# EMPLOYMENT DISCRIMINATION CLASS ACTIONS: WHY PLAINTIFFS MUST COVER ALL THEIR BASES AFTER THE SUPREME COURT'S INTERPRETATION OF FEDERAL RULE OF CIVIL PROCEDURE 23(a)(2) IN *WAL-MART V. DUKES*

## Comment*

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## I. *WAL-MART V. DUKES* SIGNALS A WHOLE NEW BALLGAME FOR EMPLOYMENT DISCRIMINATION CLASS ACTIONS

Selena Jones works as a female cashier.[1] As a single mother with three kids, she earns $8.25 per hour. Selena lives in a downtown apartment. Her landlord hassles her for rent, and she is late paying the water, the electricity, and the phone bill. When she steps into work, a manager pulls her aside, calls her "doll," and tells her to wear more makeup. In addition, the company recently promoted a male cashier, hired three years after Selena, into the assistant manager position. Selena never saw the job opening posted.

What if Selena Jones is not alone and a similar pattern of events occurred in multiple stores, across multiple regions? Without a guarantee of resulting change, a female cashier like Selena might have no incentive to fight employment discrimination.[2] When a group of employees band together to challenge discriminatory employment practices, however, the possibility of prompting change in corporate policies or practices increases significantly.[3] One important mechanism for fighting employment discrimination is the class-action lawsuit.[4]

In order for a group of plaintiffs to surpass the hurdle of class certification, a potential class must first meet the four requirements of Federal Rule of Civil Procedure (Rule) 23(a)—numerosity, commonality, typicality, and adequate representation—in addition to at least one of the requirements of Rule 23(b).[5] The commonality requirement of Rule 23(a)(2), requiring a question of law or fact common to the class, ensures that combining multiple claims together

1. Selena Jones is a fictional character, and her story illustrates details similar to the individual accounts of the plaintiffs in *Wal-Mart v. Dukes*. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2563-64 (2011) (Ginsburg, J., dissenting).

2. *See* discussion *infra* Part III.

3. *See* discussion *infra* Part VI.B.

4. *See* discussion *infra* Part III.

5. *See infra* note 70 and text accompanying note 74.

increases the efficiency and cost-effectiveness of the lawsuit.[6] Class actions are inappropriate where complex and diverse individual issues could overwhelm or confuse a jury.[7]

Prior to the June 2011 Supreme Court decision in *Wal-Mart Stores, Inc. v. Dukes* (*Dukes*), the commonality requirement of Rule 23(a)(2) was not widely debated.[8] When reviewing the Ninth Circuit's decision to affirm the certification of a class of 1.5 million female Wal-Mart employees in *Dukes*, however, the Supreme Court split 5–4 over how to interpret the commonality requirement.[9] At each stage in the litigation, "issues were hotly contested" and judges split.[10] Despite expert testimony and strong anecdotal and statistical evidence, the majority concluded that not even a single common question united the employees.[11] The dissent, on the other hand, argued that the majority incorporated a heightened "implied predominance" standard—adopted from Rule 23(b)(3)—into the threshold Rule 23(a)(2) commonality requirement.[12] The dissent reasoned that under the correct approach, the plaintiffs could have met the burden of proving a common question of law or fact.[13]

This Comment explores the consequences of the Court's divisive interpretation of Rule 23(a)(2) and the complexities involved in applying class certification requirements, specifically in the context of employment discrimination claims. Part II provides an overview of the history of employment discrimination law, and Part III discusses some advantages of bringing a class-action lawsuit over pursuing individual relief. Next, Part IV details the development of the controversy surrounding Rule 23(a)(2)'s commonality requirement. Part V introduces the recent trend, both in Texas and federal courts, of incorporating an implied predominance standard into the commonality requirement and explains why lower courts will encounter difficulties after *Dukes*. Part VI describes how the pro-business stance adopted by the majority will deter class actions against large corporations, discourage voluntary efforts of compliance with antidiscrimination laws, and burden the court system. For these reasons, Part VII recommends that the Supreme Court revisit the Rule 23(a)(2) commonality analysis and explicitly overrule the implied predominance standard suggested by *Dukes*. Finally, Part VIII offers suggestions for practitioners seeking successful class certification post-*Dukes*.

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6. *See* Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 159 (1982).

7. *See id.*

8. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011); *see* discussion *infra* Part V.B.1.

9. *See Dukes*, 131 S. Ct. at 2556, 2561-62; discussion *infra* Part V.B.2-3; *see also infra* note 95 (discussing the class size in *Dukes*).

10. Andrew J. Trask, Wal-Mart v. Dukes*: Class Actions and Legal Strategy*, 2011 CATO SUP. CT. REV. 319, 350 (2011).

11. *See* discussion *infra* Part V.B.2.

12. *See* discussion *infra* Part V.B.3.

13. *See* discussion *infra* Part V.B.3.

## II. CONSULTING THE PLAY BOOK: BRIEF OVERVIEW OF EMPLOYMENT DISCRIMINATION LAW

Before a plaintiff can bring an employment discrimination claim and potentially certify a class, a group of employees must have suffered from discrimination at the hands of their employer.

### *A. What Is Employment Discrimination?*

Employment discrimination occurs when an employer makes employment-related decisions, such as the decision to terminate an employee, "based on an employee's age, race, sex, religion, national origin, or physical disability."[14] In most states, an employer, unless governed by an employment contract, can terminate an employee for any reason, whether fair or unfair.[15] An employee can likewise quit for any reason without prior notice.[16] This common law doctrine, known as "employment at will," allows either party to terminate the employment relationship at any time.[17] Despite this seemingly broad doctrine, an employer cannot discharge an employee in violation of federal or state antidiscrimination law.[18] Employees, however, have not always benefited from these legal protections.

### *B. Origins of Employment Discrimination Law*

Employment discrimination law originated with the passage of fair employment practice statutes by several states prior to the 1954 decision of *Brown v. Board of Education*.[19] Presidential administrations created Fair Employment Practices Committees beginning in the 1930s, and Congress passed the Unemployment Relief Act of 1933.[20] In 1954, the Supreme Court decided *Brown*, expressing a principle against discrimination that transformed

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14. MARGARET C. JASPER, EMPLOYMENT DISCRIMINATION LAW UNDER TITLE VII 3 (2d ed. 2008). Additionally, some jurisdictions also prohibit employment discrimination based on "marital status, political affiliation, and sexual orientation." *Id.*

15. *Id.* at 2.

16. *Id.*

17. *Id.*

18. *Id.* at 3. Many state laws provide similar protection to employees whose employers do not fall under the federal statutes. *Id.*

19. GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 1 (3d ed. 2010); *see* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (rejecting the doctrine of "separate but equal" in public education facilities). State law encouraged the development of federal employment discrimination law by providing a model for federal bills. RUTHERGLEN, *supra*, at 244.

20. JASPER, *supra* note 14, at 1; *see* RUTHERGLEN, *supra* note 19, at 4. Fair employment practice committees looked into discrimination complaints filed against businesses with federal contracts, and the Unemployment Relief Act of 1933 declared "[t]hat in employing citizens for the purpose of this Act no discrimination shall be made on account of race, color, or creed." JASPER, *supra* note 14, at 1.

the scope of civil rights law.[21] Although *Brown* dealt with racial equality, the decision affected many legal disciplines outside of constitutional law, specifically influencing the field of employment discrimination law.[22] In the decade following *Brown*, nearly half of the states followed suit and enacted fair employment practice laws, which provided a model for federal bills, such as the Civil Rights Act of 1964.[23]

Title VII of the Civil Rights Act of 1964 (Title VII), passed into law by President Johnson, laid down the first general proscription against employment discrimination contained within federal law.[24] Title VII and the Court's decision in *Brown* laid the groundwork for the subsequent development of employment discrimination law.[25]

### *C. Title VII of the Civil Rights Act of 1964*

If the Supreme Court's decision in *Brown* signaled the beginning of the modern civil rights era, "the passage of the Civil Rights Act of 1964 marked the high point of civil rights activism."[26] Title VII of the Civil Rights Act of 1964 dramatically expanded upon the protections granted by the Constitution in order to promote the goal of equal opportunity in the workplace.[27] When Congress enacted Title VII, the courts did not recognize sex, outside of voting, as a constitutionally prohibited basis of discrimination.[28] Title VII extended prohibition against discrimination to the previously uncovered grounds of private employers—beyond the reach of the Fifth and Fourteenth

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21. RUTHERGLEN, *supra* note 19, at 1; *see Brown*, 347 U.S. at 495 ("[s]eparate educational facilities are inherently unequal").

22. RUTHERGLEN, *supra* note 19, at 4.

23. *Id.*

24. *Id.* at 1; *see* Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e et seq. (2006)).

25. *See* RUTHERGLEN, *supra* note 19, at 1. The implications of *Brown* remain controversial even today, with continued arguments over what constitutes constitutionally prohibited "intentional discrimination." *Id.* at 4.

26. *Id.* at 6; *see also* Maurice Wexler et al., *The Law of Employment Discrimination from 1985 to 2010*, 25 A.B.A. J. LAB. & EMP. L. 349, 350 (2010) (discussing the historic nature of legislation passed subsequent to Title VII).

27. *See* RUTHERGLEN, *supra* note 19, at 5-6. The Fifth and Fourteenth Amendments apply only to discrimination by the government, not discrimination by private individuals or organizations. *Id.* at 5. In addition, the Amendments only cover discrimination prohibited by the Constitution, such as race and religion, not age or disability. *Id.* Employment discrimination statutes go beyond these limitations, while retaining the same fundamental purpose of promoting equality. *Id.*

28. *Id.* at 7; *see, e.g.*, Hoyt v. Florida, 368 U.S. 57, 61 (1961) (finding the exclusion of women from juries reasonable because "woman is still regarded as the center of home and family life"). Several authors claim that Title VII passed when a legislative maneuver instigated to defeat the bill by including a preposterous provision extending equal protection to women backfired "as supporters of women's rights saw an opportunity to enact the first general prohibition against sex discrimination in employment." RUTHERGLEN, *supra* note 19, at 7. *But cf.* Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 164-65 (1991) (contending that the inclusion of sex was not an "accidental breakthrough").

Amendments—and sex.[29] Title VII, as enacted, prohibits unlawful employment discrimination practices "because of an individual's 'race, color, religion, sex, or national origin.'"[30]

When the Civil Rights Act of 1964 passed, enforcement of the prohibitions proved difficult, evidencing "that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law."[31] The women's movement of the 1960s encouraged women to utilize the inclusion of sex discrimination in the statute by pursuing workplace equality in the courts.[32] Although employment discrimination law is almost exclusively statutory, the judiciary plays a significant role in its enforcement and interpretation.[33]

### *D. Judicial Interpretation and Legislative Amendment of Title VII*

Title VII does not define "intentional discrimination as a technical term of art."[34] As a result of the statutory nature of employment discrimination law, Congress has the ultimate authority over how far to extend the principle against discrimination in the workplace.[35] Title VII developed broad prohibitions covering nearly all employment practices, leaving the courts with an active role in interpreting the statutes.[36] Naturally, the courts do not always agree on "[e]xactly what kind of distinction transforms discrimination into a morally disapproved and legally prohibited activity."[37] By allowing the courts to define the contours of discrimination under Title VII, Congress "invoked the tradition of judicial activism associated with civil rights law."[38]

Claims of intentional discrimination by individual plaintiffs, which comprise the largest share of employment discrimination claims, initially influenced the interpretation and enforcement of employment discrimination law.[39] Title VII prohibits adverse employment action "because of [an] individual's race, color, religion, sex, or national origin," which implies the

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29. RUTHERGLEN, *supra* note 19, at 6; *see* 42 U.S.C. § 2000e-3(a) (2006). Title VII enacted into law broad prohibitions, similar to those in state fair employment practice laws, covering "hiring, discharge, compensation, fringe benefits, conditions of work, and anything else connected with employment." RUTHERGLEN, *supra* note 19, at 6.

30. 42 U.S.C. § 2000e-2(a)(1) (2006); JASPER, *supra* note 14, at 1.

31. Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401 (1968).

32. JASPER, *supra* note 14, at 2.

33. RUTHERGLEN, *supra* note 19, at 1.

34. *Id.* at 33.

35. *Id.* at 10.

36. *Id.* at 11; *see* 42 U.S.C. § 2000e-2(k)-(m) (2006).

37. RUTHERGLEN, *supra* note 19, at 33.

38. *Id.* at 11. Although Congress can override judicial decisions interpreting employment discrimination laws, and indeed Congress has several times, the judiciary has still determined the course of employment discrimination law far more often than Congress has through statutory reform. *Id.* at 10-11, 13.

39. *Id.* at 32.

prohibition of an act of intentional discrimination.[40] In the past, occasions when an employer discriminated based on race or sex were easier to spot.[41] An employer, for example, might promote only men into higher paying positions within the company.[42] Today, however, employment discrimination "ha[s] become hidden and implicit."[43] Employers are well versed in the law, and strong legal and social incentives exist to maintain an appearance of workplace equality.[44]

Title VII, however, prohibits intentional discrimination as well as "practices that have the 'effect' of discriminating against" covered individuals.[45] Cases where an employer obviously relied on a prohibited characteristic when making an employment decision, although common in the initial years after Title VII passed, are today replaced by claims focused on the effects of an employer's practices rather than on the practices themselves.[46] Known as the "disparate impact" theory, claims falling under this approach require only proof of discriminatory effect, rather than proof of intentional discrimination.[47]

In *Griggs v. Duke Power Co.*, the Supreme Court first recognized the disparate impact theory, "which imposes liability upon employers for neutral practices . . . that have a disproportionate adverse effect on minority groups or women."[48] For example, in *Griggs*, the Court held that a company's high school diploma requirement and use of IQ tests unrelated to an applicant's ability to perform the job in question discriminated against African American applicants.[49] A series of cases following *Griggs* worked out the exact details of the disparate impact theory and the defenses available to employers.[50] The Civil Rights Act of 1991 eventually codified, with modifications, the disparate impact theory of liability and relevant defenses.[51]

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40. § 2000e-2(a); RUTHERGLEN, *supra* note 19, at 33 (describing intentional discrimination as focused on the reason for the employer's decision, i.e., an employee's race or sex, rather than the effects of that decision).

41. *See* RUTHERGLEN, *supra* note 19, at 36.

42. *See id.*

43. *Id.*

44. *See id.* (noting that employers today have strong incentives to settle claims arising from easily proved discriminatory practices in order to avoid liability, and only less obvious forms of discrimination usually result in extended litigation).

45. JASPER, *supra* note 14, at 3-4; *see* § 2000e-2(k) (listing burden of proof in disparate impact cases).

46. RUTHERGLEN, *supra* note 19, at 57; *see supra* text accompanying notes 41-44. Because of the difficulty associated with determining the state of mind of all of the agents acting on behalf of an institution, the focus of employment discrimination claims has shifted from a subjective to an objective approach. *See* RUTHERGLEN, *supra* note 19, at 41. Instead of focusing on the motivation behind the employer's decision, the objective approach instead looks for evidence of the disparate effects of employment practices "and the justification, if any, that can be offered for practices with such differential effects." *See id.* at 57.

47. RUTHERGLEN, *supra* note 19, at 71.

48. *Id.* at 10; *see* Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

49. *See* RUTHERGLEN, *supra* note 19, at 74-75; *Griggs*, 401 U.S. at 436.

50. *See* RUTHERGLEN, *supra* note 19, at 10.

51. *See id.*

Additionally, the passage of the Civil Rights Act of 1991 by Congress displayed a new level of concern over the interpretation and enforcement of employment discrimination law.[52] By including a previously unseen level of attention and detail, the 1991 Act proceeded to "remov[e] many issues from reconsideration by the judiciary."[53] In response to perceived inadequacies in the remedies available under Title VII, the 1991 Act also added monetary damages, allowing Title VII claims to become eligible for jury trials.[54] Awards of individual relief, however, do not directly challenge the employment polices of large corporations, making the class-action lawsuit a desirable tool for plaintiffs interested in challenging institutional practices.[55]

## III. FOR THE LOVE OF THE GAME: ALLURE OF THE CLASS ACTION FOR BRINGING EMPLOYMENT DISCRIMINATION CLAIMS

The class-action lawsuit is a valuable tool for fighting system-wide employment discrimination.[56] Individual plaintiffs face a variety of barriers when confronted with the prospect of bringing an employment discrimination claim against their employer.[57] A potential plaintiff will likely face financial expense and numerous hours devoted to litigation.[58] These are both significant impediments, especially to hourly employees.[59] Additional obstacles include emotional apprehension, fear of retaliation by an employer, or simply lack of knowledge about the legal services available to pursue an employment discrimination claim.[60]

Because one employee will likely perceive her encounter with employment discrimination as too minimal to justify litigation, class actions offer a practical

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52. *Id.* at 13.

53. *Id.*

> This process of gradual codification could continue, and conceivably accelerate, with Congress assuming a greater role in the elaboration and implementation of employment discrimination law. Nevertheless, . . . even the most technical and detailed amendments have required further judicial interpretation. Congress is not likely—and perhaps is not able as a practical matter—to greatly restrict the role of the courts in deciding what constitutes prohibited discrimination.

*Id.*

54. 42 U.S.C. § 1981a(a)(1) (2006); *see* RUTHERGLEN, *supra* note 19, at 185; *see also* JASPER, *supra* note 14, at 2 (explaining that "the Seventh Amendment mandates the availability of jury trials whenever damages may be awarded"); Wexler, *supra* note 26, at 354 (describing how the availability of jury trials increased the potential for significant damages and "resulted in an explosion of litigation").

55. *See* RUTHERGLEN, *supra* note 19, at 188.

56. *See* Marcia D. Greenburger, *The Supreme Court's Decision in* Wal-Mart Stores, Inc. v. Dukes*: No Justice for Women, No Accountability for Corporate Defendants*, NAT'L WOMEN'S LAW CTR. 1, 3 (June 29, 2011), http://www.nwlc.org/sites/default/files/pdfs/final_written_testimony_of_marcia_d_greenberger_before_senate_judiciary_committee_062911.pdf.

57. *See, e.g.*, *id.*

58. *See id.*

59. *See id.*

60. *See id.*; *see also* Suzette M. Malveaux, *Clearing Civil Procedural Hurdles in the Quest for Justice*, 37 OHIO N.U. L. REV. 621, 631 (2011) (explaining that "the class action creates a more level playing field between an employer and employee").

tool for awarding relief to injured plaintiffs.[61] Without the class action, employees forced to proceed on their own may encounter difficulties securing counsel, especially with low-valued individual claims.[62] The class action permits "individuals to pool their resources, which allows them to share litigation risks and burdens," helping to motivate and inspire confidence in individual class members.[63] Class actions thus provide an effective device for plaintiffs to challenge system-wide discriminatory employment practices.[64]

In cases in which large numbers of plaintiffs challenge employment discrimination, class actions also decrease the burden on the court system.[65] The potential for pleadings and discovery to overlap correlates with the number of individual lawsuits associated with a given nexus of employment discrimination claims.[66] The burdens of proof in disparate impact class claims are heavy, and plaintiffs often rely on statistics and expert testimony in order to establish liability.[67] The procedural and substantive requirements for the use of statistical evidence have become especially demanding, increasing the burden on attorneys.[68] Because of a class action's potential to raise the stakes by attracting widespread media attention and public interest, however, it remains one of the best devices for challenging discrimination.[69] Despite the advantages that a class action has to offer, courts often set a high bar for plaintiffs seeking to meet the certification requirements.

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61. *See, e.g.*, RUTHERGLEN, *supra* note 19, at 188; *see also* Califano v. Yamasaki, 442 U.S. 682, 701 (1979) (discussing how the class-action device provides for economical litigation by saving the resources of the courts and the parties when issues turn on questions of law common to each class member).

62. *See* Greenburger, *supra* note 56, at 4; Malveaux, *supra* note 60, at 631. Title VII of the Civil Rights Act of 1964, however, does allow a court, in its discretion, to award reasonable attorney's fees to the prevailing party. *See* 42 U.S.C. § 2000e-5(k) (2006). Likewise, a Texas court may allow the prevailing party in an employment discrimination lawsuit reasonable attorney's fees. *See* TEX. LAB. CODE ANN. § 21.259 (West 2008 & Supp. 2011). While this encourages practitioners to take on employment discrimination claims, additional deterrences such as time and labor expenditures still remain. *See* Greenburger, *supra* note 56, at 6.

63. Malveaux, *supra* note 60, at 631; *see also* Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, 106 NW. U. L. REV. COLLOQUY 34, 37 (2011), http://www.law.northwestern.edu/lawreview/colloquy/2011/18/LRColl2011n18Malveaux.pdf [hereinafter *How Goliath Won*] (explaining how when individuals with small claims refrain from challenging large corporations, this "effectively immuniz[es] companies from complying with the law").

64. *See* Greenburger, *supra* note 56, at 3.

65. *See id.* at 6.

66. *See id.*

67. *See* RUTHERGLEN, *supra* note 19, at 56.

68. *See id.* at 73 (noting, however, that the higher burden for plaintiffs in no way lessens the doctrinal significance of the disparate impact theory).

69. *See, e.g.*, *id.* at 56; *cf.* Malveaux, *supra* note 60, at 632-33 (briefly mentioning common criticisms of class-action litigation).

## IV. PICKING A TEAM: THE DIVIDE OVER RULE 23(a)'S CERTIFICATION REQUIREMENTS

Private plaintiffs in federal court can bring a class action under Rule 23.[70] Following the 1966 amendments to the Civil Rights Act, courts embraced the use of Rule 23(b)(2) to bring suits alleging racial discrimination.[71] The Federal Rules of Civil Procedure, however, do not provide detailed guidance to the courts on the permitted breadth of a class.[72] The four prerequisites listed in Rule 23(a)—numerosity, commonality, typicality, and adequate representation—leave a judge to determine under what circumstances individuals may properly join together to bring a class action lawsuit.[73] The commonality requirement of Rule 23(a)(2) provides that "[o]ne 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."[74] In the context of Title VII antidiscrimination claims, federal courts have differed in how much

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70. *See* FED. R. CIV. P. 23. When certifying a class-action lawsuit, plaintiffs must meet all four initial requirements under Rule 23(a)—numerosity, commonality, typicality, and adequate representation—in addition to at least one of the requirements under Rule 23(b). FED. R. CIV. P. 23(a), (b). If plaintiffs meet these requirements, they have the choice of bringing a class action under one of the three options listed in Rule 23(b):

> (1) prosecuting separate actions by or against individual class members would create a risk of:
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> > (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
> >
> > (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
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> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
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> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> > (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> >
> > (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> >
> > (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> >
> > (D) the likely difficulties in managing a class action.

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

71. *See* 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE § 1771 (3d ed. 2011), *available at* Westlaw FPP [hereinafter KANE]; *see also* FED. R. CIV. P. 23(b)(2) advisory committee's note to the 1966 Amendments (stating civil rights actions charging a party with unlawfully discriminating against a class are illustrative of Rule 23(b)(2) claims).

72. *See* FED. R. CIV. P. 23; Wexler, *supra* note 26, at 389.

73. *See, e.g.*, FED. R. CIV. P. 23(a); Trask, *supra* note 10, at 322-23.

74. FED. R. CIV. P. 23(a)(2).

homogeneity of class members is required before allowing the class action to proceed.[75]

In 1969, the Fifth Circuit announced the so-called "across-the-board" rule, igniting the controversy over Title VII class certification.[76] By approving the appellant's proposed class of both current employees and discharged employees, this rule set precedent allowing a Title VII plaintiff to represent all members of a group allegedly harmed by an employer's discriminatory practices, including employees who worked in different positions or in different facilities.[77] A plaintiff bringing an across-the-board case "who alleges he or she was subject to one discriminatory employment practice seeks to represent employees who were subject to another discriminatory employment practice by the same employer."[78] For a number of years, the majority of courts followed this approach, exercising a liberal approach to the Rule 23(a) threshold requirements when certifying employment discrimination lawsuits or claims implicating other constitutional rights.[79] This theory reflected a view that the nature of the claims, relying upon an individual's membership in a larger group, suggested a less stringent application of the Rule 23(a) requirements.[80]

Other courts, however, rejected the notion of liberal certification under Rule 23(a) for civil rights class actions and applied the requirements more strictly.[81] These courts chose to deny motions to certify across-the-board Title VII classes, which narrowed the playing field for class-action certification by "barr[ing] applicants, present employees, former employees, and future employees from representing each other and further barr[ing] plaintiffs from bringing suits that stretched across geographical, departmental, or occupational lines."[82] Under this approach, the courts took the view that shared racial or sexual characteristics were not enough to meet the requirements for class certification.[83]

The Supreme Court rejected the principle of liberal certification of Title VII class actions and lent support to this approach in *General Telephone Co. of the Southwest v. Falcon*.[84] In *Falcon*, a Mexican-American plaintiff sought to certify a class of Mexican-American employees and applicants who had not

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75. *See, e.g.*, Richard A. Nagareda, *Common Answers for Class Certification*, 63 VAND. L. REV. EN BANC 149, 150 (2010), http://www.vanderbiltlawreview.org/content/articles/2010/11/Nagareda-Common-Answers-for-Class-Certification-63-Vand.-L.-Rev.-En-Banc-149-2010.pdf.

76. *See* Johnson v. Ga. Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969).

77. *See id.*

78. Wexler, *supra* note 26, at 389-90.

79. *See* KANE, *supra* note 71; *see, e.g.*, Foster v. Sparks, 506 F.2d 805 (5th Cir. 1975); *Johnson*, 417 F.2d at 1124.

80. *See* KANE, *supra* note 71.

81. *See, e.g.*, *id.*; Bradford v. Sears, Roebuck & Co., 673 F.2d 792 (5th Cir. 1982); Stastny v. S. Bell Tel. & Tel. Co., 628 F.2d 267 (4th Cir. 1980).

82. Note, *Certifying Classes and Subclasses in Title VII Suits*, 99 HARV. L. REV. 619, 622 (1986) (footnote omitted).

83. *Id.*

84. *See* Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 151 (1982); Wexler, *supra* note 26, at 389-90.

been hired, claiming that the employer discriminated in its promotion and hiring practices.[85] The Court noted that while it did not disagree with the across-the-board rule, "the allegation that such discrimination has occurred neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified."[86] The court reinforced that Title VII class actions, like any other class action, must undergo "rigorous analysis" before the trial court can determine that the prerequisites of Rule 23(a) are satisfied.[87]

Although the Court held that the plaintiff in *Falcon* failed to identify common questions of law or fact, the Court did not completely bar the use of across-the-board class actions in employment discrimination cases.[88] In a footnote, the Court stated, "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes."[89] The Court, however, did not explain what would constitute "significant proof" or define what would qualify as discriminatory employment practices of "the same general fashion."[90] Following *Falcon*, the task of interpreting where to draw the line between the Court's demand for greater unity but unwillingness to deny the possibility of across-the-board class actions fell to lower courts.[91]

Courts still certify class actions after *Falcon*, but many courts have applied the Rule 23(a) requirements more strictly, resulting in less class-action certifications, especially for employment discrimination claims.[92] The Supreme Court, however, did not take up the issue of class certification requirements again until 2011, spurring the need for clarification.[93] Although the years following *Falcon* witnessed a degree of continuity across the federal courts of appeals, "[t]he 2010 decision of the Court of Appeals for the Ninth Circuit,

85. *Falcon*, 457 U.S. at 151.

86. *Id.* at 157.

87. *See id.* at 161.

88. *See* Wexler, *supra* note 26, at 390.

89. *Falcon*, 457 U.S. at 159 n.15.

90. *Id.*

91. *See* Nagareda, *supra* note 75, at 158-59; Elizabeth Chamblee Burch, *Introduction:* Dukes v. Wal-Mart Stores, Inc., 63 VAND. L. REV. EN BANC 91, 94 (2010), http://www.vanderbiltlawreview.org/articles/2010/10/Burch-Introduction-to-Dukes-Roundtable-77-Vand.-L.-Rev.-En-Banc-10-2010.pdf.

92. *See* Greenburger, *supra* note 56, at 4 (noting a study stating that employment discrimination cases amounted to 1.9% of class actions in 2010, and courts only certified employment discrimination cases about 25% of the time between 2008 and 2010); *see also* Kenneth Jost, *Class Action Lawsuits: Will the Supreme Court Approve the Wal-Mart Case?*, 21 CQ RESEARCHER, no. 19, 433, 448 (May 13, 2011), *available at* http://www.workplaceclassaction.com/CQ%20Researcher%20-%20Class%20Action%20Lawsuits.pdf (explaining that a brief from the Dukes "case found class certification granted in only 10 of 33 employment discrimination cases filed as class actions under the federal civil rights law from 2008 through 2010").

93. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011); Nagareda, *supra* note 75, at 149.

sitting en banc in *Dukes v. Wal-Mart Stores, Inc.*, open[ed] a significant fault line in the law of class certification."[94]

In *Dukes v. Wal-Mart Stores, Inc.*, the Ninth Circuit reviewed the approval of a class comprised of nationwide current and former female employees of Wal-Mart who alleged that the discretion exercised by their local supervisors over pay and promotion matters violated Title VII of the Civil Rights Act of 1964 by discriminating against women.[95] The named plaintiffs in the lawsuit did not allege that Wal-Mart had an express corporate policy hindering women, but instead that the discretion allotted to local managers led to unlawful disparities in pay and promotion between male and female employees.[96] They alleged that a strong and uniform "corporate culture" permitted bias against women that affected the decision making of each manager, "making every woman at the company the victim of one common discriminatory practice."[97] The plaintiffs in the class relied on three forms of proof to meet the standard: (1) statistical evidence reporting pay and promotion disparities, (2) anecdotal reports from about 120 employees detailing accounts of discrimination, and (3) testimony of an expert sociologist who conducted a "social framework analysis."[98] Ultimately, the Ninth Circuit held by a 6–5 vote that the district court did not abuse its discretion in certifying the proposed plaintiff class.[99]

The Ninth Circuit prescribed an approach that limited the court's focus to locating "common questions" across the proposed class and warned against "forc[ing] a trial on the merits at the certification stage."[100] The Ninth Circuit's decision conflicted with other federal circuit courts of appeal applying a more rigorous standard for class certification.[101] The basic question dividing courts

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94. Nagareda, *supra* note 75, at 151 (citing Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 628 (9th Cir. 2010) (en banc)).

95. *See Dukes*, 603 F.3d at 577-78. The Ninth Circuit noted that although the dissent referred to the class size as 1.5 million women, if past employees were excluded from the class, the number would be less, even two-thirds less, than the cited 1.5 million. *Id.* at 578 n.3. The Supreme Court, however, lists the 1.5 million number in its opinion. *See Dukes*, 131 S. Ct. at 2547.

96. *See Dukes*, 131 S. Ct. at 2548. While "[t]he notion that unchecked, local, subjective decisionmaking at [numerous] stores across the country could provide the common thread for a single action is admittedly counterintuitive," a focus on the locus of analysis—the company—instead of the agents reveals the systemic harm necessary to resolve the case on a class-wide basis. *How Goliath Won*, *supra* note 63, at 42 (noting that the multiple ways in which discrimination could play out in various situations is unnecessary to the threshold commonality determination).

97. *Dukes*, 131 S. Ct. at 2548.

98. *Id.* at 2549. The statistical evidence relied upon by the plaintiffs consisted of "regression analyses" performed by a statistician who compared the number of women promoted with the available pool of employees at a regional and a national level. *Id.* at 2555. The plaintiffs also employed a labor economist who compared Wal-Mart's promotion data to similar retailers. *Id.* Additionally, the "social framework" analysis conducted by the plaintiffs' expert sociologist details how Wal-Mart's "strong corporate culture" made the company susceptible to gender bias. *Id.* at 2553. The Court ultimately found fault with aspects of all three of the forms of proof. *See* discussion *infra* Part VIII.

99. *See Dukes*, 603 F.3d at 628.

100. *Id.* at 590, 609; Nagareda, *supra* note 75, at 152.

101. *See* Nagareda, *supra* note 75, at 152; *see also* Julian W. Poon & Blaine H. Evanson, *Class Distinctions: The Circuits Have Invoked a Variety of Different Standards in Certifying Classes for Litigation*, 33 L.A. LAW. 18, 21-22 (February 2011), *available at* http://www.gibsondunn.com/publications/Documents

in disputes over class certification is "whether the members of the proposed class are the victims of the same wrong, amenable to unitary adjudication, or whether they are the victims of differing, individualized wrongs, such as to defeat calls for class treatment."[102] The dispute over class certification invited the Supreme Court to grant certiorari in order to evaluate whether the judicial role consists solely of identifying purported common questions across a class or whether it instead entails an obligation to delve further, looking to the answers to such common questions for class-certification purposes.[103]

In June 2011, the Supreme Court granted certiorari to decide whether the Ninth Circuit's certification of the class was consistent with Rules 23(a) and 23(b)(2), resulting in a 5–4 split over how to interpret the commonality requirement of Rule 23(a)(2) in employment discrimination class actions.[104]

## V. NARROWING THE PLAYING FIELD: TREND OF INCORPORATING IMPLIED PREDOMINANCE INTO THE COMMONALITY REQUIREMENT

### *A. Texas Courts*

Similar to the Federal Rules of Civil Procedure, the Texas Rules of Civil Procedure codify the Texas law governing class-action certification requirements.[105] Texas trial courts, complying with Texas Rule of Civil

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/Poon-Evanson-ClassDistinctions.pdf (detailing the circuit split over the burden of proof required to prove Rule 23 factors prior to *Dukes*). *See generally In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008) (requiring that factual determinations meet the Rule 23 requirements by a preponderance of the evidence standard); *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 41-42 (2d Cir. 2006) (requiring a district judge to assess all relevant evidence and resolve relevant factual disputes when determining issues of class certification); West v. Prudential Sec., Inc., 282 F.3d 935, 938 (7th Cir. 2002) (noting that "[t]ough questions must be faced and squarely decided" by the district judge).

102. Nagareda, *supra* note 75, at 150.

103. *See id.* at 152.

104. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011). The plaintiffs in *Dukes* brought their claim under Rule 23(b)(2), seeking an injunction to stop Wal-Mart's alleged discriminatory practices, a declaration of the illegality of the company's actions, and monetary damages. *See* Malveaux, *supra* note 60, at 633; *see also supra* note 70 and text accompanying note 74 (listing the relevant Federal Rules).

105. *See* TEX. R. CIV. P. 42. Texas Rule of Civil Procedure 42(a) sets out the four threshold requirements of numerosity, commonality, typicality, and adequacy of representation. *See* TEX. R. CIV. P. 42(a). In addition to meeting these elements, a potential class must also fit into one of the three scenarios set forth in Texas Rule of Civil Procedure 42(b):

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> > (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

Procedure 42, have the discretion to grant or deny class certification.[106] Texas Rule of Civil Procedure 42(a)(2) parallels Federal Rule of Civil Procedure 23(a)(2).[107] Texas Rule 42(a)(2) states that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if . . . there are questions of law, or fact common to the class."[108] Because Texas patterned its civil procedure rules after the Federal Rules of Civil Procedure, federal authorities interpreting the current federal rules governing class-action certification are persuasive authority in Texas.[109]

The federal trend of tightening class-action certification requirements, confirmed by *Dukes*, mirrors a trend already played out in Texas.[110] Similar to federal courts, Texas trial courts initially practiced liberal certification of class actions, following a "certify now and worry later" approach.[111] Historically, Texas practitioners chose to bring class actions in state trial courts because of the relaxed view regarding class certification.[112]

During the 1980s and early 1990s, the Texas Supreme Court came out with several massive judgments for plaintiffs in mass tort class-action litigation.[113] The judiciary's liberal approach, however, hurt defendants—Texas businesses—and prompted concern for the business climate in Texas, resulting in sweeping tort reform and an influential shift in class-action

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> (3) the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to these issues include:
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> > (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
> >
> > (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> >
> > (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> >
> > (D) the difficulties likely to be encountered in the management of a class action.

TEX. R. CIV. P. 42(b).

106. *See* TEX. R. CIV. P. 42.

107. *See* TEX. R. CIV. P. 42(a)(2); *see also* Chad M. Pinson & David M. Hunt, *Consumer Class Actions: Texas Trends*, 30 REV. LITIG. 475, 483 (2011) (noting that the governing rules for Texas courts and federal courts are virtually identical).

108. TEX. R. CIV. P. 42(a)(2).

109. Sw. Ref. Co. v. Bernal, 22 S.W.3d 425, 433 (Tex. 2000); *see* Pinson & Hunt, *supra* note 107, at 483. Even for Texas practitioners, "understanding the trends in Texas and being able to meaningfully evaluate forum selection requires the context of federal trends, federal procedure, and federal class action jurisprudence." Pinson & Hunt, *supra* note 107, at 480-81.

110. *See* Alistair Dawson & Geoff Gannaway, *In Memoriam: Texas Class Actions*, 72 TEX. B. J. 366, 367 (2009).

111. *Bernal*, 22 S.W.3d at 435; *see* Pinson & Hunt, *supra* note 107, at 476; discussion *supra* Part IV.

112. *See* Dawson & Gannaway, *supra* note 110, at 367; *see also* Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing For Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709, 1715 (2000) (noting "the prevailing sense among some practitioners is that in many venues[,] . . . most notoriously . . . Texas, . . . judges are more than willing to certify almost anything that walks through the courtroom doors").

113. *See* Dawson & Gannaway, *supra* note 110, at 368.

jurisprudence.[114] The new pro-business climate led to a Texas Supreme Court decision in 2000 that dramatically altered the landscape for class-action certification in Texas.[115] In *Southwestern Refining Co. v. Bernal*, a group of plaintiffs sought class certification after a slop tank exploded at the refinery.[116] Claiming personal injury due to physical health problems, such as respiratory difficulties, in addition to extreme fear and mental anguish caused by the explosion, the four plaintiffs moved to certify an additional 900 claimants.[117] The company brought an interlocutory appeal to the Texas Supreme Court seeking reversal of the certification order on the ground that the plaintiffs did not meet the prerequisites to class certification.[118]

Unlike the plaintiffs in *Dukes*, who sought certification under the federal equivalent of Texas Rule of Civil Procedure 42(b)(2), the plaintiffs in *Bernal* sought certification under Texas Rule of Civil Procedure 42(b)(3).[119] Texas Rule of Civil Procedure 42(b)(3) requires common questions of law or fact to predominate over questions affecting only individuals, making class treatment "superior to other available methods for the fair and efficient adjudication of the controversy."[120] Reversing the certification order in *Bernal*, the Texas Supreme Court noted that Texas Rule 42(b)(3)'s predominance requirement "is one of the most stringent prerequisites to class certification."[121]

Although *Bernal* concerned an actual predominance analysis under the equivalent of Federal Rule of Civil Procedure 23(b)(3),[122] the case solidified the Texas trend of performing a rigorous analysis before ruling on class certification and "close[d] the courthouse doors to many class actions," patterning a nationwide trend taking place in federal courts.[123] Many district courts around the country began pulling a modified version of the predominance analysis from its appropriate location in Rule 23(b)(3) into the threshold Rule 23(a)(2) commonality requirement when engaging in this

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114. *Id.*

115. *See Bernal*, 22 S.W.3d at 434-35; Dawson & Gannaway, *supra* note 110, at 370.

116. *Bernal*, 22 S.W.3d at 428-29.

117. *Id.* at 429.

118. *Id.*

119. *See id.* at 433. The Rule 42(b)(4) cited in *Bernal* became Rule 42(b)(3) after the 2003 Amendments to the Rule. TEX. R. CIV. P. 42 historical note (West Supp. 2012).

120. *Bernal*, 22 S.W.3d at 433; TEX. R. CIV. P. 42(b)(3).

121. *Bernal*, 22 S.W.3d at 433.

122. The plaintiffs in *Bernal* sought to certify under the Texas equivalent of Rule 23(b)(3). *See supra* note 119 and accompanying text. The majority in *Dukes*, however, added an "implied" Rule 23(b)(3) predominance analysis into the Rule 23(a)(2) threshold certification requirement, despite the fact that the plaintiffs in *Dukes* sought to certify a Rule 23(b)(2) class. *See infra* Part V.B.2-4. A Rule 23(b)(2) class requires only that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23.

123. Pinson & Hunt, *supra* note 107, at 496.

"rigorous analysis."[124] In 2011, the majority of the Supreme Court affirmed this trend when it decided *Dukes*.[125]

### *B. Federal Courts*

#### *1. Play Ball: Commonality Analysis Prior to* Dukes

Prior to *Dukes*, the commonality requirement of Rule 23(a)(2) did not receive much attention from courts or commentators.[126] The Rule 23(b)(3) requirement that common issues predominate over individual issues instead maintained the majority of the focus.[127] Courts tended to assume that any classes meeting the more stringent predominance requirement in Rule 23(b)(3) would also meet Rule 23(a)(2)'s requirement "that there are questions of law or fact common to the class."[128] In other types of classes, such as Rule 23(b)(1) or Rule 23(b)(2) classes, the requirement was likewise often overlooked or incorporated into the analysis of other issues.[129]

The Supreme Court's decision in *Dukes*, however, made clear that Rule 23(a)(2) is more than an inconsequential baseline "whose existence may be assumed by a finding that the class has met the requirements of 23(b)(1), (b)(2) or (b)(3)."[130] According to the Court's opinion, although the Rule 23(a)(2) commonality analysis will sometimes overlap with other Rule 23(a) threshold requirements, district court judges must still engage in a rigorous analysis concerning the commonality of class members' claims.[131]

#### *2. Stepping Up to the Plate: The Majority's Take on the Commonality Standard*

In *Dukes*, the majority of the Supreme Court continued the trend of applying a stricter application of the Rule 23(a) requirements that began almost thirty years prior in *Falcon*.[132] Justice Scalia, writing for the majority, overturned the Ninth Circuit's decision affirming class certification and stated

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124. *See supra* note 101 and accompanying text.

125. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551-52 (2011).

126. Robin J. Effron, *The New Commonality: Rule 23(a)(2) After* Wal-Mart v. Dukes, WESTLAW J. EXPERT COMMENT. SERIES 16, 16 (2011), http://www.brooklaw.edu/newsandevents/news/2011/11-18-2011.aspx (follow "Read the full article" hyperlink); *see also* J. Douglas Richards & Benjamin D. Brown, *Predominance of Common Questions-Common Mistakes in Applying the Class Action Standard*, 41 RUTGERS L.J. 163, 163 (2009) (explaining that in practice Rule 23(a) criteria are normally easily satisfied and not strongly contested).

127. *See* Effron, *supra* note 126, at 16; Richards & Brown, *supra* note 126, at 164.

128. *See* Effron, *supra* note 126, at 16.

129. *Id.*

130. *Id.*

131. *See id.*; Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).

132. *See Dukes*, 131 S. Ct. at 2551; Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160 (1982); discussion *supra* Part IV.

that the mere claim by employees working for the same company that they suffered a disparate impact Title VII injury is not enough to establish commonality.[133] The majority held that Wal-Mart's common policy of delegating decision-making authority to local supervisors, allowing the managers discretion to make pay and promotion decisions based on subjective factors, did not satisfy the commonality requirement of Rule 23(a)(2).[134] The majority further explained that neither generalized questions that are not central to the litigation, nor a group of class members who have not suffered the same injury, meet the commonality standard.[135]

According to Justice Scalia, merely asserting common questions is insufficient because "[a]ny competently crafted class complaint literally raises common 'questions.'"[136] Rather, the claims must depend upon a common contention, for example, discriminatory bias by the same manager.[137] Justice Scalia suggested two ways to bridge the gap between individual claims and the existence of a class of plaintiffs who suffered the same injury: (1) a biased testing procedure or other companywide evaluation method, or (2) significant proof that a company operated under a general policy of discrimination.[138] The majority found that the plaintiffs' statistics, anecdotes, and expert testimony did not establish "significant proof" of a class-wide injury.[139]

Plaintiffs seeking class certification must therefore allege the "right" kind of common questions to get past *Dukes*.[140] In describing the "right" kind of common question, the majority looked to the work of late Professor Richard Nagareda, who argued that a court should grant class certification if the questions raised by the plaintiffs generate common answers, questions "capable of classwide resolution."[141] Put another way, the questions identified by the claims of the plaintiffs must depend upon the same contention, the resolution of which "resolve[s] an issue that is central to the validity of each one of the claims in one stroke."[142] The majority also noted that "[d]issimilarities" within the proposed class could prevent the finding of common answers.[143] Strikingly

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133. *See Dukes*, 131 S. Ct. at 2551.

134. *See id.* at 2554.

135. *See id.* at 2551; Grace E. Speights & Paul C. Evans, Wal-Mart v. Dukes*: Supreme Court Announces Stricter Class-Certification Standards*, WESTLAW J. EXPERT COMMENT. SERIES 2 (2011), http://www.morganlewis.com/pubs/Speights-Evans_Dukes_WestlawCommentary.pdf.

136. *See Dukes*, 131 S. Ct. at 2551 (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 131-32 (2009)); Effron, *supra* note 126, at 16.

137. *See Dukes*, 131 S. Ct. at 2551.

138. *See id.* at 2553.

139. *See id.* at 2553-57.

140. *See* Effron, *supra* note 126, at 16.

141. *See Dukes*, 131 S. Ct. at 2551; Effron, *supra* note 126, at 16; Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009). Professor Richard A. Nagareda was Professor and Director of the Cecil D. Branstetter Litigation & Dispute Resolution Program at Vanderbilt University School of Law before passing away on October 8, 2010. *See* Nagareda, *supra* note 75, at 149 nn.a1, d1.

142. *See Dukes*, 131 S. Ct. at 2551; Speights & Evans, *supra* note 135, at 2-3.

143. *Dukes*, 131 S. Ct. at 2551 (citing Nagareda, *supra* note 141, at 132).

similar to the standard that previously applied only to the Rule 23(b)(3) predominance analysis, the majority's "resolvability" approach has now "become the new threshold commonality" requirement "for all class actions."[144]

Overall, "the . . . definition of 'common question' within the resolvability framework" remains somewhat ambiguous.[145] Lower courts will likely give greater weight to the threshold commonality requirement and attempt to follow the approach laid out in *Dukes* by applying an even more "rigorous" analysis of Rule 23(a)(2) when making certification decisions.[146] The new standard, however, is far from clear.[147]

### *3. Switching Sides: The Dissent Calls the Majority Out*

Four justices, led by Justice Ruth Ginsburg, dissented in *Dukes*, urging that Wal-Mart's system, operating across multiple stores and regions, did raise issues common to all class members, and furthermore, the plaintiffs' evidence suggested that gender bias pervaded Wal-Mart's corporate culture.[148] The dissent argued that the majority introduced into the Rule 23(a)(2) commonality analysis concerns properly addressed in Rule 23(b)(3).[149] By mixing Rule 23(a)(2)'s threshold requirement with the more demanding requirement of Rule 23(b)(3)—whether common questions "predominate" over individual issues—the dissent found that the majority improperly elevated the Rule 23(a)(2) "inquiry so that it [was] no longer 'easily satisfied.'"[150]

Some commentators have labeled the majority's act of borrowing the predominance standard from Rule 23(b)(3) and giving it an implied application to Rule 23(a)(2) as "implied predominance."[151] Justice Ginsburg expressed concern that the majority engaged in this "implied predominance" approach.[152] According to the dissent, under the correct approach, a common question need

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144. *See* Effron, *supra* note 126, at 16; *see also* Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1056-57 (2005) (discussing the pre-*Dukes* commonality requirement).

145. Effron, *supra* note 126, at 16.

146. *Id. See generally* Bell v. Lockheed Martin Corp., No. 08–6292, 2011 WL 6256978, at *1 (D. N.J. Dec. 14, 2011) (citing *Dukes* and denying class certification on motion of the defense prior to conclusion of discovery in Title VII gender discrimination case); Scott v. Family Dollar Stores, Inc., No. 3:08CV540, 2012 WL 113657, at *1 (W.D. N.C. Jan. 13, 2012) (citing *Dukes* and denying class certification on motion of the defense in Title VII case filed pre-*Dukes* alleging pay disparities between male and female store managers).

147. *See* Effron, *supra* note 126, at 16.

148. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2563, 2565 (2011) (Ginsburg, J., dissenting); Trask, *supra* note 10, at 349.

149. *See Dukes*, 131 S. Ct. at 2565 (Ginsburg, J., dissenting). The predominance inquiry under Federal Rule of Civil Procedure 23(b)(3), however, was not applicable in the *Dukes* case because the plaintiffs in *Dukes* chose to certify under Federal Rule of Civil Procedure 23(b)(2). *See id.* at 2548-49 (majority opinion).

150. *See id.*, 131 S. Ct. at 2565-66 (Ginsburg, J., dissenting).

151. *See* Effron, *supra* note 126, at 16 (noting that one possible reading of the commonality standard in *Dukes* "is that the Supreme Court has taken the predominance standard from Rule 23(b)(3) and given it an implied application to Rule 23(a)(2)").

152. *See Dukes*, 131 S. Ct. at 2566 (Ginsburg, J., dissenting); Effron, *supra* note 126, at 17.

consist only of "a dispute, either of fact or of law, the resolution of which will advance the determination of the class members' claims."[153] Although somewhat similar to the standard advanced by the majority, the dissent advocated for a less demanding standard, one met by the identification of a common question uniting the plaintiffs' claims.[154] In *Dukes*, Justice Ginsburg found that the plaintiffs met this standard, "stat[ing] claims of gender discrimination in the form of biased decisionmaking in both pay and promotions."[155]

The *Dukes* majority, however, responded to the dissent by denying that it engaged in an "implied predominance" analysis.[156] Whether the majority went so far as to replace the Rule 23(a)(2) threshold commonality analysis with the Rule 23(b)(3) predominance analysis or not, the baseline of the certification requirements under Rule 23(a)(2) has moved significantly.[157] By limiting the range of permissible common questions to those that are "capable of classwide resolution" and generating "common answers," the majority adopted some variation of the implied predominance theory.[158]

### *4. Out in Left Field: Problems with the Majority's Approach*

There are several problems with the implied predominance approach undertaken by the majority in *Dukes*.[159] In cases in which plaintiffs sought to certify a class under Rule 23(b)(3), courts have not applied the predominance requirement in a uniform fashion.[160] This has led to an unpredictable pattern of decisions, producing difficulties for plaintiffs attempting to anticipate how a judge will rule on the issue of class certification.[161] If courts are unable to produce consistent results when explicitly engaging in a predominance analysis, the addition of a similar unspoken standard into the threshold Rule 23(a)(2) commonality requirement will fail "to provide a uniform or coherent baseline of commonality by which courts answer the question 'how common is common enough?'"[162]

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153. *Dukes*, 131 S. Ct. at 2562 (Ginsburg, J., dissenting); *see* Trask, *supra* note 10, at 349.

154. *See Dukes*, 131 S. Ct. at 2562 (Ginsburg, J., dissenting); Trask, *supra* note 10, at 349.

155. *See Dukes*, 131 S. Ct. at 2565 (Ginsburg, J., dissenting); Trask, *supra* note 10, at 349.

156. *See Dukes*, 131 S. Ct. at 2556; Effron, *supra* note 126, at 17.

157. *See* Effron, *supra* note 126, at 17.

158. *See Dukes*, 131 S. Ct. at 2551; Effron, *supra* note 126, at 17 ("As many of the lower courts resisting implied predominance have observed, there is little left of the threshold commonality requirement if these rules in fact require something greater, that is, a standard that is enumerated elsewhere in the Federal Rules of Civil Procedure.").

159. *See* Effron, *supra* note 126, at 17.

160. *See id.*; *see also* Richards & Brown, *supra* note 126, at 163 (noting that Rule 23 lacks definitive guidance and explaining five key ways in which attorneys and courts have misinterpreted Rule 23(b)(3)).

161. *See* Effron, *supra* note 126, at 17.

162. *See id.*

In addition, implied predominance is not a successful mechanism for resolving the problems for which it supposedly answers.[163] Courts often engage in implied predominance when judges are concerned that a class action will become "unmanageable or unwieldy."[164] In order to deny class certification, judges focus on the dissimilarities between individual claims, failing to find a common contention between class members.[165] Judges differ, however, in identifying the sort of individual issues that give rise to such unmanageability.[166] What one judge interprets as an issue central to the case could vary from another judge.[167] Furthermore, a judge's determination depends upon the issues identified as central at the outset of the case, during the class-certification stage.[168] Class facts and issues could shift following discovery and other pretrial procedures, but the decision to certify makes or breaks a case.[169]

Whatever the label, the majority's standard is "strikingly high."[170] The divide between the approaches taken by the majority and the dissent leaves unanswered exactly what sort of companywide employment practices would actually constitute a common question for the purposes of class certification.[171] The decision also leaves lower courts with discretion to determine how broadly or narrowly to interpret *Dukes* when presented with distinguishable fact scenarios.[172]

The split between the justices also increases the likelihood that the Supreme Court will revisit the decision in the future. When it does, the Court should follow the dissent's approach, ensuring that a heightened implied predominance standard has no place in the Rule 23(a)(2) threshold requirement.[173] The standard detailed by the dissent remains truer to the text of the Federal Rules of Civil Procedure.[174] Furthermore, by tightening the requirements to bring a class action, a principle method of ensuring enforcement of antidiscrimination laws, the majority's approach has the potential to harm individuals, the court system, and society as a whole.[175]

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163. *See id.*

164. *See id.*

165. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2567 (2011) (Ginsburg, J., dissenting).

166. *See* Effron, *supra* note 126, at 17.

167. *See id.*

168. *See id.*

169. *See id.* For these reasons, the *Dukes* majority acknowledged that district courts must sometimes consider the merits of a case when resolving issues of class certification. *See Dukes*, 131 S. Ct. at 2551-52.

170. Effron, *supra* note 126, at 18.

171. *See id.*

172. *See id.*; *see also supra* note 146 (listing two Title VII claims denied class certification post-*Dukes*).

173. *See infra* Part VII.

174. *See infra* Part VII.

175. *See How Goliath Won*, *supra* note 63, at 37 (stating that "[t]he *Dukes* class certification standard jeopardizes potentially meritorious challenges to systemic discrimination" and "compromises employees' access to justice").

## VI. HIT OR MISS: IMPLICATIONS OF THE MAJORITY'S DECISION IN *DUKES*

### *A. Deters Class-Action Lawsuits Against Large Corporations*

The *Dukes* decision raises the bar for potential classes alleging employment discrimination and provides defendants with a variety of tools to defeat class-certification efforts.[176] In doing so, *Dukes* deals a blow to plaintiffs seeking certification under Rule 23.[177]

The heightened certification requirements championed by the majority could lead to a decline in federal class-action lawsuits, mirroring the decline that already occurred in Texas state courts.[178] Following a tightening of the requirements for class certification by the Texas Supreme Court and the enactment of House Bill 4 by the Texas Legislature, Texas witnessed a decline in the number of plaintiffs bringing class-action lawsuits in the mid-2000s.[179] House Bill 4, passed September 1, 2002, states: "The Texas Supreme Court *shall* have jurisdiction over any interlocutory appeal from a trial court order ruling on class certification, regardless of whether the trial court certifies or refuses to certify a class."[180] The broad interlocutory appeal approved by House Bill 4 increased appellate review of class-action certifications by the conservative Texas Supreme Court.[181]

According to a 2009 article in the *Texas Bar Journal*, the consensus among members of the defense bar was that if a defense client faced proceedings against a certified class, the court would eventually overturn the certification.[182] For these reasons, plaintiffs began taking their class-action lawsuits elsewhere, such as courts in nearby Oklahoma and Arkansas.[183] A 2011 Texas article, however, combined an electronic search and a manual review of subscription service data to reveal that while nonconsumer class actions hit an all-time low in 2005, both nonconsumer and consumer class actions "climbed exponentially" and roughly doubled both from 2008 to 2009 and again from 2009 to 2010.[184] The authors observed, however, that the

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176. *See* Speights & Evans, *supra* note 135, at 2.

177. *See id.* at 6; *see also* Andrew Longstreth, Wal-Mart v. Dukes *Shakes Up Employment Class Actions*, REUTERS (Jan. 9, 2012, 7:19 PM), http://www.reuters.com/article/2012/01/10/us-walmart-study-idUSTRE80901320120110 (noting the psychological effect of *Dukes* has plaintiffs' attorneys thinking twice before taking on potentially expensive, time-consuming, and risky discrimination class actions).

178. *See* Dawson & Gannaway, *supra* note 110, at 367.

179. *See id.* In addition, the Class Action Fairness Act (CAFA), signed into law in 2005, provided a mechanism for businesses to shift major class actions (such as claims where the amount in controversy exceeds $5 million) from state to federal courts, further limiting the number of lawsuits filed in Texas. *See id.* at 372; 28 U.S.C. § 1332(d)(2) (2006).

180. Dawson & Gannaway, *supra* note 110, at 371 (citing TEX. GOV'T CODE ANN. § 22.225(d) (amended by Tex. H.B. 4, § 1.02)).

181. *See id.* at 367.

182. *See id.* at 373.

183. *See id.*

184. *See* Pinson & Hunt, *supra* note 107, at 479.

variety of class-action claims filed in Texas narrowed from a wide assortment of categories to strikingly few in the past ten years.[185] Specifically, "labor and employment class actions, which have always been a staple, dropped to one filing each in 2009," although employment and civil rights actions increased slightly in 2010.[186] Thus, while class-action filings in Texas are slowly increasing and companies must still consider the possibility of a class-action lawsuit, employment discrimination class actions remain a small portion of this rising trend.[187]

After *Dukes*, the options for class-action plaintiffs continue to dwindle as federal court requirements, like the Texas court requirements, squeeze the life out of the class-action lawsuit as an option for remedying group wrongs.[188] With the extra burdens attached to class certification, plaintiffs' attorneys may decline to represent potential large-scale classes, negatively affecting individuals who face discrimination in the workplace and other areas of society.[189]

Even without a willing attorney, however, plaintiffs still have several options: bringing individual claims, pursuing claims in smaller classes, or pursing claims with the Equal Employment Opportunity Commission.[190] Plaintiffs may also choose to file smaller class actions focused on specific jobs, specific locations, or specific aspects of employers' practices or policies.[191] Additionally, plaintiffs' attorneys could bring class actions in state courts to avoid some of the impact of *Dukes*.[192] As detailed previously, however, plaintiffs in Texas will likely fare no better than plaintiffs who attempt to certify in federal court.[193]

In general, plaintiffs will likely test the boundaries of *Dukes* when attempting to certify an expansive class under the new standard.[194] After *Dukes*, however, defendants gained an arsenal of weapons for use in arguing that a potential class lacks the commonality required to bring an employment discrimination claim.[195] Thus, corporations, facing less of a challenge from

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185. *See id.*

186. *Id.* at 480.

187. *See id.*

188. *See* Dawson & Gannaway, *supra* note 110, at 373.

189. *See How Goliath Won*, *supra* note 63, at 44 (noting, however, that cases on scale with *Dukes* are rare, and while "*Dukes* unquestionably tested the outer bounds of what it takes to hold a class together[,]" smaller classes will likely have more success); Longstreth, *supra* note 177.

190. *See* Dahlia Lithwick, *Class Dismissed: The Supreme Court Decides That the Women of Wal-Mart Can't Have Their Day in Court*, SLATE (June 20, 2011, 6:19 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/06/class_dismissed.single.html; Speights & Evans, *supra* note 135, at 6.

191. *See* Speights & Evans, *supra* note 135, at 6; *see also* Longstreth, *supra* note 177 (noting that following the *Dukes* decision, the plaintiffs in the case filed two smaller class actions).

192. Speights & Evans, *supra* note 135, at 6.

193. *See supra* Part V.A.

194. *See* Speights & Evans, *supra* note 135, at 6.

195. *See id.* at 2; *see also* Andrew Trask, *Ten Ways to Use* Wal-Mart v. Dukes *to Defend Class Actions*, CLASS ACTION COUNTERMEASURES (Mar. 1, 2012), http://www.classactioncountermeasures.com/2012/03/articles/presentations/ten-ways-to-use-walmart-v-dukes-to-defend-class-actions/ (follow hyperlink "second of

injured plaintiffs in court, have less incentive to comply voluntarily with antidiscrimination laws and policies.[196]

### *B. Discourages Voluntary Efforts of Compliance with Antidiscrimination Laws*

*Dukes* will no doubt benefit corporations that delegate decision-making authority to local stores.[197] The majority's opinion in *Dukes* suggests that a corporate policy of delegating discretion over basic employment decisions such as pay and promotion does not constitute a policy at all.[198] The majority found that Wal-Mart's decision-making structure, which decentralized basic employment decisions to local stores, was the opposite of a common practice justifying a class action: "it is a policy *against having* uniform employment practices" and "[i]t is also a very common and presumptively reasonable way of doing business."[199]

Additionally, Wal-Mart's announced policy forbidding sex discrimination further added to the majority's skepticism.[200] If a corporation has an official policy against employment discrimination, while failing to regulate or provide any oversight to mid-level managers wielding significant power over decisions affecting the everyday lives of employees, the *Dukes* decision finds no fault.[201] Even if statistical analysis reveals disparate treatment between men and women, corporations can now rely on the language in *Dukes* to defend business practices that have an obvious negative impact on a particular segment of employees.[202] Retail and similarly situated companies that frequently operate by delegating employment decision making to a local level can now argue that nationwide class actions are inappropriate.[203]

In this manner, the majority's interpretation of class certification requirements discourages voluntary efforts at compliance with antidiscrimination laws.[204] If a corporation has a stated procedure for hiring or firing, broken down from a national to a store-by-store level, a group of potential class

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my presentations at DePaul") (blog post including PowerPoint presentation explaining strategic uses of *Dukes* in defending class actions, such as attacking commonality, focusing on dissimilarities, and challenging anecdotal evidence).

196. *See* discussion *infra* Part VI.B.

197. *See* Speights & Evans, *supra* note 135, at 6.

198. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2554 (2011).

199. *See id.*; Speights & Evans, *supra* note 135, at 6.

200. *See Dukes*, 131 S. Ct. at 2553. Indeed, Wal-Mart had a central antidiscrimination policy and had won several diversity awards. *See* Trask, *supra* note 10, at 330; *see also How Goliath Won*, *supra* note 63, at 43 (explaining, however, that given current societal expectations, most employers will have an antidiscrimination policy, and the mere existence of such a policy should not destroy commonality).

201. *See Dukes*, 131 S. Ct. at 2553-54.

202. *See* Speights & Evans, *supra* note 135, at 6; *supra* text accompanying note 199 (citing language from *Dukes* opinion).

203. *See* Speights & Evans, *supra* note 135, at 6.

204. *See* Lithwick, *supra* note 190.

plaintiffs can then use statistical, anecdotal, and expert evidence to reveal a disparate impact between, for example, male and female employees based on the company's use of this published policy.[205] If a corporation fails to enumerate such a policy, however, and leaves an ample level of discretion over pay or promotion matters to managers at a local level, the company can then defend based on a lack of commonality between members of the potential class.[206] This encourages leadership in large corporations to decentralize decision-making processes and allocate more discretion to local managers and supervisors.[207]

These types of decentralized polices, however, have considerable potential to harm low-wage workers, especially in mega-corporations.[208] Hourly workers are left to the whim and caprice of higher paid supervisors, allocated significant discretion over pay and promotion decisions with little oversight.[209] Because the majority in *Dukes* found not even a single common question uniting the female Wal-Mart employees, a corporation's success at defending a class action lawsuit will likely increase along with the size and diversity of the potential class.[210] In essence, the more pervasive and widespread the discrimination affecting employees, the less likely a court will certify the class after engaging in a rigorous Rule 23(a)(2) analysis.[211]

This has grave public policy implications when considering that one main purpose of the discrimination class-action lawsuit is to eliminate unwritten policies and unspoken bias.[212] In general, "an employer can more easily mask discrimination when challenged on an individual basis than on a class-wide basis."[213] Evidence such as "statements from management, corporate documents, and companywide statistics" have the potential to reveal strong trends of corporate misconduct that an individual acting alone might never discover.[214] This shared discovery allows plaintiffs in class actions to recommend remedies and injunctive relief that reaches all of the individuals injured under a discriminatory policy or practice.[215]

Large class-action lawsuits may also generate substantial media coverage, alerting the public to systemic abuse by companies that would not otherwise receive attention or generate the level of outrage necessary to create an

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205. *See id.*
206. *See id.*
207. *See id.*
208. *See id.*
209. *See id.*
210. *See id.*
211. *See id.*
212. *See id.*
213. Malveaux, *supra* note 60, at 631.
214. *See id.* (noting that such evidence puts individuals, otherwise unaware of a company's alleged practices, on notice).
215. *See id.*

incentive for change.[216] In this way, class actions shift societal expectations and create a subsequent climate of accountability, encouraging businesses to comply with polices that work to protect individual employees.[217] Without class actions, this important mechanism for social change will disappear.[218]

In addition to encouraging voluntary efforts of compliance, litigation of employment discrimination lawsuits also has the potential to remedy past wrongs and deter future misconduct.[219] For example, two years after the plaintiffs filed the *Dukes* lawsuit, Wal-Mart began requiring its stores to post job vacancies—resolving a complaint voiced by several of the class members.[220] Wal-Mart also announced a multibillion-dollar women's initiative three months after the dismissal of the *Dukes* case.[221] Under this initiative, Wal-Mart plans to buy $20 billion worth of products from female-owned businesses in the United States over the next five years.[222] Wal-Mart further announced a plan to present over $100 million in grants to nonprofit organizations that promote women's issues.[223]

Without such pressure or incentive for corporations to protect their public image, which likewise increases company profits through consumer goodwill, employees will lose the protections that individuals, nonprofits, and public policy advocates have worked diligently to procure and protect.[224] Moreover, while plaintiffs' lawyers will not likely abandon theories based on excessive subjectivity, attorneys may choose to pursue class actions based upon objective policies, such as employment tests.[225] The majority's analysis in *Dukes*, therefore, harms individuals and organizations working to fight discrimination and establish transparent policies and equal opportunity in the workplace.[226]

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216. *See* Burch, *supra* note 91, at 92. "Although employment class actions tend not to make the popular headlines, this is far from an ordinary case: it has been publicized by *The Nation*'s Liza Featherstone and political activists like Wal-Mart Watch." *Id.*

217. *See* Malveaux, *supra* note 60, at 631 (noting "potential class-wide liability encourages companies to voluntarily comply with the law and deters future misconduct").

218. *See* Lesley Wexler, *Wal-Mart Matters*, 46 WAKE FOREST L. REV. 95, 119 (2011) (detailing why consumers and other third parties have limited influence over Wal-Mart). Although other avenues for challenging corporate practices, such as consumer boycotts, exist in addition to litigation, "it is unclear whether a boycott is likely to exert enough economic bite to change Wal-Mart's practices." *Id.* at 121.

219. *See* Malveaux, *supra* note 60, at 631; *supra* note 217 and accompanying text.

220. *See* Jost, *supra* note 92, at 446.

221. Ashley Lutz & Matthew Boyle, *Wal-Mart Announces Multibillion Dollar Women's Initiative*, BLOOMBERG (Sept. 14, 2011, 3:05 PM), http://www.bloomberg.com/news/2011-09-14/wal-mart-to-announce-multibillion-dollar-women-s-initiative.html.

222. *Id.*

223. *Id.*

224. *See* Malveaux, *supra* note 60, at 631; *see also* Wexler, *supra* note 218, at 96 (asserting that despite a successful focus on efficiency, American markets are not sufficiently competitive to quickly eliminate discrimination, suggesting why this failure may have occurred with Wal-Mart, and noting the need for government regulation).

225. *See* Speights & Evans, *supra* note 135, at 6.

226. *See How Goliath Won*, *supra* note 63, at 35. Civil rights groups, however, are already advocating for congressional action, and "future political changes to the congressional makeup could result in legislation designed to limit some of the employer-friendly aspects of *Dukes*." Speights & Evans, *supra* note 135, at 7.

### *C. Burdens the Court System*

In addition to allowing businesses to sidestep the liability associated with violations of antidiscrimination law, the majority's interpretation of the Rule 23(a)(2) commonality requirement will burden the court system as a whole.[227] By discouraging class certification, plaintiffs are more likely to bring individual claims or claims seeking to certify small, local classes.[228] An increase in the number of claims filed against a single employer could overburden court dockets with duplicative litigation that if brought as a class action would save time and judicial resources.[229] The class action "provides an efficient means of resolving similar individual claims all in one lawsuit—relieving the federal courts of repetitive individual litigation and providing defendants with global peace."[230] If an individual plaintiff wins a discrimination claim against a large corporation, chances are high that more employees will attempt to follow suit.[231] The class-action mechanism ensures that the defendant will not face multiple suits challenging a single discriminatory practice, leading to years of burdensome litigation.[232]

Furthermore, the majority's interpretation will also encourage employers and corporations to push boundaries when defending class-action claims.[233] Because of the Court's split over the commonality analysis, lower courts are more likely to attempt to broaden or narrow the limits of the Court's opinion—depending on the judge's agenda—with respect to the facts and issues presented by a particular case.[234] This uncertainty will lead to inconsistency in lower courts' interpretation of the *Dukes* decision.[235] Attorneys, clients, and courts benefit, however, from uniform policies that reduce the uncertainty associated with litigating claims.[236] For these reasons, the Supreme Court should revisit *Dukes* and clarify the boundaries of the Rule 23(a)(2) commonality requirement.

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227. *See* Greenburger, *supra* note 56, at 6.

228. *See, e.g.*, *How Goliath Won*, *supra* note 63, at 44; *see also supra* notes 190-91 and accompanying text (discussing how plaintiffs are more likely to pursue claims in smaller classes post-*Dukes*).

229. *See* Greenburger, *supra* note 56, at 6; Malveaux, *supra* note 60, at 632.

230. Malveaux, *supra* note 60, at 632.

231. *See id.*

232. *See id.*

233. *See supra* Part VI.B.

234. *See* Effron, *supra* note 126, at 17; *supra* text accompanying notes 163-69.

235. *See* Effron, *supra* note 126, at 17. *Compare* Scott v. Family Dollar Stores, Inc., No. 3:08CV540, 2012 WL 113657, at *1 (W.D. N.C. Jan. 13, 2012) (citing *Dukes* and denying class certification on motion of the defense in Title VII case filed pre-*Dukes* alleging pay disparities between male and female store managers), *and* Bell v. Lockheed Martin Corp., No. 08-6292, 2011WL 6256978, at *1 (D. N.J. Dec. 14, 2011) (citing *Dukes* and denying class certification on motion of the defense prior to conclusion of discovery in Title VII gender discrimination case), *with* McReynolds v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., No. 11-3639, 2012 WL 592745, at *6 (7th Cir. Feb. 24, 2012) (distinguishing *Dukes* and reversing denial of class certification in case alleging racial discrimination stemming from company polices).

236. *See supra* Part VI.A-B.

## VII. EXTRA INNINGS: THE SUPREME COURT SHOULD REVISIT *DUKES* AND EXPLICITLY OVERRULE ANY IMPLIED PREDOMINANCE UNDER RULE 23(a)(2)

Because the implied predominance standard suggested by the majority will deter class-action lawsuits against large corporations, discourage voluntary efforts of compliance with antidiscrimination laws, and burden the court system, the Supreme Court should revisit the Rule 23(a)(2) commonality analysis.[237] In doing so, the Court should disavow any implied predominance standard incorporated into Rule 23(a)(2) that was suggested by *Dukes* and advocate a new standard.[238]

This new standard should limit a judge's ability to weigh the merits of a case when analyzing certification requirements and leave the task of determining the persuasiveness of the proposed common proof to the jury.[239] Rather than incorporating an implied predominance analysis when considering whether to certify an employment discrimination class action under Rule 23(a)(2), courts should return to the text of the Federal Rules, and ask instead whether there is a single common question, rather than a question that predominates.[240]

The Advisory Committee Notes to the 2003 amendments to the Federal Rules state that although a limited inquiry into the merits may be necessary to make an informed decision on certification, "an evaluation of the probable outcome on the merits is not properly part of the certification decision."[241] Incorporating an implied predominance standard into the Rule 23(a)(2) analysis, however, has the effect of encouraging judges to delve into the merits of the case at the certification stage before the parties have sufficient time to clearly identify and develop disputed issues through discovery.[242] Ultimately, changes to the Federal Rules should be implemented through a formal rule-making proceeding rather than through case law, and the Supreme Court should encourage an application of Rule 23(a)(2) that follows the plain language of the rule.[243]

Furthermore, under a less stringent standard, plaintiffs are more likely to bring their claims in court, encouraging voluntary compliance with antidiscrimination laws by corporations and other organizations.[244] Class

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237. *See* discussion *supra* Part VI.

238. *See infra* notes 239-47.

239. *See* Richards & Brown, *supra* note 126, at 128.

240. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).

241. FED. R. CIV. P. 23 advisory committee's note to the 2003 Amendments; *see* Richards & Brown, *supra* note 126, at 167.

242. *See* Richards & Brown, *supra* note 126, at 165.

243. *See id.* at 186. Although the Richards and Brown article details the unjustified construction given to Rule 23(b)(3), their argument could likewise apply to the implied predominance approach under Rule 23(a)(2). *See id.*

244. *See supra* Part VI.B.

actions provide a powerful tool to challenge engrained practices of employment discrimination in the workplace, and judges should not attempt to strip plaintiffs of this valuable device by incorporating a standard of implied predominance into the Rule 23(a)(2) commonality analysis, whether in federal courts or in Texas courts.[245] In the court system, "procedural mechanisms can act as barriers to justice, as hurdles that deny due process if they are too high to clear."[246] Despite the tightening of class-certification requirements after *Dukes*, however, plaintiffs' attorneys can still successfully bring large class-action claims, but they will need to thoroughly research, compile the "correct" evidence, and carefully strategize in order to overcome the class-certification hurdle.[247]

## VIII. STRATEGY IS KEY: HOW PRACTITIONERS CAN ENSURE SUCCESSFUL CLASS CERTIFICATION AFTER *DUKES*

In the years following *Dukes*, plaintiffs will test the boundaries of the case by seeking narrower classes or attempting to distinguish their claims by narrowly framing *Dukes*' precedential effect.[248] Despite plaintiffs' efforts, defendants will likely challenge commonality during class certification proceedings more often.[249] There are, however, definite steps that attorneys can take to assist in ensuring successful class certification post-*Dukes*.[250] In *Dukes*, the majority addressed how the plaintiffs' use of statistical evidence, anecdotal evidence, and expert testimony fell short.[251] By examining and strengthening their arguments where the Supreme Court found holes in the plaintiffs' evidence in *Dukes*, practitioners can increase their chances of passing the certification threshold.[252]

Because *Dukes* affirmed that judges must conduct rigorous inquiries at the class certification stage, plaintiffs may need to make more detailed and comprehensive requests for discovery early on.[253] Plaintiffs will need to seek factual evidence in order to demonstrate that class-wide issues are capable of a common resolution using class-wide proof.[254] This need provides plaintiffs with an additional justification for seeking comprehensive discovery from defendants at the onset of litigation.[255]

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245. *See supra* Part III.

246. Malveaux, *supra* note 60, at 621 (declaring that denying litigants access to the court system through procedural hurdles denotes a crisis in the legal profession).

247. *See infra* Part VIII.

248. *See* Speights & Evans, *supra* note 135, at 6; *supra* Part VI.B.

249. *See* Trask, *supra* note 10, at 354; *supra* note 195 and accompanying text.

250. *See infra* Parts VIII.A-C.

251. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551-57 (2011).

252. *See id.*

253. *See* Trask, *supra* note 10, at 352.

254. *See id.*

255. *See id.*

### *A. Statistical Evidence*

In *Dukes*, the Court rejected plaintiffs' use of aggregate statistical analysis and found that the existence of regional disparities in pay and promotion of female employees did not meet the commonality burden.[256] The Court suggested, however, that a demonstration of store-by-store disparities might raise the uniform inference needed to show commonality.[257] The Court's analysis suggests that practitioners should attempt to break any statistical analysis down into the smallest sample size available, while still compiling group-wide, aggregate statistics.[258] For example, in a case like *Dukes*, an attorney could break down gender disparities in pay and promotion store-by-store as well as both regionally and nationally.[259]

Furthermore, the majority noted that even if statistical analysis established a pattern of discrepancies, an expert would need to demonstrate that the disparities were not the result of "some sex-neutral, performance-based criteria—whose nature and effects will differ from store to store."[260] An attorney could attempt to account for neutral criteria resulting in such disparities, however, by supplementing statistical analysis with strategic use of anecdotal evidence and expert testimony.[261]

### *B. Anecdotal Evidence*

In *Dukes*, the plaintiffs filed affidavits detailing discrimination from 120 individuals, or one for every 12,500 class members.[262] The majority, noting that more than half of the accounts came from only six states, and fourteen states had no affidavits at all, found that the anecdotal evidence could never demonstrate a company-wide policy of discrimination.[263] The majority appears to promote a policy in which the desired number of anecdotes increases along with the number of potential class members.[264] The majority, however, does not consider the practical need to allow for a more flexible ratio as the size of the class increases.[265] Effectively, "[t]his suggested proportion (or one even in the ballpark) effectively ensures that no plaintiff will be able to allege systemic

256. *See Dukes*, 131 S. Ct. at 2555; Speights & Evans, *supra* note 135, at 3.
257. *See Dukes*, 131 S. Ct. at 2555; Speights & Evans, *supra* note 135, at 3.
258. *See* Speights & Evans, *supra* note 135, at 3.
259. *See id.*
260. *See Dukes*, 131 S. Ct. at 2555.
261. *See infra* Parts VIII.B-C.
262. *See Dukes*, 131 S. Ct. at 2555; Speights & Evans, *supra* note 135, at 3.
263. *See Dukes*, 131 S. Ct. at 2556. In contrast, the majority positively cited *Teamsters v. United States*, noting that the Government filed forty anecdotes, which accounted for one out of every eight members of the class. *See id.* (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 338 (1977)).
264. *See id.* at 2555.
265. *See id.* at 2563 n.4 (Ginsburg, J., dissenting) (noting that the majority derives from *Teamsters* "a rule that a discrimination claim, if accompanied by anecdotes, must supply them in numbers proportionate to the size of the class").

discrimination by an employer the size of Wal-Mart using anecdotal evidence."[266] Detailing the story of every single potential claimant would be both financially burdensome and impractical.[267] In a case like *Dukes*, in which potential class members live thousands of miles apart, a practitioner might choose to collect a smaller number of anecdotes, utilizing the class members' stories to supplement hard, data-driven evidence with softer narrative.[268]

The majority's stance in *Dukes*, however, suggests that a practitioner utilizing anecdotal evidence in support of class certification should collect as many affidavits as feasibly possible from a broad cross-section of the potential class members.[269] A large number of personal accounts suggesting a common pattern or injury—linking multiple geographic regions and segments of the population—will aid the judge in discerning commonality across potential class members.[270]

### *C. Expert Testimony*

Finally, the *Dukes* Court rejected testimony by the plaintiffs' social science expert who testified that Wal-Mart's corporate culture made the company's practices vulnerable to gender bias, "finding the testimony useless to the salient question whether the plaintiffs could prove a general policy of discrimination."[271] The *Dukes* opinion "makes clear that courts may not merely accept plaintiffs' efforts to homogenize individual issues through [generalized] expert testimony."[272] In doing so, the Court implied, without explicitly stating, "that the *Daubert* standard applies to expert witness testimony used in support of class certification."[273]

Because lower courts will be conducting a more rigorous analysis of the Rule 23(a)(2) commonality requirement after *Dukes*, judges will more likely delve into the merits of the case before certifying a class action.[274] Courts are thus more likely to hear *Daubert* challenges to expert testimony at the class

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266. *See How Goliath Won*, *supra* note 63, at 41.

267. *See id.*

268. *See id.*

269. *See Dukes*, 131 S. Ct. at 2556.

270. *See id.*

271. Speights & Evans, *supra* note 135, at 3; *see Dukes*, 131 S. Ct. at 2554 (criticizing the expert sociologist's inability to calculate with specificity the percentage of employment decisions that might be influenced by stereotyped thinking at Wal-Mart). *But see How Goliath Won*, *supra* note 63, at 43 (asserting that the Court improperly focused on the answer to this question, rather than the question itself, despite the subtle and complex manner in which gender bias affects the workplace and the difficulty in compiling numerical statistics in this area).

272. *See* Speights & Evans, *supra* note 135, at 3.

273. *Id.*; *see Dukes*, 131 S. Ct. at 2554. The majority noted: "The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that this is so . . . ." *Dukes*, 131 S. Ct. at 2553-54 (citation omitted); *see also* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993) (requiring evidence based on scientifically valid principles to be both reliable and relevant); Trask, *supra* note 10, at 352 (noting that *Dukes* will result in a "[f]iercer battle of the experts").

274. *See Dukes*, 131 S. Ct. at 2551.

certification stage.[275] For this reason, practitioners attempting to certify a large-scale class action can plan for this scenario by ensuring that any testimony by a supporting expert witness meets the *Daubert* standard of reliability.[276]

Overall, plaintiffs must realize the importance of demonstrating why they should win the commonality analysis with a trial plan that anticipates the judge's questions and provides solid reasoning for the judge to rely upon when issuing a certification order.[277]

## IX. CONCLUSION

The Supreme Court's decision in *Wal-Mart v. Dukes* affirmed the trend already witnessed in several federal circuit courts of appeal as well as Texas state courts of applying a more rigorous analysis to the class certification procedural requirements.[278] Because the heightened implied predominance standard incorporated by the majority into Rule 23(a)(2)'s threshold commonality requirement will deter class-action lawsuits against large corporations, discourage voluntary efforts of compliance with antidiscrimination laws, and burden the court system, the Supreme Court should revisit its decision in *Dukes*.[279] In doing so, the Court should rely upon the text of Rule 23(a)(2)—which requires only a single common question of law or fact—and explicitly eliminate any notion of implied predominance from the commonality analysis.[280]

Although more challenges to commonality under Rule 23(a)(2) will likely occur after the majority's decision in *Dukes*, the class-action lawsuit "is far from dead."[281] If plaintiffs do not rise to the challenges raised by the *Dukes* opinion, however, the number of employment discrimination class actions may continue to decline, leaving idle an important and powerful tool for fighting systemic discrimination in the workplace.[282] Fortunately, practitioners can

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275. *See* Speights & Evans, *supra* note 135, at 6; *see also* Heather P. Scribner, *Rigorous Analysis of the Class Certification Expert: The Roles of* Daubert *and the Defendant's Proof*, 28 REV. LITIG. 71, 103-05, 130 (2008) (analyzing the relationship between a *Daubert* analysis and Rule 23, and recommending a full *Daubert* analysis at the class certification stage); Richard J. Arsenault & John Randall Whaley, *Will* Daubert *Challenge Your Class Certification?*, 45 TRIAL, July 2009, at 38, 41, 44-45 (noting that courts have reached various conclusions over whether expert testimony needs to meet the *Daubert* standard at the class certification stage and arguing that courts should bypass applying the standard at this stage); *cf. In re* Aftermarket Auto. Lighting Prods. Antitrust Litig., 276 F.R.D. 364, 371-72 (C.D. Cal. 2011) (looking to the soundness of the expert's methodology rather than his conclusions in order to grant certification); Trask, *supra* note 10, at 352 (noting that after *Dukes*, the Eighth Circuit held that a trial court does not need to engage in a full *Daubert* analysis when determining whether to certify a class).

276. *See* Speights & Evans, *supra* note 135, at 6.

277. *See* Pinson & Hunt, *supra* note 107, at 526.

278. *See supra* Parts IV-V.

279. *See supra* Parts VI-VII.

280. *See supra* Part VII.

281. *See* Trask, *supra* note 10, at 350.

282. *See* Malveaux, *supra* note 60, at 638; *see also supra* note 92 (noting the number of employment discrimination cases filed in the past few years).

utilize a number of techniques in order to strengthen their claims for class certification and successfully assist plaintiffs in challenging employment discrimination.[283]

283. *See supra* Part VIII.A-C.