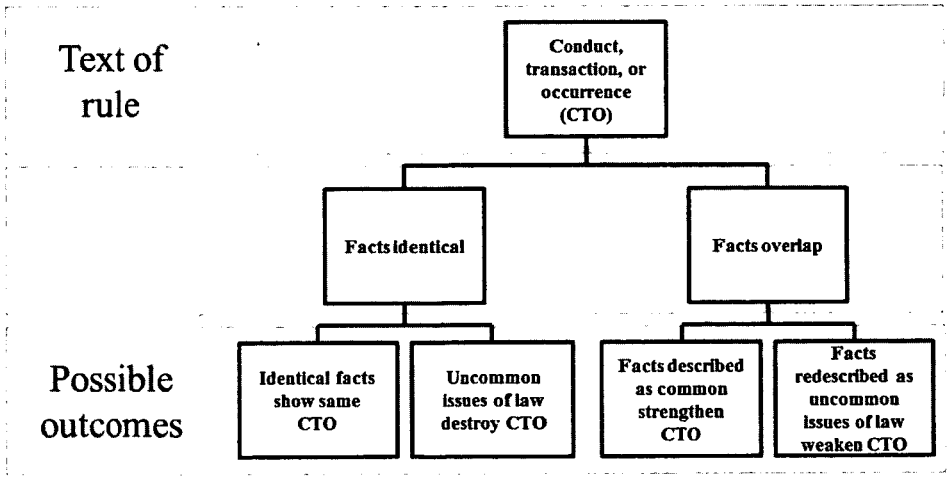
123. Maddox v. Ky. Fin. Co., 736 F.2d 380, 383 (6th Cir. 1984); *accord* Peterson v. United Accounts, Inc., 638 F.2d 1134, 1137 (8th Cir. 1981) (noting that the debt claim and lending counterclaim "may, in a technical sense, arise from the same loan transaction").

124. *See, e.g.*, *Maddox*, 736 F.2d at 383; *Peterson*, 638 F.2d at 1137.

ship. Suppose that an employee has been fired and files a lawsuit for wrongful termination. The lawsuit might grow or change in the following ways utilizing Rule 15(c),[125] which allows a plaintiff to add otherwise time-barred claims so long as they relate back to the original complaint:

- She proposes to amend her complaint to add claims, perhaps discrimination claims, which have been barred by a statute of limitations.
- She proposes to amend her complaint to add time-barred claims for actions post-termination, such as libel and defamation.
- She proposes to amend her complaint to add time-barred claims for actions pretermination, such as wage and promotion discrimination, or sexual harassment during her time as an employee.

These complications force a court to discern the proper frame of reference for bad things that happen in connection with a plaintiff's employment. The mere fact that an employment relationship exists seems overbroad. But how might one funnel the many interconnected facts relating to employment into one "transaction or occurrence" or another, or a meaningful question of fact? This is the point at which the description and redescription of facts in terms of legal issues allow judges to shore up an argument for relatedness or reaffirm the intuition that the facts are unrelated. The following chart shows another path for redescription:



In *Pendrell v. Chatham College*, for example, the plaintiff filed a § 1983 civil

125. Rule 15(c) states, in relevant part, "An amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading . . . ." FED. R. CIV. P. 15(c)(1)(B).

rights action against her employer because her contract was not renewed.[126] About two-and-one-half years later, after the court had dismissed her complaint because the college, as a private institution, was not subject to § 1983 actions, she amended her complaint to add state-law tort claims of defamation and trespass.[127] The district court refused to relate these time-barred causes of action back to the initial complaint despite its recognition that "the amended pleadings [arose] out of the same general fact situation" as the original complaint.[128] The judge's pithy observation that allowing plaintiffs to add such claims would "permit lawyers to endlessly answer the question: How many causes of action can you find in this fact situation?"[129] has propelled *Pendrell* into a standard citation for Rule 15(c) denials.[130] The substance of the decision, however, deserves further scrutiny.

An actual examination of the facts behind the various claims is conspicuously absent from the opinion. In her trespass claim, Pendrell alleged that the defendants committed the state-law tort of trespass "when they failed to renew [her] employment."[131] Here, it is unclear whether the underlying facts are different *at all* from the facts in the original complaint. The first complaint alleged violations because the college had failed to renew her contract, and the trespass claim appears to concern precisely the same event. What the court did was *redescribe* a factual issue as a legal issue, thus segregating it from the realm of permissible relatedness. The presence of a different issue of law stemming from identical facts, however, does not always mean that a court will find that a claim does not relate back.[132] A court focusing on the factual similarities might come to a decision at odds with the *Pendrell* court, holding in the employment context that "the addition of a statutory cause of action or a change from a common law claim to a statutory claim would not preclude a relation back."[133]

The *Pendrell* court's treatment of Pendrell's trespass claim is an instance of pure redescription because facts that are almost completely identical have been severed from transactional relatedness by recasting them as an uncommon issue of law via a different cause of action. Additional claims, however, do not always share identical facts with the original complaint, nor need they to satisfy Rule

126. 386 F. Supp. 341, 342 (W.D. Pa. 1974).

127. *Id.* at 342–43.

128. *Id.* at 345–46.

129. *Id.* at 345.

130. *See, e.g.*, Polycast Tech. Corp. v. Uniroyal, Inc., No. 87 Civ. 3297 (CSH), 1992 WL 123185, at *15–16 (S.D.N.Y. May 28, 1992); Marsman v. W. Elec. Co., 719 F. Supp. 1128, 1143 (D. Mass. 1988); Mainella v. Staff Builders Indus. Servs., 608 A.2d 1141, 1144–45 (R.I. 1992) (interpreting Rhode Island's Rule 15(c), which is identical to FRCP 15(c)).

131. *Pendrell*, 386 F. Supp. at 343.

132. *See, e.g.*, Kuba v. Ristow Trucking Co., 811 F.2d 1053, 1055 (7th Cir. 1987) (concluding that amended complaint seeking statutory penalty of treble damages relates back to negligence claim from same accident).

133. Faust v. RCA Corp., 612 F. Supp. 540, 543 (M.D. Pa. 1985).

15(c).[134] In the employment context, for example, there might be claims relating to conduct before the termination or after the termination.

One common claim of pretermination malfeasance is that the plaintiff experienced wage discrimination or perhaps was passed over for a promotion. Suppose, for example, that a plaintiff files a claim for wrongful discharge in violation of the Age Discrimination in Employment Act (ADEA)[135] and later adds time-barred claims for wage discrimination under the same statute.

One could argue that the wage discrimination and wrongful discharge were all part of one "general fact situation," but that the wage discrimination claim—a new and different issue of law—did not arise out of the same conduct, transaction, or occurrence. The Fourth Circuit, however, held that "the pay discrimination claim . . . arose out of the same allegedly discriminatory employer practices" as the wrongful termination claim.[136] Similarly, a Pennsylvania district judge held that "[a]lthough proof of a retaliation claim involves a different set of facts than a substantive discrimination claim, both relate to the circumstances surrounding defendant's refusal to rehire plaintiff after his lay-off."[137]

Post-termination claims pose similar problems. Pendrell's defamation claim was vaguely described as two incidents in which one of the defendants (the president of the College) "defamed plaintiff" on two dates shortly after her dismissal.[138] Presumably, the defamatory statements were made in connection with Pendrell's work or dismissal. This raises an interesting question of whether statements made in connection with a person's dismissal are a part of that "conduct, transaction, or occurrence." However, the court only defined the facts in terms of their legal category: defamation.

Barnes v. Callaghan & Co. elaborates on the possibility that facts are only relevant in terms of their legal category.[139] The plaintiff's original complaint alleged civil-rights and breach-of-contract causes of action claiming that she had been wrongfully discharged from her job.[140] She later sought to amend the complaint to add claims for slander. The court detailed the allegedly slanderous statements, noting that each concerned her job performance and reasons for her termination.[141] The district judge held that the slander claim arose from the same conduct, transaction, or occurrence as the original complaint because the

134. *See id.* ("Simply because an amended pleading changes the legal theory on which an action was initially brought is 'of no consequence if the factual situation upon which the action depends remains the same and has been brought to the defendant's attention by the original pleading.'" (quoting WRIGHT ET AL., *supra* note 34, § 1497).

135. 29 U.S.C. §§ 621–34 (2006).

136. Hamilton v. 1st Source Bank, 895 F.2d 159, 165 (4th Cir.), *aff'd in part, rev'd in part*, 928 F.2d 86 (4th Cir. 1990) (en banc).

137. Farber v. Gen. Elec. Co., No. 93-2349, 1994 WL 46519, at *4 (E.D. Pa. Feb. 16, 1994).

138. Pendrell v. Chatham Coll., 386 F. Supp. 341, 343 (W.D. Pa. 1974). Further facts about this case had been set out in the district court's earlier opinion. Pendrell v. Chatham Coll., 370 F. Supp. 494, 494–95 (W.D. Pa. 1974).

139. 559 F.2d 1102 (7th Cir. 1977).

140. *Id.* at 1104.

141. *Id.* at 1105.

"gravamen of the original complaint was clearly the injury to plaintiff's reputation and employment opportunity occasioned by the alleged malicious conduct of the defendant,"[142] but the Seventh Circuit reversed. It held that because a "slander action requires allegations of malice and of publication of the defamation to a third party,"[143] the claim did not relate back because the original complaint did not allege facts pertaining to these specific elements.[144]

The *Barnes* court, in other words, used the presence of *uncommon* issues of law to tighten the boundaries of the core transaction or occurrence. The transaction or occurrence is not defined by the relationship of facts to each other but by the relationship of facts to the elements of the claim they must support. Indeed, as another district judge held, this is true even if the slander occurs "during the same conversation in which [the plaintiff] was fired."[145]

The implication of the court's reasoning is that if the plaintiff had included the facts concerning malice and publication of the defamation in her original complaint, the slander claims would have been part of the same conduct, transaction, or occurrence. The presence of an uncommon issue of law has ratcheted up the demand for factual commonality. The presence of distinct causes of action breaks up the conduct, transaction, or occurrence, even when "the slander allegation was factually connected to the wrongful termination dispute."[146]

This is distinct from a genuine struggle to delineate the boundaries of the conduct, transaction, or occurrence, for example, by questioning whether a failure to accommodate an employee's disability at work is sufficiently factually related to allegations that the employer discriminated against the employee on the basis of race and retaliated against her for complaining of an unsafe workplace.[147]

Once again, the problem with holdings such as those in *Barnes* or *Pendrell* is not necessarily that the court got it wrong. Rather, the difficulty is in discerning exactly what it means for a new issue of law to emerge from the conduct, transaction, or occurrence. This difficulty arises because, although the *Pendrell* and *Barnes* courts stood firmly on the belief that a failure to allege facts directly supporting elements of the new cause of action was fatal, this interpretation of

142. *Id.* at 1104–05 (quoting the district court judge) (internal quotation marks omitted).

143. *Id.* at 1105–06 (citation omitted).

144. *Id.* at 1106.

145. Polycast Tech. Corp. v. Uniroyal, Inc., No. 87 Civ. 3297 (CSH), 1992 WL 123185, at *15 (S.D.N.Y. May 28, 1992).

146. Constr. Interior Sys., Inc. v. Donohoe Cos., 813 F. Supp. 29, 36 (D.D.C. 1992).

147. *See* Marsman v. W. Elec. Co., 719 F. Supp. 1128, 1143 (D. Mass. 1988) (holding that time-barred claim for discrimination of a handicap does not relate back to original complaint of racial and retaliatory discrimination). Such characterizations extend beyond the employment context. *See* Moore v. Baker, 989 F.2d 1129, 1132 & n.1 (11th Cir. 1993) ("[Amended claim of negligence does not relate back when the plaintiff's] original complaint . . . focuses solely on [the defendant's] failure to inform [the plaintiff] of . . . an alternative to surgery. Although the complaint recounts the details of the operation and subsequent recovery, it does not hint that [the defendant's] actions were negligent.").

the rule is not universal. The Fifth Circuit, for example, has noted that even if plaintiffs' original complaint "contained no allegation of any negligence on the part of the [defendant],"[148] this did not prevent them from amending the complaint to add a time-barred negligence claim. Even though this was "a complete change in the legal theory of plaintiffs' complaint, their claim continued to arise out of the conduct, transaction or occurrence attempted to be set forth in the original complaint."[149]

The higher degree of commonality that the *Barnes* court demanded also illustrates, yet again, the inadequate fit between the text of the rule and the purpose of the rule. The Seventh Circuit's concern about the facts of malice and publication of defamation in *Barnes* was not simply that the facts did not exist, but that the plaintiff did not plead them.[150] The purpose of demanding this formality is to ensure that the defendants had adequate notice that the plaintiff would bring the slander action.[151] Adequate notice is a standard element of defining "conduct, transaction, or occurrence" for Rule 15(c), and it has been used to deny motions to relate back when "the defendant has been unduly prejudiced by the delay or the amendment is futile."[152] However, the effect of the adequate notice requirement is often to allow uncommon issues of law to disrupt the factual coherence of "conduct, transaction, or occurrence" instead of recognizing that "both the original claim and the amendment involve at least substantially overlapping occurrences," and therefore inquiring specifically "into the prejudice which the defendant would suffer."[153] Herein lies the opportunity for mixed results: whereas some courts divide factual commonalities by issues of law, others will simply inquire "whether the original pleading gave the opposing party fair notice of the *general fact situation* involved in the amended pleading."[154]

It is possible to distinguish Rule 15(c) redescription from Rule 13(a) redescription on the basis that Rule 15(c)'s standard adds the word "conduct" to "transaction or occurrence," and it is the conduct that courts target when they redescribe factual issues as legal. Different laws regulate different types of conduct because "even though the new claim arose *from the same injury* as the original claim, it would not 'relate back' because it involved 'separate and distinct *conduct*.'"[155] However, as the Fifth Circuit has noted, "[t]he key phrase

148. United States v. Johnson, 288 F.2d 40, 42 (5th Cir. 1961).

149. *Id.*

150. *See* Barnes v. Callaghan & Co., 559 F.2d 1102, 1105–06 (7th Cir. 1977) (noting that plaintiff's original complaint did not allege facts forming the basis of additional causes of action).

151. *Id.* at 1106 (citing Rosenberg v. Martin, 478 F.2d 520, 526 (2d Cir. 1973)).

152. *Marsman*, 719 F. Supp. at 1142; *see also* WRIGHT ET AL., *supra* note 34, § 1498 (detailing the requirements of Rule 15(c)).

153. *See* DeMalherbe v. Int'l Union of Elevator Constructors, 449 F. Supp. 1335, 1354 (N.D. Cal. 1978).

154. Cruz v. City of Camden, 898 F. Supp. 1100, 1117 (D.N.J. 1995) (emphasis added).

155. *See* La. Wholesale Drug Co. v. Biovail Corp., 437 F. Supp. 2d 79, 87 (D.D.C. 2006) (second emphasis added) (quoting Moore v. Baker, 989 F.2d 1129, 1132 (11th Cir. 1993)).

'conduct, transaction, or occurrence' is in the disjunctive,"[156] meaning that an identity of conduct should not be necessary, even if conduct could be equated with an issue of law in the form of a cause of action.

The concern that emerges from the examples above is not simply that courts use the category of issues of law to determine commonality but that, in some instances, courts exploit the hazy distinction between fact and law to expand or contract the boundaries of "transaction or occurrence" and "common question of law or fact." Particularly in instances where causes of action themselves are used to delineate the boundaries, this practice might run afoul of "the philosophy of the Federal Rules to reject rigid categories of causes of action[] in favor of a transactional or claim analysis."[157] Although it is also possible to attribute the divergent outcomes to different judicial attitudes toward the underlying substantive claims, this alternative does not fully resolve the underlying conflict about joinder standards and policies. In deciding substantive policy questions, such as the desirability of certain lending or employment actions on procedural joinder grounds, courts obscure serious discussion of *both* the underlying substantive policy issues and the procedural policy issues, thereby missing the opportunity to clarify the law in each area.

III. THE SHADOW RULE OF IMPLIED PREDOMINANCE

Implied predominance is a shadow rule used to interpret the rules containing the "common question of law or fact" standard for commonality.[158] It occurs when courts recognize the presence of both common and uncommon issues between a set of claims or parties but require that the common issues outweigh or predominate over the uncommon issues.[159]

Courts tend to apply this rule in cases with anticipated administrative difficulties associated with coordinating discovery, motion practice, and trials involving multiple litigants and causes of action. The relationship between predominance and the common-question language has received relatively little attention from commentators,[160] particularly as applied to the non-class-action context. This section provides an account of the operation of this shadow rule in Rules 20(a) and 42(a) joinder, as well as how it affects the growing debate over how to interpret the phrase "questions of law or fact common to the class" in Rule 23(a)(2).

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156. Fed. Deposit Ins. Corp. v. Bennett, 898 F.2d 477, 479 (5th Cir. 1990).

157. *See In re* Olympia Brewing Co. Sec. Litig., 612 F. Supp. 1370, 1372 (N.D. Ill. 1985).

158. *See* FED. R. CIV. P. 20; FED. R. CIV. P. 23(a); FED. R. CIV. P. 24(b); FED. R. CIV. P. 42(a).

159. *See* O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 584–85 (6th Cir. 2009) ("The district court implicitly and improperly applied a Rule 23-type analysis when it reasoned that the plaintiffs were not similarly situated because individualized questions predominated.").

160. *Cf.* Erbsen, *supra* note 30, at 998 (arguing that the debate about class action reform has overlooked "the pivotal issue" of "whether class members' factual and legal circumstances are sufficiently alike to permit [collective] resolution").

A. RULES 20(A) AND 42(A): ECHOES OF THE OPT-OUT CLASS ACTION IN PERMISSIVE JOINDER AND INTRADISTRICT CONSOLIDATION

Implied predominance borrows the predominance requirement from Rule 23(b)(3) ("opt-out") class actions and from one of the discretionary factors allowing a judge to decline to exercise supplementary jurisdiction over a nonfederal claim.[161] A judge certifying a 23(b)(3) opt-out class must find "that the questions of law or fact common to class members predominate over any questions affecting only individual members."[162] Even within Rule 23(b)(3), however, the predominance standard has not produced uniform results; Professor Erbsen has criticized it as a "meaningless question" and "needlessly vague."[163] Although a formal predominance requirement appears only in Rule 23(b)(3) and as a discretionary factor in the supplemental jurisdiction context, some judges have transplanted it into other FRCP rules of joinder by "graft[ing] a predominance requirement" onto the commonality language in those rules.[164] The Supreme Court, however, has recently placed the issue front and center with its opinion in *Wal-Mart Stores, Inc. v. Dukes*.[165] The Supreme Court Justices' extensive debate regarding the meaning of the Rule 23(a)(2) common-question language in *Wal-Mart* will undoubtedly have a profound impact on how this standard is interpreted and applied in class action cases as well as Rules 20, 24(b), and 42(a) cases. Before delving into *Wal-Mart*, however, an investigation of implied predominance exercised by lower court judges in non-class-action cases is in order.

The implied predominance maneuver signals that judges have read a predominance requirement into the definition of a common question of law or fact.[166] In some instances, judges explicitly borrow the predominance language and import it into a test for commonality,[167] or cite the Rule 23(b)(3) predominance

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161. *See* 28 U.S.C. § 1367(c) (2006); FED. R. CIV. P. 23(b)(3); Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc., 463 F. Supp. 2d 583, 596 (E.D. La. 2006), *aff'd*, 485 F.3d 804 (5th Cir. 2007) ("To allow the entire case to be removed to federal court on the basis of a relatively insignificant claim when compared to the state law claims is a classic illustration of 'the tail wagging the dog.' There can be no doubt that state law predominates in this case." (quoting Miller v. John Sexton Sand & Gravel Corp., No. 4:96CV315-B-B, 1996 WL 909594, at *4 (N.D. Miss. Nov. 15, 1996))).

162. FED. R. CIV. P. 23(b)(3).

163. Erbsen, *supra* note 30, at 1058. The test "strives to balance the competing pull of similar and dissimilar elements within proposed class actions, but is inherently incapable of assisting courts in making principled certification decisions." *Id.* at 1050.

164. *See* Silver, *supra* note 29, at 502.

165. 131 S. Ct. 2541 (2011).

166. *See, e.g.*, Dionne v. Ground Round, Inc., No. 94-2208, 1995 WL 552036, at *1 (1st Cir. Sept. 15, 1995) (per curiam) (affirming that there was no common question of law or fact under Rule 24(b) when the district court "found that individual issues substantially predominated"); Odom v. Trailhead Lodge at Wildhorse Meadows, LLC, No. 09-cv-02298-REB-BNB, 2010 WL 2108482, at *1 (D. Colo. May 24, 2010) (denying Rule 42(a) consolidation by finding that "[a]lthough the three cases in question do have some issues of fact and law in common, . . . those common issues are not predominant among the three cases").

167. *See, e.g.*, Martinez v. Haleas, No. 07 C 6112, 2010 WL 1337555, at *3 (N.D. Ill. Mar. 30, 2010) (holding that plaintiffs' failure to "demonstrate that common legal or factual questions of class

standard as direct authority for joinder.[168] Take, for example, the district judge's resolution of the plaintiffs' proposal for Rule 42(a) consolidation in *Rendon v. City of Fresno*.[169] The opinion begins with a pro forma acknowledgement that only one common question is necessary, but then states that "consolidation may be inappropriate where individual issues predominate."[170] The authority cited for this proposition, however, does not specify that common issues must "predominate."[171] Instead, it emphasizes the judicial difficulties that the particular individual issues would cause in joining the cases—a *predominance requirement* is absent.[172] The *Rendon* judge denied consolidation on the grounds that it would prejudice earlier plaintiffs and confuse the jury.[173] It is therefore perplexing that the court felt the need to find that common issues predominated.[174]

Here, a shadow rule for the finding of commonality has bled into the practicalities analysis. One court considers the managerial problems separately from the commonalities question, and then, as if in a game of telephone, another court transforms this into a predominance requirement.

As the judges in both of these cases recognized, joining individual cases

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predominate over the individual questions" applied to his Rule 20(a) motion (quoting Martinez v. Haleas, No. 07-C-6112, 2009 WL 2916852, at *4 (N.D. Ill. Sept. 2, 2009)) (internal quotation marks omitted)); Winton Transp., Inc., v. South, No. 1:05CV471, 2007 WL 2668131, at *1 (S.D. Ohio Sept. 6, 2007) (allowing claims to be consolidated under Rule 42(a) when "common questions of law and fact predominate"); Coleman v. Conseco, Inc., 238 F. Supp. 2d 804, 819 (S.D. Miss. 2002) (denying joinder of parties under Rule 20 because "[i]ndividualized issues . . . predominate over issues common to all Plaintiffs"); Lyons v. Am. Tobacco Co., No. Civ.A. 96-0881-BH-S, 1997 WL 809677, at *4 (S.D. Ala. Sept. 30, 1997) (indicating impropriety of Rule 20 joinder "particularly in light of the obvious lack of predominance of any common legal principle or fact"); Alvarez v. Armour Pharm., No. 94-C-3587, 1997 WL 566373, at *1 (N.D. Ill. Sept. 8, 1997) (denying Rule 20 joinder when "[t]he proximate cause issues for each plaintiff would still be present and would predominate over common issues"); Pruitt v. Allied Chem. Corp., 85 F.R.D. 100, 115 (E.D. Va. 1980) (noting that "[r]equiring each plaintiff to show the commonality of interest under Rule 20 would be duplicative of the burden borne by plaintiffs [in a class action] in proving the predominance of common questions").

The Sixth Circuit recently chided a district court for making this move in the context of defining "similarly situated" plaintiffs under the Fair Labor Standards Act (FLSA). *See* O'Brien v. Ed Donnelly Enters., 575 F.3d 567, 584–85 (6th Cir. 2009) ("The district court implicitly and improperly applied a Rule-23-type analysis when it reasoned that the plaintiffs were not similarly situated because individualized questions predominated.").

168. *See, e.g.*, Reed v. Tenn. State Bancshares, No. 3:05-CV-498, 2007 WL 3181290, at *1 (E.D. Tenn. Oct. 29, 2007) (citing *Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004), a case granting class certification for a consolidation under Rule 42(a)); Vallero v. Burlington N. R.R., 749 F. Supp. 908, 913 (C.D. Ill. 1990) ("A district court may . . . consolidat[e] . . . two lawsuits when common questions of law or fact predominate." (citing FED. R. CIV. P. 42(a))).

169. No. 1:05-CV-00661 OWW DLB, 2006 WL 1582307 (E.D. Cal. June 2, 2006).

170. *Id.* at *4 (quoting *In re* Consol. Parlodel Litig., 182 F.R.D. 441, 444 (D.N.J. 1998)) (internal quotation marks omitted).

171. *In re Consol. Parlodel Litig.*, 182 F.R.D. at 444.

172. *See id.* at 447.

173. *Rendon*, 2006 WL 1582307, at *7–8; *see also* Henderson v. Nat'l R.R. Passenger Corp., 118 F.R.D. 440, 441 (N.D. Ill. 1987) (noting that, "[a]lthough certain common issues of fact may exist in both actions, the variety of individual issues predominate," and that, "[w]here . . . delay or undue prejudice would result from consolidation, separate actions should be maintained").

174. *See Rendon*, 2006 WL 1582307, at *6.

together can present administrative difficulties for the court and parties.[175] Implied predominance, however, is a poor substitute for analysis of the question of whether joinder would foist too many administrative difficulties on the court. Joinder is often a good managerial choice, even if individual issues do not predominate in the formal Rule 23(b)(3) sense of the term. Even if implied predominance were a reasonably good approximation of the results of a practicalities analysis, this is a shadow rule that courts only turn to some of the time and without a great deal of predictability. As Professor Erbsen noted in the class action context, the predominance standard is "incoherent" because

> [t]he answer to the question of whether common or individual issues predominate in a particular case is meaningless because the practical implications of individual issues can defeat certification regardless of how individual issues relate in the abstract to common issues, and regardless of the efficiencies that might arise from resolving common issues in a single proceeding. Learning how an individual question relates to a common question on some indeterminate balancing scale does not reveal any useful information about the significance of the individual question and cannot assist in determining whether a court should certify a proposed class.[176]

Professor Erbsen's astute observation draws attention to the fact that answering the commonalities question—or acting as if the commonalities question has an answer—does not bring courts any closer to discerning whether litigating claims as a class will actually bring about the efficiency or fairness gains promised by the class action device. In this view, predominance is not an answer to the commonalities question but is, instead, a symptom of the question being largely unanswerable.[177]

Returning to Rule 20(a), take, as an example, a situation where a number of cases are pending in a single judicial district in which the plaintiffs allege injuries from taking a variety of pharmaceuticals, each containing the same active ingredient. The court begins by describing that "[t]he only concrete similarity among the various Plaintiffs are [sic] that they (or their spouse) took a medicine containing . . . [the] active ingredient, and they allegedly suffered an

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175. Writing in 1991, Professor Brunet predicted that "the courts' discretionary applications of efficiency principles will triumph over the other policies relevant to complex litigation." Brunet, *supra* note 32, at 277. Courts employing implied predominance illustrate just how appealing such principles of efficiency can be, even when they are not a stated part of a rule or paper over more difficult questions about the meaning of efficiency involved.

176. Erbsen, *supra* note 30, at 1058. It should be noted that Professor Erbsen's concerns that the predominance requirement flattens the individual concerns and values of each claim might be different in a non-class context where each litigant brings the action in her own name.

177. Although I agree with Erbsen's critique of the predominance concept as incoherent, I disagree with his ultimate conclusion that predominance should be replaced by a concept of "resolvability." *See id.* at 1080–85. I worry that this concept is equally vague and susceptible to multiple interpretations and applications, and that the difficulties in the *Wal-Mart* decisions demonstrate the problems with this approach. *See infra* notes 206–26 and accompanying text.

injury."[178] The court then discusses the concern that the "individualized circumstances and conditions" of plaintiffs each alleging harm caused by a drug will be burdensome.[179] The test for common questions of law and fact then shifts from the *existence* of a commonality to the observation that "the absence of any common issues of fact *outweighs* each plaintiff's reliance on similar law."[180] Again, the commonalities analysis becomes bound up in the court's findings about administrative difficulties, leaving future parties to wonder whether these plaintiffs genuinely lacked a common issue, whether the court responded to legitimate claims about the cohesion of these *particular* plaintiffs, or whether predominance is more important when consolidation is for trial purposes only.[181] As one district judge put it, "considerations of convenience or 'manageability' should not be smuggled into the commonality analysis required by Rule 23(a)(2)."[182]

Implied predominance places limits on joinder, but a judge might also grant a joinder motion with an approving nod if "[c]ommon [q]uestions of [l]aw and [f]act [p]redominate [o]ver [i]ndividual [q]uestions,"[183] or if "the common issues outweigh the individual inquiries in these cases."[184] In some instances, the analysis focuses on the "permissive application" of Rule 23(a)(2) as an analog to Rule 20 instead of borrowing the Rule 23(b)(3) predominance requirement. For example, a judge might note that "common questions have been found to exist in a wide range of context [sic]" and that, so long as there is a common question, individual differences are "immaterial for the purposes of the

178. Graziose v. Am. Home Prods. Corp., 202 F.R.D. 638, 640 (D. Nev. 2001).

179. *Id.* at 641.

180. Weber v. Lockheed Martin Corp., No. 00-2876, 2001 WL 274518, at *2 (E.D. La. Mar. 20, 2001) (emphasis added); *see also* Hasman v. G.D. Searle & Co., 106 F.R.D. 459, 461 (E.D. Mich. 1985) (noting that, for Rule 42(a) purposes, "[w]hen cases involve some common issues but *individual issues* predominate, consolidation should be denied"); Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357, 383 (E.D. Pa. 1982) (upholding Rule 42(a) consolidation of cases where "[a]ll fifteen claims involved common as well as individual questions of law and fact, with the common issues predominating").

181. *See* Harry & David v. ICG Am., Inc., No. 08-3106-CL, 2010 WL 3522982, at *1 (D. Or. Sept. 7, 2010) (adopting language from the Manual for Complex Litigation supporting Rule 42(a) consolidation when common *evidence* will predominate at trial); Wolf v. Procter & Gamble Co., 555 F. Supp. 613, 627–28 (D.N.J. 1982) (analyzing the utility of permitting intervention with a narrow commonality as a separate question from the existence of the common question itself).

182. Wajda v. Penn Mut. Life Ins. Co., 80 F.R.D. 303, 311 (E.D. Pa. 1978).

183. Allen v. Woodford, No. 1:05-CV-01104-OWW-LJO, 2006 WL 3825008, at *11 (E.D. Cal. Dec. 26, 2006) (granting Rule 42(a) motion to consolidate cases); *see also* Mishkin v. Zynex, Inc., No. 09-cv-00780-REB-KLM, 2010 WL 749864, at *1 (D. Colo. Mar. 3, 2010) (granting Rule 42(a) consolidation because "[c]ommon questions of law and fact are predominant among the three cases"); Garcia v. Intelligroup, Inc., No. 04-4980 (JCL), 2005 WL 6074922, at *2 (D.N.J. Aug. 10, 2005) ("[Rule 42(a) c]onsolidation is appropriate as common questions of law and fact predominate . . . ."); Gurschke v. Vitek, Inc., No. C-89-4084-SC, 1992 WL 676615, at *3 (N.D. Cal. May 18, 1992) (consolidating under Rule 42(a) because "the court finds that common questions of fact and law predominate in these cases").

184. Cienega Gardens v. United States, 62 Fed. Cl. 28, 32 (Fed. Cl. 2004) (granting FED. CL. R. 42(a) consolidation, which is identical to FED. R. CIV. P. 42(a)); *see* Stroughter v. United States, 89 Fed. Cl. 755, 761 (Fed. Cl. 2009) (same).

prerequisite."[185] Even a judge who acknowledges that Rule 20 "has a more permissive application than Rule 23" might nevertheless conclude that Rule 20 incorporates a predominance requirement.[186]

Implied predominance also occurs internally within Rule 23, although it can be more difficult to discern in cases where classes seek Rule 23(b)(3) certification because the courts can be unclear about whether they are directly addressing the Rule 23(a)(2) standard in their analysis.[187] Other courts reject implied predominance.[188] The Ninth Circuit noted the disarray that shadow rules, such as implied predominance, have caused. In its now-overturned *Dukes v. Wal-Mart Stores, Inc.* decision, the Ninth Circuit commented that, "[w]hile we find the case law across circuits more uniform than some courts have implied, to the extent it is not, this result may be because of courts' failure to recognize this key difference between a district court's job under Rule 23(a)(2) and its job under Rule 23(b)(3)."[189]

B. *WAL-MART V. DUKES*: HOW THE SUPREME COURT VIEWS IMPLIED PREDOMINANCE

As a shadow rule, implied predominance is not employed consistently and in fact has been explicitly rejected by some courts.[190] The future of implied

185. Mosley v. Gen. Motors Corp., 497 F.2d 1330, 1334 (8th Cir. 1974).

186. *See* Dixon v. Ford Motor Credit Co., No. 98-2456, 1999 WL 104425, at *2 (E.D. La. Feb. 24, 1999) ("[C]ourts interpreting Rules 20 and 23 have found that joinder may be allowed when common legal issues predominate despite some factual differences among the plaintiffs' claims.").

187. For example, a court might state that "[a]s long as common questions of law or fact predominate amongst the class, the requirements of Rule 23(a)(2) are met." Tennie v. City of N.Y. Dep't. of Soc. Servs. of the N.Y.C. Human Res. Admin., No. 83 Civ. 0884 (MEL), 1987 WL 6156, at *2 (S.D.N.Y. Jan. 30, 1987). However, because a court then goes on to discuss predominance under 23(b)(3), it is not clear whether the court has really used an implied predominance standard for 23(a)(2) or whether it has concluded that 23(a)(2) has been met because the stricter 23(b)(3) also has been found. Some courts of appeals have endorsed this approach in the class action context, allowing district courts to collapse a 23(b)(3) finding of predominance with the 23(a) finding of a common question of law or fact. *See, e.g.*, *In re* Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 247 (D. Del. 2002) ("The Third Circuit requires that the commonality and predominance requirements be analyzed together, because the predominance requirement, which is 'far more demanding,' incorporates the commonality requirement." (quoting *In re* LifeUSA Holding Inc., 242 F.3d 136, 144 (3d Cir. 2001))).

188. *See, e.g.*, Alexander v. Fulton Cnty., Ga., 207 F.3d 1303, 1324 (11th Cir. 2000) ("Rule 20 does not require that *all* questions of law and fact raised by the dispute be common, but only that *some* question of law or fact be common to all parties."); Thompson v. Bd. of Educ. of the Romeo Cmty. Schs., 71 F.R.D. 398, 412 (W.D. Mich. 1976) (refusing to apply Rule 20 requirements as extra class action requirements for Rule 23 because "Rule 20 and Rule 23 concern separate situations and each has its own requirements for each situation").

189. 603 F.3d 571, 593 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011) (citation omitted).

190. *See, e.g.*, Weigele v. FedEx Ground Package Sys., Inc., No. 06-CV-1330-JLS (POR), 2010 WL 3069213, at *1 (S.D. Cal. Aug. 4, 2010) (granting Rule 20 joinder based on common issues after the court previously rejected class action for lack of predominance); Luna v. Del Monte Fresh Produce (Se.), Inc., No. 1:06-CV-2000-JEC, 2009 WL 4801357, at *3 (N.D. Ga. Dec. 10, 2009) (stating that Rule 23(b)(3) predominance standard is improper in the Rule 20 context); Habitat Educ. Ctr., Inc. v. Kimbell, 250 F.R.D. 390, 394 (E.D. Wis. 2008) (stating, in relation to Rule 42(a), "I need not find that common questions of law or fact predominate"); Fisher v. Ciba Specialty Chems. Corp., 245 F.R.D. 539, 542 (S.D. Ala. 2007) ("[T]here is *no predomination prerequisite* for joinder of multiple plaintiffs'

predominance will be determined by how courts apply the *Wal-Mart* case and whether the Court's reasoning about Rule 23(a)(2) commonality seeps into the common-question language of other rules.

Prior to *Wal-Mart*, courts and commentators had understood that one distinguishing feature between Rule 23(a)(2) and Rule 23(b)(3) was that, "[i]n contrast to Rule 23(a)(2), Rule 23(b)(3) focuses on the *relationship* between the common and individual issues."[191] The *Wal-Mart* opinion suggests, to the contrary, that the concept of commonality writ large must always be a study in the relationship between common and individual issues.

In the early proceedings in *Wal-Mart*, the district court certified under Rule 23(b)(2) a class of current and former female employees of Wal-Mart who sought declaratory and injunctive relief.[192] The Supreme Court unanimously held that the workers' claims for back pay could not be certified under Rule 23(b)(2) because they did not qualify as claims for declaratory or injunctive relief within the meaning of the rule.[193] The Court split 5–4, however, over the question of whether the putative class presented a common question of law or fact. The five-Justice majority, led by Justice Scalia, held that the class did not share any common questions of law or fact because it is "impossible to say that examination of all the class members' claims for relief will produce a common answer."[194] Although some commentators expressed surprise at the Court's embrace of the predominance approach to common questions, the decision is less unexpected in light of lower courts' willingness to borrow from Rule 23(b)(3) in other contexts.

Justice Scalia's opinion bears many of the hallmarks of implied predominance because it "blends Rule 23(a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the (a)(2) inquiry so that it is no longer 'easily satisfied.'"[195] The opinion focuses on the dissimilarities among the class members' claims and states on numerous occasions that employment decisions were made by individual managers in individual stores.[196] According to the Court, such discretion to make hiring and promotion decisions

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claims, and Rule 20 contemplates a much lower threshold . . . than . . . Rule 23 . . . ." (emphasis added)); Rochlin v. Cincinnati Ins. Co., No. IP00-1898-CH/K, 2003 WL 21852341, at *14 (S.D. Ind. July 8, 2003) (stating that presence of individual issues weighs more heavily against class certification than against Rule 20 joinder); Kracker v. Spartan Chem. Co., No. 88 CIV. 647 (LLS), 1988 WL 108489, at *2 (S.D.N.Y. Oct. 12, 1988) ("Fed.R.Civ.P. 20 requires only that 'any question of law or fact common to all these persons will arise in the action,' not that such questions predominate." (quoting 7 WRIGHT ET AL., *supra* note 34, § 1653, at 386–87)).

191. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022 (9th Cir. 1998) (emphasis added); *cf.* Silver, *supra* note 29, at 502 (explaining that courts have engaged in implied predominance for consolidations under Rule 42(a) because they are most efficient "when common issues are central").

192. *Dukes*, 603 F.3d at 577.

193. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557 (2011).

194. *Id.* at 2552.

195. *Id.* at 2565 (Ginsburg, J., concurring in part and dissenting in part) (quoting 5 J. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.23[2], at 23–72 (3d ed. 2011)).

196. *See id.* at 2554–55, 2557 (majority opinion).

means that Wal-Mart did not have a policy or practice of discrimination, and therefore the class members lacked a common question of law or fact.[197]

Like judges in other implied predominance cases, Justice Scalia stresses manageability issues: "Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once."[198] The Court cited favorably a previous holding that the typicality requirement and commonality requirement, as well as the adequacy-of-representation requirement, "tend to merge"[199] into a general manageability analysis in which the judge should consider whether "maintenance of a class action is economical."[200] Although this is a puzzling interpretation of the language, given the specific enumeration of criteria by the Rules drafters, the dicta might indicate that the common question language really is subject to broader considerations, even when the considerations are spelled out elsewhere in a rule.

The Court's focus on manageability is accompanied by an emphasis on defining common questions by the answers they will produce rather than the questions they ask. The majority relies heavily on Professor Nagareda's work arguing that

> [w]hat matters to class certification . . . is not the raising of common "questions"—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.[201]

Although Professor Nagareda was writing about Rule 23(b)(3) actions, this method of thinking proved persuasive to the majority in terms of how to assess commonality in general, rather than just predominance.

The majority goes out of its way to say that it is not engaging in an implied predominance analysis:

> We quite agree that for purposes of Rule 23(a)(2) "[e]ven a single [common] question" will do. . . . We consider dissimilarities not in order to determine (as

197. *See id.* at 2554.

198. *Id.* at 2551; *cf.* Erbsen, *supra* note 30, at 1002 ("[T]he certification inquiry should not ask whether class members' circumstances are more similar than different, but rather whether their circumstances are sufficiently different to preclude resolving their claims in a single proceeding.").

199. *Wal-Mart*, 131 S. Ct. at 2551 n.5 (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982)) (internal quotation marks omitted); *see also* Marisol A. *ex rel.* Forbes v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997) ("The commonality and typicality requirements tend to merge into one another . . . ."); Mick v. Ravenswood Aluminum Corp., 178 F.R.D. 90, 92 (S.D. W. Va. 1998) (describing "the oft-merged commonality and typicality considerations").

200. *Wal-Mart*, 131 S. Ct. at 2551 n.5 (quoting *Falcon*, 457 U.S. at 157 n.13).

201. *Id.* at 2551 (omission in original) (quoting Nagareda, *supra* note 1, at 132).

> Rule 23(b)(3) requires) whether common questions *predominate,* but in order to determine (as Rule 23(a)(2) requires) whether there *is* "[e]ven a single [common] question." And there is not here.[202]

Given the majority's insistence that they have not jettisoned the single common-question standard in favor of implied predominance, it is worth exploring whether this assertion can be supported. On close reading, the opinion evinces two interpretations of the common-question language and seems to vacillate between them. The first interpretation is to conclude that, protestations aside, Justice Scalia has endorsed implied predominance. The other possibility is that the common-question language has been interpreted to mean that the class members must share a *meaningful* or *central* common question of law or fact, regardless of whether or not individual issues predominate. The meaningful question position is evident in the Court's emphasis on questions capable of class-wide resolution, which the Court evidently believes are issues "*central* to the validity of each one of the claims,"[203] or its conclusion that the plaintiffs could not show that "all the employees' Title VII claims will in fact *depend* on the answers to common questions."[204] The question might be nominally common but can be disregarded if it is not central to the litigation. The Court uses the idea of nominally common questions as a straw man:

> "[a]ny competently crafted class complaint literally raises common 'questions.'" For example: Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get?[205]

The implication is that because *any* random group of people could have any number of factual or legal questions in common,[206] the question must be meaningful or significant. The tone of Justice Scalia's statement leaves no doubt as to the Court's view of these particular questions: they are *not* within the permissible sphere of consideration.

By putting the question in such exaggerated terms, Justice Scalia ignores the more mundane limits that courts have normally put on the common-question language. The words have never been understood to mean "any question of law or fact that could hypothetically be asked by or about this group of claimants." Rather, the phrase encompasses questions of law or fact relevant to a given

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202. *Id.* at 2556 (alteration in original) (citation omitted) (quoting Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 176 n.110 (2003)).

203. *Id.* at 2551 (emphasis added).

204. *Id.* at 2554 (emphasis added).

205. *Id.* at 2551 (alteration in original) (citation omitted) (quoting Nagareda, *supra* note 1, at 131–32).

206. This, again, is the reference-class problem. *See* Cheng, *supra* note 1, at 2095.

litigation.[207] As the discussion above has shown, this line is not always clear, particularly when it comes to discerning whether questions asked about the same law or statutory scheme can be common to a group of litigants.[208]

Assuming, however, that this formulation is not really as broad as Justice Scalia's hyperbolic statement, one is left to wonder exactly what kind of a question is meaningful enough to qualify as a "real" question of law or fact that class members might have in common. The majority opinion suggests a few possible answers. One is that the "meaningful" question is simply implied predominance in disguise; that is, when "dissimilarities" overwhelm the common questions, the questions are no longer common.[209]

Another possibility is that a meaningful common question is one that is *central* to the resolution of the case. The majority opinion emphasizes this centrality idea at several points, arguing that a common question is one that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is *central* to the validity of each one of the claims in one stroke,"[210] that it "*depend*[*s*] on the answers to common questions,"[211] or that a common question is one that will "*drive* the resolution of the litigation."[212]

Centrality, in other words, is a concept focused on the "important" issues in a lawsuit—the issues whose resolution would lead directly to a final judgment in a case, as opposed to issues whose resolution paves the path to summary judgment or trial. Although the Court does not state so explicitly, the centrality view implies that questions that do not go to the *merits* of the case are not within the definition of a "common question," even if they might outweigh the individual, merits-based issues in a case. The centrality view of the common questions is almost reminiscent of issue preclusion analysis in which a party can be precluded from relitigating an issue if it was already adjudicated and was necessary to the prior judgment.[213] Although the Court does not frame the centrality of the common issue in the same terms of logical connection that characterize issue preclusion cases, the intuition might be that, given the class

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207. *See, e.g.*, Sessions v. Owens-Ill., Inc., 267 F.R.D. 171, 175 (M.D. Pa. 2010) (rejecting defendants' claims that plaintiffs' common questions existed at too high a level of abstraction).

208. *See supra* notes 135–46 and accompanying text (discussing whether claims arising out of the same law meet the commonality threshold).

209. *See Wal-Mart*, 131 S. Ct. at 2556–57; *see also* Allan Erbsen, Wal-Mart v. Dukes *and the Heterogeneity Problem: Part I (The Aggregability/Resolvability Distinction)*, PRAWFSBLAWG (July 6, 2011, 9:55 AM), http://prawfsblawg.blogs.com/prawfsblawg/2011/07/wal-mart-v-dukes-and-the-heterogeneity-problem-part-i-the-aggregabilityresolvability-distinction.html (discussing the Court's dissimilarity analysis).

210. *Wal-Mart*, 131 S. Ct. at 2551 (emphasis added).

211. *Id.* at 2554 (emphasis added).

212. *Id.* at 2551 (emphasis added) (quoting Nagareda, *supra* note 1, at 132) (internal quotation marks omitted).

213. *See* Kremer v. Chem. Constr. Corp., 456 U.S. 461, 466 n.6 (1982) ("Under collateral estoppel, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties.").

action's res judicata effect in binding class members,[214] the common issue must form the "crux"[215] of the case in order to move into the sphere of consideration under Rule 23(a)(2).

Implied predominance and centrality are not necessarily mutually-exclusive principles or positions. One interpretation of *Wal-Mart* is that these principles now work in tandem in defining common issues. Implied predominance is the principle by which a court must look at the relationship between the common and individual issues, and centrality is the principle by which the court focuses on the relationship between the issue and the litigation. In other words, under the broadest reading of *Wal-Mart*, a court conducting a Rule 23(a)(2) analysis must account for *how* a question is answered (for example, with answers applicable to all class members) and *why* the question is being asked.

A few lower courts interpreting the common-question language outside of Rule 23(a) also have used language similar to the centrality position espoused in *Wal-Mart*. For example, one district court was not "convinced that the proposed class meets the requirements of Rule 23(a)" because "[t]he fault of the individual tenants is at the *crux* of this case."[216] Like implied predominance, the centrality concept can be used to bolster a finding of commonality as well as to destroy it.[217] Judge Weinstein accomplished the former in the Agent Orange

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214. Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. (forthcoming 2012) (manuscript at 30), *available at* http://ssrn.com/abstract=1838368.

215. *Wal-Mart*, 131 S. Ct. at 2552 ("[T]he crux of [a Title VII] inquiry is 'the reason for a particular employment decision . . . .'" (quoting Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 876 (1984)).

216. Tolle v. Knoxville's Cmty. Dev. Corp., 93 F.R.D. 376, 378 (E.D. Tenn. 1981) (emphasis added); *see also* Garza v. Gruma Corp., No. C 07-02092 JW, 2009 WL 2136930, at *5 (N.D. Cal. July 16, 2009) ("Plaintiffs fail to explain which questions of law or fact are common to the Proposed Class. . . . Further, the validity of the claims asserted in this case depend [sic] upon the particular circumstances of each distributors' negotiations and the particular language of their contract."); Jeffries v. Pension Trust Fund of the Pension, Hospitalization & Benefit Plan of the Elec. Indus., No. 99-Civ.-4174(LMM), 2007 WL 2454111, at *11–12 (S.D.N.Y. Aug. 20, 2007) ("The question of whether Defendant was required to declare a partial termination is at the core of this litigation, and its resolution would affect all members of the putative class."); *cf.* Wilensky v. Olympic Airways, S.A., 73 F.R.D. 473, 476 (E.D. Pa. 1977) ("[I]ndividual inquiry precludes our finding the existence of common questions of law and fact."). *But see* Spain Equip. Co. v. Nissan Motor Corp., 28 Fed. R. Serv. 2d (Callaghan) 937 (N.D. Ala. 1980) (noting that centrality is important to predominance analysis but not to Rule 23(a)(2) commonality analysis).

217. *See* Brown v. Kelly, 609 F.3d 467, 484 (2d Cir. 2010) ("Because these issues are likely to be central to all of the plaintiffs' cases and could be dispositive to the resolution of some claims, the district court did not abuse its discretion in certifying the City Plaintiff Class."); *Jeffries*, 2007 WL 2454111, at *11–12 ("The question of whether Defendant was required to declare a partial termination is at the core of this litigation, and its resolution would affect all members of the putative class."); San Antonio Hispanic Police Officers' Org. v. City of San Antonio, 188 F.R.D. 433, 442–43 (W.D. Tex. 1999) ("As long as class members are allegedly affected by a defendant's general policy, and the general policy is the crux or focus of the litigation, the commonality prerequisite is satisfied."); Gaspar v. Linvatec Corp., 167 F.R.D. 51, 60 (N.D. Ill. 1996) ("[T]his court found that questions of law and fact common to Gaspar's proposed class exist [because] the legal crux of Gaspar's complaint was that defendants unlawfully forced Gaspar and the class members to choose between the severance and retirement plans."); Rosario v. Livaditis (*In re* Livaditis), 132 B.R. 897, 902 (Bankr. N.D. Ill. 1991)

litigation when he found that common issues predominated for Rule 23(b)(3) purposes because of "the *centrality* of the [defendants'] military contractor defense," despite "few, if any, [other] common questions of law" and the need for "highly individualistic" inquiries into causation.[218] These decisions, however, do not indicate that centrality is a *necessary* condition for commonality. Instead, they indicate that it emphasizes or reaffirms the existence of commonality. There are far more of these decisions than decisions using centrality to *block* commonality or to certify "issue classes" under Rule 23(c).[219] Some lower courts have indirectly considered and rejected the centrality premise.[220]

Despite these few examples, centrality does not seem to have taken hold in the lower courts' interpretations of Rules 20(a) and 42(a) in the way that implied predominance has. Moreover, the meaningfulness and centrality language is harder to tie to the common-question language because it is also connected to the "transaction or occurrence" requirement of Rule 20. For example, Judge Bechtle in *In re Orthopedic Bone Screw Products Liability Litigation* denied Rule 20 joinder to plaintiffs, finding that the rule "requires at a minimum that the *central* facts of each plaintiff's claim arise on a somewhat individualized basis out of the same set of circumstances."[221] His opinion indicates that if common issues must be central, this is because of the "same transaction" requirement and not because the definition of "common question of law or fact" demands that interpretation. If centrality is indeed tied as much to the "same transaction or occurrence" language as it is to the common-question

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(noting that common claims form the "crux" of class members' claims); Moore v. Miller, 612 F. Supp. 952, 955 (N.D. Ill. 1985) ("Common questions of law and fact concerning the state's policy regarding EIC payments exist at the crux of this case."); Davis v. Bucher, 451 F. Supp. 791, 802 (E.D. Pa. 1978) ("The legality of this absolute bar is a question common to all members of the alleged class, and is the crux of this case."); Reichert v. Bio-Medicus, Inc., 70 F.R.D. 71, 74 (D. Minn. 1974) ("[T]he liability of each of the defendants . . . depends upon resolution of certain common questions of law and fact."). The centrality concept has also occasionally appeared in analysis supporting predominance. *See, e.g.*, Vaughn v. Am. Honda Motor Co., 627 F. Supp. 2d 738, 746 (E.D. Tex. 2007) *stay granted, order amended by* 507 F.3d 295 (5th Cir. 2007); Meyer v. CUNA Mut. Grp., No. 03-602, 2006 WL 197122, at *22 (W.D. Pa. Jan. 25, 2006), *aff'd sub nom.* Meyer v. CUNA Mut. Ins. Soc'y, 648 F.3d 154 (3d Cir. 2011); Bunch v. W.R. Grace & Co., No. 04-218-DLB, 2005 WL 1705745, at *4 (E.D. Ky. July 21, 2005).

218. *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 165–68 (2d Cir. 1987) (emphasis added); *see also* Baby Neal *ex rel.* Kanter v. Casey, 43 F.3d 48, 57 (3d Cir. 1994) (interpreting Rule 23(a)(2) and noting that "[i]ndeed, [Rule 23](b)(2) classes have been certified in a legion of civil rights cases where commonality findings were based primarily on the fact that defendant's conduct is *central* to the claims of all class members irrespective of their individual circumstances and the disparate effects of the conduct" (emphasis added)); Ramsey v. Arata, 406 F. Supp. 435, 441 (N.D. Tex. 1975) ("[T]he central issues . . . are common issues and I believe they . . . will dominate the conduct of the action.").

219. *See* Cabraser, *supra* note 51, at 1499 ("[Rule 23(c)] simply requires that the issue proposed for class treatment be of 'central' importance to the disposition of the case." (quoting Campion v. Credit Bureau Servs., Inc., 206 F.R.D. 663, 676 (E.D. Wash. 2001))).

220. *See, e.g.*, Mailloux v. Arrow Fin. Servs., LLC, 204 F.R.D. 38, 42 (E.D.N.Y. 2001) (suggesting that the common question being the "crux" of the class members' claim was unnecessary to support a finding of commonality).

221. No. MDL 1014, 1995 WL 428683, at *2 (E.D. Pa. July 17, 1995) (emphasis added).

language, the soundness of centrality should be looked upon with even more skepticism. For, as sections II.A and II.B have shown, the "transaction or occurrence" language is just as vague and indeterminate as the common-question language. Adding this component to a "centrality" standard is unlikely to lend additional clarity to the commonalities inquiry.

An alternative reading of *Wal-Mart* to the implied-predominance or centrality concepts would be to simply conclude that the majority has used the procedural question in Rule 23(a)(2) to make both factual and legal conclusions about the merits of the *Wal-Mart* case.[222] To the question the class members believed they had in common, namely, "whether Wal-Mart's discretionary pay and promotion policies are discriminatory,"[223] the Court simply answered in the negative. Some commentators have already noted the boldness with which the Court reached into the district court record to make its own conclusions as to the weight and quality of the evidence that the class representatives presented for certification.[224] The Court did not shrink from the possibility of peeking into the merits, reaffirming its conviction that class certification "will entail some overlap with the merits of the plaintiff's underlying claim."[225] This is unsurprising given that a standard which demands common "answers" will unavoidably be focused on what those answers will be. While this view does not give the

222. *See* John C. Coffee Jr., *"You Just Can't Get There from Here": A Primer on* Wal-Mart v. Dukes, 12 BNA CLASS ACTION LITIG. REP. 610, 612 (2011) ("As redefined, commonality necessarily overlaps with the merits."); Ralph Richard Banks, *A Cruel Paradox*, N.Y. TIMES (June 30, 2011, 5:05 PM), http://www.nytimes.com/roomfordebate/2011/06/20/a-death-blow-to-class-action/the-cruel-irony-in-the-wal-mart-ruling ("Wal-Mart v. Dukes is ostensibly focused on a narrow procedural issue but is in fact the latest installment in a long running debate about equality, in the workplace and beyond."); Matthew Bodie, *Workplace Rules*, N.Y. TIMES (June 21, 2011, 12:21 PM), http://www.nytimes.com/roomfordebate/2011/06/20/a-death-blow-to-class-action/leaving-it-to-the-workplace ("I think the real issue here is the definition of 'dispute.'"); Sergio Campos, Wal-Mart v. Dukes *and Commonality*, PRAWFSBLAWG (June 20, 2011, 5:03 PM), http://prawfsblawg.blogs.com/prawfsblawg/2011/06/wal-mart-v-dukes-and-commonality.html (arguing that the decision "conflate[s] the merits of the plaintiffs' claim of a common discriminatory policy with whether such a policy would be common to the class"); Sarah Crawford, Wal-Mart v. Dukes*: A Supreme Blow to Corporate Accountability, the Class Action Vehicle–and Justice*, AM. CONST. SOC'Y BLOG (June 27, 2011), http://www.acslaw.org/acsblog/wal-mart-v-dukes-a-supreme-blow-to-corporate-accountability-the-class-action-vehicle-%E2%80%93-and-j ("Even though the Court was presented with the limited question of whether to certify the class, the majority delved deep into the merits of the underlying claims of discrimination."); Erbsen, *supra* note 209 ("The holding in *Wal-Mart* is thus not really 'about' class actions as a procedural device so much as it is about how substantive law accommodates the available procedural methods for enforcing it."); Melissa Hart, *Hostility Toward Working Women*, N.Y. TIMES (June 21, 2011, 11:02 AM), http://www.nytimes.com/roomfordebate/2011/06/20/a-death-blow-to-class-action/failing-to-recognize-discrimination ("This case could have been decided exclusively on the question of whether Rule 23(b)(2) was the appropriate vehicle for the class action the Dukes plaintiffs brought. . . . The [Court's] decision to instead issue a potentially far-reaching attack on claims of discrimination is distressing.").

223. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2565 (2011) (Ginsburg, J., concurring in part and dissenting in part).

224. *See, e.g.*, Campos, *supra* note 222 (arguing that the Supreme Court made its own judgments about the evidence in *Wal-Mart*); Crawford, *supra* note 222 ("[T]he majority discounted sociological expert evidence [and] . . . discounted statistical evidence that quantified the discrimination.").

225. *Wal-Mart*, 131 S. Ct. at 2551 (majority opinion).

Court much credit in the realm of principled jurisprudence, it is a view that suggests that the Court's broadest actions here were with regard to its own powers and scope of review,[226] rather than with regard to the scope of Rule 23(a)(2).

C. THE UNCERTAIN FUTURE OF IMPLIED PREDOMINANCE

The *Wal-Mart* decision has raised more questions about the common question language than it has answered.[227] Although the Court built its analysis on the implied predominance approach already in use by some lower courts, it also expressly rejected that tactic, at least as a matter of words. Moreover, it elevated the centrality thesis to the forefront of commonality analysis. In light of these developments, I suggest a few rough predictions for how the common-question doctrine might unfold in the non-class-context post-*Wal-Mart*.

One possibility is that implied predominance wanes in the wake of the *Wal-Mart* decision. A key feature of the shadow rules is that courts rarely announce that they are creating or applying them; rather, shadow rules emerge through patterns of common law decision making and gloss on the rule text. In this sense, judges, now alerted to the existence of implied predominance, might take a stronger stance in rejecting it. They might do so because of a prior inclination to question that interpretation of the rule, or because of Justice Scalia's rebuttal of Justice Ginsburg's accusation of implied predominance.[228] On the other hand, courts following the substance of Justice Scalia's position might find better cover in burying the shadow rule by applying it in practice and denying it in word.

Another possibility is that the centrality and resolvability concepts gain greater traction outside of the class action context. As demonstrated above, some courts are already willing to turn to centrality in support of a joinder decision. The number of decisions using centrality to *defeat* joinder could increase, as could an increased reliance on defining centrality by looking to whether the questions are susceptible to common answers, or claimant-wide resolution.

In the months following the *Wal-Mart* decision, district judges have quoted the centrality language extensively both to grant and deny class certification. To bolster certification decisions, courts have concluded that the allegedly common issue would indeed resolve a central issue "in one stroke"[229] and noted that the

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226. *See* Hart, *supra* note 222 ("The majority ignores procedural limitations on the scope of its review.").

227. *See* Coffee, *supra* note 222, at 612–13 (arguing that a refusal to certify a class of *Wal-Mart*'s scope was unsurprising but that commonality analysis going forward is less certain for other classes of cases).

228. *See* Haynes v. Planet Automall, Inc., 276 F.R.D. 65, 73, 81 (E.D.N.Y. 2011) (stating that only a single common question is required for Rule 23(a), then denying certification under Rule 23(b)(3) using the *Wal-Mart* predominance standard).

229. *See, e.g.*, *In re* Wellbutrin XL Antitrust Litig., No. 08-2431, 2011 WL 3563385, at *4 (E.D. Pa. Aug. 11, 2011) (quoting *Wal-Mart*, 131 S. Ct. at 2551) (internal quotation marks omitted); *see also*

common issue involves "essential" facts in the litigation. Similar language has been used to support a denial of certification.[230] These early decisions indicate that in the class action context, the courts will use a mix of the centrality and implied predominance standards as described above: implied predominance to determine whether the common questions are indeed susceptible to common answers and centrality to determine the relative importance of the question to the overall litigation.

The *Wal-Mart* decision is most likely to bleed into Rule 20(a) or Rule 42(a) decisions when joinder or consolidation under these rules is sought as an alternative or second-best option to class certification. Evidence for this path appears in some Rule 24(b) permissive-intervention cases. Courts considering permissive intervention were far less likely to invoke implied predominance than courts considering permissive joinder or Rule 42(a) consolidation. The glaring exception to this pattern, however, occurs in permissive-intervention cases in which a court had first considered class certification, permissive joinder, or consolidation for the proposed intervenors.[231] In these cases, implied predominance appears as part of the permissive-intervention reasoning. A similar migration of *Wal-Mart* concepts and analysis from Rule 23 to Rules 20(a) and 42(a) therefore seems particularly likely in cases where a judge has already conducted Rule 23 commonality analysis about a group of claimants.

The final possibility is that *Wal-Mart* has little impact outside of the class action world at all. Many of the Court's conclusions relied upon facts that were (or were purported to have been) found in the Rule 23 certification process, in which judges hold hearings and make factual findings, even if such findings overlap with the merits of the case. This merits-preview idea, still controversial and difficult to delineate within class actions, might be beyond the formal fact-finding that courts are willing to make in non-class joinder decisions.

Much of the *Wal-Mart* opinion was dedicated to answering the question: "How common is common enough and what evidence must the putative class produce to meet this standard?" But underneath the disputes over the wisdom of certifying large classes based on statistical evidence, the proper standard for commonality under different procedural rules awaits an answer. As the shadow

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Walter v. Hughes Commc'ns, Inc., No. 09-2136 SC, 2011 WL 2650711, at *7 (N.D. Cal. July 6, 2011) (also quoting the "in one stroke" language); Ham v. Swift Transp. Co., 275 F.R.D. 475, 484 (W.D. Tenn. 2011) (same).

230. *See, e.g.*, Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich., 654 F.3d 618, 636 (6th Cir. 2011); Tire Kingdom, Inc. v. Dishkin, No. 3D08-2088, 2011 WL 3311742, at *7 (Fla. Dist. Ct. App. July 6, 2011) (quoting State Farm Mut. Auto. Ins. Co. v. Kendrick, 822 So. 2d 516, 517 (Fla. Dist. Ct. App. 2002)) (interpreting Florida's class action rule using precedent from Fed. R. Civ. P. 23(a)(2)).

231. *See, e.g.*, Dickerson v. U.S. Steel Corp., 582 F.2d 827, 831–32 (3d Cir. 1978); Edwards v. Accredited Home Lenders, Inc., No. 07-0160-KD-C, 2009 WL 1269511, at *2 (S.D. Ala. May 4, 2009); Wolf v. Procter & Gamble Co., 555 F. Supp. 613, 627–28 (D.N.J. 1982); Greer v. Blum, 462 F. Supp. 619, 624–26 (S.D.N.Y. 1978); Martinez v. Safeway Stores, Inc., 66 F.R.D. 446, 448–49 (N.D. Cal. 1975). Courts apply a particularly rigorous analysis for intervention in class actions. *See* Eckert v. Equitable Life Assurance Soc'y of the U.S., 227 F.R.D. 60, 64 (E.D.N.Y. 2005) (quoting 5 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 16:8 (4th ed. 2002)).

rule of implied predominance demonstrates, a muddled interpretation of the standard for Rule 23(a)(2) can have consequences beyond the realm of class actions.

IV. BEYOND THE SHADOW RULES

Joinder rules with a relatedness threshold have not produced outcomes in which there is a predictable answer to the questions "how common is common enough?" and "which commonalities should matter?" This is the result of judges' attempts to integrate a host of policy and management concerns into their joinder decisions and the gap between the general principles of joinder writ large and the purposes of each individual joinder device. Redescription and implied predominance are examples of the judicial attempt to bridge that divide by incorporating these concerns into a definition of commonality.

Having uncovered the instability of the commonalities approach, I believe that it is time to reconsider whether to abandon the commonalities approach to joinder. This Part investigates that possibility. Section IV.A begins with a careful examination of the nature of shadow rules and their place in the larger context of judicial interpretation of written directives. Section IV.B then discusses what kind of directive might replace the current language. Section IV.C then offers some limited direction for future thought and research on how to move forward with joinder rules that would function in the absence of a commonalities approach.

A. THE NATURE OF THE SHADOW RULES

Before suggesting how or whether the joinder rules should be reconstructed, it is worth pausing to consider what role, if any, the shadow rules play in the larger world of statutory interpretation and common law rulemaking.

Delving into the world of the shadow rules of joinder reveals two different narratives about the operation of rules. According to one narrative, the divergences are different interpretations of rules, and the differences among courts are no different than the divergent interpretations and applications of any statute resulting in a classic circuit split. In a second narrative, there is hardly any divergence at all, just the exercise of discretion on a factual, case-by-case basis.

The existence of the variance in interpretation and application of the joinder rules that I have described in the previous two Parts is not unique to the joinder context. In any statutory or regulatory scheme, courts will come to different interpretations of the rules. There will be circuit splits on the meaning of a particular text. There will be disagreements over whether a text has an ambiguous meaning. According to this first narrative, then, I have not detailed the divergent interpretations and applications of the joinder rules in order to illustrate some strange phenomenon of statutory interpretation that is happening only in the world of civil procedure and only in the world of joinder.

I believe, however, that there is more to this story than a collection of circuit

splits. The element of discretion overlays the spirit of the FRCP as a whole and the operation of specific rules, making it difficult to disambiguate ordinary interpretative differences from variances stemming from shadow rules.

The concept of judicial discretion looms large in the world of joinder. When joinder rules are discussed in the larger context of FRCP case-management tools, judges and commentators stress their flexible and discretionary nature.[232] The Rules drafters chose texts that bestowed a great deal of discretion upon trial judges because they wanted judges to consider the subtleties of each case, including the specific situations of the litigants and third parties, and to avoid the problems that rigid procedural formalism had produced.[233] It is in the nature of legal rules, in general, and of discretionary rules, in particular, that it will be difficult to ascertain uniformity of results.[234]

The concept of discretion is used both to explain doctrinal variance and to dismiss most serious attempts to understand it.[235] Unpacking this concept in the realm of joinder helps to explain why joinder decisions have come to be governed by conflicting shadow rules and not simply by competing interpretations of the law. The first order of business is to reiterate that the joinder rules are not woven entirely of discretionary fabric. For example, as some of the Rule 20(a) cases demonstrate, courts have debated whether the commonality requirement is discretionary at all or is instead a threshold legal matter to be crossed before moving on to other discretionary aspects of the rule.[236]

However, even within the more flexible aspects of the rules, it would be a mistake to treat discretion as a unitary concept.[237] The FRCP, as currently written, incorporate what Professor Bone has described as "Explicit Discretion" and "Interpretive Discretion."[238]

A Rule that "explicitly delegates broad discretion"[239] is an example of the first concept. For example, Rule 21 grants district judges broad discretion to manage the presence or absence of parties in a case, stating that "[o]n motion or

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232. *See, e.g.*, Marcus, *supra* note 43, at 1563 ("The procedural rules themselves could emphasize limiting discretion. But [they] do not.").

233. *See supra* notes 35–40 and accompanying text.

234. *See* Direct TV, Inc. v. Delaney, No. 03-C-3444, 2003 WL 24232530, at *4 (N.D. Ill. Nov. 20, 2003) ("In ruling on permissive joinder, courts conduct a case-by-case analysis and avoid 'hard and fast' rules."); *cf.* Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 413 (2007) ("[T]he inherent uncertainty of legal rules and the need for flexibility to respond to unanticipated situations means that rules cannot definitively determine what a judge should do in every case.").

235. *See supra* notes 65–69 and accompanying text.

236. *See supra* notes 178–86 and accompanying text.

237. Scholars of discretion have distinguished between "primary" and "secondary" discretion. *See* Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 637 (1971). The types of discretion discussed in my article are part of "secondary" discretion because the rules do not accord the district judge complete freedom to choose or create *any* rule for the resolution of the case. *See id.*; *see also* Marcus, *supra* note 43, at 1580 (stating that, when the rules were drafted, they "depended heavily on judicial discretion of at least the secondary variety").

238. Bone, *supra* note 27, at 1967–70.

239. *Id.* at 1968; *see also* Marcus, *supra* note 43, at 1576–78 (describing areas in which Congress has and has not delegated discretion for developing adjudicatory procedural doctrines).

on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party."[240] These rules supply "limited guidance . . . cast in terms of highly general goals that offer little constraint."[241]

The other big grant of explicit discretion in the joinder context is Rule 42(b) (power to order separate trials), an example of a rule of explicit discretion that "delegate[s] discretion but also list[s] factors that a judge must balance when making a decision."[242] Rule 42(b) functions not only as a specific limitation on Rule 42(a) but also as a limitation on all other rules of joinder because it allows the judge to order separate trials of "separate issues, claims, crossclaims, counterclaims, or third-party claims" when it is convenient or will "avoid prejudice" or "expedite and economize" the proceedings.[243] Professor Bone has noted that the lists of factors in rules such as these "are usually very general and frequently just repeat what any sensible judge would consider anyway. Moreover, none of these Rules specify the weights to be assigned to the different factors or tell judges how to strike the balance in close cases."[244] The discrepancies in the interpretations of the rules in Part II show the result of applying an open-ended list of factors.

The two joinder rules that fully grant explicit discretion are those that empower a court to *block* or *modify* joinder, rather than to grant it. The next inquiry, then, is whether the rules for granting joinder are rules of explicit discretion or interpretive discretion.

According to Professor Bone's theory, rules of interpretive discretion "license discretion . . . by incorporating vague language inviting case-specific interpretation."[245] Some joinder rules are a mix of explicit discretion and interpretive discretion, whereas others contain only interpretive discretion.

The "common question" and "transaction or occurrence" phrases which provide the commonality threshold are an example of what Professor Bone calls "interpretive discretion" because they "incorporat[e] vague language inviting case-specific interpretation."[246] Part of Professor Bone's theory is that the Rules drafters have "*purposefully* written in vague language."[247] It is unclear whether the phrases "transaction or occurrence" and "common question of law or fact" are *deliberately* vague choices on the part of the Rules drafters or are instead an artifact of the origin of the phrases as procedural rules from equity.[248] The result of the vague language, however, is the same: "[C]ase precedent offers little constraint in this area because balancing tests and discretionary decisions are

240. FED. R. CIV. P. 21.
241. Bone, *supra* note 27, at 1968.
242. *Id.* at 1969.
243. FED. R. CIV. P. 42(b).
244. Bone, *supra* note 27, at 1969 (footnote omitted).
245. *Id.* at 1970.
246. *Id.*
247. *Id.*
248. *See, e.g.*, 6 WRIGHT ET AL., *supra* note 34, § 1410; *see also* Burbank, *supra* note 34 (relating the comprehensive history of the FRCP, including the role of equitable rules of the Supreme Court).

normally too fact specific to support generalizations."[249]

Rules such as a Rule 13(a) (compulsory counterclaim) and Rule 20(a) (permissive joinder of parties) contain only the interpretive discretion of the commonality threshold. Other rules, however, contain grants of explicit discretion in addition to the decisions that a judge must make under the rule's interpretive discretion. For example, permissive intervention requires a common question of law or fact (interpretive discretion) but is then subject to an explicit grant of discretion in Rule 24(b)(3) or Rule 42(a).[250]

Notice how easily the rules slide between explicit and interpretive discretion. For example, Rule 24(b)(3), permitting a court to deny intervention, provides that "[i]n exercising its *discretion*, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights,"[251] whereas Rule 15(c) states that a claim will relate back if the defendant "received such notice of the action that it will not be prejudiced in defending on the merits."[252] The discretion moves from an explicit case-by-case determination of prejudice to an interpretive decision about whether notice was sufficient.[253] Beyond the discretion that is granted explicitly through text or implicitly through broad or vague language, judges also enjoy enhanced discretion in joinder decisions because the rules are relatively insulated from review due to the fact that "the final judgment rule creates the possibility that any errors made may become moot if the case is settled or if the objecting party ultimately prevails."[254]

What, then, makes joinder rules any different from other broad or vague statutes, such as the notoriously broad Sherman Antitrust Act?[255] As Professor Yablon has stated the problem: "What distinguishes instances of doctrinally recognized discretion . . . from other judicial activities, like statutory or constitutional interpretation in which judges may also decide in contradictory ways?"[256] Yablon's answer is that discretionary decisions are those "justified within the institutional structure of the courts, not by demonstrating that they are correct, but by demonstrating that the decisionmaker is the person most institutionally

249. Bone, *supra* note 27, at 1970.

250. Rule 24(b) uses the term "discretion" whereas Rule 42(a) states that the "court may" take action, indicating that the court has discretion; Rule 20(a) states that "[p]ersons may" join. *See* FED. R. CIV. P. 20(a); FED. R. CIV. P. 24(b); FED. R. CIV. P. 42(a).

251. FED. R. CIV. P. 24(b)(3) (emphasis added).

252. FED. R. CIV. P. 15(c).

253. *See supra* notes 148–54 and accompanying text.

254. *See* Kim, *supra* note 234, at 418. Kim refers to "rulings on issues such as the joinder of claims or parties" as "effectively unreviewable." *Id.* Although I believe that this is an overstatement, her emphasis on the institutional relationship between the district courts and the courts of appeals and the Supreme Court provides a valuable perspective on how the availability of appellate review—or lack thereof—impacts how judges experience and exercise discretion.

255. 15 U.S.C. §§ 1–7 (2006).

256. Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 257 (1990).

competent to make such decisions."[257]

When a legislature purposefully[258] writes a broad rule, it is often with the intent to pass on the burden of more specific rule making to another body, such as an agency or the courts. The Sherman Act is one such example of a federal statute that delegates "common law authority to the courts."[259] It is not necessarily sanctioning a multiplicity of results, but it is expecting judicially created or agency-created rules to emerge out of its text.[260] But a rule of interpretive discretion is one in which there is a lowered expectation that decision makers will craft rules in the shadow of the original text, which will bind future judges applying it. That is, a court deciding a case under the Sherman Act must persuade other courts that it has come to the *correct* decision, and this remains the case even in the face of conflicting decisions by courts. A judge deciding a case under a rule of interpretive discretion need only justify her decision on the basis that she is the best person to make it.

The generalized use of the term *discretion* weakens the driving forces behind the FRCP joinder rules. Failing to distinguish between explicit discretionary factors and interpretive discretionary factors confuses the inquiry of the meaning of commonality with the other factors that a court could or should consider in addition to commonality.[261] In that context, the presence of interpretive discretion lessens the degree to which we should expect uniformity from the courts.

The uncertainty of discretion leads to uncertainty of analysis. The purposefully vague rules appear to bestow interpretive discretion so that judges may craft flexible and individually tailored results. However, judges also respect that the written FRCP are more than equitable maxims. They therefore attempt to pin down the meaning of the phrases in a manner which gives the "purposefully vague" language more content and brings the decisions in line with other applications of the Rules. Moreover, to the extent that joinder devices are thought of as a type of "case management" tool,[262] divergences in the applications of the rule seem more like iterations of various "managerial styles" rather than serious doctrinal differences. The lack of visibility in judicial discretion first led Professor Resnik to express concern about "managerial judges."[263]

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257. *Id.* at 259.

258. To the extent that we can determine how purposeful the crafting of a vague rule is.

259. Miranda McGowan, *Do As I Do, Not As I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation*, 78 MISS. L.J. 129, 150 (2008).

260. *See* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1377 (1988) ("[F]or common law statutes . . . Congress has declared an important public policy in general, sweeping terms, and has essentially left the courts free to mold the contours of that policy . . . .").

261. *See supra* Parts II–III.

262. *See also* Gensler, *supra* note 45, at 670–74 (describing judicial case management and summarizing academic debate); Kim, *supra* note 234, at 425–26 (same); Marcus, *supra* note 43, at 1587–90 (discussing the relationship between case management and discretion); *cf.* Resnik, *supra* note 11, at 443 (proposing changing the Rules to reduce the need for judicial management).

263. *See* Resnik, *supra* note 11, at 409–12.

Joinder decisions show a variation on this invisibility—decisions and doctrinal differences are adjudicated in adversarial proceedings and recorded in written decisions but hide in plain sight behind a veil of undifferentiated doctrines of discretion. Professor Yablon believes that discretion (as opposed to simple differences in judicial outcomes) occurs when a judge "can justify her decision by demonstrating that she is *best suited* to make such a decision."[264] The more that judges position themselves as managers and cast joinder decisions as a feature of judicial management, the more that the veneer of discretion can obfuscate doctrinal differences and shadow rules can emerge.

It is within this interpretive space that the concept of shadow rules comes into play. The shadow rules are more than differing interpretations of the same statutory language. Rather, they represent the collective effort of judges to construct joinder rules within the commonality phrases. They are an attempt to impose order on a space that still allows for individual judgment calls in individual cases. When judicially created rules develop from a common law statute, courts may come to different interpretations while "filling in the details,"[265] but stare decisis ensures that the differences will smooth out over time, or at least that the differences are recognized as genuine interpretive differences.[266] With joinder, common law development at the rule level spurs the creation of shadow rules, but the case-level discretion exercised in service of judicial case management prevents the shadow rules from developing fully into recognizable rules that are applied by courts in a predictable manner.

These are rules that are founded on "the shared assumption of trial and appellate judges that there are certain legal decisions that can be made correctly at the level of practice, but cannot be reduced to rules and, accordingly, cannot be reviewed based on correct compliance with the rules."[267] The shadow rules are an attempt to reconcile discretionary directives that cannot be reduced to rules with a sense that greater order and reasoning could be placed on joinder decisions.

The shadow rules, then, are a window into the uncomfortable space that managerial judging has come to occupy by "forc[ing] us to think about whether different cases should be managed differently."[268] Because managerial rules "typically frame the trial judge's decision in a way that affords a great deal of primary discretion,"[269] the second-order rules evident in judicial decisions can remain more hidden than they otherwise could. A discussion of whether differ-

264. Yablon, *supra* note 256, at 259 (emphasis added).

265. *See* Eskridge, *supra* note 260, at 1377–78.

266. *Cf. id.* at 1376–78 (explaining that the Supreme Court has relaxed its rule of "super-strong" presumption of stare decisis when reviewing interpretations of common law statutes).

267. Yablon, *supra* note 256, at 267.

268. Subrin, *supra* note 7, at 991.

269. Kim, *supra* note 234, at 425. "Primary discretion" is a concept developed by Maurice Rosenberg to describe the sort of discretion in which "the court is free to render the decision it chooses; . . . [and in which] decision-constraining rules do not exist." Rosenberg, *supra* note 237, at 637 (distinguishing primary discretion from secondary discretion).

ent joinder outcomes and joinder devices might be better or worse for different types of cases remains buried under the apparent exercise of discretion, both primary and secondary.

By papering over the palpable differences in interpretation and application, we rob ourselves of the opportunity to move towards greater uniformity in the world of joinder. Moreover, the shadow rules themselves hold the keys to what the better rules might be. If the Rules drafters intended to leave the commonality phrases purposefully vague so that each judge has wide discretion for joinder in each case, judges have responded by imposing a sort of self-discipline. The shadow rules evince a desire to do more than connect each case *factually* to prior and subsequent cases by building a structure underlying the rules. Because rules of interpretive discretion leave open the possibility that judges could decide each case within the broad confines of a commonality phrase while also encouraging the development of shadow rules, conflicting shadow rules and uneven applications emerge.

Shadow rules are not nor need not be limited to the context of joinder or civil procedure. Discretionary rules appear elsewhere in the law,[270] and I do not claim to have found a phenomenon that does not or cannot exist in other contexts,[271] especially contexts such as findings of fact. The shadow rules of joinder, then, provide additional examples of how judicial interpretations of rules can produce divergent outcomes and examples of when we should understand these outcomes as simply different interpretations of the same rules or as genuinely different rules. It is important, however, not to overstate the applicability of this analysis. The FRCP occupy a delicate role in the world of statutory interpretation because the rules are drafted and promulgated by the judiciary itself and become effective in the absence of a congressional vote to reject the rules.[272] Therefore, many of the questions about methods of statutory interpretation that would drive the analysis in other contexts cannot be transposed directly onto the FRCP.[273]

B. RETHINKING THE COMMONALITIES APPROACH: REPLACING STANDARDS WITH STANDARDS

Rethinking the commonalities approach entails much more than merely deleting "transaction or occurrence" or "common question of law or fact" from

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270. *See, e.g.*, Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359, 360–66 (1975) (summarizing the debate over how and whether judges have discretion to decide cases and make legal rules); Rosenberg, *supra* note 237, at 637 (defining rules of discretion as those which "accord the lower court's decision an unusal amount of insulation from appellate revision").

271. *See* Yablon, *supra* note 256, at 233 ("Legal thought always has had difficulty developing a satisfactory criterion for distinguishing rule bound judicial actions from discretionary ones and, in turn, distinguishing appropriate exercises of discretion from 'abuses.'").

272. *See* Rules Enabling Act, 28 U.S.C. § 2072 (2006); Mulligan & Staszewski, *supra* note 59, at 13–14.

273. *See, e.g.*, Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1898–905 (2008) (reviewing the roles of theories of statutory interpretation in the context of jurisdictional statutes).

the text of the rules. It would mean that judges, lawyers, and scholars need to have a serious discussion about the purpose of each joinder device and how that device can be translated into rules that provide a clear framework for decisions but still operate as *standards* under which judges can exercise managerial discretion.

The "transaction or occurrence" and "common question" phrases are both "flexible standard[s]" as opposed to "bright-line rule[s]."[274] Possessing an awareness of "a fuller sense of the repertoire of available devices,"[275] Rules drafters should aim for standard-like directives that will focus, rather than constrain, interpretive power and that will enable visible and sharp, rather than veiled and diffuse, managerial activities.

Much of my criticism of the current landscape of the joinder rules is aimed at the indeterminacy of the rules, the variations in their application, and the resultant unpredictability. These features are sometimes cited among the drawbacks of standards because standards are "[v]ague," "[f]uzzy" or "[i]nchoate."[276] Rules drafters, however, need not feel as if crafting joinder devices is a binary choice between rules and standards.

Suppose one were to take seriously the proposition that ensuring consistency and predictability in the application of joinder devices was of the highest importance among the policies and values encapsulated by joinder. Drafting rule-like directives instead of standards would not necessarily achieve this end. For one thing, simply labeling a directive as a "rule" or imbuing it with apparent rule-like qualities does not a rule make because "[a] rule may be corrupted by exceptions to the point where it resembles a standard."[277] That is, "[t]he legal rule may be quite clear; however, the lower court judge has discretion to decide the case because the relevant standard is indeterminate until applied to a particular set of facts."[278]

Moreover, rules are notoriously over- and under-inclusive. Although there are often sound policy reasons for choosing a rule over a standard despite this problem,[279] this choice would not necessarily lead to consistency in the overall joinder picture. For example, take Rule 15(c). Suppose the drafters codified the issue of notice to the defendant in a formal rule such as "a claim or defense relates back to the original complaint when the party against whom the claim or defense is asserted receives written notice of the existence of such claim or defense within three months of when the original pleading is filed with the

274. *See* Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195, 225–28 (2009).

275. Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 959 (1995).

276. Schlag, *supra* note 274, at 226.

277. Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 61 (1992).

278. Kim, *supra* note 234, at 423.

279. *See* Eric A. Posner, *Standards, Rules, and Social Norms*, 21 HARV. J.L. & PUB. POL'Y 101, 101–07 (1997); Sunstein, *supra* note 275, at 968–72.

court." Judges could ensure that the rule, as narrowly defined, is applied consistently and predictably across all cases. However, because that rule does not capture other important aspects of the case that may be relevant to relation back, there will be "similar" looking cases that are excluded from the result and "dissimilar" looking cases that are included, thus resulting in only nominal, or at best partial, uniformity. In other words, the goal should not be uniformity in application of a rule for its own sake but relative predictability of reasoning and outcomes in joinder decisions generally.

The difficulties with the commonalities approach do not stem from the fact that these two standards require context-specific determinations but, instead, from the fact that the standards themselves do not capture what each joinder rule should embody. Take again the concept of notice. Rule 15(c) does not say anything about notice.[280] The notice requirement is a judicial gloss on the commonalities standard. The problem is that the overall standard of "conduct, transaction, or occurrence" that theoretically delegates broad case-specific managerial discretion now lies atop a different standard, "notice," which has its own policies and discretionary elements. Doctrinal confusion rests in this uncomfortable space where it is unclear *which* standard applies, *what* it means, and *how* binding previous findings are in the face of intuitive management decisions. In this way, "[t]he classic debate over rules versus standards is in large part a disagreement about the amount of discretion appropriately given to lower courts."[281] The key is to distinguish between visible managerial ability and unbridled interpretive flexibility. "[F]ederal appellate judges . . . have argued that, in fact, what the lower courts need most is not more interpretive flexibility, but rather clear decision-making rules to help them decide cases more efficiently and consistently."[282]

Replacing the current vague standards with mechanical rules for joinder would produce rigidity and foster a continuation of the shadow rules whereby the nuances of each situation would be forced into an ever-changing definition of the rule itself. The trade-offs between a system of rigid rules and a system of flexible standards are as old as the procedural differences between law and equity themselves[283] and are not a problem that can be "solved" by a choice of one or the other. What the FRCP joinder rules require are better standards that are tailored to the purpose of each rule. The task is to discern the level of detail

280. The section concerning "notice" is not about notice to claim opponents but is directed specifically toward changing the name of a party or notifying the United States as a defendant. FED. R. CIV. P. 15(c)(1)(C).

281. Kim, *supra* note 234, at 415.

282. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1821 (2010).

283. *See* Kim, *supra* note 234, at 416 (summarizing benefits and detriments of rules and standards); Subrin, *supra* note 7, at 921 ("[F]rom the beginning, equity's expansiveness led to larger cases—and, consequently, more parties, issues, and documents, more costs, and longer delays—than were customary with common law practice."); Sullivan, *supra* note 277, at 62–69 (describing arguments for rules and arguments for standards).

that the standard should have without the distraction of purporting to "solve" the rules-versus-standards debate,[284] just as the quixotic quest for answers in the fact-or-law debate distracts from answering basic questions about commonalities.

Directives that convey the appropriate amount of content while still retaining the positive discretionary and case-specific features of standards might come in the form of a list of factors,[285] or as a balancing test where the policies and facts to be balanced by the court are more clearly stated in the rules. In this way, the Rules drafters need not anticipate every permutation of claims, parties, discovery, motion practice, and trial in advance; this task is left ex post for the judge. The drafters could, however, better anticipate the patterns of values and concerns that have jelled into shadow rules and organize these principles or factors in a manner that promotes visible reasoning.[286] Visible reasoning is the first step on a path to greater predictability and doctrinal coherence.

Although the Rules drafters are in a good position to delete the commonalities language from the rules and turn to other standards, there is also a possibility that good standards for joinder can be judge-made. Both district and appellate judges have a role to play in this endeavor. District courts are the laboratories where well-crafted standards might emerge—standards that become easier to digest and follow where trial judges engage in a systematic evaluation and explication of factual circumstances. Appellate courts could enhance the development of such standards by adopting uniform language as the touchstone for a particular standard and reiterating the relevant facts that motivate joinder decisions and distinguish one case from the next. In other words, ordinary common law reasoning and legal development is entirely possible, even within a system of discretion.

Judicial gloss on a Rule is not necessarily problematic, as these common law rules themselves may be interpreted and applied as directives, both of the rule and standard variety.[287] If judges settle on a targeted standard that can be applied uniformly without doctrinal conflict with other shadow rules, the fact that the standard is judge-made is not necessarily a problem for the content of

284. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 590 (1992) (stating that the relative desirability of rules versus standards "raises two separate issues: rules versus standards . . . and the appropriate level of detail, which requires a separate analysis").

285. *See* Sunstein, *supra* note 275, at 963 ("We might contrast both untrammeled discretion and rule-bound procedures with approaches that allow particular judgments to emerge *through the decision-maker's assessment and weighing of a number of relevant factors, whose precise content has not been specified in advance.*").

286. *See* Subrin, *supra* note 7, at 947 (recounting Roscoe Pound's argument that "both law and legal decisions should be the outcome of the weighing of social policies, rather than the mechanical application of rules" and noting that "[t]his thinking supported Pound's more expansive view of judicial power and explained his support for adopting procedural principles of equity").

287. *See* Sullivan, *supra* note 277, at 69–83 (giving examples of constitutional directives, some used as rules and others as standards).

the directive.[288] Take, for example, the judge-made rule for permissive intervention that intervenors' claims should not "inject new issues" into the litigation.[289] Although what constitutes a "new issue" is not so obvious as to require a completely mechanical operation of the rule, judges have been able to distinguish new issues from existing ones, possibly because "new" and "existing" have firmer meanings than "important," "central," or "predominant." Another reason for the relative success of this judge-made rule is that it contains one factor to be considered as part of the overall analysis of whether granting intervention would cause undue delay or prejudice. As a factor, it guides judges' analysis without dominating, overriding, or conflicting with other shadow rules. Contrast this with the requirement that the motion for intervention be "timely," a requirement written into the text of the rule but vague enough to elude a solid meaning.[290]

C. PATHS FORWARD

In light of the difficulties posed by the commonalities approach, I have suggested that the Rules drafters abandon relatedness as a threshold requirement for non-class-action rules in the FRCP[291] in favor of more-nuanced standards that are tailored to each joinder device. This suggestion naturally invites the inquiry of what content should replace the commonality threshold in the various joinder devices discussed in this Article.

A comprehensive examination of every joinder device and its accompanying purposes would fill another article entirely. Therefore, I do not attempt here to set forth a new text or definitive proposal for how each joinder rule should be drafted or interpreted. Instead, I take a few of the values that emerge from the shadow rules and contemplate how further research and investigation could help to draft better standards in the absence of a commonalities approach. If the rules were redrafted to eliminate the commonalities approach, they would still need to embrace the values that motivated the commonalities language in the first place.

Under a noncommonalities approach, joinder rules should begin with a presumption of relatedness. Once commonality is removed as an end in and of

288. *But see* Mulligan & Staszewski, *supra* note 59 (arguing that changes to the FRCP made through the rulemaking process are preferable to judge-made changes in the rules).

289. *See* Smith v. Marsh, 194 F.3d 1045, 1051 (9th Cir. 1999); Shorb *ex rel.* Shorb v. Airco, Inc., No. 82-1983, 1985 WL 5954, at *3 (E.D. Pa. June 21, 1985); *see also* ManaSota-88, Inc. v. Tidwell, 896 F.2d 1318, 1323 (11th Cir. 1990) (affirming denial to intervene when appellant sought "to inject numerous issues into the case").

290. *See* 7C WRIGHT ET AL., *supra* note 34, § 1916; *see also* Edward J. Brunet, *A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 GA. L. REV. 701 (1978) (discussing other interpretive difficulties with Rule 24 intervention).

291. This Article does not address how the commonalities approach should apply to the three categories of class actions in Rule 23(b). However, the structure that I advocate would be consistent with deleting the "common question of law or fact" requirement from Rule 23(a) to the extent that the commonalities inquiries in Rule 23(b) would replace the need for this threshold requirement.

itself, the focus of any directive should be on factors, specific to each rule, that counsel for or against joinder. The purpose of such a restructuring would not be to take away judicial discretion but to *redirect* it toward the policy and managerial concerns that already drive joinder decisions and to do so in a way that increases the transparency of the decisions and their utility to future litigants and judges.[292]

Joinder rules without a commonality requirement are less counterintuitive than they might initially seem. It is already true that there is no relatedness requirement for the joinder of claims and permissive counterclaims.[293] Abandoning the commonalities approach means letting go of the intuition that the relative relatedness of claims or parties can, by itself, tell courts much of use regarding the propriety of joinder.

To be clear, the current structure does not *prevent* judges from considering other relevant factors in joinder decisions. The efficiency and fairness concerns behind each rule are frequently cited as reasons for granting or denying joinder. These concerns are already included in some of the rules as additional factors, such as Rule 20(b), which permits courts to "issue orders . . . 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."[294] Sometimes judges consider these reasons separately from commonalities, and sometimes these reasons are wrapped up in a general conclusion about the definition of "transaction or occurrence" or "common question of law or fact." This is the point at which the doctrine becomes unclear and outcomes are scattered across several possibilities, moving away from a system in which "civil procedure sufficiently confine[s] and focus[es] the law so that one may predict results."[295]

Abandoning commonalities is not a proposal for more joinder or for less. It is, instead, a proposal to rethink how judges reason through joinder decisions and how this reasoning is communicated to others. As Mary Kay Kane has argued,

> [e]xplicit judicial reasoning that would ground particular applications of the transaction standard in the policies that underlie the specific issues involved would allow for better scrutiny of the propriety of the results reached. This, in turn, would help to avoid possible misinterpretations and provide better guidance to the bar about how to predict and understand whether the facts and circumstances involved in particular cases do or do not meet the requirements at issue.[296]

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292. *Cf.* Marcus, *supra* note 43, at 1601–04 (arguing that district-judge discretion in the class action context is "curtailed and focused" by changes to the text of Rule 23).

293. *See* FED. R. CIV. P. 13(b); FED. R. CIV. P. 18.

294. FED. R. CIV. P. 20(b).

295. *See* Subrin, *supra* note 7, at 989.

296. Kane, *supra* note 6, at 1724.

I agree with Kane's call for explicit judicial reasoning grounded in underlying joinder policies, but I believe that the commonalities approach, of which "transaction" is a part, is a barrier to the thorough and uniform results which Kane seeks. "Transaction," along with the "common question" standard, has proved a poor proxy for policy analysis.

As Professor Subrin has noted, "[i]t has never been easy to force federal judges to follow procedure they did not like."[297] Rewriting or relegislating the rules would not necessarily ensure judicial compliance,[298] particularly because the nature of the task of joinder has a distinct managerial element and thus the directives would almost certainly be standards with ample room for judicial discretion. Although this observation underscores why it might be a good idea to jettison the commonalities approach, it also brings a stern warning to a writer, such as myself, who believes that she has a better solution. The shadow rules themselves provide clues as to what aspects of each joinder device judges believe are important considerations. The reward in paying heed to such sentiments is not simply to provide judges with procedures that they like but to take cues from their experience with joinder to assess what the relevant considerations might be.

Paying attention to the values behind joinder has two broad components. One is to carefully unpack the policy at issue, particularly to discover if that value is in fact a placeholder for several important and often conflicting underlying values. The second is to take each underlying value and evaluate it in light of a specific joinder device, thereby striving for a better fit between the content of the rule and the joinder device.

To take but one example of an underlying value, consider the concept of efficiency. The relative efficiency of various joinder devices is touted by many of the courts employing the shadow rules as well as by academic commentators. The question is always some variation of the following: where do the efficiencies of combined litigation end and the burdens of too many parties with too many claims begin? As the shadow rules demonstrate, courts are unlikely to find a single or a simple answer to that question. Rules redrafted to direct judges' attention to more specific efficiency values, however, could clarify what efficiencies judges expect to gain from joinder and where they believe that resources are lost.[299] The problem with the way the rules are currently interpreted is that judges rarely pause to consider whether the individual issues are *discovery*-intensive—a different question from merely being *fact*-intensive—and whether the duplicative issues, if litigated separately, would promote even further inefficiencies.

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297. Subrin, *supra* note 50, at 82.

298. The experience of state courts here can be instructive. *See* Gluck, *supra* note 282, at 1756 ("Every state legislature in the nation . . . has enacted into law some rules of interpretation, which many state courts are refusing to implement.").

299. *See* Brunet, *supra* note 32, at 277–78 (arguing that the term efficiency is used "too loosely" because of confusion between "individual efficiency and systemic efficiency").

One possible avenue for redrafting would be to direct judges to consider efficiency in three separate realms—pretrial discovery, pretrial motion practice, and trial—and to make the connection of each realm to a joinder device more explicit. Pretrial discovery has become one of the most expensive parts of litigation. In the most basic sense, permissive joinder of parties can combat "duplicative" discovery. Not all discovery, however, is duplicative. In some instances, discovery might *overlap* without being completely duplicative. For example, in many situations, multiple parties will want to depose a single witness. Some questions might be common to all parties, but some parties might have questions of only individual relevance for the witness. A single deposition will save resources for all parties involved, but the amount of the savings could depend on what portion of the deposition is *duplicative* (same witness and same questions) and what portion is merely *overlapping* (same witness, different questions).

The recrafted rules should also account for efficiencies gained or lost by common pretrial motion practice. As with discovery, it could be useful to distinguish between duplicative and overlapping motions. Furthermore, combined pretrial motion practice might be encouraged when judges estimate that the cases before them will be less discovery-intensive and more motion-intensive.

Pretrial motion practice also implicates values that pretrial discovery does not. For example, duplicative pretrial discovery is redundant and expensive, provides little extra benefits for the parties involved, and is particularly burdensome on third-party witnesses. Duplicative motion practice, on the other hand, can produce positive byproducts when different judges are involved because of the fresh perspective they can give to the law as applied to facts, particularly when novel questions of law are at issue. This argument may be stronger when the cases at hand could be litigated in different judicial districts or in state court instead of federal court.[300]

Finally, the rules for permissive joinder should direct judges to look at the efficiencies gained or lost by common trial separately from other aspects of litigation, if at all. Most cases settle before trial or are disposed of by summary judgment.[301] Perhaps, then, issues of joint trials should not loom so large in the initial joinder decision and should be dealt with separately via Rule 42(a) when the possibility of a trial becomes a reality.[302] In other words, unpacking the value of efficiency also requires considering that value within the context of

300. *See* Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 640, 642–43 (1981).

301. *See* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 592–93 (2004); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 706 (2004).

302. *See* Cabraser, *supra* note 51, at 1492 ("The problem that appears to plague many courts grappling with the appropriate application of the joinder mechanism in a multiplaintiff context is a failure to completely appreciate or explore the relationship between joinder, which brings multiple parties into an action, and Rule 42's consolidation/severance provisions, which enable common

each joinder device, rather than simply asking the omnibus question of whether there are too many or too few parties in a lawsuit.

Demanding finer gradations in the definition of efficiency is only half the battle. Knowing more about which joinder decisions *actually* promote or inhibit the conservation of court and party resources is essential to a recrafting of the rules, whether by explicit text or by more-consistent judicial interpretation.

The relative expense of cases, claimants, or defendants for discovery, motion, or trial purposes does not have an obvious answer. Researchers continue to investigate the thorny questions regarding the costs of litigation. Current scholarship tends to focus on the benefits or harms wrought by large-scale joinder or consolidation, or on abstract models for determining whether a case is a positive- or negative-expected-value suit. There are no good answers to questions about when joinder has *in fact* promoted or hindered judicial efficiency. At best, we have the work of judges making largely ex ante guesstimates about the costs of permitting or denying joinder. As the shadow rules show, these guesses are not groundless—they reflect the experience of judges as case managers and as consumers of the opinions of judges who have made decisions before them. They are not, however, actual evaluations of which decisions have been cost-effective, especially as understood over a large number of cases.

My argument, therefore, is better understood as a call for further empirical research into non-class joinder decisions at different stages of litigation and a call for judges to write more explicit decisions about exactly *which* efficiencies they expect to gain or lose from granting or denying a joinder decision. Only with better data can the lofty ideals of practicalities be translated into rules that would fare better than the commonalities approach.

Moreover, answers to the efficiency question are only one aspect of the analysis. Efficiency, especially when framed in terms of relative costs, does not tell us anything about how other values fare in the equation for each joinder device. To answer the efficiency question says nothing of concerns about notice to defendants and protection of plaintiffs' abilities to bring claims or about federalism and federal jurisdiction, predictability, and finality, concerns that inform joinder policy and motivate decisions that have resulted in the shadow rules. Each of these values deserves its own treatment as an individual concept, the weight of which should be evaluated in light of other joinder policies and the purpose of each individual joinder device.

CONCLUSION

Academic and judicial innovations regarding the best rules and policies for joinder are an old and continuing project. In 1952, Charles Wright offered the following description of the newly revised Minnesota Rules of Civil Procedure:

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questions of law or fact to be severed from their underlying actions and joined for a unitary hearing or trial.").

> The genius of the new rules is their recognition that no rule of pleading, which necessarily must turn on identity of causes of action and similar *a priori* concepts, can offer a satisfying answer to all the different kinds of fact situations which may arise. The only valid way to handle the problem is to say that it is desirable to include as many claims and parties as there are in one suit, except where this may make the suit too many-sided and complicated for the jury to unravel, or where this free joinder may cause prejudice to some party or claim. And no legislature can say what the optimum size of a lawsuit is under each particular constellation of allegations in the pleadings. The new rules, therefore, allow, for practical purposes, joinder of any claim or any party, and then leave it to the trial judge to order separate trials for particular claims or issues "in furtherance of convenience or to avoid prejudice."[303]

Wright's sentiments look very much like the "practicalities" approach that I advocate here, but his comments were directed toward the Minnesota Rules of Civil Procedure—the relevant texts of which were nearly identical to some of the joinder rules described in this Article. The time has come to reevaluate whether the rules, as drafted, achieve the overall purposes of joinder and the individual purpose of each joinder device.

This Article has taken a step in that direction by identifying the ills of the commonalities approach and suggesting a new direction for the judicial discretion that must be exercised in the delicate task of crafting the boundaries of a lawsuit. "Ultimately, one cannot say in any categorical sense that discretion in the rules is 'good' or 'bad.'"[304] Transparency of decisions and clarity of the standards, however, are a good place to start.

APPENDIX[305]

TRANSACTION OR OCCURRENCE RULES (EMPHASES ADDED)

Rule	Language
13(a)(1)(A) (compulsory counterclaims)	A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim: arises out of the *transaction or occurrence* that is the subject matter of the opposing party's claim . . . .
13(g) (cross claims)	A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the *transaction or occurrence* that is the subject matter of the original action or of a counterclaim . . . .

303. Wright, *supra* note 35, at 581 (quoting MINN. R. CIV. P. 42.02).

304. Gensler, *supra* note 45, at 724.

305. The rules in this Appendix are taken from the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 13, 14, 15, 19, 20, 23, 24, 42.

Rule	Language
14(a)(2)(D) (third-party defendant's claims against plaintiff)	The person served with the summons and third-party complaint—the "third-party defendant": . . . may also assert against the plaintiff any claim arising out of the *transaction or occurrence* that is the subject matter of the plaintiff's claim against the third-party plaintiff.
14(a)(3) (plaintiffs' claim against impleaded party)	The plaintiff may assert against the third-party defendant any claim arising out of the *transaction or occurrence* that is the subject matter of the plaintiff's claim against the third-party plaintiff.
15(c)(1)(B) (relation back)	An amendment to a pleading relates back to the date of the original pleading when: . . . the amendment asserts a claim or defense that arose out of the *conduct, transaction, or occurrence* set out—or attempted to be set out—in the original pleading . . . .
20(a)(1)(A) (permissive joinder of parties)	Persons may join in one action as plaintiffs if: 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* . . . .

COMMON QUESTION OF LAW OR FACT RULES (EMPHASES ADDED)

Rule	Language
20(a)(1)(B), (2)(B) (permissive joinder of parties)	Persons may join in one action as plaintiffs if: . . . any *question of law or fact common* to all plaintiffs will arise in the action.
23(a)(2) (threshold requirements for class actions)	One or more members of a class may sue or be sued as representative parties on behalf of all members only if: . . . there are *questions of law or fact common to the class* . . . .
24(b)(1)(B) (permissive intervention)	On timely motion, the court may permit anyone to intervene who: . . . has a claim or defense that shares with the main action a *common question of law or fact.*
42(a) (intradistrict consolidation of cases)	If actions before the court involve a *common question of law or fact*, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.

INTEREST RULES (EMPHASES ADDED)

Rule	Language
19(a)(1)(B) (mandatory joinder of parties)	A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: . . . that person claims an *interest relating to the subject* of the action . . . .
24(a)(2) (intervention as of right)	On timely motion, the court must permit anyone to intervene who: . . . claims an *interest relating to the property or transaction that is the subject of the action*, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.