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Introduction: Dukes v. Wal-Mart Stores, Inc.

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In Memoriam: Richard A. Nagareda (1963-2010)
The editors of the Vanderbilt Law Review *respectfully dedicate this Roundtable to the memory of Professor Richard A. Nagareda.*

Introduction: Dukes v. Wal-Mart Stores, Inc.

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Dukes v. Wal-Mart Stores, Inc., as a case, is almost as expansive as its defendant.[1] For nearly the past ten years, the world has watched as Betty Dukes and six other women representing female

[*] Assistant Professor, Florida State University College of Law. Thanks to Richard Nagareda and the editors of the VANDERBILT LAW REVIEW for inviting me to introduce this case. I was deeply saddened to learn of Richard's untimely death and dedicate this Introduction to him. He has been a tremendous mentor to me over the years and was unfailingly generous with his time, comments, and encouragement; he challenged me to push new ideas, explore their incentives on lawyers and the courts, and rethink what was possible. He is truly irreplaceable.

1. 603 F.3d 571 (9th Cir. 2010). For some of the key documents filed in the case along with a timeline, see Wal-Mart Class Website, http://www.walmartclass.com/public_home.html (for a timeline, go to "For the Press") (last visited Sept. 23, 2010).

Wal-Mart workers have sued the new Goliath for discriminating against women in its pay and promotion policies. 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.[2] As initially certified by the district court, the class members included approximately 1.5 million women, which effectively turned the class into a Goliath of its own. Yet, it's the class-certification process working this transformative magic that's at the heart of the current controversy in *Dukes*.

Given Wal-Mart's size, anything it does, or, in this case, is alleged to have done, is going to be big. (After all, 138 million people shop at Wal-Mart every week.[3]) The question, in part, is how big. Although this initial 1.5 million figure made headlines around the world, after an en banc rehearing with a split 6-5 majority, the Ninth Circuit held that class members who were no longer Wal-Mart employees when plaintiffs filed suit lacked standing to pursue equitable relief, which would cut the class by two-thirds, to around 500,000 women.[4] The court also held that plaintiffs satisfied Rule 23(a)'s requirements of commonality, typicality, numerosity, and adequacy; the district court properly included injunctive and declaratory relief as well as back pay under Rule 23(b)(2); and the district court abused its discretion by including punitive damages within the Rule 23(b)(2) class without considering whether those damages predominated.

The Ninth Circuit explored two questions in great detail, both of which underpin Wal-Mart's petition for a writ of certiorari to the Unites States Supreme Court: (1) whether common questions existed under Rule 23(a)(2), and (2) whether back pay and punitive damages could be included within a (b)(2) class without running afoul of the due process clause. As to the first question, the court observed that common questions did exist, namely, "whether Wal-Mart's female employees nationwide were subjected to a single set of corporate

2. *See, e.g.,* LIZA FEATHERSTONE, SELLING WOMEN SHORT: THE LANDMARK BATTLE FOR WORKER'S RIGHTS AT WAL-MART (Jo Ann Miller ed., 2004); Liza Featherstone, *Wal-Mart Values*, THE NATION, Dec. 16, 2002, *available at* http://www.thenation.com/article/wal-mart-values; Wal*Mart Watch, http://walmartwatch.com.

3. FEATHERSTONE, *supra* note 2, at 6.

4. *Dukes*, 603 F.3d at 578 n.3, 623. The Ninth Circuit did suggest, however, that the district court might certify a separate class for former employees that sought back pay and punitive damages. *Id.* at 623.

policies" and whether those "policies or practices are discriminatory."[5] As to the second question—whether and when Rule 23(b)(2) class actions can include claims for monetary relief—the Ninth Circuit held that although back pay could be included within a Rule 23(b)(2) class, punitive damages were far more questionable.

The relative simplicity of these questions belies the tangled doctrinal web that lurks beneath them. *Dukes v. Wal-Mart Stores, Inc.* straddles the substance-procedure divide at nearly every turn. As Richard Nagareda has explained, "A deep and increasingly important trend in contemporary class certification disputes concerns the degree to which ostensible battles over conflicting proof on the certification question are the stalking horse for something else: underlying disputes that often have little to do with the proof or the facts and everything to do with the proper meaning of governing law."[6] *Dukes* is but the latest example of this trend.

This introduction to *Dukes v. Wal-Mart Stores, Inc.* aims to set the table for what promises to be a robust, carefully considered, and thought-provoking discussion between Robert Bone, Alexandra Lahav, Greg Mitchell, and Richard Nagareda. Accordingly, what follows is a concise overview of the legal background and current debate over the two procedural issues that the Ninth Circuit explored in detail—how to evaluate Rule 23(a)(2)'s commonality requirement when common questions heavily implicate the case's merits, and when a Rule 23(b)(2) class can include relief apart from injunctive or declaratory relief without endangering due process.

I. THE CLASS CERTIFICATION STANDARD AND RULE 23(a)(2)

Understanding the class-certification debate in *Dukes* and Wal-Mart's claim that the Ninth Circuit improperly relieved plaintiffs' of their burden of proof requires some background knowledge of certification. The Ninth Circuit's en banc opinion began by tackling the question of whether the district court should consider the case's substantive merits while ruling on class certification. The question itself takes us back to a much-cited passage in the Supreme Court's 1974 opinion in *Eisen v. Carlisle & Jacquelin*: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in

5. *Id.* at 612.

6. Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 101 (2009).

order to determine whether it may be maintained as a class action."[7] With this admonition firmly in mind, courts refused to consider any evidence that looked too much like substance, even if it also implicated Rule 23's standards. But *Eisen* concerned class notice, not the propriety of class certification. The district court in *Eisen* justified shifting the costs of notifying class members to the defendant by conducting a preliminary inquiry into the merits and explaining that the defendant seemed liable. Justifiably, the Court was concerned that this proclamation would prejudice the defendant in later proceedings. Nevertheless, after *Eisen*, courts shied away from a merits-like inquiry during certification and left those questions for summary judgment motions.

Eight years later, in *General Telephone Co. v. Falcon*, the Court directly considered certification and held that a district court must "probe behind the pleadings" and satisfy itself "after a rigorous analysis" that the class meets Rule 23's prerequisites.[8] In the minds of many lower-court judges, this created an antagonistic juxtaposition: How could they satisfy *Falcon's* rigorous inquiry requirement without running afoul of what they viewed as *Eisen's* prohibition on inquiring into the merits?

As the lower courts struggled to navigate this question, the decision over whether to certify a class became increasingly important. Now, most judges wait to hear motions for class certification until after ruling on motions to dismiss and motions for summary judgment, which means that most cases settle soon after they're certified. Because class certification marks the case's near end rather than its beginning, a spate of appellate court opinions has pushed district courts to take a closer look into the merits during certification—at least insofar as the merits overlap with Rule 23's certification requirements.[9] These opinions situate *Eisen* as a case about notice and take seriously *Falcon*'s probing, rigorous analysis. Accordingly, plaintiffs must now prove that they have met Rule 23's requirements by a preponderance of the evidence, and courts must resolve any factual or legal disputes that relate to certification even when those disputes touch on the merits.

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7. 417 U.S. 156, 177–78 (1974).

8. 457 U.S. 147, 160–61 (1982).

9. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2008); Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 267 (5th Cir. 2007); *In re* IPO Sec. Litig., 471 F.3d 24, 41 (2d Cir. 2006); Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001).

In *Dukes*, the Ninth Circuit principally followed this trend, but noted that appellate courts' increased willingness to look into the merits largely developed in securities class actions, specifically fraud-on-the-market cases. In contrast, when plaintiffs present statistical evidence in pattern-or-practice employment discrimination cases, that evidence "does not *overlap* with the merits, it largely *is* the merits."[10] The evidence plaintiffs use to establish Rule 23(a)(2) commonality is the same evidence that the court will ultimately use to determine the merits. Further, as a procedural matter, Rule 23(a)(2) simply requires a common question of law or fact, a threshold much lower than that in Rule 23(b)(3) where common issues must predominate over individual ones.

Both the *Dukes* dissenters and Wal-Mart, in its petition for certiorari, took issue with the majority's approach and argued instead that plaintiffs must produce " '[s]ignificant proof that an employer operated under a general policy of discrimination' *before* a class can be certified."[11] Believing that plaintiffs *had* introduced significant proof, the *Dukes* majority required a "rigorous analysis" just as *Falcon* suggested. And, in keeping with *Eisen*, it prohibited a free-floating inquiry into the merits where Rule 23's requirements and the merits failed to overlap.[12] But, to underscore the distinction between pattern-or-practice and fraud-on-the-market cases as well as between Rule 23(a)(2) commonality and Rule 23(b)(3) predominance, it cautioned that Rule 23(a)(2)'s commonality inquiry required plaintiffs to *establish*, not *answer*, common questions of law or fact. Answering those questions, the Ninth Circuit advised, is a task best left to summary judgment motions or trial.

Determining the class-certification standard opened the door to yet another question: If courts can look into the case's merits insofar as they bear on the certification requirements and if plaintiffs must prove they've met those requirements by a preponderance of the evidence, how far should courts go in evaluating the reliability of plaintiffs' evidence? For example, to meet their burden of proof, the *Dukes* plaintiffs had to put forth evidence of a common discriminatory

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10. *Dukes*, 603 F.3d at 591.

11. Petition for Writ of Certiorari at 20, Dukes v. Wal-Mart Stores, Inc. (No. 10-277) (quoting *Falcon*, 457 U.S. at 159 n.15), *available at* http://www.scotusblog.com/wp-content/uploads/2010/08/Wal-Mart-petition-8-25-10.pdf; *see also Dukes*, 603 F.3d 571, 632 (Ikuta, J., dissenting) (discussing when evidence introduced by a single plaintiff can aid the certification decision).

12. *Id.* at 592; Richard A. Nagareda, *Common Answers for Class Certification*, 63 VAND. L. REV. EN BANC (forthcoming, 2010) (manuscript at 11).

policy. Accordingly, they offered evidence about Wal-Mart's corporate practices, policy, and culture; statistics on gender disparities; and anecdotal evidence of gender bias. To establish Wal-Mart's corporate culture, plaintiffs relied on testimony from Dr. William Bielby, a sociologist who used a social framework analysis to suggest that Wal-Mart's culture includes gender stereotyping. They also offered testimony from a statistician, Dr. Richard Drogan, who ran regression analyses for each of Wal-Mart's forty-one regions, and a labor economics expert, Dr. Marc Bendick. Not surprisingly, Wal-Mart offered experts of its own.

How should courts assess this competing evidence during certification? Because the expert testimony bears on both Rule 23(a)(2) commonality and the heart of the case, must it satisfy *Daubert* and Federal Rule of Evidence 702 or some lesser standard? Over the past ten years, courts have accepted a range of testimony based on standards far more lenient than *Daubert*. But in light of the increased rigor with which courts inquire into certification requirements that touch the merits, they have become more willing to perform a full *Daubert* analysis when the expert's testimony is critical to certification.[13] This makes sense. It would be difficult for a court to resolve the necessary factual and legal questions related to certification without depending on reliable evidence.

On the *Daubert* question, the Ninth Circuit heavily discussed the issue, but ultimately concluded that *Daubert* failed to address Wal-Mart's objections. The district court found that Dr. Bielby "provide[d] a foundation for his opinions" and that Wal-Mart did not challenge his methodology.[14] *Daubert*, of course, does not test whether the expert's testimony is persuasive, only whether it is scientifically reliable. Accordingly, the Ninth Circuit held that it was "enough that Dr. Bielby presented scientifically reliable evidence tending to show that a common question of fact—i.e., 'Does Wal-Mart's policy of decentralized, subjective employment decision making operate to discriminate against female employees?'—exists with respect to all members of the class."[15] The dissenters, on the other hand, argued that the district court should have conducted a full *Daubert* analysis; the district court's conclusion that the report was not "so flawed that it lack[ed] sufficient probative value to be considered in assessing

13. *See, e.g.,* Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815–16 (7th Cir. 2010); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 315 n.13 (3d Cir. 2008). Both cases applied a full *Daubert* analysis. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589–93 (1993).

14. *Dukes*, 603 F.3d at 602.

15. *Id.*

commonality" should have constituted legal error.[16] Moreover, as the dissent noted, Wal-Mart challenged Dr. Bielby's methodology, particularly whether his theory had been scientifically tested and whether he considered contrary facts and research.[17]

Subjecting Dr. Bielby's testimony to a *Daubert* analysis of any sort raised yet another substance-laden procedural question. His methodology employed what's known as a social framework analysis. This kind of analysis is particularly controversial when used to opine (as Dr. Bielby did) that a specific workplace's policies and practices make decisions like compensation and promotion vulnerable to gender bias. Thus, is his testimony the kind of thing that *Daubert* should screen from the factfinder (i.e., is this a question about the scientific validity of the expert's reasoning or methodology), or is this simply an issue about whether his testimony is ultimately persuasive? If it is the latter, then persuasive to whom and for what purpose: to the judge deciding whether commonality exists under Rule 23(a)(2), to the judge on a motion for summary judgment or the jury at trial, or to all at various stages in the lawsuit? The answers to these (and related) questions have been debated both between the *Dukes* majority and the dissenters and among scholars, one of whom—Greg Mitchell—will appear in the pages of this Roundtable discussion.

Setting the table for this debate requires providing some background. Both the Ninth Circuit in its first decision and Dr. Bielby's expert report cited a book by John Monahan and Laurens Walker to support the legitimacy of social framework evidence.[18] In a later article, John Monahan, Laurens Walker, and Greg Mitchell explained that "general social science research can provide a valuable context for deciding case-specific factual issues," but those general findings "cannot be linked by an expert witness to the facts of a specific case."[19] Those links, they argued, "must be recognized as

16. *Id.* at 638–39 (Ikuta, J., dissenting) (quoting Dukes v. Wal-Mart, Inc., 222 F.R.D. 189, 192 (N.D. Cal. 2004)).

17. *Id.* at 640 (Ikuta, J., dissenting); Defendant Wal-Mart Stores, Inc.'s *Daubert* Motion to Strike Declaration, Opinion, and Testimony of Plaintiffs' Expert William T. Bielby, Ph.D., at 8, 19–22, Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 189 (Civil Action No. C-01-2252 MJJ), *available at* 2003 WL 24689917.

18. Dukes v. Wal-Mart, Inc., 509 F.3d 1168, 1178 n.3 (9th Cir. 2007); Declaration of William T. Bielby, Ph.D. in Support of Plaintiffs' Motion for Class Certification at 5, Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 189 (N.D. Cal. 2003) (Civil Action No. C-01-2252 MJJ), *available at* 2003 WL 24571701. The cited authority is JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN THE LAW: CASES AND MATERIALS, at Ch. 5 (4th ed. 1998).

19. John Monahan, Laurens Walker & Gregory Mitchell, *The Limits of Social Framework Evidence*, 8 LAW, PROBABILITY, & RISK 307, 308 (2009) (internal quotations and citations omitted).

arguments to be made by the attorneys, rather than evidentiary proof that can be offered by expert witnesses."[20] Melissa Hart and Paul Secunda, on the other hand, have argued that "district courts are well within their discretion to admit social framework expertise that addresses the general research on organizational behavior and social cognition theory and that also examines and offers opinions on the policies and practices in operation in the particular workplace."[21]

For its part, the district court found Dr. Bielby's testimony relevant to determining whether a common question of fact existed as a Rule 23(a)(2) matter and thought he provided a sufficient foundation for his opinions.[22] Here, it bears mention that appellate courts review both class certification and *Daubert* questions under the abuse of discretion standard, which means that appellate courts reverse district court decisions only after a strong showing that the district court abused its discretion. Accordingly, as noted, the Ninth Circuit upheld the district court's analysis, observing that "whether the jury was ultimately persuaded by [Dr. Bielby's] opinions was a question on the merits" and that (perhaps erroneously), "Wal-Mart did not challenge [that] the methodology[] raised a question 'of corporate uniformity and gender stereotyping that is common to all class members.' "[23] In sum, even after requiring a rigorous analysis, the Ninth Circuit upheld the district court's rulings on Rule 23(a)(2) based on plaintiffs' factual evidence, expert opinions, statistical evidence, anecdotal evidence, and evidence of Wal-Mart's subjective decisionmaking.

II. RULE 23(b)(2) AND DUE PROCESS

Against the backdrop of this merits-related debate enters yet another certification question: To what extent can or should a mandatory, non-opt out Rule 23(b)(2) class include requests for back pay and punitive damages, relief that intuitively sounds a lot like monetary remedies? In fact, the question of whether back pay and punitive damages are considered legal or equitable relief (or, in more

20. *Id.* at 308; *see also* John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 VA. L. REV. 1715 (2008) (arguing that social science can only provide a context for facts of the case).

21. Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37, 62 (2009). For Monahan, Walker, and Mitchell's response, see Monahan, Walker & Mitchell, *supra* note 19.

22. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 154 (N.D. Cal. 2004).

23. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 602 (9th Cir. 2010).

workable terms, divisible or indivisible relief) matters a great deal, both to class certification and the right to a jury trial. This is the other question that Wal-Mart has asked the Supreme Court to consider. Understanding why it matters requires understanding both the procedural and substantive pieces of the puzzle.

The first half of this puzzle is procedure; it's explained in the language of Rule 23(b)(2). Rule 23(b)(2) speaks in terms of equitable relief and permits class certification when "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."[24] By contemplating equitable remedies and presuming class cohesion, this standard avoids monetary remedies and the due process rights that attach to property. It thereby paves the way for a mandatory, non-opt out class, which was precisely what the 1966 Advisory Committee had in mind to further desegregation litigation.

The second half of the puzzle is substantive. When Congress enacted Title VII of the 1964 Civil Rights Act, its menu of remedies included a declaratory judgment that the defendant violated the Act in its employment practices and an injunction to prevent the defendant from continuing to discriminate—both clearly equitable remedies. But as civil-rights litigation evolved, the Supreme Court added back pay to the list of available remedies.[25] This payment compensated plaintiffs for the difference between their current position and the position they would have been in absent the employer's discriminatory practices. Courts and litigants were careful to argue that back pay was different from ordinary monetary damages because it flows automatically from the defendant's violation of Title VII. However dubious this distinction is, casting back pay as something other than a legal remedy avoided the right to a jury trial under the Seventh Amendment, a result that 1960s-era civil-rights plaintiffs in the South preferred.

Two events, one judicial and one legislative, threatened to disrupt this delicate balance of certifying Title VII claims as Rule 23(b)(2) class actions even though they contained requests for back pay. First, in 1985, the Supreme Court's decision in *Phillips Petroleum v. Shutts* held that class members have the right to opt out of a class when their claims involve legal relief—i.e., money. Monetary damages

24. FED. R. CIV. P. 23(b)(2). For an in-depth history of Rule 23(b)(2) and the policy motivating it, see David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, FLA. L. REV. (Sept. 17, 2010 draft at 53) (forthcoming) (on file with author).

25. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

invoke the "property" portion of the due process clause's protection against deprivation of "life, liberty, or property, without due process of law."[26] But footnote three in *Shutts* left something of a loophole. It limited the Court's holding "to those class actions which seek to bind known plaintiffs concerning claims wholly or *predominately* for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief."[27] The word "predominately," first mentioned in an Advisory Committee Note on Rule 23(b)(2), became the key to maintaining the pre-*Shutts* balance and, as we'll see, the cornerstone of Wal-Mart's petition for a writ of certiorari. So long as equitable relief predominated over back pay, courts could avoid triggering due process rights, including the right to opt out.

Second, in 1991, Congress amended Title VII to add compensatory damages for emotional distress and punitive damages to plaintiffs' remedial options. Although back pay seemed harmless enough to characterize as somehow equitable, compensatory and punitive damages were a different matter. So, Congress's amendment, intended to give plaintiffs additional relief and encourage civil-rights litigation, had the ironic consequence of making a Rule 23(b)(2) employment discrimination class harder to certify and class relief harder to obtain. Given this turmoil, one might wonder why plaintiffs would choose a (b)(2) class at all, why not use (b)(3) instead? But from plaintiffs' attorneys' perspective, (b)(2) offers two comparative advantages over (b)(3) classes: plaintiffs don't automatically have the right to receive notice or opt out (which avoids diminishing attorneys' fees), and, more importantly, common issues don't have to predominate over individual ones. The latter point is of particular importance when the class definition includes everyone from hourly "demo girls," a women's-only job handing out free food samples, to cashiers, greeters, and salaried managers.[28] It likewise shifts the focus to a common, but complex, array of company-wide discriminatory practices that could be cured through a declaratory judgment and injunctive relief.

To date, the Supreme Court has shown its interest in the due process issue, but given little guidance. It granted certiorari on the issue in *Brown v. Ticor Title Insurance*, a price-fixing antitrust class action certified in the Ninth Circuit under Rule 23(b)(1) and (b)(2), but

26. U.S. CONST. amends. V, XIV § 1.

27. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 n.3 (1985) (emphasis added).

28. *Dukes*, 603 F.3d at 578; FEATHERSTONE, *supra* note 2, at 13.

then dismissed the writ as improvidently granted.[29] Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, vigorously dissented from the Court's dismissal and underscored the due process issue's importance. Nevertheless, in a per curiam opinion, six justices explained that the appeal required them to resolve a hypothetical question already foreclosed by res judicata; the parties settled the dispute and thereby mooted the question. Moreover, by mentioning the Rules Enabling Act, the justices hinted at their underlying concern: including some monetary damages within a mandatory class could be unconstitutional and call the Court's own rule-making authority into question. Although the Supreme Court has never found that a federal rule violates the Rules Enabling Act—for obvious reasons—at times, it has worked hard to avoid the issue.[30]

These two events—the Court's *Shutts* opinion and Congress's 1991 Title VII amendments—plus the added confusion from the Court's non-decision in *Ticor Title*, have caused the lower courts to split mightily over what "predominantly" means, when due process requires the right to opt out, and whether to certify (b)(2) classes requesting back pay, compensatory damages for emotional distress, and punitive damages. Before the Ninth Circuit's opinion in *Dukes*, the cases fell into two rough categories. The Fifth, Sixth, Seventh, and Eleventh Circuits took a strict approach and certified only classes with "incidental damages."[31] Of these, the Fifth Circuit's decision in *Allison v. Citgo Petroleum Corp.* is the best known. It held that "monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief. By incidental we mean damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief."[32] This standard allowed enough wiggle room to award back pay, but prevented plaintiffs from bringing claims for punitive or compensatory damages. On the other hand, in *Robinson v. Metro-North Commuter Railroad Co.*, the Second Circuit echoed Judge Dennis's dissent in

29. 511 U.S. 117 (1994).

30. *See, e.g.*, Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503–06 (2001). Just last March in its *Shady Grove* decision, a majority of the Court held that Rule 23 falls within the Rules Enabling Act. Shady Grove Orthopedic Assoc. v. Allstate Ins. Co., 130 S.Ct. 1431, 1444 (2010). The opinion was, however, badly divided with the court splitting 4-1-4 and Justice Stevens concurring with Justice Scalia to provide the vote supporting Rule 23.

31. Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 649–50 (6th Cir. 2006); Cooper v. Southern Co., 390 F.3d 695, 720 (11th Cir. 2004); Lemon v. Int'l Union of Operating Eng'rs, 216 F.3d 577, 580–81 (7th Cir. 2000); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998).

32. *Allison*, 151 F.3d at 415 (emphasis omitted).

Allison, which expressed concern over undermining Title VII's use, and opted for a contextual balancing approach.[33] This approach allowed district courts to certify (b)(2) classes so long as the injunctive or declaratory relief predominated over compensatory and punitive damages and class treatment furthered judicial economy by making the case more efficient.

The Ninth Circuit's *Dukes* opinion is the latest in this long line of cases struggling to square Rule 23(b)(2)'s mandatory nature with the due process clause in light of Title VII's full remedial menu. The *Dukes* court rejected both the *Allison* approach and its own earlier approach in *Molski v. Gleich*, which adopted *Robinson*'s reasoning.[34] In their place, it created a new case-by-case balancing test to determine when monetary relief predominates. District courts should evaluate the "objective effect of the relief sought" by considering whether monetary relief will "determine[] the key procedures that will be used," "introduce[] new and significant legal and factual issues," "require individualized hearings," and "raise particular due process and manageability concerns."[35]

Not surprisingly, back pay remained an appropriate award under the new standard just as it had been under both *Allison* and *Robinson*. Punitive damages, on the other hand, are unlikely to withstand the new test on remand: they would be decided by a jury, not a judge; they would introduce a new factual question because plaintiffs must prove that Wal-Mart acted with malice; and the size of a punitive-damage award could raise manageability concerns. Yet, because the punitive-damage claim was premised on a class-wide theory, manageability concerns were far less worrisome than they would have been if the court had to determine damages individually.

After insinuating that punitive damages might not survive its new balancing test, the Ninth Circuit suggested using a hybrid approach, something that both judges and class action scholars have toyed with for years. Hybrid class actions would allow claims for indivisible relief, such as a declaratory judgment and an injunction, to proceed under a mandatory Rule 23(b)(2) class, and would certify a separate Rule 23(b)(3) class with respect to divisible, monetary damages. This reading of Rule 23(b) harmonizes with Rule 23(c)(4), which allows courts to certify particular issues.

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33. 267 F.3d 147, 164 (2d Cir. 2001).

34. 318 F.3d 937, 949–50 (9th Cir. 2003); *see also* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 616 (9th Cir. 2010).

35. *Id.* at 617.

Accordingly, under the hybrid approach, the district court could certify the liability question as well as the request for class-wide injunctive and declaratory relief under Rule 23(b)(2). It could then guard against any due process violations by certifying a Rule 23(b)(3) class for back pay and punitive damages, which would allow class members to opt out (or, under a traditional analysis, it could include back pay in the Rule 23(b)(2) class). This would preserve members' due process rights with regard to claims for divisible, monetary relief by giving them notice, an opportunity to be heard (through the objection process), and the opportunity to opt out.

What is less clear from the Ninth Circuit's opinion is how well this hybrid approach works in tandem with the Seventh Amendment's Reexamination Clause, preclusion, and what Wal-Mart claims as its statutory and constitutional right to rebut the discriminatory inference as to each class member.[36] The Seventh Circuit's opinion in *Allen v. International Truck and Engine Corp.*, the basis for an illustrative example in the American Law Institute's Principles of the Law of Aggregate Litigation, provides some clarity on the Seventh Amendment and preclusion questions.[37]

Allen suggested that a hybrid class might provide a way around the inequity that resulted in *Allison* in light of Congress's Title VII goals. The court could certify the equitable issues under (b)(2), handle them on a class-wide basis, have a jury resolve the equitable issues, and then handle the damages claims either individually or, as the *Dukes* court contemplates, as a (b)(3) class. That way, once the jury resolves the factual issues, its opinion binds the defendant through issue preclusion principles and avoids the Seventh Amendment's Reexamination Clause issue by having only one jury pass on the facts.

What remains unclear is whether Wal-Mart has a substantive right under the law of employment discrimination to present individualized defenses to each plaintiff's claim for monetary relief. Depending on the answer to that question, *Allen* raises one possibility: to the extent that certain divisible remedies flow from one discriminatory practice adjudicated in the (b)(2) class (such as punitive damages), the court could certify those damages under Rule

36. Petition for Writ of Certiorari at 28, Dukes v. Wal-Mart Stores, Inc. (No. 10-277), *available at* http://www.scotusblog.com/wp-content/uploads/2010/08/Wal-Mart-petition-8-25-10.pdf.

37. 358 F.3d 469 (7th Cir. 2004); AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.04, illus. 5 (2010). Illustration 1 in section 2.02 is helpful as well.

23(b)(3). It could then handle other damage issues individually, if that is truly what Wal-Mart wants.

In sum, taking the Ninth Circuit's suggested hybrid approach to punitive-damage claims—and perhaps even to back pay—would provide one way for the Supreme Court (if it grants certiorari) to resolve the due process issues inherent in including damage claims in a mandatory class action while avoiding at least one sticky Rules Enabling Act problem. The question of whether Wal-Mart is entitled to assert individualized defenses, and, if so, how this affects certification, persists.

Because I've been tasked with setting the table for the rich discussion to follow, I've raised more questions than answers, forsaken many of the more nuanced arguments in favor of clarity, and tried to refrain from engaging the merits of these questions, as tantalizing as they are. The issues raised in *Dukes* give renewed meaning to Justice Reed's remark in *Erie* that "[t]he line between procedural and substantive law is hazy . . . ."[38] I've tried to lift the haze by distilling a jumble of complex issues into the simplest terms possible. Whether the Supreme Court will provide additional clarity by granting Wal-Mart's petition for a writ of certiorari remains to be seen. In the interim, however, I look forward to what promises to be an engaging Roundtable discussion.

38. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 92 (1938) (Reed, J., concurring).