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No Glue Stocked on Aisle 23: Wal-Mart Stores, Inc. v. Dukes Deals a Death Blow to Title VII Class Actions

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NO GLUE STOCKED ON AISLE 23: WAL-MART STORES, INC. V. DUKES DEALS A DEATH BLOW TO TITLE VII CLASS ACTIONS

*Matthew Costello**

Abstract

After almost ten years, Wal-Mart Stores, Inc. v. Dukes ended before it began. In a 5-4 decision (split among ideological lines), the U.S. Supreme Court decertified the Dukes class from the starting gate, ending the country's largest employment discrimination class-action lawsuit against the country's largest corporation. In the months following the Court's controversial decision, lawyers and academics have been scrambling to assess the impact of the case on procedural class action and substantive discrimination law. This Note posits that Dukes misapplied procedural class action law and seemingly overturned well-settled employment discrimination precedent. As a result, the Court's imprudent decision will likely limit the ability for Title VII plaintiffs to ever bring forth their collective claims of workplace discrimination. By erecting barriers to Title VII class litigation, the Supreme Court drastically curtailed the rights of everyday workers and inhibited the effectiveness of the legal system by allowing procedural rules to disrupt the truth-seeking function of litigation. Over the past few years, the American public has grown frustrated at the notion that large companies are too big to fail. With its decision in Dukes, the Supreme Court effectively decided that some corporations are also too big to be held accountable under Title VII.

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I. INTRODUCTION

Corporate interests prevailed over everyday Americans during the 2010-2011 U.S. Supreme Court term.¹ The "Corporate Court" under Chief Justice Roberts insulated big business from being held accountable for conduct detrimental to consumers and employees.² On June 29, 2011, the Senate Judiciary Committee convened to examine the Court's recent corporate-leaning decisions.³ The hearing, chaired by Senate Democrat Patrick Leahy, expressed particular concern with the

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¹ See generally ALLIANCE FOR JUSTICE, CORPORATE COURT'S 2010-11 TERM, PROTECTING CORPORATE INTERESTS WHEN IT MATTERS MOST 4-10 (2011), available at <http://www.afj.org/connect-with-the-issues/the-corporate-court/the-corporate-court-2010-11-end-of-year-report.pdf> (providing information on the Court's corporate-leaning decisions during its 2010-11 term).

² The term "Corporate Court" has been dubbed by critics of the Court's conservative majority, who feel that Justices Scalia, Thomas, Roberts, Alito, and Kennedy continually side with large corporations at the expense of everyday Americans. See, e.g., Ralph Nader, *The Corporate Supreme Court*, COMMON DREAMS (July 18, 2011), <http://www.commondreams.org/view/2011/07/18-12> ("Taken together the decisions [by the Corporate Court] are brazenly over-riding sensible precedents . . . blocking class actions . . . anything that serves to centralize power and hand it over to corporate conquistadores."); ALLIANCE FOR JUSTICE, *supra* note 1, at 4-10 (discussing the pro-business direction taken by the Court under Chief Justice Roberts).

³ For a webcast of the hearing, titled "Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior," see *Senate Panel Looks at Supreme Court Rulings*, C-SPAN (June 29, 2011), <http://www.c-span.org/Events/Senate-Panel-Looks-at-Supreme-Court-Rulings/10737422559-1>. Under Senator Leahy's leadership, the Senate Judiciary Committee has held numerous hearings on divisive, seemingly pro-corporate decisions of the Court. Press Release, U.S. Sen. Patrick Leahy, Leahy, Jud. Comm. Look At Impact of SCOTUS Decisions on Access To Justice, Corp. Account. (June 29, 2011), available at http://leahy.senate.gov/press/press_releases/release/?id=27ebbd14-7c31-4bda-b0e5-e5e5918b8428.

Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, the largest private-employer civil rights class action in American history.⁴

On behalf of over 1.5 million women, current and former female employees brought a class action lawsuit against Wal-Mart Stores, Inc. ("Wal-Mart"), claiming nationwide gender discrimination in violation of Title VII of the Civil Rights Act of 1964.⁵ Specifically, the class contended that Wal-Mart disproportionately denied its female employees promotions and underpaid female workers because of a corporate policy that gave store managers broad discretion when making employment decisions.⁶

After nearly a decade of litigation, *Dukes* ended before it even began.⁷ In a 5-4 decision penned by Justice Scalia, the *Dukes* majority decertified the class, holding that the plaintiffs lacked commonality under Rule 23(a)(2) of the Federal Rules of Civil Procedure ("FRCP").⁸

⁴ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). The hearing examined another divisive 2011 class-action case, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). In a 5-4 decision (split exactly like *Dukes*), the Court ruled in *AT&T* that the Federal Arbitration Act (FAA) preempted a California rule invalidating provisions in consumer contracts that require individual arbitration and waive any right to bring a class action. *Concepcion*, 131 S. Ct. at 1742-43. For a comprehensive overview of *Concepcion* and the divide between judicial and legislative interpretation of the FAA, see Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 482-98 (2011).

⁵ 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.*) [hereinafter "Title VII"].

⁶ *Dukes*, 131 S. Ct. at 2548. Plaintiffs' central theme throughout ten years of litigation entailed Wal-Mart's subjective and unstructured personnel practices, specifically:

Few objective requirements or qualifications for specific store assignments, promotions, or raises exist. Salaries are supposed to conform to general company guidelines, but store management has substantial discretion in setting salary levels within salary ranges for each employee. Salaries are also adjusted based on performance reviews, which are largely based on subjective judgments of performance.

Plaintiffs' Third Amended Complaint at ¶ 23, *Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 137 (2004) (No. C-01-2252), 2002 WL 33645690.

⁷ For a brief timeline of the major factual and procedural events leading up to the Supreme Court's decision in *Dukes*, see *Dukes v. Walmart Stores: A Summary*, WALMART WATCH, <http://walmartwatch.org/get-the-facts/dukes-v-walmart-stores-a-summary> (last visited Nov. 26, 2011). Walmart Watch, a non-profit organization, seeks to hold Wal-Mart fully accountable for its impact on communities, the American workforce, the retail sector, the environment and the nation's economy. *About*, WALMART WATCH, <http://walmartwatch.org/about> (last visited Jan. 10, 2012); see also Steven Greenhouse, *Wal-Mart Workers Try the Nonunion Route*, N.Y. TIMES (June 14, 2011), <http://www.nytimes.com/2011/06/15/business/15walmart.html> (discussing worker groups aimed at pressuring Wal-Mart for better pay and benefits, including the newest nonunion group of Wal-Mart employees—Organization United for Respect at Wal-Mart).

⁸ See *Dukes*, 131 S. Ct. at 2556-57 (citing to *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571,

Conversely, Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, found that the *Dukes* plaintiffs sufficiently demonstrated the existence of a common question to bind the class: whether Wal-Mart's pay and promotion policies gave rise to gender discrimination.⁹ Although split on the commonality issue, all nine Justices agreed that individualized claims for monetary damages cannot be certified under FRCP 23(b)(2).¹⁰ The Court favored FRCP 23(b)(3)'s mandate to provide notice to class members and an opportunity for class members to opt out of lawsuits.¹¹ The Court also rejected the district court's proposed trial plan, claiming that Wal-Mart was entitled to raise affirmative defenses to individualized backpay claims.¹²

In the months following the Court's controversial decision, lawyers and academics have been scrambling to assess the impact of *Dukes* on procedural class action and substantive discrimination law.¹³ The *Dukes* class certification standard will likely jeopardize meritorious challenges to systemic discrimination, as potential classes will struggle to "bridge

652 (7th Cir. 2010) (Kozinski, J., dissenting) ("[The] class held a multitude of jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states . . . subject to a variety of regional policies . . . [t]hey have little in common but their sex and this lawsuit.").

⁹ See *Dukes*, 131 S. Ct. at 2562 (Ginsburg, J., concurring in part and dissenting in part) (agreeing with the district court that the plaintiffs easily satisfied the commonality test under FED. R. CIV. P. 23(a)(2) because one significant issue common to a class is sufficient to warrant certification).

¹⁰ See *Dukes*, 131 S. Ct. at 2557 (expressing doubt that *any* monetary claims may be certified under FED. R. CIV. P. 23(b)(2)); *accord*, *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) ("In actions seeking monetary damages, classes can only be certified under Rule 23(b)(3), which permits opt-out, and not under Rules 23(b)(1) and (b)(2), which do not.").

¹¹ *Dukes*, 131 S. Ct. at 2558–59. In the context of class action plaintiffs seeking large money damages, the Court has found that the absence of notice and opt-out rights violates due process. See *Phillips Petroleum Co. v. Stutts*, 472 U.S. 797, 812 (1985) (explaining that a class plaintiff must receive notice, an opportunity to be heard, and an opportunity to remove himself from the class). The Court also looked favorably to the procedural protections—predominance and superiority—attending FRCP 23(b)(3) class actions. FED. R. CIV. P. 23(b)(3)

¹² Compare *Dukes*, 131 S. Ct. at 2546 ("Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay."), with *Dukes*, 603 F.3d at 625 (citing to *Hilao v. Estate of Marcos*, 103 F.3d 767, 782–87 (9th Cir. 1996) (offering an example of how the trial court could reasonably manage the liability phase of the *Dukes* class action without the need for individualized mini-trials).

¹³ See, e.g., DEBORAH M. WEISS, A GRUDGING DEFENSE OF *WAL-MART V. DUKES* 29–30 (2011) (suggesting that *Dukes* presents a surmountable obstacle to class certification); Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. COLLOQUY 34, 52 (2011) (finding that, although *Dukes* may have a limited impact on cases outside of employment discrimination law, the case nonetheless "tipped the balance" in favor of large corporations over everyday workers).

the *Falcon* gap" between an individual case and a class action lawsuit.¹⁴ Moreover, courts will likely certify FRCP 23(b)(2) classes only where a single, indivisible remedy would provide relief to each class member.¹⁵ The Court's staggering decision to limit the availability of backpay for FRCP 23(b)(2) classes is significant because of the greater difficulty classes have in aggregating monetary claims under FRCP 23(b)(3).¹⁶

Dukes also has the potential to upset settled discrimination precedent.¹⁷ On one hand, while substantive discrimination law is implicated in deciding the certification issue, *Dukes* may be viewed exclusively as a procedural, class-action decision.¹⁸ On the other hand, the Court's refusal to recognize the plaintiffs' multifaceted evidence of discrimination may severely limit the type of practices that could be challenged under traditional discrimination theories.¹⁹

¹⁴ This phrase, cited extensively by the Ninth Circuit and the Supreme Court in the *Dukes*' litigation, stems from the seminal case, *Gen. Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982). In *Falcon*, the Supreme Court explained: "Conceptually, there is a wide gap between . . . an individual's claim . . . and . . . the existence of a class of persons who have suffered the same injury as that individual . . .". *Id.* at 157–58.

¹⁵ See, e.g., *Aho v. AmeriCredit Fin. Servs. Inc.*, Civil Action No. 08-2509, 2011 WL 4018028 (E.D. Pa. Sept. 8, 2011) (rejecting Rule 23(b)(2) certification where the amount of restitution would vary from class member to class member and in some cases constitute a significant sum).

¹⁶ See *Malveaux*, *supra* note 13, at 48 (explaining that, between the Court's heightened certification analysis in *Dukes*, and the more demanding requirements and high costs for FRCP 23(b)(3) cases, future victims of systemic employment discrimination may be powerless to successfully bring a class action); see also John C. Coffee, Jr., "You Just Can't Get There From Here": A Primer on *Wal-Mart v. Dukes*, 80 U.S.L.W. 93, 2011 WL 2803345 (2011) (opining that the "simple truth" is employment discrimination litigation cannot generally be certified under FRCP 23(b)(3) because of its heightened cohesiveness standards).

¹⁷ Though the *Dukes* litigation centered on federal class action procedural rules, some academics interpret the Court's decision to have changed substantive employment discrimination law. See MICHAEL J. ZIMMER, *WAL-MART V. DUKES TAKING THE PROTECTION OUT OF PROTECTED CLASSES* 32 (Pub. L. & Legal Theory Research Paper No. 2011-028, 2011) ("[I]n *Wal-Mart* the Roberts Court did not simply apply the law of systemic discrimination, but . . . it changed that law or, at least, foreshadowed changes that the Supreme Court and lower courts will make in subsequent cases.").

¹⁸ See *id.* at 40 (opining that the text of *Dukes* opinion is so confused and oddly written that courts and academics may view the decision as having no effect on substantive legal principles). However, Justice Scalia made clear that the Court needed to analyze the merits of the plaintiffs' underlying discrimination claims to render a thorough analysis of FRCP 23(a) commonality. See *Dukes*, 131 S. Ct. at 2545 (explaining that proof of commonality necessarily overlaps with the plaintiffs' content that Wal-Mart engaged in a pattern-or-practice of discrimination).

¹⁹ *Dukes*' language implicitly suggests that facets of substantive disparate impact and disparate treatment discrimination law were overturned in the decision. See Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions: Dukes v. Wal-Mart and AT&T Mobility v. Concepcion*, DUKE J. CON. L. & PUB. POL'Y 83 (2011) (explaining that one, of many, issues with *Dukes* is its conflated employment discrimination analysis).

The Court's momentous decision is already providing large corporations an upper hand in class action lawsuits.²⁰ Soon after *Dukes*, the Ninth Circuit decertified a class that sued Costco for gender discrimination.²¹ *Dukes'* presence has also been felt outside the employee-employer context, namely fair-lending and wage-and-hour class actions.²² Guided by the Court's imprudent decision in *Dukes*, these courts ignore the reality that they may now have to adjudicate scores of claims individually, thereby perpetuating congestion of an already overburdened court system.²³

Following with the Court's disturbing trend of shielding big business, *Dukes'* misapplied procedural class action law and seemingly

²⁰ ALLIANCE FOR JUSTICE, *supra* note 1, at 5; Dave Jamieson, *Wal-Mart. V. Dukes: Workers' Class Action Crumbles in Decision's Wake*, HUFFINGTON POST (Sept. 10, 2011, 6:12 AM), http://www.huffingtonpost.com/2011/07/11/dukes-walmart-dollar-tree-lawsuit_n_894841.html.

²¹ *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 971 (9th Cir. 2011). The Ninth Circuit's decision in *Costco* foreshadows the hurdles that employment discrimination victims will have to bring claims against large corporations like Costco and Wal-Mart. See Lyle Denniston, *Opinion analysis: Wal-Mart's two messages*, SCOTUSBLOG (June 20, 2011, 2:02 PM), <http://www.scotusblog.com/2011/06/opinion-analysis-wal-marts-two-messages> ("[T]he bigger the company, the more varied and decentralized its job practices, the less likely it will . . . face a class-action claim."). For an in-depth discussion of the issues faced by large plaintiff classes, see Alexandra D. Lahav, *The Curse of Bigness and the Optimal Size of Class Actions*, 63 VAND. L. R. EN BANC 120–30 (2011).

²² See *The Wal-Mart Ripple Effect*, WALL ST. J. (Oct. 18, 2011), <http://online.wsj.com/article/SB10001424052970204422404576597031931713592.html> (discussing *Dukes'* impact on fair lending cases). Since *Dukes*, every court to consider discriminatory mortgage lending practices has ruled that the plaintiffs' claims could not move forward as class actions. Joseph L. Barloon et al., *Recent Supreme Court Actions Likely to Affect Fair Lending 'Disparate Impact' Litigation and Enforcement*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Nov. 17, 2011), http://www.martindale.com/litigation-law/article_Skadden-Arps-Slate-Meagher-Flom-LLP_1378362.htm. For an audio discussion of litigation and enforcement developments that have followed in the wake of *Dukes*, including how *Dukes* is influencing the defense of fair lending law suits, see *Podcast: Benjamin Saul, Elizabeth McGinn, and Jeff Naimon on the Impact of Wal-Mart v. Dukes*, Buckley Sandler, LLP (Oct. 21, 2011), <http://www.buckleysandler.com/news-detail/podcast-impact-of-wal-mart-v-dukes>.

²³ As predicted, attorneys for the *Dukes* women are now pursuing a state-by-state strategy. See, e.g., Bill Mears, *Supreme Court rules for Wal-Mart in massive job discrimination lawsuit*, CNN (June 20, 2011), http://articles.cnn.com/2011-06-20/us/scotus.wal.mart.discrimination_1_wal-mart-stores-class-action-plaintiffs?s=PM:US (suggesting that the plaintiffs in *Dukes* could band together in smaller groups to file lawsuits against individual stores or supervisors). Four months after the Court's ruling in *Dukes*, lawyers representing the alleged victims of Wal-Mart's gender discrimination practices filed a new lawsuit that narrowed their claims to only California Wal-Mart stores. Andrew Martin, *Female Wal-Mart Employees File New Bias Case*, N.Y. TIMES (Oct. 27, 2011), http://www.nytimes.com/2011/10/28/business/women-file-new-class-action-bias-case-against-wal-mart.html?_r=2. The following day, other female plaintiffs filed a similar suit in Texas. *Wal-Mart sued in Texas for gender discrimination*, THOMSON REUTERS (Oct. 31, 2011), http://newsandinsight.thomsonreuters.com/Legal/News/2011/10_-_October/Wal-Mart_sued_in_Texas_for_gender_discrimination.

overturned well-settled employment discrimination precedent.²⁴ Over the past few years, the American public has grown frustrated at the notion that large companies are too big to fail.²⁵ With its decision in *Dukes*, the Supreme Court effectively decided that some corporations are too big to be held accountable under Title VII.²⁶

In light of the Court's contentious decision in *Dukes*, this Note advances an in-depth discussion of the case, and suggests that the Court incorrectly applied procedural and substantive case law in decertifying the *Dukes*' class. In order to provide adequate perspective on the case, Part II discusses the primary legal conventions that operated as the Court's justification for ruling in favor of Wal-Mart.²⁷ Part III then provides an overview of the lower court proceedings, as well as the majority and dissenting Supreme Court opinions, of the *Dukes* litigation.²⁸ Next, Part IV examines how the Court's interpretation of FRCP 23(a)(2) and FRCP 23(b)(2) strayed far from settled precedent and unfairly discredited the district court's proper use of discretion in certifying the *Dukes* class.²⁹ Finally, Part V provides a summary of how *Dukes* is likely to impact class action litigation, as well as employment discrimination cases brought under systemic disparate treatment and disparate impact theories.³⁰

²⁴ See WEISS, *supra* note 13, at 27 (finding that, in conflict with *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988), *Dukes* may preclude future courts from ever certifying a claim against a subjective policy or practice—at least for a massive corporation like Wal-Mart).

²⁵ See generally ANDREW ROSS SORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM—AND THEMSELVES (2011) (delivering an in-depth account of the global financial crisis).

²⁶ From a much simpler perspective (without addressing its procedural class action issues), the question in *Dukes* came down to whether Wal-Mart is too big to be sued in a nationwide gender discrimination case. Nina Totenberg, *Can a Business Be Too Big For a Class Action Suit?*, NPR (Mar. 29, 2011), <http://www.npr.org/2011/03/29/134866747/can-a-business-be-too-big-for-a-class-action-suit>.

Indeed, several groups submitted amicus briefs to emphasize the importance of bringing class action suits against large employers for alleged discrimination, while large companies submitted briefs to challenge the plaintiffs' discrimination claims. Compare Brief for The Institute for Women's Policy Research as Amicus Curiae Supporting Respondents, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277) (citing to many authorities to discuss the importance of bringing class actions against corporations for alleged systemic discrimination), with Brief for Costco Wholesale as Amicus Curiae Supporting Petitioner, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277) (admonishing the district court's certification of the *Dukes* class).

²⁷ See *infra* Part II (discussing the substantive employment discrimination law and procedural class action rules at issue in *Dukes*).

²⁸ See *infra* Part III (providing an overview of the *Dukes* litigation, including the district court, Ninth Circuit, and Supreme Court opinions).

²⁹ See *infra* Part IV (examining the flaws in the Court's commonality and backpay analyses).

³⁰ See *infra* Part V (exploring the impact of *Dukes* on employment discrimination and class

II. BACKGROUND

Arguably the most significant class action decision in decades, *Dukes* has the potential to bar large employment class actions, redefine established Title VII precedent, and influence the terms on which the class action device is available in all areas of law.³¹ In order to appreciate the impact of the *Dukes* decision, this Part will provide an overview of substantive discrimination law and the procedural class action concepts featured in the case. To begin, it will trace the origins of Title VII and the main theories available to alleged victims of systemic discrimination.³² This Part will then examine the class action device, and give particular consideration to the class certification criteria at issue in *Dukes*—commonality under FRCP 23(a) and monetary damages under FRCP 23(b)(2).³³

A. Title VII of the Civil Rights Act of 1964

Title VII of the 1964 Act is the most comprehensive and influential federal law forbidding discrimination in employment.³⁴ Its prohibitions on discrimination based on race, color, sex, religion, or national origin

action litigation).

³¹ For a broad overview of the likely implications of *Dukes*, see *The Future of Employment Discrimination Class Actions: A Briefing on Wal-Mart v. Dukes* (Am. Con. Soc'y video, Mar. 24, 2011), available at <http://www.acslaw.org/news/video/the-future-of-employment-discrimination-class-actions-a-briefing-on-wal-mart-v-dukes>; Malveaux, *supra* note 13, at 44–52 (discussing the impact of *Dukes* on class actions and discrimination cases); see generally *infra* Part V (explaining the repercussions of the Court's decision on procedural and substantive law).

³² See *infra* Part II.A (providing a synopsis of Title VII and main theories of systemic discrimination).

³³ See *infra* Part II.B (discussing FRCP 23(a) commonality and FRCP 23(b)(2) class action rules).

³⁴ 42 U.S.C. §§ 2000e–2000e-17 (2006). Title VII has been deemed the “flagship” of federal employment discrimination law. THOMAS R. HAGGARD, UNDERSTANDING EMPLOYMENT DISCRIMINATION LAW 4 (2d ed. 2008). Title VII's broad protections distinguishes it from other federal statutes that prohibit discrimination solely with respect to one term or condition, such as compensation. HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE 45 (2d ed. 2004). Furthermore, Congress afforded employees more protection in passing the Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071 (*codified at* 42 U.S.C. § 1981 et. seq.) (2006), which amended Title VII to provide expanded relief to victims of intentional discrimination. *Id.*; see also generally JOHN J. DONAHUE III, FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW (1997) (providing a comprehensive overview of all Title VII protections).

extend to all terms, conditions, or privileges of employment.³⁵ Title VII safeguards against tangible problems, like refusal to hire or promote and unequal pay, as well as more intangible employment practices, like mentoring opportunities and workplace assignments.³⁶

The most critical and frequently litigated Title VII questions concern its liability theories and their corresponding modes of proof.³⁷ Accordingly, the following Section provides a brief overview of the discrimination theories on which the *Dukes*' class predicated its complaint.³⁸

1. Theories of Liability and Modes of Proof

After more than a decade of Title VII litigation, the Supreme Court in *International Brotherhood of Teamsters v. United States* clarified two basic principles of employment discrimination: disparate treatment

³⁵ Section 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1) (2006). There are conflicting accounts on the motivation behind adding "sex" discrimination to Title VII. Most academics and historians opine that Representative Howard Smith suggested the amendment, right before Congressional vote on Title VII, to ensure that the bill would be as full of "booby traps as a dog is full of fleas." WHALEN & WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 115–16 (1985) (quoting Rep. Howard Smith); see also Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1283 (1991) ("[S]ex discrimination in private employment was forbidden under federal law only in a last minute joking 'us boys' attempt to defeat Title VII's prohibition on racial discrimination."); but see Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 454–67 (1981) (explaining that Congress added "sex" to Title VII for serious reasons); Jo Freeman, *How Sex Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 164–65 (1991) (summarizing the major flaws in the argument that Congress added Title VII's prohibition on gender discrimination for legislative-defeating purposes).

³⁶ 42 U.S.C. §§ 2000e-2 – 2000e-3. Furthermore Section 704(a), makes it illegal for an employer to "discriminate against any of his applications or employees . . . because [that person] has opposed a practice made an unlawful employment practice . . . or because he has . . . participated in any manner in an investigation, proceeding, or hearing . . ." 42 U.S.C. § 2000e-3. Taken together, 42 U.S.C. § 2000e-3 protects against retaliation for opposing alleged unlawful employment practices. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (interpreting § 704(a) to allow current employees and applicants, as well as former employees, to bring a retaliatory discrimination claim). It is not uncommon for courts to dismiss substantive discrimination claims on a motion for summary judgment, but ultimately find the employer liable for retaliation. HAGGARD, *supra* note 34, at 159.

³⁷ LEWIS & NORMAN, *supra* note 34, at 164.

³⁸ See *infra* Part II.A.1 (discussing systemic disparate treatment and systemic disparate impact modes of employment discrimination liability); see also Brief for Respondents at 9–10, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277), 2011 WL 686407 (alleging both disparate treatment and disparate impact theories of discrimination).

theory and disparate impact theory.³⁹ The key difference between the two theories is that discriminatory intent must be proved in a disparate treatment case, whereas a plaintiff alleging disparate impact need only show the disproportionate impact of a "neutral" practice or policy.⁴⁰ While there are a variety of employment discrimination subtypes, this Section will focus on systemic theories of discrimination, which impose liability directly, not vicariously, on an employer when it has taken some discriminatory action against a protected class of employees.⁴¹ Accordingly, this Section provides an overview of the systemic disparate treatment and systemic disparate impact theories of employment discrimination.⁴²

i. Systemic Disparate Treatment

³⁹ 431 U.S. 324 (1977). *Teamsters* explained that, to achieve its stated purpose of fostering workplace equality and eliminating discriminatory practices and devices, Congress proscribed overt discrimination *and* practices that are "fair in form, but discriminatory in operation." *Id.* at 348–49.

⁴⁰ *Compare Teamsters*, 431 U.S. at 336 (requiring plaintiffs alleging disparate treatment to establish that the employer's discrimination constituted an intentional, standard operating procedure rather than a sporadic practice), *with Albemarle Paper Co. v. Moody*, 422 U.S. 405, 423 (1975) ("Title VII is not concerned with the employer's good intent or absence of discriminatory intent for Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.") (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)).

⁴¹ *See Systemic Discrimination*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC), <http://www.eeoc.gov/eeoc/systemic/index.cfm> (last visited Jan. 11, 2012) ("Systemic discrimination involves a pattern or practice, policy, or class case where the alleged discrimination has a broad impact on an industry, profession, company or geographic area. The EEOC encourages employers to prevent discrimination by taking a careful look at the practices they use to recruit, hire, [and] promote.").

While systemic treatment theories play an important role in mitigating large-scale discrimination, individual disparate treatment cases constitute the bulk of employment discrimination law. HAGGARD, *supra* note 34, at 57. A straightforward example of alleged disparate treatment is when a male received a promotion and a more senior, qualified female did not. That is, "but-for" the female's protected trait (gender), her employer would not have taken the adverse employment action. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 230 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072, *as recognized in Landgraf v. USI Film Products*, 511 U.S. 244 (1994) ("[A] substantive violation of [Title VII] only occurs when consideration of an illegitimate criterion is the 'but-for' cause of an adverse employment action.") (referencing 42 U.S.C. § 2000e-2(a)). For a broad outlook on intentional and unintentional forms of individual and systemic discrimination, see Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook On a Statutory Task*, 69 N.C. L. REV. 1–66 (1990).

⁴² *See infra* Part II.A.i–ii (providing a brief overview of substantive systemic theories of discrimination).

Proof of systemic disparate treatment is normally met by statistical evidence showing disparities between the actual and expected representation of the plaintiff's group in one or more levels of a business.⁴³ Unlike systemic disparate impact, it is predicated on a showing of intentional discrimination through an employer's business practices, policies, or individual decisions made by its agents.⁴⁴ Under systemic disparate treatment theory, all members of the protected group during the time period in which the group was underrepresented are presumptively entitled to relief.⁴⁵

The most obvious example of a discriminatory action is the adoption by an employer of a formal policy that facially draws a distinction on the basis of a prohibited characteristic.⁴⁶ In these rare cases, a class of alleged victims may establish systemic disparate treatment on the basis of the policy alone.⁴⁷ More frequently, however, plaintiffs offer statistical evidence to show a substantial underrepresentation in pay, hiring, or promotion relative to the numbers one would expect had the employer not acted with discriminatory

⁴³ See, e.g., *Mayor of Phila. v. Educ. Equal. League*, 415 U.S. 605, 620 (1974) (noting that statistical analyses have served and will continue to serve an important role in cases where the existence of discrimination is at issue). Non-statistical, anecdotal evidence concerning the discriminatory treatment of plaintiffs' protected group are "undoubtedly relevant to every other plaintiff's core allegation of systemic discrimination." *Alexander v. Fulton Cnty.*, 207 F.3d 1303, 1325 (11th Cir. 2000). Although anecdotal evidence fortifies an inference of discrimination, statistical disparities alone may prove intentional discrimination. *EEOC v. O & G Spring and Wire Forms Spec. Co.*, 38 F.3d 872, 876 (7th Cir. 1994).

⁴⁴ LEWIS & NORMAN, *supra* note 34, at 230–31. When an agent(s) of an employer commits unlawful discrimination, the employer is liable under the theory of "respondeat superior." See RESTATEMENT (SECOND) OF TORTS § 317 (1965) ("A master is under a duty to exercise reasonable care to control his servant . . . as to prevent him from intentionally harming others . . .").

⁴⁵ *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 749 (1976). In contrast, relief in a disparate impact case is limited to those plaintiffs (sometimes as few as one) who suffered an employment detriment from a practice shown to have a disproportionate adverse impact on the plaintiff's group. *Griggs*, 401 U.S. at 429.

⁴⁶ For example, in *L.A. Dep't of Water & Power v. Manhart*, the employer required female workers to make larger contributions to the company's pension fund than male employees. 435 U.S. 702, 702 (1978); see also *Az. Gov. Comm. v. Norris*, 463 U.S. 1073, 1074 (1983) (holding that Title VII prohibited an employer from paying women lower monthly retirement benefits from a fund in which both males and females made equal contributions).

⁴⁷ See *Manhart*, 435 U.S. at 704 (explaining that, because women live longer than men, the employer required its female employees to make large contributions to its pension fund). After the passage of the 1964 Civil Rights Act, however, most formal, facially discriminatory policies ended (even as less formal discrimination continued). See Tristan Green, *The Future of Systemic Disparate Treatment Law: After Wal-Mart v. Dukes*, 32(2) BERK. J. EMP. & LAB. L. (forthcoming 2011) (manuscript at 7) (opining that the elimination of most facially discriminatory policies followed the social trend towards equality inside and outside the workplace).

intent.⁴⁸ The magnitude of this disparity must be sufficient to show that the employer's discrimination amounted to a routine operating procedure, otherwise known as pattern-or-practice discrimination.⁴⁹

If plaintiffs present sufficient evidence of intentional discrimination, the burden shifts to the employer to offer a nondiscriminatory explanation for the alleged disparity.⁵⁰ If the defendant cannot rebut the presumption of intentional discrimination during this remedial phase, then the plaintiff class becomes eligible for appropriate Title VII remedies, including injunctive and declaratory relief, backpay, and compensatory damages and punitive damages.⁵¹

⁴⁸ The theoretical underpinning of statistics-based findings of systemic disparate treatment is that, "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the" relevant job pool. *Teamsters*, 431 U.S. at 339 n.20. Although *Teamsters* involved relatively straightforward statistics, other pivotal disparate treatment cases have involved less glaring disparities and more sophisticated statistical approaches. See, e.g., *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308–09 (using binomial distribution based on probability theory); *Bazemore v. Friday*, 478 U.S. 385, 398 (relying heavily on multiple regression analysis designed to demonstrate that African-Americans were paid less than similarly situated Whites).

⁴⁹ Without establishing the practice or policy as the standard procedure, relief will not be granted to the entire underrepresented class. LEWIS & NORMAN, *supra* note 34, at 233. The language, "pattern-or-practice," is drawn from the statutory authorization section in Title VII authorizing governmental enforcement (not just private enforcement) of Title VII. See 42 U.S.C. § 2000e-6(e) ("[T]he [EEOC] shall have the authority to investigate and act on a charge of a pattern or practice of discrimination . . .").

⁵⁰ During this remedial phase, an employer will typically present evidence to rebut the accuracy or significance of the plaintiff's statistics, or introduce counter-comparative statistics to negate an inference of systemic discrimination. See, e.g., *Hollander v. Am. Cyanamid Co.*, 172 F.3d 192, 202–03 (2d Cir. 1999), *cert. denied*, 528 U.S. 965 (1999) (underrepresentation of plaintiffs' age class rebutted by counter statistics aimed at disproving the inference that underrepresentation stemmed from discriminatory practices).

⁵¹ LEWIS & NORMAN, *supra* note 34, at 240. Section 706(g) of Title VII originally proscribed the remedies—injunction, affirmative relief, equitable relief, and backpay—available to plaintiffs that bring a successful case of employment discrimination. 42 U.S.C. 2000e-5(g) (2006). Enjoining the defendant from continuing discriminatory practices, known as injunctive relief, is the most fundamental and routine form of Title VII relief. HAGGARD, *supra* note 35, at 212. Backpay and other lost benefits are awarded by courts almost as a matter of course. See *Albemarle*, 422 U.S. at 421 n.14 ("It is necessary, therefore, that if a district court does decline to award backpay, it carefully articulate its reasons."). The Civil Rights Act of 1991 extended the compensatory and punitive damages to victims of disparate treatment discrimination. Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071 (*codified as amended* at 42 U.S.C. et. seq.). A Title VII plaintiff may seek compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. 42 U.S.C.A. § 1981a(b)(3) (2006). Punitive damages are authorized against non-governmental defendants who engaged in a discriminatory practice with malice or with reckless indifference to the protected rights of an aggrieved employee. 42 U.S.C.A. § 1981a(b)(1) (2006).

ii. Systemic Disparate Impact

In 1971, writing for a unanimous Court in *Griggs v. Duke Power Co.*, Chief Justice Burger explained that a facially neutral employment practice that is discriminatory in its application may violate Title VII, even where the employer's motivation in adopting the practice is neutral or benign.⁵² If plaintiffs provide sufficient evidence of statistically significant disparities, the burden shifts to the employer to prove that policy or practice at issue could be justified by business necessity.⁵³ Assuming the employer meets his burden, the employees may offer rebuttal proof that the interest asserted by the defendant could be served by a less discriminatory alternative.⁵⁴

Courts, for many years, split over the availability of disparate impact theory for subjective personnel practices.⁵⁵ In 1988, however, *Watson v. Fort Worth Bank & Trust* clarified that objective and subjective employment policies and practices could be challenged under a disparate impact theory of discrimination.⁵⁶ Particularly, delegation of

⁵² *Griggs*, 401 U.S. at 430.

⁵³ The fact that a practice or policy has a disparate impact on a protected group does not conclusively establish its illegality—an employer may offer evidence that the unintentional effect of a practice or policy is justified. *See id.* at 431 (explaining that if an employment practice which operates to exclude a protected group cannot be shown to be related to job performance, the practice is prohibited under Title VII). The business necessity defense sprung directly from Title VII, which authorizes the use of "any professionally developed ability test" that is not "designed, intended, or used to discriminate" against a protected class of employees. 42 U.S.C. § 2000e-2(h) (2006).

⁵⁴ *Albemarle*, 422 U.S. at 425. Before *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), a plaintiff's rebuttal burden was minimal. *See* LEWIS & NORMAN, *supra* note 34, at 255–56 (explaining how, although employers succeeded regularly in proffering a business necessity defense, plaintiffs' carried an equally-nominal rebuttal burden). *Wards Cove*, however, tightened the pretext stage, emphasizing that the suggested alternative "must be equally effective as [the employer's] chosen hiring procedures in achieving . . . legitimate employment goals." 490 U.S. at 661. Later, Congress responded by negating *Wards Cove's* heightened rebuttal standards, returning the standard to a mere showing of an alternative practice that the employer refuses to adopt. Section 105(a)(ii) (adding subsection (k)(1)(A)(ii) to § 703 of Title VII, 42 U.S.C.A § 2000e-2 (2006)).

⁵⁵ The foremost case rejecting the application of disparate impact theory to subjective practices is *Pouncy v. Prudential Ins. Co. of Am.*, 668 F.2d 795, 801 (5th Cir. 1982). The earliest case to apply disparate impact doctrine to subjective policies or practices is *Rowe v. Gen. Motors Corp.*, 457 F.2d 348, 355 (5th Cir. 1972). For a broad discussion of early disparate impact case law as applied to subjective personnel policies, see Alfred W. Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI. KENT L. REV. 1, 17–24 (1987).

⁵⁶ *Watson*, 487 U.S. at 991. The court analogized an employment practice with a disparate impact to intentional discrimination because the consequences are the same in both circumstances. *See id.* at 990-91 ("If an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional

subjective decision-making power to supervisors at the local level may be an unlawful employment practice if the discretion is exercised in a discriminatory manner.⁵⁷

B. Class Actions

Typically, a lawsuit is filed by a single plaintiff against a single defendant claiming redress for a particular wrong.⁵⁸ The Court observed more than seventy years ago that a foremost principle of American jurisprudence is that a party is not bound by a judgment in a litigation in which he is not designated as a party.⁵⁹ Despite this tradition, single-plaintiff lawsuits are inadequate for dealing with a defendant-employer whose unlawful conduct has harmed a large, protected employee group.⁶⁰ To circumvent these concerns, American jurisprudence offers a class action process.⁶¹ Accordingly, this Section will discuss the benefits of the class action device, as well as the procedural rules at issue in *Dukes*—commonality and predominance.⁶²

1. Dollars and Sense of the Class Action

Class actions are a procedural device to adjudicate multiple claimants' rights, available in certain circumstances where absent class members' interests are adequately represented by another similarly

discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply.").

⁵⁷ *Id.* at 990.

⁵⁸ BRIAN ANDERSON & ANDREW TRASK, *THE CLASS ACTION PLAYBOOK 2* (2010). The class action device is an exception to the prototypical rule that litigation is conducted by and on behalf of the named litigations only. *Falcon*, 457 U.S. at 155; *see also* Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Option for Reform*, 28 HARV. J.L. & PUB. POL'Y 855, 860 (2005) (explaining that, at common law, courts preferred individualized proof of liability).

⁵⁹ *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *see also Pelt v. Utah*, 539 F.3d 1271, 1281 (10th Cir. 2008) ("It is a fundamental rule of civil procedure that one who was not a party to an action is not bound by the judgment.").

⁶⁰ *See generally* ANDERSON & TRASK, *supra* note 58, at 3 (discussing the limitations of single-plaintiff lawsuits against large employers); MARGARET C. JASPER, *YOUR RIGHTS IN A CLASS ACTION SUIT 2-3* (2005) (opining that when a company's business practices cause the same injury to multiple individuals, suing as a class is justified).

⁶¹ *See* FED. R. CIV. P. 23 (listing the prerequisites for certifying a class action, the types of class actions maintainable, the requirements of a certification order, and ways in which a court can successfully manage class action litigation).

⁶² *See infra* Part II.B.1 (discussing the commonality prerequisite under FRCP 23(a)(2)); Part II.B.2 (discussing the FRCP 23(b)(2) type of class action maintainable).

situated entity.⁶³ Under FRCP 23, a class action litigation proceeds with a single plaintiff (or group of plaintiffs) who offers proof of his or her individual claim at trial.⁶⁴

The modern class action serves three central purposes. First, class actions promote judicial and economic efficiency by avoiding multiple suits on the same subject matter.⁶⁵ Second, class actions provide a mechanism to protect the rights of plaintiffs who, for practical reasons, would not bring forth individual claims.⁶⁶ Third, successful class actions may deter corporate malfeasance.⁶⁷ Given the risk for abuse, however, class action lawsuits are carefully regulated under FRCP 23.⁶⁸

⁶³ *Martin v. Wells*, 490 U.S. 755, 762 n.2 (1989); *Hansberry*, 311 U.S. at 40. Although class actions are the most recognizable form of aggregated litigation, lawsuits brought on behalf of large groups seeking substantial relief take other forms. ANDERSON & TRASK, *supra* note 58, at 4. For example, the federal rules allow parties asserting similar claims against the same defendant to "join" together in a single lawsuit. See FED. R. CIV. P. 20 (listing the requirements for joinder); see also Note, *The Challenge of the Mass Trial*, 68 HARV. L. REV. 1046, 1047 (1955) (discussing the advantages of joinder, including efficiency and foreclosing duplicative evidence); but see Richard Epstein, *Class Actions: Aggregation, Amplification and Distortion*, 2003 U. CHI. LEGAL F. 475, 486 (exposing the burdens of joinder, including that all strategy decisions must be negotiated—a process fraught with difficulties).

⁶⁴ See FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members . . . [.]"). The outcome at trial or terms of any pre-trial negotiated settlement binds the entire class. See William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. Rev. 790, 790 (noting that a class action can only bind members who are adequately represented).

⁶⁵ See *Blaz v. Belfer*, 386 F.3d 501, 504 (5th Cir. 2004) ("The class action is a procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment."); *Falcon*, 457 U.S. at 156 (holding that class relief is appropriate where the issue involved are common to the collective class and when they turn on questions of law pertinent to each class member).

⁶⁶ See *Anchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (observing that the drafters of FRCP 23(b)(3) had in mind vindication of the rights of groups of people who individually would lack the resources to challenge large companies in court). When used properly, class actions can "level the playing field" between aptly-funded corporations and individual consumers or employees. ANDERSON & TRASK, *supra* note 58, at 12; JASPER, *supra* note 60, at 2 ("In many cases, the damages suffered by an individual are too small to justify hiring a lawyer and bringing an individual lawsuit, and an illegal or dangerous business practice would continue unchallenged.").

⁶⁷ Myriam Giles & Gary B. Freidman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 139 (2006). Although successful class action suits "raise the price" for corporations to discriminate, even the threat of future class actions may defer corporate misconduct. See, e.g., Jenna Goudreau, *Wal-Mart To 'Empower' Women?*, FORBES (Sept. 14, 2011, 5:38 PM) (summarizing Wal-Mart's new Global Women's Economic Empowerment Initiative—launched months after the Court's ruling in *Dukes*).

⁶⁸ FED. R. CIV. P. 23(a) – (h). For critics, class actions represent a fundamental departure from traditional Anglo-American legal values that generate a host of problems and continues to invoke ambivalence in federal courts. See, e.g., *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002) ("The benefits [of efficiency] are elusive [in class actions]."); *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 744-45 (7th Cir. 2008)

Specifically, FRCP 23 provides a method for the court to determine whether the claims of the named plaintiff and class are so interrelated that the interests of the absent class members will be fairly and adequately protected.⁶⁹

2. Class Certification Requirements

A district court may certify a class only if the plaintiffs can establish four prerequisites: numerosity, commonality, typicality, and adequacy.⁷⁰ In addition, class actions must satisfy the requirements of any three categories depicted in FRCP 23(b).⁷¹ The decision to grant or deny

(discussing the strong incentives for both plaintiffs' counsel and defendant to use the class action as a means of quickly rendering a solution by providing large payouts to the lawyers and an illusory payout to the class); *see generally* ANDERSON & TRASK, *supra* note 58, at 15–18 (briefly summarizing the main risks of class action litigation, including a drain on judicial resources and conflation of issues). For a thorough discussion of the advantages and disadvantages of class actions, *see* ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 5 (4th ed. 2010).

⁶⁹ *Falcon*, 457 U.S. at 157.

⁷⁰ FED. R. CIV. P. 23(a). Although the Court granted certiorari for all FRCP 23(a) issues, *Dukes*, 603 F.3d 571, *petition for cert. granted*, 131 S. Ct. 795 (U.S. Dec. 6, 2010) (No. 10-277), the Court addressed only commonality in *Dukes*. *See Dukes*, 131 S. Ct. at 2553–57 (finding plaintiffs' lacked commonality under FRCP 23(a)(2)). However, numerosity, typicality, and adequacy remain crucial for class action litigants seeking certification. FED. R. CIV. P. 23(a). To satisfy the numerosity prerequisite, the class must be “so numerous that joinder of all of the members is impracticable.” FED. R. CIV. P. 23(a)(1). There is no set number of class members required to satisfy numerosity; rather, whether joinder is impracticable depends on the facts and circumstances of each case. *See Pederson v. La. St. Univ.*, 201 F.3d 388, 397 n.11 (5th Cir. 2000) (noting that trial courts conducting numerosity analyses “must not focus on sheer numbers alone”). Typicality requires that the claims or defenses of the representative parties must be typical of the claims or defenses of the class. FED. R. CIV. P. 23(a)(3). Like the commonality prerequisite, the typicality requirement is not an exacting standard. *Lightbourn v. Cnty. of El Paso*, 118 F.3d 421, 426 (noting that the test for typicality “is not demanding”). The claims of the class representatives need not be identical to the class as a whole; rather a sufficient nexus can be found where the claims of the class and named party arise from the similar conduct and implicate the same legal theories. *James v. Dallas*, 254 F.3d 551, 571 (5th Cir. 2001). Finally, adequacy requires that named plaintiffs fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a)(4). The adequacy condition requires the court to make a two-fold inquiry: whether any conflict of interest exists between the representative party and the class; and whether the class representative is competent to carry out her duties fairly, vigorously, and competently on behalf of the class. *See Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998) (explaining that a class cannot meet the stringent requirements of adequacy where there is a conflict of interest between different groups of plaintiffs with respect to appropriate relief). For an in-depth overview of the procedural rules and extensive case law governing FRCP 23(a), *see* JOSEPH M. McLAUGHLIN, *McLAUGHLIN ON CLASS ACTIONS: LAW AND PRACTICE* § 4 (5th ed. 2009).

⁷¹ FED. R. CIV. P. 23(b).

certification rests within the sound discretion of the trial judge and will not be overturned except for abuse of discretion.⁷²

Writing for the majority in *Dukes*, Justice Scalia ruled that the *Dukes* class did not meet the commonality threshold for certification under FRCP 23(a)(2).⁷³ While the dissent disagreed with the majority's application of commonality precedent, all nine justices agreed that the district court improperly certified the plaintiffs' backpay claims under FRCP 23(b)(2).⁷⁴ Accordingly, this Section will provide an in-depth overview of these two class certification rules.⁷⁵

i. FRCP 23(a)(2) Commonality

Under FRCP 23(a)(2), a class may not be certified unless there are questions of law or fact common to the class.⁷⁶ This requirement makes certain that there are shared factual or legal issues among the class members such that single adjudication of their similar claims is efficient and reasonable.⁷⁷ A common question is one that, if answered as to the named plaintiff, will affect a significant number of other class members.⁷⁸

Courts have consistently recognized that commonality is not a high burden.⁷⁹ Commonality does not require a class to show identical

⁷² *Dukes*, 131 S. Ct. at 2562 (Ginsburg, J., concurring in part and dissenting in part) ("Absent an error of law or an abuse of discretion, an appellate tribunal has no warrant to upset the District Court's finding of commonality.") (citing *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979)); MCLAUGHLIN, *supra* note 70, at 15–16; *see also* Brief for National Employment Lawyers Association et al. as Amicus Curiae Supporting Respondents at 19, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277) (stating that federal courts already subject class certification proceedings to a rigorous analysis, as evidenced by the few classes (less than 100 annually) that are certified and allowed to proceed to trial).

⁷³ *Dukes*, 131 S. Ct. at 2556–57 ("Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question.").

⁷⁴ *Id.* at 2557 (Ginsburg, J., concurring in part and dissenting in part).

⁷⁵ *See infra* Part II.B.2.i–ii (providing an overview of FRCP 23(a)(2) and FRCP 23(b)(2)).

⁷⁶ FED. R. CIV. P. 23(a)(2);

⁷⁷ MCLAUGHLIN, *supra* note 70, at 458; *see also* *La Fata v. Raytheon Co.*, 207 F.R.D. 35, 42 (E.D. Pa. 2002) (finding that commonality provides the "necessary glue" among class plaintiffs to make adjudicating the case "worthwhile").

⁷⁸ *Forbush v. J.C. Penny Co., Inc.*, 994 F.2d 1101, 1106 (5th Cir. 1993). Importantly, commonality does not require that *every* question of law or fact be common to the class. *See* 7A WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1763 at 215–17 (1995) (finding it important to clarify that FRCP 23(a)(2) does not require that all questions of law or fact be common to the class, nor does it establish any quantitative or qualitative test).

⁷⁹ *See Pichler v. UNITE*, 228 F.R.D. 230, 249 (E.D. Pa. 2005), *aff'd*, 542 F.3d 180, 184 (3d

interests; rather, commonality is satisfied when the class presents at least one issue whose resolution will affect a significant number of the class members.⁸⁰ Importantly, there is no requirement that answers to common questions guarantee a liability determination.⁸¹

Before 1982, most courts gave short shrift to commonality in employment discrimination cases.⁸² In *Gen. Telephone Co. of Southwest v. Falcon*, however, the Court barred this permissive standard, holding that trial courts must conduct a rigorous analysis to determine whether the FRCP 23(a) prerequisites have been satisfied.⁸³ Thus, when considering class certification under FRCP 23(a), a district court's rigorous inquiry will often require analyzing the merits of the plaintiffs' underlying claims, as well as scrutinizing expert testimony to determine its reliability.⁸⁴ Despite *Falcon's* insistence on a rigorous

Cir. 2008) (explaining that the commonality threshold is low becomes the named plaintiffs need only show at least one common question of fact or law); *accord*, ARTHUR R. MILLER, OVERVIEW OF CLASS ACTIONS: PAST, PRESENT, AND FUTURE 25 (1977) (finding the commonality standards "relatively easy to satisfy"); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 387 (1967) (positing that the drafters paid little discussion to commonality because its requirements were plain and non-controversial).

⁸⁰ *Savino v. Computer Credit, Inc.*, 173 F.R.D. 346, 352 (E.D.N.Y. 1997), *aff'd*, 164 F.3d 81 (2d Cir. 1998); CONTE & NEWBERG, *supra* note 68, at 272–74.

⁸¹ *See Dallas*, 254 F.3d at 570 ("All that is required for each class is that there is one common question of law or fact."); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) ("[T]he existence of shared legal issues with divergent factual predicates is sufficient to satisfy commonality."); MCLAUGHLIN, *supra* note 70, at 459 (providing affirmatively that there is no requirement that answers to common questions guarantee a determination of liability); *see also* Brief for Civil Procedure Professors as Amicus Curiae Supporting Respondents at 6–10, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277) (explaining that an analysis of FRCP 23(a) commonality is intended for courts to make a "determination" of common questions, not "findings" of a common answer).

⁸² *See* MCLAUGHLIN, *supra* note 70, at 484 (explaining that courts permitted "across-the-board" class certification for claims alleging employment discrimination); *see, e.g.*, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (noting the potential prejudice in making a preliminary merits determination of the plaintiffs' claims).

⁸³ *Falcon*, 457 U.S. at 160–61.

⁸⁴ Although *Dukes* largely analyzed commonality under FRCP 23(a)(2) and backpay under FRCP 23(b)(2), these two issues also were at the forefront of the litigation. For years following *Falcon*, federal courts evidenced confusion as to the extent it could analyze the merits of the plaintiffs' underlying discrimination claims. *Compare Eisen*, 417 U.S. at 177 ("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 order to determine whether it may be maintained as a class action."), *with Falcon*, 457 U.S. at 160–61 (explaining that a district court's certification analysis will often require looking to the issues overlapping with the merits of the underlying claims). Furthermore, before *Dukes*, courts wrestled with whether they ought to subject class certification experts to careful scrutiny according to *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993). *Compare* *Am. Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 816 (7th Cir. 2010) (requiring a *Daubert* review for class certification experts), *with* *Millenkamp v. Davisco Foods*

certification analysis, courts typically find commonality where plaintiffs provide sufficient proof that their employer followed a general policy of discrimination, including through a subjective decision-making process at the local level.⁸⁵

ii. FRCP 23(b)(2) Class Actions

If a proposed class action satisfies the FRCP 23(a) prerequisites, it then must fit within one of three categories defined under FRCP 23(b).⁸⁶ Of these class actions types, FRCP 23(b)(2) governs the certification of classes where broad injunctive and equitable relief is necessary to redress a group-wide injury.⁸⁷ The drafters of FRCP 23(b) recognized,

Int'l, Inc., 562 F.3d 971, 979 (9th Cir. 2009) (holding that, as a general rule, district courts are not required to conduct a *Daubert* hearing for class certification experts). *Daubert* requires that for expert testimony to be admissible, the expert must be qualified to give his opinion and that the expert opinion must be reliable. *Daubert*, 509 U.S. at 590–93. In making this reliability determination, the Supreme Court provided a non-exclusive list of factors for the trial judge to consider, including (1) whether the scientific theory can be or has been tested; (2) whether the theory has been subjected to peer review and publication; and (3) whether the theory is generally accepted in the relevant scientific, technical or professional community. 509 U.S. at 593–94 (1993); see also FED. R. EVID. 702 (mirroring the requirements set forth in *Daubert*).

⁸⁵ *Reeb v. Oh. Dep't of Rehab. & Corr.*, 435 F.3d 639, 644 (6th Cir. 2006); *Latino Officers Ass'n City of N.Y. v. N.Y.*, 209 F.R.D. 79, 88–89 (S.D.N.Y. 2002). Although there is a growing consensus that commonality is not presented when the conduct of a large number of decision-makers is challenged under disparate treatment law, when a plaintiff can show the breadth and consistency of discrimination, commonality is proper. *Staton v. Boeing Co.*, 327 F.3d 938, 954 (9th Cir. 2003).

⁸⁶ See FED. R. CIV. P. 23(b) (depicting the types of class actions that may be certified upon meeting the FRCP 23(a) requirements). The Fifth Circuit encapsulated the role of the three categories in a leading, yet controversial, 1998 decision:

The different types of class actions are categorized according to the nature or effect of the relief being sought. The (b)(1) class action encompasses cases in which the defendant is obliged to treat class members alike or where class members are making claims against a fund insufficient to satisfy all of the claims. The (b)(2) class action, on the other hand, was intended to focus on cases where broad, class-wide injunctive or declaratory relief is necessary. Finally, the (b)(3) class action was intended to dispose of all other cases in which a class action would be convenient and desirable, including those involving large-scale, complex litigation for money damages. Limiting the different categories of class actions to specific kinds of relief clearly reflects a concern for how the interests of class members will vary, depending upon the nature of the class injury alleged and the nature of the relief sought.

Allison v. Citgo Petroleum Corp., 151 F.3d 402, 412 (5th Cir. 1998).

⁸⁷ FED. R. CIV. P. 23(b)(2); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 162 (2d Cir. 2001).

and several courts agree, that employment discrimination lawsuits are ideal for FRCP 23(b)(2) adjudication.⁸⁸

A court will certify a FRCP 23(b)(2) class only when the plaintiffs satisfy two basic requirements. First, FRCP 23(b)(2) classes must sufficiently allege that the defendant's actions or omissions apply generally to the class.⁸⁹ FRCP 23(b)(2) classes must be defined with sufficient clarity to enable the court to determine whether a challenged practice or policy applies generally to both named plaintiffs and similarly situated unnamed plaintiffs.⁹⁰ Since, unlike FRCP 23(b)(3) classes, FRCP 23(b)(2) plaintiffs are *not* entitled to notice of the pendency of the litigation and may not opt out of the lawsuit, it is far more important to courts that the plaintiffs' interests are cohesive for FRCP 23(b)(2) classes.⁹¹

Second, class certification under FRCP 23(b)(2) is improper if the exclusive or predominant relief sought is monetary damages.⁹² In the seminal *Allison v. Citgo Petroleum Corp.* decision, the Fifth Circuit held that monetary relief may be appropriate under FRCP 23(b)(2) only when it is incidental to injunctive or declaratory relief.⁹³ The Fifth

⁸⁸ See FED. R. CIV. P. 23 advisory committee's notes (making clear that FRCP 23(b)(2) not only permits monetary relief as equitable relief, but that FRCP 23(b)(2) function wells for civil rights cases). Acknowledging the equitable nature of employment discrimination claims, courts have long recognized the utility of certifying pattern-or-practice cases under FRCP 23(b)(2). See, e.g., *Anchem Prods. Inc.*, 521 U.S. at 614 ("Civil rights cases against parties charged with unlawful, class based discrimination are prime examples" of FRCP 23(b)(2) classes); *Jefferson v. Ingersoll Intern. Inc.*, 195 F.3d 894, 896 (7th Cir. 1999) (recognizing FRCP 23(b)(2) as ideal for certification in Title VII pattern-or-practice lawsuits).

⁸⁹ See *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 256 (3d Cir. 1975) (finding that the very nature of a FRCP 23(b)(2) class is that it is homogeneous without any conflicting interests between its members).

⁹⁰ *Rahman v. Certoff*, 530 F.3d 622, 627 (7th Cir. 2008). The Eleventh Circuit drew an apt comparison between FRCP 23(b)(2) classes and FRCP 23(b)(3) classes in *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983), noting that FRCP 23(b)(3) members are legal strangers related only by a common question of law or fact, but that FRCP 23(b)(2) class members are united by an enduring legal relationship or common trait that transcends the specific facts of the lawsuit. *Id.* at 1156 n.9.

⁹¹ See *Shook v. Bd. of Cnty. Comm'rs of El Paso*, 543 F.3d 597, 604 (10th Cir. 2008) (emphasizing that without the requisite homogeneity between class members, certification may be precluded); see generally JASPER, *supra* note 60, at 17–23 (discussing notice and opt-rights).

⁹² *Allison*, 151 F.3d at 415; FED. R. CIV. P. 23 advisory committee's note; see also Suzette M. Malveaux, *Class Actions at the Crossroads: An Answer to Wal-Mart v. Dukes*, 5:2 HARV. L. & POL'Y REV. (forthcoming 2011) (manuscript at 21–24) (providing a summary of the predominance debate in federal courts).

⁹³ *Allison*, 151 F.3d at 415. In *Allison*, a divided Fifth Circuit explained that its incidental damages framework grew from two FRCP 23(b)(2) purposes: (1) it protects the interests of other class members who may want to pursue individual monetary claims through the exercise of opt-out rights under FRCP 23(b)(3); and (2) it preserves the legal system's interest in judicial

Circuit defined incidental damages as damages to which class members automatically would be entitled once liability to the class is established.⁹⁴ Many courts follow the *Allison* approach in employment discrimination cases.⁹⁵

The leading case rejecting *Allison*'s restrictive approach is *Robinson v. Metro-North Commuter R.R. Co.*⁹⁶ The *Robinson* court held that a class seeking injunctive and monetary relief may be certified under FRCP 23(b)(2) if the district court determines that the positive effect of the injunctive or declaratory relief to the plaintiffs predominates over claims for monetary damages.⁹⁷ The court highlighted the danger of the *Allison* approach, namely, that it forecloses class certification of all claims that include monetary relief even if injunctive relief is the type of relief in which the class is most interested.⁹⁸ Like *Robinson*, some circuits employ a more flexible approach, assessing whether FRCP 23(b)(2) certification is appropriate in light of the relevant importance of the damages sought, given all the circumstances of the case.⁹⁹

economy. *Id.*

⁹⁴ *Id.*; see also *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 20 (2d Cir. 2003) (following *Allison* under a more subjective framework: whether, even in the absence of monetary recovery, reasonable plaintiffs would bring the suit to obtain injunctive relief). In a crucial qualification to its holding, however, the *Allison* court asserted that providing class members with the procedural safeguards of notice and opt-out rights may permit employment discrimination claims to proceed under FRCP 23(b)(2). *Allison*, 151 F.3d at 418 n.13 (emphasis added); see also *In re Monumental Life Ins. Co.*, 365 F.3d 408, 417 (5th Cir.2004) (affirming notice and opt-out rights to a FRCP 23(b)(2) class).

⁹⁵ The Third, Sixth, Seventh, and Eleventh Circuits (as well as many federal district courts) have adopted *Allison*'s framework. MCLAUGHLIN, *supra* note 70, at 912; see, e.g., *Cooper v. So. Co.*, 390 F.3d 695, 720 n.12 (11th Cir. 2004) (affirming denial of monetary damages under FRCP 23(b)(2), stating that "*Allison* incidental damages standard is the proper legal standard" to analyze FRCP 23(b)(2) certification orders).

⁹⁶ *Robinson*, 267 F.3d at 164; accord, *Latino Officers Ass'n*, 209 F.R.D. 79 (S.D.N.Y. 2002).

⁹⁷ *Robinson*, 267 F.3d at 164 (quoting *Allison*, 151 F.3d at 430 (Dennis, J., dissenting)). Many academics argued that *Robinson*'s rejection of *Allison*'s stringent framework provided federal courts with a more workable FRCP 23(b)(2) predominance test. See, e.g., W. Lyle Stamps, *Getting Title VII Back on Track: Leaving Allison Behind for the Robinson Line*, 17 B.Y.U. J. PUB. L. 411, 411 (2003) (providing reasons for supporting the *Robinson* "predominant" over the *Allison* "incidental damages" test).

⁹⁸ *Robinson*, 267 F.3d at 163. Furthermore, the court downplayed due process risks posed by FRCP 23(b)(2), stating that the district court at the class certification stage could require notice and opt-out rights to absent class members for those portions of the suit that raises cohesion issues. *Id.* at 166. The Ninth Circuit, which has adopted *Robinson*'s flexible approach, also sanctions the use of notice and opt out rights for a FRCP 23(b)(2) class action where substantial monetary relief is at issue. See *Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir. 2003), *overruled in part by Dukes*, 131 S. Ct. 2541 (2011) (explaining that a court may fashion a FRCP 23(b)(2) to include notice and the ability for class members to opt out); FED. R. CIV. P. 23(d)(2) (explicitly granting a court the ability to provide notice to FRCP 23(b)(2) class members).

⁹⁹ See, e.g., *Molski*, 318 F.3d at 949–50 (adopting an ad-hoc balancing approach similar to

III. DISCUSSION

In dismissing *Dukes*, the Court significantly tightened the rules governing employment class actions.¹⁰⁰ Accordingly, this Part will provide a comprehensive overview of the *Dukes* litigation. First, this Part will summarize the district court's certification order and the Ninth Circuit's subsequent en banc decision affirming class certification.¹⁰¹ Next, this Part will discuss Justice Scalia's majority opinion in *Dukes*, where the Court found that the class failed to satisfy FRCP 23(a)(2) and could not be certified under FRCP 23(b)(2).¹⁰² Lastly, this Part will examine Justice Ginsburg's dissenting opinion in *Dukes*, which argued that the majority overstated the FRCP 23(a)(2) commonality requirement.¹⁰³

A. Lower Court Proceedings

On June 19, 2001, Betty Dukes¹⁰⁴ and five other female employees, on behalf of a purported class of similarly situated female workers,

Robinson). These circuits have rejected *Allison*'s incidental damages framework because neither FRCP 23(b)(2) nor its accompanying Advisory Committee Notes require that monetary damages be incidental to injunctive relief. *see* FED. R. CIV. P. 23(b)(2) advisory committee's note (1966) ("The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.") (emphasis added). Furthermore, a substantial number of courts addressing employment discrimination claims seeking substantial monetary relief steer a "middle course" through hybrid class certification. *See* MCLAUGHLIN, *supra* note 70, at 916–17 (explaining that, in *Lemon v. Int. Union of Op. Eng'rs*, 216 F.3d 577, 581 (7th Cir. 2000), the Seventh Circuit suggested a divided certification in which the court could certify injunctive relief under FRCP 23(b)(2) and monetary relief under FRCP 23(b)(3)); *but see Allison*, 151 F.3d at 426 ("[T]he Seventh Amendment precludes a partial certification of a class action on the plaintiffs' claims for equitable relief.").

¹⁰⁰ *See* Malveaux, *supra* note 13, at 52 ("*Dukes* has redefined the class certification requirements for Title VII cases in ways that jeopardize potentially meritorious challenges to systemic employment discrimination. Although the ultimate scope and magnitude of *Dukes*' impact is unclear, it is clear that *Dukes* has tipped the balance in favor of powerful employers . . ."). Countless organizations, including the NAACP, condemned the Court's decision to make it "monumentally harder for classes of discrimination victims to receive justice." Terry Shropshire, *NAACP Outraged Supreme Court Favors Wal-Mart in Gender Bias Lawsuit*, ROLLINGOUT.COM (June 22, 2011), <http://rollingout.com/politics/naacp-outraged-supreme-court-favors-wal-mart-in-gender-bias-lawsuit>.

¹⁰¹ *See infra* Part III.A (discussing the district court's certification order and the Ninth Circuit's opinion affirming class certification).

¹⁰² *See infra* Part III.B (providing a broad overview of the majority holding in *Dukes*).

¹⁰³ *See infra* Part III.C (explaining Justice Ginsburg's dissenting opinion in *Dukes*).

¹⁰⁴ In 1994, Betty Dukes started working as a cashier at a California Wal-Mart store. Paul Elias, *Betty Dukes, Wal-Mart Greeter, Leads Class Action Suit*, HUFFINGTON POST (May 1, 2010,

claimed that Wal-Mart's subjective personnel policies operated as a medium for perpetrating gender bias in its pay and promotion practices.¹⁰⁵ The plaintiffs asserted that women employed at Wal-Mart: (1) are paid less than men in comparable positions, despite having higher performance ratings and greater seniority; and (2) receive fewer (and wait longer for) promotions to management positions than men.¹⁰⁶

The *Dukes* women contended that Wal-Mart's policy of granting discretion to local managers over pay and promotions resulted in gender stereotyping and discrimination (disparate impact), and that failure to mitigate the disparities amounted to intentional discrimination (disparate treatment).¹⁰⁷ The proposed class, which consisted of women

3:47 PM), http://www.huffingtonpost.com/2010/05/01/betty-dukes-walmart-greet_n_559892.html.

By 1999, however, Dukes' career plans were in disarray. *Id.* Several years of immobility at Wal-Mart culminated in a quarrel with store management that resulted in a demotion and pay cut. *Id.* Dukes contended that these disciplinary actions amounted to retaliation for complaining about discriminatory treatment and that Wal-Mart did not discipline male employees for similar infractions. *Id.* When her complaints went unaddressed, Dukes chose to take legal action, setting the stage for the largest employment discrimination class action in U.S. history. Steven Greenhouse & Constance L. Hays, *Wal-Mart Sex-Bias Suit Given Class Action Status*, N.Y. TIMES, June 23, 2004, at A1, available at <http://www.global>

[exchange.org/campaigns/sweatshops/2149.html](http://www.globalexchange.org/campaigns/sweatshops/2149.html). For more information on Wal-Mart's alleged discrimination against the named plaintiffs, see Plaintiffs' Third Amended Complaint, *supra* note 6, at ¶ 30–94.

¹⁰⁵ Plaintiffs' First Amended Complaint ¶ 1, *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004) (No. C-01-2252 MJJ), 2001 WL 34134868.

¹⁰⁶ Plaintiffs' Third Amended Complaint, *supra* note 6, at ¶ 1–3, 26. Wal-Mart is the world's largest retailer and America's largest corporation. Rachel Tallon Pickens, *Too Many Riches? Dukes v. Wal-Mart and the Efficacy of Monolithic Class Actions*, 83 U. DET. MERCY L. REV. 71, 80–81 (2006). Despite recent efforts to fight national and global issues through its charitable arm, Wal-Mart Foundation, the company has been dubbed the "discrimination leader" and a "Merchant of Shame." Press Release, Equal Rights Advocates, Wal-Mart Stores, Inc., the Nation's Largest Private Employer, Sued for Company-Wide Sex Discrimination (June 19, 2001), available at http://www.walmartclass.com/staticdata/press_releases/r1.html ("The industry leader should not be the discrimination leader."); *Wal-Mart: Merchant of Shame*, NAT'L ORG. WOMEN, <http://www.now.org/issues/wfw/wal-mart.html> (last visited Jan. 12, 2012) (deeming Wal-Mart a "Merchant of Shame" for various issues throughout the past decade). For a summary of Wal-Mart's questionable labor practices, see Ritu Bhatnagar, *Dukes v. Wal-Mart as a Catalyst for Social Activism*, 19 BERKELEY WOMEN'S L. J. 246, 250–51 (2004).

¹⁰⁷ Brief for Respondents, *supra* note 38, at 9–10; Malveaux, *supra* note 13, at 34. While some variations exist, Wal-Mart generally delegates pay and promotion decisions to local managers. Brief for Respondents, *supra* note 38, at 1. For instance, local store managers may increase the wages of hourly employees with limited corporate oversight, while Wal-Mart affords regional and district managers broad discretion when selecting candidates for management training and promoting employees to higher office. See Melissa Hart, *Learning from Wal-Mart*, 10 EMP. RTS. & EMP. POL'Y J. 355, 361–363 (2006) (discussing Wal-Mart's unguided local discretionary policies). These subjective policies are monitored by Wal-Mart's Home Office to ensure consistency in results. *Id.* at 360–61.

employed in a range of positions, sought injunctive and declaratory relief, backpay, and punitive damages.¹⁰⁸

To appreciate the decade-long litigation and its impact on class action and employment discrimination law, this Section will provide an overview of the district court, Ninth Circuit, and Supreme Court opinions.¹⁰⁹

1. District Court Certifies the *Dukes* Class

On June 21, 2004, Judge Jenkins of the U.S. District Court for the Northern District of California certified the *Dukes* class.¹¹⁰ Judge Jenkins concluded that Wal-Mart's system giving local managers expansive discretion in pay and promotion decisions supported commonality.¹¹¹

In its certification order, the court first found that evidence from the plaintiffs' social framework expert provided support that Wal-Mart's policy of giving broad discretion to store managers engendered biased decisionmaking.¹¹² Next, the court established that the plaintiffs'

¹⁰⁸ See Plaintiffs' Third Amended Complaint, *supra* note 6, at 24–25 (detailing the plaintiffs' prayer for relief, which also included restoring employees to their "rightful positions" at Wal-Mart). However, the *Dukes*' class did not seek compensatory damages, likely because doing so would render monetary damages predominate over injunctive and declarative relief. Malveaux, *supra* note 13, at 50 n.97.

¹⁰⁹ See *infra* Part III.A.1 (summarizing the district court's certification order); Part III.A.2 (recapping the Ninth Circuit's holding to uphold class certification); Part III.B (explaining the *Dukes*' majority opinion); Part III.C (noting Justice Ginsburg's dissenting opinion on the commonality issue).

¹¹⁰ *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 137 (N.D. Cal. 2004), *aff'd*, 474 F.3d 1214 (9th Cir. 2007), *opinion withdrawn and superseded on denial of reh'g*, 509 F.3d 1168 (9th Cir. 2007), *aff'd* 509 F.3d 1168 (9th Cir. 2007), *reh'g en banc granted*, 556 F.3d 919 (9th Cir. 2009), *aff'd on reh'g en banc*, 603 F.3d 571 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011).

¹¹¹ See *id.* at 166 ("In sum, Plaintiffs have exceeded the permissive and minimal burden of establishing commonality."); *accord*, CONTE & NEWBERG, *supra* note 68, at 272–77 (citing to a long list of case law evidencing that commonality is easily met in most cases).

¹¹² *Dukes*, 222 F.R.D. at 154. The district court struck down Wal-Mart's challenges to Dr. Bielby's social framework analysis as "unfounded" and "imprecise," noting that the evidence held up even though it could not definitively state how regularly stereotypes played in decisions at Wal-Mart. *Id.* The district court's analysis seems credible, given that social science analyses combine with other evidence to draw an inference of discrimination. See Brief for American Sociological Association as Amicus Curiae Supporting Respondents at 8, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277) (explaining that, although social scientists are reluctant to predict the exact likelihood that an outcome will occur, they routinely use the laws of probability to predict when certain outcomes are likely to occur). For an overview of social framework analysis and its use in litigation, see Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 *FORDHAM*

statistical evidence and "benchmarking" study raised an implication of discrimination sufficient to satisfy commonality.¹¹³ In concluding, the court noted that the plaintiffs' anecdotal evidence of discrimination, aggregated with expert testimony and statistics, supported an inference that Wal-Mart's policies and procedures discriminated along gender lines.¹¹⁴

Finding that the plaintiffs satisfied FRCP 23(a), the court certified the class under FRCP 23(b)(2).¹¹⁵ To mitigate due process issues raised by Wal-Mart, the court ordered that notice and opt-out rights be provided to class members.¹¹⁶ The court, however, did not render the case unmanageable simply due to the sheer size of the class.¹¹⁷

L. REV. 37, 41–55 (2009).

¹¹³ *Dukes*, 222 F.R.D. at 165. The plaintiffs' statistics largely showed wide-spread gender disparities in pay and promotion and Wal-Mart's failure to keep up with its competitors with respect to promoting women to managerial positions. *Id.* at 155. Here, the court addressed the issue of whether trial courts are required to subject class certification experts to full *Daubert* scrutiny. *Id.* The court rejected Wal-Mart's approach asking the court to engage in a merits evaluation of the plaintiffs' expert opinions. *Id.*; *but see Daubert*, 509 U.S. 579, 597 (1993) (requiring the judge to act as a gatekeeper for admitting scientific evidence by ensuring the evidence is "relevant to the task at hand" and has a "reliable foundation," meaning it is based on sound "scientifically valid principles" and methodology); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 816 (7th Cir. 2010) (requiring district courts to subject class certification experts to full *Daubert* scrutiny).

¹¹⁴ *See Dukes*, 222 F.R.D. at 165 (noting that in accordance with *Teamsters*, 431 U.S. at 339, anecdotal evidence is commonly used in Title VII cases to bolster statistical proof of unlawful misconduct); *see also* Brief for Respondents, *supra* note 38, at 1 ("Wal-Mart executives refer to women employees as 'Janie Q's,' approve holding business meetings at Hooters restaurants, and attribute the absence of women in top positions to men being more aggressive in seeking advancement."). For a sample of first-hand accounts of alleged gender discrimination, see Plaintiffs' Third Amended Complaint, *supra* note 6, at ¶¶ 30–94.

¹¹⁵ *Dukes*, 222 F.R.D. at 188. The court gave relatively short shrift to the other three FRCP 23(a) requirements, but nonetheless found that the class met its burden under FRCP 23(a)(1) (numerosity), FRCP 23(a)(3) (typicality), and FRCP 23(a)(4) (adequacy). *See id.* at 188 (summarizing its opinion with respect to all four FRCP 23(a) prerequisites).

¹¹⁶ *Id.* at 173. Although the court found that the plaintiffs' prayer for monetary relief did not predominate over their claims for injunctive relief, the court required notice and opt-out rights given the "substantial" nature of the relief sought. *Id.* at 172; *see also In re Monumental Life Ins. Co.*, 365 F.3d at 416–17 (due process requires provision of notice where Rule 23(b)(2) class seeks monetary damages, while provision of opt-out rights is optional). The type of notice in FRCP 23(b)(2) class actions, however, need not always be equivalent to notice required for FRCP 23(b)(3) classes. *Johnson v. Gen. Motors Corp.*, 598 F.2d 432, 438 (5th Cir. 1979); *see generally* JASPER, *supra* note 60, at 17–19 (detailing the types of notice and procedures used to provide notice to classes).

¹¹⁷ Judge Jenkins opined that the purpose of Title VII and FRCP 23(b) would be defeated if large employers could be insulated from civil rights class actions. *Id.* at 171–72. The court dismissed Wal-Mart's position that the size of the class precluded certification, noting Title VII contains no special exception for large employers. *Id.* at 142. Insulating large companies, like Wal-Mart, from allegations that they have engaged in unlawful discrimination solely because of

2. Ninth Circuit Affirms Class Certification

On appeal, an eleven-judge en banc panel of the Ninth Circuit split 6-5 in favor of certification, finding that plaintiffs' provided sufficient evidence to establish commonality.¹¹⁸ First, the court accepted the plaintiffs' social framework analysis as establishing an inference of pervasive discrimination.¹¹⁹ At the class certification stage, the court noted, it is sufficient that experts present scientifically reliable evidence tending to show that a question of fact exists among class members—in this case, whether Wal-Mart's policy of giving subjective decision-making authority to managers propagates gender discrimination.¹²⁰ Furthermore, the court approved the district court's comprehensive, factual determinations of the plaintiffs' statistical evidence.¹²¹ Specifically, the majority concluded that the district court did not abuse its discretion when it relied on plaintiffs' use and interpretation of regionally-aggregated statistics, rather than store-level data, as evidence of commonality.¹²²

the sheer size of the company would undermine the imperatives of the 1964 Civil Rights Act. *See In re Monumental*, 365 F.3d at 417 n.16 (explaining that FRCP 23(b)(2) facilitates the bringing of civil rights class actions) (quoting *WRIGHT ET AL.*, *supra* note 79, at 215–17).

¹¹⁸ *Dukes*, 603 F.3d 571, 571 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011). In rendering its decision, the Ninth Circuit emphasized that a district court's factual findings in a certification order are entitled to deference and that certification may only be overturned if the decision is premised on legal error. *See id.* at 579 (citing *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001)). The court (on numerous occasions) commended the district court for conducting a rigorous analysis, in conformity with *Falcon*, to ensure that the class satisfied the prerequisites of FRCP 23(a). *See, e.g., Dukes*, 603 F.3d at 594–95 ("The dissent, in suggesting that we are unfaithful to *Falcon* . . . renders itself unpersuasive by critiquing the district court's eighty-four-page analysis as insufficiently rigorous.").

¹¹⁹ *Dukes*, 603 F.3d at 603.

¹²⁰ *Id.* Here, the Ninth Circuit doubted that a full *Daubert* hearing on the admissibility of Dr. Bielby's social framework analysis was warranted, nor required by law. *Id.* at 602 n.22; *but see Dukes*, 603 F.3d at 639 (Ikuta, J., dissenting) (opining that a full *Daubert* hearing is required at the class certification stage to analyze the relevancy and reliability of expert testimony); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 323 (3d Cir. 2008) (holding that expert opinion with respect to class certification calls for a rigorous analysis).

¹²¹ *Dukes*, 603 F.3d at 610 (finding the district court's "searching" analysis "solid" and in no way an abuse of discretion).

¹²² *See Id.* at 605 (citing *Kirkland v. N.Y. State Dep't of Corr. Servs.*, 520 F.2d 420, 425 (2d Cir.1975); *see also* 2 BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1598, 1723 (3d ed. 1996) (recognizing that the focus of analysis depends on the nature of a defendant's employment practices). Notably, even though Wal-Mart challenged use of regional statistics, their own statistics were arguably based on regional data as well. *Dukes*, 603 F.3d at 607 n.31.

Next, the court held that the district court properly certified the plaintiffs' backpay claims under FRCP 23(b)(2).¹²³ The Ninth Circuit rejected *Allison's* "incidental damages" test, rendering it at odds with the FRCP 23(b)(2) Advisory Committee's "predominance" test.¹²⁴ Instead, the Ninth Circuit stated that district courts should consider the objective effect of the relief sought by considering numerous factors, including whether monetary relief will raise due process or manageability issues.¹²⁵ Applying this balancing test, the court rendered the plaintiffs' backpay claims manageable and appropriate as a FRCP 23(b)(2) class action.¹²⁶

¹²³ *Dukes*, 603 F.3d at 617. Notwithstanding the district court's order to certify punitive damages under FRCP 23(b)(2), the Ninth Circuit remanded the plaintiffs' punitive damages claim to the district court to determine whether punitive damages rendered the relief predominantly monetary. *See Id.* at 621–22 (proffering four factors for the district court to consider on remand with respect to the propriety of punitive damages for FRCP 23(b)(2)). Although the Ninth Circuit did not explicitly rule that punitive damages in a massive class action could not be certified for a FRCP 23(b)(2) class, the court certainly suggested that it would have issues with such a ruling. *See Dukes*, 603 F.3d at 620 n.42 (discussing two cases in which the court found that punitive damages weighed against class certification under FRCP 23(b)(2)). After the Court's decertification ruling in *Dukes*, however, claims for punitive damages in FRCP 23(b)(2) classes are questionable – indeed, several federal district courts following *Dukes* have reached that exact decision. *See, e.g., Altier v. Worley Catastrophe Response, LLC*, 2011 WL 3205229, at *13 (E.D. La. July 26, 2011) (denying class certification under Rule 23(b)(2) with respect to punitive damages claim because such a claim “requires a focus on individualized issues to comply with constitutional protections”).

¹²⁴ *Dukes*, 603 F.3d at 616–17. The court likewise discarded its own *Molski* framework, finding that it overly-emphasized plaintiffs' subjective intent in bringing a lawsuit at the expense of other important pragmatic considerations. *Id.* at 616; *see also* Mark A. Perry & Rachael S. Brass, *Rule 23(B)(2) Certification of Employment Class Actions: A Return to First Principles*, 65 N.Y.U. ANN. SURV. AM. L. 681, 692 (finding the *Molski* framework at odds with *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)). For a discussion of the split among circuits as to how to evaluate these questions, *see* Sarah Kirk, *Ninth Circuit Discrimination Case Could Change the Ground Rules for Everyone*, 14 TEX. REV. L. & POL. 163, 171–73 (2009).

¹²⁵ *See Dukes*, 603 F.3d at 617 (adopting a case-by-case ad hoc approach); *but see* Kirk, *supra* note 124, at 172 (“Since *Molski*, no other circuit has adopted [an ad-hoc] test, and the Second Circuit . . . disavowed *Robinson* and the line of Second Circuit cases to which it belongs.”); *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1121 (8th Cir. 2005) (Class certification under Rule 23(b)(2) is proper only when the primary relief sought is declaratory or injunctive.”)

¹²⁶ *Dukes*, 603 F.3d at 619–20. Here, the court struck down Wal-Mart's argument that monetary relief necessarily predominates in a massive class action lawsuit. *Id.* at 618. Furthermore, the court noted that all circuit courts—even those averse to FRCP 23(b)(2) class certification when monetary relief is sought—accept that a request for backpay is fully compatible with the certification of a FRCP 23(b)(2) class. *See, e.g., Allison*, 151 F.3d at 415; *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 331 (4th Cir. 2006). Finally, the court stated, like many courts before it, that backpay is an “integral part of Title VII's make whole remedial scheme.” *Dukes*, 603 F.3d at 619 (internal quotations omitted); *accord*, FED. R. CIV. P. 23(b)(2) advisory committee's note to 1966 amend. (stating that the suit most apposite for FRCP 22(b)(2) certification are those in which a party is charged with discriminating against a large class).

B. *Wal-Mart v. Dukes*: Majority Opinion

Following the Ninth Circuit's opinion, Wal-Mart immediately filed a petition for a writ of certiorari with the United States Supreme Court.¹²⁷ On December 6, 2010, the Court granted Wal-Mart's petition on two issues: (1) whether the class certification permitted under FRCP 23(b)(2) was consistent with FRCP 23(a); and (2) whether claims for monetary relief can be certified under FRCP 23(b)(2), and, if so, under what circumstances.¹²⁸

Following oral arguments, on June 20, 2011, the Court concluded that the *Dukes* class failed to present sufficient evidence of companywide gender discrimination to establish a common question capable of class-wide resolution.¹²⁹ The Court also unanimously agreed that the district court improperly certified the plaintiffs' backpay claims under FRCP 23(b)(2).¹³⁰ Given *Dukes*' potential to completely alter the class action and employment discrimination legal landscape, this Section will summarize the majority and dissenting opinion in the case.¹³¹

¹²⁷ Petition for a Writ of Certiorari, *Wal-Mart Stores, Inc. v. Dukes* (No. 10-277), 2010 WL 3355820. For a timeline of the procedural posture of the *Dukes* litigation, see *Timeline: Wal-Mart discrimination case*, REUTERS (June 20, 2011), <http://www.reuters.com/article/2011/06/20/us-walmart-lawsuit-timeline-idUSTRE75J4DZ20110620>.

¹²⁸ *Dukes*, 603 F.3d 571, *petition for cert. granted*, 131 S. Ct. 795 (U.S. Dec. 6, 2010) (No. 10-277). Although the Court narrowed its focus to commonality under FRCP 23(a)(2) and monetary damages under FRCP 23(b)(2), *Dukes* discretely ruled on a number of other issues, including whether full *Daubert* review is required for experts at the certification stage and whether a court is permitted to delve into the merits of the underlying claims. See generally Grace E. Speights & Paul C. Evans, *Wal-Mart v. Dukes: Supreme Court announces stricter class certification standards*, THOMSON REUTERS, http://newsandinsight.thomsonreuters.com/Legal/Insight/2011/12_-_December/Wal-Mart_v_Dukes__Supreme_Court_announces_stricter_class-certification_standards/ (last visited Jan. 15, 2012).

¹²⁹ *Dukes*, 131 S. Ct. at 2541. For a transcript and audio version of oral arguments before the Supreme Court, see *Wal-Mart Stores, Inc. v. Dukes*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=10-277 (last visited Jan. 12, 2012). For a summary of oral arguments, see WEISS, *supra* note 13, at 23–26.

¹³⁰ *Dukes*, 131 S. Ct. at 2541.

¹³¹ See *infra* Part IV.B (providing a broad overview of the Court's majority opinion in *Dukes*); Part IV.C (explaining the reasoning behind Justice Ginsburg's dissenting opinion with respect to FRCP 23(a)(2) commonality).

1. Not Enough Glue to Bridge the *Falcon* Commonality Gap

As a threshold matter, the Court stressed trial judges must undertake a rigorous analysis to determine whether a class has affirmatively demonstrated compliance with the four FRCP 23(a) requirements.¹³² Agreeing with the Ninth Circuit, the Court noted that a thorough FRCP 23(a) examination will often entail overlap with the merits of the plaintiffs' underlying claim.¹³³

Next, in perhaps the most significant (and controversial) aspect of its ruling, the *Dukes* majority concluded that the class failed to meet the commonality criterion.¹³⁴ Commonality, the Court held, requires classes to demonstrate that its members have suffered the same injury—not just the same Title VII violation—in order to aggregate claims in a class action suit.¹³⁵ What matters to class certification, the court noted, is not the raising of common *questions*, but rather, common *answers* to bind the class and drive the litigation towards a resolution.¹³⁶ Just

¹³² See *Dukes*, 131 S. Ct. at 2551 ("Rule 23 does not set forth a mere pleading standard."); see also *Coopers & Lybrand v. Livesay*, 437 U. S. 463, 469 (1978) ("[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.") (internal quotations omitted); but see Brief for Civil Procedure Professors, *supra* note 81, at 9 (explaining that the Rule 23(a) inquiry does not require merits determinations with respect to the nature of the claims of the party seeking certification).

¹³³ *Dukes*, 131 S. Ct. at 2551 (citing *Falcon*, 457 U.S. at 161). Indeed, the Court settled the longstanding issue as to how deep a district court is permitted to probe into the merits of underlying discrimination claims. See *id.* at n.6 (explaining away its decision in *Eisen*, 417 U.S. at 177). Consensus is rapidly emerging among the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits that a certification inquiry requires rigorous factual review and preliminary determinations that may overlap with the merits of a discrimination claim. MCLAUGHLIN, *supra* note 70, AT § 3.12.

¹³⁴ *Dukes*, 131 S. Ct. at 2554. Agreeing with Judge Kozinski's Ninth Circuit dissent, Judge Scalia found that the class had "little in common but their sex and this lawsuit." *Id.* at 2557 (quoting *Dukes*, 603 F.3d 652 (Kozinski J., dissenting)). Legal practitioners and academics are sharply divided as to correctness of the *Dukes*' decision, as well as its implication for class action and employment discrimination law. Compare Fisk & Chemerinsky, *supra* note 19, at 1–2 ("The current Court majority has used its power to protect companies from big litigation . . . abdicat[ing] its responsibility to interpret federal laws on employment . . . and class actions consistently with Congress' intent to balance the interest of employees . . . with those of corporations."), with Robin Conrad, *Opposing view: Wal-Mart ruling preserves fairness*, USA TODAY (June 20, 2011, 9:11 PM), <http://www.usatoday.com/news/opinion/>

[editorials/2011-06-20-Wal-Mart-ruling-preserves-fairness_n.htm](http://www.usatoday.com/news/opinion/editorials/2011-06-20-Wal-Mart-ruling-preserves-fairness_n.htm) (While the justices did not agree on all aspects of the case, the fact that every one of them disagreed with the Ninth Circuit's decision to uphold the certification of the class is a testament to how outrageous this blockbuster class action was.").

¹³⁵ *Dukes*, 131 S. Ct. at 2551.

¹³⁶ *Dukes*, 131 S. Ct. at 2551 (citing Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 131–32 (2009); see also Robert G. Bone, *Sorting*

because one female Wal-Mart employee suffered from gender bias, Justice Scalia claimed, does not mean that a class of 1.5 million current and former employees experienced the same discrimination.¹³⁷

Relying on *Falcon*, the Court offered two ways in which a proposed class could bridge the conceptual gap between an individual's claim and a class action: evidence of a biased testing procedure for making employment decisions or proof that the employer operated under a companywide policy of discrimination.¹³⁸ The Court found, however, that neither method could sufficiently establish commonality in *Dukes*.¹³⁹

Because the plaintiffs did not allege a biased "testing procedure," the Court found that the first manner in "bridging the *Falcon* gap" had no application to the matter.¹⁴⁰ Without evidence of gender-biased evaluation criteria, the Court required the class to satisfy commonality with significant proof that Wal-Mart operated under a general policy of discrimination.¹⁴¹ Under the significant proof framework, the Court found plaintiffs' evidence insufficient to support commonality.¹⁴²

Through the Certification Muddle, 63 VAND. L. R. EN BANC 106, 111 (2011) ("Because 23(a)(2) requires only a 'common question of law or fact,' the court reasons, the plaintiffs should only have to present a question, not prove an answer. This argument misunderstands the importance of 23(a)(2) to litigating-group class actions certified under (b)(2)."). However, many courts and prominent authorities read FRCP 23(a)(2) to require only one common *question* of law or fact to bind a class. See, e.g., ANDERSON & TRASK, *supra* note 58, at 25–26 (citing 7A WRIGHT ET AL., *supra* note 78, at 218, and explaining that commonality exists if there is any issue of law or fact common to the class).

¹³⁷ *Dukes*, 131 S. Ct. at 2555–56.

¹³⁸ *Id.* at 2553 (citing *Falcon*, 457 U.S. at 159 n.15). What the court failed to consider, however, is that this *Falcon* footnote only indicated two instances in which hiring and promotion discrimination could be challenged in one class action because they shared common questions of law or fact. ZIMMER, *supra* note 17, at 33. The Court appeared to view these two exceptions as the only way in which discrimination classes could be certified, an approach not at issue in *Falcon*. See Brief for Respondents, *supra* note 38, at 25–26. For a discussion as to why the Court inappropriately conflated the two cases, see *infra* Part IV.A.1 (distinguishing the facts of *Falcon* from *Dukes*).

¹³⁹ *Dukes*, 131 S. Ct. at 2541. Surprisingly, the Court conceded that even one common question may bind the class, *id.* at 2556 (quoting Richard Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 176 n.110 (2003)) but surreptitiously buried this quote in its FRCP 23(b)(2) analysis. See *id.* at 2562 (Ginsburg, J., concurring in part and dissenting in part) ([T]he Court imports into the Rule 23(a) determination concerns properly addressed in a Rule 23(b)(3) assessment.").

¹⁴⁰ *Dukes*, 131 S. Ct. at 2553.

¹⁴¹ *Id.* at 2553–54. Courts are seemingly at odds with *Falcon*'s infamous footnote 15, as indicated in the Ninth Circuit's majority and dissenting opinions. Compare *Dukes*, 603 F.3d at 594–95 (Hawkins, J.) ("The dissent . . . seeks to create a new class action requirement based on a hypothetical in one sentence of Supreme Court dicta . . ."), with *Dukes*, 603 F.3d at 632 (Ikuta, J., dissenting) ("Evidence of discrete instances of discrimination are insufficient to sustain an

First, the Court dismissed the plaintiffs' statistics, finding that merely showing that a discretionary system produced sexual disparities is not enough to tie together the claims of the class.¹⁴³ Even if the plaintiffs' statistics demonstrated disparities at the local level, the Court found that such data would not establish a common issue because each store manager could tender a legitimate explanation for the disparity.¹⁴⁴

Second, the Court found the plaintiffs' anecdotal evidence insufficient to break the commonality barrier.¹⁴⁵ Notwithstanding sworn testimony by 120 employees in six different states alleging gender discrimination, the Court concluded that the evidence lacked vigor because of the sheer size and geographic scope of the class.¹⁴⁶ Even if all 120 personal accounts of blatant gender discrimination had

inference of an employer's general policy and do not rise to the level of 'significant proof.'").

¹⁴² *Dukes*, 131 S. Ct. at 2553. Seemingly at odds with *Watson*, the Court went to great (often confusing lengths) to express its holding that Wal-Mart's subjective policies did not establish enough "glue" to hold the class together). Compare *id.* at 2554 ("The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's 'policy' of *allowing discretion* by local supervisors over employment matters . . . a very common and presumptively reasonable way of doing business—one that we have said should itself raise no inference of discriminatory conduct."), with *id.* ("To be sure, we have recognized that, 'in appropriate cases,' giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory—since 'an employer's undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination.'").

¹⁴³ *Id.* at 2555. To the extent that plaintiffs' statistics could prove meaningful, the Court preferred store-level statistics, rather than regional and national data, as proof of unlawful gender disparities. *Dukes*, 131 S. Ct. at 2555–56; but see Brief for Labor Economists et al. as Amicus Curiae Supporting Respondents at 2–6, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277) (explaining that an analysis at the purported level of decision making is wrong and then providing four main reasons why regional statistics should be preferred in large class actions like *Dukes*).

¹⁴⁴ *Dukes*, 131 S. Ct. at 2555. Here, the Court found plaintiffs' discrimination theory at odds with Court precedent because they could not point out a specific employment practice that caused gender disparities in pay and promotion. See *id.* (citing to *Watson*, 487 U.S. at 994).

¹⁴⁵ Malveaux, *supra* note 13, at 41; see also ZIMMER, *supra* note 17, at 38 n.167 (suggesting that the Court's analysis on the plaintiffs' anecdotal evidence may lead to a mathematical test in future case).

¹⁴⁶ *Dukes*, 131 S. Ct. at 2555–57. The Court favorably cited to *Teamsters*, where plaintiffs produced one anecdote for every eight class members. 431 U.S. at 338. Given the *Dukes*' court analysis of anecdotal evidence, future courts may be hard pressed to accept a minimal number of affidavits purporting expansive discrimination against large employers. See Malveaux, *supra* note 13, at 41 (explaining that, had the plaintiffs collected affidavits in the same proportion as *Teamsters*, they would have had to come forth with 187,500 affidavits). The Court also failed to consider the anecdotal evidence in the context of plaintiffs' statistical and social framework analysis evidence, seemingly at odds with federal court's prior attitudes. See, e.g., *Teamsters*, 431 U.S. at 338 (approving government's use of anecdotal evidence to *bolster* statistical disparities); MCLAUGHLIN, *supra* 70, at 490 ("The commonality threshold ordinarily is met by specific proof, in the form of expert opinion and probative statistical and anecdotal evidence (presented in testimonial or affidavit form) . . .") (emphasis added).

been true, the Court found them too weak to support an inference of class-wide discrimination.¹⁴⁷

Third, the Court admonished the plaintiffs' social framework analysis, observing that Dr. Bielby could not conclusively determine the percentage of employment decisions made by stereotyped thinking.¹⁴⁸ Because the Court insisted that the answer to this question, rather than the question itself, establish the basis for commonality, the Court rendered the sociologist's testimony "worlds away" from significant proof.¹⁴⁹ In rejecting Dr. Bielby's opinion, the Court expressed doubt in the district court's conclusion that experts should not be subjected to close scrutiny during class action certification proceedings.¹⁵⁰

2. Backpay is not Viable under FRCP 23(b)(2)

Though the Court disagreed on the commonality issue, all nine Justices agreed that the claims for backpay may not be certified under FRCP 23(b)(2) where the requested damages are not incidental to injunctive or declaratory relief.¹⁵¹ The Court expressed trepidation that

¹⁴⁷ *Dukes*, 131 S. Ct. at 2556 (citing *Falcon*, 457 U.S. at 159 n.15).

¹⁴⁸ *Dukes*, 131 S. Ct. at 2553 (quoting *Dukes*, 222 F.R.D. at 192).

¹⁴⁹ *Dukes*, 131 S. Ct. at 2554. Justice Scalia's analysis of social framework evidence reveals a failure to understand sociological testimony and its relevance to systemic disparate treatment discrimination claims. See ZIMMER, *supra* note 17, at 37 (explaining that the Court failed to understand that social framework testimony is only relevant when examining it within the context of other statistical evidence); see also Hart & Secunda, *supra* note 112, at 39 ("[A social framework expert] will explain the general social science research on the operation of stereotyping and bias in decision making and . . . examine the policies and practices . . . at issue to identify those that research has shown will tend to increase or limit the likely impact of these factors."); but see John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 VA. L. REV. 1715, 1718–19 (2008) (suggesting that social framework testimony should be categorically disallowed in federal courts).

¹⁵⁰ *Dukes*, 131 S. Ct. at 2554. Without making a bright-line decision, the Court implicitly affirmed that expert testimony, at the certification stage, is subject to the standards set forth by *Daubert*, 509 U.S. at 593–94; *accord*, *Allen*, 600 F.3d at 816; *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011).

¹⁵¹ *Dukes*, 131 S. Ct. at 2557. In adopting this approach, the Court actually failed to address one of the questions for which it granted review: whether any monetary relief is appropriate for FRCP 23(b)(2) classes. The Court relied on the text of FRCP 23(b)(2), its history, and structure of the rule in reaching its conclusion. See, e.g., *Dukes*, 131 S. Ct. at 2558 ("In none of the cases cited by the Advisory Committee as examples of (b)(2)'s antecedents did the plaintiffs combine any claim for individualized relief with their classwide injunction."); but see *Anchem*, 521 U.S. at 614 (opining that civil rights cases against parties charged with unlawful, class based discrimination are prime examples of FRCP 23(b)(2) classes); 1 JANICE GOODMAN ET AL., *EMPLOYEE RIGHTS LITIGATION* § 2.10[2][a][i] (2010) ("Backpay is the most common form of monetary relief in Title VII cases . . . routinely granted barring extraordinary circumstances.").

certification of individualized relief under FRCP 23(b)(2), without notice or the opportunity to opt out, would run afoul of due process.¹⁵²

Moreover, the Court concluded that backpay could not be calculated on an aggregate basis and rejected the district court's proffered mathematical scheme for determining backpay.¹⁵³ Again citing due process concerns, the *Dukes* majority concluded that if the class could prove discrimination during the liability phase of litigation, Wal-Mart should then be entitled during the remedial phase to raise affirmative defenses to each class members' claim for individual relief.¹⁵⁴ The Court found that Wal-Mart would lose its Title VII right to defend itself

Furthermore, in conditioning the availability of backpay on whether such relief is incidental to injunctive relief, the Court, ostensibly at odds with numerous Title VII decisions, found the equitable nature of backpay irrelevant. Compare *Dukes*, 131 S. Ct. at 2560 ("[FRCP 23(b)(2)] does not speak of 'equitable' remedies but generally of injunctions and declaratory judgments."), with *Allison*, 152 F.3d at 415 (finding that FRCP 23(b)(2) permits monetary relief that is equitable and that "[b]ack pay, of course, had long been recognized as an equitable remedy").

¹⁵² See *Dukes*, 131 S. Ct. at 2559 (citing *Phillips Petroleum Co. v. Stutts*, 472 U.S. 797, 812 (1985)). The Court distinguished individualized claims of monetary from class-cohesive forms of monetary relief—the former requiring notice and opt-out rights under FRCP 23(b)(3), while the latter not requiring these protections because they have "no purpose" for cohesive FRCP 23(b)(2) classes. *Id.* For the *Dukes* class in particular, without the ability for plaintiffs to opt out, FRCP 23(b)(2) encouraged class members to forego potentially valid compensatory damages. See *id.* ("Respondents' predominance test, moreover, creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief."); see generally Malveaux, *supra* note 92, at 20 (explaining the differences between equitable Title VII relief, like backpay, and predominantly monetary damages, like compensatory damages, that influence the cohesiveness of a class).

¹⁵³ See *Dukes*, 131 S. Ct. at 2561 (describing, and then admonishing, the Ninth Circuit's endorsement of a formula to determine backpay relief should the plaintiffs succeed during the liability phase of disparate treatment litigation). Contrary to the language of Justice Scalia's majority opinion, however, the Ninth Circuit never formally adopted a trial plan for the district court:

At this stage, we express no opinion regarding Wal-Mart's objections to the district court's tentative trial plan (or that trial plan itself), but simply note that, because there are a range of possibilities . . . that would allow this class action to proceed in a manner that is both manageable and in accordance with due process, manageability concerns present no bar to class certification here.

Dukes, 603 F.3d at 625.

¹⁵⁴ See *Dukes*, 131 S. Ct. at 2561 (citing *Teamsters*, 431 U.S. at 362). What the Court failed to consider, though, is that the quote in *Teamsters* regarding the remedial stage of a pattern-or-practice class action is that, when a plaintiff seeking backpay establishes a pattern-or-practice of discrimination during the liability phase, "a district court must *usually* conduct additional proceedings . . . to determine the scope of individual relief." *Teamsters*, 431 U.S. at 361 (emphasis added). See, e.g., *Dukes*, 603 F.3d at 625–27 (describing an approach endorsed by the Ninth Circuit in *Hilao*, 103 F.3d at 782–87, to protect the due process rights of both plaintiffs and defendant).

against individual claims if the lower court allowed backpay claims to be calculated on the basis of a "Trial by Formula."¹⁵⁵

C. *Wal-Mart v. Dukes: Dissenting Opinion*

Justice Ginsburg, joined by Justices Breyer, Kagan, and Sotomayor, agreed with the majority's FRCP 23(b)(2) analysis, but disputed its FRCP 23(a)(2) commonality analysis.¹⁵⁶ In the dissent's view, the Court conflated the permissive requirements of commonality with the exacting standards of FRCP 23(b)(3).¹⁵⁷ The dissent argued that one significant issue common to the class may be sufficient to support class certification under FRCP 23(a)(2).¹⁵⁸ The plaintiffs, the dissent

¹⁵⁵ See *Dukes*, 131 S. Ct. at 2561 ("We disapprove that novel project."). Here, the Court found that, to strip Wal-Mart of its statutory right under Title VII to defend itself against claims of individual monetary relief, the district court's trial plan contravened the Rules Enabling Act. See 28 U.S.C. § 2072(b) ("[U.S. district court rules] shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."); *Ortiz*, 527 U.S. at 845 ("[T]he Rules Enabling Act and the general doctrine of constitutional avoidance would jointly sound a warning of the serious constitutional concerns that come with any attempt to aggregate individual . . . claims."). For a thorough examination of the Rules Enabling Act, including its effect on class actions lawsuits after *Amchem*, 521 U.S. 591 (1997), see Note, *The Rules Enabling Act and the Limits of Rule 23*, 111 HARV. L. REV. 2294 (1998).

¹⁵⁶ See *Dukes*, 131 S. Ct. at 2561–62 (Ginsburg, J., concurring in part and dissenting in part) (agreeing that the district court improperly certified the class under FRCP 23(b)(2) because of non-incidental backpay claims, but that the majority improperly imported requirements under FRCP 23(b)(3) into its FRCP 23(a)(2) analysis). Furthermore, Justice Ginsburg would have remanded to the district court for a determination as to whether the class could be certified under FRCP 23(b)(3). *Id.* at 2561; but see Coffee, *supra* note 16 (referring to Justice Ginsburg's assertion that the class could be remanded for consideration under FRCP 23(b)(3) as a non-starter because "[i]n all circuits, the predominance standard [of FRCP 23(b)(3)] has long been the Grim Reaper of putative class actions.").

¹⁵⁷ *Dukes*, 131 S. Ct. at 2565 (Ginsburg, J., concurring in part and dissenting in part). The dissent faulted the majority for taking a "dissimilarities" approach—more suitable under FRCP 23(b)(3)—rather than focusing its attention on what united the class. See *id.* (faulting the majority opinion for adopting Richard Nagareda's "dissimilarities" inquiry out of context); Nagareda, *supra* note 136, at 131 (finding that FRCP 23(b)(3) requires "some decisive degree of similarity across the proposed class" because it "speaks of common questions that predominate over individual ones").

¹⁵⁸ *Dukes*, 131 S. Ct. at 2565 (Ginsburg, J., concurring in part and dissenting in part) (citing *Dukes*, 222 F.R.D. at 145). Within this context, Justice Ginsburg emphasized the appropriate standard of review for appellate review of a certification order. See *Id.* at 2562 ("Absent an error of law or an abuse of discretion, an appellate tribunal has no warrant to upset the District Court's finding of commonality."); accord, *Armstrong v. Davis*, 275 F.3d 849, 867 (9th Cir. 2001) (finding that review of certification is subject to "very limited" review."). Indeed, Justice Scalia failed to declare the standard of review in his majority opinion. See *Fisk & Chemerinsky, supra* note 19, at 84 (finding that Justice Scalia ignored the abuse of discretion standard of review and engaged in *de novo* review). Legal decisions of a lower court on questions of law are reviewed

reasoned, had sufficiently demonstrated the existence of a common question: whether Wal-Mart's pay and promotions policies gave rise to gender discrimination.¹⁵⁹

The dissent concluded that Wal-Mart's practice of providing unchecked discretion to local managers could itself constitute a policy that created a question common to the class.¹⁶⁰ In contrast to the majority, the dissent emphasized that a system of delegated discretion is a practice actionable under Title VII when it produces discriminatory results.¹⁶¹ The plaintiffs' evidence suggested, according to the dissent, that unbridled discretion afforded to managers permitted gender biases to pervade pay and promotion decisions throughout local Wal-Mart stores.¹⁶²

under a non-deferential, *de novo* standard, allowing the appeals court to substitute its own judgment about whether the lower court correctly applied the law. *See Pierce v. Underwood*, 487 U.S. 552, 558 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for abuse of discretion).") (internal quotations omitted).

¹⁵⁹ *Dukes*, 131 S. Ct. at 2564 (Ginsburg, J., concurring in part and dissenting in part). To bring clarity to its opinion, the dissent rendered an example of how subjective employment policies may give rise to discrimination:

Performing in symphony orchestras was long a male preserve. In the 1970's orchestras began hiring musicians through auditions open to all comers. Reviewers were to judge applicants solely on their musical abilities, yet subconscious bias led some reviewers to disfavor women. Orchestras that permitted reviewers to see the applicants hired far fewer female musicians than orchestras that conducted blind auditions, in which candidates played behind opaque screens.

Id. at n.6 (internal citations omitted).

¹⁶⁰ *See id.* at 2567 (Ginsburg, J., concurring in part and dissenting in part) ("Wal-Mart's delegation of discretion over pay and promotions is a policy uniform throughout all stores."); *see also ZIMMER, supra* note 17, at 39 (finding it puzzling that Justice Scalia, without citing to any authority, decided that Wal-Mart's policy giving broad discretion to local managers could not pass muster under disparate treatment or impact law);

¹⁶¹ *Dukes*, 131 S. Ct. at 2567 (Ginsburg, J., concurring in part and dissenting in part) (citing *Watson*, 487 U.S. at 990–91). Today, however, the most difficult litigated issues surround the delegation of subjective decision-making power to supervisors and allegations that this power has been exercised in a discriminatory manner. WEISS, *supra* note 13, at 9. Numerous academics see issues in charging an employer with this form of "negligent discrimination." *See, e.g.,* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 971 (1993) ("Similarly, negligent discrimination need not and ought not to be viewed as morally reprehensible conduct. Employers are confronted daily with many difficult decisions. Even the best will inadvertently fail to exercise due care on occasion . . .").

¹⁶² *Dukes*, 131 S. Ct. at 2563 (Ginsburg, J., concurring in part and dissenting in part). Unlike the majority, the dissent gave due credence to the plaintiffs' anecdotal evidence and reproved the majority for putting a purported numerical baseline for the number of anecdotal pieces necessary to establish sufficient proof of discrimination. *See id.* n.4 ("[Teamsters] can hardly be said to

IV. ANALYSIS

The *Dukes* class certification standard raised the bar for Title VII employment discrimination class actions.¹⁶³ As one class-action expert noted, "[t]his opinion insulates companies . . . from being attacked if discrimination flourishes because they give too much discretion to individual managers. What the [C]ourt is emphasizing is it is really serious about . . . commonality."¹⁶⁴ While some practitioners and groups hail the *Dukes* decision, this Part mounts an offensive against the Court's decision to disqualify the *Dukes* class at the starting gate.¹⁶⁵

Accordingly, this Part will first examine how the Court's interpretation of commonality strays well beyond prior Title VII class action jurisprudence.¹⁶⁶ Next, this Part will discuss how the Court's unanimous holding that backpay could not be certified under the FRCP 23(b)(2) class contravened well-settled legal precedent, failed to consider the importance of backpay as an equitable remedy in Title VII cases, and unfairly discredited the district court's use of proper discretion in certifying the *Dukes* class.¹⁶⁷

establish a numerical floor before anecdotal evidence can be taken into account.").

¹⁶³ See Malveaux, *supra* note 13, at 35 (opining that the Court drew a "commonality" boundary line that favors large, powerful businesses over victims of alleged systemic discrimination); Glenn S. Grindlinger & Eli Z. Freedberg, *Changing the Game, The Supreme Court Raises the Bar on the Criteria Necessary to Certify a Class Action*, 33 N.J. LAB. & EMP. L. Q. 5, 5 (2011) ("The clarifications enunciated by the Supreme Court will make it more difficult for plaintiffs to have their lawsuits certified as a class action, and will provide some procedural relief to employers."); Andrew Longstreth, *Wal-Mart v. Dukes shakes up employment class actions*, CHI. TRIB. (Jan. 9, 2010, 6:21 PM), <http://www.chicagotribune.com/news/sns-rt-us-walmart-studytre809013-20120109,0,7436515>.

Story (heralding *Dukes* as a "game-changer" and explaining how it has "lived up to its hype").

¹⁶⁴ Daniel Fisher, *Supreme Court Dumps Wal-Mart Sex-Discrimination Class Action*, Forbes (June 20, 2011, 11:29 AM), [http://www.forbes.com/sites/danielfisher/2011/06/20/supreme-court-dumps-wal-mart-](http://www.forbes.com/sites/danielfisher/2011/06/20/supreme-court-dumps-wal-mart-sex-discrimination-class-action)

[sex-discrimination-class-action](http://www.forbes.com/sites/danielfisher/2011/06/20/supreme-court-dumps-wal-mart-sex-discrimination-class-action) (quoting Fordham University School of Law School Professor, Howard Erichson)

¹⁶⁵ See, e.g., WEISS, *supra* note 13, at 26 (taking issue with plaintiffs' anecdotal and social framework evidence); Walter Olson, *Wal-Mart v. Dukes: The Court Gets One Right*, CATO INST. (June 20, 2011, 12:57 PM), <http://www.cato-at-liberty.org/wal-mart-v-dukes-the-court-gets-one-right/> ("To sweep hundreds of thousands of workers . . . into a class . . . even if they personally have suffered no harm whatsoever . . . bends the class action mechanism beyond its proper capacity."); *but see* Fisk & Chemerinsky, *supra* note 19, at 79, 83 (finding *Dukes* stunning in its activism and flawed on four important levels).

¹⁶⁶ See *infra* Part IV.A (explaining why the plaintiffs sufficiently established a common question of law or fact to meet FRCP 23(a)(2)).

¹⁶⁷ See *infra* Part IV.B (opining that the *Dukes* court incorrectly denied certification under FRCP 23(b)(2)).

A. Plaintiffs' Evidence Provided Sufficient Support to Raise a Common Question

Courts have long recognized that commonality under FRCP 23(a)(2) is not a high burden.¹⁶⁸ Despite commonality being a permissive standard, the Court decertified the *Dukes* class for failing to "bridge the *Falcon* gap."¹⁶⁹ This Section first discusses how the plaintiffs' provided sufficient evidence to satisfy commonality, and the Court's holding to the contrary inappropriately diminishes the district court's rigorous certification analysis.¹⁷⁰ Next, this Section opines that the Court incorrectly applied substantive systemic disparate treatment and disparate impact substantive law to the plaintiffs' evidence of systemic discrimination.¹⁷¹

1. *Falcon* Did Not Create a Significant Proof Requirement for Commonality

Despite its faulty commonality analysis, the Court appropriately highlighted that the class certification standard is demanding.¹⁷² *Falcon* provides clear-cut guidance—a Title VII class action may only be certified if the trial court is convinced, after a rigorous analysis, that the prerequisites for FRCP 23(a) have been satisfied.¹⁷³ Equally important,

¹⁶⁸ See, e.g., *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) (finding that commonality is "easily met"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) (noting that commonality is a permissive requirement and all questions of law and fact need not be common to satisfy the rule), accord, Brief of Civil Procedure Professors, *supra* note 81, at 5–6 (explaining how the drafters of Rule 23 envisioned commonality as a "rather simple matter");

¹⁶⁹ See *Dukes*, 131 S. Ct. at 2560–61 (finding that plaintiffs lacked sufficient glue to bind their claims in a class action);

¹⁷⁰ See *infra* Part IV.A.i (suggesting that *Falcon* did not create a heightened certification standard).

¹⁷¹ See *infra* Part IV.A.ii (arguing that despite the Court's heightened certification standard, the plaintiffs provided sufficient evidence to raise a common question of law or fact to bind the class).

¹⁷² See *Dukes*, 131 S. Ct. at 2551 (explaining that FRCP 23 does not set forth a "mere pleading standard"); see also *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001) (leading circuit court case to explicate the rigorous standard). In *Szabo*, the Seventh Circuit found that the trial court certified the class without resolving legal and factual disputes that strongly influence a certification inquiry. *Id.* at 675. Analogizing to other inquiries that district courts routinely make under FRCP 12(b)(1) and FRCP 12(b)(2), the court noted that "[b]efore deciding whether to [certify] a class action . . . a judge should make whatever factual and legal inquiries are necessary under Rule 23." *Id.* at 676.

¹⁷³ *Falcon*, 457 U.S. at 161. Important to note, however, a district court is not bound by merits determinations at the class certification stage—a preliminary inquiry into the merits is sometimes

commonality requires that the plaintiffs establish common questions of law and facts, not answers to these questions.¹⁷⁴

Notwithstanding these well-established standards, the Court depicts *Falcon* as requiring a significant proof requirement that *Falcon* did not create.¹⁷⁵ Specifically, the *Dukes* majority erroneously converted part of a single sentence in *Falcon* dicta into a novel and exacting standard for class certification.¹⁷⁶ The facts underlying *Falcon*, however, are easily distinguishable from *Dukes*.¹⁷⁷ In *Falcon*, the Court addressed FRCP 23(a) within the context of an "across-the-board" class that sought to include both job applications denied hire and employees denied promotions.¹⁷⁸ The *Dukes* class did not present separate legal theories of recovery that the *Falcon* plaintiffs, both employees and job applicants, had pursued together in one class.¹⁷⁹ In contrast to the

necessary to make a meaningful determination of class certification only. *Dukes*, 603 F.3d at 594; *see also* *Schleider v. Wendt*, 618 F.3d 679, 686 (7th Cir. 2010) ("We do not think it is appropriate for the judiciary to make its own . . . adjustments by interpreting Rule 12 to make likely success on the merits essential to class certification . . .") (Easterbrook, J.).

¹⁷⁴ *See Eisen*, 417 U.S. at 156 ("[T]he question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."). To answer questions common to the class is the purpose of a merits inquiry, appropriately addressed at summary judgment and trial. *See* FED. R. CIV. P. 23 advisory committee's notes (2003) (explaining that an evaluation of the probable outcome of the merits is "not properly part of the certification decision"). As mentioned previously, the fact that FRCP 23(a) determinations are not intended to be binding on the actual outcome of the case lends support to the proposition that a class need only present *questions* of law or fact common to the class. Brief for Civil Procedure Professors, *supra* note 81, at 8.

¹⁷⁵ Brief for Respondents, *supra* note 38, at 25–26. As Justice Ginsburg noted in her dissent, the FRCP 23(a) commonality inquiry is analytically distinct from the more exacting requirement that common questions "predominate" in a FRCP 23(b)(3) class action. *Dukes*, 131 S. Ct. at 2556 (Ginsburg, J., concurring in part and dissenting in part); *see also Amchem*, 521 U.S. at 615 (requiring a "close look" standard only to a FRCP 23(b)(3) predominance inquiry).

¹⁷⁶ Brief for Civil Procedure Professors, *supra* note 81, at 8; *see also Brown v. Nucor Corp.*, 576 F.3d 149, 156 (4th Cir. 2009) (explaining that the question before the court was not whether the plaintiffs could prove its disparate impact and disparate treatment claims, but whether the *basis* of their claims was sufficient to support commonality); *but see Dukes*, 603 F.3d at 641 (Ikuta, J., dissenting) (reading *Falcon* to require a showing of evidence "sufficient to carry plaintiffs' burden of adducing significant proof").

¹⁷⁷ *Compare Falcon*, 457 U.S. at 157–58 (proposed class consisting of applicant and employees), *with Dukes*, 131 S. Ct. at 2544 (proposed class consisting of current and former employees).

¹⁷⁸ *See Falcon v. Gen. Tel. Co. of Southwest*, 626 F.2d 372, 375 (5th Cir. 1980). During this time period (and especially with respect to Title VII claims), courts were extremely liberal in certifying classes. *See, e.g.,* Tristan K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 *FORDHAM L. REV.* 659, 678–79 (2003) (noting the "high-water mark" of class certification under Title VII during the early years of litigation under FRCP 23).

¹⁷⁹ *Falcon*, 457 U.S. at 158. In support of class certification, the sole named plaintiff offered only his own personal claim of promotion discrimination, clearly not adequate to support a finding of commonality amongst the class. *See id.* at 161 (holding plaintiffs' individual evidence

discrete classes in *Falcon*, the *Dukes* class was defined by gender, claims pursued (pay and promotion), and discrimination theories (disparate treatment and disparate impact discrimination).¹⁸⁰ In other words, in circumstances where plaintiffs challenge two distinct processes—hiring and promotion—they must show significant proof of "a common policy *alleged* to be discriminatory" to join applicants and employees in a single class.¹⁸¹

Moreover, contrary to the majority in *Dukes*, *Falcon* does not require plaintiffs to show a common policy of proven discrimination (i.e., an "answer" to the question of whether Wal-Mart acts under a pattern-or-practice of discrimination).¹⁸² Rather, plaintiffs need only present evidence sufficient to show a common question—in this case, whether Wal-Mart's policy of subjective employment decision-making operated to discriminate against female employees.¹⁸³ The Court's heightened standard runs afoul of *Falcon*'s central holding and Title VII, which does not impose an elevated standard for challenges to subjective decision-making policies.¹⁸⁴

2. The *Dukes* Class Presented Sufficient Evidence of a Common Policy of Discrimination

of discrimination insufficient to support commonality under the Court's "rigorous analysis" threshold).

¹⁸⁰ See Brief for Respondents, *supra* note 38, at 9–10 (addressing plaintiffs' underlying systemic disparate treatment and systemic disparate impact theories of discrimination); Brief for Civil Procedure Professors, *supra* note 81, at 21 (explaining the differences between the *Falcon* class and the *Dukes* class).

¹⁸¹ Brief for Respondents, *supra* note 38, at 26 (citing *Staton*, 327 F.3d at 955, and *Griffin v. Dugger*, 823 F.2d 1476, 1486–87 (11th Cir. 1987)).

¹⁸² See *Malveaux*, *supra* note 13, at 38 (disagreeing with Justice Scalia's deconstructing of the term "question" in FRCP 23(a)(2) to require an "answer" whether Wal-Mart engaged in a pattern-or-practice of discrimination). Regardless of this formulation, one group suggested the plaintiffs' evidence could meet the Court's exacting "significant proof" threshold because, although "statistical analyses cannot definitively answer the question; they can, however, shed light on the proper answer"). Brief for Labor Economists, *supra* note 143, at 9.

¹⁸³ *Dukes*, 131 S. Ct. at 2565 (Ginsburg, J., concurring in part and dissenting in part). In other words, the plaintiff's sufficient common question "was whether the way the policy of discretion worked amounted to a pattern or practice of discrimination." ZIMMER, *supra* note 17, at 34. The plaintiffs' closely followed the Court's mandate that the existence and nature of the challenged subjective practice or policy may be proven through direct or circumstantial evidence. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003).

¹⁸⁴ See *Falcon*, 457 U.S. at 161 ("Title VII class action[s], like any other class action, may only be certified if . . . Rule 23(a) [has] been satisfied."); 42 U.S.C. § 2000e-2(a) & (k) (no heightened standard for disparate treatment discrimination claims); see also *Desert Palace*, 539 U.S. at 98–101 (showing that where the statutory language of Title VII does not indicate a clear intent by Congress to impose a heightened evidentiary standards, the Court has declined to do so).

As the lower courts and Justice Ginsburg correctly concluded, the plaintiffs' evidence satisfied commonality under FRCP 23(a).¹⁸⁵ The *Dukes* women presented three categories of evidence to meet its commonality burden: (1) expert opinion; (2) statistical evidence; and (3) anecdotal evidence.¹⁸⁶ Pursuant to *Falcon*, the district court properly engaged in a thorough, rigorous review of both the pleadings and the range of evidence gathered during discovery in determining that the plaintiffs established commonality.¹⁸⁷ The Supreme Court's inappropriately rejected the plaintiffs' commanding evidence of pervasive gender discrimination at Wal-Mart.¹⁸⁸

i. Social Framework Testimony Supports an Inference of Employment Discrimination

For example, Justice Scalia improperly deemed Dr. Bielby's social framework analysis as "world's away" from meeting the significant proof standard.¹⁸⁹ In rebuking the plaintiffs' social framework evidence,

¹⁸⁵ See *Dukes*, 131 S. Ct. at 2562 (Ginsburg, J., concurring in part and dissenting in part) (agreeing with the district court's commonality inquiry); *Dukes*, 222 F.R.D. at 145 (finding that the evidence "more than" satisfied plaintiffs' burden to demonstrate commonality).

¹⁸⁶ *Dukes*, 131 S. Ct. at 2549. For an in-depth overview of plaintiffs' evidence (as well as Wal-Mart's counterevidence), see *Dukes*, 222 F.R.D. at 151–66.

¹⁸⁷ See Brief for National Employment Lawyers Association et al., *supra* note 72, at 20–26 (explaining how the district court's certification analysis closely followed the *Falcon* "rigorous analysis" mandate); *Dukes*, 603 F.3d at 595 (rebuking the Ninth Circuit dissenters for deeming an eight-four page certification order as insufficiently rigorous). In accordance with other circuits, the district court in *Dukes* properly tested the plaintiffs' evidence against two key elements: (1) Whether the defendant has a common employment policy or practice permitting subjective or discretionary decisionmaking that applies in generally the same manner to the class; and (2) Whether the plaintiffs have proffered competent, admissible statistical and/or other evidence at the class certification phase that can support a reasonable inference of discrimination against the class. See, e.g., *Brown*, 576 F.3d at 157 (analyzing plaintiffs' claims under these questions).

¹⁸⁸ See *Dukes*, 131 S. Ct. at 2562 (Ginsburg, J., concurring in part and dissenting in part) ("The plaintiffs' evidence, including class members' tales of their own experiences, suggests that gender bias suffused Wal-Mart's company culture."); Malveaux, *supra* note 13, at 39 (opining that, taken together, plaintiffs' statistics, anecdotal accounts, and social framework analysis provided the "glue necessary to bind" the class).

¹⁸⁹ *Dukes*, 131 S. Ct. at 2554. Justice Scalia is known for his demeaning and derisive tone, both in his opinions and questioning during oral arguments. See Lincoln Caplan, "Forget the Tone. It's Dissent That Matters", YALE L. SCH. (July 7, 2003), <http://www.law.yale.edu/news/4615.htm> ("Scalia is considered an intellectual leader . . . but his stance as a dissenter seems anti-institutional and self-defeating . . . judging judges . . . burst[ing] into tantrums so injudiciously . . . [i]sn't it time for him to bite his tongue?"). For instance, Justice Scalia's scathing dissent in *Lawrence v. Texas* has been discussed frequently by academics and commentators:

the Court displayed a misunderstanding of sociology and its relevancy to pattern-or-practice discrimination suits.¹⁹⁰

Numerous social science research studies have shown that informal or formal corporate cultures affect individual-level decision making.¹⁹¹ Relevant to *Dukes*, personnel policies which tolerate or promote discretionary decision-making by managers, in the absence of formal guidelines, may lead to biased decisionmaking and gender disparate outcomes.¹⁹² Specifically, a policy that provides managers with unchecked discretion may permit decisions that integrate stereotypes about women unrelated to job performance.¹⁹³

Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct . . . [m]any Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination" which it is the function of our judgments to deter.

539 U.S. 558, 602 (2003).

¹⁹⁰ Sociology is a social science that employs systematic research methods to analyze data on an individual or organizational level. Brief for American Sociological Association, *supra* note 112, at 2–3. Like other reputable scientists, social science researchers use aggregate data to form testable hypotheses about specific problems. *Id.* at 3. Sociologists can determine with accuracy when particular conditions or practices lead to common outcomes. *Id.* Nonetheless, reluctant to assert causality without perfect data, social scientists do not usually predict the exact likelihood that some outcome will occur or the number of times it will occur. *Id.*; see also *Dukes*, 222 F.R.D. at 154 (explaining that sociology does not employ certainties, but rather, draws inferences). For a discussion of sociological research and its methodologies to draw causal inferences, see M. Gangul, *Causal Inference in Sociological Research*, 36 ANN. REV. SOCIOLOGY 21, 22 (2010).

¹⁹¹ See, e.g., J.N. BARON & D.M. KREPS, STRATEGIC HUMAN RESOURCES: FRAMEWORKS FOR GENERAL MANAGERS 20 (1999) (showing that, in addition to official corporate policies, informal subcultures may emerge within organizations to "send powerful message that are likely to influence organizational norms and values as experienced by employees"); Hart & Secunda, *supra* note 112, at 41 ("In particular, scholars have pointed to excessively subjective decisionmaking structures, without sufficient guidance or monitoring, as likely to exclude or otherwise disadvantage women and minorities in the workplace.").

¹⁹² Elizabeth Gorman, *Gender Stereotypes, Same-Gender Preferences, and Organizational Variation in the Hiring of Women: Evidence from Law Firms*, 70 AM. SOC. REV. 702, 702 (2005). When subjective discretion is condoned by corporate culture or policy, like Wal-Mart, it permits managers' stereotypes and in-group preferences to prejudice employment decisions in ways that disadvantage women. See generally N. Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and their Behavioral Manifestations*, 17 SOC. J. RESEARCH 143 (2004).

¹⁹³ See Brief for American Sociological Society, *supra* note 112, at 18–19 ("[Sociology] has

In other words, plaintiffs' evidence showing the existence of this culture and structure at Wal-Mart is relevant because it supports drawing the inference of discrimination based on the aggregate evidence provided by plaintiffs.¹⁹⁴ Justice Scalia, however, inappropriately analyzed the probative value of the social framework testimony in isolation from the plaintiffs' statistical and anecdotal evidence.¹⁹⁵ In doing so, the Court imprudently diminished the aggregate import of plaintiffs' social framework evidence.¹⁹⁶

established that subjective assessments are susceptible to influence by irrelevant and sex-biased factors such as whether one 'fits' into the work environment, conforms to prescriptive stereo-types about how women ought to be, or resembles the decision maker or other workers on characteristics that are irrelevant to job performance."). Researchers argue, that in the absence of guidelines and corporate oversight, local managers have little incentive to suppress stereotypes and are more likely to favor persons of their same sex. M. E. Heilman & M. C. Haynes, *Subjectivity in the Appraisal Process: A Facilitator of Gender Bias in Work Settings*, in *BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM* (E. Borgida and S. Fiske, eds., 2008).

¹⁹⁴ ZIMMER, *supra* note 17, at 37 (citing Hart & Secunda, *supra* note 112); *cf.* Brief for American Sociological Society, *supra* note 112, at 9 (finding Dr. Bielby's conclusions relevant (among other reasons) because they relied on a careful review of relevant, case-specific statistics).

¹⁹⁵ *See Dukes*, 131 S. Ct. at 2553–54 (analyzing Dr. Bielby's social framework findings under *Falcon*'s significant proof standard, but in isolation from plaintiff's total evidentiary record); ZIMMER, *supra* note 17, at 37 ("[Justice Scalia] avoids looking at the evidence in the whole record which is the only way that an inference of discrimination could ever be drawn.").

¹⁹⁶ Justice Scalia's scathing attitude towards Dr. Bielby's social framework analysis also introduced another issue regarding class certification that has resulted in conflicting circuit level opinions—whether class certification experts should be subjected to *Daubert* scrutiny. Malveaux, *supra* note 13, at 41 n.47. In *Dukes*, Justice Scalia stated, "[t]he district court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings . . . [w]e doubt this is so." 131 S. Ct. at 2553–54. While providing limited guidance and stopping short of defining a bright-line rule, the Court suggested that trial judges should subject class certification experts to *Daubert* review. *See* Julie Slater, *Reaping the Benefits of Class Certification: How and When Should "Significant Proof" Be Required Post-Dukes?*, 2011 B.Y.U. L. REV. 1259, 1274 (2011) ("*Dukes* seems to signal that *Daubert* should apply during class certification."). Regardless of whether full *Daubert* review is required, however, the district court acted well within its discretion to admit Dr. Bielby's social framework testimony. *See Daubert*, 509 U.S. at 595 (explaining that FED R. EVID. 403 provides significant control by federal judges over expert testimony); ANTHONY J. BOCCHINO & DAVID A. SONENSHEIN, *A PRACTICAL GUIDE TO FEDERAL EVIDENCE* 106–07 (9th ed. 2009) (noting that FED R. EVID. 702 was amended after *Daubert* to conform to the principle that trial judges serve as gatekeepers). Dr. Bielby, a renowned sociologist and professor at the University of Illinois-Chicago, easily qualifies as someone with specialized knowledge able to assist the trier of fact. *See* FED. R. EVID. 702(a) ([T]he expert's . . . knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."); *see also* Adam Liptik, *Supreme Court to Weigh Sociology Issue in Wal-Mart Discrimination Case*, N.Y. TIMES (Mar. 27, 2011), <http://www.nytimes.com/2011/03/28/us/28scotus.html?pagewanted=all> (discussing Professor Bielby's background and credentials). As the district court observed, Dr. Bielby's testimony could be admissible even without reaching definite conclusions because approximate determinations are common to his particular field of science. *Dukes*, 222 F.R.D. at 154 (citing FED. R. EVID. 702).

ii. *Dukes*' Analysis of Statistics Undermines Title VII Precedent

After finding that plaintiffs' social framework testimony lacked significant proof of commonality, the Court similarly denounced plaintiffs' statistical evidence.¹⁹⁷ The Court's implicit rule that gender discrimination statistics must be analyzed at the purported level of decision-making was incorrect for numerous reasons.¹⁹⁸

First, the Court's analysis failed to address the plaintiffs' actual theory of discrimination—the *Dukes* class never claimed that there existed uniform, store-by-store gender disparities in pay and promotion at Wal-Mart.¹⁹⁹ Rather, the plaintiffs' alleged that Wal-Mart's policy giving local managers unconstrained discretion resulted in significant gender disparities in pay and promotion that persisted unchecked.²⁰⁰ Instead of focusing on the plaintiffs' aggregate statistical evidence, the Court found regional gender disparities in pay and promotions insufficient to demonstrate commonality among the plaintiffs.²⁰¹ This conclusion is at odds with pattern-or-practice case law—that not all

More convincingly, an amicus brief submitted on behalf of the plaintiffs by the American Sociological Association supported Dr. Bielby's study. *See* Brief for American Sociological Association, *supra* note 112, at 9–10 (“[Dr. Bielby’s] use of . . . social science research findings and statistical and qualitative data specific to Wal-Mart is well within our discipline’s accepted methods for conducting a preliminary case study . . .”). Despite the district court’s seemingly failure to conduct a full *Daubert* review, doing so would not have rendered a different outcome with respect to the admissibility of Dr. Bielby’s social framework analysis. *Dukes*, 603 F.3d at 602–03 n.22.

¹⁹⁷ *Dukes*, 131 S. Ct. at 2555.

¹⁹⁸ *Id.* Justice Scalia, though, failed to examine Wal-Mart’s statistics, which *also* analyzed pay and promotions statistics on a companywide level, not a storewide level. Brief for Labor Economists et al., *supra* note 143, at 10.

¹⁹⁹ ZIMMER, *supra* note 17, at 38. In fact, Justice Scalia noted that on its face, Wal-Mart’s policy affording discretion to local managers is the opposite of a uniform employment practice that would provide the commonality needed for a class action. *Dukes*, 131 S. Ct. at 2554.

²⁰⁰ *See* Brief for Respondents, *supra* note 39, at 9–10 (“Wal-Mart’s top management implemented and maintained its pay and promotion policies, even though they knew the system disadvantaged [women] . . . [and] subjective pay and promotions policies, while neutral on their face, have disproportionately affected female employees”); *see also* Fisk & Chemerinsky, *supra* note 19, at 77–78 (discussing plaintiffs’ evidence that managers exercised their discretion to pay women less than men, and that promotions were often the result of a supervisor “tapping an employee” rather than a uniform process for both males and females).

²⁰¹ *Dukes*, 131 S. Ct. at 2555–56; *Cf.* *Emanuel v. Marsh*, 897 F.2d 1435, 1439 (8th Cir. 1990) (allowing an employee to bring forth a disparate impact claim, rather than disparate treatment claim, by proving statistical disparities); *but see* MICHAEL SELMI, *THEORIZING SYSTEMIC DISPARATE TREATMENT LAW* 17 (2011) (explaining that aggregated statistics may reflect patterns of discrimination that may not be evident by focus solely on individual cases).

women employees in a gender discrimination class action experienced gender bias does not invalidate a systemic discrimination claim.²⁰²

Second, after acknowledging that the statistics reflected gender disparities at Wal-Mart, the Court claimed that a discretionary system that has produced a workplace sex-based disparity is insufficient to demonstrate commonality, absent identification of a specific employment practice.²⁰³ Well-established precedent, particularly *Watson*, supports the conclusion that an undisciplined system of subjective decisionmaking *is an employment practice* that may be subject to disparate impact scrutiny.²⁰⁴ Thus, citing to no case law, Justice Scalia's analysis seems to indicate that despite *Watson*, a policy of discretion cannot be an employment practice for plaintiffs alleging systemic disparate impact discrimination.²⁰⁵

²⁰² See ZIMMER, *supra* note 17, at 38 (clarifying that for disparate treatment law, the court's focus should narrow to how a company implements its policy *and* the resulting gender disparities, rather than solely the *results* of the policy). Cf. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 n.25 (1979) ("When the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences [here], a strong inference that the adverse effects were desired can reasonably be drawn."); *Teamsters*, 431 U.S. at 335 n.15 (Disparate treatment [occurs when] the employer simply treats *some people* less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.") (emphasis added).

²⁰³ *Dukes*, 131 S. Ct. at 2555.

²⁰⁴ See *Watson*, 487 U.S. at 990–91 ("If an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply"); *Dukes*, 131 S. Ct. at 2565 (Ginsburg, J., concurring in part and dissenting in part) (citing *Wards Cove*, 490 U.S. at 657). Even *Falcon*, on which the Court heavily relies throughout its commonality analysis, suggested that subjective employment practices could be subject to disparate impact attack. See *Falcon*, 457 U.S. at 159 n.15 ("Significant 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*.") (emphasis added).

²⁰⁵ See ZIMMER, *supra* note 17, at 39 (suggesting that Justice Scalia implicitly foreclosed the possibility of bringing disparate impact claims based on a policy of discretion); see also WEISS, *supra* note 13, at 28 (suggesting that *Dukes sub-silentio* overruled *Watson*). To suggest that Justice Scalia overturned *Watson* is not a far-reaching view in light of the Roberts Court's recent practices. See, e.g., Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1538 (2008) (accusing Alito and Scalia of "purport[ing] to respect precedent while in fact cynically interpreting it into oblivion"); Berry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)* 1–3 (N.Y.U. Pub. L. & Legal Theory Working Papers No. 205, 2010), available at http://lsr.nellco.org/nyu_plltwp/205 (discussing "stealth" overruling with respect to the Roberts' Court).

iii. District Courts' Rigorous Certification Analyses are Entitled to Deference

In *Dukes*, the district court did not presume or fail to evaluate the legitimacy of the plaintiff class but rather found FRCP 23 satisfied only after undertaking the rigorous analysis that the *Falcon* commands.²⁰⁶ The district court's recognition of *Falcon*'s rigorous analysis mandate guided its thorough, eighty-four page analysis of the plaintiffs' statistics, social framework analysis, and anecdotal evidence alleging discrimination.²⁰⁷ As noted by the Ninth Circuit, it is difficult "to envision a more rigorous analysis than the one the district court conducted."²⁰⁸

The *Falcon* court, as well as many courts before and since, acknowledged that flexibility in administering class actions is a virtue and that trial courts are afforded deference in the exercise of it.²⁰⁹ Indeed, Justice Ginsburg's dissenting opinion articulated the standard for appellate review of a certification order—abuse of discretion—which Justice Scalia failed to pronounce in his majority opinion.²¹⁰ The district court's well-reasoned conclusion that the plaintiffs shared

²⁰⁶ *Dukes*, 603 F.3d at 597 (citing *Falcon*, 457 U.S. at 160); *Dukes*, 222 F.R.D. at 143–69. In accordance with the Supreme Court, several amicus briefs submitted on behalf of Wal-Mart suggested otherwise. See, e.g., Brief for Washington Legal Foundation as Amicus Curiae Supporting Petitioner at 4–5, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277) (faulting the lower courts for not extending a rigorous analysis to Dr. Bielby's social framework evidence); Brief for Securities Industry and Financial Markets Association as Amicus Curiae Supporting Petitioner at 13, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277) (opining that certification sets a dangerous precedent at odds with *Falcon* and that flies in the face of the requirement that lower courts subject plaintiffs' evidence to rigorous scrutiny).

²⁰⁷ See *Dukes*, 222 F.R.D. at 143–69 (taking both plaintiffs' evidence and Wal-Mart's evidence under consideration before rendering a lucid certification order).

²⁰⁸ *Dukes*, 603 F.3d at 598. In fact, the number of employment discrimination class actions filed and certified today shows that class actions are a sparingly-used device to mitigate unlawful employment discrimination. Brief for National Employment Lawyers Association et al., *supra* note 72, at 30. The low rate of class certifications for alleged victims of employment discrimination demonstrates the rigor that lower courts direct at certification orders. *Id.* at 33.

²⁰⁹ See *Falcon*, 457 U.S. at 160 (noting that this flexibility "enhances the usefulness" of class actions); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979) (acknowledging that district courts have "broad power and discretion" with respect to certification matters). Recent circuits continue to endorse the abuse of discretion standard. See, e.g., *In re Pet Food Prod. Liab. Litig.*, 629 F.3d 333, 343 (3d Cir. 2010) (endorsing abuse of discretion review for affirming certification of subclasses under FRCP 23(c)).

²¹⁰ Compare *Dukes*, 131 S. Ct. at 2562 (Ginsburg, J., concurring in part and dissenting in part) (Absent an error of law or an abuse of discretion, an appellate tribunal has no warrant to upset the District Court's finding of commonality), with *Dukes*, 131 S. Ct. at 2541–61 (Scalia, J.) (failing to articulate any standard of review).

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several common questions of law and fact necessitated greater deference by the Supreme Court.²¹¹

B. The District Court Properly Certified Plaintiffs' Claims for Backpay under FRCP 23(b)(2)

In addition to its erroneous commonality analysis, the Court improperly prohibited the plaintiffs' backpay claims under FRCP 23(b)(2).²¹² Accordingly, this Section first discusses how the Court's decision to narrow the availability of backpay for FRCP 23(b)(2) classes contravenes established Title VII class-action jurisprudence.²¹³ Next, this Section argues that Court's "incidental damages" test strayed from the "predominance" inquiry utilized (in various forms) by every circuit and stated in the Advisory Committee's Notes to FRCP 23.²¹⁴ Lastly, this Section examines why the presence of some individualized claims for monetary relief does not preclude FRCP 23(b)(2) certification.²¹⁵

1. Backpay Relief is Equitable and Serves Title VII's Remedial Objectives

As previously discussed, when a class is certified under FRCP 23(b)(2), final injunctive or declaratory relief is appropriate for all class members.²¹⁶ Despite the rule's silence on monetary relief, its language is not confined to classes that seek *only* injunctive or declaratory relief.²¹⁷ In particular, the Advisory Committee's Notes to the Rule's

²¹¹ Brief for Civil Procedure Professors, *supra* note 81 at 16–17. The plaintiffs in *Dukes* shared numerous common questions of law and fact, including: (1) whether a highly discretionary pay and promotion policy communicated through a centralized command to influence local employment decisions; and (2) whether Wal-Mart's pay and promotion decisions lead to unlawful, gender-based disparities. See Malveaux, *supra* note 14, at 1 (introducing plaintiffs' discrimination claims against Wal-Mart's pay and promotion policies); ZIMMER, *supra* note 17, at 34 ("The bridge between pay and promotion was the common question of how the policy of unstructured and unchecked discretion was administered and controlled as to both pay and promotion.").

²¹² *Dukes*, 131 S. Ct at 2557.

²¹³ See *infra* Part IV.B.1 (suggesting that the Court erred in ignoring well-settled Title VII backpay precedent).

²¹⁴ See *infra* Part IV.B.1 (arguing that the Court adopted an onerous "incidental" test at odds with case law and FRCP 23(b)(2)).

²¹⁵ See *infra* Part IV.3 (examining why the presence of some individualized claims for backpay does not preclude class certification under FRCP 23(b)(2)).

²¹⁶ FED. R. CIV. P. 23(b)(2).

²¹⁷ See generally Malveaux, *supra* note 92, at 5–15 (providing detailed arguments as to why

1966 amendments, in referencing a limitation on monetary relief for FRCP 23(b)(2) classes, implicitly recognizes the *availability* of such relief.²¹⁸

Relief that addresses a class as a cohesive unit, like backpay in *Dukes*, is apt for FRCP 23(b)(2) adjudication.²¹⁹ Courts regularly permit backpay for FRCP 23(b)(2) civil rights class actions on the grounds that it is equitable and critical to Title VII's remedial objectives.²²⁰ Importantly, for victims of employment discrimination, the Supreme Court presumptively favors awarding backpay relief: "[G]iven a finding of unlawful discrimination, backpay should be denied only for reasons that, if applied generally, would not frustrate the central statutory purposes manifested by Congress in enacting Title VII of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."²²¹

FRCP 23(b)(2) does not ban all forms of monetary relief); Brief for Civil Procedure Professors at 24–28 (explaining that FRCP 23(b)(2)'s text, structure, and purpose confirm that monetary relief may be sought in a FRCP 23(b)(2) class action). Although the *Dukes* Court recognized that one possible reading of FRCP 23(b)(2) foreclosed all forms of monetary relief, the Court did not formally adopt this interpretation. *Dukes*, 131 S. Ct. at 2557. Thus, the Court found it unnecessary to answer a question for which it *formally granted* certiorari. See *Dukes*, 603 F.3d 571, *petition for cert. granted*, 131 S. Ct. 795 (U.S. Dec. 6, 2010) (No. 10-277) ("Whether claims for monetary relief can be certified under FRCP 23(b)(2), and, if so, under what circumstances.").

²¹⁸ The Advisory Committee's Notes to FRCP 23(b)(2) clarify that the drafters did not intend to bar all forms of monetary relief—just exclusive or predominant monetary damages. See FED. R. CIV. P. 23 advisory committee's note ("The [FRCP 23(b)(2)] subdivision does not extend to cases in which the appropriate final relief relates *exclusively or predominantly* to money damages.") (emphasis added).

²¹⁹ See *Allison*, 151 F.3d at 415 (noting backpay's compatibility with Title VII's "make whole" remedial scheme). This conclusion is bolstered by comments made by Professor Benjamin Kaplan—the reporter for the Civil Rules Committee in 1966—regarding the dual goals of the class-action device: to reduce duplicative litigation of common issues in individualized proceedings and to vindicate the rights of groups of people who may not otherwise be able to bring individual lawsuits against their opponent. Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COMM. L. REV. 497, 497 (1969). Both of these objectives are well served by allowing a class to bring both injunctive and monetary relief under FRCP 23(b)(2). See *Thorn*, 445 F.3d at 331 ("[W]e do not hold, nor have we ever held, that monetary relief is fundamentally incompatible with Rule 23(b)(2)."). Furthermore, a class-action employment discrimination case like *Dukes* falls squarely within the Advisory Committee's broad description of a civil rights case proper for class adjudication under FRCP 23(b)(2). See *Amchem*, 521 U.S. at 614 (finding that civil rights cases against employers charged with discrimination are "prime examples" of FRCP 23(b)(2) class actions).

²²⁰ See LEX K. LARSON, *LARSON ON EMPLOYMENT DISCRIMINATION* § 92.11 at 5–92 (2d ed. 2010) (citing to cases that support the assertion that a preponderance of courts have had little difficulty fitting backpay into a FRCP 23(b)(2) class action); MCLAUGHLIN, *supra* note 70, at 907 n.4 (listing cases that acknowledge backpay's "fit" with FRCP 23(b)(2) class actions).

²²¹ *Albemarle*, 422 U.S. at 421.

Thus, backpay relief is fundamental to achieving Title VII's vital restorative and preventative ends.²²² It awards past wages and benefits to which an employee is entitled because of discriminatory employment practices or policies ("make whole" purpose).²²³ Furthermore, backpay acts as a discrimination deterrent, raising the costs for an employer that engages in discrimination.²²⁴ Therefore, contrary to the *Dukes* court, which found backpay's equitable character irrelevant, backpay (like injunctive and declaratory relief) is *equitable* and weighs in favor of FRCP 23(b)(2) certification.²²⁵

2. Non-Predominant Monetary Relief is Appropriate for FRCP 23(b)(2) Class Actions

Unlike compensatory and punitive damages, backpay is irregularly subjected to a predominance standard because of its equitable and uniform nature.²²⁶ Besides fitting nicely within Title VII's remedial scheme, awards for backpay do not predominate over injunctive

²²² *In re Monumental Life*, 365 F.3d at 418; *Allison*, 151 F.3d at 415; see also Malveaux, *supra* note 92, at 18 (finding that backpay "has been essential" in servicing Title VII's remedial scheme and has thus been favored for decade by federal courts.").

²²³ See LEWIS & NORMAN, *supra* note 34, at 331 ("[B]ack pay serves both [Title VII's] remedial goals: to restore discrimination to the approximate status they would have enjoyed absent discrimination . . . and to deter employee violations.").

²²⁴ The Eighth Circuit appropriately summarized backpay's deterrent function:

They provide the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history. If backpay is consistently awarded, companies and unions will certainly find it in their best interest to remedy their employment procedures without court intervention, whether that intervention is initiated by the Government or by individual employees

United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973); but see Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L. J. 1301, 1301 (1990) (arguing that Title VII remedies do not serve either its "make-whole" or deterrent purposes).

²²⁵ See *Dukes*, 131 S. Ct. at 2560 ("[R]espondents argue that their backpay claims are appropriate for a (b)(2) class action because a backpay award is equitable in nature. The latter may be true, but it is irrelevant.").

²²⁶ See, e.g., *Allison*, 151 F. 3d at 416 n.10 (applying its "incidental damages" test to only plaintiffs' compensatory and punitive damages claims); see also Malveaux, *supra* note 92, at 16 (courts do not regularly submit backpay claims to predominance scrutiny); but see Brief for Petitioner at 53, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277) ("The fact that plaintiffs are seeking monetary relief in the form of backpay, as opposed to compensatory damages does not alter the conclusion that the request for monetary relief predominates.").

remedies because backpay calculations generally involve uncomplicated factual determinations and few individualized issues.²²⁷ Thus, even those circuits applying the predominance test to backpay have recognized its compatibility with Title VII and FRCP 23(b)(2).²²⁸

The *Dukes* court, however, applied the Fifth Circuit's incidental test without formally adopting its underlying premise—predominance.²²⁹ Under this standard, the Court easily found plaintiffs' "individualized" backpay claims non-incidental to its injunctive relief claims.²³⁰ In doing so, the Court adopted the most onerous test for analyzing backpay relief under FRCP 23(b)(2), without offering reasoning why its test prevailed over the Second Circuit's "ad-hoc" approach or the Ninth Circuit's "objective effects" test.²³¹ Surprisingly, unlike every circuit decision before it, the Court rejected the predominance concept because the language of FRCP (23)(b)(2) is silent as to monetary relief.²³²

²²⁷ *Thorn*, 445 F.3d at 331.

²²⁸ *Id.*; *In re Monumental*, 365 F.3d at 418. Courts have largely certified Title VII class actions under FRCP 23(b)(2) by characterizing backpay as equitable, not monetary. *See, e.g.*, *Johnson v. Ga. Hwy. Exp., Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969) ("The demand for backpay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy . . ."), *accord*, *CONTE & NEWBERG, supra* note 68, at § 4.14 (finding that monetary relief that is equitable in nature and fits within a FRCP 23(b)(2) class).

²²⁹ *See Dukes*, 131 S. Ct. at 2561 ("[I]ncidental damages should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new substantial legal or factual issues, nor entail complex individualized determinations.") (citing *Allison*, 151 F.3d at 415).

²³⁰ *See Malveaux, supra* note 92, at 47 ("Once *Dukes* concluded that backpay had to be calculated individually, it was not a stretch for it to find such monetary relief non-incidental, and thus inappropriate for Rule 23(b)(2) certification—at least under the standard established by the Fifth Circuit in *Allison* . . .").

²³¹ *See supra* notes 96–99 and accompanying text (providing background on the Second Circuit's approach from *Robinson*, 267 F.3d at 164); *see also Dukes*, 603 F.3d at 616–17 (recommending that district courts should evaluate the objective effect of the relief sought). Specifically, the test designed by the Ninth Circuit articulates relevant factors to consider when determining if monetary relief predominates, including due process and manageability concerns. *See i.d.* at 616 (discussing factors, but noting that no one factor is determinative).

²³² *Compare Dukes*, 131 S. Ct. at 2560 (noting that on its face, FRCP 23(b)(2) does not speak of predominant equitable remedies, but rather only injunctive and declaratory relief), *with* FED. R. CIV. P. 23(b)(2) advisory committee's notes (stating that, so long as the final relief does not relate "exclusively or predominantly to money damages," certification under FRCP 23(b)(2) is proper); *see also Allison*, 151 F.3d at 415 (describing its "incidental" approach within the context of predominance). Because of FRCP 23(b)(2)'s facial silence as to backpay, circuits courts have historically relied on the Rule's Advisory Committee's Notes for guidance. *Malveaux, supra* note 13, at 49–50. Importantly, the predominance test applied with respect to FRCP 23(b)(2) is dissimilar to the predominance test used in FRCP 23(b)(3) class certifications—the question for FRCP 23(b)(2) is whether monetary relief predominates over injunctive or declaratory relief, while the issue in FRCP 23(b)(3) is whether common issues predominate over individual issues.

3. Individualized Issues Do Not Always Preclude Class Certification Under FRCP 23(b)(2)

A class maintains the requisite homogeneity when it does not require voluminous individualized assessments of backpay.²³³ Instead of granting deference to the district court's proposed formula for determining backpay relief, the *Dukes* Court favored Wal-Mart's statutory right to raise affirmative defenses against individualized backpay claims.²³⁴ The Court also expressed concern that certification of a FRCP 23(b)(2) class would run afoul of due process, since class members would not be provided notice or the opportunity to opt out.²³⁵ This decision is problematic for a multitude of reasons.²³⁶

First, during the remedial stage of a disparate treatment case, a district court must *usually* conduct additional proceedings to determine the appropriate scope of relief.²³⁷ In using the word "usually," the Court in *Teamsters* indicated that individual proceedings would not *always* compromise the remedial phase of litigation.²³⁸ Rather, courts should conduct a balancing test, weighing the interests of the employer in defending itself against individualized claims against the interests of the class in securing a fair, quick, and economical determination of the lawsuit.²³⁹

Id. at 50 n.91. In most cases predominantly seeking money damages, the inquiry under FRCP 23(b)(3) is the "keystone of the certification analysis." MCLAUGHLIN, *supra* note 70, at 927–28.

²³³ See *Shook*, 543 F.3d at 597 (finding that FRCP 23(b)(2) is not appropriate where fashioning relief requires individualized factual circumstances of different class members, or where there exists different types of relief tailored to redress individual injuries). Because FRCP 23(b)(2) classes typically challenge systemic policies or practices with uniform application on the class, a FRCP 23(b)(2) class member is regarded as having no individual right to a particular relief independent of any other member. *Cal. for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 345–46 (N.D. Cal. 2008).

²³⁴ *Dukes*, 131 S. Ct. at 2561. The Court noted that because the Rules Enabling Act forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right," a class cannot be certified if the defendant is not afforded the right to litigate statutory defenses to individual claims. See *Ortiz*, 527 U.S. at 845 (citing to the Rules Enabling Act, 28 U.S.C. § 2072(b) and *Anchem*, 521 U.S. at 613).

²³⁵ *Dukes*, 131 S. Ct. at 2559.

²³⁶ See generally Brief for Civil Procedure Professors, *supra* note 81, at 28–39 (discussing problems with the Court's analysis of FRCP 23(b)(2)).

²³⁷ *Teamsters*, 431 U.S. at 361.

²³⁸ See Brief for Respondents, *supra* note 38, at 45. No court has read *Teamsters* so strictly as to require individualized hearings in every pattern-or-practice case. See *Teamsters*, 431 U.S. at 364 (vesting trial courts with broad discretion to "fashion such relief as the particular circumstances of each case may require to effect restitution") (quoting *Franks*, 424 U.S. at 764).

²³⁹ See FED. R. CIV. P. 1 ("[The Federal Rules of Civil Procedure] should be construed and administered to secure the just, speedy, and inexpensive resolution of every action and

Clearly, use of a formula for determining backpay claims on an aggregate basis renders a speedy and inexpensive resolution for massive class action lawsuits.²⁴⁰ To yield just results, the appropriate procedure for the remedial phase of a pattern-or-practice class action should be one that awards backpay only to those injured by discrimination.²⁴¹ For the *Dukes* class, a statistical model (similar to the formula endorsed by the district court) is more likely than a series of individual hearings to accurately determine the persons injured and their backpay awards.²⁴² In short, while a formula approach is admittedly not the norm in pattern-or-practice cases, it is an appropriate option where the employer uses subjective criteria for employment decisions, objective requirements are minimal, and many more class members qualified for the positions than would have been hired or promoted even absent discrimination.²⁴³ In these cases, it is almost impossible to determine which class members represented actual victims of a discriminatory policy or practice.²⁴⁴ As

proceeding."). The presence of individualized claims in a FRCP 23(b)(2) class means that the district court will have to weigh the extent to which some issues should be adjudicated via individualized proceedings. See FED. R. CIV. P. 23(c) (noting that for all class action proceedings, the court must designate whether an issue or claim will be adjudicated on a class-wide or individualized basis). Furthermore, the court must make orders that determine the course of the proceedings. FED. R. CIV. P. 23(d). Fundamentally, these concerns relate to case management—not the propriety of a class under FRCP 23(b)(2). Brief for Civil Procedure Professors, *supra* note 81, at 30. As Seventh Circuit Judge Richard Posner explained: "Rule 23 allows district courts to devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues." *Carnegie v. Household Intern., Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

²⁴⁰ FED. R. CIV. P. 1; see also LARSON, *supra* note 220, at § 92.11 (explaining that it is often impracticable, when a large class action is involved, to calculate backpay for each individual member). The approaches adopted by various circuits corroborates that courts may utilize formulas and other mechanisms for awarding backpay on a classwide basis; cf. *Sacred Heart Health Sys., Inc. v. Humana*, 601 F.3d 1159, 1169 (11th Cir. 2010) ("[T]he decision to certify is within the broad discretion of the district court, and we review for abuse of that discretion.").

²⁴¹ *Albemarle*, 422 U.S. at 421. The Court should make every effort to avoid interpretations of Title VII that "deprive victims of discrimination of a remedy, without clear congressional mandate." *Wa. Cnty. v. Gunther*, 452 U.S. 161, 178 (1981).

²⁴² Brief for Labor Economists et al., *supra* note 143, at 20. To the extent that backpay offers a uniform remedy without requiring individual mini-hearings, such relief maintains the necessary cohesion for a mandatory, non-opt out FRCP 23(b)(2) class. *Malveaux*, *supra* note 92, at 20.

²⁴³ *Dukes*, 222 F.R.D. at 176; see also *EEOC v. O & G Spring & Wire Forms Spec. Co.*, 38 F.3d 872, 879–80 (7th Cir. 1994) (approving district court's use of a formula approach); *Hameed v. Int'l Ass'n of Bridge Workers, Local 396*, 637 F.2d 506, 520, 521 n.18 (8th Cir.1980) (same) (and cases cited therein).

²⁴⁴ For example, in *Domingo v. New England Fish Co.*, 727 F.2d 1443 (9th Cir. 1984), the Ninth Circuit held that departure from the preferred *Teamsters* approach is justified when subjective employment practices make it "difficult to determine precisely which of the claimants would have been given a better job absent discrimination, but it is clear that many should have." *Id.* at 1444. The Ninth Circuit continued: "[W]hen the class size or the ambiguity of promotion or

a long line of post-*Teamsters* cases implicitly recognize, nothing in *Teamsters* precludes calculating a total backpay award that is allocated among potential victims, where the actual victims cannot realistically be identified.²⁴⁵

V. IMPACT

The Court handed down decisions in a number of noteworthy class actions during its 2010-2011 term.²⁴⁶ *Dukes*, however, is arguably the most significant because it addressed the key standards for class certification under FRCP 23.²⁴⁷ While the full impact of *Dukes* remains

hiring practices or the illegal practices continued over an extended period of time calls forth [a] quagmire of hypothetical judgment . . . a class-wide approach to the measure of back-pay is necessitated." *Id.*

²⁴⁵ See, e.g., *Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 452–53 (7th Cir. 1976) (admitting that, while a formulaic approach may generate a windfall for some employees, it is the best courts can do under some circumstances). The Seventh Circuit noted that, given a choice between no compensation for victims of racial discrimination and an approximate measure of backpay, "we choose the latter." *Id.* at 453; see also Malveaux, *supra* note 92, at 20 ("For example, back pay for each class member may be calculated on a statistical basis, using a formula that approximates over time what salary an employee would have received but for an employer's discrimination."). Finally, the Court expressed concern that certification under FRCP 23(b)(2) of individualized monetary claims would run afoul of due process. *Dukes*, 131 S. Ct. at 2559. If the Court permitted FRCP 23(b)(2) certification, class members would be barred from pursuing monetary relief independently without notice or an opportunity to opt out. *Id.* Courts adjudicating FRCP 23(b)(2) class actions, however, have the authority to order—as the district court did in this case—that class members be provided personal notice and the opportunity to opt out. See *Lemon*, 216 F.3d at 582 (agreeing that the district court had the authority to certify monetary and equitable remedies under FRCP 23(b)(2), but under its plenary authority, provide all class members with personal notice and the opportunity to opt out); see also MANUAL FOR COMPLEX LITIGATION (4th) § 21.221 n.821 (noting that a court is not precluded from defining a class under FRCP 23(b)(1) or (b)(2) to include only those potential class members who do not opt out of the litigation). Justice Scalia failed to address the possibility of providing FRCP 23(b)(2) class members with notice and opt-out rights. See *Dukes*, 131 S. Ct. at 2558 (discussing notice and opt-out rights only within the context of FRCP 23(b)(3)).

²⁴⁶ See, e.g., *Concepcion*, 131 S. Ct. 1740, 1740 (splitting on the same ideological lines in *Dukes* and ruling that consumers can be bound by an arbitration clause in a cellphone deal or other contract even when state law permits a class-action lawsuit for claims arising from the deal); *Janus Cap. Grp. v. First Derivative Traders*, 131 S. Ct. 2296, 2296 (2011) (splitting on the same ideological lines in *Dukes* and ruling that a mutual fund's investment advisor may not be sued for securities fraud over misstatements in fund prospectuses); *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2368 (2011) (finding that a federal district court exceeded its authority under the core-litigation exception the Anti-Injunction Act when it enjoined a state court from considering a request for class certification); see generally Erwin Chemerinsky, *Closing the Courthouse Doors*, 14 GREEN BAG 2D 375 (2011) (discussing *Dukes* and *Concepcion*); ALLIANCE FOR JUSTICE, *supra* note 1, at 4–9 (discussing the Court's 2010-2011 corporate-leaning decisions); A.C. Pritchard, *Securities Law in the Roberts Court: Agenda or Indifference?*, 37 J. CORP. L. 105, 135–39 (2011) (summarizing *Janus*).

²⁴⁷ *Dukes*, 131 S. Ct. at 2550–67 (analyzing FRCP 23(a) and FRCP 23(b)).

to be seen, the decision is sure to have far-reaching implications for class action litigation.²⁴⁸

Therefore, this Part will provide a summary of how the *Dukes* case is likely to impact class action litigation and the questions that remain following the Court's decision. First, this Part will explain how, in tightening the standard for proving commonality, the *Dukes* decision will provide an additional basis for opposing class certification.²⁴⁹ Second, this Part will consider whether *Dukes sub-silentio* altered pattern-or-practice and disparate impact jurisprudence.²⁵⁰ Lastly, this Part will assess the Court's analysis with respect to backpay on future employment discrimination lawsuits.²⁵¹

A. *The Struggle to "Bridge the Falcon Gap" Under a Heightened Standard of Proof*

The *Dukes* decision will provide a strong argument for opposing class certification under FRCP 23(a)(2) commonality.²⁵² In the past,

²⁴⁸ See generally *A Death Blow to Class Actions?*, N.Y. TIMES (June 20, 2011), <http://www.nytimes.com/roomfor>

debate/2011/06/20/a-death-blow-to-class-action (compiling a number of opinions from renowned academics and practitioners to debate "a decision with broad implications for the future of class action lawsuits"). To listen to a debate between Joseph Sellers, attorney for Patty Dukes, and Mark Perry, lawyer for Wal-Mart, on the *Dukes* ruling and its implications, see "*Wal-Mart v. Dukes: Curbing Class Action Abuse or Slashing Workers' Rights?*", VA. L. SCH. (Sept. 27, 2011), available at <http://www.law.virginia.edu/lawweb/news.nsf/pp/podcastfrontpage>.

²⁴⁹ See *infra* Part V.A (discussing the implications of the Court's heightened commonality test on class action lawsuits).

²⁵⁰ See *infra* Part V.B (examining whether *Dukes* went beyond procedural class action law to change disparate treatment and disparate impact precedent).

²⁵¹ See *infra* Part V.C (considering the Court's onerous FRCP 23(b)(2) "incidental" damages test on future alleged victims of employment discrimination).

²⁵² Several post-*Dukes* courts have applied its stringent commonality standards to deny class certification. See, e.g., *Cruz v. Dollar Tree, Inc.* Nos. 074-2050 SC, 07-4012 SC, 2011 WL 2682967, at *5 (N.D. Cal. July 8, 2011) (finding that plaintiffs failed to provide common proof of class-wide liability in order to justify class certification); *MacGregor v. Farmers Ins. Exch.*, Civil No. 2:10-CV-03088, 2011 WL 2981466, at *5 (D.S.C. July 22, 2011) (concluding that, in light of *Dukes*' "illuminating" and "clear-reasoned" decision, collective treatment is improper in cases involving multiple employment locations, decentralized policies or practices, or multiple supervisors with independent decision-making authority); *but see United States v. New York*, 276 F.R.D. 22, 52 (E.D.N.Y. 2011) (finding commonality satisfied despite *Dukes*). To examine *Dukes*' likely impact on other areas of law, see David R. Garcia & Leo Caseria, *Wal-Mart v. Dukes: Implications for Antitrust Class Actions*, NAT'L L. REV. (July 13, 2011), <http://www.natlawreview.com/article/wal-mart-v-dukes-implications-antitrust-class-actions> (antitrust and securities law); Bill Pokorny, *What Wal-Mart v. Dukes Means for Wage & Hour Law*, EMPLOYERS, WAGE & HOUR INSIGHTS (June 23, 2011), <http://www.wagehourinsights.com/class-and-collective-actions/what-wal-mart-v-dukes-means->

many courts interpreted the commonality prerequisite as a lenient standard—*Dukes* affirmatively corrects that impression.²⁵³ The implications of this contentious threshold of proof are debatable.²⁵⁴ On the one hand, the Court's decision may have little impact on most class action lawsuits—cases involving 1.5 million former and current employees of different pay structure and with varying job responsibilities are rare.²⁵⁵ Smaller classes, even under the Court's amplified commonality standard, will find greater success at the class certification stage than the *Dukes* women.²⁵⁶ On the other hand, the Court's decision has the potential to effectively bar countless employment discrimination suits that rely on a theory of unchecked discretion and excessive subjectivity as a discriminatory policy.²⁵⁷ District courts will likely require a stronger causal connection between

for-wage-hour-law-employers/ (wage-and-hour law); Joseph L. Barloon et al., *supra* note 22 (fair lending practices).

²⁵³ Compare *Baby Neal*, 43 F.3d at 56 (commonality is "easily met"), with *Dukes*, 131 S. Ct. at 2551 (What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.") (emphasis in original).

²⁵⁴ Compare *Fisk & Chemerinsky*, *supra* note 19, at 85 ("[Now] Wal-Mart has an incentive to pay women as little as possible, and individual women working at Wal-Mart have little incentive to sue it."), with *WEISS*, *supra* note 13, at 2 (suggesting that, despite harsh criticism to the contrary, another interpretation of *Dukes* is one that suggests neither class actions nor challenges to structural discrimination are dead).

²⁵⁵ Many opponents of the decision to certify the *Dukes* class present "size arguments." Lahav, *supra* note 21, at 118. For example, Judge Ikuta's dissenting opinion in the Ninth Circuit suggests "[n]o court has ever certified a class like this one" and then describes the class as consisting of 1.5 million members. *Dukes*, 603 F.3d at 629 (Ikuta, J., dissenting). In its petition for certiorari, Wal-Mart calls the case the "largest employment class action in history." Petition for a Writ of Certiorari, *supra* note 127, at i. Numerous amicus briefs utilized language to emphasize the largeness of the lawsuit. See, e.g., Brief for Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioner at 3, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277) (referring to the class action as a "behemoth").

²⁵⁶ See *Amchem*, 521 U.S. at 617–18 ("[C]lass action practice has become ever more 'adventuresome' as a means of coping with claims too numerous to secure their 'just, speedy, and inexpensive determination 'one by one'." (citing FED. R. CIV. P. 1). However, smaller or even individual claims by employees against their employer may dissipate legitimate fear of reprisal. See *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978) ("Current employees . . . over whom the employer, by virtue of the employment relationship, may exercise intense leverage. Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases held up, and other more subtle forms of influence exerted."); *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.").

²⁵⁷ *Malveaux*, *supra* note 13, at 42; see also *WEISS*, *supra* note 13, at 29 ("The new commonality standard dictates an increased role for certain merit issues at the certification stage. In cases challenging subjectivity, plaintiffs must pay far more attention to the distinction between disparate impact and disparate treatment theory and the statutory basis for the proposed claim.").

an employer's policy granting broad discretion to local managers for making personnel decisions and a gender disparity or adverse employment action.²⁵⁸ If so, this shift will create hardship for alleged victims of companywide discrimination to pursue their claims collectively, especially since the *Dukes* majority provided little detail as to what a "significant proof" standard entails.²⁵⁹ Nonetheless, its rejection of the plaintiffs' evidence of systemic discrimination provides some indication of what quantity and quality of evidence courts may require in future class actions.²⁶⁰

Furthermore, in addressing the Ninth Circuit's framing of the commonality inquiry, the Court emphasized that the mere recital of *questions* that cover all class members is insufficient to meet plaintiffs' burden to affirmatively demonstrate common issues of law or fact.²⁶¹ Now, a question is common only where its *answer* will impact all class members similarly, such that proof of one plaintiff's claim will prove each class members' claims.²⁶² This formulation of commonality

²⁵⁸ See ZIMMER, *supra* note 17, at 45 ("It may be that the Court . . . meant only to render class action claims of discrimination extremely difficult, if not impossible, to bring."); Ralph Richard Banks, *A Cruel Paradox*, N.Y. TIMES (June 30, 2011, 5:05 PM), <http://www.nytimes.com/roomfordebate/2011/06/20/a-death-blow-to-class-action/the-cruel-irony-in-the-wal-mart-ruling> (explaining that a ruling premised on individual acts of discrimination makes it less likely that victims of systemic discrimination will be able to obtain relief).

²⁵⁹ See Fisk & Chemerinsky, *supra* note 19, at 84 ("[T]he result is plain: class action intentional employment discrimination cases will be *very difficult* to bring.") (emphasis added); Melissa Hart, *Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior* 1–2 (June 29, 2011), available at <http://www.judiciary.senate.gov/pdf/11-6-29%20Hart%20Testimony.pdf> (in testimony before the U.S. Senate Judiciary Committee, Professor Melissa Hart opined that *Dukes* "presents real risks to effective enforcement of federal civil rights laws" because it makes it "difficult for employees suffering similar harms to proceed together in challenging workplace discrimination"); see also Slater, *supra* note 196, at 1260 (explaining that, while *Dukes* commands "significant proof" that a subjective policy resulted in discrimination, the opinion fails to proscribe an actual "significant proof" test).

²⁶⁰ Although the Court did not ask for a specific amount of evidence, the *Dukes* opinion indirectly indicates that the larger the class, the more evidence will be required to adequately establish commonality. See *Dukes*, 131 S. Ct. at 2556 (suggesting that 120 anecdotal accounts of discrimination of a purported class of 1.5 million women would not demonstrate that the entire company operated under a general policy of discrimination, even if every account proved true). Future courts presiding over large class actions may apply a balancing test to determine whether the quantity of evidence meets the significant proof threshold established by the *Dukes* court—if a class offers weak or arguably unreliable statistical evidence, a district court may require a more significant showing of discrimination through expert testimony or affidavits. Slater, *supra* note 196, at 1270; but see ZIMMER, *supra* note 17, at 40 ("By the way the Court slices and dices the evidence in the record, it appears to require that each item or type of evidence must by itself support drawing an inference of discrimination . . .").

²⁶¹ *Dukes*, 131 S. Ct. at 2551.

²⁶² See *id.* at 2552 ("Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief

suggests that plaintiffs must link, with significant evidence, the common policy or practice to the alleged discrimination to obtain class certification.²⁶³ In elevating the evidentiary threshold, the Court confirmed the formidable climb to satisfy commonality for future class action plaintiffs.²⁶⁴

will produce a common answer to the crucial question *why was I disfavored.*") (emphasis in original)

²⁶³ Green, *supra* note 47, at 14. After *Dukes*, plaintiffs must prove that their employer's practices or policies make sex-based distinctions or are the product of "discriminatorily biased actions by high-level policy makers within the organization." *Id.* The Court's "policy-required" view is likely to result in a drastic reshaping of systemic disparate treatment law. *Id.* at 15; see also ZIMMER, *supra* note 18, at 41 (suggesting that *Dukes* may eliminate most pattern-or-practice discrimination cases); WEISS, *supra* note 13, at 27 (acknowledging that, all together, pieces of Justice Scalia's opinion may be taken as signifying statistics alone cannot establish commonality under an entirely subjective policy).

²⁶⁴ See Hart, *supra* note 259, at 6 ("What is clear is that in the future every employment discrimination class action will be evaluated in light of the current Court's hostility to class litigation."). Moreover, in *Dukes*, the Court likely elevated the threshold for expert testimony during certification proceedings. *Dukes*, 131 S. Ct at 2553–54. In lower proceedings, the district court and Ninth Circuit found no reason to exclude Dr. Bielby's testimony. The district court scrutinized his social framework analysis to determine only whether it could add probative value to the inference of discrimination and whether Dr. Bielby provided a suitable foundation for his opinion. *Dukes*, 222 F.R.D at 154. The Ninth Circuit went further, opining that *Daubert* does not have the same application to class certification proceedings as it does to expert testimony at trial. See *Dukes*, 603 F.3d at 603 (holding that at the class certification stage, it is enough that an expert presents scientifically reliable evidence tending to show that a common question of facts exists with respect to all class members). In rejecting Dr. Bielby's social framework analysis, though, the Court signaled that the *Daubert* standard of reliability at trial also will apply to the class certification stage of litigation. See *Dukes*, 131 S. Ct. at 2554 (responding to the district court's opinion that *Daubert* does not apply at the class certification by stating, "[w]e doubt this is so."). Although stopping short of mandating district courts to engage in a full *Daubert* analysis for class certification experts, the *Dukes* majority insinuated that district courts must now review expert testimony under the *Daubert* framework when a party challenges a class certification expert's qualifications or methodology. Slater, *supra* note 196, at 1274. In failing to provide any clear guidance, though, lower courts seem likely to disagree over the proper application of *Daubert* during class certification proceedings. *Id.* at 1275. For instance, just weeks after *Dukes*, the Eight Circuit explicitly held that a comprehensive *Daubert* analysis is not required at the certification stage. In re Zurn Rex Plumbing Prods. Liab. Litig., 644 F.3d 604, 613 (8th Cir. 2011). Rather, the court affirmed the district court's application of a focused, or tailored, *Daubert* analysis that examined the reliability of the expert opinion in light of the available evidence and its purpose. *Id.* at 612. The Eight Circuit's framework closely resembles the framework used by the Ninth Circuit in *Dukes*, 603 F.3d at 603, but contrasts with previous decisions in the Second and Fifth Circuits requiring expert testimony to meet the exacting *Daubert* requirements. See *Heerwagen v. Clear Channel Commc'ns.* 435 F.3d 219, 231 (2d Cir. 2006) (finding that a judge may subject certification testimony to *Daubert* scrutiny); *Bell v. Ascendant Solutions, Inc.*, 422 F.3d 307, 311, 314 n.13 (5th Cir. 2005) (noting a court may consider the reliability of expert testimony at the class certification stage).

B. The Future of Systemic Disparate Treatment and Disparate Impact Discrimination Law

While *Dukes* may be taken as having little to do with pattern-or-practice or disparate impact precedent, at minimum, it can be viewed as chipping away at the litigation structure of systemic discrimination law.²⁶⁵ Because the *Dukes* majority seems to reject well-settled Title VII precedent, this Section will explore *Dukes*' plausible repercussions on employment discrimination jurisprudence.²⁶⁶

1. Possible Implications on Systemic Disparate Treatment Law

Dukes may drastically remake systemic disparate treatment law for multiple reasons.²⁶⁷ First, by selectively parsing the plaintiffs' three types of evidence, the Court appeared to require that each type of evidence alone must support an inference of discrimination.²⁶⁸ In doing so, the Court ostensibly abandoned prior law that disparate treatment discrimination is a question of fact based on aggregated evidentiary record.²⁶⁹ This high threshold for commonality favors employers—in

²⁶⁵ See ZIMMER, *supra* note 17, at 40 ("The less good news is if the approach the Court took is treated as impacting substantive systemic discrimination law."); see generally Scott E. Lemieux, *The Revolution Will Be Sub Silento: The Roberts Court and the Democratic Costs of Judicial Minimalism* (2009), available at http://works.bepress.com/scott_lemieux/1/ (discussing the Roberts Court's judicial minimalism approach, which leaves as much as possible undecided).

²⁶⁶ See *infra* Part V.B (exploring the implications of *Dukes* on substantive discrimination law rather than procedural class action law).

²⁶⁷ See *infra* Part V.B.i (discussing reasons why *Dukes* may have altered the disparate treatment law landscape).

²⁶⁸ See *Dukes*, 131 S. Ct. at 2553–56 (analyzing plaintiffs' social framework evidence, statistics, and anecdotal accounts on a piecemeal basis); Malveaux, *supra* note 13, at 39 ("At the outset, by analyzing each type of evidence in isolation . . . the Court diminished the overall import on the plaintiffs' evidence.").

²⁶⁹ See *Teamsters*, 431 U.S. at 338 (analyzing plaintiffs' statistics congruently with forty anecdotes to bolster the an inference of discrimination); *Caridad v. Metro-North Comm. R.R.*, 191 F.3d 283, 292–93 (2d Cir. 1999) (finding commonality satisfied by statistical and anecdotal evidence suggesting disparate treatment); see also ZIMMER, *supra* note 17, at 30 (explaining that, while presumably necessary to tell a "good story" by giving context to systemic disparate treatment discrimination, anecdotal evidence works best to *bolster* statistics and expert testimony). Especially with respect to social framework testimony, courts must consider evidence in the aggregate rather than on a standalone basis:

A researcher's ability to draw causal conclusions *depends* on the scope of information available, the type of data she collects, and the methods she employs to analyze the data. Equally valid for some research purposes are techniques that focus on correlations between social phenomena instead of on causal relationships. Sociologists can determine with a great deal of

most Title VII cases, one type of evidence by itself can rarely prove systemic disparate treatment discrimination (especially massive class actions like *Dukes*).²⁷⁰

Furthermore, based on two factual assumptions, the Court seemingly reached the conclusion that unless there is an express discriminatory policy, individual plaintiffs must prove individual managers' reasons for pay and promotion decisions.²⁷¹ At a minimum, the Court may have indirectly adopted the Ninth Circuit's dissenting view of limiting the scope of disparate treatment cases to proof that high-level policy makers intended to discriminate when they adopted a facially-neutral policy.²⁷² If the Court meant to require discriminatory purpose on the part of policy makers within an organization, then defendants may now provide evidence (e.g., nondiscrimination policies and diversity officers) that negate a purposeful state of mind.²⁷³ This focus on a defendant's state of mind, however, departs from well-settled disparate treatment law, which imposed liability for difference in

certainty, given a strong body of empirical evidence, when particular conditions or practices lead to common outcomes.

Brief for American Sociological Association, *supra* note 112, at 7–8 (emphasis added).

²⁷⁰ See, e.g., EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 310–11 (7th Cir. 1988) (finding that EEOC's failure to present testimony of any witnesses who claimed that they had been victims of discrimination by Sears confirmed the weakness of its statistical evidence); Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1228–29 (11th Cir. 2001) (although plaintiffs are not required to adduce statistics, finding the sum of the anecdotal accounts alleging unlawful disparate treatment insufficient as a matter of law).

²⁷¹ See *Dukes*, 131 S. Ct. at 2555 (“[M]erely proving that the discretionary system has produced a racial or sexual disparity is not enough.”) (quoting *Watson*, 487 U.S. at 994) (emphasis in original). The two factual assumptions on which Justice Scalia rested his finding are as follows: 1) Left to their own devices, most managers in a corporation that forbids sex discrimination would select sex-neutral criteria for hiring and promotion decisions; and (2) In a company of Wal-Mart's size, it is “quite unbelievable” that all managers would exercise discretion in a common way without some common direction. *Id.* at 2554–55. Thus, Justice Scalia substituted his own factual findings, granted no deference to the district court, and effectively engaged in an improper *de novo* review. Fisk & Chemerinsky, *supra* note 19, at 84. Justice Scalia's silence as to the appropriate standard of review for class certification orders is not surprising. See *Califano*, 442 U.S. at 703 (“[I]ssues arising under Rule 23 . . . [are] committed in the first instance to the discretion of the district court.”). Knowing that their decisions may not be granted the appropriate deferential standard of review, lower courts are likely to apply an even more rigorous analysis (at the expense of Title VII plaintiffs) at the certification stage. Malveaux, *supra* note 13, at 37.

²⁷² See *Dukes*, 603 F.3d at 640 (Ikuta, J., dissenting).

²⁷³ For instance, in *Dukes*, Justice Scalia treated Wal-Mart's announced policy prohibiting discrimination as significant evidence that the company *does not* discriminate along gender lines. 131 S. Ct. at 2553; see also Green, *supra* note 47, at 19 (acknowledging that if pattern-or-practice law requires purpose on the part of high-level policy makers, then evidence that negates that state of mind works against imposing liability).

treatment on the basis of plaintiff's membership in a protected group.²⁷⁴ Because the large majority of companies now have formal policies that forbid discrimination, the result of *Dukes* seems evident: pattern-or-practice employment discrimination cases will be extremely difficult to maintain.²⁷⁵

2. Possible Implications on Systemic Disparate Impact Law

Another critical issue is whether *Dukes* altered systemic disparate impact jurisprudence relating to subjective employment policies.²⁷⁶ In *Watson*, the Court clarified that plaintiffs must identify a specific employment practice that resulted in unlawful disparities, especially where an employer combines subjective criteria with standardized rules or tests.²⁷⁷ The *Dukes* opinion, however, rationalized that "[o]ther than the bare existence of delegated discretion, respondents have identified no "specific employment practice."²⁷⁸

The Court's selective framing of disparate impact law completely alters *Watson*.²⁷⁹ While *Watson* requires Title VII plaintiffs to

²⁷⁴ The Court's infamous systemic disparate treatment cases found liability on treatment. See, e.g., *Teamsters*, 431 U.S. at 335 n.15 (explaining that pattern-or-practice theory in terms of different *treatment*, not purpose); *Hazelwood*, 433 U.S. at 307–08 (finding that "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute . . . proof of a pattern or practice of discrimination.").

²⁷⁵ Fisk & Chemerinsky, *supra* note 19, at 84. For example, courts may look favorably to diversity policies or statements made by defendants purporting workplace equality. See *Serrano v. Cintas Corp.*, Civil Case Nos. 04-40132, 06-12311, 2009 WL 910702, at *7 (E.D. Mich. Mar. 31, 2009) (concluding against certification because Cintas has a company policy in favor of diversity and evidence demonstrated the company's endeavors to target women and racial minorities in the interest of increasing diversity).

²⁷⁶ Compare *Dukes*, 131 S. Ct. at 2554 (Scalia, J.) ("Wal-Mart's "policy" of *allowing discretion* by local supervisors over employment matters . . . should itself raise no inference of discriminatory conduct.") (emphasis in original), with 131 S. Ct. at 2565 (Ginsburg, J., concurring in part and dissenting in part) ("[E]mployer's undisciplined system of subjective decisionmaking [is] an employment practic[e] that may be analyzed under the disparate impact approach.") (internal quotations omitted).

²⁷⁷ *Watson*, 487 U.S. at 994.

²⁷⁸ *Dukes*, 131 S. Ct. at 2555.

²⁷⁹ See ZIMMER, *supra* note 17, at 35 (suggesting that *Dukes* has either been overruled, or at the very least, undermined); WEISS, *supra* note 13, at 28 ("This Wal-Mart passage completely changes the meaning of the *Watson* language from which it selectively quotes."). As the *Dukes* dissent explained, the Court's precedents recognize that "the practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects" because "managers, like all humankind, may be prey to biases of which they are unaware." *Dukes*, 131 S. Ct. at 2564 (Ginsburg, J., concurring in part and dissenting in part); accord, M. HEWSTONE ET AL., 53 ANN. REV. OF PSYCH. 575 (2002) (when subjective discretion is not moderated by corporate culture or policy, it

distinguish the subjective policy alleged to have caused disparities from any objective, non-discriminatory policies, *Dukes* seemingly alters this doctrine into a requirement that plaintiffs show delegated discretion *and* a discriminatory practice.²⁸⁰ Future courts may either interpret *Dukes* to have overruled *Watson*, or find that the *Dukes* class failed to meet its burden of separating discretionary from non-discretionary policies.²⁸¹

Furthermore, that *Dukes* shields all subject decisionmaking policies from disparate impact attack is evidenced by Justice Scalia's finding that:

The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's policy of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices. It is also a very common and presumptively reasonable way of doing business—one that we have said “should itself raise no inference of discriminatory conduct, [sic]”²⁸²

This formulation plainly contradicts *Watson*, which held Title VII liability could flow from the use of excessive subjectivity as an unlawful *practice*.²⁸³ Without citing to any legal authority or reasoning,

permits managers' stereotypes to prejudice their evaluations and employment decisions in ways that may disadvantage women).

²⁸⁰ WEISS, *supra* note 13, at 28; *see also Wards Cove*, 490 U.S. at 657 (recognizing the use of subjective decision making as an employment practice subject to disparate impact inquiry); *Watson*, 487 U.S. at 988–89 (acknowledging that the Court consistently uses conventional disparate treatment theory to review hiring and promotion decisions based on the exercise of personal judgment or the application of inherently subjective criteria).

²⁸¹ In fact, during oral arguments, Justice Kennedy expressed concern that the plaintiffs failed to meet their burden of separating discretionary from non-discretionary practices. *See* Transcript of Oral Argument at 28, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-277.pdf (“[Y]our complaint faces in two directions. Number one, you said this is a culture where . . . the headquarters knows, everything that's going on. Then . . . you say . . . these supervisors have too much discretion. It seems to me there's an inconsistency there, and I'm just not sure what the unlawful policy is.”).

²⁸² *Dukes*, 131 S. Ct. at 2554 (emphasis in original) (internal quotations omitted).

²⁸³ *Watson*, 487 U.S. at 990–91; *see also* HAGGARD, *supra* note 34, at 101 (“The Supreme Court, however, [sees] no reason why disparate impact analysis . . . [can] not be applied to subjective and discretionary employment practices.”); Brief for Respondents, *supra* note 38, at 13 (“This Court has held that a policy of subjective decision-making processes that leaves unguided

Justice Scalia put the continuing viability of disparate impact law in peril.²⁸⁴

C. The Problem with Dukes' Incidental Damages Framework

The Court's unanimous decision to deny backpay relief under FRCP 23(b)(2)—the rule designed for Title VII class action litigation—are numerous.²⁸⁵ First, any monetary relief that is not incidental to injunctive or declaratory relief cannot endure FRCP 23(b)(2) certification.²⁸⁶ *Dukes*, although offering no clear justification for its evaluation, compels federal courts to adopt the most demanding standard for analyzing the availability of non-injunctive relief.²⁸⁷

Furthermore, FRCP 23(b)(3)—the rule traditionally disfavored by Title VII plaintiffs but favored by the *Dukes* Court—requires that common questions predominate over individual ones and that a class action is superior to other methods for fairly and efficiently adjudicating the case.²⁸⁸ Given the court's scorn regarding the use of discretionary decision making as grounds for the less-demanding commonality

discretion to managers is an employment practice subject to challenge under Title VII where, as here, it has resulted in a pattern of discrimination against women.") (citing *Hazelwood*, 433 U.S. at 301–02 and *Falcon*, 457 U.S. at 159 n.15).

²⁸⁴ See ZIMMER, *supra* note 17, at 44 (opining that without being able to introduce evidence of how a policy operates it will be impossible for plaintiffs to show that its operation results in unlawful discrimination); John M. Husband & Bradford J. Williams, *Wal-Mart v. Dukes Redux: The Future of the Sprawling Class Action*, 40 Colo. Law. 53 (2011), available at http://hollandhart.com/articles/Sept2011TCL_Labor&Employment.pdf (opining that *Dukes* "arguably gutted" the Court's landmark decision in *Watson*).

²⁸⁵ *Dukes*, 131 S. Ct. at 2541; see generally Malveaux, *supra* note 92, at 5–20 (explaining why Title VII class actions seek certification under FRCP 23(b)(2) and why courts regularly backpay for FRCP 23(b)(2) classes).

²⁸⁶ See *Dukes*, 131 S. Ct. at 2546 ("[R]espondents' backpay claims are not incidental to their requested injunction.")

²⁸⁷ *Id.* In discreetly adopting the Fifth Circuit's "incidental" predominance test from *Allison*, 151 F. 3d at 415, the Court missed an opportunity to adopt the more appropriate test—"objective effects" test from the Ninth Circuit *Dukes* ruling. See *Dukes*, 603 F.3d at 617 (ruling that to determine whether monetary relief predominates, a district court should consider the objective "effect of the relief sought" on the litigation) (citing *Allison*, 151 F.3d at 416). Most importantly, the Ninth Circuit's proposed (and rejected) "objective effects" test restores the discretion necessary for district courts to consider complex class action certifications, but also cabinets this discretion with factors to mitigate manageability and due process. *Dukes*, 603 F.3d at 617. For a thorough overview of the Ninth Circuit's "objective effects" test, as well as the Fifth Circuit's "incidental" test and Second Circuit's "ad-hoc" test, see Malveaux, *supra* note 92, at 20–36.

²⁸⁸ FED. R. CIV. P. 23(b)(2).

standard, this burden should be extremely difficult for plaintiffs' to meet in employment class actions.²⁸⁹

Finally, *Dukes* bars federal courts from distinguishing backpay from monetary damages and thereby obtaining FRCP 23(b)(2) certification for claims seeking large backpay relief.²⁹⁰ In requiring plaintiffs who bring class-action employment discrimination lawsuits to meet FRCP 23(b)(3)'s standards, the Court neglected the remedial nature of backpay for discrimination victims,²⁹¹ foreclosed FRCP 23(b)(2) certification for meritorious systemic discrimination claims,²⁹² and ignored the

²⁸⁹ Already, federal courts are applying *Dukes*' individualized "incidental relief" framework to deny certification for class action plaintiffs. See, e.g., *Ellis*, 657 F.3d at 986–88 (remanding for reconsideration after noting that the named plaintiffs' subjective intent with respect to seeking predominantly injunctive relief is now irrelevant, and the court's must focus on Due Process considerations and whether monetary relief could be granted without individualized determinations); *Cruz*, Nos. 074-2050 SC, 07-4012 SC, 2011 WL 2682967, at *7 (N.D. Cal. July 8, 2011) (stating that in light of the Supreme Court's rejection of a "trial by formula" approach, "it is not clear to the court how, even if class-wide liability were established, a week-by-week analysis of every class member's damages could be feasibly conducted").

²⁹⁰ See *Dukes*, 131 S. Ct. at 2560 (finding backpay's equitable nature irrelevant because it is neither injunctive or declaratory relief); see also Malveaux, *supra* note 13, at 51 (explaining that, after *Dukes*, backpay enjoys no preference over punitive and compensatory damages under FRCP 23(b)(2)).

²⁹¹ See *Franks*, 424 U.S. at 765 (emphasizing that the provisions of Title VII are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible, and that [Title VII] is "intended to make the victims of unlawful employment discrimination whole, and . . . the attainment of this objective . . . requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination."); *Albemarle*, 422 U.S. at 421–22 ("The courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the [make whole] statutory objective[], while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases.").

²⁹² See Malveaux, *supra* note 13, at 48 (recognizing that the cost of sending out class notices (which amount to hundreds of thousands of dollars) to FRCP 23(b)(3) class members, in conjunction with FRCP 23(b)(3)'s heightened certification standards, may prohibit employees alleging systemic discrimination from being able to sue large corporations); see also Suzette M. Malveaux, *Fighting to Keep Employment Discrimination Class Actions Alive: How Allison v. Citgo's Predomination Requirement Threatens to Undermine Title VII Enforcement*, 26 BERKELEY J. EMP. & LAB. L. 405, 425–26 (2005) (explaining the high costs of notice by referring to *Ahern v. Fibreboard Co.*, 162 F.R.D. 505, 528 (E.D. Tex. 1995), where the cost of notice reached \$22 million, as well as opining that the provision of opt-out rights may undermine class's ability to settle out of court). While the Court excluded backpay for FRCP 23(b)(2) class actions, it did not foreclose entirely Title VII pattern-or-practice class actions—plaintiffs may seek relief entirely as a FRCP 23(b)(3) class (if they can meet its demand prerequisites), or alternatively, may seek certification as hybrid class. See Malveaux, *supra* note 13, at 51–52 (describing hybrid classes where injunctive relief is sought under FRCP 23(b)(2), and monetary relief is sought under FRCP 23(b)(3)); accord, *Dukes*, 603 F.3d at 622 (endorsing "hybrid certification" of FRCP 23(b)(2) and FRCP 23(b)(3) classes, particularly Title VII cases that involve significant monetary damages).

importance of the class action device as a deterrent to gender discrimination.²⁹³ As one post-*Dukes* court appropriately declared: "[*Dukes*] reduced to rubble more than forty years of precedent in the Courts of Appeals, which had long held that backpay is recoverable in employment discrimination class actions certified under Rule 23(b)(2)."²⁹⁴

VI. CONCLUSION

By erecting barriers to Title VII class litigation, the Supreme Court drastically curtailed the rights of everyday workers.²⁹⁵ The Court's ruling in *Dukes* inhibits the effectiveness of the legal system by allowing procedural rules to disrupt the truth-seeking function of litigation.²⁹⁶ Moreover, if companies are insulated from class action litigation, their incentives to voluntarily undertake reforms are diminished.²⁹⁷ The Roberts Court's radical reshaping of class action and systemic discrimination law to insulate large corporations jeopardizes meritorious challenges to unlawful gender bias in the workplace.²⁹⁸ As Betty Dukes appropriately stated:

²⁹³ Although women have made significant progress since the passage of Title VII, disparities and discrimination persist in many workplaces. As a result, class actions have and should play a critical role in allaying discriminatory practices and promoting reforms to carry out the second prong of Title VII's purpose: to deter unlawful discrimination against protected groups. See SYLVIA ANN HEWLETT, OFF-RAMPS AND ON-RAMPS: KEEPING TALENTED WOMEN ON THE ROAD TO SUCCESS 93 (2007) (observing that "lawsuits can be surprisingly effective in forcing change" because "they cannot be concealed or ignored"). For instance, in *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001), Coca-Cola's settlement laid out advanced mechanisms to address nearly every aspect of the corporation's policies and procedures, including modifications to staffing, performance evaluations, and career development systems. ALEXIS M. HERMAN ET AL., FIFTH ANNUAL REPORT OF THE TASK FORCE 25–56 (2006), available at http://www.thecocacola.com/ourcompany/task_force_report_2006.pdf. For extensive information regarding workplace discrimination and the appropriateness of class action lawsuits to correcting and deterring unlawful gender disparities, see Brief for U.S. Women's Chamber of Commerce et al. as Amicus Curiae Supporting Respondents, at 4–25, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277); Brief for American Civil Liberties Union & National Women's Law Center as Amicus Curiae Supporting Respondents, at 6–37, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277).

²⁹⁴ *New York*, 276 F.R.D. at 33.

²⁹⁵ ALLIANCE FOR JUSTICE, *supra* note 1, at 3.

²⁹⁶ Hart, *supra* note 259, at 8.

²⁹⁷ *Id.*

²⁹⁸ Malveaux, *supra* note 13, at 52.

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It is not easy to take on your own employer. It is even more difficult when that employer is the biggest company in the world. In this country, there are many Betty Dukes who want their voices to be heard when they are denied equal pay and equal promotion. For many of these women, I am afraid that the court's ruling will leave them without having their due day in court.²⁹⁹

²⁹⁹ C-SPAN, *supra* note 3.