TOO BIG TO BE SUED?: CLASS ACTIONS AND THE COMMONALITY REQUIREMENT AFTER *WAL-MART V. DUKES*

Erin Shaughnessy[*]

I. INTRODUCTION

"In a sense the court has said, the banks we have were too big to fail, with Walmart we have *too big to sue*."[1] This was the headline following the Supreme Court's decision in *Wal-Mart v. Dukes*.[2] Prior to the decision, Dukes and her fellow class members were on their way to certifying the largest employment discrimination class in United States history.[3] The Court was confronted with a massive class of 1.5 million women,[4] with the potential to produce billions of dollars in damages.[5] However, the Supreme Court overturned the class certification granted by the Northern District of California and the Ninth Circuit on Rule 23 grounds.[6] In essence, the Supreme Court decided that Wal-Mart was too big to be sued and left many wondering what the future of class certification would look like for classes challenging massive corporate defendants.[7]

The *Dukes* Court diverged from consistent interpretation of Rule 23(a), implementing a heightened standard. The Court required three elements to meet the commonality requirement. First, class members must demonstrate that they "have suffered the same injury."[8] Second, the resolution of any issue

---

[*] J.D. Candidate, May 2019, University of Louisville Louis D. Brandeis School of Law; B.A. in Political Science, Murray State University, May 2016. I would like to thank my family, friends, and teachers for supporting me throughout my entire academic career. I would especially like to thank my parents, Pam and Daniel Shaughnessy, for their constant love, support, and encouragement.

[1] Lila Shapiro, *Walmart: Too Big To Sue*, HUFFINGTON POST (June 20, 2011, 8:33 PM), http://www.huffingtonpost.com/2011/06/20/walmart-too-big-to-sue_n_880930.html (emphasis added).

[2] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

[3] Robert Barnes, *Wal-Mart Asks Supreme Court to Deny Class-Action Suit by Female Workers*, THE WASH. POST (Mar. 27, 2011), https://www.washingtonpost.com/politics/wal-mart-asks-supreme-court-not-to-allow-class-action-suit-by-female-employees-alleging-discrimination/2011/03/25/AFTMXokB_story.html?utm_term=.3140b7fd3023.

[4] *Dukes*, 564 U.S. at 343.

[5] Barnes, *supra* note 3.

[6] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

[7] Shapiro, *supra* note 1.

[8] *Dukes*, 564 U.S. at 350; *see also* A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 464 (2013).

must be "central to the validity of each one of the claims."[9] Last, the claim must be one that is capable of classwide resolution.[10] "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."[11]

The Supreme Court has misunderstood and misinterpreted the commonality requirement, creating a heightened and ambiguous standard not analogous to the current articulation of Rule 23. Although the Supreme Court opinion is only six years old, it has been distinguished by lower courts hundreds of times.[12] This Note will examine those distinguishable opinions and attempt to articulate a new and comprehensible version of the commonality requirement of Rule 23(a).

Part II of this Note will examine the history of the commonality requirement prior to *Dukes*. Part III will discuss the *Dukes* decision and the affect it had on class certification. Part III will also identify distinguishable cases and analyze why they are distinguishable from *Dukes*. Part IV will discuss the questions and problems that remain after the *Dukes* decision. A hypothetical will be posed in which the proponents and opponents of the decision will propose new language for the commonality requirement. Further, a compromise position will be examined, and a conclusion will be reached as to which proposal to the commonality requirement is the best moving forward.

II. HISTORY

The current rule on class certification, Rule 23(a), is a relatively recent articulation. Over time, it has been amended to eliminate ambiguity. Despite multiple amendments, courts are still interpreting the language of the current rule. Prior to and leading up to Dukes' appearance before the Supreme Court, the rule had consistently been interpreted in the same way. However, the Supreme Court changed that interpretation when they accepted the *Dukes* case and heightened the standard.

---

[9] *Dukes*, 564 U.S. at 350; *see also* Spencer, *supra* note 8, at 464.

[10] *Dukes*, 564 U.S. at 350; *see also* Spencer, *supra* note 8, at 464.

[11] *Dukes*, 564 U.S. at 350 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

[12] *See* cases cited *infra* note 107–09.

A. Development of Rule 23

Prior to 1937, class actions were governed by Equity Rule 38.[13] The rule articulated a general test, which asked whether the question presented to the court was "one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court."[14]

In 1937, the Advisory Committee on Rules rewrote the rule concerning when a class action can be brought. This version still required numerosity.[15] However, it also required adequate representation and identified three ways that an individual could join as a plaintiff or be joined as a defendant in enforcing their rights.[16] First, when the class is "joint, common, or derivative in the sense that the owner of a primary right neglects or refuses to enforce such right and the class thereby obtains a right to enforce the primary right."[17] Second, the class is "several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action."[18] Third, the class is "several, and there is a question of law or fact common to the several rights."[19]

Each of these categories came to be known as a different type of class suit. A true class suit was one that was joint, common, or derivative.[20] A hybrid class suit was several and affecting the rights related to specific property.[21] A spurious class suit was several and related to common questions of law or fact.[22]

In 1966, the Advisory Committee amended the rule citing abstract and imprecise terms.[23] "There has been considerable trouble and difficulty experienced by the courts in determining under a given set of facts whether an action filed by a group of plaintiffs is a true class suit, a hybrid class suit, or a spurious class suit."[24] The current articulation of Rule 23(a) resulted from this amendment and requires: (1) numerosity—the class is so numerous that

---

[13] FED. R. CIV. P. 23 advisory committee's note to 1937 amendment.

[14] *Id.*

[15] James Wm. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 571 (1937) (citing FED. R. CIV. P. 23(a) (repealed 1966)).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] FED. R. CIV. P. 23 advisory committee's note to 1966 amendment.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] Shipley v. Pittsburgh & L. E. R. Co., 70 F. Supp. 870, 874 (W.D. Pa. 1947).

joinder is impracticable, (2) commonality—common questions of law or fact to the class exist, (3) typicality—the claims and defenses of class representatives are typical of the class, and (4) adequate representation—the representative parties adequately represent the class.

B. Interpretation of Rule 23(a)(2) Prior to Dukes

Prior to the *Dukes* decision, the commonality requirement was construed permissively.[25] This meant that all questions of law or fact were not required to be common to the class.[26] There was more flexibility in this interpretation, and many courts found that only one common question among the class was required.[27] In many instances, courts spent little time determining whether the requirement was met.[28] "The inquiry [was] not whether common questions of law or fact predominate[d], but only whether such questions exist[ed]"[29] Overall, the requirement was perceived as a "low hurdle" to meet.[30]

In some cases, the parties contesting the class actions conceded that common questions existed.[31] In other instances, courts declared that common questions existed without further explanation.[32] In *Vernon J. Rockler & Co. v. Graphic Enterprises, Inc.*, the district court certified a class of plaintiffs who suffered damages after purchasing defendant's stock stating that "it cannot be disputed that the claims of both the named plaintiffs raise questions common to the class."[33]

The commonality requirement was satisfied, even if only one common question of law or fact was present within the class.[34] The standard was qualitative, not quantitative.[35] Further, all questions of law and fact did not

---

[25] Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 599 (9th Cir. 2010).

[26] *Id.*

[27] *See id.*

[28] 7A WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1763 (3d ed. 2017).

[29] Hewlett v. Premier Salons Int'l, Inc., 185 F.R.D. 211, 216 (D. Md. 1997).

[30] Williams v. Mohawk Indus., 568 F.3d 1350, 1356 (11th Cir. 2009).

[31] Randle v. Swank, 53 F.R.D. 577 (N.D. Ill. 1971); Epstein v. Weiss, 50 F.R.D. 387 (E.D. La. 1970); Minnesota v. U.S. Steel Corp., 44 F.R.D. 559 (D. Minn. 1968); Mersay v. First Republic Corp., 43 F.R.D. 465 (S.D.N.Y. 1968).

[32] WRIGHT ET AL., *supra* note 28.

[33] Vernon J. Rockler & Co. v. Graphic Enters., Inc., 52 F.R.D. 335 (D. Minn. 1971); *see also* Lewis v. Bogin, 337 F. Supp. 331 (S.D.N.Y. 1972) ("[T]here can be no dispute that the questions of law and facts as to the Mobile News claims are common . . . ."); Berman v. Narragansett Racing Ass'n, 48 F.R.D. 333 (D.R.I. 1969) ("[C]ommonness of law and facts abound.").

[34] Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 599 (9th Cir. 2010).

[35] *Id.* (citing Savino v. Comput. Credit, Inc., 173 F.R.D. 346, 352 (E.D.N.Y. 1997)).

have to be common in order to satisfy Rule 23.[36] In *Dukes,* the Ninth Circuit specifically stated that the "existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class."[37] Therefore, it was still possible for a class to be certified with a diversity of factual situations underlying class members' claims.[38]

Rule 23(a)(2) also did not establish a "quantitative or qualitative test of commonality."[39] The only thing that can be understood from the commonality requirement of Rule 23 is the use of the plural word "questions."[40] This could mean that more than one issue of law or fact must be common to class members.[41] However, the Supreme Court confirmed the standard that one common question will satisfy the requirement.[42] Based on a combination of these rules, it is clear that the Court has not rested upon a quantitative or qualitative method of determining commonality.[43] Many courts do not require multiple common questions but, instead, one qualitatively sufficient question.[44] On the other hand, multiple common questions that might not individually meet a qualitative standard could be admissible because of the number of questions common to a class.

---

[36] *Id.*; Resnick v. Am. Dental Ass'n, 90 F.R.D. 530, 538 (N.D. Ill. 1981); Edmonson v. Simon, 86 F.R.D. 375, 380 (N.D. Ill. 1980).

[37] *Dukes,* 603 F.3d at 599 (citing Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998)).

[38] *See Resnick,* 90 F.R.D. at 539; *Edmonson,* 86 F.R.D. at 380.

[39] WRIGHT ET AL., *supra* note 28; *see also* Singer v. AT&T Corp., 185 F.R.D. 681, 687 (S.D. Fla. 1998).

[40] WRIGHT ET AL., *supra* note 28.

[41] *Id.*

[42] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 359 (2011).

[43] WRIGHT ET AL., *supra* note 28; *see also Singer,* 185 F.R.D. at 687; Hewlett v. Premier Salons Int'l, Inc., 185 F.R.D. 211, 216 (D. Md. 1997).

[44] *Dukes,* 564 U.S. at 359.

C. The Dukes Class Emerges

This case was brought by Betty Dukes,[45] Christine Kwapnoski,[46] and Edith Arana[47] against the largest private employer in the country, Wal-Mart.[48] Dukes, Kwapnoski, and Arana represented 1.5 million current or former female Wal-Mart employees who alleged that Wal-Mart discriminated against them by denying equal pay and promotions based on their sex.[49] Wal-Mart's policies gave store managers discretion, with little oversight, to increase the wages of hourly employees and select candidates for management roles.[50] Although Dukes identified no express policies denying advancement to women, she claimed the subjective discretion of local managers, and their use of that discretion in favor of men, disparately impacted women.[51] Further, the strong corporate culture adverse to women extended to every decision maker, making the claim common to all female employees.[52]

1. The Lower Courts Interpretation of Rule 23

The *Dukes* case began in the Northern District of California where the class was certified.[53] Rule 23 gave the district court "broad discretion" to determine class certification.[54] However, the court did not think it should make a certification decision based on the merits of the case.[55] An inquiry into the substance of the case was only to be conducted as was necessary to

---

[45] Betty Dukes began her employment with Wal-Mart as a cashier before receiving a promotion to customer service manager. *Id.* at 344. Dukes was later demoted back to cashier and then to greeter after receiving disciplinary violations. *Id.* However, she claimed that the discipline was a retaliation for filing internal complaints and claims that male employees were never disciplined for similar infractions. *Id.* Further, two male greeters in the store were paid more than her. *Id.*

[46] Christine Kwapnoski, who held a supervisory position, was constantly berated at the hands of a male manager. *Id.* His tirades included telling her to "doll up, wear makeup, and dress a little better." *Id.*

[47] Edith Arana approached her store manager on multiple occasions about management training but was brushed off every time. *Id.* She filed internal complaints about the manager but was told to apply to the district manager if she was being treated unfairly by the store manager. *Id.*

[48] *Id.* at 342.

[49] *Id.* at 343.

[50] *Id.*

[51] *Id.* at 344.

[52] *Id.* at 345.

[53] *See* Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004).

[54] *Id.* at 143 (citing Armstrong v. Davis, 275 F.3d 849, 872, n. 28 (9th Cir. 2001)).

[55] *Id.* at 144.

make a certification decision.[56] Further, the district court noted that only one significant issue of law or fact was necessary to justify certification.[57]

While examining proof of commonality, the court cited three categories of evidence that supported it.[58] First, there were facts and expert opinions regarding discriminatory company policies.[59] Wal-Mart had a uniform policy that promoted gender bias and a strong corporate culture of gender stereotyping.[60] Second, there was statistical evidence of gender disparities among the class.[61] The class presented expert testimony of widespread disparities in compensation and promotions between men and women at Wal-Mart.[62] Last, there was testimony about the discriminatory attitudes of company management.[63] The class submitted over 100 declarations of women who were paid less than men, denied promotions in favor of men, and were subjected to a sexist work environment.[64] Therefore, the district court determined that the minimal burden of commonality was met and exceeded by the class.[65]

Wal-Mart appealed to the Ninth Circuit under Rule 23(f), challenging multiple issues including certification under the commonality requirement.[66] In the Ninth Circuit, the court began with a discussion on the various standards used for conducting class certification analysis.[67] In *General Telephone Company of the Southwest v. Falcon*, the Supreme Court concluded that a court can go beyond the pleadings to the merits of the case if it is necessary to determine certification.[68] The Ninth Circuit noted that the examination by the district court was significant and sufficient under the *Falcon* standard.[69] The Ninth Circuit rearticulated many existing standards followed by other courts: the commonality requirement is construed permissively, the standard is a qualitative one, and only one significant issue common to the class is necessary to satisfy the requirement.[70] The court

---

[56] *Id.*
[57] *Id.* at 145.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.* at 154.
[63] *Id.* at 145.
[64] *Id.* at 165.
[65] *Id.* at 166.
[66] Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 578–79 (9th Cir. 2010).
[67] *Id.* at 581–86.
[68] Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160 (1982).
[69] *Dukes*, 603 F.3d at 597.
[70] *Id.* at 599.

concluded that the abundance of evidence presented at the district court was sufficient to "raise the common question whether Wal-Mart's female employees nationwide were subject to a single set of corporate policies (not merely a number of independent discriminatory acts)."[71] "[C]ommonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members."[72] The *Dukes* class was a prime example of a large class challenging a company-wide practice of discrimination that evidence shows affected every member.

2. The Supreme Court's New Interpretation of Rule 23

After thorough and rigorous analyses in the district and circuit courts, the *Dukes* class was certified.[73] The Supreme Court accepted the case on a writ of certiorari and decertified the class citing the commonality requirement as the "crux of the case."[74]

The Court concluded that the language of the commonality requirement was misread.[75] Commonality is not just a pleading standard.[76] Courts may delve into the merits of a case to reach a conclusion about class certification.[77] The Court articulated a new three-step approach to satisfy the commonality requirement.[78] Commonality requires a common injury,[79] issues central to the claim, and the capability of classwide resolution.[80] Courts must look for more than just common questions, but also common answers capable of being addressed in one fell swoop.[81]

The Court identified two ways that commonality can be met in an employment discrimination context: (1) use of biased testing procedures for evaluating applicants, and (2) significant proof of a general policy of discrimination.[82] In *Dukes,* there was no testing procedure identified as

---

[71] *Id.* at 612.

[72] *Id.* at 587 (citing Armstrong v. Davis, 275 F.3d 849, 868 (9th Cir. 2001)).

[73] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 347–48 (2011).

[74] *Id.* at 349.

[75] *See id.* (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 131–32 (2009)) ("Any competently crafted class complaint literally raises common 'questions.'").

[76] *Id.* at 350.

[77] *See id.* at 351.

[78] *See id.* at 350; *see also* Spencer, *supra* note 8, at 464.

[79] *Dukes*, 564 U.S. at 350. The Court even goes as far as to say that violations of the same provisions of law do not equate to the same injury as these violations could lead to different types of injuries. *Id.*

[80] *Id.*; *see also* Spencer, *supra* note 8, at 464.

[81] *See Dukes,* 564 U.S. at 350.

[82] *Id.* at 353.

biased.[83] The Court also did not find significant proof of a general policy of discrimination because Wal-Mart's policy forbade sex discrimination.[84] The lack of a general policy meant that there were no common standards for evaluating employees and thus, no common injury, defeating any notion of commonality.[85]

III. ANALYSIS

The *Dukes* Court's new heightened interpretation of the commonality requirement left many unanswered questions about the future of class actions. However, despite the challenges classes faced, lower courts have been willing to distinguish the *Dukes* opinion.[86] This has created inconsistencies in Rule 23 precedent as courts are left to sort through a combination of pre-*Dukes* precedent, the *Dukes* opinion, and the subsequent lower court decisions. The commonality requirement of Rule 23 requires intense scrutiny to identify a proper interpretation.

A. Effects of the Dukes Decision

Class actions post-*Dukes* face new and unexpected challenges. Many scholars have commented on the issue, resulting in opposing conclusions about the effects of the decision. The *Dukes* proponents, who seek protection for corporations, praise the Court, while its opponents, who seek protection for individuals, attempt to fight the effects of the decision.[87]

The *Dukes* proponents praise the Court for properly interpreting a previously misread standard that allowed too many classes to proceed without proper certification.[88] "Wal-Mart presented a perfect storm for the conservative wing of the Supreme Court: a class claim alleging complicated

---

[83] *Id.*

[84] *Id.*

[85] *See id.* at 353–55.

[86] *See* cases cited *infra* notes 107–09.

[87] *See generally* Michael Selmi & Sylvia Tsakos, *The Class Action After a Decade of Roberts Courts Decisions: Employment Discrimination Class Actions After* Wal-Mart v. Dukes, 48 AKRON L. REV. 803 (2015) (discussing proponents opinions on effects of Dukes decision); *see also The Equal Employment Opportunity Restoration Act of 2016: What It Means for Women*, NAT'L WOMEN'S L. CTR. (July 2016), https://nwlc.org/resources/equal-employment-opportunity-restoration-act-2016-what-it-means-women-workers/ (discussing negative effects of the *Dukes* decision); Wal-Mart v. Dukes: *Will the Supreme Court Protect Wal-Mart's Discrimination Against Women?*, ALLIANCE FOR JUSTICE 8–10, https://www.afj.org/wp-content/uploads/2013/11/wal-mart-v-dukes-report-final.pdf (last visited Dec. 21, 2018) (discussing potential negative effects on class actions).

[88] *Dukes*, 564 U.S. at 349; *see* Selmi & Tsakos, *supra* note 87, at 806.

issues of discrimination against a controversial defendant that was then placed in the hands of Justice Scalia."[89] Litigation was often too costly for large corporate defendants who were forced to settle out of necessity.[90] However, the *Dukes* decision alleviated this pressure exerted on corporate defendants in class actions.[91]

Despite the reduction in the number of class actions being filed, the proponents point out that courts continue to treat class certification in a similar manner as they did prior to *Dukes*.[92] "[T]o the extent a court would have certified the claim before the Supreme Court decision it will likely still be certified."[93] The analysis for certification has changed.[94] However, lower courts continue to certify most classes by distinguishing *Dukes* based on factual discrepancies.[95]

Dukes opponents criticize the Court for heightening the certification standard and causing numerous negative effects on the future of class action litigation.[96] Courts have seen a reduction in the number of class actions filed.[97] This reduction forces litigants to bring costly individual suits or rely on underfunded governmental agencies, such as the Equal Employment Opportunity Commission (EEOC).[98] The burden is often impossible for individual litigants to meet because the time and expense is overwhelming for a single person to handle.[99] The cost of these individual suits does not stop with the individual. A significant burden is also placed upon the court system as it is forced to hear the same issues, instead of being able to settle all of the class members' claims at the same time.[100]

Some proponents have even gone as far as to propose legislation to reverse the impact of *Dukes*. Senators Al Franken and Richard Blumenthal and Congresswoman Rose DeLauro introduced the Equal Employment

---

[89] Selmi & Tsakos, *supra* note 87, at 804–05.

[90] *Id.* at 806.

[91] *See generally* Selmi & Tsakos, *supra* note 87.

[92] *Id.* at 804.

[93] *Id.*

[94] *See id.*

[95] *See* cases cited *infra* notes 107–09.

[96] *See* Nina Martin, *The Impact and Echoes of the Wal-Mart Discrimination Case*, PROPUBLICA (Sept. 27, 2013, 9:53 a.m.), https://www.propublica.org/article/the-impact-and-echoes-of-the-wal-mart-discrimination-case. Filing a claim with the EEOC is a necessary, but often useless, step as it receives thousands of complaints and often only file a couple hundred actions in response to those complaints.

[97] Selmi & Tsakos, *supra* note 87, at 804.

[98] *See* Martin, *supra* note 96; ALLIANCE FOR JUSTICE, *supra* note 87, at 10. These governmental agencies have a huge backlog of cases and the number of enforcement actions that they can file decreases every year. *Id.*

[99] ALLIANCE FOR JUSTICE, *supra* note 87, at 10.

[100] 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 1.9 (5th ed. 2018).

Opportunity Restoration Act, which would "restore workers' ability to challenge discriminatory employment practices on a class-wide basis."[101] The legislation targets employment discrimination cases through the creation of a new procedure called "group actions."[102] The requirements necessary to institute these "group actions" would be the "pre-*Dukes*" class certification requirements.[103] The legislation notes that the merits of the case do not have to be proven, rather the class must simply identify a single common question.[104]

The interests of the proponents and opponents of *Dukes* could not be more divided. Initially, the opponents' side appears more appealing. In many instances, class actions are brought by powerless individuals. So, the outrage shown by the opponents, in protesting the fact that these individuals were not given their day in court, strikes a chord.

However, the rationale behind *Dukes* makes it easy to understand the Court's logic in making its decision. The Court should not choose between protecting some over others. The negative stereotypes associated with the large and powerful corporation should not exclude them from protection, especially when it comes down to a "bet-the-company" type of lawsuit. The Court saw that the protection the law offers should extend to both the individual and to the large corporation.

The need to protect the individual, as well as the corporation, is vital. Neither side is completely right or justified in the arguments they have put forth regarding the correctness of *Dukes*. The opponents are not right in seeking reversal of the decision and forging on with sole protection for the individual. The proponents are not right in advocating for the heightening standard, while attempting to enlarge the protection for corporations. It is possible for the Court to protect individuals and corporations fairly at the same time, although *Dukes* did not achieve that purpose. Some lower court decisions have begun to shape the proper direction for protecting both interests, demonstrating that reconciliation of these interests is achievable and should be the goal of the legal community.

---

[101] Daniel C. Gibson, *Legislation Introduced to Nullify Impact of* Wal-Mart v. Dukes *in Employment Discrimination Cases via 'Group Actions'*, BRICKER & ECKLER, LLP (June 25, 2012), http://www.bricker.com/people/daniel-gibson/insights-resources/publications/legislation-introduced-to-nullify-impact-of-wal-mart-v-dukes-in-employment-discrimination-cases-via-group-actions.

[102] *Id.*

[103] *Id.*

[104] *Id.*

B. Post-Dukes Decisions in the Lower Courts

The *Dukes* decision represented a large shift in class certification law. This new and heightened standard was untested, resulting in hundreds of opinions in which *Dukes* was distinguished. Further, post-*Dukes* opinions do not point in a singular direction. The one thing that remains clear from the opinions is that the *Dukes* standard is inoperable, burdening many classes and courts more than it has benefited them.[105] Lower courts have identified numerous factual discrepancies that distinguish cases from the heightened *Dukes* standard but have been unwilling to articulate any new legal precedent in the area of class certification.

Upon examining many of these decisions, the distinguishable factors often come down to the facts.[106] However, there are a couple different patterns that stand out among these distinguishable opinions. First, many courts have distinguished *Dukes* based upon differences in policies.[107] Second, courts have distinguished *Dukes* because the proposed classes were smaller, more uniform, and restricted in location.[108] Lastly, one lower court proposed an evidentiary requirement for class certification so that less reliance is placed on rigorous merits analysis.[109]

1. Uniform vs. Discretionary Policies

Wal-Mart's policy, giving managers subjective decision-making discretion, represented one of the biggest problems for the class. The Court took issue with the fact that the policy was discretionary.[110] The *Dukes* Court found that Wal-Mart's discretionary policy could not produce common injuries because of the nature of discretion.[111] The Court could not ensure that

---

[105] *See* cases cited *infra* note 107–09.

[106] *See* cases cited *infra* note 107–08.

[107] McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 490 (7th Cir. 2012); Daye v. Cmty. Fin. Serv. Ctrs., LLC, 313 F.R.D. 147, 178 (D.N.M. 2016); *In re* Motor Fuel Temperature Sales Practices Litig., 292 F.R.D. 652, 667–68 (D. Kan. 2013); Ellis v. Costco Wholesale Corp., 285 F.R.D. 492, 509 (N.D. Cal. 2012); Chen-Oster v. Goldman, Sachs & Co., 877 F. Supp. 2d 113, 118 (S.D.N.Y. 2012); George v. Nat'l Water Main Cleaning Co., 286 F.R.D. 168, 175 (D. Mass. 2012).

[108] *See* Brown v. Nucor Corp., 785 F.3d 895, 910 (4th Cir. 2015); Cruz v. TMI Hosp., Inc., No. 14-CV-1128 (SRN/FLN), 2015 U.S. Dist. LEXIS 147479, at *26 (D. Minn. Oct. 30, 2015); Johnson v. Flakeboard Am. Ltd., No. 4:11-2607-TLW-KDW, 2012 U.S. Dist. LEXIS 83702, at *15 (D.S.C. Mar. 26, 2012); *Ellis*, 285 F.R.D. at 509; Cronas v. Willis Grp. Holdings, Ltd., 06 Civ. 15295 (RMB), 2011 U.S. Dist. LEXIS 122736, at *8 (S.D.N.Y. Oct. 18, 2011).

[109] *Daye*, 313 F.R.D. at 160.

[110] Wal-Mart Stores, Inc. v. Dukes, 546 U.S. 338, 354 (2011).

[111] *See id.* at 352–53.

the policy had been uniformly applied across all 3,400 stores when managers operated under subjective decision-making discretion.[112]

A discretionary policy is the opposite of a uniform employment practice.[113] It allows for a level of subjectivity that cannot be regulated by any higher authority. These policies do not apply equally to everyone; they are instead governed by personal feelings, emotions, and opinions. A discretionary policy could produce a different and unique result each time it is applied.

Discretionary policies with built-in and uniformly applied criteria can be challenged successfully. These policies effectively operate as a uniform policy. However, this argument is difficult to make because of the nature of discretion. Despite this one small exception, discretionary policies will automatically be considered suspect because of their nature.[114]

Uniform policies, on the other hand, apply equally to everyone. They do not change based on subjective factors, such as personal feelings or opinions; they are objective and impartial. A uniform policy, when applied correctly, should produce the same result every time.

Lower courts have demonstrated that a variety of policies will be considered uniform enough to establish common questions of law or fact.[115] Thus, similarly situated classes can be certified because of the policy differences that exist.[116] Some of these policy differences include general uniform policies applied throughout the entire company,[117] company-wide employment practices implemented by top management,[118] and uniformly exercised discretion.[119] The element these policies have in common is that they are objective and applied consistently. The same result occurs every time the policy is implemented, and that same result is a common injury among every class member.[120] After *Dukes,* the lower courts have not let the

---

[112] *Id.* at 354.

[113] *See id.* at 355.

[114] *See id.* at 353–55.

[115] *See* cases cited *supra* note 107.

[116] *See* cases cited *supra* note 107.

[117] McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 672 F.3d 482, 488 (7th Cir. 2012); Daye v. Cmty. Fin. Serv. Ctrs., LLC, 313 F.R.D. 147, 178 (D.N.M. 2016); *In re* Motor Fuel Temperature Sales Practices Litig., 292 F.R.D. 652, 667–68 (D. Kan. 2013); George v. Nat'l Water Main Cleaning Co., 286 F.R.D. 168, 175 (D. Mass. 2012).

[118] *McReynolds*, 672 F.3d at 488; Ellis v. Costco Wholesale Corp., 285 F.R.D. 492, 509 (N.D. Cal. 2012).

[119] *Ellis*, 285 F.R.D. at 509; Chen-Oster v. Goldman, Sachs & Co., 877 F. Supp. 2d 113, 118 (S.D.N.Y. 2012).

[120] A class of consumers claimed fuel providers in California priced fuel without regard for the temperature of the fuel. *See In re Motor Fuel Temperature Sales Practices Litig.*, 292 F.R.D. at 660. In *In re Motor Fuel Temperature Sales Practices Litigation,* several corporations who owned, operated, and

heightened commonality standard prevent them from examining similar policies that have a uniform character and meet the commonality requirement.

A policy delegating discretion to "complex directors" was sufficient to satisfy commonality.[121] In *McReynolds v. Merrill Lynch*, 700 black brokers challenged Merrill Lynch's "teaming" and "account distribution" policies as being discriminatory.[122] The teaming policy permitted brokers to form teams in dealing with clients.[123] The teams had the power to decide who was admitted and were like "little fraternities."[124] "If they are white, they, or some of them anyway, are more comfortable teaming with other white brokers."[125] The account distribution policy required brokers to compete for accounts when a broker left Merrill Lynch.[126] The directors could exercise discretion by vetoing teams and adding criteria to the account distribution competitions.[127] Black brokers found it hard to join a team that generated a lot of revenue and met the criteria for the account distribution competitions.[128] The court acknowledged that there was a discretionary policy, but the discrimination was attributable to the company, not the directors' discretion.[129] The policies were established at the company level and the discrimination persisted because of the policies, not because the directors exercised discretion in a discriminatory way.[130]

---

controlled gas stations in California were sued for a breach of the duty of good faith and fair dealing, unjust enrichment, and a violation of the California Unfair Competition Law and the Consumers Legal Remedy Act. *Id.* at 659. Consumers claimed that the providers sold gas for a specific price "without disclosing or adjusting for temperature and its effects on motor fuel." *Id.* Consumers were concerned about the temperature of the gas because it affects volume and energy content. Wilson v. Ampride, Inc. (*In re* Motor Fuel Temperature Sales Practices Litig.), No. 07-1840-KHV, 2012 U.S. Dist. LEXIS 145976, at *60 (D. Kan. Oct. 3, 2012). Gas expands as it warms which affects the energy content. *Id.* at *60–61. The warmer the gas is the less energy is present, affecting the value of the gas that the consumer is receiving. *Id.* at *61. So, a warm gallon will not go as far as a cooler gallon even though they might cost the same. *See id.* at *61. The court determined that the class met the commonality requirement because there was significant proof that this practice was a general and uniform policy held by the corporations. *In Re Motor Fuel Sales Practices Litig.*, 292 F.R.D. at 668. Therefore, every consumer was injured in the same way because the cost of gas remained the same even if they got less use out of it. *Id.*

[121] *McReynolds*, 672 F.3d at 490–92.

[122] *Id.* at 488.

[123] *Id.*

[124] *Id.* at 489.

[125] *Id.*

[126] *Id.* at 488–89.

[127] *Id.* at 489.

[128] *See id.* at 490.

[129] *Id.*

[130] *See id.*

Discretionary policies are often too complicated and convoluted to guarantee uniform results that could produce common injuries. Dealing with discretion makes a court's job increasingly difficult and time consuming. Despite this, the lower courts have concluded that policies do not have to be purely uniform in order to establish common questions.[131] The evaluation of a policy's subjectivity or uniformity is not always black and white but, instead, a sliding scale. These lower court decisions would not have changed the outcome of *Dukes*, as the Court did sufficiently examine the challenged policy.[132] However, these lower court opinions demonstrate that even policies that facially appear subjective, can be uniformly applied to the point of producing common injuries.[133]

2. Smaller and More Restrictive Classes

The *Dukes* class consisted of a historically large number of members, employed in various positions, and spread out across the entire nation.[134] At the time, Wal-Mart employed more than 1 million people.[135] The stores were divided into seven divisions and forty-one regions, with each region compromising eighty to eighty-five stores.[136] Each store had forty to fifty-three departments and eighty to five hundred positions.[137] The scale of the class resulted in its downfall because "respondents wish[ed] to sue for millions of employment decisions at once."[138] The *Dukes* Court was searching for any way to ensure that a class the size of *Dukes* could not and would not be certified.[139]

The scale of a class has been the most influential factor in any court's certification decision. It is the most common way that post-*Dukes* lower courts have distinguished *Dukes* and continued to certify classes. Further, the size of the *Dukes* class was the motivating factor behind the Supreme Court's decision.[140] It is possible that the class would have succeeded if it was brought on a smaller scale or restricted to one or two regions. However, this was not

---

[131] *See* cases cited *supra* note 107.
[132] Wal-Mart Stores, Inc. v. Dukes, 546 U.S. 338, 353–58 (2011).
[133] *See* cases cited *supra* note 107.
[134] *Dukes*, 546 U.S. at 343–44.
[135] *Id.* at 342.
[136] *Id.*
[137] *Id.*
[138] *Id.* at 352.
[139] *See id.*
[140] *See id.*

the case, and the Court chose to heighten the commonality requirement, making it difficult for any class to progress beyond certification.[141]

Instead of creating an exception to Rule 23 for classes exceeding a certain size, the Court saw it as its duty to burden every class seeking federal certification. After *Dukes*, lower courts had to work harder to certify small classes that would have been unquestionably certified prior to *Dukes*. The most determinative differences in scale include limited geographic scope,[142] the number of employees involved,[143] specific jobs,[144] and the exercise of control by a single decision maker.[145]

A class of 100 members in a single steel plant was found to meet the Rule 23 commonality requirements.[146] In *Brown v. Nucor*, black workers at one South Carolina steel plant alleged racial discrimination based on job promotion practices and a hostile work environment.[147] At the time, only one black worker out of seventy-one held a supervisory position.[148] The Fourth Circuit certified the class in large part because of the scale and makeup of the class.[149] The litigation involved about 100 members.[150] Every member was employed in the same steel plant in South Carolina.[151] "The class members shared common spaces, were in regular physical contact with other departments, could apply for promotions in other departments, and were subject to hostile plant-wide policies and practices."[152] The size and makeup

---

[141] *See id.* at 350.

[142] Brown v. Nucor Corp., 785 F.3d 895, 910 (4th Cir. 2015) (single steel plant in South Carolina); Cruz v. TMI Hosp., Inc., No. 14-CV-1128 (SRN/FLN), 2015 U.S. Dist. LEXIS 147479, at *26 (D. Minn. Oct. 30, 2015) (single Fairfield hotel in Bloomington); Johnson v. Flakeboard Am. Ltd., No. 4:11-2607-TLW-KDW, 2012 U.S. Dist. LEXIS 83702, at *15 (D.S.C. Mar. 26, 2012) ("two small plants in one small town"); Cronas v. Willis Grp. Holdings, Ltd., 06 Civ. 15295 (RMB), 2011 U.S. Dist. LEXIS 122736, at *8 (S.D.N.Y. Oct. 18, 2011) (single Willis office in New York).

[143] *Brown*, 785 F.3d at 910 (100 class members); *Cruz*, 2015 U.S. Dist. LEXIS 147479, at *16 (67 class members); Ellis v. Costco Wholesale Corp., 285 F.R.D. 492, 509 (N.D. Cal. 2012) (700 class members); *Johnson*, 2012 U.S. Dist. LEXIS 83702, at *15 (25–50 class members); *Cronas*, 2011 U.S. Dist. LEXIS 122736, at *8 (317 class members).

[144] *Cruz*, 2015 U.S. Dist. LEXIS 147479, at *26 (proposed class member all worked as housekeepers); *Ellis*, 285 F.R.D. at 509 (class only involved applicants for general and assistant general manager position).

[145] *Cruz*, 2015 U.S. Dist. LEXIS 147479, at *26 (proposed class members supervised by same person); *Cronas*, 2011 U.S. Dist. LEXIS 122736, at *9 (promotion decisions made by a single ultimate decision maker).

[146] *See generally Brown*, 785 F.3d 895.

[147] *Id.* at 898.

[148] *Id.*

[149] *Id.* at 922.

[150] *Id.* at 910.

[151] *Id.*

[152] *Id.*

of the class increased the uniformity of the class and the injuries they had in common.[153]

A class alleging gender discrimination in promotion and hiring practices for two positions was enough to satisfy commonality.[154] In *Ellis v. Costco*, current and former female employees sued Costco for gender discrimination in promotion and hiring practices.[155] The litigants claimed company-wide policies had a disparate impact on females in promotions to the general manager and assistant general manager positions.[156] The class was certified by the district court and decertified by the Ninth Circuit before being recertified by the district court based on the size of the class.[157] The class consisted of around 700 members and the allegations of discrimination only extended to two positions.[158] The company-wide policies in this case were also controlled by top management within the company and they exercised a system of guided discretion.[159] The size of the class and the specific allegations presented appear to represent determining factors in the eventual certification of a class post-*Dukes*.[160]

A hypothetical best demonstrates that commonality is easier to satisfy in small scale classes. A group of 100 current and former female employees were denied promotions to supervisory positions at ABC Corporation located in state Alpha. They allege that they were denied the promotions because of a company policy that gave guided promotional discretion to a small group of managers. This group was made up of all men who exercised their discretion in a discriminatory way. This group of female employees brought a class action against ABC Corporation. In a class this size, it would be easy to identify common injuries that could give rise to common questions. It is possible that counsel for the class could get testimony from every single member because of the small size. It would also be easy to identify conclusive quantitative data related to promotional decisions and possible disparities in promotional practices because of the limited geographic scope. Therefore, it is evident that small scale classes present more opportunities for certification because of the ease in satisfying commonality.

The *Dukes* Court's decision produced benefits and burdens to the many parties involved in class certification decisions. The Court increased the

---

[153] *See id.*

[154] *See generally* Ellis v. Costco Wholesale Corp., 285 F.R.D. 492 (N.D. Cal. 2012).

[155] *Id.* at 496.

[156] *Id.*

[157] *Id.* at 496–97, 509.

[158] *Id.* at 509.

[159] *Id.*

[160] *See id.*

burden and involvement of lower courts in certification decisions. Lower courts have been forced to distinguish classes that are already reasonable in scale.[161] These courts are already burdened by large caseloads, without having to deal with increased legal minutiae involving small classes that meet the Rule 23 requirements.[162] A class that is limited to a specific location or involves a small number of class members should be more manageable.[163] These smaller classes are also more typical of class actions.[164] Common questions should be easier to identify within a smaller class.[165] There is a chance that every member of the class could be aware of the action and even involved. In a smaller setting, every member of the class might have even given a statement about their claim. In a smaller setting with fewer extraneous factors, it should be more likely that a group of people will identify a common question that can be addressed without the extended involvement of a court.

Despite this burden on lower courts, it is difficult to say that the *Dukes* Court was wrong in wanting to deal a hard blow to mass class actions. Corporations often are forced to choose between losing the entire company to a lawsuit or damaging their bottom line because of class action settlements—a lose-lose situation for any corporation involved.[166] It is evident that legal reform is necessary. The *Dukes* Court was correct in foreseeing the possible need to extend protections to corporations within the class action context. However, it would have been more appropriate for the Court to treat *Dukes* like the exceptional case it was. The Court took an unnecessarily large leap that affected all class actions, including those limited in size and scope.

3. Preponderance of the Evidence Standard

The *Dukes* class presented a plethora of evidence to the Court, including company-wide policies, expert opinions about company culture, statistical evidence of gender disparities, and class member testimony.[167] Despite this, the Court found that the evidence presented was not compelling enough to satisfy the heightened commonality requirement after a rigorous merits

---

[161] *See* cases cited *supra* note 108.

[162] Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 687 (2001).

[163] *See* Martin, *supra* note 96.

[164] 5 JEROLD S. SOLOVY ET AL., MOORE'S FEDERAL PRACTICE § 23.22 (3d ed. 2017).

[165] *See* Martin, *supra* note 96.

[166] Selmi & Tsakos, *supra* note 87, at 806.

[167] Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 600 (9th Cir. 2010).

analysis.[168] Since *Dukes,* many lower courts have engaged in a similar merits analysis. However, one lower court has challenged *Dukes* on the rigorous merits analysis the Court advocated.[169]

The Supreme Court took a cautionary stance on the issue of merits analysis in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds.*[170] This post-*Dukes* decision warned about digging too deep into a case's merits at the certification stage.[171] The Court acknowledged that *Dukes* established that the certification analysis often needs to be rigorous and extend into the merits of the case.[172] However, the Court cautioned about such "free-ranging merits inquires" saying, "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether Rule 23 prerequisites for class certification are satisfied."[173]

The U.S. District Court for the District of New Mexico identified *Amgen*'s cautionary precedent and attempted to reconcile it with the *Dukes* opinion in *Daye v. Financial Service Centers, LLC.*[174] The district court reconciled *Amgen*'s cautionary approach to merits inquiries with *Dukes*'s reliance on rigorous merits analysis by "find[ing] facts for the purposes of class certification by a preponderance of the evidence."[175] As a check on this compromise, the district court also allowed these findings to be challenged during the subsequent merits stage.[176]

This line of precedent is damaging to the *Dukes* decision. The ground work has been laid for other large classes to overcome the heightened standard and rigorous merits analysis as the class would be operating under a clearly defined burden of proof, rather than an ambiguous standard. The implications of this decision are far-reaching, as a federal court has identified and connected an unambiguous burden of proof to class certification decisions.[177] Many challenged classes prior to this had never articulated a burden that must be met by a party seeking to prove certification. However, as *Dukes* made its way through the lower courts, some courts moved towards using the preponderance of the evidence standard during the class

---

[168] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 356–58 (2011).
[169] Daye v. Cmty. Fin. Serv. Ctrs., LLC, 313 F.R.D. 147, 160 (D.N.M. 2016).
[170] Amgen, Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 465–66 (2013).
[171] *Id.*
[172] *Id.*
[173] *Id.* at 466.
[174] *Daye*, 313 F.R.D. at 160.
[175] *Id.*
[176] *Id.*
[177] *See id.* at 147.

certification stage.[178] Prior to this, a plaintiff's representations and the discretion of the court determined if enough evidence had been provided to meet the Rule 23 requirements.[179] The preponderance of the evidence standard is easily understood by attorneys and the courts. It is a workable standard with a low bar in terms of burdens of proof, as there must only be a fifty-one percent chance of something occurring to satisfy the standard.[180]

Under *Amgen* and *Daye,* the *Dukes* class would have had a better chance at being certified. This is because the evidence of discrimination, and a common injury, would be evaluated under this evidentiary standard. The female employees' testimony regarding their working conditions begins to chip away at this burden. However, it is the expert opinion regarding corporate culture and the statistical evidence of gender disparities that would have pushed the case over the line of fifty-one percent. A case as large as *Dukes* requires ample evidence to support common questions of law or fact. If the only evidence presented had been the testimony of the female employees within the class, the evidence would not have been sufficient to meet this evidentiary standard. However, these three categories of evidence combined appear more than sufficient to establish certification by a preponderance of the evidence.

An objective evidentiary standard, such as this, presents a compromise for both sides of the class certification debate. Prior to *Dukes,* the individual was in a far superior position to prove commonality, as they were faced with a relaxed standard that did not require much proof to satisfy.[181] Meanwhile, corporations were in a poor position to fight the relaxed standard, as their only option was to challenge certification after the fact. Under this evidentiary standard, individuals and corporations are in positions of equal power because the burden on the individual increases, while protections for corporations increase as well. On the one hand, the individual's burden will increase as the fate of their class rests upon them. The evidentiary standard would also eliminate mass classes that cannot carry their burden. On the other hand, corporations will receive additional protection without any increased burden. Further, courts can no longer certify a class under the relaxed commonality standard and must spend additional time examining the class in comparison to the evidence it presents. This decreases the likelihood that corporations will have to challenge certification decisions. Ultimately, the

---

[178] *See* Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc., 546 F.3d 196, 202 (2d Cir. 2008).

[179] *See Daye*, 313 F.R.D. at 159–60.

[180] Hernandez v. United States, 665 F. Supp. 2d 1064, 1076 (N.D. Cal. 2009).

[181] *See* discussion *supra* Section II.B.

evidentiary standard would reconcile the disparity in power between individuals and corporations in the context of class certification for good.

IV. RESOLUTION

Seven years out from *Dukes* and many questions remain unanswered regarding class certification and the commonality requirement. At this stage, the best remedy to the problem is to amend the language of Rule 23(a). The proponents and opponents of the *Dukes* decision each have their own ideas about how the rule should be interpreted. However, the best way to settle the conflict in interpreting the rule is to adopt a compromise position.

A. Questions Remain—The Problems Courts Face Post-Dukes

The distinguishable opinions put forth by the lower courts post-*Dukes* leave many unresolved questions. Did the Court overreach in heightening the commonality requirement? Where does the commonality requirement stand today after so many distinguishable lower court opinions? And most importantly, how should the courts interpret the commonality requirement moving forward? These questions have not been answered. Representatives of classes, attorneys, and the courts are left with an ambiguous standard and hundreds of distinguishable lower court opinions to rely upon. Action needs to be taken to remedy the ambiguity currently present in the class certification field.

The lower courts have identified multiple ways in which classes can be distinguished from the *Dukes* class in order to be ripe for certification.[182] They have taken the heightened standard and breathed into it an air of rationality and a recognition of the rule's former interpretation. They have not let classes fail because of the Court's legally opportunistic motives in heightening class certification standards. So, the question that remains unresolved is how the courts should move forward at this juncture.

The remedy rests in the language of Rule 23. The language of Rule 23(a) remains the same post-*Dukes*. The rule still requires "questions of law or fact common to the class."[183] Courts have followed the *Dukes* heightened standard when interpreting what that rule means.[184] Despite adherence to this standard, an Advisory Committee has not officially adopted the *Dukes*

---

[182] *See* cases cited *supra* note 107–09.

[183] FED. R. CIV. P. 23(a).

[184] *See* Chime v. Peak Sec. Plus, Inc., 137 F. Supp. 3d 183, 208 (E.D.N.Y. 2015); Brand v. Comcast Corp., 302 F.R.D. 201, 217 (N.D. Ill. 2014).

language as the official language of the rule. A clarified rule is necessary to ensure uniformity and ease in application.

The divide between the opponents and proponents of the *Dukes* decision suggest ideas for how the decision can be clarified. Each side would suggest strikingly different ways the rule could be rewritten. The proponents would like to see the *Dukes* decision stand with additional language that protects corporations from mass classes. The opponents would like to see *Dukes* overturned and a return to the previous interpretation of the commonality requirement. These ideas are not uniform, but they represent a starting point in discussing an amendment to Rule 23.

B. A Hypothetical—Rule 23(a)(2) Amendment Proposals

This section will explore the ideas of the opposing sides of the class certification debate and how those ideas would affect the language of Rule 23 through a hypothetical. In this hypothetical, the Advisory Committee has decided to amend Rule 23 of the Federal Rules of Civil Procedure because of the inconsistent application post-*Dukes*. The Committee has asked that each side of the class certification debate propose new language for Rule 23(a). The Committee has requested that the proposal focus specifically on Rule 23(a)(2), the commonality requirement.

1. The Proponents' Proposal

The proponents of the *Dukes* decision represent the interests of corporations who would like to see the Court's decision upheld. Prior to *Dukes*, the courts continued to harm corporations under a relaxed standard that gave individuals an overabundance of power in the class certification process.[185] It is within the power of the Court to interpret the Federal Rules of Civil Procedure and to create new precedent when necessary. The *Dukes* Court recognized the increasing problems mass class actions created for corporations and acted accordingly.[186]

The current language of Rule 23(a)(2) requires revision, as the language is outdated and harmful to corporations forced to defend against class actions. It has been over fifty years since the class action prerequisites of Rule 23(a) have been amended. The 1966 Amendment to Rule 23(a) cited practicality

---

[185] *See generally* discussion *supra* Section II.B.

[186] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 390–91 (2011).

as its justification.[187] That same rationale justifies the current proposal as codification of accepted Supreme Court precedent is the most practical and least invasive method of amending the rule.

The first major change to the current language of the commonality requirement is the identification of not just common questions of law or fact, but common injuries that are central to the claim and capable of being resolved together.[188] Common questions are easy for any class to identify, opening the door for any class to satisfy certification requirements.[189] A class must do more and prove that all of its members suffered the same injury. The definition of a class is "a group of people, things, qualities, or activities that have common characteristics or attributes."[190] Further, the nature of a lawsuit is to seek a remedy for a wrong or injury. The common characteristic of a class must be the injury that is the subject of the class action, which is the reason the class is suing. So, while it is important to identify common questions, it is even more important to prove that those questions stem from a common injury among class members.

Identifying a common injury is just the first step. Classes must also prove that the common injuries are capable of classwide resolution.[191] Different types of injuries call for different remedies. The courts cannot afford to waste time determining separate remedies for injuries a class presents when the purpose of a class is to embody common characteristics. The court should only have to determine one resolution that benefits the entire class. The absence of a provision such as this would also make settlement negotiations more complicated for corporations. As classes with separate injuries are certified, corporations might elect to pursue settlements, as opposed to trials, but settlement negotiations would be troubled by the prospect of providing multiple types of remedies to class members. Further, this measure would help prevent costly and unnecessary appeals when individual class members are not adequately compensated for their injuries. A class with multiple types of injuries that is granted a single resolution will not fully settle the class action, as those individuals that feel inadequately compensated will push for appeal. However, when the possibility of class actions with multiple types of injuries is eliminated in favor of class actions with common injuries, a single resolution will settle the action in terms of remedies.

---

[187] FED. R. CIV. P. 23 advisory committee's note to 1966 amendment.

[188] *Dukes*, 564 U.S. at 350.

[189] *Id.* at 349.

[190] *Class*, BLACK'S LAW DICTIONARY (10th ed. 2010).

[191] *Dukes*, 564 U.S. at 350.

The addition of a rigorous merits analysis requirement for classes that exceed a certain size acts as a safeguard to ensure mass classes satisfy the commonality requirement. Mass classes pose so much risk to the courts' resources and corporations financially that the additional merits analysis is a necessity. The difficulty in proving commonality increases when presented with a mass class because of the size alone. Rigorous merits analysis would ensure the risk mass classes pose is worth taking. This merits analysis would include "probing behind the pleadings."[192] The class would be required to present persuasive and admissible evidence to satisfy the new commonality requirement: a common injury central to the claims and the possibility of classwide resolution.[193] This additional step is taken to ensure that those with the potential to lose so much because of a mass class, the courts and corporations, are given every advantage, while those with the potential to recover from the action are required to bear the burden of proof.

This proposal would codify the *Dukes* heightened standard and increase protections for corporations. The new rule as proposed by the proponents would say:

> 2) the class identifies a common injury that is central to the claims and is capable of being resolved for the entire class at the same time;
>
> A) Classes seeking a recovery in excess of $500 million will be subjected to additional rigorous merits analysis prior to certification;[194]

The new language represents a corporation centered approach to determining class certification. The corporation is given the most power from this articulation of the rule. Individuals are given an overabundance of power in the class certification process. The power imbalance is detrimental to corporations as they are forced to settle lawsuits that, if given proper evaluation, might never have been certified in the first place. A heightened

---

[192] *Id.*

[193] *See id.*

[194] *See* FED. R. CIV. P. 23(a); *Dukes*, 564 U.S. at 350. By examining exposure levels, it is possible to reach a number where the monetary value of a class action becomes so high as to begin exposing a corporation to increased pressure to either engage in a bet-the-company lawsuit or settle with a class lacking the requirements to meet certification out of court. *See The 2017 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation*, CARLTON FIELDS 16 (2017), http://classactionsurvey.com/pdf/2017-class-action-survey.pdf (explaining the monetary exposure level to companies within each level of risk, i.e. routine, high-risk, bet-the-company). Seventy-five percent of high-risk lawsuits have an exposure level of $30 million dollars or more, while twenty-five percent of high-risk lawsuits have an exposure level of $1 billion dollars or more. *Id.* The low end of the exposure level for bet-the-company lawsuits begins at $1 billion dollars. *Id.* Seeing as the proponents' proposal is in support of corporations, it makes sense to set the dollar amount for requiring additional merits analysis somewhere between the twenty-fifth and seventy-fifth percentile of the high-risk level. *Id.*

standard for class certification purposes ensures that individuals are not able to exploit corporations into settlements. It provides corporations with assurances that unmeritorious classes will not make it through the certification stage.

2. The Opponents Proposal

The opponents of the *Dukes* decision represent the interests of individuals who would like to see the Court's decision overturned. In *Dukes*, the Court saw fit to heighten a relaxed standard in response to an exceptional case, the likes of which had never been seen by the Court and might never be seen by the Court again.[195] Further, the Court failed to recognize that Federal Rule 23(c)(5) gives the Court the power to subdivide large classes when appropriate, such as when it is faced with a historically large class.[196] Rule 23 was questioned prior to *Dukes,* but was never interpreted in a way that changed the meaning of the rule so drastically.[197] The heightened standard ripped a lot of power out of the hands of individuals and placed it in the hands of their opponents, the corporations.

The current language of Rule 23(a)(2) should remain, for the most part, unchanged. The 1966 Amendment was made to describe the prerequisites for class certification in more practical terms.[198] There does not appear to be more practical language than the language already selected by the previous Advisory Committee.

The first minor change to the original language includes the addition of language requiring only a single common question of law or fact. This change is necessary because history showed that there was a misconception about how common questions should be measured.[199] The current language of the rule uses the plural form of "questions," which to a textualist, would indicate that multiple questions are required to fulfill the prerequisite.[200] However, that focuses on quantity over quality. Under that standard, a single

---

[195] *See Dukes*, 564 U.S. at 338.

[196] The failure of the Court to consider that Rule 23 already provides for a means to deal with mass classes cuts against the decision and supports the opponents position. *See* FED. R. CIV. P. 23(c)(5). Since Rule 23(c)(5) would remain untouched by this amendment, the Court would have more options available to it than just certification in a questionable case. The Court will always have the option to subdivide a large class into a series of subclasses. *See* FED. R. CIV. P. 23(c)(5). Further, those subclasses could ultimately be severed from the action and maintained as a class with respect to that subclass's issue or injury. *See* FED. R. CIV. P. 23(c)(4); FED. R. CIV. P. 23 advisory committee's note to 1966 amendment.

[197] *See* discussion *supra* Section II.B.

[198] FED. R. CIV. P. 23 advisory committee's note to 1966 amendment.

[199] *See* discussion *supra* Section II.B.

[200] *See* FED. R. CIV. P. 23.

qualitatively good question would deny certification over multiple qualitatively bad questions. The addition of language requiring only a single common question of law or fact shifts the focus from quantity to quality. This change would not increase the number of classes certified. In fact, it should result in better certification decisions, meaning quality classes will meet the prerequisites and inferior classes will fail to establish commonality. These inferior classes would include classes that, prior to a shift to quality, would have met the requirements based on being able to articulate multiple common questions. A single question is all that should be required if it is a qualitatively sufficient question in relation to the case at hand.[201]

The second minor addition to the original language of Rule 23 includes a prohibition on examining the merits of a case at the certification stage. The certification stage is not the place for the court to delve into the merits of a case.[202] It accelerates certain procedures and requires that the court spend precious time and resources on matters that must be examined again if the case proceeds to trial. Certification is a procedural stepping stone to litigation—it acts as a gatekeeper. However, certification decisions should not turn into mini trials in which a case is won or lost based on a premature merits analysis.

The biggest problem with the rigorous merits analysis some courts have undertaken because of *Dukes* is the detrimental effects it has had upon classes limited in size or scope. Classes consisting of a small number of individuals, limited in geographic scope, relating to a specific job or position, or working under the control of a single decision maker do not present a strong challenge to certification.[203] The courts are being asked to waste their time and resources in conducting the rigorous merits analysis on classes such as these when a simple reading of the pleadings would indicate whether certification is proper.

If there is any question as to the presence of a common question of law or fact, the court should err on the side of certification. Conducting a merits

---

[201] Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 599 (9th Cir. 2010).

[202] *See* Amgen Inc., v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 466 (2013) ("Rule 23 grants no license to engage in free-ranging merits inquiries at the certification stage.").

[203] Brown v. Nucor Corp., 785 F.3d 895, 910 (4th Cir. 2015) (class limited in geographic scope—single steel plant in South Carolina); Cruz v. TMI Hosp., Inc., No. 14-CV-1128 (SRN/FLN), 2015 U.S. Dist. LEXIS 147479, at *26 (D. Minn. Oct. 30, 2015) (class related to specific job—proposed class member all worked as housekeepers); Ellis v. Costco Wholesale Corp., 285 F.R.D. 492, 509 (N.D. Cal. 2012) (class consisting of a small number of individuals—700 class members); Cronas v. Willis Grp. Holdings, Ltd., 06 Civ. 15295 (RMB), 2011 U.S. Dist. LEXIS 122736, at *9 (S.D.N.Y. Oct. 18, 2011) (class worked under the control of single decision maker—promotion decisions made by a single ultimate decision maker).

analysis at the class certification stage is too soon. Merits analysis should be reserved for the trial stage when a judge or jury has the province to make those decisions after careful consideration of all the facts and evidence. Erring on the side of certification also prevents the court from wasting time and resources from conducting detailed merits analysis twice. Under this rule, if a class is without merit, the merits analysis at the trial stage will prevent the class from succeeding.

This proposal would reverse the damage that has been done to Rule 23(a)(2) and articulate a new standard based upon pre-*Dukes* precedent. The new rule as proposed would say:

> 2) there is a single question of law or fact that is common among the class;
> A) The merits of the case need not be examined at this stage of certification. The court should err on the side of certification if the presence of a common question or law or fact is questionable;[204]

The new language represents an individualistic approach to determining class certification. This means that the individual is given the most power from this articulation of the rule. Corporations already have so much power within the legal system, stemming from their overabundance of resources and legal expertise, that the power imbalance must be made up in some way. A relaxed standard for class certification purposes ensures that corporations are not able to take advantage of their substantial resources to bury individuals in the legal process they would not be able to afford on their own. It provides an avenue for individuals to pool resources and come into the legal arena on equal footing.

C. Is Compromise Feasible?

The proponents' proposal and the opponents' proposal have their strengths and weaknesses. However, neither proposal is by any means the only option available. A compromise position would look beyond the rights and interests of the individual or corporation alone. A compromise could meet the goals and interests of both sides by increasing protection for corporations and requiring individuals to bear the burden of proof when they seek certification of a mass class. So, one question remains—is compromise feasible?

---

[204] *See* FED. R. CIV. P. 23(a); *see also Dukes*, 603 F.3d at 599.

1. The Compromisers' Proposal

The Court should have realized that the *Dukes* class was the exception, not the rule. Instead of sticking to the present rule and creating a different standard for classes that exceed a certain size, the Court did the opposite and created a rule for all classes based upon the largest class in United States history.[205] This new articulation of the rule treats the *Dukes* class as the exception that it should have been, interfering with the language of the rule very little.

The wording of Rule 23(a)(2) must be changed to codify the pre-*Dukes* interpretation of the commonality requirement. The single change is the addition of language requiring only a single common question of law or fact. Courts should be focused on the qualitative nature of the questions presented by a class, not the quantitative nature.[206] A class should not be forced to drown the courts in common, but ultimately irrelevant questions, simply to meet quantitative expectations for certification. A single qualitatively sufficient question of fact or law should be enough to satisfy commonality for certification purposes.[207]

The additional language embodies the exception that the *Dukes* court should have created for mass classes. The new language allows for the previous interpretation of the commonality requirement to apply, unless a class exceeds a certain size. Classes limited in size and scope will not be subject to a heightened requirement. The fact that a class is smaller should not automatically create an inference of commonality, but the search for commonality should not require the rigorous analysis and significant proof that a mass class would require.[208] This begins to tighten up the commonality requirement in a much less invasive way.

This addition increases protections for corporations as mass classes bear the burden of proving commonality by a preponderance of the evidence. The additional step maintains some of the *Dukes* precedent while clarifying the ambiguities present. The closest thing to a burden of proof for commonality that can be found in *Dukes* is significant proof of a violation on the part of the employer or class opponent.[209] Significant proof is not a clear standard and the Court offered no definitive statement as to what would be considered

---

[205] *See generally* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

[206] *See Dukes*, 603 F.3d at 599 (citing Savino v. Comput. Credit, Inc., 173 F.R.D. 346, 352 (E.D.N.Y. 1997)); *see* discussion *supra* Section IV.B.2.

[207] *Dukes*, 603 F.3d at 599.

[208] *See* cases cited *supra* note 107.

[209] *See Dukes*, 564 U.S. at 353.

significant proof.[210] The addition of a recognizable burden of proof would clarify the steps a class must take to prove commonality when the class exceeds a certain size.

The preponderance of the evidence burden was chosen for multiple reasons. First, it has already been presented as a potential option by lower courts.[211] Some lower courts have used the preponderance of the evidence standard to make class certification decisions.[212] The existence of precedent to support the use of the preponderance of the evidence standard in class certification decisions is persuasive. Second, the standard is well-established and can be understood without requiring copious amounts of explanation. This burden of proof is commonly used and understood by attorneys and the courts. Attorneys have a clear idea of the evidence they need to present to a court to establish certification. Further, courts have an idea of the sufficiency of evidence required to make a certification decision. The attachment of a clear burden of proof to mass class certification decisions creates clear expectations for future class representatives and reduces the number of contested certification decisions.

This proposal would combine and reconcile portions of both the proponents' proposal and opponents' proposal. The new rule, as proposed, would say:

> 2) there is a single question or law or fact that is common among the class;
>
> A) Classes seeking a recovery in excess of $500 million will be subjected to a heightened standard and merits analysis. The burden of proof rests on the class to prove a common question of law or fact by a preponderance of the evidence;[213]

This new language represents a neutral approach to determining class certification. Both the individual and the corporation are fairly and adequately protected by this articulation of the rule. Individuals will benefit from reverting to the old standard of certification, while corporations benefit from a much needed exception that will prevent massive classes from sailing through the certification process. This version of the rule proves that it is

---

[210] *See id.* at 353–55.

[211] *See* Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc., 546 F.3d 196, 202 (2d Cir. 2008).

[212] *See* Daye v. Cmty. Fin. Serv. Ctrs., LLC, 313 F.R.D. 147 (D.N.M. 2016); *See also Teamsters Local 445 Freight Div. Pension Fund*, 546 F.3d at 202.

[213] *See* FED. R. CIV. P. 23(a); *see generally* CARLTON FIELDS, *supra* note 194, at 16 (explaining the monetary exposure level to companies within each level of risk, i.e. routine, high-risk, bet-the-company).

possible to reconcile the interests of individuals and corporations in the class certification context.

2. Compromise is the Best Option

All three proposals present valid arguments that justify their amended versions of Rule 23(a). However, the compromise proposal is the best option for the good of all. The proposal eradicates the ambiguity and inconsistencies in the interpretation of Rule 23 through clear language that is understood and easily applied by those in the legal field. The proposal encompasses aspects of both fairness and efficiency—the previous rule does not.

The compromise position ensures fairness is afforded to those on both sides of the class certification debate. Each side gains and loses some protection. Corporations gain protection by requiring mass classes to submit to a heighted standard but lose some of the protection *Dukes* afforded them by subjecting them to a relaxed standard for smaller classes. Similarly, individuals gain protection as smaller classes must only prove the existence of a single qualitatively sufficient common question but lose some protection by shouldering the burden of proof for mass class certification.

The compromise proposal also ensures the process of class certification remains efficient for the parties involved, as well as the courts. First, the parties have a clear idea of what the burden is, how to meet the burden, and who the burden rests with, particularly in the case of mass classes. Second, the language will be easier for courts to apply. The language is clearer and leaves less room for interpretation. The courts will also understand the evidentiary standard required for mass classes, as it is a commonly known legal concept.

By adopting the compromise proposal, the proper steps will have been taken to eradicate the ambiguity associated with class certification post-*Dukes*. There should no longer be questions about how the courts should act, as the new language of the rule articulates in clear and unambiguous terms how commonality should be proven. This new rule ensures that legally permissible classes are not turned away, while it also protects corporations from being forced into a "bet-the-company" situation because of erroneous certification. Under the new commonality requirement, neither individuals nor corporations would be forced to suffer under a unilaterally protective standard, as all parties are placed on a level playing field and extended the same level of protection.

V. CONCLUSION

Prior to *Dukes*, the commonality requirement was a relaxed standard, favorable to individuals because of the ease in satisfying the requirement. The *Dukes* decision heightened the commonality requirement in favor of corporations requiring not just common questions, but common injuries and the capability of classwide resolution.

Many lower courts have attempted to apply *Dukes* with often inconsistent results. The best avenue to clarify the ambiguities *Dukes* created is to amend the language of Rule 23(a) to adopt a definite standard clarifying what is meant by "common questions of law or fact" and how to identify commonality among massive classes in the future. Despite the desire of the proponents and opponents of *Dukes* to clarify the rule to benefit their side, a compromise between the sides should be pursued to ensure fairness and efficiency.